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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Fiona Barker	Carwyn Jones
RP Boast	Kate McMillan
Shaunnagh Dorsett	Sir Geoffrey Palmer
David Hackett Fischer	Andrew Sharp
Benjamin F Gussen	David V Williams
Mark Hickford	

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# CONSIDERING THE HISTORICAL-POLITICAL CONSTITUTION AND THE IMPERIAL INHERITANCE IN MID-NINETEENTH CENTURY NEW ZEALAND: BALANCE, DIVERSITY AND ALTERNATIVE CONSTITUTIONS

**Mark Hickford\***

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*In considering the intellectual context for the New Zealand Constitution Act 1852, this essay examines a web of Whig-liberal and Tory as well as radical precepts influencing its drafting and the political constitutional culture it both expressed and reflected. In so doing, it contends that it is insufficient to label New Zealand's historical, political constitutional fabric or the 1852 constitution specifically as, say, "pragmatic". Rather, this article argues for a richer, historical engagement with political constitutionalism. This article will also examine the intellectual influences underlying an alternative, previously unidentified, draft constitution referred to as the "MS project".*

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## **I INTRODUCTION**

This article contends that one aspect of the imperial constitutional inheritance that has been neglected is the preoccupation with *adjustable* constitutional design as a means for better reflecting and securing constitutional values or norms. In doing so, it will argue that a central value in the imperial political constitution was a sense of *contestable* "balance" within a particular body politic – and, implicitly, its diversity – partly through the representation of interests as opposed to mere

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\* Prime Minister's Policy Advisory Group, Department of the Prime Minister and Cabinet; New Zealand Law Foundation International Research Fellow 2008; member of the Legislation Advisory Committee. This article is based on research originally conducted for my doctoral thesis at the University of Oxford (completed in 1999). The views expressed are strictly personal to the author and do not represent those of the Department of the Prime Minister and Cabinet or the New Zealand government. I am grateful for the comments of the anonymous reviewer, as well as those of Damen Ward, Shaunnagh Dorsett, Duncan Bell, Grant Johnston, Simon MacPherson, Ellen MacGregor-Reid, Claudia Orange, Richard Ekins, Jacinta Ruru and Sir Geoffrey Palmer on the issues and concepts referred to in this article. Any errors remain my own.

majoritarian numbers. "Balance" as a trope of political constitutional design was a norm with its own histories and was played into framing what became the New Zealand Constitution Act 1852.<sup>1</sup> As we shall see, how such balance might be obtained proved to be a matter for debate and various techniques were deployed, including using nominated upper chambers in bicameral legislatures. Furthermore, as hinted at above, adjustable balance was seen as supported through representing diverse interests. These elements became part of the intellectual architecture not only of those aligned politically with Whig interpretations of constitutionalism but also with those of Tory or early to mid-nineteenth century radical inclinations.<sup>2</sup>

Two observations follow. First, none of these normative foundations – balance and a diversity in interests – let alone their outcrops in the form of imperial legislation in 1846 or 1852, were reducible to vague, general labels such as "pragmatism", "authoritarianism" or "egalitarianism", as if these terms pervasively and ahistorically capture the ingredients of New Zealand's relevant political constitutional culture.<sup>3</sup> Rather, a more granular, historicised approach is required analytically. What may be referred to less than illuminatingly as "pragmatism" may conceal or divert attention from a range of intellectual and political genres and changes in them through time. As such, this article will contend that it is insufficient to label the historical-political constitutional fabric or the 1852 Constitution specifically as, say, "pragmatic": even diverse individuals or clusters of individuals seeking expedient solutions or pursuing tactical options operate in a web of normative principles that can be seen in their choices and in the final outcome. It will also become clear that it cannot be claimed simply, as certain scholars are wont to do, that the then colonial governor of New Zealand, Sir George Grey, was responsible for drafting the New Zealand Constitution Act.<sup>4</sup>

Secondly, these primary principles of "balance" and "diversity" in interests both promoted and reflected what I have characterised elsewhere as historical-political constitutionalism and the politics suffusing it across time.<sup>5</sup> Essentially it meant finding an acceptable institutional and

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1 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72.

2 An excellent source on this point remains JW Burrow *Whigs and Liberals: Continuity and Change in English Political Thought* (Oxford University Press, Oxford, 1988). See also the valuable discussion in Mark Francis and John Morrow *A History of English Political Thought in the Nineteenth Century* (Duckworth, London, 1994). As applicable to colonial New Zealand, see Mark Hickford "The Historical, Political Constitution – Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Qualities" [2013] NZ L Rev 585.

3 Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 281.

4 Contrast David Hackett Fischer *Fairness and Freedom: A History of Two Open Societies: New Zealand and the United States* (Oxford University Press, New York, 2012) at 92.

5 On what I have called the "historical, political constitution", see Hickford "The Historical, Political Constitution", above n 2; and Mark Hickford "Looking Back in Anxiety: Reflecting on Colonial New Zealand's Historical-Political Constitution and Laws' Histories in the Mid-Nineteenth Century" (2014) 48 New Zealand Journal of History 1.

behavioural-operational framework for each political community or cohort to work out its own solutions, and allowing (indeed praising) change over time, including adjustments to the framework. In consequence, then, there was to be no broad-ranging legal entrenchment and no major role for judges.<sup>6</sup> A key argument in my previous work on this topic is the value of not merely acknowledging the historicity of political constitutionalism but also of actively examining its rich tissues historically in and through time while focusing with care on its precise continuities and changes.<sup>7</sup> By so doing, I have endeavoured to recapitulate constitutional histories, and a self-consciously messy and dense form of them at that, as a way of accessing and understanding imperial practices and policies, as well as tracing how ongoing rivalry and contestation proved to be a central feature of historical-political constitutionalism (and *vice versa*). When looking at terms like "constitutionalism" and, say, "liberty", "liberalism" or "democracy", with a richer sense of historicity, we may see semantic continuities and conceptual ruptures.<sup>8</sup> More recently, and from a jurisprudential and philosophical perspective, I have also used this approach in order to ascertain what past analytical insights might have been drawn from historical-political constitutionalism as to its normative values (including "balance", contestability and "diversity" from the Whig interpretation) and have considered what resonances these might continue to have.<sup>9</sup> It is important to recognise that this essay considers one aspect of an imperial inheritance but certainly recognises that others deserve attention also.<sup>10</sup>

In exploring the foregoing points, this article will first set out the broad strains of political thought animating discussions on the historical-political constitution as features of constitutional design. In particular, owing to the general, but certainly not exclusive, pre-eminence of the third Earl Grey, the Secretary of State for the Colonies from 6 July 1846 until 27 February 1852, it will examine the imperial inheritances as conveyed through his influence on the drafting of the New Zealand Constitution Act, which received the royal assent on 30 June 1852.<sup>11</sup> The argument will do

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6 See also Hickford "The Historical, Political Constitution", above n 2, at 613 and the references to Alexis de Tocqueville.

7 Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at 2–4, 8–9, 20–25 and 456–462.

8 On "democracy", for instance, see Joanna Innes and Mark Philp (eds) *Re-Imagining Democracy in the Age of Revolutions: America, France, Britain, Ireland 1750–1850* (Oxford University Press, Oxford, 2013).

9 Hickford "The Historical, Political Constitution", above n 2. On the historical value, see Hickford "Looking Back in Anxiety", above n 5; and *Lords of the Land*, above n 7, at 22 and 457–458.

10 See Hickford *Lords of the Land*, above n 7, at 451 and 456–462; and Damen Ward "Territory, Jurisdiction, and Colonial Governance: 'A Bill to Repeal the British Constitution', 1856–60" (2012) 33 *The Journal of Legal History* 313.

11 As Peter Burroughs observes, the third Earl Grey during this period was unequivocally, albeit controversially, identified with "constitution making": Peter Burroughs "Grey, Henry George, third Earl Grey (1802–1894)" (May 2009) *Oxford Dictionary of National Biography* <[www.oxforddnb.com](http://www.oxforddnb.com)>.

so with passing reference to other constitutional instruments such as the Australian Constitutions Act 1850.<sup>12</sup> The process of composing the imperial legislation engaged participants of various political hues across 1851 and 1852 – Whig, Tory and radical – such that the product could be claimed to host a variety of elements. What was particular to the New Zealand situation was a mutually convenient convergence of these political accents or manners of seeing and speaking.<sup>13</sup> In saying this, I recognise that emphasising a specifically radical interpretation of constitutional politics at the relevant time is possible and is a relatively neglected area (amongst many others) that scholars might concentrate on. Indeed, some preliminary ventures towards understanding radical agitation in early colonial New Zealand settlements have been undertaken, with Kathleen Coleridge looking at artisan radicals in Wellington.<sup>14</sup> Yet, in examining the pre-eminent constitutional interpretative inheritance suffusing the New Zealand Constitution Act, this article's claim will be that the inheritance was predominantly Whig and "Whig-liberal" in its orientation with key elements in the final drafting drawing from Tory interpretations of "balance" in practice.<sup>15</sup> It has largely been an area of inattention in relevant parts of the historiographical literature, with much writing in New Zealand circles focused on *describing* the New Zealand Constitution Act or parts of it rather than considering it as part of broader, animated histories of political-legal thought in contested practice.<sup>16</sup>

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12 Australian Colonies Government Act 1850 (Imp) 13 & 14 Vict c 59.

13 Hickford *Lords of the Land*, above n 7, at 237–242 and 451.

14 For instance, refer to Kathleen Coleridge "Artisan Radicals in Wellington" in John Thomson (ed) *Books and Bibliography: Essays in Commemoration of Don McKenzie* (Victoria University Press, Wellington, 2002) 79.

15 Boyd Hilton coined the term "Whig-Liberal" in reference to mid-nineteenth century individuals such as Lord John Russell and George Morpeth, with a "Whig-Liberal Party" encompassing Viscount Howick (eventually the third Earl Grey), the Marquess of Normanby, and Henry Labouchere, for instance: Boyd Hilton *A Mad, Bad, & Dangerous People? England 1783–1846* (Oxford University Press, Oxford, 2006) at 519–20. He characterised the third Earl Grey (Viscount Howick until July 1845) as a "Liberal" in the later 1830s (at 519) but the third Earl Grey shared many attributes of those seen as "Whig-Liberals" (including a notion of intervening in the "condition of England" question with distinct policy programmes as well as an affinity towards "liberal Anglicanism" and the championing of Roman Catholic emancipation) and I have treated him as such here (while bearing his contributions on parliamentary reform in the mix too). I have used it in Hickford *Lords of the Land*, above n 7, at 235–236, 456 and 457.

16 On the significance of practice and its intersections with political-legal thought, refer to Hickford "Looking Back in Anxiety", above n 5, at 3; and Hickford *Lords of the Land*, above n 7, at 3–5, 7, 32 and 35–36. Also see Joanna Innes "Forms of 'Government Growth', 1780–1830" in David Feldman and Jon Lawrence (eds) *Structures and Transformations in Modern British History* (Cambridge University Press, Cambridge, 2011) 74 at 86. For an earlier, well known attempt to discuss the contested background to the New Zealand Constitution Act 1852 see AH McLintock *Crown Colony Government in New Zealand* (RE Owen, Government Printer, Wellington, 1958), but some methodological aspects of his work have been persuasively criticised by PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 344.

In addition, I will consider how other, broadly allied notions of achieving constitutional "balance" appropriate to colonial circumstances were conceived through looking at alternative constitutional measures proposed for New Zealand, including the so-called "MS project" in early 1852. What should always be borne in mind is that the emergence of scattered, littoral settlement enclaves on the coasts of New Zealand and Australia required deliberation on constitutional design against the background of a British constitution that was notoriously seen as an iterative work-in-progress grown through accident, inadvertence and historical contingency as opposed to a rational exercise.<sup>17</sup> In 1790, in broad alignment with this adaptive, work-in-progress temperament, Edmund Burke construed the constitution as an inheritance for which custodianship was appropriate. Thus:<sup>18</sup>

You will observe, that from Magna Charta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity; as an estate especially belonging to the people of this kingdom without any reference whatever to any other more general or prior right.

Further, this "constitutional policy [worked] after the pattern of nature" and, consequently, "by preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain we are never wholly obsolete."<sup>19</sup> Change was immanent on this view, as the preferred political constitutional settings for Burke contained the interacting and dynamic "principles of conservation and correction".<sup>20</sup> Moreover, a state, he claimed, was "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."<sup>21</sup> As the late John Burrow identified, the historicity of constitutional materials mattered too for early to mid-nineteenth century constitutional commentators such as Thomas

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17 Martin Loughlin *The British Constitution: A Very Short Introduction* (Oxford University Press, Oxford, 2013) at 8.

18 Edmund Burke *Reflections on the Revolution in France and on the Proceedings in Certain Societies in London Relative to that Event* (J Dodsley, London, 1790) at 47.

19 At 48–49.

20 At 29.

21 At 144. On Burke and constitutional continuities, see Iain Hampsher-Monk "British Radicalism and the Anti-Jacobins" in Mark Goldie and Robert Wokler (eds) *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge University Press, Cambridge, 2006) 660 at 675–676.

