

New Zealand Journal of Public and International Law



VOLUME 12 ■ NUMBER 1 ■ SEPTEMBER 2014

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	

NEW ZEALAND JOURNAL OF
PUBLIC AND INTERNATIONAL LAW

© New Zealand Centre for Public Law and contributors

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

September 2014

The mode of citation of this journal is: (2014) 12 NZJPIL (page)

The previous issue of this journal was volume 11 number 3, December 2013

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

Foreword.....	vii
Constitutional Traditions in Open Societies: A Comparative Inquiry <i>David Hackett Fischer</i>	1
"This is my Body": Constitutional Traditions in New Zealand <i>Andrew Sharp</i>	41
Constituting the Democratic Public: New Zealand's Extension of National Voting Rights to Non-Citizens <i>Fiona Barker and Kate McMillan</i>	61
The Lost Jurisprudence of the Native Land Court: The Liberal Era 1891–1912 <i>RP Boast</i>	81
How do Things Get Started? Legal Transplants and Domestication: An Example from Colonial New Zealand <i>Shaunnagh Dorsett</i>	103
Subsidiarity as a Constitutional Principle in New Zealand <i>Benjamin F Gussen</i>	123
Considering the Historical-Political Constitution and the Imperial Inheritance in Mid-nineteenth Century New Zealand: Balance, Diversity and Alternative Constitutions <i>Mark Hickford</i>	145
A Māori Constitutional Tradition <i>Carwyn Jones</i>	187
The Strong New Zealand Democratic Tradition and the "Great Public Meeting" of 1850 in Nelson <i>Sir Geoffrey Palmer QC</i>	205
Constitutional Traditions in Māori Interactions with the Crown <i>David V Williams</i>	231

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informit and EBSCO electronic databases.

NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Manuscripts should generally not exceed 12,000 words. Shorter notes and comments are also welcome. Authors should see earlier issues of NZJPIL for indications as to style; for specific guidance, see the *New Zealand Law Style Guide* (2nd ed, 2011). Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Regular submissions are subject to a double-blind peer review process. In addition, the Journal occasionally publishes addresses and essays by significant public office holders. These are subject to a less formal review process.

Contributions to NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ\$100 (New Zealand) and NZ\$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

Advisory Board

Professor Hilary Charlesworth
Australian National University

Professor Scott Davidson
University of Lincoln

Professor Andrew Geddis
University of Otago

Judge Sir Christopher Greenwood
International Court of Justice

Emeritus Professor Peter Hogg QC
Blake, Cassels and Graydon LLP

Professor Philip Joseph
University of Canterbury

Rt Hon Judge Sir Kenneth Keith
International Court of Justice

Professor Jerry Mashaw
Yale Law School

Hon Justice Sir John McGrath
Supreme Court of New Zealand

Rt Hon Sir Geoffrey Palmer QC
*Distinguished Fellow, NZ Centre for
Public Law/Victoria University of
Wellington*

Dame Alison Quentin-Baxter
Barrister, Wellington

Professor Paul Rishworth
University of Auckland

Professor Jeremy Waldron
New York University

Sir Paul Walker
Royal Courts of Justice, London

Deputy Chief Judge Caren Fox
Māori Land Court

Professor George Williams
University of New South Wales

Hon Justice Joseph Williams
High Court of New Zealand

Editorial Committee

Professor Claudia Geiringer
Dr Mark Bennett (Editor-in-Chief)

Harriet Bush (Student Editor)

Professor Tony Angelo

Professor Richard Boast

Associate Professor Petra Butler

Dr Joel Colón-Ríos (Editor-in-Chief)

Associate Professor Alberto Costi

Dean Knight

Associate Professor Meredith Kolsky

Lewis

Joanna Mossop

Professor ATH (Tony) Smith

Assistant Student Editors

Lida Ayoubi

Hilary Beattie

Kelsey Farmer

Katharine Guilford

Stephanie Luxford

Nathalie Harrington

Steven Li

Elena Mok



The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

Officers

Director

Professor Claudia Geiringer

Associate Director

Associate Professor Petra Butler

Associate Director

Dr Carwyn Jones

Associate Director

Dean Knight

Centre and Events Administrator

Anna Burnett

For further information on the Centre and its activities visit www.victoria.ac.nz/nzcpl or contact the Centre and Events Administrator at nzcpl@vuw.ac.nz, ph +64 4 463 6327, fax +64 4 463 6365.

The Unearthing New Zealand's Constitutional Traditions Conference at which preliminary versions of these articles were originally presented was hosted by the New Zealand Centre for Public Law and was made possible with the generous support of the New Zealand Law Foundation.



THE STRONG NEW ZEALAND DEMOCRATIC TRADITION AND THE "GREAT PUBLIC MEETING" OF 1850 IN NELSON

*Sir Geoffrey Palmer QC**

Prior to the passage of the New Zealand Constitution Act 1852 in the United Kingdom there was considerable agitation within what was then a Crown Colony for a more democratic form of government. This article explores a meeting that was held in Nelson, the second of the Wakefield settlements. While there were meetings held in Auckland, Wellington, Canterbury and Otago, and Constitutional Associations formed in the last three mentioned, it was from Nelson that the first stirrings of discontent came. The meeting held in Nelson was organised by the Nelson Constitutional Association, it lasted for 13 hours and was well attended. The Nelsonians wanted radical constitutional measures to be adopted, including self- government, the secret ballot for elections, the universal franchise and curbs on executive power. A major influence on the proposals generated was the Great Charter proposed in England first in 1837, and some of the participants in the Nelson meeting had been active in Chartism in the United Kingdom. The leader was Edward Stafford on his first major political outing and he was later to become the longest serving Premier of the 19th century in New Zealand. The article aims to place the debate in context, and set out the arguments that were used on both sides. It paints a picture of a vigorous emerging democratic sentiment.

