"HOSTILE INDIAN TRIBES . . . OUTLAWS, WOLVES, . . . BEARS . . . GRIZZLIES AND THINGS LIKE THAT?" HOW THE SECOND AMENDMENT AND SUPREME COURT PRECEDENT TARGET TRIBAL SELF-DEFENSE

Ann E. Tweedy[*]

TABLE OF CONTENTS

I. INTRODUCTION 690
A. Definitions of "Self-Defense" 692
B. The Second Amendment 692
C. The Justices' Perceptions of Tribes in *District of Columbia v. Heller* 694
D. Erasure of Tribes in *McDonald v. City of Chicago* 696

II. THE MYTHOLOGY OF THE COLONISTS' NEED FOR SELF-DEFENSE 697
A. The Colonial Concept of Self-Defense Related Directly to Tribes 698
B. The Perception of Indians as Aggressors 700

* Visiting Assistant Professor, Michigan State University College of Law; J.D., University of California, Berkeley School of Law (Boalt Hall), Order of the Coif; A.B., Bryn Mawr College, *cum laude*. I would like to thank Michal Belknap, Ruben Garcia, Steven Macias, Angela Harris, Michael Lawrence, Cameron Fraser, Melissa Martins Casagrande, Kevin Noble Maillard, Matthew Fletcher, William Aceves, and David Austin for reviewing and commenting on drafts of this article. I am also grateful to Nancy Kim, Jeff Schwartz, Jasmine Gonzales Rose, Angelique EagleWoman, Philip S. Deloria, Ryan Williams, Tom Barton, Colette Routel, Kenneth Klein, Ernesto Hernández-López, Donald Smythe, Matt Schaefer, Catherine Grosso, Jennifer Carter-Johnson, Wenona Singel, Bertrall Ross, Kathryn Abrams, Mark Gergen, Robert Bartlett, Saira Mohamed, Ed Dauer, Leslie Wallace, Honor Brabazon, Tiffani Darden, Jessica Fink, and Joanna Sax for their feedback based on oral presentations and brainstorming discussions. Finally, I am grateful to the Law and Society Association, University of Idaho College of Law's Crit Conference, Michigan State University College of Law's Seventh Annual Indigenous Law Conference, and the 2011 International Conference on Narrative, as well as the faculties at Hamline University School of Law, John Marshall Law School, and Florida Coastal School of Law for giving me opportunities to present this material and for the very helpful comments I received in response to those presentations.

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III. THE HISTORY THAT AMERICA'S DOMINANT HISTORICAL NARRATIVE OBSCURES 703
A. Pre-Nineteenth-Century Examples of Tribal Acts of Self-Defense 705
B. Later Examples of Tribal Land Loss Often Reflect Tribes' Inability to Make Viable Attempts at Self-Defense 707

IV. THE LABEL OF SAVAGERY WAS AN IMPORTANT AND WIDELY USED COMPONENT OF THE PERCEPTION OF INDIANS AS THE AGGRESSORS 709
A. The Meaning of "Savage" as Applied to Indians 709
B. Indians Have Been Widely Defined as "Savage" in Our Early Jurisprudence and Related Contexts 711
1. A Sampling of "Savage" Designations in Pre-Twentieth-Century Cases 712
2. Contemporary References to Indians as Savages 715
3. Five Supreme Court Cases That Use the "Savagery" Designation Form Part of the Canon of Indian Law and Continue to Be Widely Cited 717
D. Unpunished Acts of Vigilantism Against Indians and Legally Sanctioned Violence Against Them 723
1. Vigilante Violence at Work: The Paxton Riots of 1763 and 1764 723
2. Legally Sanctioned Violence Against Indians 725
E. Indians Were Historically Denied the Right to Self-Defense 727
1. Historical Prohibitions on Indians' Right to Defend Themselves 727
a. In 1705, Virginia Forbade Indians and Blacks from Raising a Hand in Opposition to a Christian 727
b. In the 1850s, the United States Forbade the Zuni Tribe from Defending Against Raids and Harassment from Other Tribes 728
2. Prohibitions on Indians' Bearing Arms and on Trading Arms and Ammunition to Indians 728
a. Federal Prohibitions 729
i. The Uniform Militia Act Suggests That the Second Amendment Was Intended to Exclude Indians 729
ii. Abraham Lincoln's 1865 Proclamation 730

Electronic copy available at: http://ssrn.com/abstract=1530326

iii. Congressional Resolution of 1876 Prohibiting Conveyance of Metallic Ammunition to "Hostile Indians" 730
iv. 1925–26 *United States Code* Prohibition on Sale of Arms and Ammunition to Uncivilized or Hostile Indians..... 731
v. Federal Regulations Prohibiting Arms Trading with Indians 732
vi. Individual Tribes Were Also Deprived of the Right to Self-Defense by the Federal Government 733
b. Colonial and State Prohibitions on Indians Bearing Arms 735

V. THE STEREOTYPES OF INDIANS AS WARLIKE SAVAGES ARE STILL USED TO DEPRIVE TRIBES OF THEIR SOVEREIGN RIGHTS TODAY 737
A. Stereotypes of Savagery Are Implicitly at Work in Case Law 738
1. The Status of Tribes Under Federal Law..... 740
a. Criminal Jurisdiction for On-Reservation Crimes 742
i. Tribal Jurisdiction 742
ii. Federal Jurisdiction 743
iii. State Jurisdiction 744
a. Tribal Civil Jurisdiction 745
2. An Extended Example of the Language of Savagery at Work in Supreme Court Case Law 747
B. The Continuing Stereotype of Indians as Savage May Also Be Driving the Federal Government's Failure to Effectively Deal with Epidemic Levels of On-Reservation Violent Crime 752

VI. AMERICA NEEDS TO RECKON WITH ITS RACIALIZED HISTORY AND POTENTIALLY REEVALUATE THE SECOND AMENDMENT AND KEY INDIAN LAW PRECEDENTS 754
A. The Implications of *Heller* for Indians on Reservation Lands Are Unclear 754
B. Where to Go from Here? 756

Electronic copy available at: http://ssrn.com/abstract=1530326

I. INTRODUCTION

This Article examines the history of self-defense in America, including the right to bear arms, as related to Indian tribes in order to shed light on how the construction of history affects tribes today. As shown below, Indians are the original caricatured "savage" enemy against whom white Americans believed they needed militias and arms to defend themselves. Since the early days, others have ably documented that the perceived enemies have multiplied to include African Americans, immigrants, and the lower classes.[1] 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 of Indian reservations has continued as a result of this very racialization.

The 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 this cultural myth[2] 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 colonies[3] were, in many instances, actually defending themselves and their homelands from white aggression and encroachment.

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1 *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).

2 In using the word "myth," I mean to invoke Richard Slotkin's definition:

> Myths 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 process 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.

3 It is important to remember that all tribes did not engage 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 undertake wars against the United States, and therefore suggesting that the term "savage

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 the federal and state governments no longer have statutes and rules in place that deny Indians the right to carry guns, in a very real sense Indians today lack the right to self-defense. This is because tribes continue to be punished for their past efforts to defend themselves. Furthermore, the Supreme Court's continual abrogations of tribal sovereign rights render tribes and the individuals, both Indian and non-Indian, living on reservations virtually defenseless against everything from predatory lending to violent crime. Thus, 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, and relatedly, 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.

The 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 precedents 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 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.

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tribes" in the Treaty of Guadalupe-Hidalgo should not be understood to refer to the Tohono O'odham); *see also* 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 that 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 U.S. government).

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."[4] 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.[5] 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 to the U.S. Constitution codifies the right to self-defense on either an individual or 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."[6]

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 tyranny that would occur if the federal government were to use a standing army to oppress

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4 BLACK'S LAW DICTIONARY 1481 (9th ed. 2009).

5 *See, e.g.*, 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* BLACK'S LAW DICTIONARY *supra* note 4, at 1481 (defining "self-defense" under international law as "[t]he right of a state to defend itself against a real or threatened attack"); *see also* 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").

6 U.S. CONST. amend. II.

unarmed state citizens.[7] 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.[8] 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.[9] 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.[10] 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*,[11] the Supreme Court adopted this latter-day 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."[12] 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 the militia purposes that had previously been thought to be the core of the Second Amendment.[13]

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

8 *See, e.g.*, Ulliver & Merkel, *supra* note 7, at 150, 178 (concluding that "the Second Amendment has no voice in the matter of gun regulation"); Williams, *supra* note 1, at 393–94 ("[T]he right to arms does belong to every individual citizen, but only if they are united into a coherent revolutionary people. As I do not believe that Americans presently comprise such a citizenry, I do not believe that the Amendment applies to modern conditions, by its own frame of reference.").

9 *See, e.g.*, Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1372–73 (1993); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 214 (1983); Rakove, *supra* note 7, at 111.

10 *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 239–240 & n.250 (2008).

11 128 S. Ct. 2783 (2008).

12 Siegel, *supra* note 10, at 239.

13 *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* majority departed from earlier precedent and

While these differing interpretations of the Second Amendment are not central to this Article, a working understanding of them should aid in comprehending various scholars' arguments. What is essential to understand is (1) that 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) that 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 which 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.[14] In oral argument for the case, Justice Kennedy interrupted counsel for the District of Columbia during his 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."[15] 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-à-vis African Americans.[16]

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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)).

14 *Heller*, 128 S. Ct. at 2822.

