

Indians and Guns

ANGELA R. RILEY*

TABLE OF CONTENTS

INTRODUCTION	1676
I. INDIANS AND GUNS FROM CONTACT TO CITIZENSHIP	1681
A. INDIANS AND GUNS IN THE COLONIAL PERIOD	1685
B. INDIAN NATIONS, THE CONSTITUTION, AND RATIFICATION OF THE SECOND AMENDMENT	1693
C. THE INDIAN AS (RESERVATION) CITIZEN	1701
II. THE INDIAN CIVIL RIGHTS ACT AND THE DISAPPEARING SECOND AMENDMENT	1703
A. ICRA’S LEGISLATIVE HISTORY AND THE SECOND AMENDMENT	1704
B. ICRA’S CURRENT PROTECTIONS AND LIMITATIONS	1715
III. INDIANS AND GUNS IN THE CONTEMPORARY CONSTITUTIONAL FRAMEWORK: UNBOUND BY THE SECOND AMENDMENT	1716
A. TRIBAL CRIMINAL AND CIVIL JURISDICTION	1718
B. INDIAN NATIONS AND GUNS	1721
1. Tribal Constitutional Law and the Right To Bear Arms	1721
2. Tribal Gun Laws in Indian Country	1725
a. <i>Criminal Codes</i>	1725
b. <i>Civil Regulatory Codes</i>	1727
C. ENGAGING “INDIANS AND GUNS”: WHAT LIES AHEAD?	1729
1. Indian Country Governance: Realities and Challenges	1729
2. Contemplating Gun Rights in Indian Country	1735

* Professor of Law, UCLA School of Law and Director, UCLA American Indian Studies Center. © 2012, Angela R. Riley. A special thanks to Eugene Volokh, whose question about Indian tribes and the Second Amendment inspired this Article. My appreciation to Stuart Banner, Devon Carbado, Kristen Carpenter, Chris Chaney, Dave Fagundes, Matthew Fletcher, Carole Goldberg, Deep Gulasekaram, Sonia Katyal, Gowri Ramachandran, Addie Rolnick, Eugene Volokh, and Adam Winkler for thoughtful comments and/or helpful conversations that shaped my thinking on this topic. Meredith Duarte, Mack Eason, and Michael Tran provided helpful research assistance. I extend a particular thanks to Leah Shearer and Scott Dewey for invaluable research support. *Jagenagenon*.

a. <i>Criminal Laws Banning Guns</i>	1735
b. <i>Civil Gun Bans</i>	1738
c. <i>Other Regulatory Options</i>	1742
CONCLUSION	1744

INTRODUCTION

The Supreme Court's recent Second Amendment¹ opinions establish a bulwark of individual gun rights against the state. *District of Columbia v. Heller* confirmed that the Second Amendment guarantees an individual the right to bear arms for self-defense,² and the Court applied this analysis to the states via incorporation theory two years later in *McDonald v. City of Chicago*.³ As a result of these cases, it is often assumed that individual gun rights now extend across the United States. But this conclusion fails to take account of a critical exception: Indian tribal nations remain the only governments within the United States that can restrict or fully prohibit the right to keep and bear arms, ignoring the Second Amendment altogether.⁴ Indian tribes were never formally brought within the U.S. Constitution; accordingly, the Second Amendment does not bind them.⁵ In 1968, Congress extended select, tailored provisions of the Bill of Rights to tribal governments through the Indian Civil Rights Act but included no Second Amendment corollary.⁶ As a result, there are over 67 million acres of Indian trust land in the United States,⁷ comprising conspicuous islands within

1. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

2. 554 U.S. 570, 636 (2008). One scholarly article describes *Heller's* holding as follows:

Heller actually decided little about the Second Amendment's scope or implementing doctrine. The majority opinion establishes that a certain class of trustworthy citizens has a judicially enforceable right to an operable handgun in the home for the purpose of self-defense—perhaps only at the time of self-defense—as against a flat federal ban on handgun possession.

Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshowes from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1043 (2009).

3. 130 S. Ct. 3020, 3050 (2010).

4. The Supreme Court has only heard five Second Amendment cases in its history, none of them pertaining to Indian tribal governments. *See id.* at 3020; *Heller*, 554 U.S. at 570; *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875).

5. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896).

6. *See* Pub. L. No. 90-284, §§ 201–203, 82 Stat. 73, 77–78 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)).

7. AREA OF INDIAN RESERVATION AND TRUST LANDS IN STATES AND COUNTIES: BASED ON DATA EXTRACTED FROM THE TRUST ASSET AND ACCOUNTING MANAGEMENT SYSTEM (TAAMS) ON MARCH 30, 2009 (2009) [hereinafter TAAMS] (on file with the Bureau of Indian Affairs Division of Land Titles and Records). Though this Article focuses on land as a geographic homeland wherein tribes face a panoply of governance issues, as has been well-documented, land and indigenous peoples' connection to it forms the basis of virtually every aspect of indigenous culture, from religion to language to ceremony. *See, e.g.*, Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1112–13 (2009) (explaining the basis of all things sacred in native communities as attached to

which individuals' gun rights are not constitutionally protected as against tribal governments.⁸ With Indian nations thus unconstrained—bearing in mind that gun rights and regulations are oftentimes set by tribal law⁹—pressing questions regarding gun ownership and control arise for those living under tribal authority.¹⁰

The relationship of Indians to guns in legal literature has largely gone untouched.¹¹ Though Second Amendment scholarship has turned, at various points, towards the question of *which* people could exercise the right to bear arms,¹² Indians are regularly left out of this discussion. When they are included it is typically to recount the view—as expressed in voluminous documentation produced contemporaneously with ratification of the Constitution as well as in more current settings, such as Justice Kennedy's questioning during oral arguments on *Heller*—that settlers' fears of “hostile” Indians at least partially motivated the Framers' commitment to a right to bear arms.¹³ The paucity of

land); Kristen A. Carpenter, *Recovering Homelands, Governance, and Lifeways: A Book Review of Blood Struggle: The Rise of Modern Indian Nations*, 41 TULSA L. REV. 79, 79–80 (2005) (“Tribal land ownership is a key factor in community revitalization, allowing tribes to foster tribal jurisdiction, economic development, housing, environmental health, subsistence patterns, and spirituality. Thus, the recovery of Indian property represents a dramatic turn of events, given both the overwhelming history of land loss and importance of a growing land base to contemporary survival.” (footnote omitted)).

8. The scope of tribal jurisdiction over reservation residents—whether member Indian, nonmember Indian, or non-Indian—is discussed fully herein at section III.A.

9. See *infra* section III.B.

10. Admittedly, it does now seem that there is virtually no way to talk about the Second Amendment without entering the fray of an extremely polarizing political conversation. But, in this piece, I largely stay out of these conversations. Rather, I accept current Supreme Court jurisprudence on this topic and work my analysis from there. I also do not undertake to examine the efficacy of gun control laws or test the “more guns, less crime” hypothesis and all its variations, though this is an important line of inquiry for those devising gun control policy.

11. But see Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 324–26 (1991) (examining a history of racially exclusive gun-control laws, particularly as they pertained to African-Americans but also touching on racial restrictions in regards to American Indians); Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137, 143 (2004) (“The ICRA has no Second Amendment analog”); Ann E. Tweedy, “Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things like That?” *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 PA. J. CONST. L. 687 (2011) (linking perceived Indian “savagery” to a denial of tribal rights to self-defense).

12. See, e.g., Cottrol & Diamond, *supra* note 11 (examining a history of racially exclusive gun-control laws, particularly as they pertained to African-Americans); Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007) [hereinafter Gulasekaram, *Aliens*] (analyzing the relationship between gun control laws and citizenship, particularly in regards to noncitizens); Pratheepan Gulasekaram, “The People” of the Second Amendment: *Citizenship and the Right To Bear Arms*, 85 N.Y.U. L. REV. 1521 (2010) [hereinafter Gulasekaram, “The People”] (arguing that the Second Amendment cannot both protect an individual right to self-defense and exclude noncitizens from this right).

13. Transcript of Oral Argument at 8, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). In his dissent, Justice Breyer conveys the view that an understanding of self-defense by arms in colonial times would have been relevant to those living on the frontier and “fighting with Indian tribes.” *Heller*, 554 U.S. at 715 (Breyer, J., dissenting); see also SAUL CORNELL, *A WELL-REGULATED*

academic scrutiny as to the relationship between Indians and guns—or, more accurately in some instances, between Indian nations and guns—is curious (if not surprising), considering the prominence given in legal scholarship to the Second Amendment and gun control as well as an emergent literature dealing with issues of criminal law enforcement in Indian country¹⁴ and the unique arrangement of quasi-constitutional protections applicable to Indian tribal governments.

This Article endeavors to fill this gap in existing gun rights scholarship. The relationship between Indians and guns holds particular salience for reservation residents, where crime is high, jurisdictional limitations cabin the ability of tribal governments to police Indian country, and political and fiscal barriers inhibit adequate complementary law enforcement by other sovereigns.¹⁵ Thus, an inquiry into Indians and guns is long overdue, particularly in light of an apparent irony. The scenario at the root of Justice Kennedy's questioning in *Heller*—the presence of vast, rural landscapes where Americans are unable to rely on the protection of the state against threatening forces—is actually still at work on some of the most rural Indian reservations in the United States, though the threats to security have been radically redefined.¹⁶ Yet, these are the very places where gun rights may be most severely curtailed and by tribal governments themselves.

Though largely unexplored, the issue of guns in Indian country resonates far beyond reservation borders. A combination of key events—including the Supreme Court's recent opinions and the assassination attempt on Congresswoman Giffords in Arizona,¹⁷ which contains over 21 million acres of Indian reservation land¹⁸—has reignited the gun debate. There has been a corresponding flood of societal, judicial, and academic interest on the topic of guns and gun control in the United States, much of it flowing in one direction—more guns and greater gun rights.¹⁹ Consequently, the question of whether and to what extent

MILITIA 39–40 (2006) (arguing that many factors, including Indians, placed a question about the formation of a militia “at the center of constitutional debate”).

14. “Indian country” is a term of art codified by statute. *See* 18 U.S.C. § 1151 (2006).

15. With over 560 Indian tribes in the United States, enormous diversity between tribes makes generalizations regarding crime difficult to compare across reservations. Nevertheless, much of the crime data collected points to extremely high rates of crime, particularly violent crime, in Indian country. *See* STEWART WAKELING ET AL., U.S. DEP'T OF JUSTICE, NCJ No. 188095 POLICING ON AMERICAN INDIAN RESERVATIONS 2, 13–22 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

16. For Indian people today, threats to security are often not due to an Indian presence; they are due to a non-Indian one. *See* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 8 (2004), available at http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.

17. *See* Marc Lacey, *New York City Investigates Arizona Gun Show*, N.Y. TIMES, Jan. 30, 2011, <http://www.nytimes.com/2011/01/31/us/31guns.html>; Timothy Williams, *After Tucson Rampage, a Struggle To Stay in Reach*, N.Y. TIMES, Feb. 6, 2011, <http://www.nytimes.com/2011/02/07/us/politics/07townhalls.html>.

18. TAAMS, *supra* note 7.

19. The Supreme Court's decision in *Heller* inspired an entirely new niche of legal scholarship on the Second Amendment, with some law reviews devoting entire issues to its rumination. *See, e.g.*, Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 N.W. U. L. REV. 923 (2009);

governments may limit gun ownership has reemerged as a critical, political issue. As many theorists and pundits pointed out in the wake of *Heller*, “[o]pinion polls demonstrate that an overwhelming majority of Americans believe that individuals should have the right to possess firearms,”²⁰ and “a majority of the population understands that right to be rooted in constitutional text and tradition.”²¹ Examining how gun rights manifest, if at all, within Indian country presses on the dominant American understanding of a cohesive constitutional frame and the rights attendant to citizenship.

In this piece, I examine Indians’ linkage to guns over time, constructing a historical and legal narrative that details the evolution of that relationship, focusing on the rights and obligations of both individual American Indians as well as those of contemporary tribal governments within the present legal regime. Through this telling, I contend that three deeply intertwined, interdependent theories—exceptionalism, citizenship, and race—emerge to explain the relationship of Indians to guns in the United States. Ultimately, each theory points to an understanding of Indians and Indian nations, both in historical and contemporary terms, as outside the dominant frame of American law, unbound by the Second Amendment.

First, the history of Indians and guns is defined by an understanding of Indians as peoples and Indian tribes as sovereign nations removed from the polity of a nascent America. This is the narrative of Indian legal exceptionalism, a place where “the rule of law cannot be easily harmonized across the colonial-constitutional divide.”²² Pursuant to the “exceptionalism theory,” Indian tribes’ outsider status in regards to gun rights—exemplified by, for example, laws prohibiting the sale of guns to “hostile” Indian tribes or treaty provisions requiring the disarmament of Indian nations—continues to define perceptions of tribal governments in the present day. These perceptions, in turn, shape the scope of current tribal jurisdiction, including the enforcement of both civil and criminal gun laws in Indian country. Indian exceptionalism, then, facilitates Indian nations’ own understanding of the role of sovereignty and their extraconstitutional status in constructing gun rights completely free from the confines of the Second Amendment.

Symposium, *The Second Amendment and the Right To Bear Arms After D.C. v. Heller*, 56 UCLA L. REV. 1041 (2009). Curiously, Arizona became more pro-gun in the wake of the Gifford’s shooting, not less. See generally Gail Collins, Op-Ed., *A Right To Bear Glocks?*, N.Y. TIMES, Jan. 10, 2011, at A21 (“Since then, Arizona has completely eliminated the whole concept of requiring a concealed weapon permit. Last year, it got 2 points out of a possible 100 in the Brady Campaign to Prevent Gun Violence state score card, avoiding a zero only because its Legislature has not—so far—voted to force colleges to let people bring their guns on campuses.”).

20. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1355 (2009).

21. William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 351 (2009).

22. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 436 (2005).

Through a different lens, the history of Indians and guns is a story about becoming American. In colonial America, rights and obligations related to guns were often tied to race, and race, in turn, was tied to citizenship. The sovereign authority to define who was in and who was out was deployed to exclude “undesirables,” including Indians. But the extension of citizenship—for Indians, the moment came officially in 1924—marked the inclusion of Indians into the polity of the United States. From here, Indians could assert rights as individual American citizens under the United States Constitution. The “citizenship theory” of Indians and guns, then, is one in which Indians may strongly adhere to the view that gun ownership—particularly in the defense of self, as articulated in *Heller*—is a distinctly American right. This view supports tribal claims that all citizens should be guaranteed individual gun rights, particularly in light of state failures to protect them from harm.

A final, related viewpoint contemplates the history of Indians and guns as an account of racial hierarchy and social control, deeply pronounced at the point of contact and through the early years of the republic but tenaciously embedded in much of American law. This narrative reveals that the relationship of Indians and guns developed in parallel to African-Americans and guns, with both groups situated at the bottom of a racial hierarchy that facilitated oppression, noncitizen status, and subjugation. Here, as a means of extracting wealth—with African slaves, their labor; with Indians, their lands—the gun served as a tool of white privilege, forever linked to a history of violence and oppression. The “race theory,” then, connects guns to a complex dynamic of racial status and domination, which may, in turn, motivate contemporary tribal governments to reject a commitment to individualized gun rights.

Mark Tushnet has written that “[t]he Second Amendment is one of the arenas in which we as Americans try to figure out who we are.”²³ In this Article, I interrogate the various lines of inquiry implicated by Tushnet’s statement through application of my three proposed theories. I conclude that the deeply complex history of Indians and guns in America produces surprising legal consequences for Indian nations—namely, a wide-ranging freedom to design and contemplate gun rights in ways solely enjoyed by tribal governments. This freedom concomitantly affords Indian tribes unique and unexpected opportunities for the development of creative regulatory solutions in relation to firearms that could potentially affect existing governance challenges in Indian country. Ultimately, these choices will be shaped in accordance with tribally distinct views of their relationship to the history that defines their current circumstances and status within the American constitutional framework. In sum, because they are unconstrained by the Second Amendment, Indian tribes enjoy a vast and unique freedom to engage in lawmaking around gun laws and policies. This presents an enormously important opportunity.

23. MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN’T END THE BATTLE OVER GUNS* xiv (2007).

In all these ways, the past and, indeed, the present position of Indians in relation to guns is a reflection of a long-standing perception of Indians and Indian nations as the un-“we,” as peoples existing consistently outside the American polity. The pressing question remaining for Indian nations—in regards to arms in particular—is how to situate themselves within the broader American legal landscape of gun rights. Ultimately, then, this is a paper about Indians and the democratic project and, at its heart, a work not only about gun policy but about tribal sovereignty and peoplehood.

This Article proceeds as follows: Part I details the untold story of Indians and guns, tracing the thread from first contact through a set of crucial lawmaking moments—at the drafting of the U.S. Constitution and ratification of the Second Amendment, during the period of Indian removal, and when citizenship was conferred on American Indians in 1924. Part II focuses on the legislative history and contemporary ramifications of Congress’ decision to omit any reference to the Second Amendment or a corollary into the Indian Civil Rights Act of 1968, leaving tribal governments free to make tribally distinct gun laws and regulations. Finally, Part III views existing tribal law and policy through the lens of the constructed theories of Indians and guns, pointing out the present-day relevance of the inquiry and highlighting potential future implications for Indian country governance.

I. INDIANS AND GUNS FROM CONTACT TO CITIZENSHIP

It is not particularly surprising that Indian nations are largely ignored by scholarship discussing guns and gun rights. As Phil Frickey persuasively argued, federal Indian law is a “largely overlooked, little-understood paradox.”²⁴ Just as Indians have always been on the periphery of the American democratic project, they have also been outside the core of American gun laws. But in the racial undercurrent that pervades the history of America, Indians have, in some important ways, always been tied to guns. Though contentious debates abound as to what the Second Amendment means, there is wide consensus on one basis for its enactment—to protect white settlers against Indians.²⁵ Crafted to, at least in part, ensure the maintenance of state and local militias, the Second Amendment guaranteed the existence of a powerful military force to secure the burgeoning union against its enemies, which was often seen as including Indian tribes. As President George Washington indicated in his 1789 report from the Secretary of War, Henry Knox, to the Senate, troops dedicated to the preserva-

24. Frickey, *supra* note 22, at 434.

25. See CORNELL, *supra* note 13 (noting that the Framers had many concerns about the burgeoning nation, including ensuring state militias to protect the country against, inter alia, “Indian attack,” which appears as a persistent concern of colonizers, even if the place of Indian nations within the federal constitutional structure was not a pressing issue); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1151 (1995) (explaining that federal and state policy makers were not concerned with determining “the need for centralized management of Indian affairs by the national government and the scope and limits of its power”).

tion of the Union were “to protect the frontiers from the depredations of the hostile Indians.”²⁶ Over two hundred years later, Justice Kennedy similarly suggested in oral arguments in *Heller* that the Second Amendment was at least partially motivated by “the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that[.]”²⁷

This history, from the point of contact through the ratification of the Second Amendment in 1791 and up until the granting of Indian citizenship in 1924, manifests the three theories explaining the relationship of Indians to guns, all of which are linked together by an overarching framework of Indians as outsiders. As a descriptive matter, colonial (and then, American) law and history provides a roadmap for understanding the role of Indians and Indian tribes as characterized by exceptionalism, or sovereign nations with whom the prevailing powers would enter into treaties, ultimately seeking amity, resources, and lands; citizenship, or peoples with allegiances to their tribal structures and networks, for whom citizenship in the United States was, at various points, undesirable or unattainable; and race, or perceptions of Indians as a primitive and inferior race of people, whose constructed and monolithic phenotype, identity, and culture necessarily situated them at the bottom of a new racial hierarchy.

In many respects, particularly early on in Indian–white relations, exceptionalism set the stage for settler’s dealings with Indian nations. Distinct from colonists’ dealings with Africans, relations between Indian nations and colonial forces reflected the interplay between sovereign governments and military opponents. With various foreign governments vying for control over the New World, relations with existing tribes—which posed a significant military threat to settlement—depended more on negotiation, strategy, and alliance than conquest.²⁸ Some colonial powers, in fact, armed Indian allies to achieve their

26. Message from President George Washington to the Senate (Aug. 10, 1789), in 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, H.R. MISC. DOC. NO. 210, at 60 (1896).

27. Transcript of Oral Argument, *supra* note 13.

28. See, e.g., Deed in Trust from Three of the Five Nations of Indians to the King, Sept. 14, 1726, in 5 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 800–01 (E.B. O’Callaghan ed., Albany, Weed, Parsons, and Co. 1885), available at <http://earlytreaties.unl.edu/treaty.00002.html> (protecting specific ancestral territories for the use of the Cayuga, Onondaga, and Seneca Nations and their successors forever); Treaty of Albany: The Great Treaty of 1722 Between the Five Nations, the Mahicans, and the Colonies of New York, Virginia, and Pennsylvania, 1722, in DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK, *supra*, at 657–81 (dissolving any alliance with the French and confirming tribal allegiance with the British); An Agreement Made Between Richard Nicolls Esq. Governor Under His Royal Highness the Duke of York and the Sachems and People Called the Sopes Indyans, Oct. 7, 1665, in RICHARD NICOLLS–ESOPUS INDIAN TREATY 1665, at 17 (Archives Div., Ulster Cnty. Clerk ed. 2002), available at http://www.jrbooksonline.com/PDF_Books/EsopusIndianTreaty.pdf (outlining policies of cooperation between the governments and addressing a specific parcel of land relinquished by the Sachem and Sopes).

mutually shared military goals.²⁹ The resulting treaty relationship between the Indian nations and the colonial powers, and the exclusion of Indian nations from the governance scheme of the U.S. Constitution,³⁰ acknowledged Indian nationhood and forever concretized Indian exceptionalism in American law.

Citizenship theory³¹ and related rationales of exclusion also played a critical role in defining the contours of the country and the status of the American Indian within it. As noncitizens, Indians were outside the polity. Laws largely proscribed Indian militia service, thus limiting Indians' lawful access to guns, and numerous colonial statutes forbade the sale of guns or ammunition to Indians altogether. Despite these prohibitions, Indians continued the march towards inclusion, sometimes possessing guns in ways similar to citizens. Market forces in trade drove Indians' access to guns and furthered Indians' journey towards formal incorporation in the body politic. Interactive relationships over time integrated the Indian, in some ways, into American life and engaged Indians as dynamic participants in the story of the settlement of the continent as they inched towards American citizenship.

Undoubtedly, race and theories of racial hierarchy also explain a great deal about the early contact between Europeans and Indian "savages." Belief in the racial inferiority of a "primitive" race provided the ideological underpinning necessary to justify the subjugation and dispossession of Indian peoples. Indians, like blacks—both enslaved and free—had to be controlled by whites in order for the colonial project to proceed. Whites utilized guns to fight warring Indians and drive them from their lands. But colonizers also welcomed the trade in guns and ammunition with Indians. It not only advanced whites' economic position but fed a futile cycle of Indian dependence on whites, tied to the gun, with disastrous ends. The dynamic ultimately concluded with massive land dispossession, most Indians situated on reservations, guns in disrepair, and the near extinction of a primary form of currency (after lands), the American bison. These interrelated dynamics set the stage for evolving convergence and divergence of Indians as a racial subject in American law.

The following Part details the story of Indians and guns in American history. Beginning with the point of contact and tracing the historical thread through the ratification of the Constitution and the Second Amendment, this Part concludes with the conferral of citizenship on all American Indians. At each juncture, I describe the relationship between Indians, Indian nations, and guns, demonstrating how acts of the U.S. government, in particular, constructed, oftentimes inadvertently, incoherence in the legal framework still at work today.

29. See CLAYTON E. CRAMER, *ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* 44 (2006) (explaining that the government in the Carolinas armed its Indian allies to assist it against the French and hostile Indian tribes).

30. See U.S. CONST. art. I, § 8, cl. 3.

31. Here, I refer to citizenship in the United States but do not engage indigenous critiques of Indian citizenship or the absence of consent of the governed in regards to Indian peoples.

* * * *

At the point of contact by Europeans with the New World, the Indian population was estimated at around 20 million.³² In just two centuries after Columbus's encounter in the New World, that population is believed to have declined by as much as 95%.³³ As historian and demographer Russell Thornton points out, there are numerous, interrelated reasons for that decline, which "stemmed from European contact and colonization: introduced disease, including alcoholism; warfare and genocide; geographical removal and relocation; and destruction of ways of life."³⁴ While the historical record leaves little doubt that disease served, far and away, as the greatest culprit in reducing Indian populations,³⁵ it is evident that the gun ultimately had a profound impact on the shifting military power of Indian tribes and colonizers after the point of contact. Some historians argue no other object brought to America by Europeans so rapidly changed Indian culture as the gun.³⁶ Undoubtedly, the drive to acquire guns, and the expertise developed in relation to them, shaped the winners and losers on the American frontier as settlers battled tribes and tribes battled one another for control over now threatened territory.³⁷ Ultimately, multiple factors caused the decline of the military force of Indians, but "firearms became the decisive factor in subduing the Indian and in settling the quarrels between white men during their early occupation of the New World."³⁸ Indeed, the role of the gun in subjugating and conquering indigenous inhabitants by Europeans is a story that was replicated across the globe.³⁹

32. JARED DIAMOND, GUNS, GERMS, AND STEEL 211 (1997). There are, however, competing estimates. See, e.g., ROBERT M. UTLEY, THE INDIAN FRONTIER 1846-1890, at 11 (rev. ed. 2003) ("More than five million natives inhabited North America in 1492.")

33. DIAMOND, *supra* note 32.

34. RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492, at 43-44 (1987).

35. See *id.* at 44.

36. CARL P. RUSSELL, GUNS ON THE EARLY FRONTIERS: A HISTORY OF FIREARMS FROM COLONIAL TIMES THROUGH THE YEARS OF THE WESTERN FUR TRADE, at v (1957) ("The gun had a greater influence in changing the primitive ways of the Indian than any other object brought to America by the white man.")

