The Validity of Tribal Checkpoints in South Dakota to Curb the Spread of COVID-19

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This Article examines the question of whether, during a public health emergency, tribes located in a state that has adopted minimal protections to curb a pandemic may enact stronger protections for their own citizens and territories. Specifically, may they do so, even when enforcement of the tribes’ protections causes inconvenience to those simply passing through the reservations and when the regulations affect nonmember residents of the reservations? If we take the Supreme Court at its word, tribes are within their rights in adopting and enforcing regulations designed to protect their citizens and other reservation residents from a public health emergency, even if these regulations affect nonmembers. While the Supreme Court’s common law test for tribal jurisdiction over nonmembers is notoriously muddy, the relevant portion of the test in these circumstances measures nonmember threats or direct effects on a tribe’s health or welfare. Given the existential threat that the pandemic poses to tribes and Native individuals and the lax approach of states like South Dakota in protecting public health, it is hard to escape the conclusion that, if the requirements of the Montana test ever can be met, they are met in these circumstances.

I. INTRODUCTION

Well over a year after it began, the COVID-19 pandemic continues to rage. As of this writing in August 2021, there have been over 215 million known cases of COVID-19 worldwide and over four million deaths, with over 650,000 of those deaths having occurred in the United States alone.¹ Late in 2019, the disease was discovered in China, with

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the first case arising there in November or December 2019. By mid-January, it had begun to spread beyond China, with the earliest case outside of that country reported in Thailand on January 13, 2020. The virus then began to spread rapidly throughout the world, producing the first known United States case on January 21. On January 30, the World Health Organization (WHO) declared the virus a World Health Emergency, and the Trump Administration followed suit the next day, declaring it a public health emergency. This was followed by the United States President’s formal proclamation of a state of emergency on March 13, 2020.

Within the United States, the governmental responses have been widely variable. At the national level, there was a sharp divide between the Trump Administration’s response, which was described as “inconsistent and incoherent,” with a prominent White House historian noting pointedly that officials have “[c]learly . . . not told the truth” and that they have “politicize[d] attempts to save people’s lives,” and the Biden Administration’s approach, which has been described as “[d]riven by science, data and public health priorities,” with the caveat that the public health system itself is in need of crucial improvements in management and implementation to function more effectively. Additionally, although federal powers such as the commerce power confer some

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3 Id.

4 Id.

5 Id.


8 Grace Segers, Historian on White House Response to COVID: ‘Clearly, They Have Not Told the Truth’, CBS NEWS (May 29, 2020), https://www.cbsnews.com/news/historian-john-barry-coronavirus-white-house-response/ [https://perma.cc/RSY6-SWUX]; see also Dan Diamond, Trump Officials Celebrated Efforts to Change CDC Reports on Coronavirus, Emails Show, WASH. POST (Apr. 9, 2021), https://www.washingtonpost.com/health/2021/04/09/cdc-covid-political-interference/ [https://perma.cc/LK66-WD4G] (“Even as career government scientists worked to combat the virus, a cadre of Trump appointees was attempting to blunt the scientists’ messages, edit their findings and equip the president with an alternate set of talking points.”). The actions of the group of Trump officials described in the Washington Post article included ordering the manufacture of statistics of deaths that would allegedly be caused indirectly by public health measures, and the tone of their emails to each other when they succeeded in altering public health messages to the public was—at least on some occasions—exultant, replete with exclamation points and expressions like “yippee!” Diamond, supra.

level of authority on the federal government to regulate public health, most public health measures in the United States have historically been enacted by state and local governments pursuant to broadly defined state police power.10

States and tribes were left for roughly the first year of the pandemic to individually determine what measures to enact to best protect public health within their own jurisdictions, a framework that produced wide-ranging results.11 This variability was partly due to the Trump Administration’s rudderless response to the pandemic—which included legally dubious orders to states to eliminate some public health protections12 and federal favoritism among, and competition with, states for medical supplies13—and partly due to the fact that states’ police power has traditionally been the most frequently invoked source of authority to regulate public health.14 Several states have imposed stringent

[https://perma.cc/L3AP-F8U4].


13 See also Santiago Legarre, The Historical Background of the Police Power, 9 U. PA. J. CONST. L. 745, 745–48, 778–79 (2007) (describing the origin of the notion of police power in United States Supreme Court jurisprudence and tying it to the powers reserved to the states in the Tenth Amendment of the United States Constitution).
measures, with others taking a more lax approach. Tribes have also varied in their responses, although their decisions generally have been less widely reported. For example, several tribes in South Dakota and throughout the country have implemented checkpoints, including the Makah Tribe, Zia Pueblo and other Pueblo tribes, the Crow Tribe, the Navajo Nation, and the Northern Cheyenne Tribe, as well as the two tribes that are the focus of this essay, the Cheyenne River Sioux Tribe and the Oglala Sioux Tribe or Oglala Lakota Nation. Tribal approaches to the checkpoints vary, with some tribes preventing entry by those who are neither tribal members nor reservation residents and others briefly stopping vehicles and then allowing most traffic to proceed. And many of the nation’s 574 federally recognized tribes have

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15 Id.
19 85 Fed. Reg. 5,462 (Jan. 30, 2020) (listing federally recognized tribes and stating that there are currently 574).
adopted numerous other public health measures in response to COVID-19 as well.20

In South Dakota, as further explained in Parts II and III, the state and many of the tribes whose reservations are within its borders have been at loggerheads due to diametrically opposed approaches to the necessity of public health measures.

This Article explores what measures tribal governments can take to enforce regulations and policies designed to protect their own citizens and others within their territories from COVID-19. Specifically, are the tribes in South Dakota legally able to operate checkpoints on state and federal highways running through their reservations to enforce regulatory measures designed to curb the spread of COVID-19? The short answer appears to be yes.

Part II examines South Dakota’s approach to the pandemic and the State’s resistance to tribal public health measures that affect nonmembers. Part III describes regulatory measures enacted by the Oglala Lakota Nation and the Cheyenne River Sioux Tribe in response to the pandemic. Part IV explains the Supreme Court’s common law test for tribal civil regulatory jurisdiction and argues that its strictures are met in the unique circumstances of the pandemic. Part V elucidates the reasons that tribal members are particularly vulnerable to COVID-19. Part VI describes and critiques the Bureau of Indian Affairs’ interim guidance relating to tribal checkpoints, and Part VII briefly explores the requirement that seizures be conducted reasonably. Part VIII discusses the difficulties posed by the Montana test in less exigent circumstances, and, finally, Part IX offers some concluding thoughts.

II. SOUTH DAKOTA’S APPROACH TO THE PANDEMIC AND ITS RESISTANCE TO TRIBAL PUBLIC HEALTH MEASURES THAT AFFECT NONMEMBERS

As further described below, South Dakota has taken an extremely hands-off approach to protecting its citizens from the pandemic, an approach that is in sharp contrast to the much more cautious approaches

of the tribes within South Dakota’s borders.\textsuperscript{21} Moreover, the State has not been content to refuse to impose public health protections in areas within which it has jurisdiction. Instead, as further described below, it has challenged tribal public health measures as well, particularly those that affect nonmembers attempting to enter or pass through tribal reservations.\textsuperscript{22}

A. South Dakota’s Response to the Pandemic

South Dakota has been described as the state with the “least restrictive COVID-19 policy environment.”\textsuperscript{23} Throughout the pandemic, the state governor Kristi Noem has almost without fail refused to impose mandatory public health measures,\textsuperscript{24} even going so far as to disparage the efficacy of masks.\textsuperscript{25} Although Governor Noem has insisted that the rural character of South Dakota obviated the need for mandatory protective measures, pointedly claiming that “South Dakota is not New York City,”\textsuperscript{26} over the course of the pandemic, the state went from being home to a single, notorious hotspot, the Smithfield meatpacking plant, to its status in April 2021 as the state with the second-highest per capita total number of COVID-19 infections in the country.\textsuperscript{27} The

\textsuperscript{21} See generally Parts II.A and B, infra, and Part III, infra.

\textsuperscript{22} See generally Part II.B, infra.

\textsuperscript{23} Dhaival Dave et al., The Contagion Externality of a Superspreading Event: The Sturgis Motorcycle Rally and COVID-19, 87 S. ECON. J. 769, 772 (2021); see also id. at 769–772.


\textsuperscript{27} Pam Louwagie, South Dakota Under Fire for Stance on Fighting COVID-19, STAR TRIB.
rural state, which is home to only about 885,000 people, experienced a peak in new cases per day in mid-November 2020, when, on November 12, over two thousand new cases were identified. Its peak in deaths per day came slightly later, with fifty-four deaths occurring on November 28, 2020.

In mid-November 2020, over 42 percent of the state’s COVID-19 tests were coming back positive, which was well over four times higher than the national positivity rate at the time. There was a shortage of adult intensive care unit beds in the state, and South Dakota’s largest

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healthcare systems reported that “they were operating at or above capacity.”

As of April 2021, South Dakota was ranked ninth in the country for per capita deaths from COVID-19, a per capita death rate that was roughly “four times” that of “similarly populated but tightly compacted San Francisco.”

Dr. Ali Mokdad, a public health expert at the University of Washington, compared South Dakota’s approach to the disease and the resulting public health outcomes in the state to the approaches and outcomes in third world countries like Yemen and Somalia.

Although the pandemic got a relatively slow start in South Dakota, the state, as shown by the statistics cited above, had made up for lost time by late fall 2020. Beyond Governor Noem’s aversion to public health directives, the explosion of cases in the state was undoubtedly attributable to her encouragement of large-scale public events, such as the Sturgis motorcycle rally, the fireworks display at Mount Rushmore over the Fourth of July, and a large country music concert.

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33 Elflein, April 8, 2021, supra note 27.


35 Groves, South Dakota’s Noem Defends, supra note 32.


37 See id. (reporting that cases had “exploded” in South Dakota by fall 2020).

38 See, e.g., Rodrick, supra note 34.

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that served as the centerpiece to an annual hunting trade show, which Governor Noem organized and hosted in October 2020. In addition to serving as vehicles for Noem to project her trademark defiant attitude, these events—held at a time when much of the rest of the country was following stay-at-home orders and adhering to other protective measures—indisputably had far-ranging public health consequences. For instance, scientists from the Centers for Disease Control and Prevention (CDC) and other public health organizations definitively traced 649 cases—including one that resulted in death—to the 2020 Sturgis motorcycle rally. And at least 118 South Dakota residents who attended the rally tested positive in the weeks following it. More dramatically, a group of economists estimated, using cell phone and other data, that the Sturgis motorcycle rally may have resulted in total public health costs in the range of $3.8 to $8.7 billion, with cases rising between 100 and 200 percent in Meade County (the site of the event) as a result of the rally. Dr. William A. Haseltine, a former professor at Harvard Medical School and Harvard School of Public Health and chair and president of the non-profit ACCESS Health International, suggested that Governor Noem’s actions in “encouraging large-scale events in a pandemic . . . [were] equivalent to manslaughter.”

