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Law of the Land: Tribal Sovereignty and Legally Legitimated Resource-Based Control of Native Americans

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Tribal Sovereignty and Legally Legitimated Resource-Based Control of Native Americans

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Abstract

In this article we reject the premise that race is merely an independent variable when studying the relationship between Native Americans and U.S. law. Instead we advance a new theory construct that more accurately understands the specific relationship between tribal sovereignty and inequality in the U.S. legal system. We term this new theoretical approach *resource-based control* that considers 1) how groups are racialized in their economic relationships with the United States, 2) how that process is derivative of the continuing process of U.S. settler-colonialism, and 3) how U.S. law functions to protect the capital of the United States.

We test resource-based control using a newly created tribal sovereignty index and corresponding measures of U.S. legal interference and Tribal legal disruption. We find that tribal sovereign power predicts both US legal action and tribal legal action, lending support to our theory of resource-based control as the attempts of U.S. law to erode tribal sovereignty, but also recognizing the agency of tribes to protect it.

Keywords: tribal sovereignty, resource-based control, settler colonialism, racialization

Introduction

For over 200 years, the United States has created and enforced laws to regulate Native Americans and their sovereign territories. These laws mean dispossessing Native peoples of their Land and other natural resources, weakening their ability and rights to self-govern, and controlling their commerce. In this way, laws enacted by the United States on Native Americans routinely undermine the fundamental notions of tribal sovereignty, underscoring the ongoing nature of settler colonialism (Glenn 2015; Rowe & Tuck 2017). Despite this, law makers and scholars alike have failed to address how the unique origins and nature of tribal sovereignty may have modernly manifested within the US legal system and continue to affect Native Americans. Instead, we have relied on broad-stroke explanations of discrimination within the US legal system that serve to homogenize marginalized people's identities and experiences. In equating marginalized peoples' inequitable interactions with the United States legal system, we have ignored the role of varying community contexts, conditions, and resources that define marginalized groups' political and economic positionalities.

We assert that the mechanisms which may explain the modern, disparate functioning of the legal system remain unclear, in part, because of two reasons: 1) many approaches to studying inequality explore how holding a non-white racial identity results in inequitable treatment within the law, rendering race an independent variable and legal harm as an outcome 2) the homogenization of marginalized peoples' identities and their experiences under US law.

Scholars of racial inequality have repeatedly utilized a *race-driven* mechanisms approach in studying inequality; such analyses have been popularized within the social sciences. These explanations propose that being a racialized person means an increased likelihood in

coming into contact with the US legal system, rendering race an independent variable. However, such explanations ignore the colonial and thus economic and political origins of racial categories. Varying racialized groups have been racialized for *specific* purposes given their *specific* relationships to the United States. Thus, it may be important to consider an alternative explanation to mechanisms of legal inequality which position race and racialized livelihoods as the outcome of colonial power, i.e., the creation and enforcement of colonial law. In other words, it may be important to consider specific positionalities of racialized peoples, particularly the desirable economic and political resources which they possess that may motivate colonial United States legal interference. In conceptualizing race as the product of racialization processes defined by 1) a marginalized group's resources and positionality and 2) the desire of the United States to control these groups and their resources, we see race as an outcome.

Educational research has long paid attention to the need for specificity when studying marginalized peoples, answering the call from Critical Race Theorists (Garcia et. al 2018; Ladson-Billings & Tate 1995; Dumas & ross 2016). However, this request remains unheeded in much of the research on US law. Equating racialized people's interactions with the law hides the specific relationships between discriminatory mechanisms and unequal outcomes, which may be specific to particular marginalized groups. The legal arena is particularly useful to analyze disparities in application of law among marginalized groups and to see how specific groups are impacted or targeted by the law. In this vein, Native Americans specifically have a unique, and we argue measurable, relationship to US law as sovereign citizens.

Native Americans are routinely undercounted, understudied, and mischaracterized, facts which remain true even within the social sciences (Desi Rodriguez-Lonebear 2019). Scholars attribute the lack of studies and data related to Native Americans to

their continued erasure. Additionally, scholars have critiqued race and ethnicity studies for positioning Native Americans as a racialized group when in fact being Native American signifies a sovereign political citizenship, not a racial identity (Desi Rodriguez-Lonebear 2019; Glenn 2015). Thus, the primary motivation for this line of research is to ask what mechanisms of inequality have remained hidden by the broad exclusion of Native Americans from inequality research and to begin the project of uncovering those mechanisms through analysis of sovereign power and its relationship to US law.

In studying the legal arena, particularly supreme court cases between tribal nations in the United States and United States itself, we can consider 1) how the law inequitably works to define Native American-ness through challenging tribal sovereignty and 2) how Native Americans' specific resources, i.e., land and the sovereignty which affords them that land, relates to the legal disparities they encounter within the United States legal system.

By studying Native Americans *specifically*, and thus considering issues of tribal sovereignty, power, and territory and how they relate to US law, not only will Native Americans' particular experiences become clearer, but also new ways to understand the modern and historical purposes of US legal interference with Native Americans may reveal themselves. In addressing the role of sovereignty, power, and territory, we demonstrate that considering the influence of a marginalized group's resources—whether it be space, time, labor, or other forms of capital— is paramount.

So, we heed Critical Race Theorists call, specifically TribalCrit scholars, and propose that given that colonization is endemic, both historically and modernly to society, issues of sovereignty must be considered when studying Native Americans (Brayboy 2006; Cerecer 2013). In doing so, we claim that given colonization's historical and ongoing nature, and its role in

racialization and race-making (Glenn 2015), that the modern functions of US law are not so different from their historical ones—controlling resources desired by the United States.

Thus, in this study, we offer a new theoretical approach in understanding inequality within the US legal system: *resource-based control*. Resource-based control assumes that (1) groups are racialized with regards to their economic relationships to the US; (2) that racialization is a process derivative of the US's settler-colonial project to accumulate power and capital; (3) US law functions as a means to protect capital in the interests of the settler- nation the United States. In the Native American case, we argue that Native Americans have a unique resource which the US has perpetually pursued: land. In this way, the colonizing US interferes in colonized tribes' affairs in patterned and specific ways to control Native Americans and their primary resources (land, and the sovereignty which affords them that land). We develop a novel tribal sovereignty measure (including measures such as reservation size, population, tribal-land-based home ownership, etc.), to operationalize the power and influence of sovereign tribal nations and advocate for its use in better studying questions of tribal sovereignty. We then construct a measure of US legal interference and a corresponding measure of Tribal legal disruption to trace the relationship between tribal sovereign power and the law.