37. *Id.* at vi ("The gun-carrying Indian played a notable role in the economic scheme of the white man and in the tragic contests for empire everywhere north of Mexico."); see also FRANK RAYMOND SECOY, CHANGING MILITARY PATTERNS ON THE GREAT PLAINS: 17TH CENTURY THROUGH EARLY 19TH CENTURY 66-67 (1953) (explaining the balance of power between tribes as depending on a host of factors, including control of trading posts, positioning of friend and foe, and supply of pelts); CHARLES G. WORMAN, FIREARMS IN AMERICAN HISTORY 209 (2007) ("Regardless of the source, the gun with its longer range than the bow and arrow and its psychological advantages of smoke, noise, and seemingly mystic characteristics initially provided the 'haves' with awesome power over the 'have nots.'")

38. RUSSELL, *supra* note 36.

39. See, e.g., DIAMOND, *supra* note 32, at 53-54 (discussing how the introduction of guns affected the balance of power between the Maori and the Moriori in New Zealand).

A. INDIANS AND GUNS IN THE COLONIAL PERIOD

Almost from the first point of contact between Europeans and Indians, Indians have had guns.⁴⁰ They acquired them slowly, at first. The trade of goods for food and survival skills in the New World sustained colonizers initially.⁴¹ Tribes used these resources as a weighty bargaining tool in the early colonial period. Edmund Morgan describes how colonizers at Jamestown in 1609–1610 were starving during a brutal winter and survived only by obtaining corn from the local Indians.⁴² Thus was born a “symbiotic relations[hip] of interdependence with Indians . . . involving both conflict and cooperation, that formed the matrix of modern American society.”⁴³

Despite European ambivalence about the exchange of firearms with the Native population, the gun trade grew from embryonic to thriving in only a few decades. Guns for trade were readily available and increasingly served as an integral part of market dynamics in early America.⁴⁴ “By the beginning of the seventeenth century the gun had become an institution in America and there were definite patterns of procedures in procuring and distributing arms and ammunition.”⁴⁵ And Indians, of course, wanted guns. Not only was the new technology viewed with “wonder,”⁴⁶ but a supply of guns and ammunition made it possible for tribes to hunt with more efficiency, producing more furs and pelts with which to trade. Guns thus catapulted the Indian into the market economy, creating a dynamic relationship between Indians and whites that set the stage for the settlement of the West.⁴⁷

Of course, guns were also desired because they allowed Indians to maintain a distinct advantage over disputes with enemy tribes.⁴⁸ After all, tribes did not have a unified Indian identity prior to contact. To the contrary, tribes had formed

40. See generally RUSSELL, *supra* note 36, at 1–61 (cataloging the introduction of guns to Indians by European colonists).

41. See generally CATHERINE O’NEILL GRACE ET AL., 1621: A NEW LOOK AT THANKSGIVING (2001) (explaining the origins of Thanksgiving).

42. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 72–73 (1975) (“It is evident that the settlers, failing to plant for themselves, depend heavily on the Indians for food.”).

43. FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST 173 (1975).

44. See WORMAN, *supra* note 37, at 207 (referring to the early colonial period and stating that “[t]he Dutch may have been the first to exchange guns for furs”).

45. RUSSELL, *supra* note 36; see also CHARLES G. WORMAN, GUNSMOKE AND SADDLE LEATHER: FIREARMS IN THE NINETEENTH-CENTURY AMERICAN WEST 435 (2005) (“The sale of firearms to Indians east of the Mississippi was well established . . . by the late seventeenth century.”).

46. UTLEY, *supra* note 32, at 19.

47. See JOHN PHILLIP REID, A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT 37 (1976).

48. See ALFRED A. CAVE, THE PEQUOT WAR 63 (1996) (“Native Americans prized European firearms for their effectiveness in hunting and in war.”); WORMAN, *supra* note 45 (“[Tribes] found guns not only gave them a psychological advantage over their tribal enemies who lacked them, but were useful in hunting”); see also Zuni Tribe of N.M. v. United States, 12 Cl. Ct. 641, 645 (1987) (noting that the United States refused to arm the Zunis to defend themselves against the “plunder” of Navajos).

strategic alliances with other tribal nations but also engaged in bitter wars over territory and resources, with hostilities sometimes extending over hundreds of years. With the introduction of firearms, guns in the hands of one tribe gave it a powerful advantage over its historical enemies and, in many instances, increased deadly battles.⁴⁹ Thus, in the fledgling new world, guns represented “access to power” for both Indians and whites,⁵⁰ playing a critical role in establishing victors⁵¹ and serving as the weapon of choice for Europeans seeking to conquer indigenous populations.⁵²

Accordingly, because guns were powerful weapons and certain Indian tribes were viewed as hostile, some early laws prohibited the trade or sale of guns and ammunition with Indians, oftentimes imposing severe penalties on those who did not abide by them.⁵³ For example, a 1642 Virginia law stated:

Be it also enacted and confirmed, that what person or persons soever shall sell or barter with any Indian or Indians for peece, powder and shott and being thereof lawfully convicted, shall forfeit his whole estate, the one halfe to the informer the other halfe to the vse of the county where such ffact shall be committed⁵⁴

Other laws similarly prohibited the sale of guns to Indian enemies, such as this 1707 South Carolina provision:

[I]f any person whatsoever shall . . . sell, give, or any other way dispose of any arms or ammunition of war, to any Indians who are open enemies to this Province, shall be, and he or they are hereby declared to be guilty of felony,

49. See, e.g., UTLEY, *supra* note 32, at 25 fig.8 (“The advent of white traders intensified traditional animosities between tribes.”).

50. See CAVE, *supra* note 48, at 63.

51. See *id.*

52. DIAMOND, *supra* note 32, at 76.

53. See, e.g., Order of Massachusetts General Court, *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 28 (Harvard Univ. Press 1929) (1648) (“Nor shall [he] sell or give to any Indian, directly or indirectly any such gun, or any gun-powder . . . upon payn of ten pounds fine”); General Court (May 17, 1637), *in* 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 195 (Nathaniel B. Shurtleff ed., Boston, Press of William White 1853) (noting that a man was whipped for selling a pistol and giving gunpowder to an Indian); see also An Act To Prohibit the Selling of Guns, Gunpowder or Other Warlike Stores to the Indians, ch. DVI (passed 1763), *in* 6 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 319, 320 (WM Stanley Ray 1899) (“[I]f any person or persons whatsoever shall directly or indirectly give to, sell, barter or exchange with any Indian or Indians whatsoever any guns, gunpowder, shot, bullets, lead, or other warlike stores without license . . . being thereof legally convicted . . . shall forfeit and pay the sum of five hundred pounds . . . and shall furthermore be whipped with thirty-nine lashes on his bare back . . . and be committed to the common gaol of the county, there to remain twelve months without bail or mainprise.”).

54. Act XXIII (1642), *in* 1 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 255 (William Walter Hening ed., New York, R. & W. & G. Bartow 2d ed. 1823).

without benefit of the clergy, and shall be liable to the same punishments which felons by the laws of England and of this Province now are.⁵⁵

Punishments included fines, whippings, and imprisonment.

Despite best efforts, however, Indians managed to obtain and use guns. Historians note, for example, that Indians were well armed even by the 1675–1676 King Phillip’s War.⁵⁶ Though some colonial governments attempted to slow or halt the trade of guns to Indians, these prohibitions had little impact because both Indians and Europeans—particularly the French and the English—thirsted for the objects of trade.⁵⁷ Thus, whites were complicit in the delivery of guns to Indians as there were enormous benefits in the exchange.⁵⁸ Goods were plentiful, especially animal pelts and hides, and Indians that hunted with guns were far more efficient than those hunting with bowie knives or arrows. The benefits meant that “[w]hite politicians of the day made all-out efforts to keep the gun and its powder and ball always available to the tribesmen.”⁵⁹

Further, with guns and ammunition serving as an integral part of the exchange between Indians and whites in regards to peace and power, halting the trade of guns meant stagnating white settlement. Historians note that the proposal to ban trade of guns with Indians was “adopted but enforcement was difficult, particularly since rifles were quite often dispensed as official gifts with the intent of cementing British–Indian relations.”⁶⁰ Guns as gifts enabled settlers to negotiate with tribes for control over territory. Some tribes even received an annual supply of guns in payment for land cessions through treaties.⁶¹ With guns serving as a powerful tool in subduing local tribes and convincing them to make peace, cede land, or ally with a particular colonial force, the trade of guns with Indians was virtually unstoppable. By 1700, the robust market in furs and pelts for guns meant that “most Indian peoples, despite attempted prohibitions, could acquire them.”⁶² Moreover, because of the

55. An Act for Regulating the Indian Trade and Making it Safe to the Publick, No. 269, § IV (1707), in 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 309, 310 (Thomas Cooper ed., Columbia, A.S. Jointon 1837); see also Letter of Governor and Deputy of the New England Co. for a Plantation Mass. Bay to the Governor and Council for London’s Plantation in the Mass. Bay in New England, in RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, *supra* note 53, at 392 (“That none sell any artillery to the natives[:] For such of o[u]r nation as sell munition, gunns, or other furniture, to arme the Indians against us, or teach them the use of armes, wee would have you to apphend them and send them prisons for England, where they will not escape severe punishment, being expressly against the proclamacon.”).

56. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 140 (1994).

57. RUSSELL, *supra* note 36, at vi.

58. See *id.*

59. *Id.*

60. See WORMAN, *supra* note 37, at 208–09.

61. See 1 CHARLES AUGUSTUS MURRAY, TRAVELS IN NORTH AMERICA 189 n.¶ (New York, Harper & Brothers 1839).

62. Timothy Morgan, *Firearms*, in ENCYCLOPEDIA OF AMERICAN INDIAN CIVIL RIGHTS 129, 129–30 (James S. Olson ed., 1997).

symbiotic relationship, Indians with guns were generally not seen as a great threat, except in the cases where the tribes had aligned with a competing colonial power.⁶³

The gun trade that developed between Indians and whites had another consequence as well. It created a heightened Indian dependence on whites, insofar as the Indian had to return to white traders repeatedly to secure gunpowder, ammunition, and repairs.⁶⁴ Accordingly, rationing these goods and services was one way early colonies attempted to assert greater control over Indians. Such tactics provided additional methods for subjugating the indigenous populations, subduing Indian military power, and negotiating with warring Indian tribes to facilitate white expansion. For example, the 1648 Massachusetts code contains a law that made it a crime to “directly or indirectly amend [or] repair . . . any gun, small or great, belonging to any Indian.”⁶⁵ The same Massachusetts law prohibited the sale of guns or gunpowder to Indians and imposed a penalty for its violation.⁶⁶

This tactic appears repeatedly throughout the colonial period as a mechanism to keep racial hierarchies in place and locate control in the European powers. In the mid-1700s, British General Jeffrey Amherst, “determined to make the most of British advantages,” limited trading to trading posts, and, “[a]ttempting to limit Indian power and increase Indian dependence, he further restricted the sale of ammunition to Indians.”⁶⁷ The tightly proscribed supply of ammunition and gunpowder appears time and again as a major strategic device for controlling the Indian tribes, as “[t]hose American Indians who did acquire firearms were reliant upon white traders for gunpowder, later metallic cartridges, and other needed accessories.”⁶⁸

This dependence was exacerbated and solidified by radical changes occurring in the southwestern part of the country. Beyond the early colonies, firearms made their way to the Plains and to the far West, sometimes a hundred years

63. SECOY, *supra* note 37, at 3–4.

64. See WORMAN, *supra* note 37 (“Those American Indians who did acquire firearms were reliant upon white traders for gunpowder, later metallic cartridges, and other needed accessories. They frequently lacked access to a means of repairing a broken gun so their firearms often were kept in use far longer if worn or damaged than if they had been in white hands.”).

65. THE LAWS AND LIBERTIES OF MASSACHUSETTS, *supra* note 53.

66. *Id.*; see also An Act To Prohibit the Selling of Guns, Gunpowder or Other Warlike Stores to the Indians, ch. DVI (1763), in THE STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 53 (“[I]f any person or persons whatsoever shall directly or indirectly give to, sell, barter or exchange with any Indian or Indians whatsoever any guns, gunpowder, shot, bullets, lead, or other warlike stores without license . . . being thereof legally convicted . . . shall forfeit and pay the sum of five hundred pounds, one moiety thereof to the informer and the other moiety to the governor or commander in chief of this province for the time being, and shall furthermore be whipped with thirty-nine lashes on his bare back, well laid on, and be committed to the common goal of the county, there to remain twelve months without bail or mainprise.”).

67. GREGORY EVANS DOWD, WAR UNDER HEAVEN: PONTIAC, THE INDIAN NATIONS, & THE BRITISH EMPIRE 76 (2002).

68. WORMAN, *supra* note 37; see REID, *supra* note 47, at 193 (describing the Cherokee’s dependence on the gun and how it was, ultimately, part of their undoing).

before whites did, radically shifting the western frontier.⁶⁹ In fact, revolutionary changes were afoot for Indians beyond the eastern seaboard by the late 1700s when the horse, which had spread via the Spanish up from Mexico, occupied the Southwest and then stretched east and north, and the gun, which was introduced on the Atlantic coast and stretched into Canada and down through the northwest territories before spreading south and west, finally converged around 1730 with striking overlap on the plains by 1800.⁷⁰ In a relatively short span of time, “the grasslands of the Great Plains nourished multiplying herds of wild horses,” and “[b]y late in the century virtually all the Indians of the Trans-Mississippi West had horses.”⁷¹

The convergence of the horse and the gun produced a wildly robust economy of trade structured around the buffalo, in particular, that only increased Indians’ desire for guns and whites’ desire to ensure Indians were well armed to facilitate the hunting of animals and the delivery of pelts to traders. Indian tribes that had, since time immemorial, traveled on foot or used dogs as a primary “beast[] of burden,” were now able to traverse large swaths of country on horseback, giving them “undreamed mobility.”⁷² Ultimately, it was this convergence of the horse and the gun on the plains, in particular, which facilitated the “buffalo-hunting culture that overspread the Great Plains and even reached into the Rocky Mountains.”⁷³ Thus, these “European contributions” of horse and gun were of “enormous consequence” to American Indians⁷⁴ and pressed the Indian and white man into a greater and greater economic interdependence, which came to a devastating and abrupt end by the close of the nineteenth century when Indian tribes were confined to reservations and the buffalo had been hunted to the brink of extinction.⁷⁵

Within this complex frame involving hundreds of tribes, numerous colonizing forces, and thousands of miles of desirable lands, laws governing the trade and sale of guns to Indians varied widely, depending largely on the colonial forces

69. UTLEY, *supra* note 32, at 14 (“For thousands of Indians who had yet to see their first white man, horse and gun brought revolutionary change to culture and balance of power.”); *cf.* SECOY, *supra* note 37, at 4–5 (“[A]lmost all of the guns possessed by any of the Plains tribes prior to the 19th century were obtained largely through trading with the English and French on the north and east. The supply of the lead and powder necessary for continued operation of these guns was obtained in a similar fashion.”).

70. SECOY, *supra* note 37, at 104–07 (including maps showing the progression of the horse culture and gun culture, respectively, from 1630 until 1790); UTLEY, *supra* note 32, at 14 (“Guns came from the east and north at the same time horses advanced from the opposite directions. Originating mainly with the French, guns spread from group to group by trade and war.”); *id.* at 20 (“[By the mid-1750s,] the Blackfeet had acquired their own ‘Big Dogs’ [horses] and firearms. Horses came in trade from tribes to the west. Guns came in trade from Assiniboines and Crees, who obtained them from French traders farther east.”).

71. UTLEY, *supra* note 32, at 13–14.

72. *Id.* at 14.

73. *Id.*

74. *Id.* at 13.

75. *See infra* notes 154–59 and accompanying text.

in control in the given region.⁷⁶ Historians attribute some of these differences to divergent views on empire building between the Spanish on the one hand and the British and French on the other. One historian explains that the Spanish “emphasis was not upon trade across the frontier to acquire wealth, but upon controlled production and distribution of wealth within the empire, [thus making] the possession of guns by Indians beyond the frontier . . . a severe threat to the maintenance of the frontier and to its future advance.”⁷⁷ Thus, “the sale of guns and ammunition to Indians beyond the frontier was forbidden by law” within the territory controlled by the Spanish,⁷⁸ explaining some of the variation one sees in the period regarding the policy of trading in guns with Indians.

Because Europeans themselves struggled to balance their own needs for survival and for a growing land base with the processes of colonization, their relationship with Indians and the arms trade was quite complicated. On the one hand, guns provided a deeply valuable commodity through which whites could negotiate with Indians to secure the goods and lands whites desired.⁷⁹ On the other hand, colonists largely interacted with Natives motivated by a crusading philosophy, which situated Indians at the bottom of existing racial hierarchies. Early writings describe Indians as savages, heathens, and infidels who had to be colonized, Christianized, and subdued.⁸⁰ Consequently, affording too great a freedom in regards to guns—a powerful, if rudimentary, weapon at the time—could threaten whites’ own survival; this concern was embodied in a 1764 draft regulation written by British officials:

Rifled Barreled Guns should certainly be prohibited; the Shawanese and Delawares, with many of their neighbours are become very fond of them [rifles], and use them with such dexterity, that they are capable of doing infinite damage, and as they are made in some of the frontier Towns, where the Indians will procure them at any Price . . . all white persons should be restricted on a very severe penalty from selling them to any Indians.⁸¹

76. See, e.g., DOWD, *supra* note 67 (describing British–Indian relations in the mid-1700s that involved the trade of guns and ammunition with Indians that was at times limited “to . . . increase Indian dependence”); SECOY, *supra* note 37, at 4–5 (describing Spanish–Indian relations beginning in the 1500s in which the “sale of guns and ammunition to Indians . . . was forbidden by law” and the opposing French–Indian relationship that involved the trade and sale of guns and ammunition to Indians).

77. SECOY, *supra* note 37, at 4–5.

78. *Id.*; see also WORMAN, *supra* note 45, at 436 (“[I]t was general Spanish policy to keep firearms out of Indian hands.”).

79. See, e.g., WORMAN, *supra* note 37, at 207 (noting that, while trade of guns with Indians who were a threat to whites was often criminalized and punished, market forces pushed gun trading forward and, “by the early 1700s, both English and French traders were bartering guns [with Indians] west of the Mississippi for horses and pelts.”).

80. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (exploring the foundational themes and history of contemporary legal thought on the rights and status of Native American peoples).

81. See WORMAN, *supra* note 37, at 208 (alteration and omission in original).

Such fears were commonly expressed by leaders who realized that guns had important utility in Indian–white relations, but who were ever mindful of the potential tipping point whereby Indians could become too powerful a military force.⁸² One “compromise” was to engage in trade of guns with Indians but ensure that the traded weapons were inferior to those owned by whites.⁸³

Throughout this period, the primary demand on Indians, of course, was for their lands. Expectedly, as Indians tried to protect their ancestral territory from encroachment, they found themselves repeatedly engaged in warfare with settlers. As a result, historical documents reflect settlers’ belief that they must maintain guns to fight back against the “savage” Indians.⁸⁴ As Morgan writes, the sentiment at the time reflected the view that, “[a]bove all, you needed guns to stay alive when marauding Indians came upon your plantation.”⁸⁵ Robert Cottrol and Raymond Diamond further explain, “For the settlers of British North America, an armed and universally deputized white population was necessary not only to ward off dangers from the armies of other European powers, but also to ward off attacks from the indigenous population which feared the encroachment of English settlers on their lands.”⁸⁶

Prior to the adoption of the Constitution, the country was in a precarious state. There were competing colonial forces at work, and numerous Indian tribes were poised to defend their lands against appropriation. Without a unified state, there was no standing army to protect the interests of the burgeoning union. Thus, many of the early laws regulating guns focused on two central themes. First, they established a framework of corresponding obligations and rights such that the embryonic colonies, lacking a standing army, could protect themselves in case of conflict or attack through the formation and regulation of militias.⁸⁷ Secondly, they ensured that two of the most threatening forces to colonization—Indian tribes and enslaved blacks—were provided enough military force to

82. See WORMAN, *supra* note 45, at 435–46 (“The greatest fear of the moment and for the future that one can conclude concerning the Comanche tribe is from their supply and use of guns which they are acquiring, and which they are instructing themselves with the handling thereof. With these weapons they will be greatly feared in this province.” (quoting New Mexico Governor don Tomás Vélez Cachupín)).

83. *Id.* at 436; see also REID, *supra* note 47, at 37–38 (describing how guns traded with and given to the Cherokee were inferior to those carried by Europeans).

84. See generally WILLIAMS, *supra* note 80, at 213–15 (discussing colonists’ responses, including a prohibition on trading guns with Indians, to confrontational Powhatan Emperor Opechancanough).

85. MORGAN, *supra* note 42, at 239.

86. Cottrol & Diamond, *supra* note 11, at 323–24.

87. Consider, for example, early gun laws that required settlers to carry weapons for protection of the colonies. See, e.g., Laws of the Colony of New Plymouth (1632), in THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 30–31 (William Brigham ed., William S. Hein Co. 1986) (1836); Court of Newport, Rhode Island (Sept. 25, 1639), in 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 93, 94 (Providence, A. Crawford Greene & Brother 1856) (“[N]oe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and . . . none shall come to any public Meeting without his weapon.”); see also MALCOLM, *supra* note 56, at 139 (“The dangers all the colonies faced, however, were so great that not only militia members but all householders were ordered to be armed.”).

facilitate the interests of whites, without allowing them power sufficient to overthrow colonial forces.⁸⁸

These two themes manifested in an interconnected story, ultimately rooted in a shared concern over advancing the colonial project while inextricably tied to maintaining requisite racial control.⁸⁹ Early laws passed in regards to guns and gun ownership set parameters for the establishment of state and local militia to achieve these dual purposes. In fact, in the Revolutionary period some laws mandated gun ownership and maintenance by “all free men between the ages of eighteen and forty-five” to ensure the protection of the states and the nation.⁹⁰ As scholar Joyce Malcolm points out, early gun ownership was often tied to militia service: “Neither the Indian nor the slave was a citizen, therefore neither was entitled to the rights of English subjects. . . . Their inability to legally own weapons merely confirmed their status as outsiders and inferiors.”⁹¹ Indians and blacks were put to work as servants and slaves in the colonies and had to be contained and subdued by armed whites to avoid an uprising and to solicit their labor.⁹² Even slaveholders had to engage in this delicate balance, arming their plantations sufficiently to protect against potential Indian attacks while also keeping their own slave population in check.⁹³ Cottrol and Diamond argue in their seminal work on race and the Second Amendment, “This need for racial control helped transform the traditional English right into a much broader American one.”⁹⁴ Thus, it was important for colonizers to keep the “suspect populations of the New World”—Indians and black slaves—from obtaining guns.⁹⁵

Despite colonial arms policies, Indians were already well armed by April 1775 when the first shot of the American Revolution was fired.⁹⁶ Indian tribes were active participants on both sides of the war, with a significant number fighting for the British, as they saw the formation of a United States as a further threat to and incursion on their sacred lands.⁹⁷ Historians note that, “[b]y the time that Cornwallis surrendered in October, 1781, practically all Indian tribes in the eastern half of what is now the United States were thoroughly familiar with guns and gunpowder.”⁹⁸ Though the Revolutionary War itself did not

88. See MALCOLM, *supra* note 56.

89. See *id.*; Cottrol & Diamond, *supra* note 11, at 325–26.

90. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 113 (2011).

91. MALCOLM, *supra* note 56, at 141.

92. Cottrol & Diamond, *supra* note 11, at 323–24.

93. James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1806 (2002) (“[G]un ownership among the bulk of slave-owning estates . . . was very high Indeed, the odds that large slaveholders would own guns is 4.3 times as high as the odds of gun ownership for estates without large numbers of slaves.”).

94. Cottrol & Diamond, *supra* note 11, at 324.

95. MALCOLM, *supra* note 56. Though, as evidenced herein, colonizers exchanged guns and ammunition with both groups, subject to particular controls and limits.

96. RUSSELL, *supra* note 36, at 50.

97. See *id.*

98. *Id.* at 51.

radically change the Indians' relationship to the gun, as they had adopted firearms long before its commencement, it is credited with further educating Indians as to their efficacy in warfare and hunting, increasing Indians' desire for arms.⁹⁹

B. INDIAN NATIONS, THE CONSTITUTION, AND RATIFICATION OF THE SECOND AMENDMENT

The end of the Revolutionary War ushered in major changes for what was now the United States. Issues of race—particularly the question of slavery and the “Indian problem”—continued to plague the country's rocky formation.¹⁰⁰ As legal historian Saul Cornell writes in *A Well Regulated Militia*, the formation of the country was precarious, with delegates to the Constitutional Convention rightfully feeling “apprehensive about the future.”¹⁰¹ As Richard Epstein describes it:

For the new nation in 1787, prospects did not look all that cheery. The nation was comprised of thirteen former colonies and a range of territories, but there were the British to the North, the French to the West in the Louisiana territory, and the Spanish in Florida to the South. Hostile Indian tribes were also located in these adjacent territories, and within the borders of the United States itself.¹⁰²

At the time, tribes still dominated much of the territory west of the Mississippi River. Though colonial contact had an enormous impact on the indigenous inhabitants of the Americas, numerous Indian tribes, in the West in particular, were still organized in functioning governmental systems, fighting for territory.¹⁰³ In fact, many west of the Mississippi River had never even encountered whites and wouldn't for another fifty to one hundred years.¹⁰⁴ Indian tribes were still largely seen as potentially hostile forces, impeding whites' efforts to overtake enormous tracts of land for settlement. And the desire for Indian lands marked relations between settlers and tribes.¹⁰⁵ In the aftermath of the Revolu-

99. *Id.* at 51–52, 55.

100. See Senator Henry L. Dawes, Address Before the Board of Indian Commissioners (Jan. 22, 1884), in 1883 BD. OF INDIAN COMM'RS ANN. REP. 69–70, reprinted in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900, at 27, 29–30 (Francis Paul Prucha ed., 1973).

