

A FRAMEWORK FOR TRIBAL PUBLIC HEALTH LAW

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INTRODUCTION

Law plays an integral role in advancing public health. Public health advancements in areas such as vaccine-preventable diseases, tobacco control, and motor vehicle safety have been driven by legal interventions, such as vaccina-

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tion requirements for school attendance, smoke-free laws, and seat belt laws.¹ The field of public health law continues to expand in the depth and breadth of the study of law as a tool in advancing public health. However, much of this research has focused on state and local governments, and does not contemplate the cultural, legal, and practical realities of Tribes and American Indian and Alaska Native communities.²

The federal government recognizes 573 Tribes within the boundaries of the United States³ and maintains a government-to-government relationship with these Tribes.⁴ Unlike state and local governments, Tribes are sovereign nations and have the inherent authority to “make their own laws and be ruled by them.”⁵ Under federal law, the United States maintains a moral and legal trust responsibility with Tribes.⁶ The trust responsibility is a “fiduciary obligation . . . to protect [T]ribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal [Indian] law.”⁷ These unique governments, and the unique relationship Tribes maintain with states and the federal government, merit their own investigation and research in terms of public health law.

Tribal exercise of sovereignty is not only political but also cultural, in the form of practices unique to each Tribe.⁸ “[C]ultural sovereignty encompasses the spiritual, emotional, mental, and physical aspects of [Native people’s] lives,” and is necessary to asserting political sovereignty.⁹ Culture and cultural practices also serve as a mechanism to promote health and wellness.¹⁰

¹ Anthony D. Moulton et al., *Perspective: Law and Great Public Health Achievements*, in *LAW IN PUBLIC HEALTH PRACTICE* 3, 8 (Richard A. Goodman et al. eds., 2d ed. 2007) (highlighting the essential role of law in advancements in public health); *CTRS. FOR DISEASE CONTROL & PREVENTION, Ten Great Public Health Achievements—United States, 1900–1999*, 48 *MORBIDITY & MORTALITY WKLY. REP.* 241, 241–43 (1999) (listing the ten great public health achievements of the twentieth century).

² See *infra* Part I.

³ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs Notice, 83 Fed. Reg. 34,863 (July 23, 2018).

⁴ See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01(1)(a) (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK].

⁵ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

⁶ See, e.g., *United States v. Mitchell*, 445 U.S. 535, 543–44 (1980); *Menominee Tribe v. United States*, 391 U.S. 404, 408 (1968); *Seminole Nation v. United States*, 316 U.S. 286, 291–92 (1942); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975).

⁷ U.S. Dep’t of the Interior, *Frequently Asked Questions*, INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/3Z49-SQUG>] (last visited July 27, 2019).

⁸ See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 *STAN. L. & POL’Y REV.* 191, 196 (2001).

⁹ *Id.* at 202, 210.

¹⁰ See *Culture is Prevention*, SAMHSA NATIVE CONNECTIONS, <https://www.samhsa.gov/sites/default/files/nc-oy1-task-3-culture-is-prevention-final-2018-05-31.pdf> [<https://perma.cc/PB82-4682>] (last visited Oct. 15, 2019).

Evidence has shown that American Indian and Alaska Native communities are disproportionately burdened by a variety of health outcomes including diabetes, unintentional injuries such as motor vehicle injuries, and chronic liver disease.¹¹ These health disparities further support the value of developing a framework in which to understand Tribal public health law through a Tribal lens, rather than through state and local public health authorities.

This article offers a framework for public health law as applied to Tribes, whose history, culture, legal structure, and population health outcomes differ greatly from other jurisdictions. Additionally, the complexities of both federal Indian law and emerging public health crises establish a need to evaluate these issues in a systematic way. Part I of this article provides background on public health law, highlighting the insufficiency of existing scholarship in Tribal public health. Part II proposes a framework for understanding and researching Tribal public health law based on Tribal sovereignty, federal Indian law, Tribal law, and an analysis of structural violence. Finally, Part III concludes with a case study to demonstrate the need for establishing a separate framework for Tribal public health law and how this framework can support thoughtful and rigorous research in this area.

I. PUBLIC HEALTH LAW

Public health law, as defined by renowned public-health-law scholar Lawrence O. Gostin, refers to a government's "legal powers and duties of the state, in collaboration with its partners . . . , to ensure the conditions for people to be healthy . . . , and [refers to] the limitations on the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals."¹² While this definition contemplates the field through the lens of a government's legal authority to engage in activities to promote public health, other definitions of public health law define it more broadly to include the study of any law that has an impact on population health.¹³

Public health law scholars and practitioners are increasingly emphasizing the value of legal epidemiology—the scientific study of law and its impact on population health—and innovative methodologies in which to conduct these studies.¹⁴ It does this by collecting, reviewing, and categorizing law across a variety of jurisdictions in a systematic way and documenting this research in a

¹¹ *Disparities*, INDIAN HEALTH SERV., <https://www.ihs.gov/newsroom/factsheets/disparities/> [<https://perma.cc/G628-PTKE>] (last visited Oct. 17, 2019).

¹² LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 4 (2d ed. 2008).

¹³ See, e.g., Montrece McNeill Ransom, Course Presentation, *Public Health Law 101*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 2014) (information on course available at https://www.cdc.gov/phlp/publications/phl_101.html [<https://perma.cc/R7DY-3XP7>]).

¹⁴ See, e.g., Scott Burris et al., *A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology*, 37 ANN. REV. PUB. HEALTH 135, 136–37 (2016); *Introduction to Legal Epidemiology*, CHANGE LAB SOLUTIONS, <http://changelabsolutions.org/phla/intro-legal-epidemiology> [<https://perma.cc/9RV4-Z48C>] (last visited July. 27, 2019).

protocol ensuring that the methods and results can be reproduced, assessed, and studied for its scientific value.¹⁵ The data can then be mined to determine trends across jurisdictions and evaluated for the efficacy of these laws and their impact on health outcomes.¹⁶

Scholars, practitioners, and attorneys in the areas of Indian health, public health, and law have greatly contributed to the knowledge base in regards to Tribal health care and public health systems.¹⁷ They have developed resources chronicling the federal Indian health policies,¹⁸ offered model and example Tribal code language on various public health issues,¹⁹ and provided commentary on specific public health law topics as they relate to Tribes including public health surveillance,²⁰ emergency preparedness,²¹ and access to traditional means of subsistence.²² Organizations like the National Indian Health Board provide invaluable surveillance and commentary on legislation and policy impacting Indian health.²³

¹⁵ See Evan D. Anderson et al., *Measuring Statutory Law and Regulations for Empirical Research*, in PUBLIC HEALTH LAW RESEARCH: THEORY AND METHODS 420, 438 (Scott Burris & Alexander C. Wagenaar eds., 2013).

¹⁶ See *id.* at 447.

¹⁷ For a selection of Tribal public health law resources see Aila Hoss, *Tribal Public Health and the Law: Selected Resources*, CTRS. FOR DISEASE CONTROL & PREVENTION: PUB. HEALTH L. (May 31, 2016), <http://www.cdc.gov/php/docs/tribalph-resource.pdf> [https://perma.cc/WAT5-YDDF] [hereinafter *Tribal Public Health and the Law: Selected Resources*].

¹⁸ See, e.g., Donald Warne & Linda Bane Frizzell, *American Indian Health Policy: Historical Trends and Contemporary Issues*, 104 AM. J. PUB. HEALTH S263, S263–64 (2014).

¹⁹ See, e.g., MODEL TRIBAL HEALTH & SAFETY CODE 3, 5 (Inter Tribal Council of Ariz., draft., Jan. 2005), <http://gptchb.org/wp-content/uploads/2014/05/MODEL-TRIBAL-HEALTH-CODE.pdf> [https://perma.cc/TXR3-RT36]; Aila Hoss et al., *Menu of Selected Tribal Laws Related to Infectious Disease Control*, CTRS. FOR DISEASE CONTROL & PREVENTION: PUB. HEALTH L. 2, 5 (July–Aug. 2014), <http://www.cdc.gov/php/docs/tribalidlaws-brief.pdf> [https://perma.cc/6WTZ-ES9E] [hereinafter *Menu of Selected Tribal Laws Related to Infectious Disease Control*]; *Drafting Tribal Public Health Laws and Policies to Reduce and Prevent Chronic Disease*, PUB. HEALTH L. CTR. 1, 1–2, <http://www.publichealthlawcenter.org/sites/default/files/resources/fs.tribal.health.policies.July2015.pdf> [https://perma.cc/S3BP-LTDQ] (last updated June 2015); *Tribal Public Health Law*, NCAI POL'Y RES. CTR., <http://www.ncai.org/policy-research-center/initiatives/projects/tribal-public-health-law> [https://perma.cc/T742-YB9H] (last visited July 27, 2019).

²⁰ See, e.g., James G. Hodge, Jr. et al., *Legal Issues Concerning Identifiable Health Data Sharing Between State/Local Public Health Authorities and Tribal Epidemiology Centers in Selected U.S. Jurisdictions*, COUNCIL ST. & TERRITORIAL EPIDEMIOLOGISTS, <https://www.cste.org/resource/resmgr/PDFs/LegalIssuesTribalJuris.pdf> [https://perma.cc/C345-MRRD] (last updated Nov. 8, 2011).

²¹ Ralph T. Bryan et al., *Public Health Legal Preparedness in Indian Country*, 99 AM. J. PUB. HEALTH 607, 607, 610 (2009); Gregory Sunshine & Aila Hoss, *Emergency Declarations and Tribes: Mechanisms Under Tribal and Federal Law*, 24 MICH. ST. INT'L L. REV. 33, 35 (2015).

²² See, e.g., Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights*, 58 CLEV. ST. L. REV. 273, 276 (2010).

²³ *About NIHB*, NAT'L INDIAN HEALTH BOARD, https://www.nihb.org/about_us/about_us.php [https://perma.cc/8662-ZPQK] (last visited July 27, 2019).

