
Tribes, Firearm Regulation, and the Public Square

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We stand at a crossroads with the United States Supreme Court seemingly poised, in New York State Rifle & Pistol Association v. Bruen,¹ to expand the right of individualized self-defense first recognized in District of Columbia v. Heller,² and shortly thereafter extended to states in McDonald v. City of Chicago.³ The Court's decision in Heller has drawn criticism for its casting of its individual-focused view of the Second

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¹ No. 20-843 (U.S. argued Nov. 3, 2021); see *N.Y. State Rifle & Pistol Ass'n v. Beach*, 818 F. App'x 99 (2d Cir. 2020), *cert. granted*, *N.Y. State Rifle & Pistol Ass'n v. Corlett*, 141 S. Ct. 2566 (2021); Amy Howe, *Majority of Court Appears Dubious of New York Gun-Control Law, but Justices Mull Narrow Ruling*, SCOTUSBLOG <https://www.scotusblog.com/2021/11/majority-of-court-appears-dubious-of-new-york-gun-control-law-but-justices-mull-narrow-ruling> (last updated Nov. 3, 2021, 5:15 PM) [<https://perma.cc/CZX8-2EMC>]. Notably the "proper cause" portion of current New York law appears to have relatively ancient roots. See 1913 N.Y. Laws vol. III 1627, 1629 ("[I]t shall be lawful for *any* magistrate, upon proof before him that the person applying therefor is of good moral character, and that proper cause exists for the issuance thereof, to issue to such person a license to have and carry concealed a pistol or revolver without regard to employment or place of possessing such weapon"); *N.Y. State Rifle & Pistol Ass'n v. Beach*, 354 F. Supp. 3d 143, 145 (N.D.N.Y. 2018) (citing the "proper cause" language of N.Y. PENAL LAW § 400.00(2)(f) (2021)).

² 554 U.S. 570 (2008).

³ 561 U.S. 742 (2010).

Amendment⁴ as rooted in history dating back to the drafting and ratification of the Amendment when, in fact, its interpretation appears to be of much more recent vintage.⁵

Putting these concerns to one side, however, another major problem with the notion of self-defense in the United States — and with the Second Amendment (which has come to be viewed as a codification of that right) — is that it is racialized. As we saw with the recent acquittal of Kyle Rittenhouse, a white teenager armed with an assault rifle who had traveled across state lines purportedly to maintain order at a protest and who ultimately killed two people and wounded a third, it appears that whites are much more likely to be able to make successful self-defense claims than are those of other races.⁶ Although race disparities relating to self-defense are often viewed as a binary with privileged whites on one side of the equation and oppressed African-Americans on the other, the system of racial

⁴ U.S. CONST. amend. II.

⁵ See, e.g., 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 U. PA. J. CONST. L. 687, 693 & n.10 (Mar. 2011) [hereinafter *Hostile Indian Tribes*] (citing Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 239-40 & n.250 (2008)) (describing the view of the Second Amendment adopted by the *Heller* majority as having crystallized in the mid-1990s); William G. Merkel, *The Second Amendment and the Constitutional Right to Self-Defense* 145 (2013) (S.J.D. dissertation, Columbia University) (“Justice Scalia’s reasoning in *Heller* is objectively untenable, in that it privileges the current Court’s fixation with libertarian individualism over the framers’ civic republican focus on the organized militia as a preferred alternative to a dangerous standing army and military establishment.”); John Paul Stevens, *The Supreme Court’s Worst Decision of My Tenure*, ATLANTIC (May 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272> [<https://perma.cc/72RN-GHPA>] (critiquing *Heller* as unsupported by a historical understanding of the Second Amendment and describing the former Justice’s “firm belief that the Second Amendment does not impose any limit whatsoever on the power of the federal government to regulate the non-military use or possession of firearms”).

⁶ See Mario Koran, *As Kyle Rittenhouse Walks Free, Kenosha Is Left to Pick Up the Pieces*, GUARDIAN (Nov. 20, 2021, 1:39 EST), <https://www.theguardian.com/us-news/2021/nov/20/as-kyle-rittenhouse-walks-free-kenosha-is-left-to-pick-up-the-pieces> [<https://perma.cc/8YER-FT4Z>]; see also JOSEPH BLOCHER & REVA B. SIEGEL, GUNS AND DEMOCRACY: PROTESTS, INSURRECTION, AND THE SECOND AMENDMENT 3 (2021); Brett Lunceford, *Armed Victims: The Ego Function of Second Amendment Rhetoric*, 18 RHETORIC & PUB. AFFS. 333, 337 (2015) (“[R]ace has serious implications for how individuals can exercise their Second Amendment rights.”); Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885, 906 (2015) [hereinafter *Indian Tribes and Gun Regulation*] (citing Patrik Jonsson, *Racial Bias and ‘Stand Your Ground’ Laws: What the Data Show*, CHRISTIAN SCI. MONITOR (Aug. 6, 2013), <http://www.csmonitor.com/USA/Justice/2013/0806/Racial-bias-and-stand-your-ground-laws-what-the-data-show> [<https://perma.cc/75NJ-Q6KK>]) (“[R]acial prejudice among juries against people of color, particularly blacks, who utilize stand-your-ground laws has been shown.”).

hierarchy in the United States is, in actuality, much more complex, with many other racial groups also being negatively affected.⁷ My purpose in this Article is to shine a light on the experiences of, and the disparities suffered by, Native Americans with respect to self-defense and, to the extent possible, to explore tribal approaches to gun regulation, particularly as they relate to the current national debate about whether the right of self-defense recognized in *Heller* extends beyond the home and, assuming that it does, whether guns may be restricted in sensitive places like schools and other government buildings.

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⁷ See, e.g., Bethany R. Berger, *Red: Racism & the American Indian*, 56 UCLA L. REV. 591, 593 (2009) (explaining that racism against Native Americans operates differently than racism against African-Americans, that “colonists’ primary concern with respect to Indians was to obtain tribal resources and use tribes as a flattering foil for American society and culture[, and that i]t was therefore necessary to theorize tribal societies as fatally and racially inferior while emphasizing the ability of Indian individuals to leave their societies and join non-Indian ones”); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as “Foreigners,” and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 351-52 (1997) (discussing the nuances of the racial hierarchy in the United States for Asian and Latino Americans).

INTRODUCTION

This Article builds on my previous work relating to self-defense and Native American tribes. In an article called “*Hostile Indian Tribes...Outlaws, Wolves...Bears...Grizzlies and Things Like That?*” *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, I argued that the actions of many tribes in defending their homelands during the colonial era and during the early years of the Republic led to their being characterized as savage aggressors.⁸ After demonstrating that the Second Amendment was in part built upon this notion, I argued that these imputations of savagery had been reified in case law and that this case law (and implicitly the notions of Native savagery encapsulated within it) was being used in the present day to deprive tribes of their right to jurisdiction over non-members, which, in a broad sense, deprives them of their right to self-defense.⁹ I built on this work in *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, where I explored tribal approaches to gun regulation and demonstrated that the Supreme Court’s limits on tribal jurisdiction interfered with tribes’ ability to formulate effective gun policy tailored to their individual needs and values.¹⁰

My purpose in this Article is to situate tribal interests in the current debate on the scope of the Second Amendment. This Article first discusses tribes’ extremely limited participation in state and federal legislative debates regarding gun laws; second, it explores the ways that Native persons continue to be harmed by notions of Native savagery, including disproportionate victimization by violent crime and disproportionate police killings; third, it explains the diversity of tribal cultures and the historical — and to some extent continued — reliance of many tribal cultures on firearms; and fourth, it examines a selection of tribal laws restricting the use of firearms in various contexts and locations to shed light on where some tribes likely stand within the current debate about the existence of a right to bring guns into the public square. All of these Sections are designed to elucidate how tribes may approach the question of allowing guns into sensitive places — and

⁸ Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 690.

⁹ *Id.* at 737-54; *see also* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1681 (2012) (arguing that one basis of the Second Amendment was to protect white settlers against Indians).

¹⁰ *See generally* Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 889-99, 900-02 (describing tribal approaches to gun regulation and discussing the complicated federal law frameworks of tribal criminal and civil jurisdiction and the problems these frameworks could pose for tribes that wish to enact restrictive gun laws).

firearm regulation more broadly — with the caveat that the nation’s numerous federally recognized tribes undoubtedly have many different approaches to firearm regulation.

I. TRIBES AND FEDERAL AND STATE GUN LEGISLATION

State gun regulation would not, in the vast majority of cases, apply to tribal members within their own reservations.¹¹ Under the Indian law canons, a federal statute of general application pertaining to gun regulation should only apply to tribal members on their reservations if its application were supported by clear legislative intent; nonetheless, some lower courts apply a presumption in favor of applicability of federal statutes of general application to tribes and tribal members within reservations based on Supreme Court dicta.¹² In contrast to the general inapplicability of state law to tribal members on-reservation and the limited applicability of federal law, both state and federal legislation would affect tribal members outside of their reservations in most instances.¹³ Moreover, state and federal gun laws could well affect non-members who commit violent crimes against tribal members (for example by limiting the availability of certain types of guns or barring access to guns for specific categories of persons), and Native Americans are known to be disproportionately affected by violent crime, the majority of which is committed by non-Natives.¹⁴ Therefore, firearm

¹¹ See FELIX S. COHEN, 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 6.03(1)(a), 6.04(3) (2019); see also Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 895. But see ROBERT T. ANDERSON, SARAH A. KRAKOFF & BETHANY BERGER, AMERICAN INDIAN LAW: CASES AND COMMENTARY 438 (4th ed. 2020) (citing possible exceptions based on geographically limited federal laws).

¹² COHEN, *supra* note 11, § 2.03. This presumption is subject to several judicially created exceptions. *Id.*

¹³ COHEN, *supra* note 11, § 7.03(1)(a)(i); see also ANDERSON ET AL., *supra* note 11, at 273 (“Outside Indian country, however, few of the special jurisdictional rules at play in Indian law apply.”).

¹⁴ See, e.g., NAT’L CONG. OF AM. INDIANS POL’Y RSCH. CTR., RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN (2018) (reporting that 84.3% of Native women have experienced violence in their lifetimes and that 96% of Native women who have experienced sexual violence have been victimized by non-Native perpetrators); NAT’L INST. OF JUST., FIVE THINGS ABOUT VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN (2016) (reporting that 83% of Native adults are victims of violence, with the vast majority of Native adults having experienced at least one instance of interracial violence). State laws may or may not apply to non-Indians on a reservation, depending on whether a court would deem them preempted or would see them as infringing on tribal self-governance rights in the specific circumstances of a given case, but, even if they did not apply to non-Natives on

safety laws at the state or federal level would presumably provide some level of protection to Native persons within a reservation even if the laws do not apply to them. Thus, as a result of off-reservation applicability to their members, the possibility of courts' applying federal laws on-reservation, and the fact that state laws affect the availability of guns for non-Native criminals, tribes have an important stake in the substance of state and federal gun regulations. Moreover, occasionally, bills and enacted legislation at the federal and state levels explicitly include tribes, naming them, for example, as potential recipients of grant monies.¹⁵

Despite the effects detailed above and although tribes have in recent decades become increasingly politically active in advocating for and against state and federal bills,¹⁶ tribes seem to be largely absent from debates about pending gun legislation. For example, I examined the legislative history for several recent laws regulating firearms in

the reservation, they could affect their access to firearms or to certain types of firearms. See COHEN, *supra* note 11, § 6.03(2)(a).

