INDIAN TRIBES AND GUN REGULATION: SHOULD TRIBES EXERCISE THEIR SOVEREIGN RIGHTS TO ENACT GUN BANS OR STAND-YOUR-GROUND LAWS?

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I. INTRODUCTION

In light of the Second Amendment's inapplicability to Indian tribes, tribes appear to have the greatest freedom to experiment with gun laws of any sovereign in the United States.[1] What have they done with that freedom and what sorts of regulations should they pursue? This article attempts to answer both questions.

As to the first, as discussed in more detail below, tribes have enacted an array of generally fairly modest firearm regulations including permit requirements, limits on concealed weapons, restrictions on having guns in certain places, and regulations as to gun type and barrel length. As to the second question, this article explores two fairly extreme types of possible tribal firearm regulations: gun bans and stand-your-ground laws. Although each may have appeal to some of the nation's 566 federally recognized Indian tribes for different reasons, this article argues that, because of the current limitations on tribal civil and criminal jurisdiction under federal law and related issues, a tribe's enforcement of either would likely be fraught with problems. Thus, despite their unparalleled discretion in the area of firearm regulation, tribes' ability to effectively regulate on this crucial issue is hampered by the arcane framework of tribal civil and criminal jurisdiction under federal law. Moreover, this incongruity contradicts Congress'

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[1] See Ann E. Tweedy, *"Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?" How the Second Amendment & Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 754–55 (2011).

intent, as manifest in the Indian Civil Rights Act (ICRA).[2]

This article argues that, in light of the formidable obstacles to successful tribal enforcement of gun restrictions, tribes concerned about the proliferation of guns on their reservations—and who might therefore consider gun bans—may be best served by enacting a comprehensive set of gun regulations that makes extensive use of forfeiture, and probably particularly in rem forfeiture, as a penalty for any violation. Tribes that wish to support gun rights are free to do so (as some have), but enacting an expanded right to self-defense, such as a stand-your-ground law, as a partial solution to on-reservation crime is likely to backfire and harm the very tribal members who would be expected to benefit from such a law.

This article first outlines some of the history and background that may influence tribes to enact different types of gun laws. It then briefly describes the gun rights provisions and the various types of firearm regulations that currently exist under tribal law. Finally, it discusses tribes' options in regulating firearms and their use in the future, specifically focusing on the potential benefits of, and problems with, two of the more extreme types of regulation: gun bans and stand-your-ground laws.

II. GUN RIGHTS AND REGULATIONS

A. History and Background that May Influence Tribal Gun Policies

Tribes have powerful reasons both to want to protect gun rights and to enact stringent firearm regulations. As sovereigns, they should be able to strike that balance for themselves, according to their differing needs and values, especially given the inapplicability of the Bill of Rights to tribes. Unfortunately, as with many tribal governance functions that ostensibly are preserved under federal law, this promise turns out to be more real in theory than in practice.

On the one hand, tribes and individual Indians have historically been forcibly disarmed and otherwise denied the right to bear arms (and sometimes literally the right to defend themselves) by the U.S. government, as well as by individual colonies and states.[3] At the same time, most tribes have a long cultural tradition of hunting.[4]

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[2] 25 U.S.C. §§ 1301–04 (2014).

[3] Tweedy, *supra* note 1, at 727–37.

[4] Sarah A. Garrott, Comment, *New Ways to Fulfill Old Promises: Native American Hunting & Fishing Rights as Intangible Cultural Property*, 92 OR. L. REV. 571, 572 (2013).

Moreover, many tribes not only continue to view hunting as an important cultural practice, but also exercise a treaty right to hunt on reservation, and, in some parts of the country, off reservation as well.[5] Because of the centrality of hunting to many tribal cultures, guns play an important role in some tribes irrespective of their usefulness for self-defense.[6] Finally, many Indian reservations are plagued by violent crime, much of which has historically gone unpunished, although there is evidence that the federal government is finally stepping up its efforts to meaningfully respond to on-reservation crime.[7] One rational response to widespread, historically unpunished violent crime is to advocate for—or, in this case, facilitate—greater armament among the citizenry.[8] Thus, given that Indians' right to bear arms has historically been infringed, that tribal hunters usually rely on guns, and that many reservations are plagued by epidemic levels of violence, tribes have ample reason to want to protect the right to bear arms on their reservations. And, as will be discussed below, several tribes have elected to protect the right to bear arms.

On the other side of the coin, however, tribes concerned about on-reservation violence may legitimately view extremely high on-reservation crime rates and the difficulty in bringing violent criminals to justice[9] as reasons to enact stringent gun regulations—

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[5] *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 18.01–18.04 (Nell Jessup Newton ed., 2012).

[6] *See* Garrott, *supra* note 4, at 592–93 (noting that Native American hunting rights are fundamentally dependent on guns).

[7] See, e.g., Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 689–90, 692 (2009); Rebecca Zimmerman, Comment, *The Use of Uncounseled Tribal Court Convictions in Federal Court Under the Habitual Offender Provision of the Violence Against Women Act: A Violation of the Sixth Amendment Right to Counsel or an Extension of Comity?*, 61 CATH. U. L. REV. 1157, 1165, 1177 (2012); Erik Eckholm, *Gang Violence Grows on an Indian Reservation*, N.Y. TIMES, Dec. 14, 2009, at A14 (describing violence on the Pine Ridge Reservation, which is home to the Oglala Sioux); Felicia Fonseca, *Authorities: Indian Tribe Crime Rates 20 Times National Average*, STANDARD EXAMINER (Nov. 12, 2013), http://www.standard.net/stories/2013/11/12/authorities-indian-tribe-crime-rates-20-times-national-average; Laura Sullivan, *Lawmakers Move to Curb Rape on Native Lands*, NPR (May 3, 2009), http://www.npr.org/templates/story/story.php?storyId=103717296 (discussing rape on the Standing Rock Sioux Reservation). For information on the United States' attempts to improve its record on prosecution of crime in Indian country, see U.S. DEP'T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS & PROSECUTIONS 6–7 (2013), available at http://www.justice.gov/sites/default/files/tribal/legacy/2014/08/26/icip-rpt-cy2013.pdf.

[8] *See* Robert T. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 358, 361 (1991) ("In a world in which the legal system [is] not to be trusted, perhaps the ability of the system's victims to resist might convince the system to restrain itself.").

[9] *See* Eckholm, *supra* note 7, at A14.

and even gun bans. Indeed, four out of the nearly four hundred school shooters since 1992 have been Native American high school or middle school students, with the most recent such incident claiming five victims at Marysville-Pilchuck High School in Marysville, Washington in October 2014.[10] At least one of these four incidents, that at Red Lake High School in 2005, occurred on-reservation.[11] While these numbers do not suggest that Native American youth are any more likely to engage in a school shooting than youth of any other race,[12] tribal leaders could legitimately conclude that stringently regulating or banning firearms on reservation could minimize the risk of future tragedies of this type.

Putting school shootings aside, there is also evidence that a greater prevalence of guns in an area exponentially increases the rates of gun suicides and unintentional firearm deaths, and, although such prevalence is not associated with a higher overall crime rate, it is associated with a greater likelihood that death will result from crime.[13] Given that Native Americans have a higher rate of suicide than any other racial group in the United States,[14] these statistics may motivate tribes to consider banning guns or at least stringently regulating them. As we will see below, many tribes have enacted laws regulating guns, including permit and background check requirements, and at least one tribe has considered enacting a gun ban.

