"What Are the Outer Boundaries of American Indian Sovereignty?"

According to James Youngblood Henderson, law is "the frontier line between power and imagination."[1] For purposes of this workshop, Henderson's claim might be rephrased more strongly: law is the point at which imagination and coercion meet, and the legal concept of sovereignty is the pinnacle of this meeting. At one level, this statement is obviously true: legal systems exist only in the minds of those who direct their coercion or tolerate such direction, and they must necessarily change when the vision of social life held by those minds changes. Yet at another it is an overstatement, because imagination must always be appropriately tethered to possible human actions where legal structures are concerned.[2] In general, we might say something like this: our legal imagination is always narrower than the bounds of the possible, but the possible is not always what our imagination might wish. In this paper, I want to consider the balance between the imaginable and the achievable in regard to patterns of authority within North America and elsewhere.

This paper is intended as an extension of my previous work within the field of political philosophy. In 2008, I published a book entitled *Ownership, Authority, and Self-Determination* which drew on theories of political obligation, state territoriality, and democratic decisionmaking to evaluate the moral status of secessionist claims from stable democracies.[3] The book gave particular consideration to possible secessionist claims by American Indian nations in the United States and Canada, and by similarly-placed Aboriginal groups elsewhere in the world (e.g. Australia). The reasons for this interest may be obvious: these groups were integrated politically against their will, often by mechanisms that ignored their pre-existing legal (or quasi-legal)[4] institutions, and in ways that were frequently contrary to the laws of the acquiring country as well.[5] This raises obvious questions for those interested in the character of morally justified sovereignty. Can political authority legitimately be acquired through force and fraud, or is some higher set of standards required? Do primarily backward-looking standards matter when evaluating legal arrangements, or concerns of prospective justice instead? Must political authority be justified by the consent of the governed, or does it rest on some other basis? These and other questions related to them structured the inquiry. My conclusion in the book was that *as a matter of principle* Aboriginal nations do seem entitled to the chance to decide their own future status, including to choose full legal separation if they so desire.

In this essay, I want to consider the degree to which this choice might be within the range of the possible, rather than simply the imaginary and illustrative (both time-honored goals within the arena of political philosophy). It should be obvious that it will be impossible for such groups to exit from continued *interaction* with the surrounding country in most circumstances, since

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[1] James (Sakej) Youngblood Henderson, "Postcolonial Legal Consciousness," *Indigenous Law Journal* 1 (2002): 1-53, at 26.

[2] I have considered the danger of too-free imaginings elsewhere, for example in Burke A. Hendrix, "Political Theorists as Dangerous Social Actors," *Critical Review of Social and Political Philosophy* (forthcoming) and Burke A. Hendrix, "Where Should We Expect Social Change in Nonideal Theory?" (unpublished manuscript on file with author).

[3] Burke A. Hendrix, *Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims* (University Park: Penn State University Press, 2008).

[4] I use the term "quasi-legal" to stand in for existing debates about rules for social organization count as law without strongly articulated institutional mechanisms for authoritatively creating new laws. My own inclination is to believe that such systems of rules do count as law in the relevant way, but I see no reason for entering the dispute here.

[5] For a discussion of legality and illegality in the United States in regard to territoriality, see e.g. Russell Lawrence Barsh, "Indian Land Claims Policy in The United States," *North Dakota Law Review* 58 (1982): 7-82, at 8-9.

Aboriginal territories are usually small and would usually form enclaves within the surrounding state.[6] But legal separation is substantially different from the severance of social and economic interactions. Rather, it entails the mutual willingness of divergent legal systems not to interfere overmuch in one another's affairs – to imagine the boundaries of their application in one location rather than another. The question, then, is whether full legal sovereignty for at least some Aboriginal peoples currently within the United States or Canada would be meaningful and legally sustainable.

This short essay will proceed as follows. First, it will outline the nature of my argument in the book, given the expectation that only a few readers will be familiar with it. Second, I will outline the conception of full sovereignty envisioned by American Indian scholar Vine Deloria Jr. in the 1970's. Third, I will turn to the evaluation of these prospects themselves. This section will form the bulk of the essay. The essay's conclusion will be that full Aboriginal sovereignty would be legally meaningful in at least some circumstances. Although purely imaginary now, it is not entirely beyond the bounds of the possible.

II. Moral Principles and Political Separation

In my book, I argued that political authority should not been seen as justified by the ownership of territory, nor by consent of the governed in any direct form. Thus, I argued, the history of injustice by which Aboriginal nations were brought within the bounds of existing states does not on its own undermine current patterns of authority. I argued instead that political authority is best seen as justified by the natural duties we all have to enter into legal arrangements that will protect both ourselves and (more importantly) others from violence and other forms of injustice. As may be obvious, this conclusion is a broadly Kantian one. It differs from Kant, however, in rejecting the notion that states are "moral persons" with an inherent integrity of their own. Perhaps most importantly, states justified by natural duties do not have strong rights to territorial integrity. Since the purpose of states is to protect the pre-political rights held by individuals, in principle boundaries should be changed whenever this would lead to substantial improvements in such protections.[7] Given the difficulties of actually undertaking territorial changes, we have good reason to uphold existing patterns of authority in most instances, but these patterns can never be more than provisional in moral terms. Certainly, there is no reason why these patterns should be insulated from forms of change that are themselves orderly and regulated by law.

How might such changes be appropriately structured? As I noted in the book, judgments about state performance are always contentious and uncertain. Nonetheless, it does seem reliably true that states protect some persons better than others, and that these patterns of burdens and benefit will often have a geographical or ethnic component. While one might hope that domestic courts or international institutions would mandate that states perform their role more effectively in such instances, there is no obvious way to ensure that they do so, and many reasons

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[6] This by no means always true, however. The Torres Straights Islanders in Australia, for example, are some distance from the mainland, and could easily orient their political, economic, and social lives toward New Guinea or other island nations if they chose to do so. Much the same could be said of Arnhem Land in Australia – which is largely isolated from the Australian economy in any case – and of areas in the Canadian North which have extensive sea access. Given the oil and natural gas off the coasts of the Canadian north, Nunavut might also be a candidate for "hard" separation at some future point.