Babington Macaulay, Henry Hallam and Edward Augustus Freeman. Hence, a conceptual and stylistic "Burkean" inheritance underscored their assorted commentaries. That is, to put it simply:<sup>22</sup>

From Burke onwards, a self-conscious and influential school of English political thinking has held that political wisdom, and the identity of a society, and hence in some measure the appropriate conduct of its affairs, are to be found essentially in its history.

Against this background, then, relatively novel colonial theatres, including New Zealand, the Cape Colony in southern Africa and New South Wales, posed puzzles for constitutional design as a spate of imperial enactments were used to adjust governmental structures while on the outlook for ways of capturing preferred aspects of extant, organic British constitutionalism.

## **II BALANCE, DIVERSITY AND CONTESTABILITY – COLONIAL NEW ZEALAND'S "FORGOTTEN" IMPERIAL INHERITANCE**

While certain themes were shared, there was a variety of whiggisms in early and mid-nineteenth century Britain, as was the case during the preceding century, as JGA Pocock, John Burrow, Mark Francis and John Morrow have analysed.<sup>23</sup> Notwithstanding these varieties, constitutional "balance" was a valued, inherited and increasingly refined motif in elite whiggish-liberal thought although the precise techniques or elements of design to secure it were disputed throughout the political spectrum. There was an established pedigree to this focus on balance, as scholars such as MJC Vile recognised.<sup>24</sup> Amongst anglophone communities, it was not restricted to the United Kingdom. We find, say, conceptual resonances in the United States with Alexander Hamilton citing David Hume:<sup>25</sup>

To balance a large state or society ... whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able by the mere dint of reason and reflection, to effect it.

By the period of interest to this essay, the conception of "balance" within a constitutional frame had been subjected to a number of subtle but significant refinements, with a precise focus on

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22 JW Burrow *A Liberal Descent: Victorian Historians and the English Past* (Cambridge University Press, Cambridge, 1981) at 2.

23 On the complexities of "whiggism", see, for instance, JGA Pocock *Virtue, Commerce and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge University Press, Cambridge, 1985); Burrow *A Liberal Descent*, above n 22, at 21–35; and Francis and Morrow *A History of English Political Thought*, above n 2, at 67–102.

24 MJC Vile *Constitutionalism and the Separation of Powers* (2nd ed, Liberty Fund, Indianapolis, 1998) at 58–82.

25 David Hume "The Rise of Arts and Sciences" in *Essays, Moral, Political, and Literary* as cited in Alexander Hamilton "The Federalist no 85" in Terence Ball (ed) *Alexander Hamilton, James Madison and John Jay: The Federalist with Letters of "Brutus"* (Cambridge University Press, Cambridge, 2003) 426 at 431.

institutional design and incentivising certain counter-balancing behaviours within and across institutional arrangements. In essence, the three take-away focal points of whiggish and liberal-Tory perspectives in the mid-nineteenth century were: first, an emphasis on the representation of varied interests in order to ensure balance, contestability and diversity within the design of a political constitutional setting and not the mere privileging of majoritarian numbers through elections; secondly, the adjustability of the representation of such interests through time so that the constitutional frame was sufficiently flexible to adapt as circumstances altered; thirdly, ensuring that aspects of the design allowed for minority interests to be guarded or, to put it another way, to ensure the vicissitudes of popular opinion would not unduly master politics. It will be seen that these preoccupations have some resonance for twenty-first century concerns regarding representation and constitutionalism. Nevertheless, an argument in this essay is that what may be referred to less than illuminatingly as "pragmatism" or "fairness" in contemporary twenty-first century commentaries may host a range of intellectual and political genres, a number of which have since been lost sight of or otherwise neglected.<sup>26</sup> Generic terms of these types tend to obscure important historical discontinuities and continuities alike.

The "balance" at issue need not have been completely evenly poised. It may have simply consisted of a defensive power to counteract or to at least thwart the overweening ambitions of one part of a constitutional polity or body politic. John Stuart Mill recognised something of this when contending in 1861 that, "[t]here is almost always a balance, but the scales never hang exactly even."<sup>27</sup> Which of them preponderates, he continued, "is not always apparent on the face of the political institutions", adding that:<sup>28</sup>

In the British Constitution, each of the three co-ordinate members of the sovereignty is invested with powers which, if fully exercised, would enable it to stop all the machinery of government.

Accordingly albeit only:<sup>29</sup>

Nominally, ... each is invested with equal power of thwarting and obstructing the others: and if, by exerting that power, any of the three could hope to better its position, the ordinary course of human affairs forbids us to doubt that the power would be exercised.

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26 On the broad, generic use of "fairness" as an organising narrative and analytical concept for New Zealand history compared to "freedom" for the United States, see Fischer, above n 4.

27 John Stuart Mill *Considerations on Representative Government* (Parker, Son and Bourn, London, 1861) at 86–87.

28 At 87.

29 At 87.

Whilst such powers might be exercised defensively in formal terms, Mill's technique was to distil from analysing the "positive political morality" or the "unwritten [constitutional] maxims" where the practical preponderance of power resided. He concluded that:<sup>30</sup>

These unwritten rules, which limit the use of lawful powers, are, however, only effectual, and maintain themselves in existence, on condition of harmonizing with the actual distribution of real political strength.

In the case of the United Kingdom during the mid-nineteenth century, according to Mill, this alignment with the practical sources of political influence meant those who commanded the confidence of the House of Commons or, in other words, the "popular power" within a "mixed or balanced constitution" such as Britain's.<sup>31</sup> Such a sentiment recalled the Whig historian Macaulay's own statement that one needed to ascertain where material or substantive influence actually resided rather than focusing upon positive emanations in the form of legal norms *per se*.<sup>32</sup> Macaulay had famously written that the "great cause of revolutions is this ... while nations move onwards, constitutions stand still."<sup>33</sup> The underlying principle was one sourced through historical observation as he identified in the second reading debate on parliamentary reform in July 1831:<sup>34</sup>

The whole of history shews, that all great revolutions have been produced by a disproportion between society and its institutions; for while society has grown, its institutions have not kept pace and accommodated themselves to its improvements.

If there was any unmanageable discord between the formal constitutional apparatus and the substance of the distribution of power such that an adjustment in the formal settings could not occur in a timely manner, then there was a risk of disruption. Accordingly, Whigs such as the third Earl Grey and Macaulay appreciated that law, for the unwary, might become a strait-jacket constraining the energies of a community. If deployed wisely and with a sense of its adaptability and changeability, it could be a timely liberator of appropriate, deliberative energies in a society. In these circumstances, legislation within a predominantly political constitution such as that of the United Kingdom became a device or a means for adjusting legal measures to the conditions of social change – remedial in its scope rather than revolutionary; enabling and facilitative of political creativity as opposed to a hardened or entrenched constraint. Here, then, was a key precept of

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<sup>30</sup> At 87–88.

<sup>31</sup> At 88.

<sup>32</sup> On Macaulay as a Whig, see Francis and Morrow *English Political Thought in the Nineteenth Century*, above n 2, at 89–98.

<sup>33</sup> TB Macaulay "Parliamentary Reform, 5 July 1831" in *Speeches of Lord Macaulay Corrected by Himself* (Longmans, Green & Co, London, 1866) 12.

<sup>34</sup> (5 July 1831) 4 GBPD HC 776 (third series).

historical, political constitutionalism in action as interpreted via mid-nineteenth century, Whig-liberal ways of seeing.

For mid-nineteenth century Whigs, as for a liberal such as John Stuart Mill exhibiting whiggish influences in his thought in 1861 when contemplating representative government,<sup>35</sup> the actual practical functionality of the behaviours, interpersonal relations, the ritualistic observances or the customary patterns of conduct beneath the perceptible or formalistic constitutional architecture was to be the focal point. Here, the third Earl Grey was revealing in his efforts to capture what he called in 1864 "the operation of the system" of parliamentary government.<sup>36</sup> In musing on parliamentary reform in 1858 and 1864, Earl Grey recognised the significance of "balance" in considering the British constitutional framework at that juncture in time. He stressed, in particular, the position of the legislature as befitted a focus on the relative centrality of the union of the executive and legislative branches in Britain's body politic. Thus, he considered that parliamentary reform and economic reforms in the second quarter of the nineteenth century meant the:<sup>37</sup>

... *balance of the Constitution* may now be in no slight danger of being deranged by the too great diminution of the influence of Parliament which the Servants of the Crown formerly enjoyed.

In celebrating the substantial preservation of much of the "mixture of classes and interests in the House of Commons" through parliamentary reform in 1832, Earl Grey claimed that:<sup>38</sup>

What was aimed at, and accomplished more successfully than could well have been anticipated, was, to redress the *balance of the Constitution*, not to make it incline as much on one side as it had previously done on the other.

He criticised the alleged derangements of political behaviour in the United States, observing Alexis de Tocqueville's comments that:<sup>39</sup>

... in the first years of the independence of the United States, there was far from being that complete and *unbalanced* ascendancy of the Democratic principle, either in the Constitutions of the separate States or in that of the General Government, which he found existing when he visited America; and that it was by successive changes, each preparing the way for that which was to follow, that this alteration in the character of the Government was accomplished.

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35 A point made well by Burrow in *Whigs and Liberals*, above n 2.

36 Earl Grey *Parliamentary Government Considered with Reference to Reform* (John Murray, London, 1864) at 4 (and also 1–3). See also Francis and Morrow *A History of English Political Thought*, above n 2, at 233 and 237 on JS Mill and Walter Bagehot for focus on the actual practices of government.

37 At 109 (emphasis added).

38 At 96–97 (emphasis added).

39 At 155 (emphasis added).

In recounting these points, Earl Grey was referring to Tocqueville's argument that "one of the most invariable rules that govern societies" holds that:<sup>40</sup>

... as the limit of electoral rights is pushed back, the need grows to push it further; for, after each new concession, the forces of democracy increase and the demands grow with its new power.

When speaking of Britain's parliamentary government in 1864, Earl Grey warned that a mere expansion of the franchise and an ending to small borough seats would "convert our Constitution into an *unbalanced* Democracy."<sup>41</sup> In this vein he supported what he called the "cumulative vote" – a form of plural voting – whereby every elector was given as many votes as there were parliamentary members to be elected from a constituency to which the elector belonged. He suggested this "cumulative vote" include the right of either giving all these votes to a single candidate or of dividing them between the various candidates.<sup>42</sup> "The object", Earl Grey contended, "would be to secure to minorities a fair opportunity of making their opinions and wishes heard in the House of Commons".<sup>43</sup> In this series of passages, he referred to the constitution in the Cape of Good Hope from 1850, which used a "cumulative vote" system for the upper chamber, the result being to give greater weight to "independent electors who are not thorough-going partisans on either side", thereby indicating that Earl Grey considered the insights to be applicable to colonial contexts.<sup>44</sup>

Furthermore, in the United Kingdom, Earl Grey's recipe for parliamentary reform suggested boosting representation for university seats (an "educational franchise"), reserving seats for particular professions and reserving seats for certain social interests, including the legal profession and those of the working classes (he used the term). "I am not aware of any reason", he argued:<sup>45</sup>

... why those who have worked in certain trades for a given time should not be registered and formed into a corporate body with the right of electing Members of the House of Commons.

If that were so, he continued:<sup>46</sup>

... the working class might have the power given to them of choosing enough Representatives fairly to express their wishes and feelings in Parliament without the risk of giving them a monopoly of the Representation by a large reduction of the Franchise.

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40 Eduardo Nolla (ed) *Alexis de Tocqueville: Democracy in America (De La Démocratie en Amérique): Bilingual Edition* (Liberty Fund, Indianapolis, 2010) vol 1 at 95.

41 Earl Grey *Parliamentary Government* (1864), above n 36, at 203 (emphasis added).

42 At 203–204.

43 At 204.

44 At 208 and note.

45 At 213.

46 At 213.

For the universities, he suggested expanding the representation in the House of Commons for the Universities of Oxford and Cambridge from two members each to four, again applying the cumulative vote. He also proposed giving representatives to the universities in London and Durham (uniting them for that purpose), to the Scottish universities ("which might also make together a single constituency") and the Queen's Colleges in Ireland.<sup>47</sup> Here we see Earl Grey's interpretation of the Whig concept of a representation of interests rather than mere numbers on a simplistic universal suffrage. It vied with other interpretations on the specifics such as the proportional representation thesis of Thomas Hare. It was a notion that had been refined since the eighteenth century, as JR Pole traced, such that these interests corresponded with the identifiable collective interests in a community – mercantile or commercial, colonial, landed or propertied and professional although specific lists might differ in certain details from one commentator to another.<sup>48</sup> Specific boroughs could be given representation because they were perceived to represent virtually a particular form of industrial interest. William Huskisson, shortly before his untimely death in 1830, claimed:<sup>49</sup>

... Sheffield, though with a large population, and an extensive hardware manufacture, would be fully represented by Birmingham, which was the head of all that manufacture; and that Manchester was, in a certain degree, justly regarded as the capital of the cotton manufacture.

Popular representation was an undoubted feature of balance in the whiggish mode of constitutional elaboration but it could not predominate, as that would be to strike a perilous imbalance. Peter Aiken characterised this point in his lectures comparing the constitutional arrangements of Britain and the United States in 1842. "[I]f", he argued:<sup>50</sup>

... the house of lords were to yield to clamour, and to refrain from the proper exercise of its functions ... an essential organ of the constitution would become weak and ineffectual, and the *balance* of its admirable mechanism would be destroyed.