15 Transcript of Oral Argument at 8, *Heller*, 128 S. Ct. 2783 (No. 07-290).

16 *Compare* Comments of *Turtle Talk, Justice Kennedy: "Hostile Indians" May Have Been a Motivating Factor for 2nd Amendment*, TURTLE TALK, http://turtletalk.wordpress.com/2008/03/19/justice-kennedy-hostile-indians-may-have-been-a-motivating-factor-for-2nd-amendment/ (Mar. 19 2008, 2:21 PM) (excerpting the oral argument in which several commenters described Justice Kennedy's reference to "hostile Indian tribes" in this con-

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 when it 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.[17] More blatantly, to support its claim that anti-slavery 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 that 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."[18] 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 cha-

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text as "disturbing" or "illuminating"), *with* Stephanie Mencimer, *Whitewashing the Second Amendment*, MOTHER JONES, http://www.motherjones.com/politics/2008/03/white washing-second-amendment (Mar. 19 2008, 11:00 PM) (quoting Justice Kennedy's allusion to "hostile Indian tribes" but ignoring the racialized implications of the statement and instead deploring the Court's failure to reckon with the Second Amendment racialized history with respect to African Americans). Classification of Indians with wolves (or rather conflation of Indians with wolves) is a longstanding practice with roots dating back to the Puritans. *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1268 (1992) ("Cotton Mather and other Puritan writers called Indians wolves, lions, sorcerers, and demons possessed by Satan.").

17 *Heller*, 128 S. Ct. at 2808–11; *see also* Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 79 (1991) (describing firearms prohibitions directed at Native Americans as being used to "oppress and . . . exterminate" them, and noting that 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 that the Court saw as bearing on the original intent of the Second Amendment. *Heller*, 128 S. Ct. at 2808–11. The Fourteenth Amendment and the other legal provisions discussed appear not to have been intended to protect Indian tribes or Indian individuals. S*ee id.*; *see also* 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 them up. 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.

18 *Heller*, 128 S. Ct. at 2807 (internal citation omitted).

racter of the 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 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."[19] 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. They thus 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

Like *Heller*, the Court's most recent gun rights opinion, *McDonald v. City of Chicago*,[20] 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[21] 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.[22] This Article explores that assumption and asks what it

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19 *Id.* at 2866 (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 of tribes as dangerous entities that needed to be defended against.

20 130 S. Ct. 3020 (2010).

21 *Id.* at 3038–43.

22 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 13, at 86; Robert T. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 323-26 (1991); Williams, *supra* note 1, at 447. 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

means for the way Indian tribes are viewed in society today and how the assumption and the continuing racialized view of tribes it embodies affect tribal rights.

II. THE MYTHOLOGY OF THE COLONISTS' NEED FOR SELF-DEFENSE

As discussed below, Indian attacks were the primary reason that militias were initially formed, and 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).[23] As explained below, however, 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) mechanisms for collective self-defense, but they are also crucial to understanding the original intent of the Second Amendment. Because militias are a core aspect (or perhaps the core) of the Second Amendment,[24] 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, needed to defend against, rather than as active subjects with their own right to self-defense.

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

23 *See, e.g.*, Bogus, *supra* note 9, at 1371.

24 Both scholars who espouse the traditional individual rights view of the Amendment and those who adhere to the collective rights view acknowledge the centrality of the militia. *Compare id.* at 1372 (stating that "any constitutional right to bear arms is directly related to" the militia), *with* Kates, *supra* note 9, at 213 ("[T]he individual right advocate may accept the state's right theory and simply assert that, even though one of the [A]mendment'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)). 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, see Ulliver & Merkel, *supra* note 7, at 148–49.

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

As David Williams has explained, "Americans . . . came to love guns through hating Indians."[25] Thus, "at [its] most macroscopic level, it is possible to understand the Second Amendment as an icon of the imperial expansion of . . . European culture."[26] Indeed, many scholars agree that the militia "[o]riginally . . . was meant to protect white settler communities from Native Americans."[27]

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 gunns at drinkeing (marriages and ffuneralls onely excepted) [sic]."[28] The reason for the law was that "gunshots were the common alarm of Indian attack,"[29] "of which no certainty can be had in respect of the frequent shooting of guns in drinking."[30] Moreover, while in the 1600s Virginia had prohibited slaves and free blacks from carrying arms, by the 1700s the colony al-

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25 Williams, *supra* note 1, at 469.

26 *Id.*

27 Burkett, *supra* note 13, at 86; *accord* Cottrol & Diamond, *supra* note 22, 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 (1914) ("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 9, at 1371 n.37 ("In 1633, for example, every man in the Plymouth county was required to own a musket, two pounds of powder, and ten pounds of bullets." (citation omitted)); 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 1, at 469 ("Americans came to cherish the right to arms. . . . [because they] lived in a frontier society.").

28 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, at 401–02 (1823).

29 Clayton Cramer, *Gun Control in the Middle and Southern Colonies*, http://www.claytoncramer.com/popular/MiddleSouthernColonialGunControl.PDF (last visited Feb. 18, 2011); *see also* HENING, *supra* note 28, at 401 ("[T]he common enemie the Indians, if opportunity serve, would suddenly invade this collony to a totall subversion of the same, and whereas the only means of discovery of their plotts is by allarms [sic] . . . .").

30 1 HENING, *supra* note 28, at 401.

lowed limited ownership of guns by African Americans in part so that they could "help defend frontier plantations against attacks by hostile Indians."[31] 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.[32] 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."[33] 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 of up to 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.'"[34] 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 1754–63.[35]

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";[36] (2) the Court's quotation of Charles Sumner's speech[37] 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 of self-defense primarily in terms of outbreaks of fighting with Indian tribes," as well as other sources of con-

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31 Cottrol & Diamond, *supra* note 22, at 325.

32 Bogus, *supra* note 9, at 1371 n.37 (citation omitted).

33 Kozuskanich, *supra* note 27, at 1046.

34 *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" born in part from 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).

35 Kozuskanich, *supra* note 27, at 1067.

36 Transcript of Oral Argument at 8, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

37 *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2807 (2008) (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").

flict.[38] 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.[39]

B. *The Perception of Indians as Aggressors*

The monolithic perception that Indians were the aggressors was necessarily colored by the colonist and early American point of view,[40] and, as explained below, it was largely inaccurate.[41] In fact, the settlers (undoubtedly subconsciously) constructed their perception of Indians as aggressors and savages largely to justify their own violent actions against Indians.[42] Richard Slotkin explains that "[t]he premise of the 'savage war' is that ineluctable political and social differences . . . make coexistence between primitive natives and civilized Europeans impossible on any basis other than that of subjugation."[43]

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38 *Id.* at 2866 (Breyer, J., dissenting). The Supreme Court's most recent Second Amendment case, *McDonald v. City of Chicago*, does not directly reference Indian tribes. However, Justice Stevens' mention, in dissent, of "invaders" as one of the primary concerns that motivated the enactment of the Second Amendment may well have been meant to include Indian tribes. McDonald v. City of Chicago, 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.

39 *Accord* Rakove, *supra* note 7, 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).

40 *See, e.g.*, R. DAVID EDMUNDS, THE SHAWNEE PROPHET, at 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, at 5–6 (1997) (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").

41 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 34, at xxv, 43, 45, 47–48, 60, 129, 160 (describing such fear among mid-Atlantic colonists in the mid- and late-1700s).

42 SLOTKIN, *supra* note 2, at 12–13.

43 *Id.* 12.

Thus, because of the perceived "'savage' and bloodthirsty propensity of the natives, such struggles inevitably become 'wars of extermination.'"[44] 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 expropriation of the Indians and the kidnaping [sic] and enslavement of black Africans.[45]

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

> In 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.[46]

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 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.[47]

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44 *Id.*

45 *Id.* at 12–13.

46 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 12–13 (1984).

47 RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815, at 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 removal from this history can help us develop a broader, more inclusive perspective and ultimately facilitate our engaging in more humane actions.

Defining one's opponents as savages in order to justify savage treatment of them is not unique to the American colonial experience.[48] 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."[49] 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."[50] 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 and, thus, that they may instigate war against them for any reason whatsoever and that anything is permissible in such wars.[51] The justification for these exclusions was generally that the so-called savages would not themselves honor the laws of war[52] and, thus, that inhumane measures, such as expanding bullets, could be rightfully used against them.[53] Notably, some Americans used America's colonial experience with Indian tribes to justify the exclusion of purportedly savage peoples from the protections of interna-

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48 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 Afghanis and [to have] constantly referred to them as savages." Gene Johnson, *Hearing Begins in Alleged Plot to Murder Afghans*, COMCAST.NET NEWS, Sept. 27, 2010, http://www.comcast.net/articles/news-national/20100927/US.Afghan.Probe/.

49 *See generally* Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other,'* *in* INTERNATIONAL LAW & ITS OTHERS 266–67 (Ann Orford, ed. 2006) (arguing that international laws of war were both inclusive and exclusive in providing protection).

50 *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).

51 *See* Mégret, *supra* note 49, at 269 (quoting Sven Lindqvist to demonstrate that Europeans believed that the laws of war did not apply to "savages and barbarians").

52 *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 choices of victims as violating emerging international law norms regarding the laws of war, norms about which the Indians undoubtedly knew little, if anything. SILVER, *supra* note 34, at 57–60.

53 *See* Mégret, *supra* note 49, at 281 (quoting Lord Lansdowne, who defended his decision to have two types of ammunition on the ground that the use of expanding bullets would be necessary when dealing with "savages").

tional law.[54] 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.

III. 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.[55] The struggle to maintain these homelands was particularly crucial for tribes, given the prevalent colonialist view that Indians and settlers could not coexist[56] and the lack of respect that most English colonists and, later, Americans showed for Indian land rights.[57] Indeed, it is difficult to imagine how

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54 *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]").

55 *See, e.g.,* PRUCHA, *supra* note 46, 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.").