101. CORNELL, *supra* note 13, at 39.

102. Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171, 174 (2008).

103. See, e.g., ALBERT L. HURTADO, INDIAN SURVIVAL ON THE CALIFORNIA FRONTIER 100–24 (1988) (detailing the situation of California Indian tribes in the early nineteenth century, who were engaged in conflicts with non-Indians over territory at the height of the gold rush and westward expansion).

104. Cf. UTLEY, *supra* note 32, at 10, 14 (discussing tribes with no white contact).

105. See, e.g., RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 71–72 (1975) (describing the Cherokee Wars of 1760 to 1761 in and around the Carolinas); COLIN G. CALLOWAY, THE WESTERN ABENAKIS OF VERMONT, 1600–1800: WAR, MIGRATION,

tionary War, Indian country was immediately infiltrated with would-be landowners.¹⁰⁶ Continued conflicts with Indians typified the westward expansion of whites and their attempts to drive Indians from their lands and, ultimately, to situate them on reservations. The resulting “bloody warfare” created an enormous political problem for the federal government, which it handled by asserting control over the dispensation of tribal lands and placing Indian Affairs in the War Department.¹⁰⁷

Indians were not the only impediment to formation of the new state. Destabilizing internal forces—including the possibility of rebellion by “debt-ridden farmers” and “enslaved Africans”¹⁰⁸—produced additional layers of anxiety. But the fear of hostile Indian tribes loomed particularly large in the minds of the Framers, who sought to safeguard the country from Indian attacks.¹⁰⁹ In the list of charges made against King George III in The Declaration of Independence, one complaint was that the King had failed to protect the colonies against the “merciless Indian Savages.”¹¹⁰ Burgeoning concerns of national security and racial hostilities and the desire for a centralized system to effectuate the massive dispossession of land from the Natives drove early leaders to advocate for a strong national government, which was seen as essential to defeating Indian opponents and opening up the land west of the Mississippi River.¹¹¹ All of these forces placed the issue of potential militia formation “at the center of constitutional debate.”¹¹²

Accordingly, the primary purpose of early gun regulation—to address the formation and control of the state and local militias pre-Constitution and to protect their establishment after the Constitution was adopted—was relevant to Indians but in a rather unique way. As Robert Clinton explains, Indian tribes

AND THE SURVIVAL OF AN INDIAN PEOPLE 113–31 (1990) (describing the Abenaki Wars from 1722 to 1727 in and around Vermont); WILLIAM N. FENTON, *THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY* 382–83 (1998) (describing the Tuscarora War from 1711 to 1713 in North Carolina).

106. RUSSELL, *supra* note 36, at 55–57 (“Immediately after the Revolution, frontiersmen and speculators swarmed into country west of the Appalachians which was still claimed by Indians. Land companies . . . waited scarcely long enough for ink to dry on the Treaty of Paris before making demands upon Indian lands.”). In an attempt to limit the expansion of settlers, Britain had passed the Proclamation of 1763, which prohibited non-Indian settlement west of the Appalachians. King George III of Great Britain, *A Proclamation* (Oct. 7, 1763), *available at* http://www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.html (“And We do hereby strictly forbid . . . all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.”).

107. RUSSELL, *supra* note 36, at 57. After being renamed, the Bureau of Indian Affairs was transferred to the Department of the Interior in 1849. Vera Parham, *Bureau of Indian Affairs: Establishing the Existence of an Indian Tribe*, in 1 *ENCYCLOPEDIA OF AMERICAN INDIAN HISTORY* 501, 501 (Bruce E. Johansen & Barry M. Pritzker eds., 2008).

108. CORNELL, *supra* note 13, at 39.

109. *See id.*

110. *THE DECLARATION OF INDEPENDENCE* para. 29 (U.S. 1776).

111. DAVID ANDREW NICHOLS, *RED GENTLEMEN & WHITE SAVAGES: INDIANS, FEDERALISTS, AND THE SEARCH FOR ORDER ON THE AMERICAN FRONTIER* 77 (2008).

112. CORNELL, *supra* note 13, at 40.

occupied a particular space in the constitutional imagination of the Founding Fathers. Recent Indian uprisings had strengthened the Framers' views that the country needed a strong central government that would have "exclusive national authority over Indian affairs" and would further limit the role of the states.¹¹³

However, at the actual debates regarding the Constitution, the Framers were "[p]reoccupied with other issues," ultimately paying "little attention to Indian affairs,"¹¹⁴ which have been described as being in "chaos" at the time.¹¹⁵ When Indian tribes were addressed, however minimally, they were contemplated as separate, independent peoples, distinct from states and foreign nations.¹¹⁶ Main foci of concern centered on treaties, taxation, and trade.¹¹⁷ Thus, as colonial powers continued to vie for the ultimate governing authority over the New World, it was essential that Congress have the exclusive right to regulate trade with the Indian nations.¹¹⁸ Ultimately, the Constitution centralized Indian affairs in the national government and "protect[ed] the legal status of the Indian tribes as separate and sovereign peoples."¹¹⁹

Thus, the "hostile" Indians, envisaged as a force outside of the polity, played a major role in the construction of the new nation, in ways perhaps wholly unanticipated at the time. Specifically, the drafting of the Second Amendment was influenced by the budding nation's racial dilemmas, both in philosophical terms—including debates regarding the proper role of Indian nations in the democratic project of America—and in purely pragmatic ways. The demographics of the new nation in the late 1700s impacted the way in which the Second Amendment was ultimately framed. One scholar writes,

When the Second Amendment was adopted, ninety-six percent of Americans lived in small towns or rural areas, often on the frontier between European areas and Native American lands, and there were only six cities with more than 10,000 people. In such an agrarian frontier culture, guns were typically

113. Clinton, *supra* note 25, at 1148. Clinton cites George Washington's January 1788 letter to Samuel Powel of Philadelphia discussing Georgia's ratification of the Constitution: "[I]f a weak state, with powerful tribes of Indians in its rear and the Spaniards on its flank, do not incline to embrace a strong *general* government, there must, I should think, be either wickedness or insanity in their conduct." *Id.* at 1160. See generally ROBERT M. UTLEY & WILCOMB E. WASHBURN, *INDIAN WARS* (Mariner Books 2002) (1977) (cataloging fighting between whites and Indians from 1622 through 1891).

114. NICHOLS, *supra* note 111, at 93.

115. Clinton, *supra* note 25, at 1147 ("The Constitutional Convention convened in May of 1787 in the midst of chaos in the management of Indian affairs.").

116. See U.S. CONST. art. I, § 8, cl. 3; Clinton, *supra* note 25, at 1148–64.

117. See U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2 (interpreted by *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872), to extend to treaties with Indian tribes). See generally DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 1* (2007) (discussing the mention of Indians in Article I, Sections 2 and 8).

118. See NICHOLS, *supra* note 111.

119. Clinton, *supra* note 25, at 1158.

needed for a family's economic success and often their survival against attack; the community protected itself through armed citizen militias.¹²⁰

Colonial America, then, has fairly clearly provided the basis for an understanding of gun ownership as inexorably tied to individualism, private property rights, and freedom from the tyranny of the state,¹²¹ all of which were largely constructed by and for the benefit of whites at the expense of nonwhites. As one historian framed it, Americans “favored a stronger Union not because they feared anarchy, but because they wanted protection from Indians.”¹²² In this romantic vision of America, “[t]he yeoman farmer, standing foursquare on his own plot of land, gun in hand and virtue in his heart, was thus the ideal citizen of a republic.”¹²³

It was within this context that the Framers drafted the Second Amendment.¹²⁴ The Constitution protected the rights of states to set the metes and bounds of militia service, and they did so for a country wherein racial hierarchies were firmly in place and with an understanding that not all within the nation would be deemed citizens for purposes of serving in the militia. And, as a leading constitutional law scholar, Adam Winkler, explains in *Gunfight*, the Second Amendment embodied the nation's need and desire to quickly raise a collective military unit to protect the country but understood that obligation as falling largely on citizens.¹²⁵ Thus, Winkler argues, “The founders believed that ordinary people should have guns and that government shouldn't be allowed to completely disarm the citizenry,” but these rights were tightly constricted by a host of laws governing and restricting gun ownership and use.¹²⁶

Virtually all eighteenth century laws relating to guns—including mandatory loyalty oaths for gun ownership, regulations on the militia, and requirements for storage of gunpowder—were state, not federal.¹²⁷ And many state militia laws

120. William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 193, 206 (2009) (footnote omitted).

121. See MORGAN, *supra* note 42, at 377 (“If they were armed with guns as well as land, they would have both the will and the means to defend their country's freedom against usurpation from within and invasion from without.”); H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 9 (2002) (“Owning and carrying personal firearms—or at least the unbridled right to do so—has become a freighted metaphor of American individualism with obvious linkage to the muscular frontier hero of myth and experience.”).

122. NICHOLS, *supra* note 111, at 94.

123. MORGAN, *supra* note 42, at 377.

124. See Epstein, *supra* note 102 (“In dealing with the Second Amendment, it is critical to understand that the stability of the United States was by no means a sure thing in 1787, and that devices to keep the Union together were uppermost on the minds of the Framers.”).

125. WINKLER, *supra* note 90, at 113–14.

126. *Id.* at 114.

127. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 502–03, 506 (2004). The first federal gun control law was passed in 1934. National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (codified as amended at 26 U.S.C. §§ 5801–5849 (2006)).

included racial restrictions.¹²⁸ For example, a 1778 law in New York mandated that the militia would be comprised of “every able bodied male person Indians and slaves excepted residing within [the] State from sixteen years of age to fifty.”¹²⁹ A 1786 New Hampshire law contained similar racial exclusions.¹³⁰ Racial restrictions were more firmly embedded after the passage of the Militia Act of 1792, which provided a model code that restricted militia participation to “white male citizen[s].”¹³¹ The Act ultimately “lacked any mechanism for federal enforcement”; thus, it “relied on the states to implement a largely hortatory organizational scheme.”¹³² Though the Act plausibly allowed states to be more racially inclusive than the model suggested in militia formation,¹³³ many remained racially exclusive.¹³⁴

However, as peoples outside the polity of the United States—as understood within the theories of Indian exceptionalism, citizenship, and race—Indian tribes remained largely unaffected by these events.¹³⁵ Indian nations were seen as sovereign, governmental entities—“domestic dependent nations”¹³⁶—that had not been brought within the ambit of the federal system. Thus, neither the Constitution, ratified in 1789, nor the Second Amendment, ratified in 1791, applied to Indians or to Indian tribal governments at the time.¹³⁷ Individual Indians were not citizens of the United States and could not naturalize; therefore, they lacked a political nexus to the U.S. Constitution. Moreover, the new country “equated whiteness with fitness for citizenship and self-governance.”¹³⁸ Accordingly, “the Framers gave little thought to the noncitizen, nonvoting Indians.”¹³⁹ A federalism-based Constitution that included only states and a national government deemed Indians and Indian nations irreconcilable with the legal framework of the new nation and, concomitantly, largely apart from the American polity. This outsider status, present since contact, informed the relationship of Indians and guns in the country’s early years and continues to pervade the status of Indians and gun ownership in contemporary America.

128. Cornell & DeDino, *supra* note 127, at 509.

129. Act of Apr. 3, 1778, 1777 N.Y. Laws 62, 62.

130. Act of June 24, 1786, § II, 1786 N.H. Laws 407, 407.

131. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271; *see* *District of Columbia v. Heller*, 554 U.S. 570, 600 (2008).

132. UVILLER & MERKEL, *supra* note 121, at 113.

133. *See* Act of May 8, 1792, § 1, 1 Stat. 271; UVILLER & MERKEL, *supra* note 121, at 114.

134. *See, e.g.*, KY. CONST. of 1850, art. VII, § 1 (“The militia of this Commonwealth shall consist of all free able-bodied male persons (negroes, mulattoes, and Indians excepted) . . .”); An Act To Regulate the Militia, § 1, 1844 R.I. Pub. Laws 501, 503; *see also* Cornell & DeDino, *supra* note 127, at 509 (describing exceptions to mandatory militia membership as “racially based”).

135. *See* WILBUR EDEL, KEKIONGA! THE WORST DEFEAT IN THE HISTORY OF THE U.S. ARMY 75 (1997).

136. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831).

137. The Constitution applied to individual Indians when they became American citizens, but the Constitution still does not apply to Indian nations.

138. Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building a Canon One Case at a Time*, 76 UMKC L. REV. 851, 858 (2008).

139. EDEL, *supra* note 135, at 70.

* * * *

As the new country entered the nineteenth century, it was still in embryonic form. Much of the West had yet to be infiltrated by whites. Tribal nations were not included within the Constitution, and individual Indians were not citizens of the United States, nor were they eligible for naturalization as foreign-born immigrants were.¹⁴⁰ The body of laws that regulated the militia largely excluded Indians,¹⁴¹ and many states still prohibited the sale of guns to Indians.¹⁴² Thus, within the “gun culture”¹⁴³ of the new America, Indian nations—then and now—were both within and without the body politic.

White America maintained its somewhat schizophrenic view of the proper relationship between Indians and guns on a symbolic and pragmatic level. For example, guns were often given as gifts by white ruling elites to indigenous leaders as a show of respect and good faith. In the 1800s, several sitting United States presidents—including Jackson, Polk, and Grant—gave pistols and rifles to Indian delegates in Washington, D.C.¹⁴⁴ And Indians were recruited to serve as police on reservations from 1870–1900, thus acquiring government-issued guns to carry out their duties.¹⁴⁵ And, after the federal government initiated its policy of removal of Indians in 1830 with passage of the Indian Removal Act,¹⁴⁶ some tribes were provided rifles as compensation.¹⁴⁷ In some instances, then, guns went with Indians as they were confined to reservations.¹⁴⁸ In fact, “[d]uring the 1860s and 1870s, the number and quality of guns in Indian hands increased, as did the variety.”¹⁴⁹ Guns had spread to the West as well, with more tribes gaining access to arms.¹⁵⁰ “Until the end of the nineteenth century, guns

140. See MONROE E. PRICE, *NATIVE AMERICAN LAW MANUAL* 239 (1970).

141. See *supra* notes 128–34 and accompanying text.

142. See *supra* notes 53–66 and accompanying text; see also *infra* notes 185–87 (discussing similar federal restrictions).

143. Lindgren & Heather, *supra* note 93, at 1840–41 (“Gun owning was so common in colonial America (especially in comparison with other commonly owned items) that any claim that eighteenth-century America did not have a ‘gun culture’ is implausible, just as one could not plausibly claim that early Americans did not have a culture of reading or wearing clothes.”).

144. WORMAN, *supra* note 45, at 467.

145. See *id.* at 474–76.

146. ch. 148, 4 Stat. 411.

147. GRANT FOREMAN, *INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS* 264 (1953).

148. See UTLEY, *supra* note 32, at 33 (“Throughout the 1830s and 1840s the eastern Indians were uprooted and moved westward. Some fifty thousand people made the trek, many at great cost in suffering, hardship, and impoverishment. They yielded 100 million acres of eastern homeland in return for 32 million western acres and 68 million dollars in annuity pledges.”); WORMAN, *supra* note 37, at 212 (“Compensation paid to such eastern tribes as the Choctaws, Cherokees, and Creeks cruelly forced to relocate in the west in the 1830s and after sometimes included rifles. On other occasions as late as the 1870s, guns were distributed as gifts to encourage American Indians to attend peace councils or as annuity payments.” (citation omitted)).

149. See WORMAN, *supra* note 37, at 216.

150. WORMAN, *supra* note 45, at 452.

remained important trade items for Indians,”¹⁵¹ with the lure of money and territory serving as a core motivator.¹⁵²

But, in 1871, Congress ended treaty making with tribes.¹⁵³ Many tribes in the East had been decimated, and most others had been removed from their aboriginal homelands and confined to reservations in Indian Territory and in the West. The powerful tribes of the southern plains—the Kiowa, Comanche, and Apache—agreed to a reservation in the Treaty of Medicine Lodge.¹⁵⁴ The defining, if brief, culture of the horse and the gun of the southern plains drew to a close, lasting, in all, barely one hundred years.¹⁵⁵ Indians’ confinement to reservations, and the near extinction of the great game of the plains—the buffalo,¹⁵⁶ in particular—due to overhunting¹⁵⁷ marked the end to the culture that produced goods for trade with whites. Buffalo numbers, estimated at around 30 million at the time of contact, were reduced to 13 million by the early 1800s, and “[b]y 1883 a scientific expedition could find only two hundred buffalo in all the West.”¹⁵⁸ Consequently, the market in guns, ammunition, and gun repair available to Indians also failed “as it became locked to the white man’s market economy” and ultimately “collapsed under the conditions of reservation confinement.”¹⁵⁹

In this closing era of true Indian freedom and autonomy, some of the most turbulent Indian battles—oftentimes marked by guns and violence—were waged with whites over aboriginal territory. The guns that had been traded on the frontier with Indians appeared in contest over conquest of this continent. A final, fierce Indian resistance was in place during this period, and tribal chiefs and warriors fought to retain their shrinking land bases and to resist removal to far-off reservations. In the war for the Black Hills, for example, during the

151. Morgan, *supra* note 62, at 130.

152. See WORMAN, *supra* note 37, at 216. (“Even while the army and government attempted to restrict the firearms trade or distribution of guns at peace conferences except those intended for hunting purposes (usually percussion revolvers and muzzle-loading rifles), an illicit trade in improved firearms, metallic ammunition, and liquor continued, driven by the potential for high profits.” (citation omitted)).

153. See Act of Mar. 8, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2006)) (“[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty[, but] nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.”).

154. UTLEY, *supra* note 32, at 171.

155. See *id.* at 13 fig.4 (“It [cultural life of the Plains Indian] flourished for little more than a century, then collapsed as suddenly as the herds were obliterated.”).

156. See *id.* at 220–21.

157. Morgan, *supra* note 62, at 130.

158. UTLEY, *supra* note 32, at 220–21.

159. *Id.* at 251; see also *id.* at 12–13 (“[T]he advent of Europeans brought the market economy to most natives; now they killed game not only for their own needs but to pile up hides and furs for barter with the whites.”); *id.* at 14 (“Guns forged another bond of dependence, however, for powder, lead, and repairs could only be obtained from the white man.”); *id.* at 221 (“Game and other resources that supported a roving life of freedom—not least of these resources open land itself—shrank as swiftly as the country filled up with white settlers.”).

Battle of the Little Bighorn, General Custer and the Seventh Cavalry rode into Paha Sapa where they waged an armed battle with Crazy Horse, Red Cloud, and Sitting Bull.¹⁶⁰ Though the Sioux won the battle, the outcome inspired the extreme backlash of the American Army and the destruction of the freedom of Plains Indians.¹⁶¹ Shortly thereafter, the Massacre at Wounded Knee in 1890 marked the “last major engagement of the Indian wars,”¹⁶² signaling “the passing of the Indian frontier”¹⁶³ and the end of the military force of American Indian tribes. The complete removal of Indians from their aboriginal lands was effectuated, as they were subsequently confined on smaller and smaller reservations.¹⁶⁴ Their military power was significantly diminished,¹⁶⁵ and many of the great Indian warriors of the period, such as Sitting Bull,¹⁶⁶ Geronimo,¹⁶⁷ and Crazy Horse,¹⁶⁸ were killed in armed attempts at capture or else perished in military camps. Thus, by the end of the nineteenth century most Indians were confined to reservations and impoverished, with virtually nothing left of value to whites with which to trade.¹⁶⁹ The few guns remaining in Indian hands were useless without currency for repairs and ammunition.

For several hundred years, the relationship between Indians and guns, though in some ways profoundly shaped by law, had largely existed beyond the bounds of legal authority. A host of laws that attempted to define the right of the Indian

160. See generally WORMAN, *supra* note 37, at 216 (“Evidence from various sources indicates that at the Custer fight in June 1876 on the ‘Greasy Grass’ or Little Bighorn, Indian warriors had a substantial number of Winchester repeaters including some Model 1873s and other up-to-date arms.”). As Dee Brown has written, when the Army arrived in Sioux Country, it encountered “[a]bout three hundred Oglalas who had come in from the Powder River country [who] trotted their ponies down a slope, occasionally firing off rifles.” DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* 283 (Henry Holt & Co. 1991) (1970). In Sioux, they called out, “The Black Hills is my land and I love it/And whoever interferes/Will hear this gun.” *Id.*

161. See *id.* at 284; see also UTLEY, *supra* note 32, at 171 (“[W]arfare with the Plains Indians rose to a thunderous finale on the Little Bighorn in 1876.”).

162. WORMAN, *supra* note 37, at 223.

163. See UTLEY, *supra* note 32, at 249–50.

164. See, e.g., ANGIE DEBO, *AND STILL THE WATERS RUN* (1940) (describing the removal of the “five civilized tribes” from the southeastern United States to lands in Indian Territory and the opening up of their lands to white settlers); FOREMAN, *supra* note 147 (providing a detailed account of the Indian Removal Act and the “Trail of Tears”).

165. See ARRELL MORGAN GIBSON, *THE AMERICAN INDIAN: PREHISTORY TO THE PRESENT* 430 (1980). Indians have, of course, continued to use guns as a source of armed resistance, even through the modern age. See, e.g., KENNETH S. STERN, *LOUD HAWK: THE UNITED STATES VERSUS THE AMERICAN INDIAN MOVEMENT* 321–22 (1994) (detailing the sometimes-armed resistance by American Indians against federal tyranny).

166. NATHANIEL PHILBRICK, *THE LAST STAND: CUSTER, SITTING BULL, AND THE BATTLE OF THE LITTLE BIGHORN* 293–95 (2010) (describing how Sitting Bull was shot and killed on the Standing Rock Sioux Reservation by Indian agent police).

167. ANGIE DEBO, *GERONIMO: THE MAN, HIS TIME, HIS PLACE* 440 (1976) (discussing how Geronimo died of pneumonia while a prisoner of war at Fort Sill, Oklahoma).

168. KINGSLEY M. BRAY, *CRAZY HORSE: A LAKOTA LIFE* 385, 389 (2006) (explaining that Crazy Horse was stabbed and killed by a guard at Camp Robinson).

169. Indian tribes retained significant lands and natural and cultural resources, much of which would be discovered and, correspondingly, desired later by non-Indians.

to possess a gun, buy ammunition, or seek repair of a rifle had largely been disregarded, ignored, or bypassed altogether, as the trade in arms with Indians had proven too desirous and beneficial on both the supply and demand sides of the equation. In this time, laws regarding Indians and guns fluctuated inconsistently between addressing Indians individually—including laws prohibiting the sale of a firearm to an Indian—and applying to Indian nations generally—such as treaty provisions that provided for the payment of guns to Indian nations in exchange for their removal from lands desired by whites. Thus, no comprehensive gun policy developed to distinguish between the individual Indian and the Indian nation, with wide variance depending chiefly on the relevant governing body, its relationship to immediately neighboring tribes, and the extent to which guns could be employed to advance Indian land dispossession.

Through this long period of war and westward expansion, Indian nations marked themselves as more than indigenous inhabitants who succumbed to colonization; rather, they stood apart as warriors, strategists, and, in some cases, savvy capitalists who fought to hold on to their territories, their cultures, and their freedom. The colonizers' law continued to change and develop around them, without ever really engaging them, and the Constitution and its Second Amendment were no different. Yet, with gun rights constitutionally tied to the militia,¹⁷⁰ and the militia structured around conceptions of race and citizenship, the impending inclusion of the individual American Indian into the citizenry of the United States was yet another watershed lawmaking moment for the Indian and potentially transformative in regards to individual Indian gun ownership.

C. THE INDIAN AS (RESERVATION) CITIZEN

There has historically been a tight relationship between gun laws and citizenship in the United States.¹⁷¹ In the early 1900s, many gun rights—either in terms of ownership or militia service—were tied to citizenship, and citizenship was defined around and limited by race, excluding Indians and many blacks and nonwhite immigrants.¹⁷² Even when Indians attempted to eschew tribal identity in favor of U.S. citizenship in order to obtain the right to vote, such as in the case of *Elk v. Wilkins*, the Supreme Court rejected such claims on the grounds that Indians were citizens of “distinct political communities,” owing “immediate allegiance to their several tribes, and were not part of the people of the United States.”¹⁷³ The Court's opinion in *Elk*, then, illustrates the interwoven strands of theories of exceptionalism, citizenship, and race, all reflecting the consistent characterization of Indians as outsiders.

Indians' inclusion into the citizenry of the United States should have had a

170. See UVILLER & MERKEL, *supra* note 121, at 114 (“The Second Amendment guaranteed the right to keep and bear arms *in the militia* . . .” (emphasis added)).

171. Gulasekaram, “*The People*,” *supra* note 12, at 1525–26.

172. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 27–34 (rev. & updated ed. 2006) (describing “[r]acial [r]estrictions in the [l]aw of [c]itizenship”).

173. *Elk v. Wilkins*, 112 U.S. 94, 99 (1884).

profound impact on their relationship to guns and, perhaps, to the Second Amendment. After all, American citizenship meant that, for the first time, the U.S. Constitution and the Bill of Rights applied to Indians just as it applied to all citizens. But citizenship appears to have had little effect on Indians as a general matter, and Indians' relationships to gun rights were no different.¹⁷⁴

Indians became citizens in piecemeal fashion. Over time, Congress linked Indian citizenship to allotments, military service, assimilation, geography, and treaties.¹⁷⁵ Military service, in particular, played a critical role as Congress passed the Indian Veteran Citizenship Act in 1919,¹⁷⁶ making the more than ten thousand American Indians who served in World War I eligible to apply for citizenship.¹⁷⁷ A few years later, Congress formally conferred citizenship on all Indians of the United States via the Snyder Act, which made "all non-citizen Indians born within the territorial limits of the United States" American citizens.¹⁷⁸ Indians born outside the United States—in Mexico or Canada, typically—were not able to obtain naturalized citizenship until Congress passed the Nationality Act in 1940.¹⁷⁹ Additionally, the Indian Citizenship Act made Indians American, but not state, citizens.¹⁸⁰ On a variety of grounds, numerous states refused to recognize the citizenship of American Indians, and they used their interpretation of Indians' noncitizen status to limit other important individual rights, including voting.¹⁸¹ Some states continued to argue against Indian state citizenship well into the late 1940s.¹⁸²

During this time, the law of arms in relation to Indians was chaotic, reflecting continued ambivalence about the link between Indians and guns. By the time of the First World War, state militias were defunct and the United States relied on a

174. See generally Donald L. Burnett, Jr., *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. ON LEGIS. 557, 582–83 (1972), reprinted in THE INDIAN BILL OF RIGHTS, 1968, at 25, 50–51 (John R. Wunder ed., 1996) (describing the failure of the Bureau of Indian Affairs to protect Indians' newly acquired constitutional rights).

175. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.01[3] (2005); see also FRANK POMMERSHEIM, *BROKEN LANDSCAPE* 169 (2009) (noting that for Indians to become citizens prior to 1924 typically required relinquishing tribal citizenship and their tribal lifeways). *But see Elk*, 112 U.S. at 109 (holding that Elk, an Indian, could not become a citizen of the United States even though he had given up Indian ways and lived among whites).

176. ch. 95, 41 Stat. 350.

177. Approximately ten thousand American Indians served in World War I, including voluntary enlistees and draftees. For many of them, the Bureau of Indian Affairs administered the enlistment of Native American Soldiers, even those without verifiable American citizenship. See THOMAS A. BRITTEN, *AMERICAN INDIANS IN WORLD WAR I: AT HOME AND AT WAR* 57–60 (1997) (explaining Native American military service and the draft).

178. Act of June 2, 1924, ch. 2335, 43 Stat. 253 ("[A]ll non citizen Indians born within the territorial limits of the United States . . . are . . . declared to be citizens of the United States . . .").

179. See Nationality Act of 1940, ch. 876, §§ 301–347, 54 Stat. 1137, 1140–68 (current version at 8 U.S.C. §§ 1421–1458 (2006)).

180. See Act of June 2, 1924, 43 Stat. 253 (current version at 8 U.S.C. § 1401(b)); McCOOL ET AL., *supra* note 117, at 9 (noting that some states did not accept Indians as citizens well into the twentieth century); POMMERSHEIM, *supra* note 175, at 174.

181. See McCOOL ET AL., *supra* note 117, at 9, 11.

182. See *id.*

national army.¹⁸³ But even without citizenship, Indians served in World War I by the thousands.¹⁸⁴ This ultimately provided a basis upon which many “earned” citizenship in 1919 and was also used as a principle motivator for the 1924 Act. At the same time, despite this participation and despite citizenship, some federal gun laws, even post-1924, continued to exclude Indians. A federal law, operative after 1924, for example, prohibited the “[s]ale of arms in district[s] occupied by uncivilized or hostile Indians.”¹⁸⁵ Another regulation included similar prohibitions but also proscribed the sale of arms and ammunitions to Indians “except upon permission of the [s]uperintendent, which will be granted only for clearly established lawful purposes.”¹⁸⁶ Thus, unlike non-Indians, Indians who wanted guns had to demonstrate their lawful purpose to justify purchase. This regulation formally stayed on the books until 1979.¹⁸⁷

To the extent individual Indians’ relationship to guns might have been radically impacted by citizenship, this change did not occur. Accordingly, even the somewhat weighty decision to incorporate the nation’s indigenous inhabitants into the American citizenry did not resolve the position of the Indian in regards to America’s law of arms.

II. THE INDIAN CIVIL RIGHTS ACT AND THE DISAPPEARING SECOND AMENDMENT

By the mid-twentieth century, the majority of Indians lived on reservations in desperate conditions. Tribal justice systems, which had been largely dismantled by the ruptures of colonization, removal, and reservation confinement, were inchoate and fledgling. The destabilization of Indian governments proved incredibly disruptive to reservation life. But certain events—including the passage of the Indian Reorganization Act (IRA) in 1934—led to the revitalization of tribal governance systems.¹⁸⁸ Tribes began to reclaim their laws and traditions and to engage in the hard work of nation building. They revived dispute resolution

183. See UVILLER & MERKEL, *supra* note 121, at 119–44.

184. See BRITTEN, *supra* note 177.

185. 25 U.S.C. § 266 (1925–26), *repealed by* Act of Aug. 15, 1953, ch. 506, 67 Stat. 590; *see also* Letter from Rowland Hughes, Assistant Dir., Office of Mgmt. & Budget, to Hugh Butler, Chairman, Comm. on Interior and Insular Affairs (June 4, 1953), *reprinted in* S. REP. NO. 268, at 4 (1953) (“The laws mentioned in the bill, and many others, were enacted in another era. They apparently were designed for the protection of the Indians, or for creating a more suitable atmosphere in the handling of hostile tribes or bands—Indians who were resentful of the rapidly expanding encroachment of white civilization into Indian territory”); Letter from Orme Lewis, Assistant Sec’y of the Interior, to Hugh Butler, Chairman, Comm. on Interior and Insular Affairs (July 29, 1953), *reprinted in* S. REP. NO. 268, at 2–4 (noting that “[t]here are no longer any Indians or Indians tribes which are considered as uncivilized or hostile in the sense in which these words are used” and that the statute is therefore “obsolete”).

186. 25 C.F.R. § 276.7–8 (1938).

187. *See* Regulating Sale of Arms and Ammunition, 44 Fed. Reg. 46, 46 (Dec. 29, 1978) (revoking the rule).

188. *See* H.R. REP. NO. 1804, at 6 (1934) (noting that the purpose of the IRA was “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism”).

systems that had survived the most difficult of periods. A wide range of governance styles resulted, pertaining to both criminal and civil matters that touched the lives of reservation Indians. Because of the jurisdictional issues at play (discussed fully *infra*), however, certain aspects of tribal nation building received scant attention, often at great cost to tribal members. Federal neglect in supporting tribal governmental infrastructure, in particular, led to unacceptable injustices for tribal citizens. Complaints about the infringement of Indians' individual rights—by state, federal, and tribal governments—began to percolate out of Indian country, ultimately reaching Congress.

The complex and even seemingly convoluted relationship of Indian nations to the Constitution's Bill of Rights can be better understood in light of the three central theories explaining the relationship between Indians and guns: exceptionalism—tribal governments existing outside the constitutional framework of the United States and, therefore, not subject to the Bill of Rights; citizenship—lawmakers' efforts to assist Indians and Indian governments in "becoming American" through enactment of the Indian Bill of Rights; and race—American law ultimately limiting tribal criminal jurisdiction and attendant due process requirements based on a defendant's racial status. The history of the Indian Bill of Rights unfolds in this Part, as I explain how, once Congress realized that the U.S. Constitution did not bind tribal governments, it moved to enact change. The result was a statute styled after the Bill of Rights that applied some provisions similar to the Bill of Rights to tribal governments but included no Second Amendment corollary. As this Part demonstrates, the 1968 Indian Civil Rights Act's (ICRA's) legislative history does not provide a clear explanation for this outcome. But an examination of both Second Amendment discourse and the racial politics in play at the time lend an inference that Congress's omission could have been dually motivated—first, because only a nascent link between gun control and the Second Amendment existed at the time and had not gained real traction in the courts or the academy and, second, because there was a growing consensus that gun control laws could be employed to disarm an increasingly discontented minority population that struggled against continued racial inequality.

A. ICRA'S LEGISLATIVE HISTORY AND THE SECOND AMENDMENT

By the early 1960s, America was embroiled in a tumultuous legal and cultural battle over civil rights. Concomitantly, certain United States senators—and Sam Ervin of North Carolina, in particular—began to focus their energies on individual rights in Indian country. Ervin, chair of the Senate Subcommittee on Constitutional Rights,¹⁸⁹ attributed his interest in the subject to reports coming

189. See *Constitutional Rights of the American Indian (Part 1): Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. (1961) [hereinafter *1961 Hearings*]; see also ALVIN J. ZIONTZ, *A LAWYER IN INDIAN COUNTRY* 173 (2009) (discussing the outcome of the

out of Indian country from tribal members: “Complaints received by the subcommittee alleging that Indians were being deprived of their rights by Federal, State, and tribal governments, prompted the subcommittee’s preliminary research into the legal status of Indian citizens.”¹⁹⁰ According to Ervin, American Indians made disturbing allegations regarding the violation of their civil rights, often at the hands of the state and federal governments, though they also reported numerous incidents implicating tribal governments.¹⁹¹

Several congressional committees took up the issue of Indian civil rights and heard testimony from 1961–1968, reinforcing Congress’s discomfort with the situation of the Indian in American society. One early report notes that “[t]here is no doubt that the American Indian is the most neglected minority group in the history of this Nation.”¹⁹² The impression was that the legal lacuna that left individual American Indians subject to abuses by tribal governments deprived Indians of possessing the “basic legal rights which accompany dignity and self-respect.”¹⁹³ Ervin was of the belief that injustice was being committed against American Indians to such a grave extent that it could only be remedied by binding tribal governments—who were outside the Constitution—to many of the same obligations as contained in the Bill of Rights.¹⁹⁴ Ervin called the

Senate hearings on Indian rights); Alvin J. Zions, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 3–5 (1975) (same).

190. 111 CONG. REC. 1799, 1799 (1965) (statement of Sen. Sam Ervin) (introducing legislation to protect rights of Indians). In years of examination for the motivation behind Congress’ action in the area, it has also come to light that Ervin had an American Indian aid (Helen Scheirbeck), who may have also piqued his interest in the area. JOHN R. WUNDER, *The Indian Bill of Rights*, in “RETAINED BY THE PEOPLE”: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 124, 127 (1994), reprinted in THE INDIAN BILL OF RIGHTS, 1968, *supra* note 174, at 2, 5; see also Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 809 (2007).

191. Many witnesses, for example, expressed frustration with the Bureau of Indian Affairs and the nature of federal involvement in criminal justice on the reservation. See, e.g., *Constitutional Rights of the American Indian (Part 4): Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 88th Cong. 822 (1963) (statement of R. Max Whittier, General Counsel, Shoshone-Bannock Tribes of Fort Hall, Idaho) (“The tribal council has been constantly frustrated by the Bureau of Indian Affairs acting through the superintendent in attempting to improve the standard of law enforcement on the reservation.”). Others discussed abuses at the hands of state government officials. See, e.g., *id.* at 898 (statement of Robert Philbrick, Chairman, Crow Creek Sioux Tribe) (“I know the city gets all of their city work done by Indian prisoners. . . . [O]ne of the police commissioners came in and he said, ‘Well, I think the boys are going to have to get some more Indians in jail, because we need quite a lot of snow moved over there on the north side of town.’”). Numerous witnesses also detailed a failure of individual rights protections by tribal courts, particularly in the context of criminal justice administration. See, e.g., *Constitutional Rights of the American Indian: Hearings on S. 961–68 & S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 130–31 (1965) [hereinafter *1965 Hearings*] (statement of Marvin J. Sonosky) (detailing some of the “deficiencies” in the tribal court system, particularly in regards to the protection of the rights of individual defendants).

192. COMM. ON THE JUDICIARY, INTERFERENCE WITH CIVIL RIGHTS, S. REP. NO. 90-721, at 29 (1967) (additional views of Sen. Sam Ervin, Jr.), reprinted in 1968 U.S.C.C.A.N. 1837, 1863.

193. See *id.* at 30.

194. *Id.* at 31 (“The Federal courts generally have refused to impose constitutional standards on Indian tribal governments, on the theory that such standards apply only to State or Federal governmental action, and that Indian tribes are not States within the meaning of the 14th amendment.”); see also

system in existence at the time “alien to popular concepts of American jurisprudence,”¹⁹⁵ and the Subcommittee concluded that “the Indian lives in a legal no man’s land,” wherein he is “enmeshed in a net of ever-widening legal complexities.”¹⁹⁶ Senator Ervin claimed that, “[i]n many instances, he is subject to three sovereigns—the Federal Government, State government, and tribal law—which present conflicting claims on the Indian’s life.”¹⁹⁷ Accordingly, to address the situation, Congress sought to pass a bill that would “assure[] that Indian tribes shall be subject to the same constitutional limitations and restraints that are imposed on the Federal, State, and local governments by the Constitution of the United States.”¹⁹⁸

But the situation was complicated by the fact that numerous complaints about constitutional violations in Indian country did not implicate tribal governments at all but were lodged against the states and federal government. In particular, many tribal leaders detailed a pattern of abuse and neglect regarding policing by state and local governments on Indian reservations. They asserted that the failure of the states to prosecute crimes by non-Indians on reservations caused great harm to Indians and non-Indians alike and, ultimately, “undermine[d] the efforts of Indian tribes to promote and preserve law and order in their communities.”¹⁹⁹ Of course, states and the federal government are (and were) constrained by the Bill of Rights at the time in regards to limiting the rights of individual U.S. citizens, including American Indians. So repeated violations of individual rights by the state or federal governments were not due to a lack of constitutional nexus and authority; rather, they were the product of neglect or indifference. And ample testimony—particularly related to issues of criminal justice—supported this view. In fact, as Indian law advocate Alvin Ziontz points out, “[t]he greatest volume of complaints voiced in the hearings concerned enforcement of state criminal laws by local authorities and communities near Indian reservations.”²⁰⁰

Criticisms of Indian tribal governments were quite different. Indian tribal sovereignty predated the formation of the United States Constitution, and tribes were never formally brought within its ambit.²⁰¹ The Fourteenth Amendment,

Ziontz, *supra* note 189, at 1–2 (“It [ICRA] resulted from Congressional concern that under the law, individual Indians appeared to have no constitutional rights vis-a-vis their tribal governments.”).

195. WUNDER, *supra* note 190, at 127; *see also* Riley, *supra* note 190.

196. S. REP. NO. 90-721, at 30.

197. *Id.*

198. 111 CONG. REC. 1799, 1800 (1965).

199. *Id.* at 1801.

200. Ziontz, *supra* note 189, at 4; *see* Carole Goldberg & Duane Champagne, *Searching for an Exit: The Indian Civil Rights Act and Public Law 280*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* 247, 249–54 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012) (describing that witness testimonies presented to Congress regularly involved “complaints from Public Law 280 tribes that they were not receiving adequate or equal law enforcement services from state and local agencies” and “that state and local officials handling on-reservation matters were actively treating Indians in a discriminatory or abusive fashion”).

201. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896).

which extended the Bill of Rights to the states, did not encompass tribal governments and still does not today. Accordingly, the testimony and discussion taking place at the congressional level on the civil rights of American Indians vis-à-vis tribal governing authority squarely dealt with the rights of the American Indian but in a distinct legal context. As the Committee noted, guarantees in the U.S. Constitution already applied to tribal citizens “to the same extent that they apply to other American citizens.”²⁰² Thus, any resulting bill would only be applicable to Indian nations to create parity in the individual Indians’ civil rights vis-à-vis non-Indians because “tribal constitutions [did] not provide the Indian with protection against action by a tribal government that would be unconstitutional if undertaken by the Federal, State, or local governments.”²⁰³ Ultimately, of course, Congress passed ICRA, which only spoke to the issue of the individual Indian’s rights in relation to tribal governmental authority.²⁰⁴

The initial bills inspired a great deal of debate and discussion. Witnesses conveyed stories of legal complexities for Indians living under multiple sovereigns. A significant focus of the testimony offered pertained to criminal justice and criminal jurisdiction on the reservations.²⁰⁵ When it came time to finalize the bill, Congress was careful to craft the law with attention to differences between Indian and Anglo governments. As a result, not every provision of the Bill of Rights was given an ICRA counterpart. Tribal elders—those from the southwestern Pueblos, in particular—expressed deep concerns about ensuring the right of Indian nations to continue a system of theocratic governance, one that would otherwise be destroyed by an extension of the First Amendment’s Establishment Clause to tribal nations.²⁰⁶ Tribes were also fearful that they simply would be incapable of funding systems to satisfy all the rights contained in the Constitution, particularly the requirements of grand jury indictment, jury

202. 111 CONG. REC. 1799, 1799 (1965) (quoting Attorney General Robert Kennedy).

203. *Id.*

204. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201–203, 82 Stat. 73, 77–78 (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)). The law also put protections in place to assist tribes in resisting future assertions of state authority under Public Law 280. *See id.* §§ 403, 406, 82 Stat. 79–80 (codified at 25 U.S.C. §§ 1323, 1326).

205. *See, e.g., 1965 Hearings, supra* note 191, at 124 (statement of Edward Cline, Counselor and Member, Omaha Tribe) (revealing that the Omaha Tribe of Nebraska was not receiving needed state justice system services); *id.* at 102 (statement of James Jackson, Tribal Chairman, Quinault Tribe) (revealing that the state’s failure to provide adequate police services on the reservation “amounted to no law and order at all for the everyday type of misdemeanor, which is 95 percent of what law and order means to a community”); *id.* at 246 (testimony of Robert B. Jim, Member, Yakima Tribal Council) (explaining that “the Yakima Tribe has been deprived of due process of law” by Washington State); *1961 Hearings, supra* note 189, at 75 (testimony of Philleo Nash, Comm’r-Designate of Indian Affairs) (“[T]here was a long period in which there was very inferior law-and-order protection [on the Omaha Reservation].”).

206. *See 1965 Hearings, supra* note 191, at 21 (statement of Frank J. Barry, Solicitor, Department of the Interior) (“[T]he Indian political system in many tribes is deeply rooted in their religious system and this, while it might be a desirable long-term objective, would result in the probable destruction of tribal government in some cases.”); Riley, *supra* note 190, at 810 & n.70.

trials in civil cases, and the right to counsel for indigent defendants.²⁰⁷

In the final bill, Congress considered these concerns and accommodated them accordingly. Jury requirements, for example, were not included wholesale because of the “serious economic and social injustice” this would work on Indian tribes.²⁰⁸ Also, the First Amendment’s Establishment Clause was omitted to protect Indian theocratic governments.²⁰⁹ In all, Ziontz points out that “it is incorrect to say that Congress intended Indian tribes to be subject to the same constitutional restrictions as federal and state governments. Instead, the legislative history makes clear that Congress found it necessary to impose a specially designed set of restraints upon tribal governments.”²¹⁰ Thus, in language closely tracking, but not mimicking, the U.S. Bill of Rights, the Act seeks to ensure the protection of certain individual rights as asserted against tribal governments. It includes a provision guaranteeing the free exercise of religion, the right to equal protection and due process, and many of the protections guaranteed in the criminal process.²¹¹ The Act also contains the writ of habeas corpus,²¹² which has proven to be one of its most significant provisions because it is the only avenue for appeal from a tribal justice system to a federal court. In declining to apply the full complement of constitutional constraints onto Indian tribes, Congress sought to further its two “distinct and competing purposes” in enacting ICRA: to strengthen the position of individual tribal members within tribal governments and to promote the well-established federal policy of furthering Indian self-government.²¹³ The final manifestation of Congress’ work was ICRA, which was enacted as a rider to the Civil Rights Act of 1964.²¹⁴

But, in all this time, there’s no indication the right to bear arms was the subject of discussion or debate. When the provisions of Title II were set forth by Ervin, no mention was made of a Second Amendment-style right.²¹⁵ This was the case even though there was a great deal of testimony taken in relation to reservation crime, an issue potentially linked to gun control concerns.²¹⁶ Even

207. See *1965 Hearings*, *supra* note 191, at 131 (“[T]ribes generally do not have the funds to pay for all inclusive features of S. 961. . . . Jury trials, prosecutors, appeals courts, counsel for indigents, all cost money.”); Riley, *supra* note 190, at 810.

208. Ziontz, *supra* note 189, at 5 (citing *1965 Hearings*, *supra* note 191, at 64–65 (statement of Arthur Lazarus, Jr., General Counsel, Association on American Indian Affairs, Inc.)).

209. See Riley, *supra* note 190, at 845.

210. Ziontz, *supra* note 189, at 6.

211. See 25 U.S.C. § 1302 (2006).

212. See *id.* § 1303.

213. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 & n.11 (1978) (noting that President Johnson supported ICRA on the ground that it furthered “self-determination,” “self-help,” and “self-development” within Indian nations); see also 114 CONG. REC. 5518, 5520 (1968); Riley, *supra* note 190, at 810.

214. See 25 U.S.C. §§ 1301–1303.

215. See S. REP. NO. 90-721, at 30–31 (1967) (additional views of Sen. Sam J. Ervin, Jr.), *reprinted* in 1968 U.S.C.C.A.N. 1837, 1864–65.

216. See, e.g., *Constitutional Rights of the American Indian (Part 2): Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. 285–356 (1961). Though the link between gun control and crime remains incredibly murky, the Supreme Court’s decision in *Heller*, at a

in the Act's amendment of certain portions of Public Law 280, allowing for retrocession of state jurisdiction over Indian nations and foreclosing future assumptions of state criminal jurisdiction without tribal consent,²¹⁷ there was no mention of gun rights.²¹⁸ Monroe Price, one of the first scholars of the burgeoning field of Indian law at the time, wrote contemporaneously with passage of the Indian Bill of Rights in his personal papers:

The Second Amendment is omitted in its entirety. Indian tribes, unlike States, do not have the right "to a well-regulated Militia, being necessary to the security of a free state;" nor is there a "right of the people to keep and bear Arms." One wonders where the National Rifle Association was at this crucial juncture.²¹⁹

The final bill ultimately reflected the points of contestation highlighted in ICRA's legislative history. Key cases revolved around individual Indian's rights vis-à-vis their tribal governments. There were disputes over religious freedom, including challenges to tribal prohibitions on sacramental peyote use²²⁰ and whether Protestant Pueblos could be buried in a non-Protestant Pueblo cemetery.²²¹ Others concerned due process claims regarding tribal governmental authority to institute and enforce a tax,²²² as well as individual Indian's citizenship rights.²²³ No reported cases pertained to gun rights, gun control, or the

minimum, expresses a majority of the Court's view that ensuring the right to arms for the defense of self is constitutionally protected. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008).

217. See Goldberg & Champagne, *supra* note 200, at 247–49; see also CAROLE GOLDBERG-AMBROSE WITH TIMOTHY CARR SEWARD, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997) (detailing the effects of Public Law 280 on reservations and proposing reconstructive policies for tribes); Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 707 (2006) (finding that, after the 1968 amendments, retrocession took place in more than twenty-five tribes in both mandatory and optional Public Law 280 states); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1409 (1997) (suggesting that the purported meaning of "lawlessness" on reservations as a reason for Public Law 280's enactment was a cultural construct and arguing that Public Law 280 was a source of such lawlessness rather than a remedy).

218. See 25 U.S.C. §§ 1323, 1326.

219. Monroe E. Price, *The Civil Rights Act of 1968: An Analysis for Discussion*, AM. INDIAN L. NEWSL. (Univ. of N.M. Sch. of Law, Albuquerque, N.M.), May 24, 1968, at 1, 1.

220. *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134–35 (10th Cir. 1959) (holding that federal courts lacked jurisdiction over appeals concerning tribal laws banning peyote); *State v. Big Sheep*, 243 P. 1067 (Mont. 1926) (involving a challenge by a Crow member to his peyote conviction based on his right to religious freedom).

221. *Toledo v. Pueblo De Jemez*, 119 F. Supp. 429 (D.N.M. 1954), *cited in* 113 CONG. REC. 13,473, 13,474 (1967).

222. *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 557 (8th Cir. 1958) (upholding tribal-land-use tax on nonmembers); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 96, 98–99 (8th Cir. 1956) (upholding tribe's power to tax and to enforce criminal adultery law and holding that tribes are constitutionally protected sovereign governments possessing inherent rights of sovereignty except where specifically limited by treaty or congressional act).

223. *Martinez v. S. Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957) (holding that tribal membership claim of daughter of a full-blooded tribal member was an internal tribal matter and not subject to federal jurisdiction).

Second Amendment.

But events occurring in the nation contemporaneously with the passage of ICRA indicate that gun control, the right to bear arms, and related issues certainly were on the minds of many Americans—citizens and policymakers alike—during this period. Discussions in Congress about the federal role in gun control had begun in earnest around the time of the New Deal, with gun control almost always discussed in the context of crime control.²²⁴ Between 1958 and 1968, four states amended an existing constitutional provision or enacted a constitutional right to bear arms.²²⁵ As leading Second Amendment scholar Eugene Volokh has thoroughly documented, by the time ICRA was passed in 1968, thirty-five states had enacted some form of constitutional protection for the right to bear arms.²²⁶ But momentum for gun control picked up in the 1950s and 1960s, with the topic gaining a particular resonance after the death of President Kennedy in 1963.²²⁷ His assassination immediately led to the introduction of gun control legislation targeting mail-order gun purchases, as this was the method used by Lee Harvey Oswald to procure the gun he used to kill Kennedy.²²⁸ A bill in Congress was broadened and enhanced “[f]ive days after the assassination of John F. Kennedy . . . to cover mail order traffic in shotguns and rifles.”²²⁹ Then, in 1968, the same year Congress passed ICRA, Martin Luther King Jr. was shot and killed.²³⁰ Less than a month later, Sirhan Bishara Sirhan murdered Robert Kennedy with a .22-caliber pistol.²³¹ As historians note, all these events “prompted various bitter comments on gun keeping.”²³² President Johnson pushed for greater gun controls in light of these events and announced his staunch opposition to the proliferation of gun violence in the United States.²³³

During this time, overt ties were made between gun violence and racial hierarchies in America. And the role of the gun in impeding or, alternately, advancing the case for racial justice was hotly contested. On the one hand, some civil rights activists viewed gun ownership and gun violence as mechanisms by which segregationists could express opposition to the civil rights movement.²³⁴

224. See Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 137 (1975).

225. See Eugene Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193, 195, 198 (2006).

226. See *id.* at 193–204.

227. Zimring, *supra* note 224, at 146.

228. See ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL* 171 (2001).

229. Zimring, *supra* note 224, at 146.

230. DECONDE, *supra* note 228, at 182.

231. *Id.* at 183.

