Voting and Indigenous Disappearance

Introduction

In 1924, the United States Congress passed the 1924 Citizenship Act which gave all Native peoples the right to vote. Given the historic struggles of communities of color, particularly African American communities, to secure the right to vote, one would presume Native peoples would hail this act as a great victory advancing the status of Native peoples. Yet, Tuscarora Chief Clinton Rickard condemned this act:

The Citizenship Act did pass in 1924 despite our strong opposition. By its provisions all Indians were automatically made United States citizens whether they wanted to be or not. This was a violation of our sovereignty. Our citizenship was in our own nations. We had a great attachment to our style of government. We wished to remain treaty Indians and reserve our ancient rights. There was no great rush among my people to go out and vote in the white man's elections. Anyone who did so were denied the privilege of becoming a chief or a clan mother in our nation.¹

While many African Americans viewed winning the right to vote as a great victory, Rickard threatened Native peoples who chose to vote in U.S. elections with a loss of tribal status. What explains these sharp differences in how the right to vote is understood in relationship to racial justice?

As many scholars have noted, Native peoples have often viewed the right to vote in U.S. elections an act of settler colonialism or even genocide. Many Native peoples see themselves as members of their Native nations rather than citizens of the United States. In fact, the Iroquois travel on their own passports. Not all Native peoples eschew the right to vote. Some Native

peoples may see themselves as dual citizens, while some may see themselves only as U.S.
citizens. Nonetheless, because of Native peoples distinct legal status in the United States, one
is more likely to find ambivalence about the right to vote than one might find in other
communities of color.

This paper will explore why there is such ambivalence within Native communities about
the right to vote through an engagement with critical race theory. The reason it is important to
engage critical race theory in this discussion is that the mistaken presumption that granting the
right to vote to Native peoples is an unqualified good is often informed by race analyses without
a concomitant analysis of colonialism. As a result, scholars often fail to distinguish how Native
identity is constructed through the right to vote in a manner that is fundamentally different from
that of other communities of color. As a result, such scholars do not sufficiently address the
negative impacts of the right to vote in Native communities. To more accurately assess how
identity is constructed through voting, it will be necessary to take a detour to explain the
particularities of Native racialization.

Native Racialization

As innumerable critical race and ethnic studies scholars have argued, racialization is not
simply about the bad treatment of racialized groups. Rather racialization fundamentally
structures the logic systems under which all peoples operate. As Denise Da Silva, notes, the very
concept of “human” in western thought is defined through a racial grammar in which only white

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people can become human. Thus, anti-racist work is not simply about elevating the status of people of color, it is about a thorough deconstruction of western thought itself.3

This shift in how we analyze racialization thus changes how we analysis the importance of the right to vote. If we follow the more dated model within race/ethnic studies of focusing on alleviating patterns of racial discrimination, then we are likely to support any policies that seem to alleviate discrimination, such as the right to vote. If, however, we understand racialization as structuring the very way we even view ourselves, the world, and our possibilities within it, then we will not presume any anti-discriminatory strategy is necessarily good. Rather, we will seek to understand how that policy fits within the larger logics of racialization that shape our world.

Thus, critical race/ethnic studies scholars have shifted their attentions to the logics of racism whereby, to quote Ruthie Gilmore, racism becomes the "state-sanctioned and/or extralegal production and exploitation of group-differentiated vulnerability to premature death."4

Despite this important shift, critical race/ethnic scholars have often presumed that racism operates through a singular logic.5 One of the problems with how Native peoples are conceptualized within critical race theory is that racism is presumed to operate under one singular logic along a black-white continuum.6 To the extent that a group seems more proximate to blackness, it is presumed to be more oppressed. To the extent that a group seems more

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3Silva, supra note 2.
6Id.
proximate to whiteness, it is presumed to be less oppressed.

As Patrick Wolfe has argued, because, under conditions of settler colonialism, settlers never leave - they must exterminate those peoples whose lands they have appropriated in order to maintain any legal claim to that land.\textsuperscript{7} In the case of Native peoples it is necessary to analyze how the racialization of Native peoples operates through a logic of extermination which is related to but nevertheless distinct from the logic of anti-Blackness. Otherwise, we may misunderstand a racial dynamic by simplistically explain one logic of white supremacy through another logic. For example, the fact that Native peoples often live in more racially integrated neighborhoods than other communities of color is often deemed to be a sign of racial progress for Native peoples.\textsuperscript{8} However, it is actually the result of the United States government’s policy of relocating Native peoples from their land bases into cities so that their lands can be liberated from resource extraction.\textsuperscript{9}

If we see racism operating through multiple logics, then we may recognize that proximity to whiteness is not necessarily a sign of racial “progress.” In the case of Native peoples, those who may have lighter-skin privilege may have more status to some extent over Black peoples that relates to their position on the color hierarchy. However, if we look at the status of Native peoples also through a logic of genocide, this status through assimilation in is also a strategy of genocide that enables the theft of Native lands. For instance, Andrew Jackson justified the

\textsuperscript{7}Patrick Wolfe, Settler Colonialism and the Transformation of Anthropology 2 (Cassell Press, 1999).

\textsuperscript{8}Doug Massey & Nancy Denton, American Apartheid (Harvard University Press, 1993).

