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INDIANS AND GUNS*

Angela R. Riley

INTRODUCTION

The Supreme Court's recent Second Amendment¹ opinions establish a bulwark of individual gun rights against the state. *District of Columbia v. Heller* confirmed that the Second Amendment guarantees an individual right to bear arms for self-defense,² and the Court applied this analysis to the states two years later in *McDonald v. City of Chicago*.³ As a result of these cases, it is often assumed that individual gun rights now extend across the United States. But this conclusion fails to take account of a critical exception: Indian tribal nations remain the only governments within the United States that can restrict or fully prohibit the right to keep and bear arms or even ignore the Second Amendment altogether.⁴ Indian tribes were never formally brought within the U.S. Constitution; accordingly, the Second Amendment does not bind them.⁵ In 1968, Congress extended select, tailored provisions of the Bill of Rights to tribal governments through the Indian Civil Rights Act but included no Second Amendment corollary.⁶ As a result, there are over 67 million acres of Indian trust land in the United States,⁷ comprising conspicuous islands within which individuals' gun rights are not constitutionally protected as against tribal governments.⁸

The relationship between Indians and guns holds particular salience for reservation residents, where crime is high, jurisdictional limitations cabin the ability of tribal governments to police Indian country, and political and fiscal barriers inhibit adequate complementary law enforcement by other sovereigns.⁹ The scenario so often proposed as a historical justification for the individual right to arms—the presence of vast, rural landscapes where Americans are unable to rely on the protection of the state against threatening forces¹⁰—is actually still at work on some of the most rural Indian reservations in the United States, albeit with roles radically redefined.¹¹ Yet these are the very places where gun rights may be most severely curtailed, and by tribal governments themselves.

The present position of Indians in relation to guns is a reflection of a long-standing perception of Indians and Indian nations as the un-“we,” as peoples existing consistently outside the American polity. The pressing question remaining for Indian nations is how to situate themselves within the broader American legal landscape of gun rights—at its heart a work not only about gun policy but also about tribal sovereignty and peoplehood.

In the full article upon which this essay is based, I detail the untold story of Indians and guns and examine the legislative history and contemporary ramifications of Congress' decision to omit any reference to the Second Amendment (or a corollary) into the Indian Civil Rights Act of 1968, leaving tribal governments free to make tribally distinct gun laws and regulations. I will not go into such depth here. Instead, this essay focuses on Indian tribes' vast and unique freedom to engage in lawmaking around gun laws and policies, unconstrained by Second Amendment jurisprudence. Accordingly, with this background, this essay proceeds as follows. In Section I, I briefly describe the intricate nature of tribal criminal and civil jurisdiction in Indian country as defined by federal law. Section II examines Indian nations' own constitutional protections for the right to bear arms, tribal criminal law regarding guns, and, finally, tribal civil regulation of guns in Indian country. In Section III, I explore some of the potential governance possibilities created by American Indian nations' unique, extra-constitutional status.

I. TRIBAL CRIMINAL AND CIVIL JURISDICTION IN INDIAN COUNTRY

The labyrinth of tribal jurisdiction in Indian country is well-documented.¹² The baseline presumption is that Indian tribes maintain jurisdictional control and authority over their own territory as a matter of their inherent sovereignty. More specifically, Indian reservations are—with some important exceptions¹³—free from state criminal jurisdiction when an Indian is involved in the crime as either the victim or the perpetrator.¹⁴ By contrast, the federal government has a large role in criminal justice in Indian country. The federal government has jurisdiction over crimes committed in Indian country by a non-Indian against an Indian¹⁵ and over major crimes committed by an Indian, whether the victim is Indian or non-Indian.¹⁶ Nonmajor crimes committed by Indians—whether they are members of the prosecuting tribe or not—remain within the exclusive jurisdiction of tribal governments.¹⁷

Perhaps most significantly, in 1978 the Supreme Court held in *Oliphant v. Suquamish Indian Tribe* that Indian tribes do not have criminal jurisdiction over non-Indians.¹⁸ Thus, if a non-Indian commits a crime against an Indian or Indian property in Indian country, the crime must be prosecuted by the federal government,¹⁹ negating the localized community control that characterizes virtually all law enforcement in the United States.²⁰ (Notably, publication of the article upon which this essay is based pre-dated the Reauthorization of the Violence Against Women Act, which contained provisions providing for tribal jurisdiction over the investigation, prosecution and sentencing of non-Indian perpetrators of domestic violence against an Indian partner or spouse in Indian Country.)²¹

Tribal civil jurisdiction over members has been repeatedly acknowledged as Indian tribes' inherent sovereign right,²² and tribes also routinely exercise jurisdiction over non-Indians on tribal lands.²³ But *Montana v. United States*²⁴ created a presumption

against tribal civil regulatory jurisdiction over nonmembers on nonmember fee land within the reservation unless that jurisdiction meets one of two exceptions: there exists a consensual relationship between the defendant and the tribe, or the regulation at issue goes to the health, safety, and welfare of the tribe.²⁵ Though seemingly capacious, these two exceptions to the so-called *Montana* rule have been construed exceedingly narrowly by subsequent Supreme Court decisions.²⁶

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

The anomalous position of Indian tribes within the federal system affords them the opportunity to self-govern in a localized manner in relation to guns. Much like the states and federal governments, Indian nations have begun to consider and fashion gun rights and protections tailored to their own tribal communities. In the following subsections, I examine two areas where tribes have addressed the right to bear arms and guns more generally—in tribal constitutions and in tribal codes, respectively.²⁷

II. INDIAN NATIONS AND GUNS

Numerous tribes operate under written constitutions, which embody a wide range of tribal governance systems. They commonly—but certainly not universally—set forth, much like the U.S. Constitution, separation of powers and protection of individual rights.²⁸ Today, a rather small but growing number of tribal constitutions expressly provide that the Indian nation may not infringe on the individual right to bear arms.²⁹ Such provisions limit the tribe’s ability to infringe the right, whether the suit is brought by an Indian or a non-Indian.³⁰

A. Tribal Constitutional Law and the Right to Bear Arms

Of those tribes identified that have provisions securing the right to bear arms, some variation can be seen, as tribal constitutions reflect tribes’ particular circumstances, history, and tradition. Of particular note is that none included an analog to the Second Amendment’s prefatory clause regarding the formation of a militia. In contrast, in each tribal constitution dealing with the right to bear arms, the individual right is paramount.³¹ As such, these tribes convey a common respect for the individual right to bear arms as a limit on the actions of tribal governments.³²

