Supersession and Sovereignty

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SUPERSESSION AND SOVEREIGNTY
Jeremy Waldron

1.
Self-determination—and controversies over self-determination—make up one of the most important themes in the politics of First Nations and in the theory and practice of indigeneity. ¹

I understand that in Australia, the issue of aboriginal self-determination is a matter of continuing controversy, with the Howard government having turned its back on self-determination as a policy aim, with the abolition of ATSIC in 2004, ² but with many academics and activists still opposing the Howard government’s “new arrangements” for mainstream delivery of government services, and pressing for a greater measure of autonomy for indigenous peoples.

In Canada, aboriginal self-determination remains a policy aim and a principle enshrined in the Constitution, though despite some very prominent instances—Nunavut, for example—³ the reality on the ground remains

¹ Advertised as Conquest and Circumstances: Can changing conditions legitimize the imposition of colonial authority?
² University Professor, NYU School of Law.
³ Mark Bennett’s article in NZPIL provides a good overview.

Mark Phillips, “Howard drops axe on ‘failed’ ATSIC,” The Daily Telegraph (Sydney, Australia), April 16, 2004, p. 2: “The Howard Government will immediately axe the Aboriginal and Torres Strait Islander Commission, ending a failed 14-year experiment in indigenous self-determination. Prime Minister John Howard said yesterday he would introduce legislation into Parliament next month to scrap the troubled indigenous body. ... ATSIC's $1 billion budget would be redirected into "mainstream" programs, with no loss in overall funding for indigenous affairs, Mr Howard said. ... "We believe very strongly that the experiment in separate representation, elected representation, for indigenous people has been a failure," Mr Howard said. "We will not replace ATSIC with an alternative body." Under the Government's plan, a small group would be appointed to advise on indigenous issues. A new model to deliver services to Aboriginal communities will be developed at the next meeting of the Council of Australian Governments. ... Leading Aboriginal figures reacted with outrage to the abolition, but it looks set to be approved by the Senate with Labor indicating it would be unlikely to block the legislation. Labor Leader Mark Latham announced his own plan last month to scrap ATSIC and replace it with a new directly elected advisory body and stronger regional councils. Questioned by reporters, Mr Howard refused to specify the failures of ATSIC. "I do believe that it has become too preoccupied with what might loosely be called symbolic issues and too little concern with delivering real outcomes for indigenous people," he said. ATSIC has been under threat for more than a year. The Government stripped the elected body of most of its budget in July last year, creating a new organisation, Aboriginal and Torres Strait Islander Services, to deliver programs.”

⁵ See http://www.gov.nu.ca/Nunavut/
disappointing to many aboriginal advocates. In the United States, Indian tribes have long enjoyed a degree of self-determination as domestic dependent nations with a sort of limited sovereignty—internal sovereignty—over their own affairs and the governance of their reservations. In New Zealand, the principles of the Treaty of Waitangi purport to guarantee a degree of self-government under the heading of tino rangatiratanga and this remains an aim of many Maori activists; but the urbanization of the Maori people, the extent of integration of the two populations through inter-marriage and the lack of any reserved territories over which political or legal jurisdiction can be exercised, means that self-determination cannot be pursued in the way or to the extent that it is pursued in Canada, for example, or the United States.

And of course indigenous self-determination is not just a phenomenon of First Nation-settler state relations in the English-speaking world. It is also a demand and to a certain extent a reality in some Asian countries, in Central and South America, and among the Sami in Northern Scandinavia. Self-determination is set out explicitly as one of the most important rights of indigenous peoples generally in Article 3 of the UN Draft Declaration of the Rights of Indigenous Peoples. And there are numerous books and articles arguing in the legal literature arguing forcefully and in very general terms that “[t]he right of self-determination is vitally important to indigenous peoples, … [being] closely linked to cultural survival, economic development, and the realization of other basic human rights”.

The demand for self-determination is backed up by all sorts of reasons and arguments, some of them having to do with culture and language survival, some having to do with the principle of susidiarity, some of them having to do with the atrocious record of central state or mainstream

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7 In Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831), Chief Justice Marshall characterized Native American tribes as “domestic dependent nations” over which the U.S. government bore responsibilities akin to those of a guardian. See Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). In Worcester v. Georgia, Chief Justice John Marshall characterized the Cherokee tribe as "a sovereign nation [with rights] to govern themselves and all persons who have settled within their territory." [Worcester v. Georgia, 31 U.S. 515, 540 (1832)].

 provision of services to indigenous communities, some a simple matter of a people wanting to be in control of its own destiny.

In this evening’s lecture I want to focus on just one line of argument put forward in favor of indigenous self-determination. What I want to focus on is the case that looks backwards to a pre-existing situation of sovereignty and self-rule and argues from the historic injustice of the events in which that was taken away 150 or 200 years ago.9 For the purposes of this evening’s lecture, then, I am interested not so much in the forward-looking consequentialist arguments for self-determination, but in the backward-looking argument for some sort of return to self-rule that was illegitimately abrogated in the eighteenth or nineteenth centuries.

In principle, the backwards-looking argument seems to make an excellent case. In many places in the world—including Australia—European settlers arrived in territories that were already populated and they abrogated and suppressed long-standing political and social structures replacing them with their own colonial institutions. Assuming this was done wrongfully, that the new structures lacked legitimacy when they were established and that this legitimacy deficit has never properly been remedied, does it not follow that there should now be some sort of transformation of the imposed regime to reflect our awareness of the injustice of its initial establishment, our sorrow at that injustice, and our determination to do something about it?

The success of the decolonization movement in Africa, Asia, and the Pacific can be read as a more or less literal application of this line of argument. In a similar way, the literal application of this argument looks to something like a restoration of aboriginal sovereignty in New Zealand or Australia, after a long period of what amounts to illegitimate colonization.10 What was illegitimately taken away by force and fraud was the right to exercise sovereignty and, morally speaking, that sovereignty remains in existence as a matter of entitlement. So if we were to pay proper attention to historic entitlement, we would stop acting as though the rights of the settler regimes were beyond question and begin acting as though the right of indigenous self-rule still existed as it existed in 1790 or 1840 or whenever the events complained of took place. Now, it might be impractical or politically impossible to simply revive aboriginal sovereignty and cast...
Crown sovereignty aside, but—so the argument runs—that should be seen for what it is: a purely practical argument. Morally, the burden of proof would have shifted. It is the hypothesis of aboriginal sovereignty that occupies the high moral ground, and it is the sovereignty of the settler state that has to plead for extenuation and survival on nothing more elevated than a purely pragmatic desire to avoid disrupting the status quo, however disreputable its origins. Proposals for indigenous autonomy or self-determination would then be put forward, not in a spirit of pleading from a position of weakness, but in the indignant tone of “Why not? How dare you resist even this, when morally and historically we are entitled to so much more!”

I put it this way, because I want to focus on this line of argument, while acknowledging that it is seldom pushed to its literal extreme. I think we are going to find the argument (and its defects) interesting, both in and of themselves and in their ramifications more generally for political philosophy and the way we think about sovereignty, the basis of government, and the allocation of the right to rule.