[7] For a cogent explanation of the relationship between pre-political rights and specific legal articulations of them, see Loren Lomasky, *Persons, Rights, and the Moral Community* (finish citation).

to suspect that such institutions will be complicit in state ineffectiveness.[8] Given these difficulties, I argued that the people within a given territory are themselves the most reliable judges of their treatment, and that virtually any territorially-concentrated group should be allowed to choose separation if their decision is structured in ways that ensure careful deliberation before any changes actually occur.[9] I suggested that potential secessionists should be required to pass at least two referenda, separated by several years to allow substantial deliberation and contestation.[10] Separatist leaders should be required to have a draft constitution in view before the final vote, so that those involved know precisely what they are voting on. My expectation is that most secessionist movements would fracture between the first referenda and the second, as proposals for the future become increasingly precise during the phase of constitutional construction. Where a separatist movement does in fact succeed, I argued that this decision should usually be dispositive.[11]

This, then, is the general theory of territoriality and self-determination outlined in the book. What might it have to do with Aboriginal nations, given their extremely small size? There are two reasons for hesitance about applying such principles to these groups. The first is the fear of political chaos. If groups the size of American Indian nations are allowed to separate politically, will there be any grounds for preventing the destruction of stable countries entirely?[12] Yet there is nothing implausible with allowing some small groups rights to have that are not generally available to all if we can provide good reasons for this limitation. In the book, I argued that Aboriginal peoples face both unusual burdens and have unusual resources that make them better candidates for such separation than other small groups. Although historical injustices are not by themselves relevant for evaluating patterns of authority, the enduring pattern of mistreatment by the United States and the inherently tenuous nature of self-determination under Congressional "plenary power" are prima facie evidence of continuing vulnerability.[13] Aboriginal peoples also may have special social resources that other groups do not, given a history of self-government and the cultural inheritances that this entails. While special vulnerabilities are probably sufficient for justification, this adds extra weight to the claim that rights of political exit should be allowed to Aboriginal groups before any other small groups. If

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[8] See for example Allen Buchanan's discussion of the "biased referee" problem in *Secession: The Legitimacy of Political Divorce from Fort Sumter to Lithuania and Quebec* (Westview Press: Boulder, 1991), XX.

[9] See for example the argument of the Canadian Supreme Court in *Reference re Secession of Quebec* that acceptable separation would require "a clear democratic expression of support on a clear question." My own argument can be seen as outlining the requirements for actually meeting this goal.

[10] It will probably also be best if they draw on detailed geographical knowledge about the distribution of preferences even before this to draw up boundaries for the new territory. There is no reason to mechanically apply the principle of *uti possidetis* where this can be avoided. See Hendrix, *Ownership*, ch. 7; for an example of how this kind of work might be carried out in a specific case, see Scott Reid, *Canada Remapped* (Vancouver: Pulp Press, 1992).

[11] This is not to suggest that there will never be instances in which the remainder state will be considerably worse off, but my expectation is that secessionists will usually be driven by harms suffered, rather than opportunities for profit. Given the costs associated with restructuring, it will rarely be the case that profit-driven secessions pay over the long term, and this fact is likely to emerge during the deliberations in between referenda.

[12] See the concerns about "infinite divisibility" raised in Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978).

[13] For the distinction between historic injustices and enduring injustices, see Jeff Spinner-Halev, "From Historical to Enduring Injustice," *Political Theory* 35 (2007): XX. Note that I assume that groups of this sort are legitimately entitled to cultural protections at the federalist or sub-federalist level. One of the strongest arguments for this position can be found in Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989); see more challengingly Claude Denis, *We Are Not You: First Nations and Canadian Modernity* (Peterborough: Broadview Press, 1997).

these arrangements succeed, then it may or may not become appropriate to consider whether the possibilities could be extended.

The stronger worry about Aboriginal secession is thus the second one: that such political exit would simply be impossible in any meaningful sense, given the small size of these groups and their location within much larger states, in which they would in many cases form an enclave. One might even argue that the mere prospect is counterproductive: if all that holds back processes of legal and social assimilation at the current time is the law of the larger country, then attempts at separation might result in even greater vulnerability. Thus the real worry about the notion of Aboriginal separation is that it is either unachievable, or that it is both unachievable *and* counterproductive.

III. Nations, States, and Protectorates

What does it look like when American Indian scholars and activists imagine a very wide degree of legal separation? Arguments of this sort have a very long historical pedigree, including for example the 1923 petition by the Six Nations of the Iroquois for assistance from the League of Nations.[14] Basing their argument for international status on treaties signed with the Dutch, French, and British, the Six Nations petitioned for relief from what they described as an "armed invasion" of Canadian troops seeking to enforce Indian Act provisions. The Six Nations were overtly contemplating the prospect of life without Canadian attachments: among their demands was "Freedom of transit across Canadian territory to and from international waters."[15]

Perhaps the most detailed effort to imagine independent Aboriginal political units, however, was that of Vine Deloria Jr. in the 1970's.[16] On Deloria's view, American Indian nations currently within the United States should be given the opportunity to reclaim an internationally sovereign presence, with the United States acting as their "protector" and primary legal interlocutor. According to Deloria, this entails that the United States and Indian nations should interact legally only through treaties that are mutually acceptable to both, and that neither should claim the right to interfere within the legal affairs of the other where such agreements are absent. For Deloria, the best models for thinking about such arrangements were to be found in the long-standing microstates of Europe: "The oldest independent states…are the mini-states of Europe: Monaco, Andorra, Liechtenstein, San Marino, and Vatican City. Each exists in substantial sovereign independence, yet each also has negotiated certain agreements, understandings, and treaties with its larger neighbors. These larger countries have been willing to recognize the small states as sovereign entities and contract with them on specific issues, an example the United States might well examine when deciding how to deal with the Indian demand for sovereignty."[17] Each of these "states" has been, in important ways, strongly dependent upon its interactions with its neighbors (including for its choice of leaders, in the case of Andorra), yet nonetheless has international status and has experienced substantial legal stability over time:[18] "If we can judge from the European experience, the fairness and equity of

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[14] *Red Man's Appeal For Justice*, 1923 (electronic source on file with author).