[https://perma.cc/Z295-NERD]. The vast majority of the charges were later dropped. Thompson, supra. The saga continued in 2021, with Noem suing the National Park Service to permit the fireworks display to go forward after her permit request was denied due to potential dangers to the park and staff, concerns about COVID-19, and tribal opposition. See, e.g., Tommy Beer, S. Dakota Gov. Noem Sues Biden Administration for Canceling Mount Rushmore Fireworks, FORBES (Apr. 30, 2021), https://www.forbes.com/sites/tommybeer/2021/04/30/s-dakota-gov-noem-sues-biden-administration-for-canceling-mount-rushmore-fireworks/ [https://perma.cc/B4J4-D7DF].


41 Rosalind J. Carter et al., Widespread SARS-CoV-2 Transmission among Attendees at a Large Motorcycle Rally and their Contacts, 30 US Jurisdictions, August–September, 2020, 73 CLINICAL INFECTIONS DISEASES S106, S106, S109 (2021). The cases identified in the Carter et al. study that were linked to the rally included secondary and tertiary cases (i.e., those affecting close contacts of attendees and such contacts’ own close contacts). Id. Fifty-six percent of the cases identified arose in South Dakota or neighboring states. Id. at S107.

42 Shannon, supra note 23, at 772, 787.

43 Shannon, supra note 25.
B. The State’s Response to Tribal Public Health Measures

Understandably, the tribes whose reservations are located within the boundaries of South Dakota have tended to adopt a much more cautious approach. Tribes have numerous reasons to appreciate the grave risks posed by the pandemic, and, as further explained below, Native individuals are significantly more at risk of catching and dying from COVID-19 than are white individuals. Some Tribes located within the borders of South Dakota have issued curfews and have prohibited non-essential travel. A few Tribes have also utilized highway checkpoints.

45 See Kalen Goodluck, Tribes Defend Themselves Against a Pandemic and South Dakota’s State Government, HIGH COUNTRY NEWS (Oct. 2, 2020), https://www.hcn.org/articles/indigenous-affairs-covid19-tribes-defend-themselves-againsta-pandemic-and-south-dakotas-state-government [https://perma.cc/Q4WA-G826] (“Tribal nations, whose citizens have been disproportionately impacted by the pandemic, have often maintained strict COVID-19 measures, including lockdowns, for protection, while non-Native governments in the U.S. and beyond have been loosening their public health orders.”).

46 See, e.g., WITT, supra note 10, at 38 (“Government authorities left Native Americans to suffer infectious disease without help on countless occasions. Military officials deliberately spread disease among Native Americans by sending them infected materials.”); id. at 6 (noting that diseases brought by Europeans “killed as many as 90 percent of the 70 million or more people living in the Americas in 1492”); Matthew L.M. Fletcher, Indian Lives Matter: Pandemics and Inherent Tribal Powers, 73 STAN. L. REV. ONLINE 38, 42–43 (2020) (detailing the effects on Tribes and Native individuals caused by the influenza pandemic of 1918 and 1919 and the federal government’s “abyssmally inadequate” response); Talha Burki, COVID-19 among American Indians and Alaska Natives, 21 LANCET NEWSDESK 325, 325 (2021), https://www.thelancet.com/action/showPdf?pii=S1473-3099%2821%2900083-9 [https://perma.cc/9A2U-ZJNM] (noting that “pandemics tend to be particularly hard on American Indians and Alaska Natives” and that “[t]heir mortality rate from the 2009 H1N1 influenza was four times greater than the general population”); Alfred J. Sciarrino, The Grapes of Wrath, Part II, 8 J. MED. & L. 1, 5–6 (2004) (describing the outbreaks among Native Americans of smallpox and other diseases in the 1600s, 1700s, and 1800s).

47 For example, a CDC report examining data from twenty-three states found that Native Americans and Alaska Natives were 3.5 times more likely to contract COVID-19 than whites and that Native Americans and Alaska Natives tended to become infected at a younger age than whites. Sarah M. Hatcher et al., COVID-19 among American Indian & Alaska Native Persons—23 States, January 31–July 3, 2020, 69 MORTALITY & MORTALITY WKLY. REP. 1166, 1167 (2020). Data specific to South Dakota show a 67 percent higher death rate from COVID-19 among Native Americans compared to whites. S.D. DEPT. OF HEALTH, OFF. OF HEALTH STATS., PROVISIONAL MORTALITY REPORT, 2020-2021 7, https://doh.sd.gov/documents/statistics/Mortality-Report-2020-2021.pdf [https://perma.cc/JS5P-VGPH]; see also Aila Hoss, COVID-19 & Tribes: The Structural Violence of Federal Indian Law, 2 ARIZ. ST. L.J. ONLINE 162, 162–63, 168, 172–73 (2021) (explaining that, in May 2020, Navajo Nation had the highest per capita rate of COVID-19 infections in all of the United States and further noting that factors like the greater prevalence of diabetes among Native Americans, the prevalence of which is linked to historical trauma, and the lower prevalence of access to an adequate water supply make Native individuals at greater risk of complications from COVID-19 in the case of diabetes and at greater risk of contracting the disease in the case of lack of access to an adequate water supply).

to enforce these and other requirements. However, the protections these tribal governments have adopted have been hampered by the state’s decision to take a minimalist approach to protecting its citizens, instead favoring economic activity and a notion of personal freedom that takes no account of harms caused to others.

Moreover, the governor of South Dakota, instead of simply accepting these Tribes’ differing policy choices, has, as further explained below, responded aggressively and challenged tribal sovereignty to enact public health measures, particularly checkpoints on state and federal highways that run through the Tribes’ reservations. Governor Noem’s response is somewhat surprising because, at some points during the pandemic, she has voiced respect for tribal sovereignty in the context of public health regulations relating to the pandemic. However, it is possible that part of her outrage has been due to the fact that tribal checkpoints designed to keep nonmembers and non-residents from infecting tribal members constitute a role reversal of sorts. This is because, in the United States, historically, white communities have often painted Native persons and other subjugated minorities as a source of disease and have therefore enacted quarantine laws targeting such groups. It is possible that part of the reason that Governor Noem was determined to thwart the two Tribes’ stringent public health measures was because, against this historical backdrop, the regulations may have been seen as


at least some extent, this mentality that tribes are the source of disease and have therefore enacted quarantine laws targeting such groups. To wit, supra note 10, at 38–40. The continued salience of this race-biased conception is exemplified by the comments of the mayor of Grants, New Mexico, as reported by the New York Times:

[Mayor Martin Hicks] asserted that Navajos were to blame for spreading the virus, openly expressing an unsubstantiated position that seems to be gaining traction in towns near Native American reservations.

“We didn’t take it to them, they brought it to us,” Mr. Hicks said in a telephone interview without offering any proof. “So how are we going to spread it amongst them when they’re the ones that brought it to us?”

Romero, supra note 17.
a power grab by the Tribes, under which they were wrongfully appropriating white racialized power to exclude undesirables. Understood in this vein, the Tribes’ actions, through a white colonialist lens, could be viewed as twistedly painting whites as the dirty outsiders who put others at risk of disease.55

In May 2020, the state ordered the Tribes to remove the checkpoints and threatened suit if they did not.56 In tweets, the Governor claimed to have sent the letters to the Oglala Sioux Tribe (also known as the Oglala Lakota Nation) and the Cheyenne River Sioux Tribe, but, in fact, it appears that she sent them only to news outlets.57 While the threatened suit did not materialize, the Governor did enlist the Trump Administration’s help in her attempt to cajole the Cheyenne River Sioux Tribe into closing its checkpoints.58 When threats and persuasion did not work, the Trump Administration ultimately sought to do the state’s bidding by suspending the Cheyenne River Sioux Tribe’s 638 contract59 to provide its own law enforcement services in lieu of the federal government’s provision of such services.60 Before the Bureau of Indian Affairs actually moved to suspend the contract, Mark Meadows, then-President Trump’s Chief of Staff, was brought in to try to intimidate the Cheyenne River Sioux Tribe into closing its checkpoints.61 In addressing Cheyenne River Sioux Tribal Chairman Harold Frazier, Mark Meadows stated, without legal authority, that he couldn’t “have checkpoints’ on

55 Accord id. (describing the comments of Mayor Martin Hicks).
60 Compl. for Injunctive & Declaratory Relief, supra note 57, at 19 ¶¶ 62–63.
61 Id. at 21 ¶ 65.
a federal road” and proceeded to threaten the withholding of the Tribe’s COVID-19 relief money, which Congress had set aside by statute. The conversations between White House staff members and tribal officials at times got even uglier. During a later phone conversation, Douglas Hoelscher, then Deputy Assistant to the President and Director of Intergovernmental Affairs, told Chairman Frazier that, by not conducting proper background checks of tribal law enforcement officers, he was “endanger[ing] . . . the people that [he was] elected to serve.” One has to wonder if the irony of making such an accusation against Chairman Frazier in an attempt to get him to abandon badly needed public health measures designed to curb the spread of a deadly pandemic was lost on Mr. Hoelscher.

The logic of the federal government’s attempt to suspend the Tribe’s law enforcement contract was apparently that the Tribe could not operate the checkpoints if it no longer had law enforcement power. The Tribe brought a declaratory judgment action in an attempt to preclude the suspension of the law enforcement contract and to prevent other unlawful actions against the Tribe. This declaratory judgment case was stayed pending administrative proceedings regarding the legality of the contract suspension, which, as of this writing, are ongoing. In March 2021, the Cheyenne River Sioux Tribe ceased operation of its checkpoints, citing low infection rates and widespread availability of the vaccine. As of this writing, the Oglala Lakota Nation continues to operate its checkpoints.

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62 Id. at 21 ¶¶ 65–66; 42 U.S.C. § 801.
63 Transcript of Teleconference between Tara Sweeney, Assistant Secretary of Indian Affairs, United States Dept. of Interior, Harold Frazier, Chairman, Cheyenne River Sioux Tribe, and others, 9 (June 17, 2020) (on file with journal).
64 See Compl. for Injunctive & Declaratory Relief, supra note 57, at 20 ¶ 64.
65 See generally id.
68 Personal communication with Josey Johnson (Mar. 27, 2021) (on file with journal); COVID-19 Travel Delays on Tribal Lands in South Dakota, S.D. DEPT OF TOURISM (Mar. 31, 2021), https://dot.sd.gov/media/Tribal%20Checkpoints.pdf [https://perma.cc/WE8T-R2T7].
III. MEASURES ENACTED BY THE OGLALA LAKOTA NATION AND THE CHEYENNE RIVER SIOUX TRIBE

Two tribes whose reservations are located within the borders of South Dakota, the Oglala Lakota Nation\(^{69}\) and the Cheyenne River Sioux Tribe, have adopted numerous measures to protect their peoples and territories from COVID-19, the most controversial of which appear to be checkpoints on state and federal highways running through their reservations. Such checkpoints have met with widespread approval in public health circles,\(^{70}\) and their primary function, at least for the Cheyenne River Sioux Tribe, was contact tracing.\(^{71}\) As explained above, the Cheyenne River Sioux Tribe closed its checkpoints in late March 2021, after having operated them for nearly an entire year,\(^{72}\) whereas, as of late March 2021, the Oglala Lakota Nation continued to operate its checkpoints.\(^{73}\) The Rosebud Sioux Tribe has implemented protective measures and initially operated checkpoints as well, but Rosebud elected to take them down after operating them for a few weeks.\(^{74}\) The decision to take them down was largely based on the expense of operating them, although the Tribe did experience non-Native resistance to checkpoints in some locations, which drew the attention of the State Attorney General.\(^{75}\)

As explained above, in Part II.B, the South Dakota governor ordered the Cheyenne River Sioux Tribe and the Oglala Lakota Nation to

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\(^{69}\) The official name of the Oglala is the Oglala Sioux Tribe, but, since the Tribe on its website refers to itself as the Oglala Lakota Nation, the latter term will be used in the text of this essay.