On the other hand, I am mindful of the fact, that very few activists and advocates for indigenous self-government embrace the historical entitlement argument in its pure form; very few are arguing for a literal return to full-blooded indigenous sovereignty.\(^{11}\) Indeed, many say that “the rhetoric of sovereignty is ... a serious impediment to the ... resolution of indigenous rights.”\(^{12}\) Or they say that traditional ideas about sovereignty are outdated anyway, and they can be “discarded for indigenous equivalents that emphasize an autonomy both relative and relational.”\(^{13}\) Mostly, talk of historical rights of sovereignty is just part of an argument for a more nuanced and heavily-qualified form of self-determination which basically accepts the overarching framework of the modern state.\(^{14}\)


\(^{12}\) We know that as a legal argument this is a non-starter: courts in NZ and Australia have said they are not willing to countenance arguments attacking the sovereignty of the Crown. Cites.

\(^{13}\) Coates in Living Relationships, p. 76. Coates in Living Relationships, p. 77: “the very word causes [needless] anxiety in countries dealing with a variety of other assaults on national sovereignty.”

\(^{14}\) Roger Maaka and Augie Fleras, "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa," in Ivison et al. (eds.) Political Theory and the Rights of Indigenous Peoples, supra note 21, at p. 93.

\(^{15}\) (I would add, though, that sovereignty as such need not be the issue. One way or another, a right to self-government was systematically abrogated and now the question is why that right—however you describe it—should not revive.)
Some analysts—my NYU colleague, Benedict Kingsbury, for example—draw a categorical line between demands for sovereignty and demands for self-determination. Kingsbury sees these as two quite different kinds of phenomenon in the politics of indigeneity.\(^\text{17}\)

I am less sure about this. I think that talk of historical rights of indigenous sovereignty does play an important role in determining the tone and the assumptions of the case for self-determination. It adds a level of rhetoric.\(^\text{18}\) And it plays an important role in motivating the argument for self-determination. That’s why I said that stuff a moment ago about who occupies the high ground, and where the burden of proof lies in evaluating these proposals, from the point of view of justice and morality. It’s a matter, if you like, of the general shadow that the issue of the unjust abrogation of sovereignty casts upon the whole self-determination debate.

At the level of content, I am interested in what the sovereignty argument adds to the other reasons that there may be for mitigating the unitary sovereignty of the settler state, and also whether it is capable of outweighing some of the considerations that may be adduced against self-determination.\(^\text{19}\)

For example, it is sometimes said that if the government accedes to demands for indigenous self-determination, why should it not also accede to demands for self-determination put forward by other groups—by immigrant communities for example, or purely regional groups? To rebut this sort of floodgates argument, people say: “No—the case for indigenous self-determination is special, because indigenous peoples once had sovereignty and it was taken away from them without their consent,” whereas the members of immigrant groups voluntarily forsook participation in the

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\(^{16}\) Cf. Anaya, p. 102: “Group challenges to the political structures that engulf them appear to be not so much challenges of absolute political autonomy as they are efforts to secure the integrity of the group while rearranging the terms of integration or rerouting its path.”


\(^{18}\) Dan Russell proceeds throughout his book, A People’s Dream, with a moderate case for self-determination of aboriginal peoples in Canada, which is not phrased at all in the resurrection of historic sovereignty; but still he uses the language of historical entitlement here and there: “When aboriginal people finally regain their self-governing authority.” (p. 216—my emphasis).

\(^{19}\) Or if self-determination is a matter of degree—which it most emphatically is—whether the historical claim leads us to push it further (even while we are well short of a sovereignty claim) or take greater risks with it, than we would do if that particular line of argument were not at the back of people’s minds.
sovereign self-determination of their countries of origin and choose to settle in New Zealand or Australia or wherever it is.\textsuperscript{20}

Or think of this. The International Covenant on Civil and Political Rights gives pride of place to the right of peoples to self-determination: according to Article I (1), “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” We know that this begs the question of who counts as a people;\textsuperscript{21} but it is thought that this is much less of a difficulty in the case of indigenous peoples, since they once exercised this right to the point of sovereignty in pre-European times,\textsuperscript{22} and it is only the brutality and injustice of colonial incursions, and not the inherent vagueness of their status as a people, that has led that claim into abeyance over the past century or two.\textsuperscript{23}

So—for all these reasons—I am interested in the validity of the historic sovereignty lines of argument and what it can contribute to the case for some sort of self-determination arrangements for indigenous peoples, a case that may well be arguable on other grounds altogether, but which may take on a certain cast or build a certain plausibility from the historical argument.

\textsuperscript{20} Although it may be the case, as Will Kymlicka suggests, “that, for many people, the basis for singling out indigenous peoples is not their history of mistreatment, but their cultural ‘Otherness’—in particular, their isolation from, and repudiation of, modern ways of life.” (See Kymlicka, Politics in the Vernacular, p. 129.)

\textsuperscript{21} The United States takes the position that indigenous peoples are not "peoples" who are entitled to the full panoply of rights associated with the ICCPR right of self-determination. In its 1995 Statement on Article 3, the U.S. stated that "there [are] no international practice[s] or international instruments that recognizes indigenous groups as peoples in the sense of having the legal right of self-determination." – quoted by Graham, op. cit., at p. 393.

\textsuperscript{22} Indeed the phrase “indigenous people” is sometimes defined in terms of peoples who have continuity with the rulers of the territory in pre-colonial or pre-settler times.

\textsuperscript{23} Actually, there are of course very considerable controversies and indeterminacies about the definition and differentiation of aboriginal peoples. Is there a Maori people which demands the right of self-determination or is the demand made in behalf of particular iwi? (See Kingsbury, Competing Conceptual Approaches, p. __, who notes the existence of “some arguments that there exists a single ‘Maori nation’ whose wrongful subordination by colonial power should be rectified as far as feasible in a continuation of the logic of decolonization.” Kingsbury cites M. Jackson, ‘The Crown, the Treaty, and the Usurpation of Maori Rights’ in Proceedings of Aotearoa/New Zealand and Human Rights in the Pacific and Asia Region: A Policy Conference (1989) 17. See also Reynolds on aboriginal national identity, who uses Mill’s definition of “nation”: “A portion of mankind may be said to constitute a Nationality if they are united among themselves by common sympathies which do not exist between them and any others – which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively.” (Mill, ORG).
In its classic form, the argument I want to consider involves something like what lawyers call a *reversion*.

Technically, a reversion is the interest in a piece of land that remains, notionally, with the owner when he alienates some estate or interest in that land in favor of someone else, an interest that returns to the owner on the occurrence of some stipulated event.\(^{24}\) Oscar transfers his land to his nephew Alfred for life and to Alfred’s children, absolutely, on their reaching the age of 18. But if Alfred dies childless or if his children die younger than 18, then the property comes back to Oscar’s possession, and its liability to come back to Oscar on the occurrence of these events amounts to a reversion.