¹⁵ See, e.g., H.R. 4199, 116th Cong. § 604 (2019) (including "Indian Tribal governments" as potential recipients of grant funding); *id.* at § 101(a)(3) (including "federally recognized Indian tribe[s]" within the definition of "State"); WASH. REV. CODE § 43.330A.050(6)(b) (2018) (identifying "Indian tribes and tribal organizations" as potential recipients of grant funds).

¹⁶ See, e.g., Frederick J. Boehmke & Richard C. Witmer, *Representation and Lobbying by Indian Nations in California: Is Tribal Lobbying All About Gaming?*, 9 INT. GRPS. & ADVOC. 80, 82 (2020) [hereinafter *Representation and Lobbying*] (finding that, in California, gaming comprises the largest issue area that tribes lobby with respect to, but that the majority of bills that tribes lobby on do not involve gaming); Frederick J. Boehmke & Richard C. Witmer, *State Lobbying Registration by Native American Tribes*, 3 POL., GRPS., & IDENTITIES 633, 643-45 (2015) (finding an increase in the number of tribes registering to lobby, especially tribes involved in gaming); Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 HARV. J. ON LEGIS. 23, 38-41 (2019) (noting that tribal lobbying is increasing); Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159, 1166 (2019) (same); cf. DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 177-79 (2007) (describing the mobilization and effectiveness of Native voters in several 2004 elections).

California,¹⁷ Washington,¹⁸ and Oregon,¹⁹ and I found no examples of any federally recognized tribe commenting on any of the bills I looked

¹⁷ For example, no tribe appears to have commented on S.B. 264, a bill that Governor Newsom signed into law on October 8, 2021, which prohibits the sale of guns (with narrow exceptions) at the Orange County Fair and Event Center and which is designed to close the gun show loophole at that location. S.B. 264, 2021–22 Reg. Sess. (Cal. 2021); *see also Governor Newsom Signs Legislation to Bolster California's Nation-Leading Gun Safety Laws, Support Survivors of Domestic Violence*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 8, 2021), <https://www.gov.ca.gov/2021/10/08/governor-newsom-signs-legislation-to-bolster-californias-nation-leading-gun-safety-laws-support-survivors-of-domestic-violence> [<https://perma.cc/7WRF-K9UU>] [hereinafter *Governor Newsom Signs Legislation*]. Several committee and floor hearings were held on S.B. 264, the records for which list supporters and those in opposition, and no tribes are listed in either category. *See* REGINALD BYRON JONES-SAWYER, SR., ASSEMB. COMM. ON PUB. SAFETY, SB 264 (Min), 2021–22 Reg. Sess., at 5–6; S. RULES COMM., OFF. OF S. FLOOR ANALYSES, THIRD READING OF SB 264, 2021–22 Reg. Sess., at 6–7 (Cal. 2021); STEVEN BRADFORD, S. COMM. ON PUB. SAFETY, 2021–22 Reg. Sess., SB 264, at 1 (Cal. 2021); S. RULES COMM., OFF. OF S. FLOOR ANALYSES, UNFINISHED BUSINESS OF SB 264, 2021–22 Reg. Sess., at 6–7 (Cal. 2021).

Similarly, no tribe appears to have commented on A.B. 1057, also signed into law on October 8, 2021, which expanded the definition of “firearm” for the purposes of gun violence and domestic violence restraining order provisions to include firearm frames and precursor parts. A.B. 1057, 2021–22 Reg. Sess. (Cal. 2021); *see also Governor Newsom Signs Legislation, supra*. This bill appears to have been uncontroversial in that no person or entity appeared in opposition at either the Senate Rules Committee hearing or the Assembly Committee on Public Safety hearing; more importantly for present purposes, no tribe appeared in support at either hearing, although protecting their members from domestic violence is an extremely important issue for many tribes. REGINALD BYRON JONES-SAWYER, SR., ASSEMB. COMM. ON PUB. SAFETY, AB 1057 (PETRIE-NORRIS), 2021–22 Reg. Sess., at 4 (Cal. 2021); S. RULES COMM., OFF. OF S. FLOOR ANALYSES, THIRD READING OF AB 1057, 2021–22 Reg. Sess., at 6 (Cal. 2021); Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 194 (2008) (“Many tribes have made combating domestic violence and protecting Native American women a priority by seeking to implement legal mechanisms for redress and by enacting comprehensive social service programs.”); *cf.* NAT’L CONG. OF AM. INDIANS POL’Y RSCH. CTR., *supra* note 14, at 1–2 (reflecting high rates of intimate partner violence and stalking experienced by Native women). While other Committee hearings were held on A.B. 1057, these hearings did not include testimony by members of the public. *See AB-1057 Firearms: Bill Analysis*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB1057 (last visited Feb. 13, 2022) [<https://perma.cc/5FN9-8UHG>] (listing California Senate and Assembly committee hearings as well as floor analyses and providing links to associated documents).

Another apparently uncontroversial bill, A.B. 1191, also signed into law on October 8, 2021, similarly did not receive official tribal support or opposition. REGINALD BYRON JONES-SAWYER, SR., ASSEMB. COMM. ON PUB. SAFETY, AB 1191 (MCCARTY), 2021–22 Reg. Sess., at 6 (Cal. 2021); S. RULES COMM., OFF. OF S. FLOOR ANALYSES, THIRD READING OF AB 1191, 2021–22 REG. SESS., at 3 (Cal. 2021); *Governor Newsom Signs Legislation, supra*. A.B. 1191 requires the California Department of Justice to provide an annual report to the state legislature relating to data on stolen, lost, found and recovered firearms as well

as those that come into the possession of the department of justice. A.B. 1191, 2021–22 Reg. Sess. (Cal. 2021).

Finally, a fourth California bill, S.B. 1446, which was enacted in 2016, is a law prohibiting possession of firearms with large capacity magazines, the constitutionality of which was upheld by the Ninth Circuit en banc on November 30, 2021. S.B. 1446, 2015–16 Reg. Sess. (Cal. 2016); *Duncan v. Bonta*, 19 F.4th 1087, 1096 (9th Cir. 2021) (en banc); see CAL. PENAL CODE § 32310 (2016). S.B. 1446 is partially duplicative of a proposition approved by California voters slightly after the passage of S.B. 1446. See, e.g., *Duncan*, 19 F.4th at 1097 (discussing the timeline of S.B. 1446 and Proposition 63); *California Ballot Backgrounder: Proposition 63 Gun and Ammunition Control*, ROSE INST. OF STATE & LOC. GOV'T (2016), <http://s10294.pcdn.co/wp-content/uploads/2016/10/Video-Voter-Prop-63-Backgrounder-Lopata-10-3-2016.pdf> [<https://perma.cc/645N-UMQA>] (providing background information on Proposition 63, including how it related to already existing statutory law). No tribes seem to have officially appeared in support or opposition to S.B. 1446. REGINALD BYRON JONES-SAWYER, SR., ASSEMB. COMM. ON PUB. SAFETY, SB 1446 (HANCOCK), 2015–16 Reg. Sess., at 8–9 (Cal. 2016); S. RULES COMM., OFF. OF S. FLOOR ANALYSES, THIRD READING OF SB 1446, 2015–16 Reg. Sess., at 7 (Cal. 2016).

¹⁸ For example, no tribes appear to have commented on E.S.S.B. 5038, passed on March 28, 2021, which was codified in Washington Revised Code section 9.41.300, and which prohibits open carry of firearms at publicly permitted demonstrations on the state capitol grounds and in state capitol buildings and legislative facilities. See, e.g., S. COMM. ON L. & JUST., 67th Leg., 2021 Reg. Sess., SENATE BILL REPORT: SB 5038 (Wash. 2021) (reflecting that no tribes commented on S.B. 5038); H. COMM. ON C.R. & JUDICIARY, HOUSE BILL REPORT: ESSB, 67th Leg., 2021 Reg. Sess. 5038 (Wash. 2021) (reflecting the same); S. COMM. ON L. & JUST., SENATE BILL REPORT: ESSB 5038, 67th Leg., 2021 Reg. Sess. (Wash. 2021) (reflecting the same). While no tribes testified or appeared, organizations representing other groups whose members are likely to be disproportionately impacted by violent crime did attend some of these hearings, including the Washington Black Lives Matter Alliance, the Pacific Northwest Anti-Defamation League, and Jewish Community Relations Council. H. COMM. ON C.R. & JUDICIARY, HOUSE BILL REPORT: ESSB; S. COMM. ON L. & JUST., SENATE BILL REPORT: SB 5038.

Similarly, no tribe seems to have commented on E.S.S.B. 6288, codified in Washington Revised Code section 43.330A, which created a state office of firearm safety and violence prevention as well as a grant program for cities that tribes are eligible to partake in. See, e.g., H. COMM. ON C.R. & JUDICIARY, HOUSE BILL REPORT: ESSB 6288, 66th Leg., 2020 Reg. Sess. (Wash. 2020) (reflecting that no tribes commented on ESSB 6288); S. COMM. ON L. & JUST., SENATE BILL REPORT: ESSB 6288, 66th Leg., 2020 Reg. Sess. (Wash. 2020) (reflecting the same); S. COMM. ON L. & JUST., SENATE BILL REPORT: SB 6288, 66th Leg. 2020 Reg. Sess. (Wash. 2020) (reflecting the same).

¹⁹ For example, Oregon passed S.B. 554 in June 2021, which, among other provisions, requires guns to be secured with a trigger or cable lock, in a gun room, or in a locked container except in specified circumstances. S.B. 554, 81st Leg. Assemb., Reg. Sess. (Or. 2021); *S.B. 554 Public Testimony*, OR. STATE LEGISLATURE: OR. LEGIS. INFO., <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Testimony/SB0554> (last visited Feb. 12, 2022) [<https://perma.cc/U46L-58RB>] (listing those who testified on S.B. 554).

at before they were enacted.²⁰ Similarly, I looked at two recent federal laws that pertain to improving the federal background check system to help ensure that ineligible persons do not purchase guns, and I did not find any indication that a tribe had commented on either of those when they were under consideration by Congress.²¹ I did, however, find evidence that a supra-tribal organization, the National Congress of American Indians (“NCAI”), had advocated for the passage of a 2006 federal statutory amendment that disqualified persons from owning

²⁰ Tribes in all three states appear to be at least fairly politically active at the state level. See, e.g., S. COMM. ON AGRIC., WATER, NAT. RES. & PARKS, SENATE BILL REPORT: SB 6494, 66th Leg., 2020 Reg. Sess., at 6 (Wash. 2020) (reflecting that several tribes testified on a trust water rights bill); H. COMM. ON COM. & GAMING, HOUSE BILL REPORT: HB 233, 64th Leg., 2018 Reg. Sess., at 4 (Wash. 2018) (reflecting testimony of the Confederated Tribes of the Colville Reservation on a bill relating to gambling addiction); Boehmke & Witmer, *Representation and Lobbying*, supra note 16 (noting that tribes are fairly politically active in California); Jeff Manning, *Tribes Ask Gov. Kate Brown to Scrutinize Dutch Bros Founder’s Plans for Grants Pass Gambling Center*, OREGONIAN <https://www.oregonlive.com/business/2021/10/tribes-allies-ask-gov-kate-brown-to-scrutinize-dutch-bros-founders-plans-for-grants-pass-gambling-center.html> (last updated Feb. 7, 2022, 11:00 AM) [<https://perma.cc/2SHN-YAA3>] (noting tribes’ requests for political action from the state governor).