\(^{71}\) Nicole Ducheneaux, Panelist Remarks on the Impact of COVID on Indian Country from Indian Country, at Federal Bar Association’s D.C. Indian Law Conference (Nov. 5, 2020).


\(^{73}\) Personal communication with Josey Johnson, supra note 68.

\(^{74}\) Telephone Interview with Lloyd Guy, supra note 49. The Rosebud Sioux Tribe’s checkpoints were only operated during the evenings. Id.

\(^{75}\) Id.
close the checkpoints, threatened suit, and deployed the Trump Administration’s help in her efforts.\textsuperscript{76} Her confrontational response is emblematic of the “difficult and checkered history” of the State’s approach to tribes.\textsuperscript{77}

The measures the Oglala Lakota Nation has adopted to protect its citizens from the pandemic include closing the Reservation “to all non-residents for non-essential travel, except for all state highway entrances for pass-through vehicles.”\textsuperscript{78} The Tribe has further imposed a daily curfew on “all individuals and businesses” within the Reservation.\textsuperscript{79} Additionally, it has imposed temporary lockdowns via executive order that apply to Reservation residents and that limit travel off-reservation except for essential purposes, including work (with a permit), procurement of essential supplies, and medical appointments.\textsuperscript{80}

Similarly, the Cheyenne River Sioux Tribe has imposed curfews, stay-at-home orders, and mandatory quarantine requirements for residents who have traveled out of state or visited hotspot areas, and, as noted above, it also operated checkpoints.\textsuperscript{81} The Cheyenne River Sioux Tribe allowed business travelers to pass through its checkpoints once they filled out a health questionnaire. Similarly, essential workers coming from non-hotspot counties were required to fill out a health questionnaire at the checkpoints unless they had procured a travel permit. Essential workers coming from out-of-state or hotspot counties were required to have travel permits to come onto the reservation. Persons leaving the Reservation to go to medical appointments in non-hotspot counties had to fill out health questionnaires upon leaving and upon returning. Those residents traveling to medical appointments out-of-state or in hotspot counties were required to quarantine themselves for fourteen days upon their return. Similarly, residents were able to travel to non-hotspots for goods and services, as long as they filled out a health questionnaire upon their return. Travelers to hotspot areas and out-of-state for essential goods and services that could not be purchased on the reservation were required to quarantine for fourteen days upon their

\textsuperscript{76} Carlisle, supra note 56; Letter from Kristi Noem, supra note 58.
\textsuperscript{79} OGLALA SIOUX TRIBE, ORDINANCE NO. 20-26 (Mar. 31, 2020).
\textsuperscript{80} See, e.g., Oglala Sioux Tribe Exec. Order No. 20-03 (Apr. 26, 2020) (imposing fourteen-day lockdown); see also Oglala Sioux Tribe Exec. Order No. 20-02 (Mar. 10, 2020) (imposing 72-hour lockdown).
\textsuperscript{81} Cheyenne River Sioux Tribe Emergency Exec. Order No. 2.6-2020-CR (May 21, 2020); Cheyenne River Sioux Tribe Emergency Exec. Order No. 2.5-2020-CR (undated); see also Summary of CRST COVID-19 Emergency Executive Orders, supra note 48.
return unless they had a travel permit. Travel permits lasted for thirty, sixty, or ninety days. Finally, those nonresidents traveling from hotspots or from out-of-state were asked to take an alternate route around the reservation. 82

Both Tribes’ measures were initially quite successful. The nearly 3,500 square mile Pine Ridge Reservation, which is home to the Oglala Lakota Nation, had only seen a small handful of COVID-19 cases by June 2020, and the first cases among tribal citizens did not begin to appear until well into May. 83 The nearly 4,300 square mile Cheyenne River Sioux Reservation had had only one case by June 2020, involving a woman who is now recovered. 84 These Tribes’ initial successes appear to be due to the strictness of the measures adopted and, especially in the case of the Cheyenne River Sioux Tribe, the fact that the measures were adopted early. 85 However, as the pandemic wore on, the number of cases on both reservations escalated, a change that may be partly reflective of state trends and partly the result of tribal members’ greater likelihood of contracting the virus. 86 As of April 17, 2021, the Cheyenne River Sioux Tribe had had 1,791 cases among its roughly 8,600 reservation residents, resulting in thirty-six deaths. 87 The larger Oglala Lakota Nation had experienced roughly 2,500 cases among its members who lived on-reservation and sixty deaths. 88 The infection rates per capita for both reservations appear to be higher than that for South Dakota, with the infection rate for those living on the Cheyenne River Sioux reservation being about 50 percent higher. 89 The fact that

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82 Summary of CRST COVID-19 Checkpoint Policies, supra note 49.
85 Id.
86 See, e.g., Hatcher, supra note 47; see generally Part II.A.
89 As noted above, the Cheyenne River Sioux Tribe had 1,791 total cases of COVID-19 on its
the on-reservation infection rates are higher is not surprising given that a CDC study found that Native Americans are 3.5 times more likely to contract COVID-19 than are whites.\textsuperscript{90} While the reasons that tribal members are more likely to contract the virus are not definitively known, poverty, lack of access to a reliable water supply, lack of indoor plumbing, and intergenerational and sometimes overcrowded housing on reservations all may play a role.\textsuperscript{91} The fact that the rates on these two reservations are nowhere near 3.5 times higher than the infection rate for whites in South Dakota tends to suggest that the protective measures that these two Tribes adopted were effective.\textsuperscript{92}

IV. THE SUPREME COURT’S COMMON LAW TEST FOR TRIBAL CIVIL REGULATORY JURISDICTION

The tribal checkpoints at issue here affect (and, in the case of the Cheyenne River Sioux Tribe, affected) both nonmembers and members of the Cheyenne River Sioux Tribe and the Oglala Lakota Nation, and reservation as of April 17, 2021, see CRST COVID Statistics—Saturday, April 17, 2021, \textit{supra} note 87, and the reservation has a total population of 8,594. See Cheyenne River Reservation and Off-Reservation Trust Land, \textit{supra} note 87. This amounts to an infection rate of 0.208. About 78 percent of the residents of the Cheyenne River Sioux Reservation are Native American. Id.

As of April 17, 2021, South Dakota had a total of 121,056 total cases. April 17th: 200 New COVID-19 Cases in South Dakota, SIOUXLAND NEWS (Apr. 17, 2020), https://siouxlandnews.com/news/coronavirus/april-17th-covid-19-in-south-dakota [https://perma.cc/XT7D-MSBB]. Based on a population of 884,659, Quick Facts: South Dakota, \textit{supra} note 28, this amounts to an infection rate of 0.137. It is worth noting that South Dakota has been accused of undercounting other metrics in the COVID-19 context. See, e.g., Rodrick, \textit{supra} note 345 (accusing Governor Noem of deliberately undercounting COVID-19 deaths for PR purposes). As of April 13, 2021, the Oglala Lakota Nation reported 2,547 on-reservation cases among its members and others who were tested by the Indian Health Service (IHS) on the reservation. April 14 Tweet, \textit{supra} note 88. A tribal employee explained that the April 14, 2021 report on the number of cases primarily represented infections contracted by tribal members who lived on the reservation but that a small number of nonmembers who had tested at IHS were also included (probably no more than fifty). Phone call between author and Oglala Sioux Tribe Public Health Administration (May 3, 2021, 3:30 pm CST). The United States Census Bureau reports that there are 17,179 Native Americans and Alaska Natives living on the Tribe’s reservation. Pine Ridge Reservation, My TRIBAL AREA, U.S. CENSUS BUREAU, https://www.census.gov/tribal/?aianihh=2810 [https://perma.cc/XC93-FGXK] (last accessed June 17, 2021). If we use that number as a rough proxy for the population represented by the April 13, 2021 case report (Oglala tribal members living on the reservation plus a small number of other individuals who tested at IHS), the infection rate among such persons would be 0.148, which is higher than that of the State of South Dakota.

Sarah M. Hatcher et al., \textit{supra} note 47.

\textsuperscript{91} See, e.g., Burki, \textit{supra} note 46; Hoss, \textit{supra} note 47, at 170; see generally Part V.

\textsuperscript{92} The infection rate for whites in South Dakota appears to be 0.121. According to the U.S. Census Bureau, whites are 84.6 percent of the population in South Dakota, which has a total population of 884,659. Quick Facts: South Dakota, \textit{supra} note 28. This means there are approximately 748,422 white people who live in South Dakota. South Dakota Department of Health reports that, as of April 17, 2021, 90,920 whites had been infected with COVID-19 (although it is unclear if this data includes probable infections as well as confirmed infections). South Dakota COVID-19 Dashboard, S.D. DEPT OF HEALTH (Apr. 18, 2021), https://doh.sd.gov/COVID/Dashboard.aspx [https://perma.cc/J4Q5-67HC]. Dividing 90,920 by 748,422 yields an infection rate of 0.12 for whites in South Dakota.
they appear to be an exercise of tribal civil (rather than criminal) regulatory authority.\footnote{See, e.g., OGLALA SIOUX TRIBE, OGLALA ORDINANCE No. 20-28 (Apr. 1, 2020) (closing the reservation to non-residents for non-essential travel with exceptions and imposing a $1,000 civil fine for violation); Cheyenne River Sioux Tribe, Emergency Exec. Order No. 2.5-2020-CR (undated) (defining violation of the curfew and stay-at-home orders as a civil infraction). At any rate, it is clear that the tribes would not have criminal jurisdiction over non-Indians in this context, although they would presumably have criminal jurisdiction over nonmember Indians, i.e., Indians from other tribes. See, e.g., Ann Tweedy, Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?, 78 A.Z.B. L. REV. 885, 893–896 (2015) (explaining the contours of tribal criminal jurisdiction). Nonetheless, tribes could presumably still utilize checkpoints on state and federal highways for valid purposes relating to criminal jurisdiction, as long as non-Indians were only detained as long as necessary to determine that they were not subject to tribal criminal jurisdiction. See, e.g., Bressi v. Ford, 575 F.3d 891, 896–97 (9th Cir. 2009); cf. United States v. Cooley, 141 S. Ct. 1638 (2021) (allowing for longer detention of potentially dangerous criminal suspects outside of the checkpoint context, but rejecting a requirement that the tribal office first determine whether or not the suspect qualifies as an Indian for criminal jurisdiction purposes). Indeed, as to state jurisdiction, the Eighth Circuit has determined that South Dakota generally lacks criminal jurisdiction pertaining to crimes arising on state highways within reservations in the state. See generally Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990) (invalidating South Dakota’s retroactive attempt to undertake jurisdiction over crimes occurring on state highways running through reservations under P.L. 280). While Rosebud Sioux Tribe refers to civil jurisdiction as well, P.L. 280 has been held not to afford states civil regulatory jurisdiction over tribes and tribal members within Indian country, so the Rosebud Tribe court’s references to civil jurisdiction are not strictly relevant to the questions of tribal civil regulatory jurisdiction we are examining here. See, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976).} Tribal civil jurisdiction over tribal citizens is generally upheld, so the only serious question concerns tribal civil jurisdiction over nonmembers. Moreover, in the context of tribal civil jurisdiction, the relevant question is whether one is a member of the tribe at issue, rather than, as in the criminal jurisdiction context, whether one is considered an Indian under federal law.\footnote{See Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1132–33 (9th Cir. 2006); Tweedy, supra note 93, at 898; accord Washington v. Confederated Tribes of the Colville Rvr., 447 U.S. 134, 160–61 (1980).}

A. Tribal Civil Jurisdiction over Tribal Citizens

Tribes are recognized as having civil jurisdiction over their members for activities occurring on the reservation.\footnote{See generally Fisher v. District Court, 424 U.S. 382 (1976).} The contours of this jurisdiction are defined by tribal law.\footnote{1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 7.02[1][a] (2020) [hereinafter COHEN].} In some subject areas, tribal civil jurisdiction over tribal citizens extends to off-reservation activities as well.\footnote{Id. at 7.02[1][c].} Thus, the authority of the Oglala Lakota Nation and the Cheyenne River Sioux Tribe to stop their own citizens at checkpoints pursuant to tribal law is not in question.
B. Jurisdiction over Nonmembers on State and Federal Highways within the Reservation

1. The framework for tribal civil jurisdiction over nonmembers

In *Montana v. United States*, the Supreme Court established, based on federal common law, that tribes generally lack civil regulatory and adjudicatory jurisdiction over nonmembers’ on-reservation activities that occur on nonmember-owned fee lands unless one of two exceptions is met:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over 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.

