NATURAL LAW, HISTORIOGRAPHY, AND ABORIGINAL SOVEREIGNTY

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I INTRODUCTION

From the 1970s onwards the juridical and political cultures of common law settler societies — Canada, New Zealand, and Australia — witnessed a wave of activity focused initially on claims to native land title and latterly on a broader array of indigenous rights placed under the umbrella of indigenous sovereignty.¹ This activity was driven by the post-war decolonising agendas of international law, national land rights movements, revisionist academic work on colonialism, and constitutional and juridical reconsideration of the forms in which indigenous peoples had been dispossessed of their lands during the period of European imperialism and colonialism. In the Australian context a particular style of historiography provided significant impetus for the juridical construction of native title rights by aiming to overturn what was claimed to be the historical misunderstanding on which the earlier failure to recognise native title was based. Embodied most forcefully in the writings of Henry Reynolds, this historiography sought to expose the error involved in the legal category under which the British annexation of Australia was supposed to have taken place, *terra nullius*: variously, land uninhabited, belonging to no-one, or without a sovereign.

Running along dual tracks, this historiography claims to show the real character of Aboriginal tenure and sovereignty at the moment of colonisation. It also offers an

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account of the forms of eighteenth- and nineteenth-century European jurisprudence deemed capable of justly recognising indigenous rights, were it not for the intervention of racist and imperialist prejudice that impelled ‘Australian jurisprudence’ towards the unjust ideology of terra nullius. This historiography thus presents itself as both empirical and normative. Not only does it offer an objective account of the historical act of colonisation, but it insists that the injustice of this act can be objectively judged in accordance with a moral-juridical principle common to modern Australians and their colonising forebears. This principle is that of the fundamental right of a people or ‘nation’ to exercise the territorial and political rights required to maintain its cultural identity against the encroachments of a foreign state, potentially also a domestic state.2 To the extent that it embodies this principle, indigenous-rights historiography participates in the genre of the ‘history of the moral nation’. It offers a narrative of the origins of the nation in terms of a fall from its high moral destiny — to be a just polity that manifests the moral identity of its people — and thereby holds out the prospect of a partial restitution of that destiny, in the form of recognition of native title and indigenous sovereignty.3

Since the early 1990s this style of history has fallen under the scrutiny of what is in effect a rival form of historiography associated with a different sense of history. This latter form is one that takes within its ambit the ‘history of historiography’ and, in doing so, offers an historical analysis of the moral-nationalist historiography of indigenous rights. Operating through the reconstruction of context-specific ‘languages’ of political thought — rather than through resolving historical narratives — this analytic historiography has begun to reconstruct the context of indigenous rights historiography. It has done so by identifying a strong linkage between the redemptive historiography of the moral nation and the revisionist historical sense of the culture of the common law.4 This link is their

2 See Henry Reynolds, Aboriginal Sovereignty: Reflections on Race, State, and Nation (1996) xiii, 177. This reflects a tendency to place European ‘stateless nations’ — entho-religious groups who did not succeed in forming their own states — and colonised indigenous peoples on the same political footing, as ‘captive nations’ or ‘nations within’. For a further example, see Will Kymlicka, ‘American Multiculturalism and the “Nations Within”’, in D. Ivison, P. Patton and W. Sanders (eds.), Political Theory and the Rights of Indigenous Peoples (2000), 216.


shared ‘presentism’ — the view that past actors were governed by the same norms and purposes as their present counterparts — which permits the law to function as the trans-historical frame against which the moral history of the nation can be judged. Modern indigenous-rights historiography and common-law revisionism both view the law as historically grounded and yet timelessly present, in the sense that its past defects can be judged and corrected in accordance with present norms that are treated as timelessly available to its original architects.

This contextualising history of historiography has a founding text in the form of J. G. A. Pocock’s mid-twentieth-century *The Ancient Constitution and the Feudal Law*. Pocock charts the seventeenth-century rise of a particular historiography and historical sense associated with the political power of England’s common lawyers. This ‘common-law mind’ was imbued with the historical doctrine that the laws of England arose from an ‘ancient constitution’ whose customary or time-immemorial character places it beyond all arbitrary legislation thereby allowing it to be timelessly present. According to Pocock, this view of a time-immemorial ‘law without a legislator’ arose within the context of the jurisprudential monopoly exercised by an exhaustively insular English common law — countries with multiple legal systems cannot treat them as timeless — and provided a powerful weapon against those who argued that laws originate in the will of a historical sovereign. By the end of the seventeenth century this historical sense had been joined and transformed by a different conception of the timelessness of English rights and liberties, namely Locke’s philosophical conception of natural rights arising from individual reason and conscience. This formed a space in which a ‘Whig’ historiography could assert the double timelessness of rights — as both time immemorial and as permanently present to reason — against all attempts to treat them as historical products of the governing will of a sovereign or state.

It is this double timelessness of rights — formed at the nexus of a time out of mind and a mind out of time — that the contextual historians of historiography have identified as a thread running through the national historiography of indigenous rights, binding historiography to a common law presentism and a ‘juridical’ relation to the colonial past. This history of historiography is contextual in the manner of the Cambridge school. It does not view forms of political, juridical, and philosophical thought as timeless in either sense: as customary or as rationally founded. Rather, it approaches them in terms of the elaboration of particular ‘languages’ seen as modes of action serving limited historical circumstances and purposes. Such a contextualising historiography tends to arise when cultural rivalry or fracturing destroys timeless foundations — for example, the rivalry between common and Roman law in some European jurisdictions, or the fracturing of the erstwhile universal church into competing religions — making it possible to treat (here) law and religion as relative to time and place. In this regard, it might be

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Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia’ (2003) 1 History Compass 1.

significant that many of the leading historians of indigenous-rights historiography are New Zealanders, coming from a context in which a founding treaty between coloniser and indigenous people resulted in the kind of cultural bifurcation suited to a contextualist historiography and historical sense. No less significant is the fact that these New Zealand historians combine expertise in Pocockian contextual historiography with formal expertise in public law. Contextualist historiography and public law have a symbiotic relationship, as public law arises from the governmental will of a sovereign or state and is thus anchored to a particular time and place through the contest of political forces. New Zealand contextualist historiography is joined to the tradition of constitutional history where the actions of the state play a central role. It thus provides a strong contrast to Reynolds’ social history of the law, where centre-stage is occupied by the nation as the morally flawed defender of timeless rights against the state.

The present paper draws on the public law historiography of the New Zealand contextualists but does not pretend to add to it. To the extent that it contributes to current scholarship and discussion, it is by further developing the intellectual history of the ‘social-national’ historiography of indigenous rights. In particular it offers an account of the role of natural law discourse in this historiography. It treats the revival of this unfamiliar and apparently superseded political language as the unexpected outcome of the application of 1970s style social history to the constitutional and public law constructions of Crown authority in colonial settings. I argue that a certain tradition of European natural law thought makes it possible for Australian indigenous rights historiography to treat the act of colonial expropriation as timelessly unjust and as presently redeemable in the history of the moral nation.

II NATURAL LAW AND SOCIAL HISTORY

Written in the aftermath of the Australian High Court’s *Mabo* judgment, Henry Reynolds’ *Aboriginal Sovereignty* is in part concerned to answer a question that the author believes was left unresolved by that judgment. Given that the Court decided that Aborigines possessed a presumptive native title right to unallocated Crown lands, why did it not also recognise the survival of rights associated with Aboriginal sovereignty? Such rights are pre-eminently those associated with the maintenance of a system of customary law and the right to social and political institutions permitting some form of self-government on Aboriginal lands, similar to the rights associated with the ‘dependent nations’ status granted to American Indians under American constitutional law. After all, if native title rights survived colonisation and were capable of recognition by the Court, why did it declare that the issue of a surviving parallel sovereignty was non-justiciable within a domestic court?

In addition to Pocock’s own commentaries on indigenous rights historiography — some now collected in his *The Discovery of Islands* (2005) — see the works of McHugh, Hickford, and Ward cited mentioned above and cited below.
Before discussing Reynolds’ answer to this question, it is important to observe that his book contains a weak and a strong thesis on the issue of Aboriginal sovereignty and makes no attempt to differentiate them. On the weak thesis, a ‘sovereignty’ right such as the maintenance of a parallel system of customary law could be treated in a manner similar to the recognition of native land title: namely, as a special form of indigenous right whose legitimacy and scope depend on its construction within the overarching constitutional-legal order of the Australian state. On the strong thesis, Aboriginal sovereignty depends not on its constructability within Australian constitutional and public law but is a right rooted in the time immemorial cultural and ethnic identity of the Aboriginal ‘nation’. Such is the right to maintain this identity through the exercise of an indigenous political authority over a territory. Far from receiving its legitimacy from the constitution of the Australian state, this right possesses the higher legitimacy accorded by natural and international law, so much so that the failure to recognise it has rendered this state itself illegitimate. Only the strong thesis sustains Reynolds’ aspiration to write a history of the moral nation’s originary fall into injustice, as we can see in these comments from his earlier book on land rights:

The inability of Australian law to retreat from historical injustice has had major implications for relations between white Australians and Aborigines. … Outwardly a majority of white Australians has rejected the claims of historic injustice. But there has always been a sense of uneasiness, a lurking shadow of guilt, a ‘whisper in the heart’ that encouraged a tendency to explain the problem away by blaming the Aborigines themselves … It eased the conscience but did nothing for the moral health of the nation.7

It is important to note, then, that our discussion of Reynolds as a representative of a national land rights historiography pertains only to this strong thesis — to the claim that the recognition of Aboriginal sovereignty represents the recovery of a timeless right and the correction of an originary wrong — for only this claim sustains his moral history of the nation.