I INTRODUCTION

This essay examines in detail the "Great Public Meeting", as it was characterised by *The Nelson Examiner and New Zealand Chronicle*, held in Nelson on 27 December 1850. The meeting began at noon and "terminated between one and two o'clock in the morning ... with only a short interval of an hour for refreshment."¹ It was attended, so the newspaper reported, by "at least four hundred

* Distinguished Fellow, Victoria University of Wellington Faculty of Law and Centre for Public Law. The author acknowledges with gratitude the comments of Dr Jock Phillips and Dr Mark Hickford. Research assistance from Vanessa Haggie was helpful.

persons, who were present some time during the discussion."² This must have constituted a considerable portion of the adult population of the Nelson settlement at that time. Including the town of Nelson and the large rural districts, there were 3,495 Europeans and 1,408 Māori there in December 1849.³ The meeting was a major public event in the life of the settlement. The number of people in New Zealand during 1850 is subject to various estimates. Hight and Bamford state that there were 12,000 colonists in New Zealand in 1850.⁴ Statistics New Zealand estimates that populations at the end of 1850 were 65,650 Māori and 22,108 non-Māori, so perhaps the Nelson settlement exerted more political influence in New Zealand then than it does now.⁵

In the course of delving into Nelson political developments in the nineteenth century, particularly at the time of Provincial Government, I have formed the view that politics were lively and participation more widespread than is the case in contemporary New Zealand. It may be that the constitutional traditions New Zealand formed in the nineteenth century were richer and more intense than those forged in the twentieth century. The old tradition tended to peter out and become lost in the arid rigidities of parliamentary sovereignty and unitary government. These speculations are, however, beyond the scope of the evidence I can bring to demonstrate them. Yet the robust nature of New Zealand's commitment to democracy was a tradition that developed early.

My aim here is to outline in detail the political views and philosophies of emerging democratic theory articulated at the 1850 Nelson meeting, a set of views that were radical by the standards of the political culture of England from which the settlers came. An attempt is then made to analyse the influences that were at work on the participants at the meeting. These people were innovators and determined to secure a future form of Government for the colony that put them in charge. They argued for big and bold constitutional reform. The arguments were based on emerging democratic principles that were skilfully presented at the meeting and strongly debated and tested by amendments. Most of the proposals made at the meeting are now embodied in our existing constitutional arrangements: universal suffrage, the secret ballot, responsible self-government, the capacity to amend the basic constitutional law and the reduction of executive power. The essay concentrates upon the views of the settlers in Nelson. How that connects with the wider imperial

1 "Great Public Meeting to Consider the Future Form of Government for the Colony" *The Nelson Examiner and New Zealand Chronicle* (Nelson, 11 January 1851) at 178. This paper can easily be accessed through Papers Past, the electronic website maintained by the National Library.

2 At 178.

3 "Statistics of Nelson, 1849" *The Nelson Examiner* (16 February 1850) at 201. More than 1,500 members of the European population were aged less than 21.

4 The estimate of population appears in J Hight and HD Bamford *The Constitutional History and Law of New Zealand* (Whitcombe and Tombs Limited, Christchurch, 1914) at 195.

5 Statistics New Zealand "New Zealand Long Term Data Series" <stats.govt.nz>.

questions of constitutional design that were being debated in London at the time is a topic upon which some observations are made in the conclusion, but that is not where this essay is centred.

I became aware of the meeting when conducting research, published elsewhere, on the activities of my great-grandfather John Palmer, who arrived in the New Zealand Company settlement of Nelson from England on the *Phoebe* in 1843.⁶ Along with many other Nelson settlers, my ancestor John Palmer was a proponent of the immediate introduction of representative government in a petition to Parliament he signed in April 1849.⁷ The agitation in Nelson for greater democracy than Crown Colony government afforded was strong. The 1846 Constitution was not regarded as satisfactory and had not been fully brought into force.

II THE POLITICAL AND CONSTITUTIONAL CONTEXT

Nelson was the second colony of settlers established by the New Zealand Company, after Wellington. It struggled from the beginning, although it was planned upon the principles of systematic colonisation propounded by Edward Gibbon Wakefield. The Wakefield system aimed to bring a cross section of people from England. The Company would sell land to the settlers, financing its activities to some degree by buying land cheaply and selling it for a considerable profit. In the case of the Nelson settlement the principles of the Wakefield scheme did not work out as intended. There was not enough good land in the rural areas suitable for farming. The plan was too ambitious. It took time and expense to develop the land and make it suitable for agriculture. Too many people who bought land remained at home in England, causing many problems associated with absentee landlords. Not enough people with capital actually emigrated to Nelson.

Many of the people who did come to Nelson were from the labouring and skilled artisan classes and they underwent years of hard times. The Working Men of Nelson presented a lengthy memorial of their grievances as early as January 1843 which was highly critical of both the Company and the landowners. There were many expressions of discontent in the years leading up to 1850.⁸ The Company initially had guaranteed work for labourers for twelve months, but very few found that they could get work. Poverty among the working people was widespread. A considerable number left. The Company had to adjust its administration as a result of protests in order to ameliorate poverty through relief works. Squatting became common. These discontents found an outlet in the

6 For greater detail see Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 15–49. John Palmer signed with 35 others a public notice calling for the "Great Public Meeting" to be held.

7 "Petition of the Settlers of Nelson, to Parliament" *The Nelson Examiner* (21 April 1849) at 31. The petition objected to Sir George Grey's action in delaying representative government and establishing a set of Councils for the Colony consisting of his own nominees. Similar exercises were undertaken in other areas, particularly Wellington. In Nelson 405 signatures were obtained and a large public meeting was held in Nelson on 2 January 1849.

8 The best account of the early tribulations of the Nelson settlement appears in Jim McAloon *Nelson – A Regional History* (Cape Catley Ltd, in Association with the Nelson City Council, Queen Charlotte Sound, 1997) at 10–48.

political agitation that arose not only in Nelson but throughout the Colony as to the manner in which the people were governed.

New Zealand constitutional history in the formative stages can be divided into the pre-colonial period, the Colonial period and the period following the New Zealand Constitution Act 1852.⁹ When New Zealand was a Crown Colony the Executive Government, in the person of the Governor, acting in the name of the Crown, had complete power over the executive and legislative functions of government.¹⁰ This situation lasted from the acquisition of British sovereignty in 1840 until the 1852 Act came into force. The first Constitution was the Charter of 1840 granted by letters patent dated 16 November 1840.¹¹ Although there were various efforts to change that situation none was successful until the 1852 Act was passed by the Imperial Parliament in London. The 1846 Constitution was intended to reduce the level of gubernatorial autocracy by granting representative institutions.¹² But its inordinate complexity and changing conditions in New Zealand led Governor Grey, when he brought the system into operation in 1848, not to so proclaim and create representative institutions. The Parliament in London followed his lead and suspended those parts of the previous Act that concerned central and provincial assemblies.¹³ These actions caused opposition among the settlers and led to agitations to bring about change, particularly in Wellington, Christchurch and Nelson. Grey was acting no doubt in what he conceived to be the best interests of Māori who were liable, he thought, to suffer depredation of their lands from representative legislatures.¹⁴ There does exist a detailed and intricate analysis of the events both in New Zealand and in the United Kingdom concerning the period of Crown Colony Government.¹⁵ In a striking passage discussing the 1846 Constitution, Dr AH McLintock states:¹⁶