56 *See, e.g.,* SLOTKIN, *supra* note 2, 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, Colo. Sch. Dist. 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." (quoting HIRAM PRICE, COMM'R OF INDIAN AFFAIRS, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1881)).

57 *See, e.g.,* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 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 46, at 14 ("The supremacy of the cultivator over the hunter was a classic weapon in the arsenal of the dispossessors."); SILVER, *supra* note 34, 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 46, 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 omitted) (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*

a continent peopled by numerous nations that had inhabited it for thousands of years could be taken over, and the 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.[58]

There are countless examples of tribes' being deprived of their land by whites and attempting to defend themselves against the losses.[59] Below, a few colonial examples are discussed, followed by

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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 v. M'Intosh*); *see also* SLOTKIN, *supra* note 2, at 40 (1973). Slotkin quotes 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 s [sic] 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 work or die; but it is so crowded that he must be told to behave himself or die.

Id. at 40–41 (quoting *Our Indian Policy*, N.Y. WORLD, Jan. 18, 1874, at 4).

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).

58 *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 (last visited Feb. 18, 2011). 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.

59 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 34, at 114–123 (discussing the evolution of racialized ideas of whiteness and Indianness in the mid-Atlantic colonies).

some later examples. However, as the later examples illustrate, as time wore on, Indians increasingly lacked the military force even to make viable attempts at self-defense.[60]

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.[61] Rather, American colonial history is an exceedingly complex web, the complexity of which has been obscured by the monolithic view of tribes as historical aggressors that we inherited from our colonial roots.[62] 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 upon Indian lands and in many cases treating the inhabitants despicably, the Indians resisted with force."[63] He 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 white settlers who had invaded their lands and quickly killed a quarter to one-third of the population."[64] This revolt was then "used as an excuse for massive retaliation against the Indians" and was "looked upon as proof that

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60 *See* SLOTKIN, *supra* note 2, 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").

61 *See, e.g., id.* (acknowledging that "Indians were certainly aggressors in particular cases"); *see also* JOHN DEMOS, THE UNREDEEMED CAPTIVE: A FAMILY STORY FROM EARLY AMERICA 4 (1994) (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 47, 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 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.")

62 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. PA. 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).

63 PRUCHA, *supra* note 46, at 13.

64 *Id.*

Indians could not be trusted."[65] The Pequot War of 1637 was also born from 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.[66] 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,"[67] is similarly described by Prucha as "furnish[ing] still another case of warfare instigated by Indians in a desperate attempt to stop the advancing tide of English settlement."[68] However, Prucha's description of the war's having been instigated by the tribes is contested. Several figures of the day, including Rhode Island's deputy governor, John Easton, blamed the war on Massachusetts's bad faith in dealing with the Indians.[69] 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 [sic].'"[70] Regardless of which side actually started the war, it is clear both that a major cause of the Indians' discontent was white encroachment on their lands and that the Puritans strove to "exterminate" their tribal opponents.[71]

Historian R. David Edmunds recounts eighteenth-century examples involving tribes defending their lands in the Old Northwest.[72] For example, he describes the tribes' attempts to maintain their hunting grounds in what is now Kentucky, along the Licking and Kentucky Rivers.[73] 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.[74] However, the tribes' British allies promised them victory after the war.[75] Nonetheless, when the British lost the war, they made no attempt to protect tribal property rights in the

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65 *Id.*

66 *See id.* (describing the Pequot War of 1637 as the result of English settlers' moving into an area inhabited by the Pequot Indians).

67 RICHARD SLOTKIN, REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER 1600–1860, at 79 (1973).

68 PRUCHA, *supra* note 46, at 13.

69 *See* SLOTKIN, *supra* note 67, at 79–81 (describing how John Easton blamed the war on the intolerance of Massachusetts).

70 *Id.* at 80 (alteration in original).

71 SLOTKIN, *supra* note 2, at 12.

72 *See generally* EDMUNDS, *supra* note 40.

73 EDMUNDS, *supra* note 40, at 3.

74 *Id.*

75 *Id.*

Treaty of Paris.[76] The frontiersmen then began to advance further into tribal territories in southern Ohio.[77] 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.[78]

Edmunds describes in detail the 1786 treaty negotiations with the Shawnees relating to their claims to Ohio.[79] Despite Britain's assurances to the tribe that the Shawnees maintained ownership over their lands after the Revolutionary War, armed U.S. 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 villages."[80] 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."[81]

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 that 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.[82] 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

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76 *Id.*

77 *Id.*

78 *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.*

79 *Id.* at 12–13.

80 *Id.* at 13.

81 *Id.* at 13.

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

> from that silent assembly. Their afflictions were of long standing, and they felt them to be irremediable.[83]

Next, during the Reservation Period, from the 1820s through the 1880s, Indians were forcibly confined to reservations in the hopes of converting them to white ways.[84] 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 treated their refusal to remain confined (and their attachment to their ancestral lands) as a declaration of war.[85] For example, in 1879, an imprisoned group of Cheyennes who had escaped from their reservation and were attempting to return to their ancestral lands were told that they had to return to the reservation.[86] 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.[87] When the group finally escaped, the federal troops gunned down as many of the Indians as they could.[88] 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.[89] 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.[90]

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83 *Id.* at 75.

84 *See, e.g.*, *id.* at 77.

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

86 *Id.* at 322.

87 *Id.*

88 *Id.* at 322–23.

89 *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 OF FEDERAL INDIAN LAW, *supra* note 58, § 1.03. 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, 326–27 (1894).

90 *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

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.[91] The Allotment Policy was driven by white hunger for Indian lands as well as by a hope to assimilate Indians into mainstream culture,[92] and it had the effect of reducing the total tribal land-base from 138 million acres to 48 million acres.[93]

The above examples demonstrate the extent to which tribes have been deprived of their land throughout U.S. history. They also show that many battles between tribes and colonists or Americans were in some measure based on 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 U.S. 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 that had been invaded by Europeans or confiscated by Americans.

IV. 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.[94] The first of these is that of the "'noble savage' [or] natural man living without technology and elaborate societal structures."[95] This meaning, although inaccurate

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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." *Id.* at 658–59.

91 *See, e.g.*, ANDERSON, *supra* note 82, at 77.

92 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 104.

93 *See, e.g.*, ANDERSON, *supra* note 82, at 77; *see also* Ann E. 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).

94 PRUCHA, *supra* note 46, at 7.

95 *Id.*; *see also* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 27 (2002). This appears to be the meaning that to

and offensive for Indians, is not at issue in this Article because it does not bear directly on the issue of self-defense.[96] The second is the one that is relevant here. It is that of the "'ignoble savage[]'[:] treacherous, cruel, perverse, and in many ways approaching the brute beasts with whom he shared the wilderness. In this view, incessant warfare and cruelty to captives marked the Indians."[97] In fact, during the colonial period, "[n]ot a few Englishmen saw the Indians . . . as literally children of the Devil."[98]

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.[99] 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.[100]

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 such and using their alleged savagery to justify deprivations of tribes' sovereign rights.[101] Critical race theorists have explained how such racialized stereotypes function in the American

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which the French colonists who inhabited the Great Lakes Region in the mid- and late-seventeenth century ascribed. WHITE, *supra* note 47, 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 *savage* its power").

96 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, '*Foreignness' & Asian-American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 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.

97 PRUCHA, *supra* note 46, at 7; *see also* ALEINIKOFF, *supra* note 95, at 27.

98 PRUCHA, *supra* note 46, at 7–8.

99 *See* ALEINIKOFF, *supra* note 95, at 23–28 (noting that reservation policies were eventually defended as places where Indians "could be taught 'arts and industry' of European civilized life"); *see also* PRUCHA, *supra* note 46, 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.").

100 *See* ALEINIKOFF, *supra* note 95, at 23–28.

101 *See infra* note 239; *see generally infra* Part V (describing how stereotypes operate in the Supreme Court's Indian law cases). *But see* PRUCHA, *supra* note 46, 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").

legal system to deprive people of color of rights.[102] 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 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."[103] Prior to 1900, these offensive descriptions were frequently reified in both state and federal case law.[104] 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 or usually 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.[105]

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102 *See, e.g.*, Aoki, *supra* note 96, at 20, 23–24, 32, 37–38; Delgado & Stefancic, *supra* note 16, at 1264; Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1797 (1993).

103 *See, e.g.*, Proclamation No. 28 (March 17, 1865), *reprinted in* 13 Stat. 753 (1866) (prohibiting sale of arms and ammunition to "hostile Indians"); *see also* Swetman v. Sanders, 20 S.W. 124, 125 (1892) (noting that a settler "failed to occupy the land on account of his fear of hostile Indians"); Emery, *supra* note 27, at 475 (describing Indians as "savage . . . enemies"); Kozuskanich, *supra* note 27, at 1067 (quoting a 1757 *New York Mercury* article describing Indians as "barbarous enemies").

104 *See, e.g.*, ROBERT A. WILLIAMS JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA, at xix (2005) (discussing United States Supreme Court cases that relied on racist language in deciding "precedent-setting cases on Indian rights").

105 For a description of the psychological process of othering, see, for example, 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,

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."[106] In 1814, the Supreme Court of Errors and Appeals of Tennessee described a rural district as "remote from the capital, detached from the rest of Virginia by an extensive wilderness, [and] infested by an Indian enemy"[107] The Tennessee court further described "the harassed and endangered state of this infant settlement, whose very extermination was threatened by the savage foe."[108] 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."[109] 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 composing 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 [sic] inhabitants from Indian rapine, and Indian barbarity . . . ."[110]

In an 1835 Tennessee Supreme Court case, the court affirmed its jurisdiction over a murder involving a Cherokee victim and a Cherokee accused that took place within Cherokee territory, despite contrary Supreme Court precedent.[111] The majority opinion discussed the white settlement of the Carolinas, concluding that:

> [T]he 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

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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.