To support this claim Reynolds offers what he takes to be two convergent lines of argument. First, he offers anthropological and historical evidence — pertaining to Aboriginal numbers, patterns of land use, and the exercise of customary law — designed to show that in the face of claims regarding terra nullius the Aborigines exercised sovereignty over their own lands.8 Given that this evidence cannot by itself determine the existence of Aboriginal sovereignty — sovereignty not being an anthropological or historical fact but a category of European law and politics — Reynolds mounts a second argument. This is to the effect that sovereignty of indigenous peoples was recognised in eighteenth and nineteenth-century European law in the discipline of jus naturae et gentium, the law of nature and nations.9 It is

8 This evidence is presented in chapter 2 of *Aboriginal Sovereignty*, much of which is a repetition of chapter 3 of *The Law of the Land*.
9 Presented in chapter 3 of *Aboriginal Sovereignty*. 
this second argument that is decisive for Reynolds’ case. Through it he purports to show that Aboriginal territorial self-governance was legally recognisable as sovereignty at the time of colonisation, such that the actions of the British and Australian states in denying Aboriginal sovereignty are morally or legally ‘justiciable’ under the *jus gentium* or its step-child, modern international law. If this is so, then the refusal of ‘Australian jurisprudence’ to recognise Aboriginal sovereignty — a refusal that Reynolds identifies with Justice Burton’s denial that the tribes were sovereign states in the case of *R. v Murrell* (1836) — arises not from law and justice but from the racism and ignorance of colonial society.

In order to answer the question ‘Were Aboriginal tribes sovereigns?’, Reynolds thus regards it as sufficient to ask: ‘Did Burton’s conclusions flow logically from the law of nations as it was understood in 1836? Or had the jurisprudence of New South Wales been corrupted by the needs and prejudices of colonial society?’ In order to show what should and did flow logically from the law of nations, he cites from an array of similarly titled works, but above all from the Prussian philosopher Christian Wolff’s *Jus gentium*, which Reynolds characterises as ‘the major work of international law in the middle years of the eighteenth century’. In one regard Wolff suits the purpose well. Not only does he argue that wandering tribes and nations should be seen as the rightful owners of their lands regardless of whether they make settled and intensive use of them, but he insists that colonising powers have no right to impose their sovereignty on ‘barbarous and uncultivated nations’ in order to make their own use of these lands. In another regard, though, Wolff offers at best only tenuous support for Reynolds’ case. Setting aside for the moment the question of whether Wolff was the major eighteenth-century representative of the law of nature and nations, we can observe that while there was a German version, Wolff’s *Jus gentium* was not translated into English until the twentieth century. Further, unlike comparable works by Pufendorf and Vattel, which were translated into English during the seventeenth and eighteenth centuries, there is no record of Wolff’s *Jus gentium* being used as a teaching text at English universities or the Inns of Court, or circulating in common law circles. Given this, it is hard to see how Wolff’s defence of indigenous property rights could have been ‘of major importance for the debate in Australia’.

In fact, and somewhat incongruously, Reynolds partially acknowledges this problem — ‘Australian judges may not have been aware of Wolff’s writing’ — but then argues that Australian jurists had encountered Wolff’s arguments at one remove. This occurred via the writings of his Swiss disciple Emmerich de Vattel, whose *Le Droit des gens* (1758) had been translated into English in 1759 and did circulate in common law circles, principally in the 1833 translation of Joseph Chitty. The problem with this move though — as Reynolds acknowledges — is that Vattel did not equate nomadic land ownership (as a form of *dominium*) with sovereignty of a territory (*imperium*). In fact used the difference between nomadic

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ownership and territorial sovereignty to justify the right of European nations to colonise lands occupied by ‘wandering nations’ and impose sovereignty on them. Given that Burton himself cited Vattel in this vein, it begins to look as if the law of nations did not provide unambiguous support for the existence of indigenous ownership and sovereignty, and that some uses of it might even have justified the denial of these things.

In order to counter this serious threat to his case, Reynolds argues that in citing Vattel, Burton turned to ‘those passages which supported attitudes towards the Aborigines which had developed within colonial society and twisted international law to a shape which justified what had already been done’. He thus moves into the register of the subjunctive and counterfactual, arguing that ‘Had the law been applied with more impartiality it would have been possible to accord to the Aborigines both land ownership and sovereignty.’

In doing so, however, Reynolds silently drops his central historical argument — that the recognition of Aboriginal sovereignty did ‘flow logically from the law of nations as it was understood in 1836’ — and replaces it with a different, non-historical one: namely, that such recognition would have flowed logically had the law been applied impartially. Given though that the only criterion he offers for an impartially applied law of nations is that it recognises Aboriginal sovereignty, it appears that Reynolds is establishing a circular relation between the ‘true’ law of nations and the recognition of Aboriginal sovereignty. He thus tacitly abandons his historical investigation into whether aboriginal sovereignty was recognisable in the law of nations ‘as it was understood in 1836’, replacing it with the covert philosophical argument that Aboriginal sovereignty’s mode of existence is such as to make it timelessly recognisable by a properly impartial law of nations.

This set of moves is a pointer to the constitutive features of Reynolds’ historiographic discourse. Reynolds appeals to the law of nations in order to establish the normative standpoint, common to us and our colonial forebears, within which Aboriginal sovereignty is rightfully recognisable, and in relation to which its denial (by Burton and the courts) constitutes a manifest injustice. In silently dropping his historical claim that the colonial jurists did indeed share this normative law-of-nations standpoint, however, Reynolds tacitly treats this standpoint as timeless and universal. In fact he treats it as grounded in the time-immemorial ‘ancestral rights’ of the Aborigines themselves and their recognition by a timelessly rational jus gentium. In this regard, he reactivates one of the programmatic imperatives of a particular tradition of the jus naturae et gentium: namely, to subordinate the positive law of the state to a higher timeless moral law. This reactivation is in turn governed by the specific conceptions of history and society present in the genre of social history that drives Reynolds’ account. History for Reynolds is not operative at the level of law and state but at the level of society. Society signifies the economic and ideological mechanisms that defeat or delay the manifestation of rational law by forcing it through the detour of local historical

13 Ibid. 54.
interests — the corruption of law by colonial society — but also the process of moral development that will bring this detour to an end in true recognition. This produces Reynolds’ structuring opposition between a timeless law from whose impartial use the recognition of a time-immemorial Aboriginal sovereignty flows logically, and a law whose failure to recognise this sovereignty signifies that it has been ‘corrupted by the needs and prejudices of colonial society’.

This structural opposition is a pointer to the historiographic genre that governs Reynolds’ reactivation of the law of nature and nations: namely, a particular form of anti-state social history that rose to prominence during the 1970s. This is a historiography that derives law and the state from society — understood as a collective moral or cultural identity seeking self-determination — and that treats political and legal forms deemed inimical to this process as ideological expressions of social interests. What is excluded from this historiographic perspective is the possibility that legal and political discourses — such as those found in the tradition of *jus naturae et gentium* — might be anchored in historical reality in a manner at once both more direct and less universal than when seen as the true or false expression of a self-determining moral identity, ‘nation’ or society. It already appears, though, that the law of nature and nations varied in its deployment not in accordance with the options of true representation or false ideology, but in accordance with its elaboration in different forms designed to give shape to particular juridical, philosophical, and political programs. This suggests that if sovereignty was an important object of natural law discourses, then there may be no single or uncontestable answer to Reynolds’ question, ‘Were Aboriginal tribes sovereigns?’ It might be that any answer will depend on how sovereignty has been constructed in particular discourses, and on the juridical, moral, theological, or political purposes governing its construction. That, at least, is the possibility to which we now turn.

### III THE LAW OF NATURE AND NATIONS IN CONTEXT

Despite its intellectual importance in seventeenth- and eighteenth-century Europe, the law of nature and nations was not really a unified academic discipline and was certainly not a law. Rather it formed a matrix for an array of disciplines — politics, theology, ‘positive’ law (Roman, civil, public), and moral philosophies of various kinds — inside which an array of normative concepts (obligation, duty, right, law, sovereignty, state, nation, ruler, citizen) were ceaselessly formulated and reformulated. This gestational matrix was nominally held together by the overarching conception of a law that is ‘natural’ in two distinct but interacting senses: in being derived from man’s moral nature, and in being derived using

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natural reason as opposed to revealed Christian truth. Early modern Europe, however, housed a multiplying diversity of models of human nature, and neither was there any consensus regarding the character of natural reason or its limits in relation to divine truth. This meant that rather than enclosing a settled domain of scholarly inquiry, these twin features of natural law marked the parameters of a field of ferocious cultural-political conflict.

