TOWARD TRIBAL REGULATORY SOVEREIGNTY IN THE WAKE OF THE COVID-19 PANDEMIC

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The media has often highlighted the devastating toll COVID-19 has taken in many parts of Indian country—and that, to be sure, is part of the story. But there are other aspects of the picture as well. On the one hand, tribes have taken resourceful and creative measures to combat COVID-19. On the other, a troublesome doctrinal landscape has complicated their efforts to do so. The judicially crafted Montana *framework severely restricts tribal civil-regulatory power over nonmembers—a particular problem during the COVID-19 pandemic, when nonmembers have defied tribal curfews, camped in prohibited areas, and opened businesses on reservations despite closure orders. While* Montana *nominally contains a "health and welfare" exception allowing tribes to exercise power over nonmembers in emergencies, its contours are too ambiguous and fact-specific to allow tribes to act with the certainty and speed they require. The pandemic thus provides a vivid illustration of the way in which* Montana *hinders effective tribal governance. Further, the pandemic has occurred at a moment when the Court may be more receptive than it has been in the past to arguments favoring tribal sovereignty—and at a time when many of the concerns about tribal regulation that motivated the Court four decades ago in* Montana *seem increasingly distant both from current doctrine and contemporary tribal realities. As a result, it is time, at a minimum, for the Court to expand* Montana*'s "health and welfare" exception to resemble something closer to the powers states possess to safeguard public health.*

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INTRODUCTION

As the COVID-19 pandemic spread throughout the United States, members of the Oglala Lakota Nation[1] knew they were facing a serious problem. Although the tribe at the time had no reported cases (a situation that would last through the beginning of April 2020),[2] it had been clear for some time to tribal leaders that, without action, the pandemic could spread to tribal lands with catastrophic consequences. Tyler Yellow Boy, a member of the tribe's pandemic task force, noted the potentially devastating combination of challenges the tribe was facing: a particularly vulnerable population due to age and chronic conditions, a shortage of beds and ventilators, and difficulties in obtaining supplies and funds.[3] As of April 4, 2020, for example, the tribe still had only 24 COVID-19 test kits; President Julian Bear Runner estimated that medical resources were inadequate to handle an outbreak of more than ten people.[4]

Worried about what could happen if COVID-19 gained a foothold, the tribe swung into action quickly to "wall[] off the outside world" and help keep tribe members safe from the disease.[5] On March 8, 2020—just a few days after New York Mayor Bill DeBlasio had urged residents to "get out on the town despite coronavirus,"[6] and President Trump suggested shutting 21 COVID-19 patients out of the country to help to keep U.S. numbers down[7]—the tribe curbed nonessential travel by its employees and urged nontribal visitors to postpone their trips to the Pine Ridge Reservation.[8] Two days later, as the first COVID-19 cases were identified in the surrounding state of South Dakota, the tribe declared a state of

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1. The tribe is also known as the Oglala Sioux Tribe, which is the name used on some official pronouncements. *See* OGLALA LAKOTA NATION, https://www.oglalalakotanation.info/ (last visited Feb. 12, 2021).

2. Mike Moen, *Native American Tribes Respond to COVID with Limited Resources*, CAP. J. (Apr. 5, 2020), https://www.capjournal.com/news/coronavirus/native-american-tribes-respond-to-covid-with-limited-resources/article_df4d1a18-77b5-11ea-b4a0-7fe91c80eded.html.

3. *See id.*

4. *See* Dana Hedgpeth et al., *Indian Country, Where Residents Suffer Disproportionately from Disease, Is Bracing for Coronavirus*, WASH. POST (Apr. 4, 2020), https://www.washingtonpost.com/climate-environment/2020/04/04/native-american-coronavirus/.

5. *See id.*

6. Bill DeBlasio (@BilldeBlasio), TWITTER (Mar. 2, 2020, 6:16 PM), https://twitter.com/BilldeBlasio/status/1234648718714036229.

7. *See* James Fallows, *The Three Weeks That Changed Everything*, ATLANTIC (June 29, 2020), https://www.theatlantic.com/politics/archive/2020/06/how-white-house-coronavirus-response-went-wrong/613591/.

8. *Oglala Sioux Tribe Announces Travel Restrictions for Coronavirus*, NEWSCENTER1 (Mar. 8, 2020), https://www.newscenter1.tv/oglala-sioux-tribe-announces-travel-restrictions-for-coronavirus//.

emergency.[9] Church volunteers who had been helping to repair houses were instead asked to stay away.[10] Later in March, the tribe issued a shelter-in-place order applicable to "[a]ll individuals currently living within the Pine Ridge Indian Reservation,"[11] and shortly thereafter imposed a curfew[12] and passed an ordinance closing the reservation to nonresidents for nonessential travel.[13] Finally, in a move that would later cause resistance from South Dakota's governor and subsequent legal action,[14] the tribe established checkpoints, staffed by volunteers and a security firm, at entrances to the reservation in order to ensure compliance with the tribe's limits on nonresident entry.[15]

Despite these measures, in early April, the tribal council learned that Juliana Parker,[16] a non-Native teacher living on the reservation with her husband, had tested positive for COVID-19 following travel to Colorado that the tribal council believed to be in violation of the shelter-in-place order.[17] (Parker denied this, saying she had made the trip before the order was in place.)[18] After a 9–9 tie ultimately broken by President Bear Runner, the tribal council voted to banish the couple from the reservation.[19] The tribal power to exclude, which has a historical foundation in

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9. Kevin Abourezk, *'We Are Staying on Top of It': Oglala Sioux Tribe Declares Coronavirus Emergency*, INDIANZ.COM (Mar. 11, 2020), https://www.indianz.com/News/2020/03/11/we-are-staying-on-top-of-it-oglala-sioux.asp.

10. *See* Felicia Fonseca, *Tribes Take Measures to Slow Spread of New Coronavirus*, ABC NEWS (Mar. 21, 2020), https://abcnews.go.com/Health/wireStory/tribes-measures-slow-spread-coronavirus-69727117.

11. Oglala Sioux Tribal Council Ordinance 20–18, FACEBOOK (Mar. 27, 2020, 12:42 AM), https://www.facebook.com/covid19informationOST/photos/pcb.1173486065619861/117348253228688/?type=3&theater.

12. Oglala Sioux Tribe (@OSTOfficial1), *Oglala Sioux Tribal Council Ordinance 20–26*, TWITTER (Apr. 1, 2020, 8:12 PM), https://twitter.com/OSTOfficial1/status/1245549611365871618.

13. Oglala Sioux Tribe (@OSTOfficial1), *Oglala Sioux Tribal Council Ordinance 20–28*, TWITTER (Apr. 2, 2020, 5:25 PM), https://twitter.com/OSTOfficial1/status/1245870091184435207.

14. *See* Mark Walker & Emily Cochrane, *Tribe in South Dakota Seeks Court Ruling Over Standoff on Blocking Virus*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/us/politics/coronavirus-south-dakota-tribe-standoff.html.

15. *See Oglala Sioux Tribal Council Passes Border Patrol Ordinance*, NEWSCENTER1 (Apr. 3, 2020), https://www.newscenter1.tv/oglala-sioux-tribal-council-passes-border-patrol-ordinance/.

16. Although Parker initially did not want to be identified, she later revealed her name to the media. *See* Arielle Zionts, *Couple Reacts to Banishment from Pine Ridge Reservation After COVID-19 Journey*, RAPID CITY J. (Apr. 20, 2020), https://journalstar.com/news/state-and-regional/nebraska/couple-reacts-to-banishment-from-pine-ridge-reservation-after-covid-19-journey/article_194fcc9f-a08f-5a36-8d6d-8e78c6c8181d.html.

17. *See* Clarissa-Jan Lim, *She's the First Coronavirus Case on One Native Reservation. She's Been Banished from Her Home*, BUZZFEED NEWS (Apr. 14, 2020), https://www.buzzfeednews.com/article/clarissajanlim/pine-ridge-reservation-banish-non-native-coronavirus.

18. *Id.*

19. *Id.*

some tribes' practices[20] but which has more recent grounding in courts' often landowner-like conception of tribal sovereignty,[21] has long been somewhat controversial,[22] and some tribe members objected to the decision.[23] President Bear Runner, however, while acknowledging that there were "[two] sides of the story," emphasized the potential danger to tribe members and the need for non-Natives on the reservation to follow the rules; further, he noted, the banishment was subject to appeal.[24] Shortly after this action, the tribal council imposed a strict temporary lockdown.[25]

Unfortunately, COVID-19 eventually established a larger presence on the Pine Ridge Reservation. On May 11, two reservation residents tested positive for COVID-19, prompting the tribe to impose another brief lockdown.[26] Despite the tribe's efforts, cases have continued to grow.[27] Nonetheless, delaying the onset of COVID-19 allowed the tribe time to obtain supplies and develop surge plans,[28] as well as prevent much of the harm that might have resulted from uncontrolled spread. Despite its severe lack of resources (the Pine Ridge Reservation is located in the poorest county in the United States),[29] the tribe for many months had significantly fewer cases per capita than the surrounding state of South Dakota,[30] which as of March 2021 had not imposed a shelter-in-place order or mask mandate despite

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20. *See* Jeremy Wood, *Tribal Exclusion Authority: Its Sovereign Basis with Recommendations for Federal Support*, 6 AM. INDIAN L.J. 198, 203 (2018).

21. *See id.* at 224 (noting that courts previously saw the exclusion power as an incident of tribal sovereignty but more recently have grounded it in landownership).

22. For a discussion of banishment's legal status and the reasons why some tribes have used it, see *infra* note 81.

23. Lim, *supra* note 17.

24. *Id.*

25. *Id.*

26. Kevin Abourezk, *'It's Really Scary for Us': Oglala Sioux Tribe Orders Lockdown After COVID-19 Hits Reservation*, INDIANZ.COM (May 12, 2020), https://www.indianz.com/News/2020/05/12/pine-ridge-reservation-coronavirus-lockdown.asp.

27. *See Covid-19 Information for OST*, FACEBOOK, https://www.facebook.com/covid19informationOST/?hc_ref=ARTYJJEanQJ7oHMA0BSdHNDowcGM1Yewq5x1vrngOM6nHuhKORJEGjelKxr_CWuItgA&fref=nf&__tn__=kCH-R (last visited Apr. 10, 2021) (posting regular updates about the tribe's rising COVID-19 statistics).

28. *See* Arielle Zionts, *Tribal Nations, Citizens Take COVID-19 Prevention Seriously in South Dakota*, RAPID CITY J. (Apr. 22, 2020), https://rapidcityjournal.com/news/local/tribal-nations-citizens-take-covid-19-prevention-seriously-in-south-dakota/article_e8b56d33-9ecc-5bad-b270-69cb8e3e6ecb.html.

29. *See Pine Ridge Indian Reservation*, RE-MEMBER, https://www.re-member.org/pine-ridge-reservation.aspx#:~:text=Oglala%20Lakota%20County%2C%20contained%20entirely,poorest%22%20county%20in%20the%20nation (last visited Feb. 12, 2021).

30. *See* Anpotowin Jensen, *Stanford Medicine Team Aids Lakota Nation in Fighting COVID-19*, SCOPE (Mar. 29, 2021), https://scopeblog.stanford.edu/2021/03/29/stanford-medicine-team-aids-lakota-nation-in-fighting-covid-19/; *see also Covid-19 Information for OST*, *supra* note 27.

having among the highest per capita case rates in the United States.[31] While the South Dakota surge ultimately affected the Oglala Lakota Nation as well,[32] the tribe has since emerged as a leader in vaccination efforts,[33] and cases have dwindled to a handful per week as of March 2021.[34]

The media has often highlighted the devastating toll COVID-19 has taken in many parts of Indian country[35]—and that, to be sure, is part of the story. Many of the challenges tribes face—fragile tribal finances, a high chronic-disease burden, locations far from medical facilities—make COVID-19 particularly dangerous for Native people.[36] But there are other parts of the picture as well: on the one hand, the often resourceful and creative measures tribes have taken to combat COVID-19 and, on the other, the troublesome doctrinal landscape that has complicated their efforts to do so.

While each tribe's COVID-19 response has been different, similarities exist across many tribal approaches. In particular, many tribes recognized early on the distinct threat that COVID-19 posed to them and took aggressive steps to combat the virus. The Cheyenne River Sioux Tribe, located in South Dakota on the Cheyenne River Reservation,[37] implemented checkpoints and took a variety of other actions, from requiring shoppers to be 16 or older (the rationale being that younger children might be unreliable social distancers) to setting up daily check-ins on elderly residents living alone.[38] The Picuris Pueblo in New Mexico worked with state and federal authorities to set up a roadblock and pop-up testing site, requiring that everyone from "visiting construction workers and homebound seniors to the

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31. *See* Stephen Rodrick, *The Covid Queen of South Dakota*, ROLLING STONE (Mar. 16, 2021), https://www.rollingstone.com/politics/politics-features/south-dakota-kristi-noem-covid-1142068/amp/.

32. *See* Erik Ortiz, *As South Dakota Takes Hands-Off Approach to Coronavirus, Native Americans Feel Vulnerable*, NBC NEWS (Nov. 25, 2020), https://www.nbcnews.com/news/us-news/south-dakota-takes-hands-approach-coronavirus-native-americans-feel-vulnerable-n1248868.

33. *See* Jensen, *supra* note 30.

34. *See Covid-19 Information for OST*, *supra* note 27.

35. *See, e.g.*, Gregory D. Smithers, *Covid-19 Has Been Brutal in Indian Country — Just Like Past Epidemics Were*, WASH. POST (May 20, 2020), https://www.washingtonpost.com/outlook/2020/05/20/covid-19-has-been-brutal-indian-country-just-like-past-epidemics-were/.

36. *See* Thomas D. Sequist, *The Disproportionate Impact of Covid-19 on Communities of Color*, NEW ENG. J. MED. (July 6, 2020), https://catalyst.nejm.org/doi/full/10.1056/CAT.20.0370. For a vivid account of desperate conditions in a remote part of the Navajo Nation, see Sunnie R. Clahchischiligi, *Navajo Elders: Alone, Without Food, in Despair*, GUARDIAN (Aug. 6, 2020), https://www.theguardian.com/us-news/2020/aug/06/navajo-nation-reservation-elderly-people-covid-19.

37. *See History*, CHEYENNE RIVER SIOUX TRIBE, https://www.cheyenneriversiouxtribe.org/history (last visited Mar. 14, 2021).