\textsuperscript{9}Myla Vicenti Carpio, Indigenous Albuquerque (Texas Tech Press, 2010); Renya Ramirez, Native Hubs (Duke University Press, 2007).
removal of Cherokee peoples from their lands on the basis that they were now really “white,” and hence not entitled to their lands. During the Trail of Tears in which the Cherokee nation was forcibly relocated to Oklahoma, soldiers targeted Cherokee women who spoke English and had attended mission schools for sexual violence. They were routinely gang raped, causing one missionary to the Cherokee, Daniel Butrick, to regret that any Cherokee had ever been taught English.10

Thus, the distinctness by which Black and Native peoples have been racialized impacts how they might understand the right to vote. Because anti-Black racism positions Black peoples in an antagonistic relationship to whiteness, winning the right to vote - a privilege bestowed upon white peoples - can be read a sign that the distance between black and white peoples is disappearing in U.S. society. However, Native peoples, who have been forced to assimilate into white society so that they will no longer remain a threat to white claims to this land, may read the imposition of the right to vote as just another policy that bestows whiteness on them in order to effectuate the colonial project. Native peoples are supposed to disassociate from their own nations and assimilate into the United States settler state. Thus, as will be discussed in the next section, the differing ways in which Native and Black peoples have been racialized have impacted how the Courts have differentially understood their relationships to voting and citizenship.

**Native Peoples and Infantile Citizenship**

In his infamous decision in *Dred Scott v. Sandford*, Roger Taney stated that the key legal

question before the Court was: “Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.”

The Court determined that the answer is no: because people Black people are property they are not capable of becoming U.S. citizens (although states might grant that right). According to the Court, Black peoples

had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

As Justice Daniel further explained in his concurring opinion, Black peoples have the

11Dred Scott v. Sandford, 60 U.S. 393, 403, 15 L. Ed. 691 (1856)

12Id. at 407-08, 15 L. Ed. 691 (1856)
ontological status of property that derives from their origins in Africa as the property of Europe.

Consequently, this ontological status does not change simply because one’s owner relinquishes his property rights. Black peoples remain property whether or not an individual owns them.

Now, the following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know—that the African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognized by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as property in the strictest sense of the term.

But it has been insisted, in argument, that the emancipation of a slave, effected either by the direct act and assent of the master, or by causes operating in contravention of his will, produces a change in the status or capacities of the slave, such as will transform him from a mere subject of property, into a being possessing a social, civil, and political equality with a citizen. In other words, will make him a citizen of the State within which he was, previously to his emancipation, a slave.

It is difficult to conceive by what magic the mere surcease or renunciation of an interest in a subject of property, by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation.\(^{13}\)

Native peoples by contrast, are situated as potential citizens. Native peoples are described as “free” people, albeit “uncivilized.” While because of their child-like primitive state, they are not worthy of citizenship at the moment, they may eventually become citizens if they were to renounce their relationship to their Native nation and demonstrate the maturity required to become a citizen.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together

\(^{13}\text{Dred Scott v. Sandford, 60 U.S. 393, 475-77, 15 L. Ed. 691 (1856)}\)
in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.\textsuperscript{14}

As Saidiya Hartman notes in \textit{Scenes of Subjection}, Black peoples, while property, are still bound by the law - but only as potential transgressors of it. They are owed no protection, but do owe complete allegiance to it.\textsuperscript{15} As the court notes:

Another of the early laws of which we have spoken, is the first militia law, which was passed in 1792, at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every ‘free able-bodied white male citizen’ shall be enrolled in the militia. The word \textit{white} is evidently used to exclude the African race, and the word ‘citizen’ to exclude unnaturalized foreigners; the latter forming no part of the sovereignty, owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the Government, whether they were slave or free; but it is repudiated, and rejected from the duties

\textsuperscript{14}Dred Scott v. Sandford, 60 U.S. 393, 403-04, 15 L. Ed. 691 (1856)

\textsuperscript{15}Hartman supra note 2.
and obligations of citizenship in marked language.\textsuperscript{16}

Essentially, Native peoples do not owe allegiance to the United States, but may be compelled through dominion to adhere to its laws. Black peoples, by contrast, have a propertied relationship to the United States - they necessarily belong to it and are subject to it as property, but are deprived of any ability to claim rights as citizens.

Interestingly, the status of Native and Black peoples reverses after the 14th Amendment. In \textit{Elk v. Wilkins}, the Court ruled that the 14th amendment did not apply to Native peoples. In this case, John Elk filed a complaint when he was not allowed to vote in a city council election in Omaha, Nebraska despite the fact that he was an established resident of Omaha, had renounced his relationship to his tribal nation, and claimed full allegiance to the United States.

The Court articulated the legal question at hand to be “whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the fourteenth amendment of the constitution.”\textsuperscript{17} The Plaintiff cited the \textit{Dred Scott}, decision to argue in favor of his inherent right to citizenship. However, the Court read \textit{Dred Scott} to hold that Native peoples cannot be born U.S. citizens. According to the Court, the \textit{Dred Scott} decision recognizes that Black peoples fundamentally belong to the United States but holds Black peoples cannot vote because of their status as property. Post 13th and 14th amendments however, the property status of Black people has been extinguished, thus allowing Black people

\textsuperscript{16}\textit{Dred Scott v. Sandford}, 60 U.S. 393, 420, 15 L. Ed. 691 (1856)

\textsuperscript{17}\textit{Elk v. Wilkins}, 112 U.S. 94, 99, 5 S. Ct. 41, 44-47, 28 L. Ed. 643 (1884)
born in the United States a guaranteed citizenship. Native peoples, by contrast, still do not properly belong to the United States. The 14th amendment does not guarantee them natural-born citizenship without express permission from the United States.\footnote{Elk v. Wilkins, 112 U.S. 94, 101, 5 S. Ct. 41, 44-47, 28 L. Ed. 643 (1884)}

In this case, whereas Black peoples have the ontological status of property, Native peoples have the ontological status of children. Because of their status of “pupillage,” they are not in able to achieve citizenship without the permission of their “parent” - the United States.