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

B. Tribal Gun Laws in Indian Country

1. *Criminal Codes* Perhaps not surprisingly, virtually every tribe researched that has a criminal code has enacted some type of gun law. Laws banning or governing the carrying of concealed weapons are quite prevalent.³³ Several tribes allow

concealed carry where a permit has been issued by the tribe.³⁴ Some tribes more tightly constrain gun ownership in general, limiting the places where weapons may be lawfully carried, with no permit exceptions.³⁵

References to guns or weapons are most common in code provisions related to violent crimes like assault, robbery, intimidation, and stalking.³⁶ Some tribes allow tribal police to take guns from the home in a domestic violence situation even if the gun was not used in the incident at issue.³⁷ Others condition release of a defendant guilty of domestic violence on a guarantee of no future possession of firearms.³⁸ Numerous tribes have comprehensive criminal gun laws.³⁹

Tribes also employ carve outs to general gun regulations or prohibitions for activities that may be tribally distinct or connected to their particular cultural and ceremonial practices. The Navajo Nation Code, for example, includes an express exception to its general gun laws where the firearm is used in “any traditional Navajo religious practice, ceremony, or service.”⁴⁰ The San Ildefonso Pueblo Code similarly states an exception to its criminal gun code when the gun use is related to “any ceremony where traditions and customs are called for.”⁴¹ And the Shoshone and Arapaho of the Wind River Indian Reservation set forth requirements regarding the hunting of “big game” on the reservation.⁴² The code includes pre-ceremony permitting requirements relevant to those dancing in the tribes’ Sundance Ceremony and using male elk or male deer in the ceremonies themselves.⁴³

2. Civil Regulatory Codes Numerous tribes have enacted comprehensive civil codes regarding guns. Unsurprisingly—given the rural nature of many reservations and the deep cultural links to a subsistence lifestyle—many pertain to hunting.⁴⁴ These codes typically set parameters for the taking of game in ways similar to non-Indian country regulations, including regulations regarding the types of guns that can be used in hunting.⁴⁵ In some instances, they set forth exceptions to general criminal gun laws or articulate time, place, and manner restrictions. Such restrictions also address the use of firearms in demonstrations and regulations regarding the sale of guns on the reservation.⁴⁶

Other civil codes regulate guns with regard to particular reservation locales, including casinos⁴⁷ and schools,⁴⁸ debtor–creditor law,⁴⁹ and transportation.⁵⁰ There are also tribally specific rules embodied in the codes, with the use of bows and arrows commonly addressed along with guns.⁵¹

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

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

Tribal governments are positioned to reclaim some of the local control over gun regulation that has historically marked this body of law. Though states may have lost some of their traditional freedom to regulate after *McDonald*, tribes continue to enjoy full flexibility. Tailoring of gun laws may be particularly appealing for tribal governments,⁵² as each tribe's unique culture, geography, history, demographics, and treaty-rights considerations can inform the particular panoply of gun rules and regulations a tribal government may choose to enact and enforce. It is also likely that, in structuring gun laws, tribal governments—like other sovereigns—will take into account the particular criminal statistics of their community.

Such an analysis may be particularly critical for tribal governments. Reservations are notoriously difficult to police, with the safety and security of reservation residents oftentimes suffering as a consequence of the complexities of existing jurisdictional arrangements.⁵³ The vast majority of reservations are home to both Indians and non-Indians, with many being majority non-Indian.⁵⁴ As a general matter, residents are free to move on and off the reservation freely and without impediment.⁵⁵ There is little tracking by any government (tribal, state, federal) as to who is residing on the reservation at any given time.⁵⁶ And reservations have received far less than their fair share of attention in regard to criminal justice resources.⁵⁷ All of these factors make reservation governance all the more difficult, particularly given that one's racial and political status bear on the question of which sovereign may exercise jurisdiction in a given instance.

On the other hand, tribes' freedom to tailor gun laws to meet the needs of local communities empowers Indian nations to define their own relationship to guns and enact laws that are a good cultural, institutional, and fiscal match.⁵⁸ In this sense, tribes may seek coherence and consistency in the face of an otherwise muddled body of federal Indian law—one that has proven faulty, in part, because the wide diversity in language, culture, religion, governance, and history among Indian nations is seldom taken into account.⁵⁹

Because sovereignty and property are so inextricably linked for Indian nations, some brief discussion of differences among tribal land bases is apposite. For example, tribes that were subject to allotment⁶⁰ now must govern territory that is characterized by "checkerboarding," with individual Indian trust allotments, Indian-owned fee land, non-Indian-owned fee land, and tribal trust lands situated side by side, creating convoluted jurisdictional arrangements. As a result, tribal, state, and federal law enforcement officials must work together through a process of on-the-ground arrangements, such as cross-deputization.⁶¹

By contrast, other tribes maintain enormous, largely contiguous swaths of rather remote territory, sometimes spanning several state lines and time zones.⁶² The role of the federal government in investigating and prosecuting crime greatly

impacts governance here, where the closest prosecutor's office and federal court may, literally, be hundreds of miles away.⁶³ On the other hand, in Public Law 280 states, tribes must coordinate with sometimes reluctant state law enforcement officials to address crime on the reservation.⁶⁴ Tribes' specific internal governmental arrangements may further impede streamlined, efficient law enforcement efforts⁶⁵ and may also be negatively impacted by social problems, such as high rates of unemployment and poverty.⁶⁶

Scholars and policymakers have also long complained that too little is known about crime in Indian country.⁶⁷ Despite the recent studies discussed *infra*—as well as evidence suggesting high crime rates in Indian country and a great deal of crime committed by non-Indians in Indian country—the data required to draw concrete conclusions about gun crime in Indian country and who commits it is largely unavailable.⁶⁸ Gaps in the data—long pointed out by tribal members, policymakers, and scholars in the area⁶⁹—have contributed to the problem of inadequate jurisdictional governmental infrastructure.⁷⁰

The collection of data regarding crime involving American Indians is particularly worthwhile in regard to Indian women, who are grossly over-represented in crime-victim statistics.⁷¹ According to Amnesty International, jurisdictional and institutional barriers have made Indian women particularly vulnerable to sexually violent crimes with little access to adequate justice systems.⁷² Anecdotally, there also appears to be an increase in crime across Indian country by non-Indians, particularly as non-Indian gangs and drug cartels increasingly infiltrate Indian reservations.⁷³ But these statistics fail to paint a complete picture of the criminal justice challenges faced by tribes. Notably, many conclusions about crime involving Indians are drawn from nationwide crime data by race but are not Indian-country specific.⁷⁴ Undoubtedly, more empirical studies are needed to draw concrete conclusions about Indian country criminal activity.