However, foundational public health law literature remains heavily focused on state and local government authority and corresponding methodologies for studying state and local law.²⁴ Public health law scholarship frequently (1) omits Tribes or American Indian and Alaska Natives from its discussion, (2) quotes language that references Tribes without analysis (*e.g.*, quoting the Commerce Clause, which references Indians), (3) discusses Tribes generally in the same context as state or local governments, (4) references data indicating that Tribes or American Indian Alaska Natives are disproportionately burdened by health outcomes without further analysis, or (5) references Tribes in very specific contexts such as informed consent in research or religious freedom.²⁵ Even amongst the resources that offer some description of Tribal public health law, the summary is short, general, and fails to provide any analysis or specific application on a public health issue.²⁶ These resources do not discuss the inherent authorities of Tribal governments to engage in public health activities, the unique role in which Tribes can promote health in their Tribal codes, or the complicated jurisdictional arrangements outlined in federal Indian law and policy that can also impact Tribal public health.²⁷ Tribal land, tax bases, and healthcare systems are markedly different from those in state and local governments.²⁸ Additionally, there is remarkable diversity between Tribal governments, laws, histories, and cultures.²⁹ Finally, public health law research methodologies do not contemplate the challenges to securing quality American Indian and Alaska Native health data³⁰ or the limited number of Tribal codes in legal databases.³¹

²⁴ See *infra* Appendix.

²⁵ See *infra* Appendix.

²⁶ See, *e.g.*, SCOTT BURRIS ET AL., THE NEW PUBLIC HEALTH LAW: A TRANSDISCIPLINARY APPROACH TO PRACTICE AND ADVOCACY 28–29 (2018); JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL 62–63 (3d ed. 2018).

²⁷ See *infra* Appendix.

²⁸ See COHEN'S HANDBOOK, *supra* note 4, §§ 8.01, 15.01, 22.04.

²⁹ See MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 16–17 (West Acad. Pub. 2017).

³⁰ See BEST PRACTICES IN AMERICAN INDIAN & ALASKA NATIVE PUBLIC HEALTH: A REPORT FROM THE TRIBAL EPIDEMIOLOGY CENTERS 2013 125 (2013), http://itcaonline.com/wp-content/uploads/2014/03/TEC_Best_Practices_Book_2013.pdf [<https://perma.cc/D9F5-UN5C>].

³¹ See, *e.g.*, Anderson et al., *supra* note 15, at 424 (failing to discuss legal epidemiology in the context of Tribal law research); Burriss et al., *supra* note 14, at 136. As sovereign nations, Tribes have the authority to determine which databases will house their Tribal codes and the frequency with which they will be updated. See David E. Selden, *Researching American Indian Tribal Law*, 43 COLO. LAW. 51, 51 (2014). There are twenty-four Tribal Codes available on WestlawNext. *Id.* at 52. There is much variability in terms of the dates of these codes, but many are several years old. See *Tribal Codes*, WESTLAW, <https://legal.thomson-reuters.com> [<https://perma.cc/RPF6-LSBH>] (narrow in WestlawNext by “Statutes & Court Rules”). Lexis Advance maintains eight Tribal Codes. See Selden, *supra*, at 52. The National Indian Law Library and the Library of Congress maintain a database of Tribal law but does not maintain the codes of every Tribe. See *id.* The National Congress of American Indians was funded to maintain a Tribal public health law database, but that project was never com-

Yet, the need for more Tribal public health law scholarship and resources only continues to grow,³² and a framework for Tribal public health law can provide a foundation for future research. For example, health departments are increasingly seeking accreditation through the Public Health Accreditation Board (PHAB), and these accreditation standards specifically measure the legal authorities of the health departments.³³ During listening sessions at the National Tribal Forum for Excellence in Community Health Practice, Tribes indicated that several of the measures were confusing and potentially inaccurate to Tribes.³⁴ While some Tribes have secured PHAB accreditation,³⁵ the PHAB accreditation standards do not contemplate or differentiate between Tribes at all,³⁶ and there were no separate guidance documents for Tribal health departments until 2018.³⁷

II. TRIBAL PUBLIC HEALTH LAW

Tribal public health law refers to bodies of law, including Tribal, federal, state, or others, that can impact the population health of Tribal or American Indian and Alaska Native communities. A framework for Tribal public health law includes four pillars that should be acknowledged or considered in any Tribal public health law inquiry. The first pillar is that Tribes are sovereign nations that maintain inherent authorities. Second, federal Indian law impacts the rela-

pleted. *See id.* at 53–54. For a discussion on researching Tribal law, see Kelly Kunsch, *A Legal Practitioner's Guide to Indian and Tribal Law Research*, 5 AM. INDIAN L.J. 101, 102 (2017). *See also* Selden, *supra*. Some Tribes maintain and update their codes and Tribal websites, but this varies from Tribe to Tribe. *See id.* at 53.

³² For example, during the author's tenure as a staff attorney at the Centers for Disease Control and Prevention's Public Health Law Program, the office received thirty-one technical assistance requests on Tribal public health law issues in 2014, fifty-eight in 2015, fifty-two in 2016, and over forty halfway through 2017. Data on file with author.

³³ *Standards & Measures, Version 1.5*, PUB. HEALTH ACCREDITATION BOARD 1, 1 (Dec. 2013), https://www.phaboard.org/wp-content/uploads/2019/01/PHABSM_WEB_LR1.pdf [<https://perma.cc/ARZ6-5JGW>].

³⁴ National Tribal Forum for Excellence in Community Health Practice, (Aug. 30, 2016) (on file with author) (referring to listening sessions PHAB held with Tribal communities). For example, Domain 6, which is about enforcing public health laws, and Domain 12, which is about maintaining capacity to engage the public health governing entity, have been confusing for Tribes interested in pursuing PHAB accreditations. *Id.*

³⁵ *See 16 Health Departments Awarded PHAB Accreditation: Cherokee Nation First Tribal Health Department in U.S. to Achieve Designation*, PUB. HEALTH ACCREDITATION BOARD, <http://www.phaboard.org/54-percent-of-u-s-population-now-served-by-a-phab-accredited-health-department/> [<https://perma.cc/8ZBX-8HN3>] (last visited Oct. 21, 2019).

³⁶ *See Standards & Measures, Version 1.5*, *supra* note 33, at 2; *see also Standards & Measures, Version 1*, PUB. HEALTH ACCREDITATION BOARD 1, 2 (May 2011), <http://www.phaboard.org/wp-content/uploads/PHAB-Standards-and-Measures-Version-1.0.pdf> [<https://perma.cc/EG6E-JZXP>].

³⁷ *See Supplemental Process and Documentation Guidance for Tribal Public Health Department Accreditation*, PUB. HEALTH ACCREDITATION BOARD 1, 2 (Feb. 2018), <http://www.phaboard.org/wp-content/uploads/PHAB-Tribal-Guidance-Final-1.pdf> [<https://perma.cc/NKY3-U5LK>].

tionship between Tribes, states, and the federal government and in turn impacts public health. Third, Tribes exercise their authority through Tribal law in the form of constitutions, codes, cases, customary law, and intertribal coordination. The fourth pillar acknowledges that non-Tribal governmental public health interventions can result in structural violence and further an adverse impact on Tribal communities, especially the interventions that occur without Tribal consultation. These pillars can be used by any government navigating public health issues that implicate Tribes and American Indians and Alaska Natives, including Tribal governments themselves. However, local, state, and federal actors should pay particular attention to the fourth pillar by ensuring that their governmental actions do not perpetuate structural violence. This section discusses these principles in more detail and their application to Tribal public health.

A. Tribal Sovereignty and Inherent Public Health Authority

Tribes have existed as distinct political entities in what is now the United States since time immemorial.³⁸ Because Tribes predate both colonial and federal governments, Tribal sovereignty is not based on, but recognized by, federal law.³⁹ Where the U.S. Constitution grants state sovereignty, it does not for Tribes.⁴⁰ Tribal sovereignty includes an inherent authority, or a “plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law.”⁴¹ Inherent authority includes various powers such as determining the form of Tribal government and the power to legislate and tax.⁴²

Tribes exercise political sovereignty alongside cultural sovereignty, which includes their unique cultural teachings and practices.⁴³ Cultural sovereignty ensures that Native people have the authority, through law and governance, to practice and protect their cultural teachings and practices.⁴⁴ As W. Richard West, founding director of the National Museum of the American Indian (Cheyenne Arapaho), wisely noted, the “goal of political sovereignty is protecting a way of life.”⁴⁵

³⁸ STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 1 (4th ed. 2012).

³⁹ *Id.* at 81; *see also* FLETCHER, *supra* note 29, at 5.

⁴⁰ 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.”).

⁴¹ COHEN’S HANDBOOK, *supra* note 4, §§ 4.01(1)(b), 4.01(2); *see also* United States v. Wheeler, 435 U.S. 313, 322 (1978) (quoting FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1945)); Williams v. Lee, 358 U.S. 217, 220 (1959) (stating that Tribes have the “right . . . to make their own laws and be ruled by them.”); FLETCHER, *supra* note 29, at 5–6.

⁴² *See* COHEN’S HANDBOOK, *supra* note 4, §§ 4.01(1), 4.01(2) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)).

⁴³ *See* Coffey & Tsosie, *supra* note 8, at 196.

⁴⁴ *See id.* at 210.

⁴⁵ *Id.* at 202 (citing Michelle Hibbert, *Galileos or Grave Robbers? Science, the NAGPRA, and the First Amendment*, 23 AM. INDIAN. L. REV. 425, 434 n.66 (1998–99)).

Federal law dictates that “Indian [T]ribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”⁴⁶ There is no evidence suggesting that the inherent authority of a Tribe to protect health and welfare has been withdrawn or abrogated; in fact, this authority has been recognized as an inherent component of Tribal governing systems by the Supreme Court.⁴⁷ Thus, “[T]ribes have inherent authority as sovereign nations to protect and promote the health and welfare of their citizens, using methods most relevant for their communities.”⁴⁸ In fact, public health law scholars describe the protection of public health and welfare of citizens as not only an authority but also a duty and obligation.⁴⁹ Foundational principles of public health law provide rich discussion on the scope of a government’s public health authority, sovereign or otherwise. For example, *parens patriae* authority refers to a government’s authority to intervene and implement strategies to protect the well-being of their community, like secondhand smoke laws.⁵⁰

B. Federal Indian Law and Public Health

Federal Indian law is the framework of law that governs the rights, relationships, and responsibilities between Tribes, states, and the federal government.⁵¹ This law recognizes Tribal sovereignty and the exercise of this sovereignty in case law, executive orders, treaties, agreements, and statutes.⁵² Because federal Indian law coexists with Tribal inherent sovereignty, it can impact the exercise of this sovereignty. However, federal law, exercised through federal plenary power, also establishes substantive requirements in various settings that can and do impact Tribal public health.⁵³ The origins of federal Indian law are rooted in international principles of colonization and discovery, and are distinct from any other area of law in American legal practice. Thus, in order to understand the current health care structure for Tribal communities, this section offers a basic understanding of the principles of federal Indian law. It then outlines the statutes and regulations that specifically address the health of Tribal communities.