[15] *Red Man's Appeal*, paragraph 20, subsection 5.

[16] Vine Deloria Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (New York: Delta Publishing, 1974). This book was apparently something of a collective effort, with Deloria joined by Kirke Kickingbird, Fred Ragsdale, and others. This book prompted vehement responses on publication, including by Indian academics. See for example Robert A Fairbanks' review in *American Indian Law Review* 2 (1974): 169-72.

[17] Deloria, *Broken Treaties*, 176-177.

[18] The legal status of these countries is not as uniformly ancient as Deloria's text suggests. While the sovereignty of San Marino purports to date back to Roman times, and that of Andorra and Monaco from the late Middle Ages, the

these relationships is far greater than anything ever enjoyed by Europe's colonies around the world – and probably the best current analogy for the US relationship to the Indian tribes."[19]

For Deloria, this status was justified both on legal and moral grounds. He believed that previous American policy had failed so spectacularly that change was needed, and the most appropriate form of change was the recognition of the national status Indian tribes had always held for certain purposes within American law. The balance of his work was thus spent on defusing likely objections to this proposal. Since many of these objections are likely to occur in response to my own suggestions,[20] it seems worthwhile considering the nature of his defenses.

The most easily defused objection to Aboriginal separation is probably on grounds of simple population size. Unless one is believes that international legal status has been irrelevant for the European microstates, it is difficult to make the case that at least the larger Aboriginal nations within the United States and Canada should be excluded for reasons of population. Liechtenstein, Monaco, and San Marino all have populations under 40,000, while Andorra's is slightly over 80,000.[21] Navajo Nation, in the American Southwest, with an estimated 180,000 residing within reservation boundaries[22] and a total citizenship of 225,000, is considerably more substantial. While no other Aboriginal territories in the United States come close to this total, there are a handful in the 10,000-20,000 range, including Pine Ridge, Akwesasne/St. Regis, Standing Rock/Cheyenne River, Fort Apache, and Gila River.[23] Outside of the United States, Arnhem Land in Australia has a population in the same range, while that of Nunavut in Canada is about 30,000. Aboriginal populations in Alaska and Canada's Northwest Territories form substantial local majorities around which contiguous borders could be constructed, and close examination would probably discover further areas as well. Allowing mild non-contiguity (e.g. in the Dakotas) would open up further options.[24] Given continuing population growth within Aboriginal communities, it seems reasonable to believe that the in-principle acceptance of Aboriginal microstates would remain relevant even if the cut-off point was set at something like 20,000 or 30,000, particularly since the prospect of separation might draw others to the territory who wished to join.

Deloria reasonably argues that the incapacity of these units to defend themselves militarily is not relevant for disqualifying their sovereign prospects. Clearly the European microstates have not survived by force of their own arms, and as Deloria notes very few

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others have more recent legal beginnings. Liechtenstein's independence begins in 1806, while the official international status of Vatican City was established only in 1929. In any case, it is hard to seriously include Vatican City as a "country" among the others on the list, despite its international status.

[19] Deloria, *Broken Treaties*, 177.

[20] In fact, my own argument about the possibilities of Aboriginal separation was strongly shaped by Deloria's view, even if the justification by which I reach this conclusion differs considerably.

[21] Current country information is taken from the CIA's online "World Factbook," available at https://www.cia.gov/library/publications/the-world-factbook/

[22] See the census date reported at http://www.navajonationcouncil.org/NNprofile.htm

[23] With the exception of Akwesasne-St. Regis, these figures are based on data from the 2000 United States census at www.census.gov/compendia/statab/2010/tables/10s0038.xl There are plausible questions about how accurate this data may be, however. While official census date holds that the tribal population of Pine Ridge is slightly over 15,000, for example, the United States Department of Housing and Urban Development puts the Indian population of Pine Ridge at around 29,000. Other data suggest it may be higher yet – see Kathleen Pickering, "Pine Ridge Work Force Study" (2005), on file with author.

[24] Rosebud and Pine Ridge are the obvious candidates, since they already come together at one corner. A larger association with Standing Rock and Cheyenne River also seems natural in geographical terms. Although the political character of the reservations have diverged with time, it is not obvious why this could not be overcome if there was motivation to do so.

countries in the modern world would be able to defend themselves against the United States military if they wished to do so in any case.[25] Nor, as he notes, should one demand that microstates be able to survive economically without intensive interactions with economic actors outside their borders: "The idea (known as autarky) that a nation must be totally economically self-sufficient has been completely discredited in international economic theory and practice…. Total self-sufficiency is neither feasible nor desirable."[26] Deloria's description of the behavior of Europe's microstates is certainly on target: all have survived through economic openness rather than closure.[27] This is not to say that their survival has been easy, but it is to say that it has been possible in ways that it almost certainly would not have been otherwise.

Deloria also seeks to answer challenges that are more specific to the particular circumstances of Aboriginal peoples in the present day.[28] Perhaps most important for present purposes is the profound poverty within virtually all territories having concentrated Aboriginal populations. Indeed, much of the anger at countries like the United States and Canada within Aboriginal communities stems from the profound poverty within these communities, the legacy at least in part of centuries of brutal mistreatment and neglect. Deloria acknowledges the difficulty of escaping this poverty quickly: "It is apparent that for the immediate future the United States will have to continue to appropriate large sums of money to keep the reservation people employed and to provide services for them."[29] Yet he suggests that this should not be a disqualifying factor – indeed, he asserts that it has not been elsewhere: "If economic strength is the criterion for sovereignty, than most of the countries in the developing world would never have qualified in the first place."[30] He thus sees no reason to believe that Aboriginal states should be kept within their present countries simply because they are not yet able to fund their own survival: "It is entirely reasonable, therefore, to consider a form of sovereignty for American Indian tribes in which the United States government would continue to provide necessary economic assistance."[31] Much the same holds true, he argues, for the expertise necessary to operate the institutions of governance: assistance by the United States or international agencies would be appropriate in this case as well, and would be easier than the task faced in many parts of the world, since most Aboriginal peoples are already well-educated by world standards.[32]