106 Lessee of Clark v. Hackethorn, 3 Yeates 269, 270 (Pa. 1801).

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

108 *Id.*

109 Gregory v. Baugh, 25 Va. 611, 633–34 (1827) (emphasis added).

110 Dale v. Governor, 3 Stew. 387, 388 (Ala. 1831).

111 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. (6 Pet.) 515, 596 (1832), that the State of Georgia lacked jurisdiction over Cherokee territory within its state boundaries.

> extirpated for their want of religion and just morals, they might be reclaimed for their errors" . . . . [a] rule of which savages of this description have no just right to complain.[112]

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."[113] 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."[114]

In 1859, the U.S. Supreme Court cited the petition of two settlers to establish a ranch in what later became California.[115] 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."[116]

In *The Sutter Case* of 1864,[117] 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."[118]

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."[119] 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,"[120] while a Court of Claims case in the same year described the Indian population of the upper San Joaquin Valley as "most numerous, most warlike, and most hostile."[121]

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112 *Foreman*, 16 Tenn. at 265.

113 *Id.* at 278.

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

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

116 *Id.* (emphasis added). Note the troubling view that the Indians' occupation of the tract did not demonstrate that they had any ownership interest.

117 The Sutter Case, 69 U.S. (2 Wall.) 562, 587 (1864).

118 *Id.* at 563.

119 Alire v. United States, 1 Ct. Cl. 233, 238 (1865).

120 Chapman v. School District, 5 F. Cas. 487, 491 (C.C.D. Or. 1866).

121 Fremont v. United States, 2 Ct. Cl. 461, 464 (1866).

In 1874, the Supreme Court of the Territory of Idaho described "[t]he whole country" as having been "inhabited by wild and barbarous savages."[122] In 1877, the U.S. 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."[123] 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."[124]

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 whom were presumably fighting to retain their lands, as savage aggressors. While these 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.[125] Given that Indians were being described as 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

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

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

124 State *ex rel.* Truman v. McKenney, 2 Nev. 171, 179 (1883).

125 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:

> [T]he 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 christians, and which the courts of justice are bound to regard.

Cornet v. Winton's Lessee, 10 Tenn. 143, 150 (1826) (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. (19 How.) 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. (19 How.) at 527–29 (Catron, J., concurring); *see supra* notes 112–13 and accompanying text (quoting and citing *Foreman*). It is difficult to know what to make of the discrepancies among the language used here, that used in *Foreman*, and that used in Justice Catron's opinion in *Dred Scott*.

Indians as savage and the concomitant abrogations of tribal rights to be discussed later serve 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.[126]

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.[127] 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].'"[128] 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."[129]

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.[130] 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.[131]

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

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

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

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

130 *See* WILLIAMS, *supra* note 104, 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").

131 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

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 tend to not only not rely on virulently racist decisions pertaining to them, such as *Dred Scott*,[132] but also explicitly disclaim such decisions.[133] 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.[134] 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" towards tribes and Indians.[135] Additionally, as argued below, such repetition and reliance on offensive opinions enable further derogation of tribal rights.[136]

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 their exercise of the 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 their right to self-defense. Furthermore, tribes' sharply circum-

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that are embedded . . . in the national psyche." DELGADO & STEFANCIC, *supra* note 40, at 28.

132 60 U.S. 393 (1856).

133 *See, e.g.*, WILLIAMS, *supra* note 104, at 18 ("Supreme Court justices [sic] never cite [*Dred Scott*] . . . except as a prime example of a very *bad* precedent.").

134 *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* EEOC v. Bimbo Bakeries U.S.A., Inc., No. 1:09-CV-1872, 2010 WL 598641, at *5 (M.D. Pa. Feb. 17, 2010) ("While simple teasing, offhand 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'") (internal citation omitted).

135 WILLIAMS, *supra* note 104, at 21.

136 *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 goods to be imported" similarly "leads to a conception of guestworkers as lacking any agency in the terms and conditions of their employment").

scribed 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.[137] 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*, Chief Justice Marshall stated that:

> [T]he 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.[138]

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 classed "as fierce savages whose occupation was war." Finally, the Court states that "[t]o leave them in 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 did not 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

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137 *See generally* 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. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S.(8 Wheat.) 543 (1823); *see also* WILLIAMS, *supra* note 104, at 51–58, 60–70, 75–79, 89–95 (discussing these five cases and their use of the language of savagery).

138 *Johnson*, 21 U.S. (8 Wheat.) at 590.

land under the doctrine of discovery.[139] 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.[140]

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.[141] 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."[142] So, once again, we see the Court espouse a view of 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."[143]

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139 The doctrine of discovery granted European nations rights to tribally occupied land in the New World by virtue of "discovering" it. *See, e.g.*, WILLIAMS, *supra* note 104, at 51–53 (alteration in original); *see also* Tweedy, *supra* note 57, at 665–67 (2009) (explaining the doctrine of discovery as formulated in *Johnson v. M'Intosh*). In addition to the deprivation of tribal property rights that it effected, 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").

140 *See supra* notes 43–45 and accompanying text (discussing and quoting from SLOTKIN, *supra* note 2).

141 *See Cherokee Nation*, 30 U.S. (5 Pet.) at 7–8, 12–13, 15, 20 ("[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).

142 *Cherokee Nation*, 30 U.S. (5 Pet.) at 18.

143 *Id.* at 15. In a 2009 petition for certiorari, a tribal member asked the Court to overturn *Cherokee Nation v. Georgia*'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, and he further suggested that the decision was comparable to *Plessy v. Ferguson*,

Next, in *Worcester v. Georgia*, a case that actually affirms tribal sovereignty vis-à-vis the claims of the State of Georgia, the Court makes multiple references to the tribes as warlike.[144] For instance, it describes the tribes' "general employment" as "war, hunting, and fishing."[145] Later, the Court describes tribes as "[f]ierce and warlike in their character."[146] 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.[147] For example, it quotes the following language from the charter to William Penn: "in 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."[148] It similarly quotes the charter to Georgia as follows:

> [W]hereas 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.[149]

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's and other states' powers over tribes under English law, to quote them without even acknowledging the one-sided views they encompassed perpetuated the

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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-cherokee-nation-v-georgia/, *cert. denied*, 130 S. Ct. 809 (2009). In the extremely unlikely event the Court were to decide to overrule *Cherokee Nation* on this issue at some point, the overruling would presumably have the effect of reestablishing tribes' collective right to self-defense as nations under international law. *See supra* Part I.A, (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 holding tribes to be foreign nations.

144 Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

145 *Id.* at 543; WILLIAMS, *supra* note 104, at 64 (citing *Worcester* and discussing quoted language).

146 *Worcester*, 31 U.S. (6 Pet.) at 546.

147 WILLIAMS, *supra* note 104, at 67–68.

148 *Worcester*, 31 U.S. (6 Pet.) at 545.

149 *Id.* at 546.

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.[150] In it, the Court determined that it lacked jurisdiction over an on-reservation murder of one Indian by another 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 racalized premise and, in that sense, it is a very dangerous victory.[151] The Court explains that the Sioux, pursuant to a treaty and associated act of Congress:

> [W]ere . . . 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 might become a self-supporting and self-governed society.[152]

Thus, in addition to relying on racialized ward-guardianship language and describing tribes as in a "state of pupilage"—ideas that both derive from the Marshall Trilogy[153]—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.*[154]

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150 *Ex Parte* Crow Dog, 109 U.S. 556 (1883).

151 WILLIAMS, *supra* note 104, at 77–79.

152 109 U.S. at 568–69.

153 WILLIAMS, *supra* note 104, at 76–77; *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

154 109 U.S. at 571 (emphasis added).

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.[155] 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 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."[156] 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.[157] 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 the 1955 case, *Tee-Hit-Ton Indians v. United States*.[158] This case 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.[159] 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:

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155 *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).

156 109 U.S. at 571; *see* WILLIAMS, *supra* note 104, at 78–79 (describing this passage from *Ex Parte Crow Dog*).

157 ANDERSON, *supra* note 82, at 91; *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*).

158 348 U.S. 272 (1955).

159 WILLIAMS, *supra* note 104, at 89–94 (discussing the holding and background of *Tee-Hit-Ton Indians* and connecting it with the *Johnson* case).

> 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.[160]

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.[161] 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 racialized imagery of Indians has had and continues to have devastating effects for tribes in terms of their legal rights[162] 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" and that "[t]he perceived inferiority of that group has been given the sanction of law in the legal history of racism in America."[163] 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 history[164] and continue in force today. As shown below, these caricatured images have facilitated both vigilante

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160 *Tee-Hit-Ton Indians*, 348 U.S. at 289–90. *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.

161 *Cf.* Garcia, *supra* note 136, 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 102, 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).

162 *See* WILLIAMS, *supra* note 104, 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.").

163 *Id.* at 17.

164 *E.g., id.* 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.").

and state-sanctioned violence against Indians.[165] The images 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 V.A, these images are used to implicitly justify abrogations of tribal sovereignty in case law.

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

Historical vigilante and state-sanctioned violence against Indians is 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.[166]

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.[167] One particularly important in-

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165 *Accord* Delgado & Stefancic, *supra* note 16, 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").