The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed.

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States.\footnote{Elk v. Wilkins, 112 U.S. 94, 99, 5 S. Ct. 41, 44-47, 28 L. Ed. 643 (1884)}

Native legal scholar Robert Williams provides a helpful framework for understanding the relationship between these cases. In his germinal text, Like A Loaded Weapon, Williams argues that while Native nations rely on the Cherokee nation cases as the basis for their claims to sovereignty, he notes that all these cases rely on a logic based on white supremacy in which Native peoples are racialized as incompetent to be fully sovereign. Rather than uphold these cases, he calls on the courts to actually overturn these cases so that they go by the wayside as did the Dred Scott and Plessy v. Ferguson decisions.
I therefore take it as axiomatic that a “winning courtroom strategy” for protecting Indian rights in this country cannot be organized around a set of legal precedents and accompanying legal discourse that views Indians as lawless savages and interprets their rights accordingly. Before rejecting out of hand this axiom that the precedents and language the justices use in discussing minority rights are vitally important to the way the Court ultimately identifies and defines those rights, I ask Indian rights lawyers and scholars to consider carefully the following question: Is it really possible to believe that the court would have written brown the way it did if it had not first explicitly decided to reject the “language in Plessy v. Ferguson” that gave precedential legal force, validity, and sanction the negative racial stereotypes and images historically directed at blacks by the dominant white society?\(^\text{20}\)

Despite the problems with these cases, Native nations generally call on courts to uphold rather than overturn the Cherokee nation cases because they appear to recognize a limited form of sovereignty for Native nations. Williams points to the contradictions involved when Native peoples ask courts to uphold these problematic legal precedents rather than overturn them. “This model’s acceptance of the European colonial-era doctrine of discovery and its foundational legal principle of Indian racial inferiority licenses Congress to exercise its plenary power unilaterally to terminate Indian tribes, abrogate Indian treaties, and extinguish Indian rights, and there’s nothing that Indians can legally do about any of these actions.”\(^\text{21}\)

Furthermore, Williams notes, the racial ideologies that undergird early Supreme Court decisions regarding Native peoples continue to inform current decision and legislation, even in cases that seem to have “positive” outcomes. While he perhaps problematically suggests that racial ideologies as they pertain to African Americans have been at least formally renounced under Brown v. Board, we can see that his analysis would actually also apply to African

\(^{20}\)Robert Williams, Like a Loaded Weapon xxxiii (University of Minnesota Press, 2005).

\(^{21}\)Id. at 151
Americans, even if these ideologies are formally renounced. To illustrate, even though Black peoples are not longer formally recognized as property at the time of Elk V. Wilkins, Black peoples ontological status as property governs their being granted citizenship. While Black people may not be formal property, their ontological status of property guarantees their presumed natural relationship to the United States. As will be discussed later in this paper, Native peoples’ ontological status as children continues to inform later federal policies that seemingly grant Native peoples more rights, particularly the right to vote.

As Anne McClintock has argued, Native peoples become displaced into anachronistic space by which they always appear to be in an anterior relationship to modernity. That is, “real” Native peoples are always presumed to be living in the past, wearing regalia, and living in teepees. Native peoples today, who might want to own ipods, always seem less authentic because Nativeness is ontologically relegated to the past. This anachronistic space becomes naturalized through the logics of family by which Native peoples are infantalized as children in relationship to European “man.”\textsuperscript{22} To illustrate, as previously described, courts often describe Native peoples as children under the ward of the parental care of the United States government. Within this colonial imaginary (imaginary being defined as the set of values, institutions, laws, and symbols common to a particular social group and the corresponding society), the Native exists only to allow the European to remake its civilization from what was seen as its corruption. Once the European is remade, the Native is rendered permanently infantile - an innocent savage. It cannot mature into adult citizenship, it can only be locked in a permanent state of infancy. The Native will then either degenerate into brutal savagery or disappear into “civilization.”

\textsuperscript{22}McClintock supra note 2 at 38
peoples are thus confined to what Lauren Berlant terms an “infantile citizenship” that confines Native peoples into a permanently anterior relationship to the United States.23

Consequently, the seeming pathway to citizenship offered in Dred Scott can be properly understood as a pathway to genocide - Native peoples can be included in the United States only insofar as they no longer remain Native. Thus, Robert Williams’ previously described critique of the Marshall trilogy (Johnson v. McIntosh and the Cherokee nation cases) can be extended. While these decisions seem to afford some degree of self-determination for Native nations, this self-determination was presumed to be temporary. In first of the Marshall trilogy, Johnson v. McIntosh, the Court contends that Native nations have a right to “occupancy,” 24 but not a right to title over their lands. Conquest confers the right of title to the conqueror even thought he conquered should not be “wantonly oppressed.”25 It is important to note that while Native peoples have a right to occupancy, this right is temporally located. Eventually, Native peoples should “mature” into whiteness and disappear as Native peoples. At that point, they will no longer require any legal rights to land.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected.