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[10] Peter Langman, *School Shooters Who Are Not White Males*, PSYCHOLOGY TODAY (Dec. 23, 2012), http://www.psychologytoday.com/blog/keeping-kids-safe/201212/school-shooters-who-are-not-white-males; Scott Neuman, *5th Teen Dies from Injuries in Oct. 24 Wash. School Shooting*, NPR (Nov. 8, 2014), http://www.npr.org/blogs/thetwo-way/2014/11/08/362547490/5th-teen-dies-from-injuries-in-oct-24-wash-school-shooting; *Our National Issue*, STOPTHESHOOTINGS.ORG, http://www.stoptheshootings.org/ (last visited Feb. 17, 2015) (stating that 387 school shootings have occurred since 1992 and listing information about the incidents).

[11] *Victims of the Red Lake Shooting*, MINN. PUB. RADIO (Mar. 22, 2005), http://news.minnesota.publicradio.org/features/2005/03/22_ap_redlakevictims/.

[12] *See, e.g.*, TINA NORRIS ET AL., THE AMERICAN INDIAN & ALASKA NATIVE POPULATION: 2010, at 3 (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf (explaining that Native Americans, including those who identified as only Native American and those who identified as Native American along with another race, made up 1.7% of the U.S. population in 2010). Since four out of 387 school shooters since 1992 were Native Americans, it appears that Native Americans make up a slightly lower percentage of school shooters than one would expect based on population percentages alone. *See* Langman, *supra* note 10; *Our National Issue*, *supra* note 10.

[13] *See* Philip J. Cook, *The Great American Gun War: Notes from Four Decades in the Trenches*, 42 CRIME & JUST. 19, 49, 59 (2013).

[14] *National Suicide Statistics at a Glance*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/violenceprevention/suicide/statistics/rates01.html (last updated Dec. 16, 2014).

B. What Types of Gun-Related Laws Have Tribes Enacted?

1. Right to Bear Arms

Several tribes protect the right to bear arms. For instance, the Little River Band of Ottawa Indians and the Nottaweseppi Huron Band of the Potawatomi constitutionally protect the right, whereas the Navajo Nation includes the right to bear arms in its statutory Bill of Rights,[15] which functions similarly to a constitutional provision.[16]

Just as the Supreme Court suggested in *District of Columbia v. Heller*[17] with respect to the meaning of the right to bear arms under the U.S. Constitution, for tribes, explicitly protecting the right to bear arms does not necessarily mean that the right cannot be regulated.[18] Navajo Nation, for instance, prohibits both the use of firearms and the carrying of loaded firearms in Marble Canyon Navajo Nation Park,[19] and the Nation also generally prohibits the carrying of loaded weapons with exceptions, such as for possession in the home or in a motor vehicle, for hunting, and for engaging in religious practices.[20]

It is important to note, however, that the right to bear arms is explicitly qualified in the Navajo Bill of Rights.[21] Similarly, the

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[15] CONSTITUTION OF THE LITTLE RIVER BAND OF OTTAWA INDIANS art. III, § 1(k); CONSTITUTION OF THE NOTTAWESEPPI HURON BAND OF THE POTAWATOMI art. VII, § 1(a)(11); NAVAJO NATION BILL OF RIGHTS § 6; *see also* Angela R. Riley, *Indians and Guns*, 100 Geo. L.J. 1675, 1722 (2012) ("Today a rather small but growing number of tribal constitutions expressly provide that the Indian nation may not infringe on the individual right to bear arms."). Interestingly, the St. Regis Mohawk Tribe also appeared to constitutionally protect the right to bear arms, CONSTITUTION OF THE SAINT REGIS MOHAWK TRIBE ON-KWA-IA-NE-REN-SHE-RA art. IV, § 1(I), but, in fact, the 1995 constitution is not currently in place and the Tribe does not have a constitution (or any law protecting the right to bear arms) as of the time of this writing, *see* Press Release, Saint Regis Mohawk Tribe, Election Board Denies Petition Initiative Regarding Constitution (Feb. 19, 2008) (on file with author); E-mail from Aimée Benedict, Publications Manager/Webmaster, Saint Regis Mohawk Tribe, to author (Nov. 13, 2014, 10:06 EST) (on file with author).

[16] Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 WM. MITCHELL L. REV. 392, 418 (2010).

[17] District of Columbia v. Heller, 554 U.S. 570 (2008).

[18] *See id.* at 626–28.

[19] NAVAJO NATION CODE ANN. tit. 19, § 609(A) (2009); *Park Rules & Regulations*, NAVAJO NATION PARKS AND RECREATION, http://navajonationparks.org/permits.htm (last visited Feb. 17, 2014).

[20] NAVAJO NATION CODE ANN. tit. 17, § 320 (2009).

[21] Navajo Nation's Bill of Rights states that "[t]he right of the people to keep and bear arms for peaceful purposes, and in a manner which does not breach or threaten the peace or unlawfully damage or destroy or otherwise infringe upon the property rights of others, shall not be infringed." NAVAJO NATION BILL OF RIGHTS § 6.

Huron Potawatomi and Little River Band provisions prohibit only unreasonable infringements of the right to bear arms and therefore appear to presumptively allow any reasonable regulation of the right.[22] The apparent prevalence of these qualifications on the right to bear arms among tribes may suggest that tribes are inclined to adopt a relatively moderate view of the right to bear arms.

Instead of generally protecting the right to bear arms, the Squaxin Island Tribe in Washington takes the more limited approach of codifying the use of firearms in self-defense as an exception to firearms-related offenses, such as the unlawful discharge of a firearm and intimidation by use of a firearm.[23]

2. Types of Firearm Regulations

In the course of my research, I learned of one tribe that had considered enacting a gun ban[24] and another that appeared to have had a general gun ban with exceptions in the past.[25] Like Squaxin Island and Navajo Nation, many other tribes have put into place various types of firearm regulations short of gun bans,[26] although I did hear from another researcher that tribes were reluctant to regulate firearms because of the controversial nature of the issue. Tribal laws include prohibitions on certain gun types, like short-barreled shotguns and rifles,[27] which tend to be easier to conceal and less precise, as well as machine guns.[28] Permit requirements,[29]

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[22] *See* CONSTITUTION OF THE LITTLE RIVER BAND OF OTTAWA INDIANS art. III, § 1(k); CONSTITUTION OF THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBE art. VII, § 1(a)(11).

[23] SQUAXIN ISLAND TRIBAL CODE § 9.12.855 (2013).

[24] E-mail from Sheri Freemont, Dir., Family Advocacy Ctr., Salt River Pima-Maricopa Indian Cmty., to author (Sept. 17, 2014, 2:59 EST) (on file with author).

[25] *Compare* Exec. Comm. Res. AS-94-01 (Absentee-Shawnee Tribe of Indians of Okla. 1994) ("It shall be unlawful for any person . . . except a duly appointed peace officer to carry upon or about his or her person, or in a portfolio or purse, any dangerous weapon, or firearm, except as may otherwise be provided for in the Code of Laws of the Absentee-Shawnee Tribe of Oklahoma."), *with* ABSENTEE-SHAWNEE TRIBE OF INDIANS OF OKLA. TRIBAL CRIM. CODE §§ 507–08 (2010) (prohibiting certain persons from carrying firearms, prohibiting the possession of certain types of firearms, and imposing other restrictions on the use of firearms). Given the apparent inconsistency between the resolution and the code provisions, it appears reasonable to infer that the ban enacted by resolution is no longer in place.