We find that there is a strong relationship between the size of tribal lands and both US legal interference and Tribal legal disruption. We argue that taken in combination with our other findings about the significant relationship between population size and other measures of tribal sovereignty, that tribal sovereign power predicts high-level US legal action and high-level tribal legal action. This lends credence to our theories about resource-based control and the continued project of US law to attempt to erode sovereignty, while also recognizing the dynamic agency of tribes to litigate to protect or expand sovereign rights. We conclude with a brief exploration of

potential future directions of research, including working with tribal communities to collect more reliable data and revisiting assumptions about racialization in the United States.

In light of our findings, we then ultimately propose a new theoretical framework to explain inequality in the US legal system. Informed by Black Marxian traditionalists Franz Fanon and Cedric J. Robinson who gesture to the economic, and thus colonial, basis of race, we suggest that disparate treatment of tribal sovereign citizens under US law is derivative of *resource-based control*.

Settler Colonialism & Racial Formation

Settler colonialism has been ignored as a structuring phenomenon in the sociological discipline (Glen 2015). The majority of sociological studies of racism focus on white-black racial conflict, largely excluding other racialized groups; this is no truer of Native Americans who are systematically excluded from scholarship and data collection efforts (Villegas 2012). However, scholars have argued that for a historically grounded analysis of U.S. race formation, settler colonialism must be acknowledged as a key, ongoing event within the United States (Smith 2012; Glen 2015).

Given that the US settler colonial project's objective to seize land and gain control of resources, Native Americans pose a unique problem to the United States: they possess desired capital-generating resources. In response to their land possession, the United States racialized Native Americans as savage to justify their elimination, whether through biological warfare or assimilation (Wolfe 2006). In being deemed savage, the US positions Native Americans as incapable land stewards who must be saved (through missionary efforts, boarding schools, and other institutions) by the "civilized" white settler-settlers, making a clear path for the US's

unfettered access to tribal nations' territories. By racializing Native Americans as savage and justifying their land dispossession, the United States government ensured their disappearance and genocide. In this way, the "primary motive for elimination", and, in tandem, their racialization, "is not race … but access to territory" (Wolfe 2006: 388).

Our theory of resource-based control frames settler colonialism as one of the many imperial projects of the US which has played a role in race formation within the United States. It agrees with Andrea Smith's (2012) contention that there are varying logics of white supremacy. However, Smith proposes that the varying logics are " (1) slaveability/anti-black racism, which anchors capitalism; (2) genocide, which anchors colonialism; and (3) orientalism, which anchors war" (Smith 2012: 66). We work from the assumption that the desire of a dominant group to maintain power, or capital within a capitalist society, motivates *all* logics of supremacy. Colonialism, slavery, continued anti-blackness, and war are power-maintaining endeavors, and within a capitalist society such as the United States, are processes born from the US's desire to accumulate resources.

Economic Underpinnings of Racialization

The origins of race have been subjects of intellectual discussion for decades, particularly among race and ethnicity theorists in sociology (Bonilla-Silva 1997; Omi & Winant 2014; Jung 2019). The underpinnings of our theorization of the functions of US law is necessarily composed of what we believe to be an accurate explanation, at least in part, of persistent racial inequality: resource-based control.

We are far from the first to theorize about the economic underpinnings of racialization. In his *The Wretched of the Earth* (2002), Franz Fanon suggests that the economic exploitation of racialized groups is masked by "the accompanying ideology of racism" (Nursey-Bray 1972:

154); in his argument, Fanon conveys that while modernly, racism works through racial differentiation and the accompanying ideology of white supremacy, white supremacy is not a full explanation of the origins of racism. For him, racism is an ideological position born from and meant to justify the economic domination of colonized peoples. This perspective is in stark contradiction with other scholarship which relies on more cognitive explanations of racism devoid of economic relations (Omi & Winant 2014).

Fanon was not alone in his thinking; in his *Black Marxism,* Cedric J. Robinson (2005) underscored the economic relationships inherent in race relations, a phenomena he named racial capitalism. Robinson argues that the rise of capitalism extended the ethical faults of feudalism, a system which relied in part on ethnic differentiation for the political and economic gains of a land-having class. For Robinson, failure to acknowledge the origins of racism is an indication which reflects "how resistant the idea [racism] is to examination" (Robinson 2005: 72). This study aims to push through this resistance and lay bare, once again, the nature of the origins of race. Specifically, we intend to revive intellectual discussion around the economic, and more broadly resource-based, motivations behind the inequality from which racialized groups suffer.

Building our theoretical framework from the tradition of Fanon and Robinson is not to deny the seemingly autonomous functioning of racism, or to imply that racism is solely a coincidence of the US's imperial and economic desires. Instead, we aim to emphasize that racism is an intentional artifact of the economic motivations behind the makings of race. In doing so, we propose that in considering the stratifying mechanisms of race, attention must be paid to resource-accumulation, despite recent suggestions that resource-accumulation is no longer the primary goal of racialization (Hernandez-Lopez 2010).

We build on Fanon and Robinson's work by proposing that settler colonialism and the historical and contemporary treatment of Native Americans by the US settler-nation bolsters our theoretical understanding of the origins and functions of race. Additionally, centering settler-colonialism as an analytical lens makes clear the economic origins of race as "settler colonialism is a land-acquiring and thus resource acculumiating project" (Wolfe 2006). The inclusion of settler colonialism into theoretical understandings of race reveals that racism may be less autonomous from its origins than often thought. Evidence which demonstrates the economic motivations behind inequality is revealing of the *ongoing* relationship between the US's economically- based imperial desires and modern-day racism.

Racialization and the Law

Racialization of Native Americans is maintained through multiple processes of law, but we distinguish two types here 1) disproportionately harsh application of US law 2) creation of new law especially targeting Native Americans. We argue that racialization undergirds these processes, with support from other scholars and the history of lawmaking in the United States. Franklin (2013) argues that Native Americans might be seen as less similar to mainstream (i.e. white) society than even Hispanic or African Americans persons due to stereotypes about criminal behavior (Leiber, Johnson, Fox, & Lacks 2007, Muñoz & McMorris, 2002; Zatz, Lujan, & Snyder-Joy, 1991), stereotypes about being uncivilized, suspicious or lazy (Mieder 1993, Rouse & Hanson 1991, Trimble 1998), and a perception that Native Americans function as wards of the United States government rather than as an independent nation (Leiber 1994). Green (1991) more directly attributes the generation of these stereotypes to the process of colonization that has effectively forced Native Americans to the economic and political edges of society (Nielsen 1996). Wilmot and DeLone (2010) argues that the current reliance on conflict

theory as an explanation for these processes belies the unique position of Native American culture and history in US society.