Deloria did not believe that all Aboriginal peoples would choose to separate from the countries in which they are now enmeshed, of course. His own view was that a wide range of relationships would be legitimate, based on the varying wishes of specific American Indian groups. After discussing United Nations Trust Territories and American Pacific Island possessions, he suggests that the model of semi-sovereignty held by Puerto Rico may be one of the better solutions. "Puerto Rico…enjoys clearly the optimum relationship. As a commonwealth, Puerto Rico is totally self-governing; its population has US citizenship and is free to migrate to the US without quota. Puerto Rico has non-voting representation in Congress,

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[25] Deloria, *Broken Treaties*, 172.
[26] Deloria, *Broken Treaties*, 172-173.
[27] Unsurprisingly, such openness seems to be strongly associated with success in small territories throughout the world. See for example the ample evidence gathered in Evgeny Yuryevich Vinokurov, *A Theory of Enclaves* (Lanham: Lexington Books, 2007).
[28] Deloria was writing in 1974, but his portrayal remains accurate.
[29] Deloria, *Broken Treaties*, 162.
[30] Deloria, *Broken Treaties*, 173.
[31] Deloria, *Broken Treaties*, XX.
[32] Deloria, *Broken Treaties*, 174-176.

but Puerto Ricans do not vote for President unless they reside in the continental US."[33] For Deloria, it is perfectly natural that Aboriginal nations would have a variety of relationships with the United States: "In the world today sovereignty permits an abundance of different forms of relative dependence or independence, any of which would be available as a model for a future US Government-Indian relationship. Therefore, the proposal advanced in this book and by other Indian spokesmen for a return to the sovereign relationship… has every justification from an international point of view."[34] Despite his advocacy of relatively close bonds in many instances, however, it should not be missed that his position assumes a bedrock of Aboriginal sovereignty from which agreements can be negotiated: if Aboriginal nations are to have interactions with the surrounding state only on the basis of mutually acceptable agreements, then they must clearly maintain ultimate legal sovereignty to fall back on when necessary.

When Deloria made these arguments in the 1970's, there was not yet much talk of the fraying of sovereignty within a globalizing world, nor was there anything like the globalized movement of indigenous peoples that recently brought about the United Nations Declaration on the Rights of Indigenous Peoples. We thus have many more models available for thinking about what self-determination might mean in terms of local autonomy in the present day. Yet these new resources have not in themselves been as informative as they might be, because the fraying of conceptual sovereignty has allowed for infinite hedging about just what self-determination might entitle a group to choose. Consider, for example, Articles 3 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples: "Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." Do either of these articles entitle an Aboriginal people to full legal withdrawal from the surrounding state, from which it can then choose to negotiate consensual relationships or not do so? Does it entitle them to join another country if they so choose (e.g. when they are already on an international border)?[35] It seems clear that it does not – indeed, had it been so intended it would never have received United Nations approval in any case, even absent the resistance of the United States and Canada to the actually-adopted Declaration. The "demise of sovereignty" as an intellectual background thus allows for (intentional) obfuscation of what is being advocated: not sovereignty, but particularized federalism that is intended to achieve specifiable goals.

For at least some Aboriginal scholars and activists, this remains insufficient protection in the absence of the right to choose full legal separation when this seems appropriate.[36] Perhaps

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[33] Deloria, *Broken Treaties*, 182-183.

[34] Deloria, *Broken Treaties*, 186.

[35] There are a number of examples in which the choice of one country or another might be highly relevant. Examples include St. Regis/Akwesasne and the Blackfoot reservation on the United States-Canada border, and Tohono O'odham on the United States-Mexico border.

[36] One of the more outspoken advocates of this position is Taiaiake Alfred, who asserts that Mohawk territories have never been part of Canada or the United States and never will be so long as those states continue to assert illegitimate authority. See for example Gerald R. [Taiaiake] Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Oxford: Oxford University Press, 1995), and Taiaiake Alfred, *Wasáse: Indigenous Pathways to Action and Freedom* (Peterborough: Broadview Press, 2005). For a view that rejects this kind of aspiration to separation, see most strikingly John Borrows, "Seven Generations, Seven Teachings: Ending the *Indian Act*," Research Paper for the National Centre for First Nations Governance (2008), especially 23-27. Available online at http://www.fngovernance.org/research/john_borrows.pdf.

more importantly for current purposes, it seems of importance for those of us interested in sovereignty to be able to take a clear position here. Is it the case that imagining a future something like that of the European microstates for those Aboriginal nations who wish to pursue this would be appropriate? Or is it the case that our imagination should be limited to more stolidly federalist arrangements, in which existing states remain the ultimate judges of what shall happen within Aboriginal territories, subject to perhaps some complaints from the international community now and then when these arrangements seem mistaken in certain of their details?

IV. Imagination, Sovereignty, and Possibility

It is obvious why Aboriginal nations would prefer to imagine themselves as future microstates on the model of Liechtenstein and Monaco, and equally obvious why countries like the United States and Canada have resisted even the milder form of autonomy asserted in the Declaration of Indigenous Rights: sovereignty remains a central conceptual frame for imagining the boundaries and nature of political authority. What matters is not only what the concept contains in a legal sense, but what it *means* on an affective level and where it orients our fundamental thinking. Sovereignty is a word that captures our imaginations (particularly for those who are not lawyers!), and sets in motion a wide range of expected behaviors and valuations. Americans take it for granted, for example, that they should interact with Canada as a foreign country, even though its population is about that of California. Logic might dictate that both Canada and California should be independent of the United States, or that neither should be. But the prospect of Californian separation appears bizarre, while the continued independence of Canada seems obvious. Sovereigns units are imagined to be roughly equal in character for most purposes, even if they manifestly are not. Most Americans have no idea that the population of Ireland is roughly equal to that of Oregon, or that Australia has roughly as many citizens as New York. The former are sovereign countries, while the latter are subunits; one scarcely needs to know more.

