



“[H]OSTILE INDIAN TRIBES . . . OUTLAWS,
WOLVES . . . BEARS . . . GRIZZLIES AND
THINGS LIKE THAT?” HOW THE SECOND
AMENDMENT AND SUPREME COURT
PRECEDENT TARGET TRIBAL SELF-DEFENSE

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INTRODUCTION

This article examines the history of self-defense in America, including the right to bear arms, as related to Indian tribes, in order

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to shed light on how the construction of history affects tribes today. As shown below, Indians are the original caricatured “savage” enemy that white Americans believed they needed militias and arms to defend themselves from. Since the early days, others have ably documented that the perceived enemies have multiplied to include African-Americans, immigrants, and the lower classes.² But this has not meant that Indians have been let off the hook. Instead, they not only remain saddled with whites’ nightmare images of their savagery, but they continue to be punished for the popular perception of them in very concrete ways. Specifically, they are repeatedly and increasingly denied the right to govern on grounds of their untrustworthiness, and it is entirely possible that the lawlessness on Indian reservations has continued as a result of this very racialization.

This article first examines evidence that the historical meaning of self-defense in America (including that of the Second Amendment) was predicated largely on the premise that European, especially English, colonists needed to defend themselves against “savage” Indians. The article then argues that the cultural myth³ of white America’s need to defend itself against Indians obscures the fact that Indians who engaged in armed conflicts with the United States or the colonies⁴ were, in many instances, actually defending

² See, e.g., David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 469 (1999).

³ In using the word “myth,” I do not use the word to describe a story that is known by its tellers to be false. Instead, I mean to invoke Richard Slotkin’s definition:

[M]yths are stories drawn from a society’s history that have acquired through persistent usage the power of symbolizing that society’s ideology and of dramatizing its moral consciousness—with all the complexities and contradictions that consciousness may contain. Over time, through frequent retellings and deployments as a source of interpretive metaphors, the original mythic story is increasingly conventionalized and abstracted until it is reduced to a deeply encoded and resonant set of symbols, “icons,” “keywords,” or historical clichés. In this form, myth becomes a basic constituent of linguistic meaning and of the processes of both personal and social “remembering.”

RICHARD SLOTKIN, GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA 5 (1992). Thus, I do not use the word “myth” to describe a story that is known by its tellers to be false.

⁴ It is important to remember that not all tribes engaged in wars or other violent conflicts with the United States or the colonies. See, e.g., Eileen Luna-Firebaugh, *‘Att Hascu ‘Am O ‘I-oi? What Direction Should We Take?: The Desert People’s Approach to the Militarization of the Border*, 19 WASH. U. J.L. & POL’Y 339, 346 (2005) (stating that the Tohono O’odham Tribe was historically and continues to be comprised of “peaceful farmers” who did not



themselves and their homelands from white aggression and encroachment on the lands they owned and had been using for centuries.

The article next argues that this self-defense mythology and the oppressive history that it obscures have had important historical consequences for tribes and continue to have concrete consequences for tribes today. These continuing consequences are largely due to the fact that tribes today continue to be viewed as “savage” in the popular imagination and by Supreme Court Justices. The article further argues that such consequences can be understood as a deprivation of the right to self-defense in a figurative sense.

More specifically, as scholars such as Robert Williams have documented, the Supreme Court implicitly relies on this racialized characterization to deny tribes their sovereign powers. Thus, despite the fact that federal and state governments no longer have statutes and rules in place that deny Indians the right to carry guns, because tribes continue to be punished for their past efforts to defend themselves, in a very real sense Indians today lack the right to self-defense. Furthermore, the Supreme Court’s continual abrogation of tribal sovereign rights render tribes and the individuals living on reservations, both Indian and non-Indian, virtually defenseless against everything from predatory lending to violent crime. As a result, the depictions of tribes as savages are depriving tribes and Indians of their right to self-defense in a figurative sense on a macroscopic level. Additionally, America’s cultural understanding of tribes as warlike savages who perpetrated aggressions on innocent white colonists may well be working to subconsciously motivate the federal government to turn a blind eye to the horrific levels of violent crime that plague Indian reservations in the United States.

This article concludes that, as a nation, we must make an honest attempt to reckon with this checkered history and that, ultimately, we need to reevaluate both key Indian law precedent and the right to self-defense embodied in the Second Amendment. At a minimum, Indians’ and tribes’ constitutional rights must be protected prospectively, both in the context of self-defense as traditionally understood and more widely. Moreover, limitations

undertake wars against the United States and therefore, suggesting that the term “savage tribes” in the Treaty of Guadalupe-Hidalgo should not be understood to refer to the Tohono O’odham); Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL’Y REV. 271, 274 (2001) (suggesting that peaceful tribes, *i.e.*, those who had not made war on the United States, were less likely to be federally recognized because they may well have been completely unknown to the United States government).

on tribal jurisdiction are, in many cases, grounded on notions of savagery and should be regarded as inherently suspect. Finally, as a society, we must question all of our assumptions about tribes and Indians.

A. DEFINITIONS OF “SELF-DEFENSE.”

The term “self-defense” has both an individual and a collective meaning, and the jurisprudence of the Second Amendment has varied its focus between the two meanings. On an individual level, “self-defense” refers to “[t]he use of force to protect oneself, one’s family, or one’s property from a real or threatened attack.”⁵ On a collective level, under international law, the right of “self-defense” allows a nation to respond with force when an armed attack occurs and may also allow the use of force to repel an imminent attack.⁶ For tribes, collective self-defense has historically been more important, but, as shown below, federal, state, and colonial governments have historically sought to prevent individual Indians from bearing arms, presumably to thwart the exercise of tribes’ collective right to self-defense.

In this article, I also use the term “self-defense” more broadly, as a constitutive role of government, and accordingly examine what aspects of sovereignty are necessary to a government’s ability to defend its people from crime and other types of depredations.

B. THE SECOND AMENDMENT.

By protecting the right to bear arms, the Second Amendment of the United States Constitution codifies the right to self-defense, on an individual level, a collective level, or on both levels, depending on one’s interpretation. It provides that “[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.”⁷

In terms of original intent, the first portion of the Second Amendment, “from “[a] well-regulated militia” through “free state,” appears to have been designed to protect against the potential tyranny of the federal government, specifically the

⁵ BLACK’S LAW DICTIONARY 1481 (9th ed. 2009).

⁶ See Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?* 5 WASH. U. J.L. & POL’Y 51, 58 (2001). *Accord supra* note 5, at 1481 for a definition of “self-defense” under international law as “[t]he right of a state to defend itself against a real or threatened attack”; Thomas M. Franck, *What Happens Now? The United States After Iraq*, 97 AM. J. INT’L L. 607, 611 (2003) (discussing the possibility that the right of “self-defense” under the U.N. Charter has come “through practice, to include a right of action against an imminent (as opposed to an actual) armed attack”).

⁷ U.S. CONST. amend. II.



tyranny that would occur if the federal government were to use a standing army to oppress unarmed state citizens.⁸ As for the second portion, relating to “the right . . . to keep and bear Arms,” there is disagreement as to whether this confers an individual right or only a collective right. Those who see the Second Amendment as conferring a collective right view the right to bear arms as pertaining solely to militia service and therefore, sometimes argue that the Amendment is now defunct.⁹ By contrast, the traditional individual rights view of the Amendment was that, because the militia was comprised of all adult white male citizens and arguably existed independently of the legislature, every person has an implicit individual right to bear arms.¹⁰ By the mid-1990s, however, scholars had begun to construe the second clause of the Amendment, protecting the right of the people to bear arms, as divorced in meaning from the first clause, which relates to militia service.¹¹ Therefore, such scholars concluded that there was an individual right to bear arms that was unrelated to militia service.

In *District of Columbia v. Heller*,¹² the Supreme Court adopted this newly minted individualist understanding of the Second Amendment, thus enshrining as constitutional law, the individual’s right to bear arms; “to defend himself and his family from criminals”¹³ More remarkably, the *Heller* Court stated that military-style arms could be regulated or even prohibited consistently with the Amendment and therefore, sanctioned restrictions on the use of arms for militia purposes that had previously been thought to be the core of the Second Amendment.¹⁴

⁸ See, e.g., H. Richard Uviller & William G. Merkel, *Muting the Second Amendment: The Disappearance of the Constitutional Militia*, in *THE SECOND AMENDMENT IN LAW & HISTORY* 148, 149 (Carl T. Bogus ed., 2000) (discussing the principal drafters’ intent); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 *CHI.-KENT L. REV.* 103, 144, 150-51 (2000) (discussing the ratifiers’ intent and the concerns of Antifederalists and Federalists generally).

⁹ See, e.g., Ulliver & Merkel, *supra* note 8, at 150, 178; Williams, *supra* note 2, at 393-94.

¹⁰ See, e.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204, 214 (1983); Carl T. Bogus, *Race, Riots, and Guns*, 66 *S. CAL. L. REV.* 1365, 1372-73 (1993); Rakove, *supra* note 8, at 111.

¹¹ Reva B. Siegel, *Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*: 122 *HARV. L. REV.* 191, 239-240 & n.250 (2008).

¹² 554 U.S. 570 (2008).

¹³ Siegel, *supra* note 11, at 239.

¹⁴ *Id.* at 199-200, 239; Accord Maxine Burkett, *Much Ado About . . . Something Else: D. C. v. Heller, The Racialized Mythology of the Second Amendment, and Gun Policy Reform*, 12 *J. GENDER RACE & JUST.* 57, 66 (2008) (“[T]he Heller

While these differing interpretations of the Second Amendment are not central to this article, a working understanding of each should aid in comprehending various scholars' arguments. What is essential to understand is that (1) the Second Amendment codifies some portion of the broader right to self-defense, although there is little agreement as to whether it is a collective or an individual right or both, and (2) the right to bear arms in particular, and the right to self-defense generally, have historically been denied to tribes as a result of the perception of them as savage, a perception that stems in significant part from their past acts of self-defense and that has continuing effects on tribes today.

C. THE JUSTICES' PERCEPTIONS OF TRIBES IN *DISTRICT OF COLUMBIA V. HELLER*.

In *Heller*, as noted above, a divided Supreme Court held that the Second Amendment included an individual right to defend oneself with a handgun and therefore, struck down the District of Columbia's general ban on possession of handguns.¹⁵ In oral argument for the case, Justice Kennedy interrupted counsel for the District of Columbia during counsel's argument that the Second Amendment right was limited to the military context. The Justice then inquired whether the 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 and bears and grizzlies and things like that?"¹⁶ Several tribal advocates and Indian law scholars found Justice Kennedy's classification of tribes with "outlaws, wolves[,] and bears" troubling, but those outside of the Indian law field seemed to miss the racialized implications of the question even as they extrapolated the racialized historical underpinnings of the Amendment *vis-a-vis* African Americans.¹⁷

majority departed from earlier precedent and found, unequivocally, an individual right to bear arms for 'traditionally lawful' purposes, such as self-defense within the home. Most notably, the Court found that this individual right was unconnected to militia service . . . The Court's reasoning focused disproportionately on the structure of the Amendment, finding that the Amendment is 'naturally' divided into two parts—a prefatory clause and an operative clause. Importantly for the Court, the prefatory clause regarding the militia does not limit or expand the operative clause . . ." (footnotes omitted).

¹⁵ *Heller*, 554 U.S. at 635-36.

¹⁶ Transcript of Oral Argument at 8, *District of Columbia v. Heller*, 554 U.S. 570 (Mar. 18, 2008) (No. 07-290).

¹⁷ Classification of Indians with wolves (or rather conflation of Indians with wolves) is a longstanding practice with roots dating back to the Puritans. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law & Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1268 (1992); Compare Justice Kennedy: "Hostile Indians" May Have Been a Motivating Factor for 2nd Amendment, TURTLE TALK (Mar. 19,



This cultural blindness regarding the racialization of American Indians is also reflected in the Court's opinion in *Heller*, when the Court discusses the historical disarmament of African-Americans and quotes a speech by the nineteenth century politician Charles Sumner. In the *Heller* opinion, the majority recounts instances of African-Americans being systematically disarmed and statutory and constitutional attempts to remedy that problem, many of which were based on Second Amendment justifications, without mentioning Indians being denied the right to bear arms.¹⁸ More blatantly, to support its claim that antislavery advocates often invoked the right to bear arms for self-defense, the Court quotes an 1856 speech by the politician Charles Sumner in which Indians are described as one of the chief reasons why pioneers needed arms: "The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest."¹⁹ This quote not only racializes Indians by grouping them with animals, but, by the use of the term "under God," it portrays disputes between Indians and settlers as struggles between evil and good. Yet, the loaded character of these words is not even mentioned in the majority opinion. Similarly, Justice Breyer's dissenting opinion alludes, albeit in a somewhat more neutral fashion than Justice Kennedy's oral argument question or the

2008, 2:22 PM) <http://turtletalk.wordpress.com/2008/03/19/justice-kennedy-hostile-indians-may-have-been-a-motivating-factor-for-2nd-amendment> with Stephanie Mencimer, *Whitewashing the Second Amendment*, MOTHER JONES, (Mar. 20, 2008) <http://www.motherjones.com/politics/2008/03/whitewashing-second-amendment>

¹⁸*Heller*, 554 U.S. at 611-17; See Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 79 (1991) for a description of firearm prohibitions for Native Americans as a means to "oppress and . . . exterminate" them. Restrictions on blacks owning arms "were abolished, at least facially, during Reconstruction," whereas those pertaining to Indians remained in place long after.

To be completely fair to the *Heller* Court, it should be acknowledged that the Court was recounting the historical disarmament of African-Americans in large part to support its conclusion that the Fourteenth Amendment and other post-Second Amendment laws encompassed an individualized understanding of the right to self-defense, a conclusion which the Court saw as bearing on the original intent of the Second Amendment. *Heller*, 554 U.S. at 611-17. The Fourteenth Amendment and the other legal provisions discussed appear to have not been intended to protect Indian tribes or Indian individuals. See *id.*; DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 163-64 (5th ed. 2005) (addressing the Fourteenth Amendment's inapplicability to Indians, particularly its citizenship provision). Thus, there was arguably no reason to bring Indians into the discussion. On the other hand, however, the lack of historical and current concern for tribes' and Indians' right to self-defense and their right to bear arms speaks volumes about America's failure to reckon with its injustices against tribes and Indians.

¹⁹ *Heller*, 554 U.S. at 609 (citation omitted).

Court's quotation of Charles Sumner, to the fact that "[t]wo hundred years ago, most Americans, many living on the frontier, would likely have thought of self-defense primarily in terms of *outbreaks of fighting with Indian tribes*, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways."²⁰ In Justice Breyer's dissent, Indians are one group in a list of sources of conflict that allegedly precipitated the early Americans' need for self-defense. Thus, Indians are monolithically portrayed as a force to defend against and therefore, implicitly lack a right to self-defense in their own right.

D. ERASURE OF TRIBES IN *MCDONALD V. CITY OF CHICAGO*

Additionally, the Court's most recent gun rights opinion, *McDonald v. City of Chicago*,²¹ like *Heller*, demonstrates a cultural blindness regarding the historical abrogation of tribal and individual Indians' self-defense rights. The *McDonald* opinion extensively reviews the history of African-American disarmament,²² but completely ignores the similar history with respect to Native Americans. While the history of the disarmament of African-Americans is clearly relevant to *McDonald's* holding that the Second Amendment had been incorporated against the states under the Fourteenth Amendment's due process clause, the utter lack of cognizance of Native American disarmament remains striking.

Heller's assumption that Indian tribes were one of the paramount reasons that colonists and early Americans needed to engage in self-defense generally and needed guns specifically, runs throughout the literature on the Second Amendment and the colonial history of America generally.²³ This article explores that

²⁰ *Id.* at 715 (Breyer, J., dissenting) (emphasis added). While this statement may well be correct as to the concerns of the settlers, without further explanation or qualification, it reflects and perpetuates a view that tribes were dangerous entities that needed to be defended against.

²¹ 130 S. Ct. 3020 (2010).

²² *Id.* at 3038-43.

²³ The right to self-defense also has a racially charged history with respect to African-Americans, and this history has received significant scholarly attention in recent years. *See, e.g.*, Burkett, *supra* note 14, at 86; Williams, *supra* note 2, at 447; Robert T. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991). While this history provides important context for the right to self-defense, delineating how slave revolts came to be a central concern of militias in early American history and how later gun control efforts were often aimed at disarming African-Americans, this article focuses primarily on the lesser known (and



assumption and asks what it means for the way Indian tribes are viewed in society today, and how the assumption and the continuing racialized view of tribes affects tribal rights today.

I. THE MYTHOLOGY OF THE COLONISTS' NEED FOR SELF DEFENSE.

As discussed below, Indian attacks were the primary reason that militias were initially formed. Throughout the colonial era, militias were understood to be necessary to protect against Indian attacks (although, as time went on, protection against slave revolts became another pressing goal of the militias).²⁴ But, the monolithic notion of Indians as the aggressors in armed conflicts was actually constructed subconsciously to justify the actions of colonists in perpetrating aggressions against tribes and in confiscating their lands.

Militias were not only a central part of the colonies' (and later the states' and federal government's) mechanism for collective self-defense, but they are crucial to understanding the original intent of the Second Amendment. Because militias are a core aspect (or perhaps the core) of the Second Amendment,²⁵ the fact that they were developed in large part to fight Indian tribes, under the rubric of defending against their aggressions, suggests that tribes have historically been constructed as a caricatured other that European colonists and then white American citizens need to defend against, rather than as active subjects with their own right to self-defense.

a. The Colonial Concept of Self-Defense Related Directly to Tribes.

complementary) story of how the right to self-defense has operated with respect to Indian tribes.

²⁴ See, e.g., Bogus, *supra* note 10, at 1371.

²⁵ Both scholars that espouse the traditional individual rights view of the Amendment and those that adhere to the collective rights view acknowledge the centrality of the militia. Compare *id.* at 1372 (“[A]ny constitutional right to bear arms is directly related to” the militia) with Kates, *supra* note 10, at 213 (“[T]he individual rights advocate may accept the state’s right theory and simply assert that, even though one of the Amendment’s purposes may have been to protect the states’ militias, another was to protect the individual right to arms. Indeed, the evidence suggests it was precisely by protecting the individual that the Framers intended to protect the militia.” (footnote omitted)). See generally Ulliver & Merkel, *supra* note 8, at 148-49 (for a cogent argument that the constitutional right to bear arms is now defunct because it was based on a late-eighteenth century conception of militia service that has since become completely archaic).

As David Williams has explained, “Americans . . . came to love guns through hating Indians.”²⁶ Thus, “at [its] most macroscopic level, it is possible to understand the Second Amendment as an icon of the imperial expansion of . . . European culture.”²⁷ Indeed, many scholars agree that the militia “[o]riginally . . . was meant to protect white settler communities from Native Americans.”²⁸

It should come as no surprise then, that prior to the formation of the Republic, British colonies, such as those in Pennsylvania, Virginia, and Massachusetts, appear to have been predominantly concerned with what they perceived as defending themselves against unjustified attacks by Indians. Virginia for instance, passed a statute in 1655-56 that outlawed the “shoot[ing] of any guns at drinkeing[,] [sic] [,] marriages and ffuneralls [sic] onely [sic] excepted . . .”²⁹ The reason for the law was that “gunshots were the common alarm of Indian attack”³⁰ “of which no certainty [could] . . . be had in respect of the frequent shooting of guns in drinking . . .”³¹ Moreover, while in the 1600s Virginia had

²⁶ Williams, *supra* note 2, at 469.

²⁷ *Id.*

²⁸ Burkett, *supra* note 14, at 86. *Accord Cottrol & Diamond, supra* note 23, at 323-24 (“For the settlers of British North America, an armed and universally deputized white population was necessary not only to ward off dangers from the armies of other European powers, but also to ward off attacks from the indigenous population which feared the encroachment of English settlers on their lands.”); Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 474-75 (1915) (“In the American colonies, with their small revenues and beset as they were with savage and other enemies, it was deemed necessary that every man of military age and capacity should provide himself with arms and be ready to bear them in defense of himself and his neighbors and the colony at large”). *See also* Bogus, *supra* note 10 at 1371 n.37 (“In 633, for example, every man in the Plymouth county was required to own a musket, two pounds of powder, and ten pounds of bullets.”); Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 RUTGERS L.J. 1041, 1047 (2007) (“Pennsylvanians were less concerned with an individual right to bear arms than they were with the responsibility of the provincial government to enable them to protect themselves on the frontier.”); Williams, *supra* note 2 at 469 (“Americans came to cherish the right to arms [because they] lived in a frontier society.”).

²⁹ 1 WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 401-02* (1823) *available at* R. & G. & W. Bartow 1823) *available at* <http://ia700406.us.archive.org/13/items/statutesatlargeb01virg/statutesatlargeb01virg.pdf>

³⁰ Clayton Cramer, *Gun Control in the Middle & Southern Colonies*, 3-4, <http://www.claytoncramer.com/popular/MiddleSouthernColonialGunControl.PDF>; *See also* Hening, *supra* note 29, at 401 (reciting “[t]hat the common enemy [sic] the Indians, if opportunity serve, would suddenly invade this colony to a totall [sic] subversion of the same, and whereas the only means of discovery of their plotts [sic] is by allarms [sic] . . .”).

³¹ *Id.*



prohibited slaves and free blacks from carrying arms, by the 1700s, the Colony allowed limited ownership of guns by African-Americans, in part, so that they could “help defend the frontier plantations against hostile Indians.”³² Similarly, in 1633, the Plymouth Colony, located in what became Massachusetts, required every man “to own a musket, two pounds of powder, and ten pounds of bullets” to enable the Colony to defend itself against Indians.³³ Finally, in the mid- to late-1700s, Pennsylvania experienced sharp internal conflicts as a result of popular resentment against the ruling Quaker government’s policy of “pacifism and negotiation with Natives.”³⁴ These conflicts, which ultimately resulted in the ousting of the pacifist Quakers from the colonial government, led first to organization of local militias, then later to the passage of an Assembly bill in 1763 authorizing payment to as many as 700 volunteers to protect the backcountry during harvest, and finally to the passage of the Pennsylvania Declaration of Rights of 1776, “which guaranteed that the people had a right to bear arms ‘for the defense of themselves.’”³⁵ Other colonies also formed informal local militias to “ward off Indian attacks,” especially during the period of the French and Indian War, which lasted from 1754-1763.³⁶

And, most recently, the myth that Indians were a primary reason that colonists needed to defend themselves was perpetuated in *Heller* in: (1) Justice Kennedy’s oral argument question as to 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 and bears and grizzlies . . .,”³⁷ (2) the Court’s quotation of Charles Sumner’s speech³⁸ without any qualification or explanation, and (3) Justice Breyer’s statement in dissent that “[t]wo hundred years ago, most Americans, many living on the frontier, would likely have thought

³² Cottrol & Diamond, *supra* note 23, at 325.