[26] *See, e.g.*, Riley, *supra* note 15, at 1725–28 (discussing various types of tribal gun regulations).

[27] *See, e.g.*, EASTERN BAND CHEROKEE INDIANS CODE § 14-34.11(a) (2010); METLAKATLA INDIAN CMTY. LAW AND ORDER CODE pt. IV, § 1(a)(2) (1976); LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE § 5-11-2 (2004); SALT RIVER PIMA-MARICOPA INDIAN CMTY. CODE OF ORDINANCES § 6-150(l)(6) (2014); SQUAXIN ISLAND TRIBAL CODE § 9.12.840(A)(2) (2010).

[28] *See, e.g.*, METLAKATLA INDIAN CMTY. LAW AND ORDER CODE pt. IV, § 1(a)(6); LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE § 5-11-2; SQUAXIN ISLAND TRIBAL CODE §

which occasionally include background checks,[30] appear to be fairly prevalent, as are restrictions on carrying concealed firearms[31] and loaded weapons.[32] Additionally, a federal regulation was recently amended to facilitate tribal access to the federal firearm background check system, but it appears that the logistics of facilitating that access are still being worked out.[33]

Like the Navajo provision relating to Marble Canyon Park, some tribes bar guns from certain places,[34] and others bar or restrict the

9.12.840(A)(1).

[29] *See, e.g.*, EASTERN BAND CHEROKEE INDIANS CODE § 144-2; SALT RIVER PIMA-MARICOPA INDIAN CMTY. CODE OF ORDINANCES § 6-151.

[30] *See* CONFEDERATED TRIBES OF THE GRAND RONDE CMTY. OF OR. PUB. SAFETY ORDINANCE ch. 201(k)(3)(A)(v) (2014) (requiring applicants for a Tribal Concealed Carry Permit to consent to a background check); CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIMINAL CODE §§ 4.157(B)(2) (2014) (stating that "[t]he Chief of Police . . . shall conduct any investigation necessary to corroborate the requirements" for obtaining a concealed weapon permit).

[31] *See, e.g.*, ABSENTEE-SHAWNEE TRIBE OF INDIANS OF OKLA. TRIBAL CODE CRIMINAL OFFENSES § 508(a) (2010) ("It shall be unlawful to carry a dangerous weapon concealed on the person."); COLVILLE CONFEDERATED TRIBES CODE § 3-1-13 (2011) (providing that it is unlawful to carry a concealed weapon in a public place without a permit); EASTERN BAND CHEROKEE INDIANS CODE §14-34.11(a) ("It shall be unlawful to carry a dangerous weapon concealed on the person."); CONFEDERATED TRIBES OF THE GRAND RONDE CMTY. OF OR. PUB. SAFETY ORDINANCE ch. 201(k)(2) (prohibiting possession of a concealed handgun on the person or readily accessible within his or her vehicle without a permit); KALISPEL TRIBE LAW AND ORDER CODE § 9-5.06 (2012) (barring the carrying of concealed weapons in public places without a permit); LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE § 5-11-5 (prohibiting any person from carrying a concealed weapon without a tribal license); CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIMINAL CODE §§ 4.156–57 (2014) (requiring possession of a permit to carry a concealed weapon, and setting forth that a firearm safety course is a prerequisite to being granted a permit); Fort Peck Assiniboine & Sioux Tribes v. Stiffarm, No. 019 (Fort Peck Tribal Ct. Aug. 31, 1987) (upholding conviction for carrying a concealed weapon in the face of vagueness and due process challenges).

[32] *See, e.g.*, ABSENTEE-SHAWNEE TRIBE OF INDIANS OF OKLA. TRIBAL CODE CRIMINAL OFFENSES § 507(a)(2) ("It shall be unlawful to . . . [c]arry a loaded firearm in a vehicle on a public road without lawful authority to do so."); COLVILLE CONFEDERATED TRIBES CODE § 4-1-249 (2009) (providing that nonmembers of the Tribe may not possess loaded weapons within the boundaries of the reservation and that no person may possess a loaded weapon in the North Half); EASTERN BAND CHEROKEE INDIANS CODE § 14-34.10.(a)(2) (2013) (prohibiting possession of loaded weapons in vehicles on public roads); NAVAJO NATION CODE ANN. tit. 17, § 320 (2009) (stating general rule prohibiting the possession of loaded weapons and enumerating exceptions).

[33] National Instant Criminal Background Check System Regulation, 79 Fed. Reg. 69047, 69048 (Nov. 20, 2014) (codified at 28 C.F.R. § 25.6(j)(1)); E-mail from M. Brent Leonhard, Attorney, Confederated Tribes of the Umatilla Indian Reservation, to author (Feb. 4, 2015, 3:22 PST) (on file with author).

[34] *See, e.g.*, CONFEDERATED TRIBES OF THE GRAND RONDE CMTY. OF OR. PUB. SAFETY ORDINANCE ch. 201(k)(1) ("Under no circumstances may any person carry, possess or use a weapon in any building owned, leased, or controlled by the Tribe, or anywhere that Tribal business is being conducted (including Tribal events) . . . ."); SALT RIVER PIMA-MARICOPA INDIAN CMTY. CODE OF ORDINANCES § 6-152(c) ("It shall be unlawful for any person to carry, operate, possess, receive, transport, or ship any firearm, or ammunition at a community event or community building or facility within the Salt River Pima-Maricopa Indian Community.");

use of silencers.[35] Finally, some tribes prohibit felons from possessing firearms,[36] as do both the United States[37] and many individual states,[38] and persons with other characteristics, such as mental incompetence, are sometimes barred as well.[39]

3. Remedies

Tribes vary in whether they incorporate gun regulations into their criminal or civil codes.[40] In addition to ordinary criminal and civil sanctions, such as incarceration and fines, some tribes include forfeiture of the firearm as one of the remedies for a violation.[41]

SQUAXIN ISLAND TRIBAL CODE § 9.12.870 ("No person shall carry any firearm or other dangerous weapon in or within fifty (50) feet of any building or structure on lands owned or controlled by the Squaxin Island Tribe, with the exception of private residences located on tribal lands . . . .").

[35] *See, e.g.*, METLAKATLA INDIAN CMTY. LAW AND ORDER CODE pt. IV, § 1(a)(7) (1976) (defining a silencer as a "prohibited firearm"); LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE § 5-11-2 (defining a firearm silencer as a prohibited "controlled weapon"); SALT RIVER PIMA-MARICOPA INDIAN CMTY. CODE OF ORDINANCES § 6-150(l)(4) (defining a silencer as a "prohibited weapon"); LAW AND ORDER CODE OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION § 8-1-24(7) (1988) (declaring that silencers may not be used while hunting).

[36] *See, e.g.*, LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE § 5-11-6; SQUAXIN ISLAND TRIBAL CODE § 9.12.825.

[37] 18 U.S.C. § 922(d)(1) (2013).

[38] *See, e.g.*, State v. Roy, 761 N.W.2d 883, 884 (Minn. Ct. App. 2009); State v. Jacobs, 735 N.W.2d 535, 536 (Wis. Ct. App. 2007).