38. *See* Bart Pfankuch, *How a S.D. Native American Tribe Is Protecting Its People from COVID-19*, ARGUS LEADER (May 20, 2020), https://www.argusleader.com/story/news/2020/05/20/how-s-d-native-american-tribe-protecting-its-people-covid-19/5232458002/ (discussing the "extensive and thus far highly successful effort of the Cheyenne River Sioux Tribe to prevent the deadly virus from infecting its roughly 12,000 residents").

clerks at the pueblo's sole general store" test negative before setting foot on tribal land.[39] The Navajo Nation imposed a strict stay-at-home order on March 20, 2020,[40] at a time when only a handful of states had done so.[41] Further, even as many jurisdictions in the United States were slow to recognize the importance of masks,[42] Navajo Nation President Jonathan Nez was wearing a mask in public by mid-March,[43] and the Navajo Nation went on to mandate face coverings in public places throughout the Nation on April 17.[44] Elsewhere within the United States, tribes confronted COVID-19 with similarly swift action.[45]

But despite these efforts, the tribal response to COVID-19 has been complicated by an unusual circumstance of tribal sovereignty. Since the U.S. Supreme Court's 1981 decision in *Montana v. United States*,[46] tribes have virtually no regulatory jurisdiction over nonmembers when they are acting on privately owned land within tribal borders.[47] In other words, tribal power even in Indian

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39. Morgan Lee, *Small Tribes Seal Borders, Push Testing to Keep Out Virus*, PBS (May 9, 2020), https://www.pbs.org/newshour/health/small-tribes-seal-borders-push-testing-to-keep-out-virus.

40. *See* NAVAJO DEP'T HEALTH, NAVAJO NATION PUBLIC HEALTH EMERGENCY ORDER NO. 2020-003 (Mar. 20, 2020), https://www.navajo-nsn.gov/News%20Releases/NNDOH/2020/March/NDOH%20Public%20Health%20Emergency%20Order%202020-003%20Dikos%20Ntsaaigii-19.pdf. While the pandemic has had severe effects on the Navajo Nation and its members, the tribe's actions are credited with flattening the curve and reducing new case numbers. Rima Krisst, *Johns Hopkins: 'This Virus Is Not Going Away,'* NAVAJO TIMES (July 16, 2020), https://navajotimes.com/ae/health/johns-hopkins-this-virus-is-not-going-away.

41. *See* Alicia Lee, *These States Have Implemented Stay-at-Home Orders. Here's What That Means for You*, CNN (Apr. 7, 2020), https://www.cnn.com/2020/03/23/us/coronavirus-which-states-stay-at-home-order-trnd/index.html.

42. *See* Megan Molteni & Adam Rogers, *How Masks Went from Don't-Wear to Must-Have*, WIRED (July 2, 2020), https://www.wired.com/story/how-masks-went-from-dont-wear-to-must-have/.

43. *See* Felicia Fonseca, *Tribes Take Measures to Slow Spread of New Coronavirus*, ABC NEWS (Mar. 21, 2020), https://abcnews.go.com/Health/wireStory/tribes-measures-slow-spread-coronavirus-69727117.

44. *See* NAVAJO DEP'T HEALTH, NAVAJO NATION PUBLIC HEALTH EMERGENCY ORDER NO. 2020-007 (Apr. 17, 2020), https://www.ndoh.navajo-nsn.gov/Portals/0/COVID-19/News/NDOH%20Public%20Health%20Emergency%20Order%202020-007%20Dikos%20Ntsaaigii-19.pdf?ver=Dr8o5Cs86WTg9c9Qw0DojA%3D%3D.

45. *See, e.g.*, Shirin Ali, *Wisconsin's Native American Tribes See Results from Aggressive Action Against COVID-19*, WIS. WATCH (July 20, 2020), https://www.wisconsinwatch.org/2020/07/wisconsin-covid-19-update-7-20-20/ (discussing Wisconsin tribes' swift action against the virus); Felicia Fonseca, *Hard-Hit Tribe Takes Strict Steps as Virus Surges in Arizona*, FOX 10 (June 27, 2020), https://www.fox10phoenix.com/news/hard-hit-tribe-takes-strict-steps-as-virus-surges-in-arizona-1 (discussing White Mountain Apache Tribe's effort to combat the coronavirus by "taking cues from severe measures imposed by other tribes nationwide").

46. 450 U.S. 544 (1981).

47. *See id.* at 565 (suggesting that, in general, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

country[48] extends unambiguously only to people who are formally enrolled members of the tribe[49]—a group that is highly unlikely to include everyone living on the reservation and, for some tribes, may be only a minority of residents.[50]

To be sure, *Montana* allows two exceptions to this rule,[51] one of which allows the tribe to regulate conduct by nonmembers that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[52] This exception sounds potentially broad, but courts have interpreted it extraordinarily narrowly, sometimes suggesting that the regulation in question must be "necessary to avert catastrophic consequences."[53] Also problematically, courts applying the exception "disregard the aggregate effects of the conduct tribes attempt to regulate, asking only whether any particular instance, taken in isolation, actually poses [a] . . . threat to the very existence of the tribal community."[54] Thus, for example, tribal courts may lack jurisdiction to hear a tort claim involving a traffic accident because, even though widespread negligent driving could gravely imperil the population's well-being, a single incident (even if a sign of a broader problem) does not.[55]

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48. *See id.* at 561–62 (differentiating between lands owned by Indians (or held in trust for them) and other land located in Indian country).

49. *See id.* at 563–64 (discussing the "divestiture" of tribal power over nonmembers).

50. *See* Terrill Pollman, *Double Jeopardy and Nonmember Indians in Indian Country*, 82 NEB. L. REV. 889, 898 (2004) (noting that while, for most tribes, Indians (both members and nonmembers) are a majority, "[o]n some reservations . . . non-Indians far outnumber members and nonmember Indians").

51. The first exception allows the tribe to regulate "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. The Court has interpreted this exception as requiring an explicit contractual relationship that directly pertains to the matter in question—not, for example, the kind of quasi-consent through voluntary affiliation that suffices for personal jurisdiction outside the tribal context. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997) (suggesting that this exception is limited to those who are actually a party to a formal agreement).

52. *Montana*, 450 U.S. at 566.

53. *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 341 (2008) (internal citation omitted).

54. Philip H. Tinker, *In Search of a Civil Solution: Tribal Authority to Regulate Nonmember Conduct in Indian Country*, 50 TULSA L. REV. 193, 219 (2014).

55. *See Strate*, 520 U.S. at 457–58 ("[T]hose who drive carelessly on a public highway . . . endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule."). Lower courts have followed this principle as well. *See, e.g.*, Atkinson Trading Co. v. Manygoats, No. CIV 02-1556-PCT-SMM, 2004 WL 5215491, at *11 (D. Ariz. Mar. 17, 2004). There, the Navajo Nation Labor Commission lacked jurisdiction under *Montana* over claim by employee that nontribal employer had terminated her in violation of the Navajo Preference in Employment Act ("NPEA"). *Id.* at *12. The court held that the health-and-welfare exception did not apply because "while employment matters concerning tribal members are certainly related to the economic security and welfare of the tribe, they do not have a substantial impact on the tribe as a whole." *Id.* at *11.

Of course, measures to control a deadly pandemic to which a tribe's population is especially vulnerable would certainly seem to meet anyone's definition of the sort of needed-to-avert-catastrophe regulation that *Montana* permits.[56] Indeed, the threat of epidemic illness is all too real to many tribes because of their historical experience with disease[57] and, in some cases, the small numbers and advanced age of their members. The Picuris Pueblo's lieutenant governor, for example, noted disturbing parallels between COVID-19 and the devastating diseases brought to Native people by European colonists, explaining that "[i]f the virus does reach us, that could be the end of Picuris."[58] Other pueblos—some of whose members number only in the hundreds—similarly regard COVID-19 as an "existential threat" to their communities.[59] COVID-19 thus seems like the sort of emergency for which the health-and-welfare exception was tailor-made. Further, even beyond the health-and-welfare exception, tribes have another power to rely on—that is, the power to exclude members and nonmembers alike from tribal lands, which underpins the legality of banishment and likely permits lesser, included actions such as subjecting incoming visitors to border checkpoints.[60]

Yet while a robust argument exists that tribes are acting fully within their powers when they act forcefully to combat COVID-19, it remains no more than that—a never-tested argument in an area of law where massive uncertainties exist about the particulars.[61] No specific case law describes what actions tribes may and

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56. For example, Professor Ann Tweedy argues that the second exception is applicable because "COVID-19 plainly presents a health issue, and infected nonmembers could unquestionably directly affect the health of the Tribes and their members." Ann E. Tweedy, *The Validity of Tribal Checkpoints in South Dakota to Curb the Spread of COVID-19*, 2021 U. CHI. LEGAL F. (forthcoming 2021) (manuscript at 15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622836.

57. As Matthew L.M. Fletcher notes, "[i]t should be no surprise that many Indian tribes have been aggressively issuing drastic quarantine orders" in response to COVID-19 given the losses tribes suffered and the inadequate federal response they experienced during the 1918–1919 influenza pandemic. Matthew L.M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STAN. L. REV. ONLINE 38, 42–44 (2020) [hereinafter Fletcher, *Indian Lives*].

58. *See* Lee, *supra* note 39.

59. *Id.* Of note, the official Oglala Lakota Nation's Twitter account also drew a connection between the COVID-19 threat and colonists' deliberate spread of infectious disease to the Native population, tweeting a cartoon depicting South Dakota Governor Kristi Noem urging a tribe member to reopen by offering a "gift" of coronavirus-infected blankets. *See* Oglala Sioux Tribe (@OSTOfficial1), TWITTER (May 12, 2020, 9:49 PM), https://twitter.com/OSTOfficial1/status/1260432060910571525.

60. *See* Tweedy, *supra* note 56, at 20.

61. *See* Fletcher, *Indian Lives*, *supra* note 57, at 39 ("[The existence of] tribal regulatory powers over nonmembers in Indian country during a pandemic . . . should be an easy argument, but federal Indian law makes it more complicated than it should be."); Paul Spruhan, *COVID-19 and Indian Country: A Legal Dispatch from the Navajo Nation*, NW. U. L. REV. (May 5, 2020), https://northwesternlawreview.org/uncategorized/covid-19-and-indian-country-a-legal-dispatch-from-the-navajo-nation/ (discussing how the uncertainties of federal Indian law have made tribal pandemic response more difficult); *see also* Aila Hoss, *A Framework for Tribal Public Health Law*, 20 NEV. L.J. 113, 117 (2019) (noting the lack of attention to tribes in public health analysis and literature).

may not take during a pandemic,[62] and courts have reached conflicting results on how tribes may use their exclusion power more generally.[63] There is no tribal equivalent of the Tenth Amendment reserving powers to tribes,[64] nor is there any tribal equivalent of *Jacobson v. Massachusetts*,[65] the foundational Supreme Court case that recognizes states' power to take aggressive action, including mandatory vaccination and quarantine, to combat a public health emergency.[66] Surely *Montana* permits tribes to do *something* to stop nonmembers from bringing infection to the reservation, but how far can tribes go? How long may the measures remain in place? How sharply can the tribal response diverge from the policies of surrounding states?[67]

These issues are not merely theoretical. State and local authorities have challenged the legality of tribal orders,[68] and nonmembers have shown a propensity in many areas to flout COVID-19-related directives—whether by stealing tribal supplies,[69] failing to inform tourists passing through tribal areas of tribal public health restrictions,[70] opening a restaurant for dine-in service prohibited by tribal

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62. *See* Justin B. Barnard, *Responding to Public Health Emergencies on Tribal Lands*, 15 YALE J. HEALTH POL'Y L. & ETHICS 251, 260 (2015) (noting that "[n]o published federal court decisions address state and tribal authorities responding to a natural disaster or public health emergency" crossing tribal borders).

63. *See id.* at 272–73.

64. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

65. 197 U.S. 11 (1905).

66. *See* Barnard, *supra* note 62, at 256–57 (discussing states' extensive powers during public health emergencies).

67. *See* Stephen Groves, *South Dakota Lawmakers Criticize Gov. Noem on Tribal Checkpoints*, RAPID CITY J. (July 21, 2020), https://rapidcityjournal.com/news/local/south-dakota-lawmakers-criticize-gov-noem-on-tribal-checkpoints/article_80c37453-8185-5503-a5f6-676b781f69de.html (discussing conflict between South Dakota Governer Kristi Noem's policies and those of tribes within South Dakota's borders).

68. *See* Lindsey Schneider, Joshua Sbicca & Stephanie Malin, *Native American Tribes' Pandemic Response Is Hamstrung by Many Inequities*, CONVERSATION (June 1, 2020), https://theconversation.com/native-american-tribes-pandemic-response-is-hamstrung-by-many-inequities-136225 (discussing various ways in which nontribal authorities have hindered tribes' COVID-19 response).

69. *See* Sahir Doshi et al., *The COVID-19 Response in Indian Country: A Federal Failure*, CTR. FOR AM. PROGRESS (June 18, 2020), https://www.americanprogress.org/issues/green/reports/2020/06/18/486480/covid-19-response-indian-country/.

70. *See* Emily Atkin, *A Deadly Re-Opening*, HEATED (May 18, 2020), https://heated.world/p/a-deadly-re-opening?token=eyJ1c2VyX2lkIjo5MzMzNzE1LCJwb3N0X2lkIjo0NjYyNTUsIl8iOiJOYStSeCIsImlhdCI6MTU5MTIwMzg1NSwiZXhwIjoxNTkxMjA3NDU1LCJpc3MiOiJwdWItMjQ3MyIsInN1YiI6InBvc3QtcmVhY3Rpb24ifQ.gem_0gaNwAi5w6AwptiBxwq2Kq7VOrAru7Ej4yoySqo (discussing the Navajo Nation's alarm at the National Park Service's decision to reopen Grand Canyon National Park while the Navajo Nation was on lockdown).

rules,[71] camping in areas closed to visitors,[72] or arguing that tribal curfews do not apply to them.[73] In combatting a virus that moves swiftly and often stealthily,[74] particularly where testing capacity is inadequate,[75] tribes need certainty, the ability to respond with speed, and the power to enforce their orders against the recalcitrant. The *Montana* framework makes that difficult and, in some cases, potentially impossible.