24Johnson v. McIntosh, 21 U.S. 543, 562, 5 L. Ed. 681 (1823)

25Id. at 589
The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.26

Similarly, in a concurring opinion to Worcester v. Georgia, which, on one hand, upheld the right of the Cherokee nation to be free of state laws because of their semi-sovereign status, also explain that sovereign status of Native peoples was not permanent. Rather, Justice M’Lean implies that the recognition of Native sovereignty is primarily a strategic one - design to facilitate European access to land and resources until such time that it would be in a position to expropriate them.

In this view perhaps, our ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbours.27

Because this recognition is strategic, it is meant to be temporary. Eventually, Native land title will be fully extinguished.

The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government, in the extinguishment of their title, and especially by the compact with the state of Georgia. It is a question, not of abstract right, but of public policy. I do not mean to say, that the same moral rule which should regulate the affairs of private life, should not be regarded by communities or nations. But, a sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to

26 Id. at 589-90

become amalgamated in our political communities.\textsuperscript{28}

Thus, M’Lean’s opinion eventually holds that the Cherokee should be subsumed under the government of the State of Georgia, but the timing of land extinguishment should be done in conjunction with the federal government.

At best they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.

This state of things can only be produced by a co-operation of the state and federal governments. The latter has the exclusive regulation of intercourse with the Indians; and, so long as this power shall be exercised, it cannot be obstructed by the state. It is a power given by the constitution, and sanctioned by the most solemn acts of both the federal and state governments: consequently, it cannot be abrogated at the will of a state. It is one of the powers parted with by the states, and vested in the federal government. But, if a contingency shall occur, which shall render the Indians who reside in a state, incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a state government to extend to them the aegis of its laws. Under such circumstances, the agency of the general government, of necessity, must cease.\textsuperscript{29}

Similarly, in Ex Parte Crow Dog, the Court holds the U.S. cannot exercise criminal jurisdiction over Indian on Indian crime on Indian lands without express Congressional authorization (which later is given in the Major Crimes Act).\textsuperscript{30} While this decision would seem

\textsuperscript{28}Id. at 593

\textsuperscript{29}Id. at 593-94

\textsuperscript{30}Ex parte Kan-gi-shun-ca, 109 U.S. 556, 571-72, 3 S. Ct. 396, 405-06, 27 L. Ed. 1030 (1883)
to uphold a degree of sovereignty for Native peoples, again this sovereignty is framed temporally.

Now, Native peoples as children lack the maturity to observe United States criminal laws. They cannot differentiate “red man’s revenge from white man’s justice.” Thus this recognition is predicated on the presumption of Native peoples inability to understand principles of justice rather than on a recognition of their ability to manage their own affairs.

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

The Court later upholds the constitutionality of the Major Crimes Act in United States v. Kagama. In this decision, Native peoples are described as “domestic, dependent communities” rather than “domestic, dependent nations” as they had been in the Cherokee nation cases. The rationale for this decision points to the necessary disappearance of Nation nations. “The power of the general government over these remnants of a race once powerful, now weak and diminished in

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31Id.

32Id.

33United States v. Kagama, 118 U.S. 375, 384, 6 S. Ct. 1109, 1114, 30 L. Ed. 228 (1886)
numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."  

The reasoning in these cases is that indigenous peoples must disappear so that non-Native peoples can then become the rightful inheritors of all that was indigenous. As Kate Shanley notes, Native peoples are a permanent "present absence" in the US colonial imagination, an "absence" that reinforces, at every turn, the conviction that Native peoples are indeed vanishing and that the conquest of native lands is justified. Ella Shohat and Robert Stam describe this absence as "an ambivalently repressive mechanism [which] dispels the anxiety in the face of the Indian, whose very presence is a reminder of the initially precarious grounding of the American nation-state itself. In a temporal paradox, living Indians were induced to `play dead,' as it were, in order to perform a narrative of manifest destiny in which their role, ultimately, was to disappear." While this analysis may seem to be detour from an analysis of Native peoples and the right to vote, the colonial framing of Native peoples as children completely informs U.S. policy as it pertains to voting as well as Native responses to these policies. As will be discussed in the next section, this logic of disappearance informs U.S. policies regarding Native people and what Kevin Bruyneel describes as the "gift of citizenship."

The Native Citizen/Worker

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34 Id.
35 Lecture, UC Davis Hemispheric Indigeneities Conference, March 1997.
In the previous section, I explained how Native peoples have been legally understood to be children. While courts have often held that Native peoples are potential citizens who can have the right to vote - unlike African Americans in the antebellum period - their potential can be realized only when they mature out of their status as Native peoples. In addition, Native peoples’ status as children simultaneously marks them as “non-workers.” Native peoples’ pathways to voting depends on their maturation into adult (i.e. white) workers. Thus, Native peoples’ pathways to citizenship and voting then become framed as rewards for proving their ability to work.