[39] *See, e.g.*, EASTERN BAND CHEROKEE INDIANS CODE § 14-34.10(a)(1) (2010); CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIMINAL CODE § 4.157(A)(10)–(11) (2014).

[40] *See* Riley, *supra* note 15, at 1725–28 (describing firearm provisions in tribal criminal codes and in tribal civil regulatory codes). *Compare* EASTERN BAND CHEROKEE INDIANS CODE § 14-34.10 (defining "weapons offense" in a provision of the tribe's criminal code), *and* SQUAXIN ISLAND TRIBAL CODE § 9.12.840 (making it a felony to sell or possess a prohibited firearm), *with* CONFEDERATED TRIBES OF THE GRAND RONDE CMTY. OF OR. PUBLIC SAFETY ORDINANCE ch. 201(k)(4)(A) (2014) (providing for civil penalties for weapons violations).

[41] *See, e.g.*, COLVILLE CONFEDERATED TRIBES CODE § 3-1-13 (2011) ("Weapons lawfully seized under this section may be forfeited to the Tribes pursuant to tribal civil forfeiture procedures."); THE CONFEDERATED TRIBES OF THE GRAND RONDE CMTY. OF OR. PUBLIC SAFETY ORDINANCE ch. 201(k)(4)(B) ("The Tribal Police Department may, in addition to or in lieu of other permissible action, seize any firearm in the possession of a person on Tribal Lands without a valid Tribal Concealed Carry Permit in accordance with Tribal law."); GRAND TRAVERSE BAND CODE tit. 14, § 701(c) (2012) ("Firearms possessed upon Tribal lands in contravention of state law and/or without required licenses issued by this Tribal Council shall be subject to forfeiture."); SALT RIVER PIMA-MARICOPA INDIAN CMTY. CODE OF ORDINANCES § 6-152(g) (2014) ("Any person convicted of a violation of this section shall forfeit all firearms, ammunition, and weapons seized pursuant to the investigation.").

C. What Types of Gun Regulations Should Tribes Enact in the Future?

This section focuses particularly on two relatively extreme (and diametrically opposed) types of regulation, gun bans and stand-your-ground laws, and it examines whether it is advisable for tribes whose policies dovetail with either approach to enact such laws. Ultimately, largely because of jurisdictional limitations and the endemic uncertainty of the Supreme Court's test for tribal civil jurisdiction over nonmembers, I conclude that tribes should avoid such extreme types of firearm regulation and that tribes who wish to regulate guns will likely be best served instead by defining gun regulations as *both* civil and criminal and including forfeiture as one of the remedies for any violation.

1. Overview of Tribal Criminal and Civil Jurisdiction Under Federal Law

In order to understand the difficulties tribes face in enforcing gun laws, it is necessary to understand the basic framework of tribal civil and criminal jurisdiction, particularly with respect to nonmembers. Accordingly, the most important rules are outlined below.

a. Tribal Criminal Jurisdiction

Tribes generally have criminal jurisdiction over their own members and over Indians from other tribes for acts committed within the reservation (or in a dependent Indian community or on an Indian allotment).[42] They, however, generally lack criminal jurisdiction over non-Indians under current Supreme Court precedent,[43] although Congress recently passed the Violence Against Women Reauthorization Act of 2013 (VAWA 2013),[44] which restored tribal criminal jurisdiction over certain non-Indian perpetrators of domestic violence and dating violence, provided that the victims are Indian.[45] VAWA 2013's restoration of tribal criminal jurisdiction over a subset of non-Indian perpetrators is

[42] 18 U.S.C. § 1151; 25 U.S.C. § 1301(2) (2013); United States v. Lara, 541 U.S. 193, 198 (2004); *see also* Tweedy, *supra* note 7, at 693.

[43] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

[44] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54 (codified in scattered sections of 18, 22, 25, and 42 U.S.C.).

[45] 25 U.S.C. § 1304.

monumental, but, at the same time, there are several aspects of the law that will limit its effect in the near term as well as over time. First, VAWA 2013 jurisdiction does not go into effect for tribes (other than the three who have been selected by the federal government for pilot projects) until March 2015.[46] Additionally, it will be optional for tribes to assume the additional jurisdiction, and tribes have to meet certain requirements, some of which require considerable monetary and institutional investment, in order to participate.[47] Thus, it remains accurate to think of the general rule of lack of tribal criminal jurisdictions over non-Indians as still being in place, with some tribes assuming a chunk of additional jurisdiction under VAWA 2013 over time.

Tribal criminal sentencing authority is limited to either a maximum of one year of incarceration (or a fine of $5000) or to a maximum of three years of incarceration (or a fine of $15,000), depending on the characteristics of the crime; the defendant's criminal history; and on whether the tribe provides defendants with certain protections, such as effective assistance of counsel for indigent defendants.[48] Under ICRA, the only form of federal review available for a tribal criminal conviction is habeas corpus, although, under VAWA 2013, defendants petitioning a federal court for a writ of habeas corpus will also be able to seek a stay of detention from that court.[49] In sum, then, regarding tribal criminal jurisdiction over gun crimes, tribes will have criminal jurisdiction (with limited penalties) over members of their own tribes and other Indians.[50] They will lack jurisdiction over non-Indians for pure gun crimes, although VAWA 2013 jurisdiction may come into play in some cases, for instance if a tribe that has elected to undertake such jurisdiction defines use of a gun as an aggravating factor in a

[46] § 908(b), 127 Stat. at 125–126.

[47] 25 U.S.C. § 1304(a)(4), (d); *see also id.* § 1302(c) (requiring Indian tribes to provide defendants the right to effective assistance of counsel and to provide indigent defendants with defense attorneys at the expense of the tribal government when a term of imprisonment of more than one year may be imposed).

[48] *Id.* § 1302(b)–(c).

[49] *Id.* §§ 1303, 1304(e); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70 (1978) (discussing Congress' awareness of the potential effects of federal judicial review on tribal self-government and its intention to limit such review).

[50] Who is "Indian" is itself a complicated determination under federal law. *See, e.g.*, 25 U.S.C. § 1301(4) ("'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies."); ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 317–18 (2d ed. 2010).

domestic violence crime.[51]

It is important to note a complicating factor when considering tribal criminal jurisdiction: the federal government and, to varying degrees, state governments also have criminal jurisdiction on Indian reservations, and federal (and sometimes state) jurisdiction overlaps with that of tribes.[52] Very briefly, the federal government generally has jurisdiction over Indians who commit enumerated "major" crimes on reservation, as well as over cases in which there is a non-Indian perpetrator and an Indian victim or vice versa, and courts have determined that tribes have concurrent jurisdiction over Indian perpetrators in both sets of cases (although the question of concurrent tribal jurisdiction is less settled with respect to the enumerated major crimes).[53] States have jurisdiction over non-Indian-on-non-Indian crimes committed on reservation, and some states also have general criminal jurisdiction over reservations pursuant to a federal statute, the most common of which is popularly known as Public Law 280.[54] Tribal criminal jurisdiction over Indians is widely understood to run concurrently with Public Law 280.[55] One caveat for Public Law 280 is that state gun laws would only be applicable on reservations pursuant to Public Law 280 if the gun laws were part of a criminal prohibitory scheme rather than a civil regulatory scheme; in other words, isolated criminal sanctions within a civil state gun code would not be applicable on reservations under Public Law 280.[56]

In enacting criminal gun laws, tribal councils would be wise to consider the interplay of their proposed laws with existing federal and state criminal firearm regulations, especially those that will apply on reservation. For tribes where Public Law 280 or a similar federal statute applies to make state criminal law applicable on the reservation, tribes will want to make sure they are not subjecting their members to inconsistent obligations. Additionally, in such situations, if the state and tribal gun regulations are very similar or

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[51] *See* Riley, *supra* note 15, at 1726 ("Domestic violence, a notorious problem on Indian reservations, appears commonly in [tribal] criminal codes as well, sometimes within the context of guns.").