In point of fact Grey was engaged in a double game and playing it to his own rules and satisfaction. As a man of avowedly liberal principles, anxious to be acclaimed the father of democratic government in New Zealand, he felt himself cast for the major role in the drama of constitution making. But as an

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

10 AH McLintock (ed) *An Encyclopaedia of New Zealand* (RE Owen Government Printer, Wellington, 1966) vol 2 at 68.

11 The authority for this was contained in the New South Wales Continuance Act 1840 (Imp) 3 & 4 Vict c 62.

12 New Zealand Government Act 1846 (Imp) 9 & 10 Vict c 103.

13 Government of New Zealand Act 1848 (Imp) 11 & 12 Vict c 5.

14 For a succinct account of the development, see Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 103–110.

15 AH McLintock *Crown Colony Government in New Zealand* (RE Owen Government Printer, Wellington, 1958).

16 At 291. A somewhat more favourable view of Grey is presented by his biographer J Rutherford *Sir George Grey KCB, 1812–1898: A Study in Colonial Government* (Cassell & Co, London, 1961) at 142–162 and 234–251.

autocratic, self-willed governor bent on shaping native policy to his own inclination, he was determined to postpone on every possible pretext that boon which the colonist so eagerly desired.

The mark of Governor Sir George Grey upon New Zealand's constitutional traditions is as important as it is elusive, given the nature of his character and his methods of operating. He claimed credit for the 1852 Constitution Act and his dispatches certainly are reflected in important parts of it. But the activities of the various Constitutional Associations in powerfully articulating the argument for self-government certainly contributed to bringing about change. Constitutional Associations were set up in Wellington, Christchurch and Nelson, and also later in Otago. But it was Nelson from which the first "strong expressions of discontent" came.¹⁷ They were directed against Grey's plan to have a nominated rather than elected Council for New Munster. New Zealand had been divided into two Provinces: New Ulster that covered the North Island down to the Patea River, and New Munster for the rest of the Country. The complexity of the new arrangements must have been a formidable obstacle to their implementation.¹⁸

III CONSTITUTIONAL AGITATION IN NELSON

The Nelson Settlers' Constitutional Association was formed or revived after 36 people signed a public notice in *The Nelson Examiner* on 30 November 1850 calling for a public meeting to hammer out specific proposals for representative government. Edward Stafford's name headed the list. He was later to be Superintendent of the Nelson Province and then Premier of New Zealand for extended periods, and would be the longest serving Premier in the nineteenth century. The 1850 meeting was his first significant political outing, although his record was consistent: "he had been at every political meeting held in Nelson since the beginning of 1843 and had signed every memorial and protest."¹⁹ Stafford, although born in Edinburgh, "grew up in the leisured, sporting world of the Anglo-Irish gentry and in the intellectual environments of the Tytlers, a family which had produced two eminent historians."²⁰ From his time at Trinity College in Dublin and later before he went to New Zealand, Stafford showed active interest in the Chartist policies and had spoken in favour of secret ballots in Edinburgh.²¹ Stafford showed a firm command of constitutional principle and can be considered New Zealand's first significant constitutional reformer.

17 McLintock *Crown Colony Government*, above n 15, at 296.

18 Some of the pertinent documents relating to these arrangements are to be found in W David McIntyre and WJ Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) at 54–114.

19 Edmund Bohan *Edward Stafford: New Zealand's First Statesman* (Hazard Press, Christchurch, 1994) at 60.

20 Edmund Bohan "Stafford, Edward William" in Claudia Orange (ed) *The Dictionary of New Zealand Biography 1769–1869* (Bridget Williams Books, Department of Internal Affairs, Wellington, 1990) vol 1 at 404.

21 Bohan *Edward Stafford*, above n 19, at 13.

Nelsonians conducted the meeting on 27 December 1850 at Albion Square, in Bridge Street next to the Queen's Gardens, where the Court House now is and where the late lamented Nelson Provincial Council Chambers stood from 1860 until they were demolished in 1969.²² The then court room was too small and the meeting had to be moved to a large booth erected for the school examinations. *The Nelson Examiner*, which came out once a week, suspended publication for a week in order to bring out a full report in a double issue, which appeared on 11 January 1851. The report is exceedingly long and detailed. Nothing like the meeting had ever before been seen in Nelson. The great preponderance of opinion at the meeting favoured the taking of radical constitutional steps.

The lengthiest debate was on the secret ballot. Voting in England at this time for those few who could vote was by show of hands, and conservatives thought that to have a secret ballot was un-English. But the secret ballot carried by a large majority at the meeting. The issue of responsible government, that is to say where the executive is responsible to the Parliament, was strongly supported to the point that it was considered that even *ex officio* members of the Executive should be subject to dismissal by a two-thirds of the members of both Houses. The meeting passed resolutions supporting a bicameral Parliament, triennial elections and annual meetings of the Parliament with power by a two-thirds majority of each House to remove the Governor. They wanted power to be granted to amend the Act in the New Zealand Parliament. They wanted a system of local government. They wanted universal male suffrage. They wanted the powers of the colonial Parliament to be absolute in all local matters. By the standards of the time this was a radical constitutional agenda and it is hardly surprising the New Zealand Constitution Act of 1852 passed at Westminster did not match the sentiments of the Nelson settlers. The mastermind behind all of this constitutional activism was Edward Stafford.²³ The prominence it gave him undoubtedly helped him to be elected Nelson's first Provincial Superintendent, after the new Constitution of 1852 was implemented. His arguments were forceful and well developed and he carried all before him at the meeting.

The commitment to open, democratic government espoused by the great meeting in Nelson was remarkable. Governor Grey advised the British Government that Nelson had "a very large number of intellectual and highly-educated persons."²⁴ Similar efforts were occurring in Wellington and in

22 As a law student home from the University in vacations I used to study in these beautiful wooden buildings that housed the Supreme Court Library for many years and where court sittings were held. Many government departments in those days had offices there, and the maintenance of the buildings was let go by the Ministry of Works so that in the end the buildings were demolished in circumstances of great local controversy.

23 Bohan *Edward Stafford*, above n 19, has an excellent chapter on "the Constitutionalists" at 40–48. He also describes the complicated political manoeuvrings concerning leadership of the Nelson Constitutional Association at 49–56.