Unequal Application of US Law

A fertile ground for understanding the unequal application of US laws on Native Americans is criminal sentencing. Criminal sentencing is useful category for this consideration because the United States has taken jurisdiction over a majority of criminal law involving Native Americans through the Major Crimes Act, Public Law 280, and more recently the Tribal Law and Order Act, and Violence Against Women Act. This means that many criminal sentences of crimes involving Native people are under US authority and subject to US law.

Despite this, there is a dearth of studies on sentencing outcomes for Native American offenders, some finding disparity and some not. Many of the early studies in the area have also been criticized as using weak data and methods (Zats 1987). Taken together, the studies that do exist seem to suggest that discrimination towards Native Americans is contextual rather than systematic (Bachman, Alvarez and Perkins 1996; Wilmot and DeLone 2010). That is, patterns of discrimination vary by regional, geographic context, and crime category. Consistent with this understanding are groups of studies that find disparity in sentencing for some types of offenses (Swift and Bickel 1974; Alvarez and Bachman 1996, Bachman et al. 1996; Everett and Wojtkiewicz 2002; Wilmot and DeLone 2010; Franklin 2013), but not others (Swift and Bickel 1974; Feimer et al. 1990; Hutton et al. 1989; Pommersheim and Weise 1989; Wilmot and DeLone 2010; Franklin 2013).

Recent work by Wilmot and DeLone (2010) synthesizes this seemingly disparate universe of findings using a more complex set of integrated hypotheses taken from the unique

position of Native Americans in US society and finds confirmation for theories of contextual discrimination. Franklin (2013) proposes that the perceived separation of Native Americans from white society may in part explain the disparity in sentencing, further lending credence to theories of contextual discrimination and providing a link back to theories about the impacts of colonialism articulated by Green (1991) and Nielsen (1996). Importantly, Wilmot and DeLone specifically,

> "[C]all for the creation of a Native American race-specific theoretical tradition to explain criminal justice decision making. Thus, making the unique aspects of the Native American historical and cultural experience in America central to the formation of research hypotheses will better able researchers to capture the subtle nature of contextual discrimination in the complex nature of bureaucratic, legal culture, and judicial factors impacting criminal sentencing" (2013:174).

We undertake this project here, specifically generating a larger theory of the consequences of US law, albeit not narrowed specifically to criminal justice decision-making, on Native Americans for the purpose of their dispossession and disempowerment.

Generation of New Law Imposed Upon Native Americans

United States law has treated Native Americans and Native American land inconsistently over its history, sometimes stating policy goals of genocide, sometimes self-determination, sometimes trying to eliminate tribal governments (Deer 2018). This leaves a complex string of contradictory laws that ultimately function to remove many functions of justice from Native American control (i.e. a weakening of tribal sovereignty) and place legal authority in the US courts.

Undergirding all law governing Native Americans and Native American land is the concept of sovereign status or inherent sovereignty. Hannum (1998) usefully defines sovereignty

in this context as constitutional or legal independence. Hannum emphasizes that while states exercising such sovereignty might delegate powers to other entities, a sovereign power is by definition under no legal authority beyond international law (1998:487). Lujan (1998) describes this sovereignty as meaningfully distinguishing Native Americans from any other racial group in the United States. Further, despite the governmental boundaries that sovereignty implies, the United States has frequently enacted legislation that functions to remove authority and control from Native American tribes (McSloy 1992).

US Right to Native Legal Control

Both of the previously described legal processes of continued racialization of Native Americans are themselves undergirded with the same class of assumptions that maintain those processes. First, it presumes that the United States government has the right to regulate tribal sovereign nations, Native land, and the land titles held by sovereign tribal nations. Second, it presumes that the United States is going to follow laws it creates to regulate Native lands without revision of the law itself. Third, it ignores the dehumanization of Native Americans in the legal consciousness of the United States as a significant factor in legal decision-making. In order to exemplify how these presumptions have replicated to become increasingly insidious, we go backwards in history to the original legal case in regulating the land rights of Native Americans: *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

Johnson v. M'Intosh is the first of the famed cases known as the Marshall Trilogy, three case opinions primarily authored by Chief Justice John Marshall that established the structure for Native American tribal sovereignty that remains in place today (Fletcher 2014). Joined later by *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832),

Johnson v. M'Intosh established federal supremacy of US law over what was termed 'Indian affairs.' Notably, neither party in this case represented the tribal interest. Rather, the US created law governing the land rights of Native people without their legally recognized presence at all. Both American parties in the case claimed they had valid land title from Indian Nations, but the Supreme court ruled that Native Americans could not sell their property to anyone except the United States government, thereby functionally limiting the ability of Native tribes to control their own land.

In his critique of the outcome of M'Intosh scholar Robert Williams takes aim at the judicial project itself saying of Chief Justice Marshall "[h]is judicial task was merely to fill in the details and rationalize the fictions by which Europeans legitimated the denial of the Indians' rights in their acquisition of the Indians' America" (312:1992). This frames M'Intosh as less of a legal question and more of a legitimation of US governmental authority over Native commerce. When asking whether this framing is justified, we can look to the actual text of decisions in later cases, notably *Cherokee v. Georgia*, 31 U.S. 515 (1832) where Chief Justice Marshall likens the relationship of the Cherokee Nation to the United States to a paternalistic authority saying, "the relationship of the tribes to the United States resembles that of a 'ward to its guardian'".

We also know that the United States has only selectively upheld the laws, in the spirit in which they were made, concerning Native lands and tribal sovereignty. Notably, in *Worcester v. Georgia*, 31 U.S. 515 (1832) the supreme court declared the Cherokee Nation was a sovereign power. In spite of this, U.S. President Andrew Jackson brutally campaigned to not uphold the law and proceeded to annihilate sovereign land rights under the Indian Removal Act leading to thousands upon thousands of deaths on the Trail of Tears (Cave 2003).