[52] *See* Tweedy, *supra* note 7, at 693–95.

[53] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 9.04; Tweedy, *supra* note 1, at 742–44.

[54] Act of Aug. 15, 1953, Pub. L. No. 83–280, 67 Stat. 588 (codified as amended in scattered sections of 18, 25, and 28 U.S.C.); Tweedy, *supra* note 1, at 744.

[55] *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 6.04(3)(c).

[56] *See, e.g.,* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208–14 (1987); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 6.04.

identical in some respects, this may increase opportunities for cross-deputization of tribal police officers, which could enable the officers to enforce state gun laws against non-Indian violators on the reservation.

Although federal firearms laws are fairly limited, state criminal laws may be enforced by the federal government on reservations under the Assimilative Crimes Act.[57] Thus, state law should be examined even outside of situations where state criminal laws are directly applicable.

Federal gun law includes prohibitions on possession by persons such as felons, drug addicts, and domestic abusers and the giving or disposing of firearms or ammunition to such persons.[58] A similar provision prohibits sale, delivery, or transfer of a firearm or ammunition to a juvenile.[59] Certain types of guns, like machine guns, and devices, such as silencers, are prohibited under federal law.[60] Additionally, guns may not be possessed or used in a school zone.[61] Finally, using or possessing firearms in commission of a drug felony or a federal crime of violence and possessing a stolen firearm or stolen ammunition are prohibited as well.[62] Thus, tribes should have a fairly easy time regulating consistently with federal law as long as they don't wish to allow unusually dangerous types of firearms, such as machine guns, allow sales or gifts to juveniles (other than a temporary transfer for hunting or other exempted activities),[63] or allow guns in schools. The bigger challenge will likely come for tribes that wish to ensure some degree of consistency with state criminal law, either because it is directly applicable under a statute like Public Law 280 or because it may be applied by the federal government under the Assimilative Crimes Act.[64]

b. Tribal Civil Jurisdiction

Tribal civil jurisdiction over nonmembers under federal law is both simpler and more uncertain than the framework of tribal criminal jurisdiction. The basic test comes from a Supreme Court

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[57] 18 U.S.C. § 13 (2013); *see also* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 716 (2006).

[58] 18 U.S.C. § 922(d), (g), (n).

[59] *Id.* § 922(b), (x)(1).

[60] *Id.* § 922(k), (o), (r); 26 U.S.C. § 5861 (2013).

[61] 18 U.S.C. § 922(q)(2)(A).

[62] *Id.* §§ 842(h), 922(i), (j), (u), 924(c).

[63] *Id.* § 922(x)(3).

[64] The *United States Code* provision allowing juveniles to possess firearms in certain circumstances also requires compliance with state and local law. *Id.* § 922(x)(3)(A)(iv).

case, *Montana v. United States*,[65] in which the Court held that tribal civil jurisdiction over nonmembers engaging in activities on fee land on the reservation is divested except in the following circumstances:

> 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.[66]

Under *Montana* and most of its progeny, the test—and the Court's restriction of tribal civil jurisdiction over nonmembers—only applies on non-Indian-owned fee lands on a reservation, but, in one fairly recent case with a very unusual fact pattern, the Court hinted that, in some instances, the test applies to nonmember activities on tribally owned lands as well.[67]

While the *Montana* test appears broad on its face—apparently sweeping within its ambit civil jurisdiction over all those who enter business or other consensual relationships with the tribe or its members *and* all those whose activities have the potential to negatively affect the tribe's health or welfare, economic security, or political integrity—in fact, the test has been interpreted to date in an unduly parsimonious way by the Supreme Court.[68] What this means for tribes that attempt to assert civil jurisdiction over nonmembers, whether it be regulatory or adjudicatory,[69] is that it is impossible to predict whether the jurisdiction will be upheld in the face of a challenge. Unfortunately, it is always possible that the Supreme Court will discover a new exception to the test that would be very difficult or impossible for the litigants to anticipate, such as the Court's admonition in *Plains Commerce Bank v. Long Family Land & Cattle Co.*[70] that tribal civil jurisdiction over on-reservation land sales between nonmembers does not exist and therefore is not

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[65] Montana v. United States, 450 U.S. 544 (1981).

[66] *Id.* at 565–66 (citations omitted).

[67] Nevada v. Hicks, 533 U.S. 353, 359–360 (2001); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 4.02 (concluding, despite *Hicks*, that "tribes will normally possess regulatory jurisdiction over nonmembers engaging in activities on tribal land in the absence of powerful countervailing state interests, such as existed in *Hicks*").

[68] *See* Tweedy, *supra* note 7, at 677–83.

[69] *Id.* at 702–03 & n.257.

[70] Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).

subject to the *Montana* test,[71] or the Court's conclusion in *Strate v. A-1 Contractors*[72] that on-reservation car accidents on state rights-of-way involving only nonmembers cannot meet the test despite their obvious effect on the tribe's health or welfare.[73] Thus, although at least one scholar has predicted that tribal civil gun laws will be held to meet the *Montana* test,[74] in fact it is nearly impossible to predict whether a law will be held to pass the test, particularly given the test's focus on the particular individual or entity being regulated in each case.

The question of tribal civil jurisdiction is subject to a much simpler framework than tribal criminal jurisdiction. Basically, tribes have civil jurisdiction over their members on reservation and over nonmembers (whether Indian or not) provided one of the *Montana* exceptions is met.[75] The trouble is that one literally never knows whether the Court would hold one of the exceptions to be met in any given case.

Under *Montana*, then, a tribe has the potential to regulate all persons, although its ability to regulate a nonmember in any given case will always be subject to some uncertainty (at least for activities occurring on fee lands).[76] This framework contrasts with a tribe's criminal jurisdiction, which is subject to a very complex framework, but which, under current law, is much more definite in scope. We know that almost all non-Indians (excluding certain domestic violence and dating violence offenders) will not be subject to tribal criminal jurisdiction and that all Indians will.[77] Some uncertainty exists in the criminal milieu as well, relating to whether the Supreme Court might strike down the statute extending tribal criminal jurisdiction to all Indians (rather than just Indians who are members of the prosecuting tribe) or the VAWA 2013 provisions relating to non-Indians as unconstitutional,[78] but, given the clarity of the statutory law on criminal jurisdiction and the fact that the Supreme Court has already once upheld the constitutionality of ICRA amendments[79] that extended tribal

[71] *Id.* at 331–32; *see* Tweedy, *supra* note 7, at 681–82.

[72] Strate v. A-1 Contractors, 520 U.S. 438 (1997).

[73] *Id.* at 457–58; Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 171 (1999/2000).

[74] Riley, *supra* note 15, at 1739.

[75] *See id.* at 1720.

[76] *See* Montana v. United States, 450 U.S. 544, 565–66 (1981).

[77] *See supra* notes 42–45 and accompanying text.