As a result of its centrality to various European political orders and their interlocking religious orders, ‘law’ played a talismanic role in such conflict. This was especially so in the forcing houses of *jus naturae et gentium*, the universities of the Holy Roman German Empire. Here imperial public law was used to regulate political conflict, and Romano-canon law played a key role in securing the nexus between political and ecclesial authority that lay at the heart of the early modern confessional state. In this setting, it was the matrix character of *jus naturae et gentium* — its capacity to harness the powerful disciplines of politics, law, and theology — that permitted it to address the most important and intractable cultural-political problems of the period: namely, the unsettled and incendiary relations between estates and territorial states, states and empire, and political and religious authority, or state and church. Considering the cultural and political fissures underlying these problems, and given the conflicting interpretations of man’s moral nature and rational capacities present in the *jus naturae et gentium*, it is less surprising that this took shape not as a single academic discipline but in a diversity of rival forms aligned with a variety of conflicting religious and political programs.

The form of *jus naturae et gentium* that Reynolds identifies with the law of nations as such — the line that passed from Wolff to Vattel (and that would include Darjes and Achenwall) — was thus only one of several on offer in the crowded and fractious intellectual market of the eighteenth century. Its way of constructing such concepts as nature, obligation, right, and sovereignty was neither uncontested nor capable by itself of determining norms governing positive politics and law. In fact Wolff elaborated his *jus naturae et gentium* in direct competition with another form, one whose Grotian and Hobbesian origins were definitively reworked by Samuel Pufendorf and then passed into the eighteenth century by Christian Thomasius, where it remained in rivalry with the Wolff school.

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16 For a rare overview of some of this diversity, see the essays collected in T. J. Hochstrasser and Peter Schröder (eds.), *Early Modern Natural Law Theories: Contexts and Strategies in the Early Enlightenment* (2002).

What is distinctive about Wolff’s version of the *jus naturae et gentium* is that it makes natural theology (metaphysics) and moral philosophy foundational for the construction of juridical and political concepts. Drawing on a mix of Thomistic and Leibnizian fundamentals, Wolff argues that as a result of its emergence from God’s intellection of the forms of things, the universe represents a morally ordered whole in which man participates through his own nature, understood in the Aristotelian manner as rational and sociable. From within this metaphysical framework Wolff can derive an objective conception of the good — as the happiness attendant on man’s rational participation in the divine natural order — and a conception of obligation based in a notion of moral necessity grounded in man’s moral nature. Man is thus obligated by his rational nature to follow the good, and because this good can only be acceded to through the realisation of this nature, the fundamental natural law duty is that man must complete or perfect his own rational and sociable nature. In opposition to Hobbes and Pufendorf, Wolff thus regards obligation as natural rather than imposed. This allows him to define law not in terms of the command of a superior — God, the prince, the state — but in terms of the rule that binds man to act in accordance with the natural obligation he is under to perfect his nature. Wolff thus understands natural law via the traditional Thomist formula as the command of right reason (*dictamen rectae rationis*) through which man performs actions conformable to the perfection of his nature and avoids those that conflict with this. The law thus arises from natural obligation, and from this obligation also arises a natural right to perform the actions required by human moral self-perfection.

It is this moral-ontological basis that is responsible for the moralised and universalised (deterritorialised, cosmopolitan) construction of sovereignty and polity in the Wolffian form of *jus gentium*. In Wolff’s model, individuals enter states not in pursuit of security as such, but in order to obtain the security necessary for them to perfect their rational and sociable nature in common. Man is fundamentally a citizen of the world, as his moral nature is the universal means by which he participates in the divine order of the cosmos, which leads Wolff to envisage a *civitas maximus* or world republic as the ultimate destiny of human political development. Vattel does not share Wolff’s conception of a world republic, but he does follow him in viewing peoples or nations as the form of political association into which individuals enter in order to perfect their rational and moral nature. Political authority is thus vested in the people or nation itself,

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with sovereignty understood in terms of the exercise of power required and justified by the maintenance of a self-perfecting or self-determining collective moral person.\(^{24}\)

The second general duty of a nation towards itself is to labour at its own perfection and that of its state. It is this double perfection that renders a nation capable of attaining the end of civil society: it would be absurd to unite in society, and yet not endeavour to promote the end of that union. … All the citizens who form a political society reciprocally engage to advance the common welfare, and as far as possible to promote the advantage of each member. Since then the perfection of the society is what enables it to secure equally the happiness of the body and that of the members, the grand object of the engagements and duties of a citizen is to aim at this perfection. This is more particularly the duty of the body collective in all their common deliberations, and in every thing they do as a body.\(^{25}\)

This conception of a morally-grounded sovereignty incorporate in the moral nation is one that outstrips the merely delegated sovereignty or positive laws of the state: ‘Government is established only for the sake of the nation, with a view to its safety and happiness’.\(^ {26}\) It also provides the intellectual architecture for a supra-state order in which the world is envisaged as peopled by nations each of which is obligated by the law of self-perfection and all of which are thus under a universal law of nations by which the rights attending this obligation can be adjudicated.\(^ {27}\) It is in this context that Vattel can assert the rights of territorial ownership (dominium) and sovereignty (imperium) acquired by a nation to this end to be inviolable by all other nations. This same framework, though, also makes it possible for him to argue that ‘wandering’ nations at a lower level of self-development may not possess the right of sovereignty over a territory, making it legitimate for higher (European) nations to assume such sovereignty and restrict the dominium of the indigenous nation.\(^ {28}\) In any case, in arguing that Aboriginal sovereignty was recognisable by the law of nations, Reynolds cites only the Wolff-Vattel (metaphysical and moral-philosophical) version — centred in a conception of the nation as a morally self-determining collective individual obligated by a supra-state moral order — even if he reactivates this conception at one remove, from the standpoint of a late-twentieth-century anti-state social history.

Taking into account its location in an array of rival forms of jus naturae et gentium, how should we view the cultural and political significance of the Wolff-Vattel version? In claiming that Wolff’s Law of Nations was the ‘major work of international law in the middle years of the eighteenth century’ from which, if it had been applied ‘impartially’, recognition of Aboriginal sovereignty would ‘flow

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\(^{25}\) Ibid. bk. I, ch. ii, § 14.

\(^{26}\) Ibid. § 21.

\(^{27}\) Ibid. bk. I, ch. iii, § 31.

\(^{28}\) Ibid. bk. II, ch. i, § 3.

\(^{29}\) Ibid. bk. I, ch. xviii, § 208.
logically’, Reynolds seeks to establish a general normative framework against which the injustice of the denial of sovereignty can be objectively established. This strategy attempts to escape from the historical reality that there was no such shared normative framework. We have noted that the Wolff-Vattel form of *jus naturae et gentium* was elaborated in self-conscious opposition to a quite different line — that running from Grotius and Hobbes into Pufendorf and thence via Thomasius into the eighteenth century — which was the source of conflicting conceptions of obligation and law, sovereignty and state. This body of work produced a normative and substantive framework for understanding law and politics that was radically opposed to and by the Wolff-Vattel framework, yet was no less available to eighteenth-century public law officers, including those working in the British Colonial Office.

Pufendorf’s *Jus naturae et gentium* of 1672 begins with a construction of obligation that is grounded in public law and Hobbesian anthropology rather than metaphysics and moral philosophy.29 Man is placed under obligation not by his own rational and moral nature — whose vicious passions make him incapable of rational self-governance — but by a ‘superior’ with two defining features: power to coerce the recalcitrant, and ‘just reasons’ for restraining the free will of his subjects at his discretion.30 These just reasons refer not to the rules governing the perfection of man’s moral nature but to a pact in which individuals, living in mutual fear, agree to submit their wills to the will of a superior in exchange for the provision of protection, against each other and their external enemies.31 The unchallengeable power or sovereignty arising from this pact is thus not the political expression of fundamental capacity for or right to moral self-development. Rather, it is that required to maintain domestic civil peace and to protect the borders of a political territory from external threat. Security is not a means to anything higher — the collective moral self-determination of the nation — but constitutes the absolute untranscendable horizon of politics and law as such. As a result of this exclusion of metaphysics and moral philosophy from the political-juridical construction of obligation and sovereignty, nations — understood as self-perfecting collective moral persons — play no role in Pufendorf’s construction of politics and law. This construction is focused wholly on what has been characterised as the modern form of the state, understood as an apparatus for the exercise of political rule that is doubly ‘impersonal’ or detached: from the personal will of the ruler, and from the moral will of the communities or nations over which he rules.32


31 Ibid. §§ 9-12.

32 For a classic account of the historical emergence of this conception of the state, see Quentin Skinner, 'From the State of Princes to the Person of the State', in *Visions of Politics* vol. 2, (2002), 368.
Pufendorf’s conception of sovereignty and the state is indicative of a profound de-universalising or territorialising of politics and law. His version of the law of nature — that man should conduct himself in a sociable manner in order to avoid the dangers posed by his weak will and vicious passions — is indeed seen as universal. The manner, though, in which individuals become obligated to this law — via the pact in which a bordered population pledges obedience to a sovereign in exchange for protection from each other and from foreigners — is deeply territorial or geopolitical. This issues in the Hobbesian doctrine that only the territorial sovereign may determine how the natural law is to be enacted as civil law, and whether it has been. For Pufendorf all human law properly understood — as sovereign commands capable of coercively imposing obligation — is thus confined to the interior of the territorial state. As a result, he denies the existence of a positive law of nations. In the international arena, absent the sovereign who is the source of coercively imposed obligation, there is no law, only the tenuous domain of treaties and covenants, adherence to which is voluntary and governed by the balance of power rather than right.