232. *Id.*; see also Zimring, *supra* note 224, at 148 (discussing the political pressure in the aftermath of King’s and Kennedy’s assassinations).

233. See DECONDE, *supra* note 228, at 183.

234. See Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 578 (2006). But see Adam Winkler, *MLK and His Guns*, HUFFINGTON POST (Jan. 18, 2011, 8:25 AM), <http://www.huffpost.com>.

From this perspective, gun proponents became linked with an anti-civil-rights agenda, and gun opponents simultaneously came to represent those working to dismantle “white male status” and force a movement towards racial equality.²³⁵ On the other hand, individual gun rights were highly valued by some racial minorities who could not rely on the state to secure their safety, security, or equality. As Adam Winkler asserts, the Black Panthers emerged during this period as “the true pioneers of the modern pro-gun movement,” as gun rights were linked to the right of self-defense and to the case for racial justice.²³⁶ The Black Panthers, in particular, saw the gun as a way of securing safety for African-Americans, who had long been abused and harassed by the police. Within the group, guns were linked to the case for advancing racial justice with “[e]very member . . . expected to know how to use a firearm.”²³⁷

The American Indian, of course, was also subjected to the racist ideologies that persisted in this period. Like blacks, Indians were targeted by the Ku Klux Klan for moving into white neighborhoods and for interracial relationships with whites.²³⁸ They were subject to police brutality and exposed to violence when they attempted to assert their treaty rights.²³⁹ The massive removal of Indian children into Indian boarding schools that had begun in earnest in the 1800s to “kill the Indian, save the man” continued, with the number of enrollees peaking in the early 1970s.²⁴⁰ Kept down by racism and pervasive discrimination in exercising their voting rights, treaty rights, and protection of their natural and cultural resources, Indians responded with their own movement towards securing political and civil rights.²⁴¹ One of the pivotal events of the “Red Power” movement came in 1964 when American Indian activists rowed out to Alcatraz Island for an initial occupation of a “modest few hours.”²⁴² They claimed the Island for Indians under the 1868 Treaty of Fort Laramie²⁴³ between the United States and the Sioux nation.²⁴⁴ Though the long-lasting, historical occupation of Alcatraz commenced a few years later,²⁴⁵ the Red Power movement had made

huffingtonpost.com/adam-winkler/mlk-and-his-guns_b_810132.html? (discussing Martin Luther King Jr.’s use of firearms to protect himself when the state would not).

235. See Braman & Kahan, *supra* note 234 (quoting Richard Hofstadter, *America as a Gun Culture*, AM. HERITAGE, Oct. 1970, at 4, 84).

236. Adam Winkler, *The Secret History of Guns*, ATLANTIC, Sept., 2011, at 80, 80. See generally WINKLER, *supra* note 90 (linking the Black Panthers to modern pro-gun arguments).

237. WINKLER, *supra* note 90, at 234.

238. See CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 130–32 (2005).

239. See Bradley G. Shreve, “From Time Immemorial”: *The Fish-In Movement and the Rise of Intertribal Activism*, 78 PAC. HIST. REV. 403, 432 (2009).

240. K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL 145 (1994). See generally *id.* (detailing the sometimes grueling experience of boarding-school assimilation for Indian children); MARGARET CONNELL SZASZ, EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928 (3d ed. 1999) (same).

241. See WILKINSON, *supra* note 238, at 132–33.

242. *Id.* at 133.

243. U.S.–Sioux Nation, Apr. 29, 1868, S EXEC. DOC. NO. 40-A.A. (1869).

244. See WILKINSON, *supra* note 238, at 133.

245. *Id.* at 134.

its presence known in the United States. While American Indians intentionally separated their cause from that of the larger civil rights movement as a continued commitment to the ideals of Indian differentness—as Vine Deloria noted, for Indians, “legal equality and cultural conformity were identical”²⁴⁶—they drew on the success of the civil rights movement to advance the cause for Indian rights.

Though ICRA’s history tells us little about Congress’s concerns over the formation of an American Indian movement poised to fight for Indian rights, there is little doubt—particularly given the pervasive nature of racial civil unrest in the country at the time—that these events were on the minds of the federal government during the hearings on the Indian Bill of Rights and in the construction of the Act. Certainly, in the country generally, the connection between race and gun rights was tightly wound. In 1967, then-Governor of California Ronald Reagan signed the Mulford Act into law, banning the public possession of loaded guns.²⁴⁷ The law was specifically directed towards limiting the armed resistance of the Black Panthers.²⁴⁸ With political momentum for gun control heightened, in October 1968 the President also signed into law the Gun Control Act of 1968,²⁴⁹ which similarly “represented a backlash against armed blacks who were seen to be undermining social order.”²⁵⁰ Thus, although the grassroots cause for Indian rights as a matter of *racial* justice was only burgeoning,²⁵¹ the link between civil rights and armed resistance was prevalent and of great concern to lawmakers, providing some basis for understanding why Congress would not have worked to ensure a Second Amendment corollary in ICRA.

Additionally, ICRA’s ultimate omission of a right to bear arms may be further explained by the state of Second Amendment jurisprudence at the time. For one, gun control has largely been a state and local, not federal, issue. Even in the wake of the Gun Control Act of 1968, passed the same year as ICRA, critics charged that “gun control has never been an important federal legislative topic.”²⁵² Moreover, for much of its history, the Second Amendment was not

246. VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* 180 (1969).

247. 1967 Cal. Stat. 2459 (codified as amended in scattered sections of CAL. PENAL CODE).

248. See WINKLER, *supra* note 90, at 245.

249. Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.); see Zimring, *supra* note 224, at 146–47.

250. WINKLER, *supra* note 90, at 247.

251. The view of Indianness as largely a political, rather than racial, classification was concretized and perpetuated by the Supreme Court’s case of *Morton v. Mancari*, 417 U.S. 535, 545–48 (1974), which exempted preferential employment of Indians from Title VII antidiscrimination legislation. This phenomenon has continued and has shaped Indian nations’ relationship with the dominant society. See Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 969–1025 (2011) (describing the consequences for Indians when their political identity is considered at the expense of Indian racial identity).

252. Zimring, *supra* note 224, at 135.

viewed as necessarily implicated by federal gun control laws.²⁵³ Although the Supreme Court had opined on its scope three times by ICRA's enactment—in 1875, 1886, and 1939²⁵⁴—the Court had not expressly held that the Second Amendment protected an individual right to bear arms,²⁵⁵ though certain dicta created the inference the Court may, in fact, have been headed in that direction in its thinking.²⁵⁶ But, when faced with Second Amendment challenges to gun control laws during this same period, lower courts closely followed the Supreme Court's lead.²⁵⁷ Even scholars had, virtually unanimously, “endorsed the collective right model” until one lone piece of scholarship departed from this view in 1960.²⁵⁸ It wasn't until 1970—after ICRA had been passed—that the individual rights view of gun ownership took off in the scholarly realm.²⁵⁹

The progression of a changing view of the Second Amendment as supporting an individual right to bear arms, as opposed to a strictly collective right, can be seen in both group and individual scholarly transitions. Leading constitutional law scholar Akhil Reed Amar, for example, began to move towards this position in the early 1990s.²⁶⁰ Other prominent scholars similarly migrated in their

253. Though not dominant in the courts or the academy, there were certainly competing strands of thought. See WINKLER, *supra* note 90, at 213–15.

254. See *supra* note 4.

255. See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4 (2000) (“For nearly a century, the collective right model remained not only widely accepted but uncontroversial.”).

256. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (treating the Second Amendment right as being comparable to other individual rights provisions in the Bill of Rights); *Knapp v. Schweitzer*, 357 U.S. 371, 378 n.5 (1958) (treating the Second Amendment as securing a right to keep and bear arms roughly comparable to the First and Fourth Amendment's protections), *overruled by* *Murphy v. Waterfront Comm'n.*, 378 U.S. 52 (1964); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (suggesting that the Second Amendment protects more than merely a collective right in arms); see also Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 178 (2008) (“The story of how arms-bearing became a more individualistic right during Reconstruction is merely one part of a much larger story of how the Fourteenth transformed the Bill.”).

257. See Bogus, *supra* note 255.

258. *Id.* at 5 (citing Stuart R. Hayes, *The Right To Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960)); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 226 n.6 (1978) (maintaining the position that the Second Amendment is not about an individual right); WINKLER, *supra* note 90, at 95 (discussing the small number of law review articles espousing the individual rights view in the 1960s).

259. See Bogus, *supra* note 255, at 8–10.

260. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1265 (1992) (explaining that private and public rights were “marbled together into a single clause” in the Second Amendment); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1165 (1991) [hereinafter Amar, *Constitution*] (addressing the possibility that the Second Amendment, though belonging to the people as a collective right, could be employed to oppose “central tyranny”). Some scholars attribute this shift to the NRA. See Miller, *supra* note 20, at 1354; Jill Lepore, *The Commandments: The Constitution and Its Worshippers*, NEW YORKER, Jan. 17, 2011, at 70, 75 (contending that the NRA began in the 1970s to make the claim that the Second Amendment contained an individual right to bear arms, backed Ronald Reagan, and lodged an all-out campaign to make their case). “In an interview in 1991, the former Chief Justice Warren Burger said that the N.R.A.'s interpretation of the Second Amendment was ‘one of the greatest pieces of fraud, I repeat the word

interpretations.²⁶¹ Perhaps most famously, Harvard Law School Professor Laurence Tribe changed his view on the Second Amendment and the right to bear arms as an individual right between publishing the second and third editions of his highly respected treatise, *American Constitutional Law*, in which he staked out a mediated position on gun rights and gun control, one that positioned him somewhere between the purely collective and purely individual rights models.²⁶²

With the exception of relatively minor departures from a rather dominant judicial and scholarly perspective, then, it is apparent that strong momentum for a view of gun control as linked to the Second Amendment is fairly recent.²⁶³ This might provide an alternative explanation for the absence of a right corollary to the Second Amendment in ICRA.²⁶⁴ When reviewing the scholarship and commentary of those who were intricately bound up in Indian law and in ICRA's passage at the time, one sees that some scholars lumped the omission of the Second Amendment with the seemingly irrelevant Third Amendment's protection against quartering of soldiers—denoting both as virtually antiquated constitutional relics.²⁶⁵ Ultimately, of course, neither Amendment was the subject of debate or included in the final text of the Act.²⁶⁶

Accordingly, despite a voluminous record behind ICRA's passage—one that focused heavily on criminal law, policing, and criminal justice generally—ICRA was passed into law without any discussion or inclusion of a right to bear

“fraud,” on the American public by special interest groups that I have ever seen in my lifetime.” Lepore, *supra* (quoting MACNEIL/LEHRER NEWSHOUR (PBS television broadcast Dec. 16, 1991)).

261. See, e.g., LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 134 (1999) (“The right to bear arms is an individual right.”); William Van Alstyne, Essay, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1253 (1994) (contending that the right to bear arms is an individual right).

262. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 896–903 (3d ed. 2000) (calling Second Amendment jurisprudence “radically underdeveloped, largely because it has been mistakenly interpreted in binary terms”).

263. See, e.g., John Kaplan, *Foreword* to FIREARMS & VIOLENCE: ISSUES OF PUBLIC POLICY, at xxiii, xxv (Don B. Kates, Jr., ed., 1984) (“For some years, the Second Amendment to the Constitution has been regarded by the great majority of constitutional scholars as irrelevant to the issue of gun control.”).

264. See, e.g., Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 2 n.8 (1979).

265. See, e.g., Ziontz, *supra* note 189, at 6; see also Amar, *Constitution*, *supra* note 260, at 1131–32 (noting that, in law school classes and the academy, the Second and Third Amendments are “generally ignored by mainstream constitutional theorists”); Lepore, *supra* note 260, at 75 (“But the Yale law professor Reva Siegel has argued that, for much of the twentieth century, legal scholars, judges, and politicians, both conservative and liberal, commonly understood the Second Amendment as protecting the right of citizens to form militias—as narrow a right as the protection provided by the Third Amendment against the government’s forcing you to quarter troops in your house.”). That the Third Amendment is deemed as antiquated or irrelevant seems to have remained a largely uncontroversial position. See, e.g., Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 400 (2008); Louis Henkin, “*Selective Incorporation*” in the *Fourteenth Amendment*, 73 YALE L.J. 74, 85 n.41 (1963).

266. See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201–203, 82 Stat. 73, 77–78 (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)).

arms.²⁶⁷ As such, Indian nations were then, and remain today, outside the polity in regards to gun ownership, firmly established in a post-*Heller*, post-*McDonald* world as the only governments within the United States that may entirely restrict or prohibit those rights guaranteed by the Constitution's Second Amendment.

B. ICRA'S CURRENT PROTECTIONS AND LIMITATIONS

Practically speaking, case law subsequent to ICRA's passage may have made the extension of a Second Amendment-styled right to tribal governments irrelevant in any case. Ten years after ICRA, the Supreme Court held in *Santa Clara Pueblo v. Martinez* that federal courts lack authority to hear any ICRA claims brought against tribal governments other than habeas corpus petitions.²⁶⁸ Thus, unless someone is detained within the meaning of federal habeas corpus, they cannot appeal an ICRA case to the federal courts.²⁶⁹ The Court's decision rested on its view, expressed in the majority opinion written by Justice Thurgood Marshall, that tribal courts are better equipped than federal courts to interpret and adjudicate civil rights complaints within Indian communities and are more capable of doing so in a manner consistent with traditional tribal norms and governance structures.²⁷⁰

Ultimately, what this means for those asserting claims against tribal governments under ICRA is that the highest tribal forum available—be it a tribal council, an alternative dispute forum, or an appellate court, for example—is the last stop for civil rights complaints.²⁷¹ Aside from habeas, the federal courts do not have jurisdiction to sit in review of these decisions. Pragmatically speaking, some argue this situation has potentially led to underenforcement of civil rights of individuals within the jurisdiction of tribal governments, due to financial, institutional, and political impediments.²⁷² Others have proffered strong empirical evidence to refute this proposition.²⁷³ In any case, the state of the law leaves

267. *See id.*

268. 436 U.S. 49, 61 (1978); *see* Riley, *supra* note 190, at 801.

269. *See Martinez*, 436 U.S. at 66–67; *cf.* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 896–97 (2d Cir. 1996) (holding that banishment is such a severe restraint on liberty as to constitute detention for purposes of ICRA's federal court habeas review).

270. *See Martinez*, 436 U.S. at 67. On a variety of fronts, *Martinez* has proven itself to be one of the most controversial decisions in all of Indian law. *See* Catharine A. MacKinnon, *Martinez Revisited*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY*, *supra* note 200, at 27; Gloria Valencia-Weber, Rina Swentzell & Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY*, *supra* note 200, at 39.

271. *See Martinez*, 436 U.S. at 65–66; Riley, *supra* note 190, at 811–12.

272. *See, e.g.*, Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495, 559–60 (2001) (describing how law's outdated view of culture causes it to reinforce traditional cultural rules rather than contribute to a culture of reform).

273. *See* Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 *OR. L. REV.* 1109, 1115–89 (2004) (detailing steps the Navajo Tribe has taken to ensure protection of individual rights in the context of tribal sovereignty); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 *AM. INDIAN L. REV.* 285 (1997)

tribal governments free to prohibit arms (unless bound by their own constitutions) and to interpret their own constitutions consistent solely with tribal, rather than federal or state, law.

III. INDIANS AND GUNS IN THE CONTEMPORARY CONSTITUTIONAL FRAMEWORK: UNBOUND BY THE SECOND AMENDMENT

Cottrol and Diamond argued two decades ago for the need to reconsider what the Second Amendment means in light of black-on-black violence and “the modern Afro-American experience.”²⁷⁴ Such an inquiry is similarly long overdue as to American Indians. In undertaking this examination, I contend that the theories relating to Indians and guns work to explain tribes’ contemporary tribal gun rights and laws and, more significantly, offer tribes a potentially valuable descriptive framework and analytical tool for answering future difficult lawmaking questions about guns in Indian country.

As this Article has demonstrated, the interrelated theories of exceptionalism, citizenship, and race combine to explain the complexity and existing incoherence of laws related to guns.²⁷⁵ As the only sovereigns not bound to protect an individual right to bear arms as set forth in *Heller* and *McDonald*, tribal governments may define gun rights completely free of state and federal constitutional restraints. Laws related to Indians and guns explain Indian difference and further manifest in additional, concrete data points: tribal governments have inherent, sovereign authority; this authority is exercised within the millions of acres of territory under their jurisdiction; and, despite evidence of rampant reservation crime, tribal governments lack criminal jurisdiction over non-Indians.²⁷⁶ This unique positioning allows tribes to engage in lawmaking within Indian country in ways impermissible outside of it.

Moreover, the link between race, arms, and (a lack of) state protection of certain of its citizens has long been a part of the rhetoric of racial politics in America. Even if scholars and lawyers were not linking gun control and the Second Amendment until the 1970s, American citizens who have felt ignored by, or even subject to oppression by, the state’s police force have long made this connection.²⁷⁷ Since Reconstruction, certain African-American constituencies have periodically asserted rights to arms as a means of protecting themselves.²⁷⁸ Malcolm X famously proclaimed,

(concluding that tribal courts do protect individual rights); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479 (2000) (same).

274. Cottrol & Diamond, *supra* note 11, at 319.

275. *But see* Frickey, *supra* note 22, at 435–36 (warning that “incoherence” in Indian law cannot be easily resolved).

276. *See* WAKELING ET AL., *supra* note 15.

277. DECONDE, *supra* note 228, at 173.

278. *Id.*

[W]here the government has proven itself either unwilling or unable to defend the lives and the property of Negroes, it's time for Negroes to defend themselves. Article number two of the constitutional amendments provides you and me the right to own a rifle or a shotgun. . . . If the white man doesn't want the black man buying rifles and shotguns, then let the government do its job.²⁷⁹

This view, that gun ownership could potentially afford racial minorities the protection that the state failed to provide, has informed the discourse over race and the right to arms in the United States.²⁸⁰

Today, American Indians, as a class, are citizens of the United States. They are also citizens of their states of domicile and hold membership in their Indian nations. The citizenship theory of Indians and guns—a story of Indians becoming and being Americans—may persuade tribes that more robust protections for individual gun rights are not only necessary for the personal security of reservation residents but represent the ultimate exercise of rights guaranteed to all Americans. In this line of thinking, despite the extraconstitutional status of Indian nations, individual American Indians should have the same protections vis-à-vis tribal governments as they have vis-à-vis state and federal governments, as articulated in *Heller* and *McDonald*.

Finally, the emphasis on the political nature of Indianness has, in some respects, deemphasized the import of its racial components.²⁸¹ But race has played a central role in defining the rights of the Indian.²⁸² As Rob Williams has most persuasively argued, contemporary treatment of tribes is rooted in a historical and legal othering of Indians, built upon a perception of the Indian as savage, primitive, and uncivilized that continues to inform contemporary American law.²⁸³ This othering has produced an ambivalence—amongst Indians and non-Indians—surrounding inclusion, as the Indian continues to define herself and be defined by others as outside the mainstream of the American legal system.²⁸⁴ The impact of this myth of savagery may, in turn, incentivize tribes

279. Malcolm X, Speech at Cory Methodist Church: The Ballot or the Bullet (Apr. 3, 1964), in *MALCOLM X SPEAKS* 23, 43 (George Breitman ed., Grove Weidenfeld Evergreen ed. 1990) (1965).

280. See, e.g., DECONDE, *supra* note 228, at 179 (describing how Black Panthers believed in the right to bear arms and considered the gun “a tool of black liberation” (quoting G. LOUIS HEATH, *OFF THE PIGS!* 39 (1976)); see also WINKLER, *supra* note 90, at 232–34 (discussing the origins of the Black Panther Party and the influence Malcolm X had on the organization).

281. See Rolnick, *supra* note 251, at 1000–25.

282. See Bethany R. Berger, *Red: Racism and the American Indian*, 56 *UCLA L. REV.* 591 (2009) (examining the role of racism in shaping law by and about Indians).

283. See, e.g., WILLIAMS, *supra* note 80; see also ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005) (tracing racist language toward Indians in society and the Supreme Court); Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707 (1993) (discussing the “racial and cultural otherness” of Indians as a justification for land dispossession).

284. See generally CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14 (1987) (discussing the desired “measured separatism” of Indian nations).

to reject the gun altogether, as it maintains its talismanic power as a symbol of racial violence and an antiequality agenda in America.

Ultimately, a long history of Indians and guns raises some pressing questions about contemporary tribal governance. Do Indian tribes protect the individual right to bear arms, despite their freedom to do otherwise? Correspondingly, where tribes do regulate guns—either civilly or criminally—what do those laws look like? And, most importantly for purposes of this paper, how do the theories explaining Indians' relationship to guns either explain existing laws or aid in informing future ones?

In the following section III.A, I briefly describe the intricate nature and sometimes messy boundaries of tribal sovereignty and the layers of tribal criminal and civil jurisdiction in Indian country as defined by federal law. Section III.B turns this inquiry inward, examining, in turn, Indian nations' own constitutional protections for the right to bear arms, tribal criminal law regarding guns, and, finally, tribal civil regulation of guns in Indian country. In section III.C, I employ the theories of Indians and guns to explore some of the potential governance possibilities created by the unique status of American Indian nations outside the dominant framework.

A. TRIBAL CRIMINAL AND CIVIL JURISDICTION

In all of American Indian law, the consequences of outsider status are nowhere more manifest than in federal mandates regarding tribal criminal and civil jurisdiction. Criminal jurisdiction in Indian country is notoriously convoluted and almost universally considered to be one of the biggest problems facing tribes and Indians.²⁸⁵ The labyrinth of tribal jurisdiction in Indian country is well documented.²⁸⁶ Even when one masters general guidelines, there are many variances—such as crossdeputization, Public Law 280, and gaming compacts—that can further modify existing jurisdictional arrangements, such that it can be paralyzingly difficult to analyze Indian tribal jurisdiction.²⁸⁷

There are potentially three sovereign governments—federal, state, and tribal—whose jurisdiction must be considered when determining criminal jurisdiction in Indian country. The baseline presumption is that Indian tribes maintain

285. See, e.g., S. COMM. ON INDIAN AFFAIRS, THE TRIBAL LAW AND ORDER ACT OF 2009, S. REP. NO. 111-93, at 1–2 (2009); see also Lynn Taylor Rick, *Rape on the Reservation: Criminal Convictions Tough To Come By in Indian Country*, RAPID CITY J., Nov. 2, 2010, http://rapidcityjournal.com/news/article_c77c315e-e60a-11df-80d0-001cc4c002e0.html (“[T]he challenges of trying a rape case within the complex network of federal and tribal systems on the reservation are many.”).

286. See Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (calling tribal criminal justice a “jurisdictional maze”); Elizabeth Ann Kronk & Heather Dawn Thompson, *Modern Realities of the “Jurisdictional Maze” in Indian Country: Case Studies on Methamphetamine Use and the Pressures To Ensure Homeland Security*, FED. LAW., Mar.–Apr. 2007, at 48, 48.

287. Though I will mention some of these unique jurisdictional arrangements throughout this discussion, I will not document, for example, all the nuances that such arrangements bring to bear on tribal communities or how they affect jurisdiction in every case.

jurisdictional control and authority over their own territory as a matter of their inherent sovereignty. More specifically, Indian reservations are—with some important exceptions²⁸⁸—free from state criminal jurisdiction when an Indian is involved in the crime as either the victim or the perpetrator.²⁸⁹ By contrast, the federal government has a large role in criminal justice in Indian country. Absent treaty provisions to the contrary, federal criminal laws of general applicability—though oftentimes contested in scope—apply in Indian country to all people just as they apply elsewhere.²⁹⁰ The federal government also has jurisdiction over crimes committed in Indian country by a non-Indian against an Indian²⁹¹ and over major crimes committed by an Indian, whether the victim is Indian or non-Indian.²⁹² Nonmajor crimes committed by Indians—whether they are members of the prosecuting tribe or not—remain within the exclusive jurisdiction of tribal governments.²⁹³

The parameters of *tribal* criminal jurisdiction in the United States, by contrast, have been set largely by the Supreme Court rather than Congress, though congressional acts certainly have clarified and shaped tribal jurisdiction.²⁹⁴ Perhaps most significantly, in 1978 the Supreme Court held in *Oliphant v. Suquamish Indian Tribe* that Indian tribes do not have criminal jurisdiction over non-Indians.²⁹⁵ Thus, if a non-Indian commits a crime against an Indian or Indian property in Indian country, the crime must be prosecuted by the federal government, negating the role of localized community control that characterizes virtually all law enforcement in the United States.²⁹⁶ There are exceptions for Public Law 280 jurisdictions, where the state will prosecute crimes committed in Indian country, though tribes retain concurrent jurisdiction over crimes

288. See, e.g., Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010) and 28 U.S.C. § 1360 (2006)). As a Public Law 280 state, California long took the position that Public Law 280 barred tribal criminal jurisdiction. See *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1197–98 (C.D. Cal. 1998).

289. See General Crimes Act, 18 U.S.C. § 1152 (2006); *United States v. McBratney*, 104 U.S. 621 (1881) (holding that state has jurisdiction over crimes committed by a non-Indian against a non-Indian in Indian country); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561–62 (1832) (holding that state criminal laws had no role in Indian country).

290. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 175, § 9.02[3][a]. The same is true of other generally applicable federal criminal laws, such as drug laws. *Id.*

291. See 18 U.S.C. § 1152.

292. See *id.* § 1153 (covering fifteen “major” crimes).

293. See 25 U.S.C. § 1301(2).

294. See, e.g., *id.*

295. See 435 U.S. 191, 212 (1978), *superceded by statute in part*, Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (1990) (codified at 25 U.S.C. § 1301(2), (4)) (clarifying that Indian tribes may assert jurisdiction over nonmember Indians).