[78] *See* Tweedy, *supra* note 7, at 695–701, 711–12.

[79] *See id.* at 695; *see also* Act of Nov. 5, 1990, Pub. L. No. 101–511, § 8077(b), 104 Stat

criminal jurisdiction to all Indians,[80] there is less uncertainty in the criminal context.

Tribes considering enactment of gun laws should take these uncertainties into account, and, in most cases will probably be best served by enacting laws that explicitly contain *both* criminal and civil sanctions. Ideally, they should also provide that comparable civil sanctions will come into play if the original criminal sanction is struck down as an unlawful exercise of tribal jurisdiction and, where applicable—for instance in the case of an Indian who is not a member of the tribe imposing the sanction—vice versa. Although tribes will not be able to avoid the uncertainty that is currently endemic to this area of law, they will be able to maximize their chances of having their gun laws enforced against the largest contingent of persons in this way.

2. Tribal Gun Bans

Next, I will briefly examine two diametrically posed types of gun laws to see if tribes whose policies align with either type would be well served to enact laws of that type. But first, a bit of background. Tribes, like states, can be "laboratories for democracy."[81] Given the lack of applicability of the Second Amendment or any comparable federal statutory provision to tribal governments,[82] in the case of gun laws, tribes are arguably the ultimate laboratories of democracy in the United States. Two sources of law have created this unique framework. The first is the constitution, which, we know from Supreme Court precedent, binds only the states and/or the federal government, depending on the provision at issue.[83] The second source of law is ICRA, a federal

1856, 1892 (amending 25 U.S.C. § 1301(2) to recognize and affirm tribes' ability "to exercise criminal jurisdiction over all Indians").

[80] United States v. Lara, 541 U.S. 193, 210 (2004).

[81] Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1153 (2004) (internal quotation marks omitted). Professor Krakoff explains that Navajo tribal officials have condemned the Supreme Court's limitations of tribal powers, and she quotes Navajo Nation's former Legislative Counsel Raymond Etcitty as asking: "What about the concept of laboratories for democracy?" *Id.* (internal quotation marks omitted).

[82] *See, e.g.*, Tweedy, *supra* note 1, at 754–55 (discussing *Talton v. Mayes*, 163 U.S. 376 (1896), and ICRA); Alex Tallchief Skibine, Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes, AM. INDIAN L. REV. (forthcoming 2015) (manuscript at 40–41), (discussing *Talton v. Mayes*).

[83] *See Talton*, 163 U.S. at 382; Brent W. Stricker, *Gun Control 2000: Reducing the Firepower*, 31 MCGEORGE L. REV. 293, 295 (2000); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been

statute that imposes many of the obligations in the Bill of Rights on tribes (subject to tribal interpretation), but which contains no Second Amendment analog.[84] While it is not clear why ICRA does not include a right to bear arms, we do know that Congress was deliberate about what it chose to include and not to include in ICRA.[85] Thus, we can only assume that Congress' decision to omit a right to bear arms from ICRA was similarly deliberate.

As discussed above, tribes concerned about high levels of on-reservation violent crime and the collateral effects of high gun prevalence, such as escalations in violence and exponentially higher rates of gun suicide and unintentional firearm death, may legitimately conclude that a gun ban would provide a partial solution to these problems.[86] Indeed, we know that one tribe has considered such a measure and another appears to have had a gun ban (with exceptions) in place in the past.[87] Despite the apparent freedom that tribes have under federal law to enforce policies against gun use, tribes whose governmental policies support gun bans[88] should carefully consider whether to enact them because of the enforcement difficulties and because of the potential to make bad law.

a. Enforcement Difficulties

As we saw above, a criminal provision banning guns would apply to all Indians, whether members of the regulating tribe or not, but it would not apply to non-Indians.[89] For some tribes, depending on

regarded as unconstrained by . . . constitutional provisions framed specifically as limitations on federal or state authority.").

[84] Tweedy, *supra* note 1, at 754.

[85] *See, e.g.*, Riley, *supra* note 15, at 1707–08.

[86] *See supra* notes 9–14 and accompanying text.

[87] *See supra* notes 24–25 and accompanying text.

[88] In light of the centrality of hunting to many tribal cultures, interest in across-the-board gun bans may be limited to tribes whose members do not have hunting rights or who no longer exercise them, for instance, because of the urbanization of reservation lands. However, even hunting tribes may be interested in partial gun bans, under which, for example, gun use could be limited to the hunting context.

[89] *See supra* notes 42–43 and accompanying text (noting that tribes generally have criminal jurisdiction over members of their own tribes and Indians from other tribes for actions taken within the reservation, but generally not over non-Indians). A limited exception would apply for cases where the use of a gun was defined as an aggravating factor for crimes perpetrated by non-Indians that qualified for tribal prosecution under VAWA 2013, such as domestic violence, dating violence, or violation of a restraining order, but, even so, other requirements would also apply, such as the requirement that the defendant have the requisite relationship with the prosecuting tribe. *See* 25 U.S.C. § 1304(b)(4) (2013) (creating an exception to the general rule that a tribe may not exercise criminal jurisdiction over non-

the demographics on their reservations, this may be workable. But given that, generally, a large proportion of violent crime against Indians is committed by non-Indians,[90] many tribes will undoubtedly view a gun ban that only applies to Indians as problematic at best. Indeed, there is evidence that non-Indian criminals are drawn to reservations because of the potential to commit crimes with impunity,[91] and thus a gun ban that applied only to Indians could conceivably draw more armed non-Indian criminals to a reservation to the obvious detriment of tribal members. While the likelihood of a gun ban attracting criminals may be low, the general inapplicability of tribal criminal law to non-Indians remains very troubling.

One way to potentially get around this limitation would be to include civil sanctions in the regulatory scheme as well. Civil sanctions would be applicable to tribal members on the reservation and would have the potential to be applicable to all non-Indians on the reservation (and Indians from other tribes) as well. The difficulty here, as discussed above, is that it is impossible to tell whether a court would uphold a tribe's right to impose a civil ban on a non-Indian (or an Indian from another tribe), given the Supreme Court's apparent propensity to either conclude that the requirements of the *Montana* test have not been met or that the test does not apply at all in a case before it.[92] However, as noted above, the *Montana* test was only intended to apply on non-Indian-owned fee lands, so it remains quite possible that tribes will have broader authority to civilly regulate gun use on tribal lands.

Given the obvious impact of guns on a tribe's health and welfare,

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Indians for cases where the defendant resides on or is employed within the Indian country of the prosecuting tribe or the defendant's spouse or partner is a member of the prosecuting tribe or an Indian residing in its Indian country and other requirements are met); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54 (codified in scattered sections of 18, 22, 25, and 42 U.S.C.); Riley, *supra* note 15, at 1726–27 (describing the different ways that tribes have incorporated guns into domestic violence criminal codes). Moreover, VAWA 2013 would not permit a tribe to directly enforce a gun ban against non-Indians. *See* 25 U.S.C. § 1304 (implicitly creating an opening for tribes to prosecute the use of a gun in certain crimes of domestic violence, but not allowing direct enforcement of a gun ban).