³³ Bogus, *supra* note 10, at 1371 n. 37.

³⁴ Kozuskanich, *supra* note 28, at 1046.

³⁵ *Id.* at 1042, 1049, 1050-51, 1061; *cf.* PETER SILVER, OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA 108 (2008) (describing the retreat of many Quakers from government during this period as a “push-me-pull-you process” borne in part of their being chased out of government by their opponents, largely as a result of perceived “Quaker-Indian intimacy,” but noting that this retreat from government was also viewed as a desirable affirmation of virtue by some Quakers).

³⁶ Kozuskanich, *supra* note 28, at 1067.

³⁷ Transcript of Oral Argument at 8, *Heller*, 554 U.S. 570, (Mar. 18, 2008) (No. 07-290).

³⁸ *See Heller*, 554 U.S. at 609 (using the quoted passage as evidence that the prevailing view in 1856 was that the Second Amendment protected the right to self-defense against “the red man”).

of self-defense primarily in terms of outbreaks of fighting with Indian tribes . . . [.]” as well as other sources of conflict.³⁹ Because the Second Amendment grew directly out of Americans’ colonial experiences of defending themselves through militias, these colonial laws regarding arms bearing and the colonies’ use of militias to ward off perceived Indian attacks are directly relevant to the Amendment.⁴⁰

b. The Perception of Indians as Aggressors

The monolithic perception that Indians were the aggressors was necessarily colored by the colonists’ and early Americans’ point of view,⁴¹ and, as explained below, it was largely inaccurate.⁴² In fact, the settlers (undoubtedly subconsciously) constructed their perception of Indians as aggressors and savages largely to justify their own violent actions against Indians.⁴³ Richard Slotkin explains that “[t]he premise of the ‘savage war’ is that ineluctable

³⁹ *Id.* at 715 (Breyer, J., dissenting). The Supreme Court’s most recent Second Amendment case, *McDonald v. City of Chicago, Illinois*, does not directly reference Indian tribes. However, Justice Stevens mentions, in dissent, that “invaders” were one of the primary concerns that motivated the enactment of the Second Amendment. This may well have been meant to include Indian tribes. 130 S. Ct. 3020, 3107 n.33 (2010) (Stevens, J., dissenting). Of course describing tribes as “invaders” would be ironic, although no irony appears to have been intended.

⁴⁰ *Accord* Rakove, *supra* note 8, at 118 (stating, in reference to the Second Amendment, “that the ways in which Americans conceived of and formulated rights were a product not just of what they had inherited [from British thinking] but of what they had experienced” during the colonial era).

⁴¹ *See, e.g.*, R. DAVID EDMUNDS, *THE SHAWNEE PROPHET* x (1983)). (“[D]ifferent peoples interpret the same events within their own particular cultural framework. . . . [B]oth Indians and white Americans were the products of their own cultures and had difficulty in comprehending each others’ perspective.”) KERWIN LEE KLEIN, *FRONTIERS OF HISTORICAL IMAGINATION: NARRATING THE EUROPEAN CONQUEST OF NATIVE AMERICA, 1890-1900*, 5-6 (University of California Press 1999) (explaining that we evaluate stories, including historical stories, from “within narrative traditions we can interweave with others but never entirely escape” and that “an inquiry into historical knowledge can only be a ‘sociohistorical account of how various people have tried to reach agreement on what to ‘believe.’”) (quoting Richard Rorty, *Solidarity or Objectivity? in RELATIVISM: INTERPRETATION AND CONFRONTATION* 35-50 (Michael Krausz ed. 1989). *See also* RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 28-29 (2001) (explaining that “we are all our stock of narratives—the terms, preconceptions, scripts, and understandings that we use to make sense of the world”).

⁴² This is not to say that colonists did not genuinely fear Indians. In fact, there seems to have been a widespread fear of Indians among white colonists in at least some areas. *See, e.g.*, Silver, *supra* note 35, at xxv, 43, 45, 47-48, 60, 129, 160 (2008) (describing such fear among mid-Atlantic colonists in the mid and late 1700s).

⁴³ SLOTKIN, *supra* note 3, at 12-13.



political and social differences . . . make coexistence between primitive natives and civilized Europeans impossible on any basis other than . . . subjugation . . .”⁴⁴ Thus, because of the perceived “‘savage’ and bloodthirsty propensity of the natives, such struggles inevitably become ‘wars of extermination’ . . .”⁴⁵ He further explains that

In its most typical formulations, the myth of ‘savage war’ blames Native Americans as instigators of a war of extermination. Indians were certainly aggressors in particular cases, and they often asserted the right to exclude settlers from particular regions. But . . . [t]he accusation is better understood as an act of psychological projection that made the Indians scapegoats for the morally troubling side of American expansion: the myth of ‘savage war’ became a basic ideological convention of a culture that was itself increasingly devoted to the extermination or appropriation of the Indians and the kidnaping and enslavement of black Africans.⁴⁶

Other historians have confirmed Professor Slotkin’s view. For example, Francis Paul Prucha recounts how

[i]n the very beginning, the natives received the English colonists hospitably, greeted them with signs of friendship, and supplied them with food. But the image of savagism in the minds of the Europeans included a strong element of treachery on the part of the savages, and English behavior toward the Indians soon brought real enmity to the surface.⁴⁷

On a more general level, Richard White summarizes the extent to which the dominant American perception of Indians, both historical and contemporary, has varied and continues to vary from the reality of Indian cultures and existence, thus resulting in inaccurate portrayals of tribes.

The American Republic succeeded in doing what the French and English empires could not do. Americans invented Indians and forced Indians to

⁴⁴*Id.* at 12.

⁴⁵*Id.*

⁴⁶*Id.* at 12-13.

⁴⁷ 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 12-13 (1984).

live with the consequences of this invention. . . Europeans met the other, invented a long-lasting and significant common world, but in the end reinvented the Indian as other. Ever since, we have seen the history of the colonial and early republican period through that prism of otherness.⁴⁸

Defining one's opponents as savages in order to justify savage treatment of them is not unique to the American colonial experience.⁴⁹ Rather, Frédéric Mégret describes how this same motif has played out from the inception of the international law of war in the late 1800s until the present to exclude non-Western peoples from the protective reach of the law of war by defining them as "savages."⁵⁰ Thus, as Mégret argues, "international humanitarian law has always had an 'other'—an 'other' that is both a figure excluded from the various categories of protection, and an elaborate metaphor of what the laws of war do not want to be."⁵¹ Accordingly, describing non-Europeans as "savages" has allowed European countries to argue convincingly that they do not need to honor the laws of war when fighting with such peoples. Thus, they

⁴⁸ RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815*, xv (1991).

The point here is not to assign blame to either the colonists or the Indians. It is perhaps relatively easy to understand the colonists' desire to displace the Indians, given the rigid religious outlook many of them ascribed to and the irrevocable investment they had made in traveling to the New World. Conversely, one can readily understand why the Indians wanted to retain their cultures, lands, and livelihoods. But the insights possible as a result of our standpoint of over one hundred and fifty years removed from this history can help us develop a broader more inclusive perspective and ultimately facilitate our engaging in more humane actions.

⁴⁹ One very recent example of this use of savage imputations involves accusations of war crimes by U.S. soldiers stationed in Afghanistan. A U.S. soldier accused of masterminding three killings of Afghan civilians is said to have "had pure hatred for all Afghans and [to have] constantly referred to them as savages." Gene Johnson, *Hearing Begins in Alleged Plot to Murder Afghans*, *THE SPOKESMAN-REVIEW*, (Sept. 27, 2010), <http://www.spokesman.com/stories/2010/sep/27/hearing-begins-alleged-plot-murder-afghans/>.COMCAST.NET NEWS, Sept. 27, 2010.

⁵⁰ See generally Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': a Postcolonial Look at International Humanitarian Law's 'Other'*, in *INTERNATIONAL LAW & ITS OTHERS* 266-267 (Ann Orford ed. 2006) (arguing that international laws of war were both inclusive and exclusive in providing protection).

⁵¹ *Id.* at 266. Accord Eliga H. Gould, *Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772*, 60 *WM. & MARY Q.* 471, 479, 483 (2003) (explaining that the British Atlantic Colonies in the 1700s were perceived as being beyond the purview of international customary law and that this led to a license for violence against Indians as well as against competing colonists).]



may instigate war against them for any reason whatsoever and anything is permissible in such wars.⁵² The justification for these exclusions was generally because the so-called savages would not themselves honor the laws of war,⁵³ Thus, inhumane measures, such as expanding bullets, could be rightfully used against them.⁵⁴ Notably, some Americans used America's colonial experience with Indian tribes to justify the exclusion of purportedly savage peoples from the protections of international law,⁵⁵ and the United States has made at least one similar argument today, in the context of the so-called War on Terror.⁵⁶ Taking the myth of the savage war with Indian tribes as an earlier instance of what was to occur with the exclusionary development of the international law of war provides further evidence that Indian tribes could not have been envisioned to have any right to self-defense because such rights were reserved for so-called civilized nations.

II. THE HISTORY THAT AMERICA'S DOMINANT HISTORICAL NARRATIVE OBSCURES.

Although colonial America perceived the Indian populations as making unprovoked cruel attacks on white settlers, it must be remembered that the Indians who engaged in armed conflicts with the United States and its predecessor colonies were in many instances defending their homelands from confiscation.⁵⁷ The struggle to maintain these homelands was particularly crucial for

⁵² See Mégret, *supra* note 50, at 269 (quoting Sven Lindqvist to demonstrate that Europeans believed that the laws of war did not apply to "savages and barbarians").

⁵³ See *id.* at 289, 293-94 (discussing how "civilized nations" feared that because the "non-civilized" were unable or unwilling to adhere to the laws of war they would gain a tactical advantage). This concern was also voiced by colonists in reference to their conflicts with Indians; specifically, mid-Atlantic colonists viewed the Indians' methods of attack and choice of victims as violating emerging international law norms regarding the laws of war; norms which the Indians undoubtedly knew little if anything about. SILVER, *supra* note 35, at 57-60.

⁵⁴ See Mégret, *supra* note 50, at 281 (quoting Lord Lansdowne who defended his decision to have two types of ammunition on the grounds that the use of expanding bullets would be necessary when dealing with "savages").

⁵⁵ See *id.* at 292 (describing how one American concluded from American colonial experience that "devastation and annihilation [was] the principle method of warfare that savage tribes [knew]").

⁵⁶ See Carol Rosenberg, *War Court Filing Comparing Seminoles to al Qaeda Stirrs Protest*, MIAMI HERALD, Mar. 23, 2011, available at <http://www.miamiherald.com/2011/03/23/2130766/war-court-filing-comparing-seminoles.html>.

⁵⁷ See, e.g., PRUCHA, *supra* note 47, at 12 ("The [English colonists'] replacement of the Indians on the land became the basis for the enduring conflict with the Indians who remained, and Indian wars marked the English experience as they did that of the United States.").

tribes given both the prevalent colonialist view that Indians and settlers could not coexist⁵⁸ and the lack of respect that most English colonists and, later, Americans showed for Indian land rights.⁵⁹ Indeed, it is difficult to imagine how a continent peopled

⁵⁸ See, e.g., SLOTKIN, *supra* note 3, at 12 (noting that the underlying premise of a “savage war” is the view that coexistence between the natives and the civilized Europeans is impossible). This view that Indians and whites could not coexist is graphically demonstrated in the 1881 Annual Report of the Commissioner of Indian Affairs. See, *Cuthair v. Montezuma-Cortez*, Colorado School District No. Re-1, 7 F. Supp. 2d 1152, 1158 (D. Colo. 1998) (“‘[S]avage and civilized life’ cannot live and prosper together. One of the two must die. If the Indians were to be a civilized people and become happy and prosperous, he [the Commissioner of Indian Affairs] felt they should learn our language and adopt our modes and ways of life.”).

⁵⁹ See, e.g., *Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823) (holding that underlying fee title to Indian lands came to be vested in the European colony that first discovered the lands by virtue of the “discovery”); PRUCHA, *supra* note 47, at 14 (“The supremacy of the cultivator over the hunter was a classic weapon in the arsenal of the dispossessors.”); SILVER, *supra* note 35, at 8 (quoting a 1741 letter from a group of Delaware Indians to Pennsylvania’s governor regarding the settlers’ encroachment on their lands and their fear of defending their lands because of threats of violence); Gould, *supra* note 51, at 499 (describing the fiction underlying the Proclamation of 1763 that the British colonies of that time were located on what had been vacant land that the indigenous inhabitants had no want of “and of which they make no actual and constant use”) (citation and internal quotation marks omitted); 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, 665-67 (2009) (explaining the doctrine of discovery as formulated in *Johnson*); see also SLOTKIN, *supra* note 3, at 40 (quoting the *New York World* of January 18, 1874, as follows:

The Indians have their choice of incorporation with the general mass of the population and a life of civilized industry, which in the great majority of instances they decline to lead[;] or else of betaking themselves to such regions as are not needed for the maintenance of civilized men, there to remain unmolested until either the land they live on is needed, in which case they must be removed, or else they issue from it to molest civilized settlers, in which case they must be punished with death if no less penalty will avail. The country is not yet so crowded that. . . [the Indian] must be told to behave himself or die).

Thus, it appears that, in 1874, one prominent view was that Indians had no right to their land at all once it was “needed” by whites. Under this mind-set, Indians only existed at the sufferance of the dominant white society.

On the other hand, the sharp contrast between the colonists’ Lockean views of property rights and the collective or communal understanding of those rights among Native Americans undoubtedly led to misunderstandings on the part of the colonists as to whether Indians claimed ownership. See, e.g., Honor Brabazon, *Property Rights and Imperialism—Then and Now: Contemporary Private Property Rights Discourse in Historical Context* 8-9 (May 29, 2009) (unpublished manuscript) (on file with author) (discussing the Natives’ and colonists’ differing conceptions of property in colonial America).



by numerous nations who had inhabited it for thousands of years could be taken over, and the indigenous nations displaced, without the colonists' experiencing violent repercussions. However, such repercussions were nevertheless taken as evidence of the Indians' irrepressibly violent tendencies and were used as an excuse for violent retaliation....⁶⁰

There are countless examples of tribes being deprived of their land by whites and of those tribes attempting to defend their lands by use of force.⁶¹ Below, a few colonial examples are discussed followed by some later examples. However, as the later examples illustrate, as time wore on, Indians increasingly lacked the military force to even make viable attempts at self-defense.⁶²

At the same time, it is important to remember that tribes that engaged in armed conflicts were not uniformly acting in a posture of self-defense.⁶³ Rather, American colonial history is an

⁶⁰ See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1] (2009) ("When tribes rose up in violence against what they perceived as unjustified intrusions on their land, as they did in the Pequot War of 1637 and King Philip's War of 1675, these attacks were taken as cause for just wars against them, with dispossession of Indian property by conquest in reprisal.")

A popular Indian view of the tribal role in protecting their homelands from colonial attack is vividly demonstrated by the contemporary t-shirts that picture small groups of armed Indians and read "Homeland Security: Fighting Terrorism Since 1492." COYOTES CORNER, <http://www.coyotescorner.com/tshirts-hs.htm>. Yet even these t-shirts have been virulently attacked by whites, presumably because they threaten to disrupt the dominant view of colonial history. See Joseph Farah, *Fighting Terrorism Since 1492*, HUMAN EVENTS.COM (Oct. 4, 2006), <http://www.humanevents.com/article.php?id=17364>.

⁶¹ While I generally use the term "white" to describe European colonists, racialized notions of whiteness and Indianness probably did not fully develop among Americans of European descent until late in the eighteenth century. See, e.g., SILVER, *supra* note 35, at 114-123 (discussing the evolution of racialized ideas of whiteness and Indianness in the mid-Atlantic colonies).

⁶² See SLOTKIN, *supra* note 3, at 12 (stating that, with one possible exception, "after 1700 no tribe or group of tribes pursued (or was capable of pursuing) a general 'policy' of exterminating or removing White settlements on a large-scale basis").

⁶³ See, e.g., SLOTKIN, *supra* note 3, at 12 (acknowledging that "Indians were certainly aggressors in particular cases"); see also JOHN DEMOS, *THE UNREDEEMED CAPTIVE: A FAMILY STORY FROM EARLY AMERICA* 4 (1995) (alluding to instances in the colonial Northeast of Indians' capturing colonists and of some of these captives' coming to prefer Indian ways). Additionally, European expansion into the Americas had complex effects on tribes that hinder attempts to simply categorize even individual tribal actions as acts of aggression or defense. See, e.g., WHITE, *supra* note 48, at xv ("The wars of the Iroquois proper, or the Five (later Six) Nations, [in the mid-seventeenth century] were . . . a result of changes as complicated as any I present here. The reader should not mistake their warfare for 'normal' Indian warfare in North America. It, too, was a complex product of European expansion.").

exceedingly complex web; the complexity of which has been obscured by the monolithic view of tribes as historical aggressors.⁶⁴ In attempting to tell part of the story that has been largely overlooked, I do not mean to imply that this is the entire story or to replace one monolithic view of tribes with another.

a. Pre-Nineteenth Century Examples of Tribal Acts of Self-Defense.

Francis Paul Prucha explains that, “as the English expanded, encroaching on Indian lands and in many cases treating the inhabitants despicably, the Indians resisted with force.”⁶⁵ Prucha then details several instances of seventeenth century conflicts that had their origin in Indian attempts to preserve their land-bases against white encroachment. The first occurred in 1622 in Virginia, “in which the Indians under Opechancanough rose up against the white settlers who had invaded their lands and quickly killed a quarter to one-third of the population.”⁶⁶ This revolt was then “used as an excuse for a massive retaliation against the Indians” and was “looked upon as proof that Indians could not be trusted.”⁶⁷ The Pequot War of 1637 was also born out of a land dispute between the Indians and the English; it resulted from English attempts to expand the Massachusetts Bay Colony into the Connecticut River Valley and the Pequots’ resistance to those attempts.⁶⁸ Prucha similarly describes King Philip’s War of 1675-1676, in which a “confederation of formerly friendly tribes . . .” drove the New England colonies “nearly to the brink of destruction . . .”⁶⁹ as “furnish[ing] still another case of warfare instigated by Indians in a desperate attempt to stop the advancing tide of English settlement.”⁷⁰ However, Prucha’s description of the war’s having been instigated by the tribes is contested. Several figures of the

⁶⁴ In addition to the colonists’ and Indians’ differing conceptions of property rights, another factor that complicated land disputes between the tribes and the colonists was that, in some cases, individual Indians would claim authority to speak on behalf of tribes and sell tribal lands when in fact they lacked such authority. See, e.g., Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PENN. L. REV. 1065, 1083 (2000) (describing examples where agreements for the purchase of land were made by individual Indians without the approval of all members of a tribe).

⁶⁵ PRUCHA, *supra* note 47, at 13.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *id.* (describing how the Pequot War of 1637 was the result of English settlers and the Pequot Indians moving into the same region).

⁶⁹ RICHARD SLOTKIN, *REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600-1860*, 79 (1973).

⁷⁰ PRUCHA, *supra* note 47, at 13.



day, including Rhode Island's deputy governor, John Easton, blamed the war on Massachusetts' bad faith in dealing with the Indians.⁷¹ Easton in particular charged that a female tribal chief "had practised much [that] the quarrell might be desided without war, but sum of our English allso in fury against all Indians wold not consent . . ." ⁷² Regardless of which side actually started the war, it is clear that a major cause of the Indians' discontent was white encroachment on their lands and that the Puritans strove to "exterminate" their tribal opponents.⁷³

Historian R. David Edmunds recounts 18th century examples involving tribes defending their lands in the Old Northwest.⁷⁴ For example, Edmunds describes the tribes' attempts to maintain their hunting grounds in what is now Kentucky, along the Licking and Kentucky Rivers.⁷⁵ During the Revolutionary War the tribes had formed war parties to strike at white settlements along these rivers that were interfering with their hunting practices, and Indian villages were burned in retaliation.⁷⁶ However, the tribes' British allies promised the tribes victory after the war;⁷⁷ nonetheless, when the British lost the war, they made no attempt to protect tribal property rights in the Treaty of Paris.⁷⁸ The frontiersmen then began to advance further into tribal territories in Southern Ohio.⁷⁹ Eventually, after "a series of questionable treaties" and "armed expeditions" in 1794, the Indians were forced to give up their claims to most of Ohio.⁸⁰

Edmunds describes in detail the 1786 treaty negotiations with the Shawnees relating to their claims to Ohio.⁸¹ Despite Britain's assurances to the Tribe that the Shawnees maintained ownership over their lands after the Revolutionary War, armed United States officials told the Shawnee treaty delegation that they would have to "give up their claims to lands east of the Miami [River] and acknowledge the sovereignty of the United States over all their

⁷¹ See SLOTKIN, *supra* note 69 at 79-81 (describing how John Easton blamed the war on the intolerance of Massachusetts).

⁷² *Id.* at 80.

⁷³ SLOTKIN, *supra* note 3, at 12.

⁷⁴ See generally EDMUNDS, *supra* note 41.