24 McLintock *Crown Colony Government in New Zealand*, above n 15, at 299.

Christchurch, but the detailed record we have of the Nelson meeting gives an opportunity to examine the arguments being made.²⁵ The prevailing sentiment was for representative democracy with universal male suffrage, responsible government, limited executive powers and more accountability for their exercise, with power over most matters centred in New Zealand.

When the Nelson Constitutional Association was formed, John Perry Robinson, a person who had worked hard in England for the 1832 Reform Bill but who was making his first public speech, said, as reported in *The Nelson Examiner*, that "he considered it to be the duty of every man in every station to exert himself to put an end to the evils which had hitherto beset the colony, and to secure for it those political privileges which would preserve it against such abuses of authority in the future."²⁶ Robinson had been active as a leader in the representation of the labourers' objections to the activities of the New Zealand Company. Clearly, based on his public utterances, Robinson had been influenced by the publication of the Chartists' demands of 1837 in England, as well as by his experiences with the 1832 reforms known as the Great Charter. In England, Robinson, a wood turner, had been closely involved with the Birmingham Mechanics Institute, where there were lectures from Chartists and other radical movements.²⁷

The sub-committee that formulated the Association's initial proposals was headed by Stafford, who had publicly spoken in favour of the secret ballot at Chartist meetings in Edinburgh.²⁸ It included five others: Robinson, Travers, Elliott, Saxton and White. WLT Travers was born in Ireland, educated in France, became a solicitor in England and arrived in Nelson in 1849, where he practised law. He was not afraid of radical causes and was a supporter of universal suffrage. He was a colourful debater. Charles Elliott was the owner of *The Nelson Examiner* and a person of variable political views but whose views at this time were highly inclined to full democracy. George White had been the Police Magistrate during the difficult period Nelson experienced after the loss of many of its leaders at the Wairau affray in 1843, and had reason to be upset with Governors, having been forced out of his position.²⁹ John Saxton was a landowner with middle of the road political views. These men put forward a set of proposals that appear to have been drafted by Stafford. They all spoke at the meeting.

25 The agitation by the various Constitutional Associations around New Zealand is dealt with in McLintock *Crown Colony Government in New Zealand*, above n 15, at 294–307.

26 "Public Meeting: Formation of a Constitutional Association" *The Nelson Examiner* (30 November 1850) at 158.

27 David A Armstrong "Robinson, John Perry" in Claudia Orange (ed) *The Dictionary of New Zealand Biography 1769–1869* (Bridget Williams Books, Department of Internal Affairs, Wellington, 1990) vol 1 at 369.

28 Bohan *Edward Stafford*, above n 19, at 13.

29 Ruth Allan *Nelson: A History of Early Settlement* (AH and AW Reed, Wellington, 1965) at 289.

The Conservatives in Nelson did not agree with the reforms suggested. Their leader was a wealthy Scot, Dr David Monro, later Speaker of the New Zealand House of Representatives. He lived in Waimea West at "Bearcroft". Stafford and Monro had travelled to the colonies together and were firm friends despite their different political views. Monro's son, CJ Monro, is credited with introducing rugby to New Zealand, following his education in England.³⁰ The conservatives also forwarded their petition, containing a different and more moderate agenda, to Governor Grey and were strongly excoriated by *The Nelson Examiner*, since they represented such a small minority opinion.³¹ One of Grey's biographers, Edmund Bohan remarks:³²

In Nelson, Grey's luring away of Dillon, Domett and Fox left Stafford, the youngest and ablest of the settler leaders, at the head of a powerful radical group of farmers, pastoralists and working men united in demanding government money for Nelson's urgently needed public works, full political representation and the Chartist dream of universal suffrage and the secret ballot.

On the one hand the radicals comprised Stafford and his Committee supported by artisans and labourers. They certainly had the numbers when it came to votes. The conservatives, headed by Monro, tended to be the more wealthy landowners. Monro was supported in the debates by WO Cautley, a Cambridge graduate, and Francis Jollie, among others. The manoeuvres around the Constitutional Association stimulated the development of two distinct political groupings. The debates that had been going on for some years in Nelson led inexorably to what might be called two political parties: the Supper Party, that represented the wealthy landowners who were interested in protecting their interests; and the Nelson Political Union, that represented the working people but which had leaders like Stafford. These groupings came to dominate Nelson Provincial politics after the Provincial Councils were established by the 1852 Act, as discussed later in this essay.

It is not easy to unravel the relationships between the Constitutional Associations in the various provinces. Whether it was Wellington that took the lead or Nelson is open to question. But the final public meeting in Wellington took place on 3 February 1851, well after the Nelson meeting of 27 December 1850, reports of which would have been available in Wellington. There is no doubt that Stafford paid several visits to Wellington over the period and was well connected there, having married in 1846 Emily Wakefield, the daughter of the leader of New Zealand Company settlement in Wellington, Colonel William Wakefield. Stafford was engaged in fairly continuous constitutional agitation in Nelson from April 1847 onward, when the details of Earl Grey's 1846 Constitution reached New Zealand. Stafford was also close to both William Fox and the Hon Constantine Dillon.

30 New Zealand Rugby Union "History: Christ's College, Finchley" (21 December 2005) <www.nzrugby.co.nz>.

31 *The Nelson Examiner* (18 January 1851) at 186. There is a good account of the constitutional politics in Nelson at this period in McAloon, above n 8, at 45–48.

32 Edmund Bohan *To be a Hero: A Biography of Sir George Grey 1812–1898* (HarperCollins, Auckland, 1998) at 107.

There were numerous expressions of constitutional discontent in Nelson in the period under review. The developments were extensively reported and the remedies were championed by *The Nelson Examiner*. The sequence of events in 1850 and 1851 was as follows.

A public notice published on 30 November 1850 in *The Nelson Examiner* to the effect that because it was the intention of the Government in the United Kingdom to introduce a Bill for "the establishment of Representative Government in New Zealand", the inhabitants of the settlement were invited to meet on Friday 27 December to consider whether it might be "advisable to recommend certain provisions suited to the requirements of New Zealand to be submitted to her Majesty's Ministers, with a view to their being embodied in the proposed Bill."³³ The same edition of *The Nelson Examiner* that contained the public notice included a report of a public meeting to form a Constitutional Association held at the Nelson Literary and Scientific Institution several days earlier. The purpose of the Association was to address the situation where "the Government of the colony had been carried on without the colonists having any voice in the administration of their own affairs". The resolution passed at the meeting stated that the object of the Association should "be to watch over and protect the political interests of the settlement."³⁴ To become a member it was necessary only to pay one shilling per annum.