⁴⁶ *Wheeler*, 435 U.S. at 323.

⁴⁷ See *Montana v. United States*, 450 U.S. 544, 566 (1981). Under the *Montana* test, Tribes can maintain civil jurisdiction against non-member activities on reservation lands in certain instances: “A [T]ribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe.” *Id.*

⁴⁸ *Tribal Public Health and the Law: Selected Resources*, *supra* note 17.

⁴⁹ See, e.g., GOSTIN, *supra* note 12, at 8–9.

⁵⁰ See HODGE, *supra* note 26, at 57–58.

⁵¹ See MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 3 (2016).

⁵² See *id.* at 4.

⁵³ *Id.* at 4–5.

1. *Principles of Federal Indian Law*

The Supreme Court held that Congress, as opposed to the Tribes, has plenary power to legislate regarding all matters concerning Indians.⁵⁴ This principle is essential in understanding the role the federal government has over Tribes.⁵⁵ The federal government's plenary power can preempt nearly all Tribal authority.⁵⁶ However, federal legislation does not apply to Tribes or Indians on Tribal lands unless specifically authorized by Congress.⁵⁷ Without congressional authorization, Tribal law remains governing law over a Tribe.⁵⁸

While Congress has plenary authority over Tribes, state laws cannot infringe on Tribal sovereignty.⁵⁹ In *Williams v. Lee*, the Supreme Court articulated an infringement test to determine whether a state's law violates this principle: "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."⁶⁰ This case is significant because it highlights the fact that state laws are inapplicable on the Tribes' land. Of course, state laws can still affect the health of Tribal communities, such as environmental laws affecting the quality of air or water.

In the context of civil jurisdiction, the *Montana* test establishes that Tribes can maintain civil jurisdiction against non-member activities on reservation lands in certain instances: "A [T]ribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe."⁶¹ In practice, the potential for real conflicts of law and competing jurisdiction can exist, and there is limited case law on how civil jurisdictional principles may be applied in public health contexts.⁶²

The federal government has a policy to provide and protect Tribal communities because of its role in "the destruction of Indian civilization,"⁶³ based on treaties, agreements, legislation, and case law.⁶⁴ In light of history, treaties,

⁵⁴ See, e.g., *United States v. Kagama*, 118 U.S. 375, 384–85 (1886); *Ex parte Crow Dog*, 109 U.S. 556, 568–69 (1883).

⁵⁵ See FLETCHER, *supra* note 51, at 4–5.

⁵⁶ See *id.* at 4.

⁵⁷ *Id.* at 226–27.

⁵⁸ *Id.*

⁵⁹ *Id.* at 5–6.

⁶⁰ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

⁶¹ *Montana v. United States*, 450 U.S. 544, 566 (1981).

⁶² For an article discussing the legal authorities and challenges of implementing Tribal dental health programs, see Geoffrey D. Strommer et al., *Tribal Sovereign Authority and Self-Regulation of Health Care Services: The Legal Framework and the Swinomish Tribe's Dental Health Program*, 21 J. HEALTH CARE L. & POL'Y 115, 150–56 (2018).

⁶³ AM. INDIAN POL'Y REV. COMMISSION, REP. ON INDIAN HEALTH: TASK FORCE SIX 33 (1976).

⁶⁴ *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942); U.S. Dep't of the Interior, *supra* note 7.

agreements, and legislation, the Supreme Court has also found that a unique trust relationship exists between the federal government and the Tribes.⁶⁵ Thus, the federal government has a duty to provide health services to the Tribes. However, the limits of the policy and the trust are not well-defined in the context of health services.

2. *Statutes and Regulations*

While many treaties reference the provision of health care services in exchange for ceded territories, the federal provision of health care to Indians is marked by a history of congressional action and further codified in regulation. In an effort to prevent the spread of infectious disease to United States soldiers, military physicians and missionaries treated Indians for diseases such as smallpox throughout the early 1800s.⁶⁶ The first congressional action regarding Indian health occurred in 1832, which authorized the Army to administer smallpox vaccinations for Indians.⁶⁷ This action was followed by treaties between individual Tribes and the federal government to provide various health services such as physicians, medical supplies, and hospitals.⁶⁸ It is not clear that the federal government complied with these treaties as there were only four hospitals and seventy-seven physicians servicing Indians by 1880.⁶⁹

The federal commodities program greatly affected the health of Tribal communities.⁷⁰ As the federal government removed the Tribes to the western United States, it had a duty to provide them with food.⁷¹ The commodities program only offered foods of low nutritional value, such as lard and flour, which would keep during the trip west.⁷² Similarly, Indians became less physically active after the government placed them on small reservations and limited their ability to hunt and gather, a traditional means of sustenance for many Tribes.⁷³

With the spread of disease throughout Indian reservations and crowded boarding schools, Congress was pressured to increase health care appropriations for Indians.⁷⁴ In 1921, Congress passed the Snyder Act, which provided

⁶⁵ See, e.g., *United States v. Mitchell*, 445 U.S. 535, 542 (1980); *Menominee Tribe v. United States*, 391 U.S. 404, 410–11 (1968); *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 375 (1st Cir. 1975).

⁶⁶ COHEN'S HANDBOOK, *supra* note 4, § 22.04(1).

⁶⁷ Act of May 5, 1832, ch. 75, 4 Stat. 514 (convening Indian tribes for the purpose of arresting the progress of smallpox by vaccination).

⁶⁸ COHEN'S HANDBOOK, *supra* note 4, § 22.04(1).

⁶⁹ *Id.*

⁷⁰ Dana Vantrease, *Commod Bods and Frybread Power: Government Food Aid in American Indian Culture*, 126 J. AM. FOLKLORE 55, 57 (2013); see also Mary Story et al., *The Epidemic of Obesity in American Indian Communities and the Need for Childhood Obesity-Prevention Programs*, 69 AM. J. CLINICAL NUTRITION 747S, 751S–52S (1999).

⁷¹ See *Unnatural Causes: Bad Sugar* (California Newsreel 2008).

⁷² See *id.*

⁷³ See *id.*

⁷⁴ U.S. Nat'l Library of Med., *1921: Congress Funds American Indian Health Care*, NATIVE VOICES, <https://www.nlm.nih.gov/nativevoices/timeline/427.html> [https://perma.cc/UQ9T-

appropriations “for the benefit, care, and assistance . . . [and] [f]or [the] relief of distress and conservation of health” for “Indians throughout the United States.”⁷⁵ Although some improvements were seen, health services remained insufficient to serve Tribal communities.⁷⁶

In an effort to reduce the federal government’s role in Indian services, the Johnson-O’Malley Act gave the Secretary of Interior, who is responsible for Indian affairs, the authority to enter into contracts with states or territories for providing health care to Indians.⁷⁷ At the same time as the Johnson-O’Malley Act, the federal government facilitated Tribal self-government of various services through the Indian Reorganization Act.⁷⁸ It also authorized additional funding to Tribes for these services.⁷⁹

However, Tribal communities remained markedly unhealthy.⁸⁰ Thus, in 1954, the Indian health services underwent reorganization.⁸¹ The responsibility for Indian health services was transferred from the Bureau of Indian Affairs in the Department of the Interior to the United States Public Health Service (later the Department for Health and Human Services).⁸² In 1968, the Indian health services program was officially named the Indian Health Service (IHS).⁸³ Congress also gave IHS increased financial resources.⁸⁴

With the reorganization of IHS, and the start of the Era of Tribal Self-Determination with the *Williams v. Lee* decision discussed supra, Congress dramatically altered the Indian health care system. In 1975, Congress passed the Indian Self-Determination and Education Assistance Act, which allowed IHS to give Tribes funding to administer their own health care.⁸⁵ The following year, Congress passed the Indian Health Care Improvement Act, which sought to improve health services offered by IHS, increase services available to urban Indians, and promote the education and retention of health professionals to work in Indian communities.⁸⁶

Under the current structure of IHS, Tribes have three options that they can elect to receive health services from the government. First, Tribal members can

FF7DJ] (last visited July 27, 2019). The abysmal health conditions on reservations were documented in the “Meriam Report.” LEWIS MERIAM, *THE PROBLEM OF INDIAN ADMINISTRATION* 3 (1928).

⁷⁵ Snyder Act (Indian Affairs Bureau) 25 U.S.C. § 13 (2012 & Supp. IV 2016).

⁷⁶ See COHEN’S HANDBOOK, supra note 4, § 22.04(2)(a).

⁷⁷ Johnson-O’Malley Act, 25 U.S.C. § 5342 (2012 & Supp. IV 2016).

⁷⁸ Indian Reorganization Act, 25 U.S.C. § 5113 (2012 & Supp. IV 2016).

⁷⁹ *Id.*

⁸⁰ See David S. Jones, *The Persistence of American Indian Health Disparities*, 96 AM. J. PUB. HEALTH, 2122, 2128–29 (2006).

⁸¹ Warne & Frizzell, supra note 18, at S263–64.

⁸² 42 U.S.C. § 2001 (2012 & Supp. IV 2016).

⁸³ COHEN’S HANDBOOK, supra note 4, § 22.04(1).

⁸⁴ *Id.*

⁸⁵ Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 (2012 & Supp. V 2017).

⁸⁶ Indian Health Care Improvement Act, 25 U.S.C. § 1601 (2012 & Supp. V 2017).

receive medical services directly from IHS facilities throughout the country.⁸⁷ Second, Tribes can receive funding from IHS and administer their own programs.⁸⁸ Finally, third-party health care providers can also provide health care to Indians through contracts with IHS.⁸⁹ Nearly sixty percent of Tribes have some sort of self-governing contract with IHS.⁹⁰

Eligibility to receive care via IHS is complex and can include individuals that are not Tribal members.⁹¹ In general, to be eligible to receive direct services from IHS programs and facilities, an individual must be of Indian descent and a member of the Indian community to use the facility services.⁹² To receive services from a contracted health entity funded through IHS, an individual must be of Indian descent, belong to a Tribal community, and reside within the Tribal Contract Health Service Delivery Area, which includes trust land, the reservation, and neighboring counties.⁹³ All IHS funded programs must meet certain requirements in order to operate.⁹⁴ Urban Indians, however, have a different set of requirements, which include living in an urban area with a sufficient Indian population and being a member of a Tribe or a relative of a Tribal member within two generations.⁹⁵ Although Indians, as United States citizens and citizens of states, are entitled to receive health benefits from other state and federal programs, IHS remains the primary federal source of health care for Indians.⁹⁶ In its aggregate history, IHS has remained chronically underfunded.⁹⁷

The 1992 amendments to IHCIA authorized the establishment of Tribal epidemiology centers (TECs) to serve Tribes across each Indian Health Service region throughout the United States.⁹⁸ TECs perform a variety of functions, in consultation with Tribes, including:

⁸⁷ *About Us*, INDIAN HEALTH SERV., <https://www.ihs.gov/SelfGovernance/aboutus/> [<https://perma.cc/CET5-6T2A>] (last visited Aug. 1, 2019).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See Eligibility*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs/eligibility/> [<https://perma.cc/Y4CV-NAY6>] (last visited July 29, 2019).