296. See Assimilative Crimes Act, 18 U.S.C. § 13; General Crimes Act, 18 U.S.C. § 1152; see also Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1014–16 (2008) (describing law enforcement in the United States generally as a “community endeavor” and explaining how this differs in Indian country). As this Article was going to print, the Senate passed the Reauthorization of the Violence Against Women Act, which would extend tribal jurisdiction over non-Indian perpetrators of crime on the reservation in some limited circumstances. The legislation had yet to be taken up by the House.

committed by Indians.²⁹⁷ When a tribe asserts jurisdiction over a crime committed by an Indian, ICRA limits the punishments that tribal courts may impose on defendants to a \$5000 monetary fine and one year in jail.²⁹⁸ Lobbying efforts recently aided in passage of the Tribal Law and Order Act, which authorizes enhanced punishments of up to three years and fines up to \$15,000 where particular procedural protections are in place.²⁹⁹ Of course, this does not ameliorate the problems of a lack of tribal jurisdiction over non-Indians in Indian country.

Tribal civil jurisdiction over members has been repeatedly acknowledged as Indian tribes' inherent sovereign right.³⁰⁰ On the ground in Indian country, tribes also routinely exercise civil regulatory and adjudicatory jurisdiction over non-Indians and non-Indian businesses located on tribal lands as an extension of their inherent authority to exclude.³⁰¹ But today the baseline for tribal civil jurisdiction over nonmembers on non-Indian fee land within Indian country is set by *Montana v. United States*.³⁰² *Montana* created a presumption against tribal civil regulatory jurisdiction over nonmembers on nonmember fee land within the reservation unless that jurisdiction meets one of two exceptions: there exists a consensual relationship between the defendant and the tribe or the regulation at issue goes to the health, safety, and welfare of the tribe.³⁰³ Though seemingly capacious, these two exceptions to the so-called *Montana* rule have been construed exceedingly narrowly by subsequent Supreme Court decisions, leaving tribes to wonder as to the scope of tribal civil jurisdiction over nonmembers operating on non-Indian lands within Indian country.³⁰⁴

297. *But see* Carole Goldberg & Heather Valdez Singleton, Research Priorities: Law Enforcement in Public Law 280 States 3 (unpublished manuscript), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/209926.pdf> (“Yet the U.S. Supreme Court has yet to resolve the matter, and the Attorney General of California, as recently as 1995, took the position that Public Law 280 divested tribes of criminal jurisdiction.”).

298. 25 U.S.C. § 1302(a)(7)(B) (Supp. IV 2010).

299. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 234, § 1302(a)(7)(C), 124 Stat. 2258, 2280. The Tribal Law and Order Act empowers tribes to expand their sentencing authority to impose a maximum sentence of three years and a maximum fine of \$15,000 for any single offense. 25 U.S.C. § 1302(b). Before tribal sentencing authority is expanded, tribes must take the necessary steps to provide defendants effective assistance of counsel, § 1302(c)(1), provide indigent defendants the assistance of a licensed defense attorney at the expense of the tribal government, § 1302(c)(2), require that the presiding judge over the criminal proceedings be legally trained and licensed to practice law, § 1302(c)(3), make tribal criminal laws, rules of evidence, and rules of criminal procedure publicly available, § 1302(c)(4), and maintain a record of criminal proceedings, § 1302(c)(5).

300. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 4 (1831) (“Cherokee nation, and the other nations have been recognized as sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self government within that territory.”).

301. *See* *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 805 (9th Cir. 2011) (per curiam).

302. 450 U.S. 544 (1981).

303. *Id.* at 565–66.

304. *See* *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (holding that the tribal court had no jurisdiction over a land dispute arising on the reservation with an off-reservation bank); *Nevada v. Hicks*, 533 U.S. 353, 364–66 (2001) (holding that the tribal court

In general, foundational Indian law cases establish that states lack civil regulatory and adjudicatory authority in Indian country.³⁰⁵ Today, state civil jurisdiction in Indian country is limited to those cases where state law has not been preempted by a federal and tribal statutory scheme.³⁰⁶ For final determinations regarding the role of state civil law in Indian country, courts apply the infringement test of the landmark, 1959 case of *Williams v. Lee*, seeking to determine “whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”³⁰⁷

The practical implications of these jurisdictional limitations are central to contemplating gun rights in Indian country and set the backdrop for understanding the scope of tribal authority to enact laws related to the right to bear arms and gun control, as described in the following section.

B. INDIAN NATIONS AND GUNS

The right of Indian tribes to make their own laws and be governed by them³⁰⁸ predates the formation of America. Such rights, linked to a tribe’s inherent sovereignty, have been recognized for centuries and are embodied in treaties, statutes, and case law. The anomalous position of Indian tribes within the federal system affords them the unique opportunity to self-govern in a localized manner in relation to guns. In the following subsections, I examine two areas where tribes have addressed the right to bear arms and guns more generally—in tribal constitutions and in tribal codes, respectively.³⁰⁹

1. Tribal Constitutional Law and the Right To Bear Arms

Numerous tribes operate under written constitutions, which embody a wide range of tribal governance systems. Many of these constitutions reflect the particular historical context in which a tribe’s constitution was developed.³¹⁰ They commonly set forth, much like the U.S. Constitution, separation of powers

lacked jurisdiction over a case involving a search warrant by state officials executed on Indian trust land within the reservation). As a general matter, states cannot exercise civil jurisdiction in Indian country where state law has been preempted by a federal and tribal statutory scheme, as, I would argue, is the case with gun control. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343–44 (1983).

305. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561–62 (1832). *But see* 28 U.S.C. § 1360 (2006) (authorizing selected states to assume civil adjudicatory jurisdiction over disputes arising in Indian country).

306. *Mescalero Apache Tribe*, 462 U.S. at 343–44; *see also* Frickey, *supra* note 22, at 435 (“Even the Chief Justice of the North Dakota Supreme Court recently said that, ‘in matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us what it is.’”).

307. 358 U.S. 217, 220 (1959).

308. *See id.*

309. This section is meant to give an anecdotal flavor to the issue of gun laws in Indian country but does not reflect a comprehensive, empirical examination.

310. *See* Duane Champagne, *Remaking Tribal Constitutions: Meeting the Challenges of Tradition, Colonialism, and Globalization*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* 11, 12 (Eric D. Lemont ed., 2006) (arguing that prospective constitution writers will have to draw on tribal, colonial, and American examples as well as the tribe’s “unique cultural and

and protection of individual rights.³¹¹ Some tribal constitutions directly reflect ICRA's influence, mirroring the individual-rights restrictions as seen in the federal statute.³¹²

In recent years, however, many tribes have undertaken constitutional reform, departing from the broadly implemented bureaucratic constitutions of the Indian Reorganization Act era.³¹³ Because of a spate of recent tribal constitutional reform projects, some of these individual rights provisions have recently been drafted or modified.³¹⁴ Today, a rather small but growing number of tribal constitutions expressly provide that the Indian nation may not infringe on the individual right to bear arms.³¹⁵ Practically speaking, such provisions bind the tribal government to the stated protection and would, accordingly, limit the tribe's ability to infringe the right, whether the suit is brought by an Indian or a non-Indian.³¹⁶

Of those tribes identified that have provisions securing the right to bear arms, some variation can be seen, as tribal constitutions reflect tribes' particular circumstances, history, and tradition. Of particular note is that none included an analog to the Second Amendment's prefatory clause regarding the formation of a militia. In contrast, in each tribal constitution dealing with the right to bear arms, the individual right is paramount.³¹⁷ As such, these tribes convey a

institutional arrangements and histories"); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1080–83 (2007) (describing constitutional reform within tribal communities).

311. See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 895–98 (2003) (discussing the general process by which tribes adopted individual rights provisions); Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS, *supra* note 310, at 184, 195–96 (“Today, establishment of separation of powers is a common theme of many tribes’ constitutional reform efforts.”). This is not to say that a tribe is without a quasi-constitutional structure, even in the absence of a written constitution. See Kalt, *supra*, at 188 (explaining how, for centuries, the “Cochiti Pueblo has sustained continuity of collective organization for collective decision- and rule-making, although this organization was never written down as a ‘constitution’”).

312. See, e.g., COLD SPRINGS RANCHERIA CONST. art. X, § 5 (including a “Bill of Rights” that mirrors the language of ICRA); EASTERN SHAWNEE CONST. art. V (same); ELY SHOSHONE CONST. art. VIII, § 2 (same); HOOPA VALLEY CONST. art. VIII (including a “Rights of Members” article that mirrors the language of ICRA); SIPAYIK MEMBERS OF THE PASSAMAQUODDY CONST. art. IV, § 1 (including an “Individual Rights” article that mirrors the language of ICRA).

313. See, e.g., COLORADO RIVER INDIAN CONST. (constitutional reform undertaken in 1974); FORT McDOWELL YAVAPAI NATION CONST. (constitutional reform undertaken in 1999); KAIBAB BAND OF PAIUTE INDIANS CONST. (constitutional reform undertaken in 1986); TOHONO O’ODHAM NATION CONST. (constitutional reform undertaken in 1986); YAVAPAI-APACHE NATION CONST. (constitutional reform undertaken in 1992).

314. See Stephen Cornell, Catherine Curtis & Miriam Jorgensen, *The Concept of Governance and Its Implications for First Nations* 11 (Joint Occasional Papers on Native Affairs, Paper No. 2004-02, 2004), http://www.jopna.net/pubs/jopna_2004-02_Governance.pdf; see also Kalt, *supra* note 311, at 192 (“It is striking how commonly one finds constitutional reform occurring within Indian nations now well-known for their political, social, cultural, and economic success.”).

315. See, e.g., ZUNI TRIBE CONST. art. III, § 1.

316. *But see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (suggesting that tribal sovereign immunity may be a barrier to such lawsuits); Riley, *supra* note 310, at 1108 (same).

317. The Navajo Nation functions under a code rather than a constitution and also has a “[r]ight to keep and bear arms,” which reads, “The right of the people to keep and bear arms for peaceful

common respect for the individual right to bear arms as a limit on the actions of tribal governments.

Consider, for example, the current draft of the new Mille Lacs Band of Ojibwe's Constitution, which stipulates, "[t]he government of the Band shall not make or enforce any law or take any executive action . . . prohibiting the right of the People to keep and bear arms."³¹⁸ A similar clause is contained in the Constitution of the Zuni Pueblo:

Subject to the limitations prescribed by this constitution, all members of the Zuni Tribe shall have equal political rights and equal opportunities to share in tribal assets, and no member shall be denied freedom of conscience, speech, religion, association or assembly, nor shall he be denied the right to bear arms.³¹⁹

These can be contrasted with other tribes, whose constitutions are slightly more nuanced in the way the right is articulated. For example, the Little River Band of Ottawa Indians' Constitution states, "[t]he Little River Band in exercising the powers of self-government shall not . . . [m]ake or enforce any law *unreasonably* infringing the right of tribal members to keep and bear arms."³²⁰ The Constitution makes clear in its language that the right is not absolute but is subject to reasonable restriction. The Saint Regis Mohawk, likewise, include the clarification that the right to bear arms shall not be denied by the tribe "in exercising its powers of self-government" specifically.³²¹

One line of inquiry raised by this examination is what, if anything, these tribes have in common beyond their constitutional similarities. Research reveals that these seven tribes are tied together by some common threads. First, they are all located in largely rural areas. For most, the distance to major cities (depending on where one is on the reservation) is measured in hours of travel time, with one—Zuni Pueblo—located over two and a half hours from the nearest major city of Albuquerque. Additionally, all of these tribes had at least one treaty with the United States government, and most of them entered into numerous trea-

purposes, and in a manner which does not breach or threaten the peace or unlawfully damage or destroy or otherwise infringe upon the property rights of others, shall not be infringed." NAVAJO NATION CODE ANN. tit. 1, § 6.

318. MILLE LACS BAND OF OJIBWE CONST. art. V, § 1(f) (Draft, July 10, 2010).

319. ZUNI TRIBE CONST. art. III, § 1.

320. LITTLE RIVER BAND OF OTTAWA CONST. art. III., § 1(k) (emphasis added).

321. SAINT REGIS MOHAWK CONST. art. IV, § 1; *see also* CHEYENNE & ARAPAHO CONST. art. I, § 1(p) ("The government of the Tribes shall not make or enforce any law which . . . denies to any Person the right to own and use firearms subject to regulation by the Tribes by law."); POKAGON BAND OF POTAWATOMI INDIANS CONST. art. XVI(m) ("The Pokagon Band, in exercising the powers of self-government, shall not . . . [m]ake or enforce any law unreasonably infringing the right of a person to keep and bear arms."). Because these constitutional protections have not been the subject of reported tribal court opinions, it is difficult to determine how they might be interpreted under each tribe's respective tribal law, but it is plausible that different tribal courts would interpret these constitutional protections in varying and differing ways.

ties.³²² Significantly, each of them maintains some type of tribal court system in which to adjudicate disputes, including the opportunity to address questions that are constitutional in scope.³²³ And all of them, with the exception of Zuni Pueblo, operate casinos, which likely bring non-Indian patrons and visitors into their reservations, perhaps also influencing their position on the right to bear arms.³²⁴

At the same time, it's important not to overstate their shared features. Many, if not most, Indian tribes are located in rural areas away from large cities. And tribes commonly have casinos or other businesses that attract non-Indians into their territory.³²⁵ Though not every Indian tribe entered into a treaty with the United States or governing colonial power, hundreds of tribes did do so.³²⁶ And tribal courts are an increasingly routine, though certainly not universal, presence in Indian country today.³²⁷ Accordingly, without a more exhaustive survey of tribes and tribal constitutions—including interviewing the tribal leaders who engaged in the drafting of the provisions—it's difficult to draw any definitive conclusions about why the right appears in this form among this group of tribes but not others.

322. See NATIONAL GEOGRAPHIC ET AL., INDIAN NATIONS OF NORTH AMERICA 55 (2010) (relating the treaty history of the Pokagon Band); *id.* at 152–53 (relating the treaty history of the Cheyenne and Arapaho); *Chronological History of Zuni*, PUEBLO OF ZUNI, <http://www.ashiwi.org/ChronologicalHistory.aspx> (last visited Feb. 10, 2012); *Culture & Traditions: A Short History of the Mille Lacs Band of Ojibwe*, MILLE LACS BAND OF OJIBWE, http://www.millelacsband.com/Page_History.aspx (last visited Feb. 10, 2012); *Culture and History*, SAINT REGIS MOHAWK TRIBE, http://srmt-nsn.gov/government/culture_and_history/ (last visited Feb. 10, 2012); *History*, NAVAJO NATION, <http://www.navajo-nsn.gov/history.htm> (last visited Feb. 10, 2012); LITTLE RIVER BAND OF OTTAWA INDIANS, <http://www.Irboi-nsn.gov/images/docs/HistoryErasofIrboi.pdf> (last visited Feb. 10, 2012).

323. See, e.g., ZUNI TRIBE CONST. art XIV; *Courts of the Navajo Nation in the Navajo Nation Government: A Public Guide to the Courts of the Navajo Nation*, THE JUDICIAL BRANCH OF THE NAVAJO NATION, <http://www.navajocourts.org/publicguide.htm> (last modified Jan. 2010); *Judicial Branch*, CHEYENNE AND ARAPAHO TRIBES, <http://www.c-a-tribes.org/judicial-branch> (last visited Feb. 10, 2012); *Tribal Court*, LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT, <https://www.lrboi-nsn.gov/index.php/government/tribal-court> (last visited Feb. 10, 2012); *Tribal Court*, POKÉGNEK BODÉWADMIK POKAGON BAND OF POTAWATOMI, <http://www.pokagonband-nsn.gov/Government/TribalCourt> (last visited Feb. 10, 2012); *Tribal Court*, SAINT REGIS MOHAWK TRIBE, http://srmt-nsn.gov/divisions/justice/tribal_court/ (last visited Feb. 10, 2012); *Tribal Government: Tribal Courts*, MILLE LACS BAND OF OJIBWE, http://www.millelacsband.com/Page_TribalCourt.aspx (last visited Feb. 10, 2012).

324. See *Gaming Tribe Report*, NAT'L INDIAN GAMING COMMISSION, <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/listandlocationoftribalgamingops/abc.pdf> (last updated Feb. 10, 2012). The history behind the reasons for enactment of these particular constitutional protections is unknown. However, given the absence of tribal criminal jurisdiction over non-Indians, the rural nature of these reservations, and the importance—as articulated in *Heller*—of the right to keep and bear arms for the defense of self, the active presence of non-Indians in Indian country could be a factor motivating tribes to protect the right to bear arms.

325. See *id.*

326. See FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 1 (1994).

327. See Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 83 (2011) (explaining that 565 federally recognized tribal entities exist and roughly 200 tribal court systems, 160 Native Alaskan courts, and “21 C.F.R.” (Code of Federal Regulation) courts for Indian offenses exist to provide justice services to those communities).

Consequently, research reveals that most Indian tribes, in fact, do not expressly protect the right to bear arms in their constitutions.³²⁸ Thus, practically speaking, tribes' extraconstitutional status means that those tribes that do not guarantee a right to bear arms are free to choose amongst a variety of gun control options.³²⁹ And even those that do contain an individual right guarantee will interpret their constitutional provisions according to tribal law and tradition, as they are not bound by federal law or federal court precedent.³³⁰ Accordingly, even if a tribe's constitution directly mirrored that of the United States, the Supreme Court's recent Second Amendment rulings—including, specifically, *Heller* and *McDonald*—would be inapplicable to tribal governments. Disputes over the scope of a right to bear arms in tribal court, then, could yield radically different results than similar cases adjudicated in the federal courts.

2. Tribal Gun Laws in Indian Country

Beyond constitutional guarantees, as seen in the following subsections, tribes may—and often do—regulate the ownership, possession, and use of guns in Indian country through both civil and criminal codes.

a. Criminal Codes. Perhaps not surprisingly, where tribes have criminal codes they almost always enumerate gun crimes. As previously explained, absent treaty provisions to the contrary, federal criminal laws of general applicability, including gun laws, are in effect in Indian country as they are anywhere.³³¹ And, in fact, there are federal laws that might affect firearm ownership and possession in Indian country, particularly as they pertain to domestic violence convictions.³³² But where gaps or issues of nonenforcement arise, reservation Indians will look to tribal governments to define the scope of gun regulation.³³³ As explained previously, non-Indians are not subject to tribal criminal law.³³⁴

328. However, an exhaustive search of published tribal court opinions does not turn up one case in which a tribal government attempted to ban guns on the reservation.

329. See *infra* section III.C.

330. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59–60 (1978).

331. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 175, § 9.02[1], [3], [9]. There are two federal statutes chiefly responsible for regulation of the sale and use of firearms. See Gun Control Act of 1968, 18 U.S.C. §§ 921–931 (2006); National Firearms Act of 1934, 26 U.S.C. § 5801–72 (2006).

332. See, e.g., 18 U.S.C. § 117(a) (stipulating that a three time offender of domestic violence in Indian country will be imprisoned up to ten years); *id.* § 922(g)(9) (stipulating that a person who has been found guilty of committing misdemeanor domestic violence in any court cannot possess a firearm).

333. Except in Public Law 280 states, state criminal law is inapplicable in Indian country. See 18 U.S.C. § 1162 (2006 & Supp. IV 2010); 28 U.S.C. § 1360 (2006).

334. See *Oliphant v. Squamash Indian Tribe*, 435 U.S. 191, 212 (1978), *superseded by statute in part*, Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (1990) (codified at 25 U.S.C. § 1301(2), (4)). Again, this could change, pending the outcome of Congress's vote to reauthorize the Violence Against Women Act.

Virtually every tribe researched that has a criminal code has enacted some type of gun law. Criminal laws regarding guns in Indian country, as a general matter, map onto those seen in states and municipalities around the country. Laws banning or governing the carrying of concealed weapons are quite prevalent.³³⁵ Several tribes allow concealed carry where a permit has been issued by the tribe.³³⁶ Some tribes more tightly constrain gun ownership in general, limiting the places where weapons may be lawfully carried with no permit exceptions.³³⁷

Tribes' most comprehensive gun laws are reflected in those pertaining to standard violent crimes. Because tribes retain jurisdiction over crimes by Indians and have exclusive jurisdiction over nonmajor crimes committed by Indians,³³⁸ tribal codes reflect the jurisdictional realities, with many codes omitting reference to crimes that would fall within the federal government's jurisdiction under the Major Crimes Act, such as murder. References to guns or weapons are most common in code provisions related to assault, robbery, intimidation, and stalking.³³⁹ Otherwise, tribal criminal codes are replete with gun restrictions, including laws governing ownership, carry, and use. Tribes such as the Fort Peck Assiniboine, the Eastern Band of Cherokee Indians, Oglala Sioux, the White Mountain Apache, the Chickasaw Nation, and numerous others, have comprehensive criminal gun laws.³⁴⁰

Domestic violence, a notorious problem on Indian reservations, appears commonly in criminal codes as well, sometimes within the context of guns. Some tribes allow tribal police to take guns from the home in a domestic

335. *See, e.g.*, POARCH BAND OF CREEK INDIANS TRIBAL CODE § 8-6-17 (defining carrying a concealed weapon as a crime if committed by any person "other than an authorized law enforcement officer"); Fort Peck Assiniboine & Sioux Tribes v. Stiffarm, No. AP-019, 1987 Mont. Fort Peck Tribe LEXIS 6, *7 (Fort Peck Ct. App. Aug 12, 1987) (citing the tribe's concealed weapon statute).

336. *See, e.g.*, BAY MILLS LAW & ORDER CODE § 610 (concealed weapons code); BLACKFEET TRIBAL LAW & ORDER CODE ch. 5, pt. IV, § 3 (same); HOPI INDIAN TRIBE, LAW & ORDER CODE § 3.3.12 (same).

337. *See, e.g.*, LAWS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES § 2-1-1204 (criminalizing carrying a concealed weapon in a prohibited place); ELY SHOSHONE CRIM. CODE § 202.265 (restricting carrying a firearm on school property).

338. *But see* 18 U.S.C. § 1162 (2006 & Supp. IV 2010) (providing tribes and states concurrent jurisdiction); 28 U.S.C. § 1360 (2006) (same).

339. *See, e.g.*, BAY MILLS LAW & ORDER CODE § 609(A)(5) (defining "Criminal Sexual Conduct" as an offense where the offender may be "armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon"); BLACKFEET TRIBAL LAW & ORDER CODE ch. 5, pt. II, § 5(E)(2) (defining "Domestic Abuse" as an offense that may involve "the use or threatened use of a weapon"); CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. III, § 213(b) (defining "Simple Assault" as an act by an offender who "recklessly or negligently causes bodily injury to another with a dangerous weapon"); SWINOMISH TRIBAL CODE § 4-02.100(E)(4) (defining "Stalking" as a "Class B offense" if "the stalker was armed with a dangerous weapon, while stalking the person").

340. *See, e.g.*, ASSINIBONE & SIOUX COMPREHENSIVE CODE OF JUSTICE tit. VII, § 401; CHEROKEE CODE § 14-10.30; CHICKASAW NATION CODE § 5-1506.8(A) ("It shall be unlawful to carry a Dangerous Weapon concealed on the person . . ."); *id.* § 5-1506.7; HOPI INDIAN TRIBE, LAW & ORDER CODE § 3.3.12; NAVAJO NATION CODE ANN. tit. XVII, § 320; OGLALA SIOUX TRIBE CRIM. OFFENSES CODE §§ 510-511; WHITE MOUNTAIN APACHE CRIM. CODE § 2.71.

violence situation even if the gun was not used in the incident at issue.³⁴¹ Others condition release of a defendant guilty of domestic violence on a guarantee of no future possession of firearms.³⁴²

Tribes also employ carve outs to general gun regulations or prohibitions for activities that may be tribally distinct or connected to their particular cultural and ceremonial practices. The Navajo Nation code, for example, includes an express exception to its general gun laws where the firearm is used in “any traditional Navajo religious practice, ceremony, or service.”³⁴³ The San Ildefonso Pueblo Code similarly states an exception to its criminal gun code regarding “Negligent Use & Discharging of Firearms & Cannons” for those circumstances when such gun use is related to “any ceremony where traditions and customs are called for.”³⁴⁴ And the Shoshone and Arapaho of the Wind River Indian Reservation set forth requirements regarding the hunting of “big game” on the reservation.³⁴⁵ The code includes preceremony permitting requirements unique to those who will be dancing in the tribes’ Sundance Ceremony and using male elk or male deer in the ceremonies themselves.³⁴⁶

Undoubtedly, the articulation of gun crimes is an essential tool for tribes in addressing public safety in Indian country and is, intuitively, at least one place where tribes may choose to legislate in regards to guns. At the most basic level, maintaining law and order, including imposing incarceration when necessary, is a key feature of sovereignty.³⁴⁷

b. Civil Regulatory Codes. Numerous tribes have enacted comprehensive civil codes regarding guns. Unsurprisingly—given the rural nature of many reservations and the deep cultural links to a subsistence lifestyle—many of these codes pertain to hunting and fishing.³⁴⁸ These codes typically set parameters for the taking of fish and game in ways similar to non-Indian country

341. *See, e.g.*, COUSHATTA TRIBE OF LA. CODES § 3A.02.010(a)(2) (allowing officers to seize weapons when responding to a domestic violence crime); WHITE MOUNTAIN APACHE CRIM. CODE § 6.3(D)(2) (allowing police officers to remove weapons discovered during a domestic violence investigation); *see also* ELY SHOSHONE TRIBAL CODE § 171.146 (permitting officers to seize weapons when responding to any arrest).

342. *See, e.g.*, CHEROKEE CODE §§ 14-34.15(a), 14-40.1(p)(2)(e); NEZ PERCE CODE § 7-2-18(b)(5); *see also* COUSHATTA TRIBE OF LA. CODES § 3A.04.010(b)(4) (conditioning pretrial release on prohibition of firearm possession); ELY SHOSHONE TRIBAL CODE § 176.337 (providing for court notification of convicted domestic-abuse defendant concerning future restrictions on gun possession).