At the same time, on a tribe-by-tribe basis, Indian nations do typically have an understanding of the criminal justice issues they face and what the greatest obstacles are to solving those problems.⁷⁵ Tribal leaders, including tribal prosecutors, police officers, and judges are uniquely positioned to gather information—formally or informally—about barriers to public safety in Indian country. This particularized analysis is likely to be more useful to tribes than generalized Indian-country data anyway, as each tribe is free to establish its own laws regarding arms that fit its particular history, culture, and contemporary circumstances.

B. Contemplating Gun Rights in Indian Country

With wide-ranging diversity between tribes, it is neither feasible nor desirable to create a one-size-fits-all paradigm for gun control in Indian country.⁷⁶ Tribes can and do take into account a multiplicity of factors in determining the best gun control laws for their tribal nation, including subsistence hunting, recreational gun use, and ceremonial activities.

In this excerpted essay, however, I place a particular emphasis on the potential for gun laws to speak to reservation crime. In no way do I mean to suggest, of course, that gun laws can ever be an appropriate stand-in for an infusion of adequate resources into Indian country to address public safety concerns. Moreover, I emphasize the critical caveat that the connection between gun control and crime reduction is heavily contested.⁷⁷ But gun ownership and use is heavily regulated all across the United States—more in some places than in others—and it is, thus, correspondingly important to think about how such laws and regulations may work on reservations. Here I discuss three potential models of gun laws tribes may consider implementing.

1. Criminal Laws Banning Guns One way for tribes to deal with the question of gun regulation in Indian country is to enact universal disarmament and criminally ban all firearms and handguns on the reservation. This was essentially the tack taken by Washington, D.C. and Chicago before the Supreme Court determined such bans were constitutionally impermissible. But tribes could enact such bans without federal or state constitutional restraints. Of course, those tribes whose own constitutions contain a right to bear arms would have to overcome their own legal barriers to such a law.⁷⁸ But, absent that potential restriction, tribes have relative freedom to enact such laws.

And complete bans may, for some tribes, constitute a good cultural, governmental, and institutional fit. If the tribe faces a large amount of gun crime committed by tribal members or even other Indians, a criminal prohibition on guns may result in reduced reservation gun crime, since—up to the limits proscribed by the Indian Civil Rights Act—the tribe may criminally prosecute all Indians who violate the ban. Thus, a tribe that either has few non-Indian residents or few non-Indian reservation visitors may find a criminal gun ban an appealing option; tribes would not have to strain their already limited resources by enacting gun laws that discern between authorized and unauthorized uses of guns.

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

But there is even a more potent objection to the suggestion of a universal, criminal gun ban in Indian country. Given that tribes do not have criminal jurisdiction over non-Indians, a criminal gun ban could only be applied to Indians. This would result in a disparate system, one in which Indians—including Indians who are not tribal

members—would be criminally prohibited from having guns, but non-Indians could not be criminally prosecuted by the tribe for gun ownership. Consequently, a tribal criminal gun ban would leave non-Indians uniquely free to arm themselves. If a tribe has particular concerns about crime by non-Indians against Indians, this type of ban could essentially be construed as empowering non-Indians against an unarmed Indian population.

Relatedly, one argument against individual gun ownership is that citizens should rely on our collective sources of state protection rather than private weaponry for security from harm.⁷⁹ But the power of this argument depends on ensuring the state is providing adequate protection to its citizens. It is not clear such protections are readily available in Indian country; on many rural Indian reservations there is grossly inadequate law enforcement,⁸⁰ and jurisdictional, legal, cultural, and institutional barriers make criminal justice difficult. A recent press release from the Fort Hall Reservation in Idaho pointed out, for example, that the reservation traverses four separate counties.⁸¹ When 911 calls come in, they are routed to the county dispatcher who then reroutes the calls to the Fort Hall Police Dispatch Center. Pat Teton, Fort Hall Police Chief reports, “The time lost in having to reroute emergency calls can mean the difference between life and death.”⁸² Moreover, until recently, many rural residents had no physical addresses whatsoever, and conveyed their location through rural route numbers or by giving verbal directions to emergency personnel.⁸³ Accordingly, the rural nature of many Indian reservations may motivate some tribes toward robust gun rights.

Moreover, though *Heller* does not constitutionally limit the actions of Indian nations, its admonitions regarding the right of self-defense may be morally instructive to tribal governments considering such a ban. In particular, if we think of reservations as places where residents are not provided adequate protection by the nation-state,⁸⁴ gun rights and gun control could be viewed in light of existing racial hierarchies and social injustice.⁸⁵ Ultimately, the reservation Indian may find herself in a situation where she cannot count on governmental police power for protection, raising the question of whether such circumstances increase the desire and need for robust rights to arms for the purpose of self-defense.⁸⁶

2. Civil Gun Bans Another option is for tribes to enact a universal gun ban in the form of civil regulation, which would make Indians and non-Indians alike subject to tribal civil liability. The appeal might be fewer strains on the tribal criminal justice system, while still securing the same kind of objectives as would be sought by a criminal ban. Moreover, the ban would be applicable to all those on the reservation and would not—as a criminal ban might do—actually put non-Indians in a stronger position vis-à-vis Indians on the reservation, because a civil gun ban within Indian country arguably would apply to everyone. Nonmembers on non-Indian fee land within the reservation likely would be subject to tribal jurisdiction, as gun regulations clearly fit within *Montana’s* “health or welfare” exception.⁸⁷

Although one potential drawback to a civil ban might be that civil laws do not provide the same panoply of punishment options as criminal law, it is here that innovative tribal solutions come into play. To achieve greater control over nonmembers' on-reservation activity, some tribes have begun to exercise civil regulatory jurisdiction over non-Indians, even in cases where the civil regulation blurs the murky edges of criminal law.⁸⁸ As Matthew Fletcher notes, numerous tribes are now enforcing civil offense ordinances against non-Indians to keep the charges in line with Supreme Court precedent.⁸⁹ In the two cases cited by Fletcher in advocating for greater tribal control over reservations, guns were involved.⁹⁰ In both cases, the tribe charged the perpetrator with a civil offense and imposed civil, rather than criminal, penalties.⁹¹

Anecdotal evidence indicates this practice is increasingly common, particularly as tribes with gaming and entertainment facilities see many more non-Indians coming onto their reservations.⁹² The Nottawaseppi Huron Band of the Potawatomi, for example, imposes civil penalties for actions that typically might be in the purview of a criminal misdemeanor code,⁹³ defining civil wrongs such as public intoxication and possession of drug paraphernalia as "Conduct Deemed Detrimental to Public Health, Safety and Welfare," with a seeming intent to fall within the second *Montana* exception.⁹⁴ And some of these codes relate directly to the regulation of guns, such as the code of the Confederated Tribes of Siletz Indians in Oregon, which includes the offense of purposefully pointing a firearm at another.⁹⁵

Without the power to physically constrain non-Indians, some tribes have turned to their power to exclude as a way to maintain law and order on the reservation.⁹⁶ Tribes use exclusion to remove offenders from the reservation through civil means, without invoking a criminal prosecution or criminal penalties.⁹⁷ The Navajo Nation Code, for example, has a provision for the "[e]xclusion from all lands subject to the territorial jurisdiction of the Navajo Nation courts."⁹⁸ Numerous other tribes have done the same.⁹⁹ A judge for the Tulalip Tribal Court has also discussed using this process to rid the reservation of non-Indian wrongdoers. After a civil exclusion order is issued, she explained, the subject of the order "gets a ride to the reservation border" by tribal police and is instructed not to return.¹⁰⁰ Exclusion of non-Indians, in fact, is an increasingly common practice among tribal governments.