²¹ The two federal laws I looked at were the Fix the NICS Act, Pub. L. No. 115-141, tit. VI (2018), and the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180. For both Acts, I looked at statements in the Congressional Record relating to the underlying bills (and related bills) as well as Committee hearings and Committee Reports. See, e.g., H.R. Res. 2640, 110th Cong., 153 CONG. REC. 6339-47 (June 2007); H.R. Res. 2640, 110th Cong., 153 CONG. REC. 16923-28, 15969-71, 16024-28, 1653, 1660 (Dec. 2007); *Preventable Violence in America: An Examination of Law Enforcement Information Sharing and Misguided Public Policy: Agenda Before the H. Comm. on the Judiciary*, 115th Cong. (2018) (listing witnesses who testified on the Fix the NICS bill); S. COMM. ON THE JUDICIARY, 110TH CONG. REP. ON SCHOOL SAFETY AND LAW ENFORCEMENT IMPROVEMENT ACT OF 2007, 110-83 (Sept. 21, 2007) (reporting on NICS Improvement Amendments Act of 2007); *See Something, Say Something: Oversight of the Parkland Shooting and Legislative Proposals to Improve School Safety Agenda: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) (listing witnesses who testified on the Fix the NICS bill); *Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS): Hearing on S. 1916 Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (listing witnesses who testified on the Fix the NICS bill); S. REP. NO. 110-183 (2007); S. REP. NO. 110-183 (2007) (pertaining in part to the School Safety and Law Enforcement Improvement Act of 2007); H.R. REP. NO. 115-437 (2017) (reporting on the Fix NICS Act of 2017, to accompany H.R. 4477). Additionally, I informally asked a federal lobbyist for tribes whether he knew of any examples of tribes weighing in on federal firearm bills, and he responded that he did not. For a listing of key federal laws regulating firearms, see *Key Federal Regulation Acts*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/key-federal-regulation-acts/> (last visited Feb. 6, 2022) [<https://perma.cc/3BWG-MXLB>].

firearms based on tribal court domestic violence convictions (among other types of court convictions for domestic violence).²²

With respect to the recent state laws I looked at, the only example of Native interests being voiced on these issues that my search uncovered was a letter that was submitted in support of an Oregon bill by the Native American Youth and Family Center (“NAYA Family Center”), a Portland non-profit that serves urban Native youth and families.²³ The Oregon bill, which was eventually enacted into law, provided for safe storage of firearms,²⁴ and the NAYA Family Center commenter noted the potential of the bill to protect Native Americans and other BIPOC communities from gun violence, highlighting data showing that

²² See E-mail from Rob Valente, Domestic Violence Policy Consultant, to author (Jan. 18, 2022, 9:28 AM) (on file with author) (describing negotiations, in which NCAI took the lead, with Congressional Representatives from Wisconsin regarding the addition of tribal court convictions to the text of 18 U.S.C. § 921); see also Violence Against Women Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (adding tribal domestic violence convictions to the list of disqualifying convictions under the Violence Against Women Act of 2005). The legislative history of the Violence Against Women Act of 2005 references NCAI’s advocacy, albeit in a non-specific way. See, e.g., H.R. Res. 3402, 109th Cong., 151 CONG. REC. 13761-62 (2005) (including a statement of Sen. Biden regarding passage of the Act in which he acknowledges that he is “indebted to a whole host of groups who worked on this measure and/or voiced their support throughout the journey from introduction to passage, including the . . . National Congress of American Indians”).

I also found other examples of tribal organizations’ legislative advocacy with respect to firearms, although the advocacy was less direct than the examples discussed above. See, e.g., Nat’l Indigenous Women’s Res. Ctr., *Firearms Protection Legislation and Safety for Native Women: Are Legal Reforms Falling Short of Reaching Native Women?*, RESTORATION MAG., <https://www.niwrc.org/restoration-magazine/february-2017/firearms-protection-legislation-and-safety-native-women-are> (last visited Feb. 7, 2022) [<https://perma.cc/5UYU-D3LP>] (arguing for more federal firearms restrictions aimed at keeping Native women safe); *Testimony of the National Congress of American Indians, Hearing on the Reauthorization of the Violence Against Women Act Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism and Homeland Security*, 116th Cong. 116-17 (2019) (“Tribes have also begun working with National Instant Criminal Background Check System (NICS) representatives from the Federal Bureau of Investigation to ensure that tribes are also able to enter their domestic violence convictions into the system so that offenders are no longer able to illegally purchase firearms.”).

²³ Letter from William Miller to Chair Smith Warner, Vice-Chair Drazan, Vice-Chair Holvey, and Members of the House Committee on Rules (Apr. 21, 2021). See generally *History*, NAYA FAMILY CTR., <https://nayapdx.org/about/history/> (last visited Feb. 7, 2022) [<https://perma.cc/EJX2-C8Y5>] (reflecting that the NAYA Family Center is an “urban Indian agency” that serves “self-identified Native Americans” across the Portland, Oregon metropolitan area and that NAYA Family Center’s mission includes “enhanc[ing] the diverse strengths of our youth and families”).

²⁴ 2021 Or. Laws 146.

American Indian and Alaska Native Oregonians were the most likely of any ethnicity in the state to die of gun violence.²⁵ Mr. Miller, the letter's author, applauded the fact that the bill did not take a punitive approach to the issue of safe storage and stated that the bill would aid in reducing gun suicides, further noting that Native Americans and Alaska Natives have the second highest suicide rate of any ethnicity in the state.²⁶ Given the aforementioned extremely high rates of violence against Native Americans and the fact that they have the highest rate of suicide of any racial group in the United States, it is likely that at least some federally recognized tribes would share these concerns and would support safe storage and other types of gun regulations.²⁷ Indeed, at least one tribe has enacted a safe storage law, although it is narrower than Oregon's law in that it applies only in homes where children under twelve are present.²⁸ However, some tribes — particularly those whose members exercise treaty hunting rights — may weigh preservation of freedoms relating to firearms more strongly than would a non-profit serving urban Indians.²⁹ In fact, given that the tribal safe storage law discussed

²⁵ Miller, *supra* note 23, at 1. The NAYA Family Center letter uses the term “ethnicity,” *id.*, although it appears to be more common to construe Native American status as a racial category when looking at issues of racial categorization and racial identity and as a political category when tribal citizenship or potential tribal citizenship or the government-to-government relationship between the United States and a tribe or tribal members is at issue. *See, e.g.,* Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 NYU L. REV. 958, 967 (2011) (arguing that “Indian” signifies both a racial category and the unique political history of Indian tribes, including their ongoing political relationship with the federal government”).

²⁶ Miller, *supra* note 23, at 1.

²⁷ *See* Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 887-88, 900; NAT'L CONG. OF AM. INDIANS POL'Y RSCH. CTR., *supra* note 14; NAT'L INST. OF JUST., *supra* note 14; *Racial and Ethnic Disparities*, SUICIDE PREVENTION RES. CTR., <https://sprc.org/scope/racial-ethnic-disparities> (last visited Feb. 7, 2022) [<https://perma.cc/U396-HM2H>].

²⁸ SWINOMISH TRIBAL CODE § 10-09.170.

²⁹ *See* Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 887; *see also* NAT'L URB. INDIAN FAMILY COAL., URBAN INDIAN AMERICA: THE STATUS OF AMERICAN INDIAN & ALASKA NATIVE CHILDREN & FAMILIES TODAY 7 (2008), <https://assets.aecf.org/m/resourcedoc/AECF-UrbanIndianAmerica-2008-Full.pdf> [<https://perma.cc/MFQ7-5XEA>] (noting that the definition of “urban Indian” is unsettled but that, for purposes of the report, the term means “individuals of American Indian and Alaska Native ancestry who may or may not have direct and/or active ties with a particular tribe, but who identify with and are at least somewhat active in the Native community in their urban area”); Stephen Kulis, M. Alex Wagaman, Crescentia Tso & Eddie F. Brown, *Exploring Indigenous Identities of Urban American Indian Youth of the Southwest*, 28 J. ADOLESCENT RES. 1, 3 (May 1, 2013) (“There are a number of reasons to expect that urban American Indian identities are complex and diverse. Particularly in large urban settings with rapidly growing American Indian populations, American Indian youth may differ widely

above was adopted by a tribe that exercises treaty hunting rights,³⁰ this complexity of interests could be one of the reasons the tribal safe storage law alluded to above is narrower than the Oregon law. At any rate, with 574 federally recognized tribes,³¹ there are bound to be many varying views as to how to weigh different policy interests relating to firearms. The NAYA Family Center letter provides an important window into one approach.³² NCAI's advocacy in favor of banning firearm ownership for those who have been convicted of domestic violence offenses in tribal court further suggests that many tribes support laws preventing violent offenders from gaining access to firearms as a means to protect the safety of Native women and other domestic violence victims.³³

Despite the clues as to possible tribal approaches to firearm policy that we can glean the NAYA Family Center letter and the evidence that a supra-tribal organization's advocacy was part of the impetus for making tribal domestic violence convictions a bar to firearm ownership under federal law, the relative dearth of tribal voices in state and federal legislative debates regarding firearms remains striking. While it is impossible to know for certain why tribes seem to be unlikely to participate in these debates, their apparent absence may well be due to the controversial character of gun control legislation and to a concern that weighing in on one side or the other may have negative judicial or legislative consequences relating to tribal sovereign rights in other areas.³⁴ Another possible explanation is that tribes simply have more

in tribal background, family histories of reservation life, forced relocation and migration, and intermarriage across tribes and nonnative ethnic groups.”).

³⁰ See Treaty of Point Elliott, art. V, Apr. 11, 1859; SWINOMISH TRIBAL CODE tit. 18, ch. 4 & § 18-04.020 (setting forth laws regulating tribal hunting and gathering and noting in section 18-04.020 that “[b]y the Treaty of Point Elliott, the Swinomish Indian Tribal Community reserved the right to hunt and gather on open and unclaimed lands”).

³¹ Tribes, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/international/what-we-do/tribes> (last visited Feb. 7, 2022) [<https://perma.cc/TF4R-WFRK>].