In international law, a similar doctrine is used sometimes to characterize changes of sovereignty or to argue that sovereignty over some disputed territory should be awarded to one state rather than another. The transfer of sovereignty over Hong Kong in the 1990s from Britain to the People’s Republic of China is usually described as a reversion, China resuming its former sovereignty when the passage of a certain number of years brought Britain’s legal interest in the territory to an end.\(^ {25}, 26\)

The issue of reversion arose in a 1998 arbitration between Yemen and Eritrea concerning some uninhabitable islands in the Red Sea. The Ottoman Empire had governed the islands, ever since its incorporation of *Bilad el-Yemen* in the sixteenth century. But when the Ottoman Empire collapsed and Turkey renounced all its claims after the end of the First World War, the islands were in possession of Italy, and were subsequently claimed by Eritrea as successor to Italy’s possession of that part of the world (originally Ethiopia). The Yemeni’s protested claiming that as the former sovereign in pre-Ottoman times, they had a reversionary interest in the islands. The tribunal demurred saying that the continuity of Yemen’s pre-Ottoman title was unclear, as was the standing in international law of the doctrine of reversion.\(^ {27}\) It eventually awarded several of the islands to Yemen but in

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\(^{24}\) Cf. *Black’s Law Dictionary* 5th Thomson West 1999, p. 1345

\(^{25}\) Kevin M. Harris, “The Hong Kong Accord as a Model for Dealing with other Disputed Territories,” *American Society of International Law Proceedings* 80 April 9-12, 1986, 348. In the agreement of 1984, Great Britain did not just agree to cede Hong Kong to the PRC; it agreed to “restore” Chinese sovereignty

\(^{26}\) Another example—Kal Raustiala, “The Geography of Justice,” *Fordham Law Review*, 73 (2005), 2501 at p. 2541: “Cuba retains a reversionary right over Guantanamo if and when the lease is terminated by mutual assent of the parties…. The United States cannot cede Guantanamo to any state other than Cuba, and if the United States exits Guantanamo, the base reverts completely to Cuba.”

doing so, the Tribunal placed the greatest weight not on historical entitlement but on evidence of effective exercise of sovereignty and governmental authority “in the last decade or so leading up to the present arbitration.”

So reversion is a controversial doctrine in international law, but it has been invoked in the politics and theory of indigenous self-determination by Australian scholar Julie Cassidy—a law professor at Deakin University. Cassidy describes it in the following terms:

[t]he right of an ousted sovereign to have sovereignty restored under the laws governing belligerent occupation is derived from ultimate de jure title ... Sovereign rights do not inure in a belligerent occupant, much less an occupant whose entry was unlawful ... The sovereignty of the dispossessed peoples continues, awaiting reversion, despite the loss of territory. ... [W]here people have been forcibly subjugated, their sovereign title continues in abeyance and can later be restored.

In estates and trusts, we do not usually talk of reversion of property that has been wrongfully taken, because we don’t think that the taker has acquired any sort of legitimate interest. But in international law, we may use the concept in this way because even an unlawful occupier acquires a certain status with regard to the territory it. So we may well want to say that when the occupier is forced to withdraw, sovereignty as at the time immediately preceding the incursion revives; and we may say that the regime that was defeated in the occupation has or had a reversionary interest (similar to Oscar’s interest, during the time that it is unclear whether Alfred is going to have children) even while the occupation lasts.


But the Tribunal did say (§123): “There can be no doubt that the concept of historic title has special resonance in situations that may exist in the contemporary world, such as determining the sovereignty over nomadic lands occupied during time immemorial by given tribes who owed their allegiance to the ruler who extended his socio-political power over that geographic area. A different situation exists with regard to uninhabited islands which are not claimed to be falling within the limits of historic waters.”

30 James Crawford, The Creation of States in International Law (Oxford: Clarendon Press, 1979), p. 415: “It must be conceded that whatever the validity or usefulness of reversion as a political claim, there is little authority, and even less utility, for its existence as a legal claim.”


32 Hague Convention, Article 43.
For instance—and this is an example used by Benedict Kingsbury to illustrate the tenor of this sort of argument\(^3\)—when Iraqi forces were expelled from Kuwait in the first Gulf War in February, 1991, the regime that had been in power at the time of the invasion by Iraq (six months earlier) was restored. The restored Kuwaiti regime had the same basis of legitimacy then as it had at the time of the original invasion. Or in another example that Kingsbury cites: "[W]hen Estonia, Latvia, and Lithuania broke away from the Soviet Union in 1991, they claimed simply to be restoring a pre-existing sovereignty that had been illegally interfered with by unlawful forcible incorporation into the USSR in 1940-1941."\(^4\) In both cases, legitimate sovereignty was there—in the wings, awaiting restoration, awaiting the operation of the international law doctrine of reversion.

So the argument goes: why should we not similarly say that the sovereignty of the indigenous peoples of New Zealand, or Australia, or Canada, or the United States, which have equally been the victims of unjust ousters—why should we not say that after all this time, their sovereignty too is there waiting in the wings, as a standing reproach to the sovereignty of settler regimes, awaiting reversion when the world finally appreciates the injustice of what happened in the eighteenth and nineteenth centuries.

\(^3\) Ben Kingsbury in "Competing Conceptual Approaches," at p. 118

\(^4\) Urs W. Saxer, "The Transformation Of The Soviet Union: From A Socialist Federation To A Commonwealth Of Independent States," Loyola of Los Angeles International and Comparative Law Journal, 14 (1992) 581 at p. 690: “the Baltic states constituted a case of state succession because they were officially released from the Soviet Empire, and thus obtained full and universally recognized independence. However, given that they were occupied illegally by the Soviet Union, their achievement of independence in 1991 could also be regarded as an act of regaining statehood. Thus, different rules might apply. Arguing that this constitutes a case of "reversion to sovereignty" [Crawford, The Creation of States in International Law, at 414-16] or "retroactive statehood" implies that these states started from the point where their sovereignty ceased to exist… However, it is doubtful whether this theory has a sufficient foundation in international law to apply to the Baltic states. Arguably, more than fifty years of tight Soviet rule in the Baltic republics and the continuing close ties of the Baltic republics and the other republics interrupted continuity with the Baltic states as they existed between 1918 and 1940. [See id. The doctrine of retroactive sovereignty was primarily applied to countries that came under foreign occupations in the period of 1935 to 1945, a comparatively limited period. See id. at 418-19.] This is particularly true in international law, where, due to a decentralized structure and a lack of international enforcement authority, the status quo often has to be recognized, even if it arose from a violation of international law.” See also Algimantas P. Gureckas, “Lithuania's Boundaries And Territorial Claims Between Lithuania And Neighboring States,” New York Law School Journal Of International And Comparative Law, 12 (1991), 107, at pp. 140-1: “The Allied annulment of all German annexations was apparently based on a conviction that they were accomplished by force or a threat of force and therefore possessed no validity. Thus, although there was no specific stipulation for the reversion of the territories taken by Germany after December 31, 1937, to their previous status, such a general reversion was implied in the principle of the restoration of German boundaries. Indeed, with the unconditional surrender, previous Allied decisions on Germany's frontiers became operative and all affected states immediately took possession of the territories that were under their sovereignty before that date.”
The logic of reversion seems compelling. It contrasts two regimes of
governance, regime A (which once governed a society) and which was
unjustly ousted at a particular time in the past, and regime B which is either
the regime that ousted it or a successor to the regime that ousted it. So, for
instance, in New Zealand regime A might be the sovereign confederated
tribes of New Zealand, or it might be the sovereignty of a particular tribe in
relation to a particular area of New Zealand; the time of ouster is somewhere
in the period 1840-1865, and regime B is the present New Zealand
government, successor to the British imperial authority which ousted regime
A at that earlier time.