As reflected in the Johnson v McIntosh decision, one of the colonial rationales for expropriating Native lands is that Native peoples did not properly work the land. For instance, governor John Winthrop of Massachusetts Bay declared that "America fell under the legal rubric of *vacuum domicilium* because the Indians had not `subdued' it and therefore had only a `natural' and not a 'civil' right to it." George E. Ellis (1880) echoed: "the Indians simply wasted everything within their reach. . .They required enormous spaces of wilderness for their mode of existence." Walter Prescott Webb reasoned that free land was "land free to be taken." This reasoning became the colonizer's legal basis for appropriating land from Native peoples. This notion that Native peoples did not properly use land, and hence had not title to it, forms the basis of the “doctrine of discovery” of which must U.S. Indian case law is based. As articulated in Johnson v. McIntosh for why Native peoples should have the right to occupancy but not right to

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38Francis Jennings, Invasion of the Americas 82 (Norton Press, 1975)

39Id. at 84.

40Id.
title over land: “[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.”

In 1887, the Dawes Allotment Act was passed which divided Native lands into individual allotments of 80-160 acres. The federal government then expropriated the remaining surplus lands. Native peoples were given fees in trust for 25 years until deemed “competent” by the Secretary of Interior. They could then obtain fee patents enabling them to sell their lands. The rationale for this policy was that the practice of communal land ownership among Native peoples was discouraging them from working the land. In the 1887 Indian Commissioner’s Report, J.D. C. Atkins explains the need for allotment:

Take the most prosperous and energetic community in the most enterprising section of our country- New England; give them their lands in common, furnish them annuities of food and clothing, send them teachers to teach their children, preachers to preach the gospel, farmers to till their lands, and physicians to heal their sick, and I predict that in a few years, a generation or two at most, their manhood would be smothered...

This pauperizing policy above outline was, however, to some extent necessary at the beginning of our efforts to civilize the savage Indian. He was taken a hostile barbarian, his tomahawk red with the blood of the pioneer; he was too wild to know any of the arts of civilization. Hence some such policy had to be resort to settle the nomadic Indian and place him under control. This policy was a tentative one. . .Now, as fast as any tribe becomes sufficiently civilized and can be turned loose and ut upon its own footing, it should be done. Agriculture and education will gradually do this work and finally enable the Government to leave the Indian to stand alone.  

The report warns that allotment will not work overnight: “Idleness, improvidence, ignorance,

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41Johnson v. McIntosh, 21 U.S. 543, 590, 5 L. Ed. 681 (1823)

and superstition cannot by law be transformed into industry, thrift, intelligence, and Christianity speedily." Nonetheless, the pathway towards civilization requires Native peoples to adapt to a capitalist work model. The 1881 Commissioner’s Report further explained how work can save Native peoples from barbarism:

It must be apparent . . . that the system of gathering the Indians in bands or tribes on reservations. . . thus relieving them of the necessity of labor, never will and never can civilize them. Labor is an essential element in producing civilization. . . The greatest kindness the government can bestow upon the Indian is to teach him to labor for his own support, thus developing his true manhood, and, as a consequence, making himself-relying and self-supporting.

In this report, we can see how Native peoples are placed in a different relationship to whiteness as are African Americans. Whereas Black peoples soon become subjected to legally-sanctioned forms of racial segregation after the end of slavery, Native peoples are frequently articulated as being assimilable into whiteness. “The Indian is not unlike his white brother in moral and intellectual endowments and aspirations. He is proud of his manhood, and when he comes to understand the matter he will cheerfully and proudly accept the responsibilities which belong to civilized manhood.” The Commissioner’s report suggests that the problem with Native peoples arises not from their biological differences but from their primitive social structures. “So long as tribal relations are maintained so long will individual responsibility and welfare be swallowed up in that of the whole, and the weaker, less aspiring, and more ignorant of the tribe will be victims of the more designing, shrewd, and ambitions head-men. Any people, of

\[43\] Id. at 4.

\[44\] Id.

\[45\] Id. at 6-7.
whatever race and color, would differ from our Indians under like conditions.”

The promised reward for becoming workers is citizenship and the right to vote. The Dawes Act provides once Native peoples are issued a fee patent, they will be “hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.” As the Commissioner’s Report describes this “gift:"

Under this act it will be noticed that whenever a tribe of Indians of any member of a tribe accepts lands in severalty the allottee at once, ipso facto, becomes a citizen of the United States, endowed with all the civil and political privileges and subject to all the responsibilities and duties of any other citizen of the Republic. This should be a pleasing and encouraging prospect to all Indians who by experience or education have risen to a plane above that of absolute barbarism. . . . With in a very short time many Indians will be invested with American citizenship, including of course the sacred right of the elective franchise.

However, the price of this gift is the annihilation of Native culture and social structure. Native peoples receive this gift when they cease to be Native. As Denise Da Silva phrases it, Native peoples are continually positioned at the “horizon of death,” whereby their pathway to citizenship demands their annihilation. As the Report makes clear: “I fail to comprehend the full import of the allotment act if it was not the purpose of the Congress which passed in and for the Executive whose signature made it a law ultimately to dissolve all tribal relations to place each adult Indian upon the broad platform of American citizenship.”

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46 Id. at 7.

47 Dawes Severalty Act of 1887 United States Statutes at Large (49th Cong. Sess II, Chp. 119, p. 388-391)


49 Id.
As discussed previously, Black peoples are ontologically figured as property. As such, they are positioned in binary relationship to whiteness. As critical race scholar Cheryl Harris notes, whiteness is constructed as “property” that is withheld from Black peoples that simultaneously allows white people to maintain a propertied relationship with Black people.50 George Lipsitz similarly argues that white people have a “possessive investment in whiteness.”51 However, these accounts of whiteness as property generally fail to account for the intersecting logics of white supremacy and settler colonialism as they apply to Native peoples. In this intersection, whiteness may simultaneously operate as a weapon of genocide used against Native peoples in which white people also demonstrate their possessive investment not simply in whiteness, but also in Nativeness. The weapon of whiteness as a “scene of engulfment”52 ensures that Native peoples disappear into whiteness so that white people in turn become the worthy inheritors of all that is indigenous.