³² Although the NAYA Family Center letter is not, strictly speaking, a tribal letter, as noted above, the concerns expressed would likely be shared by at least some tribes. Cf. Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 900 & n.88 (explaining how different tribal communities may approach and have approached partial gun bans as well as across-the-board gun bans).

³³ See generally *About NCAI*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/about-ncai> (last visited Feb. 8, 2022) [<https://perma.cc/YNA2-KANU>] (“The organization's policy issues and initiatives are driven by the consensus of our diverse membership, which consists of American Indian and Alaska Native tribal governments, tribal citizens, individuals, and Native and non-Native organizations.”).

³⁴ See Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 890, 902-03; see also TROY L. ARMSTRONG, PHILMER BLUEHOUSE, ALFRED DENNISON, HARMON MASON, BARBARA MENDENHALL, DANIEL WALL & JAMES W. ZION, FINDING AND KNOWING THE GANG

immediately pressing concerns and that they are therefore focusing their legislative advocacy elsewhere for the time being.³⁵ Finally, it is also possible that some tribes may be engaging in behind-the-scenes advocacy on issues relating to firearms regulation that is not apparent from the public record.

The remaining Sections of this Article elucidate aspects of colonialism and tribal cultures that likely weigh into tribal approaches to, and preferences with respect to, firearm policy, culminating, in Part V, with an examination of tribal laws relating to firearms, especially those concerning the ability to carry firearms in tribal government buildings and other sensitive areas and contexts.

NAYEE—FIELD-INITIATED GANG RESEARCH PROJECT: THE JUDICIAL BRANCH OF THE NAVAJO NATION 267 (2002) (discussing the fact that weapons control, including firearms regulations, may be “an important element of gang control” and explaining that that fact “could require the [Navajo Nation] Council to enter the controversial area of gun control”).

³⁵ An older article by Richard Witmer discusses tribal priorities relating to issue positions that influenced tribal decisions as to whether to support candidates for state and federal public office. Richard C. Witmer, *The High Stakes of Indian Gaming: Economic Development & Political Participation on Native American Homelands*, 5 RED INK 26, 27 (Fall 1996). The research findings were based on open-ended survey questions asking which issues were most important in deciding to support a candidate, *id.* tbl.2, and, more broadly, all important issues that would be considered in deciding whether to support a candidate. *Id.* at 27. Firearms regulation does not appear on either list, nor does any broader category that might encompass it, such as public safety. *Id.* Rather, the two issues considered the most important by respondents to the survey were Gaming and Tribal Sovereignty/Treaty Rights. *Id.* On the other hand, violence against Indian women has since come to the fore as one of the most pressing issues facing tribes, and such violence is often facilitated by the use of firearms. See Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 689 (2009); NCAI POL'Y RSCH. CTR., *supra* note 14; 76th Annual Convention & Marketplace, NCAI, <https://www.ncai.org/events/2019/10/20/76th-annual-convention-marketplace> (last visited Feb. 8, 2022) [<https://perma.cc/XR47-HTBM>]; Jenni Monet, *Prosecuting Non-Native Americans*, AL JAZEERA AM. (Feb. 22, 2014, 8:00 PM ET) <http://america.aljazeera.com/articles/2014/2/22/prosecuting-non-nativeamericans.html> [<https://perma.cc/XT8N-WF5H>]; Nat'l Indigenous Women's Res. Ctr., *supra* note 22; see also EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA'S UNIQUELY LETHAL INTIMATE PARTNER VIOLENCE PROBLEM 4 (Oct. 7, 2019), <https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/> [<https://perma.cc/Q7AW-JDHC>] (“Intimate partner violence and gun violence in the US are inextricably linked.”). Thus, tribal priorities may well have changed since the Witmer article came out.

II. HISTORICAL PERCEPTION OF TRIBES AS SAVAGE AGGRESSORS AND CONTINUING CONSEQUENCES WITH RESPECT TO TRIBES' AND NATIVE INDIVIDUALS' RIGHT TO SELF-DEFENSE

As referenced in the Introduction, I previously demonstrated that, historically, in the colonial era and during the early years of the Republic, tribes' conflicts with settlers often resulted from tribes' defense of their lands from settler encroachment, but that tribes engaging in such conflicts were painted as savage aggressors.³⁶ I argued that this perception was part of the impetus for the right to form a militia codified in the Second Amendment and that it resulted in tribes' and Native individuals' not being understood to have a right to self-defense.³⁷ I further explained that these notions of savagery had resulted not only in juridical denials of tribes' and Native individuals' rights to self-defense in a concrete sense, but also in a figurative denial of the right to self-defense in that notions of tribal savagery have been codified in case law that is still being cited to restrict tribal exercises of sovereignty, particularly when tribal jurisdiction over non-members is involved.³⁸ I explained how this use of racist precedent was leaving tribes without the necessary tools to deal with violent crime against their members, a circumstance that is properly understood as a lack of self-defense in a broad sense.³⁹

The aspects of colonialism described above almost certainly affect tribal approaches to, and policy interests relating to, firearm regulation. Furthermore, in the context of the current national debate about the constitutionality of state limits on the use and possession of firearms outside the home and particularly in the public sphere,⁴⁰ this history of colonialism and the racialized character of the right of self-defense raise the question of whether tribes and Native persons could — practically speaking — take advantage of broadly construed Second Amendment

³⁶ Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 703-07; accord ROXANNE DUNBAR-ORTIZ, *LOADED: A DISARMING HISTORY OF THE SECOND AMENDMENT* 35 (2018); LEVI GAHMAN, *LAND, GOD, AND GUNS: SETTLER COLONIALISM & MASCULINITY IN THE AMERICAN HEARTLAND* 98-99 (2020).

³⁷ Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 697-703; accord DUNBAR-ORTIZ, *supra* note 36, at 49 (describing “the Indian Wars’ . . . as vitally important to understanding” one of the core rationales of the Second Amendment); GAHMAN, *supra* note 36, at 106 (“U.S. settler colonial society did not become plagued by racism and exclusion, but in fact, was founded upon racism and exclusion.”).

³⁸ Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 709-54.

³⁹ *See id.* at 747-54.

⁴⁰ *See generally* BLOCHER & SIEGEL, *supra* note 6 (describing the current public debate around gun rights and personal freedoms).

rights outside of their reservations.⁴¹ While the answer to this question is not cut and dry, there are indications that tribes and Native persons continue in the present day to be conceptualized as outsiders vis a vis the right to self-defense in its current (albeit contested) formulation as an individual right to carry firearms and to use them when threatened with death or bodily harm.

A. *Tribes and Native Americans Continue to Be Unreflectively Viewed as Entities or Persons to Be Defended Against*

The title for my article “*Hostile Indian Tribes...Outlaws, Wolves...Bears...Grizzlies and Things Like That?*” *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense* comes from an oral argument question in *District of Columbia v. Heller*⁴² in which Justice Kennedy inquired of counsel for the District of Columbia whether the Second Amendment had “nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves, bears and grizzlies and things like that?”⁴³

In the article, I explore the “cultural blindness” that this question (as well as the references to Native Americans in the majority opinion and in one of the dissenting opinions) reflects regarding the racialized character of both the Second Amendment and the concept of self-defense generally vis a vis Native Americans.⁴⁴ In the ten years since the article came out, litigants and courts have continued to reference the monolithic view that tribes historically were threatening forces that citizens needed to defend against, without addressing the one-sidedness of this view or its implications for the rights of tribes and Native individuals in the present. Three examples are provided below, although the first is the most balanced reference of the three.

The first example is a very brief and comparatively balanced discussion in the text of the Ninth Circuit’s en banc opinion *Young v. Hawaii*⁴⁵ regarding colonial examples of laws requiring colonists to

⁴¹ See Luncford, *supra* note 6, at 337-39; Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 906.

⁴² *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁴³ Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 694 (quoting Transcript of Oral Argument at 8, *Heller*, 554 U.S. 570 (No. 07-290)); see also Merkel, *supra* note 5, at 161.

⁴⁴ Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 694-97.

⁴⁵ 992 F.3d 765 (9th Cir. 2021) (en banc).

bring their weapons to public places such as churches.⁴⁶ The court notes “that these early statutes were . . . [drafted to address] the perceived need for protection from outside groups, such as slaves and Native Americans.”⁴⁷ The majority’s use of the adjective “perceived” suggests a willingness to question the justifications for these sorts of laws, a willingness that was markedly absent from the majority opinion in *Heller*, as well as from Justice Breyer’s dissent.⁴⁸ Nonetheless, the en banc opinion in *Young* stops short of an exploration or acknowledgement of what this racialized history vis a vis Native Americans (and African-Americans) might mean for these groups and for their exercise of the right to bear arms in the present.

A more pointed example is found in an amicus brief filed in the en banc proceedings in *Duncan v. Bonta*,⁴⁹ a case that concerned the constitutionality of California’s ban on large-capacity magazines. The brief of the Firearms Policy Coalition and other gun rights groups, in attempting to show the long history of the use of large-capacity magazines, describes Meriwether Lewis’s demonstration to Native Americans of a large-capacity magazine gun that he was carrying on the expedition and then claims (without providing a pin cite to Lewis’s voluminous journals) that Lewis made the point that having a gun with such a magazine allowed the expedition party to defend themselves against Native Americans even though they were out-numbered:

Meriwether Lewis is believed to have acquired from Lukens the Girandoni rifle that he famously carried on the Lewis and Clark expedition. Lewis mentioned it in his journal 22 times. Sixteen times, Lewis was demonstrating the rifle to impress various Native American tribes encountered on the expedition - often “astonishing” or “surprising” them, and making the point that although the expedition was usually outnumbered, the smaller group could defend itself.⁵⁰

⁴⁶ *Id.* at 819. There is another very brief discussion earlier on in the majority opinion in a footnote. *Id.* at 796 n.16.

⁴⁷ *Id.* at 819.

⁴⁸ See Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 694-96.

⁴⁹ *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc).

⁵⁰ Brief of Firearms Policy Coalition et al. as Amicus Curiae Supporting Plaintiffs-Appellees at 17-18, *Duncan v. Bonta*, 19 F.4th 1087 (No. 19-55376). David J. Silverman argues that the popular view of Native Americans in the colonial era, which seems to be present in the Lewis journal quotes, as overly impressed with “the mere sound, flash, and smoke of firearms” is too simplistic; instead, he argues that most tribes approached guns with a practical mindset and viewed them as necessary for war (and, in the case of

The part of the passage containing quotes is followed by a cite to a specific page number in the journals, but the self-defense claim at the end of the passage is supported simply by a citation to the journals in their entirety.⁵¹ While I am not an expert on Meriwether Lewis's journals, the lack of proper citation to the self-defense claim does raise the question of whether this interpretation of the journals as expressing the idea that a high-capacity magazine gun ensured the fabled expedition's survival might be a stretch. Relatedly, this passage reflects an understanding on the part of the authors of the brief (or their clients) of Native Americans as persons that must be defended against. The quoted material from the journals appears to describe friendly interactions in which Lewis demonstrates the use of an important technological innovation, but the authors seem to jump from those apparently amicable meetings to the notion that the Native Americans the expedition encountered could never be other than a threat. This passage thus exemplifies the idea that Native Americans are the quintessential target of the right of self-defense — an idea that reverberates through *Heller* and which has been documented more generally by several scholars.⁵²

The third and most egregious example involves an argument by a United States prosecutor in a terrorism trial involving a prisoner at Guantanamo Bay. In the brief, the United States drew an analogy between the defendant's alleged terrorist activities and two situations involving tribes in the 1800s.⁵³ The first situation the United States

some tribes, for hunting) because of their lethality. DAVID J. SILVERMAN, THUNDERSTICKS: FIREARMS AND THE VIOLENT TRANSFORMATION OF NATIVE AMERICA 8 (2016).