In its peculiar mid-nineteenth century British *adaptation*, monarchical, aristocratic and popular or democratic elements were to be put into the mix but the increased focus was on representation and balance *within* a parliament (including, of course, the co-ordinate monarchical, aristocratic and popular elements to the legislative process).<sup>51</sup> If one interest predominated, then this would lead to

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47 At 210–211.

48 JR Pole *Political Representation in England and the Origins of the American Republic* (University of California Press, Berkeley, 1966) at 442–499.

49 (23 February 1830) 22 GBPD HC 893 (third series). See also Norman Gash *Politics in the Time of Peel: A Study in the Technique of Parliamentary Representation, 1830-1850* (Faber, London, 1953) at 16.

50 PF Aiken *A Comparative View of the Constitutions of Great Britain and the United States of America in Six Lectures* (Longman and Co, London, 1842) at 88 (emphasis added).

51 Vile *Constitutionalism and the Separation of Powers*, above n 24, at 238–242.

pathological consequences – if popular opinion prevailed to the exclusion of other interests, the risk of immoderate, highly combustible views was feared along with the slumber of conformity; if the popular interest were held in thrall of executive interests, then the contesting role of the popular interest would be compromised – so the anxieties went. There were undoubted colonial New Zealand resonances too. Indeed, Henry Sewell in New Zealand in 1859 recorded in his journal how "[d]emocracies without very powerful correctives are the worst kind of governments".<sup>52</sup> Diversity of represented interests within a constitutional setting enabled what Bagehot would eventually characterise as "government by discussion" or "a polity of discussion" in 1873.<sup>53</sup> That is, Bagehot advocated a picture of contestability "in which the sovereign power is divided between many persons, and in which there is a discussion among many persons", irrespective of whether a so-called "free state" or a "state with liberty" was framed as a "republic or ... monarchy".<sup>54</sup> He expressed discomfort with those who sought to evade complexities in political constitutional design and the discursive, agonistic qualities that it invariably occasioned.<sup>55</sup>

Earl Grey, as with others such as John Stuart Mill or the lesser known Peter Aiken, therefore disagreed with the case for a swiftly expanded democracy made by philosophic radicals of a Benthamite hue or generally aligned with James Mill's earlier arguments for an increasingly democratic constitution.<sup>56</sup> James Mill, writing his *Essay on Government* for *The Encyclopædia Britannica* (1820) criticised orthodox Whig notions of constitutional balance and controversially recommended a suffrage for all men forty years of age and over.<sup>57</sup> In the elder Mill's account, the public interest would be identified principally with the vicissitudes of public opinion, as majorities formed and re-formed on the issues of the day. He was not persuaded by non-radical whiggish ideas as to representing distinct interests in communities, such as the landed interests, and manufacturers or merchants, all of which he called mockingly "representation by clubs".<sup>58</sup> James Mill proved undeniably critical of the "doctrine of constitutional balance" although his characterisation of it was

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52 Hickford *Lords of the Land*, above n 7, at 324.

53 Walter Bagehot *Physics and Politics or Thoughts on the Application of the Principles of Natural Selection and Inheritance to Political Society* (2nd ed, Henry S King, London, 1873) at 158, 161 and 200.

54 At 158.

55 At 192–193.

56 Burrow *Whigs and Liberals*, above n 2, at 40.

57 James Mill "Essay on Government" in Terrence Ball (ed) *James Mill: Political Writings* (Cambridge University Press, Cambridge, 2005) 28. For the dating see John M Robson and Jack Stillinger (eds) *The Collected Works of John Stuart Mill: Autobiography and Literary Essays* (Liberty Fund, Indianapolis, 2006) vol 1 at 685. James Mill disappointed both Whigs and philosophic radicals in his search for a compromise between the notion of a universal male suffrage and a concept of ensuring mature or astute political participation through simply proposing an age-based franchise qualification.

58 James Mill "Essay on Government", above n 57, at 32.

not as subtle or as refined as his own son, John Stuart Mill, or as Earl Grey would construe it in 1861 and 1864 respectively. Of "constitutional balance", Mill the elder decried it as "wild, visionary, chimerical" in its pretence:<sup>59</sup>

By this [theory of balance], it is supposed, that, when a Government is composed of Monarchy, Aristocracy, and Democracy, they balance one another, and by mutual checks produce good government.

He swiftly concluded with a rhetorical question: "If there are three powers, how is it possible to prevent two of them from combining to swallow up the third?"<sup>60</sup> His son's subsequent comments in 1861 on the adjustable, flexible nature of constitutional balance resonated by way of counter-argument – the variety of political interests engaged were incentivised to behave in a rivalrous fashion although the risk of despotism or degradation was certainly acknowledged.

"Balance", then, was not an excuse for stasis or for complacency and ease. Watchfulness was required. Differing forms of representation within the House of Commons, as well as varied franchise qualifications, were particular ways of ensuring sufficient balance according to the Whig-liberal thesis. Indeed, political constitutional health and appropriate constitutional change through time was to be maintained through a balance of interests, represented in forums, such as an assembly or legislature, where the balance could find expression. The core questions tended to revolve around who or what might be represented, and how balance could be maintained and adjusted with appropriate care in and through time. The central insight was that appropriate, temporally sensitive balance in a community could manage the risks of corruptibility and despotism in any body politic. Over-representation of one interest was seen to be fraught with risk. It would be far better, then, to ensure that a mix of interests was pitted against each other so that the encroachments of others could be contested and resisted. Maintaining contestability in the body politic between rivalrous powers or influences proved to be a key theme for design. Variety and contest were to be encouraged and politics would be the principal medium for assuring these features. This is not surprising. It was an insight already established in the eighteenth century in

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59 At 19.

60 At 19.

David Hume's works for instance.<sup>61</sup> With a distinctly mid-nineteenth century accent on "progress" or improvement, John Stuart Mill in 1861 averred that:<sup>62</sup>

No community has ever long continued progressive, but while a conflict was going on between the strongest power in the community and some rival power; between the spiritual and temporal authorities; the military or territorial and the industrious classes; the king and the people; the orthodox, and religious reformers.

Mill cautioned that, "[b]ut when the Democracy is supreme, there is no One or Few strong enough for dissentient opinions and injured or menaced interests to lean upon".<sup>63</sup> The challenge, he argued, was:<sup>64</sup>

... how to provide, in a democratic society, what circumstances have provided hitherto in all the societies which have maintained themselves ahead of others – a social support, a *point d'appui*, for individual resistance to the tendencies of the ruling power; a protection, a rallying point, for opinions and interests which the ascendant public opinion views with disfavour.

The antitheses of a whiggish-liberal balanced and mixed constitution, and localised autonomy, were perceived to be complacent uniformity and servility not to mention risks of falling prey to arbitrariness and despotism.

Early to mid-nineteenth century Whig and liberal-Tory or Peelite (after Sir Robert Peel) views broadly converged in their anxieties and cautions around the politically unrestrained *demos* although their sense of how to respond to public opinion might differ in particular details of institutional design. Here, Tocqueville was a salutary influence, as was François Guizot, although each supplied different insights and points of emphasis. Tocqueville's celebrated *Democracy in America*, volume one of which was first published in 1835 and translated into English that year by Henry Reeve, mused complicatedly on the various meanings of "democracy" with reference to what was allegedly

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61 Eugene Miller (ed) *David Hume: Essays, Moral, Political, and Literary* (Liberty Fund, Indianapolis, 1987) at I.xiv.20:

Greece was a cluster of little principalities, which soon became republics; and being united both by their near neighbourhood, and by the ties of the same language and interest, they entered into the closest intercourse of commerce and learning. ... Each city produced its several artists and philosophers, who refused to yield the preference to those of the neighbouring republics: Their contention and debates sharpened the wits of men: A variety of objects was presented to the judgment, while each challenged the preference to the rest: and the sciences, not being dwarfed by the restraint of authority, were enabled to make such considerable shoots, as are, even at this time, the objects of our admiration. ... Europe is at present a copy at large, of what Greece was formerly a pattern in miniature.

62 John Stuart Mill *Considerations on Representative Government*, above n 27, at 149.

63 At 149–150.

64 At 150.

lacking in France.<sup>65</sup> Guizot's lectures at the Sorbonne on the history of civilisation in Europe, translated by William Hazlitt initially in 1846, for instance, as well as Guizot's translation of Edward Gibbon's *The History of the Decline and Fall of the Roman Empire* in 1850, were, as Burrow has argued, influential transmitters of this philosophy of history to Whig and Tory strands of constitutionalism.<sup>66</sup> For Whigs such as Herman Merivale, permanent under-secretary at the Colonial Office from 3 May 1848 through to 3 May 1860, and for "liberal" or Peelite Tories such as Henry Pelham-Clinton, styled the Earl of Lincoln until 1851 and the fifth Duke of Newcastle thereafter, France posed a warning, or at least a source of cautionary lessons in 1789, 1830 and 1848, for example. So too did the United States at least prior to the conclusion of its civil war and before the passage of the second reform statute in the United Kingdom in 1867. The lessons to be drawn from the United States and France could be constructive or not. Many Whigs saw the United States as an example of the oppressiveness and despotism of unrestrained public opinion notwithstanding its formal constitutional apparatus. In 1864, Earl Grey, gazing on the ruinous civil war between the Union and the Confederacy, remarked on the weaknesses of a system where executive authority was not dependent on maintaining the political confidence of a majority of representatives.<sup>67</sup> As noted above, alignment between a formal constitutional arrangement and the changeable nature of underlying interests within a given polity across time was considered vital to the health of any appropriately balanced constitutional framework. Thinking from the vantage point of August 1852, the fifth Duke of Newcastle, a Peelite Tory, mused in a Macaulayesque vein to William Ewart Gladstone, another Peelite, in a private letter which also traversed the Canterbury Association and the New Zealand Constitution Act, that the:<sup>68</sup>

... mistake of France and the cause of her present fate was too great and obstinate a resistance to a fair and necessary expansion of the democratic element in her government and that the resistance of Louis Philippe & Guizot to any Electoral Reform was one of the main causes of the Revolution of 1848.

Against this background, official advice concurred on the significance of "balance" to constitutional design in colonial settings. One focal area was the framing of a bicameral rather than a unicameral legislature or to have a mixed elective and appointment basis for selecting members of a single legislative chamber. Thus, a special committee of the Privy Council for Trade and Foreign

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65 Arthur Goldhammer (translator) *Lucien Jaume: Tocqueville: The Aristocratic Sources of Liberty* (Princeton University Press, Princeton, 2013) at 16–20.

66 Burrow *Whigs and Liberals*, above n 2, at 122–123. William Hazlitt (translator) *François Guizot: The History of Civilization: from the Fall of the Roman Empire to the French Revolution* (David Bogue, London, 1846) at 24; and Edward Gibbon *The History of the Decline and Fall of the Roman Empire, with Notes and a Memoir by FA Guizot* (JS Virtue, London, 1850).

67 Earl Grey *Parliamentary Government*, above n 36, at 28–32.

68 Hickford *Lords of the Land*, above n 7, at 241.

Plantations, in its advisory report dated 30 January 1850 agreed, with the Chief Justice of the Cape Colony:<sup>69</sup>

... in believing, that if it is desired to give to the Legislative Council [Upper Chamber] strength to act in any degree as a balance to the Assembly, the elective principle must enter into its composition.

It suggested a longer term and half of the chamber being subject to re-election every five years. Somewhat controversially, Earl Grey had already resorted to the technique of a special committee of the Privy Council in 1849 comprising himself, Henry Labouchere as President of the Board of Trade, Lord Campbell, a future Chief Justice and the then Chancellor of the Duchy of Lancaster, the former permanent under-secretary of the Colonial Office, James Stephen, and Sir Edward Ryan, the one-time Chief Justice for Bengal, in seeking advice on the framing of a constitutional setting for the Australian colonies.<sup>70</sup> It reported on 4 April 1849 with Stephen reputedly having prepared the draft. Earl Grey's reflections on the experiences with constitutional framing in Australia and the Cape Colony led him to say that, "[t]he attempts hitherto made to create in the Colonies a substitute for the [unelected] House of Lords [in the United Kingdom], have been attended with very moderate success."<sup>71</sup> In explaining this statement he argued that:<sup>72</sup>

Legislative Councils composed of Members appointed by the Crown have, in general, had little real influence over public opinion, while they have been attended with the great disadvantage of rendering the Assembly less efficient, by withdrawing from the scene where their services might be most valuable, some of the persons best qualified, by the enjoyment of a certain degree of leisure, by their character and ability, to be useful members of the popular branch of the Legislature.

Section 2 of the eventual Australian Constitutions Act 1850 reflected the third Earl Grey's preferences in a way that the New Zealand Constitution Act 1852, as ultimately enacted, (as we shall see) did not. The composition of the Legislative Council for New South Wales was to be divided into thirds, with the Crown appointing one third and the remaining two thirds to be elected.<sup>73</sup>

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69 "Report of Privy Council – Constitution of the Cape of Good Hope" reprinted in Earl Grey *The Colonial Policy of Lord John Russell's Administration* (Richard Bentley, London, 1853) vol 2 at 359.