Since the ouster was illegitimate, therefore from the point of view of
justice, it is as if regime A were still in place. Of course it does not exercise
de facto power. But nothing has been done legitimately to eliminate its
right to exercise power over the territory, and so regime A remains there as a
permanent possibility and a standing reproach to the illegitimate foundations
of the de facto power of regime B. It is possible that this unjust and
unsatisfactory situation will continue indefinitely. But those who take
justice seriously will hope that it does not last. And they should be ready
and willing to restore regime A to full authority when the opportunity arises.
In fact, such an opportunity has arisen, for in the past few decades there has
been an awakening of substantial and widespread awareness of the injustice
of the original ouster (and other aspects of settlement). We should take
advantage of this awakening therefore to recognize that regime A has, and
has always had, legitimate title to rule the society which it ruled at the time
of the original ouster.

Claims to this effect are heard in Australia and elsewhere. Cassidy
notes that in 1987 the Chairman of the Northern Land Council declared that
“[a]boriginal People are the indigenous sovereign owners of Australia and
adjacent islands since before 1770 … Their Sovereignty has never been ceded ....”\textsuperscript{35} “We have never conceded defeat and will continue to resist this
on-going attempt to subjugate us.... The Aboriginal people have never
surrendered to the European invasion and assert that sovereignty over all
Australia lies with them. ... [W]e demand that the colonial settlers who have
seized the land recognize this sovereignty and on that basis negotiate their
right to be there.”\textsuperscript{36}


\textsuperscript{36} See generally \textit{Standing Committee on Constitutional and Legal Affairs (Austl.), Two Hundred Years
Later}, ¶ 2.6 (1983).
As to New Zealand: in his book *Justice and The Maori*, Andrew Sharp reports claims from the 1980s by Donna Awatere and others which demanded—as a matter of justice—the return of Maori sovereignty, something which had been taken by force and by trickery but never surrendered.\(^{37}\)

Obviously there are differences between (say) the Kuwaiti example, which involved a period of just six months, and the indigenous claims which involve the passage of somewhere between one and two centuries. But there is an array of intermediate cases. The reversion to the Baltic republics involved a passage of almost fifty years, two generations. The Yemeni claim involved the passage of centuries. And we mentioned the reversion of Hong Kong to Chinese rule after 155 years, which is pretty close to the timeline that is envisaged for these indigenous claims.

There is one significant difference between the Kuwaiti case and the Hong Kong case, which I think is very important for our analysis of indigenous claims to reversion. In the Kuwaiti case, the reversion was not just to Kuwaiti sovereignty as a general matter; it involved the restoration of the very regime that had been ousted. This was not the case in Hong Kong. There regime A, which existed at the time of the Treaty of Nanking in 1842, was quite different from the regime involved at the time of the reversion. The one was the imperial Qing Dynasty, a Manchu dynasty, which had ruled China as an absolute monarchy since the seventeenth century; the other was the People’s Republic of China, an avowedly communist regime, which in 1949 had overthrown the regime that overthrew the Qing Dynasty in 1912. So Hong Kong is not an example of regime reversion. Instead—with some qualifications—Hong Kong reverted to the form of government that the Chinese people had set up in the meantime.\(^{38}\) And the same is true of the Baltic examples. There was no restoration of the regimes that were in power at the time of the Soviet occupation. Instead the people of the Baltic states took it upon themselves to set up new regimes on the basis of their sovereign independence. The reversion was to Lithuanian, Estonian, or Latvian popular sovereignty rather than to an *ancien régime*.

In the Hong Kong case, there are additionally huge changes – social, economic, and geographical—that took place over the intervening century


\(^{38}\) Hong Kong is actually an interesting intermediate case, since although we can treat it as an instance of popular sovereignty reversion, there is the issue of lack of self-determination so far as the people of the particular territory were concerned. John W. Head, “Selling Hong Kong to China: What Happened to the Right of Self-Determination?” *46 University of Kansas Law Review* 46 (1998) 283.
and a half: massive changes in population, patterns of settlement, style of economy, social and political expectations. Even in some of the shorter cases, there are changes. Latvia has 29% ethnic Russian population = two or three times the level it had in the pre-war years. And of course in the indigenous cases—there have been massive changes in population, patterns of settlement, style of economy, social and political expectations since the beginning of the nineteenth century in New Zealand, Australia, and North America.

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So that is the argument that we are going to scrutinize. What, if anything, is wrong with it. Well, let me say—first off—that I am not denying that aboriginal peoples once did have political authority over their lands. Sovereignty is a difficult term. But whether we call it sovereignty or not, something in the way of self-government was taken away at the time of settlement.

Nor am I denying the injustice. I am perfectly willing to accept that sovereignty or the power of self-government was illegitimately seized by the British crown and white settler regime in Australia by whatever standards were or are appropriate for determining these matters. Maybe things are more controversial in New Zealand, with the Treaty of Waitangi, and in North America, with a variety of treaty regimes. But let’s grant the injustice of all that too. The problem with the argument is not in its premises.

What do I want to dispute? I want to deny that the fact that something was seized unjustly is itself a sufficient condition for the justice of its return. The justice of the return of sovereignty or any other rights of self-government depends on a variety of factors, many of them relative to present circumstances that differ from the circumstances which made indigenous regimes legitimate two hundred years ago.

39 For present purposes I am prepared to concede with that particular chiefs had sovereignty over their fiefdoms or that the Confederated Chiefs of New Zealand had sovereignty. This is not a Prendergastian argument.

40 I am not arguing on the basis of either the inter-temporal rule or the rejection of the inter-temporal rule—the argument that says that claims to sovereignty and to the legitimate abrogation of sovereignty should be determined by the standards prevailing at the time the action in question took place. I do think there are interesting arguments about this and about what we should say about the anachronistic application of modern doctrines and sentiments. See my discussion in RTPP. But that has never been the basis for my supersession thesis and it is not the basis of my argument today.


42 See Tully, Strange Multiplicity
Some of you will know—and it was mentioned in the advertisement for his lecture—that I have written a number of papers defending the proposition that the effects of historic injustice may in some cases be overtaken by circumstances, and that social conditions may change to render just what was previously the product of injustice.\(^{43}\) Demographic changes, for example, may mean that land cannot be regarded any longer as the heritage of a few, and the fact that it was taken unjustly from that few sometime in the past doesn’t change the fact that property entitlements need now to be adjusted to fit new conditions. I call this controversial thesis “the supersession of historic injustice.”