Of course, a civil gun ban also has drawbacks. One potential objection is that, in the absence of adequate criminal penalties, such a ban lacks the enforcement mechanism necessary to act as a deterrent. Moreover, when attempting to exercise civil regulatory jurisdiction over non-Indians in regard to gun ownership and use, tribes would have to prepare for potential state or even federal backlash. Wholesale gun bans are likely to be challenged through litigation, putting questions of the scope of Indian tribal jurisdiction over non-Indians in regard to the highly politicized issue of gun control into the hands of the federal courts, where tribes have—at least in the last two-plus decades—not fared well.¹⁰¹

3. *Other Regulatory Options* Most gun control laws in the United States don't focus on gun bans but contemplate more mediated measures. Tribes' civil regulatory authority presents an opportunity to devise gun control laws that could employ some of these more modest regulation schemes without resorting to wholesale bans.¹⁰² This may come in the form of regulation on types of guns, on uses, or in permitting.

Given the well-documented distinction between the use of shotguns and handguns in committing violent crime, for example, limiting the types of guns that may be lawfully possessed in Indian country could serve as one way for tribes to advance public safety.¹⁰³ A tribe might also require that gun owners stipulate that acquiring a gun permit in Indian country necessarily subjects that person to tribal jurisdiction. Or if a tribe considers tribal members' rights to armed self-defense as central to individual rights, and is equally cognizant of the severity of crime committed on reservations by non-Indians, presumably a tribe could create a civil gun control statute that would ensure the gun rights of tribal members, even if it abridged those of non-members. Though such schemes may potentially raise equal protection issues, such disputes will be resolved in tribal courts, in accordance with tribal interpretations of tribal law.¹⁰⁴ This leaves tribal autonomy and the right of self-determination intact.

Alternately, tribes might also consider amending their constitutions to include a right to bear arms, if one is not already present. Many tribes currently are in a period of constitutional revitalization, and several have recently undergone or are now undergoing changes in their constitutional structure. Given that many tribal constitutions were drafted either with the heavy influence of the Indian Reorganization Act or the Indian Civil Rights Act—neither of which suggested the inclusion of a Second Amendment counterpart—the omission of a right to bear arms may, for many tribes, merely be an oversight that is ripe for readjustment.

A final option may be for tribes to actually mandate gun ownership for reservation security. The model for such mandatory gun laws lies in the history of the United States itself. In early America, laws mandating gun ownership and maintenance were frequently employed to ensure public safety.¹⁰⁵ Contemporary Indian tribes may determine, based on available data, that laws requiring gun ownership, maintenance, and even carry may be appropriate for Indian nations. Of course, it is critically important to understand those laws in historical context and promulgated in conjunction with provisions regarding the formation of a militia, which is not, it seems, an avenue tribes have taken or likely will take.

To be clear, I am in no way making an argument for more expansive tribal constitutional protections for gun rights, advocating more lenient gun laws within Indian country, or even suggesting that more liberal access to guns will reduce crime on reservations or protect reservation residents. The exact opposite may, in fact, be true. Nor am I suggesting that any criminal law or civil regulatory scheme

stands as a substitute for adequate law enforcement in Indian country. To the contrary, what I have attempted to do here is present a set of workable scenarios that touch on the spectrum of plausible legal responses that tribes could employ in the exercise of their sovereignty and toward the goal of addressing reservation security. The outsider status afforded to Indians and to Indian nations that made the current legal lacuna possible, even if accidentally, provides provocative options for tribes attempting to address reservation crime and safety in light of exceedingly constrained jurisdictional limits, and in the absence of a full complement of governance options.

The convergence of the gun and the Indian (nation) is a story of the racially tinted American dream, the un-“we,” and the hundreds of nations within this nation that remain, for better or worse, outside the polity. But Indian otherness has, perhaps unwittingly, created a legal chasm within which tribes may engage in innovative governance to address reservation security. Their extraconstitutional status affords them the freedom to tailor their gun laws and engage community-based solutions to reservation ills that have not been fully explored to date. As sovereign nations unconstrained by the federal Constitution and, concomitantly, the Supreme Court’s interpretation of the Second Amendment, tribal governments can exercise local control over guns and devise systems and codes in line with their tribally distinct needs. The freedom from restraint means each tribe’s own culture, history, current legal status, and contemporary governance challenges will set the standard for which courses of action to take to address governance issues.

CONCLUSION

Ultimately, then, this excerpted essay is as much about tribal sovereignty as it is about gun policy.¹⁰⁶ And Indian nations’ sovereignty is expressed by each tribal nation individually. Proposing one solution would not only be legally impossible but would also be unwise. However, the convergence of the unique legal status of Indians, Indian nations, and guns with the availability of innovative governance solutions in Indian country allows tribes to address issues of crime, violence, racial inequities, and social justice in ways that would be impermissible if undertaken by federal or state governments.¹⁰⁷ Suggesting one solution for all tribes—other than a uniquely shared freedom to define their own path forward—would undermine tribal sovereignty and ultimately derail the purpose of the project: to emphasize the sovereign nature of tribal governments and their concomitant freedom to devise gun policy that works for their own nation.