From the perspective of American Indian nations, it is easy to see why the experience of European microstates might be an attractive model. These are stable, prosperous countries that seem secure over the long term, within a peaceful continent that shows no interest in forcing them to teach different languages in their schools, or in redistributing property holdings within their boundaries, or in spontaneously terminating their very existence. Nor is it obvious why Americans and Canadians should be particularly fearful of such a possibility once irrational terrors about the loss of the nation's structural integrity are set aside.[37] Switzerland and Austria do not seem overly distressed about the existence of their neighbor Liechtenstein; there is no rage within Italy at the continued existence of San Marino. Canada is not overly bothered by the continued existence of Point Roberts or the Northwest Angle, nor are Americans concerned that Grand Manan falls to Canada rather than itself. Why, then, would a massive country such as the United States be bothered by a few small changes in its territorial and demographic composition here and there? Americans would doubtless scream about the existential threat to their very national existence, but it is hard to see why irrational terror should be given any moral status. It may be that, politically, this is simply an unmovable obstacle that will not go away. But seeing our moral circumstances clearly is important in its own right: if they involve irrational resistance to justified arrangements on our own side, there is value in facing up to this clearly.

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[37] See the cogent arguments about the relationship between territorial imaginaries and concepts of purity and pollution in Barry Smith, "The Cognitive Geometry of War," in P. Koller and K. Puhl (eds.), *Current Issues in Political Philosophy* (Vienna: Holder-Pichler-Tempsky, 1997).

The most serious boundary to Aboriginal sovereignty is thus clearly within the imaginations of non-Aboriginal citizens within countries like the United States and Canada. Nonetheless, it is important to consider to the degree to which Aboriginal social actors may be captured by problematic imaginings of their own.[38] Is it the case that "sovereignty" is too large of a concept to capture the possible bounds of their future political status, because they are too deeply enmeshed within surrounding states that are much larger and wealthier, with legal systems that necessarily cannot be decoupled from their own? Here one must examine more closely what the possible relationships between the United States and Aboriginal political units might look like, if they were once somehow put into place. Would these relationships necessarily result in arrangements functionally identical to those that currently exist, or would they be substantially different in important ways?[39]

Interdependence Sovereignty

International relations scholar Stephen Krasner has argued that sovereignty is best understood when examined along four separate axes, and his distinctions are useful here.[40] States can score highly on one sort of sovereignty, while doing poorly on the others. In some cases, states can far so poorly that it would no longer be worthwhile to regard them *as* a state. Evaluating the general possibilities of Aboriginal microstates is thus a way to gauge their possible legal stability and survivability over time.

The first category of sovereignty Krasner refers to as interdependence sovereignty. That is, does the state have the capacity to regulate the flow of goods, persons, and finance across its borders?[41] It seems clear that Aboriginal microstates could assert little sovereignty in this regard if they hoped to survive after (somehow) coming into existence. All of the European microstates (with the unrevealing exception of Vatican City) have survived by opening their economies strongly to involvement with surrounding countries, and in most instances by opening their borders to large numbers of tourists as well.[42] They have entered customs unions and other arrangements with bordering states, and are strongly reliant on the fortunes of the countries that they border (or, in the case of San Marino, that entirely surround them).[43] For many purposes, their laws are indistinguishable from those of their neighbors, and the citizens of both countries circulate across the border easily. This obviously poses something of a challenge for potential Aboriginal political units, particularly those that would be entirely enclaved within a single

[38] Even if it turns out to be the case that Aboriginal nations cannot reasonably function as independent sovereigns, this in no way absolves non-Aboriginal citizens of these countries of irrationality. If I prevent you from going outside the house on the irrational ground that there has been an alien invasion, I deserve no moral credit if this incidentally prevents you from being hit by a car.

[39] Or at least overall no better at meeting the diverse range of Aboriginal goals. Some arrangements might fare better on one axis than another, such that neither holds overall moral gains. In these circumstances, it might still be worthwhile to allow Aboriginal groups to decide for themselves, since their own relative rankings may differ, but the impetus for doing so would presumably be less strong.

[40] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

[41] Krasner, *Sovereignty*, 12-14.

[42] See the substantial evidence for the requirement of openness among non-sovereign enclaves as well in Vinokurov, *A Theory of Enclaves*.

[43] It is possible that the presently-existing European microstates have survived as they have precisely because they were placed in an advantageous circumstances, although it is not obvious with the possible exception of Monaco that any of them has a strong comparative advantage in economic terms.

country.[44] In some cases, Indian nations would have to maintain a far greater degree of openness than they now do if they hoped to survive economically for any period of time.[45]

Does this mean that the entire prospect of separation should be set aside for those Aboriginal nations who are not well-placed to engage in commerce with multiple countries when needed? If the United States chose to blockade a separatist territory, or even to place high boundaries on goods flowing in or out, it seems unlikely that it could hope to survive for long. There are two questions here. First, would the United States have the right under international law to blockade an independent state in this way? It seems clear that it would not have the right to blockade persons from coming and going (especially not by air), but it is less obvious that it would be legally obliged to allow its citizens to trade. Even if it were legally obliged to allow them to do so under international law, would it in fact uphold this obligation? Here it is hard to say, and much would surely depend upon the character of the interactions leading to separation. Given the expected backlash by American citizens to anything that threatens to alter the country's territorial boundaries, it seems inevitable that unilateral separation would be met with initially hard reprisals. Would these reprisals continue over the longer term? My own suspicion is that they would not, because a number of humanitarian and business groups would react badly to them, so the task would be to ride out the initial wave of difficulty. This suggests that the first candidates for Aboriginal separation, if anyone is actually to undertake unilateral action in this regard, would fare best if they had access to more than one country or to international waters. A single separation that turned out to be relatively uneventful in practice would do much to normalize the process; after that, subsequent incidents would be less likely to seem sufficiently threatening to disrupt business too much. (Agreeing to abide by NAFTA regulations would also be a way of signaling a difficult-to-refuse desire to do business.) Once such trade were allowed by surrounding states, many microstates could probably exploit favorable tax policies and other inducements to maintain a substantial flow of business over the long term.