Thus, Native peoples’ proximity to whiteness is critical for whiteness to absorb indigeneity - only when Native peoples are viewed as being “like” white peoples is there a possibility that they can be absorbed into white society. However, as Homi Bhabha and other postcolonial theorists have noted, this absorption is never total, thus creating a permanent colonial anxiety with respect to the indigenous peoples that are to be absorbed. As Kevin

50 Cheryl I. Harris, Whiteness As Property, 106 Harv. L. Rev. 1709 (1993)


52 Silva supra note 3.
Bruyneel contends, this advocacy of bestowing citizenship upon Native peoples soon gave way to a more qualified citizenship because Native peoples were not deemed to be civilizing quickly. Because of Native peoples’ ontological status as children, they were never quite mature enough to earn their full independence from their colonial fathers.\textsuperscript{53} Adding to Bruyneel’s analysis, it also seems that the problem was that Native peoples were maturing too quickly and perhaps becoming too skilled in the ways of whiteness.

While reporting on Native peoples’ response to the Dawes Act, the Commissioner’s report on one hand states that once Native peoples start working, they will joyfully enter American society and dissolve their tribal communities. However, in reporting which communities are most opposed to the Act, the Commissioner reports that those that are most opposed are the “five civilized tribes,” the tribes that have already adopted farming economies that have been prescribed as the route to civilization. So, what then explains why the Native peoples who should most support allotment given the Commissioner’ logic actually oppose it? Apparently, they have become “too capitalist.” These Natives have become excessively “enterprising” and are acquiring wealth at the expense of other Indians. The Commissioner then blames these enterprising Native for not properly sharing resources.\textsuperscript{54}

The irony of course of this reasoning is that the previously stated rationale for allotment is that Native peoples practice of sharing resources was discouraging enterprising individuals from acquiring wealth! Thus, suddenly the pursuit of individual wealth that was supposed to be inculcated into Native communities becomes undesirable once Native peoples become successful

\textsuperscript{53}Bruyneel, supra note 44 at 3.

\textsuperscript{54}Report of the Secretary of the Interior, supra note 49 at 10.
at it. This ideology is echoed today, as Jessica Cattelino notes, in the critique of gaming tribes. Native peoples are supposed to engage capitalism, but not successfully.\footnote{55}{Jessica Cattelino, \textit{High Stakes} (Duke University Press, 2008)}

Thus, it is perhaps not a surprise that even after Native peoples were made unilaterally citizens, states routinely deprived them of the right to vote. In states where Native peoples had the numbers to pose a threat to the well-being white property owners, laws similar to those that were used to disenfranchise African Americans were used against Native peoples.\footnote{56}{Laughlin McDonald, \textit{American Indians and the Fight for Equal Voting Rights} 18-20 (University of Oklahoma Press, 2010)} States often contended that Native peoples were still “wards” of the state, and hence as legal children, should not have the right to vote. The Supreme Court of Arizona’s rationale for denying Native peoples right to vote illustrates Robert Williams’ previously described critique of the Marshall trilogy. That is, today the guardian relationship between the U.S. government and Native nations is generally understood - at least by Native peoples - to be a “trust” relationship where, in exchange for all the lands taken from Native peoples, the federal government has a trust responsibility to act in the best interest of Native nations. However, the terminology of “guardianship” ultimately derives from conception of Native peoples as children. Thus, even when more contemporary policy makers of justices utilize the language of guardianship to connote the trust responsibility between the U.S. and Native nations rather than a relationship based on “pupilage,” the ideology of Native as “child” still permeates their legal reasoning. For instance, the Arizona Supreme Court based its decision to deprive Native peoples the right to vote on their guardian relationship with the federal government. The court cites the Cherokee
nation cases to argue that Native peoples are in guardian relationship with the United States. However, it ignores the these cases’ holding Native nations have a sovereign status that supersedes state governments because of this guardian relationship with the federal government. To the contrary, it declares that Native peoples are under the jurisdiction of the state of Arizona. Rather it cites these cases to define the guardianship relationship to mean: “They [Native nations] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.”

After defining this guardian relationship to connote Native peoples’ infantile status, the Court then notes the Arizona constitution excludes the five groups of people from the right to vote. The group that pertains to Native people is the following

‘Persons under guardianship, non compos mentis, and insane.’ Presumably this refers to three separate classes, for we must assume under the second canon of construction above referred to that the makers of the Constitution did not use three different phrases to mean the same thing. On the other hand, under the maxim ‘noscitur a sociis,’ they must by considered to have some common quality or relationship. . .

Insanity is a broad, comprehensive, and general term, of ambiguous import, for all unsound and deranged conditions of the mind. . . However, legally speaking, insanity is generally regarded as such unsoundness of mental condition as nullifies or does away with individual legal responsibility or capacity. . .compos mentis' was originally a phrase which was considered practically synonymous with insanity, but under the influence of modern thought the words are now generally construed to intend the subject's mental inability to manage himself and his ordinary affairs, from whatever cause, as distinct from ordinary insanity, such inability may arise. . .