The decision was based primarily on the judicially-created implicit divestiture doctrine, which maintains that some powers—particularly concerning nonmembers—are now inconsistent with the tribes’ sovereign status, but the Court in *Montana* also alluded to fairness concerns rooted in the state’s augmentation of the reservation’s natural resources, which the Crow Tribe was seeking to regulate. Later cases have often included fairness to nonmembers as part of the justification for denying jurisdiction.

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100 *Montana*, 450 U.S. at 548, 564–65.
101 See, e.g., *Strate*, 520 U.S. at 459 (expressing concern about requiring nonmembers to defend against plaintiff’s claims in “an unfamiliar court”); Ann Tweedy, *The Liberal Forces Driving the Supreme Court’s Divestment & Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 164–65 (2000).
It is *Montana*’s second exception that is most obviously likely to be applicable here because COVID-19 plainly presents a public health issue, and infected nonmembers could unquestionably directly affect the health of the Tribes and their members. By its terms, *Montana* itself applies to nonmember activities on nonmember-owned fee lands within the reservation, so roads through tribal trust lands would not appear to be within its purview. However, a Supreme Court case called *Strate v. A-1 Contractors* extended the applicability of *Montana*’s limitations on tribal jurisdiction and its exceptions to those limitations to rights-of-way for state highways within reservations. Lower court cases have applied the same analysis to on-reservation rights-of-way for federal highways. Significantly, the Eighth Circuit has recognized that the tribes located within the borders of South Dakota have a “vested interest in self-government” that extends to all highways within their reservations.

Additionally, while the Oglala Lakota also operates checkpoints on Bureau of Indian Affairs (BIA) roads, South Dakota Governor Kristi Noem’s objections have focused on the checkpoints located on state and federal highways. Moreover, consistent with *Montana*’s applicability solely to nonmember-owned fee lands and state and federal rights-of-way, courts have upheld tribal jurisdiction on BIA roads without analyzing whether either *Montana* exception is met. Thus, generally speaking, for tribal civil jurisdiction over nonmembers on state and federal highways running through a reservation to obtain, one of the *Montana* exceptions must be met.

As other scholars and I have explained, the Court has narrowed the *Montana* exceptions over time to such an extent that, in the vast majority of cases, it is difficult to predict whether they will be viewed to apply in any given case. This unpredictability is due in large part to the

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102 It is conceivable that the consensual relationship exception could be applicable in some instances, but, for the purposes of this essay, I focus on the second exception.
104 *Id.* at 454; Tweedy, *supra* note 101, at 171.
105 *See, e.g.*, Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997).
106 *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1174 (8th Cir. 1990) (invalidating the state’s attempt to assume jurisdiction over the highways on reservations under P.L. 280); *see also S.D. CODIFIED LAWS § 31-1-1 (2010)* (defining “highway” for purposes of state law).
108 *Kaczke, supra* note 18; *Letter from Kristi Noem, supra* note 58.
109 *See, e.g.*, McDonald v. Means, 309 F.3d 530 (9th Cir. 2002). While the Court did suggest in *Nevada v. Hicks* that the ownership status of land was merely a factor to consider in the *Montana* test (rather than the test’s applicability actually turning on land ownership status, as the Court had previously held), that statement in *Hicks* is best viewed as dicta that was tied to the unique facts of that case. *See, e.g.*, COHEN, *supra* note 96, at § 4.02[3][c][i]; *Means*, 309 F.3d at 540.
110 Tweedy, *supra* note 99, at 677–83; Tweedy, *supra* note 93, at 897; Leah Jurss, *Halting the
Court’s practice of coming up with new ad hoc exceptions to the *Montana* exceptions, apparently in order to foreclose tribal jurisdiction over nonmembers.\(^{111}\) In the years since *Montana*, the Court has increasingly moved from a territorially based conception of tribal sovereignty—under which tribes would have expansive jurisdiction over their entire territories—to a consent-based conception—under which tribal membership is seen as evidencing the consent that is generally understood as a prerequisite to jurisdiction.\(^{112}\) Nonmember activities that affect tribal health or welfare in a general sense, such as reckless driving or hotel occupancy that will undoubtedly sometimes trigger the need for tribal police, fire, and ambulance services, are rejected as insufficient to establish the threat or direct effect necessary to validly invoke *Montana*’s second exception, with the Court sometimes noting that applying the exception in such circumstances would allow it to “severely shrink the rule.”\(^{113}\) On the other hand, however, the Court very recently approved the use of the exception to allow tribes to detain drunk drivers, transporters of contraband, and others who pose egregious threats to a tribe’s health or welfare.\(^{114}\)

The narrowness of the exceptions as generally conceived is exemplified in *Long Family Land and Cattle v. Plains Commerce Bank*.\(^{115}\) In *Long Family Land and Cattle*, after rejecting the applicability of the first exception, the Court described the high bar that a tribe would have to meet to satisfy *Montana*’s second exception: “The [nonmember’s] conduct must do more than injure the tribe, it must ‘imperil the subsistence’ of the tribal community.”\(^{116}\) The Court further suggested that a tribe (or other proponent of tribal jurisdiction) may need to show that the tribe’s exercise of jurisdiction is “necessary to avert catastrophic consequences.”\(^{117}\) Importantly, however, the Court in *Long Family Land and Cattle* did recognize that a tribe could legitimately regulate “noxious uses” under *Montana*’s second exception;\(^{118}\) the noxious nature of COVID-19 creates an analogous problem requiring the regulation of

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\(^{112}\) Tweedy, *supra* note 99, at 675.


\(^{115}\) 554 U.S. 316 (2008).

\(^{116}\) *Id.* at 341 (internal citations omitted).

\(^{117}\) *Id.* (internal citations omitted); see also Fletcher, *supra* note 46, at 42 (discussing *Long Family Land & Cattle*’s catastrophic consequences language and lower court decisions holding the standard to be met).

nonmember interaction and movement to protect tribal health and welfare.

Although I have argued previously that a tribe’s ability to meet the *Montana* exceptions would necessarily be extremely uncertain under any given set of facts,\(^\text{119}\) I did not anticipate the COVID-19 pandemic or the lamentable circumstances that it, combined with many other factors, would create for tribes. Sadly, given the inadequacy of their healthcare resources, the delayed provision of relief monies, the tenuousness of tribal finances, and the underlying health conditions of many tribal members that increase their vulnerability to COVID-19, there is little doubt that the Cheyenne River Sioux Tribe’s and the Oglala Lakota Nation’s subsistence have been imperiled by COVID-19 and the constellation of factors that heightens their vulnerability to it.\(^\text{120}\) Moreover, in light of South Dakota’s grossly inadequate response to COVID-19, the tribal checkpoints were and are necessary to avert catastrophic consequences. A large-scale outbreak on either reservation would be catastrophic, not only because of the lethality of COVID-19, which is exacerbated among Natives due the prevalence of preexisting conditions that increase their risk of serious illness and death from the disease, but also because the healthcare systems for each Tribe lack the capacity and equipment to handle such an outbreak.\(^\text{121}\) The remoteness of the two reservations only adds to these difficulties. In short, there should be little doubt that the two Tribes’ checkpoints meet the requirements of the second *Montana* exception.\(^\text{122}\)

\(^{119}\) Tweedy, *supra* note 93, at 898.

\(^{120}\) Accord Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842, 850 (9th Cir. 2009) (holding, in the alternative, that a tribe had a colorable claim to jurisdiction under *Montana’s* second exception where a nonmember had inadvertently started a forest fire on the reservation that resulted in the destruction of “millions of dollars of the tribe’s natural resources”).

\(^{121}\) For a discussion of the prevalence of preexisting conditions and other factors that exacerbate health risks to Native Americans from COVID-19, see *supra* note 47 and infra notes 151–163 and accompanying text. For a discussion of the inadequacy of tribal on-reservation healthcare systems, see infra notes 191–193 and accompanying text.

\(^{122}\) While the Supreme Court has recently expressed a willingness to cabin the extremely broad public health authority of states set forth in Jacobson v. Massachusetts, 197 U.S. 11 (1905), in the context of religion, *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), this approach seems to be of a piece with the current Court’s deference to religion, see generally Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, SUP. CT. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825759 [https://perma.cc/ZG48-YYWC], rather than an indication that it is inclined to limit state public health authority more broadly. Although some courts have suggested that the limitations on state public health authority imposed in *South Bay United Pentecostal Church* may be extended to select contexts beyond religion, such as racial discrimination and content-based suppression of speech, see, e.g., *Cnty. of Los Angeles Dep’t of Pub. Health v. Super. Ct. of Los Angeles Cnty.*, 61 Cal. App. 5th 478, 489–490 (2021), such extensions, even if eventually made by the Supreme Court, would likely be quite narrow.

It is true that there is no Supreme Court equivalent to *Jacobson* in the context of tribal jurisdiction. Florey, *Toward Tribal Regulatory Authority, supra* note 99, at 407. However, given tribes’ heightened vulnerabilities in the face of the pandemic, it would be extremely egregious for
This conclusion is fortified by the Supreme Court’s June 2021 decision in United States v. Cooley.\(^\text{123}\) While the Court’s opinion in Cooley is puzzling in that, without explanation, it takes the unprecedented step of applying Montana in the criminal context,\(^\text{124}\) the opinion nonetheless conclusively demonstrates that Montana’s second exception does important work.\(^\text{125}\) In Cooley, the Court applied the exception to uphold a tribal police officer’s authority to detain and search a non-Native motorist who appeared to be impaired, had a loaded, semiautomatic weapon in close proximity, had drug paraphernalia, and had been traveling with his young child.\(^\text{126}\) In upholding tribal jurisdiction under Montana, the Court recognized tribes’ need “to protect themselves against ongoing threats.”\(^\text{127}\) It elaborated that such threats “may be posed by . . . non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation.”\(^\text{128}\) As a result of the extreme vulnerability of Native individuals and tribal communities to the harms posed by the pandemic,\(^\text{129}\) potentially infected individuals attempting to enter a reservation appear to pose a greater threat to tribes and Native individuals than would a single criminal suspect.