Does openness mean that Aboriginal political units would be entirely swamped by their interactions with the surrounding state? It seems unlikely that they would, at least in certain key areas of central importance to them. This is obvious in terms of domestic issues like public symbolism, education, social assistance, community planning, and so on. There is no evidence that the capacities of European microstates have been entirely eroded by their extreme openness, and it seems likely that many things of importance could be maintained here as well, particularly for those Aboriginal nations who are some distance from large urban populations (e.g. in the Dakotas) so that interactions involve primarily goods and finance rather than large numbers of persons. Nor would the influx of large numbers of persons necessary undermine the political character of the relevant group: even if they admitted non-citizens, they would not therefore be required to grant them citizenship and consequent voting rights. Presumably they would want systems of naturalization procedures, but they could reasonably be contingent on signs of willingness to assimilate into community life, for example by demonstrating linguistic competence or appropriate kinds of cultural knowledge (e.g. about the Great Law of Peace in Iroquois communities).[46]

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[44] It is important to note once again that this does not describe all potential Aboriginal units: some would lie on the boundary between the United States and Canada or the United States and Mexico, while others would have access to waterways that would reasonably allow them the security of international sea trade (e.g. Akwesasne-St. Regis on the St. Lawrence River), or have ocean access itself (e.g. Arnhem Land in Australia).

[45] Cf. Borrows, "Seven Teachings," 23-27.

[46] See the discussion of citizenship arrangements in Borrows, "Seven Teachings."

It is important to note, however, that remaining willingly within the United States or Canada might allow Aboriginal groups to limit these strong requirements of openness. Aboriginal nations that are willing to remain under the authority of a much larger state are likely to be able to access expertise and financial support that would be available to them in independence only with difficulty. Microstates are always on the edge of financial insolvency if their economic policies are badly chosen, and this puts a heavy burden on them to continually adhere to international best practices – their survival depends upon their capacity to ride out hard times. Within a larger country, Aboriginal nations have far less need for concern in this regard, and insofar as they can expect assistance from their fellow citizens, have less need to continually monitor the pulse of the world economy (and, ironically, that of the state in which they would otherwise be enclaved). It is thus quite possible that separation would actually *reduce* their interdependence sovereignty, particularly when one factors in the loss of their voting capacity within the larger state (limited in effect as it might be), and their ability to access broader social provisions and capacities. I do not think that this is a moral blockade on allowing them the choice, but it does suggest that the effects of legal independence can sometimes be paradoxical.

Domestic Sovereignty

Domestic sovereignty entails the capacity to control the behaviors of persons within one's own borders.[47] This includes both the capacity to serve as the unquestioned and effective source of law enforcement within one's boundaries, but also includes the actual range of choice about what the content of those laws might be. In the latter regard, it is impacted by interdependence sovereignty: insofar as territories must remain strongly open, governments have less range for choice about the specific laws that they will enforce. For the reasons outlined above, this aspect of domestic sovereignty would be substantially limited in certain areas for any prospective Aboriginal microstate.

Somewhat surprisingly, however, the real challenge to the mere possibility of Aboriginal separation lies in regard to law enforcement and other more prosaic elements of domestic governance. Unfortunately, the truth is that the large majority of Aboriginal political units within the United States and Canada are badly governed. This is generally the legacy of long years of oppressive and counterproductive paternalism, along with long-standing failures to provide sufficient resources. Although the United States has officially been dedicated to American Indian self-governance since the Indian Reorganization Act in the 1930's (the perverse reversal of Termination aside), it is only over the last three decades that self-government has actually been anything approaching a reality; in Canada, it is more recent yet.[48] While there is ample evidence that self-government has improved the quality of governance and service provision, building legal and other capacities is an extremely slow process in the best of circumstances, and these are certainly not them.[49] Tribal policing capacities are often extremely limited, and the trumping role of the FBI where felonies are concerned means that these

[47] Krasner, *Sovereignty*, 11-12.

[48] Until the modern era, the United States habitually destroyed Aboriginal governments when they showed signs of competence, on the not unreasonable theory that such governments would resist incursions into their spheres of competence. The most egregious case is surely the American destruction of the Cherokee Nation, both during the period of Removal and, once it had relocated to Oklahoma, during the period of tribal allotment.

[49] For evidence of success, see for example Miriam Jorgensen (ed.), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson: University of Arizona Press, 2007). For processes of governance-building (including interesting first hand accounts), see Eric D. Lemont (ed.), *American Indian Constitutional Reform and the Rebuilding of Native Nations* (Austin: University of Texas Press, 2006).

capacities are in no way oriented to the needs of independence. The European microstates have had centuries to develop effective systems of governance, workable laws, and patterns of expertise to survive and prosper. That is by no means the case on Aboriginal territories within the United States or Canada, or other countries such as Australia. Unsurprisingly, it is this same political incapacity that drives hopes for separation where they exist – populations reasonably (but perhaps incorrectly) hope that they could do better without the interference of Federal governments that have caused such profound harm in the past.[50]

In these circumstances, Deloria is surely right to note that, even in the best of circumstances, Aboriginal nations will need outside assistance for a long time to come. At present, there is a substantial chance that any Aboriginal group seriously pursuing independence would have a humanitarian crisis on its hands in relatively short order, which would probably lead to eventually to intervention by the surrounding state in one form or another. Even if such outcomes were avoided, lack of governance capacity means that tribes would struggle to avoid becoming havens for multiple forms of crime, including drug trafficking. Many already suffer from these problems in serious ways, and they might readily become worse. This is particularly so on reservations with a relatively large territory, where policing is inherently more difficult. Ironically, the very factors that lead some current Indian reservations to appear more "statelike" when seen on the map render them more difficult to govern in practice, as control of persons within the territory eludes the capacity of governmental institutions. The most serious problem facing independent Aboriginal political units would thus be the most serious one they already face: that of protecting their citizens and providing them with basic services and reliable legal tools for pursuing their goals.

The relevant question, however, is whether they are more likely to develop the necessary capacity by remaining in their current political circumstances, or by seeking exit. This depends in part on what kind of support they are likely to receive in independence. Although one might imagine that independence would bring in its train funding and capacity building from international organizations, there is no reason to believe that this would in fact occur – we do not, after all, live in a world where these organizations show up like the local fire department upon need. Would the states from which they had separated provide them with this support? As noted above, Deloria suggested that they were entitled to it, and that there was nothing implausible in such a proposal, given the assistance that the countries already give to developing states elsewhere and the unambiguous debts of honor owed to Aboriginal populations for generations of state failure and active harm. Deloria's moral case is compelling, but would most citizens of the United States or Canada find it so? Here much depends upon the nature of the exit, but it seems unlikely that they would embrace it eagerly. Even if they could be brought to trade freely with the new country and allow is citizens free rights of passage, it is hard to imagine much enthusiasm about continued economic support if framed as a matter of obligation.[51] Nor is it likely that Aboriginal nations would have sufficient financial leverage in independence (e.g.