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1. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.
 2. 554 U.S. 570, 636 (2008). One scholarly article describes *Heller*’s holding as follows:

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

Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1043 (2009).
 3. 130 S. Ct. 3020, 3050 (2010).
 4. The Supreme Court has only heard five Second Amendment cases in its history, none of them pertaining to Indian tribal governments. See *McDonald*, 130 S. Ct. 3020; *Heller*, 554 U.S. 570; *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875).
 5. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896).
 6. See Pub. L. No. 90-284, §§ 201–03, 82 Stat. 73, 77–78 (1968) (codified as amended at 25 U.S.C. §§ 1301–03 (2006)).
 7. AREA OF INDIAN RESERVATION AND TRUST LANDS IN STATES AND COUNTIES: BASED ON DATA EXTRACTED FROM THE TRUST ASSET AND ACCOUNTING MANAGEMENT SYSTEM (TAAMS) ON MARCH 30, 2009 (2009) (on file with the Bureau of Indian Affairs Division of Land Titles and Records). Though this article focuses on land as a geographic homeland wherein tribes face a panoply of governance issues, as has been well-documented, land and indigenous peoples’ connection to it forms the basis of virtually every aspect of indigenous culture, from religion to language to ceremony. See, e.g., Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1112–13 (2009) (explaining the basis of all things sacred in native communities as attached to land); Kristen A. Carpenter, *Recovering Homelands, Governance, and Lifeways: A Book Review of Blood Struggle: The Rise of Modern Indian Nations*, 41 TULSA L. REV. 79, 79–80 (2005) (“Tribal land ownership is a key factor in community revitalization, allowing tribes to foster tribal jurisdiction, economic development, housing, environmental health, subsistence patterns, and spirituality. Thus, the recovery of Indian property represents a dramatic turn of events, given both the overwhelming history of land loss and importance of a growing land base to contemporary survival.” (footnote omitted)).

8. The scope of tribal jurisdiction over reservation residents—whether member Indian, nonmember Indian, or non-Indian—is discussed fully herein at Section III.A.
9. With over 560 Indian tribes in the United States, enormous diversity between tribes makes generalizations regarding crime difficult to compare across reservations. Nevertheless, much of the crime data collected points to extremely high rates of crime, particularly violent crime, in Indian country. See STEWART WAKELING ET AL., U.S. DEP'T OF JUSTICE, NCJ NO. 188095 POLICING ON AMERICAN INDIAN RESERVATIONS 2, 13–22 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.
10. See, e.g., Transcript of Oral Argument at 8, *Heller*, 554 U.S. 570 (No. 07-290) (quoting Justice Kennedy as wondering whether the Second Amendment had anything to do with “the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that.”).
11. For Indian people today, threats to security are often not due to an Indian presence, but a non-Indian one. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 8 (2004), available at http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.
12. See Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976) (calling tribal criminal justice a “jurisdictional maze”); Elizabeth Ann Kronk & Heather Dawn Thompson, *Modern Realities of the “Jurisdictional Maze” in Indian Country: Case Studies on Methamphetamines Use and the Pressures To Ensure Homeland Security*, FED. LAW., Mar.–Apr. 2007, at 48, 48.
13. See, e.g., Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010) and 28 U.S.C. § 1360 (2006)). As a Public Law 280 state, California long took the position that Public Law 280 barred tribal criminal jurisdiction. See *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1197–98 (C.D. Cal. 1998).
14. See General Crimes Act, 18 U.S.C. § 1152 (2006); *United States v. McBratney*, 104 U.S. 621 (1881) (holding that state has jurisdiction over crimes committed by a non-Indian against a non-Indian in Indian country); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561–62 (1832) (holding that state criminal laws had no role in Indian country).
15. See 18 U.S.C. § 1152.
16. See 18 U.S.C. § 1153 (covering fifteen “major” crimes).
17. See 25 U.S.C. § 1301(2).
18. See 435 U.S. 191, 212 (1978), *superseded by statute in part*, Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (1990) (codified at 25 U.S.C. § 1301(2), (4)) (clarifying that Indian tribes may assert jurisdiction over nonmember Indians).
19. There are exceptions for Public Law 280 jurisdictions, where the state will prosecute crimes committed in Indian country, though tribes retain concurrent jurisdiction over crimes committed by Indians. *But see* Carole Goldberg & Heather Valdez Singleton, Research Priorities: Law Enforcement in Public Law 280 States 3 (unpublished manuscript), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/209926.pdf> (“Yet the U.S. Supreme Court has yet to resolve the matter, and the Attorney General of California, as recently as 1995, took the position that Public Law 280 divested tribes of criminal jurisdiction.”).

20. See Assimilative Crimes Act, 18 U.S.C. § 13; General Crimes Act, 18 U.S.C. § 1152; see also Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1014–16 (2008) (describing law enforcement in the United States generally as a “community endeavor” and explaining how this differs in Indian country).
21. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 (2013).
22. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 4 (1831) (“Cherokee nation, and the other nations have been recognized as sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self government within that territory.”).
23. See *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 805 (9th Cir. 2011) (per curiam).
24. 450 U.S. 544 (1981).
25. *Id.* at 565–66.
26. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (holding that the tribal court had no jurisdiction over a land dispute arising on the reservation with an off-reservation bank); *Nevada v. Hicks*, 533 U.S. 353, 364–66 (2001) (holding that the tribal court lacked jurisdiction over a case involving a search warrant by state officials executed on Indian trust land within the reservation). As a general matter, states cannot exercise civil jurisdiction in Indian country where state law has been preempted by a federal and tribal statutory scheme, as, I would argue, is the case with gun control. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343–44 (1983).
27. This section is meant to give an anecdotal flavor to the issue of gun laws in Indian country but does not reflect a comprehensive, empirical examination.
28. See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 895–98 (2003) (discussing the general process by which tribes adopted individual rights provisions); Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* 184, 195–96 (Eric D. Lemont ed., 2006) (“Today, establishment of separation of powers is a common theme of many tribes’ constitutional reform efforts.”). This is not to say that a tribe is without a quasi-constitutional structure, even in the absence of a written constitution. See Kalt, *supra*, at 188 (explaining how, for centuries, the “Cochiti Pueblo has sustained continuity of collective organization for collective decision- and rule-making, although this organization was never written down as a ‘constitution.’”).
29. See, e.g., ZUNI TRIBE CONST. art. III, § 1.
30. But see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (suggesting that tribal sovereign immunity may be a barrier to such lawsuits); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1108 (2007) (same).
31. The Navajo Nation functions under a code rather than a constitution and also has a “[r]ight to keep and bear arms,” which reads: “The right of the people to keep and bear arms for peaceful purposes, and in a manner which does not breach or threaten the peace or unlawfully damage or destroy or otherwise infringe upon the property rights of others, shall not be infringed.” NAVAJO NATION CODE ANN. tit. 1, § 6.
32. See MILLE LACS BAND OF OJIBWE CONST. art. V, § 1(f) (Draft, July 10, 2010); ZUNI TRIBE CONST. art. III, § 1; LITTLE RIVER BAND OF OTTAWA CONST. art. III, § 1(k); SAINT REGIS MOHAWK CONST. art. IV, § 1; see also CHEYENNE & ARAPAHO CONST. art. I, § 1(p)