In the past, I have applied the supersession thesis primarily to claims about property rights, especially land rights.\(^{44}\) You can see this lecture as a way of considering the supersession of historic injustice as it applies to issues about sovereignty and the circumstances in which political authority is seized, abrogated, established, and sustained. The legitimacy of political structures is less a matter of the way they were established, more a matter of their responsiveness to present circumstances. And responsiveness to present circumstances may trump or supersede any claim for reversion to an earlier form or heritage of governance, if that is not in fact capable of solving the problems that need to be solved by government.

In the case of land rights, my supersession argument was based on what I think of as an anti-Nozickian premise.\(^{45}\) Property rights must be in some degree sensitive to present circumstances. Many of us insisted on this time and again in response to Lockean or Nozickian theories of property, quite apart from any impact on indigenous issues, and it really has been quite disturbing to see Nozickian theories revived in an unmitigated form to legitimize indigenous claims.\(^{47}\) Well, just as my position in the supersession


\(^{44}\) Emphasize under this heading that that case is not an argument against compensation for past injustices --an injustice often involves two components—an injury and a continued withholding of what it is that the victim of the injustice has a right to. If you wrongfully evict me from my house, then I suffer the injury and injustice of the actual eviction of the robbery, and I also suffer the injustice of not having the use of my house. The second injustice persists, so long as my house is not returned to me. But if circumstances change in a way that requires a rethinking of the allocation of property in houses, then this on-going injustice may peter out. But still compensation will be owed for the initial injustice and for the continuing injustice of withholding my house form me for as long as I was in fact entitled to it.

\(^{45}\) Cf. Nozick, *Anarchy, State, and Utopia*, Ch. 7

papers might be described as anti-Nozickian, as insisting that historical entitlement be mitigated by sensitivity to current circumstances, so my position on governance might be described as broadly anti-legitimist. Both involve an attack on historical entitlement. Both involve a scrutiny of historical based claims in the light of present circumstances.

4.
The reversion claim can be seen in two lights – either (a) as a claim about a particular regime or (b) as a claim about popular sovereignty.

(a) A claim about regime-reversion suggests that the governmental set-up at the time of the injustice is the governmental set-up that should be restored. (This is what happened in Kuwait.)

(b) The claim about popular-sovereignty-reversion is that those for whom, by whom and among whom government was set up at the time of the injustice are those for whom, by whom and among whom governmental set-up should now be chosen. (This is the Latvian version)

The two are not mutually exclusive; they are often run together. But I’m analytic philosopher, so I want to pick them apart and deal with them one by one.

5.
Let us begin with regime-reversion. In my view, one very important consideration is some assessment of whether the mode of government to which reversion is envisaged continues to be appropriate in the circumstances that have developed since the unjust abrogation of its original powers. Government is both an important and a morally problematic thing; questions about legitimacy reflect the problematic character of its possession and use of a monopoly of force, and those legitimacy questions are answered first and foremost on the basis of its present necessity and its capacity to use those powers for the good of the society it governs.

47 The fact is that conditions now (e.g. size of population, nature of governmental responsibility) are radically different from those that obtained at the time the settler regimes were (unjustly) set up. This affects what property rights can be regarded as legitimate, and I am arguing today that it also affects what modes of government can be regarded as legitimate. What was previously an unjust regime may now be just in light of the new circumstances. Good-hearted responsiveness to historic injustice is not enough; we must pay attention to the relation between the circumstances that framed the historic injustice and the circumstances we are dealing with today.
So consider the following scenarios:

(1) Regime B is a unified state governing an extensive territory, whose inhabitants are accustomed to thinking of themselves as a single nation. Regime A, which centuries ago was unjustly ousted by regime B, consisted of a number of petty kingdoms often at war with one another. Does recognition of the unjust ouster require reversion from a unified state to a plurality of petty chiefdoms? 

(2) Regime B is a modern bureaucratic regime, with an extensive state apparatus devoted to the maintenance of public health, public education, economic infrastructure, and the facilitation of large scale economic activity. Regime A, unjustly ousted two centuries ago, was a regime which made rudimentary provision for war but very little else. It took no responsibility for the general subsistence, health and well-being of the population, beyond elementary protective services. (For the most part, particular households took care of these matters.) Does the argument for reversion require the dismantling of the modern state apparatus and a return to the more limited scope of governance represented by regime A?

(3) Regime A was a monarchy, in which government was regarded as the patrimony of a particular family, who treated governmental power as an opportunity to accumulate rents from all economic activity in the society, rents which were then devoted to personal and familial prosperity. Regime B is a modern state that also taxes economic activity, but does so on a non-patrimonial basis. Suppose as before that A was unjustly ousted many years ago. Does recognition of that injustice provide any reason for dismantling modern fiscal arrangements and replacing them with patrimonial arrangements?

In my view, the reversion argument fails in all three of these scenarios. Why?—because there is more to the legitimacy of any form of government than an assertion that it was legitimate in the past. As I said, a claim to rule is always problematic and it doesn’t get past first base (so far as legitimacy is concerned) unless it presently embodies a viable and

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48 Cf. Hurst Hannum, Autonomy, Sovereignty, and Self-Determination, p. 454: “the prospect of 5,000 homogenous, independent statelets which define themselves primarily in ethnic, religious, or linguistic terms is one that should inspire at least as much trepidation as admiration.” – quoted in Henry Reynolds, Aboriginal Sovereignty: Three Nations, One Australia (St. Leonards, NSW: Allen and Unwin, 1996), p. 175.
appropriate mode of governance for the society in question. If it does not then it has not continued as legitimate-in-principle since the time of its unjust ouster, and it has not in fact—despite the ardent claims of its adherents—remained available (morally or practically speaking) for reversion as soon as the injustice of its ouster was acknowledged.

The disparity I am envisaging in my scenarios as between regimes A and B is not a minor one. It is not a question of Thatcherism versus welfarism or anything like that. I have in mind massive differences in governmental structure and responsibility. I am thinking of differences of the sort that Max Weber traced in his great work, *Economy and Society*, such as the distinction between a bureaucratic regime and a war-lord’s household, or between modern fiscal administration and patrimonial tax-farming, or between a form of government organized around the idea of public goods and public structures versus a mode of rule which “regards all governing powers and the corresponding economic rights as privately appropriated economic advantages.”

I am talking about very gross differences of structure, function, and responsibility that in the case of regime B answer to the complexity of the economy, the density of civil society, and the character of the embedded expectations that people have so far as the workings of law and government are concerned. I am not a Marxist but I assume that variations in the structures and functions of the legal apparatus respond to changes in social and economic conditions and in the associated character of governmentality, i.e., the reciprocal provision and expectation associated with governance that is a key element in real-world legitimacy.

Again, I am not assuming that at the time of the ouster, the replacement of regime A by regime B was justified on account of regime A’s structural or functional inadequacy. In many of the colonial cases we are considering, the colonial regime—though part of a more extensive imperial apparatus—was also pretty rudimentary, by modern standards of administration. I am assuming that there is some important practical disparity between regime A and regime B at the present time—that is, at the time at which the reversion is envisaged. The cases I am imagining compare regime A as it was in, say, 1840 with regime B as it is in 2006. That’s hat the logic of regime-reversion requires us to consider. But it is

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50 Judgments to this effect will be controversial. That’s OK. The points I want to make in this lecture have to do with the inescapability of judgments like these in determining whether the reversion argument is viable. What they show is the inadequacy of the reversion argument in the way it is presented.
perfectly possible that for a considerable portion of time after 1840, reversion to regime A would have been appropriate.