⁹² 42 C.F.R. § 136.12 (2019).

⁹³ *See id.*

⁹⁴ *See Eligibility and Funding*, INDIAN HEALTH SERV., <https://www.ihs.gov/selfgovernance/funding/> [<https://perma.cc/2LPQ-LU9A>] (last visited July 29, 2019).

⁹⁵ Indian Health Care Improvement Act, 25 U.S.C. § 1603 (2012 & Supp. V 2017).

⁹⁶ *About IHS: Agency Overview*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs/overview/> [<https://perma.cc/RX6J-8HQA>] (last visited Aug. 1, 2019).

⁹⁷ *See* Neill F. Piland & Lawrence R. Berger, *The Economic Burden of Injuries Involving American Indians and Alaska Natives: A Critical Need for Prevention*, 32 IHS PRIMARY CARE PROVIDER 269, 270 (2007).

⁹⁸ Aila Hoss et al., *Tribal Epidemiology Centers Designated as Public Health Authorities Under the Health Insurance Portability and Accountability Act* (Apr. 16, 2015), <http://www.cdc.gov/phlp/docs/tec-issuebrief.pdf> [<https://perma.cc/T2G5-34BD>] [hereinafter *Tribal Epidemiology Centers*]. The Indian Health Service, an agency of the U.S. Department of Health and Human Services, provides health care to American Indian and Alaska Native people. *About IHS*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs/> (last visited Aug. 17,

- (1) collect[ing] data relating to, and monitor[ing] progress made toward meeting, each of the health status objectives of the Service, the Indian [T]ribes, [T]ribal organizations, and urban Indian organizations in the Service area;
- (2) evaluat[ing] existing delivery systems, data systems, and other systems that impact the improvement of Indian health;
- (3) assist[ing] Indian [T]ribes, [T]ribal organizations, and urban Indian organizations in identifying highest-priority health status objectives and the services needed to achieve those objectives, based on epidemiological data;
- (4) mak[ing] recommendations for the targeting of services needed by the populations served;
- (5) mak[ing] recommendations to improve health care delivery systems for Indians and urban Indians;
- (6) provid[ing] requested technical assistance to Indian [T]ribes, [T]ribal organizations, and urban Indian organizations in the development of local health service priorities and incidence and prevalence rates of disease and other illness in the community; and
- (7) provid[ing] disease surveillance and assist[ing] Indian [T]ribes, [T]ribal organizations, and urban Indian communities to promote public health.⁹⁹

There are twelve TECs operating in Indian Health Service regions throughout the United States.¹⁰⁰ In an effort to improve TEC data access to legally protected health information, the Patient Protection and Affordable Care Act permanently reauthorized IHCA and “designat[ed] [T]ribal epidemiology centers . . . as public health authorities under the Health Insurance Portability and Accountability Act (HIPAA) and authoriz[ed] TEC access to data held by the US Department of Health and Human Services.”¹⁰¹

While the federal government maintains authority to intervene in infectious disease threats in Indian country, through isolation and quarantine as an example,¹⁰² the day-to-day management of public health rests with the Tribes.¹⁰³ The following section outlines various examples of Tribal laws supporting public health.

2019).

⁹⁹ Indian Health Care Improvement Act § 1621m(b).

¹⁰⁰ *Division of Epidemiology and Disease Prevention: Tribal Epidemiology Centers (TECs)*, INDIAN HEALTH SERV., <https://www.ihs.gov/epi/tecs/centers/> [<https://perma.cc/5VWV-8DS6>] (last visited Aug. 17, 2019).

¹⁰¹ *Tribal Epidemiology Centers*, *supra* note 98; *see also* Indian Health Care Improvement Act § 1621m(e)(1).

¹⁰² 25 U.S.C. § 198 (2012 & Supp. V 2017).

Whenever the Secretary of the Interior shall find any Indian afflicted with tuberculosis, trachoma, or other contagious or infectious diseases, he may, if in his judgment the health of the afflicted Indian or that of other persons require it, isolate, or quarantine such afflicted Indian in a hospital or other place for treatment. The Secretary of the Interior may employ such means as may be necessary in the isolation, or quarantine of such Indian, and it shall be the duty of such Indian so afflicted to obey any order or regulation made by the Secretary of the Interior in carrying out this provision.

Id.

¹⁰³ *See Menu of Selected Tribal Laws Related to Infectious Disease Control*, *supra* note 19.

C. Tribal Law and Public Health

As sovereign nations, Tribes have the authority to maintain governing structures and develop a legal system reflective of each Tribe's unique history, culture, and customs.¹⁰⁴ This is exercised not only in maintaining governing structures, such as executive agencies, Tribal councils, and Tribal court systems, but also through the development of Tribal constitutions, Tribal codes, and Tribal case law.¹⁰⁵ These areas provide opportunity for leadership to implement, support, and enforce these laws. Throughout these bodies of law are examples of the application of Tribal customary laws, which "is essential for the cultural survival of American Indians as a distinct people and as a governing entity."¹⁰⁶ This section offers examples of public health issues across each type of Tribal law.

1. Tribal Constitutions

Origin stories narrating the creation of land and Tribes offer early examples of Tribal Constitutions as they often highlight the values of the Tribes and their governing structures.¹⁰⁷ Today, hundreds of Tribes have adopted written constitutions that outline the topics of membership, governance, and elections, among others.¹⁰⁸ Tribal constitutions may also provide Tribal legislators the authority to pass laws (including health laws) and establish health departments.¹⁰⁹

The National Indian Law Library houses over four hundred Tribal Constitutions in its database.¹¹⁰ In a search of these constitutions, thirty explicitly reference the word "health."¹¹¹ A search for the words "welfare" and "safety" generated over sixty¹¹² and forty¹¹³ results, respectively. For example, the Preamble of the Constitution of the Poarch Band of Creek Indians states that the

¹⁰⁴ See *Williams v. Lee*, 358 U.S. 217, 220 (1959).

¹⁰⁵ See FLETCHER, *supra* note 51, at 235–90.

¹⁰⁶ Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 230 (1994).

¹⁰⁷ COHEN'S HANDBOOK, *supra* note 4, §§ 4.01(1)(b), 4.05(3).

¹⁰⁸ *Id.* § 4.05(3).

¹⁰⁹ See, e.g., CONST. OF THE POKAGON BAND OF POTAWATOMI INDIANS § 2, <http://www.pokagonband-nsn.gov/sites/default/files/assets/department/government/form/2014/tribal-constitution-328-243.pdf> [<https://perma.cc/T68Y-6H8A>] (giving the Tribal Council authority "[t]o make laws").

¹¹⁰ Selden, *supra* note 31, at 52. The tally of 400 constitutions can include duplicates of the same constitution.

¹¹¹ On Mar. 1, 2019, the author conducted a search on the National Indian Law Library database of Constitutions found at <https://www.narf.org/nill/triballaw/index.html> [<https://perma.cc/TA2B-P7NQ>] (searching for "health" and filtering results by choosing "Tribal Constitutions"). While the search counted thirty-nine results, an inventory that removed duplicates found that thirty results were generated.

¹¹² For author conducted search, see *supra* note 111 (searching for "welfare" and filtering results by choosing "Tribal Constitutions").

¹¹³ For author conducted search, see *supra* note 111 (searching for "safety" and filtering results by choosing "Tribal Constitutions").

Tribe adopts its constitution and Tribal government to “[h]elp our members achieve their highest potential in education, physical and mental health, and economic development.”¹¹⁴

The Standing Rock Sioux Tribal Constitution also specifically mentions health and welfare:

The Tribal Council shall exercise the following powers . . . [t]o promote and protect the health, education and general welfare of the members of the Tribe, and to administer charity and such other services as may contribute to the social and economic advancement of the Tribe and its members.¹¹⁵

The Tribe relied on this section of the Constitution as authority to declare an emergency in June 2013 following excessive rainfall and flash flooding earlier that year.¹¹⁶

2. Tribal Codes

Although Tribes have existing inherent authorities to promote public health, Tribal codes can operationalize processes, duties, and responsibilities across public health programs. Tribal codes, laws passed by Tribal legislatures, provide both examples of enabling authorities for Tribal agencies engaging in public health activities¹¹⁷ as well as examples of law used for public health interventions.¹¹⁸

¹¹⁴ POARCH BAND OF CREEK INDIANS TRIBAL CONST. pmb1. (4), https://library.municode.com/tribes_and_tribal_nations/poarch_band_of_creek_indians/codes/code_of_ordinances/241400?nodeId=TRCO [<https://perma.cc/L9NW-LNEL>].

¹¹⁵ STANDING ROCK SIOUX TRIBE CONST. art. IV, § 1(c), http://indianaffairs.nd.gov/image/cache/standing_rock_constitution.pdf [<https://perma.cc/KZT3-EDMW>].

¹¹⁶ See *Standing Rock Sioux Tribe Severe Storms and Flooding*, FEMA (June 25, 2013), <https://www.fema.gov/disaster/4123> [<https://perma.cc/36HQ-8WXP>]; see also Sunshine & Hoss, *supra* note 21, at 36.

¹¹⁷ For an example of a reorganization of a Tribal Department of Health, see Press Release, Navajo Nation, President Shelly Signs Navajo Department of Health Act into Law (Nov. 7, 2014), available at http://www.navajo-nsn.gov/News_Releases/OPVP/2014/nov/Navajo_Department_of_Health_Enacted.pdf [<https://perma.cc/6C5G-36QN>]. Red Star International is a nonprofit organization that partners with Tribal governments and organizations to improve the health of Tribal communities. *About Us*, RED STAR INT’L, <https://redstarintl.org/> (last visited Aug 17, 2019). Red Star International, in a Guide and Toolkit prepared with the Inter Tribal Council of Arizona defines Tribal health departments as:

[A] federally recognized [T]ribal government, [T]ribal organization or inter-[T]ribal consortium as defined in the Indian Self-Determination and Education Assistance Act, as amended, with jurisdictional authority to provide public health services, as evidenced by constitution, resolution, ordinance, executive order or other legal means, intended to promote and protect the [T]ribe’s overall health, wellness and safety; prevent disease; and respond to issues and events.