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[50] There is also a problematic attachment to methods of traditional governance within many Aboriginal communities. This leads to resistance to apparent best practices pushed by outsiders. While virtually all Aboriginal groups recognize that traditions methods of governance cannot exist unchanged in present circumstances, there is little agreement about which elements to retain and which to abandon. These processes will doubtless be worked out over time, but the mistrust created by years of fraud and brutality make this process both fraught and slow-moving.

[51] This is a widespread intuition in regard to what can and should be expected of states. See for example the discussion of enclaves in Zoran Oklopcic, "Examining Choice: Self-Determination, Theories of Secession, and the Independence of Kosovo." Unpublished manuscript (2010), cited with permission.

through comparative advantage in tax law) to fund this development themselves. Unfortunately, economic success requires precisely the kind of state agility that is currently lacking.

Yet the anger within Aboriginal territories is driven by failures that have *already* occurred, and that have continued for a long time: Aboriginal territories have remained under trained and under-resourced after a long time within their current countries, and the improvements that they have achieved have generally been through entrepreneurship and self-organization rather than through governmental fiat. Would an Aboriginal nation with the recognized legal right to full independence have greater opportunities to gain the assistance that they need even absent a sense of obligation by the citizens of their former state? Here matters may depend a great deal on the outcomes of high-risk kinds of political bargaining. Even if the citizens of surrounding states we less than eager to provide assistance for the good of those within the boundaries of the new state, they would also have a strong interest in ensuring that the Aboriginal territory did not become merely a haven for illegal activity. The only ways to prevent such activity would be to wall off all access to the relevant territory, or to offer assistance to build capacity there. The latter is clearly the less expensive and less morally troubling option, particularly for countries that would inevitably hope that Aboriginal territories would choose to rejoin them in time. Thus it seems possible that existing states would end up offering much of the necessary financial assistance and expertise in the end, even if they did not frame this assistance as a matter of compensation for past harms or obligation in some other sense.

At the end of the day, it seems difficult to say with certainty whether Aboriginal political units could in fact maintain the capacity for internal sovereignty over an extended period of time. It is clear that most would struggle mightily in the initial stages at least, and perhaps permanently. Yet it is not clear that they would necessary fare worse than they currently do all things considered, and perhaps more importantly it is not clear that their populations should be prevented from making this attempt even if they are likely to fail in this way. The worst-case scenario seems to be a return to the political status quo, perhaps with a more final kind of Termination looming soon after. Such Termination of a separate status is always a possibility under current circumstances, and the political status quo is itself unpredictable even if self-determination policies are left in place. In these circumstances of present political failure and future uncertainties, it is not obvious that the likely difficulties of ensuring internal sovereignty are sufficient to blockade the right of Aboriginal populations to make the decision for themselves. Risky political choices are sometimes necessary political choices, and it is not obvious that the difficulties of ensuring internal sovereignty are so strong as to overwhelm this decision entirely. It is hard to see that many Aboriginal groups would actually choose to separate after close examination of their possibilities in this regard, but given reasonable expectations about even worst-case scenarios it is not obvious why they should be prevented from making the attempt. At worst, they fail and return to the status quo; at best, they succeed and regain the kind of political independence that more competent states would have provided them with in the first place.

International Legal Sovereignty

Because this paper is already becoming rather long (at least for the purposes of this workshop), and because many of the most serious difficulties have been outlined already, I will spend relatively less time on Krasner's final two categories. The first of these is international legal sovereignty, which consists of the right to be recognized as a sovereign state and to make

contracts and treaties accordingly.[52] Since I am already assuming that the sovereignty of Aboriginal units has (somehow) been legally recognized by surrounding states, I will not address that here. Rather, it seems worthwhile to briefly consider the more literal meaning of international legal sovereignty: would other countries than the United States or Canada recognize independent Aboriginal political units and treat them *as* states?

Given the existence of other microstates on the international scene, it seems likely that they would, even if it seems unlikely that they would do so excitedly. This is obviously the case if these new units were already recognized by their former state as sovereign entities. It seems considerably less likely if they were not, given the obvious stakes at the international level in extending diplomatic treatment only to new entities when necessary. One suspects that at least some other states would grant recognition if the relevant territory chose exit through sufficiently procedural means and managed to pull off a decade or so self-rule, but this kind of bootstrapped sovereignty is difficult in obvious ways. Even if Aboriginal nations were able to bill their independence as the natural result of previous relationships with the larger state (through references to treaties or previous constitutional provisions), worries about international order would often outweigh such arguments, and considerations of power would inevitably do so if the former state insisted that they not be granted recognition.

This does not mean that claims to international sovereignty would be irrelevant even if not fully carried out, however. Even if Aboriginal states were only treated as legally sovereign by their former country on a de facto rather than a de jure way (where international matters are concerned), it seems likely that they would be able to take part in a number of ad hoc relationships with other states that would have some relevance to their political fates. This might be especially important in business or other contractual matters, for example, or in terms of capacity to secure certain kinds of outside assistance or expertise. What really matters is the willingness of the United States (or Canada, etc.) to put limits on its own claims to sovereignty, rather than the positive recognition of outside forces, although this latter recognition would obviously make the former more secure and trustworthy. What this suggests is that countries like the United States could grant effective sovereignty to Aboriginal political units if they so chose without creating larger political shockwaves across the world. What really matters is the sovereign imagination of American citizens and legal structures themselves: are Aboriginal nations necessarily captured inside, or are they ultimately the legal masters of their fate?