Finally, law divorced from context is law misunderstood. In the case of law involving Native peoples, it would be unconscionable to ignore the dehumanization of Native tribes and Native people as part of legal decision-making. In *Cherokee v. Georgia*, Justice William Johnson justifies his decision writing "…rules of nations" would regard "Indian tribes" as "nothing more than wandering hordes, held together only by ties of blood and habit, and having neither rules nor government beyond what is required in a savage state." This description and degradation of Native tribes clearly articulates that bias against Native persons was used as evidence for legal decision-making. Considering such legal decisions to be 'good law' in the present day with no interrogation of these motives serves to perpetuate past harms against Native peoples while enshrining new harms into law using these cases as precedent.

If despite all of this, we still want to know about the substance of *Johnson v. M'Intosh* taken on its own, what we are left with is a single buyer market where Native tribes may only sell land to the dominant colonial power and only the colonial power can buy from Native tribes. But history tells us this relationship was even more unequal than 1-1 buyer/seller market implies and from the text of the legal decision alone. The United States had non-monetary tools at its disposal like threats, force, and the spread of settlers (who brought with them disease, the destruction of animal populations, and the destruction of natural resources) to force sales at low prices (Kades 2000). Therefore, we see in *Johnson v. M'Intosh* a foreshadowing of the centuries of resource-based control that would be enacted and maintained by the US government. Consequently, we analyze the law directly - not in its substance but in the wielding of law itself as a form of US interference with tribal sovereignty and conversely as a form of tribal disruption.

Hypotheses

In keeping with our theory of resource-based control, we predict that there will be an enduring relationship between land holdings and US law. That is, we predict that sovereign power measured as the holding of land and population resources will predict US Legal Interference with tribal sovereignty. However, we also predict that these concentrations of power will predict Tribal Legal Disruption, as tribes with increased sovereignty are able to mobilize resources to protect and expand sovereign rights. Finally, we hypothesize that other measures of sovereign rights, like home ownership, education, and receipt of food stamps will give us leverage to understand other aspects of the relationship between sovereign tribal power and legal action.

Measuring Tribal Sovereignty and Legal Processes

In order to measure the effect of tribal sovereignty on legal processes, we develop new measures of both concepts. Our goal in doing so is to provide measures specifically designed to capture the unique contextual elements of tribal sovereignty and tribal sovereign interests.

Measuring Tribal Sovereign Power

The primary methodological currency of this work is to advance a new measure of tribal sovereign power that we believe more accurately considers tribal sovereign nations as distinct, historically contextualized, and autonomous sovereign actors. We then use this new measure of tribal sovereign power to analyze both broad patterns of US legal interference and use of US law by Native tribes.

We generate our measure of tribal sovereignty using data from the US Census and data about Public Law 280 (PL280) status. First, we retrieved geospatial information about tribal

reservation lands using TigerLine Shapefiles of tribal reservations. We then used county and state Federal Information Processing System (FIPS) codes to crosswalk native land locations with US Census data, to collect data on reservations themselves and on adjacent counties. We collected census data broadly on land and population statistics including: the land area of reservations, the average land area of adjacent counties, population (on reservations), income ratios between Native Americans and white people in adjacent counties, the average percent of residents with less than a highschool diploma in adjacent counties, the percentage of Native Americans who receive food stamps, the number of Native American children enrolled in schools in adjacent counties, the rate of home ownership by Native Americans on reservations, the average rate of home ownership by Native Americans in adjacent counties. We also included an indicator as to whether a given tribe resided in a PL280 state (i.e. within Alaska, California, Minnesota, Nebraska, Oregon or Wisconsin). These data taken in sum, are what we use to measure resources, power, and elements of tribal sovereignty.

Measuring US Legal Interference and Tribal Legal Disruption

We also create parsimonious measures of legal interference and disruption by identifying the universe of supreme court decisions about Native American issues and quantifying how often different tribes and the US government initiate high-level legal cases. We are inclusive of all types of legal issues in the creation of this database, arguing that many areas of law are intrinsically connected to the project of sovereignty as we have defined it in the theoretical orientation of this manuscript. We develop this database beginning with all cases categorized under the issue header of "Native American" by Oyez, the free law project born of Cornell University's Legal Information Institute (Oyez 2021). Oyez provides detailed information on Supreme Court Decisions made since October of 1955. In order to ensure important Native Law

cases before 1955 are included in the analysis, which we believe is important due to the cumulative nature of US law, we also supplement the Oyez data with the US Department of Justice's list of "Significant Indian Cases" (DOJ 2015) and with the "List of all United States Supreme Court Cases Involving Indian Tribes" maintained by Wikipedia (Wikipedia 2021).[1] This gave us a universe of 216 supreme court cases ranging from 1810 to 2021.

We propose that there is something conceptually different about the use of law by each respective party. That is, that the colonizing nation creating laws about Native Americans is substantively different than tribal nations bringing legal cases against the colonizing nation in a potentially hostile court. Therefore we create two measures. The first, called "US Legal Interference," quantifies how often the US government takes tribal authorities to court or how often the US governmental-power interest acts as the petitioner. The second, which we term "Tribal Legal Disruption," quantifies how often tribal authorities/interests have taken the US government to court or how often the tribal sovereign interest is aligned with the petitioner .

We then closely examined each case to determine 1) what the Native American interest was (since Native American individuals are not always claimants or respondents in these cases, despite the focal issue being a Native American issue)[2], 2) the topic of the case, 3) which tribe was involved in the case, and 4) whether the tribe was the claimant or respondent in the case. We then developed two measures of the use of law - reshaping the data such that we are