166 *See, e.g., id.*

167 *See, e.g.,* EDMUNDS, *supra* note 40, 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.'" (alteration in original) (citations omitted)); *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 141, 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

stance 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.[168] In Pennsylvania in December 1763, "a group of mostly Scot[s]-Irish Presbyterian frontiersmen slaughtered twenty Indians . . . claiming that [they] had perpetrated murders along the frontier."[169] In early 1764, these same frontiersmen marched to Philadelphia "intent on killing the Moravian Indians moved there by the government for protection."[170] In an effort to gain more public support for their actions, the rioters later voluntarily issued what apparently passed for an apology.[171] 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.'"[172] 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.[173] Instead, their actions are credited with having helped "shape[] popular ideas of defense and the essential role government played in providing safety."[174]

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 lynchers. H.R. Res. 4715, 2006 Reg. Sess. (Wash. 2006), *available at* http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bills/House%20Resolutions/4715-Sto%20lo%20Nation.pdf; S. Res. 8729, 2006 Reg. Sess. (Wash. 2006), *available at* http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bills/Senate%20Resolutions/8729-Sto-lo%20Nation.pdf; *see also* 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) (stating that "[v]igilantism is the extralegal use of deadly force by an organization of private individuals to achieve some public or political goal" and that "[v]igilante or 'Regulator' movements figured periodically in the development of frontier settlements before 1850, . . . [b]ut after 1865, vigilance organizations became the cutting edge of social conflict").

168 *See* Kozuskanich, *supra* note 27, 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).

169 *Id.* at 1051.

170 *Id.*

171 *Id.* at 1052.

172 *Id.*

173 *Id.* at 1053.

174 *Id.* at 1054.

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 of 1776 partly in response to the Paxton Riots,[175] 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."[176] 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*.[177] 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.[178] 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 against whom colonists needed to defend. 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.[179]

Additionally, the State of Georgia hanged a Cherokee man in 1830 in open defiance of a writ of error from the U.S. Supreme Court.[180] Prior to the hanging, a conference of Georgia judges had

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175 *Id.* at 1060–62.

176 *Id.* at 1044.

177 *Id.* at 1041–42 (discussing Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *aff'd* District of Columbia v. Heller, 128 S. Ct. 2783 (2008)).

178 District of Columbia v. Heller, 128 S. Ct. 2783, 2802 (2008).

179 *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"); *see also* Proclamation of Jonathan Belcher, Governor of the Province of New Jersey (June 2, 1756) (providing for payment of $130 for delivery of an adult male Indian scalp).

180 ANDERSON, *supra* note 82, at 53–54; *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12–13 (1831).

rejected the Cherokee Nation's legal argument that the State lacked jurisdiction because the crime occurred in federally recognized Cherokee territory, concluding that the "'habits, manners, and imbecile intellect' of the Indians opposed their governance as an independent state."[181] When the Supreme Court finally determined in a later case, *Worcester v. Georgia*,[182] that the State of Georgia lacked jurisdiction over Cherokee territory, 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."[183]

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.[184]

Additionally, "[d]uring the Seven Years' War, it became official policy to kill Indian prisoners, whom in time many officers simply called 'those Vermine.'"[185]

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

> The 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° be-

181 ANDERSON, *supra* note 82, at 53.

182 31 U.S. (6 Pet.) 515 (1832).

183 ANDERSON, *supra* note 82, at 74 (quoting Letter from William Williamson, Subcommander of the Georgia Guard, to Wilson Lumpkin, Governor of Georgia (Apr. 28, 1832) (internal quotation marks omitted), *available at* http://neptune3.galib.uga.edu/ssp/cgi-bin/tei-natamer-idx.pl?sessionid=7f000001&type=doc&tei2id=tcc537).

184 A COLLECTION OF ALL THE ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA 339–341 (1733) [hereinafter A COLLECTION OF ALL THE ACTS].

185 SILVER, *supra* note 34, 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").

> low 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 . . . .[186]

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."[187]

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.[188]

E. 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' rights to self-defense.

1. Historical Prohibitions on Indians' Right to Defend Themselves

a. In 1705, Virginia Forbade Indians and Blacks from Raising a Hand in Opposition to a Christian

Virginia's draconian law provided for no qualifications or exceptions:

> [I]f any Negro, Mulatto, or *Indian*, Bond or Free, shall at any Time lift his or her Hand in Opposition 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

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186 Conners v. United States, 33 Ct. Cl. 317, 322–23 (1898).

187 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 1.03[7].

188 *See, e.g.*, ANDERSON, *supra* note 82, at 53 (quoting Georgian judges' determination of Indians to be unsuited to govern themselves because of their "habits, manners, and imbecile intellect").

> Lashes, well laid on; cognizable by a Justice of the Peace for that County wherein such Offence shall be committed.[189]

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 least transgression to prevent the chaos that would otherwise ensue as a result of their irrational violent tendencies.

b. 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."[190] 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.[191] 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 constituted historical denials of Indians' (and tribes') right to self-defense. Additionally,

189 A COLLECTION OF ALL THE ACTS, *supra* note 184, at 226.
190 Zuni Tribe of N.M. v. United States, 12 Cl. Ct. 641, 646–47 (1987).
191 *Id.* at 647, 655.

gun-rights advocate Don Kates has argued that the original intent of the Second Amendment itself was to exclude Indians and blacks.[192] 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.[193]

a. Federal Prohibitions

i. 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.[194] It was enacted one year after the Second Amendment was ratified and, therefore, provides good evidence of the original intent of the Amendment.[195] On its face, the Act excludes everyone but white men, at least from federal service.[196] 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 was originally meant to denote a group whose membership was subject to race (and sex) restrictions.[197] From this

192 Kates, *supra* note 9, at 217 n.54.

193 *See supra* Part II.A.

194 *See* Uniform Militia Act of 1792, 1 Stat. 271 (repealed 1903).

195 *See, e.g.*, Bogus, *supra* note 9, at 1373 n.47; *cf. Heller*, 128 S. Ct. 2783, 2810 (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"); Kates, *supra* note 9, at 266 (averring that "one can scarcely argue that the First Militia Act violated the [Second] amendment").

196 *See, e.g.*, Bogus, *supra* note 9, at 1373 n.47; Williams, *supra* note 1, at 451; *see also* Ulliver & Merkel, *supra* note 7, at 153 ("The act required that states carry their 'able-bodied white male citizens' between the ages of eighteen and forty-four on the rolls . . . . But 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 22, at 332 (arguing that that the Uniform Militia Act, while conscripting only white males, excluded no one from the nation's militia).

197 This exclusion of Indians from the protections of the Second Amendment is part and parcel with the historical denial of constitutional rights to other groups such as African Americans and women. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 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

group, male Indians were excluded by virtue of not being white, as well as, potentially, by their lack of citizenship.[198] 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.

ii. Abraham Lincoln's 1865 Proclamation

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."[199] While this Proclamation applied only to 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.

iii. Congressional Resolution of 1876 Prohibiting Conveyance of Metallic Ammunition to "Hostile Indians"

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 be-

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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 and Political Argument*, 96 CALIF. L. REV. 283, 298 (2008) (describing Justice Taney's opinion in *Dred Scott* as "a thoroughgoing exercise of . . . originalism").

198 *See, e.g.*, Tweedy, *supra* note 93, at 159 (stating that Indians generally were not made United States citizens until 1924); *see also* 8 U.S.C. § 1401(b) (2006).

199 Abraham Lincoln, Proclamation No. 28 (Mar. 17, 1865), *reprinted in* 13 Stat. 753 (1866).

> ing conveyed to such hostile Indians, and is further authorized to declare the same contraband of war in such district of country . . . .[200]

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

iv. 1925–26 *United States Code* Prohibition on Sale of Arms and Ammunition to Uncivilized or Hostile Indians

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.[201] When the law was in place, such "trading posts were Indians' only source of supplies."[202]

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,[203] 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.[204] Thus, the 1920s saw

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200 H.R.J. Res. 20, 44th Cong., 19 Stat. 216 (1876).

201 25 U.S.C. § 266 (1925–26) (repealed 1953).

202 Associated Press, *Government Drops Restrictions on Sale of Guns to Indians*, WASH. 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) (also 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").

203 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 fetichism [sic], 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 95, at 27 (noting, "[t]hroughout the nineteenth century," that Indians "were 'uncivilized' went without saying").

204 *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 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 popular demand "that Indians be absorbed into the mainstream of American life"); Bethany R. Berger, *Red: Racism and 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 from his tribe, the Indian could

an expansion of the groups of Indians who were denied the right to bear arms potentially to include all tribal Indians.

v. Federal Regulations Prohibiting Arms Trading with 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.[205] 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."[206] 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 will be granted only for clearly established lawful purposes."[207] Thus, even Indians who were regarded as civilized and friendly by the U.S. 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,[208] 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. 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 in 1949.[209] 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 will be granted only for clearly established lawful purposes," remained.[210] This section stayed in place until the

be civilized and would thereby add glory of [sic] the English race; tied to it, however, he was the enemy of all civilization").

205 25 C.F.R. §§ 276.7, 276.8 (1939); Regulating Sale of Arms and Ammunition, 44 Fed. Reg. at 46 (revoking restriction on sale of arms and ammunition to Indians because of the obsolescence of the rule); Associated Press, *supra* note 202, at A11.

206 25 C.F.R. § 276.7.

207 *Id.* § 276.8.

208 *See, e.g.*, Tahmassebi, *supra* note 17, at 81.

209 25 C.F.R. §§ 276.7, 276.8 (1949).

210 25 C.F.R. § 251.8 (1966).

rule was officially revoked in 1979 due to its obsolescence.[211] Thus, Indians' right to bear arms remained explicitly burdened by the law until 1979.