If tribal powers even in the face of a once-in-a-century pandemic are not firmly established, tribal authority to deal with more commonplace problems and everyday emergencies is far less so. As the Supreme Court itself has recognized, much conduct causing significant harm to tribe members is simply not covered by the *Montana* health-and-welfare exception.[76] (*Montana*'s second exception for "consensual activity" is also unhelpful in most situations; some courts have suggested it means little beyond allowing tribes to enforce agreements they make in their own courts.[77]) Tribes are often helpless against nonmember reckless drivers, meth cookers, and check kiters.[78] Technically, they cannot even direct nonmembers

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71. *See* Doshi et al., *supra* note 69; *see also* Kym Kemp, *Yurok Tribe Castigates Del Norte County Supervisor for Supporting Restaurant Reopening Dine-in Services in Klamath*, REDHEADED BLACKBELT (May 4, 2020), http://kymkemp.com/2020/05/04/yurok-tribe-castigates-del-norte-county-supervisor-for-supporting-restaurant-reopening-dine-in-services-in-klamath/.

72. *See* Doshi et al., *supra* note 69; *see also* Jeniffer Solis, *Tribes Face Theft, Vandalism, and a Rising Number of COVID-19 Cases*, NEV. CURRENT (May 7, 2020) https://www.nevadacurrent.com/2020/05/07/tribes-face-theft-vandalism-and-a-rising-number-of-covid-19-cases/ (describing trespassing, theft, and other issues faced by the Walker River Paiute and Yerington Paiute tribes); Benjamin Spillman & Jenny Kane, *Native Communities in Nevada Turn to Tradition and Each Other During Pandemic Crisis*, RENO GAZETTE J. (Apr. 23, 2020), https://www.rgj.com/story/news/2020/04/23/coronavirus-impact-nevada-tribes-indigenous-people/5160591002/ (describing nonmembers who have "pushed through barriers to park and camp" on tribal land).

73. Matthew L.M. Fletcher describes how sheriffs' offices in two New Mexico counties took the position the Navajo Nation lacked authority to enforce its Easter weekend curfew as to nonmembers. *See* Fletcher, *Indian Lives*, *supra* note 57, at 38–39.

74. *See* Nathan W. Furukawa, John T. Brooks & Jeremy Sobel, *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, EMERGING INFECTIOUS DISEASES (July 2020), https://doi.org/10.3201/eid2607.201595 (discussing COVID-19 transmission by people not showing symptoms).

75. Several months into the pandemic, access to testing remains limited and wait times for results remain long in many areas within the United States. *See* Katherine J. Wu, *'It's Like Groundhog Day': Coronavirus Testing Labs Again Lack Key Supplies*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/07/23/health/coronavirus-testing-supply-shortage.html.

76. *See* Strate v. A-1 Contractors, 520 U.S. 438, 457–58 (1997) (acknowledging that dangerous driving could harm tribe members but declining to find that *Montana*'s second exception was met).

77. *See, e.g.*, *id.* at 457 (taking limited view of consensual relationship exception).

78. *See* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1002 (2010) [hereinafter Fletcher, *Resisting*] (discussing "destructive and exploitative" behavior by nonmembers in Indian country); *see also* Matthew

acting on private property to control their vicious dog or dispose of their garbage properly.[79] The blunderbuss tool of banishment—which often engenders bad feeling and which tribes are generally reluctant to undertake[80]—remains tribes' sole option for dealing with persistent troublemakers who do not have formal membership in the tribe.[81] Indeed, because states and counties generally also lack power over nonmembers on reservations[82]—appropriately so, because states and tribes are separate sovereigns independent of each other[83]—there may be no power apart from the federal government that can restrain nonmembers from doing virtually anything they wish within tribal borders.[84] Matthew L.M. Fletcher has observed that conduct by nonmembers in Indian country is "some of the least governed activity in the

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L.M. Fletcher, *Tribal Civil, Criminal, and Regulatory Jurisdiction over Nonmembers*, *in* 2017 ROCKY MOUNTAIN MINERAL LAW FOUND., INDIAN LAW AND NATURAL RESOURCES: THE BASICS AND BEYOND 2-1, 2-23 (2017) [hereinafter Fletcher, *Nonmembers*] (collecting cases in which courts have found civil jurisdiction to be lacking over cases involving nonmembers).

79. *See* Fletcher, *Nonmembers*, *supra* note 78, at 2-1, 2-23. S*ee generally* Ruth L. Kovnat, *Solid Waste Regulation in Indian Country*, 21 N.M. L. REV. 121 (1991). The story of a tribe's struggles with a nonmember who refused to control his dog was told to the Author by a lawyer representing the tribe in question.

80. *See* Wood, *supra* note 20, at 199 ("[E]xclusion is a stark remedy, and its effect on those excluded is severe.").

81. For the past couple of decades, as the Supreme Court has significantly narrowed tribes' criminal and civil powers, tribes have turned to banishment as a last resort for dealing with on-reservation troublemakers. *See* Renee Ruble, *Banishment Laws Revived Among Indians*, WASH. POST (Jan. 25, 2004), https://www.washingtonpost.com/archive/politics/2004/01/25/banishment-laws-revived-among-indians/68626da3-64a2-434d-9c1d-de8822648a94/ (noting that banishment is a response to the limited penalties tribes can impose even on members and that, where non-Indians are concerned, it is tribes' "only weapon against outsiders who make trouble on the reservation"); *see also* Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 88 (2007) ("Hindered by their limited civil and criminal jurisdiction, frustrated with their inability to impose meaningful sanctions, and fearful of further disruption, harm, and violence to their communities, tribal governments recognize that the old customs of banishment and exclusion are powerful and effective means of reestablishing order and safety in their communities.").

82. Justin B. Barnard describes the "jurisdictional limbo" of nonmembers on reservations during a public-health emergency. *See* Barnard, *supra* note 62, at 266–67. As he notes, under *Montana*, "a federal court would likely not countenance a tribe's application of coercive or rights-limiting emergency measures to non-members and their property" yet at the same time "the mere fact that tribes may not have jurisdiction over non-members living in Indian country does not automatically establish the application of state law." *Id.*

83. The most famous expression of this principle (although it has waned somewhat in strength over the years) is from *Worcester v. Georgia*, 31 U.S. 515, 520 (1832), which refers to the Cherokee Nation as a "distinct community, occupying its own territory . . . in which the laws of [states] can have no force."

84. *See* Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/. While Crane-Murdoch discusses *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and criminal jurisdiction, tribes' lack of civil jurisdiction also helps to make reservations a haven for many non-Indian lawbreakers.

United States."[85] And although restrictions on tribal criminal jurisdiction over nonmembers is also a significant contributor to this problem,[86] *Montana*'s limits on regulatory power mean that—issues of enforcement aside—tribes technically cannot even purport to make law applicable to nonmembers in most circumstances.

These problems are not new. For years, tribal advocates have, before the Supreme Court and many lower federal courts, argued for change that has failed to materialize.[87] Decades of the Supreme Court rolling back tribal sovereignty have fostered among tribes and tribal lawyers a deep—and historically warranted—pessimism.[88] This Article argues, however, that while the legal landscape for tribes remains uncertain in many ways, the issue of tribal regulatory authority presents a particularly strong case for a new approach at a time when change is possible.

Why might this be a particularly opportune time for progress on tribal regulation? To begin with, the pandemic—and its well-publicized disproportionate impact on tribes[89]—provides a vivid example of why it is important for tribes to be able to engage in rapid on-the-ground regulation of members and nonmembers alike.[90] But the lessons of the tribal COVID-19 experience are not limited to the current crisis. While pandemics are unusual, other public health issues, both acute and slow-burning—not to mention other sorts of emergencies—are not.[91] The tribal experience of COVID-19 clearly illuminates the inadequacy of tribes' *Montana*-constrained powers in ways that might focus attention on the problems with the status quo.

Further, the pandemic has happened at a time when the chance for progress at the Supreme Court is perhaps greater than it has been for decades. Justice Kagan and Justice Sotomayor have cast more pro-tribal votes than their predecessors and appear to have, in contrast with many previous justices, familiarity with and sympathy for the issues facing tribes.[92] The nomination of Justice Gorsuch to Justice Scalia's seat has been an even more important development. Indeed, it is hard to

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85. Fletcher, *Resisting*, *supra* note 78, at 1002.

86. *See id.* at 986–89 (discussing combined impacts of *Oliphant*, which restricts tribal criminal jurisdiction, and *Montana*, which limits tribes' civil authority).

87. *See* Bethany R. Berger, *Hope for Indian Tribes at the U.S. Supreme Court?*, 2017 U. ILL. L. REV. 1901, 1905–06 (2017) (detailing the discouraging legal landscape tribes have faced and noting that "tribal interests lost more than three-quarters of the cases decided by the United States Supreme Court" in recent years).

88. *See id.* at 1903 (describing the "sense of doom" felt by tribal advocates while awaiting a Supreme Court decision).

89. *See* Ortiz, *supra* note 32.

90. *See* Fletcher, *Indian Lives*, *supra* note 57, at 46–47 (noting that "even a single nonmember who is a COVID-19 carrier violating a tribal quarantine order is a terrible danger to a tribal community").

91. *See generally* Gregory Sunshine & Aila Hoss, *Emergency Declarations and Tribes: Mechanisms Under Tribal and Federal Law*, 24 MICH. ST. INT'L L. REV. 33 (2015) (discussing situations such as natural disasters, terrorism, or infectious disease outbreaks in which tribes might wish to declare a state of emergency).

92. *See* Berger, *supra* note 87, at 1915–16 (noting that "Justice Sotomayor's knowledge of Puerto Rico's struggles with dependent sovereignty likely contributes to her sympathy for tribal claims" and that Justice Kagan as dean of Harvard Law School brought prominent Indian law scholars to campus to occupy a revolving chair).

think of a more consequential change in Supreme Court membership for tribal issues that often blur ideological lines.[93] The significance of the change does not only lie in the fact that Justice Scalia was generally hostile to tribal interests while Justice Gorsuch is friendly to them—though that fact alone has tipped potential 4–5 losses for tribes into 5–4 wins.[94] It is also that Justice Gorsuch possesses a strong understanding of the issues and doctrines surrounding tribal sovereignty that many previous justices have not. Although the Court's recent *McGirt v. Oklahoma*[95] decision, authored by Justice Gorsuch, did not deal directly with tribal regulatory power, it evinces a fundamental recognition of tribes' sovereign character that has implications for the regulatory arena as well.[96] While tribal advocates have made compelling arguments to the Supreme Court about tribal sovereignty for decades, the Court—or at least a majority of justices—may now be listening.

Judicial options for strengthening and clarifying the nature of tribal regulatory powers are many. A welcome route, to be sure, would be for the Court to entirely sweep away the *Oliphant/Montana* framework that has reigned—with little authority to back it and much destructive effect—for almost a half-century. But the Court could also take the more modest, incremental step of understanding *Montana*'s health-and-welfare exception more expansively than it has where regulation is concerned, taking advantage of a door the Court has already left open.[97]

This Article proceeds in four parts. First, it discusses the existing case law that has severely constrained tribes' ability to regulate uniformly throughout territory over which they are nominally sovereign. Second, the Article looks at the difficulties the *Montana* framework—in COVID-19 times and otherwise—poses to effective tribal regulation and day-to-day governance. Third, the Article discusses the Supreme Court's relative neglect of tribal regulation (as opposed to tribal courts and taxation) since *Montana*, which suggests a need to revisit the issue in light of changed conditions. Finally, the Article evaluates prospects for reform in the Supreme Court.

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93. *See* Dahlia Lithwick, *What's Behind Neil Gorsuch's Stunning Win for Indigenous People*, SLATE (July 14, 2020), https://slate.com/news-and-politics/2020/07/mcgirt-v-oklahoma-neil-gorsuch-tribal-rights.html (quoting Slate jurisprudence writer Mark Joseph Stern as saying that, following Justice Gorsuch's appointment, "I don't know that we've had a five-justice majority as sympathetic to tribal rights as we have today ever in the history of the Supreme Court").

94. The three important federal Indian law cases in which Justice Gorsuch participated—*Washington State Department of Licensing v. Cougar Den*, 139 S. Ct. 1000 (2019), *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), and *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)—were all decided by 5–4 majorities.

95. 140 S. Ct. 2452 (2020).

96. *See infra* notes 274–77 and accompanying text.

97. *See infra* note 224 and accompanying text.

I. THE COMPLEX LANDSCAPE OF TRIBAL REGULATORY POWER

In the 1970s, the Supreme Court began deciding a series of cases that narrowed tribal sovereignty relative to the way it had been previously understood.[98] In *Oliphant v. Suquamish Indian Tribe*,[99] the Court held that tribes lack criminal jurisdiction over non-Indians—although Congress subsequently rolled back small parts of this decision by restoring tribes' criminal jurisdiction over nonmember Indians[100] and non-Indian domestic- and dating-violence offenders in limited circumstances.[101] A few years later, *Montana* restricted tribes' civil jurisdiction to regulate nonmembers,[102] while subsequently *Strate v. A-1 Contractors*[103] and *Atkinson Trading Co. v. Shirley*[104] applied *Montana*'s principles to, respectively, tribal adjudicative jurisdiction and tribal taxation.

Tribes and scholars alike have been highly critical of these cases as inconsistent with foundational principles of tribal sovereignty, unsupported by prior authority, and devastating to autonomous tribal governance.[105] Many uncertainties continue to attend their application, perhaps the most important being the degree to which tribes have greater latitude to regulate (or assume jurisdiction over cases arising on) tribal trust land as opposed to land privately owned by nonmembers.[106]

Montana—the source of broad-ranging limits on tribes' power to regulate, adjudicate, and tax—is likely among the most sweepingly influential of any Indian-

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98. *See* Barnard, *supra* note 62, at 262 (noting that the Court's current approach is "starkly different" from the historical view of tribal sovereignty first articulated by Chief Justice Marshall in *Worcester v. Georgia*); Thomas Paul Schlosser, *Tribal Civil Jurisdiction over Nonmembers*, 37 TULSA L. REV. 573, 573–74 (2001) (detailing the Court's "erratic and standardless" movement away from traditional notions of tribal authority in this area).

99. 435 U.S. 191 (1978).

100. *See* United States v. Lara, 541 U.S. 193 (2004).