⁷⁵ EDMUNDS, *supra* note 41, at 3.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ EDMUNDS, *supra* note 41, at 3

⁷⁹ *Id.*

⁸⁰ *Id.*, at 4. This turn of events resulted in demoralization among the Indians as well as forced overcrowding, as they moved into areas already occupied by other tribes. *Id.*

⁸¹ *Id.* at 12-13.

villages.”⁸² When a Shawnee chief replied that the tribe had “no intention of giving up their lands in Ohio,” the U.S. Indian agent “threatened the destruction of the Shawnee women and children.”⁸³

b. Later Examples of Tribal Land Loss Often Reflect Tribes’ Inability to Make Viable Attempts at Self-Defense.

The historical record is also replete with more modern examples of confiscation of tribal lands. However, in these later cases, tribes generally lacked the wherewithal to defend themselves and therefore often did not even attempt to do so. For instance, between 1820 and 1850, the vast majority of Indian tribes who occupied lands east of the Mississippi were rounded up by the federal government and forced to walk west, to new lands located in Oklahoma or other western regions, thus giving up any remnants of their ancestral land-bases.⁸⁴ Alexis de Tocqueville’s description of the 1831 Choctaw removal illustrates the brutality of the process:

It was then in the depths of winter, and that year the cold was exceptionally severe The Indians brought their families with them; there were among them the wounded, the sick, newborn babies, and old men on the point of death. They had neither tents nor wagons, but only some provisions and weapons. I saw them embark across the great river, and the sight will never fade from my memory. Neither sob nor complaint rose from that silent assembly. Their afflictions were of long standing, and they felt them to be irremediable.⁸⁵

Next, during the Reservation era, from the 1820s through the 1880s, Indians were forcibly confined to reservations in the hopes of converting them to white ways.⁸⁶ Some tribal members managed to escape from the reservations they had been confined to in order to attempt to return to their lost homelands, but, in many cases, they were doomed because the federal government reacted to their refusal to remain confined (and their attachment to their ancestral lands) as a declaration of war.⁸⁷ For example, in 1879, an imprisoned group of Cheyennes who had escaped from their reservation, attempting to return to their ancestral lands, were told

⁸² *Id.* at 12-13(alteration in original).

⁸³ *Id.* at 13.

⁸⁴ ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW, CASES AND COMMENTARY 75 (2008).

⁸⁵ *Id.*, at 75 (citation omitted).

⁸⁶ *See, e.g., id.*, at 77.

⁸⁷ *See, e.g., Connors v. United States*, 33 Ct. Cl. 317, 323 (1898).



that they had to return to the reservation.⁸⁸ When they answered “[w]e will die, but we will not go back,” the federal officials attempted to force compliance by keeping the group, including women and children, in the barracks without water for three days and without food or fuel for five days in temperatures of forty degrees below zero.⁸⁹ When the group finally escaped, the federal troops gunned down as many of the Indians as they could.⁹⁰ Twelve days later, troops found the survivors and killed most of them as well, shooting down a total of twenty-four Indians, including two babies.⁹¹ In this case, the Indians had made an abortive attempt at self-defense after they had been encircled by the troops, killing two privates and a lieutenant, before they ran out of ammunition and were forced to desperately advance with their hunting knives.⁹²

Finally, the Allotment Period, from the 1880s to the 1920s, presented another era of massive tribal land loss as a result of the federal policy of parceling out reservations to individual tribal members (with the intent to make it alienable fee land after a trial period) and usually selling off the remainder of each reservation to whites.⁹³ The Allotment policy was driven largely by white hunger for Indian lands (as well as by a hope to assimilate Indians into mainstream culture),⁹⁴ and it had the effect of reducing the total

⁸⁸ *Conners*, 33 Ct. Cl. at 322.

⁸⁹ *Id.*

⁹⁰ *Id.* at 322-23.

⁹¹ *Id.* at 323. Another example from this period of federal aggression occurred in 1864, when the United States “slaughtered at least 150 Cheyenne and Arapaho who had gathered near Denver to make peace with the United States.” COHEN’S HANDBOOK, *supra* note 60, at § 1.03[7]. In this case, however, the Tribes sought to exercise their right to self-defense by instituting war in response: “[e]xasperated and maddened by this cold-blooded butchery of their women and children, disarmed warriors, and old men, the remnant of these Indians sought the aid and protection of the Comanches and Kiowas, and obtained both.” *Leighton v. United States*, 29 Ct. Cl. 288, 326-7 (1894).

⁹² *Conners*, 33 Ct. Cl. at 323. Another example of tribal land loss involves the Zuni Tribe. In that case, the federal government took Zuni reservation lands for railroad purposes from the late 1880s through the early 1900s and also allowed white copper miners to appropriate Zuni aboriginal copper mines between 1877 and 1882. *Zuni Tribe of N. M. v. United States*, 12 Ct. Cl. 641, 657 (1987). Additionally, between 1901 and 1912, the federal government appropriated Zuni lands for third parties under homesteading laws, “failed to prevent Anglo, Hispanic, and Navajo trespass onto Zuni lands,” and “allowed third parties to drive the Zunis from their lands and actively prevented the Zunis from controlling their land.” *Zuni Tribe of New Mexico*, 12 Ct. Cl. at 658-59.

⁹³ See, e.g., *ANDERSON*, *supra* note 84, at 77.

⁹⁴ COHEN’S HANDBOOK, *supra* note 60, at § 104.

tribal land-base from 138 million acres to forty-eight million acres.⁹⁵

The above examples demonstrate the extent to which tribes have been deprived of their land throughout United States history. They also show that many battles between tribes and colonists or Americans were in some measure related to the Indians' attempt to protect their lands from white encroachment. Although tribes initially had the military power to make viable attempts to maintain their lands against white encroachment, the 1700s, 1800s, and 1900s saw tribes increasingly less able to defend themselves or their lands. In a practical sense, then, tribal subjugation by the United States government deprived tribes of any meaningful right to self-defense by making it impossible for tribes to act to defend themselves. Thus, it is apparent that, although tribes were perceived as aggressors, in fact they were often defending lands that belonged to them and which had been invaded by Europeans or confiscated by Americans.

III. THE LABEL OF SAVAGERY WAS AN IMPORTANT AND WIDELY USED COMPONENT OF THE PERCEPTION OF INDIANS AS THE AGGRESSORS.

a. The Meaning of "Savage" as Applied to Indians.

Prucha describes two basic and contradictory meanings of "savage" as applied to Indians by the colonists.⁹⁶ The first of these is that of the "noble savage" [or] natural man living without technology and elaborate societal structures."⁹⁷ This meaning, although inaccurate and offensive for Indians, is not directly at issue in this article because it does not bear directly on the issue of self-defense.⁹⁸ The second meaning is the one that is relevant here.

⁹⁵ See, e.g., ANDERSON, *supra* note 84, at 77; see also Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 189-94 (2000) (discussing the allotment policy).

⁹⁶ PRUCHA, *supra* note 46, at 7.

⁹⁷ *Id.* (alteration in original); see also T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 27 (2002). This appears to be the meaning that the French colonists who inhabited the Great Lakes Region in the mid- and late-seventeenth century ascribed to WHITE, *supra* note 48, at 58 (describing the "common [French colonial] misunderstanding of Algonquian society as a place of license without order" and noting that "[i]t was this misperception that gave the word *sauvage* its power . . .").

⁹⁸ However, Keith Aoki has demonstrated that such bifurcated racialized stereotypes readily shift in popular imagination from one pole to the other, suggesting that they are in fact closely related ways of othering members of non-white racial groups. Keith Aoki, *Foreign-ness & Asian-American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4



It is that of the “‘ignoble savage,[]’ treacherous, cruel, perverse, and in many ways approaching brute beasts with whom he shared the wilderness. In this view, incessant warfare and cruelty to captives marked the Indians.”⁹⁹ In fact, during the colonial period, “[n]ot a few Englishmen saw the Indians . . . as literally children of the Devil.”¹⁰⁰

As the decades wore on, violent clashes with Indians became less common due to tribes’ drastically decreased power, and the goal of exterminating Indians gave way to one of assimilation.¹⁰¹ Thus, by the late 1800s, rather than being seen as children of the Devil, Indians were understood as merely biologically inferior to the Anglo-Saxons who were divinely destined to exert a civilizing and bettering influence not only on Indians and others present in the United States, but also on non-Anglo-Saxon peoples throughout the world.¹⁰²

Nonetheless, the notion of Indians as warlike savages, which was based in large part on the historical myth of the savage war, survived and lives on even now in the collective memory and in case law defining Indians as savages and using their alleged savagery to justify deprivations of tribes’ sovereign rights.¹⁰³ Critical race theorists have explained how such racialized stereotypes function in the American legal system to deprive people of color of rights.¹⁰⁴ In the Indian law context, because these cases continue to be cited in contemporary decisions that rule against tribal sovereignty, the notion of the Indian as a dangerous warlike savage who instigated unwarranted aggressions upon innocent European settlers continues to be implicitly used to abrogate tribes’ sovereign rights. In this sense, tribes continue to be punished for past acts of self-defense. Moreover, abrogations of tribal sovereignty literally render tribes unable to defend

UCLA ASIAN PAC. AM. L.J. 1, 15-16, 35-36, 39 (1996). Thus, it may be somewhat artificial to attempt to separate out the two stereotypes of savagery.

⁹⁹ PRUCHA, *supra* note 47, at 7; *see also* ALENIKOFF, *supra* note 97.

¹⁰⁰ PRUCHA, *supra* note 47, at 7-8.

¹⁰¹ *See* ALENIKOFF, *supra* note 97, at 23-28; *see also* PRUCHA, *supra* note 47, at 9 (“[T]he white goal continued to be the ultimate transformation of the Indians with whom they came into contact, a ‘civilizing’ process that reached its apogee in the United States at the end of the nineteenth century.”).

¹⁰² *See* ALENIKOFF, *supra* note 97, at 23-28.

¹⁰³ *See infra* note 239; *see generally* Part IV, *infra*. *But see* PRUCHA, *supra* note 47, at 8 (arguing that “[a]s the English experience deepened, the theoretical concepts of noble and ignoble savagery (though long continued in imaginative literature) were replaced by more realistic and complex appraisals based on practical encounters”).

¹⁰⁴ *See, e.g.*, Aoki, *supra* note 98, at 20, 23-24, 32, 37-38; Sheri Lyn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1797 (1993); Delgado & Stefancic, *supra* note 16, at 1264.

themselves against depredations by outsiders, thus depriving them of the right to self-defense in a practical sense.

The meaning of “savage” as warlike, hostile, or barbarous permeates early American case law and other documents. A brief sampling of these appellations, primarily from pre-twentieth century case law, is provided below.

b. Indians Have Been Widely Defined as ‘Savage’ in Our Early Jurisprudence and Related Contexts.

Historical descriptions of tribes (which, in some cases, continued into the twentieth century) routinely designated Indians as “savage,” “hostile,” or “barbarous.”¹⁰⁵ These offensive descriptions were frequently reified in both state and federal case law¹⁰⁶ prior to 1900. Such descriptions were based in large part on the myth that Indians were brutal warlike aggressors, when in fact Indians who engaged in conflicts with colonies and, later, the United States were often acting to defend themselves and their homelands. These imputations of savagery illustrate the “othering” of Indians based in large part upon their acts of self-defense, and such imputations were commonly used to help justify abrogating sovereign rights.¹⁰⁷

1.A Sampling of “Savage” Designations in Pre-Twentieth Century Cases.

In 1801, the Supreme Court of Pennsylvania explained that “[i]n 1777, the [white] inhabitants fled from the savages.”¹⁰⁸ In 1814, the Supreme Court of Errors and Appeals of Tennessee described a rural district as “remote from the capital, detached

¹⁰⁵ See, e.g., Proclamation No. 28 by Abraham Lincoln, (Mar. 17, 1865) (prohibiting sale of arms and ammunition to “hostile Indians”); *Swetman v. Sanders*, 20 S.W. 124, 125 (1896) (noting that a settler “failed to occupy the land on account of his fear of hostile Indians”); *Kozuskanich*, *supra* note 28, at 1067 (quoting 1757 New York Mercury article describing Indians as “barbarous enemies”); *Emery*, *supra* note 28 (describing Indians as “savage . . . enemies”).

¹⁰⁶ See, e.g., ROBERT WILLIAMS, *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA*, xix (2005) (discussing United States Supreme Court cases).

¹⁰⁷ For a description of the psychological process of othering, see, e.g., Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 611-18 (2009). As Professor Todres explains, othering occurs, especially in individualist cultures, at both the individual and collective levels, and “[a]t both . . . level[s], this Self/Other dichotomy functions to create (1) a devalued and dehumanized Other, enabling differential treatment of the Other; (2) a conception of a virtuous Self and corresponding assumption that the Self (or dominant group) is representative of the norm; and (3) a distancing of the Other from the Self.” *Id.* at 613-14.

¹⁰⁸ *Lessee of Clark v. Hackethorth*, 3 Yeates 269, 270 (Pa. 1801).



from the rest of Virginia by an extensive wilderness, [and] infested by an Indian enemy”¹⁰⁹ The Tennessee court went on to allude to “the harassed and endangered state of this infant settlement, whose very extermination was threatened by the savage foe”¹¹⁰ The Supreme Court of Appeals of Virginia in 1827 cited a 1711 Virginia statute that appointed Rangers “to restrain *disorderly and barbarous Indians* frequenting our frontiers” and provided that “if any Indian, of any nation at war with us, was taken by the Rangers, he should be *transported* [to the West Indies], and sold [as a slave] for the benefit of the Rangers.”¹¹¹ The Supreme Court of Alabama in 1831 quoted the preamble of an 1821 statute enacted for one settler’s specific benefit:

[W]hereas, the territory now comprising the State of Alabama, was during our late contest with the British government, subjected to all the hardships and cruelties, which a relentless war, waged by the merciless savage, is calculated to produce; and whereas, our venerable citizen, Colonel Samuel Dale, was the first to . . . save its defenceless inhabitants from Indian rapine, and Indian barbarity¹¹²

In an 1835 Tennessee Supreme Court case, the court affirmed its jurisdiction over a murder case involving a Cherokee victim and a Cherokee accused that took place within Cherokee territory, despite contrary Supreme Court precedent.¹¹³ The majority opinion discussed the white settlement of the Carolinas, concluding that

the principle by which the country was taken possession of, was the only rule of action possible to be observed; . . . it was more just the country should be peopled by Europeans, than continue the haunts of savage beasts, and of men yet more fierce and savage, who, “if they might not be extirpated for their want of religion and just morals, they might be reclaimed for their errors” [a] rule of

¹⁰⁹ *Smith v. Lessee of Craig*, 2 Tenn. 287, 1814 WL 314, *8 (Tenn. Err. & App. 1814).

¹¹⁰ *Id.*

¹¹¹ *Gregory v. Baugh*, 25 Va. 611, 633-34 (1827) (first emphasis added).

¹¹² *Dale v. The Governor*, 3 Stew. 387, 388 (Ala. 1831).

¹¹³ *State v. Foreman*, 16 Tenn. 256, 337, (1835). The U.S. Supreme Court had held three years earlier in *Worcester v. Georgia*, 31 U.S. 515, 596 (1832), that the State of Georgia lacked jurisdiction over Cherokee territory within its state boundaries.

which savages of this description have no just right to complain.¹¹⁴

The court went on to describe the tribes of the “immense west and northwest” as “[t]ribes that subsist on raw flesh, and are savage as the most savage beasts that infest that mighty wilderness.”¹¹⁵ In somewhat less inflammatory, but still racially charged, language, the Court of Appeals of Law of South Carolina referred, in 1847, to “frequent wars with the savage tribes” and then stated that “[t]he Indians were reckless of their own life, and greedy of that of their enemy.”¹¹⁶

In 1859, the United States Supreme Court cited the petition of two settlers to establish a ranch in what later became California.¹¹⁷ The 1838 petition stated that the desired “tract is uncultivated, and in the power of a multitude of savage Indians, who have committed and are daily committing many depredations; and *being satisfied that the tract does not belong to any corporation or individuals*, they earnestly ask the grant, offering to domesticate the Indians”¹¹⁸

In *The Sutter Case* of 1864, the Supreme Court set aside a decree upholding a land grant to John Sutter.¹¹⁹ The Court described the land Sutter attempted to settle beginning in 1839 as “uninhabited, except by bands of warlike Indians, who made frequent predatory incursions upon the undefended settlements to the south and east of this place.”¹²⁰

In 1865, the Court of Claims described the Territory of New Mexico during the period between January and August of 1855, stating that “[t]here were repeated acts of depredation by the Indians upon the property of the white settlers, many acts of cruelty, murder, and massacre, such as are incident to savage warfare.”¹²¹ An 1866 federal appellate case from Oregon referred with reverence to “those who had settled and held the country for the United States, amid extreme privation and suffering, against the dangerous and savage Indian”¹²² while a Court of Claims case in the same year described the Indian population of the upper

¹¹⁴ *Foreman*, 16 Tenn. at 265.

¹¹⁵ *Id.* at 278.

¹¹⁶ *State v. Belmont*, 35 S.C.L. (4 Strob.) 445, 451 (S.C. App. L. 1847).

¹¹⁷ *United States v. Teschmaker*, 63 U.S. (22 How.) 392, 401 (1859).

¹¹⁸ *Id.* (emphasis added). Note the troubling view that the Indians’ occupation of the tract did not indicate that they had any ownership interest.

¹¹⁹ *In re Sutter*, 69 U.S. (2 Wall.) 562, 587 (1864).

¹²⁰ *Id.* at 563.

¹²¹ *Alire’s Case*, 1 Ct. Cl. 233, 238 (1865).

¹²² *Chapman v. School District*, 5 F. Cas. 487, 491 (1866).



San Joaquin Valley as “most numerous, most warlike, and most hostile.”¹²³

In 1874, the Supreme Court of the Territory of Idaho described “[t]he whole country” as having been “inhabited by wild and barbarous savages.”¹²⁴ In 1877, the United States Supreme Court explained that, upon Wisconsin’s admission to the Union in 1846, “Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous condition of the Indian tribes would give place to the higher civilization of our race”¹²⁵ Finally, in 1883, the Supreme Court of Nevada noted that “[i]n 1861 the Indians here were savages in name and fact,” and that, although “[s]ome were peaceable[and] others aggressive and warlike,” they “killed inoffensive white men.”¹²⁶

The caricatured history depicted in these cases contrasts sharply with the historians’ accounts discussed above in that this case law monolithically portrays the tribes, many of which were presumably fighting to retain their lands, as savage aggressors. While these cases comprise a mere sampling of those pre-1900 cases that describe Indians as savages or use other designations of the same import, they provide a general idea of the extent to which Indians were viewed through the prism of violent, irrational otherness and even demonized.¹²⁷ Given that Indians were being described as

¹²³ *Fremont & Jackson’s Case*, 2 Ct. Cl. 461, 464 (1866).

¹²⁴ *Pickett v. United States*, 1 Idaho 523, 530 (1874).

¹²⁵ *Beecher v. Wetherby*, 95 U.S. 517, 526 (1877).

¹²⁶ *State ex rel. Truman v. McKenney*, 2 P. 171, 179 (1883).

¹²⁷ It is important to understand that this view of tribes, although extremely prevalent, was probably not universal. For example, in 1826, the Supreme Court of Errors and Appeals of Tennessee surprisingly concluded that

the early notions of the Spaniards and others, “*that the Indians were mere savage beasts without rights of any kind,*” have long since been exploded, as the result of avarice, fraud, and rapacity; and that those who acted upon them are at this day deemed by the people of the United States, more savage and cruel than those they despoiled. The Cherokees are, in point of fact, a conquered people, with acknowledged rights; which rights, I am proud to say, have for the last thirty years, been respected with that good faith on our part, that became us as honest men and [C]hristians, and which the courts of justice are bound to regard.

Cornet v. Winton’s Lessee, 10 Tenn. 143, 150 (1826)(alteration in original)(citation omitted). Given that the author of this opinion was Judge Catron, the same judge who wrote the opinion in *Foreman*, which was decided a few years later, and that he later became a Supreme Court Justice and authored a concurring opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), in which he argued that Dred Scott was lawful property the title to which Congress could not annul, this language should not be over-emphasized. See *Dred Scott*, 60 U.S. at 527-29 (Catron, J., concurring); *supra* notes 113-114 and accompanying text (quoting and citing *Foreman*). It is difficult to know what to make of the

such in significant part as a result of their attempts to defend themselves and their homelands and their resistance to European encroachment, this judicial othering of Indians as savage and the concomitant abrogations of tribal rights to be discussed later served to punish tribes for past acts of self-defense.

2. CONTEMPORARY REFERENCES TO INDIANS AS SAVAGES.

Judicial references to Indians as savages have become less common, although they still occur in published opinions, usually in quotations of earlier cases or documents. Three recent examples are discussed below. In April 2009, a federal bankruptcy court in Texas quoted language from an 1857 Texas Supreme Court case, which the bankruptcy court appreciatively described as “colorful[]”:

It has been comparatively but a few years since the first settlements of Americans were made in Texas. The whole country was then infested by savages. Subsequently there were hostilities with Mexicans, and the frontiers are still exposed to the incursions of Indians. The country has been settled, and still is settling, by, in a great measure, force of arms.¹²⁸

In *Warren v. United States*, decided in 2000, the District of Columbia Circuit held plaintiff’s quiet title action to be barred by the statute of limitations.¹²⁹ In so holding, the court quoted a 1947 Supreme Court case that distinguished the quiet title action at issue there from those involving “savage tribe[s]” and “hitherto unknown islet[s].”¹³⁰ Finally, in 1987, the Court of Claims noted that, in the 1500s, the Spanish had recognized the Zuni Tribe’s territory “as a foreign nation and not as an area occupied by a savage tribe.”¹³¹

These references, with the exception of the first from *In re Wilson*, are generally less virulent than the earlier references to tribes as savages. However, they nonetheless demonstrate that it is still acceptable and even legally sanctioned to refer to tribes as “savages,” at least by quoting earlier cases and other documents.¹³²

discrepancies among the language used here, that used in *Foreman*, and that used in Justice Catron’s opinion in *Dred Scott*.

¹²⁸ *In re Wilkinson*, 402 B.R. 756, 765 (W.D. Tex. 2009) (quoting Choate v. Redding, 18 Tex. 579, 580-81(1857)).

¹²⁹ *Warren v. United States*, 234 F.3d 1331, 1338 (D.C. Cir. 2000).