While 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 most likely 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.

vi. Individual Tribes Were Also Deprived of the Right to Self-Defense by the Federal Government

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.[212] Moreover, the federal government, which had promised to defend the Zuni from such attacks, failed to do so adequately,[213] and the raids therefore continued, including kidknappings and livestock thefts.[214]

Two other examples involve the Sioux Tribe. 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).[215] Because the Indians traditionally hunted for food and did not know how to farm, without either their weapons or government rations, they would have starved.[216]

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

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

213 *Id.* at 654.

214 *Id.* at 645.

215 Sioux Nation of Indians v. United States, 601 F.2d 1157, 1164–66 (Ct. Cl. 1979); Tahmassebi, *supra* note 17, at 79.

216 *Sioux Nation*, 601 F.2d at 1166; Tahmassebi, *supra* note 17, at 79.

Thus, the federal government appears to have disarmed them not only to lessen their potential power as opponents, but also in order to credibly threaten them with starvation.[217]

Another important example involving the Sioux is the United States' infamous massacre at Wounded Knee, where it is estimated that in December 1890, nearly 300 Sioux were killed, including many women and children who died while fleeing.[218] As a precursor to the massacre, U.S. troops instructed the Sioux they were traveling with to surrender their guns.[219] However, the troops were not satisfied that all the weapons had been surrendered and began to search each Sioux man.[220] When a gun went off, the troops began firing on the tepees where the women and children were gathered, "pour[ing] in 2-pound explosive shells at the rate of nearly fifty per minute, mowing down everything alive."[221]

Thus, as shown above, 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.[222] 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 on Indians' bearing of arms continued long after the Reconstruction-era efforts to remove formal

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217 *See Sioux Nation*, 601 F.2d at 1166; *see also* Tahmassebi, *supra* note 17, at 79.

218 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); *see also* Tahmassebi, *supra* note 17, at 79–80. 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. Dussias, *supra* , at 795–98.

219 Dussias, *supra* note 218, at 798; *see also* Tahmassebi, *supra* note 17, at 79–80.

220 Dussias, *supra* note 218, at 798.

221 *Id.* at 798 (citation omitted) (internal quotation marks omitted).

222 A news article from 1979 regarding revocation of the rule reports that the rule had "not been used for many years." Associated Press, *supra* note 202, 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 B. 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 v. Suquamish Indian Tribe*, 435 U.S. 191, 200 & n.10 (1978). Kopel, *supra*, at 298 & n.39*; see infra* notes 298-310 and accompanying text (discussing *Oliphant*).

restrictions on African Americans' ability to bear arms.[223] While this information should not be taken, by any means, to suggest that racism against African Americans has been overcome and racist laws consequently abolished,[224] 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.[225] 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.[226] 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 her hand in opposition to a Christian.[227] The second allowed Indians to fish, oyster, and gather plants provided that they first obtained a li-

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223 Tahmassebi, *supra* note 17, at 79; *see also* District of Columbia v. Heller, 128 S. Ct. 2783, 2809–11 (discussing post-Civil War laws enacted for the benefit of African Americans).

224 *See, e.g.,* Burkett, *supra* note 13, at 97–99 (detailing "race neutral" gun control measures in the 1960s that were actually aimed at restricting blacks from bearing arms).

225 *Cf.* Williams, *supra* note 104, at 86–87 (elucidating the fact that the Supreme Court's decision in *Brown*, 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).

226 State v. Hirsch, 114 P.3d 1104, 1126, 1127 (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 13, at 63 (noting that colonial authorities "sought to disarm blacks and Indians" (citation omitted) (internal quotation marks omitted)); Kates, *supra* note 9, 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); Tahmassebi, *supra* note 17, at 79 & n.51 (citing 1879 Idaho law that forbade the "sale or provision of firearms and ammunition to 'any Indian'" (citation omitted)).

227 A COLLECTION OF ALL THE ACTS, *supra* note 184, at 226; *see also supra* Part II.E.1.a.

cense from the Justice of the Peace, but prohibited them from carrying arms and ammunition while doing so.[228]

A 1723 Virginia law generally prohibited Indians and blacks from possessing arms and ammunition, and provided a punishment of whipping for violation.[229] The law did, however, provide an exception for Indians or blacks living on frontier plantations.[230] 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.[231]

A 1724 Boston law forbade Indians, blacks, and mulattos from carrying weapons and additionally "from assembling in groups larger than two and from being on the streets from one hour after sundown until one hour before sunrise."[232] Oregon's first firearms restriction after statehood was directed at Native Americans.[233] 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."[234] Finally, in 1879, Idaho "prohibited the sale or provision of firearms to 'any Indian.'"[235]

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, in other words, as 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.[236] The state attempts are particularly striking given that, since the adoption of the Constitution, states have been generally considered barred from regulating

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228 A COLLECTION OF ALL THE ACTS, *supra* note 184, 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. *Id.*

229 A COLLECTION OF ALL THE ACTS, *supra* note 184, at 342.

230 *Id.* at 231.

231 *Id.*

232 Bogus, *supra* note 9, at 1370 & n.31.

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

234 *Id.*

235 Tahmassebi, *supra* note 17, at 79 & n.51.

236 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 13, 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 to gain superiority over, rather than equality with, his adversaries." (citations omitted) (internal quotation marks omitted)).

Indians, at least on-reservation.[237] 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.[238]

V. 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,[239] the most salient effect of this fear

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237 *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 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).

238 *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 17, 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.").

239 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 REV. (Spokane, Wash.), July 3, 2000, at A1 (citation omitted) (internal quotation marks omitted). The resolution was recognized as racist by both anti-racism organizations and tribal rights groups. Jim Camden & Julie Titone, *Anti-sovereignty Resolution Draws Fire; Some Call GOP Action Racist,;* [sic] *Others Say It's Simply Misguided*, SPOKESMAN REV. (Spokane, Wash.), July 8, 2000, at A1; *see also* Berger, *supra* note 204, 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, 6:59 AM). 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-Wis., 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. 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

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*[240] 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:[241]

> Justice Jackson focused his . . . dissenting opinion . . . upon the larger set of constitutional values that were threatened by the Court's holding . . . . 'But once 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 an 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.'"[242]

In the case of tribes, Williams explains, the "racist precedents and language of Indian savagery used and relied upon by the justices [of the Supreme Court] . . . have most often worked . . . to justify denial to Indians of important rights of property, self-government, and cultural survival."[243] Thus, absent the stereotyping of savagery, "there is usually no other stated justification to be found for the way that Indians are treated by the justices."[244] 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 that not only

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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 78 (2009).

240 323 U.S. 214 (1944).

241 WILLIAMS, *supra* note 104, at xxv, 29.

242 *Id.* at 29 (quoting *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting)).

243 *Id.* at xxv.

244 *Id.*

were infected by racialized portrayals of Indians, but also, to a significant extent were based on such portrayals.[245] 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's 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 include explicitly the language of savagism in opinions.[246]

Thus, usually without appearing to do so, current Supreme Court cases and other cases from the state and federal system validate, perpetuate, and reinforce this racialization.[247] 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 punishment has persisted for nearly 400 years in some cases, tribes cannot be said to have any current right to self-defense, irrespective of whether or not they can now buy guns or form militias. 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.[248] Since 1975, *Worcester*, for example, has been cited in 392 state and federal cases, including thirty-five U.S. Supreme

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

246 *But see id.* 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 a 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"). 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 will not feel it. United States v. Sioux Nation, 448 U.S. 371, 437 (1980) (Rehnquist, dissenting). 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 supra* Part II.B & IV.D.

247 *Cf.* Anthony Cook, *Cultural Racism and the Limits of Rationality in the Saga of Rodney King*, 70 DENVER UNIV. 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.").

248 "Recent" here is defined as any case published after December 31, 1975.

Court cases.[249] 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,[250] 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.

1. 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.'"[251] For example, in *Cherokee Nation*,[252] discussed earlier, tribes were held to be "'domestic, dependent nations' who enjoyed a 'quasi-sovereign status'" under federal law.[253] 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"[254] by confiscating tribal land and parceling

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

250 *See, e.g.*, Tweedy, *supra* note 57, at 674.

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

252 30 U.S. (5 Pet.) 1 (1831).

253 Steinman, *supra* note 251, at 765 (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 7) (internal quotation marks omitted); *see also* Fisher v. Dist. Court, 424 U.S. 382, 390 (1976) (referring to the Northern Cheyenne Tribe's "quasi-sovereign" status).

254 Steinman, *supra* note 251, at 765.

it out to individual Indians and non-Indians.[255] 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.[256] 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*,[257] consistently diminished sovereignty over non-members, largely on its own initiative.[258]

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;[259] (2) because Congress has been held to have virtually unlimited "plenary power" over tribes;[260] and (3) because the Supreme Court has invested itself with the power to construct (and especially to diminish) tribal sovereignty under federal law according to its own policy determinations.[261] 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

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255 *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).

256 Steinman, *supra* note 251, at 765.

257 435 U.S. 191 (1978).

258 *See* Tweedy, *supra* note 57, at 674–83 (discussing the Court's divestment of tribal sovereignty during the past three decades).

259 *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 57, at 664 n.55 (describing the foundational decisions of Indian law as primarily federal common law decisions).

260 *See* Tweedy, *supra* note 57, at 659–62, 659 nn.31 & 34 (describing and discussing the origins and virtually unlimited character of Congress's plenary power over Indian affairs).

261 *See* Tweedy, *supra* note 57, at 674–83 (discussing the Court's divestment of tribal sovereignty during the past three decades).