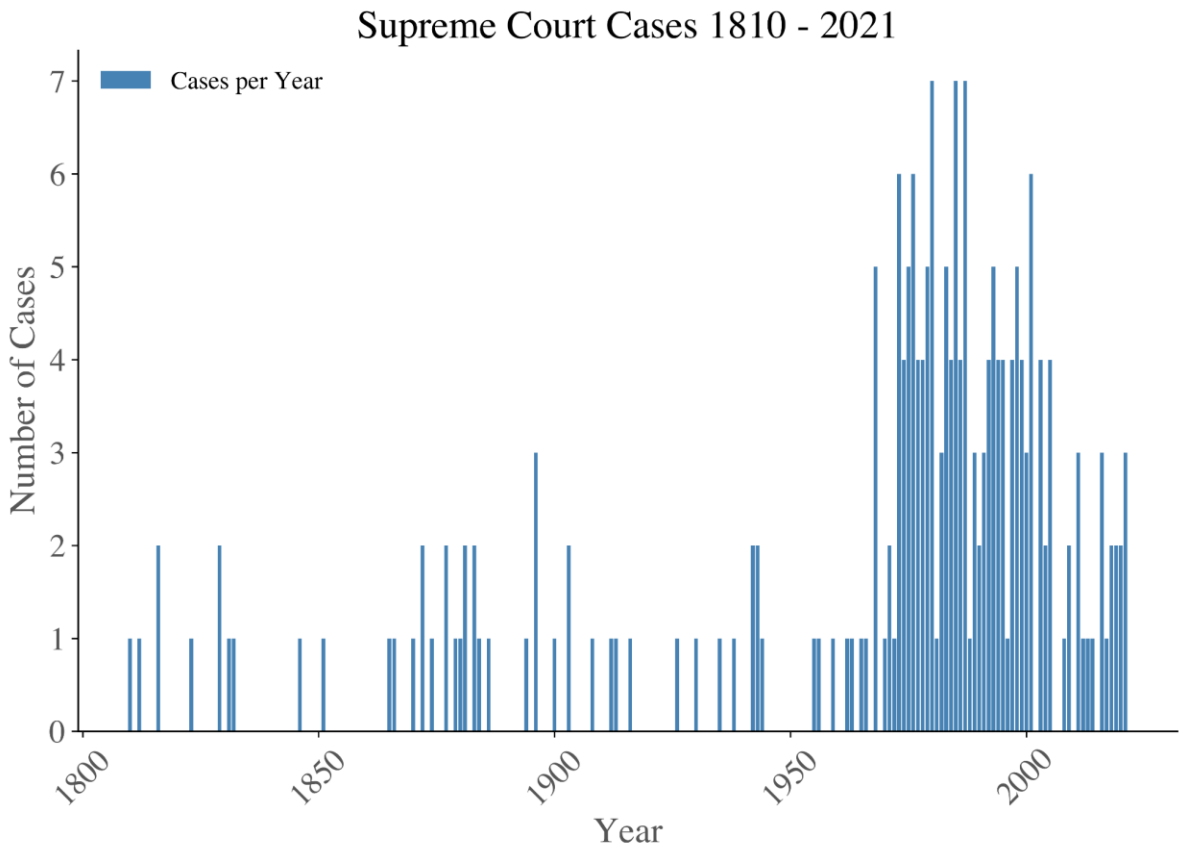
[1] Note that all cases in the Wikipedia list were accompanied by a complete citation the the United States Reports, making it straightforward to verify they were accurate. This open source list also has the advantage of being updated much more frequently, ensuring coverage at both ends of the temporal distribution.

[2] This is particularly common in cases in the 1800s and early 1900s where the Supreme Court was principally preoccupied with making laws about land titles. Often the legal actors in these cases were all white Americans, who were disputing the validity of titles purchased directly from Native Americans (rather than the US government as decided in Johnson v. M'Intosh). In cases like these, we coded based on which party position best represented the tribal sovereign interest. We provide more detail on how decisions were made in Appendix A.

able to discern the number of cases per tribal collective. This required coding out cases where multiple tribes were joined as parties to a given case.

Figure 1 below plots the included cases over time, demonstrating that a majority of included decisions occur between 1970 and the early 2000s. This is perhaps an indication of increased use of law on behalf of both the US government and Native tribes, foreshadowing the usefulness of our legal interference and disruption measures. There are, however, a substantial number of cases in the 1800s also included in the data. These cases tended to be disproportionately about land rights and title holdings, making them especially relevant for this analysis.

Figure 1: Included Supreme Court Cases by Year



The US government and Native American tribes acted as the petitioner in relatively equal measure. The US governmental interest was or was aligned with the petitioner in ~52% of cases, while the tribal sovereign interest was aligned with the petitioner ~48% of the time. There was significant dispersion in the data, that is, some tribes were in court much more often than others.

The tribes with the highest scores in the US Legal Interference measure were (in order) the Cherokee, Choctaw, Navajo, Apache, Sioux, Colville, Puyallup, and Menominee. This group of 8 tribes comprised ~31% of the cases in the legal interference measure. The tribes with the highest scores in the Tribal Legal Disruption measure were similar, but not identical. Approximately 42% of cases in which the sovereign interest aligned with the petitioner were generated by a group of 9 tribes: the Navjo, Sioux, Cherokee, Apache, Chippewa, Yakama, Crow, Shoshone, and Creek. We opted to record zeros in this analysis, so as not to systematically ignore tribes who have not participated in Supreme Court Cases from our analysis.

Data Combination and Aggregation

A key element of this research was combining the tribal sovereignty variables with the legal interference and disruption measures. We did this by carefully aggregating reservation lands by tribal collective, often doing additional research to make sure we were not inappropriately collapsing tribal groups that have similar names but are not actually the same tribe or bands of the same tribe which have their own reservations and constitutions. This process was particularly difficult because we used over 200 years of Supreme Court laws, a time period that saw the formal combination and extermination of some tribal groups, leaving holes in the availability of contemporary data. In Appendix B we provide documentation of how we decided

to ameliorate these issues on a case by case basis to maximize the population of usable and comparable data. We then transformed each Supreme Court case into a count of cases per tribe, separated across the US Legal Interference and Tribal Legal Disruption measures.

Results

In order to measure the relationship between the measures of tribal sovereign power and legal action, we estimate a series of zero-inflated Poisson models. For both legal action measures we estimate 2 models. First, we predict legal action using only variables about land holdings and population size. This allows us to parsimoniously test the role of land and population for a maximum number of tribal groups. We also estimate a second model that uses the other tribal sovereignty variables. What we sacrifice in sample size, we gain in increased measurement nuance from multiple variables that helps contextualize and elucidate the role of the variables in the baseline model.