This is sometimes referred to as the problem of ‘enforcement’ in international law, on the assumption that rights exist under a law of nations even if the power to enforce them is absent. But this assumption belongs to the Wolff-Vattel version of jus gentium, where obligation arises from the universal imperative of moral self-perfection and thus gives rise to supra-state human or international rights independent of their enforcement by a ‘superior’. In Pufendorf’s construction, where individuals are obligated by human laws only to the extent that they are coercively imposed by a territorial sovereign, it is not just the enforcement of supra-state rights that is in question, but their existence. As a result, while Pufendorf insists that it contravenes the law of nature for states to wage war on each other, to seize each other’s land and treasure, this contravention infringes no justiciable right, as none such exists at this level. This means that such infringements must find their redress not in law but in war, to the extent that it cannot be avoided.

Such acts of sovereign states, including expropriatory colonisation, may thus be wrong in relation to the law of nature and a legitimate cause of war, without being illegal (or legal) in relation to a putative law of nations. It is thus characteristic of Pufendorf’s approach to interstate politics that he should endorse Grotius’s view of how sovereignty is acquired over conquered peoples. According to Grotius, when

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33 Pufendorf, De jure naturae et gentium, bk. VII, ch. vi, § 13; bk. VIII, ch. i, § 5.
34 Ibid. bk. II, ch. iii, § 23.
35 There would thus seem to be little to be said in favour of Richard Tuck’s claim that Pufendorf’s natural law was similar to Wolff’s in combining an account of law-governed relations between states with a rejection of ‘liberal values’ within states. See Richard Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant (1999), 195. Pufendorf had a basically Hobbesian view of interstate relations and his domestic absolutism supported a powerful form of religious toleration.
36 Ibid. bk. VIII, ch. vi, §§ 1-3.
37 Ibid. § 24.
a conquest occurs, the relations between the conquered people and their new sovereign should revert as quickly as possible to the standard model — with the conquered people exchanging obedience for protection and thereby establishing the new sovereign’s legitimacy — as it is not the role of the state to express the moral identity of a nation, only to provide security for its subjects. On this view, ‘stateless nations’ or ‘captive nations’ do not constitute an ongoing moral-political burden, as the legitimacy of the secular state depends not on the ‘recognition’ of its constituent moral communities but on their pacification and the achievement of domestic security. The wrongness of conquest and the fact that it infringes no actual rights — that it is neither just nor unjust — both arise from the circumstance that states are not under juridical obligation in their relations to each other, conducting themselves rather in the manner of individuals living in the state of nature.

It would be misguided, however, to treat Pufendorf as any kind of apologist for colonisation. The two states in which he served as a public law jurisconsult and court political adviser — the Protestant territorial states of Sweden and Brandenburg-Prussia — were not significantly involved in (extra-European) colonisation and his work for them pertained to a different kind of problem. Pufendorf’s Jus naturae et gentium was centrally concerned with the relation between religious and political authority as this had come into crisis in the context of the early modern Holy Roman German Empire. This was a context in which complex interrelations between bitterly opposed confessionalising churches and an array of rival political authorities — the imperial estates, cities, and dynastic states for which the churches served as institutions of cultural formation and national pedagogy — had led to a protracted period of religious and political conflict. This had jeopardised the existence of the Empire itself during the Thirty Years War, and exposed its Protestant states and estates to the threat of annihilation by their Catholic enemies. If Pufendorf severed the link between man’s moral nature and political obligation, and if he located sovereignty in the doubly impersonal state as opposed to the ‘moral nation’, that is because the moral nation was in fact the religious nation: the community whose cultural identity was formed through its participation in the liturgies of the rival churches. The political expression of the moral nation — most dramatically in the form of early modern confessional state — had been accomplished by programs for the political and juridical enforcement of a particular religion. This in turn had produced endemic and protracted conflict under conditions where a single state was home to more than one religious ‘nation’, and across the Empire as a whole owing to its housing of rival confessional states.


Pufendorf responded to this problem by relegating the ‘politics of recognition’ oriented to the moral nation in favour of the doubly impersonal conception of the nation-blind state. The state itself thus should not be identified with one or with many religious nations, as these are forms of society over which it must exercise impersonal rule.

Pufendorf’s version of the law of nature and nations may thus be regarded as supplying the intellectual architecture for a radical desacralisation and territorialisation of political authority. This program for the separation of church from state required that obligation and right be severed from a grounding in man’s cosmic moral nature, which was hostage to rival moral theologies and philosophies. They should be tied instead to the laws imposed by a sovereign who is secular in the sense of grounding his power in the preservation of territorial social peace. The denial of a domain of positive jus gentium or supra-state international law — which in reality had been the law of the trans-territorial church and Empire — was thus a product of the same secularisation of politics that provided a rationale for religious toleration and civil pluralism. This is not to say that Pufendorf’s program was the expression of an exemplary secular rationalism embodied in the modern state. It was in fact a much more strategic intervention designed to respond to the Treaty of Westphalia — as an imperial public law enactment that required imperial states to introduce limited forms of religious toleration — and to the Religionspolitik of Brandenburg-Prussia, where the Calvinist ruling house had been compelled to deconfessionalise itself after failing to Calvinise its Lutheran nobility and population.

The programmatic character of Pufendorf’s law of nature and nations — that is, its role in reshaping political and juridical thought in order to provide a (fiercely contested) response to the problem of the political governance of religion — means of course that it is not ‘true’ in the sense of representing the timeless essence of


42 Hunter, Rival Enlightenments, ch. 4.

43 Richard Tuck’s argument that natural law thinkers derived their moral anthropologies from accounts of the anarchic conduct of states — see Tuck, War and Peace, 9 — thus finds little purchase in the case of Pufendorf. Pufendorf developed his quasi-Epicurean conception of man — as a creature whose passions threaten his society and whose reason is incapable of transcendent reflection and self-control — primarily in opposition to the rationalist anthropology of the Christian natural theologians and natural jurists. He did so not by reflecting on the international conduct of states, but on what it would take to deprive the scholastic natural jurists of the theocratic authority they claimed in mediating divine law to the civil sovereign via their purported insight into a transcendent natural law. See above all, the polemical essays and disputations collected in Samuel Pufendorf, Eris Scandica, und andere polemische Schriften über das Naturrecht, ed. Fiammetta Palladini (2002).

44 The appropriate cautions in this regard are given in Detlef Döring, ‘Säkularisierung und Moraltheologie bei Samuel von Pufendorf’ (1993) 90 Zeitschrift für Theologie und Kirche 156.

45 On this, see Bodo Nischan, Prince, People, and Confession: The Second Reformation in Brandenburg (1994).
obligation, sovereignty, and the state. Despite their ability to capture important aspects of cultural and political reality, such concepts operate as instruments for achieving programmatic purposes, which is also why they cannot be false in any straightforward sense. The same comments apply to Wolff and Vattel’s *jus gentium*, whose concept of a universal natural obligation — grounded in man’s moral nature and expressed collectively in the self-determining nation — was programatically intended to defeat the Hobbesian-Pufendorfian desacralisation of the state and reinstate moral philosophy at the foundations of politics and law. Neither of these versions of the *jus naturae et gentium* can thus provide a definitive answer to Reynolds’ question of ‘Were Aboriginal Tribes Sovereigns?’ The unreconciled historical co-existence of two such fundamentally different forms of the law of nature and nations, however, might suggest why this question cannot be answered and should not be put in this form. If sovereignty is not a stable concept representing an evident political reality — if it confronts us instead as a fiercely contested term within rival theory-programs, anchored in particular historical circumstances, and shaping particular political interests — then the revealing question is not whether Aboriginal tribes possessed sovereignty. Rather, it is the question of how this possession was affirmed, denied, or left open: on the basis of what kind of political or juridical discourse; uttered by what sorts of actors; as a way of formulating what kinds of competing cultural, economic, or political agendas.

**IV Natural Law, Common Law, and Public Law**

We have indicated that natural law is not a species of justiciable law but a hybrid academic discourse, drawing on the disciplines of theology, positive law, political science, and moral philosophy. Its rival forms have been distinguished by the relative pre-eminence given to particular disciplines within the matrix, and by the uses to which these forms have been put. In the early modern Holy Roman German Empire natural law discourses played an important role in organising the reception of positive law (Romano-canon, imperial public law) within the legal orders of emerging territorial states, most of which first took shape as confessional states. Theological forms of natural law — the tradition of Christian natural law — thus helped to shape the development of theocratically-oriented legal systems by showing how the civil law could be regarded as an expression of divine law, mediated through the norms of ‘natural law’ (typically the Decalogue and the rules of the Christian love ethic). Political-jurisprudential forms of natural law, such as Pufendorf’s, were designed to facilitate the emergence of secularised legal and political orders by, for example, showing how fundamental public law instruments like the Treaty of Westphalia could be integrated into territorial legal orders, providing states with a means to govern their churches and religious ‘nations’.