70 Benjamin Disraeli and Baron Monteagle of Brandon (Thomas Spring-Rice) critiqued the delegated irresponsibility of a special committee so appointed although Frederick Madden and David Fieldhouse have pointed out that such committees were merely advisory and did not execute policy: Frederick Madden and David Fieldhouse (eds) *Settler Self-Government 1840–1900: The Development of Representative and Responsible Government – Select Documents on the Constitutional History of the British Empire and Commonwealth* (Greenwood Press, Westport, 1990) vol 4 at 300, n 1.

71 Earl Grey *The Colonial Policy of Lord John Russell's Administration*, above n 69, at 98.

72 At 98.

73 Australian Constitutions Act 1850 (Imp) 13 & 94 Vict c 59 at [III].

... such Number of the Members of the Legislative Council of each of the said Colonies respectively as is equal to One Third Part of the whole Number of Members of such Council, or if such whole Number be not exactly divisible by Three, One Third of the next greater Number which is divisible by Three, shall be appointed by Her Majesty, and the remaining Members of the Council of each of the said Colonies shall be elected by the Inhabitants of such Colony.

Provincialism or localism in the form of subsidiary or local government relative to central government was also seen as a counter-balance to centralised government authority. Here, the vital point was to ensure a measure of jurisdictional autonomy for local or provincial administration as against the centre. This was a principle associated more with certain Tories, such as the younger Benjamin Disraeli, who in 1836 accused the Whigs of overweening, centralising tendencies. He alleged that, "[l]ocal institutions, supported by a landed gentry, check them; hence their love of centralisation and their hatred of unpaid magistrates."<sup>74</sup> But Whigs, in practice, were not insensitive to the significance of localised or regional centres of authority. About this aspect, too, there could be substantial debate as to the ways and means by which such forms of governance could be designed and distributed. Joshua Toulmin Smith, the author of *Local Self-Government and Centralization* in 1851, was a major advocate of local or municipal forms of government as opposed to centralisation although he was alive to the significance of Westminster enabling through statute various social interventions or policies that might be executed locally.<sup>75</sup> In relation to colonies specifically, localism or municipalism was seen as an important counter-balance to popular opinion and central authorities where moderating, non-popular aristocratic sources of authority were not readily available or where the range of distinct interests to be represented within a popular assembly was regarded as limited. In the absence of a non-elective second chamber such as the House of Lords, Earl Grey was amenable to designing a multi-layered constitutional setting with various counter-points established throughout the system at the municipal, regional or provincial and central levels, as was the Governor for New Zealand from 1845 until 1853, George Grey.<sup>76</sup> At a generic level, various contemporaries saw the shift in this direction as part of a grand narrative towards representative institutions and self-administration.<sup>77</sup> Indeed, by 1861, John Stuart Mill, who

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74 Benjamin Disraeli "The Spirit of Whiggism" (1836), published as an addendum to the "Letters of Runnymede" reprinted in William Hutcheon (ed) *Whigs and Whiggism: Political Writings by Benjamin Disraeli* (John Murray, London, 1913) at 331.

75 K Theodore Hoppen *The Mid-Victorian Generation 1846–1886* (Oxford University Press, Oxford, 1998) at 105; and Hickford *Lords of the Land*, above n 7, at 241.

76 For instance, see the discussion in Grey to Earl Grey (30 August 1851) *Great Britain Parliamentary Papers 1852* [1475] at 18–33 (George Grey agreed with Earl Grey's suggestion for the election of an upper chamber: "such a number of votes being allowed to each member of [the provincial] Councils as to enable a minority to be at least to some extent represented" (At 27)).

77 As PG McHugh has commented, such a teleological interpretation infects late twentieth century and twenty-first century scholarship (personal discussions).

combined a fascinatingly complex set of philosophical inheritances, including from his Benthamite father, James Mill, and his own adaptations, felt able to write that:<sup>78</sup>

It is now a fixed principle of the policy of Great Britain, professed in theory and faithfully adhered to in practice, that her colonies of European race, equally with the parent country, possess the fullest measure of internal self-government.

Again, however, if merely seen at the highest level of principle, important differences, often bespoke and peculiar to specific colonial settings such as New Zealand, Australia, British North America and the Cape Colony could be overlooked in the under-wiring of what might be seen otherwise as a general level of consensus. Colonial New Zealand already evidenced idiosyncrasies in its constitutional framing given the precedent of the 1846 imperial legislation, which had established two provinces in the form of New Ulster and New Munster, a fully nominated legislative council reconstituted for each province, representative institutions in the form of two elected assemblies (which were eventually suspended from coming into effect for five years).<sup>79</sup> As such, the Colonial Office appreciated that the suspended parts would come into operation from March 1853 unless the constitutional arrangements were settled differently.

### **III DRAFTING THE NEW ZEALAND CONSTITUTION ACT – TRANSMITTING AN IMPERIAL INHERITANCE THROUGH TRANS-OCEANIC POLITICS AND LEGISLATIVE DESIGN**

What the New Zealand Constitution Act reveals is how a complex inheritance from the United Kingdom was transmitted to colonial theatres by way of legislative design, one practically forgotten now but undeniably rich in its nuances and various applications. What it illuminates is that the historical-political constitutional framework should not be reduced to formulaic labels such as "pragmatic", prompting a need for more searching historical analysis into colonial and contemporary New Zealand "constitutional culture[s]". The New Zealand Constitution Act, an enactment of the imperial legislature at Westminster, set up hedgerows and thickets with points of influence counterbalanced by others entitled to cause difficulty or challenge. The drafting process for what became the Constitution Act was somewhat tortuous, with a "heads of Bill for [the] Government of New Zealand 1852" in place by February 1852, but it hastened swiftly to its denouement when a further revised version was debated in the House of Commons where it attracted significant attention on the part of elite parliamentarians, including Lord John Russell, Gladstone, Sir James Graham, Robert Vernon Smith, Sir William Molesworth and Frederick Peel (Benjamin Hawes' successor as parliamentary under-secretary of state for the colonies from 1

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78 John Stuart Mill *Considerations on Representative Government*, above n 27, at 322. See also Duncan Bell "John Stuart Mill on Colonies" (2010) 38 *Political Theory* 34.

79 New Zealand Government Act 1846 (Imp) 9 & 10 Vict c 103. On the subsequent suspension, see McLintock, above n 16, at 291–293.

November 1851 until 27 February 1852). The New Zealand Constitution Bill was brought into the House on 3 May 1852, read a second time on 21 May 1852, addressed in committee on 4 June 1852 and dealt with in the House of Lords on 25 June and 28 June 1852. Ultimately, Earl Grey's Derbyite Tory successor, Sir John Pakington, could claim the success of finally securing its enactment while Earl Grey benefited little from its passage into the statute book, having relinquished office before the event on account of the fall of Lord John Russell's government. Earl Grey was, moreover, associated with various delays since 1846 in not settling the constitution with any finality during his almost six-year long tenure. In its enacted form the Constitution Act introduced representative institutions to colonial New Zealand on an elective basis through establishing a relatively simple and generous property-based franchise for males twenty-one years of age or upwards.<sup>80</sup> A General Assembly comprising the Governor, a Legislative Council and a House of Representatives was secured pursuant to s 32, with s 58 providing for the ability of the imperial Crown to disallow any Bill enacted by the assembly "at any time within two years after such Bill shall have been received by the Secretary of State for Her Majesty". Section 2 of the statute established six provinces: Auckland, New Plymouth, Wellington, Nelson, Canterbury and Otago, while the limits of each province were to be fixed by proclamation. Earl Grey's "heads of [a] Bill for [the] Government of New Zealand 1852" contemplated a mere five provinces under cl 3, namely Auckland, Wellington, Nelson, Canterbury and Otago "the limits thereof to be fixed by proclamation by the Governor".

### ***A Drafting a Constitution – Reserved Civil Lists, Second Chambers and Localism***

It is useful to trace the varying fortunes of the concept of dynamically poised "balance" and a "diversity" of interests in the process of drafting what resulted in the New Zealand Constitution Act. An:<sup>81</sup>

... understanding of the past can help us appreciate how far the values embodied in our present way[s] of life, and our present ways of thinking about those values, reflect a series of choices made at different times between different possible worlds.

The point is to nuance or granulate our senses of various pasts; to "help liberate us from the grip of any one hegemonal [hegemonic] account of those values and how they should be interpreted and understood".<sup>82</sup> In a draft printed version of the instructions dated February 1852 and proposed for the colonial governor, Sir George Grey, the whiggish trope of adjusting constitutional framing as circumstances changed was signalled clearly and nicely. Thus, the 1846 constitution was no longer appropriate as "changes [had] taken place in the state of affairs of New Zealand, and the additional

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<sup>80</sup> Section 7.

<sup>81</sup> Quentin Skinner *Visions of Politics: Volume I – Regarding Method* (Cambridge University Press, Cambridge, 2002) at 6.

<sup>82</sup> At 6.

information which [had] been obtained since that measure was passed, suggest[ed] the propriety of various modifications, both in its substance and form, although its essential principles ought ... to be preserved".<sup>83</sup> As Secretary of State for the Colonies, Earl Grey favoured a reserved civil list not subject to approval by the colonial legislature. He counselled Sir George Grey to consider reserving an amount "for the benefit of the Aborigines [of New Zealand]" observing that the new legislature could only alter such amounts with the "concurrence of the Crown".<sup>84</sup> In Earl Grey's "heads of [a] Bill" the sum reserved was £7,000 for "native purposes" under cl 78. On the indigenous population, Earl Grey's own thoughts were disclosed in his reflections on colonial policy generally when he said:<sup>85</sup>

We believed the obvious difficulty of giving to a representative Legislature the power of legislating for the Natives, in the election of which they could have no influence, might be obviated, by empowering the Crown to define districts within which the laws and customs of the Natives ... should be maintained.

Section 71 of the Constitution Act and s 10 of the preceding 1846 statute certainly reflected such a stance, with the provision in 1852 stating it:

... may be expedient that the Laws, Customs, and Usages of the aboriginal or native Inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their Relations to and Dealings with each other, and that particular Districts should be set apart within which such Laws, Customs or Usages should be so observed.

Yet the Secretary of State was also mindful of the need to engage with assorted indigenous chiefly elites even though appreciating that the political salience of those elites might dissipate over time as the colonial jurisdiction gradually incorporated their territories. To that extent, he considered the "absence of any provision for maintaining the position in society of the Chiefs" to be unsatisfactory.<sup>86</sup> He elaborated that, "[e]xperience in Kafraria, in Ceylon & wherever barbarous tribes have been brought under British dominion seems to me to show that this may be a source of danger hereafter". Permitting the "Chiefs to maintain their accustomed station amongst their countrymen" (including by way of implication the application of customary law) was needed if they were to "remain really affected to the Government & contented". These indicia revealed how, as

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83 Draft letter from Earl Grey (Secretary of State for the Colonies) to Grey (Governor of New Zealand) (February 1852) CO209/159, folio 229 National Archives, Kew, London (TNA).

84 Earl Grey to Grey (19 February 1851) at Gre/B99/6C/40 Palace Green, Durham University Library (DUL).

85 Earl Grey *The Colonial Policy of Lord John Russell's Administration*, above n 69, at 154–155 (see s 71 of the Constitution Act and Hickford *Lords of the Land*, above n 7, at 239–240, 340, 345, 347, 353 and 357)

86 Earl Grey to Grey (24 August 1853) GNZ Mss35(13), folios 63–64, Auckland Public Library, as cited in Hickford *Lords of the Land*, above n 7, at 240. On "custom" as an aid to constitutional complexity, see Hickford *Lords of the Land*, above n 7, at 240–241

secretary of state, Earl Grey's conception of balance extended to the presence of hapū-Māori, diverse political communities with their own chiefly elites in his imagining although he, along with Merivale, envisaged their eventual, complete merging with the colonial body politic.<sup>87</sup>

Earl Grey used each special committee report on Australia and the Cape colony self-interestedly as precedents for approaching the framing of New Zealand's colonial constitution. This much is clear not merely from official correspondence but also from private or confidential material emanating from Earl Grey's personal hand. Drawing attention to both reports in February 1851, he advised George Grey, the Governor, privately that:<sup>88</sup>

... you will perceive that it w[oul]d be impossible now to propose that in a legislature of two houses either sh[oul]d consist of nominees of the Crown, [and] I am strongly of [the] opinion that the mode of constituting the [second] chamber suggested in my confidential despatch is the best that c[oul]d be adopted.

That is, searching for a tool to mitigate the problems he anticipated with an elective upper chamber that might become a "mere repetition of the [elected] Assembly [below]", he suggested the "members [being] elected by the provincial legislatures as the Senators in the U[nited] States are elected by the state legislatures".<sup>89</sup> Accordingly, Earl Grey did not focus on a second chamber in the General Assembly at the centre of colonial government alone but on how the "elective principle" might reproduce the politics of the localities throughout the New Zealand settlements. In February 1851 he anticipated an "extremely democratic party" having a "majority in each provincial legislature" (including advocates of universal male suffrage) as "probable" on the basis of intelligence received via George Grey and other sources. If so, Earl Grey continued, such a party in each provincial legislature:<sup>90</sup>

... w[oul]d be able to have the entire nomination of the upper house in the general legislature if the election of members of this body were conducted in the ordinary manner.