Table 1: The Impact of Tribal Sovereign Power on US Legal Interference

	Dependent variable:	
	US Legal Interference via Supreme Court	
	(1)	(2)
Land Area of Reservation (10's of Sq.Mi.)	0.001***	0.001***
	(0.0001)	(0.0001)
Average Land Area of Adjacent Counties(10's of Sq.Mi.)	-0.704***	-0.689***
	(0.226)	(0.234)
Population of Reservation (100's of People)	0.0003***	0.0003***
	(0.00005)	(0.0001)
Income Ratio (Income of Native Americans on Rez /Average Income Whites in Adjacent Counties)		0.428
		(0.420)
Average Percent of Residents with Less Than a Highschool Diploma in Adjacent Counties		0.004
		(0.023)
Percent of Native Americans who Receive Food Stamps on Reservation		-0.015*
		(0.008)
Aveage Percent of Native Americans who Receive Food Stamps in Adjacent Counties		-0.010
		(0.011)
Number of Enrolled Native Children in Schools in Adjacent Counties (In 100's of Children)		-0.007
		(0.013)
Rate of Home Ownership by Native Americans on Reservation		0.010
		(0.007)
Average Rate of Home Ownership by Native Americans in Adjacent Counties		-0.016*
		(0.009)
PL280 State Indicator		0.542**
		(0.241)
Constant	-0.558***	0.019
	(0.162)	(0.788)
Observations	232	218
Log Likelihood	-235.246	-217.837
Akaike Inf. Crit.	478.492	459.675
Note:		*p<0.1; **p<0.05; ***p<0.01

Table 1 (above) depicts the relationship between tribal sovereign power on US legal interference. We find that the influence of the three land/income variables remains strong across both models. In both Model 1 and Model 2 we find a strong positive relationship between reservation size and US legal interference ($p<0.01$), that is a tribe having larger land holdings predicts more US legal interference. Specifically, we find that for every 1 unit change in the land area of a reservation (here measured as 10's of square miles) the difference in the logs of

expected counts changes by 0.001, given other variables in the model being held constant. Given the small units of measurement in reservation area, we consider this effect substantial. We find a similar, strong, positive relationship between population size and US legal interference ($p<0.01$). We find a strong negative relationship between adjacent county size and legal interference ($p<0.01$), suggesting that tribes that are dwarfed in size by their contiguous US neighbors are interfered with less.

In Model 2 were able to leverage more nuanced tribal sovereignty variables, while seeing no weakening of the primary land/income relationships. We found their to be a significant positive relationship between PL280 designation and US interference ($p<0.05$) and negative relationships that approach significance for both the percentage of Native Americans who receive food stamps on a reservation and the average rate of home ownership by Native Americans in adjacent counties (not on reservations). These latter two findings are particularly interesting because they suggest that communities with less poverty/US government benefits on reservations and less assimilation into adjacent non-reservation counties are interfered with more.

We replicate these models in Table 2 (below), this time predicting Tribal Legal Disruption rather than US Legal Interference. Again we find consistently strong relationships between population and land holdings and legal action ($p<0.01$). This suggests that not only does concentrated resource-based power increase US legal interference, but it may also increase the ability of the tribe to litigate to protect or expand sovereign rights in US courts. There are, however, some different patterns in the population-sovereignty variables for the tribal legal disruption measure visible in Model 2.

Table 2: The Impact of Tribal Sovereign Power on Tribal Legal Disruption

	Dependent variable:	
	Tribal Disruption via Supreme Court	
	(1)	(2)
Land Area of Reservation (10's of Sq.Mi.)	0.001***	0.001***
	(0.0001)	(0.0001)
Land Area of County(10's of Sq.Mi.)	-0.373**	-0.517***
	(0.169)	(0.193)
Population of Reservation (100's of People)	0.0003***	0.0002***
	(0.0001)	(0.0001)
Income Ratio (Native American/White)		-0.279
		(0.450)
Average Percent of Residents with Less Than a Highschool Diploma in Adjacent Counties		0.062***
		(0.017)
Percent of Native Americans who Receive Food Stamps on Reservation		-0.019**
		(0.008)
Average Percent of Native Americans who Receive Food Stamps in County		-0.030***
		(0.011)
Average Number of Enrolled Native Children in Schools in Adjacent Counties (In 100's of Children)		-0.003
		(0.014)
Rate of Home Ownership by Native Americans on Reservation		-0.019***
		(0.006)
Average Rate of Home Ownership by Native Americans in Adjacent Counties		0.0002
		(0.010)
PL280 State Indicator		0.440*
		(0.258)
Constant	-0.697***	1.213*
	(0.150)	(0.660)
Observations	232	218
Log Likelihood	-245.790	-222.842
Akaike Inf. Crit.	499.579	469.683
Note:		*p<0.1; **p<0.05; ***p<0.01

Our results show that PL280 status is no longer the most significant of the population variables when predicting Tribal Legal Disruption (though PL280 status does approach significance at ($p<0.1$). We find that several variables describing on-reservation populations significantly predict tribal legal interference. These include negative relationships between the percentage of Native Americans who receive food stamps on reservation ($p<0.05$) and the rate of home ownership by Native Americans on reservation ($p<0.01$). We also find some conditions in adjacent counties significant predict supreme court legal action by tribes including a negative relationship between the the percentage of Native Americans who receive food stamps in the county ($p<0.01$) and a significant positive relationship between the average percentage of residents with less than a high school diploma in adjacent counties ($p<0.01$). We are wary of over-interpreting any individual one of these variables, but argue that these patterns demonstrate how tribes are less likely to seek legal recourse when they have increased capacity to care for their citizens through social welfare programs and homeownership. Specifically, the negative relationship between homeownership, receiving social welfare, and the likelihood that a tribe takes the US to court suggests that tribes who have more of the benefits of sovereignty, i.e., a socially and economically healthier tribal population, are less compelled to take the United States to court.

Discussion and Conclusion

Our work inserts itself among other attempts to clarify why the US legal system creates and maintains inequality, particularly racial inequality. Recent work by theorists in related spaces considers a number of explanations including race-based control (Alexander 2012) and class-based control (Clegg & Usmani 2019). Our work arrives amidst these explanations with a new

theory more broadly applicable to US law and Native Americans specifically: resource-based control.

Resource-based control joins previous theories such as Alexander's and Usmani's at their motivating question: why does immense legal inequality persist in the United States? These scholars' have answered, suggesting that legal disparity is a result of ongoing white anxiety, white supremacy, and the failure of the United States to absorb poor people of color into its economic fabric. For them, disparity within the criminal justice system can be explained by a desire to control poor marginalized peoples, particularly racialized peoples. This work's aim is to instead gesture towards the structures which gave rise to these identities, colonial power, and ask how that structure persists in the larger institution of law that built, maintains, and continues to reinforce the structures. In doing so, we propose that the larger project of US law targeting Native Americans is derivative of the US's imperial desire to establish and maintain colonial power. Within a capitalist society, colonial power is inherently economic power.