Tribal Community Health Assessment for Public Health Accreditation: A Practical Guide and Toolkit, INTER TRIBAL COUNCIL ARIZ. (June 2013), <https://itcaonline.com/wp-content/uploads/2011/03/Tribal-CHA-Toolkit-for-Public-Health-Accreditation-Pilot-Version.pdf> [<https://perma.cc/PX2T-9YME>].

¹¹⁸ See, e.g., *Menu of Selected Tribal Laws Related to Infectious Disease Control*, *supra* note 19; Aila Hoss & Dawn Pepin, *Menu of Selected Tribal Laws Related to Mosquito and Vector Control*, CTRS. FOR DISEASE CONTROL & PREVENTION: PUB. HEALTH L. (Nov. 30,

The Little Traverse Bay Bands of Odawa Indians Code of Law provides an example of a Tribal code establishing the Tribe's health department.¹¹⁹ The code provides the department certain authorities and duties including:

1. Promote, design and implement health programs for each facet of our [T]ribal community.
2. Strive to improve and enhance the understanding of health related issues within our community and in the greater community.
3. Assist with annual community events that incorporate health and wellbeing.
4. Provide services and programs that increase health and wellbeing.
5. Administer health-based programs, grants and projects that assist our Tribal Citizens with an awareness of the unique needs of our Tribal Citizens.
6. Establish more interactive resources for [T]ribal citizens that utilize the most current and feasible technologies.
7. Administer all Indian Health Services' health-related programs and funding received by the Tribe, as appropriate.
8. Administer all funds and grants to the Tribe related to health matters, as appropriate.
9. Establish appropriate programs such as health clinic, dental clinic, contract health, healthy start, community outreach, diabetes self-management, substance abuse, mental health and any other applicable health related opportunities.¹²⁰

Across Tribes, the services provided by Tribal health departments can vary substantially. In 2012, the National Indian Health Board and the Walsh Center for Rural Health Analysis conducted a study of seventy-nine Tribal health departments.¹²¹ The study found that nearly all of the health departments offer diabetes screening, chronic disease prevention services, substance abuse services, and blood pressure screenings.¹²² Yet, only around a third provided services such as food service inspections, school inspections, and food safety programming.¹²³

2016), <https://www.cdc.gov/php/docs/menu-mosquito.pdf> [<https://perma.cc/WB2T-FAVY>]; Aila Hoss, *Menu of Selected Tribal Laws Related to Motor Vehicle Safety*, CTRS. FOR DISEASE CONTROL & PREVENTION: PUB. HEALTH L. (Sept. 17, 2015), <https://www.cdc.gov/php/docs/tribalbrief-mvs.pdf> [<https://perma.cc/3L7Z-WJ8X>]; Aila Hoss & Hillary Li, *Selected Tribal Laws Related to Occupational Safety and Health*, CTRS. FOR DISEASE CONTROL & PREVENTION: PUB. HEALTH L. (Apr. 20, 2017), <https://www.cdc.gov/php/docs/menu-tribalosh.pdf> [<https://perma.cc/7763-V89U>]; Aila Hoss & Gregory Sunshine, *Tribal Emergency Preparedness Law*, CTRS. FOR DISEASE CONTROL & PREVENTION: PUB. HEALTH L. (Mar. 2, 2017), <https://www.cdc.gov/php/docs/brief-tribalemergency.pdf> [<https://perma.cc/R6WW-UMWY>].

¹¹⁹ WAGANAKISING ODAWA TRIBAL CODE OF LAW tit. XV, ch. 12, 15.1201, <http://www.ltbbo.dawa-nsn.gov/TribalCode.pdf> [<https://perma.cc/25C5-NU29>] (last updated Sept. 2019).

¹²⁰ *Id.* at 15.1204.

¹²¹ Alana Knudson et al., *A Profile of Tribal Health Departments*, NORC: WALSH CTR. FOR RURAL HEALTH ANALYSIS 2 (June 2012), [http://www.norc.org/PDFs/Walsh Center/Research Briefs/Research Brief_W18_KnudsonA_Profile_2012.pdf](http://www.norc.org/PDFs/Walsh%20Center/Research%20Briefs/Research%20Brief_W18_KnudsonA_Profile_2012.pdf) [<https://perma.cc/6HGQ-RLWL>].

¹²² *Id.* at 3.

¹²³ *Id.* at 4.

Tribal codes are also rich with examples of law supporting public health interventions.¹²⁴ In 2015, the Navajo Nation became the first jurisdiction in the United States to implement a junk food tax on certain unhealthy foods.¹²⁵ To address infectious disease control, “[t]he codes of the Prairie Band of Potawatomi Nation and Kalispel Tribe each include an exclusion provision for non-members with infectious disease.”¹²⁶ The Prairie Band Potawatomi Nation Law and Order Code permits removal and exclusion of non-members for “[e]ntering or remaining upon the Reservation or upon off-Reservation Potawatomi Indian land while afflicted by a communicable or contagious disease”.¹²⁷ The Kalispel Tribal Law and Order Code provides, “[a]ny person, except a member of the Kalispel Tribe entitled to reside thereon, may be excluded from the Kalispel Reservation upon the following grounds . . . [c]ontagious disease.”¹²⁸

3. Tribal Case Law

As an exercise of their sovereignty, Tribes have the authority and option to establish courts and judicial systems to adjudicate conflict¹²⁹ or have the option of relying on Tribal councils or other agencies.¹³⁰ The structure and organization of Tribal judiciaries vary from Tribe to Tribe but many have trial and appellate courts, apply customary teachings and methods to adjudicate conflict, and create common law in the form of judicial opinions.¹³¹ Tribal courts often hear cases related to criminal law, family law, and torts—topics highly relevant to public health—but also more traditional health law topics.¹³²

As an example, the Oneida Appeals Commission Trial Court, in *Klimmek v. Oneida HRD-Benefits*, heard a case related to health insurance coverage.¹³³ In this case, the plaintiff sustained injuries following a fall while working for

¹²⁴ See *supra* note 118 and accompanying text.

¹²⁵ Payton Guion, *Junk-Food Tax Imposed by Navajo Nation is the First in the US*, INDEPENDENT (Mar. 27, 2015, 5:55 PM), <https://www.independent.co.uk/news/world/americas/junk-food-tax-imposed-by-navajo-nation-is-the-first-in-the-us-10139696.html> [https://perma.cc/CHQ7-85AF].

¹²⁶ *Menu of Selected Tribal Laws Related to Infectious Disease Control*, *supra* note 19.

¹²⁷ POTAWATOMI LAW AND ORDER CODE ch. 14-1-4(P), <https://www.codepublishing.com/KS/Potawatomi/#!/Potawatomi14/Potawatomi1401.html#14-1-4> [https://perma.cc/Z26U-NPV2] (last visited Oct. 23, 2019).

¹²⁸ KALISPEL TRIBE OF INDIANS LAW AND ORDER CODE, § 5-1.01(10), <https://9b37abdd1c3135d9659b-298f012ea728efea7c302ad9a6f7bba0.ssl.cf2.rackcdn.com/pdf-uploads/LAW-AND-ORDER-CODE-10-11-18v2.pdf> [https://perma.cc/8VMV-8T9P] (last visited Oct. 23, 2019).

¹²⁹ See COHEN’S HANDBOOK, *supra* note 4, § 4.04(3)(c).

¹³⁰ See *id.*

¹³¹ *Id.*

¹³² Aila Hoss, Presentation at the Public Health Law Conference: Tribal Courts and Public Health Jurisdiction, https://www.networkforphl.org/_asset/mlkwxg [https://perma.cc/9C5R-A94K] (last visited July 28, 2019).

¹³³ *Klimmek v. Oneida HRD-Benefits*, 2005 WL 6425720, at *1 (Oneida Trial Ct. 2005).

the Oneida Tribe of Wisconsin.¹³⁴ She received initial treatment at the Oneida Health Center but then sought care at an out-of-network center for continued physical therapy.¹³⁵ The plaintiff was billed for the services at the out-of-network center, the only one in the area that provided these services, and her insurance and Tribal workers' compensation refused to pay for these charges.¹³⁶ The court found that the plaintiff was responsible for the charges because her insurance policy stated that she would be responsible for out-of-network services, and she failed to negotiate with the insurer in advance.¹³⁷

Lone Bear v. Fort Peck Tribes offers an example of a traditional public health law issue in the Fort Peck Court of Appeals.¹³⁸ In this case the petitioner, allegedly an alcoholic or drug dependent person in need of medical care, was allowed to testify in his involuntary commitment hearing after asking for legal counsel, which was not provided.¹³⁹ The court found that this violated the petitioner's due process rights, and the involuntary commitment was not upheld.¹⁴⁰

4. Tribal Customary Law and Culture

Traditional practices, teachings, and customs vary from Tribe to Tribe and are sacred and private to each Tribe and its members. Application of customary laws into various legal bodies can be one form of Tribal exercise of cultural sovereignty.¹⁴¹ This section does not seek to describe or share such customary law; rather, it will highlight two examples of how Tribes have incorporated these customs into law. It is important to note, however, that customary law can be exercised by leadership and the community independent of any written law.¹⁴²

First, the Navajo Nation Code Health Commitment Act of 2006 authorizes the Navajo Nation to involuntarily commit Tribal members in need of medical care that are unwilling or unable to seek such care and pose a risk to themselves or the community.¹⁴³ While this is an authority common to other Tribes or even states, the Act also states that "[t]he Navajo principle of k'é (respect, solidarity, compassion and cooperation) shall be applied at all steps of the civil commitment, evaluation, treatment processes, and reintegration of the afflicted person

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at *1–2.

¹³⁸ See *Lone Bear v. Fort Peck Tribes*, 13 Am. Tribal Law 397, 398–99 (2016).

¹³⁹ *Id.* at 399.

¹⁴⁰ *Id.* at 402.

¹⁴¹ See Coffey & Tsosie, *supra* note 8, at 210.

¹⁴² Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence* 10–11 (Mich. State Univ. Coll. of Law, Indigenous Law & Policy Ctr., Working Paper No. 2006-04, 2006), <https://www.law.msu.edu/indigenous/papers/2006-04.pdf> [<https://perma.cc/9DWD-D9HN>].

¹⁴³ NAVAJO NATION CODE ANN. tit. 13, § 2101(A) (2010).

into the community.”¹⁴⁴ This principle of k'é balances the legal authority of the Tribe with the dignity of the individual, ensuring that a traditional teaching is not lost at the expense of the Tribe's public health authority.