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87 Draft letter from Earl Grey to Grey (29 January 1852) CO209/159, folio 335a TNA.

88 Earl Grey to George Grey (19 February 1851) at Gre/B99/6C/38-39 DUL.

89 Earl Grey to Grey (7 August 1851) at Gre/B99/6C/46 DUL.

90 Earl Grey to Grey (19 February 1851) at Gre/B99/6C/39 DUL.

Ensuring a diversity of represented interests was seen as conducive to maintaining constitutional "balance" and, to this end, protecting minority interests was something Earl Grey remained conscious of. Accordingly, he argued:<sup>91</sup>

... if each member of the provincial legislature were entitled to give all his votes in the manner I have suggested to one candidate it is clear that a minority consisting of [one third] w[oul]d be enabled to name one of the members to be elected by each provincial legislature.

Techniques such as plural voting (one person exercising more than one vote for a particular chamber in a legislature), specifically reserved seats for certain interests in a political community, upper chambers with Crown-nominated members or members elected for longer electoral terms as with the United States Senate, were all calculated to shape and to preserve a delicate balance of interests and to protect minorities. Basing his approach off the preceding 1842 legislation for New South Wales and Van Diemen's Land,<sup>92</sup> Earl Grey had already experimented with the concept of a single legislative council where one third of the members would be appointed by Her Majesty, and the remaining "Members of the Council shall be elected by the Inhabitants of [the relevant] Colony" (s 35 of the Australian Constitutions Act 1850, and also s 2 in relation to the proposed new colony of Victoria).

Under s 33 of the New Zealand Constitution Act as passed, however, the upper chamber or Legislative Council was fully nominated on the part of the Crown with this proving to be a major point of discord not only in the parliamentary debates but during the drafting of the New Zealand Constitution Bill.<sup>93</sup> Earl Grey had envisaged in his preceding drafts that constitutional "balance" between a popularly elected Assembly and a second chamber was best achieved through adopting a different elective principle for the Legislative Council. The Legislative Council of New Zealand was to consist of fifteen members, three to be chosen by each of the five provincial legislative councils in Earl Grey's proposal by way of election on what he characterised as a "cumulative vote", an electoral mechanism he favoured consistently. He saw the "cumulative vote" as a way of ensuring a constitutional balance as opposed to an "unbalanced democracy". As already seen, he dealt with this topic in relation to the United Kingdom itself.

For Pakington, nevertheless, a membership predicated on Crown nomination provided an adequate – indeed a preferred – counter-balance to the democratic or popular interest represented through the lower chamber or the House of Representatives and the various provincial legislatures.

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91 Earl Grey to Grey (19 February 1851) at Gre/B99/6C/39 DUL.

92 New South Wales Constitution Act 1842 (Imp) 5 & 6 Vict c 76.

93 Under s 34:

Every Member of the Legislative Council of New Zealand shall hold his Seat therein for the Term of his Life, subject nevertheless to the Provisions herein-after contained for vacating the same.

He defended a completely nominated Legislative Council to the Governor on the basis that a comparable approach had been taken in other colonies, including Canada. In a deleted passage from a draft despatch of 3 March 1852 intended for Sir George Grey, Pakington was to have written:<sup>94</sup>

But I may observe that in addition to the ordinary arguments in favour of the established usage, H[er] M[ajesty]'s Governm[en]t have been also moved by the consideration that the exclusively popular character given to the local councils seemed more especially to require some counterpoise in the general legislature.

In the committee debate on 4 June 1852, Molesworth, a radical colonial reformer critiqued Pakington's proposal in a way that revealed how the United States afforded design alternatives to Crown-nomination in devising an appropriate constitutional "balance". The benefit of an upper chamber, he claimed, was to introduce a conservative element in circumstances where the lower chamber would be more responsive to public opinion:<sup>95</sup>

The only way to make the upper house effective, was having it elective by the people, and allowing its members to sit for a longer period than those of the lower.

He protested against a "nominated second chamber as being contrary to that sound principle of *balance of power*", which he "thought ought to exist in every Government formed on an analogy to the Constitution of England or of the United States".<sup>96</sup> Gladstone, a Peelite Tory, joined with Molesworth in the assault, hearkening back in so doing to his comparable criticisms of nomineeism during the debates on the Australian Constitutions Bill in 1850 when he characterised "nominees" as "men put there by the influence of the Crown, to check and control the actions of the elected members of the popular assembly".<sup>97</sup> Before the House of Commons on the New Zealand constitutional proposals in May 1852, Pakington acknowledged that "Earl Grey decided that one-third of the members should be nominees, and the Governor of New Zealand had recommended the adoption of the same course". His fellow Tory, Adderley "objected [however] to the nominee chamber, because it was a caricature of the House of Lords", adding:<sup>98</sup>

These nominees were not in the independent position which belonged to Members of the House of Lords in this realm; they were merely tools of the Crown, carrying on through an additional department of legislature that which pervaded too exclusively all our Colonial Constitutions, namely, the Crown, and nothing but the Crown".

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94 Draft letter from Pakington (Secretary of State for the Colonies) to Grey (3 March 1852) at CO209/159 folios 373-373a TNA.

95 (4 June 1852) 122 GBPD HC 47 (third series).

96 At 47 (emphasis added).

97 (8 February 1850) 108 GBPD HC 599 (third series).

98 (3 May 1852) 121 GBPD HC 130 (third series).

Gladstone supported Earl Grey's plan on the upper chamber noting that it had drawn from the United States Senate:<sup>99</sup>

... if there be one thing in the constitution of the United States of America which more than others entitles the great authors of that astonishing work to the gratitude of their countrymen, and to fame as wide and lasting as the world, it is the system which they have devised for the election of the Senate—which, proceeding on the principle of providing for the election of Senators from separate States, each considered as units and all as equal, establishes a check on the power of mere numbers or pure popular election.

Pakington's riposte was simple:<sup>100</sup>

The right hon Gentleman the Member for the University of Oxford said, he wished to draw a precedent from the United States of America [whereas Pakington's] answer to that was, that he would rather draw a precedent from Great Britain.

On Pakington's coming into office, Herman Merivale assembled a bundle of papers for his review in March 1852 not only with a view to briefing the new Secretary of State with a range of relevant material but also in an attempt to contextualise the "MS project" or alternative draft constitution which the lobbying colonial reformers had supplied, as discussed in detail below. Amongst the bundle was an undated confidential "heads of Bill for [the] Government of New Zealand 1852" marked "G" with a reference in the left margin in Merivale's handwriting to a "Heads of Bill submitted to Sir J[ohn] Pakington" on 21 March 1852.<sup>101</sup> Earl Grey's "heads of Bill" was in a printed format, as it had been prepared for Cabinet. It is evident that Merivale's handwritten comment in the margin referred to the alternative "MS project" draft as his marginalia were notes setting out comparative differences and resemblances between Earl Grey's "heads of Bill" and the alternative, handwritten, manuscript or "MS" framework put before Pakington. Thus, he refers to cl 14 of the "MS project", which proposed the establishment of a "provincial legislature" to consist of two chambers "apparently with election" (to use Merivale's words), and he observed that cl 24 of the project only reserved a civil list of £5,000 but that this amount was not to be varied. Merivale advised Pakington that Earl Grey's own "heads of [a] Bill for [the] Government of New Zealand 1852" was framed "partly on directions received from L[or]d Grey in conversation & by other written minutes with which I will not trouble you".<sup>102</sup> It was this document more than any other, coupled with a printed draft despatch marked "H" intended for George Grey, the colonial governor in New Zealand, that formed the basis for the final version of the enacted legislation. Despite having

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<sup>99</sup> (21 May 1852) 121 GBPD HC 968 (third series).

<sup>100</sup> At 979.

<sup>101</sup> Confidential, CO209/159 at folio 157 TNA.

<sup>102</sup> Herman Merivale, CO209/159 at folio 215a TNA.

left office, Earl Grey was consulted on the drafting of the statute and, towards the conclusion of the legislative process, he prepared a number of comments, which he supplied as notes to the Colonial Office on the "New Zealand Bill". Some changes were made to the draft legislation as a result; other suggestions were not accommodated. Frederick Peel retained this missive for reflection before returning it to him on 2 June 1852. As is often the fate of complex Bills, compromises were made. Amongst the proposed changes accommodated in part were those around what might qualify as a quorum for the provincial legislatures. Earl Grey criticised the proposal to set the quorum for provincial councils at one half of the total council membership. Noting that the House of Commons then had a quorum requirement of less than one sixteenth, he suggested that one quarter be the quorum, as per the draft heads of a Bill formulated under his auspices in February 1852. The Colonial Office under Pakington eventually settled for one third in what became s 22 of the Constitution Act. For Earl Grey, "requiring the attendance of a large quorum is to enable a minority to defeat all legislation by absenting themselves".<sup>103</sup> He also secured a power for the Governor to withhold assent to a provincial council Bill, which was reflected in s 29 of the 1852 Act. He failed in opposing a Legislative Council holding nominees appointed for life but his criticisms again reveal his own sense of how to ensure constitutional "balance": a nominated council of life members would be "an oligarchical body above all [controlled] either by the Crown or the people".<sup>104</sup> One other important point Earl Grey failed on was on elected superintendents exercising the executive function regarding provinces. Sir George Grey had advocated superintendents on an elective basis whereas Earl Grey, in opposing that concept, considered "all [e]xecutive authority, except that which, in the strictest sense of the word, is merely municipal, must emanate from the Crown".<sup>105</sup> Pakington, however, agreed with the elective principle for provincial superintendents, considering such officers to be equivalent to the heads of municipalities who were elected and the elective proposal to be a useful concession to the governor on the ground and to colonial reformist opinion in the United Kingdom (Sir William Molesworth, for instance) and New Zealand.<sup>106</sup>

Consistent with the theme of localism as a counterpoint to undue centralisation where aristocratic cohorts could not be drawn upon, relatively autonomous provincial legislatures were considered important. In supporting the maintenance of local, provincial legislatures in what became the New Zealand Constitution Act 1852, Merivale, as permanent under-secretary in the Colonial

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103 Earl Grey "New Zealand Bill" at Gre/B147/58 DUL.

104 At Gre/B147/58.

105 Draft letter from Earl Grey to Grey (February 1852) CO209/159 at folio 230a TNA

106 Pakington to Grey (16 July 1852) CO209/159 at folios 364a-365 TNA.

Office in London, advised Frederick Peel, who was not only the parliamentary under-secretary at the end of Earl Grey's tenure but also son of the deceased liberal-Tory premier, Sir Robert Peel, that:<sup>107</sup>

Since it is impossible under existing circumstances to constitute ... a [general] legislature with any aristocratic or other check on the immediate pressure of popular power, the check which independent local legislatures might afford seems (as in America) something of a practical substitute.

In speaking of New Zealand, Merivale observed that, "the experiment of a single & strongly democratic legislature, to govern a country so large, [and] so broken by natural obstacles into small [and] distant neighbourhoods, seems to me a hazardous one". For this reason Merivale advocated "New England" as an appropriate analogy: "New England, which has always been a collection of provinces with separate legislatures, is hardly larger than New Zealand". Merivale characterised George Grey's initial preference as a plan in 1851, "[o]f municipalities: Provincial Councils transacting most ordinary business: and a general legislature seldom meeting" whereas Frederick Peel inclined to a model "[o]f Provincial Councils with limited powers of a municipal character, [and] a general Council transacting the ordinary legislative business".<sup>108</sup> Mindful of localised settler politicking, George Grey had suggested local legislatures remaining pre-eminent in 1851, if only for a time (although his support for this position was not widely appreciated beyond the internal counsels of officialdom), and this suggestion converged neatly with the sorts of Whig intellectual inheritance familiar to Merivale – Tocqueville, as his readers knew, had spoken favourably of New England townships and their local administration. For Tocqueville, the New England township was a wellspring of local liberty, civic passion and pride, and, ultimately, popular sovereignty within the United States – in Tocqueville's account, France lacked this sort of civic setting, with its stress on locally-based officials reporting to central government.<sup>109</sup> Peel indeed preferred a less federal system. But he explained it by comparison to what he interpreted as a more federal 1846 constitution set-up, comprising New Ulster and New Munster.<sup>110</sup> Earl Grey conceived of the need for provincial legislatures as potentially temporary and looked forward to the time when the provincial legislatures proposed for New Zealand would "sink into little more than district

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<sup>107</sup> Memorandum from Merivale (permanent under-secretary, Colonial Office) to Peel (parliamentary under-secretary of State for the Colonies) (1 January 1852) CO209/159 at folio 221a TNA.

<sup>108</sup> Memorandum from Merivale to Peel (1 January 1852) CO209/159 at folio 221a TNA.

<sup>109</sup> Nolla, above n 40, at 104–129, for instance. Also see Jaume, above n 65, at 24–31.