The bearing of these examples on the case of indigenous sovereignty claims ought to be obvious. The societies that are the subject of these claims have changed massively, both socially, structurally, politically, since the time when the unjust events complained of took place. Different styles and problems of governance have emerged, different things are expected from government, certain things are no longer tolerated from government.

There are a number of possible responses to this critique of regime-reversion:

(1) We might say that all this is just another way of making the compromise point. Everyone agrees that the reversion argument has to be compromised for the sake of practicality. Most of the schemes and claims that I referred to at the beginning of this lecture are envisaged as very limited claims. And it may be thought that those limits sufficiently respect whatever power there is in the points about regime-types and regime-reversion that I am trying to make with my outlandishly exaggerated examples.

But the criticisms I am making actually undermine the reversion argument, they don’t just reflect the pressure on a valid argument of points external to it. The reversion argument only works if regime A is an appropriate mode of governance now (and has remained so since the injustice). If it is not, then the reversion has no grip whatsoever, for there is no appropriate mode of government to revert to. There is not even a prima facie case for reversion in my three examples. Everything becomes a forward-looking discussion, where of course compromise among various considerations will be the name of the game.

(2) A more sophisticated response goes as follows. OK, so maybe a regime of type B is more appropriate now than a regime of type A. But if regime A was unjustly ousted, then its restoration would give regime A a chance to change and develop autonomously into something with the sort of characteristics that regime B envisages. Surely indigenous groups have a right to change (and control the change of) their governance and sovereignty structures to suit modern conditions and the needs and demands of their members. 

Restored tribal government could evolve into national or federal government; a restored war-lord state could develop bureaucratic institutions; restored patrimony might resolve itself into a modern Weberian

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fiscal state; and so on. For a hundred years or more political and structural change has been imposed on the society; now with reversion to the society’s original sovereign(s), then it or they can manage the process of modernizing the state. I think this takes us to popular-sovereignty reversion, which I will talk about in a moment. But first a couple of points about this line of argument.  

First, we must not forget that self-determination often involves a celebration of traditional forms of law and governance—the protection of the integrity of immemorial political culture and political formalities, and so it may not always be obvious that what is desired as part of indigenous self-government is movement towards a new type of regime. The fetishization of culture, including political culture can be a principled impediment to evolution and change.

Second, there is a question about whether society can afford to await this process of development to an appropriate kind of polity. Maybe the responsibilities of government are too compelling to permit us to dismantle structures that do perform in the hope that others gradually will grow up that are capable of doing so, but in a distinctively indigenous way. Here’s an analogy: maybe it is like dismantling the existing fire brigade, and hoping that no modern industrial fires break out, while traditional fire-fighting arrangements appropriate to an utterly different pattern of building and economic activity evolve into modern forms. It is part of my claim in this lecture that, even in the politics of indigeneity, we have to understand sovereign governance in functional terms—I think Julius Stone would have approved of that.  

Sovereign government operates more like a fire brigade than like a family or tribal patrimony.

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52 Second, there are issues of whether a reversion to traditional forms of government, to enable them to develop into modern forms, really represents a victory for all indigenous people. Remember the controversy in New Zealand about whether Treaty rights and reparations inure to the benefit of all Maori or only those—certainly not a majority—who happen to maintained their links to particular iwi.

53 Cites?
6.

Though some indigenous claims look to regime reversion, it may make more sense to think in terms of the reversion of popular-sovereignty rather than a particular type of governmental structure. A *people* was deprived of the right to rule themselves; rule by others was foisted upon them; now that the injustice of that has been recognized, it is appropriate to restore to *that people* the constitutive right of self-government that they had, and that from a moral point of view, they never lost. Armed with that right, it is for them to figure out the kind of regime they want, or the kind of changes that are necessary—if indeed changes are thought necessary—to bring their traditional mode of governance up to date.

Well, here again we have to draw some distinctions. When we describe a people as sovereign, we usually do so in relation to a territory which they are sovereign over. Now if we are talking about a particular people as entitled, after many years, to be regarded as the popular sovereigns of a certain territory, then—on the sort of functional approach—we have to consider what has happened to that territory during the time in which their sovereignty was in abeyance.

One can imagine certain literal changes to the land itself—it may have disappeared, swamped by global warming, or the natural frontiers which divided it from other lands may have changed. But the primary changes will be social and economic. Demographic changes will be particularly important, when we are talking about popular sovereignty. The land may now be inhabited by a greater population than previously, or inhabited by a population that has much denser contact than previously with other adjacent populations. There may be different patterns of ancestry and ethnicity, different patterns of settlement, different patterns of production and subsistence, different patterns of interaction, and of course arising out of all that, different kinds of dispute to be resolved or prevented by legal mechanisms.

How should we think about this? Suppose the land is now inhabited by the descendants of settlers who are not members of the group said to have popular sovereignty over the land. Then the character of the claim to popular sovereignty has changed. Previously, it was a right to rule the land, a right that inhered in a people who collectively comprised all the inhabitants of the land. It would have a Rousseauian character: no one would be subject to the popular sovereign who was not also a member of it.\footnote{Rousseau, *Social Contract.*} But now, if there are (say) a million descendants of settlers and a million
members of the group which is said to be entitled to sovereignty, then a reversion to indigenous popular sovereignty takes on a different moral hue. It is now inherently a right to rule over others, and one would think that a right to rule others cannot necessarily be legitimated on the same basis as a right to exercise Rousseauian governance where the rulers and the ruled are on and the same.

Some nationalists do not flinch at this consequence. They are happy to accept that a large portion of the population is no longer treated as part of the “We, the people” that determines the form of government that they are subject to. Latvia, for example, regards most members of its very substantial ethnic Russian minority in that light. And some indigenous advocates, too, are prepared to embrace this conclusion. Andrew Sharp reports that Donna Awatere in the early 1980s insisted that Pakeha be regarded as more or less unwelcome visitors, resident aliens. Just as Waldron, a resident alien in the United States, has no right to participate formally in American politics, so pakeha have no inherent right to participate formally in determining the constitution of Aotearoa.

Alternatively, the claim may be weaker—we may understand reversion to popular sovereignty not so much as a right to determine the basis of rule in a territory (which is also inhabited by others), but instead as an inherent feature of a people, considered quite apart from any land or any relations with others. An indigenous people may claim sovereignty over themselves, and insist on a reversion to that sovereignty when it has not been justly surrendered.