By 7 December a sub-committee had drawn up "a draft statement of the principles on which a Constitution for New Zealand should be framed."³⁵ The 13 principles were to be submitted to the "Great Public Meeting". They are set out as originally advertised:³⁶

**PRINCIPLES ON WHICH A CONSTITUTION FOR NEW ZEALAND SHOULD BE
FOUNDED**

1. That the Legislature of New Zealand shall consist of a Governor, and of two Houses, to be called respectively the Upper and Lower House, all the members of which shall be elective, except certain civil officers of the Crown, hereafter named, who shall have *ex officio* seats: and such Governor and the two Houses together shall be called the Parliament of New Zealand.
2. That the Governor shall be appointed by the Crown and paid from the Treasury of the United Kingdom, and shall be removed on a vote for an address to the Crown praying for such removal being passed by two thirds of the whole number of members of each House.

33 "Representative Government" *The Nelson Examiner* (30 November 1850) at 157.

34 "Public Meeting: Formation of a Constitutional Association" *The Nelson Examiner* (30 November 1850) at 158.

35 *The Nelson Examiner* (7 December 1850) at 2.

36 "Principles on Which a Constitution for New Zealand Should be Founded" *The Nelson Examiner* (7 December 1850) at 2.

3. That no Parliament shall sit for more than three years from the date of the return of the writs, and that no longer period than twelve calendar months shall elapse between one Session and the next.
4. That every adult male not subject to the customary legal disqualifications, and who shall have resided in the district in which he claims to vote six months previous to the day of registration, shall be qualified to vote.
5. That the mode of voting shall be by ballot.
6. That every registered elector shall be eligible to be elected a member of the Lower House.
7. That the following civil officers of the Crown, viz., shall be necessarily *ex officio* members of the Parliament, and that one at least of such *ex officio* members shall sit in each house: provided always, that no such member shall have a seat in more than one house, and that such *ex officio* members, or any one of them, shall vacate his or their seats on a vote of want of confidence in such member or members being passed by two-thirds of the whole number of members of both Houses.
8. That the powers of the Colonial Parliament shall be absolute in all local matters.
9. That all Bills for raising and appropriating the revenue of the Colony shall originate in the Lower House.
10. That the Parliament of New Zealand shall have power to repeal or alter any law in force within the said colony, including any of the provisions of the Act proposed for the Government of the Colony, provided that any such vote of the Colonial Parliament so repealing or altering the provisions of such last mentioned Act must be passed by a majority of at least two-thirds of the whole number of the members of each house.
11. That no salaries of any officers of the Colonial Government shall be reserved from the control of the Parliament of New Zealand, except those of the Governor (if not, as already recommended, paid from the Treasury of the United Kingdom), and of the Judges.
12. That there shall be but one General Executive, which shall be central.
13. That to meet the requirements of the several settlements, the Governor, with the consent of the Parliament of New Zealand, shall have power to create Municipal Corporations for each district, with power to enact laws of a purely local nature: such Corporations not to come into operation in any settlement except on a requisition of the majority of the electors in such settlement.

On the same date that the principles were published *The Nelson Examiner* carried an extensive report of the public meeting that took place at the Britannia Saloon in Wellington, as reported in the *Wellington Independent* on 20 November 1850. It is not clear how many people attended that meeting. There was clear co-ordination between the Constitutional Associations of Wellington and Nelson, and Stafford had been in Wellington not long before the meetings in Nelson. While the positions on all issues were not the same in Wellington as the Nelson principles, there was broad

congruence in the sentiments for self-government. The Wellington meeting had been convened to discuss Governor Grey's proposed Bill. It was notable for an address by John Robert Godley, founder of the Canterbury settlement, who had only arrived in New Zealand in April 1850. In the account that appeared in *The Nelson Examiner* he asked the Wellington meeting what was the "great political object" to which they were striving. He answered his own question this way:³⁷

... 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.

The "Great Public Meeting" itself was held on December 27 and only a brief report of the meeting appeared in *The Nelson Examiner* on 28 December 1850, the main report coming out a week later. The principles were carried by the Meeting, although in a modified and more elaborated form, compared with those originally advertised by the Constitutional Association:³⁸

- I That in the opinion of this Meeting, the Legislature of New Zealand shall, consist of a Governor and of two Houses of Representatives, to be called respectively the Upper and Lower House, all the members of which should be elective, except certain civil officers of the Crown, not exceeding four in number, who should be necessarily *ex officio* members of such Legislature, and at least one of whom should sit in each House: but that no such *ex officio* member should sit in more than one House; and that such *ex officio* members, or any one or more of them, should vacate his or their seats and office on a vote of want of confidence in such member or members being passed by a majority of not less than two-thirds of the whole number of members of both Houses; and that such Governor, and two Houses, together, should be called "the Parliament of New Zealand".
- II That in the opinion of this Meeting, the Governor should be appointed by the Crown, and paid from the Treasury of the United Kingdom; and should be removed on a vote for an address to the Crown, praying for such removal, being passed by two-thirds of the whole number of members of each House.

37 "Great Public Meeting at Wellington to Discuss Sir G Grey's Proposed Provincial Council's Bill" *The Nelson Examiner* (7 December 1850) at 3. Gerald Hensley in Claudia Orange (ed) *The Dictionary of New Zealand Biography 1769–1869* (Bridget Williams Books, Department of Internal Affairs, Wellington, 1990) vol 1 at 152 attributes to Godley his most famous saying "I would rather be governed by Nero on the spot, than by a board of angels in London, because we could, if the worst came to the worst, cut off Nero's head, but we could not get at the board in London at all."

38 These resolutions passed are extracted from the report in "Great Public Meeting to Consider the Future Form of Government for the Colony" *The Nelson Examiner* (11 January 1851) at 178.