⁵¹ Brief of Firearms Policy Coalition et al., *supra* note 50, at 18 nn.23, 24.

⁵² See Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 694-96, 698 & nn.25, 27 and sources cited therein.

⁵³ Brief of United States at 23-27, *Al Bahlul v. United States*, 967 F.3d 858 (D.C. Cir. 2020) (No. 09-001), <https://turtletalk.files.wordpress.com/2011/03/bahlul-brief-irt-specified-issues-11-mar-2011.pdf> [<https://perma.cc/9TXV-2S5R>]; see also *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1294-95 (D. Haw. 2011) (a companion case to *Al Bahlul* discussing the analogy between al Qaeda and the Seminole Tribe and relying on it with the disclaimer that the “court takes no comfort” in the analogy). This brief came to light just after my article “*Hostile Indian Tribes...Outlaws, Wolves...Bears...Grizzlies and Things Like That?*” *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense* went to press. Compare Tweedy, *Hostile Indian Tribes*, *supra* note 5 (reflecting March 2011 publication date), with Matthew L.M. Fletcher, *Federal Government Compares Seminoles to Al Qaeda in Military Commissions Case*, *Turtle Talk* (Mar. 15, 2011) (reflecting that the blog post regarding the analogy was published March 15, 2011, which is the same month as the *Hostile Indian Tribes* article), <https://turtletalk.blog/2011/03/15/federal-government-compares-seminoles-to-al-qaeda-in-military-commissions-case/> [<https://perma.cc/G4MU-3EQ7>]. However, I was able to at least mention the *Al Bahlul* issue in a reprinted version of the article that appeared in

analogizes to is very troubling.⁵⁴ In arguing that a person could be convicted of the crime of aiding the enemy without breaching a duty owed to the United States, the United States uses the example of two British nationals who were sentenced to death for aiding the Seminoles in 1818.⁵⁵ This discussion in the brief includes highly offensive historical quotes (without any qualification or disclaimer) referring to the Seminoles as “savages” and more specifically as a “savage communit[y]” whose wars were “always attended, on their part, with acts of barbarity the most shocking.”⁵⁶ References to Native Americans as savages are racist, and if, for some reason, historical quotes using that language must be used, at a minimum, their problematic nature should be highlighted to avoid reinforcing and legitimizing that racism.⁵⁷ Instead, the quotes in the brief are simply set forth as though there is nothing out of the ordinary about them, with the clear implication being that they convey a historical truth. The use of these quotes culminates in the all-too-familiar argument that the Seminoles, like the al Qaeda, were not entitled to humane treatment because the way they waged war against the United States “violated the customs and usages of war.”⁵⁸ It was argued at the time of the events involving the two British nationals that, because the Seminoles were not entitled to humane treatment, neither were the British nationals who had aided them.⁵⁹ These arguments are utilized in the brief to illustrate the point that the crime

another law journal. See 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, 4 CRIT: CRITICAL STUD. J. 1, 15 & n.56 (2011).

⁵⁴ The second analogy, involving an Attorney General Opinion reasoning that those supplying the Comanches with ammunition while they were at war with the United States could be subject to court martial, does not use racist language and, unlike the first analogy, is not patently problematic. Brief of United States, *supra* note 53, at 26-27.

⁵⁵ *Id.* at 23; see also Matthew L.M. Fletcher & Peter S. Vicaire, *Indian Wars: Old & New*, 15 J. GENDER, RACE & JUST. 201, 227-28 (2012).

⁵⁶ Brief of United States, *supra* note 53, at 23-24 (quoting President James Monroe, ANNALS OF CONG., 15th Cong., 2d Sess. 13 (1819)).

⁵⁷ See Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 715-16.

⁵⁸ Brief of United States, *supra* note 53, at 25. For a discussion of other instances of the use of this argument to justify savage treatment of a nation's opponents, see Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 702 (citing Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'*, in INTERNATIONAL LAW & ITS OTHERS 266-67 (Ann Orford ed. 2006)).

⁵⁹ Brief of United States, *supra* note 53, at 23-24 (quoting ANNALS OF CONG., 15th Cong., 2d Sess. 13).

of aiding the enemy does not require one to have a duty to the United States.⁶⁰

Even more troubling than the racist content of the quotes themselves is that the Seminoles were being treated in a cruel and inhumane manner by the United States during the war against them that had been initiated by General Jackson with apparent complicity by President Monroe but without the consent of Congress.⁶¹ Thus, even aside from the palpable racism in the quotes, the analogy itself reflects a warped view of history in which the Seminoles, who originally had attacked a United States ship *in retaliation* for the destruction of one of their villages, are painted as inhumane aggressors, a characterization which was then used to justify further inhumane treatment of them.⁶² One of the sad ironies in this use of a wrongheaded and racist analogy by a military prosecutor is that Native Americans serve in the United States armed forces at the highest rate of any racial group.⁶³ Thankfully, the

⁶⁰ *Id.* at 26.

⁶¹ See, e.g., Abraham D. Sofaer, *Executive Power and the Control of Information: Practice Under the Framers*, 1977 DUKE L.J. 1, 33-44 (1977) (describing General Jackson's role in initiating the war and President Monroe's delay in informing Congress); Michelle Tirado, *Military Prosecutors Pull Away from Analogy Likening Seminoles to al Qaeda*, INDIAN COUNTRY TODAY, <https://indiancountrytoday.com/archive/military-prosecutors-pull-away-from-analogy-likening-seminoles-to-al-qaeda> (last updated Sept. 12, 2018) [<https://perma.cc/PC2J-94N3>] (describing the federal prosecutors as having "backtracked" from the analogy but noting that the Seminole Tribe did not receive an apology); see also Fletcher & Vicaire, *supra* note 55, at 228 (quoting NCAI's statement that Jackson was engaged in "an illegal war, burning entire Indian villages in a campaign of extermination"). For more on the inhumane treatment of Native cultures by the United States during conflicts in the colonial era and the early years of the republic, see SILVERMAN, *supra* note 50, at 17-18 ("The most common element in the sequential collapse of Indian military resistance to Euro-America was starvation and war-weariness stemming from the enemy's scorched-earth tactics and killing of women, children, and the elderly."); accord DUNBAR-ORTIZ, *supra* note 36, at 29, 46 (describing Anglo settlers' violent attacks on Indigenous families and communities and the slaughter of such persons "without distinction of age or gender"); see also SILVERMAN, *supra* note 50, at 2.

⁶² Sofaer, *supra* note 61, at 33-34, 34 n.212; see also FRANCIS PAUL PRUCHA, *I THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 87 (1984) (quoting General Jackson's justification for the war and his invocation of the right of self-defense: "The Seminole Indians inhabiting the territories of Spain have . . . visited our Frontier settlements with all the horrors of savage massacre — helpless women have been butchered and the cradle stained with the blood of innocence . . . The immutable laws of self-defense, therefore compelled the American Government to take possession of such parts of the Floridas in which the Spanish authority could not be maintained.").

⁶³ See, e.g., *American Indian Veterans Have Highest Record of Military Service*, NAT'L INDIAN COUNCIL ON AGING (Nov. 8, 2019), <https://www.nicoa.org/american-indian-veterans-have-highest-record-of-military-service/> [<https://perma.cc/8FCT-2V4W>] (noting

military prosecutors eventually backtracked from the analogy, although it does not appear that the Seminole Tribe ever received the requested apology.⁶⁴

From these recent uses of the trope that Indians historically were simply forces to defend against, we can see that much work remains to be done to reframe the right of self-defense to include Native Americans and other oppressed groups. Moreover, when courts rely on history to support (or reject) current firearm regulations, the historical information must be critically evaluated to avoid reinforcing racist characterizations and instantiating them in Second Amendment jurisprudence.

B. *Violence Against Native Americans*

1. *Violent Victimization in General*

In addition to the continued invocation of the stereotype of tribes and Native individuals as savage aggressors that we see in discussions of the Second Amendment and of the Law of War, it is likely that these stereotypes are facilitating — and causing the dominant culture to turn a blind eye toward — continuing violent acts against Native Americans. As mentioned in Part II, Native Americans are disproportionately victimized by violent crime.⁶⁵ For example, eighty-three percent of Native adults have been victims of violence, and fifty-six percent of Native women have experienced sexual violence in their lifetimes.⁶⁶ Moreover, in some counties, the murder rate for Native women is more than ten times the national average.⁶⁷ Historically, federal prosecution rates for these crimes have been extremely low, although more attention has been paid to this issue in recent years.⁶⁸ It is very possible that racist stereotypes of Native Americans as savages are part of the explanation for the longstanding indifference to, and failure to remedy, these issues.⁶⁹

that American Indians and Alaska Natives serve in the Armed Forces at five times the national average).

⁶⁴ Tirado, *supra* note 61.

⁶⁵ See *supra* note 14 and sources cited therein.

⁶⁶ NAT'L INST. OF JUST., *supra* note 14; see also NAT'L CONG. OF AM. INDIANS POL'Y RSCH. CTR., *supra* note 14, at 1.

⁶⁷ NAT'L CONG. OF AM. INDIANS POL'Y RSCH. CTR., *supra* note 14, at 1.

⁶⁸ See Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 753-54; Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 887 & n.7 and sources cited therein.

⁶⁹ Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 754.