101. *Oliphant* held that tribes could not exercise criminal jurisdiction over all non-Indians. The Court extended *Oliphant*'s holding to nonmember Indians in *Duro v. Reina*, 495 U.S. 676 (1990), a decision later reversed by Congress through the so-called *Duro* fix. *See Lara*, 541 U.S. at 216. When Congress renewed the Violence Against Women Act, it allowed some tribes to exercise criminal jurisdiction over domestic- and dating-violence offenders under certain conditions. *See* 25 U.S.C. § 1304.

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

103. *See* 520 U.S. 438 (1997).

104. *See* 532 U.S. 645 (2001).

105. *See* Michael Doran, *Redefining Tribal Sovereignty for the Era of Fundamental Rights*, 95 IND. L.J. 87, 126–138 (2020) (comprehensively summarizing, though somewhat departing from, scholarly criticism of the Court's recent case law). For one of the earliest and most comprehensive critiques, see Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999) [hereinafter Frickey, *Colonialism*].

106. *Compare* Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813 (9th Cir. 2011) (holding that *Montana* does not apply to tribal land), *with* Dolgen Corp. v. Miss. Band of Choctaw Indians, No. 4:08CV22TSL-JCS, 2008 WL 5381906, at *2 n.1 (S.D. Miss. Dec. 19, 2008) (suggesting that "*Montana* applies to Indian and non-Indian land alike").

law case the Court has ever decided.[107] Yet both the tribal regulation at stake in *Montana* and the circumstances behind the regulation's enactment were somewhat unusual. At the root of the dispute was the Crow Tribe's effort to restrict on-reservation hunting and fishing by non-Indians—a pastime that had caused the tribe numerous problems, from depleted animal populations,[108] to increased costs for game wardens,[109] to racist threats against tribal authorities.[110] But as the issue wended its way through the courts,[111] the primary focus of the litigation was initially not tribal regulation per se but the narrower question of whether an 1868 treaty secured the tribe ownership of the Big Horn riverbed where the nonmember fishing was taking place.[112] In rendering a decision, the Supreme Court ultimately answered this question in the negative.[113]

Only after disposing of the treaty issue did the Court consider the aspect of *Montana* that has had far-reaching influence today: the question whether tribes, by virtue of their retained sovereignty, have authority over nonmembers within their borders. On this issue, the Court was influenced by *Oliphant*, decided just three years earlier—even though *Oliphant* dealt only with the criminal context and rested on a notably thin skein of authority: an 1830 treaty with one specific tribe (the Choctaw Tribe, whose powers were not at issue in the case),[114] an 1878 federal district-court case from Arkansas,[115] and an "unspoken assumption" presumed to guide congressional action in the nineteenth century.[116] Nonetheless, the Court extended *Oliphant*'s reasoning further in *Montana* to "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," at least when they were acting on nontribal land.[117]

This sweeping holding was tempered only by two exceptions the Court recognized—one for "the activities of nonmembers who enter consensual relationships with the tribe or its members" and another allowing regulation of

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107. *Montana* has been applied to all tribes—regardless of their treaty history—and has been broadened to govern essentially all aspects of tribes' civil authority, including tribal court jurisdiction and taxation. *See supra* notes 102–04 and accompanying text.

108. John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of* Montana v. United States, *in* INDIAN LAW STORIES 540–41 (Goldberg et al. eds., 2011).

109. *Id.* at 540.

110. *See id.* at 542–43.

111. John P. LaVelle discusses the complex procedural history of *Montana* and a related case, *Finch v. United States*, 433 U.S. 676 (1977), at length. LaVelle, *supra* note 108, at 545–56.

112. *See* LaVelle, *supra* note 108, at 538, 558–59. Even in discussing the tribe's regulatory powers, the focus was on treaty rights rather than inherent tribal authority. *See id.* at 563.

113. *See* Montana v. United States, 450 U.S. 544, 552–53 (1981).

114. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197 (1978), *superseded by statute*, 25 U.S.C. § 1301(2), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

115. *Id.* at 199–200.

116. *Id.* at 203.

117. *See Montana*, 450 U.S. at 565.

"[nonmember] conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[118] The broad language of these exceptions—and the seeming resemblance of the second to the general state police power[119]—is deceptive. Even as the Court has extended *Montana* to new contexts, it has consistently interpreted its exceptions narrowly. In determining whether a "consensual relationship" exists, the Court does not permit consideration of the defendant's overall connection to the tribe, construing the exception to mean only that someone party to a formal agreement with a tribe can be sued for issues arising directly from that agreement.[120] Likewise, the Court has largely dismissed the idea that *Montana*'s health-and-welfare exception permits regulation of any conduct that is not a widespread, imminent threat to the tribe's very existence.[121] It has found the exception to be satisfied in only a single case that produced a highly fractured opinion.[122]

Like *Oliphant*, *Montana* was an instance of the Court creating federal common law, seemingly on its own initiative.[123] No constitutional provision, congressional enactment, or prior case law dictated its result. Commentators have attempted to provide explanations for the Court's sudden intrusion into the question of tribal sovereignty, an area it had often sidelined.[124] Given that it considered the propriety of tribal criminal jurisdiction on a reservation where tribe members were vastly outnumbered by nonmembers,[125] *Oliphant* has been seen as a case with "bad facts"[126] that propelled the Court to a sweeping result it might otherwise not have

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118. *Id.* at 565–66.

119. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 74 (1917) (describing the "authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare" as "very broad" and well established).

120. *See* Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997).

121. *See id.* at 457–58.

122. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (plurality opinion). The Court found that the health-and-welfare exception permitted the tribe to zone nonmember fee land within a forested, predominantly tribe-owned "closed area" but not to zone an "open area" where most land was privately owned by nonmembers. *See id.* at 433 (Stevens, J., announcing the judgment of the Court in part and concurring in part).

123. *Cf.* Frickey, *Colonialism*, *supra* note 105, at 58, 65 (describing the Court as having adopted a common-law approach to federal Indian law in *Oliphant* and subsequent cases).

124. For example, *Williams v. Lee*, 358 U.S. 217 (1959), which turned out to be a foundational case affirming the exclusive jurisdiction of tribal courts over Indian defendants, was something of an afterthought while the Court was deciding landmark civil-rights cases. *See* Bethany R. Berger, Williams v. Lee *and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1514 (2011).

125. *See* Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of* Lone Wolf, 38 TULSA L. REV. 5, 21 (2002) (noting that *Oliphant* was "a miserable test case for asserting tribal criminal jurisdiction over non-Indians, because only about fifty tribal members and almost 3,000 non-Indians lived on the reservation").

126. *Cf. id.*; *see also* Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175, 189 n.75 (2008) (describing *Oliphant* as the "quintessential 'bad' facts case").

reached. Bad facts, at least in the Court's mind, may also have been at play in *Montana*, where the Court appeared to see the tribe's efforts to limit the hunting and fishing rights of non-Indians in almost equal-protection-like terms.[127] The Equal Protection Clause, of course, does not apply to tribes, along with most of the rest of the Constitution, and the Indian Civil Rights Act—which applies many constitutional protections to tribes by statute—does not supply a cause of action in federal court.[128] Nonetheless, the Court has shown a persistent nervousness about enabling tribes to act in ways it sees as inconsistent with U.S. constitutional values.[129] In *Montana*, the Court appeared to see the tribe's action as an expression of animus toward non-Indians[130] rather than a justified effort to protect its fish and game resources in the face of a growing problem, despite evidence in the record to that effect.[131]

The Court's view of tribal power in *Montana* as a tool that posed a serious threat of bias to nonmembers was based on faulty assumptions and information even at the time. But decades later, what is perhaps most striking about *Montana* is the increasing detachment of its concerns from the real problems facing tribes and Indian country today. Overwhelmingly, as the tribal response to COVID-19 illustrates, the problems tribes face stem not from a need to legislate for nonmembers specifically but from the difficulty tribes have in convincing nonmembers to follow otherwise universally applicable rules. The *Montana* standard may have been intended to create a sort of judicially fashioned equal-protection rule for tribes, but ironically it has had a nearly opposite effect, enabling nonmembers to escape the application of laws designed for everyone's benefit.

II. HOW *MONTANA* HINDERS EFFECTIVE TRIBAL REGULATION

The Court has since extended *Montana* beyond the regulatory context to reach all aspects of tribal civil jurisdiction over nonmembers, including the authority of tribal courts[132] and the power to tax.[133] All of these *Montana*-driven limits on tribal sovereignty have posed significant challenges to effective tribal governance,

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127. In a later case, for example, Justice Stevens in the controlling concurrence characterized *Montana* as involving a "discriminatory" regulation that "prohibited non-Indians from hunting or fishing on their own property while members of the Tribe were free to engage in those activities" and suggested that this was important to the result. *See Brendale*, 492 U.S. at 443 (Stevens, J., announcing the judgment of the Court in part and concurring in part).

128. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58–59 (1978).

129. *See* Frickey, *Colonialism*, *supra* note 105, at 65–66 (noting that "the Court has found it increasingly incongruous that tribes . . . may use the coercive power of government against nonmembers without being subject to all of the basic constitutional limitations and remedies"); *see also* Doran, *supra* note 105, at 95–96 (suggesting that the Court's recent case law is a response to a "trilemma" (in which only two options are compatible with each other) of preserving tribal sovereignty, keeping tribes outside the federalist structure, and the "assurance to all persons that, under the Constitution, the exercise of governmental power cannot violate certain basic rights").

130. *See supra* note 127 and accompanying text.

131. *See* LaVelle, *supra* note 108, at 539–41.

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

133. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

such that it is hard to say which of these restrictions is the most troublesome.[134] But the uncertainty attending tribal regulation unquestionably creates a great deal of day-to-day difficulty for tribes. *Montana*'s restriction of most tribal regulatory power to tribe members and tribal land guarantees that tribal authority over even mundane and uncontroversial issues will have large gaps and question marks.[135]

Consider first the question of membership. Today, many reservations have large proportions of nonmembers living on them.[136] Further, the definition of "nonmember" varies widely, encompassing, at one extreme, people who clearly belong to the tribal community but, for one reason or another, cannot or do not wish to formally enroll[137] to, at the other extreme, non-Indians who may feel little connection to the tribe or—in a worst-case scenario—have found Indian country a haven for criminal activity precisely because of the complicated jurisdictional rules that apply.[138] Tribes have interests in regulating nonmembers across this entire spectrum, but *Montana* makes it difficult for them to do so.

Just as most reservations contain a varied assortment of people with different degrees of tribal affiliation, the same is true for land. Most reservations contain a mix of land held by the federal government for the tribe in trust and privately owned land, much of the latter the product of the disastrous "allotment" policy started in the 1880s[139] that was intended to break up reservations and provide land to eager white settlers.[140] Under normal principles of sovereignty, of course, the fact that some land in Indian country is privately owned would be irrelevant to the tribe's ability to govern activities there. As Justice Gorsuch observed in *McGirt*, public land is routinely transferred to private ownership without any change in the

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134. *See* Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1263 (2001) (noting that the "jurisdictional scheme announced by the Court in *Strate*, *Hicks*, and *Atkinson* [is] unworkable for many tribes").

135. *See* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 791 (2014) [hereinafter Fletcher, *Unifying*] (noting that a few nonmembers "engage in almost herculean (and occasionally offensive) efforts to avoid fairly noncontroversial assertions of tribal jurisdiction").

136. Bethany Berger notes that "on heavily allotted reservations, a substantial proportion and sometimes the vast majority of residents may be non-Indian." Bethany Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1071 (2005). Even on the Navajo Reservation, which is unusual in that little land was allotted to nonmembers, 10% of residents are either non-Indian or nonmember Indians. *See id.*

137. *See* Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1558 (2013) [hereinafter Florey, *Uniqueness*] (noting that "connection with a tribe is better conceived as falling along a spectrum" rather than a binary member/nonmember distinction).

138. *See* Gary Fields, *On U.S. Indian Reservations, Criminals Slip Through Gaps—Limited Legal Powers Hobble Tribal Nations; Feds Take Few Cases*, WALL ST. J. (June 12, 2007), https://www.wsj.com/articles/SB118161297090532116 (noting that "[f]or some non-Indians, tribal lands are virtual havens" because of jurisdictional gaps).

139. *See* Florey, *Uniqueness*, *supra* note 137, at 1519.

140. *See id.*; *see also* McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (2020).

government's political sovereignty over the landholder.[141] In Indian country, however, the Supreme Court has sometimes construed tribal sovereignty as a landowner-like right to exclude people from tribal lands and, at other times, as a sort of contractual bond among tribe members.[142] Neither of these conceptions of tribal sovereignty provides tribes with a clear source of authority over nonmembers acting on their own property.

Almost as troublesome as the circumscribed authority that *Montana* allows tribes is the uncertainty about where its limits lie. Scholars continue to debate whether the Court means *Montana* to be applied only to fee land or also in some measure to tribal trust land, a question about which the Court has sent conflicting signals.[143] As the elaborate reasoning and fractured voting of *Brendale* shows, *Montana*'s narrow and enigmatic exceptions are also complicated to apply and do not necessarily command agreement among courts.[144] The uncertain boundaries of *Montana* are troublesome to tribes that wish to develop a consistent zoning plan,[145] restrict nonmembers from driving in unsafe ways,[146] or ensure that tribal waterways are held to consistent environmental standards.[147]

Notably, uncertainties about the outer bounds of tribal authority can also complicate federal regulatory efforts that involve tribes. Under the Clean Water Act, for example, tribes may apply for "treatment-as-state" status, enabling them to set water quality standards for surface waters on reservations.[148] In *Montana v. EPA*,[149] Montana challenged the EPA's determination that the Confederated Salish and Kootenai Tribes had power under the second *Montana* exception to regulate nonmember fee land. Although the District Court ultimately deferred to the EPA's findings,[150] the need to adjudicate such determinations on a tribe-by-tribe, situation-by-situation basis illustrates the problems the shifting ground of the *Montana* exceptions poses for tribal regulation in general.

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141. *See McGirt*, 140 S. Ct. at 2464 (noting that while "[t]he federal government issued its own land patents to many homesteaders throughout the West[,] . . . no one thinks any of this diminished the United States's claim to sovereignty over any land" and suggesting that the same principles should apply in Indian country).

142. *See infra* note 275.

143. *See* Judith Royster, *Revisiting* Montana: *Indian Treaty Rights and Tribal Authority over Nonmembers*, 57 ARIZ. L. REV. 889, 891 (2015) (noting that lower federal courts "struggle with the question of whether *Hicks* extended the presumption against inherent tribal civil jurisdiction over nonmembers to all activities on trust lands as well as activities on fee lands").

144. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 445 (1989) (Stevens, J., announcing the judgment of the Court in part and concurring in part).

145. *See id.*

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

147. *See* Montana v. EPA, 941 F. Supp. 945 (D. Mont. 1996); *see also* Krakoff, *supra* note 134, at 1263 (discussing the difficulties that the uncertainties of the *Montana* scheme pose for tribal governance).

148. *See* 33 U.S.C. § 1377(e).

149. 941 F. Supp. at 946.

150. *See id.* at 958.

Further muddling the issue is the relationship between tribal powers under *Montana* and the right to exclude that tribes have also been held to possess.[151] As the Court put it in *Mescalero Apache*, tribes' "power to exclude nonmembers entirely or to condition their presence on the reservation" is "well established."[152] This power—flowing from an apparent understanding of tribal authority as landowner-like[153]—derives from a skein of doctrine that the Court has at times suggested is separate from *Montana* and, at others, entangled with it. In *Brendale*, for example, Justice Stevens relied largely on the power to exclude to find that the tribe had the power to zone the closed area; he noted that the tribe's "power to exclude nonmembers from a defined geographical area obviously includes the lesser power to define the character of that area."[154] Yet Justice Stevens also cited the *Montana* health-and-welfare exception, as did the three justices who would have permitted the tribe to zone both the open and closed area.[155] Even as the Court has extended the *Montana* framework to new contexts, it has also continued to mention the right to exclude, leaving ambiguous the extent to which it is intertwined with tribes' limited powers over nonmembers under *Montana*.[156]

The tribal right to exclude arises in many cases involving the validity of tribal regulation, where in some circumstances courts have relied on it as an alternative or additional source of tribal power beyond the *Montana* exceptions.[157] Courts are particularly likely to turn to the power to exclude as a source of tribal

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151. *See* Alex Tallchief Skibine, *Making Sense Out of* Nevada v. Hicks: *A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 355–58 (2001) [hereinafter Skibine, *Sense*] (noting confusion and inconsistencies in the Supreme Court's discussions of the right to exclude).

152. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983).

153. *See* Skibine, *Sense*, *supra* note 151, at 355–58 (observing that the Court has conceived of the exclusion power in these terms while arguing that this represents a misunderstanding of the right to exclude, which should be seen as a treaty-protected aspect of tribal sovereignty).

154. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 434 (1989) (Stevens, J., announcing the judgment of the Court in part and concurring in part).

155. *See id.* at 444 (finding that zoning the closed area was "necessary to protect the welfare of the Tribe"); *id.* at 458 (Blackmun, J., concurring in part and dissenting in part) (describing the power to zone as "central" to tribal health and welfare).

156. *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 335–36 (2008) (connecting regulatory authority under *Montana* with the power to exclude). Lower courts have taken a variety of approaches to reconciling the right to exclude and *Montana*. In *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 900 (9th Cir. 2019), the court noted that "[a]lthough some jurisdictions have interpreted *Hicks* as eliminating the right-to-exclude framework as an independent source of regulatory power over nonmember conduct on tribal land, we have declined to do so." Under the Ninth Circuit's approach, "a tribe's regulatory power over nonmembers on tribal land does not solely derive from an Indian tribe's exclusionary power, but also derives separately from its inherent sovereign power to protect self-government and control internal relations." *Id.* at 895.

157. *See* Tweedy, *supra* note 56, at 20–21 (noting that courts have treated the right to exclude nonmembers from tribal lands as an "additional" source of tribal power beyond the *Montana* exceptions).

authority when tribal regulations concern conduct on or use of tribal lands.[158] But the existence of these two overlapping powers further obscures the question of how far each extends and in which circumstances tribes are entitled to rely on each power.

Nonetheless, the relative certainty of the power to exclude from tribal lands has made it an appealing option for tribes in circumstances where they otherwise have few choices. Tribes have relied on literal exclusion of troublemakers from the reservation in situations where either the validity of tribal law as applied to nonmembers or the tribe's ability to enforce its law by other means may be in question. For example, *United States v. Nichols*[159] was a case involving federal enforcement of a tribal exclusion order. The tribe had initially issued an order excluding the nonmember defendant following his assault on a tribe member;[160] later, after a tribal officer observed the defendant driving carelessly on the reservation in a car with children not in safety restraints, the officer called in an FBI agent for help enforcing the order.[161] The court required exhaustion of tribal remedies before the defendant could challenge the order in federal court.[162] Tribes have used exclusion orders of nonmembers in a variety of other circumstances: to remove a nonmember convicted of stealing solar cells from a reservation;[163] as a sanction against "a nonmember who stole and reported tribal traditions for his own academic gain;"[164] and, in multiple instances, as a last-ditch measure against drug dealers.[165]

Tribes, then, are faced with a difficult situation. On the one hand, there is almost no situation in which a tribal rule can be definitively said to apply to a nonmember on private land, and ambiguities may exist even when tribal land is at stake.[166] While some nonmembers nonetheless behave as responsible citizens of Indian country, others exploit this situation to act lawlessly.[167] Even in a situation as extreme as the COVID-19 pandemic, when tribal powers as to nonmembers are presumably at their apex, and when the interest at stake—limiting the spread of a potentially deadly disease—is clearly one that extends to nonmembers, there exist numerous examples of nonmembers failing to heed tribal authority.[168] In other cases,

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158. *See* Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 849–50 (9th Cir. 2009) (describing the tribe's enforcement of rules governing "trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands" as "plainly concern[ing] a property owner's right to exclude" or "an owner's right to occupy").

159. No. CR 14-30038-MAM, 2014 WL 4185360 (D.S.D. Aug. 20, 2014).

160. *Id.* at *1.

161. *Id.* at *2.

162. *Id.* at *1.

163. *See* Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985).

164. Wood, *supra* note 20, at 204.

165. *See id.* at 203–04.

166. *See* Barnard, *supra* note 62, at 270 (discussing limitations on tribes' power to exclude state officials from tribal land).

167. *See* Fletcher, *Resisting*, *supra* note 78.

168. *See supra* notes 68–72 and accompanying text.

tribal actions to combat COVID-19 have been challenged by state and local governments.[169]

At the same time, the tribal right to exclude is well established, and exclusion orders have often been respected by both federal courts and federal authorities.[170] Tribes are thus faced with a relatively all-or-nothing choice: exclude nonmembers from the reservation entirely or risk the possibility that they will defy more modest tribal orders. Understanding these legal constraints provides context for decisions like the Oglala Lakota Nation's resolution to exclude a nonmember teacher believed to have violated the Nation's shelter-in-place order.[171] While tribes may prefer less drastic remedies in such situations—and many tribes incorporate "extensive due process protections" into their exclusion ordinances[172]—exclusion at least provides tribes one of the few ways they can act against nonmembers with relative confidence that their legal authority to do so will be upheld.

When tribes attempt to rely on their exclusion power for broader ends, however, this relative security may fall away. The exclusion power would seem to provide tribes with clear authority to impose checkpoints or other border controls in an effort to reduce the transmission of COVID-19 by visitors,[173] yet tribes' attempts to do so have nonetheless been fraught with various issues. Tribes, for example, require state cooperation to limit travel in areas over which they lack direct control (as in the New Mexico town of Gallup).[174] In other cases, tribes have clashed with state governors over the use of their exclusion power. For example, Governor Kristi Noem of South Dakota threatened legal action against the tribes imposing checkpoints on state highways that pass through Indian country, prompting the tribes to file suit in federal court to clarify their rights.[175] Tribes' exclusion power has seldom been used or tested to the degree it has been during this crisis, and the confusion attending the relationship between the exclusion power and *Montana* complicates tribes' efforts to take even the measures that would seem to flow most logically from it.

Montana's limits on tribal regulation have caused tribes to face difficult choices as they attempt to manage the COVID-19 pandemic. Tribes have had to decide, for example, whether to issue exclusion orders against nonmembers or to live with the risk that they may not heed tribal commands,[176] or the degree to which they should work with states that may have conflicting policies.[177] Even where the

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169. *See* Schneider et al., *supra* note 68.

170. *See supra* notes 159–65 and accompanying text.

171. *See* Lim, *supra* note 17.

172. Wood, *supra* note 20, at 211.

173. *See* Tweedy, *supra* note 56.

174. *See* Simon Romero, *New Mexico Invokes Riot Law to Control Virus Near Navajo Nation*, N.Y. TIMES (May 6, 2020), https://www.nytimes.com/2020/05/04/us/coronavirus-new-mexico-gallup-navajo.html; *see also* Barnard, *supra* note 62, at 282–90 (discussing the importance of cooperation between state and tribal governments in a public health emergency).

175. *See* Groves, *supra* note 67.

176. *See supra* notes 16–24 and accompanying text.

177. *See generally* Groves, *supra* note 67.

right option is clear, tribes face constant uncertainty about whether lack of compliance by nonmembers will undo the progress they have made.[178]

Yet although the extent of their powers is unclear, tribes have been using what regulatory authority they possess to tackle a variety of issues in creative and often successful ways. Tribes, to be sure, should not have to prove they can regulate responsibly to enjoy the basic attributes of sovereignty they have historically possessed inherently. It is nonetheless striking how nimbly, creatively, and often successfully tribes have responded to many challenges—not just in the area of COVID-19, where many tribes took proactive measures[179] at a time when states and the federal government were still underestimating the threat[180]—but in many other areas of regulation, where tribes have often pioneered innovative and community-driven solutions.[181]

Tribes, in other words, have managed to work as effectively as they can within *Montana*'s limits. Yet the restrictions *Montana* places on tribal power, which manage to be at once stringent and ambiguous, significantly hinder tribes' ability to carry out their policies in a uniform, consistent manner. Somewhat perversely, given that *Montana*'s health-and-welfare exception is designed to permit tribes to tackle urgent threats, these problems are particularly acute in emergencies like the COVID-19 pandemic, which demand a legal clarity and certainty that existing case law simply cannot provide.

III. REGULATION AS AN AFTERTHOUGHT

While the Court has never recognized the poor fit between *Montana*'s underlying fears about the equal treatment of nonmembers and the day-to-day realities affecting tribal governance, it has in the intervening years largely shifted its concerns away from tribal regulation. Even as the Court has applied *Montana* strictly and extended it to new contexts, that is, it has not been particularly active in adjudicating issues of tribal regulation in particular. Further, the Court has at least intermittently taken a somewhat more positive view of tribal regulation in the few subsequent cases in which the issue has arisen. This shift in the Court's focus suggests that the concerns that originally animated *Montana* may have lost force in the context of tribal regulation and creates an opening for change.

Perhaps most important, the Court has upheld tribal regulatory power in two cases following *Montana*—something it has never done directly in the adjudicative or taxation context. In *New Mexico v. Mescalero Apache Tribe*,[182] the Court drew important lines around *Montana* by noting that it "concerned [only] lands located within the reservation but not owned by the Tribe or its members"[183]

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178. *See supra* notes 69–72 and accompanying text.

179. *See supra* notes 6–8 and accompanying text.

180. *See* Isaac Sebenius & James K. Sebenius, *How Many Needless Covid-19 Deaths Were Caused by Delays in Responding? Most of Them*, STAT NEWS (June 19, 2020), https://www.statnews.com/2020/06/19/faster-response-prevented-most-us-covid-19-deaths/.

181. *See* Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 715–16 (2017) [hereinafter Florey, *Making*].

182. 462 U.S. 324 (1983).

183. *Id.* at 330–31.

(although whether *Montana* is limited to tribal lands no longer remains clear in all circumstances).[184] In holding that New Mexico lacked authority to impose its own hunting and fishing rules on the reservation,[185] the Court spoke favorably of the tribe's carefully crafted regulatory scheme, describing how its "comprehensive fish and game management program" in partnership with the federal government had replenished the reservation's animal population.[186]

A few years later, in *Brendale v. Confederated Tribes*, the Court held that a tribe could apply its zoning restrictions to nonmember property in one part of the reservation—the sole instance in which the Court has directly found (in any context) that either of the *Montana* exceptions applied.[187] It is worth noting that the decision was hardly a resounding one; rather, the Court was intractably split, leaving Justice Stevens's opinion the controlling one. The case involved a reservation consisting of a "closed" forested area of cultural and spiritual significance to the tribe where most land was tribally owned[188] and an "open" area where about half the land was privately owned by nonmembers.[189] Justice Stevens—apart from Justice O'Connor, who joined his opinion, the only member of the Court to distinguish between the two areas in applying *Montana*[190]—held that the tribe could zone the former but not the latter.[191] He suggested that this was in part because development in the closed area would threaten the tribe sufficiently to invoke *Montana*'s health-and-welfare exception,[192] but also invoked numerous other factors, including the fact that the tribe retained significant power to exclude in the closed area[193] and that the zoning requirements applied evenhandedly to members and nonmembers.[194]

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184. *See id.* at 324.

185. *Id.* at 344.

186. *Id.* at 328.

187. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 438 (1989) (Stevens, J., announcing the judgment of the Court in part and concurring in part). Although the Court's later 4–4 affirmance in *Dollar General* left standing a Fifth Circuit opinion relying on the "consensual relationship" exception to find that a nontribal defendant who hired tribal interns could be sued in tribal court for alleged molestation arising out of the internship, the Court did not comment on its reasoning. *See* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (per curiam), *aff'g* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 173–74 (5th Cir. 2014).

188. *See Brendale*, 492 U.S. at 438 (Stevens, J., announcing the judgment of the Court in part and concurring in part).

189. *See id.* at 444 (describing the "open" area as "an integrated community that is not economically or culturally delimited by reservation boundaries").

190. Four justices would have held that the tribe could not zone either area, while another three would have allowed the tribe to zone nonmember land in both areas. *See id.* at 429–30 (White, J., announcing the judgment of the Court in part and dissenting in part); *id.* at 448–50 (Blackmun, J., concurring in part and dissenting in part).

191. *See id.* at 447–48 (Stevens, J., announcing the judgment of the Court in part and concurring in part).

192. *See id.* at 443.

193. *See id.* at 441.

194. *See id.* at 443.