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

33. *See, e.g.*, POARCH BAND OF CREEK INDIANS TRIBAL CODE § 8-6-17 (defining carrying a concealed weapon as a crime if committed by any person, “other than an authorized law enforcement officer”); Fort Peck Assiniboine & Sioux Tribes v. Stiffarm, No. AP-019, 1987 Mont. Fort Peck Tribe LEXIS 6, *5 (Fort Peck Ct. App. Aug 12, 1987) (citing the tribe’s concealed weapon statute).
34. *See, e.g.*, BAY MILLS LAW & ORDER CODE § 610 (concealed weapons code); BLACKFEET TRIBAL LAW & ORDER CODE ch. 5, pt. IV, § 3 (same); HOPI INDIAN TRIBE, LAW & ORDER CODE § 3.3.12 (same).
35. *See, e.g.*, CONFEDERATED SALISH AND KOOTENAI TRIBES LAWS § 2-1-1204 (criminalizing carrying a concealed weapon in a prohibited place); ELY SHOSHONE CRIM. CODE § 202.265 (restricting carrying a firearm on school property).
36. *See, e.g.*, BAY MILLS LAW & ORDER CODE § 609(5) (defining “Criminal Sexual Conduct” as an offense where the offender may be “armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon”); BLACKFEET TRIBAL LAW & ORDER CODE ch. 5, pt. II, § 5(E)(2) (defining “Domestic Abuse” as an offense that may involve “the use or threatened use of a weapon”); CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. III, § 213(b) (defining “Simple Assault” as an act by an offender who “recklessly or negligently causes bodily injury to another with a dangerous weapon”); SWINOMISH TRIBAL CODE § 4-02.100(E)(4) (defining “Stalking” as a “Class B offense” if “the stalker was armed with a dangerous weapon, while stalking the person”).
37. *See, e.g.*, COUSHATTA TRIBE OF LA. CODES § 3A.02.010(a)(2) (allowing officers to seize weapons when responding to a domestic violence crime); WHITE MOUNTAIN APACHE CRIM. CODE § 6.3(D)(2) (allowing police officers to remove weapons discovered during a domestic violence investigation); *see also* ELY SHOSHONE TRIBAL CODE § 171.146 (permitting officers to seize weapons when responding to any arrest).
38. *See, e.g.*, CHEROKEE CODE §§ 14-34.15(a), 14-40.1(p)(2)(e); NEZ PERCE CODE § 7-2-18(b)(5); *see also* COUSHATTA TRIBE OF LA. CODES § 3A.04.010(b)(4) (conditioning pretrial release on prohibition of firearm possession); ELY SHOSHONE TRIBAL CODE § 176.337 (providing for court notification of convicted domestic-abuse defendant concerning future restrictions on gun possession).
39. *See, e.g.*, ASSINIBONE & SIOUX COMPREHENSIVE CODE OF JUSTICE tit. VII, § 401; CHEROKEE CODE § 14-10.30; CHICKASAW NATION CODE § 5-1506.8(A) (“It shall be unlawful to carry a Dangerous Weapon concealed on the person”); *id.* § 5-1506.7; HOPI INDIAN TRIBE, LAW & ORDER CODE § 3.3.12; NAVAJO NATION CODE ANN. tit. XVII, § 320; OGLALA SIOUX TRIBE CRIM. OFFENSES CODE §§ 510–11; WHITE MOUNTAIN APACHE CRIM. CODE § 2.71.
40. NAVAJO NATION CODE ANN. tit. XVII, § 320(B)(4).

41. SAN ILDEFONSO PUEBLO CODE tit . VI, § 13.55(b).
42. SHOSHONE & ARAPAHO FISH & GAME CODE ch. 4.
43. *See id.* § 16-4-1(1).
44. *See, e.g.*, CHEROKEE CODE § 113-10 (outlining the restrictions on weaponry used to hunt); MILLE LACS BAND STAT. ANN. tit. XI, § 4038 (prohibiting hunting with a firearm while under the influence of alcohol); SHOSHONE & ARAPAHO FISH & GAME CODE § 16-8-12 (“Firearms Restrictions”); SILETZ TRIBAL CODE § 7.022 (applying state regulations to the weapons used in hunting); WHITE MOUNTAIN APACHE, GAME & FISH CODE § 4.14 (“Prohibited Activities: Occupation and Use”); *id.* § 5.16 (“Prohibited Devices”); *id.* § 5.19 (“Prohibited Activities: Hunting”).
45. *See, e.g.*, WHITE MOUNTAIN APACHE, GAME & FISH CODE §§ 2.2, 5.16(A), 5.19(A)(3).
46. *See, e.g.*, CHEROKEE CODE §§ 144-1 to -2 (regulating firearm and handgun sales); *id.* § 167-2(d) (“It shall be unlawful for any person participating in, affiliated with, or present as a spectator at any parade, demonstration, picket line or exhibition to willfully possess or have immediate access to any dangerous weapon.”).
47. *See, e.g.*, ABSENTEE SHAWNEE GAMING ORDINANCE § 323 (disallowing firearms on gaming premises except by permission of Gaming Commission); NEZ PERCE CODE § 6-2-13(n)(1) (regulating employees’ possession of firearms and weapons on gaming premises).
48. GRAND TRAVERSE BAND CODE tit. XVI, § 213(d)(5) (allowing an adult affiliated with a school to exert physical force against a student in order to seize a dangerous weapon).
49. *See* CHICKASAW NATION CODE § 5-215.19(A)(14) (exempting one handgun or rifle from being seized from a debtor); CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. IV, § 310(a)(15) (same); CONFEDERATED SALISH AND KOOTENAI TRIBES LAWS § 4-3-317(9) (exempting personal property, including firearms, up to \$5000 aggregate value from execution of a judgment).
50. BAY MILLS SNOWMOBILE CODE § 1614 (providing that firearms must be unloaded, locked, and stored if being transported by snowmobile); SILETZ TRIBAL CODE § 12.124 (criminalizing the discharge of a weapon on or across a highway); YANKTON SIOUX TRIBAL CODE § 11-8-080 (defining shooting from or across a public highway as a civil violation).
51. *E.g.*, BAY MILLS SNOWMOBILE CODE § 1614.
52. *Cf.* Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009) (describing the variance in gun control laws amongst different states); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights To Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 221–22 (2009) (detailing state and local regulation of concealed guns despite right to bear arms).
53. *See supra* note 9 and accompanying text.
54. L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 134 tbl.4 (1994) (detailing that in eight of the ten most populated reservations, the majority of residents were non-Indian).
55. Riley, *supra* note 29, at 1066, 1068.
56. *But see* Sex Offender Registration and Notification Act (SORNA) § 127, 42 U.S.C. § 16917(a)(1); National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,049–50 (July 2, 2008) (detailing tribal authority to monitor sexual offenders residing in Indian territory). In addition, the community and family-

based nature of Indian tribes makes it likely that tribes are most aware of the presence of tribal members, who also participate in ceremonial and community life, as well as seek goods and services from their tribal governments.