2. Police Violence Against Native Americans

In addition to the general violent victimization of Indigenous persons in the United States, both on and off of reservations, another glaring problem relates to police killings of Native Americans. By most accounts, Native Americans are the most likely of any racial or ethnic group to be killed by police,⁷⁰ and there is also evidence suggesting that police killings of Native Americans (and Native mortality rates in general) are under-reported.⁷¹

In some areas of the country, the disparities are shockingly stark. For example, an economist who studies police violence found that, in the Ninth Federal Reserve District, which covers Minnesota, Montana, North Dakota, South Dakota, the Upper Peninsula of Michigan, and twenty-six counties in northern Wisconsin, Native American females are thirty-eight times more likely than white females to have fatal encounters with police and that Native American males in that District are fourteen times more likely to have fatal encounters with police than are white males.⁷²

⁷⁰ See, e.g., Jasmine Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 376 (2018) (“Victims of police violence are disproportionately people of color. Over the two-year period of 2015-2016, Latinos, blacks, and Native Americans were respectively 1.15 times, 2.5 times, and 2.7 times more likely to be killed by police than whites.”); Ian F. Tapu, *The Reasonable Indigenous Youth Standard*, 56 GONZ. L. REV. 529, 533 (2021) (“Indeed, while Native Americans account for only 0.8% of the population, they comprise 1.9% of police killings, making it the group most likely to be killed by law enforcement.” (citation and internal quotation marks omitted)); Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN, <https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html> (last updated Nov. 13, 2017, 2:51 PM EST) [<https://perma.cc/QF9E-2XHL>] (“Native Americans are killed in police encounters at a higher rate than any other racial or ethnic group, according to data from the Centers for Disease Control and Prevention”); Teran Powell, *Native Americans Most Likely to Die From Police Shootings, Families Who Lost Loved Ones Weigh In*, WUWM 89.7 FM (June 2, 2021, 12:52 PM CDT), <https://www.wuwm.com/2021-06-02/native-americans-most-likely-to-die-from-police-shootings-families-who-lost-loved-ones-weigh-in> [<https://perma.cc/N9NC-5BD5>] (“Native American people are killed in police encounters more than any other ethnic group, according to the Centers for Disease Control & Prevention.”). *But see* ACLU, *THE OTHER EPIDEMIC: FATAL POLICE SHOOTINGS IN THE TIME OF COVID-19*, at 4 (2020) (citing data to the effect Black Americans are slightly more likely than Native Americans to be killed by police).

⁷¹ Hansen, *supra* note 70.

⁷² *Federal Reserve District, 9th*, FRASER, <https://fraser.stlouisfed.org/subject/federal-reserve-district-9th> (last visited Feb. 14, 2022) [<https://perma.cc/VW8V-DAWJ>] (listing the geographic areas encompassed within the district); Powell, *supra* note 70 (citing Dr. Matthew Harvey’s research); *see also* MATTHEW HARVEY, *FATAL ENCOUNTERS BETWEEN NATIVE AMERICANS AND THE POLICE 13-14* (2020); *id.* at 3 (defining the term “fatal encounters” to include “both police-induced deaths (such as a fatal shootings) and

As will be discussed below, in many instances, Native victims of police killings either were suspected of having, or had, a weapon of some kind, although not necessarily a firearm. These heartbreaking statistics are yet another indication that the racialized historical view of Native Americans as a dangerous threat that must be defended against has continuing salience⁷³ and, concomitantly, that the right of self-defense is coded white. These data further indicate that, if the individual right to defend oneself with a firearm is expanded by the Supreme Court, Native Americans may not be able, as a practical matter, to access these expanded rights.

Police killings of Native Americans receive scant media attention,⁷⁴ and the individual stories of the deaths of Natives at the hands of police are not widely known. Accordingly, I will briefly discuss three examples to illustrate the problem.

A twenty-six-year-old Oneida man named Jonathan Tubby was arrested by police in Green Bay, Wisconsin, in 2018 after he ran a stop sign and it was discovered that he had an outstanding warrant for drunk driving.⁷⁵ The officers allegedly suspected Mr. Tubby of having a weapon, although no weapon had been discovered in a search.⁷⁶ When they arrived at the jail, the officers had difficulty getting him to leave the police car.⁷⁷ They broke the back window of the car and sprayed an eye irritant into the vehicle, and, when Mr. Tubby exited, he stumbled blindly around before being “taken down by a police canine.”⁷⁸ While he lay face down, police shot him five times in the back, neck, and torso.⁷⁹ No charges were ever filed against the officers, and no weapon

police-involved deaths (such as those where police were involved and the cause of death is an overdose, suicide, or vehicular [sic]).”

⁷³ See Hansen, *supra* note 70 (discussing Professor Matthew Fletcher’s view that police stereotypes of Native Americans as “being violent or addicted to alcohol and other drugs” are likely part of the reason that Native Americans are killed by police at such high rates).

⁷⁴ See, e.g., HARVEY, *supra* note 72, at 3 (“While attention directed toward police treatment of blacks is certainly warranted, fatal encounters between police and Native Americans have failed to receive comparable attention. Despite the high population-adjusted counts of Native American deaths at police hands, many of these incidents escape media attention”); Powell, *supra* note 70 (noting that Native Americans’ “voices are rarely heard regarding police brutality”).

⁷⁵ Powell, *supra* note 70.

⁷⁶ See Appellants’ Opening Brief at 3, *Doxtator v. O’Brien*, No. 21-2101 (7th Cir. Nov. 1, 2021).

⁷⁷ See Powell, *supra* note 70.

⁷⁸ Appellants’ Opening Brief, *supra* note 76, at 3.

⁷⁹ *Id.*

was ever found on Mr. Tubby.⁸⁰ The family's civil lawsuit was dismissed,⁸¹ and appeal is now pending in the United States Court of Appeals for the Seventh Circuit.⁸²

In 2015, Rosebud Sioux Tribe citizen Paul Castaway was killed by Denver police after his mother called the police because Mr. Castaway, who was mentally ill and suicidal, had threatened her with a knife before running out the back door.⁸³ When the police arrived, Mr. Castaway demanded that the police kill him and then pressed the knife to his own throat.⁸⁴ Video footage appears to show him walking toward one of the officers with the knife still pressed to his own throat.⁸⁵ The officer backed away and then shot him three times. Police then handcuffed him, and he died at the hospital.⁸⁶ The district attorney found the shooting to be justified.⁸⁷

A final example involves the police killing of a pregnant mother on the Muckleshoot Reservation outside of Seattle.⁸⁸ Renee Davis had had an argument with her partner on a Friday in October 2016, and, after he left, she began to send him very concerning texts, including a photo of herself with a large cut on her body and a threat to shoot herself.⁸⁹ He went to police hoping that they could provide help.⁹⁰ Ms. Davis had

⁸⁰ See *id.* at 3-4, 27; Powell, *supra* note 70.

⁸¹ Powell, *supra* note 70.

⁸² Oral argument was heard on February 23, 2022, and, as this article goes to press, no decision has yet been issued. *Susan Doxtator v. Erik O'Brien*, No. 21-02101, (7th Cir. Feb. 23, 2022) (Bloomberg Law).

⁸³ First Complaint & Jury Demand ¶¶ 1-3, 13, 17, *Estate of Castaway v. Traudt*, 2019 WL 6700512 (D. Colo. 2019) (No. 1:16-cv-1763); see also Hansen, *supra* note 70.

⁸⁴ Hansen, *supra* note 70; see also First Complaint & Jury Demand, *supra* note 83, ¶¶ 24-25.

⁸⁵ First Complaint & Jury Demand, *supra* note 83, ¶¶ 33, 42; see also Response to the Defendant's Motion for Summary Judgment at 5, *Castaway*, 2019 WL 6700512 (No. 1:16-cv-1763).

⁸⁶ Hansen, *supra* note 70.

⁸⁷ *Id.*

⁸⁸ Hallie Golden, *A Pregnant Woman Was in Trouble. Cops Killed Her in Her Bed.*, DAILY BEAST (Jan. 4, 2021, 5:00 AM ET), <https://www.thedailybeast.com/renee-davis-of-washington-state-was-killed-by-cops-in-her-bed-in-2016-and-her-family-still-wants-justice> [<https://perma.cc/94SJ-97U9>].

⁸⁹ Brief of Appellant, *Davis v. King County*, 479 P.3d 1181 (Wash. Ct. App. 2021) (No. 79696-8-1), 2019 WA APP. CT. BRIEFS LEXIS 3468, at *1, *1-3; Golden, *supra* note 88.

⁹⁰ Brief of Appellant, *supra* note 89, at *3; Golden, *supra* note 88. The police involved were King County police officers because the Muckleshoot Indian Tribe had contracted with the King County Sheriff's Office to provide on-reservation law enforcement services. See Complaint ¶ 1, *Davis v. King County*, No. 18-2-00321-1, 2018 WL 11302891, ¶ 1 (Wash. Super. Ct. Jan. 3, 2018).

a history of mental health problems as well as of domestic abuse inflicted by a previous partner, and, as a result, the police were familiar with her.⁹¹ Two officers then went to Ms. Davis's home, moved her two young children to the front door area of the house, and then entered her bedroom, where they found her lying on her bed, covered with a blanket.⁹² They ripped off the blanket and then shot her eight times, allegedly because she began to raise what turned out to be an unloaded pistol.⁹³ Eventually, after the family's civil case was dismissed by the Washington Court of Appeals and then reinstated, King County agreed to pay the family \$1.5 million in a settlement.⁹⁴ Outcry over the killing of Ms. Davis also formed part of the impetus for changes in state law to restrict the use of deadly force by police and to eliminate a bar on private personal injury lawsuits against police when the victim was engaged in commission of a felony.⁹⁵

All three of these tragic killings, combined with the extremely high rates of police killings of Native Americans generally, suggest that many police may be operating based on stereotypes of Native Americans that are rooted in historical misperceptions of them as savage aggressors. In the case of Mr. Tubby, there was no weapon whatsoever, and yet he was killed based, at least in part, on suspicion of a weapon. Mr. Castaway and Ms. Davis were both experiencing mental health crises and were suicidal when they were killed. Yet, police shot Mr. Castaway as he held a knife to his own throat and advanced aggressively on Ms. Davis as she lay in her bed, stripping a blanket off of her.

Additionally, due in part to the inadequacies of the Indian Health Service, untreated mental illness is a serious problem in many Native American communities,⁹⁶ and the examples of the killings of Mr.

⁹¹ Brief of Appellant, *supra* note 89, at *1-3; see Golden, *supra* note 88.

⁹² Brief of Appellant, *supra* note 89, at *6.

⁹³ Mike Carter, *King County to Pay \$1.5 Million in 2016 Shooting Death of Pregnant Muckleshoot Mother Renee Davis*, SEATTLE TIMES (Aug. 4, 2021, 7:19 PM), <https://www.seattletimes.com/seattle-news/king-county-to-pay-1-5-million-settlement-over-2016-shooting-death-of-pregnant-muckleshoot-mother-renee-davis/> [<https://perma.cc/PR2L-VDHU>]; Golden, *supra* note 88; see also Brief of Appellant, *supra* note 89, at *6-7.

⁹⁴ Carter, *supra* note 93.

⁹⁵ *Id.*

⁹⁶ See, e.g., Hansen, *supra* note 70 (discussing the mental health crisis affecting Native Americans). However, the Biden Administration has increased funding to the Indian Health Service, and, although much of the funding will go to COVID-19 relief efforts, \$420 million is slated to provide better mental health and substance abuse services. See, e.g., Press Release, Indian Health Serv., Biden Administration Invests Additional \$1.8 Billion in American Rescue Plan Funding to Combat COVID-19 in Indian Country (June 16, 2021), <https://www.ihs.gov/newsroom/pressreleases/2021-press-releases/biden-administration-invests-additional-1-8-billion-in-american-rescue->

Castaway and Ms. Davis illustrate the need for reliable, culturally appropriate services.⁹⁷ Moreover, the disproportionate rates of police killings of Native Americans — and these three examples in particular — may suggest that armed Native Americans are much more likely to be victimized by police, further indicating that increasing the scope of Second Amendment rights — as the Supreme Court seems poised to do⁹⁸ — will ultimately benefit whites and may further endanger BIPOC persons (and Native Americans in particular) who choose to arm themselves. Yet, as will be discussed below, tribal cultures historically relied on firearms to defend themselves, to protect their interests, and, in many cases, to hunt. We know that hunting continues to be important to many tribes, and, based on the historical prominence of firearms in numerous tribal communities, it is reasonable to expect that firearms remain an important part of some tribal cultures even outside of the hunting context. Thus, it is likely that many tribes would favor some accommodation between gun rights and gun regulations.