343. NAVAJO NATION CODE ANN. tit. XVII, § 320(B)(4).

344. SAN ILDEFONSO PUEBLO CODE tit. VI, § 13.55(b).

345. SHOSHONE & ARAPAHO FISH & GAME CODE ch. 4.

346. *See id.* § 16-4-1(1).

347. *See* Riley, *supra* note 190, at 834–35.

348. *See, e.g.*, CHEROKEE CODE § 113-10 (outlining the restrictions on weaponry used to hunt); MILLE LACS BAND STAT. ANN. tit. XI, § 4038 (prohibiting hunting with a firearm while under the influence of alcohol); SHOSHONE & ARAPAHO FISH & GAME CODE § 16-8-12 (Firearms Restrictions); SILETZ TRIBAL CODE § 7.022 (applying state regulations to the weapons used in hunting); WHITE MOUNTAIN APACHE, GAME & FISH CODE § 4.14 (Prohibited Activities: Occupation and Use); *id.* § 5.16 (Prohibited Devices); *id.* § 5.19 (Prohibited Activities: Hunting).

regulations. For example, such codes establish regulations regarding the types of guns that can be used in hunting, the maximum catch, and whether dogs can be used to aid in hunting.³⁴⁹ In some instances, they set forth exceptions to general criminal gun laws or articulate time, place, and manner restrictions.³⁵⁰ Such restrictions also address the use of firearms in demonstrations and regulations regarding the sale of guns on the reservation.³⁵¹

Other civil codes dealing with guns relate to restrictions in particular reservation locales, including casinos and tribal government buildings.³⁵² Several address the issue of guns in and around schools.³⁵³ Curiously, some tribes also have in place regulations in the context of debtor–creditor law that guarantee debtors one firearm from being seized by a creditor.³⁵⁴ Others govern the transportation of guns, addressing such questions of how and when guns can, for example, be transported on a snowmobile, or whether a gun can be shot across a public highway or from the window of a moving vehicle.³⁵⁵

There are also tribally specific rules embodied in the codes, with the use of bows and arrows commonly addressed along with guns.³⁵⁶ In some cases, tribes set forth specific requirements for acquiring Band hunting licenses (as distinct from Indian hunting licenses generally), particular regulations governing hunting and trapping on tribal lands, and codes distinguishing between commercial and cultural hunting.³⁵⁷

349. *See, e.g.*, WHITE MOUNTAIN APACHE, GAME & FISH CODE §§ 2.2, 5.16(A), 5.19(A)(3).

350. *But see, e.g.*, State v. Roy, 761 N.W.2d 883, 891–92 (Minn. Ct. App. 2009) (holding that state court had jurisdiction to prosecute tribal member for violating felon-in-possession statute even though the violation took place on the tribal member’s reservation and involved exercising tribal treaty hunting rights because the defendants’ inability to possess a firearm was based on his own conduct); State v. Jacobs, 735 N.W.2d 535, 536 (Wis. Ct. App. 2007) (same).

351. *See, e.g.*, CHEROKEE CODE §§ 144-1 to -2 (regulating firearm and handgun sales); *id.* § 167-2(d) (“It shall be unlawful for any person participating in, affiliated with, or present as a spectator at any parade, demonstration, picket line or exhibition to willfully possess or have immediate access to any dangerous weapon.”).

352. *See, e.g.*, ABSENTEE SHAWNEE GAMING ORDINANCE § 323 (disallowing firearms on gaming premises except by permission of Gaming Commission); NEZ PERCE CODE § 6-2-13(n)(1) (regulating employees’ possession of firearms and weapons on gaming premises).

353. GRAND TRAVERSE BAND CODE tit. XVI, § 213(d)(5) (allowing an adult affiliated with a school to exert physical force against a student in order to seize a dangerous weapon).

354. *See* CHICKASAW NATION CODE § 5-215.19(A)(14) (exempting one handgun or rifle from being seized from a debtor); CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. IV, § 310(a)(15) (same); LAWS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES § 4-3-317(9) (exempting personal property, including firearms, up to \$5000 aggregate value from execution of a judgment).

355. BAY MILLS TRIBAL CODE tit. XVI, § 1614 (providing that firearms must be unloaded, locked, and stored if being transported by snowmobile); SILETZ TRIBAL CODE § 12.124 (criminalizing the discharge of a weapon on or across a highway); YANKTON SIOUX TRIBAL CODE § 11-8-080 (defining shooting from or across a public highway as a civil violation).

356. *E.g.*, BAY MILLS TRIBAL CODE tit. XVI, § 1614

357. *See* MILLE LACS BAND STAT. ANN. tit. XI, § 2001(b) (defining Mille Lacs’ “Band Hunting Licens[es]”); *id.* § 2620 (regulating hunting and trapping on tribal lands); *see also id.* § 102 (describing cultural hunting, fishing, and gathering of wild rice as unique protected rights of tribal members).

C. ENGAGING “INDIANS AND GUNS”: WHAT LIES AHEAD?

In the following section, I provide background on governance within Indian country and then lay out three broad, potential categories of options for tribes to consider in regards to gun regulation: criminal gun bans, civil laws banning guns, and other forms of gun regulation.

1. Indian Country Governance: Realities and Challenges

Thinking of Indian nations as self-selected laboratories for gun laws presents unique and uncharted opportunities for tribes. Tribal governments are positioned to reclaim some of the local control over gun regulation that has historically marked this body of law. Scholars have long argued that “states and municipalities, far more sensitive to local needs and gun cultures, should be given free reign to design gun control policy that fits their specific demographic.”³⁵⁸ Though they may have lost some of that freedom after *McDonald*, tribes continue to enjoy full flexibility. Tailoring of gun laws may be particularly appealing for tribal governments.³⁵⁹ Guns oftentimes serve multiple purposes within a given community, including the fulfillment of military duties, sports or recreational activities, subsistence hunting, or self-defense. Unfortunately, of course, guns may also be used in the commission of crimes.³⁶⁰ Thus, each tribe’s unique culture, geography, history, demographics, and treaty-rights considerations may converge to inform the particular panoply of guns rules and regulations a tribal government may choose to enact and enforce based on these factors.

Though crime is only one facet of gun ownership and use, it is clear that the question of gun control has been historically, and remains today, linked to issues of crime control and public safety. This is so even though the connection between gun control and the minimization of gun crime is seriously contested.³⁶¹ Nevertheless, it is likely that, in structuring gun laws, tribal governments—like other sovereigns—will take into account the particular criminal statistics of their community (including who commits crime, against whom, and by what means) in assessing the best gun laws for their respective nations. Such an analysis may be particularly critical for tribal governments. As this Article has demonstrated, reservations are notoriously difficult to police, with the safety and security of reservation residents oftentimes suffering as a consequence of

358. Miller, *supra* note 20, at 1354.

359. Cf. Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009) [hereinafter Volokh, *Implementing*] (describing the variance in gun control laws amongst different states); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights To Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 221–22 (2009) [hereinafter Volokh, *Nonlethal*] (detailing state and local regulation of concealed guns despite right to bear arms).

360. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting).

361. See COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT’L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2 (Charles F. Wellford et al. eds., 2005).

the complexities of existing jurisdictional arrangements.³⁶² In addition, reservations can fairly be said to have received far less than their fair share of attention in regards to criminal justice resources.³⁶³

This practical—if not legal³⁶⁴—gap in criminal jurisdiction has been the subject of much scholarly critique³⁶⁵ and has also led to some recent policy changes that are meant to mitigate these negative consequences.³⁶⁶ But the reality is that the vast majority of reservations are home to both Indians and non-Indians, with many being majority non-Indian.³⁶⁷ As a general matter, residents are free to move on and off the reservation freely and without impediment.³⁶⁸ There is little tracking by any government (tribal, state, or federal) as to who is residing on the reservation at any given time.³⁶⁹ All of these factors make reservation governance all the more difficult, particularly given that one's racial and political status bear on the question of which sovereign may exercise jurisdiction in a given instance.

Tribes' freedom to tailor gun laws to meet the needs of local communities empowers Indian nations to implement regulations and protections that are particularly suited to them. This means that tribes may define their relationship to guns—informed by the theories of exceptionalism, citizenship, and race—

362. See *supra* note 15 and accompanying text.

363. See CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 24–26 (2007), available at <http://cdn.law.ucla.edu/SiteCollection/Documents/centers%20and%20programs/native%20nations/pl280%20study.pdf>; Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 721–40 (2006) (detailing how the lack of resources in Indian country bears on criminal justice at the tribal and federal levels).

364. At one point, the Supreme Court's ruling in *Duro v. Reina*, 495 U.S. 676, 679 (1990), actually did create a legal jurisdictional gap in Indian country, but Congress quickly addressed it. See Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (1990) (codified at 25 U.S.C. § 1301(2), (4) (2006)).

365. See, e.g., WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 21 (2010) (saying cases like *Oliphant*, which reflect “the vestiges of colonialism . . . must go”); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 214 (2002) (calling *Oliphant's* reasoning “an inventive process of judicial historical revisionism”); Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 128 (2004) (arguing that *Oliphant* puts “tribal communities at the mercy of non-Indian criminals”); Frickey, *supra* note 22, at 457–58 (calling *Oliphant's* reasoning “troubling”); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 3 (1991) (criticizing the Supreme Court's decision in *Oliphant*).

366. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, 2261–301; see also Washburn, *supra* note 296, at 1027 (explaining that the Act would create an Indian Law and Order Commission to investigate Indian criminal justice).

367. L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 134 tbl.4 (1994) (detailing that, in eight of the ten most populated reservations, the majority of residents were non-Indian).

368. Riley, *supra* note 310, at 1066, 1068.

369. But see Sex Offender Registration and Notification Act (SORNA) § 127, 42 U.S.C. § 16927(a)(1); National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,049–50 (July 2, 2008) (detailing tribal authority to monitor sexual offenders residing in Indian territory). In addition, the community and family-based nature of Indian tribes makes it likely that tribes are most aware of the presence of tribal members, who also participate in ceremonial and community life as well as seek goods and services from their tribal governments.

with ultimate authority to enact laws that are a good cultural, institutional, and fiscal match.³⁷⁰ In this sense, tribes may seek coherence and consistency in the face of an otherwise muddled body of federal Indian law. After all, one of the reasons federal law and policy regarding Indians and Indian nations—both generally and in regards to criminal justice, in particular—has proven faulty is that the wide diversity in Indian nations is seldom taken into account. There are over 560 federally recognized Indian nations in the United States and many more that are unrecognized. These nations represent a wide diversity in terms of language, culture, religion, governance, and history, all of which drive tribes' construction of gun regulations.

Tribes that were subject to allotment, for example, had their reservations opened up to white settlement after individual allotments were assigned to tribal members.³⁷¹ Such tribes—including all thirty-eight tribes in the state of Oklahoma—now must govern territory that is characterized by “checkerboarding,” with individual Indian trust allotments, Indian-owned fee land, non-Indian-owned fee land, and tribal trust lands situated side by side, creating convoluted jurisdictional arrangements in some of the more rural parts of the United States. It has been said that “[p]olice working on or around Oklahoma’s patchwork reservations have to carry GPS devices because the change by a few feet in the location of a crime can determine whether it’s under state, tribal or federal authority.”³⁷² As a result, tribal, state, and federal law enforcement officials must work together through a process of on-the-ground sovereignty arrangements. Oftentimes, tribal and state police enter into crossdeputization and intergovernmental agreements to ensure effective policing of Indian territory.³⁷³ Even so, tribal police typically cannot arrest non-Indians for violations of tribal law, even on Indian lands.³⁷⁴

370. See Stephan Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't* 16 (Joint Occasional Papers on Native Affairs, Paper No. 2005-02, 2005).

371. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, *repealed by* Indian Land Consolidation Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007.

372. Michael Riley, *1885 Law at Root of Jurisdictional Jumble*, DENVER POST, Nov. 13, 2007, www.denverpost.com/lawlesslands/ci_7422829.

373. See, e.g., Intergovernmental Co-operative Agreement, Citizen Band Potawatomi Indian Tribe of Okla.–Pottawatomie County, Okla., Jan. 4, 1995, *available at* http://www.ncai.org/ncai/resource/documents/governance/ok_law_cross-deputization_agreement_between_citizen_band_of_potawatomi_and_pottawatomie_county_december_1994.pdf (detailing a crossdeputization agreement between the Citizen Band Potawatomi Tribe and Pottawatomie County of Oklahoma to coordinate the authority of commissioned officers of both parties for better law enforcement).

374. Although crossdeputization agreements sometimes allow tribal police to arrest non-Indians in Indian country, arrests can only be made for violations of state law. CAROLE E. GOLDBERG, REBECCA TSOSIE, KEVIN K. WASHBURN & ELIZABETH RODKE WASHBURN, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 932–33 (6th ed. 2010) (“[T]he deputization agreement [grants] state law enforcement authority to tribal police.”). After *Oliphant*, non-Indian criminals on reservations were not subject to tribal law jurisdiction. *Id.* at 279 (“Under *Oliphant*, a non-Indian who commits a crime against the person or property of an Indian must be tried in federal court generally under 18 U.S.C. § 1152 (unless

By contrast, other tribes maintain enormous, largely contiguous swaths of rather remote territory, sometimes spanning several state lines and time zones.³⁷⁵ The role of the federal government in investigating and prosecuting crime greatly impacts governance here, where the closest prosecutor's office and federal court may, literally, be hundreds of miles away.³⁷⁶ These logistical barriers link up with tribes' specific internal governmental arrangements, which may further impede streamlined, efficient law enforcement efforts³⁷⁷ and may also be negatively impacted by social problems, such as high rates of unemployment and poverty, which limit tribal members' ability to fully engage in the criminal justice system.³⁷⁸

Moreover, in several states, Public Law 280 alters standard jurisdictional arrangements. In Public Law 280 states, the state is charged with responsibility for criminal jurisdiction on the reservation.³⁷⁹ However, because Indian trust lands are not subject to taxation by the states, state law enforcement has often been seen as an unfunded mandate, resulting in gross and rampant underpolicing of reservation lands in Public Law 280 states and a concomitant absence of federal resources devoted to help tribes in Public Law 280 states develop their own criminal justice systems.³⁸⁰ Thus, even where these tribes are positioned to maintain their own tribal police force, they also must coordinate with sometimes reluctant state law enforcement officials to address crime on the reserva-

a federal statute, such as Public Law 280, has granted the state jurisdiction over crimes occurring on reservations).”).

375. Washburn, *supra* note 363, at 711. *See generally* Dave Smith, *Spring Forward, Fall Back: Time Zone Differences Can Wreak Havoc with Police Reports and More*, POLICE (Dec. 2010), <http://www.policemag.com/Channel/Patrol/Articles/Print/Story/2010/12/Spring-Forward-Fall-Back.aspx> (“All Tribal paperwork including citations had to be on daylight time and all Arizona paperwork had to be on MST, which also made for interesting moments of confusion. . . . [W]hen I patrolled the Four Corners Monument I drove through four states in 10 seconds!”).

376. *See Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 49 (2008) [hereinafter *Declination Hearing*] (statement of Janelle F. Doughty, Director, Dep't of Justice and Regulatory Affairs, S. Ute Indian Tribe), available at http://www.indian.senate.gov/public/_files/September182008.pdf (noting that the nearest federal courthouse to the Southern Ute Indian reservation is 350 miles away); Washburn, *supra* note 296, at 1022 (detailing expansive distances that separate tribal communities and federal court houses and the challenges this creates for federal prosecutors and reservation residents).

377. The Hopi, for example, live on a reservation entirely surrounded by the Navajo Nation and have a governance system based on kin and clan relationships that are decentralized, with power largely situated at the village level. *See, e.g.*, CONST. & BY-LAWS OF THE HOPI TRIBE art. III, § 2 (describing powers reserved to Hopi villages); Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y 761, 768–73 (2000) (explaining the process by which the Hopi courts enforce village decisions and police enforce court orders); Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 458 (describing Hopi societal structure as defined by largely individual, decentralized Hopi villages, each with its own unique decision-making processes).

378. *See generally* Washburn, *supra* note 363, at 766–72 (discussing obstacles to access for defendants in Indian country).

379. GOLDBERG-AMBROSE WITH SEWARD, *supra* note 217, at 1, 9.

380. *See id.* at 17; *see also* Goldberg & Champagne, *supra* note 200, at 249–55 (discussing the two main complaints from tribes in Public Law 280 states).

tion.³⁸¹

The problems with obtaining a complete understanding of criminal justice in Indian country are not limited to a lack of attention to diversity amongst tribal nations. Scholars and policy makers have long complained that federal laws have failed to address issues of criminal justice in Indian country, in part because so little is known about it.³⁸² Despite the recent studies discussed *infra*—as well as evidence suggesting high crime rates in Indian country and a great deal of crime committed by non-Indians in Indian country—the data required to draw concrete conclusions about gun crime in Indian country and who commits it is largely unavailable.³⁸³ This historical dearth of empirical research conducted on crime in Indian country has fueled the problems of deficient justice systems. Gaps in the data—long pointed out by tribal members, policymakers, and scholars in the area³⁸⁴—have contributed to the problem of inadequate jurisdictional governmental infrastructure.³⁸⁵ However, recent successful efforts—such as those realized by some of the field’s leading scholars, Carole Goldberg and Duane Champagne, for example—in securing the funding and access necessary to answer questions about Indian country justice issues have begun to turn the tide.³⁸⁶

The collection of data regarding crime involving American Indians is particularly worthwhile in regards to Indian women, who are grossly over-represented in crime-victim statistics. According to a 2004 U.S. Department of Justice report, “[t]he rate of violent victimization among American Indian women was

381. See Goldberg-Ambrose, *supra* note 217, at 1425–26.

382. See, e.g., Washburn, *supra* note 363, at 775–76.

383. See generally DIANE J. HUMETEWA, 2009 ARIZONA INDIAN COUNTRY REPORT 28–68 (2009), available at http://www.justice.gov/usao/az/reports/2009_Report.pdf (providing a sample of Indian country cases prosecuted by the Office of the U.S. Attorney for the District of Arizona from July 1, 2008 to July 1, 2009 but without capturing the incidence of gun crime or the race of victims); PERRY, *supra* note 16, at v (compiling data from 1992 to 2002 and positing that “[a]pproximately 60% of American Indian victims of violence, about the same percentage as of all victims of violence, described the offender as white”). However, Steven Perry’s report does not provide statistics specific to Indian country crime. See PERRY, *supra* note 16, at 6.

384. See, e.g., GOLDBERG & CHAMPAGNE, *supra* note 363, at 250, 274 (discussing the severe lack of reliable data surrounding Indian country criminal justice, which renders scholars ill-equipped to effectively compare Public Law 280 and non-Public Law 280 jurisdictional frameworks); Deer, *supra* note 365, at 122 (highlighting the gap in Indian country criminal justice scholarship related to issues of sexual violence); Washburn, *supra* note 363, at 776 (advocating for a comprehensive analysis of the challenges facing Indian country criminal justice to develop potential solutions).

385. See, e.g., Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL’Y 59 (2003) (addressing the negative impact of the *Oliphant* decision on Indian country); Washburn, *supra* note 363, at 775–76 (explaining the ineffective execution of federal jurisdiction in Indian country). See generally Goldberg-Ambrose, *supra* note 217 (exploring the challenges facing Indian communities impacted by the Public Law 280 jurisdictional framework).

386. See GOLDBERG & CHAMPAGNE, *supra* note 363; see also DIANE J. HUMETEWA, 2008 INDIAN COUNTRY REPORT (2008), available at http://www.justice.gov/usao/az/reports/2008_Report.pdf (compiling data related to civil, criminal, and appellate cases in the District of Arizona that involved Indians); HUMETEWA, *supra* note 383 (doing the same for the following year).

more than double that among all women.”³⁸⁷ Another recent study found that a shockingly high number of American Indian and Alaskan Native women—thirty-four percent—will be raped in their lifetimes.³⁸⁸ A report published by Amnesty International in 2007 contends that jurisdictional and institutional barriers—many of which were attributed to federal government neglect—have made Indian women particularly vulnerable to sexually violent crimes with little access to adequate justice systems.³⁸⁹ And yet, more research indicates that a majority of certain crimes—such as rape of Indian women, for example—are perpetrated by non-Indian men.³⁹⁰ Anecdotally, there also appears to be an increase in crime across Indian country by non-Indians, particularly as non-Indian gangs and drug cartels increasingly infiltrate Indian reservations.³⁹¹ But all these statistics fail to paint a complete picture of the criminal justice challenges faced by tribes. Notably, many conclusions about crime involving Indians are drawn from nationwide crime data by race but are not Indian-country specific.³⁹² Undoubtedly, more empirical studies are needed to draw concrete conclusions about Indian country criminal activity.

At the same time, on a tribe-by-tribe basis, Indian nations do typically have an understanding of the criminal justice issues they face and what the greatest obstacles are to solving those problems.³⁹³ Tribal leaders, including tribal prosecutors, police officers, and judges, are uniquely positioned to gather information—formally or informally—about barriers to public safety in Indian country. This particularized analysis is likely to be more useful to tribes than generalized Indian-country data anyway, as each tribe is free to establish its own laws regarding arms that fit its particular history, culture, and contemporary circumstances. Accordingly, a tribe may find that one or more of the respective theories of exceptionalism, citizenship, or race provide a descriptive foundation from which to build and refine future gun control laws.

387. PERRY, *supra* note 16, at v.

388. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, NCJ No. 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 ex.7 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

389. AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 27–39 (2007) (exploring the jurisdictional challenges hindering Native women’s access to effective justice following sexual assault and other related crimes).

390. PERRY, *supra* note 16, at 9 & tbls. 12–13.

391. See, e.g., Eric Eckholm, *In Drug War, Tribe Feels Invaded by Both Sides*, N.Y. TIMES, Jan. 24, 2010, <http://www.nytimes.com/2010/01/25/us/25border.html>; Ken Ellingwood, *Tribes Are Caught on the Border*, L.A. TIMES, May 8, 2000, <http://articles.latimes.com/2000/may/08/news/mn-27815>.

392. See Carole Goldberg & Kevin Washburn, *Lies, Damn Lies, and Crime Statistics*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 25, 2008), <http://indiancountrytodaymedianetwork.com/ictarchives/2008/07/25/goldberg-and-washburn-lies-damn-lies-and-crime-statistics-93310> (pointing out that the BJS statistics do not take account of whether the crime occurred within Indian country). Given the percentage of Indians in the general population (around 1–2%), off-reservation crime data provides an insufficient basis upon which to assess Indian country criminal justice issues.

393. See Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1110–16 (2010) (arguing for greater tribal, localized control over criminal justice in Indian country).

2. Contemplating Gun Rights in Indian Country

With wide-ranging diversity between tribes, it is neither feasible nor desirable to create a one-size-fits-all paradigm for gun control in Indian country.³⁹⁴ Nevertheless, it is worthwhile to explore whether and to what extent particular gun control measures will make sense for today's Indian tribes. I assume here that tribes can and would take into account a multiplicity of gun uses in determining the best gun control laws for their tribal nation. The importance of subsistence hunting, recreational gun use, and ceremonial activities undoubtedly will all have a heavy impact on tribes' structuring of gun laws.

In this section of the Article, however, I place a particular emphasis on the potential for gun laws to speak to reservation crime. In no way do I mean to suggest, of course, that gun laws can ever be an appropriate stand-in for an infusion of adequate resources into Indian country to address public safety concerns. Moreover, I emphasize the critical caveat that the connection between gun control and crime reduction is heavily contested.³⁹⁵ I acknowledge, as a starting point, that if tribes are looking at gun control as a means of addressing on-reservation crime, it is not clear that any laws or regulations will make a meaningful difference. A 2004–2005 National Academy of Sciences and Center for Disease Control survey of criminological research concluded that there's insufficient evidence to determine whether gun control laws or gun decontrol laws reduce crime at all.³⁹⁶ Even given the inconclusiveness of this information, however, gun ownership and use is heavily regulated all across the United States—more in some places than in others—and it is, thus, correspondingly important to think about how such laws and regulations may work on reservations. Here, I discuss three potential models of gun laws tribes may consider implementing and then raise some of the most pressing potential objections.

a. Criminal Laws Banning Guns. One way for tribes to deal with the question of gun regulation in Indian country is to enact universal disarmament and criminally ban all firearms and handguns on the reservation entirely. This was essentially the tack taken by Washington D.C. and Chicago before the Supreme Court determined such bans were constitutionally impermissible. But tribes could enact such bans without federal or state constitutional restraints. Of course, those tribes whose own constitutions contain a right to bear arms would have to overcome their own legal barriers to such a law.³⁹⁷ But, absent that

394. As empirical studies have shown, tribes are more successful in the long run when there is a good match "between formal governing institutions and contemporary indigenous ideas." See Cornell & Kalt, *supra* note 370, at 7, 16.

395. COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, *supra* note 361.

396. *Id.* at 2 ("[T]he committee found no credible evidence that the passage of right-to-carry laws decreases or increases violent crime, and there is almost no empirical evidence that the more than 80 prevention programs focused on gun-related violence have had any effect on children's behavior, knowledge, attitudes, or beliefs about firearms.").

397. See *supra* notes 317–21 and accompanying text.

potential restriction, tribes have relative freedom to enact such laws. And complete bans may, for some tribes, constitute a good cultural, governmental, and institutional fit.

The benefits may be persuasive. Tribes would not have to strain their already limited resources to enact tailored gun laws, put permitting procedures in place, or discern between authorized and unauthorized uses of guns. A complete ban would free the tribe from policing various forms of permissible and impermissible gun use. If the tribe faces a large amount of gun crime committed by tribal members or even other Indians, a criminal prohibition on guns may result in reduced reservation gun crime. This is particularly so given that most murders in the United States are committed with guns, and at least triple that number of nonlethal injuries occur each year due to guns.³⁹⁸ And, pursuant to inherent tribal sovereignty, the tribe may also criminally prosecute—up to the limits proscribed by the Indian Civil Rights Act—all Indians who violate the ban. Thus, a tribe that either has few non-Indian residents or few non-Indian reservation visitors may find a criminal gun ban an appealing option.