> 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. . . .
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> And as 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 "What 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 litigation.[262]

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"[263] and a "morass."[264] Among the most troubling aspects of the maze are the limitations on tribal jurisdiction effected by statute and by Supreme Court decisions, which are discussed below.

i. Tribal Jurisdiction

In an Indian reservation, Indian allotment, or other dependent Indian community,[265] tribes have criminal jurisdiction over their members as well as other Indians.[266] 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 both[267] (although under a 2010 law called the Tribal Law and Order Act,[268] tribes are able to impose sentences of up to three years and fines of up to $15,000 if cer-

262 Steinman, *supra* note 251, at 766–67 (citations omitted).

263 *See generally* AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 8 (2007) (reporting on the complex "maze" of tribal, state, and federal law that makes it extremely challenging for Native American victims of sexual violence to achieve justice).

264 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.").

265 *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").

266 25 U.S.C. § 1301(2) (2006) (defining tribal "powers of self-government"); United States v. Lara, 541 U.S. 193, 210 (2004).

267 25 U.S.C. § 1302(7).

268 Indian Arts and Crafts Amendments Act of 2010, §§ 201–66, Pub. L. No. 111-211, 124 Stat. 2258, 2261–62.

tain requirements are met).[269] Moreover, although tribes, being neither federal nor state actors, are not generally bound by constitutional provisions requiring protection of individual rights,[270] most Bill of Rights protections have been imposed on tribes through the Indian Civil Rights Act (ICRA).[271] The most notable exception in the criminal milieu is the right to counsel for an indigent defendant,[272] although tribes that impose the stronger punishments now available under the Tribal Law and Order Act must provide indigent defendants with the right to an attorney.[273]

Although under the Major Crimes Act,[274] 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.[275] Furthermore, the only federal review available of a tribally imposed conviction is habeas corpus.[276]

ii. Federal Jurisdiction

As noted above, the federal government has jurisdiction over certain major crimes committed by an Indian against an Indian on the reservation.[277] The federal government also has jurisdiction over on-reservation crimes involving a non-Indian perpetrator and an Indian

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269 25 U.S.C. § 1302; Indian Arts and Crafts Amendments Act of 2010 § 234(a).

270 *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 South Dakota, 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).

271 25 U.S.C. § 1302.

272 *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 14.04[2] (noting that the 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* U.S. 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 federal Constitution nor the terms of ICRA require tribes [to do so] in tribal courts.").

273 Indian Arts and Crafts Amendments Act of 2010 § 234(a)(2).

274 18 U.S.C. § 1153 (2006).

275 *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.").

276 25 U.S.C. § 1303; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (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.").

277 18 U.S.C. § 1153.

victim or vice versa under the Indian Country Crimes Act[278] and the Assimilative Crimes Act.[279]

iii. State Jurisdiction

States have jurisdiction over crimes between one non-Indian and another within Indian country.[280] Additionally, under a federal law popularly known as Public Law 280,[281] some states, as a substitute for federal jurisdiction, have additional criminal jurisdiction over Indian country.[282] Although it is not entirely clear, it appears that tribes have concurrent jurisdiction with states in these circumstances to the same extent they otherwise would have had with the federal government.[283] 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, at least in the criminal context.[284] Finally, states have jurisdiction over crimes not in Indian country regardless of the perpetrator's and victim's Indian status or lack thereof.[285]

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 wheth-

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278 *Id.* § 1152; *see also* Washburn, *supra* note 157, at 716–17 (discussing the framework of federal jurisdiction created by the Indian country statute, the Major Crimes Act, and the General Crimes Act).

279 18 U.S.C. § 13; *see also* Washburn, *supra* note 157, 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)).

280 United States v. McBratney, 104 U.S. 621, 621–22 (1881).

281 18 U.S.C. § 1162 (2006); 25 U.S.C. §§ 1321–26 (2006); 28 U.S.C. § 1360 (2006).

282 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 6.04[3] (explaining the history of Public Law 280 and the state jurisdiction that it authorizes); *see also* MAZE OF INJUSTICE, *supra* note 263, 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.").

283 Tweedy, *supra* note 57, at 694.

284 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."); MAZE OF INJUSTICE, *supra* note 263, at 36–37 ("A combination of federal legislation and state and US [stet] Supreme Court decisions . . . has resulted in considerable confusion and debate over the right of Alaska Native peoples to maintain tribal police and court systems."); *cf.* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 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.").

285 *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 9.03[1].

er an area *is* Indian country may take weeks or even months.[286] 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,[287] 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.

a. Tribal Civil Jurisdiction

Tribal civil jurisdiction has become exceedingly complicated, and a thorough analysis of the subject could easily span 100 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.[288] Absent federal delegation or congressional restoration of tribal sovereignty,[289] the general rule of when tribes have civil jurisdiction over non-members 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.[290]

While *Montana*'s limitations on civil jurisdiction over non-members 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

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286 MAZE OF INJUSTICE, *supra* note 263, at 34 (noting the difficulty in determining the status of land in Oklahoma).

287 *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, *Methamphetamine: Casting a Shadow Across Disciplines and Jurisdictions*, 82 N.D. L. REV. 1249, 1249-50 (2006).

288 *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 4.02 (highlighting federally imposed limitations on tribal powers).

289 *See generally* Tweedy, *supra* note 57 (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).

290 Montana v. United States, 450 U.S. 544, 565–66 (1981) (citations omitted).

each new case heard by the Supreme Court.[291] 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,[292] and, more importantly, ownership of land may have become merely one factor in the analysis as to whether the *Montana* limitations on tribal jurisdiction apply at all.[293] 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,[294] and the Court has concluded that land sales by non-members on the reservation are not "activities" for purposes of the consensual relationship exception.[295] 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 non-member's actions.[296] 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 *Montana* exceptions' primary function in the Supreme Court is "to exist in theory but never actually apply."[297] Thus, while tribes may legally exercise civil authority over non-members under *Montana*, they have had tremendous difficulty in getting the Supreme Court to enforce this right in individual cases.

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291 *See, e.g.*, Tweedy, *supra* note 57, at 674–76, 678, 703 & nn.256 & 257 (listing various cases where the Supreme Court limited tribal power).

292 *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 93, at 171 (analyzing *Strate* as narrowing the *Montana* holding to apply only to certain circumstances).

293 *See* Tweedy, *supra* note 57, 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).

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

295 *See id.* at 681 (examining *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (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 requesting a variety of other remedies).

296 Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2726 (2008).

297 Tweedy, *supra* note 57, at 682.

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

In *Oliphant*,[298] 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.[299] As further discussed below, this holding has played a substantial part in exposing tribes to widespread lawlessness nationwide,[300] thus rendering tribes literally unable to defend themselves from violence.[301]

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."[302] 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.[303] He was thus putting whites in the place of the Indian defendant in *Crow Dog*, but could hardly convincingly describe whites as savages,[304] as this would not only presumably conflict with his own worldview 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 ascer-

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298 435 U.S. 191 (1978).

299 *Id.* at 203 (relying on Congress' "unspoken assumption" that tribes lacked such jurisdiction)*; see also* Tweedy, *supra* note 93, at 151–52 (noting the "dubious evidence" supporting the Court's decision in *Oliphant*).

300 *See, e.g.*, Trachman, *supra* note 272, 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.").

301 For an example of a tribal court case that analyzes the question of criminal jurisdiction over non-members (in this case non-member Indians) as a self-defense issue, see *Means v. District Court of the Chinle Judicial Dist.*, 7 Navajo Rptr. 383, 386 (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 non-member on-reservation crime).

302 WILLIAMS, *supra* note 104, at 109 (quoting *Oliphant*, 435 U.S. at 210–11 (1978); *Ex Parte* Crow Dog, 109 U.S. 536, 571 (1883)).

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

304 *Id.*

tainable to one not versed in Indian law.[305] 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.[306]

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 Indian tribes' rights are necessarily implicitly "'diminished'" in myriad ways as a result of their incorporation into the United States—ways that, based on *Oliphant* and subsequent Supreme Court decisions, appear to remain obscure until the Court elucidates them.[307] 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.[308] 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.[309]

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.[310] 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

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305 *See id.* at 108–10 ("[T]he same basic nineteenth-century racist attitude of Indian cultural inferiority found in *Crow Dog* is now being applied to Indians once again . . . .").

306 *Accord* Kates, *supra* note 9, 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.").

307 *See* WILLIAMS, *supra* note 104, at 98 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978)).

308 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208–09 (1978); *see also* WILLIAMS, *supra* note 104, at 99 (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18–19 (1831)).

309 *See Oliphant*, 435 U.S. at 206-07 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)); *see also* WILLIAMS, *supra* note 104, 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 57, at 671–72.

310 *See* Tweedy, *supra* note 57, at 673–74 (discussing the positive aspects of the three decisions).

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.'"[311]

Oliphant was not only a highly significant blow to tribal rights in its own right, but, importantly, the Court has also expanded it exponentially to reduce tribal sovereignty even further.[312] Thus, even when the antecedent decisions that *Oliphant* was based on are not themselves cited, the racialized language of savagery in them continues to operate through *Oliphant* and its progeny 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.*[313] In *Long Family Land & Cattle*, the Court further reduced tribes' already drastically curtailed sovereignty over non-members, overturning a tribal court jury verdict in a discrimination case against a non-member bank on the basis that the tribal court lacked jurisdiction.[314]

The *Long Family Land & Cattle* Court expanded further *Oliphant*'s holding that tribes lacked criminal jurisdiction over non-members, and it also expanded the holdings of subsequent cases extending *Oliphant*'s holding to the civil context.[315] One such intervening case, *Montana v. United States*,[316] had expanded *Oliphant*'s idea of implicit abrogations of tribal sovereignty due to alleged inconsistence with the

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311 WILLIAMS, *supra* note 104, at 29 (quoting Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)).