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The manner in which continental natural law was received within the overwhelmingly common law juridical and political culture of England has not yet been the subject of sustained research, although important lines of inquiry are emerging. The translation of several of Pufendorf’s key works into English during the last decade of the seventeenth century and the first decade of the eighteenth is a pointer to their reception by various factions in the great unresolved struggles over state and religion, king and parliament, sovereignty and the ‘ancient constitution’. The student digest of Pufendorf’s *De jure naturae et gentium* — his *De officio hominis et civis* of 1673 — translated by Andrew Tooke in 1691, had a ‘Whig’ complexion. This was heightened in the modified fourth edition of 1716 when the editors drew on Barbeyrac’s French translation to erase references to the state — displacing it with ‘civil society’ and ‘nation’ — going so far as to excise some of Pufendorf’s Hobbesian characterisations of the state of nature, presumably because of their role in motivating the need for an absolute sovereign.\(^4\) In his 1717 English rendition of Barbeyrac’s extraordinary 1712 French edition of the *De jure*, Basil Kennet deepened this Whig reception of Pufendorf, this time not by doctoring the text but by embedding it in Barbeyrac’s massive notational apparatus of a distinctly Lockean caste. There were two English translations of Pufendorf’s 1687 treatise on the separation of church and state, the *De habitu religionis christianae ad vitam civilem*. The preface to the 1698 version (by Jodocus Crull) treats separation — against the grain of Pufendorf’s arguments — as a means of protecting the independence of the church against and overweening Hobbesian state;\(^5\) while the preface to the second (anonymous) translation of 1719 treats the text as a warning against the political empowerment of religion and as a defence of toleration, more in keeping with Pufendorf’s original purposes.\(^6\) In commenting on the English edition of Pufendorf’s major work of political and constitutional history — his anti-imperial *De statu imperii Germanici* (1667) — Michael Seidler has characterised Edmund Bohun’s translation as the work of a Tory propagandist intent on defending a divine right absolute sovereignty (repudiated by Pufendorf) against Protestant dissent and republican popular sovereignty theorists.\(^7\)

When it comes to the most important English edition of Vattel’s *Jus gentium* — Joseph Chitty’s translation and commentary of 1833 — we find a similar process of grooming the original work for a particular kind of reception and use. Chitty was a ‘pupil master’ at the Inns of Court, and his central concern was not the domestic

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\(^6\) Samuel Pufendorf, *Of the Relation between Church and State: or, how far Christian and Civil Life Affect Each Other* (1719).

disposition of sovereignty but the status of the British Crown in the international context of the Napoleonic wars and the American revolutionary wars. It was to this end that he translated Vattel’s treatise on the obligations of ‘nations’ under a natural law of international rights, surrounding it with notes on the latest public law cases dealing with Britain’s obligations in relation to Admiralty law, war reparations, military alliances, and peace treaties. It is significant that in these notes Chitty comments on the difficulties posed for Vattel by the fact that monarchs have disregarded the law of nations in tying their sovereignty to the common law. In doing so they have denied that natural law might form part of a positive law of nations, such that the law of nations is regarded as of ‘imperfect and inefficient obligation’. In this early formulation of the problem of ‘enforcement’ in international law, Chitty notes the absence of a ‘permanent and general international court’ and observes that ‘it will be found that in general the sovereign, or government of each state, who has the power of declaring war and peace, has also, as an incident, sole power of deciding on questions of booty, capture, prize, and hostile seizure’, such acts being non-justiciable in any domestic court. Despite his attraction to Vattel’s conception of a universal moral obligation, Chitty does not think that this can be binding on states. Rather, he envisages their conduct as being gradually and partially governed through the emergence of temporary interstate tribunals ‘confirmed by temporary statutes in each country’.\(^{52}\) In other words, Chitty’s common law reception of Vattel was oriented not to the relegation of state jurisdictions in favour universal natural (human) and international rights, but to a linking of state jurisdictions via bi- or multi-lateral treaties and domestic statutes that left the principle of state sovereignty intact.

The diverse works of *jus naturae et gentium* reached the Australian colonies at the beginning of the nineteenth century, carried in the baggage and minds of governors, officials, and lawyers formed in the English common law culture, some of whom may well have been taught by Chitty.\(^{53}\) At this point, these works had already passed through several stages of grooming and reception, where they had been made and remade in accordance with their several uses in a variety of political and juridical contexts. Their use in the colonial Australian setting would draw on these prior articulations of the law of nature and nations. It would also give rise to new inflections in the context of the volatile tripartite relations between imperial officials, local settlers (and their lawyers), and the indigenous peoples. Arguments over Aboriginal sovereignty thus did not take place against the backdrop of a normatively pristine law of nature and nations, from whose impartial use the objective recognition of such sovereignty might flow logically. Rather, they occurred within the context of an internally divided and ceaselessly transformed discursive hybrid whose pretensions to universal rationality and impartiality had long been forfeit to the vehement disagreements of those laying claim to them. This provides us a suitable standpoint from which to discuss the role of the law of nature and nations in colonial arguments over Aboriginal sovereignty.


In appealing to natural law as a source for the recognition of Aboriginal title and sovereignty denied by Australian common law, the social-national history of indigenous rights has reactivated one of the central functions of the natural law tradition. This is to provide a reception context for positive law by surrounding it with an array of political, metaphysical, and moral-philosophical discourses designed to anchor it in a particular cultural-political program. By identifying itself with the moral-philosophical variant of jus naturae et gentium — at the centre of which lies the conception of the nation as a self-determining collective moral person — this historiography has purported to uncover native title and customary law rights below (or above) the level of positive law, hence surviving colonisation and now capable of legal recognition. In order to overcome the problem posed by the apparently moralistic and non-justiciable character of this version of jus gentium rights, its protagonists have not followed Chitty in tying them to the piecemeal constructions of international public law. Neither have they followed the public law jurists who treat native title rights as positive law constructions designed to integrate forms of Aboriginal land use within the tenure jurisdiction of the domestic state. Rather, they have sought to show that morally obligatory natural law rights were actually present within the positive law and policy of colonial Australia, at least during an initial ‘golden age’. Not only does this make it possible to claim that natural law native title and sovereignty rights are justiciable realities recognised by colonial jurisprudence, it also allows these rights to be treated as timeless moral facts that positive law is compelled to recognise on pain of being condemned as unjust. This amounts to what I earlier identified as Reynolds’ strong thesis, the alternative thesis being that native title and (where they are recognised) customary law rights are creations of constitutional and public law, operating as means of integrating colonised peoples within the legal and political order of the colonising state.

Reynolds develops his case by pointing to the presence of jus gentium arguments in a series of colonial cases where various protagonists argued for the non-amenability of Aborigines to Crown jurisdiction, hence for a parallel Aboriginal jurisdiction and rights. Taking as their starting point the three main ways in which

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56 On this, see McHugh, ‘Common-Law Status’.

the *jus gentium* recognised the lawful assertion of sovereignty over a colonised territory — by conquest, cession, or occupation/settlement — these protagonists argued that as they had neither been conquered nor ceded their territory via a treaty, the Aborigines remained outside Crown jurisdiction and under their own laws. Reynolds tracks this line of argument through its use by defence attorneys in *R. v Murrell* (1837) and *R. v Bonjon* (1841), where it was accepted by the presiding judge, Justice Willis. He also provides extensive citation of its elaboration by the colonial publicist E. W. Landor, who buttressed it with an argument that British colonial sovereignty was ‘personal’ rather than territorial, hence capable of recognising indigenous jurisdiction.58 That this view did not carry the day, Reynolds attributes to two counterpoised legal doctrines — *terra nullius* which allowed Australia to be treated as a ‘legal desert’, and a conception of sovereignty as the exercise of unified and unchallengeable supreme authority over a territory — doctrines that signaled the corruption of *jus gentium* by the racism and ignorance of colonial society.59

In a different version of this argument, Bruce Kercher arrives at a similar destination, working with an overlapping array of cases that Kercher himself has been instrumental in recovering and making availed for researchers.60 In *R. v Lowe* (1827) — where Lieutenant Lowe was on trial for the murder of an Aboriginal man know to Europeans as Jackey Jackey — Kercher focuses on the defence team’s use of arguments drawn from the law of nature and nations in order to show the non-amenability of Aborigines to Crown jurisdiction (hence Lowe’s innocence in killing one). William Wentworth thus cites from Vattel’s *Law of Nations* to the effect that a nation, here consisting of ‘independent families’, might occupy and live off the land of a territory without exercising ‘empire’ or sovereignty over it or themselves. As a result, according to Vattel:

> No person can take possession of that empire, because it would be to subject them, in spite of themselves, and no person is under condition to subject free born men, unless they submit voluntarily. The land belongs to them exclusively, and one cannot, without injustice, deprive them of their land.61

Wentworth even permits himself to speculate whether — New South Wales having been settled without the appropriation of sovereignty — the Crown actually possesses jurisdiction over European settlers, but retreats from this incendiary conjecture and contents himself with the argument that the Crown certainly does not possess sovereignty over the Aboriginal population. While the presiding judges

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59 Ibid. 121.
Natural Law, Historiography, and Aboriginal Sovereignty

— Chief Justice Forbes and Justice Stephen — rebuffed the defence argument, declaring the court’s jurisdiction over the Aboriginal victim hence over Lowe, they did this, Kercher argues, not via terra nullius but by invoking the New South Wales Act of 1823, as establishing Crown jurisdiction by statute. According to Kercher, the possibility for juridictional plurality thus remained open — as can be seen in R. v Ballard (1829) where Forbes denied Crown jurisdiction in a case of inter se homicide — until its closure in R. v Murrell of 1836, whose affirmation of jurisdiction overturned Ballard. In locating the emergence of the ‘insidious myth’ of terra nullius in Justice Burton’s Murrell judgment, Kercher’s account thus converges with Reynolds’. Kercher, though, ascribes Burton’s blindness to Aboriginal sovereignty not so much to his distorted use of Vattel’s jus gentium as to his ‘positivist’ acceptance of a unified sovereignty as the sole source of law — Reynolds concurs — this associated with the loss of a more flexible colonial legal pluralism.