We can think of this by analogy with the Lockean individual of classic liberal theory. Each individual person is born free and is entitled to govern himself and is not naturally subject to anyone else’s sovereignty: “…no one

55 “In 1991, ethnic Russians joined ethnic Latvians in voting for independence, trusting in promises of equal rights. But fearful of being swamped by ethnic Russians, Latvia passed citizenship laws that excluded most ethnic Russians from automatic citizenship. Under pressure from the European Union, which Latvia joined last year, the citizenship process has been made easier, but there are still 440,000 non-citizens (down from 700,000 in the early 1990s).”-- Stefan Wagstyl, “Peacetime collaboration,” Financial Times, May 7, 2005, Saturday FT Weekend Magazine, p. 21. Also consider this: Daniel Williams, “Latvia's Russians: Outsiders Wanting In,” The Washington Post, July 24, 1998, Final Edition, p. A1: “Latvians pride themselves on their reserve, yet Russian complaints easily make them boil over. At the recent conference on integration, speeches were mostly full of goodwill and stressed the need for education and tolerance. At one point, a Russian spectator—a resident since 1946—objected to his status as outsider, saying he regarded himself not as a potential immigrant but as a de facto citizen. He made his remarks in Russian, which set off an emotional response from Vilnus Zarins, a philosophy professor at Latvia University. ‘It’s your problem if you have not learned Latvian since 1946 and do not respect people who have lived here for 4,000 years,’ he said. ‘We hear threats from people who say Latvians have taken something away from them. No, citizenship was given back—to us.’”

56 Sharp, p. 258.
can be put out of this estate, and subjected to the political power of another, without his own consent.”57 And so, also, it may be said, each people is naturally free and entitled to govern itself, and not to be subject to anyone else’s sovereignty without consent, even though this right of self-rule is not anchored to any particular piece of land or to the right to rule over anyone else. This is certainly a much weaker claim, and I doubt that it would appeal much to those indigenous advocates who present themselves as (for example in New Zealand) tangata whenua, the people of the land.

Nevertheless, what the weaker claim conveys is still reasonably important: the idea is that whether or not they have the right to rule anyone else, this people—this indigenous or aboriginal people—never voluntarily gave up the right to rule themselves, and that unalienated right ought to be respected by those who have had the presumption to set up a system of rule in this territory.

You can see the practical force of the claim. Since the aboriginal peoples never consented to be ruled by the Crown or by a settler state, then evidently there is hard bargaining to be done before the settler state can achieve full legitimacy. And it is reasonable (one might think) either that in the course of that bargaining, certain reservations for tribal autonomy might be insisted upon, or, if good-faith bargaining has not taken place, then some modicum of autonomy might be insisted upon as a marker that full legitimacy for the settler state has yet to be secured.

But I still have trouble even with this weaker form of popular sovereignty reversion. My difficulty is not easy to explain because it involves questioning some pretty fundamental assumptions of liberal political philosophy. You see—I am actually not convinced that consent is necessary for legitimate government or for political obligation, either the consent of individuals or the consent of whole peoples. It seems to me to be a mistake—a mistake of Lockean liberal theory in the social contract tradition—to think that being governed, being subject to a legal and political order, is something that a person or people is entitled to accept or reject, at its own free option.

I don’t want to get too deeply into this. But I have become aware as I developed this lecture that it takes us deep into the foundations of political philosophy and exposes some major fault-lines in the way we think about peoples and states.

Popular-sovereignty-reversion insists that a people has no obligation to associate themselves with others in their territory under political and legal

57 Locke, Second Treatise, § 95.
institutions, if those institutions are not theirs. They can withhold their consent if they like, and stand aloof from whatever legal and political arrangements the others set up to facilitate interaction and deal with disputes. They are entitled to do this—and maintain this aloofness for a century or more, except to the extent that they are coerced by de facto power. And even then, their right to dissociate themselves continues; their posture of proud independence can remain in force as a matter of principle as long as they can sustain it and it can be revived at any opportune moment. The argument invites to accept that that this is a reasonable posture. What do we think of this?

Well, it is certainly a fair posture by the standards of liberal political philosophy. But looked at from the point of view of real life, it is a fantasy. It is certainly not how law and the state present themselves to us. Whatever the fantasies of Lockean theory, Englishmen who came to these lands were not subject to Crown authority because they had agreed to be, but because they were born into a particular jurisdiction and had an obligation, not conditional on their consent, to fall in with existing legal and political arrangements.

And even at the level of abstract theory, there are dissenting voices from the Lockean view of consent as the basis of obligation, voices that present government and submission to law as a moral necessity, not a matter of choice or option. John Rawls uses a social contract device to figure out what justice requires in a modern society, but he does not use the social contract to explain political obligation: he says instead that we have a natural duty to set up, submit to, and play our part in institutions that are capable of doing justice in a territory. 58 John Finnis—Australia’s contribution to natural law jurisprudence—argues in his book Natural Law and Natural Rights that authority/governance is an urgent practical necessity in human affairs—its necessity, its urgency, trumps legitimist questions about who in particular is entitled to exercise it. 59

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58 Rawls cite (TJ). Many years ago, I associated myself in print with the argument out forward by Rawls against consensual theories of political obligation and in favor of a natural duty to bring into being, to support and to play one’s part in just institutions: see Waldron, “Special Ties and Natural Duties,” Philosophy and Public Affairs, 22 (1993), 3-30.

59 In matters of governance ultimately “it is the sheer fact of effectiveness that is presumptively (not indefeasibly) decisive.” He says that “[a]uthority (and thus the responsibility of governing) in a community is to be exercised by those who can in fact effectively solve coordination problems for that community,” and that we make a serious mistake—a serious moral mistake—if we withhold our acceptance of a regime on the ground that those who can exercise authority have no entitlement to do so, so far as we are concerned. (Finnis, NLNR, p. 247). Finnis criticizes the lawyerly mentality that is obsessed with authorization and entitlement. “The lawyer … when confronted by a claim to a certain status, title, power, or right, inquires after the root of the alleged title; he asks to be shown the conveyance or enactment or
In the political philosophy of Immanuel Kant, people who live in the same territory and who are likely to quarrel endemically about the use of the same land or the same resources have an obligation to set up, maintain, and apply institutions that can determine the answer to their disputes. When you cannot avoid living side-by-side with others, Kant says, “you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of [positive law].”\(^{60}\) The move to civil society is mandatory because people’s use of land and resources bring them into conflict with others in the vicinity and these conflicts need to be resolved juridically.\(^{61}\) So Kant believed that the establishment of a state, among those who shared the same territory, was a moral necessity and if anyone opposed the establishment of a civil constitution or sought to stand aloof from it, no wrong would be done if they were impelled by force to join.\(^{62}\)

Now it may be said in response to this, that indigenous peoples have not adopted the irresponsible posture I am suggesting: they have been perfectly happy, all along, to share political and legal institutions with those in their vicinity and to provide for the adjudication of disputes between them and the settlers. They have always made their own institutions available for this task, and until it became hopeless because of the power and presumption of alien institutions they were prepared to insist—in exactly the spirit of the Kantian strictures—that newcomers submit to their institutions as well. That was certainly a fair response at the time the unjust suppression of their own institutions took place.