In most cases, the intrusion posed by the checkpoints is also similar in its temporary nature to the tribal officer’s detention of the suspect in Cooley. In Cooley, the Court placed importance on the fact that the criminal suspect was only detained by the tribal officer while awaiting arrival of federal and state law enforcement.\(^\text{130}\) The checkpoints similarly merely created a delay for many travelers, while most others faced the relatively minor inconvenience of having to travel around a reservation rather than pass through it.\(^\text{131}\)

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\(^{123}\) 141 S. Ct. 1638 (2021).


\(^{125}\) Cooley, 141 S. Ct. at 1643.

\(^{126}\) Id. at 1642, 1646; Tweedy, supra note 124, at 35–36 (citing United States v. Cooley, 919 F.2d 1135, 1139–40 (9th Cir. 2019) (reciting the facts of the case), rev’d 141 S. Ct. 1638 (2021)).

\(^{127}\) Cooley, 141 S. Ct. at 1643.

\(^{128}\) Id.

\(^{129}\) See supra note 47 and infra notes 147–154 and accompanying text (addressing greater vulnerability of Native Americans to COVID-19), 191–193 and accompanying text (addressing the inadequacy of tribal healthcare systems, particularly those of the Cheyenne River Sioux and the Oglala Lakota Nation, to deal with COVID-19).

\(^{130}\) Cooley, 141 S. Ct. at 1644–1645.

\(^{131}\) See supra notes 78–82 and accompanying text. This similarity would not exist for nonmember reservation residents who lacked a travel permit and who had traveled to hotspot areas or out of state and who then had to quarantine for fourteen days. See Summary of CRST COVID-19 Checkpoint Policies, supra note 49. However, as residents of the reservation, such persons would also appear to pose a greater risk to the reservation community than someone who simply wanted
of detention of the criminal suspect in Cooley, then, the length of time the nonmember had to spend under tribal jurisdiction was relatively brief. Thus, Cooley strengthens the conclusion that, under Montana and its progeny, tribes are empowered to operate checkpoints to avert or at least minimize pandemic-related threats.

2. Given the fact-based quality of the Montana test, some travelers may argue that they do not pose the necessary risk to trigger Montana’s second exception

Akin to an as-applied constitutional challenge, the Montana test has been described as exceedingly fact-based to such an extent that civil jurisdiction in any given instance depends on the particular activities of the individual nonmember whose activities a tribe is seeking to regulate.132 Thus, it is conceivable that travelers who intended to simply pass through either reservation without stopping would not have posed a substantial risk to the applicable Tribe, particularly—especially in the early months of the pandemic—if they were not coming from a hotspot area or from out of state, and such travelers could therefore have argued that the second Montana exception did not apply.

One problem with such an argument is that humans can never be sure they will be able to follow through with their own intentions. A driver could have car trouble or experience a medical emergency while passing through a reservation and in such a circumstance could well pose a risk of infection to those who stopped to help. Less dramatically, a driver who intended to simply pass through Pine Ridge Reservation could unexpectedly experience a hunger pang and decide to stop on U.S. Highway 18 at Taco John’s or Pizza Hut. Such a stop could also pose a risk of infection to the restaurant workers that the driver interacted with. Finally, Tribes in South Dakota and elsewhere have experienced open resistance to their checkpoints, particularly by non-Native motorists,133 and those who are angry about the checkpoints may well hide their true intentions.134 Indeed, these concerns have been borne out. The Cheyenne River Sioux Tribal Chairman, Harold Frazier, has stated that he has observed—and photographed—commercial trucks whose

to pass through.


133 See, e.g., Telephone Interview with Lloyd Guy, supra note 49 (recounting that one individual “blew through” a Rosebud checkpoint); Florey, supra note 99, at 407–08, 420.

134 Accord Considerations for Health Screening for COVID-19 at Points of Entry, supra note 70 (recognizing that travelers stopped at checkpoints may be dishonest).
drivers claimed to intend to drive straight through the reservation without stopping instead buying fuel from an on-reservation gas station and purchasing items from a store on the reservation.\textsuperscript{135}

Therefore, the risks posed by a pass-through driver may be diminished (if we assume that a good percentage of such drivers will in fact adhere to their stated intentions) but not nonexistent. Such a driver could argue that the risks he or she poses are not sufficient to meet the second \textit{Montana} exception. Even if we accept that contention for the sake of argument, it does not follow that these drivers cannot be stopped and inconvenienced by a tribal checkpoint. Rather, the Ninth Circuit has acknowledged in the context of a tribal checkpoint to apprehend intoxicated drivers and to verify drivers’ licenses and registrations that tribal officers can stop non-Indian drivers at such a checkpoint long enough to determine whether they are Indian and therefore subject to tribal criminal jurisdiction.\textsuperscript{136} Tribal jurisdiction over nonmembers is generally broader in the civil context than in the criminal context,\textsuperscript{137} so this rule should apply in the civil context as well, thus affording tribal checkpoint operators the authority to stop all drivers long enough, in the case of those who are not tribal members, to determine whether they have jurisdiction. Unlike in the criminal context, where the determination of jurisdiction is based on Indian status, in the civil context, with respect to nonmembers, it is based on the degree of potential threat the nonmember poses to reservation residents based on their intended activities. Indeed, the Supreme Court has approved the placement of administrative burdens on tribal members to facilitate collection of state taxes, a type of civil regulation, from their nonmember customers, even though the state would generally lack jurisdiction over the tribal member or tribe on whom the burden was imposed.\textsuperscript{138} Being stopped briefly at a checkpoint is simply another type of administrative burden, and, because it is necessary to ensure enforcement of valid tribal regulatory authority, it should not be viewed as problematic.

\textsuperscript{135} Transcript of Teleconference between Douglas L. Hoelscher, Deputy Assistant to the President and Director of Intergovernmental Affairs, Harold Frazier, Chairman, Cheyenne River Sioux Tribe, and others 33–34 (June 15, 2020) (on file with journal).

\textsuperscript{136} Bressi v. Ford, 575 F.3d 891, 896–97 (9th Cir. 2009); \textit{cf.} United States v. Cooley, 141 S. Ct. 1638 (2021) (allowing for longer detention of potentially dangerous criminal suspects outside of the checkpoint context, but rejecting a requirement that the tribal officer first determine whether or not the suspect qualifies as an Indian for criminal jurisdiction purposes).

\textsuperscript{137} Tweedy, supra note 93, at 898–899.

\textsuperscript{138} Washington v. Confederated Tribes of the Colville Rsrv., 447 U.S. 134, 159–160 (1980); \textit{Cohen}, supra note 96, at \textsection 6.03[1][a] (“A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.”). Some of the tribes in \textit{Confederated Tribes} retained ownership of the cigarettes at issue until their ultimate sale to the consumer, so the administrative burden for those particular tribes appears to have fallen on the tribes themselves. \textit{Confederated Tribes of the Colville Rsrv.}, 447 U.S. at 144.
3. Where nonmember activities are intended to occur may be determinative of whether *Montana* applies in an individual case

While the checkpoints are located on state and federal highways and (less controversially) on other roads, these roads are not necessarily the loci of the activities that each Tribe is seeking to regulate. For example, imagine a young woman who is not a tribal member traveling from Sioux Falls (once the primary hotspot location in the state and an area that has continued to see high numbers of cases off and on throughout the pandemic)\(^\text{139}\) to the Cheyenne River Sioux Reservation to visit her grandmother, who is a tribal member and who lives on tribal trust land. If the Tribe turned her away at a state highway checkpoint, it does not follow that it was regulating her activity on the highway—rather the Tribe would be more properly seen as regulating her access to on-reservation trust land for purposes of a family visit. In such a case, the tribal regulation is valid irrespective of any *Montana* analysis. This is because the challenged activities are intended to occur on on-reservation trust land, and the *Montana* analysis solely applies to nonmember owned fee lands (and possibly tribal lands in unique circumstances involving heightened state interests, which are not present here).\(^\text{140}\) Additionally, tribes generally maintain a sovereign right to exclude individuals from tribal trust lands,\(^\text{141}\) as well as from reservations and portions of reservations that are mostly comprised of trust lands and other tribal lands.\(^\text{142}\) Thus, even where a stop of a motorist occurs on a state right-of-way, courts have recognized that, when the motorist’s activities that the tribe seeks to regulate occurred on tribal trust lands, *Montana* may not apply.\(^\text{143}\) Therefore, just as some individual motorists who are passing through the reservations may be able to argue that their activities do not result in a risk of sufficient magnitude to trigger *Montana* (although this would not exempt them from the minimal burden of stopping at the checkpoint, as discussed above), the Tribes may be able to argue that some nonmembers can be excluded irrespective of *Montana*.


\(^\text{140}\) See supra note 109.

\(^\text{141}\) See, e.g., Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 899–903 (9th Cir. 2017).

\(^\text{142}\) See, e.g., Brendale v. Confederated Tribes of the Yakima Resrv., 492 U.S. 408, 434–435, 441 (plurality opinion).

\(^\text{143}\) See, e.g., Wilson v. Horton’s Towing, 906 F.3d 773, 780 (9th Cir. 2018).
V. THE VULNERABILITY OF TRIBAL MEMBERS TO COVID-19

Ideally, tribes should be able to adopt policies and regulations for their peoples and their territories that match their societal values, regardless of whether their citizens are more or less vulnerable to a particular threat than the rest of the population.\textsuperscript{144} As I have argued elsewhere, this is part of their governmental prerogative.\textsuperscript{145} Unfortunately, as explained above, the limitations on tribal jurisdiction adopted by the Supreme Court have seriously undermined tribes’ capacity to effectuate governmental policies and to protect their citizens from societal ills generally.\textsuperscript{146} It therefore behooves tribes to be able to justify the need for regulations, particularly those that will affect noncitizens.

In the case of COVID-19, tribal governments (as well as other sovereigns) indisputably have a strong need to protect their citizens. Coronavirus is “significantly more lethal than the seasonal flu,” with the Case Fatality Rate in the United States being 1.8 percent as of April 17, 2021.\textsuperscript{147} Because it is a new virus, there was no preexisting immunity

\textsuperscript{144} See, e.g., Florey, supra note 132, at 748 (noting that “[m]any distinct features of tribes in the United States support their potential as policy laboratories” and further noting that “[t]he combination of tribal diversity and responsive government means that tribal regulation can be closely targeted to specific populations and their particular challenges”).

\textsuperscript{145} Tweedy, supra note 93, at 886 (discussing this principle in the context of tribal gun regulation).

\textsuperscript{146} See, e.g., Tweedy, supra note 99, at 687–692.