Westphalian Sovereignty

Krasner's fourth category is Westphalian sovereignty, which entails the capacity to choose the kinds of governing institutions that will exist within a territory, and the kinds of policies that that the government will pursue.[53] While states that have interdependence sovereignty have the capacity to regulate flows across their borders, and states with internal sovereignty have the capacity to enforce law against individuals within their boundaries, states with Westphalian sovereignty have governments that are sufficiently independent of outside forces to be able to choose policies for themselves. It is easiest to see the force of Westphalian sovereignty as Krasner conceives it if we ask who is able to shape the governmental structures of the state and choose those who occupy them. Are governmental structures substantially induced from outside, even if they are treated as legally independent, or are those who occupy these structures primarily chosen by citizens themselves? We can also ask about the scope of legal

[52] Krasner, *Sovereignty*, 14-20.
[53] Krasner, *Sovereignty*, 20-25.

entanglements with other political units. Has the state, through one means or another, transferred legal control over central aspects of policy on a permanent basis, so that it is now unable to reclaim that authority even if it wishes to do so?

Would Aboriginal political units be able to have Westphalian sovereignty in his sense? Maintaining such sovereignty would clearly be no easy task. In part, this is because they would be forced by even the best of circumstances to enter into a number of contracts and agreements with the surrounding state or other states that would thereafter be difficult to withdraw from. It is not obvious that they would need to give up so much sovereignty that this would obviate its legal importance, however. Perhaps of greater concern is the capacity for outside forces to choose policies either directly or indirectly. If Aboriginal political units did prove unable to secure law and order within their boundaries without assistance, this assistance would doubtless come with a number of conditions, many of which would put dampers on the capacity for independent choice. But there are deeper problems as well, having to do with the economic importance of outside actors to small and financially vulnerable states. If an Aboriginal microstate is to be economically viable, it will have to maintain openness to cross-border flows of goods and money, but it will also have to ensure that at least some key businesses remain located within its territory. Such businesses are likely to exert a very heavy influence both through legitimate channels and through illegitimate ones. The threat of relocation will often be sufficient to create many policy changes, for example, but in a state with a miniscule population strategic donations to different political campaigns are likely to be extremely powerful as well. In these conditions, there is a non-neglible chance that "international" economic actors might simply capture the state, and that they might even bring about changes in basic legal structures that make this arrangement permanent.

More broadly, it would be difficult to keep out involvement by political organizations from the surrounding state, with far deeper financial resources and greater expertise, and there are reasons to suspect that these could in many cases fundamentally shape the character of political debate or competition in ways that would mostly elude the control of those within the society. (Even if they are the only ones with the right to vote, the control of agendas can be achieved from outside, and this means that many essential issues might never even come up for direct consideration.) There are ways that Aboriginal political units could avoid or minimize these difficulties, of course. Aside from standard campaign finance laws and so on, it is also possible that, in some instances, campaigns could be conducted in an Aboriginal language or idioms that are difficult for outsiders to penetrate effectively. But the possibilities here are nonetheless uncertain, and possible only for populations with strong cultural resources or excellent institutional capacities. Even if the surrounding state did not choose to use the withdrawal of trade or other heavy leverage against Aboriginal microstates, then, the ability of their citizens to collectively choose their governors and laws would be cause for concern. If the surrounding state chose to behave aggressively as well, their room for maneuver would be narrow indeed. Still, one ought to keep in mind the baseline against which the comparison must be made: it does seem reasonable to believe that the Westphalian sovereignty of Aboriginal nations would be considerably greater even in these circumstances than in the present, where (in the United States at least) Congressional plenary authority and the specter of Termination lies always in the wings. If the United States cannot be trusted to allow a sovereign microstate to control its own affairs, what hope is there where sovereignty is not even nominally present?

V. Conclusion

Given the length of this paper, I will keep my conclusion brief. It should be obvious by now in any case: given the difficulties that Aboriginal microstates would face, the legal recognition of sovereignty would not bring with it terribly robust capacities at self-determination. It is probably the case that such self-determination could in principle be secured more effectively and more reliably through a well-designed set of constitutional protections within existing states, should such states prove willing to offer them. Nonetheless, it is hard to believe that Aboriginal microstates would necessarily fail, or that the legal recognition of their full sovereignty would be irrelevant. Perhaps the strongest evidence for this is the continued insistence of the United States, Canada, and other countries on their rights to govern the Aboriginal groups within their midst: these countries and their legal systems know that sovereignty matters, even if it is far from the be-all and end-all of political control. The European microstates demonstrate that such arrangements can be successful over the long term, and the presence of relatively new microstates such as Palau and Tuvalu demonstrates that such arrangements can still be constructed, even in the world we currently inhabit. Given the embarrassing record of countries like the United States, Canada, and Australia in regard to their Aboriginal peoples, it is hard to believe that these peoples should be required to remain within these states if they demonstrate a strong will to exit. Despite the difficulties involved, it does not seem that the imaginations of independence-seeking Aboriginal actors have strayed beyond the bounds of the possible; certainly it is not obvious in the absence of any experiments whatsoever.

My own hope is that no Aboriginal groups would choose the option of full separation if it were allowed to them, but only plebiscitary procedures themselves seem able to decide this question fully. Such plebiscites are, of course, unlikely to happen in any real circumstances. The sovereign imagination of countries like the United States and Canada is almost certainly too fixed in place for this to ever come about. But there is value in taking note of the prospects for sovereignty in any case. Ultimately, what justice seems to demand is that the relevant countries stop failing their Aboriginal populations, by providing them with resources sufficient to make up for harmful legacies and by providing them with sufficient self-determination to manage most of their own affairs. Canada has unambiguously taken this direction with Nunavut, as has Denmark with Greenland, and many elements of American policy currently point in this direction as well. Ironically, success in such policies will require that Aboriginal populations be allowed to develop the kind of capacity for political choice and governmental efficacy that would be most conducive to ultimate separation from the countries that now rule them. The prospect of full legal independence may thus be one important element of this larger goal of pursuing justice. Holding out the ultimate possibility of statehood may be one of the best methods to motivate good governance, and may often be sufficient to ensure that few Aboriginal groups would feel sufficiently aggrieved to pursue it – and would be sufficient to ensure that if they do so choose, the transition will be relatively painless for all concerned. Those who lobby for full sovereignty are thus making real moral arguments that should be taken seriously. The fact that such arguments continue to be rejected out of hand is perhaps the best evidence that they are still needed.