As a second example, culture has also been incorporated into Tribal case law. In a case regarding the protection of a wildlife reserve, the Colville Confederated Tribes Court of Appeals highlighted how land use is directly related to the protection of the health and welfare of the Tribe and its members.¹⁴⁵ It also stated that the land is of cultural importance to the Tribe:

It is well known in Indian Country that spirituality is a constant presence within Indian [T]ribes. Meetings and gatherings all begin with prayers of gratitude to the Creator. The culture, the religion, the ceremonies—all contribute to the spiritual health of a [T]ribe. To approve a planned development detrimental to any of these things is to diminish the spiritual health of the Tribes and its members.¹⁴⁶

In this regard, the court relied on both health and cultural findings to find that the Tribe had land use authority to prevent the development on land within the Tribe's reservation.¹⁴⁷

Professor Gloria Valencia-Weber has argued that the incorporation of Tribal customs into law allows Tribes to both innovate and preserve Tribal cultures.¹⁴⁸ But the incorporation of culture is also an effective public health tool.¹⁴⁹ Tribes have utilized their practices as a means to improve public health through the growing and consuming of traditional foods, promoting and teaching traditional dances and sports, and integrating spiritual and mental health services into their services and programs.¹⁵⁰

¹⁴⁴ *Id.* § 2101(C).

¹⁴⁵ *Hoover v. Colville Confederated Tribes*, No. AP99-001, 2002 WL 34540595, 6 CCAR 16, 3 CTR 44, at *10 (Colville Tribal Ct. App. Mar. 18, 2002).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at *9-10.

¹⁴⁸ Valencia-Weber, *supra* note 106, at 226-27.

[T]he development of Indian law based on custom is the engine for innovation. The pervasive ability to change, in order to survive and maintain continuity, is the cultural characteristic of the [I]ndigenous people of the Americas. American Indian [T]ribes have retained the capacity to integrate external concepts, technology, and life forms. Through adoption, adaptation, and appropriation the acceptance results in new meaning and value specific to [T]ribal culture. The simultaneous pursuit of conservation and innovation is the historic pattern of native cultures. Twentieth-century American Indians are not copies of Anglo-Americans; as [I]ndigenous people they are engaged in jointly preserving and changing a cultural way of life. Likewise, the product of [T]ribal courts is not a jurisprudential laminate. Tribal courts can be the possible laboratories for new, beneficial concepts in law.

Id.

¹⁴⁹ KAREN M. ANDERSON & STEVE OLSON, *LEVERAGING CULTURE TO ADDRESS HEALTH INEQUALITIES: EXAMPLES FROM NATIVE COMMUNITIES* 64 (2013) (stating that “[c]ulture dictates the language used to define issues, the identification of problems, the framing of those problems, the manner in which solutions are sought, and the methods for defining and measuring success”).

¹⁵⁰ Sheila Fleischhacker et al., *Promoting Physical Activity Among Native American Youth: A Systematic Review of the Methodology and Current Evidence of Physical Activity Interven-*

5. Intergovernmental Coordination

Tribal leaders—whether executives, agency leadership, or judges—have the option to support Tribal public health via intergovernmental coordination.¹⁵¹ These can include mutual aid agreements or memoranda of understandings.¹⁵² These relationships allow neighboring jurisdictions to formalize roles and responsibilities in the event of certain instances of relevance to all governments.¹⁵³ For example, Tribes and local governments in the Olympic Peninsula established a mutual aid agreement to share resources in the event of an emergency.¹⁵⁴ Assistance can include support in isolation, quarantine, or other activities.¹⁵⁵

Throughout Indian country, Tribes have also established intertribal health boards, usually organized as nonprofit corporations, to collaborate and support neighboring Tribes on various health issues.¹⁵⁶ Duties of intertribal health boards can include participating in federal consultation regarding health care services funded and provided by the federal government, assisting in distributing health resources, and providing recommendations on health policies.¹⁵⁷

D. Structural Violence

Structural violence is “invisible, embedded in ubiquitous social structures, normalized by stable institutions and regular experience[,]” and “occurs when-

tions and Community-Wide Initiatives, 3 J. RACIAL & ETHNIC HEALTH DISPARITIES 608, 613 (2016); Ursula Running Bear et al., *Spirituality and Mental Health Status Among Northern Plain Tribes*, 21 MENTAL HEALTH RELIGION & CULTURE 274, 283 (2018).

¹⁵¹ See David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120, 121 (1993).

¹⁵² See, e.g., Hoss & Sunshine, *supra* note 118; Victoria Warren-Mears, *Principles and Models for Data Sharing Agreements with American Indian/Alaska Native Communities*, NAT'L CONGRESS AM. INDIANS POL'Y RES. CTR., [http://genetics.ncai.org/files/Principles and Models for Data Sharing Agreements.pdf](http://genetics.ncai.org/files/Principles%20and%20Models%20for%20Data%20Sharing%20Agreements.pdf) [<https://perma.cc/HL3S-UDU8>] (last visited Oct. 24, 2019).

¹⁵³ See *Memorandum of Understanding & Mutual Aid Agreements*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/aging/emergency/legal/agreements.htm> [<https://perma.cc/DJ6K-3UMD>] (last reviewed Nov. 26, 2012).

¹⁵⁴ *Olympic Regional Tribal-Public Health Collaboration and Mutual Aid Agreement*, KITSAP PUB. HEALTH 1 (Nov. 3, 2009), <https://www.kitsappublichealth.org/about/files/agreements/681.pdf> [<https://perma.cc/7C49-6YDL>].

¹⁵⁵ *Id.* at 2.

¹⁵⁶ See, e.g., *About GPTCHB*, GREAT PLAINS TRIBAL CHAIRMEN'S HEALTH BOARD, <https://gptchb.org/about/> [<https://perma.cc/P52K-JEJD>] (last visited July 22, 2019); *About ITCA*, INTER TRIBAL COUNCIL OF ARIZ., https://itcaonline.com/?page_id=6 [<https://perma.cc/JY5Z-WJD7>] (last visited July 22, 2019); GREAT LAKES INTER-TRIBAL COUNCIL INC., <https://glitc.org/> [<https://perma.cc/548B-SXWB>] (last visited July 22, 2019); *Who We Are*, SOUTHERN PLAINS TRIBAL HEALTH BOARD, <https://www.spthb.org/about-us/who-we-are/> [<https://perma.cc/TE3A-C46L>] (last visited July 22, 2019). All intertribal health boards were once intertribal councils. See *id.*

¹⁵⁷ *About GPTCHB*, *supra* note 156.

ever people are disadvantaged by political, legal, economic, or cultural traditions.¹⁵⁸ In the context of the legal systems governing Tribes and American Indians and Alaska Natives, federal Indian law has perpetuated structural violence against these governments and communities, and in turn lead to inequitable health outcomes.

Federal Indian law has been used to extinguish Indian cultural practices,¹⁵⁹ deny Tribal property rights to ancestral lands,¹⁶⁰ prevent Indians from accessing sacred lands and waters,¹⁶¹ impede on rights to practice Indian religions,¹⁶² circumvent customary law to address criminal violations committed by Indians on Indian land,¹⁶³ and prevent Tribal governments from prosecuting non-Indians who commit crimes on Indian land,¹⁶⁴ among other tragedies. The use of federal Indian law has been a form of structural violence, and these losses have contributed to the historical trauma impacting American Indian and Alaska Native communities.¹⁶⁵ State laws have also been used to undermine Tribal sovereignty. For example, states have asserted authority over Tribal lands¹⁶⁶ and have challenged Tribal rights under the Indian Child Welfare Act.¹⁶⁷

This historical trauma has been defined as “the collective emotional and psychological injury both over the life span and across generations resulting from the history of difficulties that [Indians] as a group have experienced in America” and has a “layering effect” of individuals and communities.¹⁶⁸ Symptoms of this trauma are similar to those of post-traumatic stress disorder and include anger, depression, and discomfort and mistrust around non-Indians.¹⁶⁹ Although rooted in history, the wounds left by federal Indian law remain fresh

¹⁵⁸ Deborah DuNann Winter & Dana C. Leighton, *Structural Violence Section Introduction* to DANIEL J. CHRISTIE ET AL., PEACE, CONFLICT, AND VIOLENCE: PEACE PSYCHOLOGY FOR THE 21ST CENTURY 99 (2001).

¹⁵⁹ Matthew L.M. Fletcher, *Looking to the East: The Stories of Modern Indian People and the Development of Tribal Law*, 5 SEATTLE J. FOR SOC. JUST. 1, 4 (2006).

¹⁶⁰ See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998); *Hagen v. Utah*, 510 U.S. 399, 420–21 (1994).

¹⁶¹ See, e.g., *Nevada v. United States*, 463 U.S. 110, 113, 143 (1983); *Montana v. United States*, 450 U.S. 544, 547, 566 (1981).

¹⁶² See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 441–42 (1988); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1062–63 (9th Cir. 2008).

¹⁶³ See, e.g., *United States v. Kagama*, 118 U.S. 375, 375–76, 385 (1886).

¹⁶⁴ See, e.g., 18 U.S.C. § 13(a) (2012 & Supp. V 2017); *Id.* § 1153.

¹⁶⁵ Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 60, 60, 64–68 (1998).

¹⁶⁶ *Ute Indian Tribe v. Myton*, 835 F.3d 1255, 1257–58, 1260 (10th Cir. 2016).

¹⁶⁷ *Texas v. Zinke*, NICWA, <https://www.nicwa.org/wp-content/uploads/2018/05/Texas-v-Zinke-Case-Summary.pdf> [<https://perma.cc/B3BR-9J8B>] (last visited Oct. 25, 2019).

¹⁶⁸ PEGGY HALPERN, OBESITY AND AMERICAN INDIANS/ALASKA NATIVES 31 (2007), <http://aspe.hhs.gov/hsp/07/ai-an-obesity/report.pdf> [<https://perma.cc/2HBM-VK4J>] (citation omitted).

¹⁶⁹ *Id.* (citing Brave Heart & DeBruyn, *supra* note 165).

for many Indians.¹⁷⁰ The effects of the trauma remain relevant to Indians today as Tribal communities continue to experience poor economic conditions on reservations, discrimination, and cultural loss.¹⁷¹

Another enduring legacy of federal Indian law is that it has set the federal and state governments at odds with Tribal governments. Federal Indian law is a “product of the tension between two conflicting forces—separatism and assimilation,”¹⁷² leaving the federal and state governments and Tribal governments competing for control of governing Indian peoples. Federal Indian law is thus a story of competing sovereignty.¹⁷³ This legacy also perpetuates structural violence.