Case Fatality Rate Data varies over time and by location. The CFR of COVID-19 Differs by Location, and Has Changed During the Early Period of the Outbreak, OUR WORLD IN DATA (Apr. 18, 2021), https://ourworldindata.org/mortality-risk-covid?country=~USA#the-cfr-of-covid-19-differs-by-location-and-has-changed-during-the-early-period-of-the-outbreak [https://perma.cc/CQZ5-M6MF]. Additionally, the Case Fatality Rate is imprecise in that it both underestimates and overestimates the risk of death from COVID-19. There Are Two Reasons Why the Case Fatality Rate Does Not Reflect the Risk of Death, COVID-19 DATA EXPLORER, OUR WORLD IN DATA (Apr. 18, 2021), https://ourworldindata.org/mortality-risk-covid?country=~USA#there-are-two-reasons-why-the-case-fatality-rate-does-not-reflect-the-risk-of-death [https://perma.cc/5BVT-CEJX]. It overestimates the risk because there are likely to be many people who have COVID-19 but do not realize it, and it underestimates the risk of death because there are people who currently have the disease and who will eventually die from it but have not died.
to COVID-19 when it first hit in winter 2020, and it was generally expected early in the pandemic that 40 to 70 percent of the general population would become infected unless aggressive social distancing measures were undertaken or a vaccine was found and widely implemented.148 Thankfully, as this Article goes to press, independently developed types of vaccines have been approved and are now being administered.149

The statistics regarding COVID-19 outlined above are general statistics, and, as alluded to earlier, the vulnerability of Native Americans is much greater.150 This greater vulnerability is due in large part to the higher prevalence of underlying health conditions, including, among a host of others, diabetes and coronary heart disease, in the Native American population that exacerbate the risk of death from COVID-19.151 The death rate of Native Americans in the United States from COVID-19 is nearly twice that of whites.152 And, in addition to the higher risk of death, Native Americans have been found to be 3.5 times more likely to contract the disease than are whites and also to be more likely to contract the illness at a younger age than whites.153 The fact that Native Americans tend to contract COVID-19 at younger ages than do whites becomes even more problematic when one takes into account the fact that the Native population tends to be younger than the general


150 See supra note 47 and accompanying text.


153 Hatcher et al., supra note 47.
population. For example, the median age on reservations is twenty-nine, whereas the median age in the United States population as a whole is thirty-eight. Data from nearly a dozen states, including Alaska, Arizona, Idaho, Mississippi, Montana, New Mexico, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin, show a disproportionately high percentage of Natives in those states being afflicted with and/or dying from the disease. For example, although the population of New Mexico is only 9 percent Native American, a full 60 percent of those infected in New Mexico as of May 2020 were tribal members. While the disparity in infections has since shrunk to 19 percent, Native Americans accounted for nearly one-third of the deaths in the state as of April 18, 2021. Although the disparity in COVID-19 deaths between Native Americans and other races is somewhat less stark in South Dakota than in New Mexico, it remains very troubling: those identifying solely as Native American make up 8 percent of the population of South Dakota and yet account for 15 percent of the COVID-19-related deaths in the state.

Concerningly, however, it is widely acknowledged that the current COVID-19 data are incomplete, with many states choosing not to collect data on infection rates among Native Americans and even some on-reservation healthcare providers failing to “consistently collect or submit data on outcomes.” Even with these data gaps, the news is extremely alarming. In May and June 2020, Navajo Nation was reported to have the highest per capita rate of infection in the United States, with the Nation’s per capita rate as of June 28, 2020 surpassing even “that of Wuhan at the peak of the outbreak in China.” Moreover, the Navajo Nation’s total death toll in February 2021 was 1,038 persons, “the equivalent of losing one in every 160 people on the reservation.”

156 Id. (describing the percentage of the population of New Mexico that identifies as solely Native American or Alaska Native); Marjorie Childress, COVID-19 Has Spread to Most New Mexico Tribes, N.M. IN DEPTH (May 13, 2020), http://nmindepth.com/2020/05/13/covid-19-has-spread-to-most-new-mexico-tribes/ [https://perma.cc/Z6VW-Q4JE].
157 Racial Data Dashboard, supra note 155.
158 Id.
160 IDSA & HIVMA, supra note 151, at 1; Burki, supra note 46, at 325; Kim, supra note 151.
161 IDSA & HIVMA, supra note 151, at 1.
162 Lakhani, supra note 152. White Americans generally suffer 121 deaths per 100,000 people. Id. Other Southwest tribes experienced devastating per capita infection rates as well. Childress,
For Indigenous Americans as a whole, the four weeks leading up to February 2, 2021 “saw 958 deaths among Indigenous Americans, making it the deadliest stretch of the pandemic for them so far.” To make matters worse, another layer of grief overlays tribes and Native individuals as a result of the many grave losses caused by the pandemic; this is because “scores of elders, custodians of the language, history, and tradition of Native Americans” have been lost to COVID-19. Thus, the pandemic is causing a loss of both beloved family members and parts of Native cultures themselves.

The disproportionately devastating effects of COVID-19 for Native individuals and tribes are further compounded by the long history of devastation caused to Native cultures by disease. In the 1600s, 1700s, and 1800s, Native peoples survived the decimation resulting from multiple outbreaks of smallpox and other diseases. Later outbreaks of disease in the United States have also disproportionately affected Native Americans. The influenza pandemic in 1918 and 1919 caused the loss of 2 percent of the entire Native population in the United States, with losses of Native populations in the West and Southwest in the range of 4 to 6 percent. Even as recently as 2009, the mortality rate of Native Americans and Alaska Natives from H1N1 influenza was four times higher than that of the general population.

Native peoples’ and Native individuals’ past experiences with disease and their cultural history of devastation from disease outbreaks undoubtedly increase the trauma they experience in the face of the current pandemic. Moreover, there is developing evidence, as further

supra note 156. For example, the Zia Pueblo had a per capita infection rate of eleven percent in May 2020, an extremely high rate for that very early stage of the pandemic. Id. One member of the Zuni Tribe even voiced concern in April 2020 that COVID-19 could cause that tribe to “go extinct,” Acee Agoyo, *At This Rate, the Entire Tribe Will Be Extinct*: Zuni Pueblo Sees COVID-19 Cases Double as First Death Is Confirmed, INDIANZ (Apr. 8, 2020), https://www.indianz.com/News/2020/04/08/at-this-rate-the-entire-tribe-will-be-ex.htm [https://perma.cc/NKYQ-95HL]. and the lieutenant governor of the Picuris Pueblo expressed similar concerns. Florey, *supra* note 99, at 406.

163 Burki, *supra* note 46, at 325.


166 Fletcher, *supra* note 46, at 42.

167 Burki, *supra* note 46, at 325.

168 Accord Neha A. John-Henderson & Annie T. Ginty, *Historical Trauma and Social Support as Predictors of Psychological Stress Responses in American Indian Adults During the COVID-19 Pandemic,* 139 J. OF PSYCHOSOMATIC RES. 1, 4 (2020) (finding “that [American Indian] adults who think more frequently about historical loss associated with the colonization and genocide of their people, experienced greater increases in psychological stress from before the declaration of
discussed below, that past traumatic experiences like devastation of one’s culture from disease may be passed down through generations biologically via a process called epigenetics in such a way that vulnerability to future disease may be increased as a result of these past traumas. This increased trauma in the face of disease and increased vulnerability to disease exacerbates the threat that the pandemic poses to the health and welfare of the Cheyenne River Sioux Tribe and the Oglala Lakota Nation (and other tribes) under the Montana test. This is so because, not only is there mounting evidence, described below, that both personally experiencing trauma and exposure to historical trauma harms one’s health, but experiencing trauma also affects a direct detriment to a person’s welfare or wellbeing in its own right.

Disease outbreaks and federal indifference to or complicity in exacerbating such outbreaks are, of course, not the only type of historical trauma experienced by Native peoples within the United States. Land loss, suppression and attempted eradication of culture, forced relocation, and termination of the federal-tribal relationship are a few examples of the many others.

The reverberations of these unparalleled traumas undoubtedly continue today, and the reverberations of traumas stemming from past disease outbreaks in particular are likely amplified by the fear, anxiety, grief, and physical suffering that COVID-19 is visiting upon these communities. This is true not only because of cultural memory of the devastation resulting from these outbreaks being passed down through oral history and other mechanisms of cultural transmission but also because historical traumas like large-scale disease outbreaks are thought to cause changes in gene expression by affecting processes such as methylation of DNA and by modifying histones, which are water soluble

COVID-19 as a pandemic to one month following the declaration of the pandemic); see also Emily Esterwood & Sy Ateazz Saeed, Past Epidemics, Natural Disasters, COVID19, and Mental Health: Learning from History as we Deal with the Present and Prepare for the Future, 91 PSYCHIATRIC Q. 1121, 1121 (2020) (predicting, based on studies relating to past pandemics as well as COVID-19, that COVID-19 is likely to lead to greater incidence of PTSD and anxiety, among other psychological problems).

170 Witt, supra note 10, at 38; Fletcher, supra note 46, at 43.
173 Accord Burki, supra note 46, at 326 (quoting Professor Melissa Begay’s statement that “[o]ur grandparents still talk about smallpox and tuberculosis, these diseases are very real to us”).
proteins that form a complex with DNA. It is believed that these changes (which can cause genes that would be normally be switched on and off intermittently to adapt to changing circumstances to become permanently switched off) can be passed down through generations.

Thus, epigenetic changes, which are caused by both historical trauma and personally experienced childhood trauma, can create a feedback loop whereby individuals (or in the case of Native Americans, peoples) become more susceptible to certain ailments, including various diseases and mental health problems. Moreover, Native Americans, including members of tribes located within the boundaries of South Dakota, have a much higher incidence of experience of childhood trauma, also referred to as Adverse Childhood Experiences (ACEs). And, significantly for our purposes in evaluating Native Americans’ risks with respect to the coronavirus, several of the diseases and psychiatric disorders that are linked to epigenetic changes commonly arising from

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In addition to epigenetic changes resulting from historical trauma, which may be passed down through generations, see *infra* notes 175–176 and accompanying text, knowledge of historical trauma also cases distress to Native Americans whose ancestors experienced historical trauma. Brockie et al., *supra* note 171, at 2 (“Over 50% of Native Americans indicate that they think about loss related to historical trauma, such as loss of language, loss of culture, and loss of land, at least occasionally, and which caused [sic] them psychological distress.”).