To be sure, the Court has not always looked favorably on tribal regulation in the post-*Montana* era. In *South Dakota v. Bourland*,[195] the Court found that the Cheyenne River Sioux Tribe lacked the power to regulate non-Indian hunting and fishing on the reservation.[196] Yet because the facts of the case, as the Court noted,[197] were quite similar to those of *Montana*, there was little room for the Court to reach a different result.[198]

More recently, in *Plains Commerce Bank v. Long Family Land and Cattle Co.*,[199] the Court held that a tribal court lacked jurisdiction over claims by tribe members that a nontribal bank had breached their contract and defrauded them (among other causes of action) by failing to honor agreed-upon repurchase terms for land they had deeded to the bank and instead selling it to nonmembers.[200] Although the case concerned claims in tribal court, the Court rested its decision on the tribe's lack of regulatory authority over the underlying transaction, stating baldly that "*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land."[201]

Despite the unsatisfying result, however, *Plains Commerce Bank* says less about tribal regulation than it might have for two reasons. First, the Court was careful to present the result as solely a question about the status of land itself. As the Court noted, "The distinction between sale of the land and conduct on it is well established in our precedent" and—in contrast to the former—"certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight."[202] Second, even as the Court recognized that the plaintiffs' claims under tribal tort law raised questions of tribal regulatory authority,[203] the question actually facing the Court was whether a tribal court had jurisdiction over these claims.[204] As discussed below, the Court has appeared to see a particular need to shield nonmember defendants from tribal court jurisdiction, a stance in keeping with its often defendant-friendly holdings in nontribal contexts.

The Court's apparent lack of recent interest in considering issues raised by tribal regulation contrasts with its activity in broadly extending *Montana* to apply to tribal taxation and tribal court jurisdiction—areas in which it has taken many cases

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195. 508 U.S. 679, 697–98 (1993).

196. The Court noted that *Montana*'s exceptions could potentially apply but also observed that the district court had made findings not addressed by the appellate court that the exceptions were inapplicable. *Id.* at 695–96.

197. *Id.* at 688.

198. The Court rejected the tribe's contentions that the status of the land in question was different from that in *Montana* because (among other arguments) Congress had preserved some measure of tribal authority. *See id.* at 690–92. After ruling unfavorably to the tribe on this issue—and suggesting that the *Montana* exceptions likely did not apply—there was little ground on which the Court could have reached a result different from that in *Montana*. *See id.*

199. 554 U.S. 316 (2008).

200. *Id.* at 323–24.

201. *Id.* at 332.

202. *Id.* at 334–35.

203. *See id.* at 332 ("[T]he tribal tort at issue here is a form of regulation.").

204. *Id.* at 320.

and often ruled against tribal interests. In taxation cases, the Court has—applying the odd, preemption-like test that governs this area—allowed states a wide ability not only to tax nonmember activity in Indian country but also to require tribes to enforce compliance.[205] At the same time, it has applied *Montana* to severely limit tribes' ability to tax nonmembers on private land.[206]

Tribal court jurisdiction, however, is the area in which both the Court's activity and its hostility to tribal interests has been particularly pronounced. In *Strate v. A-1 Contractors*, the unanimous Court applied the *Montana* framework for the first time to the jurisdiction of tribal courts and held in addition that the health-and-welfare exception did not permit tribal court jurisdiction over a nonmember defendant in a case involving a fatal car accident.[207] In *Nevada v. Hicks*, the Court both reaffirmed *Strate* and narrowed the jurisdiction of tribal courts still further—finding that the tribal court lacked jurisdiction over claims against state officers executing a search warrant even though they had arisen on tribal land.[208] Most recently,[209] the Court in 2015 granted certiorari in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*,[210] a case involving the alleged molestation of a young Dollar General intern[211] by a nontribal manager in which the Fifth Circuit had sustained tribal jurisdiction over Dollar General based on the consensual-relationship exception (the claim arose out of the internship program that Dollar General had entered into).[212] Given the justices' prior votes and their comportment at oral argument, [213] the Court was widely expected to rule against the tribal court's

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205. *See, e.g.*, Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Washington v. Confederated Tribes, 447 U.S. 134, 156, 160 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). The Court has not universally ruled against tribal interests in this area, holding at times that state taxes are invalid if their incidence falls on tribe members or if they are in tension with a comprehensive federal regulatory scheme. *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). Most recently in *Washington State Department of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1007 (2019), the Court held that a treaty exempted tribe members from state taxation of fuel importers. At the same time, the Court has occasionally allowed state regulations to apply in Indian country in non-taxation contexts, such as alcohol sales licensing. *See* Rice v. Rehner, 463 U.S. 713 (1983).

206. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001) (holding that the "general rule [of *Montana*] applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land").

207. 520 U.S. 438, 457–58 (1997).

208. 533 U.S. 353, 374 (2001).

209. In the interim, the Court decided *Plains Commerce Bank*, 554 U.S. at 323–24, which was nominally about tribal adjudicative jurisdiction but also hinged on the Court's conclusion that "the Tribe lacks the civil authority to regulate [through tort law] the Bank's sale of its fee land." *Id.* at 330.

210. 136 S. Ct. 2159 (2016) (per curiam) (mem).

211. *See* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 169 (5th Cir. 2014).

212. *Id.* at 173–74.

213. *See* Matthew Fletcher, *Why Justice Kennedy Wasn't Good for Indian Country*, HIGH COUNTRY NEWS (July 6, 2018), https://www.hcn.org/articles/tribal-affairs-why-justice-

jurisdiction;[214] following the unexpected death of Justice Scalia, however, the case fizzled into a 4–4, per curiam affirmance of the lower court decision.[215]

As a result of these cases, in recent years most of the scrutiny of the *Montana* standard by both courts and scholars has been on the adjudicative side.[216] In many cases—decided both by the Supreme Court and lower federal courts—tribes have sought to uphold their sovereignty to resolve disputes involving their members in tribal tribunals; some courts, recognizing the importance of courts to tribal sovereignty and self-governance, have agreed with the tribal perspective,[217] while others—citing the availability of state courts[218] or concerns about bias and due process[219]—have found tribal jurisdiction over nonmembers to be improper.

In consequence of these developments, tribal regulation—even as it formed the original basis for the *Montana* standard—has come to seem like something of an afterthought in *Montana*'s application. While the Court, as discussed, has considered some cases involving the applicability of *Montana* to regulation,[220] it has not done so recently, except insofar as tribal regulatory powers are bound up with the question of tribal court jurisdiction[221] or taxation.[222] The same pattern generally holds in lower federal courts, where the majority of recent cases applying *Montana* consider the standard's application in the adjudicative realm alone.[223]

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anthony-kennedy-wasnt-good-for-indian-country (relating how Justice Kennedy "lean[ed] over the bench, red-faced and angry, lecturing Neal Katyal [counsel for the tribe]" during oral argument).

214. *See* Berger, *supra* note 87, at 1903.

215. *See Dollar General*, 136 S. Ct. at 2159.

216. *See, e.g.*, M. Gatsby Miller, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction Over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825, 1837–38 (2014) (suggesting that the Court may be more concerned about tribal adjudicatory jurisdiction relative to regulatory jurisdiction because it "fear[s] that nonmembers will be subjected to adjudication of their rights by a court that is hostile to them and that no proper federal review permits redress of the problems this would raise" and believes there is "an inherent unfairness in subjecting nonmembers to unfamiliar tribal courts"). In contrast, scholars have argued that tribal adjudicative jurisdiction could be treated in a manner similar to personal jurisdiction in nontribal courts. *See* Florey, *Uniqueness*, *supra* note 137; Alex Tallchief Skibine, *Incorporation Without Assimilation: Legislating Tribal Jurisdiction over Nonmembers*, 67 UCLA L. REV. DISCOURSE 166 (2019).

217. *See, e.g.*, Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813 (9th Cir. 2011) (holding that tribal courts may exercise jurisdiction over cases arising on tribal land notwithstanding *Montana*).

218. Strate v. A-1 Contractors, 520 U.S. 438, 439 (1997) (finding that tribal court jurisdiction was not necessary because, among other reasons, the plaintiff could pursue her case "in the state forum open to all who sustain injuries on North Dakota's highways").

219. *See* Miller, *supra* note 216, at 1838 ("Commentators agree that the perception that tribal courts are biased against nonmembers affects federal judicial determinations of jurisdiction over nonmembers.").

220. *See supra* notes 182–94 and accompanying text.

221. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 323–24 (2008).

222. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001).

223. By the Author's rough count of lower-court cases citing *Montana* since 2016, 56 dealt with tribal regulatory jurisdiction and 23 with tribal adjudicative jurisdiction.

The Court has further left unresolved the question whether tribes' adjudicative and regulatory jurisdiction are coextensive, suggesting that, if anything, the latter is broader. In *Strate*, as the Court first extended *Montana*'s reach to tribal courts, it noted that "a tribe's adjudicative jurisdiction does not exceed its legislative [i.e., regulatory] jurisdiction."[224] Later, in *Nevada v. Hicks*, the Court reaffirmed this framework, but was careful to note that it had "le[ft] open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction"[225]—thus suggesting that tribal legislative jurisdiction might be the broader of the two. The Court has not since returned to this question; lower courts tend to treat the two forms of jurisdiction as similar in scope, particularly in cases where a tribal court's claim of adjudicatory power is "directly incident to a proper exercise of tribal regulatory authority," as when a tribe turns to court to enforce tribal law.[226] Yet the potential divergence between these forms of jurisdiction might be interpreted to allow tribes more latitude for regulation.[227]

If the turn in judicial focus from regulation to adjudication (and, to some extent, taxation) seems curious at first glance, it is in other ways unsurprising. First, the shift is likely in part a function of the issues that spawn the most litigation. Just as people often abide by unlegislated community and legal norms,[228] nonmembers have incentives to follow tribal rules in many circumstances rather than challenge them in court.[229] As Matthew L.M. Fletcher has noted, "[T]housands upon thousands of nonmembers consent to tribal jurisdiction as a matter of course" such that "the only cases federal courts see in the current era are outlier cases."[230] To be sure, these outlier cases exist; nonmember plaintiffs do sometimes seek to have tribal regulations invalidated[231] (and the validity of tribal regulation occasionally becomes

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

225. *See* Nevada v. Hicks, 533 U.S. 353, 358 (2001).

226. *See* Barnard, *supra* note 62, at 274.

227. In other areas of law, courts draw distinctions between prescriptive and judicial jurisdiction without treating them as coextensive; indeed, adjudicative authority is normally broader. *See* Florey, *Uniqueness*, *supra* note 137, at 1508. Of course, any divergence between the two forms of authority might not work to tribes' benefit; it might mean only that the Court will place even stricter limits on tribal adjudication than on regulation, as in cases like *Nevada v. Hicks*, where the Court found that the tribal court lacked jurisdiction over a case against state officers even though it arose on tribal land. *See Hicks*, 533 U.S. at 375.

228. *See, e.g.*, Claire A. Hill, *Repetition, Ritual, and Reputation*, 2020 WIS. L. REV. 515, 523 (2020) (describing the role of norms in the process of contracting).

229. John Shuford, for example, describes a location in the Inland Northwest (not identified due to privacy concerns) where an increasingly powerful tribe and a mostly white town dominated by the resource-extraction industry are geographically and economically interconnected and where the town's leaders, "though resistant, are slowly acceding to tribal law enforcement and tribal regulation." *See* John Shuford, *The Tale of the Tribe and the Company Town*, 90 OR. L. REV. 1273, 1281–82 (2012).

230. *See* Fletcher, *Unifying*, *supra* note 135, at 791.

231. *See, e.g.*, Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298, 1301 (9th Cir. 2013) (private landowner's declaratory judgment action challenging tribal authority to require him to obtain a tribal permit prior to building a house); Slawson Expl. Co., Inc. v. U.S. Dep't of the Interior, No. 1:17-cv-166, 2017 WL 7038795, at *8 (D.N.D. Nov. 27, 2017) (challenge to Interior Board of Land Appeals order on grounds that

an issue in some other way).[232] But such cases are relatively rare and often intertwined with issues of tribal court jurisdiction,[233] particularly because in many circumstances plaintiffs must exhaust tribal remedies before seeking relief in federal court.[234] By contrast, defendants in tribal courts—like defendants everywhere—seek ways to have cases against them dismissed,[235] guaranteeing that questions involving the scope of tribal adjudicative power will frequently find their way to the federal courts.

Second, even leaving aside the hostility to tribal sovereignty in general that some justices have displayed over the years, the Supreme Court's pro-defendant disposition of tribal jurisdiction cases is also not particularly unexpected. The justices' focus on rolling back tribal jurisdiction is of a piece with its numerous recent defendant-friendly rulings in the nontribal context, including restricting personal jurisdiction,[236] limiting class actions,[237] capping punitive damages,[238] expanding the reach of arbitration,[239] and heightening pleading standards.[240] Some commentators have speculated, for example, that prior to the decision in *Strate*—

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it "impose[d] tribal regulation on non-Indians contrary to *Montana*"); AT&T Corp. v. Oglala Sioux Tribe Util. Comm'n, No. CIV 14–4150, 2015 WL 5684937, at *3 (D.S.D. Sept. 25, 2015) (action by nonmember telecommunications company seeking declaratory judgment that tribal commission lacked authority to impose access charges).

232. *See, e.g.*, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 418 (1989) (White, J., announcing the judgment of the Court in part and dissenting in part) (tribal challenge to county decision allowing development in violation of tribal zoning requirements); Rincon Mushroom Corp. v. Mazzetti, No. 09-cv-2330-WQH-JLB, 2019 WL 2341376, at *1 (S.D. Cal. June 3, 2019) (dispute involving tribal regulation of fee land on reservation).

233. *See infra* note 253 (discussing cases in which the tribe brings suit to enforce tribal regulations).

234. Two pre-*Strate* Supreme Court cases, *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987), created a requirement that defendants exhaust tribal remedies before challenging tribal jurisdiction in federal court. In *Strate*, however, the Court suggested that exhaustion was not required in cases where tribes clearly lack adjudicative jurisdiction over nonmember conduct on nonmember land because it would "serve no purpose other than delay." Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997). Exhaustion issues continue to be litigated frequently. *See, e.g.*, Sprint Commc'ns Co. L.P. v. Wynne, 121 F. Supp. 3d 893, 904–05 (D.S.D. 2015) (requiring plaintiff in suit challenging tribe's telecommunications regulations to exhaust remedies in tribal court).

235. For example, the forum non conveniens doctrine allows cases to be dismissed in favor of another forum (somewhat analogous to the tribal context, where if a suit in tribal court is dismissed for lack of jurisdiction, it may still be possible for the plaintiff to sue in state or federal court). In such cases, "defendants almost always want a forum non conveniens dismissal for, at worst, the benefits of delay and, at best, the outcome-determinative effect of ending the litigation." *See* Emily J. Derr, Note, *Striking a Better Public–Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 830 n.87 (2008).

236. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783–84 (2017).

237. *See* Wal-Mart v. Dukes, 564 U.S. 338, 367 (2011).

238. *See* State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 429 (2003).

239. *See* AT&T Mobility v. Concepcion, 563 U.S. 333, 351–52 (2011).

240. *See* Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009).

which reflected a sharp reversal in the Court's previously somewhat favorable approach to tribal courts[241]—the justices' attention was "hijacked by a very, very unusual, but devastating" result in a separate tribal case involving a railroad accident.[242] In that case, a Crow tribal court allegedly had given jury instructions in the Absalooke language,[243] and the jury initially rendered a verdict of $250 million, later reduced to $25 million.[244] In other words, the Court has frequently shown an impulse to protect defendants from what it perceives to be plaintiff-friendly courts; when a tribal court is involved, that inclination may be particularly strong.

Special considerations also appear to play into the Court's reasoning in the taxation context. Taxation is, of course, a vital source of income for state, local, and tribal governments alike, and as a result it is an issue over which states and tribes frequently clash. When tribes can sell cigarettes and other goods without charging state tax, state revenues suffer; when tribes are required to charge state as well as tribal tax, they lose the ability to impose lower tribal taxes to attract business and shore up tribal finances.[245] As a result, the issue is—as with tribal court jurisdiction—frequently litigated.[246] Further, the Supreme Court has generally expressed more concern with ensuring that states do not have an expected stream of tax revenue disrupted than with allowing often cash-strapped tribes to gain an additional source of income.[247]

Many commentators, including the Author,[248] have been highly critical of the Court's reasoning and results in these areas.[249] Allowing states to tax products sold by tribes and hindering tribes' ability to tax nonmember enterprises adds to

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241. For example, in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987), the Court, in extending the requirement that litigants exhaust remedies in tribal court prior to filing a federal suit, observed that "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."

242. *See* Matthew L.M. Fletcher, *2010 Dillon Lecture: Rebooting Indian Law in the Supreme Court*, 55 S.D. L. REV. 510, 516 (2010) [hereinafter Fletcher, *Rebooting*]; *see also* Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN L. REV. 253, 263–64 (2017) (discussing concerns that might have motivated the justices' decision in *Strate*).

243. *See* Fletcher, *Rebooting*, *supra* note 242, at 516.

244. *See* Burlington N. R.R. v. Red Wolf, 196 F.3d 1059, 1062 (9th Cir. 1999). The Ninth Circuit ultimately held the tribal court lacked jurisdiction over the dispute. *See id.*

245. *See* Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97, 100 (2015) [hereinafter Fletcher, *Disruption*] (noting that, in taxation conflicts with tribes, "states seem to be concerned over potential impacts on the state and local tax base," while tribes are concerned with revenue but also care about good governance).

246. *See id.* (noting that "dramatic disputes" in litigation with tribes often involve, among other issues, "states, local governments, and tribes . . . conflict[ing] over taxes in Indian country").

247. *See, e.g.*, City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 215 n.9 (2005) (noting the "present-day and future disruption" that would occur if the tribe were no longer required to pay property tax).

248. *See* Florey, *Uniqueness*, *supra* note 137.

249. *See, e.g.*, Fletcher, *Resisting*, *supra* note 78; Frickey, *Colonialism*, *supra* note 105, at 28–34.

many tribes' financial strain.[250] Restricting tribal courts from exercising jurisdiction over nonmembers who knowingly form ties in Indian country or cause harm there is at least as devastating to tribal governance and justice. Tribal courts have long been an integral part of tribal governance,[251] and the Court's constrained view of tribal judicial jurisdiction continues to hamper tribes' ability to enforce tribal law and injured tribe members' efforts to seek compensation. In an ideal world, the Court would radically alter the *Montana* framework in all its applications.

Nonetheless, it is worth noting that both doctrine and circumstances present particular opportunities to sway courts on the tribal regulation issue—an area where tribal interests may be somewhat less likely to be in conflict with those of states or corporate defendants, and where the *Montana* framework has increasingly come to seem glaringly inadequate. Further, progress in enhancing tribal regulatory powers could in turn open a door to change on the taxation and adjudicative jurisdiction fronts. Taxes[252] and courts[253] can, after all, be key tools of regulation. Examples abound of tribes using both to achieve policy goals, from the Navajo Nation's comprehensive junk-food tax (passed well before most nontribal jurisdictions in the United States had even considered a soda tax)[254] to tribal courts' central role in enforcing tribal regulations.[255] Further, at least in the judicial realm, current doctrine makes tribal regulatory authority a prerequisite for tribal court jurisdiction.[256] As a

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250. *See* David Y. Kwok, *Taxation Without Compensation as a Challenge for Tribal Sovereignty*, 84 MISS. L.J. 91, 92 (2014) ("If tribal sales are not exempt [from state tax] . . . tribes lose an important source of government funding because double taxation of tribal sales places tribal businesses at a competitive disadvantage with businesses subject solely to state taxation.").

251. In the foundational case *Williams v. Lee*, 358 U.S. 217, 220 (1959), for example, the Court famously recognized the contribution of tribal courts to tribe members' right to "make their own laws and be ruled by them."

252. *See* Fletcher, *Disruption*, *supra* note 245, at 100 (noting that tribes use taxes to achieve regulatory as well as revenue-raising ends).

253. The relationship between regulatory and adjudicative jurisdiction is particularly strong when an action against a nonmember in tribal court is brought by the tribe itself to enforce tribal law. For example, in *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 896–98 (9th Cir. 2019), the tribe brought a tort action in tribal court against a nonmember who had worked as an administrator for the tribe, alleging that she had violated multiple provisions of tribal law. The Ninth Circuit found that the tribe had regulatory authority over the defendant's conduct and that, consequently, the tribal court had authority to adjudicate the tribe's claims. *See id.* at 906; *see also* FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 919–20, 931 (9th Cir. 2019) (holding that in a suit by a tribe to collect a use payment fee for waste storage on the reservation, *Montana* permitted both tribal regulatory and adjudicative jurisdiction over the matter); McKesson Corp. v. Hembree, No. 17–CV–323–TCK–FHM, 2018 WL 340042, at *11 (N.D. Okla. Jan. 9, 2018) (finding *Montana* exceptions did not permit Cherokee Nation to sue opioid manufacturers for violations of tribal law).

254. *See* Florey, *Making*, *supra* note 181, at 714–16.

255. *See supra* note 251.

256. *See, e.g.*, Plains Commerce Bank v. Long Fam. Land & Cattle Co., 554 U.S. 300, 316 (2008) (concluding that a tribal court lacked jurisdiction over a dispute because the tribe did not have the underlying authority to regulate the transaction involved).

result, if courts were to adopt a broader view of tribal regulatory powers, other important areas of tribal authority could more easily follow suit.

IV. PROSPECTS FOR TRIBAL REGULATORY SOVEREIGNTY IN THE COURTS

COVID-19 and its effects in Indian country—as well as the friction and legal battles between the Oglala and Cheyenne River Sioux tribes and South Dakota's Governor Kristi Noem[257]—have been extensively covered by the media, bringing a new attention to the importance of tribal sovereignty. To the extent tribal regulatory issues find their way to the courts, they may arrive at a promising moment for action, particularly at the Supreme Court but also in certain lower courts. Even before Justice Gorsuch assumed a seat on the Court, Bethany R. Berger noted that the Court's 2015 term had gone better than expected for tribes: "By June of most years, professors of federal Indian law are reeling . . . . Last June was different."[258] While cautioning that "[o]ne should not overstate the significance of the 2015 Term"[259] and that even the cases decided in tribes' favor "did not help build a cogent theory of third sovereign status,"[260] Berger nonetheless expressed cautious optimism that then newly confirmed Justice Gorsuch (as a possible fifth vote along with the four prior justices most sympathetic to tribal interests) might extend this trend.[261]

So far, Justice Gorsuch has borne out the more optimistic predictions, becoming the first justice known to have hired an enrolled tribe member as a clerk[262] and deciding three important cases favorably to tribes. In *Washington State Department of Licensing v. Cougar Den, Inc.*,[263] he concurred in the 5–4 majority finding that an 1855 treaty permitted the Yakama Nation to transport fuel on Washington State's roads without being subject to the state's tax. Applying one of the traditional Indian-law canons of interpretation that the Court has recently tended to overlook,[264] Justice Gorsuch focused on how the Yakamas would have understood the treaty language at the time.[265] In *Herrera v. Wyoming*,[266] Justice Gorsuch joined Justice Sotomayor (the opinion's author) and the other three liberal justices in holding that Wyoming's admission to statehood did not void tribal treaty rights permitting the tribe to hunt in the area that is now the Bighorn National

257. For a detailed discussion of the situation, see Tweedy, *supra* note 56.

258. *See* Berger, *supra* note 87, at 1938.

259. *See id.*

260. *See id.* at 1940.

261. *See id.* at 1941–42. Justices Sotomayor, Kagan, Ginsburg, and Breyer have shown some propensity to rule in favor of tribes. *See id.*

262. *See Chickasaw Woman Selected to Clerk for Supreme Court Justice Neil Gorsuch*, CHICKASAW NATION MEDIA REL. OFF. (Apr. 13, 2018), https://chickasaw.net/news/press-releases/release/chickasaw-woman-selected-to-clerk-for-supreme-cour-47329.aspx.

263. 139 S. Ct. 1000 (2019).

264. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 445–48 (2005).

265. *See Cougar Den*, 139 S. Ct. at 1006–07 (Gorsuch, J., concurring).

266. 139 S. Ct. 1686 (2019).

Forest—thus permitting tribe members to do so even in circumstances contrary to state law.[267]

Most consequential, however, is the Gorsuch-authored opinion in *McGirt v. Oklahoma*.[268] The case considered whether Oklahoma lacked criminal jurisdiction over the defendant for a crime he alleged was committed in Indian country (where states generally lack criminal jurisdiction),[269] which in turn required the court to decide whether the Creek Nation continued to possess land reserved to it in an 1866 treaty.[270] In concluding that it did, Justice Gorsuch wrote an opinion sweeping not only in result (the Court noted that "as much as half [of Oklahoma's] land and roughly 1.8 million of its residents" could be deemed part of Indian country as a result of its decision)[271] but in reasoning. The opinion is a welcome corrective to prior approaches on many points of federal Indian law, stating clearly, for example, that Congress must be explicit when it wishes to break its treaty promises[272] and that current demographics of a reservation have little or no place in the analysis whether it has been disestablished.[273]

Yet the opinion goes further, with resonance well beyond the specific facts of the case. Where previous opinions have often tended to treat tribal powers as merely those of landowners[274] or glorified membership-based clubs,[275] Justice Gorsuch articulates a vision of tribes as genuine sovereigns with territorial authority over reservations. In particular, Justice Gorsuch makes a key comparison between land patent grants of the United States and the sale of on-reservation tribal land to private owners. As he notes, "[N]o one thinks any of this [the granting of patents] diminished the United States's claim to sovereignty over any land,"[276] and therefore "there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally."[277]

In most contexts, the recognition that the transfer of land to private ownership does not divest the sovereign of jurisdiction would be unremarkable.

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267. *See id.* at 1698.

268. 140 S. Ct. 2452 (2020).

269. *See* United States v. McBratney, 104 U.S. 621, 624 (1881).

270. *See McGirt*, 140 S. Ct. at 2459.

271. *See id.* at 2479.

272. *Id.* at 2462 ("If Congress wishes to break the promise of a reservation, it must say so.").

273. *See id.* at 2469 (noting that "[demographic] evidence [cannot] overcome congressional intent as expressed in a statute").

274. *See* Skibine, *Sense*, *supra* note 151, at 355–58 (critiquing the landowner view of tribal sovereignty).

275. As Philip Frickey memorably put it, the Supreme Court has at times appeared to regard tribes as "ethnocentric Elks Clubs." *See* Frickey, *Colonialism*, *supra* note 105, at 80; *see also* Fletcher, *Unifying*, *supra* note 135, at 800 (discussing the complicated relationship between theories of tribal jurisdiction based in landownership and those based in member consent).

276. *See McGirt*, 140 S. Ct. at 2464.

277. *See id.*

Given the Court's recent focus on land status as the determinant of tribal power,[278] however, it is near revolutionary. Indeed, *McGirt*'s conception of a tribal sovereignty that transcends land ownership status is at direct odds with the view expressed by the Roberts majority in *Plains Commerce Bank*—decided just 12 years ago—that land that has left tribal hands winds up more or less irrevocably beyond tribal control.[279]

Justice Gorsuch's *Cougar Den* concurrence, *Herrera* vote, and *McGirt* opinion suggest some commonalities in his views: a belief in the more robust view of tribal sovereignty that prevailed before the *Oliphant/Montana* era,[280] a conviction that tribal treaty rights must be honored if Congress has not explicitly abrogated them,[281] and an understanding that tribes are independent sovereigns that may chart a course independent of state law.[282] Justice Gorsuch's endorsement of these principles may bode well for progress on the issue of tribal regulation.[283] Some measure of power to control what happens on reservation lands, regardless of owner—and some degree of certainty of the extent of that power—is important for tribal sovereignty both conceptually and practically. *McGirt*'s willingness to treat tribal sovereignty as following the usual rules—not a special set of lesser ones—is a step toward that recognition.[284]

Justice Gorsuch's emphasis on strict textualism[285] may also be a boon for tribes in the area of regulatory jurisdiction. As previously discussed,[286] the *Oliphant/Montana* line of cases is notable for being grounded in the Court's view of

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278. *See supra* note 274 and accompanying text.

279. *See* Plains Commerce Bank v. Long Fam. Land & Cattle Co., 554 U.S. 300, 335 (2008) (holding that tribes lack all power to "regulat[e] the sale of fee land").

280. *See* Schlosser, *supra* note 98, at 574 (describing the traditional understanding of tribal sovereignty); *see also supra* note 102 and accompanying text.

281. *See McGirt*, 140 S. Ct. at 2462–63 (noting that the Court will "not lightly infer" that Congress meant to breach a treaty promise).

282. *See id.* (expressing concern about leaving "tribal rights in the hands of the very neighbors [i.e., states] who might be least inclined to respect them").