One of the contributors to structural violence is the lack of meaningful consultation with Tribal governments when developing laws or using legal strategies to address public health issues. At the federal level, consultation refers to an obligation by federal agencies to consult with Tribes “prior to taking actions that affect federally recognized tribal governments,” to ensure that “all interested parties may evaluate for themselves the potential impact of relevant proposals.”¹⁷⁴ While agency consultation is required by several executive orders,¹⁷⁵ its foundation’s basis is the federal government’s trust responsibility and is supported by treaties and federal law.¹⁷⁶ Some state laws also require Tribal consultation based on agreements, state statutes, and policies.¹⁷⁷

¹⁷⁰ A member of the Klamath Tribe once told me that Indians experience time differently than other peoples. Two hundred years of federal Indian law feels like only “a blink of the eye.” This is especially true when one considers the fact that the history of Indians spans many centuries. Federal Indian law remains in recent memory.

¹⁷¹ HALPERN, *supra* note 168, at 31 (citing L. Whitbeck et al., *Conceptualizing and Measuring Historical Trauma Among American Indian People*, AM. J. COMMUNITY PSYCHOL. 33, Nos. 3/4 (2004)).

¹⁷² DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 32 (6th ed. 2011).

¹⁷³ *Id.* at 447 (“Federal Indian law at its core is about jurisdiction, which derives from the sovereignty of the government asserting it.”).

¹⁷⁴ Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936, 936–37 (Apr. 29, 1994).

¹⁷⁵ *Id.* at 936; *see also* Exec. Order No. 13175, 65 Fed. Reg. 67249, 67250 (Nov. 6, 2000); Exec. Order No. 13084, 63 Fed. Reg. 27655 (May 14, 1998).

¹⁷⁶ Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13 (2012 & Supp. V 2017); PEVAR, *supra* note 38, at 40; Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FED. B. ASS’N: INDIAN L. SEC. 1, 5–8 (Dec. 9, 2010), <http://www.fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> [<https://perma.cc/YB9G-XATD>]; Gabriel S. Galanda, *The Federal Indian Consultation Right: No Paper Tiger*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Dec. 6, 2010), *originally published at* <http://indiancountrytodaymedianetwork.com/2010/12/06/galanda-federal-indian-consultation-right-no-paper-tiger-81452> (on file with author).

¹⁷⁷ Aila Hoss, *Tribal Consultation: Selected Resources*, CTRS. FOR DISEASE CONTROL & PREVENTION: PUB. HEALTH L. (Feb. 18, 2016), <https://www.cdc.gov/phlp/docs/tribal-consultation-resources.pdf> [<https://perma.cc/52YJ-CTD5>] (citing Gabriel S. Galanda, *Advancing the State-Tribal Consultation Mandate*, INDIAN COUNTRY TODAY (Oct. 17, 2012)).

Unfortunately, in practice, consultation systems are largely ineffective and fail to produce true, meaningful engagement with Tribes prior to action being taken.¹⁷⁸ Lack of consultation undermines trust and leads to ineffective or harmful programing.¹⁷⁹ Thus, the final structural violence inquiry must also ensure that when local, state, and federal actors are taking action, that this action is preceded and informed by meaningful Tribal consultation and engagement.

When legal tools are used to analyze and respond to public health issues, these strategies must be evaluated in terms of whether they perpetuate structural violence against Tribes and American Indians and Alaska Native communities. Avoiding structural violence requires considering not only what is legal but also what is just and culturally appropriate. How this evaluation may impact decision making and responses to Tribal public health issues is explored in the next section.

III. APPLYING THE TRIBAL PUBLIC HEALTH LAW FRAMEWORK

Examples of Tribal public health are instructive case studies for the application of the four pillars of the Tribal public health law framework. These pillars are expanded into four inquiries to be made when evaluating such issues.¹⁸⁰ This section offers an example of the application of the framework across the issue of tobacco control.

¹⁷⁸ See PEVAR, *supra* note 38, at 41.

¹⁷⁹ The purpose of consultation is to develop effective policies and programs. For example, the U.S. Department of Education's consultation policy states that consultation "is important in formulating effective [Department of Education] policies and programs that have [T]ribal implications." *Consultation and Coordination with American Indian and Alaska Native Tribal Governments*, U.S. DEP'T EDUC. 1, 2 <https://www2.ed.gov/about/offices/list/oese/oie/tribalpolicyfinal.pdf> [<https://perma.cc/X8TX-ZEJ6>] (last visited Aug. 20, 2019).

¹⁸⁰ See *infra* Table 1.

TABLE 1: FRAMEWORK FOR TRIBAL PUBLIC HEALTH LAW

| Pillar | Components | Inquiry: In responding to a Tribal public health issue, have you: |
|---------------------------------------------------------|-------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Tribal Sovereignty and Inherent Public Health Authority | | ensured that Tribal Sovereignty is respected and promoted and explored strategies that can be implemented relying on Tribal inherent authority? |
| Federal Indian Law and Public Health | U.S. Constitution Statutory Law Regulations Case Law Intergovernmental Coordination | evaluated whether any federal Indian laws are implicated by the issue? |
| Tribal Law and Public Health | Constitutions Tribal Codes Tribal Case Law Customary Law | considered utilizing Tribal law tools to address the issue such as authorities in the Tribal constitution, Tribal codes, reliance on Tribal case law or customary law? |
| Structural Violence | | assessed whether legal strategies proposed would perpetuate structural violence against a Tribe or American Indian and Alaska Native communities? ensured actions by local, state, and federal actors include Tribal engagement and consultation? |

American Indians and Alaska Natives are disproportionately burdened by illnesses associated with tobacco use.¹⁸¹ These illnesses include cardiovascular disease, lung cancer, and diabetes.¹⁸² Culturally, many Tribal communities rely on non-commercial tobacco as part of their sacred ceremonies, although the type of usage can vary from Tribe to Tribe.¹⁸³ As sovereign nations, Tribes have the authority to establish their programmatic and legal structure regarding tobacco cessation and control, and state tobacco laws do not apply on Tribal lands.¹⁸⁴

In this hypothetical, perhaps a public health organization seeks to limit tobacco use on Tribal lands, particularly Tribal gaming enterprises where non-Tribal members frequent or work, raising concerns regarding indoor smoking and secondhand smoke exposure. Specifically, it would like to see the en-

¹⁸¹ See *American Indians/Alaska Natives and Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/tobacco/disparities/american-indians/index.htm> [<https://perma.cc/29E8-WGKF>] (last visited July 24, 2019).

¹⁸² *Id.*

¹⁸³ *Traditional Tobacco*, KEEP IT SACRED, <https://keepitsacred.itcmi.org/tobacco-and-tradition/traditional-tobacco-use/> [<https://perma.cc/PH9M-T8VX>] (last visited Aug. 20, 2019).

¹⁸⁴ See *supra* Section II.A–B.

forcement of strict anti-tobacco laws from the state applied to Tribal lands. It is sharing research on the impacts of smoke-free Tribal casinos, which suggest that patrons will still attend.¹⁸⁵ It also recommends that the Tribe follow the example of other Tribes that have implemented smoke-free casinos.¹⁸⁶

The first step of the Tribal public health law framework requires that any public health law measure respect and support Tribal sovereignty and the Tribe's inherent authority. In our hypothetical, advocating for state law application on Tribal lands or using state laws as models would be inappropriate unless Tribal legal and cultural tools were considered in consultation with Tribes and existing Tribal mechanisms were found to be insufficient. In the context of federal Indian law, the federal government has not limited the jurisdiction of Tribes to pass their own tobacco prevention laws. Thus, there are no issues under the federal Indian law prong of the framework.

Next, the framework requires consideration of Tribal laws to promote the public health goal. In this context, the Tribe can pass smoke-free and secondhand smoke ordinances in workplaces, including casinos. However, the Tribe may consider allowing for exceptions that maintain the legality of traditional tobacco use to protect the Tribe's culture.

Finally, an assessment would be needed to evaluate how the intervention would perpetuate structural violence against the Tribe. Because a non-Tribal organization initiated the issue, it could be argued that the organization is imposing its own norms on the Tribe. Imposing state laws or demanding conformity with them also perpetuates structural violence. Instead, such an initiative needs to be Tribally driven.

CONCLUSION

At the 2017 Federal Bar Association's annual Indian law conference, Matthew L. M. Fletcher, Professor of Law and Director of the Indigenous Law & Policy Center at Michigan State University, highlighted the need to "cobble together a statutory regime to support a concept not in statute."¹⁸⁷ In the case of

¹⁸⁵ Isaiah "Shaneequa" Brokenleg et al., *Gambling with Our Health: Smoke-Free Policy Would Not Reduce Tribal Casino Patronage*, 47 AM. J. PREVENTIVE MED. 290, 291, 296 (2014), <https://www.sciencedirect.com/science/article/pii/S0749379714001718> [<https://perma.cc/7FZB-XXN5>]; David S Timberlake et al., *Tribal Casinos in California: The Last Vestige of Indoor Smoking*, 12 BMC PUB. HEALTH 144 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3306736/pdf/1471-2458-12-144.pdf> [<https://perma.cc/RU2N-G43V>]; *Tribal Casinos And Second Hand Smoke*, ETR ASSOCIATES, <https://www.etr.org/ccap/assets/File/TRIBAL-CASINOS-AND-SECOND-HAND-SMOKE.pdf> [<https://perma.cc/Y55S-P682>] (last visited Aug. 20, 2019).

¹⁸⁶ See *From Smoke-Filled to Smokefree: One Tribal Casino's Journey for Health*, AM. NONSMOKERS' RTS. FOUND. (Jan. 2, 2018), <https://no-smoke.org/smoke-filled-smokefree-one-tribal-casinos-journey-health/> [<https://perma.cc/TYW9-SZZL>].

¹⁸⁷ As an example, Professor Fletcher highlighted the brief for respondents regarding the authority of courts to have civil jurisdictions over nonmembers based on Supreme Court precedent rather than a statutory scheme. Brief for Respondents at 15, 19–20, Dollar Gen.

Tribal public health law, there is no comprehensive statutory scheme outlining the depth and breadth of Tribal authority. Yet, this authority is inherent to Tribes and permeates from Tribal sovereignty, Tribal law, and Tribal governance. This article proposes a framework for understanding and applying Tribal public health authorities based on four pillars including Tribal sovereignty, Tribal law, federal Indian law, and preventing structural violence.