176 Trerotola et al., *supra* note 174, at 5–7; Brockie et al., *supra* note 171, at 3–5; accord Hoss, *supra* note 47, at 165–66; Brockie et al., *supra* note 171, at 1 (“Epigenetic modifications are considered to be an individual’s molecular response to the environment and occur in an effort to preserve the health of the individual by increasing the accessibility of genes for transcription and translation that relate to immediate survival.”).

historical and childhood traumas create risks of experiencing complications from COVID-19.\textsuperscript{178} These include cancer, nicotine dependence, and obesity, among others.\textsuperscript{179}

An example of an ACE that has been linked to epigenetic consequences is observing one’s mother be physically abused.\textsuperscript{180} Native women are much more likely to experience domestic violence, with over 50 percent of Native women experiencing physical abuse at the hands of a spouse or intimate partner in their lifetimes and over 80 percent of Native women experiencing some form of violence in their lifetimes.\textsuperscript{181} This victimization of Native women suggests that Native children are more likely to witness the physical abuse of their mothers. And, in fact, a study of the ACEs experienced by Native Americans located within the boundaries of South Dakota found that nearly a quarter of Native respondents had, as children, witnessed their mothers being treated violently, compared to just over five percent of the non-Native respondents in the state.\textsuperscript{182}

Additionally, childhood poverty is a traumatic experience that has been linked to changes in the methylation of genes related to metabolism and inflammation,\textsuperscript{183} and chronic inflammation in turn has been linked to such COVID-19 risk factors as heart disease, diabetes, and cancer.\textsuperscript{184} Moreover, in the South Dakota study, nearly 40 percent of the

\textsuperscript{178} See, e.g., Brockie et al., \textit{supra} note 171, at 4 (adverse childhood experiences (ACEs), specifically removal of a child from their parents due to abuse or neglect, linked to cancer); \textit{id.} at 2 (exposure to childhood trauma linked to substance use disorder); \textit{id.} at 3 (ACEs linked to obesity); \textit{id.} at 5 (methylation differences linked to drug use and, in females, nicotine dependence); \textit{see also id.} at 2 fig.1, (showing a link between trauma, epigenetic changes, and cardiovascular disease, diabetes, and obesity); Warne et al., \textit{supra} note 177, at 1566 (over a third of Native Americans in South Dakota surveyed were current smokers, compared to 15 percent of non-Native American persons surveyed); Trereto\_la et al., \textit{supra} note 174, at 5–6 (suggesting a possible connection between DNA methylation patterns that are transmitted intergenerationally and diabetes); Hoss, \textit{supra} note 47, at 165–66; \textit{People with Certain Medical Conditions, CTRS. FOR DISEASE CONTROL \& PREVENTION} (Mar. 21, 2021), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html [https://perma.cc/N2RY-6MX8] (stating that cancer, heart disease, diabetes, current smoking and a history of smoking, substance abuse disorders, and obesity create risks of complications from COVID-19).

\textsuperscript{179} Brockie et al., \textit{supra} note 171, at 4 (adverse childhood experiences (ACEs), specifically removal of a child from their parents due to abuse or neglect, linked to cancer); \textit{id.} at 2 (exposure to childhood trauma linked to substance use disorder); \textit{id.} at 3 (ACEs linked to obesity); \textit{id.} at 5 (methylation differences linked to drug use and, in females, nicotine dependence); \textit{see also People with Certain Medical Conditions, supra note 178}.

\textsuperscript{180} Brockie, \textit{supra} note 171, at 4.


\textsuperscript{182} Warne et al., \textit{supra} note 177, at 1565.

\textsuperscript{183} Brockie, \textit{supra} note 171, at 4.

\textsuperscript{184} \textit{Understanding Acute and Chronic Inflammation}, HARV. HEALTH PUB’G, HARV. MED. SCH. (June 17, 2020), https://www.health.harvard.edu/staying-healthy/understanding-acute-and-chronic-inflammation#~:null;text=Research%20has%20shown%20that%20chronic,to%20know
Native American respondents had incomes at or below 50 percent of the federal poverty level, which would indicate that their children would be experiencing poverty; this compared with roughly 13 percent of non-Native respondents being afflicted with that level of poverty.\textsuperscript{185} The poverty rate on the Pine Ridge reservation is over 50 percent, and the life expectancy of individuals living there is the lowest in the United States.\textsuperscript{186}

Furthermore, removal of a child from his or her home due to abuse or neglect has been tied to epigenetic changes linked to susceptibility to cancer,\textsuperscript{187} which, as noted above, increases one’s risk of developing complications from COVID-19, and Native children generally are currently four times more likely to be removed from their homes than are non-Native children.\textsuperscript{188} Thus, for Native Americans, the continued intergenerational effects of the historical trauma caused by colonialism combined with the higher prevalence of ACEs in Native communities create unique vulnerabilities and lead to greater susceptibility to complications from COVID-19.

While the evidence as to intergenerational transmission of epigenetic changes is still developing,\textsuperscript{189} mounting evidence, as described above, appears to support the intergenerational effects of trauma on health outcomes resulting from epigenetic changes to gene expression. And even putting epigenetic pathways to one side, historical trauma continues to affect Native Americans through cultural transmission and because “[p]opulations that have experienced higher levels of historical trauma are more likely to be exposed to trauma throughout the life course.”\textsuperscript{190} These vulnerabilities exacerbate the detrimental effects that COVID-19 is likely to have on the health and welfare of tribes, including those within the borders of South Dakota. Combined with the state’s hands-off approach to the pandemic, these experiences with trauma leave tribal members in an extremely precarious position in the face of the COVID-19 pandemic. This precariousness in turn increases the threat that, absent effective tribal regulation, infected non-Natives pose to tribal health and welfare.

\textsuperscript{185} Warne et al., supra note 177, at 1564.


\textsuperscript{187} Brockie, supra note 171, at 4.


\textsuperscript{189} See generally Bernhard Horsthemke, A Critical View on Transgenerational Epigenetic Inheritance in Humans, 9 NATURE COMMUNICATIONS 2973 (2018).

\textsuperscript{190} John-Henderson & Ginty, supra note 168, at 2.
Adding to these severe difficulties, the vulnerabilities of Native individuals and indigenous peoples within the United States to COVID-19 are exacerbated by other dire problems, such as the gross inadequacy of healthcare facilities on many reservations, including a lack of bed space and shortage of qualified doctors and other medical personnel, conditions which only add to the trauma Native Americans experience in the face of COVID-19.191 One stark example of the inadequacy of healthcare resources available to tribes is the fact that the Oglala Lakota were only allocated four ventilators for their Reservation to serve the Tribe’s nearly 47,000 members.192 The Cheyenne River Sioux Tribe similarly has grossly inadequate healthcare resources to deal with the virus, given that its hospital has only eight beds, six respirators, and no intensive care capacity and that the next nearest hospital is 170 miles away.193

Other problems include the disproportionate lack of water availability and indoor plumbing on reservations and the prevalence of overcrowded housing, both of which are known to lead to greater transmission rates of COVID-19.194 The Tribes within the borders of South Dakota are no strangers to these problems. For example, most of the communities on the Cheyenne River Sioux Reservation “do not have water and sewer systems making it difficult to live in sanitary conditions.”195 And on the Pine Ridge Reservation, home to the Oglala Lakota Nation, “[a] severe housing shortage forces hundreds into homelessness while thousands of others live in overcrowded, substandard accommodations.”196 Indeed, as Matthew Fletcher points out, “[p]ublic health


192 Pfankuch, supra note 84.


scholars have long warned that a pandemic reaching Indian country could be more disastrous for Indian country than for the American population overall.”

Finally, tribal funding sources tend to be much more limited than those of other governments. This is due, in substantial part, to the Supreme Court’s restrictions on tribal taxing authority pertaining to nonmembers, particularly those occupying or engaged in activities on nonmember-owned fee land within a reservation, and to its concomitant willingness to allow state taxation of nonmembers in some circumstances. Under this framework, tribes generally have to meet the Montana test to tax nonmember activities on fee lands. Tribes are more likely to be able to tax nonmember activities on trust lands, but the feasibility of their actually imposing a tax may be undercut by the Supreme Court’s willingness to also allow state taxes in some cases based on a specialized preemption analysis. Because the Court has not to date required tax revenue to be apportioned between a state and a tribe, allowing both entities to tax tends to effectively result in double taxation, a circumstance that may well lead the tribe to forego its tax to avoid driving business away from the reservation. One situation in which state taxes and other regulations are likely to be foreclosed is that in which a tribe adds value to goods or services provided on a reservation. Largely because of these tax-related limitations, tribal casinos (rather than tribal taxes) often serve as major sources of revenue for the funding of health and social services. But most tribes have...

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197 Fletcher, supra note 46, at 46.
203 See COHEN, supra note 96, at §§ 8.03[1][d], 8.05; see also Tweedy, supra note 99, at 704 n.63. It is important to note that this problem of double taxation has been ameliorated in some states through compacts with tribes and state authorizing legislation. See COHEN, supra, at § 8.05; Act of June 11, 2020, ch. 132, 2020 Wash. Laws (allowing for state governor to enter compacts with tribes regarding sharing of state sales and use tax revenues and some business and occupation tax revenues).
204 COHEN, supra note 96, at § 6.03[2][a] (quoting the Court’s statement in Confederated Tribes of the Colville Rsrv. “that a tribe’s interest in raising revenues ‘is strongest when the revenues are derived from value generated on the reservation by activities involving the [t]ribe[ ] and when the taxpayer is the recipient of tribal services’ and that a state’s interest ‘is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services’
205 Crepelle & Murtazashvili, supra note 198, at 4.
shuttered their casinos due to COVID-19. Although the temporary closures were necessary to protect the tribes and others from the spreading of disease, at the same time, because of the Court’s substantive and practical limitations on tribes’ taxing ability, the closures further compromised tribes’ already tenuous ability to effectively treat citizens who became infected with COVID-19 and to fund measures to prevent the spread of the disease within their territories. Moreover, the federal government’s monetary aid to tribes to address the COVID-19 pandemic was sorely delayed, a problem that compounded tribes’ already very strained financial situation. This combination of factors has created a perfect storm of vulnerability among tribes. This vulnerability limits tribes’ ability to protect the health and welfare of their citizens from COVID-19.

Because of Native Americans’ extreme vulnerability to the disease and the lethality of COVID-19 generally, tribes’ continued existence and vitality have been literally at stake in the fight against COVID-19 (although the danger is slowly dissipating as more people become vaccinated). This is particularly true in South Dakota in light of the governor’s prioritization of business interests over public health and her disdain for mandatory restrictions in furtherance of public health. The potential for individuals residing off-reservation who are not subject to any mandatory state or even local public health restrictions to

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207 Fletcher, supra note 46, at 44; Mineo, supra note 206; Romero & Healy, supra note 206; Burki, supra note 46, at 325.

208 See, e.g., Kim, supra note 151; Carlson, supra note 16.

209 See, e.g., Agoyo, supra note 162; Native Communities Have Been Hit Hard by COVID-19—and Fear for Their Survival, PBS NEWS HOUR (May 25, 2020), https://www.pbs.org/newshour/show/native-communities-have-been-hit-hard-by-covid-19-and-fear-for-their-survival [https://perma.cc/5XBA-CCXY]; Tribe Removes Disputed Coronavirus Reservation Checkpoints, supra note 67 (citing the “arrival of coronavirus vaccines” as one of the reasons that the Cheyenne River Sioux Tribe removed its checkpoints in March 2021).