¹³⁰ *Id.* at 1338 (quoting *United States v. Fullard-Leo*, 331 U.S. 256, 268 (1947)).

¹³¹ *Zuni Tribe of N.M. v. United States*, 12 Cl. Ct. 607, 618 (1987).

¹³² See WILLIAMS, *supra* note 106, at 57 (explaining that modern Indian law cases rely on earlier explicitly racist cases “frequently and without any form of discomfort, embarrassment, or even qualification”).



These cases also demonstrate that, when modern courts quote earlier sources that use this type of language, the language is not considered so abhorrent that modern courts feel the need to explicitly disclaim it or to carefully examine the rationale of the cases cited for elements of racism.¹³³ Thus, referring to tribes and Indians as “savages” appears to remain at least somewhat socially acceptable, even in the staid arena of the judiciary. This situation for tribes and Indians, in which racial epithets are still used in judicial opinions without being recognized as such, differs markedly from that for African-Americans in that courts not only do not rely on virulently racist decisions pertaining to them, such as *Dred Scott v. Sandford*, but also explicitly disclaim such decisions.¹³⁴ Furthermore, unlike the situation for tribes and Indians, racial epithets used to demean African-Americans tend to be recognized as such and thus may be avoided by courts, even in quotations.¹³⁵ By contrast, courts’ continued repetition of language denigrating tribes as “savage,” without any express disapproval of the earlier language, signals to the rest of society that it is both legal and reasonable “to act in a racially discriminatory and hostile way” toward tribes and Indians.¹³⁶ Additionally, as argued below, such repetition and reliance on offensive opinions enable further derogation of tribal rights.¹³⁷

¹³³ This blindness is most likely due to the basic cultural problem “that much hate speech is *not perceived as such* at the time” because it accords with “messages, scripts, and stereotypes that are embedded . . . in the national psyche.” DELGADO & STEFANCIC, *supra* note 41, at 28 (emphasis in original).

¹³⁴ See, e.g., WILLIAMS, *supra* note 106, at 18 (“Supreme Court justices never cite [*Dred Scott v. Sandford*] . . . except as a prime example of a very *bad precedent*”) (emphasis in original).

¹³⁵ See, e.g., *Jones v. First Student, Inc.*, No. 07-C-7139, 2009 WL 2949720, at *3 & n.3 (N.D. Ill. Sept. 9, 2009) (noting, in an employment discrimination case, that the word “nigger,” which was alleged to have been used by the plaintiffs’ co-worker, would be replaced throughout the opinion by “N-word”); see also *E.E.O.C. v. Bimbo Bakeries U.S.A., Inc.*, No. 1:09-CV-1872, 2010 WL 598641, at *5 (M.D. Pa. Feb. 17, 2010) (noting that, “[w]hile simple teasing, off-hand comments, and isolated incidents usually do not amount to discriminatory changes in the terms and conditions of employment, the use of racial epithets—especially the word ‘nigger,’ which has a long and sordid history in this country—can quickly change the atmosphere, environment, and culture of a workplace from positive to poisonous”); *Jones*, 2009 WL 2949720, at *5 (quoting another court’s statement that the “N-word is an ‘unambiguously racial epithet’”) (citation omitted).

¹³⁶ WILLIAMS, *supra* note 106, at 21.

¹³⁷ Cf. Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 41 (2006) (discussing the fact that popular portrayal of undocumented immigrants as “animals” makes it “easier for Americans to see both legal and illegal immigrants as lacking any rights” and arguing that “framing guestworkers as

Moreover, because the language of savagery is tied to and stems in significant part from many tribes' defense of their homelands—in other words from an exercise of their right of self-defense—the repetition of the language and the abrogations of tribal sovereignty that are based on it constitute a punishment for tribes' historical exercise of that right. Furthermore, tribes' sharply circumscribed sovereignty under federal law literally renders them unable to defend against non-Indian depredations.

3. Five Supreme Court Cases that Use the “Savagery” Designation Form Part of the Canon of Indian Law and Continue to Be Widely Cited.

In addition to the overt contemporary use of the term “savage” discussed above, four Supreme Court cases from the 1800s and one from the 1950s that use designations of ignoble savagery form part of the canon of Indian law and continue to be cited by the Supreme Court and other courts.¹³⁸ While the continuing effect of these cases will be addressed in detail in Part V, it is useful here to understand the racist language that the Court used in these cases.

In the earliest case, *Johnson v. M'Intosh*, Justice Marshall stated that

the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.¹³⁹

While this description is less one-dimensionally racialized than many of the others cited above, it still contains extremely harmful racialized elements. For one, “the tribes of Indians inhabiting this country” are defined monolithically, despite the fact that tribes are in fact culturally diverse. More importantly for the purposes of this article, they are all classified “as fierce savages whose occupation was war.” Finally, the Court states that “[t]o leave them in

goods to be imported” similarly “leads to a conception of guest workers as lacking any agency in the terms and conditions of their employment.”).

¹³⁸ Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); *Ex Parte Crow Dog*, 109 U.S. 556 (1883); *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. M'Intosh*, 21 U.S. 543 (1823); see also WILLIAMS, *supra* note 106, at 51-58, 60-70, 75-79, 89-95 (2005) (discussing these five cases and their use of the language of savagery).

¹³⁹ *Johnson*, 21 U.S. at 590.



possession of their country was to leave the country a wilderness.” While the statement contains an implicit and somewhat rare acknowledgement that the country did in fact belong to tribes, it is followed by the all-too-familiar claim that the Indians somehow didn’t deserve to retain their lands, apparently because of their differing conception of property rights. Coupled with the description of Indians as “fierce savages whose occupation was war,” this statement supports Justice Marshall’s conclusions that the colonial government’s attempt to dispossess and conquer them was inevitable and that the United States had a legal right to their land under the doctrine of discovery, which granted European nations rights to tribally occupied land in the New World by virtue of “discovering” it.¹⁴⁰ Thus, this passage operates as a justification for the course of colonial and early American history, much along the lines of Richard Slotkin’s discussion of the myth of the savage war.¹⁴¹

In Chief Justice Marshall’s opinion in the next case, *Cherokee Nation v. Georgia*, he rejects the argument that the Cherokee Nation can be considered a foreign nation under the Constitution for purposes of invoking the Court’s original jurisdiction in a suit against Georgia, which was then committing numerous depredations against the Nation and its people.¹⁴² Part of the Chief Justice’s reasoning for rejecting the Cherokee’s argument is that “the habits and usages of the Indians” at the time the Constitution was written did not lend themselves to the institution of legal actions, rather “[t]heir appeal was to the tomahawk, or to the government.”¹⁴³ So once again we see the Court espouse a view of

¹⁴⁰ See, e.g., WILLIAMS, *supra* note 106, at 51-53; see also Tweedy, *supra* note 59, at 665-67 (2009) (explaining the doctrine of discovery as formulated in *Johnson v. McIntosh*). In addition to the deprivation of tribal property rights that it affected, the Doctrine of Discovery also justified infringement on other aspects of tribal sovereignty. See, e.g., Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 6 (2005) (explaining that Indian “national sovereignty and independence were considered to have been limited by Discovery since it restricted the Indian nations’ international diplomacy, commercial, and political activities to only their ‘discovering’ European country”).

¹⁴¹ See *supra* notes 43-45 and accompanying text (discussing and quoting from GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH CENTURY AMERICA).

¹⁴² See 30 U.S. 1, 7-8, 12-13, 15, 20 (1831) (“[A]n Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.”); see also Gloria Valencia-Weber, *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 454 (2003) (detailing violent actions undertaken by the citizens of Georgia against Indians in the late 1700s).

¹⁴³ *Cherokee Nation*, 30 U.S. at 18.

a tribe as irrational and warlike, and once again this view is used to justify denying the tribe the legal rights to which others (here other nations) are considered automatically entitled. Moreover, the Court's decision literally had the effect of leaving the Nation defenseless against Georgia's attempts "to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force."¹⁴⁴

Next, in *Worcester v. Georgia*, a case that actually affirms tribal sovereignty *vis-a-vis* the claims of the State of Georgia, the Court makes multiple references to the tribes as warlike.¹⁴⁵ For instance, it describes the tribes' "general employment" as "war, hunting, and fishing."¹⁴⁶ Later, the Court describes tribes as "[f]ierce and warlike in their character . . ."¹⁴⁷ Finally, and perhaps most offensively, the Court quotes from, and relies upon, virulently anti-Indian colonial charters in reaching its decision that the State of Georgia lacks the authority to unilaterally declare war on the Cherokees under the circumstances of the case.¹⁴⁸ For example, it quotes the following language from the charter to William Penn: "[I]n so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves, as of other enemies . . . may probably be feared . . ."¹⁴⁹ It similarly quotes the charter to Georgia as follows:

¹⁴⁴ *Id.* at 15. In a 2009 petition for certiorari, a tribal member asked the Court to overturn that case's determination that tribes are not foreign nations on the basis that it was unconstitutional and in violation of the United States' human rights treaty obligations. He further suggested that the decision was comparable to *Plessy v. Ferguson*, 163 U.S. 537, 552-53 (1896) (upholding the "separate but equal" doctrine of racial segregation). Petition for Writ of Certiorari at 8-11, *Smith v. Shulman*, No. 09-512 (Oct. 28, 2009), available at <http://turtletalk.wordpress.com/2009/11/01/shinnecock-member-asks-supreme-court-to-overturn-chokeee-nation-v-georgia/>. In the extremely unlikely event the Court were to decide at some point to overrule *Cherokee Nation* on this issue, the overruling would presumably have the effect of reestablishing tribes' collective right to self-defense as nations under international law. See Part I.A., *supra* (describing the collective right to self-defense under international law). But, given the complicated and enmeshed relationship between federally recognized tribes and the federal government that has developed since *Cherokee Nation*, it is now very difficult to imagine the Court's holding tribes to be foreign nations.

¹⁴⁵ 31 U.S. 515 (1832).

¹⁴⁶ *Id.* at 543; WILLIAMS, *supra* note 106, at 64 (citing *Worcester* and discussing quoted language).

¹⁴⁷ *Worcester*, 31 U.S. at 546.

¹⁴⁸ WILLIAMS, *supra* note 106, at 67-68.

¹⁴⁹ *Worcester*, 31 U.S. at 545.



whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which, in the late war by the neighbouring savages, was laid waste by fire and sword, and great numbers of the English inhabitants miserably massacred; and our loving subjects, who now inhabit there . . . will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages.¹⁵⁰

The references to the warring character of the tribes give credence to a racialized, caricatured view of them as irrational instigators of war. This view is amplified by the damning anti-Indian judgments contained in the colonial charters. While the charters undoubtedly constituted good evidence of the reach of Georgia and other states' powers over tribes under English law, to quote them without even acknowledging the one-sided views they encompassed perpetuated the stereotypes of Indians and the view that they in fact committed the atrocities of which they are accused.

The fourth case, *Ex Parte Crow Dog*, was decided in 1883.¹⁵¹ In it, the Court determined that it lacked jurisdiction over an Indian-on-Indian, on-reservation murder that had already been resolved according to tribal tradition because Congress had not expressly provided for federal jurisdiction. While this case is considered by many to be a victory for tribal rights, albeit a short-lived one, it is a victory that relies on a racialized premise, and in that sense it is a very dangerous victory.¹⁵² The Court explains that the Sioux, pursuant to a treaty and associated act of Congress,

were . . . to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards, subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped

¹⁵⁰ *Id.* at 546.

¹⁵¹ 109 U.S. 556 (1883).

¹⁵² WILLIAMS, *supra* note 106, at 77-79.

might become a self-supporting and self-governed society.¹⁵³

Thus, in addition to relying on racialized ward-guardianship language and describing tribes as in a “state of pupilage”—ideas derived from the Marshall Trilogy¹⁵⁴—the Court uses the Sioux’s alleged savagism to justify their lack of political rights.

Later in the opinion, the Court goes even further:

It is a case where . . . that law . . . is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and *which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man’s revenge by the maxims of the white man’s morality.*¹⁵⁵

Here again, the quote is saturated with racialized constructs. The reference to the Sioux’s “free though savage life” suggests that they are lawless and therefore inferior when in fact their laws were simply different than those of the dominant colonial society.¹⁵⁶ It describes the law under which the Sioux defendant was charged as “opposed to the strongest prejudices of [the Sioux’s] savage nature,” again suggesting that the rule of law itself is foreign to the

¹⁵³ *Ex Parte Crow Dog*, 109 U.S. at 568-69.

¹⁵⁴ WILLIAMS, *supra* note 106, at 76-77.

¹⁵⁵ *Ex Parte Crow Dog*, 109 U.S. at 571 (emphasis added).

¹⁵⁶ See, e.g., Rebecca Tsosie, *Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Cultural Harm*, 35 J.L. MED. & ETHICS 396, 397-98 (2007) (describing traditional tribal notions of property rights).



Tribe's irrational savagism. Finally, the passage makes a binary distinction between "the red man's revenge," –again incorporating the idea of Indians as irrational and vengeful–with the rational and civilized "maxims of the white man's morality."¹⁵⁷ The references to the "strongest prejudices" of the Sioux's "savage nature" and to the "red man's revenge" are ironic, however, because there was nothing vengeful or savage about the traditional resolution of the murder that the Tribe had already effected; rather, in an effort to "preserve the community cooperation necessary for the Sioux way of life," peacekeepers were ordered to meet with both sides, after which the murderer's family made an offering to the victim's family of money, horses, and a blanket.¹⁵⁸ Thus, the real problem from the perspective of the federal government appears to have been that the tribal solution was not savage enough.

The final Supreme Court case that explicitly incorporates language of ignoble savagery and continues to be widely cited is *Tee-Hit-Ton Indians v. United States*.¹⁵⁹ This case, decided in 1955, builds on the Doctrine of Discovery as formulated in *Johnson* to hold that tribes are not entitled to compensation under the Fifth Amendment when lands to which they have aboriginal title are confiscated by the United States government.¹⁶⁰ The Court uses the language of savagery to help bolster its conclusion that the Tee-Hit-Ton Tribe was not entitled to Fifth Amendment compensation due to the fact that tribes generally have lost their lands to the United States through conquest rather than through arms-length transactions:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.¹⁶¹

¹⁵⁷ See also WILLIAMS, *supra* note 106, at 78-79 (describing this passage from *Ex Parte Crow Dog*).

¹⁵⁸ ANDERSON, *supra* note 84, at 919; see also Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 770 & n.303 (2006) (alluding to the traditional tribal resolution that had already taken place in *Ex Parte Crow Dog*).

¹⁵⁹ 348 U.S. 272 (1955).

¹⁶⁰ WILLIAMS, *supra* note 106, at 89-94 (discussing the holding and background of *Tee-Hit-Ton Indians* and connecting it with the *Johnson* case).

¹⁶¹ *Tee-Hit-Ton Indians*, 348 U.S. at 289-290. *Tee-Hit-Ton Indians* to some degree bucks the trend of describing tribes as aggressors in that it seems to admit that the United States and the colonies instigated conflicts in attempts to confiscate tribal lands.

Here we see the adjective “savage” working to implicitly dehumanize the tribes and lessen or obliterate any possible sympathy that the reader might feel for them as a result of the uncompensated confiscation of their land.¹⁶² In effect, we as non-Indian readers are told that the tribes are just savages so we need not worry about what happens to them.

As discussed below, this racist imagery of Indians has had and continues to have devastating effects for tribes in terms of their legal rights¹⁶³ and the violence they face and have faced with impunity. Robert Williams has explained that, in incorporating racist constructs such as savagery into landmark decisions, the Supreme Court “gives racism an authoritative, binding legal meaning in our legal system. The perceived inferiority of that group in our society has been given the sanction of law in the legal history of racism in America.”¹⁶⁴ I would argue that, although the Supreme Court may be the most important vessel of this power, all American courts possess it to some degree. Thus, based on the numerous cases quoted above, it is clear that racialized views of Indians, particularly those caricaturing them as violent, irrational, and warlike, *i.e.*, ignoble savages, are an important constituent of American history¹⁶⁵ and continue in force today. As shown below, these caricatured images have facilitated both vigilante and state-sanctioned violence against Indians.¹⁶⁶ The images have also motivated the federal, state, and colonial governments to explicitly deny Indians the right to self-defense, including the narrower right to bear arms. Additionally, as discussed in Part IV.A., these images

¹⁶² See, *e.g.*, Garcia, *supra* note 137, at 41 (explaining how descriptions of groups such as immigrants and guestworkers as inhuman can lead to a popular conception that such groups lack rights); accord Johnson, *supra* note 104, at 1747 (describing how the racialized testimony of a white witness to the effect that the black victim was bear-like and “subhuman” in the trial of police officers for the beating of Rodney King allowed the jurors to disregard the victim’s suffering and the wrongs inflicted upon him)..

¹⁶³ See WILLIAMS, *supra* note 106, at xxv (“The racist precedents and language of Indian savagery . . . have most often worked . . . to justify the denial to Indians of important rights of property, self-government, and cultural survival.”).

¹⁶⁴ WILLIAMS, *supra* note 106, at 17.

¹⁶⁵ *E.g.*, WILLIAMS, *supra* note 105, at 39 (“Indianophobia, as generated by the language of Indian savagery in American history, is an important part of who we are as a people in America. It’s one of the original, founding forms of racism and racial hostility cultivated by Europeans in the New World, and it constitutes a primal, driving force in defining how we became who we are as a people today.”).

¹⁶⁶ Accord Delgado & Stefancic, *supra* note 17, at 1264 (noting that the stereotype during the Reconstruction Period of African-American men as “brutish and bestial . . . was offered to justify the widespread lynching that took 2,500 black lives between 1885 and 1900”).



are used to implicitly justify abrogations of tribal sovereignty in case law.

c. Unpunished Acts of Vigilantism Against Indians and Legally Sanctioned Violence Against Them.

Historical incidents of vigilante and state-sanctioned violence against Indians are discussed below, followed by the denial of Indians' rights to self-defense, including the right to bear arms. Both patterns—that of violence against Indians and that of explicitly denying Indians the right to self-defense—are necessarily tied to the American view of Indians as violent savages who need to be preemptively attacked and disarmed to protect white safety.¹⁶⁷

1. Vigilante Violence at Work: The Paxton Riots of 1763 and 1764.

As might be expected, the stereotypes and the perceived otherness of Indians that they embody enabled the colonists and early Americans to engage in brutal, unpunished acts of violence against individual Indians and tribes. Indeed, such vigilante attacks were common in early American history.¹⁶⁸ One particularly

¹⁶⁷ See, e.g., *id.*

¹⁶⁸ See, e.g., EDMUNDS, *supra* note 41, at 4-5 (“Although white poachers [in the 1790s] killed deer on Indian lands with impunity, tribesmen trespassing on white property were considered fair game for frontier marksmen. Many Indians on peaceful trading ventures within the settlements were robbed and murdered by American citizens, but frontier courts systematically acquitted culprits accused of such crimes. . . . Governor William Henry Harrison of Indiana Territory confessed that ‘a great many of the Inhabitants of the Fronteers (sic) consider the murdering of Indians in the highest degree meritorious.’ ”); see *id.* at 22 (in 1800, “Governor St. Clair pointed out that the Shawnees and their Indian neighbors daily were subjected to ‘injustice and wrongs of the most provoking character, for which I have never heard that any person was ever brought to justice and punishment’ ”); see also Valencia-Weber, *supra* note 142, at 454 (quoting President Washington’s 1795 statement that “‘the fair prospect [of amicable relations with the Cherokees and Creeks as a result of successful treaty negotiations] in this quarter has been once more clouded by wanton murders, which some citizens of Georgia are represented to have recently perpetrated on hunting parties of the Creeks, which have again subjected that frontier to disquietude and danger’ ”) see generally Keith Thor Carlson, *The Lynching of Louie Sam*, 109 B.C. STUD. 63, 63 (1996) (describing the unpunished lynching of a fifteen-year-old Indian boy from British Columbia in 1884 by Washington settlers who framed him for murder and noting that “[w]ithin American society, vigilante violence had long been viewed as a legitimate means of establishing (or re-establishing) social order.”). Recently, the Washington State Legislature passed a resolution acknowledging the lynching and apologizing for not taking action against the lynchings. H.R. Res. 4715, (Wash. 2006), available at <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bills/House%20Resolutions/4715-Sto%20lo%20Nation.pdf>; S. Res.

important instance of such vigilante violence was the Paxton Riots, which are credited with having significantly shaped the individual rights conception of the Second Amendment that *Heller* embodies.¹⁶⁹ In Pennsylvania in December 1763, “a group of mostly Scotch-Irish Presbyterian frontiersmen slaughtered twenty Indians . . . claiming that these Indians had perpetrated murders along the frontier.”¹⁷⁰ In early 1764, these same frontiersmen marched to Philadelphia “intent on killing the Moravian Indians moved there by the government for protection.”¹⁷¹ In an effort to gain more public support for their actions, the rioters later voluntarily issued what apparently passed for an apology.¹⁷² It included six sworn testimonies of “dubious veracity” asserting that the slaughtered Indians had been guilty of murder and asked the rhetorical question of whether “any person [can] be so little acquainted with the law of nature, . . . as to suppose that [the Indians’] giving up this single article [of their independent nationhood] to us, would secure to every individual of them the benefit of a trial by our laws?”¹⁷³ This rhetorical question indicates the disdain in which at least some settlers held Indians, and it shows that some such people believed that Indians were fair game for murder with impunity.

Despite the protestations of the Quakers, “no trial was ever held,” and these men were never brought to justice.¹⁷⁴ Instead, their actions are credited with having helped “shape[] popular ideas of defense and the essential role government played in providing safety.”¹⁷⁵

This instance of vigilantism and the rioters’ success in influencing their fellow colonists and the colonial government, which eventually adopted the Pennsylvania Declaration of Rights

8729 (Wash. 2006), available at Richard Slotkin, *Equalizers: The Cult of the Colt in American Culture*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 54, 62 (Bernard E. Harcourt ed., 2003) (explaining that “[v]igilantism is the extralegal use of deadly force by an organization of private individuals to achieve some public or political goal.” He further notes that “[v]igilante or ‘Regulator’ movements figured periodically in the development of frontier movements before 1850, . . . [b]ut after 1865, vigilance organizations became the cutting edge of social conflict . . .”).