[90] *See* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, A BJS STATISTICAL PROFILE, 1992–2002: AMERICAN INDIANS AND CRIME, at iii, v (2004), *available at* http://www.justice.gov/sites/default/files/otj/docs/american_indians_and_crime.pdf; Tweedy, *supra* note 7, at 690 & n.185; Jenni Monet, *Prosecuting non-Native Americans: Three Western Tribes Begin Pilot Programs to Try to Stem Tide of Sexual Violence from Perpetrators off the Reservation*, AL JAZEERA AMERICA (Feb. 22, 2014), http://america.aljazeera.com/articles/2014/2/22/prosecuting-non-nativeamericans.html.

[91] *See* Tweedy, *supra* note 7, at 686 n.168; Monet, *supra* note 90.

[92] *See supra* Part II.C.1.b.

tribes do have a strong argument that the requirements of *Montana*'s second exception are met. Tribes that decide to enact a gun ban despite the risk that civil regulatory jurisdiction over nonmembers may not be upheld should include strong legislative findings as to the effect of guns on reservation life, using supporting statistics from the reservation or surrounding area (or general statistics if no local statistics are available).

Additionally, as discussed above, tribes that want their gun laws to apply to as many groups as possible will probably be best served by enacting gun laws that are both criminal and civil in nature and that contain explicit language to the effect that, if one type of sanction is struck down because of limitations on tribal regulatory jurisdiction, a comparable sanction of the other type will be applied if consistent with federal law.[93] Additionally, the law should include a severability clause so that, if one part of it is struck down under federal law, the remainder will stand. Finally, given the statistical evidence that lower gun prevalence in an area is correlated with less gun violence,[94] any tribes that do enact gun bans should include civil forfeiture as a remedy, which should thereby reduce the number of guns in circulation.[95]

b. The Potential to Make Bad Law

Another potential problem with a tribal gun ban is that, as a result of the availability of federal court review of the jurisdictional question,[96] a federal appellate court or the Supreme Court could be alarmed by a tribe's ability to make law that contradicts the current interpretation of the Second Amendment and, in response to that

[93] Some complications may ensue. For example, if a civil sanction is stuck down under *Montana* with respect to a nonmember Indian, imposition of a criminal sanction in its place would require a new trial, but these types of inefficiencies appear to be part of the cost of developing a tribal law that stands the greatest chance of being upheld in some part with respect to the largest number of people.

[94] *See* Cook, *supra* note 13, at 49, 59.

[95] In rem (or civil) forfeiture may be the best option for tribes because of its reduced burden of proof requirements and because it is based on the fiction that the action is against the thing itself rather than a person. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 329–333 (1998) (discussing in rem forfeitures and distinguishing them from criminal forfeitures). It is thus conceivable that tribes could avoid jurisdictional uncertainty with respect to the validity of the forfeiture itself by utilizing in rem forfeiture. *See, e.g.,* Henry S. Noyes, *A "Civil" Method of Law Enforcement on the Reservation: In Rem Forfeiture and Indian Law*, 20 AM. INDIAN L. REV. 307 (1995/1996).

[96] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 468 U.S. 1315, 1318–19 (1984) (holding that the question of the scope of tribal civil jurisdiction under *Montana* is a federal question). ICRA allows for habeas review in the criminal context to challenge detention, but an ICRA violation would have to be alleged. *See supra* note 49 and accompanying text.

alarm, narrow the scope of tribal jurisdiction to an even greater extent than is already the case. Due to the current Supreme Court's reluctance to enforce tribal jurisdiction, in the context of federal Indian law, the concern that "bad facts make bad law" is heightened.[97] Despite tribes' clear ability, under federal law, to disregard the Second Amendment, presenting a federal court with a fact pattern of a tribe's wholesale denial of the individual right to self-defense, which the Court recently recognized in *Heller*, may be unwise, particularly given that some members of the Court have expressed concern about the fact that tribes are not directly bound by the Bill of Rights.[98]

Although tribes have the right under federal law to pass gun bans, enforcement difficulties and the possibility of making bad law warrant serious consideration. Tribes that want to minimize these concerns have a variety of options. Regulating guns in a way that is similar to current state regulation and is consistent with existing federal precedent on the Second Amendment would reduce the likelihood (but would not eliminate the possibility) that a court could react emotionally to the tribal regulation and therefore narrow tribal jurisdiction even further. Additionally, enacting a gun law that is similar to that of a surrounding state may give rise to opportunities such as cross-deputization of tribal police officers, which could allow enforcement against nonmembers under state

[97] ANDERSON ET AL., *supra* note 50, at 532; Tweedy, *supra* note 7, at 683.

[98] *See, e.g.,* Tweedy, *supra* note 7, at 699–701 (discussing Justice Kennedy's concurrence in *United States v. Lara*, 541 U.S. 193, 211 (2004)). It is possible that the Court may, at some point, begin to explicitly incorporate some constitutional rights against tribes. The late Phil Frickey argued that concern about the lack of applicability of constitutional rights in tribal justice systems is driving the Court's incursions on tribal jurisdiction. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 65–66 (1999). Building on this work, some have argued that some constitutional rights, such as due process, should be held to bind tribes. *See, e.g.*, Skibine, *supra* note 82, at 39–42. If this sort of change in the law were to begin to occur, it would seem that the Second Amendment would be a prime candidate to be included among the constitutional rights incorporated against tribes. The amendment is worded broadly, describing the right to bear arms as a "right of the people," U.S. CONST. amend. II, and the Court recently held in forceful terms that the right is "a basic right" and that it "is 'deeply rooted in the Nation's history and tradition,'" McDonald v. City of Chi., IL, 561 U.S. 742, 767–68 (2010) (citation omitted). Thus, although the law is clear at this point that the Second Amendment does not apply to tribes, it is not inconceivable that the Court could alter this framework at some point in the future. It is important to recognize that such an alteration would violate consent-of-the-governed principles because tribes never consented to be bound by the constitution. *See, e.g.*, Kristen Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085, 3099 (2013) (noting that tribes did not consent to the constitutional compact). Nonetheless, it is possible that courts would be more comfortable with tribal jurisdiction (and consequently more likely to uphold it) if this were to occur. *See* Tweedy, *supra* note 7, at 712; Skibine *supra* note 82, at 39–42.

law. This step could have important practical benefits. Civil (or in rem) forfeiture should again be considered as a remedy for tribes that wish to reduce the prevalence of guns on their reservations. In order to avoid perceptions of unfairness that could negatively affect court holdings, tribes should also ensure that their gun laws do not discriminate against nonmembers.[99]

It is important to recognize, however, that for a tribe that wishes to enact a gun ban to instead take one of these middle ground approaches entails a voluntary incursion on its own sovereignty. As is often the case in Indian law, such a tribe is in the double bind situation of having a sovereign right that it dare not exercise for fear it will be taken away. It is fair to wonder what kind of right that is.

This problem also raises separation of powers concerns. Tribes have repeatedly been held to be subject to Congress' plenary power.[100] When they benefit from that power, as in this situation, as a result of the lack of a right to bear arms in ICRA, tribes rightfully should be able to reap those benefits. For a court to hold otherwise would be to disregard Congress' intent in an area in which it is entitled to deference.

3. Stand-Your-Ground Laws

On the other side of the coin, tribes may legitimately view the exceedingly high crime rates on reservations and the relative lack of police presence as reasons to enact stand-your-ground laws.[101] Such laws have been enacted in several states in recent years, with at least eighteen states currently having them in place.[102] Stand-your-ground laws allow "people to use deadly force to defend themselves if they feel threatened, even if they are in a public place and have a

[99] *See, e.g.*, Montana v. United States, 450 U.S. 544, 548, 557, 566 (1981). *Montana* involved a tribal regulation that discriminated against nonmembers in the hunting and fishing context, and the Court appeared to be influenced by fairness concerns in deciding the case. *See, e.g.*, Tweedy, *supra* note 73, at 154, 157.