Broadly speaking, persons under guardianship may be defined as those who, because of some peculiarity of status, defect of age, understanding, or self-

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57 Porter v. Hall, 34 Ariz. 308, 321, 271 P. 411, 415 (1928)

58 Id. at 417.
control, are considered incapable of managing their own affairs, and who therefore have some other person lawfully invested with the power and charged with the duty of taking care of their persons or managing their property, or both. It will be seen from the foregoing definitions that there is one common quality found in each: The person falling within any of the classes is to some extent and for some reason considered by the law as incapable of managing his own affairs as a normal person, and needing some special care from the state. To put it in a word, he is not sui juris. It is apparent to us that it was the purpose of our Constitution, by these three phrases, to disfranchise all persons not sui juris, no matter what the cause, and its justice is plain. The man who for any reason is exempt from responsibility to the law for his acts, who cannot be trusted to manage his own person or property, certainly as a matter of common sense cannot be trusted to make laws for the government of others, and placing him under the guardianship of another conclusively establishes that incapacity. We hold, therefore, that any person who, by reason of personal inherent status, age, mental deficiency, or education, or lack of self-control, is deemed by the law to be incapable of handling his own affairs in the ordinary manner, and is therefore placed by that law under the control of a person or agency which has the right to regulate his actions or relations towards others in a manner differing from that . . .by which the actions and relations of the ordinary citizen may be regulated, is a 'person under guardianship.'

Having then defined a category of peoples that are mentally incompetent to vote, the Court holds that Native peoples are within this category. These Indian Tribes are the wards of the nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. When the reasoning of the Court, guardianship does not invoke a trust responsibility with sovereign nations as it understands these nations to be under the jurisdiction of the state of Arizona; rather it connotes the mental incapacity of Native peoples who are “incapable of handing [their] own affairs.” This decision comes after the 1924 Citizenship Act which granted Native peoples the right (whether they wanted it or not) to

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59 Id. at 416-417.

60 Id. at 417.

61 Id. at 416-417.
vote without having to rescind tribal membership.

Similarly, South Dakota continued to deny Native peoples the right to vote unless they severed their tribal relationships until 1951.\textsuperscript{62} Even then, South Dakota required Native peoples to register to vote in person in county offices that were often hundreds of miles away from their homes. Tribes were not allowed to register their members to vote. Mail-in registration was not allowed until 1973. And in the 1980s, Native peoples requested court intervention because county auditors refused to print enough voter registration cards in time to allow Native peoples to vote in time for elections.\textsuperscript{63}

South Dakota State Attorney William Janklow condemned the 1975 Voting Rights Act Amendments as a “facial absurdity” and urged the Secretary of State not to comply with the Section 5's preclearance requirements.\textsuperscript{64} Section 5 of the Voting Rights Act requires certain jurisdictions (generally those that have had a history of voting discrimination against racial/language minority groups – Native peoples are covered under language rather than racial minority status), to have any changes in their voting procedures pre-cleared by the court system before it is implemented to ensure it does increase discrimination in that jurisdiction. South Dakota generally refused to comply with preclearance requirement of section 5 by only submitting ten out of 600 proposed statutes and regulations for preclearance between 1976-


\textsuperscript{63}Id. at 1024-25.

\textsuperscript{64}Id. at 1027.
2002. Native peoples have filed numerous suits against the state for its various redistricting plans for voter dilution because these plans make it more difficult for the Native peoples to elect candidate of their choice. In a 2004 case, the state of South Dakota defended a redistricting plan that would pack Native peoples into one district with the argument that Native peoples would not want to vote anyway because of “the ‘enormous funding’ tribes receive from the United States.” Again, Native peoples are essentially being described as wards of the federal government and thus not entitled to vote as mature citizens. In this case, however, the district court did not accept that argument and found the redistricting plan a violation of §2 of the Voting Rights Act. Of course, when Native peoples, despite these obstacles, began to organize successful voter drives, they were accused of vote fraud. In retaliation for this successful voting efforts, state legislators imposed more voting restrictions that would disproportionately impact Native voters. During Congressional debates, the previously described ideologies that frame Native peoples as undeserving voters were present. In reference to Native voters, Representative Stanford Adelstein stated, “Having made many efforts to register people ... I realize that those people we want to vote will be given adequate opportunity. I, in my heart, feel that this bill ... will encourage those who we don't particularly want to have in the system. ... I'm not sure we want

\[\text{Id.}\]

\[\text{McDonald supra note at 63, 124}\]

\[\text{Bone Shirt v. Hazeltine, supra note at 69, 1022.}\]

\[\text{Id.}\]

\[\text{Id. at 1026.}\]
that sort of person in the polling place.” South Representative Ted Klaudt commented: “The way I feel is if you don't have enough drive to get up and drive to the county auditor ... maybe you shouldn't really be voting in the first place.” Once again, Native peoples have not demonstrated the ability to work hard enough to earn the right to vote.

These colonial logics then put Native peoples in a contradictory position. In 1999, the United States filed suit against Blaine County, Montana claiming that its at-large voting process for County Commissioners violated Section 2 of the Voting Rights Act. While white people were the majority overall in the county, Native peoples were the majority in two of the three districts. The trial court ruled that this process was a violation of Section 2. In the appeal made by the County Commissioners made two rather contradictory arguments. One, it contended that Native peoples interests are not separate from that of white peoples and hence do not require specific representation in the voting system. “Indians have no distinctive political issues of heightened concern. There being no such issues, an American Indian candidate cannot be said to understand and represent these issues better than a non-Indian candidate . . . and so American Indian candidates could be preferred, if at all, only for discriminatory racial reasons.” That is, in response to the charge that Native peoples face discrimination, Blaine County contends that there

70Id.