283. Prior to October 2020, the outlook appeared especially favorable, given that the Court's four liberal justices plus Justice Gorsuch had ruled in favor of tribal interests in several recent cases. The unexpected death of Justice Ginsburg and her swift replacement by Justice Amy Coney Barrett, however, disrupted that narrow majority and makes the future far more uncertain. As a leading tribal advocacy group noted, Justice Barrett's views on tribal issues are largely unknown. *See* JOEL WEST WILLIAMS, NATIVE AM. RIGHTS FUND, THE NOMINATION OF AMY CONEY BARRETT TO THE SUPREME COURT OF THE UNITED STATES: AN INDIAN LAW PERSPECTIVE 5 (2020), https://sct.narf.org/articles/indian_law_jurispurdence/amy_coney_barrett_indian_law.pdf?_ga=2.221841816.1465175848.1602268586-1865702208.1602268586 (noting that "her writing as a law professor and her record as a judge on the Seventh Circuit offer little insight into her understanding and views on Indian law topics that may come before the U.S. Supreme Court").

284. *See* Florey, *Uniqueness*, *supra* note 137, at 1506 ("Highlighting tribes' uniqueness can be a way of lowering expectations about the sort of entities tribes actually are[.]").

285. *See* Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 186 (2017).

286. *See supra* notes 114–22 and accompanying text.

historical "assumptions" about tribes[287] or tribes' "dependent status" as such,[288] not treaty provisions or other sources of positive law.[289] Given a chance to reconsider the issue, Justice Gorsuch might view these vague justifications with the same skepticism he did similar arguments made by Oklahoma in *McGirt*.[290]

A reexamination of tribes' regulatory powers could take several forms. To be sure, the most desirable path would be to reverse *Montana* entirely or at the very least to limit its scope. *Montana* has lacked both legal and policy justification from the beginning, and the distinct situation it addressed—an effort to restrict nonmember hunting in ways the Crow Tribe found justified but the Court found problematically targeted—seems far removed from the far more common issue today of nonmembers who receive, in essence, a special *exemption* from most tribal law.[291] But *Montana* is now so thoroughly embedded in federal Indian-law doctrine as to make it difficult to uproot.[292]

A more likely path might be simply for the Court to recognize a broader range of legitimate tribal regulatory interests in applying *Montana*'s exceptions. Even against the backdrop of the Court's often capricious decision-making in matters of tribal sovereignty, the Court's narrow reading of the *Montana* exceptions stands out for lacking justification, particularly when *Montana* is applied to tribal regulations that are of general application and do not single out nonmembers. The Court has never explained why it has chosen to understand the exceptions in such a constrained way, rather cautioning that they should not be read too expansively simply because the Court does not wish them to be too broad. In *Plains Commerce Bank*, for example, the Court, citing *Strate* and *Atkinson*, observed that *Montana*'s exceptions "are 'limited' ones,"[293] that "cannot be construed in a manner that would 'swallow the rule' . . . or 'severely shrink' it."[294] Yet the Court has failed to connect this crabbed understanding of the exceptions to any broader purpose, such as equal treatment of nonmembers in regulation (its apparent concern in *Montana*)[295] or the

287. *See id.*; *see also* Frickey, *Colonialism*, *supra* note 105, at 6–7 (noting the "unstated assumption" behind the Court's recent Indian-law cases that "tribal sovereignty over non-Indian areas and tribal authority to regulate significant nonmember interests are inconsistent with what the Supreme Court presumes to be the wishes of Congress").

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

289. *See* Frickey, *Colonialism*, *supra* note 105, at 58.

290. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (2020) ("For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument.").

291. *See supra* note 167 and accompanying text.

292. *See* Fletcher, *Unifying*, *supra* note 135, at 840 ("Frankly, it is not palatable to argue for dramatic common law reform when the federal judiciary has decided so many cases using the *Montana-Strate* analysis.").

293. *See* Plains Com. Bank, v. Long Fam. Land & Cattle Co., 554 U.S. 316, 330 (2008) (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001)).

294. *See id.* (citing *Atkinson*, 532 U.S. at 655 and Strate v. A-1 Contractors, 520 U.S. 438, 458 (1997)).

295. *See supra* note 127 and accompanying text.

worries about due process in tribal court that have seemed to underlie its adjudicative-jurisdiction cases.[296]

Opening up *Montana*'s exceptions to a potentially broader reading, therefore, seems the least complicated path toward allowing tribes more scope to regulate nonmembers. Where an expanded view of the consensual-relationship exception seems the most natural route for extending tribal court jurisdiction,[297] given its similarity to concepts such as purposeful availment in personal-jurisdiction analysis, the health-and-welfare exception seems the most logical fit for allowing a broader scope of tribal regulation.[298] The COVID-19 pandemic makes plain the degree to which a basic, clearly defined police power over all citizens, not just some, is essential to a well-functioning government, especially but not exclusively in times of crisis. Moreover, in the state realm, litigation about COVID-19 restrictions has produced a wealth of cases in which courts have sought to adapt the *Jacobson* framework to accommodate more contemporary tiered scrutiny and concerns about constitutional rights.[299] These cases provide a recent example of how the state police power even at its apogee can be balanced with attention to individual rights;[300] they should serve to reassure courts that allowing tribes a far more robust power to regulate than *Montana* currently allows can be reconciled with concern for nonmember interests.

The focus on regulation is not intended to deny that the other areas *Montana* has touched—tribal court jurisdiction and taxation—are equally important concerns for tribes. But tribal regulation is distinct from these areas for a few reasons that may make the Court more receptive to arguments to extend it.

First, as previously discussed, the Court has not examined the issue of tribal regulation in some time. The closest it came was in *Plains Commerce Bank*, where it grounded its conclusion that the tribal court lacked jurisdiction in the absence of underlying tribal regulatory authority.[301] But even there, the Court was careful to announce the limits of its holding and to emphasize that it applied to land sales, not

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296. *See Strate*, 520 U.S. at 459 (discussing possible burdens on a nonmember defendant appearing in an "unfamiliar" tribal court).

297. *See* Florey, *Uniqueness*, *supra* note 137, at 1527 (noting that "on its face [the consensual relationship] exception might seem to support comparisons to the notion of minimum contacts in personal jurisdiction").

298. Many canonical cases involving the state police power describe it in similar terms. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905) ("The good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests[.]").

299. For just a small sampling of these cases, see, for example, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring); Carmichael v. Ige, 470 F. Supp. 3d 1133, 1141–42 (D. Haw. 2020); Bayley's Campground v. Mills, 463 F. Supp. 3d 22, 30–32 (D. Me. 2020); Six v. Newsom, 462 F. Supp. 3d 1060, 1072–73 (C.D. Cal. 2020); Lawrence v. Colorado, 455 F. Supp. 3d 1063, 1070–72 (D. Colo. 2020).

300. *See* Doran, *supra* note 105, at 140 (suggesting that a "political backlash" could occur if tribes were perceived to have the power to ignore fundamental rights).

301. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008).

nonmember conduct.[302] Indian country and tribal governance have changed substantially since *Montana*, but the Court has so far failed to grapple with today's different circumstances.[303] Nor has it ever articulated a clear rationale for extending its apparent concern in *Montana* with unequal treatment of nonmembers to regulations that apply equally to all reservation residents.[304]

Second, the Court may be swayed by the fact that tribal rules, as applied to nonmembers, often fill a void in authority rather than competing with a state equivalent. The Court has often expressed interest in maintaining a status quo where state courts hear cases against nonmember defendants as usual, and state and local governments can continue to receive their expected revenue streams.[305] In Indian country, however, much nonmember behavior is not subject to regulation by either tribal or state governments;[306] there is, in these cases, nothing for tribal rules to displace. This lack of direct conflict with state interests could make a broader understanding of the *Montana* health-and-welfare exception more palatable to the Court in the regulatory context than in others.

Further, as previously noted, fairness concerns weigh in favor of, not against, tribes' ability to apply neutral legislative rules to nonmembers living on a reservation. It is difficult to justify why a tribe member must follow day-to-day rules that her neighbor, a nonmember on private fee land, does not. This is particularly true because—in contrast to nonmember defendants in tribal court, who may have been in Indian country relatively transiently[307]—a person who lives or owns land on a reservation can be reasonably expected to have familiarized themselves with tribal law and policies.

Urging that tribes should have greater scope to regulate under *Montana* need not entail neglecting other tribal sovereign powers. Even if a reexamination of the *Montana* exceptions started with tribes' regulatory jurisdiction, it need not end

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302. *See id.* at 334.

303. *See* Reid Peyton Chambers, *Reflections on the Changes in Indian Law, Federal Indian Policies, and Conditions on Reservations Since the Late 1960s*, 46 ARIZ. ST. L.J. 729, 736–37 (2014) (noting that, in the past few decades, "tribes . . . have taken control over governing their reservations" with the result that "conditions on most reservations today are in many ways dramatically different from the late 1960s").

304. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 443 (1989) (Stevens, J., announcing the judgment of the Court in part and concurring in part).

305. A striking example of this phenomenon is *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220–21 (2005), in which the Court held, in essence, that the divestiture of full tribal control through land sales operated as a one-way ratchet; the tribe could not regain its sovereign power to remain free from local taxes by buying its land back from nonmembers. The Court indicated its desire not to disrupt the status quo, noting the area's current "distinctly non-Indian character" and concluding that it would "decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns." *Id.* at 202–03.

306. *See* Fletcher, *Resisting*, *supra* note 78, at 1002.

307. In *Strate*, for example, the nonmember defendant was a contractor on the reservation to do landscaping work. *See* Strate v. A-1 Contractors, 520 U.S. 438, 443 (1997). This connection—while meaningful and deliberate—is of more limited duration than that of someone who owns land in Indian country and/or intends to reside there long-term.

there. Progress in expanding tribal legislative powers could lay the groundwork for similar gains in other areas important to tribal sovereignty, insofar as taxation and litigation—particularly when initiated by the tribe itself—can be seen as additional instruments of regulation.[308]

At the same time, a note of caution is warranted, about both Justice Gorsuch in particular and the Court as a whole. Not all of the justices in the five-justice pro-tribal majorities in recent cases have been consistently supportive of tribal rights,[309] and the single-vote victories tribes have won mean that the replacement of Justice Ginsburg by Justice Barrett could quickly reverse any progress, depending on what Justice Barrett's views on tribal issues (now largely unknown) turn out to be.[310] Further, while early signs are promising, it remains unclear exactly how far Justice Gorsuch's sympathy for tribal rights extends. As a Tenth Circuit judge prior to his elevation to the Court, then-Judge Gorsuch voted for pro-tribal results the majority of the time, but with some notable exceptions.[311] On nontribal issues, Justice Gorsuch has voted fairly reliably (although not universally)[312] with the Court's conservative faction.[313] While justices' positions on tribal sovereignty themselves often fail to map ideological lines,[314] some tribal issues nonetheless overlap with more politically charged questions. For example, Justice Gorsuch's frequently pro-business stances as an appellate judge—and, in particular, his tendency to side with defendants on procedural issues[315]—were noted by many prior to his confirmation.[316] It remains to be seen how Justice Gorsuch might react when tribal and business interests collide—as they did, for example, in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, decided just prior to his confirmation, where a tribe sought to hold a corporation to account in tribal court.[317]

Nonetheless, for the first time in perhaps decades, there appears to be hope for making progress on the question of tribal legislative authority—and perhaps, by extension, for tribes' taxation and adjudicative powers, insofar as those can be framed as adjuncts of effective tribal governance more generally. While many factors contribute to this cautiously optimistic view, the tribal experience of

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308. *See supra* notes 249–50 and accompanying text.

309. *See* Berger, *supra* note 87, at 1912–13 ("[U]ntil recently, the more liberal justices on the current Court have frequently voted to undermine tribal interests[.]").

310. *See id.* at 1942.

311. *See id.* at 1941–42.

312. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1734 (2020).

313. *See Neil Gorsuch*, BALLOTPEDIA, https://ballotpedia.org/Neil_Gorsuch (last visited Apr. 11, 2021) (analyzing Justice Gorsuch's voting record).

314. *See* Berger, *supra* note 87, at 1911–14.

315. *See Gorsuch on Rule 23 and CAFA*, JDSUPRA (Feb. 23, 2017), https://www.jdsupra.com/legalnews/gorsuch-on-rule-23-and-cafa-19108/.

316. *See, e.g.*, Sara Randazzo, *Judge Neil Gorsuch's Time on Bench: Several Opinions Favor Businesses Over Consumers*, WALL ST. J. (Jan. 31, 2017), https://www.wsj.com/articles/judge-neil-gorsuchs-time-on-bench-several-opinions-favor-businesses-over-consumers-1485912330; David Smith, *Democrats Will Seek to Tie Gorsuch to Trump as a Judge Soft on Big Business*, GUARDIAN (Mar. 20, 2017), https://www.theguardian.com/law/2017/mar/20/neil-gorsuch-senate-democrats-big-business-trump.

317. 136 S. Ct. 2159 (2016).

COVID-19—and the challenge tribes' limited authority over nonmembers has posed to them during this crisis—strengthens the case that the current complicated *Montana* landscape needs to change. The *McGirt* majority's striking willingness to regard tribes as possessing the normal characteristics of sovereigns, including territorial authority over people and land within their borders, provides a potential starting point for reconsidering *Montana*'s strictures.

CONCLUSION

For many years, tribes have made the best of their regulatory powers even while facing strict yet uncertain limits on the degree to which they can apply them to nonmembers within their borders. The same has been true during the COVID-19 pandemic. Many tribes recognized the risk of the disease early and acted quickly with approaches rooted both in science[318] and community norms.[319] While tribes have had some success fighting back a virus that remains a grave threat to them, the uncertainty of tribal regulatory jurisdiction over all people and land within reservations has complicated the tribal response.

Montana's limits on tribal regulation were never grounded in preexisting law and, from the start, have caused needless difficulties for tribes, as the COVID-19 response makes manifest. Changes in Supreme Court membership and recent decisions like *McGirt* suggest that the Court might, for the first time in decades, be open to a broader understanding of tribal authority. While tribal sovereignty has many dimensions, perhaps the most basic is the power to make rules that apply uniformly within tribal territory, regardless of who happens to own a particular parcel of land. It is time for the Court to change *Montana*'s framework to allow tribes to do so.

318. *See supra* notes 37–45 and accompanying text.
319. *See supra* note 36 and accompanying text.

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