<sup>110</sup> Memorandum to Peel (19 December 1851) CO209/159 at folios 217a–219a, TNA.

councils": municipalism in the substantive sense.<sup>111</sup> Earlier, he had anticipated this possible trend with favour in a despatch to Grey in February 1851:<sup>112</sup>

I agree with you in thinking that hereafter when the population of the colony shall have increased and the means of communication been improved, many of the subjects which must for the present be dealt with by these separate legislatures will be brought again with propriety under the control of the general legislature, the provincial councils confining themselves ultimately to the discharge of duties similar to those which in Canada devolve on the district councils.

### ***B The Complexities of Politics – Colonial Reformers and Others in Contest on Constitutions***

The political and intellectual historical context to the Constitution Act 1852 was undeniably complicated. If one is to discern the interplay of strains of thought and practice underpinning this imperial legislation then it pays to engage with this complexity. We have already examined the whiggish pieties influencing constitutional design during Earl Grey's tenure as Secretary of State for the Colonies. Importantly, political affinities could be aligned across party affiliations or factions on questions of colonial settlements. In circumstances where party discipline and factions within broad areas of alignment were still relatively fluid compared to later twentieth century or early twenty-first century notions, it was not a simplistic matter of views cleaving to party preconceptions, whether Whig or Tory, a point well rehearsed in the pertinent historiographical literature associated with Eric Evans, Peter Mandler, Boyd Hilton and Jonathan Parry amongst others.<sup>113</sup> A variety of self-designations were used by those counting themselves amongst the non-conservative parliamentarians in the House of Commons in 1847, including "independent Whig", "moderate Whig", "liberal", "reformer", "radical reformer" and "repealer".<sup>114</sup> Indeed, the Peelites Tories (or "liberal conservatives" as they were also known) associated with Sir Robert Peel's views in favour of free trade and repeal rather than retention of the corn laws, had not followed the departing protectionist Tories under the fourteenth Earl of Derby (formerly Viscount Stanley) and Benjamin

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111 Earl Grey to Grey (7 August 1851) at Gre/B99/6C/47 DUL.

112 Earl Grey to Grey (19 February 1851) CO406/12 at folio 53a TNA.

113 Eric J Evans *The Forging of the Modern State: Early Industrial Britain 1783–1870* (2nd ed, Longman, London, 1996) at 404–405, and n 3; Peter Mandler *Aristocratic Government in the Age of Reform: Whigs and Liberals, 1830–1852* (Clarendon Press, Oxford, 1990) at 270–274; Jonathan Parry *The Rise and Fall of Liberal Government in Victorian Britain* (Yale University Press, New Haven, 1993) at 170–175; and Boyd Hilton *A Mad, Bad, & Dangerous People?*, above n 15, at 513–515 (particularly in relation to the period from 1846 after the Tory split). Hoppen cautions against seeing too much fluidity, however, when looking at the macro-level of voting patterns, suggesting that one might see "moderately fluid or passingly unstable" behaviour in "parliamentary terms" if the patterns were anything like those analysed for 1841–1847 and 1851–1857: Hoppen, above n 75, at 132. The main instabilities tended to be noticed at the elite leadership cohort levels.

114 Parry *The Rise and Fall of Liberal Government in Victorian Britain*, above n 113, at 167.

Disraeli in 1846. For a distinct period in the later 1840s and through much of the subsequent decade, some of these Peelite Tories could at various times align with the Whigs or even elements of radical opinion depending on the political issues in question and likely tactical advantages. Thus, we see a rump of Peelites, such as William Ewart Gladstone and the fifth Duke of Newcastle, numbering approximately 100 in 1847 but no more than 40 by 1852.<sup>115</sup>

Similarly, so-called "colonial reformers", including Sir William Molesworth, the then House of Commons member for Southwark and a radical long negative about whiggish policies,<sup>116</sup> the Tory parliamentarian Charles Bowyer Adderley (the first Baron Norton), Adderley's long-standing friend John Godley, the well-known theorist of systematic colonisation Edward Gibbon Wakefield, the free trader Richard Cobden, James Edward Fitzgerald and the Tory protectionists Augustus Stafford and Spencer Walpole, associated with a revived intensification of interest in colonial projects and the establishment in the United Kingdom of a society for the reform of colonial government by 1 January 1850, could play host to a broad range of not always compatible political orientations.<sup>117</sup> Their varying approaches tended to be contingent on emerging colonial issues and whether ministerialists at any given time – Whig during Lord John Russell's administration or Tory under Derby – were warmly receptive or not to their policy proposals. Derby warned Disraeli to avoid entanglements with the colonial reformers, suggesting how it was difficult to conceive of a "more heterogeneous combination of names".<sup>118</sup> Molesworth was no friend of Earl Grey's colonial policies during Lord John Russell's administration or his draft New Zealand Constitution Bill. In July 1848, for one thing, pursuing self-dramatisation and able to present himself as independent of ministerial government, he rounded on the Secretary of State for the Colonies' approach (and that of his

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<sup>115</sup> Hoppen, above n 75, at 138.

<sup>116</sup> Although Molesworth, a radical-liberal, agreed to support Lord John Russell's Whig ministry on a number of votes notwithstanding his earlier recriminations regarding Whig politics.

<sup>117</sup> On the society for the reform of colonial government, see WP Morrell *British Colonial Policy in the Age of Peel and Russell* (Oxford University Press, Oxford, 1930) at 488–489; McLintock, above n 16, at 304–306; and Jonathan Parry *The Politics of Patriotism: English Liberalism, National Identity and Europe, 1830–1886* (Cambridge University Press, Cambridge, 2006) at 184–191. On the success of colonial reformers in attaching certain radicals to their retinue, see Hoppen, above n 75, at 158.

<sup>118</sup> Angus Hawkins *The Forgotten Prime Minister, the 14th Earl of Derby: Ascent, 1799–1851* (Oxford University Press, Oxford, 2007) at 370.

predecessors), arguing that "the Colonial Government of this country is an ever-changing, frequently well-intentioned, but invariably weak and ignorant despotism".<sup>119</sup> He added:<sup>120</sup>

... it is everything by turns, and nothing long; Saint, Protectionist, Freetrader, in rapid succession; one day it originates a project, the next day it abandons it, therefore all its schemes are abortions, and all its measures are unsuccessful; witness the economical condition of the West Indies, the frontier relations of the Cape of Good Hope, the immoral state of Van Diemen's Land, and the pseudo-systematic colonisation and revoked [1846] constitution of New Zealand.

In essence, Molesworth's radicalism was expressed here as a form of criticism against the fiscal burdens of London-based imperial administration and the need for additional, accelerated colonial self-government. Earl Grey's then parliamentary under-secretary of State for the Colonies, Benjamin Hawes, contended against Molesworth in the Commons arguing defensively that these reforms were already in train. Again, it is overly simplistic to assume Molesworth to be an ally of Earl Grey on matters of imperial governance simply because Molesworth, a radical, demonstrated general voting support for the Whigs overall on divisions in the House of Commons, particularly from 1851.<sup>121</sup>

Individual stances could vary messily across parts of a political spectrum subject to a particular question of interest (such as colonial self-government) or to interpersonal familial and patronage networks. George William, the fourth Baron Lyttelton, brother-in-law to Gladstone, fastened onto Gladstone as a way to influencing both the Whig regime of Lord John Russell (and Earl Grey as Secretary of State for the Colonies), as well as Sir John Pakington, the Derbyite conservative who succeeded Earl Grey on 27 February 1852, and remained in office until 28 December 1852. Lyttelton had been the parliamentary under-secretary at the Colonial Office in 1846 during Gladstone's brief tenure as Secretary of State for the Colonies. Edward Gibbon Wakefield was certainly committed to a campaign in the United Kingdom. In writing to Godley on 9 February 1851 he said "I should rely mainly on L[or]d Lyttelton, fearing that others, whose opinions are sound would be wanting in earnestness: for as Stanley once said, 'Being in office makes all the difference'".<sup>122</sup> Fitzgerald became the first Secretary of the Colonial Reform Society in 1850 and became an editor of *The Lyttelton Times* from January 1851 as well as one of its contributors. He expressed certain radical viewpoints, specifically in favour of pronounced local self-government in

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119 (25 July 1848) 100 GBPD HC 849 (third series).

120 At 849.

121 In this sense, I differ from the anonymous reviewer of an earlier draft version of this article who assumes simple partisan alignment between Molesworth and the Whigs. The interesting feature of Molesworth's case, as with many others during this time, is that an acutely disciplined partisan loyalty cannot be assumed and Molesworth was notoriously unfavourable towards Earl Grey's colonial administration even though supportive of aspects of Lord John Russell's Whig ministry.

122 Wakefield to Godley (9 February 1851) qMs-0387, *Letters to JR Godley* vol 1, Canterbury Papers, Alexander Turnbull Library, Wellington (ATL).

the anglophone settlement colonies as opposed to continuing intense forms of imperial supervision or imperial veto powers such as those of disallowance.<sup>123</sup> He also developed a propensity to support publicly equality in political and civil rights between European settlers in colonial New Zealand and members of pre-existing indigenous communities, although Alan Ward has exercised caution in pronouncing on whether his views were genuine or disingenuous on that score.<sup>124</sup> Yet Fitzgerald's correspondence networks tended to align him broadly if not completely in philosophical terms with Gladstone from whom he sought patronage and to whom he recounted his experiences in Vancouver Island, saying that:<sup>125</sup>

If there had been a colony there before the Californian gold was found, it is possible that personal influence might have done much to retain the settlers – by personal influence I mean the mutual attachment of the settlers to one another and to a government of which they were experiencing the wisdom and excellence – I can conceive that had that grown up, the settlement might have withstood the shock of Californian temptation.

Throughout, Godley, agent of the Canterbury Association, was a key intellectual influence on Fitzgerald who presented as something of the protégé. By way of a published speech in November 1850, Godley set out his own precepts for colonial reform as applied to New Zealand:<sup>126</sup>

... the object which the colonists of New Zealand have given their energies to obtain, and which they will obtain, if they be true to themselves, is something very different from the mere form of a constitution; it is the substance which all such forms are but methods of exercising; in a word, it is political power; the power of virtually administering their own affairs, appointing their own officers, disposing of their own revenues, and governing their own country.

Godley was an advocate for targeted and intensive campaigning on the issue in London. It is this very approach that was in evidence on the part of Frederick Weld, Henry Sewell and William Fox in late 1851 and early 1852. The radicalism of Godley as a colonial reformer, such as it was, was that of an advocate for untrammelled colonial autonomy emancipated from the interventionist possibilities of metropolitan imperial oversight. His instincts as to the franchise were not as radical as those of Fox who displayed ease in putting forward claims for a universal male suffrage regime based on residence requirements only. That is, in an extract from a lecture on the New Zealand Constitution Act published in *The Lyttelton Times* in January 1853, Godley said, "In my opinion the

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123 For a later period, see Hickford *Lords of the Land*, above n 7, at 341–347.

124 On which, see MPK Sorrenson *Ko Te Whenua Te Utu – Land is the Price: Essays on Maori History, Land and Politics* (Auckland University Press, Auckland, 2014) at 169–170; and Alan Ward, *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1995) at 153–154.

125 Fitzgerald to Gladstone (3 October 1849) AddMss44368, at folios 256a–257 British Library, London (BL).

126 "The Future Government of Canterbury" *Lyttelton Times* (Lyttelton, 25 January 1851) at 2.

qualification fixed by the act, involving as it does, almost what is vulgarly but improperly called universal suffrage, is too low", adding that:<sup>127</sup>

I hold that before the responsible and arduous privileges of an elector under a popular constitution be intrusted [sic], some approximate test of reasonable competence on the part of the trustees should at least be sought for, and I do not think that every man 21 years old, or every occupier of a house worth £5 is capable of exercising even indirectly the functions of a legislator with advantage to the community.

Godley advised Gladstone that he had "urged the importance of Colonial Reformers making the *reserved civil lists* their main object of attack".<sup>128</sup> He asserted, consistently with colonial reform precepts, that these civil lists were:<sup>129</sup>

... not only the strength of the bureaucratic system, but its foundation; so long as local legislatures have not complete power over their purses, they have nothing; so long as we can't stop salaries, we have no control over the executive, we have practically nothing to do with governing the country.

To exacerbate the complexities, a number of interpersonal jealousies and dislikes emerged around the management of the Canterbury Association, with Godley expressing frustration with Wakefield and Sewell.

Adderley, a somewhat idiosyncratic, non-interventionist Tory, was consistently a *bête noir* for the third Earl Grey, penning pointed critiques of his colonial policies.<sup>130</sup> Adderley evidenced a quality of dramatising his political claims into personal achievements, sometimes out of thin air. Thus, he brazenly and incorrectly claimed, "As to the detail of the New Zealand Constitution Act, I cannot do better than continue quoting Mr Gladstone's criticism, agreeing as I do with his general approval of the measure, which indeed was based on a draft I drew up under the guidance of Gibbon Wakefield".<sup>131</sup> This was nothing more than hyperbole. This quality on Adderley's part resonates with Parry's observation that a tacit radical-Peelite alliance in the colonial reform camp was not averse to talking up its past political successes in becoming mainstream members of government

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127 "Mr Godley's Lecture on the New Zealand Government Bill" *Lyttelton Times* (Lyttelton, 15 January 1853) at 9. In this sense, he would have also disapproved the franchise provided for in the draft alternative constitution at cl 5, as it referred to a tenement of an annual value of £5: "Heads of a Bill to Settle the Constitution of the Colony of New Zealand and the Several Settlements Therein" CO209/159, folios 254-254a, TNA.