57. See CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 24–26 (2007), available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/centers%20and%20programs/native%20nations/pl280%20study.pdf>; Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 721–40 (2006) (detailing how the lack of resources in Indian country bears on criminal justice at the tribal and federal levels).
58. See Stephan Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't* 16 (Joint Occasional Papers on Native Affairs, Paper No. 2005-02, 2005).
59. There are over 560 federally recognized Indian nations in the United States and many more that are unrecognized.
60. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, *repealed by* Indian Land Consolidation Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007. The statute opened reservation lands to white settlement, with “allotments” set aside for tribal members.
61. See, e.g., Intergovernmental Co-operative Agreement, Citizen Band Potawatomi Indian Tribe of Okla.–Pottawatomie County, Okla., Jan. 4, 1995 (detailing a crossdeputization agreement between the Citizen Band Potawatomi Tribe and Pottawatomie County of Oklahoma to coordinate the authority of commissioned officers of both parties for better law enforcement).
62. Washburn, *supra* note 57, at 711. See generally Dave Smith, *Spring Forward, Fall Back: Time Zone Differences Can Wreak Havoc with Police Reports and More*, POLICE, Dec. 2010, <http://www.policemag.com/Channel/Patrol/Articles/Print/Story/2010/12/Spring-Forward-Fall-Back.aspx> (“All Tribal paperwork including citations had to be on daylight time and all Arizona paperwork had to be on MST, which also made for interesting moments of confusion. . . . [W]hen I patrolled the Four Corners Monument I drove through four states in 10 seconds!”).
63. See *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 49 (2008) [hereinafter *Declination Hearing*] (statement of Janelle F. Doughty, Director, Dep’t of Justice and Regulatory Affairs, S. Ute Indian Tribe), available at http://www.indian.senate.gov/public/_files/September182008.pdf (noting that the nearest federal courthouse to the Southern Ute Indian reservation is 350 miles away); Washburn, *supra* note 20, at 1022 (detailing expansive distances that separate tribal communities and federal court houses, and the challenges this creates for federal prosecutors and reservation residents).
64. See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1425–26 (1997).
65. The Hopi, for example, live on a reservation entirely surrounded by the Navajo Nation and have a governance system based on kin and clan relationships that are decentralized, with power largely situated at the village level. See, e.g., CONST. & BY-LAWS OF THE HOPI TRIBE art. III, § 2 (describing powers reserved to Hopi villages); Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL’Y 761, 768–73 (2000) (explaining the process by which the Hopi courts enforce village decisions and police enforce court orders); Charles F. Wilkinson, *Home Dance, the*

Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest, 1996 BYU L. REV. 449, 458 (describing Hopi societal structure as defined by largely individual, decentralized Hopi villages, each with its own unique decision-making processes).

66. See generally Washburn, *supra* note 57, at 766–72 (discussing obstacles to access for defendants in Indian country).
67. See, e.g., *id.*, at 775–76.
68. See generally DIANE J. HUMETEWA, 2009 ARIZONA INDIAN COUNTRY REPORT 28–68 (2009), available at http://www.justice.gov/usao/az/reports/2009_Report.pdf (providing a sample of Indian country cases prosecuted by the Office of the U.S. Attorney for the District of Arizona from July 1, 2008, to July 1, 2009, but without capturing the incidence of gun crime or the race of victims); PERRY, *supra* note 11, at v (compiling data from 1992 to 2002 and positing that “[a]pproximately 60% of American Indian victims of violence, about the same percentage as of all victims of violence, described the offender as white”). However, Steven Perry’s report does not provide statistics specific to Indian country crime. See PERRY, *supra* note 11, at 6.
69. See, e.g., GOLDBERG & CHAMPAGNE, *supra* note 57, at 250, 274 (discussing the severe lack of reliable data surrounding Indian country criminal justice, which renders scholars ill-equipped to effectively compare Public Law 280 and non-Public Law 280 jurisdictional frameworks); Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL’Y 121, 122 (2004) (highlighting the gap in Indian country criminal justice scholarship related to issues of sexual violence); Washburn, *supra* note 57, at 776 (advocating for a comprehensive analysis of the challenges facing Indian country criminal justice to develop potential solutions).
70. See, e.g., Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL’Y 59 (2003) (addressing the negative impact of the *Oliphant* decision on Indian country); Washburn, *supra* note 57, at 775–76 (explaining the ineffective execution of federal jurisdiction in Indian country). See generally Goldberg-Ambrose, *supra* note 64 (exploring the challenges facing Indian communities impacted by the Public Law 280 jurisdictional framework).
71. PERRY, *supra* note 11, at v (“[T]he rate of violent victimization among American Indian women was more than double that among all women.”).
72. AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 27–39 (2007) (exploring the jurisdictional challenges hindering Native women’s access to effective justice following sexual assault and other related crimes).
73. See, e.g., Eric Eckholm, *In Drug War, Tribe Feels Invaded by Both Sides*, N.Y. TIMES, Jan. 24, 2010, <http://www.nytimes.com/2010/01/25/us/25border.html>; Ken Ellingwood, *Tribes Are Caught on the Border*, L.A. TIMES, May 8, 2000, <http://articles.latimes.com/2000/may/08/news/mn-27815>.
74. See Carole Goldberg & Kevin Washburn, *Lies, Damn Lies, and Crime Statistics*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 25, 2008), <http://indiancountrytodaymedianetwork.com/ictarchives/2008/07/25/goldberg-and-washburn-lies-damn-lies-and-crime-statistics-93310> (pointing out that the Bureau of Justice Statistics’ statistics do not take account of whether the crime occurred within Indian country). Given the percentage of Indians in the general population (around 1–2%), off-reservation crime data provides an insufficient basis upon which to assess Indian country criminal justice issues.