¹⁶⁹ See Kozuskanich, *supra* note 28, at 1042, 1044, 1052-53 (describing how the historical origins of the Second Amendment were impacted by the legal complaints that motivated the Paxton Riots).

¹⁷⁰ *Id.* at 1051.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1052.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1053.

¹⁷⁵ Kozuskanich, *supra* note 28, at 1054.



of 1776 partly in response to the Paxton Riots,¹⁷⁶ are particularly significant for purposes of understanding the vision of the Second Amendment espoused by the Supreme Court in *Heller*. This is because “[i]ndividual rights scholars have consistently claimed the Pennsylvania Declaration of Rights as their own, insisting that it provides evidence that Americans understood the right to bear arms as one of personal self-defense.”¹⁷⁷ Moreover, “the language of Pennsylvania’s Declaration of Rights of 1776” is “[a]t the center” of the D.C. Circuit’s “historical interpretation of the Second Amendment” that the Supreme Court affirmed in *Heller*.¹⁷⁸ More importantly, the *Heller* majority itself significantly relied on the Pennsylvania Declaration of Rights in construing the Second Amendment to include an individual right to bear arms.¹⁷⁹ This history shows that the Second Amendment as presently constituted stems from an idea of Indians as savage enemies who lacked rights of their own and whom colonists needed to defend against. In other words, the Amendment is historically predicated on destructive, racialized views of Indians.

2. Legally Sanctioned Violence Against Indians.

In addition to vigilantism, there were also many instances of de jure violence against Indians, which were implicitly justified by the notion of tribes as savages. One particularly stark example is the fact that many colonies had laws providing for the payment of bounty for delivery of Indian scalps.¹⁸⁰

Additionally, the State of Georgia hanged a Cherokee man in 1830 in open defiance of a writ of error from the United States Supreme Court.¹⁸¹ Prior to the hanging, a conference of Georgia judges had rejected the Cherokee Nation’s legal argument that the State lacked jurisdiction because the crime occurred in federally

¹⁷⁶ *Id.* at 1060-62.

¹⁷⁷ *Id.* at 1044.

¹⁷⁸ *Id.* at 1041-42 (discussing *Parker v. District of Columbia*, 478 F.3d 370 (D.C. 2007), *aff’d* *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

¹⁷⁹ *Heller*, 554 U.S. 570, 601

¹⁸⁰ *See, e.g.*, David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 182 n.43 (2004) (noting that “most colonies paid bounties for Indian scalps, which often just led to the murder of Christianized, neutral, peaceful Indians”)(citing another source); *see also* Proclamation of Jonathan Belcher, Governor of the Province of New Jersey (June 2, 1756) (providing for payment of one hundred and thirty dollars for delivery of an adult male Indian scalp).

¹⁸¹ ANDERSON, *supra* note 84, at 53-54; *see also* *Cherokee Nation v. Georgia*, 30 U.S. 1, 12-13 (1831) (reciting facts from the Cherokee Nation’s complaint).

recognized Cherokee territory, concluding that the “habits, manners, and imbecile intellect’ of the Indians opposed their governance as an independent state.”¹⁸² When the Supreme Court finally determined in a later case, *Worcester v. Georgia*, that the State of Georgia lacked jurisdiction over Cherokee territory¹⁸³ the Georgia Guard retaliated against the celebrating Cherokees by throwing three of them in jail and promising that if the United States attempted to come to their aid, the Cherokees “would be swept of the Earth before any assistance could arrive.”¹⁸⁴

Moreover, colonies such as Virginia had laws that prescribed brutal punishments for Indians and African Americans. For instance, a 1723 Virginia law provided that “Negros, Mullattos, or Indians,” could testify against “Negros, or other slaves” accused of conspiring to rebel or make insurrection, but that

where any such Negro, Mullatto, or Indian, shall, upon due Proof made . . . be found to have given a false Testimony, every such offender shall, without further Trial, be ordered by the said Court to have one Ear nailed to the Pillory, and there to stand for the Space of one Hour, and then the said Ear to be cut off; and thereafter, the other Ear nailed in like Manner, and cut off, at the expiration of one other Hour; and moreover, to order every such Offender Thirty-Nine Lashes, well laid on, on his or her bare Back, at the common Whipping-Post.¹⁸⁵

Additionally, “[d]uring the Seven Years’ War, it became official policy to kill Indian prisoners, whom in time many officers simply called ‘those Vermine.’”¹⁸⁶

Finally, the federal government itself was responsible for many atrocities. For example, as discussed previously, in 1879 the government apprehended a group of Cheyennes who had escaped

¹⁸² ANDERSON, *supra* note 84, at 53.

¹⁸³ 31 U.S. 515, 561 (1832).

¹⁸⁴ ANDERSON, *supra* note 84, at 74 (quoting Letter from William Williamson, Subcommander of the Georgia Guard, to Wilson Lumpkin, Governor of Georgia (Apr. 28, 1832)), *available at* <http://neptune3.galib.uga.edu/ssp/cgi-bin/tei-natamer-idx.pl?sessionid=7f000001&type=doc&tei2id=tcc537>).

¹⁸⁵ A COLLECTION OF ALL THE ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA 339-341 (William Parks 1733). [hereinafter A COLLECTION OF ALL THE ACTS OF ASSEMBLY].

¹⁸⁶ SILVER, *supra* note 35, at 132; *see also id.* at 91 (describing a 1757 essay by Colonel James Burd of Pennsylvania in which he “urg[ed] attacks on Indian villages”).



from the reservation that the federal government had forcibly removed them to. When the Indians refused to return,

[t]he military authorities . . . resorted to the means for subduing the Cheyennes by which a former generation of animal tamers subdued wild beasts. In the midst of the dreadful winter, with the thermometer 40° below zero, the Indians, including the women and children, were kept for five days and nights without food or fuel, and for three days without water. At the end of that time they broke out of the barracks in which they were confined and rushed forth into the night. The troops pursued, firing upon them as upon enemies in war .¹⁸⁷

Another example of such a federally sanctioned atrocity had occurred fifteen years earlier, in 1864, when the United States “slaughtered at least 150 Cheyenne and Arapaho who had gathered near Denver to make peace with the United States.”¹⁸⁸

As these few examples demonstrate, Indians were not at all safe in colonial and early America, and, as shown above, the atrocities committed against them were implicitly or explicitly justified by the popular perception of Indians as savages who uniformly instigated attacks on innocent whites.¹⁸⁹

d. Indians Were Historically Denied the Right to Self-Defense.

In addition to being subjected to countless acts of violence, Indians were also historically denied the right to carry arms and, in some cases, were explicitly denied the right to defend themselves. Both types of laws appear to have been attempts to achieve the same result, namely to protect whites from Indians’ perceived violent or savage tendencies, perceptions that stem largely from tribes’ justified acts of self-defense. Moreover, these laws constitute clear-cut denials of Indians’ right to self-defense.

1. Historical Prohibitions on Indians’ Right to Defend Themselves.

In 1705, Virginia forbade Indians and Blacks from raising a hand in opposition to a Christian. This draconian law provided for no qualifications or exceptions:

If any Negro, Mulatto, or *Indian*, Bond or Free, shall at any Time lift his or her Hand in Opposition

¹⁸⁷ *Connors v. United States*, 33 Ct. Cl. 317, 322-23 (1898).

¹⁸⁸ COHEN’S HANDBOOK, *supra* note 60, at § 1.03[7].

¹⁸⁹ *See, e.g., ANDERSON, supra* note 84, at 53 (quoting Georgian judges’ determination of Indians to be unsuited to govern themselves because of their “habits, manners, and imbecile intellect”).

against any Christian, not being Negro, Mulatto, or *Indian*, he or she so offending shall, for every such Offence, proved by the Oath of the Party, receive on his or her bare Back, Thirty Lashes, well laid on; cognizable by a Justice of the Peace for that County wherein such Offence shall be committed.¹⁹⁰

Thus, under this law, Indians, as well as blacks, were literally denied any right to defend themselves, at least when the aggressor was a white Christian. Moreover, it appears from the wording that all that was needed to prove the violation of this law was for the alleged victim to claim under oath that a violation had occurred. It is difficult to imagine more powerful evidence of subjugation than this wholly one-sided law. The law also suggests an understanding of Indians (and blacks) as dangerous aggressors who must be subject to harsh penalties for the smallest transgression to prevent the chaos that would otherwise ensue as a result of their irrational violent tendencies.

In the 1850s, the United States forbade the Zuni Tribe from Defending Against Raids and Harassment from Other Tribes.

In 1848 and 1850, the United States promised “to protect the Zunis from raiding Navajos, while the Zunis themselves were prohibited from pursuing military campaigns against the Navajos without the consent of the territorial authorities of Santa Fe.”¹⁹¹ Nonetheless, when the “Navajos continued raiding and harassing” the Zunis, the United States not only forbade them “from taking any action to defend themselves,” but also “failed to provide [the] adequate protection” it had promised to the Zunis.¹⁹² Thus, we see again the view of Indians as untrustworthy, presumably because of their violent (in other words, “savage”) tendencies, being used to deny tribes the right to self-defense even when the circumstances clearly indicate the need for self-defense. Also apparent from this example is federal apathy towards the plight of the Zunis, which may well stem from the perception of Indians in general as savage or uncivilized. As will be shown below, such apathy continues today.

2. Prohibitions on Indians Bearing Arms and on Trading Arms and Ammunition to Indians.

Indians were historically forbidden from bearing arms under colonial, state and federal law, prohibitions which constitute

¹⁹⁰ A COLLECTION OF ALL THE ACTS OF ASSEMBLY, *supra* note 185, at 226 (emphasis in original).

¹⁹¹ Zuni Tribe of N.M. v. United States, 12 Cl. Ct. 641, 646 (1987).

¹⁹² *Id.* at 647, 655.



historical denials of Indians' (and tribes') right to self-defense. Additionally, gun rights advocate Don Kates has argued that the original intent of the Second Amendment itself was to exclude Indians and blacks.¹⁹³ This interpretation comports with common sense given that the need for self-defense in the colonies, and specifically the need for militias, was originally grounded on the perceived need to defend against Indian aggression.¹⁹⁴

a. Federal Prohibitions.

The Uniform Militia Act suggests that the Second Amendment was intended to exclude Indians. The first federal law enacted under the Second Amendment was the Uniform Militia Act, which required white male citizens between eighteen and forty-five to enroll in the militia.¹⁹⁵ It was enacted one year after the Second Amendment was ratified, and therefore provides good evidence of the original intent of the Amendment.¹⁹⁶ On its face, the Act excludes everyone but white men, at least from federal service.¹⁹⁷ Because the Uniform Militia Act bears on the intent behind the Second Amendment, its exclusion of everyone but white men from federal militia service suggests that the “people” referred to in the Amendment, upon whom the right “to keep and bear arms” was conferred, was originally meant to denote a group whose membership was subject to race (and sex) restrictions.¹⁹⁸ From

¹⁹³ Kates, *supra* note 10, at 217 n.54.

¹⁹⁴ See Part II.A *supra*.

¹⁹⁵ See 1 Stat. 271 (1792).

¹⁹⁶ See, e.g., Bogus, *supra* note 9, at 1373 n.47; *Heller*, 554 U.S. 570, 614 (stating that “discussions [that] took place 75 years after the ratification of the Second Amendment . . . do not provide as much insight into its original meaning as earlier sources”) Source ok; Kates, *supra* note 9, at 266 (averring that “one can scarcely argue that the First Militia Act violated the Second Amendment”).

¹⁹⁷ See, e.g., Williams, *supra* note 2, at 451; Bogus, *supra* note 10, at 1373 n.47; see also Ulliver & Merkel, *supra* note 8, at 153

(“The act required that states carry their ‘able-bodied white male citizen[s]’ between the ages of eighteen and forty-four on the rolls . . . Congress also implicitly left the states free to continue the practice of exempting various additional categories of citizens . . . Indeed, Congress also seemingly left open the question of states including additional categories of persons—principally, free black males—in their state militia rosters, even though no federal service requirement attached to them by virtue of the act.”).

But see Cottrol & Diamond, *supra* note 23, at 332 (arguing that that the Uniform Militia Act, while conscripting only white males, excluded no one from the nation’s militia).

¹⁹⁸ This exclusion of Indians from the protections of the Second Amendment is part and parcel of the historical denial of constitutional rights to other groups such as African-Americans and women. See, e.g., *Dred Scott v. Sandford*, 60

this group, male Indians were excluded by virtue of not being white, as well as, potentially, by their lack of citizenship.¹⁹⁹ Given that Indians were excluded from the militia, they would implicitly lack the right to bear arms under the traditional individualist view of the Second Amendment. Thus, their individual right to self-defense would be partially abrogated under an originalist understanding of the Second Amendment.

In 1865, President Abraham Lincoln issued a Proclamation that “all persons detected in that nefarious traffic [of furnishing hostile Indians with arms and munitions of war] shall be arrested and tried by court martial at the nearest military post”²⁰⁰ While this Proclamation applied only to the provision of arms to “hostile Indians,” the numerous references to “savage Indians” in the case law discussed above suggest that hostility may well have been largely in the eye of the beholder. This and similar laws had the effect of indirectly denying Indians the right to bear arms and thus the right to effective self-defense.

The 1876 Resolution of the Forty-Fourth Congress is similar in approach to President Lincoln’s Proclamation in that it also prohibited others from trading arms or related articles with allegedly hostile Indians:

Whereas, it is ascertained that the hostile Indians of the Northwest are largely equipped with arms which require special metallic cartridges, and that such special ammunition is in large part supplied to such hostile Indians . . . through traders and others in Indian country: Therefore, *Resolved* . . . That the President . . . is hereby authorized and requested to take such measures . . . to prevent such special metallic ammunition being conveyed to such hostile Indians, and is further authorized to declare the

U.S. 393, 403 (1856) (holding that “a negro, whose ancestors were imported into this country, and sold as slaves” could not “become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [sic] by that instrument to the citizen”). *see also* U.S. CONST. amend. XIX (affording women suffrage as of 1920); Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal & Political Argument*, 96 CALIF. L. REV. 283, 298 (2008) (describing Justice Taney’s opinion in *Dred Scott* as “a thoroughgoing exercise of . . . originalism”).

¹⁹⁹ *See, e.g.*, Tweedy, *supra* note 95, at 159 (stating that Indians generally were not made United States citizens until 1924); *see also* 8 U.S.C. 1401(b) (2009).

²⁰⁰ Proclamation No. 28, 125 (March 17, 1865).



same contraband of war in such district of country²⁰¹

Thus, again, we see Indians being denied the right to bear arms, a portion of the right to self-defense, through indirect measures.

In 1925-26, a provision of the United States Code required the Secretary of the Interior to adopt rules and regulations to prohibit the sale of arms or ammunition “within any district or country occupied by uncivilized or hostile Indians” and further provided that any Indian trader or trader’s agent who violated the rules would forfeit his license to trade with the Indians, and he or his agent would be excluded from the applicable district or country.²⁰² When the law was in place, such “trading posts were Indians’ only source of supplies.”²⁰³

This law is particularly interesting in that it expands the earlier restriction to include “uncivilized” as well as hostile Indians. Presumably many or most Indians would have been considered uncivilized at that point in time,²⁰⁴ and the concept of a “civilized Indian” would most likely have been reserved for someone who had cut ties with his or her tribe and assimilated into white culture.²⁰⁵ Thus, the 1920s saw an expansion of the groups of

²⁰¹ Res. 20, 44th Cong., 19 Stat. 216 (1876).

²⁰² 25 U.S.C. § 266 (1925-26) (repealed 1953).

²⁰³ Associated Press, *Government Drops Restrictions on Sale of Guns to Indians*, THE WASHINGTON POST, Jan. 6, 1979, at A11 (discussing more recent regulation that incorporated the language from this statute); see also *Regulating Sale of Arms and Ammunition*, 44 Fed. Reg. 46 (Jan. 2, 1979) (referring to the later federal regulation and noting that “[c]ircumstances which gave rise to this rule no longer exist[]” and that “Indians are now able to purchase arms and ammunition at any place they are lawfully for sale”).

²⁰⁴ For instance, in *United States v. Sandoval*, 231 U.S. 28 (1913), decided just over ten years before this statute was enacted, the Supreme Court rejected arguments that the Pueblo were too advanced to have their lands considered Indian country under U.S. law:

The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people.

Id. at 37-39; see also Aleinikoff, *supra* note 97, at 27 (noting that, “[t]hroughout the nineteenth century, that Indians “were ‘uncivilized’ went without saying”).

²⁰⁵ See, e.g., COHEN’S HANDBOOK, *supra* note 60, at § 1.04 (discussing the prominent view during the Allotment period, which lasted from 1871 to 1928, that “tribal autonomy” was a form of “savagery” and the demand “that Indians be absorbed into the mainstream of American life”); Bethany R. Berger, *Red: Racism & the American Indian*, 56 UCLA L. REV. 591, 606 (2009) (stating that, by the mid-eighteenth century, laws began to reflect the view that, “[s]eparated

Indians who were denied the right to bear arms potentially to include all tribal Indians.

By 1939, the United States Code provision discussed above had been transferred to the Code of Federal Regulations, where it remained, in various incarnations, until 1979.²⁰⁶ The 1939 regulation was divided between two sections of the Code of Federal Regulations. The first section, 25 C.F.R. § 276.6 substantially mirrored the United States Code provision prohibiting the sale of arms and ammunition “within any district or country occupied by uncivilized or hostile Indians.”²⁰⁷ The second section, 25 C.F.R. § 276.8, went further and prohibited Indian traders from selling arms and ammunition to the Indians “except upon permission of the superintendent, which shall be granted only for clearly established lawful purposes.”²⁰⁸ Thus, even Indians who were regarded as civilized and friendly by the United States government would have to prove a “clearly established lawful purpose” before they could purchase a gun. There is evidence that discretionary gun permitting schemes are often enforced in a discriminatory manner,²⁰⁹ and there is no reason to think that 25 C.F.R. § 276.8 would have been any different, especially given the entrenched stereotypes of Indians as violent and irrational.²¹⁰ Again, then, we see that, historically, large numbers of Indians were denied the right to bear arms and even those that were not so denied were subjected to special burdens.

These regulations were still in place and remained substantially unchanged through 1949.²¹¹ By 1966, the first section, prohibiting sales to uncivilized and hostile Indians, had been dropped from the Code of Federal Regulations, and only the second section, requiring that arms and ammunition not be sold to Indians, “except upon permission of the superintendent which shall be granted only for clearly established lawful purposes,” remained.²¹² This section stayed in place until the rule was officially revoked in 1979 due to

from his tribe, the Indian could be civilized and would thereby add glory of the English race; tied to it, however, he was the enemy of all civilization.”)

²⁰⁶ 25 C.F.R. §§ 276.7, 276.8 (1939) Regulating Sale of Arms and Ammunition, 44 Fed. Reg. 46 (Jan. 2, 1979) (revoking restriction on sale of arms and ammunition to Indians because of the obsolescence of the rule); *Government Drops Restrictions on Sale of Guns to Indians*, *supra* note 203.

²⁰⁷ 25 C.F.R. § 276.7 (1939).

²⁰⁸ 25 C.F.R. § 276.8 (1939).

²⁰⁹ *See, e.g.*, Tahmassebi, *supra* note 18, at 80-81.

²¹⁰ *See* Parts II.B. & IV.B.

²¹¹ 25 C.F.R. §§ 276.7, 276.8 (1949).

²¹² 25 C.F.R. § 251.8 (1966).



its obsolescence.²¹³ Thus, Indians' rights to bear arms remained explicitly burdened by the law until 1979.

Since the federal regulations, United States Code provision, and earlier federal laws referred to Indians rather than tribes, it appears that the laws were designed primarily to prevent collective military actions by tribes. This goal is evident from the fact that the laws, until 1966, looked to the character of the Indians in the area, presumably the tribe or tribes, in determining the legality of sales and either sanctioned or prohibited the sales on an across-the-board rather than an individualized basis. Thus, the goal was presumably to prevent tribes from engaging in collective violent action, including acts of self-defense, although Indians' individual rights to bear arms were compromised in the process.

In addition to the statutes, regulations, and other laws discussed above, the federal government also prohibited and prevented individual tribes from arming themselves in the face of direct attack or disarmed them and then attacked them or used their disarmament to gain accession to federal demands. For example, pursuant to "general United States policy," the Department of the Interior in 1849 refused to give arms and ammunition to the Zuni Tribe to allow it to protect itself from attacks by the Navajos and Apaches.²¹⁴ Moreover, the federal government, which had promised to defend the Zuni from such attacks, failed to do so adequately,²¹⁵ and the raids therefore continued, including kidnappings and livestock thefts.²¹⁶

Two other examples involve the Sioux Tribe. First, in one case, in 1876 the Sioux had been disarmed by the federal government and then were threatened with denial of rations so that they would cede their sacred Black Hills (which the federal government wanted because gold had been discovered there).²¹⁷ Because the Sioux traditionally hunted for food and did not know how to farm, without either their weapons or government rations, they would have starved.²¹⁸ Thus, the federal government appears to have disarmed them not only to lessen their potential power as

²¹³ Regulating Sale of Arms and Ammunition, 44 Fed. Reg. 46 (Jan. 2, 1979).

²¹⁴ Zuni Tribe of N.M.v. United States, 12 Cl. Ct. 641, 645 (1987).

²¹⁵ *Id.* at 654.

²¹⁶ *Id.* at 645.

²¹⁷ Sioux Nation v. United States, 601 F.2d 1157, 1164-66 (Ct. Cl. 1979); Tahmassebi, *supra* note 18, at 79.