[100] *See, e.g.,* Tweedy, *supra* note 7, at 659–662 (discussing the plenary power doctrine).

[101] *See supra* note 7 (citing sources on crime rates on reservations and on the rates at which Indians are victimized by violent crime); *see also* INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 67 (2013) *available at* http://www.aisc.ucla.edu/iloc/report/ (citing statistics as to the under-policing of reservations compared to lands outside reservations and stating that there is a fifty-percent average staffing shortfall for on-reservation police forces when unfilled positions are taken into account).

[102] Douglas G. Smith II, Comment, *Standing Your Ground in Kansas*, 82 UMKC L. Rev. 847–48 & n.5 (2014).

realistic option to retreat."[103] They are understood by their proponents to "protect the innocent over the criminal, the peace-loving over the violent, and the law-keeper over the law-breaker."[104]

As we saw above, tribes generally lack criminal jurisdiction over non-Indians and instead must—in most cases—rely on the federal government,[105] which has historically declined to prosecute a large number of cases.[106] Moreover, reservations tend to be plagued by violent crime, much of which is committed by non-Indians.[107] Even in cases where states are responsible for prosecuting on-reservation crime, there is evidence that states have often not diligently performed this function and that they appear to discriminate against Indian victims and alleged Indian perpetrators.[108] Because of these factors, tribes may see stand-your-ground laws as a practical response to the jurisdictional void. The fact that criminals may well be drawn to reservations because of the lower likelihood of prosecution[109] may increase the attractiveness of stand-your-ground laws for some tribes.

However, as with gun bans, there are serious drawbacks for tribes in enacting stand-your-ground laws. First of all, the law would only be recognized as a defense in tribal court.[110] If a tribal member killed or harmed someone in what she believed was self-defense but then was prosecuted in federal or state court, the tribe's stand-your-

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[103] Cook, *supra* note 13, at 27–28.

[104] Rich Morthland, '*Stand Your Ground' Laws Protect the Innocent*, U.S. NEWS & WORLD REP., Mar. 28, 2012, *available at* 2012 WLNR 6700818.

[105] See *supra* notes 43, 52–55 and accompanying text.

[106] *See supra* note 7 and accompanying text.

[107] *See* Fonseca, *supra* note 7; *supra* note 91 and accompanying text.

[108] Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1418, 1437–38 (1997); Tweedy, *supra* note 7, at 692–93; *see also* Catherine M. Grosso & Barbara O'Brien, A Significant Factor: Evidence of Discrimination Against Native American Capital Defendants in North Carolina, 1990–2009, at 8–9 (unpublished manuscript) (on file with author) (reporting the results of an empirical study on the implementation of the death penalty in North Carolina that revealed that, in the nineteen years at issue, (1) prosecutors were more than twice as likely to bring death eligible cases involving Native American defendants to capital trials than they were cases involving non-Indian defendants and (2) Native American defendants in such cases were more than twice as likely to be sentenced to death following a capital trial as compared to other defendants).

[109] Tweedy, *supra* note 7, at 686 n.168; Monet, *supra* note 90.

[110] *See* 2 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 12:10 (2014) (footnote omitted) ("Choice of law scholars have long recognized that criminal law is peculiarly local in nature, and it is settled that, in criminal prosecutions, the court will routinely apply the substantive law of the forum."); Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1628–29 (2006).

ground law would not protect her.[111] Thus, a tribal stand-your-ground law could mislead a tribal member into thinking she could vigorously defend herself in the face of any threat, whereas in fact this would not be the case *except* in a tribal court prosecution. In this sense, a tribal stand-your-ground law could do more harm than good. While not directly caused by the limitations on tribal jurisdiction under federal law, this problem is a creature of the complex jurisdictional scheme that applies on reservations and which creates uncertainty as to which and how many sovereigns might prosecute an alleged perpetrator. It is also related to the marginalization of tribal law, which is rarely enforced by federal or state courts.[112] Nonetheless, if the reservation were subject to state jurisdiction under Public Law 280 or a similar federal law *and* the state had a stand-your-ground law, the calculus in enacting such a law might be different.

However, there are other serious problems as well. One very important issue is that stand-your-ground laws have actually been shown to increase the number of murders and non-negligent manslaughters in a jurisdiction.[113] Tribes that are concerned about high rates of violent crime should be wary of implementing a solution that has the potential to exacerbate rather than ameliorate the problem. Additionally, racial prejudice among juries against people of color, particularly blacks, who utilize stand-your-ground laws has been shown.[114] While such prejudice would presumably be unlikely to play out against Indians among jurors in tribal court—many of whom would likely be Indian themselves—it could increase the problems a Native person would face if prosecuted in federal (or state) court for an action undertaken on the reservation. Finally, as discussed above, greater gun prevalence in an area has been shown to escalate levels of violence in crime and to exponentially increase gun suicide rates and unintentional gun homicide rates.[115] Assuming that a stand-your-ground law would lead to greater gun

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[111] *See* RICE, *supra* note 110, §12:10; Florey, *supra* note 110, at 1628–30.

[112] *See* ANDERSON ET AL., *supra* note 50, at 561 (remarking that the Supreme Court's opinion in *National Farmers Union Ins. Cos.* marks "the only reference to tribal court opinions (other than for procedural history) that we have seen in a Supreme Court opinion"); Florey, *supra* note 110, at 1628–29; *supra* Part II.C.1.

[113] *See* Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RESOURCES 821, 823, 849 (2013).

[114] Patrik Jonsson, *Racial Bias and 'Stand Your Ground' Laws: What the Data Show*, CHRISTIAN SCI. MONITOR (Aug. 6, 2013), http://www.csmonitor.com/USA/Justice/2013/0806/Racial-bias-and-stand-your-ground-laws-what-the-data-show.

[115] Cook, *supra* note 13, at 49, 59.

prevalence and given that Indians already have the highest suicide rate of any group in the United States,[116] tribes that might otherwise be open to enacting stand-your-ground laws may well determine that a stand-your-ground law is simply not worth the risk that more innocent people will die.

Tribes who wish to protect gun rights should simply codify the right to bear arms rather than attempting to expand the right to self-defense through a stand-your-ground law.

III. CONCLUSION

Although tribes appear to have a great deal of freedom with respect to protecting and regulating gun rights, a closer examination reveals that much of this freedom is thwarted by serious obstacles related to enforceability and jurisdiction in contravention of Congress' intent in enacting ICRA. Examining the types of gun laws tribes might want to enact reveals the problems with the current jurisdictional scheme in Indian country, which is a creature of federal law. Unfortunately for tribes, whatever firearms-related policies they find most suit their needs, they will likely be best served by relatively modest laws and regulations in this area of the law. However, that being said, there do appear to be measures that tribes can take in formulating gun laws, particularly in the area of gun regulation, that will enhance the likelihood that they can meet their regulatory goals to some degree. For tribes that wish to decrease the prevalence of guns on their reservations, in rem forfeiture may be a particularly useful tool. Tribal access to the federal firearm background check database will likely also prove useful for tribes wishing to regulate gun use.

[116] *National Suicide Statistics at a Glance*, *supra* note 14.