75. See Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1110–16 (2010) (arguing for greater tribal, localized control over criminal justice in Indian country).
76. As empirical studies have shown, tribes are more successful in the long run when there is a good match between “formal governing institutions and contemporary indigenous ideas.” See Cornell & Kalt, *supra* note 58, at 7, 16.
77. COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT’L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2 (Charles F. Wellford et al. eds., 2005).
78. See *supra* notes 30–31.
79. See generally RAMSEY CLARK, CRIME IN AMERICA 107 (1970) (arguing against individual gun ownership for the purposes of self-defense, calling such tactics “anarchy, not order under law—a jungle where each relies on himself for survival,” which goes against the idea of government fulfilling its obligation to protect citizens).
80. See Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 788–89 (2006) (detailing the extremely rural nature of many Indian reservations and the concomitant problems of crime and insufficient law enforcement).
81. Press Release, Shoshone-Bannock Tribes, Tribes Eye Dedicated 911 System (June 24, 2011), available at <http://www.shoshonebannocktribes.com/documents/pressreleases/addressing.pdf>.
82. *Id.*
83. See *id.*
84. See Goldberg-Ambrose, *supra* note 64, at 1410–11; Washburn, *supra* note 80, at 710–13; Michael Riley, *Justice: Inaction’s Fatal Price*, DENVER POST, Nov. 13, 2007, http://www.denverpost.com/ci_7437278 (noting that an attempted murderer’s identity and address—an Indian on a reservation—were known but “the FBI failed to make an arrest for seven months” and also noting the enormous caseload carried by FBI agents assigned to the Blackfeet reservation).
85. Cf. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 318 (1991) (“With the exception of Native Americans, no people in American history have been more influenced by violence than blacks.”).
86. See *id.* at 359.
87. *Montana v. United States*, 450 U.S. 544, 566 (1981). As discussed, *infra*, there would likely be heavy opposition by non-Indians to such an assertion of tribal authority.
88. See Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1002–14 (2010) (advocating Indian resistance to federally defined civil jurisdiction over non-Indians); Hallie Bongar White, Kelly Gaines Stoner & James G. White, *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 431 (2008) (discussing the possibility of exercising civil jurisdiction over non-Indians in domestic violence, sexual assault, and stalking cases in the absence of criminal jurisdiction).
89. Fletcher, *supra* note 88, at 1015.
90. *Id.* at 1015 & nn. 227–28.
91. *Id.* at 1015–16.

92. *See, e.g., Bill Would Give Tribal Police Jurisdiction over Non-tribe Members*, KOMO NEWS (Jan. 30, 2008, 5:22 PM PST), <http://www.komonews.com/news/local/15044786.html> (addressing the Tulalip Reservation’s new influx of non-Indian customers of tribal enterprises, and the authority of the Tulalip Police Department to maintain public-safety efforts); *see also* Jeff Barnard, *Oregon’s Biggest Casino is a Major Philanthropist*, KATU.COM (May 24, 2004, 5:19 AM PST), <http://www.katu.com/news/business/3615016.html> (explaining the positive impact of the Confederated Tribes of Grand Ronde’s successful casino on the State of Oregon’s economy); Nicholas K. Geranios, *Ten Years Later, Tribe’s Casino Venture Paying Off*, LAS VEGAS SUN, Dec. 16, 2003, <http://www.lasvegassun.com/news/2003/dec/16/ten-years-later-tribes-casino-venture-paying-off/> (addressing the success of Coeur d’Alene Tribe of Indians’ successful casino operations).
93. NOTTAWASEPPI HURON BAND OF THE POTAWATOMI INDIANS LAW & ORDER CODE tit. VIII, ch. 9, §§ 306, 308.
94. *Id.* §§ 301–16; *see also* BLUE LAKE RANCHERIA ORDINANCES no. 04-2000 (“Nuisance Ordinance”); CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, PUBLIC SAFETY ORDINANCE (c)(1) (“No person shall cause or permit a nuisance on Tribal Lands.”); PAWNEE TRIBE OF OKLA., LAW & ORDER CODE §§ 537, 539–40, 552. The four provisions of the Pawnee Tribe’s code—Possession of an Alcoholic Beverage, Abuse of Psychotoxic Chemical Solvents, Dangerous Drug Offense, and Livestock Offense—authorize a civil proceeding as an appropriate response to a violation. PAWNEE TRIBE OF OKLA., LAW & ORDER CODE §§ 537, 539–40, 552; *see also* NOTTAWASEPPI HURON BAND OF THE POTAWATOMI INDIANS LAW & ORDER CODE tit. XIII, ch. 9, §§ 303, 309 (applying civil penalties to public intoxication and drug paraphernalia possession).
95. SILETZ TRIBAL CODE § 12.103(s).
96. These are codes intended to provide for the exclusion and expulsion of nonmembers from tribal territory. *See, e.g.,* CHEROKEE CODE ch. 2; COLVILLE CONFEDERATED TRIBES CODE ch. 3-2; FORT McDOWELL YAVAPAI NATION, LAW & ORDER CODE ch. 15; HOOPA VALLEY TRIBAL CODE tit. V; *see also* White, Stoner & White, *supra* note 88, at 443 (discussing tribes’ right to exclude or banish non-Indians).
97. *See* White, Stoner & White, *supra* note 88, at 443.
98. NAVAJO NATION CODE ANN. tit. XVII, § 204(D)(4). The Nation is also clear about the circumstances under which an order of exclusion may be entered against a nonmember. *See id.* § 204(A), (D).
99. *See, e.g.,* GRAND TRAVERSE BAND CODE tit. XIV, ch. 9; MILLE LACS BAND STAT. ANN. tit. II, § 3004 (defining exclusion as a possible penalty for violating a civil offense); SILETZ TRIBAL CODE § 9.028 (defining exclusion as a possible civil penalty for violating offenses outlined in the tribes’ Cultural Resource Lands and Sacred Sites Ordinance).
100. Teresa Pouley, Judge, Tulalip Tribal Court, Public Address at the Federal Bar Association 36th Annual Indian Law Conference (Apr. 7, 2011) (quotation based on author’s notes).
101. *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (discussing racist undercurrents in federal Indian jurisprudence).
102. Of course, civil gun codes may also create a panoply of options for tribes to regulate hunting, use of firearms in ceremonies, recreational gun use, and the rest. The focus

- here on gun laws as pertaining specifically to crime is intentional and in no way is meant to imply a limitation on tribes' governance over gun usage more generally.
103. See Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 ALB. GOV'T L. REV. 440, 446 (2008).
 104. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978). There is an equal protection provision in the Indian Civil Rights Act, but equal protection claims against tribal governments would have to be brought in tribal court. See *id.* at 58–59.
 105. See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 113 (2011). Of course, in the colonial period, these laws were designed to protect whites and the burgeoning Union against potential uprisings by slaves or against attack from hostile Indian tribes or competing colonial powers. See *id.* at 115–16.
 106. To be clear, I am not advocating for any particular outcome, protection, or laws in regard to guns, nor am I making any claim about the relationship between guns and safety. The empirical evidence regarding whether legal protection for gun rights contributes to or lessens the crime rate is politically charged, hotly contested, and ultimately inconclusive.
 107. This is, of course, assuming that there is any connection between gun control and crime, which is an open question.