Using Marx's conceptualization of inequality as a natural result of capitalism, and capitalism as a natural result of imperialism, Franz Fanon (2002) and Cedric J. Robinson (2005) emphasize the economic basis of race. We situate our work within their perspectives by arguing that race works to justify economic inequality and mask economic relationships between the colonized and colonizer. Specifically, we work from the theoretical position that race, and this white supremacy, were born from a desire for Euro-colonizers to maintain their control over the colonized and their resources.

In pinpointing the economic origins of race, we do not wish to make too broad a claim about the modern functioning of racism. Racism at an ideological level has always necessarily been in part isolated from the original construction of race. We think of racism as what allowed

race to take hold; it relies on the biological and cultural explanations offered as justifications to explain the economic inequality that race's construction brought about.

We also work from a legal perspective: where codified laws that necessarily imbue Native American land and Native American communities with a different set of legal regulations and expectations for sovereignty. We argue that neglecting to measure legal experiences through the unique lens of the Native American experience inevitably distorts the results to conceal the realities of discrimination faced by Native Americans. Indeed, our results support this assertion as we move toward a new measure of tribal sovereign power to characterize the relationship between Tribal Sovereign Nations and the United States.

Native Americans serve as an ideal group for study given their unique position as citizens of sovereign internal nations. As tribal nations, Native Americans possessed and continue to possess desired land for the US's settler colonial project, necessitating their dispossession and disappearance. The US has systematically mistreated Native Americans throughout the ongoing process of settler colonialism in order to obtain their capital—land (Deloria 1985). Using our theoretical framework, resource-based control, we estimate a series of models that use political, land-based, and population-based variables to study the relationship between tribal sovereign power and legal action. We found that the same concentrations of land and population resources that predict US legal interference also predict increased legal disruption on the part of sovereign tribal nations, lending credence to our theory of resource-based control in characterizing the settler colonial project of US law.

Limitations

While we believe this work makes significant contributions both in theory and measurement, it is not without limitations. The selection of supreme courts for the development of legal interference measures is in some ways optimal, since it allows us to have complete population coverage of those cases, but it is also limited to issues brought before the Supreme Court. Future work should consider not only the impacts of decisions coming from the lower courts, but also the myriad of Acts and other forms of governmental action that might operate differently at the local level. This work is also cross-sectional, representing the current state of sovereignty and legal interference at the data it is written. Again, this is optimal in some ways, since it allows us to build the entire history of legal action into the measure. However, we would suggest future work look more carefully at how sovereign power and relationship dynamics between tribal sovereign nations and the United States have changed over time. Finally, our ability to construct a dynamic construct of sovereign power was constrained by the types of information available. Our primary source of tribal sovereignty data was the US Census, which historically struggles to survey Native persons, considering them the most undercounted population - which has effects on different types of funding (Kesslen 2019).

In this way, our work supports the call for data sovereignty and increased relationship building between research institutions and Indigenous communities. Increased data-collection capacity within tribal communities and improved relationships between researchers and tribes could foster more reliable, useful data about Native Americans. In collecting this data, tribal communities and their research partners can work together to accurately assess the experiences of Native Americans within US institutions. By accurately and reliably demonstrating the inequality from which Native Americans suffer, the true magnitude of the impacts of colonization can be known.

References

Alexander, Michelle. 2012. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. Revised paperback edition. New York: New Press.

Alvarez, Alexander, and Ronet D. Bachman. 1996. "American Indians and Sentencing Disparity: An Arizona Test." *Journal of Criminal Justice* 24(6):549-561.

Bachman, Ronet, Alex Alvarez, and Craig Perkins. 1996. "Discriminatory imposition of the law: Does it affect sentencing outcomes for American Indians." Pp. 197-220 in *Native Americans, Crime, and Justice* edited by M. O. Nielsen and R.A. Silverman. Boulder, CO: Westview Press.

Bachman, Ronet, Heather Zaykowski, Christina Lanier, Margarita Poteyeva, and Rachel

Brayboy, Bryan McKinley Jones. 2005. "Toward a Tribal Critical Race Theory in Education." *The Urban Review* 37(5):425-446.

Kallmyer. 2010. “Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaska Native (AIAN) Women.” *Australian & New Zealand Journal of Criminology* 43(2):199-222.

Carroll, Stephanie Russo, Desi Rodriguez-Lonebear, and Andrew Martinez. 2019. "Indigenous Data Governance: Strategies from United States Native Nations." *Data Science Journal* 18(1):31.

Cave, Alfred A. 2003. "Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830." *The Historian* 65(6):1330-1353.

Clegg, John, and Adaner Usmani. 2019. “The Economic Origins of Mass Incarceration.” *Catalyst: A Journal of Theory and Strategy* 3(3).

Deer, Sarah. 2018. “Native People and Violent Crime: Gendered Violence and Tribal Jurisdiction.” *Du Bois review: Social Science Research on Race* 15(1):89-106.

Deloria, Vine. 1985. *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*. 1st University of Texas Press ed. Austin: University of Texas Press.

DOJ. 2015. “Significant Indian Cases.” U.S. Department of Justice.

Everett, Ronald, and Roger Wojtkiewicz. 2002. "Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing." *Journal of Quantitative Criminology* 18(2):189-211.

Fanon, Frantz. 2002. *The Wretched of the Earth*. New York: Grove.

Feimer, Steven, Frank Pommersheim, and Steve Wise. 1990. "Marking Time: Does Race Make a Difference? A Study of Disparate Sentencing in South Dakota." *Journal of Crime and Justice* 13(1):86-102.

Fletcher, Matthew. 2014. “A Short History of Indian Law in the Supreme Court.” *American Bar Association.*

Franklin, Travis W. 2013. "Sentencing Native Americans in US federal courts: An examination of disparity." *Justice Quarterly* 30(2):310-339.

Glenn, Evelyn Nakano. 2015. "Settler Colonialism as Structure: A Framework for Comparative Studies of US Race and Gender Formation." *Sociology of Race and Ethnicity* 1(1):52-72.

Green, Donald E. 1991. "American Indian criminality: What do we really know?" Pp. 222-270 in *American Indians: Social justice and Public Policy* edited by D. E. Green and T. V. Tonneson. Milwaukee: University of Wisconsin System Institute on Race and Ethnicity.