- III That in the opinion of this Meeting, population should alone be regarded in determining the number of members of the Parliament of New Zealand to be returned by each district; and that, subject to the proviso hereinafter contained, every registered elector should be eligible to be elected a member to either House: provided that such elector should, as regards the Upper House, possess the qualification which it may be deemed expedient to require in members of that House; and that the following qualifications for members of that House appear to be most suitable to the circumstances of this colony, namely: where the elector shall not be less than thirty years of age; or where, not having attained that age, he shall have sat as a member of the Lower House for at least two sessions; or where, not having attained that age, he shall have held an *ex officio* seat in either House: provided he shall have previously resigned the office in right of which he held such at officio seat. But that it should not be necessary, in any case, that members of either House actually reside in the district for which they may be elected to serve.
- IV That in the opinion of this Meeting, every adult male who should have resided in the district in which he claims to vote for six months previously to the day of registration, should be qualified to vote in the election of members: provided always, that no person should be entitled to vote who is an alien, who is of unsound mind, or who at anytime theretofore should be attainted or convicted of treason, felony or any other infamous offence, in any part of her Majesty's dominions.
- V That in the opinion of this Meeting that in the elections of members, the mode of voting should be by ballot.
- VI That in the opinion of this Meeting, no Parliament for New Zealand shall sit for more than three years from the return of the writs, and that no longer period than twelve calendar months should elapse between one session and the next; that the powers of such Parliament should be absolute in all questions not affecting the prerogatives of the Crown, or being Imperial questions, but nevertheless, that such Parliament should have full power to repeal or alter any of the provisions of the Act passed for the Government of the Colony, provided that any vote in favour of such repeal or alteration respectively should be passed by a majority of not less than two-thirds of the whole number of members of each House; and that any Act of the Parliament of New Zealand not affecting such prerogative and Imperial questions, shall be referred to the Home Government, but that the Governor shall be required to declare his assent to, or dissent from, every Bill passed by the New Zealand Parliament before the close of the session in which such Bill was passed.
- VII That in the opinion of this Meeting, all Bills for raising and appropriating the revenue of the Colony should originate in the Lower House, and that no salaries of any officers of the Colonial Government should be reserved from the control of the Parliament of New Zealand, except those of the Governor (if not, as already recommended, paid from the Treasury of the United Kingdom) and of the Judges, after the salaries of the latter have been fixed at the period of their appointment.

- VIII That it is the opinion of this Meeting, that in case the peculiar circumstances of the Province of New Ulster as at present constituted, more particularly as regards the aboriginal native population thereof, should prevent the adoption of one general Executive for the whole colony, it is expedient that there should be but one general Executive for the Province of New Munster, as at present constituted, and which should be as central as possible.
- IX That a memorial embodying the wishes of this meeting on the subject of the future Government of this colony, as expressed in the Resolutions adopted by this Meeting, be with those Resolutions be forwarded to Her Majesty's Principal Secretary of State for the Colonies; that copies of such memorial be sent to such members of the Imperial Parliament as have shown an interest in colonial questions; and that a committee of seven persons be forthwith appointed to prepare such memorial.

The final step for present purposes came with the 18 January 1851 edition of *The Nelson Examiner* in which was printed the complete Memorial to the Rt Hon Earl Grey, Her Majesty's Principal Secretary of State for the Colonies, which is long and closely argued.³⁹ It is followed by the minority message to Sir George Grey, as Governor of New Zealand, from the minority group headed by Dr Monro. The significant thing about the minority view is that they were not against all of the propositions that had been agreed by the meeting. The minority makes it clear that they are in favour of representative institutions and they look forward to the time when further political privileges could be conferred upon the New Zealand settlers. They were opposed to Provincial Councils that Grey was proposing and had implemented, as they were "cumbrous, expensive and ostentatious." Proper municipal government was required. One central Legislature and Executive would be quite sufficient for New Zealand. While favouring a liberal franchise, the conservatives were not prepared to support universal suffrage as the meeting had done. They favoured a small property qualification. Universal suffrage was opposed as well because it included "all the aborigines of the colony." The conservatives were also opposed to the ballot, because "secret voting appears to us moreover incompatible with the spirit of free institutions and the genius of a free people." Voting should be open, not by secret ballot. Neither did the conservatives favour removal of the Governor by a two-thirds majority of both houses. It was not, they said, essential to responsible government. It was particularly important not to allow the Governor to be dismissible because of "the rights of the native race." Another point of disagreement was the composition of the Upper House:⁴⁰

... our view of the matter being that two Legislative Houses should consist of persons representing different interests, not influenced by the same impulses, and not subject to the same direct responsibility.

39 "To the Right Hon Earl Grey, Her Majesty's Principal Secretary of State for the Colonies" *The Nelson Examiner* (18 January 1851) at 186.

40 "To His Excellency Sir George Grey KCB, Governor-in-Chief of New Zealand" *The Nelson Examiner* (18 January 1851) at 188.

IV THE ARGUMENTS

It is not easy 164 years later to imagine what it was like to be a Nelson settler in 1850 and to understand the factors that were influencing their conduct. They clearly thought they had total freedom of speech and the ability to roundly criticise the Governor, and that they did in robust terms. They also believed that their voices had to be heard in the United Kingdom. They felt no reservation in communicating with British Ministers directly. They also felt that things were different in New Zealand than in the United Kingdom, and they needed to be able to get on with things as local conditions allowed, rather than be subject to gubernatorial dictates. They exuded a sense of confidence and boldness that was without political inhibition. An orderly public meeting in which the issues were fiercely debated and then voted on and then transmitted to the authorities must rate in modern terms as a conscious act of self-determination. The arguments had been refined in four public meetings held in various parts of the province: three in country districts of Richmond, Spring Grove and Motueka, and one at Nelson itself. These meetings also involved debate which allowed the competing arguments to be rehearsed, so by the time they came to the big meeting the issues were clear and the lines of discussion clearly joined. The resolutions put were either adopted unanimously or with large majorities. I shall try to précis the main arguments used in the debate on both sides, removing the rhetoric. I have drawn on not only the extensive report of the debate itself reported in *The Nelson Examiner* but also the memorials prepared afterwards to which reference has already been made.

A The Form of Government

The proponents of the meeting were conscious of the fact they were setting a pattern for the future. Stafford and other proponents told the meeting the colonists required the rights possessed by their forefathers, who were possessed of the power of an uncontrolled legislature. The demands made must be temperate and reasonable. The failure to implement the 1846 Constitution with elected representatives produced much discontent. This was compounded by the decision of the Governor to establish Provincial Councils composed of entirely *ex officio* members and nominees of the Crown. The unhappiness has continued for five years, leading to much interchange of opinions between inhabitants as to what form of government would suit them. Fortunately a high degree of consensus had been reached and every adult male residing in the district had attended the various meetings "with scarcely an exception."⁴¹

The requirement was for a legislature of a "calm and deliberate character" with the opportunity for reflection – two Houses would produce this effect. It should be called the Parliament of New Zealand. There was within the Colony material for two Houses but not an hereditary Upper House. Some qualifications may be required for that House but not a high property qualification. Members

41 "To the Right Hon Earl Grey, Her Majesty's Principal Secretary of State for the Colonies" *The Nelson Examiner* (18 January 1851) at 186.

should be elected, not be nominees of the Governor. The Upper House should not be hereditary nor should its members be elected for life. Membership in both Houses should be elective as in the Cape Province. Dissension, distrust and irritation will occur if unelected people pass laws. The colonists were the best judges of who should represent them. Nominees were a stigma on the people. Two Houses were necessary to check against impulsive or hasty legislation. Two Houses would also allow new arguments to be considered for legislation. Some *ex officio* members of the legislature were needed but they must be capable of being removed on a vote of want of confidence passed by a two-thirds majority of the whole of both Houses. *Ex officio* members would be required only temporarily. The legislature should not have control of the Governor's salary. But the executive had to be responsible to the legislature. Nominees were a reproach to the people. The Government should act in obedience to those who paid for it. Responsible Government meant there could not be a spirit of antagonism between the Government and those they governed. Government must not only be representative, but also responsible.