210 Goodluck, supra note 45; see also Witte, supra note 26 (quoting Gov. Noem describing other states’ stay-at-home orders as “reflect[ing] a ‘herd mentality’”).

spread COVID-19 generally and to infect tribal members and others who reside on reservations located inside the state’s borders has been extremely high throughout the pandemic. While the availability of vaccines certainly lessens the danger, children under twelve cannot yet be vaccinated and remain at risk, with the proportion of total infections attributable to children rising rapidly nationwide as of early May 2021. Moreover, the dangerous P.1 COVID-19 variant, which is resistant to vaccines, has been discovered in South Dakota’s Pennington County, which abuts the Pine Ridge Reservation, and the highly contagious Delta variant has become very prevalent in the state. To make matters worse, ideological distrust of the COVID-19 vaccines appears to be stronger in South Dakota than elsewhere, with demand for the shot waning as the vaccine was opened up to the general population more broadly. Some rural counties in northwest and central South Dakota in particular have alarmingly low rates of vaccination.

be available, as of July 2021, Native Americans in general had the highest vaccination rate in the United States.\textsuperscript{217}

Transmission from those traveling to, from, or through the Oglala Lakota or Cheyenne River Sioux reservations could occur in any of myriad ways. For example, such transmission could occur as a result of reservation residents leaving the reservation to shop or attend medical appointments or through those who live outside the reservation entering it for personal visits or for employment. Thus, the state’s lax approach to fighting COVID-19 is a classic example of a case where a state permits “conduct that causes negative externalities in other jurisdictions.”\textsuperscript{218} The Oglala Lakota and the Cheyenne River Sioux have taken action, including the establishment of checkpoints, to minimize those negative externalities and to diminish the de facto lowest common denominator effect that South Dakota’s laissez faire approach would otherwise have.\textsuperscript{219} Thankfully, as shown above, this situation is one of the rare cases in which one of the predicate conditions for tribal civil regulatory jurisdiction over nonmembers on non-tribal lands and within rights-of-way is almost indisputably met.

VI. THE BUREAU OF INDIAN AFFAIRS’ INTERIM GUIDANCE

On April 8, 2020, the Bureau of Indian Affairs (BIA) issued interim guidance on tribal checkpoints that were established due to COVID-19. The BIA stated that the checkpoints on state and federal highways would only be valid after a tribe reached an agreement with the applicable road owner.\textsuperscript{220} It cited a federal regulation pertaining to tribal roads that had no obvious applicability to the question to support its assertion.\textsuperscript{221} The guidance, however, is not based on law and is not binding on tribes. Federal Indian law governing tribal jurisdiction is primarily a creature of federal common law. Because of Congress’s plenary authority over tribes, only Congress can alter United States Supreme

\textsuperscript{217} Kennecke, supra note 216; Sukee Bennett, American Indians Have the Highest Covid Vaccination Rate in the US, NOVA (July 6, 2021), https://www.pbs.org/wgbh/nova/article/native-americans-highest-covid-vaccination-rate-us/ [https://perma.cc/KW57-KBSH].

\textsuperscript{218} Florey, supra note 132, at 729.

\textsuperscript{219} See Letter from Julian Bear Runner, supra note 107, at 1 (noting that “[t]he State of South Dakota’s response to the COVID-19 crisis is ineffective as shown by the increasing number of cases in South Dakota” and explaining that the Oglala Lakota’s decision to establish checkpoints was necessary because of South Dakota’s “lack of judgment and planning of preventative measures in response to the current pandemic”); see also Florey, supra note 132, at 726–27 (discussing the lowest common denominator effect in the context of differing state regulations).


\textsuperscript{221} Id. (citing 25 C.F.R. § 170.114).
Court holdings on tribal jurisdiction by passing an otherwise valid statute.\textsuperscript{222} The Supreme Court has told us that \textit{Montana} applies to questions of tribal civil jurisdiction relating to nonmember activities on state highways, and lower courts have extended this analysis to federal highways.\textsuperscript{223} The reason that \textit{Montana} and its progeny apply is because rights-of-way for state and federal highways have been held to be the equivalent of nonmember-owned fee land.\textsuperscript{224} The BIA cannot overcome these holdings simply by issuing guidance citing an inapplicable regulation; unlike Congress, federal agencies lack plenary authority over tribes.

Moreover, the guidance was a surprising development given the federal government’s trust relationship with tribes and the fact that, under Executive Order 13175, the federal government “recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.”\textsuperscript{225} Executive Order 13175 also requires that federal agencies “have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”\textsuperscript{226}

Because the guidance was not rooted in law and conflicts with Supreme Court precedent, the precedent governs, rather than agency guidance.

VII. SEIZURES AND REASONABLENESS

As explained above, the checkpoints are almost certainly lawful under \textit{Montana’s} second exception. However, the Oglala Lakota, the Cheyenne River Sioux, and other Tribes that put COVID-19 checkpoints into place should still ensure that the implementation of the checkpoints is reasonable. Because they are considered seizures, state and federal checkpoints must be conducted in a reasonable manner to pass Fourth Amendment muster.\textsuperscript{227} Tribes are not subject to the Fourth Amendment of the United States Constitution because they are neither federal nor state actors and did not consent to the constitutional compact.\textsuperscript{228} However, tribes are bound by an identically worded provision of the Indian

\textsuperscript{222} \textit{United States v. Lara,} 541 U.S. 193, 200–02 (2004).
\textsuperscript{223} \textit{Strate v. A-1 Contractors,} 520 U.S. 438, 454 (1997); \textit{Wilson v. Marchington,} 127 F.3d 805 (9th Cir. 1997).
\textsuperscript{224} \textit{Strate,} 520 U.S. at 454; \textit{Nord v. Kelly,} 520 F.3d 848, 853 (8th Cir. 2008).
\textsuperscript{225} Exec. Order No. 13,175, 65 Fed. Reg. 67,249, at § 2 (Nov. 6, 2000).
\textsuperscript{226} \textit{Id.} at § 5(a).
\textsuperscript{228} \textit{See, e.g., Florey, supra note 132, at 717; Tweedy, supra note 99, at 693.}
Civil Rights Act (ICRA), though they need not interpret it identically to the constitutional provision. The safest course for tribes in terms of preserving their jurisdiction in the face of a potential challenge is to take guidance from Fourth Amendment precedent and ensure that their operation of checkpoints is reasonable and that motorists are not detained any longer than is necessary to determine how the given tribe’s COVID-19 regulations apply to them and for the tribal officer to inform them as to what they must do to comply.

VIII. THE CONTINUING PROBLEMS WITH THE MONTANA TEST

Even while the pandemic serves as a textbook illustration of a case where the stringent requirements of Montana’s second exception should be viewed as undeniably met, it also serves as a grave reminder of what is wrong with the Montana test and of the life-or-death consequences that are at times attendant on a Tribe’s ability to exercise regulatory jurisdiction over members and nonmembers alike. Rather than accepting tribal self-government and the Cheyenne River Sioux’s and Oglala Lakota’s eminently reasonable decisions to take strong protective measures to combat the spread of COVID-19, Governor Kristi Noem gave the Tribes an ultimatum, strategically delivered to news outlets rather than to the Tribes directly: take down the checkpoints within forty-eight hours or face a lawsuit. The lawsuit never materialized—most likely because Governor Noem realized that, even within the confines of Montana’s problematic framework, the lawsuit was probably a

231 A Ninth Circuit case called United States v. Faire, 575 F.3d 929 (9th Cir. 2009), provides a good summary of what is required for a checkpoint to be considered reasonable under the Supreme Court’s Fourth Amendment precedent:

If the checkpoint is not per se invalid as a crime control device, then the court must “judge [the checkpoint’s] reasonableness, hence, its constitutionality, on the basis of the individual circumstances.” This requires consideration of “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”

Id. at 932 (internal citations omitted). Additionally, stops at a checkpoint must not be based “solely [on] the unfettered discretion of officers in the field.” Brown v. Texas, 443 U.S. 47, 51 (1979); in other words, stopping every vehicle is generally preferable to conducting random stops. Sitz, 496 U.S. at 454.

233 Ducheneaux, supra note 57; Compl. for Injunctive and Declaratory Relief, supra note 57, at 17–18 ¶ 55 & n.28.
234 Compl. for Injunctive and Declaratory Relief, supra note 57, at 17–18 ¶ 55 & n.28.
Noem then turned her efforts to using her insider status with then-President Trump to try to bogart a solution.\textsuperscript{236}

Her initial approach of threatening an almost immediate lawsuit rather than genuinely trying to negotiate a solution may well have gained more traction in less urgent circumstances. This is because, outside of the unique, dire circumstances that we currently find ourselves in, the \textit{Montana} framework creates an additional layer of vulnerability for tribes attempting to protect their citizens and other reservation residents from ills that, although important, do not create as much urgency as the pandemic. The uncertainties posed by the framework and the Court’s resistance to tribal jurisdiction incentivize non-Native governments and individuals to challenge tribal authority\textsuperscript{237} and allow courts to be conscripted into participating in these efforts to harass tribes and chill their exercises of governmental authority. This is contrary to the recognition in American jurisprudence that governmental resources should be protected “from depletion due to the need to... defend against suits.”\textsuperscript{238} Additionally, control mechanisms like Rule 11\textsuperscript{239} sanctions that are designed to curb the temptation for parties to bring frivolous suits serve little use if the area of law is so fact-based as to be, in most cases, utterly unpredictable. Tribal public health regulations relating to the pandemic appear to comprise one of the few, exigent situations where a court could easily determine that the \textit{Montana} test is satisfied, without the need for a lengthy and expensive trial. While the problems with the framework have less bearing in our present, unusual circumstances, the problems remain extant in other contexts and are deserving of a legislative (or judicial) solution.\textsuperscript{240}

Justice Kagan’s statement in dissent in \textit{South Bay United Pentecostal Church v. Newsom},\textsuperscript{241} in which she criticizes the majority’s decision to enjoin some of California’s pandemic-related restrictions on churches, could, as shown below, easily be modified to critique the \textit{Montana} test generally, outside of the pandemic context:

\begin{itemize}
\item \textsuperscript{235} Ducheneaux, \textit{supra} note 57.
\item \textsuperscript{236} See \textit{supra} note 58 and sources cited therein; Benji Jones & Charles Davis, \textit{The White House Reportedly Asked South Dakota’s Governor How to Add Another President to Mount Rushmore, and She Later Gave Trump a 4-foot Replica with His Face on It}, BUS. INSIDER (Aug. 8, 2020), https://www.businessinsider.com/how-gov-noem-trumps-desire-carved-into-mt-rushmore-2020-8 [https://perma.cc/4SPY-4X6K] (describing Noem as “a close ally of President Trump’s”).
\item \textsuperscript{237} See Fletcher, \textit{supra} note 46, at 38–39.
\item \textsuperscript{239} Fed. R. Civ. P. 11.
\item \textsuperscript{240} See Tweedy, \textit{supra} note 232.
\item \textsuperscript{241} 141 S. Ct. 716, 720 (2021) (Kagan, J., dissenting).
\end{itemize}
The Court’s decision[s] leave[ ] . . . [tribal] policymakers adrift . . . . It is difficult enough in a predictable legal environment to craft . . . policies that keep communities safe. That task becomes harder still when officials must guess which restrictions this Court will choose to strike down. The Court injects uncertainty into an area where uncertainty has human costs.\footnote{\textit{Id.} at 723 (with modifications to demonstrate how the same basic critiques would apply equally to the \textit{Montana} test).}

The uncertainty is undoubtedly starker in the garden-variety (i.e., non-pandemic) tribal civil regulatory context under \textit{Montana} than in the situation at issue for states in crafting public health regulations after \textit{South Bay United Pentecostal Church}, and the resulting human costs deserve attention.

IX. CONCLUSION

The COVID-19 pandemic, combined with the host of preexisting conditions that are more prevalent among Natives, the laissez-faire approach that South Dakota has taken to the virus, the inadequacy of tribal healthcare systems, and the underfunding and delayed funding of tribal relief efforts has created a life-or-death situation for tribal governments seeking to curb the virus. Tribes appear to be well within their rights in reasonably implementing checkpoints to curb the spread of the deadly disease.