312 *See, e.g.*, WILLIAMS, *supra* note 104, at 137–48 (discussing the Court's use of *Oliphant* in *Nevada v. Hicks*, 533 U.S. 353 (2001)); *see also* Tweedy, *supra* note 57, at 675–83 (discussing the Court's trend of divesting tribal sovereignty as beginning with, and being rooted in, *Oliphant*).

313 128 S. Ct. 2709, 2718–19, 2723 (2008).

314 *Id.* at 2720 (holding that the tribal court lacked jurisdiction to hear a discrimination claim against defendant bank because the tribe lacked the civil authority to regulate the bank's sale of its fee land); *see also* Tweedy, *supra* note 57, at 679–83 (discussing how *Long Family Land & Cattle* further reduced tribal sovereignty).

315 *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); State v. A-1 Contractors, 520 U.S. 438, 459–60 (1997) (holding that 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 that the tribal court lacked civil jurisdiction to adjudicate claims involving non-Indian hunters and fishers on non-Indian fee land). All three cases are cited in *Long Family Land & Cattle*, 128 S. Ct. at 2718–19.

316 *Montana*, 450 U.S. at 549 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)); *see also* WILLIAMS, *supra* note 104, at 139 (describing how *Montana* expanded *Oliphant*'s jurisdictional limitations to the civil sphere).

tribes' dependence on the United States to the civil arena.[317] As alluded to above, *Montana* had held that tribes' civil regulatory jurisdiction over non-member 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.[318]

As one of the remedies the plaintiffs sought in *Long Family Land & Cattle* was setting aside the defendant bank's foreclosure sale of their property, the Court was able to decide the case without rigorously examining the *Montana* rule. Instead, the Court paradoxically held that the *Montana* rule was not at all applicable because land sale was not an "activity" under *Montana*.[319] Thus the 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.[320] *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*.[321]

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317 *Montana*, 450 U.S. at 565–66 (expanding the *Oliphant* principles to hold that the tribe lacked jurisdiction in a civil regulatory matter).

318 *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.").

319 *Long Family Land & Cattle*, 128 S. Ct. at 2724 (distinguishing the resale of land from the uses to which the land is put); *see also* Tweedy, *supra* note 57, at 679–82 (discussing the Court's decision in *Long Family Land & Cattle*, including the opinion's failure to reckon with the *Montana* exceptions).

320 *Long Family Land & Cattle*, 128 S. Ct. at 2719 (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*, 10 U.S. (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 v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) (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 also 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*, 10 U.S. (6 Cranch) at 147 (mentioning limitations on tribal authority to govern outsiders in a paragraph describing the United States' legal interests in Indian lands).

321 *Montana*, 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." (citation omitted)).

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 consensual relationship has been established.[322] 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 puzzling and somewhat misleading way.[323] *Worcester* held that Georgia lacked jurisdiction over the Cherokee Nation's tribal territory and concomitantly emphasized the Cherokee Nation's right to decide who entered its territory.[324] But Chief Justice Roberts uses *Worcester*'s holding 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."[325] *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.[326] 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,[327] the tone of the decision is overtly dismis-

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322 *Long Family Land & Cattle*, 128 S. Ct. at 2724–25.

323 *Id.* at 2723 (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").

324 Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (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 . . . .").

325 *Long Family Land & Cattle*, 128 S. Ct. at 2723.

326 *See Worcester*, 31 U.S. (6 Pet.) 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.").

327 *See* Tweedy, *supra* note 57, at 687–88 & n.171 (describing how *Long Family Land & Cattle* negatively impacts tribes' ability to protect their governmental interests, specifically how inability to enforce anti-discrimination laws against non-members will lead to job and opportunity losses).

sive of tribes and tribal rights.[328] Moreover, the analysis in 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.[329] These aspects of the decision independently harm tribes and negatively affect how society views them, affirming societal racialization of tribes.[330]

B. The Continuing Stereotype 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

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328 For instance, the *Long Family Land & Cattle* Court accuses the Longs of "attempt[ing] to recharacterize their claim," 128 S. Ct. at 2720, although the alleged recharacterization 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 2714–15. 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 2719. 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 REV. 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).

329 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 57, at 680. 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*, 128 S. Ct. at 2722–23 & 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 also 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 2723.

330 *See, e.g.*, Des Rosiers, *supra* note 328, 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).

beyond the judicial abrogation of tribal sovereignty.[331] One area 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.[332] 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.[333] 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."[334] 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,[335] rarely prosecute violent crime in Indian country.[336] 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.[337] Additionally, although several Senate Committee hearings have now been conducted on the issue and legislation that takes limited steps to remedy

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331 *See, e.g.*, *supra* note 239 and sources cited therein (discussing *Spokesman Review* articles and *Stop Treaty Abuse-Wisconsin*).

332 Tweedy, *supra* note 57, at 690 (discussing the rate of sexual violence against Native women and the obstacles they face when seeking justice).

333 *Id.* at 689.

334 *Id.* at 690–91 (citations omitted).

335 *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 grants of federal jurisdiction over interracial on-reservation crimes that involve both non-Indians and Indians); *see supra* notes 277-79 (discussion federal criminal jurisdiction).

336 *Id.* at 691 (suggesting U.S. Attorneys prosecute as few as 15% of felony cases referred to them by tribal prosecutors).

337 *See* Trachman, *supra* note 272, at 854 (noting that *Oliphant* played an important role in causing lawlessness on Indian reservations); Tweedy, *supra* note 57, at 684–95 (explaining the practical effects of the divestment of tribal sovereignty); *see also* Krakoff, *supra* note 264, at 1111–12 (describing the effects of the federal government's divestment of sovereignty on the Navajo Nation).

the problem has recently passed,[338] 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 been working to make the safety of Indian reservations such a low priority that some have credibly accused the federal government of genocide.[339] 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 failure 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.[340]

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

A. *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 jurisdiction.[341] Furthermore, the Indian Civil Rights Act[342] includes no Second Amendment analog, despite its imposition of obligations on tribes to protect several rights that are framed in language similar to that of

338 Tribal Law and Order Act of 2010 §§ 201–66, Pub. L. No. 111-211, (2010); *see also* Tweedy, *supra* note 57, at 709 (discussing Senate Committee on Indian Affairs hearings addressing law enforcement and administration on tribal lands).

339 Tweedy, *supra* note 57, at 684 & n.160 (citing multiple sources that characterize divestment as part of genocide).

340 Tweedy, *supra* note 57, at 690 (reciting that 86% of the perpetrators of rape against Indian women are non-Indian men).

341 Talton v. Mayes, 163 U.S. 376, 381–83 (1896) ("[T]he Fifth Amendment to the Constitution of the United States is a limitation only upon the powers of the General Government. . ."); Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D, 259 F.2d 553, 556–57 (8th Cir. 1958) ("The Indian tribes are not, however, states and these Constitutional limitations have no application to the actions, legislative in character, by Indian tribes.").

342 25 U.S.C. §§ 1301–03 (2006).

the U.S. Constitution's Bill of Rights.[343] Thus, tribes could enact their own restrictions on gun ownership irrespective of *Heller*, and it appears that a number of tribes do currently regulate gun ownership.[344] 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,[345] 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.[346] Thus, it is a real possibil-

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343 *Id.* § 1302 (listing several rights that may not be infringed by tribal governments, including free exercise of religion, security against unreasonable search and seizures, and double jeopardy protections); 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).

344 *See, e.g.*, Absentee-Shawnee Tribe of Indians of Okla., Res. No. AS-94-01 (Jan. 3, 1994), *available at* http://thorpe.ou.edu/codes/absshaw/Crimoff.html (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"); *see also* Criminal Code Offenses & Punishments, SILETZ TRIBAL CODE § 12.126 (1992) (amended 2005) (criminalizing the carrying of a machine gun without a federal license and defining other, similar offenses).

345 Tweedy, *supra* note 57, at 659–60 & nn.31 & 34 (discussing the plenary power doctrine).

346 *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 14.03[2][a]; *see also* Lyng v. Nw. Cemetery Protective Ass'n, 485 U.S. 439, 440, 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. (5 Pet.) 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); Washburn, *supra* note 157, 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); *id.* at 715–16, 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); *cf.* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, § 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). *See generally* Singer, *supra* note 255, at 43–47 (explaining how the government's non-consensual al-

ity 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.[347] To put this example in concrete terms, imagine that, as a GOP delegate advocated in 2000,[348] 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.

B. Where to Go from Here?

What does the troubled relationship detailed above between Indians and non-Indians mean for the Second Amendment? Regard-

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lotment 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).

347 *See, e.g.*, Tweedy, *supra* note 57, at 659 (describing the origins of the doctrine of implicit divestiture); *see also Cherokee Nation*, 30 U.S. (5 Pet,) at 17–18 ("[A]ny 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."); *supra* note 251 and accompanying text (addressing *Oliphant*'s use of the doctrine). 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).

348 *See supra* note 239 (discussing *Spokesman Review* articles).

less 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.[349] 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 the right of self-defense, viewed narrowly, and the Second Amendment, but also with respect to key Indian law precedents that affect tribal self-defense in a broader sense. To the extent that these precedents are substantively affected by notions of savagery (and

349 *See generally* WILLIAMS, *supra* note 1; Bogus, *supra* note 9.

many appear to be), they should not be relied upon, particularly in deciding issues of tribal sovereignty. And care should be taken to protect tribal and individual Indians' constitutional rights. At least in cases where there is no conflict between a tribe's sovereignty and an individual Indian's asserted constitutional right,[350] 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 *Johnson*'s 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 are 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.

350 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. A more thorough examination of this proposed solution would be necessary before it could be unequivocally supported.