III. FIREARMS AND TRIBAL CULTURES

With five hundred and seventy-four federally recognized tribes, Indigenous cultures within the United States are incredibly diverse, and it is important not to conceive of them monolithically. Tribal cultures, like all cultures, are also constantly evolving, so what has been true in the past about a given Native culture is not necessarily true today. Specific tribal laws may be the best window into an individual tribe's approach to firearm regulation, and those will be addressed in Part IV. This Part focuses on what we know about the historical importance of firearms to many tribal cultures and the historical and current importance of firearms for hunting for some tribes.

A. Many Tribes' Historical Reliance on Firearms

Historian David J. Silverman explains how guns became crucial for many tribal cultures in the period extending from “the early days of the Atlantic coast colonization in the seventeenth century, through the end

plan-funding-to-combat-covid-19-in-indian-country/ [https://perma.cc/JT9M-VCJX] (announcing that \$420 million of the funds will be used for mental health and substance abuse prevention and treatment).

⁹⁷ See Nat'l Native American Bar Ass'n, *The National Native American Bar Association Declares Takomi Hasapa Wiconi Hecha (Black Lives Matter)* (June 15, 2020) (stating that “[h]istoric trauma and mental illness are persuasive factors in Native encounters with police, particularly those that result in death”).

⁹⁸ See Howe, *supra* note 1.

of the Plains wars in the late nineteenth century.”⁹⁹ He describes firearms’ centrality in inter-tribal conflicts, as well as in conflicts with the colonists and with the United States, and the acuity with which various tribes strategized and negotiated to ensure continued access to firearms and ammunition should any one source of such items dry up.¹⁰⁰

According to Silverman, the tribes that acquired firearms often transformed themselves into “predatory gunmen,” leading other tribes to realize “that the groups most at risk of subjugation, forced adoption, enslavement, displacement, and death were the ones who failed to provide their warriors with guns and ammunition.”¹⁰¹ This led to an inter-tribal arms race, and, for some tribes, guns became symbols of masculinity.¹⁰² For example, Silverman notes that, for the Blackfeet, “capturing an enemy warrior’s gun became the greatest honor a man could accomplish in battle.”¹⁰³

Indigenous persons from small communities that could not realistically compete with larger, more powerful tribes tended to become middlemen who trafficked guns from remote colonial sources, thus cementing an alliance with larger, more powerful tribes.¹⁰⁴ So important was tribal business to gun manufacturers that some modified their guns to suit tribal preferences.¹⁰⁵ Silverman claims that, rather than succumbing to colonialism in a downward spiral that began with Euro-American contact, Native Americans “used guns to reshape their world,” and, through firearm use and expertise, accumulated “wealth, power, and honors.”¹⁰⁶ Thus, according to Silverman, it was, in actuality, the United States’ “scorched-earth tactics” and wanton killing

⁹⁹ SILVERMAN, *supra* note 50, at 8; accord Donald E. Worcester & Thomas F. Schilz, *The Spread of Firearms Among the Indians on the Anglo-French Frontiers*, 8 AM. INDIAN Q. 103, 113 (1984) (“By 1820, few of the important tribes were without firearms.”); see also SILVERMAN, *supra* note 50, at 2.

¹⁰⁰ See SILVERMAN, *supra* note 50, at 8, 13-15, 19; see also David J. Silverman, *Guns, Empires and Indians: Multilateral Imperial Politics Triggered an Indigenous Arms Race and Led to the Violent Transformation of Native America*, AEON (Oct. 13, 2016), <https://aeon.co/essays/how-did-the-introduction-of-guns-change-native-america> [<https://perma.cc/MAH8-6339>].

¹⁰¹ SILVERMAN, *supra* note 50, at 8.

¹⁰² *Id.* at 8-9.

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at 14; see also Worcester & Schilz, *supra* note 99, at 109 (describing Ojibwa and Cree middlemen who supplied the tribes on the northern Great Plains with firearms).

¹⁰⁵ SILVERMAN, *supra* note 50, at 12.

¹⁰⁶ *Id.* at 19.

of children, women, and the elderly that eventually spelled defeat for tribes as military forces.¹⁰⁷

While Silverman does not claim that all tribes had the same cultural investment in guns (he notes, for example, that many tribes in the Southwest lacked significant access to guns until the mid- to late nineteenth century), his analysis paints a picture of numerous tribal cultures' coming to form a significant attachment to firearms over time. While tribes themselves are no longer able to use guns for military purposes,¹⁰⁸ we do know that Native Americans have the highest rate of serving in the United States military of any racial group,¹⁰⁹ a fact which may suggest the continued importance of firearms to many Native individuals and, by extension, tribes. Clearly, more research needs to be done on current tribal cultures' approach to firearms, and it would be very beneficial for a researcher or organization to partner with individual tribes to begin this work. Until that research is done, one thing we can glean from historical accounts like Silverman's is that we should not assume that, because Native Americans have such high rates of victimization by violent crime, they would necessarily support strict gun regulations. While it is known that some would,¹¹⁰ it is likely that others would not. In addition to tribes' historical relationships to firearms, present circumstances like the degree of urbanization of their reservations and communities will almost certainly play a role in their individual approaches.

B. *Historical and Current Reliance on Hunting*

Another reason that tribes may favor more freedom with respect to firearms is because of the continued reliance of many on firearms for hunting. Silverman documents the historical importance of guns for hunting for many tribes, focusing especially on deer-hunting tribes east

¹⁰⁷ *Id.* at 18; accord DUNBAR-ORTIZ, *supra* note 36, at 29, 46 (describing Anglo settlers' violent attacks on Indigenous families and communities and the slaughter of such persons "without distinction of age or gender"); see also Riley, *supra* note 9, at 1699 (linking the end of tribal gun culture to Indians' confinement on reservations by the United States government and to, on the Great Plains, the decline of buffalo).

¹⁰⁸ See, e.g., ANDERSON ET AL., *supra* note 11, at 132 (quoting Felix Cohen's statement that "[c]onquest . . . terminates the external powers of sovereignty of the tribe"); see also *Cherokee Nation v. Georgia*, 30 U.S. 1, 17-18 (1831) ("[The Indian tribes] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory and an act of hostility.").

¹⁰⁹ *American Indian Veterans Have Highest Record of Military Service*, *supra* note 63.

¹¹⁰ See Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 890.

of the Mississippi, caribou- and moose-hunting tribes near Hudson Bay, and later, when guns became more technologically advanced, buffalo-hunting tribes on the Plains.¹¹¹ Tribal cultures are not static, and hunting tribes that began to rely on guns for hunting later than the periods on which Silverman focuses may now also be very attached to the use of guns for hunting. Conversely, it is possible that hunting has decreased in importance for some tribes that historically relied on it.

Tribes that have reservations are generally understood to have hunting rights within their reservation borders, whether or not the applicable law reserving the reservation mentions such rights.¹¹² Additionally, some tribes, particularly those in the Great Lakes region and in the Pacific Northwest, have recognized off-reservation hunting rights, which include access rights to non-tribal lands.¹¹³ Furthermore, tribes may regulate their members in the exercise of such rights, both on- and off-reservation, and state regulation of tribal members in the exercise of such rights is limited to situations in which the resource at issue is held in common by the tribes and the state and such regulation is necessary for conservation.¹¹⁴ Moreover, tribal members are not limited to traditional tools for harvest and may employ firearms for hunting.¹¹⁵ It follows that tribes that continue to have robust hunting cultures are more likely to want to ensure that their firearm regulations will be flexible enough to preserve the right to use firearms effectively in hunting on the reservation and, for tribes that have such rights, off-reservation as well.¹¹⁶

One indication of changing tribal mores with respect to firearms is the greater prevalence of female hunters in some tribes in the present day. Silverman states that, among Native Americans, firearm use was virtually exclusively a male prerogative during the historical periods

¹¹¹ SILVERMAN, *supra* note 50, at 9.

¹¹² COHEN, *supra* note 11, § 18.03.

¹¹³ *Id.* § 18.04. Additional tribes may have off-reservation treaty hunting rights that have not yet been fully defined. See, e.g., Navajo Treaty of 1868, Navajo Nation-U.S., art. IX, June 1, 1868, 15 Stat. 667 (“[The Navajo] retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase.”).

¹¹⁴ COHEN, *supra* note 11, §§ 18.03, 18.04.

¹¹⁵ *Id.* § 18.04(2)(b).

¹¹⁶ See, e.g., Ruth Hopkins, *Indian Country and the Second Amendment*, INDIAN COUNTRY TODAY (Oct. 3, 2012), <https://indiancountrytoday.com/archive/indian-country-and-the-second-amendment> [<https://perma.cc/5MBB-XE7X>] (reflecting the views of the author about the Second Amendment, the need for firearms for hunting, and the relationship between firearms and tribal sovereignty).

that he studied.¹¹⁷ While I am not aware of data on the current prevalence of Native female hunters, I did come across two examples of such hunters in my research. First, Muckleshoot citizen Renee Davis, who was killed by police in 2016, was a hunter who exercised her Tribe's treaty rights, and this was one of the reasons that she owned a gun.¹¹⁸ Secondly, Native writer and attorney Ruth Hopkins, who is of Sisseton-Wahpeton, Mdewakanton, and Hunkpapa heritage, wrote an opinion piece on the importance of firearms to tribal communities in which she stated: "I enjoy hunting too, so I own firearms."¹¹⁹ She further explained that she now hunts for her father because he is no longer physically able to do so.¹²⁰ These examples illustrate that some tribal cultures are changing to accommodate women who wish to continue their tribes' hunting traditions. This change is undoubtedly only one example of how tribal traditions with respect to hunting have changed over time, and, just as all cultures change, tribal cultures will continue to do so.

IV. TRIBAL LAWS

I previously documented a variety of tribal laws, including: (1) codification of the right to bear arms, which tended to be explicitly qualified in many instances; (2) prohibitions on certain gun types, characteristics, and related equipment; (3) permit requirements; (4) restrictions on carrying concealed and/or loaded weapons; (5) status-based restrictions pertaining, for example, to felons and persons adjudged mentally incompetent; and, finally, (6) restrictions on carrying guns in certain places, including in or near buildings owned by or under the control of the applicable tribe, at a specific tribal park, and

¹¹⁷ SILVERMAN, *supra* note 50, at 10-11.