On the other hand, the potential disadvantages to this approach are evident. As an initial matter, a criminal gun ban may not be a good cultural or institutional fit for some tribes. If one considers the importance of hunting and fishing—for subsistence, ceremonial, and even religious purposes—within tribal communities, a criminal gun ban would be highly undesirable for some tribes. Moreover, depending on the tribe, such a ban might even be construed to be violative of treaty rights, protecting, in particular, the traditional hunting of big game.

But there is even a more potent objection to the suggestion of a universal, criminal gun ban in Indian country. Given that tribes do not have criminal jurisdiction over non-Indians, a criminal gun ban could only be applied to Indians. This would result in a disparate system, one in which Indians—including Indians who are not tribal members—would be criminally prohibited from having guns, but non-Indians could not be criminally prosecuted by the tribe for gun ownership. Such a disparate system may only add to the already burdensome process of differentiated policing of Indians and non-Indians within Indian country.

Consequently, a tribal criminal gun ban would leave non-Indians uniquely free to arm themselves. If a tribe has particular concerns about crime by non-Indians against Indians, this type of ban could essentially be construed as empowering non-Indians against an unarmed Indian population. It might even have the perverse consequence of exacerbating or increasing crime by non-Indians against Indians if, as some scholars contend, the presence of an armed

398. Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 ALB. GOV'T L. REV. 440, 446–49 (2008) (citing to numerous FBI and other statistics detailing injuries and deaths caused by guns).

populace actually serves to deter crime, at least for purposes of self-defense.³⁹⁹ With concerns that Indian reservations already are havens for non-Indian criminals, a criminal scheme disarming Indians may put Indians in the difficult position of choosing to live unarmed amongst potentially armed non-Indians or violate tribal criminal laws and keep a gun anyway. Ultimately, such a scheme might actually put greater strain on tribal resources if it increased the number of criminal cases on tribal courts' dockets, especially where reservation residents are charged with various forms of unlawful firearm possession.

Relatedly, a standard argument against individual gun ownership is that, as a society, we should rely on our collective sources of state protection—notably, police officers—rather than private weaponry for security from harm.⁴⁰⁰ But the power of this argument depends on ensuring the state is providing adequate protection to its citizens. It is not clear such protections are readily available in Indian country. The reality is that on many rural Indian reservations there is grossly inadequate law enforcement.⁴⁰¹ While the problem of ensuring services to a rural population is not unique to Indian country, the particular jurisdictional, legal, cultural, and institutional barriers that this Article has discussed make criminal justice perhaps most difficult in Indian country.

At the most basic level, consider problems with tribal emergency-response systems. One tribe's story is illustrative. A recent press release from the Fort Hall Reservation in Idaho pointed out, for example, that the reservation traverses four separate counties.⁴⁰² When 911 calls come in, they are routed to the county dispatcher who then reroutes the calls to the Fort Hall Police Dispatch Center. Pat Teton, Fort Hall Police Chief reports, "The time lost in having to reroute emergency calls can mean the difference between life and death."⁴⁰³ Additionally, because of limitations on tribal jurisdiction, even after a new, more efficient system is put into place at Fort Hall, the law will require that county officers "respond to 911 calls involving non-Indians on the reservation, but . . . still notify the tribal police as a courtesy and for possible backup assistance."⁴⁰⁴ One can only surmise that the additional time it takes for an emergency dispatcher to inquire into whether a potential attacker is Indian or non-Indian—and, therefore, which group of law enforcement officers should

399. This is an oft-repeated, if highly controversial, proposition. For a discussion of the various viewpoints about the relationship between gun control and crime, see Volokh, *Implementing*, *supra* note 359, at 1465–67.

400. See generally RAMSEY CLARK, *CRIME IN AMERICA* 107 (1970) (arguing against individual gun ownership for the purposes of self-defense, calling such tactics "anarchy, not order under law—a jungle where each relies on himself for survival," which goes against the idea of government fulfilling its obligation to protect citizens).

401. See Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 788–89 (2006) (detailing the extremely rural nature of many Indian reservations and the concomitant problems of crime and insufficient law enforcement).

402. Press Release, Shoshone-Bannock Tribes, Tribes Eye Dedicated 911 System (June 24, 2011), available at <http://www.shoshonebannocktribes.com/documents/pressreleases/addressing.pdf>.

403. *Id.* at 2.

404. *Id.*

respond to the call—potentially costs victims valuable time.⁴⁰⁵ Accordingly, the rural nature of many Indian reservations may motivate some tribes towards robust gun rights. Again, in Fort Hall, as in many rural parts of the country, new technology, including sophisticated GPS systems, aids in alleviating some of the problems with response times.⁴⁰⁶ But until recently, many rural residents had no physical addresses whatsoever and conveyed their location through rural route numbers or by giving verbal directions to emergency personnel.⁴⁰⁷

Moreover, though *Heller* does not constitutionally limit the actions of Indian nations, its admonitions regarding the right of self-defense may be morally instructive to tribal governments considering such a ban. In particular, if we think of reservations as places where residents are not provided adequate protection by the nation-state, gun rights and gun control could be viewed in light of existing racial hierarchies and social injustice.⁴⁰⁸ One can imagine, for example, the relatively common scenario where tribal members are underprotected by tribal governments due to a combination of a lack of resources, federal limitations on punishments imposed, and the absence of tribal criminal jurisdiction over non-Indians. They similarly may be unable to rely on state and federal governments for protection because of either jurisdictional limitations or political, financial, and institutional barriers.⁴⁰⁹ Additionally, the paucity of prosecutions by the federal government—or counties in the case of Public Law 280 states—only increases tribal members' anxiety around criminal justice.⁴¹⁰ Ultimately, then, the reservation Indian may find herself in a situation where she cannot count on governmental police power for protection, raising the question of whether such circumstances increase the desire and need for robust rights to arms for the purpose of self-defense.⁴¹¹

b. Civil Gun Bans. Another option is for tribes to enact a universal gun ban in the form of civil regulation, which would make Indians and non-Indians alike subject to tribal civil liability. Here, a tribe would not have to concern itself with

405. This discussion assumes that having a gun could, in some way, serve as a form of protection. There is actually no definitive evidence as to the efficacy of guns as a deterrent to crime. Thus, I raise this here as an argument to be considered, but I take no position on whether owning a gun in any way protects people from crime.

406. See Press Release, *supra* note 402.

407. See *id.* at 2.

408. Cf. Cottrol & Diamond, *supra* note 11, at 318 (“With the exception of Native Americans, no people in American history have been more influenced by violence than blacks.”).

409. See Goldberg-Ambrose, *supra* note 217, at 1410–11; Washburn, *supra* note 363, at 710–13; Michael Riley, *Justice: Inaction's Fatal Price*, DENVER POST, Nov. 13, 2007, http://www.denverpost.com/ci_7437278 (noting that an attempted murderer's identity and address—an Indian on a reservation—were known but “the FBI failed to make an arrest for seven months” and also noting the enormous caseload carried by FBI agents assigned to the Blackfeet reservation).

410. *Declination Hearing*, *supra* note 376, at 42 (statement of M. Brent Leonhard, Deputy Att’y Gen., Confederated Tribes of Umatilla Indian Reservation); Washburn, *supra* note 363, at 729–40; Riley, *supra* note 409 (noting the U.S. attorney in Montana's view that the “lack of investigation of low-priority felonies erodes faith in justice on reservations”).

411. See Cottrol & Diamond, *supra* note 11, at 359.

distinctions between Indians and non-Indians within Indian country, as a civil gun ban within Indian country would apply to everyone. The appeal might be fewer strains on the tribal criminal justice system, while still securing the same kind of objectives as would be sought by a criminal ban. Moreover, the ban would be applicable to all those on the reservation and would not—as a criminal ban might do—actually put non-Indians in a stronger position vis-à-vis Indians on the reservation. To do so, a tribe may enact a civil code regulating the conduct of all on the reservation. When applied on Indian lands within the reservation, these laws would apply to everyone equally pursuant to the tribe's inherent sovereign authority.⁴¹² As to nonmembers on non-Indian fee land within the reservation, violators would similarly be subject to tribal jurisdiction, as gun regulations clearly fit within *Montana's* “health or welfare” exception.⁴¹³

Although one potential drawback to a civil ban might be that civil laws do not provide the same panoply of punishment options as criminal law, it is here that innovative tribal solutions come into play. In the absence of criminal jurisdiction over non-Indians, tribal efforts to impact threatening or dangerous non-Indian activity must come through a noncriminal mechanism. To achieve greater control over nonmembers' on-reservation activity, some tribes have begun to exercise civil regulatory jurisdiction over non-Indians, even in cases where the civil regulation blurs the murky edges of criminal law.⁴¹⁴ As Indian law scholar Matthew Fletcher notes, numerous tribes are now enforcing civil offense ordinances against non-Indians to keep the charges in line with Supreme Court precedent.⁴¹⁵ Other scholars have similarly examined how tribes may, for example, hold violators in civil (rather than criminal) contempt in tribal jails or impose monetary fines, community service, or restitution obligations on non-Indians who violate civil laws that are, at heart, quasi-criminal.⁴¹⁶ By law, the punishments must be noncriminal and nonpunitive in nature. In the two cases cited by Matthew Fletcher in advocating for greater tribal control over reservations, for example, guns were involved.⁴¹⁷ In both cases, the tribe charged the perpetrator with a civil offense and imposed civil, rather than criminal, penalties.⁴¹⁸

412. However, the interplay of federal laws regarding guns, as well as any potentially applicable state gun laws, would have to be analyzed in each case. There remains a significant degree of uncertainty as to how courts will resolve civil regulatory conflicts among the respective sovereigns.

413. *Montana v. United States*, 450 U.S. 544, 566 (1981). As discussed, *infra*, there would likely be heavy opposition by non-Indians to such an assertion of tribal authority.

414. See Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1002–14 (2010) (advocating Indian resistance to federally defined civil jurisdiction over non-Indians); Hallie Bongar White, Kelly Gaines Stoner & James G. White, *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 431 (2008) (discussing the possibility of exercising civil jurisdiction over non-Indians in domestic violence, sexual assault, and stalking cases in the absence of criminal jurisdiction).

415. Fletcher, *supra* note 414, at 1015.

416. White, Stoner & White, *supra* note 414, at 439–42.

417. Fletcher, *supra* note 414, at 1015 & nn.227–28.

418. *Id.* at 1015–16.

Tribes have engaged in these kinds of resourceful solutions for some time. The Navajo Nation, for example, has a provision in its code that sets forth the availability of “[c]ivil prosecutions of non-Indians.”⁴¹⁹ The code makes clear that “[a]ny non-Indian alleged to have committed any offense enumerated in [the] Title may be civilly prosecuted by the Office of the Prosecutor.”⁴²⁰ Ever mindful of the limitations of criminal jurisdiction over non-Indians, the code goes on to stipulate that “[i]n no event shall such a civil prosecution permit incarceration of a non-Indian or permit the imposition of a criminal fine against a non-Indian.”⁴²¹ The code further discusses various civil penalties that could be imposed against a non-Indian for a civil wrong.⁴²² Other tribes have similar civil code provisions.⁴²³

Anecdotal evidence indicates this practice is increasingly common, particularly as tribes with gaming and entertainment facilities see many more non-Indians coming onto their reservations.⁴²⁴ The Nottawaseppi Huron Band of the Potawatomi, for example, imposes civil penalties for actions that typically might be in the purview of a criminal misdemeanor code, including indecent exposure and possession of marijuana.⁴²⁵ It defines these civil wrongs—such as public intoxication, possession of drug paraphernalia, and others—as “Conduct Deemed Detrimental to Public Health, Safety and Welfare,” with a seeming intent to fall within the second *Montana* exception.⁴²⁶ And some of these codes relate directly to the regulation of guns, such as the code of the Confederated

419. NAVAJO NATION CODE ANN. tit. XVII, § 204.

420. *Id.* § 204(A).

421. *Id.*

422. *See id.* § 204(D).

423. *See, e.g.,* COLVILLE CONFEDERATED TRIBES CODE § 5-5-2 (“Non-Indians committing domestic violence will be subject to all civil remedies available under this chapter, including exclusion.”); NEZ PERCE CODE § 4-3-24 (Harassment); SILETZ TRIBAL CODE § 12.103(c) (Assault); *id.* § 12.103(y) (Possession, Delivery, or Manufacturing of Controlled Substance); *id.* § 12.103(aa) (Unauthorized Sale or Distribution of Prescription Drugs).

424. *See, e.g.,* *Bill Would Give Tribal Police Jurisdiction over Non-tribe Members*, KOMO NEWS (Jan. 30, 2008, 5:22 PM PST), <http://www.komonews.com/news/local/15044786.html> (addressing the Tulalip Reservation’s new influx of non-Indian customers of tribal enterprises, and the authority of the Tulalip Police Department to maintain public-safety efforts); *see also* Jeff Barnard, *Oregon’s Biggest Casino is a Major Philanthropist*, KATU.COM (May 24, 2004, 5:19 AM PST), <http://www.katu.com/news/business/3615016.html> (explaining the positive impact of the Confederated Tribes of Grand Ronde’s successful casino on the State of Oregon’s economy); Nicholas K. Geranios, *Ten Years Later, Tribe’s Casino Venture Paying Off*, LAS VEGAS SUN, Dec. 16, 2003, <http://www.lasvegassun.com/news/2003/dec/16/ten-years-later-tribes-casino-venture-paying-off/> (addressing the success of Coeur d’Alene Tribe of Indians’ successful casino operations).

425. NOTTAWASEPPI HURON BAND OF THE POTAWATOMI INDIANS LAW & ORDER CODE tit. VIII, ch. 9, §§ 306, 308.

426. *Id.* §§ 301–316; *see also* BLUE LAKE RANCHERIA ORDINANCES no. 04-2000 (Nuisance Ordinance); CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, PUBLIC SAFETY ORDINANCE (c)(1) (“No person shall cause or permit a nuisance on Tribal Lands.”); PAWNEE TRIBE OF OKLA., LAW & ORDER CODE §§ 537, 539–540, 552. The four provisions of the Pawnee Tribe’s code—Possession of an Alcoholic Beverage, Abuse of Psychotoxic Chemical Solvents, Dangerous Drug Offense, and Livestock Offense—authorize a civil proceeding as an appropriate response to a violation. PAWNEE TRIBE OF OKLA., LAW & ORDER CODE §§ 537, 539–540, 552; *see also* NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

Tribes of Siletz Indians in Oregon, which includes the offense of purposefully pointing a firearm at another.⁴²⁷

Without the power to physically constrain non-Indians, some tribes have gone further, turning to their power to exclude as a way to maintain law and order on the reservation.⁴²⁸ Tribes use exclusion to remove offenders from the reservation through civil means, without invoking a criminal prosecution or criminal penalties.⁴²⁹ Some tribes contain express language for this purpose in their civil codes. The Navajo Nation code, for example, has a provision for the “[e]xclusion from all lands subject to the territorial jurisdiction of the Navajo Nation courts.”⁴³⁰ The Nation is also clear about the circumstances under which an order of exclusion may be entered against a nonmember.⁴³¹ Numerous other tribes—such as the Confederated Tribes of Siletz Indians, the Grand Traverse Band of Indians, and the Mille Lacs Band of Ojibwe Indians—have done the same.⁴³² At a recent Indian law conference, a judge for the Tulalip Tribal Court also discussed using this process to rid the reservation of non-Indian wrongdoers. After a civil exclusion order is issued, she explained, the subject of the order “gets a ride to the reservation border” by tribal police and is instructed not to return.⁴³³ Exclusion of non-Indians, in fact, is an increasingly common practice amongst tribal governments.

These innovative civil penalties present some novel mechanisms through which tribes may be encouraged that their laws will be generally applicable on the reservation. The component of civil exclusion, specifically, may empower tribes to more aggressively remove non-Indian gun offenders from Indian country.

Of course, a civil gun ban of this nature has drawbacks. One potential objection is that, in the absence of adequate criminal penalties, such a ban lacks the enforcement mechanism necessary to act as a deterrent. Moreover, where tribes attempt to exercise civil regulatory jurisdiction over non-Indians in regards to gun ownership and use—particularly as it relates to non-Indians on non-Indian fee land within the reservation—tribes would have to prepare for

INDIANS LAW & ORDER CODE tit. XIII, ch. 9, §§ 303, 309 (applying civil penalties to public intoxication and drug paraphernalia possession).

427. SILETZ TRIBAL CODE § 12.103(s).

428. These are codes intended to provide for the exclusion and expulsion of nonmembers from tribal territory. *See, e.g.*, CHEROKEE CODE ch. 2; COLVILLE CONFEDERATED TRIBES CODE ch. 3-2; FORT MCDOWELL YAVAPAI NATION, LAW & ORDER CODE ch. 15; HOOPA VALLEY TRIBAL CODE tit. V; *see also* White, Stoner & White, *supra* note 414, at 443 (discussing tribes’ right to exclude or banish non-Indians).

429. *See* White, Stoner & White, *supra* note 414, at 443.

430. NAVAJO NATION CODE ANN. tit. XVII, § 204(D)(4).

431. *See id.* § 204(A), (D).

432. *See, e.g.*, GRAND TRAVERSE BAND CODE tit. XIV, ch. 9; MILLE LACS BAND STAT. ANN. tit. II, § 3004 (defining exclusion as a possible penalty for violating a civil offense); SILETZ TRIBAL CODE § 9.028 (defining exclusion as a possible civil penalty for violating offenses outlined in the tribes’ Cultural Resource Lands and Sacred Sites Ordinance).

433. Judge, Tulalip Tribal Court, Public Address at the Federal Bar Association 36th Annual Indian Law Conference (Apr. 7, 2011) (quotation based on author’s notes).

potential state or even federal backlash. Such bans are likely to be challenged through litigation, putting questions of the scope of Indian tribal jurisdiction over non-Indians in regards to the highly politicized issue of gun control into the hands of the federal courts, where tribes have—at least in the last two-plus decades—not fared well.⁴³⁴ The political ramifications could be intense, depending heavily on the prevailing gun laws of the surrounding community. Of course, tribes routinely deal with the delicate nature of intergovernmental dynamics as well as the complexities of oftentimes complicated relationships with non-Indians, inside and outside of Indian country. The potential for such tensions do not typically serve as an absolute barrier to innovative tribal governance, though tribes may approach such scenarios with caution.

c. Other Regulatory Options. Most gun control laws in the United States don't focus on gun bans but contemplate more mediated measures. Tribes' civil regulatory authority presents an opportunity to devise gun control laws that could, depending on the tribes' particular circumstances, employ some of these more modest regulation schemes to circumscribe crime on the reservation without resorting to wholesale bans.⁴³⁵

Tribes may choose—as many states do—to create stricter gun control laws than those in play outside the reservation boundaries.⁴³⁶ This may come in the form of regulation on types of guns, on uses, or in permitting. Given the well-documented distinction between the use of shotguns and handguns in committing violent crime, for example, limiting the types of guns that may be lawfully possessed in Indian country could serve as one way for tribes to advance public safety.⁴³⁷ Additionally, to facilitate supervision over reservation residents or visitors, a tribe may require that gun owners stipulate that acquiring a gun permit in Indian country necessarily subjects that person to tribal jurisdiction. Or if a tribe considers tribal members' rights to armed self-defense as central to individual rights and is equally cognizant of the severity of crime committed on reservations by non-Indians, presumably a tribe could create a civil gun control statute that would ensure the gun rights of tribal members, even if it abridged those of non-members. Another may determine that their cultural tradition binds them to allow wide-ranging gun ownership, but for hunting purposes only, or that rural residents should have greater gun rights than urban members. Though such schemes may potentially raise equal protection issues, such disputes will be resolved in tribal courts, in accordance with tribal

434. See generally WILLIAMS, *supra* note 283 (discussing racist undercurrents in federal Indian jurisprudence).

435. Of course, civil gun codes may also create a panoply of options for tribes to regulate hunting, use of firearms in ceremonies, recreational gun use, and the rest. The focus here on gun laws as pertaining specifically to crime is intentional and in no way is meant to imply a limitation on tribes' governance over gun usage more generally.

436. See Volokh, *Implementing*, *supra* note 359; Volokh, *Nonlethal*, *supra* note 359.

437. See Bogus, *supra* note 398, at 446.

interpretations of tribal law.⁴³⁸ This leaves tribal autonomy and the right of self-determination intact.

Alternately, tribes might also consider amending their constitutions to include a right to bear arms, if one is not already present. Though each tribes' history and experience in constitution drafting is unique, many tribes currently are in a period of constitutional revitalization, and several have recently gone, or are now undergoing, changes in their constitutional structure.⁴³⁹ Given that many tribal constitutions were drafted either with the heavy influence of the Indian Reorganization Act or the Indian Civil Rights Act—neither of which would have suggested the inclusion of a Second Amendment counterpart—the omission of a right to bear arms may, for many tribes, merely be an oversight that is ripe for readjustment. Once again, however, each tribe would have to weigh all the factors relevant to such a change, including its particular geographic location and the expanse of its territory, its governance scheme (including whether or not it is located in a Public Law 280 state), the empirical realities regarding crime, victimization, and enforcement in Indian country, and its resources, among many other factors, to determine if such a constitutional provision is desirable.

A final option may be for tribes to actually mandate gun ownership for reservation security. The model for such mandatory gun laws lies in the history of the United States itself. In early America, laws mandating gun ownership and maintenance were frequently employed to ensure public safety.⁴⁴⁰ Of course, in the colonial period, these laws were designed to protect whites and the burgeoning Union against potential uprisings by slaves or against attack from hostile Indian tribes or competing colonial powers.⁴⁴¹ Such laws were rigidly enforced, and “[i]n some states . . . government officials conducted door-to-door surveys of gun ownership in the community.”⁴⁴² Contemporary Indian tribes may determine, based on available data, that laws requiring gun ownership, maintenance, and even carry may be appropriate for Indian nations. Of course, it is critically important to understand those laws as promulgated historically in conjunction with provisions regarding the formation of a militia, which is not, it seems, an avenue tribes have or likely will take. And, of course, as with other forms of gun control, tribes would be free to impose or restrict these laws in relation to specific groups of people or for certain purposes.

To be clear, I am in no way making an argument for more expansive tribal constitutional protections for gun rights, advocating more lenient gun laws within Indian country, or even suggesting that more liberal access to guns will

438. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978). There is an equal protection provision in ICRA, but equal protection claims against tribal governments would have to be brought in tribal court. See *id.* at 58–59.

439. See *supra* notes 313–14 and accompanying text.

440. See WINKLER, *supra* note 90, at 113.

441. See *id.* at 115–16.

442. *Id.* at 113.

reduce crime on reservations or protect reservation residents. The exact opposite may, in fact, be true. Nor am I suggesting that any criminal law or civil regulatory scheme regarding guns stands as a substitute for a lack of effective law enforcement in Indian country. To the contrary, what I have attempted to do here is present a set of workable scenarios that touch on the spectrum of plausible legal responses that tribes could employ in the exercise of their sovereignty and towards the goal of addressing reservation security. The outsider status afforded to Indians and to Indian nations that made the current legal lacuna possible, even if accidentally, provides provocative options for tribes attempting to address reservation crime and safety in light of exceedingly constrained jurisdictional limits and in the absence of a full complement of governance options.

CONCLUSION

Tribal sovereignty and Indian otherness has, perhaps unwittingly, created a legal chasm within which tribes may engage in innovative governance to address reservation security. Their extraconstitutional status affords them the freedom to tailor their gun laws and engage community-based solutions to reservation ills that have not been fully explored to date. As sovereign nations unconstrained by the federal Constitution and, concomitantly, the Supreme Court's interpretation of the Second Amendment, tribal governments can exercise local control over guns and devise systems and codes in line with their tribally distinct needs. The freedom from restraint means each tribe's own culture, history, current legal status, and contemporary governance challenges will set the standard for which courses of action to take to address governance issues.

Ultimately, then, this Article is as much about tribal sovereignty as it is about gun policy.⁴⁴³ And Indian nations' sovereignty is expressed by each tribal nation individually. Proposing one solution would not only be legally impossible but would also be unwise. Instead, I have demonstrated that the relationship between Indians and guns is one that has been undertheorized and understudied. The convergence of the unique legal status of Indians, Indian nations, and guns with the availability of innovative governance solutions in Indian country allows tribes to address issues of crime, violence, racial inequities, and social justice in ways that would be impermissible if undertaken by federal or state governments.⁴⁴⁴ Suggesting one solution for all tribes—other than a uniquely shared freedom to define their own path forward—would undermine tribal

443. To be clear, I am not advocating for any particular outcome, protection, or laws in regards to guns, nor am I making any claim about the relationship between guns and safety. The empirical evidence regarding whether legal protection for gun rights contributes to or lessens the crime rate is politically charged, hotly contested, and ultimately inconclusive.

444. This is, of course, assuming that there is any connection between gun control and crime, which is an open question.

sovereignty and ultimately derail the purpose of the project—to emphasize the sovereign nature of tribal governments and their concomitant freedom to devise gun policy that works for their own nation.

Cottrol and Diamond wrote over two decades ago that “the Second Amendment is an arena of constitutional jurisprudence that still awaits its philosopher.”⁴⁴⁵ Since that time, there has been an explosion in Second Amendment jurisprudence, scholarship, and debate. The gun and its place in a democratic society is a question that continues to haunt Americans, as we contemplate its history, present, and future against a distinctly American perspective shaped by a focus on individual rights, freedom from tyranny, and the protection of private property. But we must also consider that this view of gun rights has its limits. Taken together with Tushnet’s admonition—that America’s relationship to the gun is part of figuring out “who we are”⁴⁴⁶—the convergence of the gun and the Indian (nation) is a story of the racially tinted American dream, the un-“we,” and the hundreds of nations within this nation that remain, for better or worse, outside the polity.

445. Cottrol & Diamond, *supra* note 11, at 311–12.

446. TUSHNET, *supra* note 23, at xiv.