71Id.

72UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BLAINE COUNTY, MONTANA; Don K. Swenson, Arthur Kleinjan, and Victor J. Miller, in their official capacities as members of the Blaine County Board of Commissioners; and Sandra Boardman, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County, Montana, Defendants-Appellants., 2003 WL 22594106 (C.A.9), 4

73Id. at 50.
can be no discrimination because Native do not have distinct interests - having apparently successfully assimilated into white society. But should it be the case that they would exercise a voting bloc, that effort would be unjustifiable because they do not really exist, and hence would be a sign of racial discrimination on the part of Native peoples. Essentially, we see the same ideology described previously in which Native peoples once they mature into U.S. citizenship are supposed to disappear. If they fail to disappear and assert their self-determination, then they do so illegitimately.

However, the argument of the appellant was inconsistent, because at the same time it denies that Native peoples have cohesive interests, it also justifies the exclusion of Native peoples from the electoral system because of their essential foreignness. “African Americans and other ethnic groups have fought to be integrated into this unique fabric of American life, Indian peoples have passively resisted.” Echoing the rationale in Elk v. Wilkins, Native peoples are portrayed as not belonging to the United States, unlike African Americans, and hence less entitled to voting rights protection. However, this portrayal of Native peoples as outside the system would be inconsistent with the previous claim that their interests can be easily represented then by white representatives.

Homi Bhabha and Edward Said argue that part of the colonization process involves partially assimilation the colonized in order to establish colonial rule. That is, if the colonized group seems completely different from the colonists, the colonized implicitly challenge the

\[\text{I^4 d. at 58.}\]


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supremacy of colonial rule because “why do they not want to be like us?” Hence, the colonized must seem to partially resemble the colonists in order to establish the ideology that the way colonizers live is the only way to live. However, the colonized group can never be completely assimilated - otherwise, they would be equal to the colonists and there would be no reason to colonize them. If we use Bhabha’s and Said’s analysis, we can see that while Native peoples are promised assimilation into U.S. society through voting if they adapt to a capitalist work economy, in fact Native peoples are punished if they too successfully assimilate.

**To Vote or Not To Vote**

Given the complicity of the extension of voting rights in the logics of extermination, the question remains, should Native peoples vote in United States elections? As mentioned previously, many Native peoples, especially those from the Six Nations Iroquois, have consistently refused the gift of citizenship. Native legal scholar Tom Porter (also Iroquois) has argued that the Citizenship Act was a “genocidal act.”\(^{76}\) Interestingly, he takes a position similar to colonial law makers at the time of the Dawes Act: Native peoples should choose between U.S. citizenship or citizenship within their tribes. Unlike these colonial law makers, his point is not to force Native peoples to assimilate into U.S. polity but to stress that there is a radical incommensurability between claiming U.S. and Native citizenship. Native peoples cannot assert sovereign status while claiming citizenship in the country that is trying to colonize their nation.

Laughlin MacDonald, by contrast, seems to deny any possibility that Native peoples might not want to vote. He views the extension of the this right as a sign of progress countering “the long history of discrimination against Indians [that] has wrongfully denied Indians an equal

\(^{76}\)Porter, *supra* note at 1.
opportunities get involved in the political process.”

As Kevin Bruyneel points out, the Native response to voting covers the spectrum. Some peoples see themselves only as members of their tribal nation. Others see themselves as dual citizens. Some might see themselves primarily as tribal citizens but feel they should vote anyway given the impact of US policies on Indian lands. Given these varied responses, it would appear that one does not have to choose between a Porter approach that would deem any voting in U.S. elections as a betrayal of sorts or one that ignores the status of the United States as a colonial setter state as does MacDonald. That is, many Native scholars and activists who understand the United States to be a settler state, but also feel the need to engage in short-term legal strategies.

However, Tom Porter’s critique should not be dismissed either. As Glen Coulthard has noted, Native peoples’ participation in U.S. elections, even as a matter of political subversion, can alter Native peoples’ perceptions of themselves as members of sovereign nations. One cannot presume that is possible to engage the system without also being simultaneously interpellated into it. And of course, as many Native scholars and activists have pointed out, even those who vote only in tribal elections can still be interpellated into colonial ideologies if the tribal governance systems they support engage in homophobia, anti-Black racism, patriarchy

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77 McLaughlin, supra note at 63, 257.
78 For a fuller discussion on the variety of views about voting, see Bruyneel supra note 44.
79 Glen Coulthard, Subjects of Empire: Indigenous Peoples and the “Politics of Recognition” in Canada, 6 Contemporary Political History No. 4 2007, 437.
or other ideologies inherited from the settler state.\textsuperscript{80} Thus, the pathway forward is not always clear. But it may be possible to strategically engage the U.S. political system without granting it legitimacy. In any case, an analysis of Native peoples' right to vote in the United States is incomplete without an analysis of settler colonialism.

\textsuperscript{80}Scott Lyons, X-Marks (University of Minnesota Press, 2010); Jennifer Denetdale, Chairmen, Presidents, and Princesses: The Navajo Nation, Gender and the Politics of Tradition 20 Wicazo Sa Review Spring 2006, 9.