¹¹⁸ Golden, *supra* note 88; see also David Kroman, *Seattle Caught Between Tribal Rights and Protecting Its Water Supply*, CROSSCUT (Oct. 26, 2018), <https://crosscut.com/2018/10/seattle-caught-between-tribal-rights-and-protecting-its-water-supply> [<https://perma.cc/VZ26-P88L>] (discussing the Muckleshoot Indian Tribe's treaty hunting rights); Rae Rose, *Remembering Renee Davis: Mother, Cultural Advocate, Victim of Police Violence* by Rae Rose, LAST REAL INDIANS (Oct. 20, 2020), <https://lastrealindians.com/news/2020/10/19/clbjzukyilheyvfm8dap7lsh4unm9r> [<https://perma.cc/YD44-NEBF>] ("Renee took back her culture by hunting, fishing, and learning all she could learn of her Coast Salish heritage."); Complaint, *supra* note 90, at ¶ 16 (referencing the fact that police were told that Ms. Davis owned both "a hunting rifle and a pistol"). Another reason that Ms. Davis had a firearm was so that she would have a means of defense against a physically abusive ex-boyfriend who had recently been released from prison. Brief of Appellant, *supra* note 90, at *3.

¹¹⁹ Hopkins, *supra* note 116.

¹²⁰ *Id.*

at tribal events.¹²¹ I also explained that one tribe had considered enacting a gun ban and that one tribe had had such a ban in the past and further suggested that the controversial nature of gun regulations may be influencing tribes to refrain from stringently regulating firearms and encouraging them to instead focus on relatively modest regulations.¹²²

My purpose in this part is to expand on my previous research relating to restrictions on carrying guns in certain places and to further explore restrictions on displaying guns in a threatening manner.¹²³ These two types of restrictions dovetail with our current national debate about the use of, and display of, guns in the public square,¹²⁴ and tribal approaches to them shed light on how some tribes might respond to that debate, although, as noted previously, the diversity of tribal cultures and tribal policy approaches should always be kept in mind.

A. Prohibitions on Carrying Firearms in Tribal Buildings and Other Areas

My previous research discussed laws enacted by the Salt River Pima Maricopa Indian Community, the Confederated Tribes of the Grand Ronde Community, and the Squaxin Island Tribe pertaining to carrying firearms in (or near) tribal buildings and in related contexts such as at tribal events.¹²⁵ While each of these tribal laws was constructed slightly differently, they were similar in scope.¹²⁶ I also looked at a Navajo law

¹²¹ Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 889-92, 891 n.34. My previous research revealed one ban on carrying concealed weapons, enacted by the Absentee-Shawnee Tribe of Oklahoma. *Id.* at 891 n.31. Two additional tribes appear to have such a ban in place, with an exception for law enforcement officers. POARCH BAND OF CREEK INDIANS CODE § 8-6-17 (2016); SNOQUALMIE TRIBAL CODE tit. 7.1, ch. 10, § 1.

¹²² Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 890. The reason that tribes can consider passing gun bans is that they are not bound by the Second Amendment. *See id.* at 899-900 (explaining the Second Amendment's lack of applicability to tribes and the absence of any federal statutory obligation in the Indian Civil Rights Act, 25 U.S.C. § 1302, requiring tribes to respect a right to bear arms).

¹²³ This research is more of a sampling and is not intended to be exhaustive. For a discussion of the difficulties inherent in amassing a comprehensive picture of tribal laws, see Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 COLUM. HUM. RTS. L. REV. 104, 108-09 (2015).

¹²⁴ *See generally* BLOCHER & SIEGEL, *supra* note 6 (arguing that recognition of the fact "that [the] government regulates guns to prevent social as well as physical harms is a critical first step in building a constitutional democracy in which citizens have equal claims to security and to the exercise of liberties").

¹²⁵ Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 891 n.34.

¹²⁶ *See id.*

restricting the carrying and use of firearms in Marble Canyon Navajo Nation Park.¹²⁷

Additional laws relating to firearms and public buildings include a Ponca Tribe of Nebraska ordinance prohibiting possession of firearms and other deadly weapons “in any public Ponca Tribe of Nebraska building, facilities, or vehicles”¹²⁸ and a Confederated Tribes of Siletz Indians provision prohibiting possession “of a destructive device or loaded or unloaded firearm” in a public building.¹²⁹ Laws that were similar but somewhat more limited included a Little River Band of Ottawa Indians regulation prohibiting employees from bringing unauthorized firearms to work and from possessing them in Tribal facilities¹³⁰ and a provision from the Yurok Tribe’s gaming compact with California prohibiting any person (except for law enforcement personnel) from possessing firearms in the gaming facility.¹³¹

Two other tribal laws prohibited possession and use of firearms in cemeteries,¹³² and another tribe, similar in approach to Navajo’s restrictions on firearms in the Marble Canyon Navajo Nation Park, prohibited the discharge of firearms into, in, or across a specific preserve.¹³³

B. *Prohibitions on Display of Guns in a Threatening Manner*

Several tribes have restrictions of varying strictness in place relating to displaying firearms. The goal of such laws appears to be protecting public safety by “preventing the social as well as physical injuries that guns can inflict,” including threats and intimidation.¹³⁴ The most restrictive of these that I found is a Little Traverse Bay Bands of Odawa Resolution requiring that non-members not possess a gun within fee or trust lands on the reservation unless doing so is legal under state and/or federal law and the firearm is either unloaded and fully enclosed within a firearm case or unloaded and in a closed portion of a vehicle.¹³⁵

¹²⁷ *Id.* at 889 & n.19.

¹²⁸ PONCA TRIBE OF NEB. CODE § 1-9-2(1) (2010).

¹²⁹ SILETZ TRIBAL CODE § 12.123 (2005).

¹³⁰ LITTLE RIVER BAND OF OTTAWA INDIANS REGUL. R600, ch. IX, § 9.1(k) (2006).

¹³¹ Tribal-State Gaming Compact, Yurok Tribe-State of Cal., Aug. 29, 2006, § 12.8.

¹³² 12 GRAND TRAVERSE BAND CODE § 1108(a)(6) (2018); ONEIDA TRIBE OF WIS. CODE ch. 75.8-1(f) (2010).

¹³³ SWINOMISH TRIBAL CODE § 2-03.200(K) (2021).

¹³⁴ BLOCHER & SIEGEL, *supra* note 6, at 3.

¹³⁵ LITTLE TRAVERSE BAY BANDS OF ODAWA RESOL. 010806-02 (2005). Given the extent to which Native Americans are victimized by violent crime and the proportion of such crimes that are perpetrated by non-Natives, it is reasonable for tribes to respond by

The Siletz Tribe prohibits paramilitary activity, which it defines as “[e]xhibiting, displaying, or demonstrating the use or making of [a] firearm . . .” with the intent or knowledge that it “will be unlawfully used in a civil disorder,” as well as “[a]ssembling with one or more persons for purpose of training with or practicing with such firearm . . .”¹³⁶ Finally, two tribes prohibit displaying a firearm in such a way as to intimidate another person. The Northern Arapaho Tribe prohibits “[k]nowingly point[ing] or display[ing] a firearm or other weapon at or in the direction of another, whether or not the person believes the firearm is loaded,”¹³⁷ and Snoqualmie Indian Tribe prohibits “display[ing] or draw[ing] any firearm . . . apparently capable of producing bodily harm” so as to “manifest[] an intent to intimidate another” or to “warrant[] alarm for the safety of others . . .”¹³⁸

These restrictions on the use and possession of firearms in tribal buildings and in other sensitive areas, as well as the restrictions on displaying firearms in a threatening way, tend to suggest, at least for the tribes that have enacted such laws, a restrained and judicious approach to firearms that is in line with states that similarly wish to enact moderate firearm regulations to minimize danger while at the same time allowing for the use of firearms for legitimate purposes commensurate with public safety. Given that tribes often tend to be concerned about the social welfare of their citizens rather than focusing primarily on furthering individual gain, these tribes’ restrictions on firearms in sensitive areas and prohibitions on display of guns in a threatening

stringently regulating non-members’ use and possession of firearms. See Tweedy, *Hostile Indian Tribes*, *supra* note 5, at 753-54; Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 900-902 & associated notes and sources cited therein; *supra* note 14 and sources cited therein. At the same time, this approach could be risky in that it could potentially lead to judicial backlash. Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 902-04 & 904 n.99.

¹³⁶ SILETZ TRIBAL CODE § 12.127 (2005).

¹³⁷ NORTHERN ARAPAHO CODE tit. 20, § 305(a)(2) (2016).

¹³⁸ SNOQUALMIE TRIBAL CODE tit. 7, ch. 1, § 10.3(a). A similar concern for preventing both social injuries due to threats and intimidation and physical injuries may be behind the Rosebud Sioux Tribe’s law criminalizing possession of a firearm while intoxicated. See *Rosebud Sioux Tribe v. Luxon*, at 1 (Oct. 30, 2009, as amended Feb. 11, 2009), https://libguides.law.usd.edu/ld.php?content_id=36906691 [https://perma.cc/24TZ-GTEW] (describing charges at issue and analyzing issues on appeal). The Navajo Nation’s focus on peacefulness in its statutory right to bear arms also appears to be designed to protect against both social and physical injuries. See Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 6, at 889 n.21 (quoting Navajo Nation Bill of Rights § 6 as restricting “[t]he right of the people to keep and bear arms” to “peaceful purposes, and in a manner which does not breach or threaten the peace . . .”).

manner are not surprising,¹³⁹ and, although there is clearly a need for a great deal more research in this area, it may turn out that these types of laws are quite common among tribes.

CONCLUSION

This Article has attempted to bring to light some of threads that likely affect tribal policy interests and preferred approaches to regulating firearms. Tribes appear to have chosen to largely stay out of state and federal legislative debates about firearm regulation. Moreover, while it is clear that many tribal cultures historically were very invested in firearms, less is known about the extent to which this rich history continues to influence these cultures, although it is likely safe to assume that tribes whose members engage in treaty hunting would want to preserve their members' access to firearms for hunting purposes. Additionally, given the current violent victimization of Native individuals, both generally and at the hands of police, tribes undoubtedly have serious concerns about the safety of their members, and therefore many tribes may be open to moderate firearm regulation to further public safety. Tribal laws are likely the best window into tribal policy in this area, although it is possible that tribes have been chilled in fully implementing their policies both due to the controversial nature of firearm regulation and as a result of restrictions on their jurisdiction that make it difficult to regulate effectively. The available tribal laws suggest that a good number of tribes value protections that pertain to government buildings and other sensitive areas and that several tribes also support prohibitions on displaying guns in a threatening manner. However, much more research needs to be done in this area.

¹³⁹ My experience serving as an in-house attorney for tribes in the Northwest is the primary basis of this statement. Another supporting example is the services that the Menominee Tribe provided to its members prior to the federal government's termination of its relationship with the Tribe, which resulted in depletion of the Tribe's resources and a consequent inability to continue these services, such as free health, surgical and dental care and free electricity and water. See ANDERSON ET AL., *supra* note 11, at 142-44; see also David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?*, 25 AM. INDIAN L. REV. 93, 102 (2001) (arguing that tribal societies are more communal in nature than the dominant society). But see Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 767-80 (2001) (arguing that communalism among tribes has been overstated and that the reality is more complicated).