²¹⁸ *Sioux Nation*, 601 F.2d at 1166; Tahmassebi, *supra* note 18, at 79.

opponents but also in order to credibly threaten them with starvation.²¹⁹

The second important example involving the Sioux is the United States' infamous massacre at Wounded Knee in December 1890, where it is estimated that nearly 300 Sioux were killed, including many women and children who died while fleeing.²²⁰ As a precursor to the massacre, U.S. Troops instructed the Sioux they were traveling with to surrender their guns.²²¹ However, the troops were not satisfied that all the weapons had been surrendered and began to search each Sioux man.²²² When a gun went off, the troops began firing on the tepees where the women and children were gathered, "pouring in 2-pound explosive shells at the rate of nearly fifty per minute, mowing down everything alive."²²³

As shown above, then, the federal government engaged in a regulatory and administrative policy of substantially restricting and often prohibiting Indians' ability to bear arms from 1792 until, at least formally, 1979.²²⁴ Such restrictions, along with federal actions directed at individual tribes, had the literal effect of denying Indians individually and the tribes to which they belonged collectively the right to bear arms. Moreover, formal restrictions

²¹⁹ See *Sioux Nation*, 601 F.2d at 1166; see also Tahmassebi, *supra* note 18, at 79.

²²⁰ Allison Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth Century Christianization Policy in Twentieth Century Free Exercise Cases*, 49 STAN. L. REV. 773, 797-98 (1997); The massacre was born out of the United States' attempts to suppress a Sioux spiritual practice, called the Ghost Dance, which the federal government deemed to be dangerous. See also Tahmassebi, *supra* note 18, at 79-80.

²²¹ Dussias, *supra* note 220, at 798; see also Tahmassebi, *supra* note 18, at 79-80.

²²² Dussias, *supra* note 220, at 798.

²²³ *Id.* (citation and internal quotation marks omitted).

²²⁴ A news article from 1979, regarding revocation of the rule, reports that the rule had "not been used for many years." Associated Press, *Government Drops Restrictions on Sale of Guns to Indians*, THE WASHINGTON POST, Jan. 6, 1979, at A11. Despite this general federal history of denying Indians' the right to arm themselves in self-defense, there were occasional exceptions. For example, David Kopel examines three Supreme Court cases involving Indian defendants from the 1890s in which the Supreme Court overturned lower court murder convictions based in part on the defendants' claims that they were acting in self-defense. See generally David Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293 (2000). Ironically, the views of the trial judge discussed in Kopel's article, whose death penalty convictions were overturned by the Supreme Court, were lauded and used as persuasive authority to defeat tribal criminal jurisdiction in *Oliphant*. *Id.* at 298 & n.39; see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 200 & n.10 (1978). See *infra* notes 288-300 and accompanying text for a discussion of *Oliphant*.)



on Indians' bearing of arms continued long after the Reconstruction era efforts to remove formal restrictions on African-Americans' ability to bear arms.²²⁵ While this information should not be taken, by any means, to mean that racism against African-Americans has been overcome and racist laws consequently abolished,²²⁶ it does suggest that Americans are more cognizant of the problem of racism against African-Americans and therefore that overtly racist laws have become unacceptable. In contrast, our racism against Indians remains largely invisible to us, and laws (including the Supreme Court's federal common law decisions) that racialize Indians may be more difficult to recognize.²²⁷ Indeed, stereotypes of Indian savagery allowed formal restrictions on Indians' carrying guns to remain in place until the late 1970s and have continuing harmful effects upon tribes today.

b. Colonial and State Prohibitions on Indians' Bearing Arms.

In addition to federal restrictions and prohibitions, the colonies and states also historically outlawed Indians from bearing arms. Statutes banning Indians from owning or carrying guns were among the first types of gun laws enacted by the colonies and early states, and these laws continued to be in place, in some cases, well into the late nineteenth century.²²⁸ A few examples, arranged chronologically, are provided below.

In 1705, the colony of Virginia had two relevant laws in place. The first, discussed above, forbade an Indian from raising his or

²²⁵ Tahmassebi, *supra* note 18, at 79; *see also* District of Columbia v. Heller, 554 U.S. 570, 614-616 discussing post-Civil War laws enacted for the benefit of African-Americans).

²²⁶ *See, e.g.,* Burkett, *supra* note 14, at 97-99 (detailing "race neutral" gun control measures in the 1960s that were actually aimed at restricting blacks from bearing arms).

²²⁷ *Cf.* Williams, *supra* note 106, at 86-87 (elucidating the fact that the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), represented a paradigm shift in the Court's treatment of African-Americans and other minorities but that this shift did not occur with respect to Indian tribes).

²²⁸ State v. Hirsch, 114 P.3d 1104, 1126-27 (Or. 2005) (noting that "colonies tried to keep arms out of the 'wrong hands' by forbidding . . . Native Americans from carrying certain weapons" and that states continued firearm regulation designed to disarm Native Americans after the Revolutionary War period.) (citations omitted); Burkett, *supra* note 14 at 63 (noting that colonial authorities "sought to disarm blacks and Indians . . .") (citation and internal quotation marks omitted); Tahmassebi, *supra* note 18, at 79 & n.51 (citing 1879 Idaho law that forbade the "sale or provision of firearms and ammunition to 'any Indian'") (citation omitted); Kates, *supra* note 10, at 241 n.156 (describing laws prohibiting gun carrying and ownership by Indians and blacks as one of the four types of early gun laws).

her hand in opposition to a Christian.²²⁹ The second allowed Indians to fish, oyster, and gather plants provided that they first obtained a license from the Justice of the Peace but prohibited them from carrying arms and ammunition while doing so.²³⁰

A 1723 Virginia law generally prohibited Indians and blacks from possessing arms and ammunition and provided a punishment of whipping for violation.²³¹ The law did, however, provide an exception for Indians or blacks living on frontier plantations.²³² However, even they, if free, were required to first obtain a license from the Justice of the Peace or, if enslaved, from the plantation owner.²³³

A 1724 Boston law forbade Indians, blacks, and mulattos from carrying weapons and “from assembling in groups larger than two and from being on the streets from one hour after sundown until one hour before sunrise.”²³⁴ Oregon’s first firearms restriction after obtaining statehood was directed at Native Americans.²³⁵ It became effective in 1864 and “prohibited selling or giving any firearms or ammunition to any Native American without the authority of the United States.”²³⁶ Finally, Idaho “prohibited the sale or provision of firearms to ‘any Indian’ ” in 1879.²³⁷

This sampling of historical state and colonial gun control measures directed at Indians demonstrates the extent to which states and colonies, like the federal government, viewed Indians as untrustworthy, *i.e.* as savage or violent and irrational. As a result of this distorted perception, states and colonies worked to limit Indians’ access to guns while allowing members of the dominant white population to use and carry them.²³⁸ The state attempts are

²²⁹ A COLLECTION OF ALL THE ACTS OF ASSEMBLY, *supra* note 185, at 226; *see also* Part II.E.1.a. *supra*.

²³⁰ *Id.* at 231. The license required was also quite restrictive, defining the amount of time the Indian fisher or gatherer was allowed to engage in such activities.

²³¹ *Id.* at 342.

²³² *Id.* at 231.

²³³ *Id.* at 231.

²³⁴ Bogus, *supra* note 10, at 1370 & n.31.

²³⁵ *State v. Hirsch*, 114 P.3d 1104, 1120 (Or. 2005).

²³⁶ *Id.*

²³⁷ Tahmassebi, *supra* note 18, at 79 & n.51 (Reference to 1879 Idaho Sess. Laws 31).

²³⁸ This strategy is in sync with an often overlooked aspect of gun armament: it only affords a true advantage if the other side is not so armed. *See, e.g.*, Burkett, *supra* note 14, at 77 (“[T]he peculiar advantage of owning a repeating firearm like the Colt is not realized in a gunfight against an equally armed opponent. Rather, it lies in the capacity of a technologically advanced weapon to enable its user to defeat larger numbers of less well-armed adversaries. In short, the gun permits its holder to transcend his perceived position of inferiority and



particularly striking given that, since the adoption of the Constitution, states have been generally considered barred from regulating Indians, at least on-reservation.²³⁹ Like the analogous federal laws, these state and colonial laws raise elemental questions about the right to self-defense and in fact suggest that it was meant as a privilege for the dominant white population to be used to subjugate and oppress members of those unarmed minority groups who found themselves at the other end of the gun barrel.²⁴⁰

E. THE STEREOTYPES OF INDIANS AS WARLIKE SAVAGES ARE STILL USED TO DEPRIVE TRIBES OF THEIR SOVEREIGN RIGHTS TODAY.

While formal restrictions on Indians' gun ownership have now been abolished, the American legacy of fear of Indians based on a perception of savagery continues to plague tribes. Currently, although other ramifications exist,²⁴¹ the most salient effect of this

to gain superiority over, rather than equality with, his adversaries.”) (citations and internal quotation marks omitted).

²³⁹ See, e.g., *Worcester v. Georgia*, 31 U.S. 515 (1832) (striking down a Georgia law that prohibited white persons from living on Indian land unless they had satisfied conditions imposed by state law).

²⁴⁰ See, e.g., Bogus, *supra* note 9 at 1369 (explaining that, in 1517, the “non-white world literally found itself looking down the barrel of a gun”); *id.* at 1370 (“Guns were important to enforcing white control.”)...”). The strategy was twofold: to keep guns out of the hands of blacks and Indians and to keep white men well-armed.”); cf. Tahmassebi, *supra* note 18, at 79 (“The history of firearms prohibitions in regard to Native Americans presents a[n] . . . example of the use of gun control to oppress and . . . exterminate, a non-white ethnic group.”).

²⁴¹ For instance, in June 2000, the Washington State Republican Party passed a resolution “calling for the abolition of tribal governments” by “whatever steps necessary,” and the resolution’s author specifically threatened the use of “the U.S. Army and the Air Force and the Marines and the National Guard” to effect the abolition. Julie Titone, *Resolution Would End Tribal Sovereignty; If Indians Don’t Like It, Send In The Troops, GOP Delegate Says*, SPOKESMAN REVIEW, July 3, 2000, at A1 (citation omitted). The resolution was recognized as racist by both anti-racism organizations and tribal rights groups. Jim Camden and Julie Titone, *Anti-Sovereignty Resolution Draws Fire Some Call GOP Action Racist; (sic) Others Say It’s Simply Misguided*, SPOKESMAN REVIEW, July 8, 2000, at A1; see also Berger, *supra* note 205 at 647 (“The denigration of tribal governments . . . has lain at the heart of racism against Indian tribes”). In a similar vein, in August 2010, New York City’s mayor offensively urged the governor to enforce cigarette tax laws pertaining to on-reservation sales by getting himself “a cowboy hat and a shotgun.” Sarah Moses, “*CNY Native Americans Call New York City Mayor Bloomberg’s ‘Cowboy Hat’ Remark Racist*” Syracuse.com (Aug. 24, 2010). Other ramifications include race-based physical and verbal harassment of tribal members who exercise treaty fishing rights, see generally *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 843 F. Supp. 1284 (D. Wisc. 1994) (holding that Indians’ treaty fishing right was violated when protestors battered and assaulted them to block their access to the waterfront), and dehumanizing views of Indians as bloodthirsty savages in advertising, see, e.g., Michael K.

fear is that tribes' sovereign rights are diminished based on early case law that defined them as savage. This abrogation of sovereignty, particularly jurisdiction over non-members, renders tribes very vulnerable to outside depredations, effectively leaving them unable to defend themselves.

A. STEREOTYPES OF SAVAGERY ARE IMPLICITLY AT WORK IN CASE LAW.

Robert Williams quotes Justice Jackson's dissent in *Korematsu v. United States*²⁴² to explain how the racist precedents using the language of Indian savagery continue to plague current Indian law decisions and to implicitly justify abrogation of tribal rights:²⁴³

Justice Jackson focused his . . . dissenting opinion . . . upon the larger set of constitutional values that were threatened by the Court's holding '[O]nce a judicial opinion rationalizes . . . an order [such as the military order justifying Korematsu's exclusion and detention] to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, . . . the Court has for all time validated the principle of racial discrimination' [T]he principle validated in that opinion now 'lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.' Jackson described what happens when the Supreme Court reviews and approves a principle of racial discrimination as the doctrine of the Constitution: 'There it has a generative power of its own, and all that it creates will be in its own image.'²⁴⁴

In the case of tribes, Williams explains, the "racist precedents and language of Indian savagery used and relied upon by the justices

Green, *Images of Native Americans in Advertising: Some Moral Issues*, 12 J. BUS. ETHICS 323, 324, 328-29 (1993). Even in the generally very progressive realm of contemporary poetry, one can find examples of Indians being portrayed as savages. For instance, in the poem "God Ode," Kim Addonizio describes Indians as the metaphorical enemy of the speaker's body. The poem begins "Praise having a body to be unhappy in,/ suffering the slings and staring unbelieving at the arrows/ bristling from your chest as the Indians creep closer." KIM ADDONIZIO, "God Ode" in LUCIFER AT THE STARLITE (2009).

²⁴² 323 U.S. 214 (1944).

²⁴³ Williams, *supra* note 106, at xxv, 29.

²⁴⁴ 324 U.S. 885 (1945).



[of the Supreme Court] . . . have most often worked . . . to justify denial to Indians of important rights of property, self-government, and cultural survival.”²⁴⁵ Thus, absent the stereotyping of savagery, “there is usually no other justification to be found for the way that Indians are treated by the justices.”²⁴⁶ While Supreme Court justices are no longer likely to describe tribes as savages or to insert quotes in their opinions that contain such language, they continue to rely on the precedents that do use that language, precedents which not only were infected by racialized portrayals of Indians, but, to a significant extent were based on such portrayals.²⁴⁷ These precedents denied tribes sovereign rights based in large part on the implicit justification of Indian savagery. When these precedents are relied upon now, they are expanded, to use Williams’ terminology, to justify even greater incursions upon tribal sovereignty. The same principle applies to opinions produced by lower federal, as well as state, courts, although, as discussed above, such courts are more likely to explicitly include the language of savagism in opinions.²⁴⁸

Thus, usually without appearing to, current Supreme Court cases and other cases from the state and federal system validate, perpetuate, and reinforce this racialization.²⁴⁹ In other words, given that the language of Indian savagery stems in significant part from tribal efforts to defend their homelands, Indians are still being punished for their historical acts of self-defense. As this

²⁴⁵ Williams, *supra* note 106, at xxv.

²⁴⁶ *Id.* at xxv.

²⁴⁷ *See id.* at 49 (discussing the Supreme Court’s continued reliance on *Johnson, Worcester, and Cherokee Nation*).

²⁴⁸ *But see* Williams, *supra* note 106, at 121 (discussing Justice Rehnquist’s dissent in *United States v. Sioux Nation*, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting), in which the Justice, quoting an historian, described the Sioux as “liv[ing] only for the day, recogniz[ing] no rights of property, robb[ing] or kill[ing] anyone if they . . . could get away with it, inflict[ing] cruelty without a qualm, and endur[ing] torture without flinching”) (citation omitted). Note that not only is an extremely violent, or savage, character imputed to the Sioux in this quote, but that the Sioux people are also dehumanized based on their supposed immunity to pain, a characteristic that implies that we can justify doing whatever we want to them because they won’t feel it. *Sioux Nation*, 448 U.S. at 437. Thus, in this quote, former Chief Justice Rehnquist demonstrates how the language of savagery can be used to justify violence against supposedly savage groups. *Id.*; *see also* Part II.B. *supra*.

²⁴⁹ *Cf.* Anthony Cook, *Cultural Racism & the Limits of Rationality in the Saga of Rodney King*, 70 DENVER U. L. REV. 297, 302 (1993) (“After centuries of life predicated on the assumptions of white supremacy, society finally reaches a point at which the assumptions no longer need stating. They provide the backdrop for conversations, interactions and encounters that never utter a racist word, but yet reproduce the imagery of supremacy and inferiority that perpetuates the subordination of blacks in society”)

punishment has been going on for nearly four hundred years in some cases, and is still ongoing whether or not tribes can now buy guns or form militias, tribes cannot be said to have any current right to self-defense. This is particularly true given that the abrogations of tribal sovereignty that are based implicitly on the imputation of savagery (and thus in significant part on past acts of self-defense) literally render tribes defenseless against outsiders.

First of all, all five Supreme Court cases discussed in Part IV.B.3 have been cited in recent Supreme Court and other state and federal court decisions.²⁵⁰ Since 1975, *Worcester*, for example, has been cited in 392 state and federal cases, including thirty-five United States Supreme Court cases.²⁵¹ A case with a decidedly more negative holding for tribes, *Cherokee Nation*, has been cited in 268 state and federal cases since 1975, including twenty-two Supreme Court cases. Finally, *Johnson*, the least positive for tribes out of these three Indian law decisions written by Chief Justice Marshall,²⁵² has been cited in 110 post-1975 state and federal cases, including ten Supreme Court cases. As for *Crow Dog*, it has been cited in a total of eighty-one state and federal court cases since 1975, including seven Supreme Court cases. Lastly, *Tee-Hit-Ton* has been cited in fifty-nine post-1975 state and federal cases, including three Supreme Court cases. The language of savagery lives on, however, even in recent Indian law cases that do not cite to any of these five cases. This is because recent opinions commonly cite earlier cases that have themselves relied on racialized precedents such as these five cases. An extended example of how citation of early racialized decisions inscribes racism into current decisions is described below. Before delving into this example, however, I wish to provide a brief overview of the status of tribes generally under federal law and of the criminal and civil jurisdictional frameworks for cases arising within reservations or involving tribes.

I. THE STATUS OF TRIBES UNDER FEDERAL LAW.

“[T]he relationship of Indian tribes to the National Government” under federal law is widely understood to be ‘an anomalous one and of a complex character.’”²⁵³ For example, in

²⁵⁰ “Recent” here is defined as any case published after December 31, 1975.

²⁵¹ These counts include majority, concurring, dissenting, and plurality opinions.

²⁵² See, e.g., Tweedy, *supra* note 59, at 674.

²⁵³ See, e.g., *United States v. Lara*, 541 U.S. 193, 226 (2004) (Souter, J., dissenting) (citation omitted); see also Erich W. Steinman, *Legitimizing American Indian Sovereignty: Mobilizing the Constitutive Power of Law Through Institutional Entrepreneurship*, 39 L. & SOC’Y REV. 759, 765 (2005)



Cherokee Nation v. Georgia,²⁵⁴ tribes were held to be “ ‘domestic, dependent nations’ who enjoyed a quasi-sovereign status under federal law.”²⁵⁵ However, later federal cases and other federal actions, such as the Allotment Policy, which was in place from the 1880s through the 1920s, viewed tribes as “wards of the state” and pursued an “aggressive policy of assimilating tribal members”²⁵⁶ by confiscating tribal land and parceling it out to individual Indians and non-Indians.²⁵⁷ The Allotment Policy was followed by yet more reversals in federal policy, including the Indian New Deal of the 1930s, which reflected a legislative policy in favor of tribal self-determination, the termination era of the 1950s, which constituted a reversion to harsh, assimilationist policies, and the current self-determination era ushered in by President Nixon in 1970.²⁵⁸ Despite the fact that current legislative and executive policy supports tribal self-determination, however, the Supreme Court has, since its 1978 decision in *Oliphant v. Suquamish Indian Tribe*,²⁵⁹ consistently diminished sovereignty over non-members, largely on its own initiative.²⁶⁰

Great disparities in federal treatment of tribes in different eras and even within the same era by different branches of government are possible (1) because federal Indian law is largely a creature of federal common law,²⁶¹ (2) because Congress has been held to have virtually unlimited “plenary power” over tribes,²⁶² and (3) because the Supreme Court has invested itself with the power to

(describing tribes as holding an “anomalous and ambiguous status” under federal law as they entered the 1970s).

²⁵⁴ 30 U.S. 1 (1831).

²⁵⁵ Steinman, *supra* note 253, at 765 (quoting *Cherokee Nation*, 30 U.S. at 7) (internal quotation marks omitted); *see also* Fisher v. District Ct., 424 U.S. 382, 390 (1976) (referring to the Northern Cheyenne Tribe’s “quasi-sovereign” status).

²⁵⁶ Steinman, *supra* note 253, at 765.

²⁵⁷ *See, e.g.*, Joseph William Singer, *Lone Wolf, or How to Take Property by Calling It a “Mere Change in the form of Investment,”* 38 TULSA L. REV. 37, 43-47 (2002).

²⁵⁸ Steinman, *supra* note 253, at 765.

²⁵⁹ 435 U.S. 191 (1978).

²⁶⁰ *See* Tweedy, *supra* note 59, at 674-683 (discussing the Court’s divestment of tribal sovereignty during the past three decades).

²⁶¹ *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 207 (2004) (“Consequently we do not read any of these cases as holding that the Constitution forbids Congress to change ‘judicially made’ federal Indian law through this kind of legislation.”); *see also*, Tweedy, *supra* note 59, at 664 n.55 (describing the foundational decisions of Indian law as primarily federal common law decisions).

²⁶² *See* Tweedy, *supra* note 59, at 659-662, 659 n.31, n.34 (describing and discussing the origins and virtually unlimited character of Congress’ plenary power over Indian affairs).

construct (especially to diminish) tribal sovereignty under federal law according to its own policy determinations.²⁶³ The fact that court decisions and statutes from eras of conflicting policy remain good law simultaneously has created a schizophrenic body of law, as Erich Steinman sums up:

Lacking comprehensive constitutional foundations, federal Indian law has been, as described by legal scholars, “bizarre” and a “middle-eastern bazaar where practically anything is available”. . . . Indian law expert Charles F. Wilkinson identifies two uniquely divergent lines of opinion issued by the Supreme Court. One set casts tribal governments as largely autonomous under overriding federal authority but free of state control. In the other, tribes are understood as wards of the federal government. Indian law is “time-warped,” as conflicting rulings are based on laws or policy generated in different eras and reflect variants of these two interpretations of tribal status. The underlying ambiguity has resulted in widely divergent perceptions—and rulings—even though ‘tribal sovereignty’ has nonetheless remained an active principle

[A]s legal anthropologist Thomas Biolsi has pointed out, the contradictions within Indian law elicited (and still do today) continual challenges even to those tribal rights affirmed by specific court rulings. Comparing Indian law to racial discrimination law, Biolsi asks “[W]hat things would be like if the laws of slavery *and* the 13th through 15th amendments to the Constitution were equally on the books, or if *both Plessy v. Ferguson* . . . and *Brown v. Board of Education* were equally ‘good law’ in the present”. Such conditions invite virtually ongoing litigation²⁶⁴

a. Criminal Jurisdiction for On-Reservation Crimes.