128 Godley to Gladstone (10 February 1852) qMs-0385 *Letters to JR Godley* vol 1, Canterbury Papers, Alexander Turnbull Library, Wellington (ATL) (emphasis in original).

129 Godley to Gladstone (10 February 1852) qMs-0385 *Letters to JR Godley* vol 1, Canterbury Papers, Alexander Turnbull Library, Wellington (ATL).

130 Edward Beasley *Empire as the Triumph of Theory: Imperialism, Information, and the Colonial Society of 1868* (Routledge, Abingdon and New York, 2005).

131 See also Hickford *Lords of the Lands*, above n 7, at 237-238.

ministries in the later 1850s.<sup>132</sup> In criticising Earl Grey's colonial administration, Adderley supported the non-interventionist radical or liberal-Tory theme of colonial "local administration" or "self-administration", stating that, "To intrude government, albeit in a generous spirit, on those who are born to govern themselves, is to thwart and cripple, not to guide or assist".<sup>133</sup> Nevertheless, Earl Grey considered the aspiration of "responsible government" in the Australian and New Zealand colonies to be an error when reflecting in 1864 on their relative experiences, thereby suggesting he had not adjusted his stance towards the self-styled colonial reformers. He condemned the experiment as premature when commenting on the "deplorable results of establishing 'Responsible Government'" in New Zealand, arguing:<sup>134</sup>

All effective power was exercised by the Colonists, through the Legislatures and the Executive Officers, whom they directly or indirectly appointed; while the Maories [sic] had no share in choosing either the Members of the General and Provincial Legislatures, or those to whom Executive authority was committed.

In specific projects for colonial reform, such as a revised constitution for colonial New Zealand in 1851 and 1852, Adderley, Gladstone, Lyttelton and Wakefield, could even prove receptive to a political agitator of a much more intemperately radical persuasion like William Fox, who was not averse to favouring universal male suffrage, a position generally associated philosophically with radical-Benthamite views via James Mill's *Essay on Government*. Fox had returned to Britain in June 1851 where he represented the perspectives of Wellington colonists, describing himself as their "honorary agent". Unsurprisingly, Fox's views were filtered with a view to presenting a more politically congenial view to non-radical political actors. In the alternative constitution put up via Gladstone in early 1852, there was no express reference to universal suffrage, notwithstanding large public demonstrations amongst colonists in Nelson in favour of the concept and the secret ballot. These public meetings pronounced on constitutional matters and were widely reported in the colonial press. In London, Fox had not been silent or oblique on the point of suffrage however. In 1851 he published *Six Colonies of New Zealand* through JW Parker and Son, a tract critical of Colonial Office policies and distilling the colonists' preferences as that of a "franchise universal, except so far as limited by twelve months' residence", a "legislature consisting of two chambers, both entirely elective", "[n]o civil list to be reserved".<sup>135</sup> Yet his own second minute forwarded to Gladstone most likely in January 1852, while mentioning how at Nelson two general meetings were held where "Sir [George Grey's] measure was again rejected", did not dwell on the minute details of

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<sup>132</sup> Parry *The Politics of Patriotism*, above n 117, at 186.

<sup>133</sup> CB Adderley *Review of "The Colonial Policy of Lord J Russell's Administration"—by Earl Grey, 1853; and of Subsequent Colonial History, Part I* (E Stanford, London, 1869) at 418.

<sup>134</sup> Earl Grey *Parliamentary Government*, above n 36, at 357–358 and 359.

<sup>135</sup> William Fox *The Six Colonies of New Zealand* (JW Parker and Son, London, 1851) at 158.

the franchise argument advisedly given the purpose of the minute was to garner political support and not to fragment the positions of the colonial reformers.<sup>136</sup> Rather, Fox distilled the essence of the opposition mounted against the colonial Governor as one of resisting his proposals to allegedly "extend the provincial form of government at present existing which is a costly and cumbrous system of centralization".<sup>137</sup> He swiftly summarised the other objectionable components as being the "element of nomineeism, the civil list, the extent of the veto of the home government and others".<sup>138</sup>

In many aspects, Fox demonstrated a non-interventionist radical-Benthamite inheritance, albeit one adapted to his own political ambitions and peculiarly New Zealand orientation. Jeremy Bentham, an antecedent of imperial scepticism, had largely proved critical of the degrading effects of colonisation on the metropolitan centre and its cultures. In a piece prepared in 1793 but not published until 1830, he proclaimed:<sup>139</sup>

You will, I say, give up your colonies – because you have no right to govern them, because they had rather not be governed by you, because it is against their interest to be governed by you, because you get nothing by governing them, because you can't keep them, because the expense of trying to keep them would be ruinous, because your constitution would suffer by your keeping them.

In a missive from 1829, Bentham anticipated the possibilities of the Australian colonies no longer standing as "a dependency on the English monarchy" but being transformed "into a Representative Democracy" towards the end of the nineteenth century.<sup>140</sup> From a general Benthamite viewpoint, completely emancipating colonies from distant metropolitan governance, while instituting representative popular regimes, was the ultimate aspiration. In this sense too, the stance of a Tory such as Adderley or Fitzgerald, another unremitting advocate for colonial "self-administration" and for localised, colonial consent to any constitutional changes proposed, could be seen as broadly

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136 Fox undated minute AddMss44567 at folio 165 BL. (For George Grey's measure see Grey to Earl Grey (30 August 1851) *Great Britain Parliamentary Papers* 1852 [1475] at 18–33).

137 At folio 168.

138 At folio 169.

139 Jeremy Bentham "Emancipate Your Colonies!" (1830) in Philip Schofield, Catherine Pease-Watkin and Cyprian Blamires (eds) *Rights, Representation, and Reform* (Oxford University Press, Oxford, 2002) at 312–313; and see Duncan Bell "Empire and Imperialism" in Gareth Stedman-Jones and Gregory Claeys (eds) *The Cambridge History of Political Thought in the Nineteenth Century* (Cambridge University Press, Cambridge, 2011) at 881.

140 Jeremy Bentham "Postscript" (1829) in Philip Schofield, Catherine Pease-Watkin and Cyprian Blamires (eds) *Rights, Representation, and Reform* (Oxford University Press, Oxford, 2002) at 314. On Bentham's various stances on colonies, see Duncan Bell *The Idea of Greater Britain: Empire and the Future of World Order, 1860–1900* (Princeton University Press, Princeton, 2007) at 72–74. On early imperial scepticism generally see Gregory Claeys *Imperial Sceptics: British Critics of Empire, 1850–1920* (Cambridge University Press, Cambridge, 2010) at 5–36.

allied with a radical-Benthamite approach such that political convergence for a time was expedient and useful, as was the case with proposing an alternative constitutional model to that of Earl Grey.<sup>141</sup>

### *C An Alternative Constitution in Draft – the "MS project" for New Zealand in 1852*

As it was, the version of the draft alternative constitution appearing in the Colonial Office files was presented to it on 21 March 1852.<sup>142</sup> The exact authorship of the alternative constitution – the "MS project" – is somewhat obscure if one considers the copy in the Colonial Office records alone but, importantly, what appears to be an earlier, undated draft of it materialises in Gladstone's personal papers in a hand or hands resembling, if not identical to, the elegant handwritten script of Fox's "minute" presented to Gladstone (albeit not in Fox's personal handwriting, which is located on the rear of the minute entitled "Minute on the present position of the Question of Self-Government in New Zealand submitted to Her Majesty's Principal Secretary of State for the Colonies by the Honorary Agent of the Wellington Colonists").<sup>143</sup> The main reason to suppose it was an earlier draft is to assume that a further advanced draft was given to the Colonial Office for its review although, of course, one cannot be certain on that score. Another, related rationale is that it lies adjacent to Fox's second minute, which we know from Colonial Office references was also available to the Office for its consideration in early 1852.<sup>144</sup> Furthermore, it omitted any clear reference to a reserved civil list except a mention in cl 14 for the general parliament to ensure a first instance annual payment out of the revenue to Her Majesty whereas the Colonial Office copy contained in cl 24 a clearly reserved sum of £5,000 per annum to be applied "for native purposes" only. Merivale referred to "clause 24" specifically in his analysis of the Earl Grey's "heads of [a] Bill" against the "MS project".<sup>145</sup> Fox was a submitter, at least, of the earlier draft constitution to Gladstone entitled "A Bill entitled an Act to settle the constitution of the Colony of New Zealand and the several Settlements therein". McLintock correctly identified the cluster of campaigners involved in the development of an alternative to the Earl Grey version of the proposed constitution which Pakington

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141 It is in this sense, then, that I mention Fox and Fitzgerald as portraying "more 'radical' or Benthamite viewpoints" in Hickford "Looking Back in Anxiety", above n 5, at 12.

142 CO209/159 at folio 157 TNA.

143 The British Library dating estimates *circa* 1851 for these documents although it is conceivable that the draft constitution in Gladstone's personal papers predates the March 1852 version in the Colonial Office records by a month or two, thereby dating it to January or February 1852. See also Hickford "The Historical, Political Constitution", above n 2, at 610.

144 Memorandum from Gairdner "No 2 Remarks on the Second Minute in Mr Fox's letter of the 24: Jan[uar]y 1852" (26 April 1852) CO209/159 at folios 519-528a TNA.

145 CO209/159 at folio 163a TNA.

inherited but, critically, McLintock had not located either of the alternative drafts in the archival sources.<sup>146</sup>

Fox was, it is reasonable to suppose, an authorising spirit behind the project but most probably in concert with individuals such as Wakefield, Adderley, Sewell and the Duke of Newcastle. Gladstone's diary suggests meetings with likely candidates for joint authorship in the broad sense, specifically Henry Sewell, Fox and Edward Gibbon Wakefield, and these names align with those Adderley mentioned in his memoir. Fox, as we know, had reportedly worked with Sewell on his own *Six Colonies of New Zealand*, published in London in 1851, with Sewell contributing the section on "waste lands" according to the bibliographer Thomas Hocken.<sup>147</sup> In addition, Fox was reported as having written "confidently of our [colonial reformers with an interest in New Zealand] prospects" in securing an alternative constitution to that of Earl Grey, as:<sup>148</sup>

He, [Frederick] Weld, Adderl[e]y, [the] Duke of Newcastle and Sewell have agreed upon a Bill to be introduced the present session either by Gladstone or Newcastle (as the two may determine) proposing a Constitutional Assembly upon a £5 franchise, to confer upon [New Zealand] a full measure of self gover[men]t.

Six organised settlements in New Zealand were to be accorded provincial status under cl 1 of the "MS project" draft: Auckland, New Plymouth, Wellington, Nelson, Canterbury and Otago. Here, presumably, was a place where the draft influenced the New Zealand Constitution Bill during Pakington's command of it, as Earl Grey's proposal supported a mere five provinces by omitting New Plymouth. These sorts of concessions on Pakington's part aided the perception of his role in managing the Bill through the parliamentary process. Gladstone went so far as to say that Pakington had exceeded expectations but lamented nevertheless that:<sup>149</sup>

Pakington knows nothing of colonial questions [and] is necessarily governed either from the office or by opinion out of doors; on subjects therefore where the first is adverse [and] the second has not been advanced nothing must be hoped from him.

While Fox's personal influences were undoubtedly filtered, the draft "MS project" envisaged a number of the details of a constitution to be ascertained and settled on the ground in colonial New Zealand itself through a Constituent Council. Clause 10 in the Colonial Office copy outlined how this Council (called the "legislative council of New Zealand" and comprising four members elected from each of the six provinces) would be "required to frame and enact a law or ordinance for

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146 McLintock, above n 16, at 331.

147 TM Hocken *A Bibliography of the Literature Relating to New Zealand* (John McKay, Government Printer, Wellington, 1909) at 159.

148 Featherston to Godley (25 May 1852) qMs-0382 *Letters to JR Godley*, vol 1, Canterbury Papers, ATL.

149 Gladstone to Fitzgerald (18 June 1852) Ms-0840 ATL.

establishing a permanent constitution of government" for colonial New Zealand. The work of the Council would be subject to the provisions set out subsequently in the "MS project" draft and these "conditions" were to be "deemed and taken to be fundamental parts of the constitution" and "shall not except as expressly mentioned be altered without the authority of the Parliament of the United Kingdom".<sup>150</sup> Either way, the benefit of such an approach would be to give a stronger hand to settlement-based politics particular to places like Auckland, Wellington, Nelson, Canterbury, Otago and New Plymouth, as they tried to secure advantages against the Governor within New Zealand itself. Fox and his allies, for instance, appreciated the significant mobilisation of settler opinion at Nelson on the question of constitutional design (particularly universal male suffrage and a secret ballot), and a "Constituent Council" would have permitted such lobbying to be brought to bear. The underlying principle was one of localized, more consensual or at least collaborative colonial determination of the constitutional settings as opposed to an imperial construction. Consistent with this overall tenor or tone, Adderley favoured "self-administration" where there would be no jurisdiction for any imperial disallowance of colonial legislation or a veto. At this broad process level, then, Adderley could be seen as aligned with Fox even though points of substance, such as universal suffrage, might be the subject of dispute. McLintock remains a sound source on the details of the broad campaign within colonial New Zealand settlements on the various proposals for representative institutions (as opposed to London) although McLintock's work has been qualified since through Paul McHugh's thoughtful historiographical contributions.<sup>151</sup> Moreover, McLintock did not identify the draft alternative constitutions (including the "MS project") developed in the United Kingdom.<sup>152</sup> Neither, for that matter, did NA Foden or James Hight and HD Bamford.<sup>153</sup> In that sense, and consistently with the methodological perspective I have deployed elsewhere, this essay has endeavoured to entwine an appreciation of elements active within colonial theatres with those also operating in the imperial metropole.<sup>154</sup>

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150 "Heads of a Bill to settle the Constitution of the Colony of New Zealand and the several settlements therein" CO209/159 at folios 256a–257 TNA.