The arrangement put forward was best for scattered settlements, between which there were irregular communications, so it was not possible to follow the English model in those circumstances. One legislature should be set up for the whole of the Islands but the "native question" in the north may prove to be a barrier. Native issues should be protected and this would be achieved by the *ex officio* members of the legislature. The natives are "cultivating our habits and living under our laws." Two Houses were needed so one House could check the other. There were legislatures similar to what was proposed in the United States. And it would be possible on that model to have the elected representatives in the Lower House elect representatives in the Upper House. But how the Upper House was to be elected should be left to the UK Government. Financial accountability of the New Zealand Government was critical to the inhabitants of the Colony. Because of the difficulty of communications and the delays most questions had to be settled in New Zealand. No minister in the UK can make a good judgment about how things will work here because he will not be familiar with the conditions. That is why a large measure of self-government is a necessity. And that is also why we must have here the powers to alter the Constitution. Further, the principles of representative government require that expenditure must be approved by the legislature. The colonists are both the recipients of the government services and they pay for them. The advantages of a single unitary government are considerable in the conditions to be found in New Zealand. It is more direct and more efficient than provincial councils could be. Further, there should be a single executive. And Auckland should not be the seat of Government because it is too far away from other parts of the country.

In opposition to these views it was argued that one central legislature would prevent provincial government of a type that was already being established. The material did not exist within the Colony for two Houses. Two Houses were cumbersome, unnecessary and expensive. There was no advantage in having two identical elected chambers. Reflection is better obtained from a legislative process that involves first, second, and third readings of bills that are separated as to time. And what

was proposed was not like any form of government in existence anywhere. There would be no support in England for it. Proponents would have been better to have based themselves on Sir George Grey's dispatch to the UK. Efforts to control and hold accountable officers of the Crown in the manner proposed would be an infringement on the prerogatives of the Crown and the same end could be better attained by withholding supply. The Executive should be responsible only to the Lower House, not to two-thirds of the members of both Houses. This was a simpler and better arrangement. The large native populations of the North Island caused problems of the upmost difficulty. In the South Island there were fewer natives and their native title could be said to be extinguished. The South Island was ready for self-government. British subjects were entitled to self-government. So the meeting should only recommend it for the South Island. Native disaffection meant that the UK would not hand over power of self-government to the whole of New Zealand.

B Removal of the Governor

This power was necessary because colonists had the right to ask for power to protect themselves from the "headstrong ignorance or stubborn malevolence" after many "exhibitions of the freaks of Colonial Governors".⁴² Opposition to the power of removal flowed from a lingering aristocratic feeling that ought to be dismissed. The power was necessary because the Governor would have at his disposal large sums of money for native uses, thus rendering him independent of the legislature. The natives would not be better provided for by giving the colonists the power of appointment over the Governor, rather than by the removal of an obnoxious one. To ask for part of a power is not to ask for more than the whole of it. The colonists were not subjects of the Governor and analogies to the power of the sovereign were wrong. The Governor was a servant of the Crown. More than a shadow of power remained with the Governor. Power to veto legislation would be in the hands of the Governor only. It was not in the hands of the home Government. The Governor had no royal powers. The power of the purse did not extend to the Governor, only to departments or instruments of the Government. Measures were needed to prevent tyranny and oppression of the weak by the strong, and governors should not by themselves become instruments of oppression. The power to remove a governor would not be exercised frequently, any more than the power used to withhold supply is exercised frequently. But when it existed a state of contention should not exist for long and be prolonged. That is why the power to remove was necessary. The legislature should not have power over the Governor's salary, which is why it should be set by the British Treasury.

Opponents argued that the innovation proposed was not practicable. The Governor was a representative of the Crown and exercised royal powers. Removal short of the term would amount to a revolution. Given the distance from England the result could be disastrous and governments would be overthrown. The risk was that there would be a rapid succession of Governors. So the Governor would become an automaton or totally obstructive. The exercise of the legislative veto

⁴² These views were expressed by Mr George White "Great Public Meeting to Consider the Future Form of Government for the Colony" *The Nelson Examiner* (11 January 1851) at 178.

would be fraught. Government could come to a halt for long periods under the proposal. The result of what was proposed would either end up with abandonment of the power of recall or direct election of the Governor by the people. So the power to remove the Governor should be omitted. Further, the native question could not be avoided and that is what the proposal did. Suffrage was not proposed for the natives at present but their position could not be ignored. Or was it proposed to give the natives suffrage since natives should have some say in a vote of no confidence? The Governor may be advancing their interests and a no confidence motion would destroy their progress. There was a grave risk of injury to the native race and the advisers to the Queen could not be a party to that. So power could not be trusted to the settlers alone.

C Universal Suffrage

Proponents argued that universal suffrage could be conceded without danger because the colonists had by their conduct shown themselves qualified to exercise the fullest political privileges. And because there were criminals in New South Wales was no reason to deny the vote in Nelson. Nor was there a reason to deny the vote to hard-working Englishmen because Māori could not vote. Englishmen should not be treated like Māori. The argument that some people had superior education to others and there should be a restriction on voting by education was not valid, because many people present had educated themselves by reading. No one class is better than any other and no class can claim a prescriptive right to govern. The working class has been the salvation of Nelson and should have a say in governance. The working class should have the same political rights and privileges as others and should not be treated as convicts or Māori. Working class men were just as able to discharge their civic obligations as their superiors. Voting is a personal right not a property right. A poor man should not be excluded, any more than a rich man. Universal suffrage is the only fair thing. To prefer the rich is to cast a stigma on honest poverty. Wealth is no proof of moral excellence nor poverty its absence. The franchise is not based on the natural rights of man. It is part of the political rights of belonging to and of being a member of society. In the colonies the domestic, the labourer and the mechanic are quite as independent as their employers because of their scarcity and the increasing demand for their labour, so they command high wages. The working class has been participant in all the meetings. At the big meeting not one person in forty voted for a property qualification for voting. It would be unfair to impose a property qualification. All that should be required is six months residence. In the United Kingdom universal suffrage should be done gradually, but things are different here. It would not produce uncomfortable effects here. We should be given the full measure of liberty we are fitted to receive. Neither should particular qualifications for members be required, as this was the case in Scotland.