But now here we all are in 2006, and the question is whether that posture of insisting that all land and resource disputes be resolved by dormant indigenous institutions remains reasonable. Given the scale, the intricacy, and the density of interactions, the complex an elaborate


\(^{61}\) Ibid., §44, at 124 [6: 312]: “[H]owever well disposed and law-abiding men might be, . . . individual men, peoples, and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it and not to be dependent upon another’s opinion about this. So, unless it wants to renounce any concepts of Right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law.”

\(^{62}\) Idem. See also JW, “Kant’s Legal Positivism,” 109 Harv. L. Rev. 1535. See also id. § 8, at 77 [6: 256]: one must “be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another’s to enter along with him into a civil constitution.
arrangements of modern state and law seem to be required for the resolution of disputes, the administration of law, and the provision of services. The legal system that are called for, on Kantian grounds, is a legal system that has grown up along with the nature of the interactions and disputes it has to address—the interactions and disputes that modern society and modern economy throws up—and it is institutions on that scale that we are required (on the Kantian argument) to submit to and support.

Sure it is true that the legal system of the modern settler state got itself into that position of ascendancy through trickery, force and injustice: and that may seem unfair to the former indigenous state. But part of what I want to emphasize—part of the fundamental reorientation of liberal political philosophy that is called for in this regard—is that we should cease regarding the law as somebody’s law (so that it becomes a question of fairness whose law should do this particular work), and see it more in the light of a functional apparatus that is just there and available in a territory, not the possession or patrimony of any particular person or people. As I said before: sovereignty, state, and law should be seen as less like a family firm, more like a fire brigade—a functional necessity, not a cultural patrimony. We set up and fund a fire brigade to respond to the kinds of conflagrations we expect under modern conditions; we choose it on the basis of matching capacity to circumstances. We don’t choose it on the basis of heritage—the traditional red fire engine, the ancestral jobs for firefighters grandfathered in from long ago. If its services are made available to all, it doesn’t matter whose fire brigade it is, or whose traditions its matches, or who set it up or how; what matters is that we have it and it works.

I realize that this tends to undercut not just liberal consent theory, but also the whole nationalist conception of a state as the entitlement of a particular people, on the basis of national or ethnic commonality. If you are still attracted by that ideal—and I ma sure many of you are—then you will not find this part of my lecture convincing. But I have become persuaded that this way of looking at the world is fundamentally misconceived. I don’t think that that we should think of law or government as designed to protect or nourish a particular culture or way of life. States and legal systems are needed for those who, because of their proximity in the same territory, are likely to be in endemic conflict with one another, and it is this that forms the basis of the Kantian position that one is not entitled to withhold one’s support and compliance from a state just because it is not the state of one’s ancestors.

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63 Mill on nationalism.
Well—all this has taken us much deeper into the foundations of political philosophy than you might have expected in a lecture of this sort. Perhaps that is inevitable in any discussion of indigenous self-determination. In his excellent book, *A People’s Dream: Aboriginal Self-Government in Canada*, Dan Russell observes that the whole issue of indigenous self-government raises fundamental and quite abstract questions of political philosophy:

Political theorists might wish to take advantage of this unique opportunity to examine matters related to social contract theory. Philosophers such as Hume, Rousseau, Mill, and Rawls have developed theories within purely hypothetical contexts, but Aboriginal self-government presents a unique opportunity to examine such matters in a more pragmatic setting.64

I think Russell is right about that and I think of myself in this lecture—and in some of my other writings on these issues—as taking advantage of this unique opportunity.

7.

Let me conclude with a couple of mitigations. First, the argument I am making is not an argument based on pure prescription. F.M. Brookfield remarked once that “though Crown sovereignty over New Zealand may have originated in usurpation, the passage of time had endowed it with legitimacy.”65 But I am making no claim about the passage of time *per se*. Both with regard to land and with regard to sovereignty, I am talking about the impact of changes in circumstances—contingent changes in circumstances. Where those changes have not taken place, or where they have taken us in a different direction, then for all that I have said the revival of aboriginal sovereignty may well be justified on reversionary grounds.66

Secondly—and this is very important—there is no reason why criticisms I have made of the sovereignty argument should undercut or have any impact on recognition of customary title. People sometimes think that

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64 Russell, *A People’s Dream*, p. 211.


66 Notice that my examples in section 4 are all unidirectional. They all assume that despite having been established unjustly, regime B is an improvement on regime A. But we could equally imagine cases where the opposite is true—where the unjustly imposed regime is worse than the one that it ousted. In these cases, perhaps the reversion argument *would* work.
an attack on indigenous sovereignty is necessarily an attack on customary title. This is not the case. There may be other reasons for casting doubt on customary title but not in anything I have said this evening.

Here’s the point. The fact that a regime may be inappropriate as a basis for government now (either on account of its structure and function or on account of its popular sovereignty base) does not mean that laws or customs dating from the time when it was in force do not have present effect. One can accept that the past acts of regime A create rights which constrain regime B, even though no reversion to regime A is possible or desirable.

Some of you will be familiar with Oliver Wendell Holmes’s great lecture “The Path of the Law.”67 Towards the end of that lecture, Holmes complained that it is obscene to have no better reason for a common law rule than that so it was decided in the time of Henry IV. But still he applied the ancient common law rule (about conversion ab initio) dating from the fifteenth century in Commonwealth v Rubin,68 even though of course any reversion of Massachusetts to the rule of Lancastrian monarchs would be unthinkable. Sovereigns establish rights that last longer than themselves; and the fact that the sovereign does not last doesn’t mean the particular rules or property rights do not last.69

8.

It is time to finish. One of the things that was drummed into me when I studied logic and the philosophy of science as an undergraduate at Otago University was that a faulty argument is not redeemed by the sheer weight of other arguments associated with it: two bad arguments do not make a good one. Equally, I do not at all accept that a flaw or a fallacy in an argument matters less if the argument is not being pushed to an extreme. If an argument is fallacious, it supports nothing; not even a prima facie or a moderate version of what its conclusion purports to be.

On the other hand, I also learned in my logic classes that a theory or a proposition is not discredited simply because one of the arguments put

67 citation

68 165 Mass 453 (1896).

69 Equally the fact that management of customary property or other collective property requires something like self-government is not affected by my arguments. There is a delicate distinction between territorial sovereignty and collective property. But the view that something like regional autonomy is required for the management of collective or tribal property is a quite separate line of argument for self-determination and not on which my argument evening has cast any doubt.
forward in its favor is shown to be weak or fallacious. That applies here. The fact that the argument based on reversion to an historic aboriginal sovereignty does not work, the fact that it embodies a flawed political philosophy, does not by itself discredit the principle of aboriginal self-government or self-determination. As I said at the beginning there are many arguments for this, and some of them may be stronger than the argument we have examined. If time permitted I would have something to say about some of the others as well—particularly about the desirability of cultural or language survival as a legitimate aim of public policy. But I have leady gone on too long. In my view, the argument based on sovereignty as an historic entitlement of aboriginal peoples is a distraction in the argument about self-determination. I hope I have done something to remove that distraction so that the real issues for and against some measure of self-government for indigenous peoples can be examined and debated in a forward-looking way, less burdened by the weight of history than the argument that I have been examining.