The need for this framework is demonstrated by public health law literature's lack of focus on Tribal public health issues. It remains relevant as American Indian and Alaska Native communities continue to be disproportionately burdened by health outcomes. This need also exists to ensure that public health law literature contemplates the unique histories, cultures, and laws across Tribes.

This article also seeks to initiate a discussion to promote the existing work regarding Tribal public health law, consider mechanisms to ensure it is incorporated into existing public health law resources, and ensure that additional Tribal-specific public health law resources are developed. Thus, for future research, this framework can be evaluated, refined, and expanded but also applied to additional case studies and emerging Tribal public health law issues.

APPENDIX: REFERENCES TO TRIBES IN SELECTED PUBLIC HEALTH LAW BOOKS¹⁸⁸

| Source | Page(s) | Reference to Tribes, American Indians, or Alaska Natives |
|----------------------------------------------------------------------------|---------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL (3d ed. 2018). | 62–63 | subsection on Tribal public health powers |
| MARY ANNE BOBINSKI ET AL., BIOETHICS AND PUBLIC HEALTH LAW (4th ed. 2018). | 254 | informed consent exercise related to Tribes and DNA based on <i>Havasupai Tribe v. Board of Regents</i> |
| | 430 | note referencing the <i>Havasupai</i> case regarding the scope of consent and Tribes in research |
| | 432 | providing additional information on group rights and genetic research, which included a reference to Tribes (citing Debra Harry & Le'a Malia Kanehe, <i>Assessing Tribal Sovereignty over Cultural Property: Moving Towards Protection of Genetic Material and Indigenous Knowledge</i> , 5 SEATTLE J. SOC. JUST. 27 (2006)) |
| | 430–31 | in a discussion on research on minority groups, describing and citing scholarship by Kristen Carpenter, <i>Real Property and Personhood</i> , 27 STAN. ENVTL. L.J. 313, 380 (2008). |
| | 719 | quoting language from the Model State Emergency Health Powers Act related to reporting and contact tracing: Whenever the public health authority learns of a case of a reportable illness or health condition, an unusual cluster, or a suspicious event that it reasonably believes has the potential to be caused by bioterrorism, it shall immediately notify the public safety authority, [T]ribal authorities, and federal health and public safety authorities. |

¹⁸⁸ Sources selected included texts that provide foundational information on public health law, including textbooks and practitioner guides. When available, electronic versions of these texts were searched for terms: “Indian,” “Native,” “Indigenous,” “Tribe,” and “Tribal.” The author was unable to find a copy of Frank P. Grand, *THE PUBLIC HEALTH LAW MANUAL* (3d ed. 2004).

| Source | Page(s) | Reference to Tribes, American Indians, or Alaska Natives |
|-------------------------------------------------------------------------------------------------------------------|---------|------------------------------------------------------------------------------------------------------------------------------------------------|
| SCOTT BURRIS ET AL., THE NEW PUBLIC HEALTH LAW (2018). | 20–21 | stating that federal, state, Tribal, and local governments implement public health programs |
| | 28–29 | subsection on Tribal and territorial public health activities |
| | 61 | discussing the prevalence of diabetes among various racial/ethnic groups, including American Indians |
| | 123 | referencing the Commerce Clause |
| | 124 | referencing the Commerce Clause |
| | 169 | referencing <i>Employment Division v. Smith</i> , 494 U.S. 872 (1990), a case about religious rights of Native Americans |
| LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW AND ETHICS: A READER (3d ed. 2018). | 124–25 | referencing the Commerce Clause in <i>National Federation of Independent Business v. Sebelius</i> , 567 U.S. 519 (2012) |
| | 182 | referencing <i>Employment Division v. Smith</i> regarding religious rights of Native Americans |
| | 311 | stating that various governments, including Tribal, have sued opioid manufacturers for their role in the opioid crisis |
| | 341 | discussing the availability of food insecurity grants available to states, Tribes, and local governments |
| | 480 | stating that <i>Department of Health and Human Services</i> emergency preparedness guidance is not binding on state, Tribal, or local planners |

| Source | Page(s) | Reference to Tribes, American Indians, or Alaska Natives |
|-------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (3d ed. 2016). | 73 | stating that there have been disputes between federal, state, Tribal, and local governments on which authority should act on public health issues |
| | 94 | quoting Commerce Clause |
| | 95 | quoting Commerce Clause |
| | 109 | discussing <i>Seminole Tribe v. Florida</i> , 517 U.S. 44 (1996) in the context of abrogation of state authority under the Commerce Clause |
| | 260 | referencing tobacco manufacturer challenges to the Tobacco Master Settlement Agreement on constitutional and antitrust grounds as well as the “unlawful exclusion of Indian [T]ribes” |
| | 278 | discussing tobacco tax avoidance by purchasing tobacco products on Indian reservations |
| | 319 | mentioning a hypothetical on conducting genetic research on Native Americans |
| | 325 | explaining the HIPAA public health authority exception, which includes states, Tribes, and local governments |
| | 336 | mentioning the need to improve surveillance in subpopulations such as American Indian and Alaska Natives, by citing to a study from the Centers for Disease Control and Prevention on improving HIV surveillance among American Indian and Alaska Natives |
| | 394 | stating that emergencies pose challenges to state, Tribal, local, and federal laws |
| | 396 | stating that emergencies prompted the federal government to provide more support to improve capacity of states, Tribes, and local government |
| | 485 | mentioning that American Indian and Alaska Native teenagers and young adults have the highest rates of suicide in those age groups |
| | 573 n.2 | stating that Tribal governments have a role in public health and cites to other resources for more information, but none are exclusive to Tribal public health or Tribal public health law |
| 603 n.165 | referencing the <i>Employment Division v. Smith</i> case about religious rights of Native Americans | |

| Source | Page(s) | Reference to Tribes, American Indians, or Alaska Natives |
|-------------------------------------------------------------------------------------------------------------|---------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| RICHARD J. BONNIE & RUTH GAARE BERNHEIM, PUBLIC HEALTH LAW, ETHICS, AND POLICY: CASES AND MATERIALS (2015). | 84 | defining public health authority under the HIPAA Privacy Rule, which includes states, Tribes, and local governments |
| | 136 | stating the provision of legal protections for healthcare practitioners and institutions during an emergency and explaining that Tribes and states could implement crisis standards of care |
| | 220–21 | defining the “Eight Americas,” which are distinct groups within U.S. populations, including western Native Americans, and the life expectancy of these groups |
| | 299 | citing the number of colleges in the United States (including Tribal colleges) that have one hundred percent smoke free policies |
| | 571 | listing the number of syringe service programs in the United States, which include Indian lands |
| | 591 | discussing the Youth Risk Behavioral Surveillance System, a school-based survey conducted by the CDC in conjunction with states, Tribes, territorial, and local health agencies |
| | 728 | referencing the Vaccines for Children program that pays for and distributes vaccines to health care professionals for Medicaid patients, uninsured patients, and American Indians and Alaska Natives |

| Source | Page(s) | Reference to Tribes, American Indians, or Alaska Natives |
|----------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| WENDY K. MARINER & GEORGE J. ANNAS, PUBLIC HEALTH LAW (2d ed. 2014). | 25 | listing Indian Health Service as an example of the federal government providing direct medical care |
| | 59 | quoting the Commerce Clause |
| | 208 | citing to <i>Lyng v. Nw. Indian Cemetery Protective Ass'n</i> , 485 U.S. 439 (1988), within a non-Indian related case |
| | 209–12 | referencing the <i>Employment Division v. Smith</i> case regarding religious rights of Native Americans |
| | 222, 233 | referencing statutory language on peyote use by members of a federally recognized Tribe within another case and case notes |
| | 336 | referencing the authority of federal agencies, such as the Bureau of Indian Affairs, to strip search |
| | 388 | referencing the role of governors in engaging in mutual aid agreements with other states and Tribes in the context of emergency preparedness |
| | 563–64 | note regarding Tribal suit limiting right to research its DNA |
| | 599 n.3 | referencing Indian Tribe exemption to the Americans with Disabilities Act |
| | 611 | excerpt from Kelly D. Brownell et al., <i>Personal Responsibility and Obesity: A Constructive Approach to a Controversial Issue</i> , 29 HEALTH AFFAIRS 379, 380 (2010), on personal responsibility and obesity, which offers a comparison to Pima Indians in Northern Mexico versus Southern Arizona |
| | 677 | excerpt from federal statute on tobacco referencing state, local, and Tribal governments |
| | 817 | explaining that suicide rates among Native Americans and Whites are higher than Blacks, Hispanics, and Asian Americans |
| | 845 | in the context of the right to bear arms, comparing land within the Louisiana Purchase that had hostile Indians, with the right to bear arms in England without hostile Indians, and with twenty-first century Illinois without hostile Indians |
| 886 | referencing how Indigenous people around the world face discrimination in: Ole Petter Ottersen et al., <i>The Political Origins of Health Inequity: Prospects for Change</i> , 383 LANCET 630, 632 (2014) | |

| Source | Page(s) | Reference to Tribes, American Indians, or Alaska Natives |
|-------------------------------------------------------------------------------------------------|---------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| PUBLIC HEALTH LAW RESEARCH: THEORY AND METHODS (Scott Burris & Alexander Wagenaar, eds., 2013). | 80 | citing a definition of public health infrastructure: “[I]ncreas[ing] the proportion of Federal, Tribal, State, and local jurisdictions that review and evaluate the extent to which their statutes, ordinances, and by-laws ensure the delivery of essential public health services” |
| WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW (2009) | 80 | citing the Commerce Clause |
| | 168 | highlighting how American Indian children experience obesity at higher rates |
| LAW IN PUBLIC HEALTH PRACTICE (Richard A. Goodman et al. eds., 2d ed. 2007). | 4 | referencing early U.S. history and the scourge of Indigenous populations |
| | 36 | quoting the Commerce Clause |
| | 55 | referencing the Substance Abuse and Mental Health Services Administration giving grants to states, territories, Tribes, Tribal organizations, and private organizations |
| | 147 | table on U.S. Resident Population of Sentenced Prisoners (all races/ethnicities including American Indian and Alaska Natives, Asians, Native Hawaiians, Pacific Islanders, and those identifying two or more races) |
| | 239 | stating that federal, Tribal, state, and local public health agencies engage in public health practice activities |
| | 252 | referencing state, local, territorial, and Tribal governments as public health authorities under HIPAA |
| | 298 | referencing the WIC program being available in each state, D.C., some territories, and Tribal organizations |
| | 461 | referencing the Maternal and Child Health Epidemiology Program that supports fourteen state public health agencies and one Indian Health Board |