The determination of criminal jurisdiction for on-reservation crimes is so complicated as to have been termed a “maze”²⁶⁵ and a

²⁶³ See Tweedy, *supra* note 59, at 674-683 (discussing the Court’s divestment of tribal sovereignty during the past three decades).

²⁶⁴ Steinman, *supra* note 253, at 766-67 (citations omitted).

²⁶⁵ See generally AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007) (reporting on the complex “maze” of tribal, state, and federal law that makes it



“morass.”²⁶⁶ Among the most troubling aspects of the maze are the limitations on tribal jurisdiction effected by statute and by Supreme Court case law, which are discussed below.

1. Tribal Jurisdiction.

Generally, in an Indian reservation, Indian allotment, or other dependent Indian community,²⁶⁷ tribes have criminal jurisdiction over their members as well as other Indians.²⁶⁸ However, under the Indian Civil Rights Act, the sentences they may impose are limited generally to a prison term of one year, a fine of \$5,000, or both²⁶⁹ (although, under a 2010 law called the Tribal Law and Order Act,²⁷⁰ tribes are able to impose sentences of up to three years and fines of up to \$15,000 if certain requirements are met).²⁷¹ Moreover, although tribes, being neither federal nor state actors, are not generally bound by constitutional provisions requiring protection of individual rights,²⁷² most Bill of Rights protections have been imposed on tribes through the Indian Civil Rights Act.²⁷³ The most notable exception in the criminal milieu is the right to counsel for an indigent defendant,²⁷⁴ although tribes that

extremely challenging for Native American victims of sexual violence to achieve justice).

²⁶⁶ Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1182 (2004) (“[T]he federal statutory scheme addressing crimes in Indian country creates a confusing morass in which tribes, states, and the federal government may, depending on various factors, have exclusive or concurrent criminal jurisdiction.”).

²⁶⁷ See 18 U.S.C. § 1151 (2006) (Defining “Indian country” as including Indian allotments, Indian communities, and “all land within the limits of any Indian reservation . . .”).

²⁶⁸ . *Lara*, 541 U.S. at 210; 25 U.S.C. § 1301(2) (2006).

²⁶⁹ 25 U.S.C. § 1302(7)(2006).

²⁷⁰ Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, §§ 201-266, 124 Stat. 2258, 2261-62 (2010). http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ211.111.pdf

²⁷¹ *Id.* at 2279-80; 25 U.S.C. § 1302 (2006).

²⁷² See *Talton v. Mayes*, 163 U.S. 376, 381-83 (1896)(stating that powers of the local government exercised by the Cherokee nation are not derived from the Constitution); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D.*, 259 F.2d 553, 556-57 (8th Cir. 1958) (holding that because Indian tribes are not states, constitutional limits on legislative actions by states under the Fifth and Fourteenth Amendments do not apply to them).

²⁷³ 25 U.S.C. § 1302 (2006).

²⁷⁴ See, e.g., COHEN’S HANDBOOK, *supra* note 60, at §14.04[2](noting that ICRA omits the Constitutional requirements of free counsel for indigent defendants and that ICRA’s legislative history “indicates that these omissions reflect a deliberate choice by Congress to limit its intrusion into traditional tribal independence.”); Will Trachman, *Tribal Criminal Jurisdiction After United States v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CALIF. L. REV. 847, 880 (2005) (“Thus even though state and federal courts must provide indigent defendants with assistance of counsel free of charge, neither the

impose the stronger punishments now available under the Tribal Law and Order Act must provide indigent defendants with the right to an attorney.²⁷⁵

Although, under the Major Crimes Act,²⁷⁶ federal courts have jurisdiction over enumerated Indian-on-Indian felonies, such as murder and rape, some courts have held that tribal courts retain concurrent jurisdiction in such cases.²⁷⁷ Furthermore, the only federal review available of a tribally imposed conviction is habeas corpus.²⁷⁸

2. Federal Jurisdiction.

As noted above, the federal government has jurisdiction over certain major crimes committed by an Indian against an Indian on the reservation.²⁷⁹ The federal government also has jurisdiction over on-reservation crimes involving a non-Indian perpetrator and an Indian victim or vice versa under the Indian Country Crimes Act²⁸⁰ and the Assimilative Crimes Act.²⁸¹

3. State Jurisdiction.

States have jurisdiction over non-Indian-on-non-Indian crimes within Indian country.²⁸² Additionally, under a federal law popularly known as Public Law 280,²⁸³ some states, as a substitute for federal jurisdiction, have additional criminal jurisdiction over Indian Country.²⁸⁴ Although it is not entirely clear, it appears that

federal Constitution nor the terms of ICRA require tribes . . . [to do so] in tribal courts.”).

²⁷⁵ Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, § 234(a)(2), 124 Stat. 2258, 2279 (2010).

²⁷⁶ 18 U.S.C. § 1153 (2006).

²⁷⁷ *See, e.g., Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) (“That the tribes retain jurisdiction over crimes within the Major Crimes Act is the conclusion already reached by distinguished authorities on the subject.”).

²⁷⁸ 25 U.S.C. § 1303 (2006); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (“[T]he structure of the statutory scheme and the legislative history of Title I suggest that Congress’ failure to provide remedies other than habeas corpus was a deliberate one.”).

²⁷⁹ 18 U.S.C. § 1153 (2006).

²⁸⁰ 18 U.S.C. § 1152 (2006); *see also Washburn, supra* note 158, at 716-17 (discussing the framework of federal jurisdiction created by the Indian country statute, the Major Crimes Act, and the General Crimes Act).

²⁸¹ 18 U.S.C. § 13; *see also Washburn, supra* note 158, at 716-17 (“[T]he Assimilative Crimes Act[] provides that any state criminal law of the state in which the lands are located can be assimilated if there is no federal criminal law on point.”) (footnote omitted).

²⁸² *United States v. McBratney*, 104 U.S. 621, 621-22 (1881).

²⁸³ 18 U.S.C. § 1162 (2006); 25 U.S.C. §§ 1321-26 (2006); 28 U.S.C. § 1360 (2006).

²⁸⁴ COHEN’S HANDBOOK, *supra* note 60, at § 6.04[3] (explaining the history of Public Law 280, and the state jurisdiction which it authorizes); *see also MAZE*



tribes have concurrent jurisdiction with states in these circumstances, to the same extent that they otherwise would have with the federal government.²⁸⁵ In Alaska, matters are further complicated by the general absence of Indian Country, which appears to leave the state having broad jurisdiction over Native Villages....²⁸⁶ Finally, states have jurisdiction over crimes not in Indian Country regardless of the perpetrator's and victim's Indian status or lack thereof.²⁸⁷ As this framework makes abundantly clear, determining what government has jurisdiction over a crime committed in Indian Country is no simple matter. Moreover, in some states, such as Oklahoma, where extensive allotment has occurred, the determination of whether an area *is* Indian Country may take weeks or even months.²⁸⁸ Given this framework and the fact that criminal perpetrators naturally try to hide their identities, and, in these circumstances, may also try to hide their races,²⁸⁹ it is not surprising that there is considerable difficulty in bringing criminals to justice or that such obstacles help create an atmosphere of lawlessness on many reservations.

OF INJUSTICE, *supra* note 265, at 29 (“Public Law 280 is seen by many Indigenous peoples as an affront to tribal sovereignty, not least because states have the option to assume and to relinquish jurisdiction, a power not extended to the Indigenous peoples affected. In addition, Congress failed to provide additional funds to Public Law 280 states to support the law enforcement activities they had assumed.”).

²⁸⁵ COHEN’S HANDBOOK, *supra* note 60, at § 6.04[3][c] (“Public Law 280 did not specifically extinguish any tribal court jurisdiction, and the legislative history reflects no such congressional intent.”).

²⁸⁶ *See generally*, Alaska v. Native Vill. of Venetie Tribal Gov’t, 522 U.S. 520, 533 (1998) (“These [current federal] protections, if they can be called that, simply do not approach the level of superintendence over Indians’ land that existed in our prior cases.”); COHEN’S HANDBOOK, *supra* note 60, at § 4.07[3][d] (“[The Alaska Court’s decision] suggests that Alaska native villages retain authority over other matters connected to core tribal interests, regardless of the absence of Indian Country.”); MAZE OF INJUSTICE, *supra* note 265, at 36-37 (“A combination of federal legislation and state and US Supreme Court decisions . . . has resulted in considerable confusion and debate over the right of Alaska Native peoples to maintain tribal police and court systems.”).

²⁸⁷ *See, e.g.*, COHEN’S HANDBOOK, *supra* note 60, at § 9.03[1].

²⁸⁸ MAZE OF INJUSTICE, *supra* note 265, at 34 (noting the difficulty in determining the status of land in Oklahoma).

²⁸⁹ *See* ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 26 (2005) (listing examples to support the claim that both today and historically white men who raped and murdered Indian women would try to attribute this crime to Indian men). *See also* Elizabeth Ann Kronk, *The Emerging Problem of Methamphetamine: Casting A Threat Signaling the Need to Reform Criminal Jurisdiction in Indian Country*, 82 N.D.L. REV. 1249, 1249-1250 (2006) (noting that a drug lord “with connections to the Mexican drug cartel” “blended into” the Wind River Indian Reservation community and that this increased his confidence that he would be able to carry out his plan to ensnare the community in a web of meth addiction).

4. Tribal Civil Jurisdiction.

Tribal civil jurisdiction has become exceedingly complicated, and a thorough analysis of the subject could easily span one hundred or more pages. However, below is an abbreviated overview of the subject. Tribes generally have regulatory and adjudicatory jurisdiction over their members, whereas tribal jurisdiction over non-members has been increasingly circumscribed.²⁹⁰ Absent federal delegation or congressional restoration of tribal sovereignty,²⁹¹ the general rule of when tribes have civil jurisdiction over nonmembers was enunciated in *Montana v. United States*:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.²⁹²

While *Montana*'s limitations on civil jurisdiction over nonmembers originally only applied to tribal regulatory jurisdiction (rather than adjudicatory jurisdiction) and applied only to non-Indian-owned fee lands within reservations, the limitations have been expanded with each new case heard by the Supreme Court.²⁹³ Thus, for example, under current law, jurisdiction over state rights-of-way through tribally owned land on the reservation is subject to a *Montana* analysis,²⁹⁴ and, more importantly, ownership of land may well have become merely one factor in the analysis as to whether the *Montana* limitations on tribal

²⁹⁰ See, e.g., COHEN'S HANDBOOK, *supra* note 60, at § 4.02 (highlighting federally imposed limitations on tribal powers).

²⁹¹ See generally Tweedy, *supra* note 59 (discussing the potential for congressional restoration of tribal sovereignty); Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara*, 35 ENVTL. L. 471, 473-74 (2005) (discussing delegation of federal power to tribes).

²⁹² *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (citations omitted).

²⁹³ See, e.g., Tweedy, *supra* note 59, at 674-76, 678, 703 & n.256, n.257 (listing various cases where the Supreme Court limited tribal power).

²⁹⁴ See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (citing *Montana* as the "pathmarking case concerning tribal civil authority over nonmembers" and applying its analysis). See also Tweedy, *supra* note 95, at 171 (analyzing *Strate* as narrowing the *Montana* holding to apply only to certain circumstances).



jurisdiction apply at all.²⁹⁵ Furthermore, with respect to *Montana*'s consensual relationship exception, the Court has required that there be a stringent nexus between the consensual relationship and the tribe's assertion of jurisdiction.²⁹⁶ The Court has concluded that land sales by nonmembers on the reservation are not "activities" for purposes of the consensual relationship exception and therefore that they cannot fall under that exception.²⁹⁷ Finally, the Court has dismissed the applicability of the second exception, relating to the tribe's health, welfare, political integrity, or economic security, when a tribe could not plausibly claim "catastrophic consequences" as a result of the nonmember's actions.²⁹⁸ These are only a few of the ways that the Court has limited the *Montana* language to further narrow tribal jurisdiction. As I suggested in a previous article, it is possible that the primary function of the *Montana* exceptions in the Supreme Court is "to exist in theory but never actually apply."²⁹⁹ Thus, while tribes may legally exercise civil authority over nonmembers under *Montana*, they have had tremendous difficulty in getting the Supreme Court to enforce this right in individual cases.

b. An Extended Example of the Language of Savagery at Work in Supreme Court Case Law.

In *Oliphant v. Suquamish Indian Tribe*,³⁰⁰ the Court relied on very questionable sources, such as "unspoken assumption[s]" and withdrawn administrative opinions to effect a devastating blow to tribal sovereignty, the revocation of tribes' criminal jurisdiction over non-Indians.³⁰¹ As further discussed below, this holding has played a substantial part in exposing tribes to widespread

²⁹⁵ See Tweedy, *supra* note 59, at 678 (summarizing *Nevada v. Hicks*, 533 U.S. 353 (2001) in which the Supreme Court held that a tribal member could not bring a §1983 claim against a state officer who executed a search warrant on tribal land).

²⁹⁶ See *id.* (discussing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) and its changes to the *Montana* test).

²⁹⁷ See *id.* at 681 (examining *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) in which the Supreme Court held that a tribal court did not have jurisdiction to hear a discrimination case seeking to set aside the sale of fee land on a reservation pursuant to a deed of trust and a variety of other remedies).

²⁹⁸ *Long Family Land & Cattle*, 554 U.S. at 341.

²⁹⁹ Tweedy, *supra* note 59, at 682.

³⁰⁰ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

³⁰¹ *Id.* at 203 (relying on Congress' "unspoken assumption" that tribes lacked such jurisdiction). See also Tweedy, *supra* note 95, at 151-52 (noting the "dubious evidence" supporting the Court's decision in *Oliphant*).

lawlessness nationwide,³⁰² thus rendering tribes literally unable to defend themselves from violence.³⁰³

In Justice Rehnquist's majority opinion in *Oliphant*, he quoted *Crow Dog*, including the *Crow Dog* opinion's most offensive passage emphasizing that it would be unfair to "measure[] the red man's revenge by the maxims of the white man's morality."³⁰⁴ However, Justice Rehnquist carefully elided the portions of the *Crow Dog* passage that defined Indians as savages because he was using the *Crow Dog* passage in *Oliphant* to underscore that it would be unfair to outsiders (namely whites) to allow Indian tribes to exercise criminal jurisdiction over them.³⁰⁵ He was thus putting whites in the place of the Indian defendant in *Crow Dog* but could hardly convincingly describe whites as savages,³⁰⁶ as this would not only presumably conflict with his own world view but would also lack cultural resonance. By making this strategic use of ellipses, Justice Rehnquist was able to preserve a sanitized version of the offensive language in *Crow Dog* and then use it to deny Indians the right to criminal jurisdiction over non-Indians. The racialized language of savagery from *Crow Dog* was therefore at work in *Oliphant* but in a way that would not have been readily ascertainable to one not versed in Indian law.³⁰⁷ Moreover, the notion of tribes as untrustworthy that pervades *Oliphant* can be linked to the stereotype of savagery, specifically to the conception of tribes as unpredictable aggressors.³⁰⁸

³⁰² See, e.g., Trachman, *supra* note 274, at 854 ("The *Oliphant* decision led to an atmosphere of lawlessness on tribal reservations and substantially hindered the ability of tribal governments and police to combat crimes committed by non-Indians on reservations").

³⁰³ For an example of a tribal court case that analyzes the question of criminal jurisdiction over nonmembers (in this case nonmember Indians) as a self-defense issue see *Means v. District Court of the Chinle Judicial Dist.*, No. SC-CV-61-98, (Supreme Court of the Navajo Nation May 11, 1999), available at <http://www.tribal-institute.org/opinions/1999.NANN.0000013.htm> (noting that "[t]he social health of the Navajo Nation is at risk . . . as is the actual health and well-being of thousands of people" as a result of nonmember on-reservation crime).

³⁰⁴ WILLIAMS, *supra* note 105, at 109 (quoting *Oliphant*, 435 U.S. at 210-11, and *Crow Dog*, 109 U.S. at 571).

³⁰⁵ See *id.* at 108-09 (examining Justice Rehnquist's reasoning in *Oliphant*).

³⁰⁶ *Id.*

³⁰⁷ See *id.* at 108-110 ("[T]he same basic nineteenth century racist attitude of Indian cultural inferiority found in *Crow Dog* is now being applied to Indians once again . . .").

³⁰⁸ Accord Kates, *supra* note 10, at 217 n.54 ("The original intention [of the Second Amendment] would unquestionably also have been to exclude Indians and blacks on the grounds of alienage or untrustworthiness.").



In *Oliphant*, Justice Rehnquist also made use of *Johnson*, *Cherokee Nation*, and *Worcester*. He used the doctrine of discovery from *Johnson* as a springboard for the idea that rights of Indian tribes are necessarily implicitly “diminished” in myriad ways as a result of their incorporation into the United States—ways which, based on *Oliphant* and subsequent Supreme Court decisions, appear to remain obscure until the Court elucidates them.³⁰⁹ Justice Rehnquist similarly used *Cherokee Nation*’s somewhat limited acknowledgement that, because tribes were “completely” under the sovereignty of the United States, a foreign nation’s attempt to acquire either their land or a connection with them would be considered an affront to the United States to support the expansive holding that tribes lacked criminal jurisdiction over non-Indians for crimes committed on the reservation.³¹⁰ Finally, Justice Rehnquist questionably used *Worcester* to support the notion that the Suquamish Tribe’s generic acknowledgement of “dependence” on the United States in its treaty actually signified that the tribe consented to cede its criminal jurisdiction over non-Indians to the federal government.³¹¹

Thus, *Oliphant* demonstrates that the elements of racial animus in Chief Justice Marshall’s trilogy of Indian law decisions have functioned to exponentially reduce tribal sovereignty despite the positive aspects of the early decisions.³¹² In other words, as Justice Jackson recognized in his *Korematsu* dissent, the racist principle, once validated in a judicial opinion, “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes . . .”³¹³

Not only was *Oliphant* a highly significant blow to tribal rights in its own right, but the Court has expanded it exponentially to reduce tribal sovereignty even further.³¹⁴ Thus, even when the

³⁰⁹ See WILLIAMS, *supra* note 105, at 98 (quoting *Oliphant*, 435 U.S. at 209).

³¹⁰ *Oliphant*, 435 U.S. at 208-209. See also WILLIAMS, *supra* note 106, at 99 (quoting *Cherokee Nation*).

³¹¹ See *Oliphant*, 435 U.S. at 206-07 (quoting *Worcester*). See also WILLIAMS, *supra* note 106, at 106-07 (analyzing Rehnquist’s use of *Worcester* in *Oliphant*). This holding is completely at odds with *Worcester* in that the Court in *Worcester* was careful to construe tribal cessions made in treaties narrowly. See, e.g., Tweedy, *supra* note 59, at 671-72.).

³¹² See Tweedy, *supra* note 59, at 673-74 (discussing the positive aspects of the three decisions).

³¹³ WILLIAMS, *supra* note 105, at 29 (quoting *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)).

³¹⁴ See, e.g., WILLIAMS, *supra* note 105, at 137-48 (discussing the Court’s use of *Oliphant* in *Nevada v. Hicks*, 533 U.S. 353 (2001)). See also Tweedy, *supra*

antecedent decisions on which *Oliphant* was based are not themselves cited, the racialized language of savagery in them continues to operate, through *Oliphant* (and the cases that have relied on *Oliphant* and that are in turn cited to support later abrogations of tribal sovereignty) to deprive tribes of their sovereign rights. Indeed, *Oliphant* has been cited in 265 federal and state cases, including twenty-two Supreme Court cases, since it was decided in 1978.

Moreover, both *Oliphant* and *Worcester* were cited in the Court's 2008 decision, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*³¹⁵ In *Long Family Land & Cattle*, the Court reduced tribes' already drastically curtailed sovereignty over non-members by overturning a tribal court jury verdict in a discrimination case against a non-member bank on the basis that the tribal court lacked jurisdiction.³¹⁶

The *Long Family Land & Cattle* court expanded *Oliphant's* holding that tribes lacked criminal jurisdiction over non-members and also expanded the holdings of subsequent cases that had extended *Oliphant's* holding to the civil context.³¹⁷ One such intervening case, *Montana v. United States*³¹⁸ had expanded *Oliphant's* idea of implicit abrogations of tribal sovereignty because of alleged inconsistency with the tribes' dependent status to the United States to the civil arena.³¹⁹ As alluded to above, *Montana* had held that tribes' civil regulatory jurisdiction over

note 59, at 675-83 (discussing the Court's trend of divesting tribal sovereignty as beginning with, and being rooted in, *Oliphant*).

³¹⁵ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S.Ct. 2709, 2718-19, 2723 (2008).

³¹⁶ *Id.* at 2720 (holding the tribal court lacked jurisdiction to hear a discrimination claim against defendant bank because the tribe lacks the civil authority to regulate the bank's sale of its fee land). *See also* Tweedy, *supra* note 59, at 679-83 (discussing how *Long Family Land & Cattle* further reduces tribal sovereignty).

³¹⁷ *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 374-75 (2001) (holding that tribes have no jurisdiction to adjudicate claims that state officials violated tribal law in the performance of their duties); *Strate v. A-1 Contractors*, 520 U.S. 438, 459-60 (1997) (holding the tribal court did not have jurisdiction to adjudicate a civil tort claim because tribal adjudication is not necessary to protect tribal self-government); *Montana v. United States*, 450 U.S. 544, 566-67 (1981) (holding the tribal court lacked civil jurisdiction to adjudicate claims involving non-Indian hunters and fisherman on non-Indian fee land). All three cases are cited in *Long Family Land & Cattle*, 128 S. Ct. at 2718-19.

³¹⁸ *Montana v. United States*, 450 U.S. 544, 549 (1981) (citing *Oliphant*, 435 U.S. 191 (1978)). *See also* WILLIAMS, *supra* note 105, at 139 (describing how *Montana v. United States* expanded *Oliphant* jurisdictional limitations to the civil sphere).