Hannum, Hurst. 1998 "Sovereignty and its Relevance to Native Americans in the Twenty-First Century." *American Indian Law Review* 23(2):487-495.

Hutton, Chris, Frank Pommersheim, and Steve Feimer. 1989. "Fought the Law and the Law Won: A Report on Women and Disparate Sentencing in South Dakota, I." *New England Journal on Crime & Civil Confinement* 15:177.

Jung, Moon-Kie. 2019. "The Enslaved, the Worker, and Du Bois's Black Reconstruction: Toward an Underdispline of Antisociology " *Sociology of Race and Ethnicity* 5(2):157-68.

Kades, Eric. 2000. "The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands." *University of Pennsylvania Law Review* 148(4):1065-1190.

Kesslen, Ben. 2019. “Native Americans, the Census' Most Undercounted Racial Group, Fight for an Accurate 2020 Tally.” *US News.* Accessed here: https://www.nbcnews.com/news/us-news/native-americans-census-most-undercounted-racial-group-fight-accurate-2020-n1105096

The Lakota People’s Law Project. 2015. *Report: Native Americans Most Likely to Be Killed by Police*.

Leiber, Michael. 1994. “A Comparison of Juvenile Court Outcomes for Native Americans, African-Americans, and Whites.” *Justice Quarterly* 11(2):257-276.

Leiber, Michael, Joseph Johnson, Kristan Fox, and Robyn Lacks. 2007. “Differentiating Among Racial/Ethnic Groups and its Implications for Understanding Juvenile Justice Decision Making.” *Journal of Criminal Justice* 35(5):471-484.

Lujan, Carol Chiago. 1998. “The only real Indian is the stereotyped Indian”. Pp. 47-57 in *Images of Color, Images of Crime* edited by C. R. Mann and M.S. Zatz. Los Angeles: Roxbury.

Mieder, Wolfgang. 1993. “The Only Good Indian is a Dead Indian”: History and Meaning of a Proverbial Stereotype.” *The Journal of American Folklore* 106:38-60.

Muñoz, Ed, and Barbara McMorris. 2002. “Misdemeanor Sentencing Decisions: The Cost of being Native American.” *The Justice Professional* 15(3):239-259.

McSloy, Steven Paul. 1992. "Back to the Future: Native American Sovereignty in the 21st Century." *NYU Review of Law & Social Change* 20:217-300.

Nielsen, Marianne. 1996. "Contextualization for Native American Crime and Criminal Justice Involvement.” Pp. 10-20 in Native Americans, Crime, and Justice edited by M. O. Nielsen and R.A. Silverman. Boulder, CO: Westview Press.

Nielsen, Marianne. 1996. "Major Issues in Native American Involvement in the Criminal Justice System.” Pp. 293-302 in Native Americans, Crime, and Justice edited by M. O. Nielsen and R.A. Silverman. Boulder, CO: Westview Press.

Nursey-Bray, Paul. 1972. “Marxism and Existentialism in the Thought of Frantz Fanon.” *Political Studies* 20(2):152–68.

Omi, Michael, and Howard Winant. 2014. *Racial Formation in the United States*. New York: Routledge.

Oyez. 2021. Cases – Native Americans (Issue 186). *Cornell University’s Legal Information Institute.*

Pommersheim, Frank, and Steve Wise. 1989. "Going to the Penitentiary: A Study of Disparate Sentencing in South Dakota." *Criminal Justice and Behavior* 16(2):155-165.

Robinson, Cedric J. 2005. *Black Marxism: The Making of the Black Radical Tradition*. United States: The University of North Carolina Press: Made available through hoopla.

Rouse, Linda, and Jeffery Hanson. 1991. “American Indian Stereotyping, Resource Competition, and Status-Based Prejudice.” *American Indian Culture and Research Journal* 15(3):1-17.

Rowe, Aimee Carrillo, and Eve Tuck. 2017. “Settler Colonialism and Cultural Studies: Ongoing Settlement, Cultural Production, and Resistance.” *Cultural Studies ↔ Critical Methodologies* 17(1):3–13.

Sewell, Abigail A. 2016. "The Racism-Race Reification Process: A Mesolevel Political Economic Framework for Understanding Racial Health Disparities." *Sociology of Race and Ethnicity* 2(4):402-432.

Smith, Andrea. 2012. “Indigeneity, Settler Colonialism, White Supremacy.” Pp. 66–90 in *Racial Formation in the Twenty-First Century*, edited by D. M. HoSang, O. LaBennett, and L. Pulido. University of California Press.

Swift, Byron, and Gary Bickel. 1974. "Comparative Parole Treatment of American Indians and Non-Indians at US Federal Prisons." *Bureau of Social Science Research, Washington, DC*.

Trimble, Joseph. 1988. “Stereotypical Images, American Indians, and Prejudice.” Pp. 181-202 in *Eliminating Racism*, edited by Katz and D. A. Taylor. New York: Plenum.

Villegas, Malia. 2012. “Data Quality as an Essential Element of Sovereignty: Education Research Linking Hands with Policy Makers. Hands Forward: Sharing Indigenous Intellectual Traditions Conference. University of British Columbia.

Watson, Blake. 2012. *Buying America from the Indians: Johnson v. McIntosh and the history of native land rights*. University of Oklahoma Press.

Williams Jr, Robert A. 1992. *The American Indian in western legal thought: the discourses of conquest*. Oxford University Press.

Wilmot, Keith A., and Miriam A. Delone. 2010. "Sentencing of Native Americans: A Multistage Analysis Under the Minnesota Sentencing Guidelines." *Journal of Ethnicity in Criminal Justice* 8(3):151-180.

Wikipedia. 2021. “List of United States Supreme Court Cases Involving Indian Tribes.” Available at: https://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_cases_involving_Indian_tribes

Zatz, Marjorie, Carol Lujan, and Zoann Snyder-Joy. 1991. “American Indians and Criminal Justice: Some Conceptual and Methodological Considerations.” Pp. 100-112 in *Race and Criminal Justice*, edited by M. J. Lynch and E. B. Patterson. New York: Harrow and Heston.

Cases Referenced

Cherokee v. Georgia, 31 U.S. 515 (1832)

Johnson v. M'Intosh, 21 U.S. 543 (1823)

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