If we look a little more closely at some of the cases cited by Reynolds and Kercher, however, then a different picture of their significance starts to emerge, one of greater historical-juridical complexity, and of much greater political ambivalence. In Lowe, prior to Wentworth’s citation of Vattel, his colleague Robert Wardell also drew on the law of nature and nations, this time citing from Pufendorf’s De jure naturae et gentium. In a sobering reminder of the purpose driving the defence arguments for the non-amenity of Aborigines to Crown jurisdiction — that is, to justify Lieutenant Lowe’s killing of one — Wardell culminates these arguments with the assertion that the Aborigines must nonetheless be punishable under divine law and the law of nature. According to Wardell, Pufendorf provides authority for the defence argument that it is legitimate for an individual to avenge a crime committed in the state of nature by unilaterally punishing the perpetrator. He quotes from Pufendorf’s De jure thus: ‘It may sometimes happen that any private subject may assume the same right of defence which he would have had in a state of nature, for instance, if he happened to come into any place which belongs to no commonwealth, but continues in its primitive liberty of nature. Were someone to be attacked by a foreigner under these circumstances then he can do whatever is necessary to defend himself. Wardell concludes that: ‘According to this doctrine then the right of punishing crime is vested in the individual insured, or in his avenger’. Lowe was thus appropriating the natural right of punishment that reverts to individuals in the state of nature, and in doing so was following a natural law of reciprocal violence that is practiced by the Aborigines themselves.

62 Ibid. 105.
63 Ibid. 110, 112.
65 It is a sobering historical irony that Wardell would himself be murdered by two escaped convicts, an event that occurred not in the state of nature but in the under-policed governmental half-light of the colonial frontier.
To date, however, the historiography of this case has failed to observe the following significant fact: the doctrine that Wardell attributes to Pufendorf directly contradicts the latter’s own arguments on the right to punish. The passage cited by Wardell — regarding the circumstance in which individuals may defend themselves when outside their own states — comes not from Pufendorf’s discussion of the right to punish, but from his account of the right of war. In fact Pufendorf discusses this circumstance as a marginal exception to the rule that individuals living in states have no private right of war, which belongs to the sovereign alone who exercises it on behalf of the state. In no sense is this exceptional circumstance supposed to legitimize a private right to punish, as claimed by Wardell. If we turn to Pufendorf’s actual discussion of the right of punishment, then it is clear that the whole point of this is to deny any continuity between the right of war in the state of nature and the right of punishment in the civil state. According to Pufendorf, the latter right belongs wholly to the civil sovereign who exercises it not as a natural right of defence delegated to him by his subjects, but as a right originating from the purpose of sovereignty itself: namely, the maintenance of social peace through the exercise of unchallengeable coercive power.  

If we look for the source of Wardell’s defence of the individual’s natural right to punish, or right to punish in the state of nature, searching in the edition from which he was citing — Basil Kennet’s 1717 English translation of Barbeyrac’s 1712 French edition — then we can find it in on the very pages where Pufendorf denies this right. Here Wardell’s argument is presented in a long note by Pufendorf’s famous Huguenot translator and commentator, Jean Barbeyrac, dissenting from Pufendorf’s doctrine that the civil sovereign possesses an exclusive right to punish.  

Citing Locke’s Second Treatise of Government as his authority, Barbeyrac contends that were the right to punish wholly a prerogative of the territorial state and its sovereign — as Pufendorf argues — then it would be impossible to punish foreigners or pirates, who are not members of the state. Neither, of course, would subjects have a right to punish a tyrannical sovereign. In other words, the Pufendorf cited by Wardell is not a pristine source of natural law reasoning from which an objective recognition of Aboriginal sovereignty arose. Rather it is the doctored, ‘Lockeanised’ Pufendorf produced by early eighteenth-century Whig publicists as part of their battle against the prerogative rights of the sovereign and the Crown. The fact that this Lockean Pufendorf was produced to defend a particular political position should alert us to the possibility that Wardell’s inverted citation of him might also have been intended to serve a political purpose.

Similar remarks apply to the liberties that Wentworth takes with Vattel’s text and arguments. In fact Wentworth begins his submission by repeating Wardell’s Lockeian argument that a natural right to punish belongs to individuals before it is delegated to the Crown, asserting that, as the Aborigines are living in the state of

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67 Ibid. The relevant Barbeyrac commentary is given in note 3, at 764.
nature, individuals possess the natural right to punish their aggressions.\(^{68}\) Next, Wentworth adds an argument which McHugh shows had formed an important part of the settler arsenal in the American colonies: namely, that, having met with little opposition, the British sovereign had not conquered the native inhabitants and thus did not the exercise prerogative rule that came from the seizure of sovereignty through conquest.\(^{69}\) According to Wentworth, this is why the Crown did not empower the Governor of New South Wales to exercise discretionary rule in such matters as taxation, so that government must take place through parliamentary legislation. This, then, is the context in which Wentworth introduces Vattel’s doctrine regarding the illegitimacy of assuming sovereignty over native landholders who do not themselves exercise sovereignty. In other words, he does not introduce this doctrine as a natural law argument for the recognition of Aboriginal sovereignty under the law of nations. Rather, he assimilates it to a ‘Whig’ common-law political argument supposed to show that in the absence of conquest, the Crown has no jurisdiction over Aborigines in their own ‘demesne’, hence no jurisdiction over soldiers and settlers who ‘punish’ them in that place — elided by Wentworth with the state of nature — in accordance with natural right.

Here too, an exceptional case — Vattel’s discussion of nations living off the demesne of a territory without exercising sovereignty over it — is turned into the normal situation. Vattel is quite clear that land-holding and sovereignty are normally reciprocally related, and that jurisdiction in fact arises from their coincidence.\(^ {70}\) This shows that it is impossible to derive a conception of Aboriginal sovereignty from Vattel’s account of independent families occupying a demesne. Of more immediate importance, it is a pointer to the fact that Vattel does not regard those nations who exercise ownership without sovereignty as if they were in the state of nature. In living off the land, such nations are already within the ‘society of nations’, but at a lower developmental level than those nations who have formed political societies in order to exercise sovereignty.\(^ {71}\) They are at an even lower level still if they live off the land by hunting and gathering rather than agriculture, which is a sign that they have scarcely begun to develop their humanity.\(^ {72}\) In other words, it is only by forcibly assimilating Vattel’s conception of the hunter-gatherer demesne to a Lockean state of nature that Wentworth can seek to deny Crown jurisdiction over Lowe as avenger of the natural law, again in defence of the common law liberties of soldiers and settlers. Not only does Vattel regard the hunter-gatherer demesne as subject to the law of nations — rather than treating it as the state of nature — but he views this law as legitimating the partial appropriation

\(^{68}\) R v. Lowe (1827), Decisions of the Superior Courts.

\(^{69}\) See McHugh, ‘Common law Status’. See also the illuminating essay by Lisa Ford, ‘Empire and Order on the Colonial Frontiers of Georgia and New South Wales’ (2006) 30 Itinerario 95.

\(^{70}\) Vattel, Law of Nations, bk. II, ch. vii, § 84.

\(^{71}\) On the place of Scottish developmental ‘stadal theory’ in Vattel’s jus gentium — and its use in the construction limited forms of indigenous rights — see Hickford, ‘Maori Property Rights’; more generally, Mark Hickford, “Making ‘territorial rights of the natives’: Britain and New Zealand, 1830-1847”, (PhD, University of Oxford, 1999).

\(^{72}\) Ibid. bk. I, ch. vii, § 81.
of this demesne by more developed sovereign nations, who would thus certainly exercise jurisdiction in their appropriated lands.73

It begins to seem, then, that in seeking to find within early colonial law an uncompromised law of nature and nations from whose impartial application the recognition of Aboriginal sovereignty would flow logically, the social history of the moral nation has been engaged in a doubly risky venture. On the one hand, this strategy risks overlooking the fact that the cited law of nature and nations represents a partisan moral-philosophical version of the discourse. The cited form of this discourse, moreover, was itself the product of a series of political assimilations and uses that had transformed it into a weapon of choice for various anti-state political positions. On the other hand, it risks treating a different line of *jus naturae et gentium* — the political-juridical form focused in not in the morally self-determining nation but in the politically determinant sovereign state — as an ideological cover for social forces. In so doing, it fails to grasp its independent historical reality of this form as a rival reception context for positive law and politics in the colonial state. If the assertion of the extra-jurisdictional status of the Aborigines was something less than a *bona fide* attempt to recognise their national sovereignty, then the assertion of the Crown’s singular and unified sovereignty over the territory was something more than a *mala fide* denial of the Aborigines’ existence as a self-determining moral nation.