³¹⁹ *Montana v. United States*, 450 U.S. at 565-66 (expanding the *Oliphant* principles to hold that the tribe lacked jurisdiction in a civil regulatory matter).



nonmember activities on non-Indian owned fee land within the reservation was abrogated as a result of the tribes' dependent relationship, except in certain circumstances such as when the nonmembers had entered into consensual relationships with the tribe or its members.³²⁰

However, the Court did not rigorously examine the *Montana* exceptions but instead paradoxically focused on one of several remedies the plaintiffs sought in *Long Family Land & Cattle*, namely, setting aside the defendant Bank's foreclosure sale of their property. It then held that the *Montana* rule was not at all applicable because land sale was not an "activity" under *Montana*.³²¹ Thus the *Long Family Land & Cattle* Court used *Oliphant* implicitly, through *Montana*, to derogate tribal rights.

The Court in *Long Family Land & Cattle* also cited *Oliphant* directly for the proposition that tribes have lost the right to govern anyone in their territory except themselves.³²² *Oliphant's* use of that statement was limited to tribal criminal jurisdiction; it had since been expanded to civil jurisdiction subject to the exceptions laid out in *Montana*.³²³ The *Long Family Land & Cattle* decision represents yet another expansion, apparently holding that tribes may not regulate land sales involving non-members even if a

³²⁰ *Id.* at 565 ("A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

³²¹ *Long Family Land & Cattle*, 554 U.S. at 336 (distinguishing the resale of land from the uses to which the land is put). *See also* Tweedy, *supra* note 59, at 679-82 (discussing the Court's decision in *Long Family Land & Cattle*, including the opinion's failure to reckon with the *Montana* exceptions).

³²² *Long Family Land & Cattle*, 554 U.S. at 328. (citing *Oliphant* to support the proposition that tribes have no right to govern anyone in their territory besides themselves. Interestingly, in making this statement, the *Oliphant* Court is itself quoting an 1810 case called *Fletcher v. Peck*, 6 Cranch 87, 147 (1810), which states that "[a]ll the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." *Oliphant*, 435 U.S. at 209 (citing *Fletcher* for the proposition that the overriding sovereignty of the United States restricts tribal authority from governing people other than themselves). However, as might be expected, *Oliphant* is expanding the principle, which was not only dicta in *Fletcher* but appears to be more of an assertion of the federal government's right to regulate outsiders within Indian reservations than a derogation of the tribes' rights to do so. *Fletcher*, 6 Cranch at 147 (mentioning limitations on tribal authority to govern outsiders in a paragraph describing the United State's legal interests in Indian lands).

³²³ *Montana v. United States*, 450 U.S. at 565 ("Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.").

consensual relationship has been established.³²⁴ Thus, the principles of *Oliphant* were used in *Long Family Land & Cattle* to implement yet another novel limitation on tribal rights. Without the specter of savagery, it is hard to see why the court has so much difficulty in entrusting tribes with the territorial jurisdiction that is rightfully theirs.

Worcester is also cited in *Long Family Land & Cattle*, in a similarly puzzling and somewhat misleading way.³²⁵ *Worcester* had held that Georgia lacked jurisdiction over the Cherokee Nation's tribal territory and had concomitantly emphasized the Cherokee Nation's right to decide who entered its territory.³²⁶ But Chief Justice Roberts uses *Worcester*'s holding affirming the Cherokee Nation's right to decide who may enter its territory to support his statement that tribes lack jurisdiction over their reservations unless they actually own the land: "[b]y virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to managing tribal land."³²⁷ *Worcester* nowhere suggests that land ownership *inside* a reservation is determinative of tribal jurisdiction; the relevant boundary in *Worcester* is that between tribal and state territory.³²⁸ Thus, we can only assume that *Worcester*'s dark side of the racial stereotyping is at work in the *Long Family Land & Cattle* majority decision, expanding the savagery language beyond the stereotyping's original use in *Worcester* to overshadow that case's true holding.

In addition to the difficulties that the holding in *Long Family Land & Cattle* poses for tribes,³²⁹ the tone of the decision is overtly dismissive of tribes and tribal rights.³³⁰ Moreover, the analysis in

³²⁴ *Long Family Land & Cattle*, 554 U.S. at 337-38.

³²⁵ *Id.* at 334 (citing *Worcester* to support the proposition that "[b]y virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to managing tribal land.").

³²⁶ *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) ("The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves.").

³²⁷ *Long Family Land & Cattle*, 554 U.S. at 334.

³²⁸ *See Worcester*, 31 U.S. at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.").

³²⁹ *See Tweedy, supra* note 59, at 687-88 & 687 n.171 (describing how *Long Family Land & Cattle* negatively impacts tribes' ability to protect their governmental interests, specifically how inability to enforce antidiscrimination laws against non-members will lead to job and opportunity losses).

³³⁰ For instance, the *Long Family Land & Cattle* Court accuses the Longs of "attempt[ing] to recharacterize their claim," 554 U.S. at 330, although the



the opinion is often facile, avoiding the difficult task of truly applying the Court's complicated Indian law precedents and announcing rules for the first time while proclaiming that they are well-established.³³¹ These aspects of the decision independently harm tribes and negatively affect how society views them, affirming societal racialization of tribes.³³²

B. The Continuing Stereotyping of Indians as Savage May Also Be Driving the Federal Government's Failure to Effectively Deal with Epidemic Levels of On-Reservation Violent Crime.

The continuing societal racialization of Indians and tribes, and specifically the stereotype of savagery, undoubtedly has effects beyond the judicial abrogation of tribal sovereignty.³³³ One area

alleged re-characterization is actually comprised of the Longs' valid argument that the case arose out of the defendant's failure to provide them with promised loan moneys. Additionally, the Court appears glib about federal actions, such as diminishing the reservation land-base by parceling out the reservation pursuant to the General Allotment Act, that have undoubtedly caused untold grief for the tribe and its members. For instance, the Court states that, although the reservation was "[o]nce a massive, 60-million acre affair," it "was appreciably diminished by Congress in the 1880s . . ." *Id.* at 320-21. At another point, the Court states: "[t]hanks to the Indian General Allotment Act of 1887 . . . there are millions of acres of non-Indian fee land located . . ." within reservations. *Id.* at 328. The Court's implicit expression of satisfaction that the federal government has inflicted these harms upon tribes can only indicate disrespect of their position and an utter lack of empathy towards them. Such language can be expected to further alienate tribes and make them even less likely to trust in the court system. *See* Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 COURT REVIEW. 54, 57, 60, 60 n.48 (2000)(arguing that courts must carefully choose "therapeutic" language to avoid exacerbating the tension between majority and minority groups).

³³¹ For instance, the Court focuses exclusively on the tribal court's jurisdiction to enforce one of the remedies sought by the plaintiffs for the alleged discrimination, the setting aside of the Bank's subsequent sale of the land, rather than undertaking the required (and unquestionably more difficult) analysis of whether the tribal court had jurisdiction over the discrimination claim itself, for which the plaintiffs had sought both legal and equitable remedies. *See, e.g.,* Tweedy, *supra* note 59, at 680 (discussing this aspect of *Long Family Land & Cattle*). The Court then sidesteps the applicability of the *Montana* exception by concluding that land sales are not activities within the meaning of *Montana*. *Long Family Land & Cattle*, 554. U.S. at 333-34, 333 n.1 (creating a distinction between land use and land sale). Not only does the Court adopt this conclusion, which is questionable in itself, but it avers, without any basis whatsoever, that "[t]he distinction between sale of land and conduct on it is well-established in our precedent . . ." *Id.* at 334.

³³² *See, e.g.,* Des Rosiers, *supra* note 330, at 56-58, 59-60 (using a case study on Quebec to illustrate how lack of nuance in court language can exacerbate pre-existing tensions rather than resolve a conflict).

³³³ *See, e.g., supra* note 241 and sources cited therein (discussing *Spokesman Review* articles and *Stop Treaty Abuse-Wisconsin*).

where these stereotypes may well be at work is the federal government's failure, at least up to this point, to deal effectively with violent crime on reservations. As I discussed in a previous article, American Indians are more often victimized by violent crime than any other group, and Native women are especially at risk.³³⁴ Indeed, Native women are 2.5 times more likely to be raped than other women, and one in three Native women will be raped in her lifetime.³³⁵ In a 2007 report on the subject, Amnesty International found that "Indian women face considerable barriers to accessing justice," and the organization charged the U.S. government with "interfer[ing] with the ability of tribal justice systems to respond to crimes of sexual violence . . ."³³⁶ Not only has tribal criminal jurisdiction over non-Indians been abrogated, as we saw in *Oliphant*, but it appears that federal prosecutors who are responsible in most states for prosecuting the majority of serious crimes on Indian reservations that are perpetrated by Indians as well as those crimes that have an Indian victim and a non-Indian perpetrator or vice versa³³⁷ rarely prosecute violent crime in Indian country.³³⁸ Thus, tribes are largely powerless to deal with this epidemic violence. In other words, without the recognized sovereign powers over non-Indians that the Supreme Court, in cases such as *Oliphant* and *Long Family Land & Cattle*, has abrogated, tribes cannot defend themselves, and the federal government has failed, at least up until now, to effectively defend them.

As noted above, a significant portion of this problem is attributable to *Oliphant*'s divestment of tribal criminal jurisdiction and the stereotypes of savagery that are at play in that decision.³³⁹ Additionally, although several Senate Committee hearings have

³³⁴ Tweedy, *supra* note 59, at 690 (discussing the rate of sexual violence against native women and the obstacles they face when seeking justice in such cases).

³³⁵ *Id.* at 689.

³³⁶ *Id.* at 690-91 (citations omitted).

³³⁷ *Id.* at 692-95 (discussing the Major Crimes Act's grant of federal jurisdiction over enumerated felonies perpetrated by Indians and the Indian Country Crimes Act and Assimilative Crimes Act's grant of federal jurisdiction over interracial on-reservation crimes that involve both non-Indians and Indians).

³³⁸ *Id.* at 691 (Suggesting U.S. Attorneys prosecute as little as 15% of felony cases referred to them by tribal prosecutors).

³³⁹ See Trachman, *supra* note 274, at 854 (noting that *Oliphant* played an important role in causing lawlessness on Indian reservations); see also Tweedy, *supra* note 59, at 684-95 (explaining the practical effects of the divestment of tribal sovereignty); see Krakoff, *supra* note 266, at 1111-12 (describing the effects of the federal government's divestment of sovereignty on the Navajo Nation).



now been conducted on the issue, only legislation that takes limited steps to remedy the problem has passed.³⁴⁰ It is unclear why the problem was allowed to become so dire before meaningful steps were taken. It may well be that the stereotypes of savagery at play in the decisions divesting tribal sovereignty have also worked to make the safety of Indian reservations a low priority, prompting some to accuse the federal government of genocide.³⁴¹ In other words, it is entirely possible that the current lawlessness on Indian reservations is a continuation of the pattern of unpunished vigilantism and *de jure* violence against Indians that was prevalent in colonial and early American periods. America's othering of Indians as savage, which stemmed largely from their acts of self-defense, may still be implicitly justifying (or at least facilitating) the nation's current failure to defend them (and to allow them to defend themselves) from perpetrators of on-reservation violent crime, including the predominantly non-Indian perpetrators of the rape of Indian women.³⁴²

F. AMERICA NEEDS TO RECKON WITH ITS RACIALIZED HISTORY
AND POTENTIALLY REEVALUATE THE SECOND AMENDMENT AND
KEY INDIAN LAW PRECEDENTS.

I. THE IMPLICATIONS OF *HELLER* FOR INDIANS ON RESERVATION
LANDS ARE UNCLEAR.

First of all, tribes as governments need not provide Second Amendment protections to those within their jurisdiction. This is because tribes, being neither state nor federal actors, are not required to provide constitutional rights to those within their jurisdiction³⁴³ and because the Indian Civil Rights Act,³⁴⁴ a statute that imposes a statutory obligation on tribes to protect several rights that are framed in language similar to that of the United States Constitution's Bill of Rights, includes no Second Amendment analog.³⁴⁵ Thus, tribes could enact their own

³⁴⁰ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, §§ 201-266 (2010); Tweedy, *supra* note 58, at 709 (discussing Senate Committee on Indian Affairs hearings addressing law enforcement and administration on tribal lands).

³⁴¹ Tweedy, *supra* note 59, at 684 & n.160 (citing multiple sources that characterize divestment as part of genocide).

³⁴² Tweedy, *supra* note 59, at 690 (reciting that 86% of the perpetrators of rape against Indian women are non-Indian men).

³⁴³ *Talton*, 163 U.S. at 381-83 (“ . . . [T]he Fifth Amendment to the Constitution of the United States is a limitation only upon the powers of the General Government. . . .”); *Barta*, 259 F.2d at 556-57 (“The Indian tribes are not, however, states and these Constitutional limitations have no application to the actions, legislative in character, by Indian tribes.”).

³⁴⁴ 25 U.S.C. §§ 1301-03 (2006).

³⁴⁵ 25 U.S.C. § 1302 (2006) (listing several rights that may not be infringed by tribal governments, including free exercise of religion, security against

restrictions on gun ownership irrespective of *Heller*, and it appears that a number of tribes do currently regulate gun ownership.³⁴⁶ More importantly for the purposes of this article, it is not entirely clear that the Court would interpret *Heller* to prohibit the federal government from banning firearms in Indian Country. The Supreme Court has held Congress to have exceedingly broad “plenary power” over tribes,³⁴⁷ and at least partially as a result of this power, Indians (and tribes) have had mixed success when they have tried to enforce federal constitutional rights in the courts.³⁴⁸

unreasonable search and seizures, and double jeopardy protections); *see also* Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137, 143 (2004) (noting differences between the ICRA and the Bill of Rights).

³⁴⁶ *See, e.g.*, Absentee-Shawnee Tribe of Indians of Okla., Res. No. AS-94-01 (Jan. 3, 1994) (enacting a general ban on the carrying of firearms on the person “except as may otherwise be provided for in the Code of Laws of the Absentee-Shawnee Tribe of Oklahoma”), *available at* <http://thorpe.ou.edu/codes/absshaw/Crimoff.html>; *see also* Criminal Code Offenses & Punishments, SILETZ TRIBAL CODE §12.126 (1992) (amended 2005) (criminally prohibiting the carrying of a machine gun without a federal license and defining other, similar offenses).

³⁴⁷ Tweedy, *supra* note 59, at 659-660 & 659 n.31, n.34 (discussing the plenary power doctrine).

³⁴⁸ *See, e.g.*, COHEN'S HANDBOOK, *supra* note 60, at § 14.03[2][a]; *see also* Lyng v. Nw. Cemetery Protective Ass'n, 485 U.S. 439, 441, 451 (1988) (holding that the Free Exercise Clause did not prevent the federal government from engaging in timber harvesting and road building on federal lands even assuming that the federal activities would “virtually destroy the . . . Indians' ability to practice their religion” (citation omitted)); *United States v. Antelope*, 430 U.S. 641, 644, 649 (1977) (denying Indian defendants' equal protection claim based on their having been tried under federal law for felony murder because they were Indians whose crime occurred on a reservation whereas non-Indians who committed the same actions off-reservation would not be subject to murder charges under the applicable state's laws); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284-85 (1955) (holding that a tribe is not entitled to compensation under the Fifth Amendment for a federal taking of timber on lands to which the tribe held aboriginal title); *Cherokee Nation, v. Georgia* 30 U.S. 1, 18-19 (1831) (holding that tribes are not “foreign nations” and therefore that they are not entitled to invoke the Court's original jurisdiction in order to sue states); COHEN'S HANDBOOK, *supra* note 60, at § 5.04[2][c] (explaining that the Fifth Amendment Takings Clause does apply to federal takings of Indian lands in cases where the federal government had previously recognized Indian title); Washburn, *supra* note 158, at 751-55 (describing federal courts of appeals cases in which Indian defendants have unsuccessfully sought to enforce their Sixth Amendment rights regarding jury pool composition); *see generally* Washburn, *supra* note 158, at 7115-16, 741-75 (describing the federal criminal justice framework for crimes that occur in Indian Country and arguing that this framework may well violate several constitutional rights of Indian defendants and their respective tribal communities, including rights based on the Sixth Amendment and those existing under the First Amendment); Singer, *supra* note



Thus, it is a real possibility that despite *Heller* the Court would uphold a federal firearms ban that applied to Indians on reservations. This possibility demonstrates the uncertainty that even today surrounds Indians' attempts to enforce the constitutional rights afforded to everyone else in the populace, including the individual right to self-defense enunciated in *Heller*. Additionally, if tribes were to assert a collective right to self-defense against some sort of armed attack by the United States, an individual state, or some other entity, it seems almost certain that a federal court, in accordance with the examples from American history discussed above, would hold that no such right existed, most likely because it was implicitly divested by virtue of tribes' dependent status.³⁴⁹ To put this example in concrete terms, imagine that, as a GOP delegate advocated in 2000,³⁵⁰ the United States armed forces were summoned to go onto reservations and forcibly dismantle tribal governments. Would tribes be held to have a legal right to fight back? Probably not. Thus, despite the Second Amendment's intent to protect against federal tyranny—a goal that many see as archaic today—Indian tribes remain under the shackles of federal tyranny in the form of congressional plenary power and the decisions of a Supreme Court that often appears openly hostile to their sovereign rights.

Not only do tribes lack a right to self-defense in the sense that they are still being punished for past acts of self-defense and in that the incursions on their sovereignty that constitute this punishment render them unable to defend themselves against outsider depredations, but it is also uncertain whether individual Indians on reservations can reap the benefits of *Heller*. Moreover, it seems highly unlikely that a tribe could successfully assert a collective right to self-defense.

257, at 43-47 (explaining how the government's non-consensual allotment of tribal property, as sanctioned by the Court in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), constituted a taking of property in violation of the Fifth Amendment).

³⁴⁹ See, e.g., Tweedy, *supra* note 59, at 659 (describing the origins of the doctrine of implicit divestiture); see also *supra* note 253 and accompanying text (addressing *Oliphant's* use of the doctrine); Cherokee Nation, 30 U.S. at 17-18 ("any attempt [by a foreign nation] to acquire . . . [tribal] lands, or to form a political connexion with . . . [Indian tribes located within the United States], would be considered by all as an invasion of our territory, and an act of hostility").

One practical illustration of tribes' lack of a collective right to self-defense is that tribes with reservations near an international border were left out of the federal Homeland Security funding scheme. See generally Jim Adams, "Homeland Security funding a disgrace," INDIAN COUNTRY TODAY (July 2, 2004).

³⁵⁰ See *supra* note 241 (discussing *Spokesman Review* articles).

II. Where to Go from Here?

What does the troubled relationship detailed above between Indians and non-Indians mean for the Second Amendment? Regardless of whether the *Heller* court is correct as a historical matter that the Amendment was intended to incorporate an individual right to bear arms, the Amendment itself is based in significant part on our gross misperceptions of Indians. This is because, if the Amendment is militia-based, as the collective rights view and the traditional individualist view understand it to be, then a racialized view of Indians is inherent in the fact that the militias were originally designed to defend against what were perceived as tribal acts of unprovoked, savage aggression (although in fact the Indians were in many cases defending themselves and their property). Moreover, *Heller's* latter-day individualist conception is based in part on the Pennsylvania Declaration of Rights, a document that historically stemmed from racialized conceptions of tribes. Additionally, the *Heller* Court appears to have only been able to conceive of tribes in a one-dimensional, racialized way—as a force to defend against. Thus, under any of the dominant interpretations of the Amendment, it is infused with racialized perceptions of Indians.

This problem is different and deeper than that involving other rights, such as voting, that were originally applied in discriminatory ways. This is because the Second Amendment itself incorporates our conception of the other. In other words, the right could not logically exist unless there were some other “bad” group that the good upstanding citizens needed to defend themselves from, either as a militia or on an individual basis.³⁵¹ Without this “other,” the Amendment would be considered obsolete, a mere relic of history. Instead, the Amendment and the rights it is thought to encompass excite a great deal of passion and controversy. Nonetheless, despite this problem and the arguments of some scholars that the Amendment should be considered legally defunct, at this point in time it is not realistic to consider amending the constitution to remove the Amendment, and even if the Amendment were repealed the stereotypes of savagery would continue to do dangerous work in other contexts. Thus, we must start unraveling these stereotypes now. We must take a serious look at our history and we must question all our assumptions about tribes and Indians.

Moreover, this reevaluation must be undertaken not just with respect to a narrowly viewed right of self-defense and the Second Amendment, but also with respect to key Indian law precedents

³⁵¹See generally Williams, *supra* note 2; Bogus, *supra* note 10.



that affect tribal self-defense in a broader sense. To the extent that these precedents are substantively affected by notions of savagery—and many appear to be—they should not be relied upon, particularly in deciding issues of tribal sovereignty. Care should also be taken to protect tribal and individual Indians' constitutional rights. In cases where there is no conflict between a tribe's sovereignty and an individual Indian's asserted constitutional right,³⁵² there is no reason to afford Indians or tribes any less protection for their constitutional rights than anyone else.

While a detailed solution to these problems is beyond the scope of this article, it is clear that denigrating legal fictions, such as the *Johnson v. M'Intosh* holding that the United States gained underlying fee title to tribal lands by virtue of discovering them and *Tee-Hit-Ton*'s holding that the United States does not owe tribes Fifth Amendment compensation for the taking of aboriginal title because tribes as conquered peoples must be eschewed. Moreover, limitations on tribal jurisdiction such as those effected by *Oliphant* and *Long Family Land & Cattle* that are implicitly grounded on notions of tribal untrustworthiness with respect to outsiders likely stem from racialized conceptions of Indians and should be regarded as inherently suspect. Although justice for tribes and Indians may be difficult to even envision in the face of hundreds of years of largely unjust precedent and, in many cases, positive law, we must dare to imagine it and then collectively demand it of ourselves, our courts, and our government generally.

³⁵² In the relatively rare case where a tribe's right to self-government conflicted with an individual's constitutional right, one solution might be to define the tribe's right to self-government as a compelling interest. However, I am not suggesting that such a solution be applied in the context of ICRA-based individual rights, which are statutory rather than constitutional.