151 McHugh "The Historiography of New Zealand's Constitutional History", above n 16.

152 In this neglect, however, McLintock was not alone, as the "MS project" and its relative in Gladstone's personal papers have not been located or identified before: see Hickford *Lords of the Land*, above n 7, at 242; and Hickford "The Historical, Political Constitution", above n 2, at 608–613.

153 NA Foden *The Constitutional Development of New Zealand in the First Decade* (LT Watkins, Wellington, 1938) (who admittedly only took the discussion to 1849); and J Hight and HD Bamford *The Constitutional History and Law of New Zealand* (Whitcombe and Tombs, Christchurch, 1914) at 260–262.

154 Mark Hickford "Decidedly the Most Interesting Savages on the Globe': An Approach to the Intellectual history of Māori property rights, 1837–1853" (2006) 27 *History of Political Thought* 122; Hickford "Framing and Reframing the *Agōn*: Contesting Narratives and Counter-Narratives on Māori Property Rights and Political Constitutionalism, 1840–1861" in Saliha Belmessous (ed) *Native Claims: Indigenous Law against Empire, 1500–1920* (Oxford University Press, Oxford and New York, 2011) 152; and Hickford

Overall, the "MS project" conceived of constitutional "balance" as being secured through potent provincial legislatures with clearly insulated areas of statutory competence. These provinces were a keystone in the proposal, with their territorial areas of jurisdiction to include "all the lands over which the title of the Aboriginal inhabitants [had] been extinguished" but would "not include within the limits of any province any land over which the title of the aboriginal inhabitants [had] not been extinguished".<sup>155</sup> Executive authority was to be constrained. The Governor-in-Chief would not be removable except by the Crown on address from the colonial parliament while "reserved powers, prerogatives, privileges and executive powers" were listed and thereby delimited in cl 11 of the "MS project" draft. Thus, we find a list including the power to imprison during times of war, the power to grant titles and honours and the power to receive ambassadors. A general Supreme Court was to be established with "original jurisdiction" under cl 27 on "all questions arising out of or in relation to laws passed by the General Parliament" as well as "in all questions between two or more of the said provinces", not to mention any issues emerging out of the proposed constitutional statute (to be settled by the "constituent council") or its interpretation. On analysing the project for Pakington, Merivale observed how:<sup>156</sup>

... the MS Bill contain[ed] sets of provisions on the following subjects: the composition of the Constitutional Council [called a "constituent council" in a copy of the draft Bill itself]: The functions of the Governor: Limitations on the power of the legislature which are reasoned necessary by the removal of the Crown's ordinary power of disallowance: The constitution of a Supreme Court, apparently to decide in each case whether the legislature has exceeded these powers.

The draft in Gladstone's personal possession referred to this council explicitly as the "constituent council". Given that the phrase "constituent council" does not appear in the Colonial Office's copy but that Merivale knew of the phrase, this would imply oral discussions between Pakington and Gladstone, Newcastle and Lyttelton. Merivale also focused on the manner in which provincial boundaries might be established:<sup>157</sup>

In Lord Grey's plan the fixing the boundaries of the provinces was left to the Governor: But it was intended that he should be instructed so to limit them as to include in them as nearly as possible the *settled* lands.

He added that the "rest was left under the control of the General Legislature, but with power to the Governor to set apart aboriginal districts where native usages should prevail". Although not

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"Making 'Territorial Rights of the Natives': Britain and New Zealand, 1830–1847" (DPhil dissertation, University of Oxford, 1999).

155 CO209/159 at folios 252a–253 TNA.

156 Merivale (permanent under-secretary, Colonial Office) to Pakington (Secretary of State for the Colonies) (24 March 1852) CO209/159 at folios 289a–290 TNA.

157 At folios 291–291a.

necessarily a conscious aspect of design, the on-going presence of hapū-centred polities and indigenous norms also contributed to the overall sense of diversity and contest within the introduced constitutional settings. As Merivale noted, "[i]n the MS Project mainly the same object is attempted, but in a different way", as the "'provinces' are to consist only of such lands as have been actually purchased from the natives [whereas] [a]ll the rest is left under the legislative authority of the Governor".<sup>158</sup>

Adderley, Lyttelton, Edward Gibbon Wakefield, Henry Sewell and Fox targeted Gladstone amongst the Peelite Tories as one not only sympathetic towards increased colonial self-administration but also one able to exert pressure on Earl Grey and subsequently Sir John Pakington, when the Derbyite Tory administration assumed office in February 1852. Gladstone recounted in June 1852 how:<sup>159</sup>

At the commencement of the present [parliamentary] session, when Lord Grey was in office, the Duke of Newcastle [and] I in conjunction with the gentlemen of the Canterbury Association [and] Mr Fox prepared a set of Resolutions, as the foundation of a Bill, relating to New Zealand, to be moved as a substitution for Lord Grey's plan if that should prove unsatisfactory.

These draft resolutions are to be found in Gladstone's personal papers. Two Bills were prepared as well, one of which Gladstone retained a copy of. The resolutions cleaved to the concepts given expression in the "MS project" and the earlier draft in Gladstone's possession.<sup>160</sup> Amongst a crowded set of commitments, Gladstone wrote to or met with Edward Gibbon Wakefield on 15 May, 18 May and 3 June 1852 on the New Zealand question. On the subject of New Zealand's constitution he spoke with a key Peelite Tory, Sir James Graham, formerly Sir Robert Peel's confidante and Home Secretary from 1841 until 1846, in May and early June 1852, recording in his diary "Saw ... Sir J Graham (NZ)" and "Saw Sir J Graham on NZ" respectively.<sup>161</sup> We also know from Gladstone's personal correspondence that Thomas Tancred, Fox, Wakefield and Sewell all wrote to him on 22 May 1852 while monitoring media accounts of Gladstone's speeches on the New

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<sup>158</sup> At folios 291a–292.

<sup>159</sup> Gladstone to Fitzgerald (Secretary of the Colonial Reform Society) (18 June 1852) Ms-0840 ATL

<sup>160</sup> New Zealand Resolutions, draft, (31 January 1852) AddMss44568 at folios 12–14a BL.

<sup>161</sup> MRD Foot and HCG Matthew (eds) *The Gladstone Diaries: Volume IV, 1848–1854* (Clarendon Press, Oxford, 1974) at 430–431 and 432.

Zealand Constitution Bill during its passage through the House of Commons. They requested Gladstone to give them "a corrected copy of [his] speech of last night for immediate publication" and noted that the:<sup>162</sup>

... distinctions between central, provincial, & municipal councils [are] not clear in the reports – and will you allow the suggestion that in speaking of the upper branch of the central legislature you should term it the upper chamber & not as you did in the [H]ouse the Legislative Council – the latter an expression not generally understood.

Sure enough, John W Parker and Son published a corrected copy of Gladstone's second reading speech for circulation. Neither the "MS project" nor the resolutions secured meaningful support however.

In the end, Gladstone was intent on preserving momentum in the legislature while Pakington's Bill was a live, tangible option rather than risking any deferment or delay through endeavouring to secure additional amendments on the basis of the detail of the "MS project". "I for one", he wrote, "did all I could to help it on and refrained from urging in the Committee even the most important of the improvements in the constitution which might have been made".<sup>163</sup> Gladstone, in supporting the broad direction of Pakington's measure, could take some comfort from Fox's memorandum in May 1852 where Fox said that the "real question is what sort of 'municipalities' are to be bestowed in addition to a central government". While the *Times* admitted the "propriety of having some sort, but [limiting] their powers to those of an English Borough mere paving [and] lighting".<sup>164</sup> "The colonists", Fox averred:

... ask for municipalities "in the widest [and] most ancient sense of the word" [that is] with plenary power in all local matters peculiar to each settlement – [and] they would limit the functions of the general or central legislature to objects of a general [and] central character.

Fox concluded that this "Pakington's Bill substantially provides".<sup>165</sup> Lord Lyttelton privately relished the point that the "Government ... fancy that their province[s] will be new little municipalities, [a view] in which they are mistaken", he claimed.<sup>166</sup> Soon after arriving in Wellington on 18 December 1852, Frederick Weld, an ally of the radically inclined, legally trained William Fox, and a member of the Wellington Settlers' Constitution Association, privately reported his reflections on the new Constitution Act 1852 to the fifth Duke of Newcastle in London. He

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162 Thomas Tancred, Fox, Wakefield, Sewell and another to Gladstone (22 May 1852) AddMss44372 at folios 71 BL. Gladstone's speech on the second reading was printed and published.

163 Gladstone (Member of Parliament) to Fitzgerald (18 June 1852) Ms-0840, ATL.

164 Fox to Gladstone (c5 May 1852) AddMss44568 at folio 126a BL. Also *The Times* (5 May 1852).

165 At folio 126a.

166 Lord Lyttelton to Godley (14 June 1852) qMs-0382 *Letters to JR Godley* vol 1, Canterbury Papers, ATL.

applauded how the Act introduced a "system of localization as expressed in the provincial governments", claiming that the "general feeling" of the "colonists" in Wellington gave this feature considerable support.<sup>167</sup> Indeed, notwithstanding the emergence of a constitutional statute, the arguments above have suggested the ways in which that statute reflected an iterative, historical political constitutional culture, one with its own richly contested normative values around balance and diversity.

#### **IV CONCLUSION – THE PROTEAN QUALITIES OF IMPERIAL CONSTITUTIONALISM**

In the foregoing article I have contended that it remains important to engage with the protean qualities of imperial constitutionalism and the intersections between colonial settlement politics, anxieties and agendas and those of metropolitan politicians – the different, occasionally overlapping or conjoined networks of whiggish-liberal, Tory and radical colonial reformers. These were not the aridities of distant legal analysis but a complex milieu of historical sensitivities and a focus on what sorts of behaviour to incentivise through a mix of ways and means. Engaging with these concepts and actors in practice is an essential part of taking a historical approach to constitutional inheritances seriously. Let us be comfortable, then, with the messiness and complexity of human affairs. To do otherwise risks obscuring and abridging our understanding of the myriad histories, all of which have shaped our convoluted inheritances. This is not to say that these histories need determine how we might interpret concepts in the early twenty-first century in an anachronistic fashion. As Ronald Dworkin has said, "interpretation engages history, but history does not fix interpretation".<sup>168</sup> With reference to the philosophers Isaiah Berlin and Bernard Williams he also said invaluable by way of elaboration that they argued "we cannot appreciate the character or force of a political concept like liberty until we have gained a sense through history of what it meant to our political predecessors".<sup>169</sup> A subtler, enriched sense of the historicity of the political constitution allows us to become more conscious of what we might be neglecting or forgetting.<sup>170</sup> Ultimately, there were three key areas of focus in constitutional design to achieve balance and contested diversity: first, developing local institutions responding to provincial constituencies; secondly, sustaining a careful relationship between central and local concerns with a view to minimising centralising tendencies; thirdly, maintaining Crown-nominated or managed parts of the system insulated from the vagaries of popular opinion, such as governor-centric diplomacy with hapū

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<sup>167</sup> Weld (Wellington Settlers' Association) to the Duke of Newcastle (26 December 1852) NeC960/1 University of Nottingham.

<sup>168</sup> Ronald Dworkin *Justice for Hedgehogs* (Belknap, Cambridge (Massachusetts), 2011) at 350.

<sup>169</sup> At 350.

<sup>170</sup> Hickford "The Historical, Political Constitution", above n 2, at 592–593 and 623.

through negotiating, say, purchase deeds,<sup>171</sup> although Pakington proceeded further than Earl Grey through maintaining a nominated upper chamber. This article is as much a study in discontinuity, change and difference in, as well as dormancy of, strains of constitutional thought and practice. Evidently, participants need not be completely conscious of what they are doing in or through historical constitutions by which the distribution of authority might be discussed and contested or how authoritative political decisions might have been influenced or set out. Yet colonial New Zealand supplies illustrations of political actors in earnest, often revealing an array of intellectual precepts or prejudices to which they are responding. By no means uniquely, New Zealand's constitutions over time – and I use the plural form deliberately – were processes and spaces to be watched, inhabited and lived.

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171 Hickford *Lords of the Land*, above n 7, at 239–240, 330–332, 354–357 and 378–379; and Hickford "Looking Back in Anxiety", above n 5, at 6–13 and 15–21.