V WHAT IS NEW SOUTH WALES?

Paul McHugh has argued that the doctrines that historians take to be exemplary for the recognition (or denial) of indigenous rights — that the indigenous people had not been conquered by the Crown; that the Crown exercised supreme sovereignty over a territory — in fact occurred within the context of certain kind of political conflict that played out in a number of English common law colonies.74 Arguments regarding conquest, rights, and sovereignty emerged from a long-standing culture of English political thought. This was organised around the poles of the defence of time-immemorial common law rights against Crown prerogative versus the assertion of Crown sovereignty as the condition of existence of the common law and its rights. In the common law colonies, this bifurcated political language played into a repeated pattern of colonial political conflict. Settlers and their lawyers could appeal time-immemorial rights and jurisdictional pluralism, asserting a more local jurisdiction against that of the far-off sovereign, and seeking maximum freedom to exploit the economic and social opportunities provided by the under-regulated frontier. The British Colonial Office and its colonial governors could assert the unchallengeable and unified territorial sovereignty of the Crown, seeking to bring both settlers and Aborigines under a single jurisdiction, but lacking the administrative reach, police powers, and local knowledge required to make such programmatic assertions binding on the dangerously fluid reality of the

73 Ibid. bk. II, Ch. vii, § 86.
74 See in particular, McHugh, ‘Common-Law Status’; and, more extensively, McHugh, *Aboriginal Societies and the Common Law*. 
frontier. Under these conditions the natural law rights of *jus gentium* and the public law rights of the Crown — including native title rights — did not provide a formal legal basis for timeless realities, but an entirely historical means of programming government, and resistance to it.

Consider again in this regard the circumstances in which colonial jurists denied that the Aborigines had been conquered — and were hence unamenable to Crown jurisdiction — which Reynolds treats as evidence for natural-law openness to the possibility of Aboriginal sovereignty. In *Lowe*, Wentworth formulated this denial in the following way:

> I will not suppose this Court can be ignorant of the early annals of this country, because it must be within the judicial cogniscance of this Court, as much as the battle of Hastings in the Court of Westminster — that we landed on these shores without opposition, that we took it, and remained in it without opposition, and that no conquest was ever made of it by his Britannic Majesty. … if any conquest had ever been made, it is clear that it was competent to his Majesty, by virtue of his prerogative, to delegate his Governors various powers, which he withheld from them. The King would have had the power to authorise his Governors here to make laws, and levy taxes, and not have been under the necessity to have had recourse to this legislature for any provisions …

In reactivating the status of the Norman conquest of England within English common-law culture, Wentworth positions the controverted conquest of the Aborigines according to long-standing topics of English political argument. Here, conquest provided a justification for rule by a sovereign regarded as the source of all law, while the questioning of conquest provided a justification for the denial of such rule via recourse to time-immemorial (Saxon) laws and rights: the ‘ancient constitution’ that had survived the Norman invasion. In denying that the Aborigines had been conquered, Wentworth’s intention was not to assert their natural law rights to an independent jurisdiction or sovereignty, but to restrict the prerogative rights of the Crown over the settlers, including Wentworth himself. The object of the exercise was to permit the settlers to deal directly with the Aborigines outside of Crown jurisdiction. This was not so much to justify violent treatment of them — although this is what Wentworth was doing in his defence of Lieutenant Lowe — as to permit the unfettered purchase of Aboriginal lands. In this regard it is worth noting that in 1840 Wentworth would himself play a key role in an abortive attempt to purchase large tracts of Maori land from a group of visiting chiefs.

The British Colonial Office’s assertion of an exhaustive and singular territorial sovereignty needs to be seen against the backdrop of this kind of settler and judicial

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77. See Hickford, ‘Maori Property Rights’, 156.
activism. On 26 July 1837 — no doubt informed by the doubts raised about Crown jurisdiction over Aborigines in the cases of *Lowe* (1827), *Ballard* (1829), and *Murrell* (1836) — the Colonial Secretary, Lord Glenelg, spelt out government policy in a dispatch to Governor Bourke:

> Your commission as Governor of New South Wales asserts Her Majesty’s sovereignty over every part of the continent of New Holland which is not embraced in the colonies of Western or Southern Australia. Hence I conceive it follows that all the natives inhabiting those territories must be considered as subjects of the Queen, and as within Her Majesty’s allegiance. To regard them as aliens, with whom a war can exist, and against whom Her Majesty’s troops may exercise belligerent rights, is to deny that protection to which they derive the highest possible claim from the sovereignty which has been assumed over the whole of their ancient possessions.  

This attempt to constitute the Aborigines as British subjects through the sovereign assertion of the Crown’s territorial jurisdiction was no doubt fuelled by several motives, no less by the desire to control and Christianise the Aborigines than to protect them from land-hungry entrepreneurs and vigilante shepherds and soldiers. Such *de facto* assertions of territorial sovereignty did indeed function as authority to which judges could appeal in declaring Crown jurisdiction over Aboriginals and settlers. Sovereignty and its consequences for Aboriginal rights, however, was not itself seen as founded *de jure* in the titles under which it was asserted — whether these be conquest, cession, occupation or prescription — as these were treated as instruments for exercising governmental authority in accordance with (shifting) policy objectives.

The instrumental public law use of these concepts is clear enough in a supportive letter that Governor Gipps wrote to Chief Justice Dowling in January 1842. This letter was in response to Justice Willis’s arguments in *R. v Bonjon* (1841) that, in the absence of conquest or cession, the Crown lacked jurisdiction over the Aborigines in *inter se* cases. Arguing that none of the three ways of acquiring colonies — by conquest, cession, or occupancy — had been satisfied in the Australian context, Willis had drawn on Vattel to mount a case for a form of Crown sovereignty that treated the Aborigines as ‘dependent states’ retaining their own laws in *inter se* cases. Gipps’s letter to Dowling is a clear expression of the executive’s concern at what seemed to be an attempt by the judiciary to make government policy from the bench. After asserting that the ‘sovereigns of Great Britain have … assumed unqualified dominion over the parts of New Holland forming the territory of New South Wales’ and declaring that ‘by an Act of Parliament, 9 Geo. 4, c. 83, that within the colony of New South Wales, British law shall be established, without reference to any other law, or laws, save as such as

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79 Willis’s address can be found in *British Parliamentary Papers, Colonies Australia, 1844*, vol. 8, 148.
may be made by the local legislature’, the Governor offered this comment on the status of the Aborigines as a conquered people:

That even if the aborigines be looked upon as a conquered people, and it bew even further admitted that a conquered people are entitled to preserve their own laws until a different law be proclaimed by the conqueror, still no argument in favour of a separate code of laws for the aborigines of New South Wales can be drawn therefrom: first, because the aborigines never have been in possession of any code of laws intelligible to a civilized people; and secondly, because their conquerors (if the sovereigns of Great Britain are so to be considered) have declared that British law shall prevail throughout the whole territory of New South Wales.\(^{80}\)

In short, were it to have been used as a public law category in New South Wales, then the juridical meaning and effectivity of a term such as conquest would have been determined not by its (in any case controverted) use in the texts of the law of nature and nations, but by something else altogether: namely, the government’s practice of asserting its complete rights of ownership (dominium) and legislation (imperium), on the basis of which the Crown alone could grant such rights as native title rights or customary law rights should this be deemed appropriate on policy grounds. The argument that colonisation is normatively governed by the jus gentium categories of conquest, cession, or occupation — such that a colonised people not deemed to be conquered might retain native title or sovereignty rights in accordance with a higher law of nature and nations — suffers from a double weakness. On the one hand, it is undermined by the fact in the absence of concrete legislative enactments and judicial decisions the meaning and applicability of such categories remains floating and contentious. On the other, it is vitiated by the fact that the use that state officials do make of such categories is determined not by the higher law of nature and nations but by far more immediate policy objectives linked to the extension of government and expressed in positive law.

There was, nonetheless, real uncertainty in all quarters about how Crown jurisdiction should be extended over the Aborigines and in what sense they could be regarded as British subjects. On the one hand, there were those officials like Secretary Glenelg and Governors Bourke and Gipps who sought to exercise a strict Crown jurisdiction over the Aborigines by asserting the territorial character of sovereignty and jurisdiction. On the other hand, there were those who argued against such strict jurisdiction and in favour of the Aborigines retaining their own laws, at least for the time being.\(^{81}\) This latter argument could be maintained by those who regarded it as unjust to subject the Aborigines to a form of law so foreign to their own laws and way of life, as well as by those who sought to weaken the exercise of Crown jurisdiction to facilitate exploitation of the Aborigines. If Lord Glenelg derived the status of British subject directly from the exercise of territorial sovereignty or subjection, Wardell and Wentworth made it

\(^{80}\) Ibid. 144.

\(^{81}\) Cf., Damen Ward’s discussion of the ‘strict applicationist’ and ‘exceptionalist’ positions — both of which remained integrationist — in his ‘A Means and Measure of Civilisation’.
conditional on a dense network of cultural qualifications: knowledge of the English language and the basic precepts of Christianity, and, above all, knowledge of English law and the capacity to occupy the roles of plaintiff and juror in trial proceedings.

It is this common law construction of British jurisdiction and subjecthood that allows Wentworth to argue that the Aborigines do not live in the jurisdiction of New South Wales, which is a place defined not by the Crown’s territorial sovereignty, but by the presence of common law British subjects:

By the New South Wales Act the jurisdiction of this Court in New South Wales is rendered co-extensive with the jurisdiction of the Court of the King’s Bench in England. It is a preliminary question then what is New South Wales? I think I shall prove that New South Wales in this act means such parts of the territory as are occupied by British subjects ...  

Given that the Aborigines are not British subjects — as they have never been conquered and lack the necessary common-law cultural qualifications — they exist in another jurisdictional space. In declaring this space to be that of the state of nature subject to *jus gentium* and natural law, Wentworth and Wardell were in fact defending a more personal and local form of common-law jurisdiction against the modern territorial jurisdiction of the Crown.  

In the three leading cases of *R. v Lowe* (1827), *R. v Ballard* (1829), and *R. v Murrell* (1836), one can see the colonial judiciary charting a fluctuating course between these two poles — between jurisdiction as defined by the presence of British common law subjects and as defined by the exercise of the Crown’s territorial sovereignty — but gravitating in the latter direction. In *Lowe*, Chief Justice Forbes rejects Wentworth’s attempt to restrict the Crown’s jurisdiction to a place co-terminus with the presence of British common law subjects, and he does so by defining jurisdiction in terms of the exercise of territorial sovereignty. According to Forbes, the time for ‘the abstract principles of the law of nations’ is over, having been eclipsed by the act of parliament that establishes sovereignty over the territory of New South Wales: ‘If the Act of Parliament has recognised a sovereignty over this country, and recognised the application of English law here, we must look to the British law as established here *de facto*; and the Court is of that opinion’. The only thing required to establish Lowe’s amenability to jurisdiction is thus the geo-political locale in which the killing took place: ‘It is stated to be at Wallis’s Plains, in the district of Newcastle, in the Territory of New South Wales.’  

This way of asserting the British subjecthood of the Aborigines was the means by which the British government sought to maintain jurisdictional control over rogue soldiers like Lowe and similar threats to civil order on the frontier.

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83 On this see Ford, ‘Empire and Order’.  
84 *R. v Lowe* (1827), *Decisions of the Superior Courts.*
In *Ballard*, however, concerned with *inter se* Aboriginal homicide, Forbes denies the Court’s jurisdiction by using the other principle: Aboriginals in their natural state lack the moral and juridical capacity to qualify as British subjects. They are thus beyond Crown jurisdiction even if the purported crime does take place ‘in the Territory of New South Wales’. It is noteworthy that here Forbes makes use of the Lockean natural law argument that entrance into the state’s jurisdiction takes place via a contract in which natural rights are exchanged for the sovereign’s protection — ‘They give up no natural rights’, he says of the Aborigines — rather than through the *de facto* declaration of territorial sovereignty. Here in effect Forbes accepts the argument that he rejected when it was put by Wentworth in *Lowe*: New South Wales is defined by the presence of British common law subjects or the English common law nation, which means that the Aborigines inhabit another jurisdictional space, the state of nature.

Given this oscillation between opposed principles for determining jurisdiction, it seems clear that when Forbes later declared that the Court could try an Aborigine for the killing of another — in *R. v Murrell* (1836), seven years after *Ballard* — he was not so much ‘overturning’ *Ballard* as reverting to *Lowe*. In *Murrell*, the defence attorney, Sydney Stephen, uses all of the common law arguments for identifying jurisdiction with common law British subjecthood, hence denying the Court’s jurisdiction over Aboriginal offenders: having neither been conquered nor ceding their lands, the Aborigines are not British subjects, and it is unfair to subject them to the common law when they lack the juridical capacities and standing required to enjoy its protection. In explaining the Court’s rejection of these arguments, Justice Burton’s reasons rehearse the grounds for the Crown’s exercise of territorial sovereignty in substantially the same terms as Forbes in *Lowe*. Burton asserts that the British sovereign has taken possession of New South Wales as a distinct territory and imposed jurisdiction on it — ‘the rights of Domain and Empire’ — through an act of parliament, and the offence took place within this territorial jurisdiction where ‘by the Common Law and by Stat. 9 Geo. 4 c 83 the law of England is the law of the land’.

Burton does, however, supplement Forbes’ arguments with one taken from Vattel. With regards to ‘numbers and civilisation’ and their ‘form of Government and laws’, he argues, the Aboriginal tribes could not be ‘recognized as so many sovereign states governed by laws of their own’, which means that the land of New South Wales could be regarded as ‘unappropriated’ when taken by the British sovereign. This is the reasoning that Reynolds and Kercher view as representing the dark cloud of the *terra nullius* doctrine settling over Australian law. They see it as signifying the eclipse of the earlier natural law recognition of native title and jurisdiction by a positivist law acting at the behest of a corrupt state and society in order to dispossess the Aboriginal population of their rights and land. There are several reasons, though, for doubting the contextual adequacy of this interpretation.

85 *R. v Ballard* (1829), *Decisions of the Superior Courts*.
86 *R. v Murrell* (1836), *Decisions of the Superior Courts*.
87 *R. v Murrell* (1836), *Decisions of the Superior Courts*. 
Firstly, as mentioned, the bulk of Burton’s reasons for asserting Crown jurisdiction are identical to Forbes’ arguments from territorial sovereignty made nine years earlier in his *Lowe* judgment. Second, the one argument that Burton adds to Forbes’ — his denial that the Aboriginal tribes were sovereign states — comes not from statist positive law, but from Vattel’s *jus gentium*. It appears from the passages cited as authority for his judgment — especially the relevant paragraphs in Bk. I, ch. xviii of the *Law of Nations* — that Burton is mobilising Vattel’s argument that legitimate ownership requires both occupancy (domain) and territorial sovereignty (empire), understood as an unified and unchallengeable capacity for political rule over a territory. Following Vattel, Burton can thus argue that ‘wandering tribes’ who do not exercise sovereignty over a territory do not possess legitimate ownership, which means that appropriation of such a territory is lawful according to the law of nations.  

At the level of textual citation, then, Burton’s argument from the absence of Aboriginal sovereignty represents not a new legal positivism but an attempt to marshal the law of nations in support of Crown jurisdiction. Burton may well have been seeking to supplement Forbes’ earlier *de facto* defence of territorial jurisdiction — the view that jurisdiction and legality are internal to an expropriating act of sovereignty that is not itself legal (or illegal) — by using Vattel to argue for the natural law legitimacy of this act. This would combat the way in which the settlers’ advocates used Vattel to restrict Crown territorial jurisdiction in favour of a more local common law jurisdiction. In any case, the fact that Vattel could be cited with roughly equal plausibility on both sides of the argument indicates that it was not the law of nature and nations that was playing the determinative role. Rather, this was played by the two counter-balanced ideological positions which, despite their seventeenth-century origins, continued to frame political and juridical argument: the conception of subjecthood in terms of the exercise of territorial sovereignty versus the conception of it as a dense network of customary rights, cultural qualification and local jurisdiction.

**VI CONCLUSION**

The picture of the exercise of sovereignty and jurisdiction in colonial Australia that begins to emerge from a contextualist historiography differs in several regards from that characteristic of the narrative social history of the moral nation. It is not self-evident that any of the peoples caught up in colonisation — whether indigenous dwellers or incoming ‘people of the boat’ — should be regarded as possessing juridical rights arising from their status as morally self-determining ‘nations’. This is in part because to view them in this way one must first accede to a particular tendentious moral-political position — represented here by the metaphysical version of the law of nature and nations — whose concrete political and juridical outcomes have varied with its programmatic use. It is also because a

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rival conception of politics — oriented not to the self-realising nation but to the exercise of ‘impersonal’ rule by a nation-blind state — has become indispensable to our political and juridical self-understanding. In its radically de facto colonial imposition, a state conceived in this way does not recognise indigenous rights in accordance with the principle of moral self-determination founded in time-immemorial law. Rather it does so in accordance with the practice of incorporating the totality of ownership and legislative right, in order to constitute itself as the sole source of the titles that its subjects are capable of holding. This includes native title understood as a modern form of land tenure defined by the Crown’s exclusive right of extinguishment. The recognition of native title in High Court’s Mabo judgment may thus be regarded as the common law’s belated exercise of this right on behalf of the Australian Crown. If the British Crown’s refusal to formally recognise native title and customary law — as time-immemorial natural law facts — does not represent the moral nation’s fall into an originary injustice, then the Mabo judgment does not represent the partial restoration of this nation to an integral condition. This conception of history, as the path charted by a morally self-perfecting nation, arose during the 1970s when an anti-state social history reactivated a metaphysical natural law doctrine and attached itself to the ‘presentist’ self-understanding of common law revisionism. The rival contextualist historiography of political thought and public law constitutionalism views the state not as an agent responsible to and for the moral history of the nation, but as one whose normatively ungoverned actions — including colonisation — give rise to history as their uncontrollable consequence. If this is a historiography from which no moral guilt may be ascribed to today’s Australians, then it is equally one from which they may draw no moral comfort.