Opponents argued that to receive the vote people had to be advanced by the standards of historical experience. Once universal suffrage is introduced it does not admit of further extension, and it must be uniform as between town and country. On the state of present advancement universal suffrage is not fitted for any people on earth. Constitutions flow from circumstances and are not made. Suffrage is not a matter of abstract right and wrong, but springs from man's connection with

society. It is not a great hardship not to vote if you enjoy the equal protection of the laws, person and property. A free press and public expression of opinion are a better protection against oppression than the extension of suffrage. Those with property bear a heavier burden from the state and should have a bigger say. The labouring class is the great majority in this community and would have too much power relative to other classes. Quoting Burke, universal suffrage would place poverty, ignorance, and youth predominant over age, cultivation and wealth. And the character of future populations has to be considered when weighting the issue.

The evils of American democracy show the tyranny of public opinion, the exclusion of people of intellect from political power and selfishness and violence of political parties. We should exclude from the franchise those who from want of energy, prudence or character cannot or do not provide for themselves. Proximity to a large convict population in Australia was a risk and they may be able to get round the disqualification of conviction. How would we know their records? Universal suffrage will attract the naturally corrupt. The North Island native populations are numerous and jealous although the natives in the south are more easily managed. There are 30,000 Europeans in New Zealand and 100,000 Māori. Surely that would suggest we must have universal suffrage for all. If that will not work, then the appropriate test is a property qualification for all. Then only a small number would be disqualified. It is too wild to think anything like universal suffrage could be granted and to ask for it is to be discredited as a colony. No other British colony has universal suffrage. Franchise should go up and down according to circumstances depending upon the property, virtue and intelligence of the community. It is unfair to exclude the natives because they are an intelligent and highly improvable race. But they are not fitted for the franchise at present and under a system of universal franchise it would be impossible to ignore their status as British subjects under the Treaty of Waitangi. There was not enough education within the country to grant the vote; education should come before suffrage. What was proposed were principles that even democratic America had failed to adopt. There were three great innovations – universal suffrage, vote by ballot, and the qualifications for elected members. No place on earth had done these three things together.

D Secret Ballot

The proponents said this was the most controversial resolution before the meeting and views had been strongly expressed at all the previous meetings. It was debated at length at the big meeting. It was a major demand of the working class. The ballot would remove the abuses of open voting. Candidates should declare their policies and programmes and be questioned on them but for voters such openness was not appropriate. The voter had to select candidates whose views most closely resembled his own. In this he exercised a private judgment in making his own choice. He was responsible to himself and to his conscience and to no-one else. Open voting, on the other hand, exposed the voter to external influences. The ballot was designed to protect the voter from those influences. Voting was the voter's affair and no one had a right to interfere or know the voter's intention. Printed ballots would be prepared with the names of candidates and the voter would erase the names he would reject and deposit the ballot in a receptacle. After the close of the election the

votes would be counted. Such abominations as committee rooms and open taverns would be avoided. There would be quite a different atmosphere from the commotion and barracking of open voting that progressed through the day. Clubs in London always had secret ballots to elect members so why not for elected representatives. If the process was good for the rich it could not be argued against for the poor. The ballot would not prevent people declaring their preferences if they wished. Political opinions are like religious opinions; everyone is entitled to his own beliefs and is accountable to his own conscience. To say the ballot was un-English was a puerile argument. To advance such an argument showed the lack of credibility of the arguments against the ballot. To say that it is not done in England is not an argument against it. To say that drunkenness is an English characteristic does not mean we should be opposed to temperance. Ignorance, brutality and every vice that intemperance gives rise to are not to be mourned because they are the departed characteristics of Englishmen. The ballot is prized by Americans as one of the most valuable of their institutions, Justice Chapman has written a pamphlet which says that English writers who state the ballot is a failure in America are chiefly tourists who know little of the country or its people. The ballot ensures that voters are free from brutal insults of an incensed mob. And it would be individual preferences here, rather than parties as at home.

Unless there were a secret ballot in Nelson absentee landlords were likely to exert undue influence. The bulk of those landlords were represented in Nelson by one firm. The shortage of tenants did not mean that argument was invalid. Possession of great powers in the hands of a few individuals would be a cause of great anxiety. Intimidation occurred in every English election and it would occur here unless we have the ballot. The wearer knows where the shoe pinches and that is why so many here are claiming the ballot. Everyone is entitled to full protection in the exercise of his opinions. Where men are personally known to one another friendships and enmities can be strong. Voting by ballot would ensure these relations were not damaged and would ensure elections can be settled peaceably. Because of its privacy the ballot would ally excitement. There may be several voters in one household and secrecy would be desirable in such a situation. The ballot offers to weaker voters freedom from the tyrannies to which they are subject in a system of opening voting. It frees men from the bondage of party. The ballot is amiable; it leaves people open to reason rather than undue influence, therefore it is rational. And it is practicable because it is used in clubs and societies. It provides the voter with an unmolested enjoyment of his sacred right to exercise his own conscience. New Zealand would be a good place to try an experiment with this system.

Opponents said that to disapprove of the ballot was not an argument for the approval of discord, drunkenness and violence. The ballot was a means of enabling a man to exercise secretly a power that concerned the public good. Voting was a duty more than a right and it was best exercised under the influence of public opinion. Arguments for the ballot were based on abuses of open voting, intimidation and violence in England, where power is nominally in the hands of the many but in reality in the hands of a few. Such dangers did not exist in New Zealand. To openly empower opinion is to give their cause influence and support. The ballot was unconstitutional to an

Englishman's characteristic of openly facing his opponent. To introduce the ballot would lower people's self-esteem and produce tyranny, instead of liberty. Furthermore, the ballot would not put an end to intimidation and bribery at elections. The ballot was not honourable. It was unmanly and deceitful. In America the ballot causes a spirit of partisanship, secret political clubs and bribery and intimidation. People here are too independent to be intimidated by their employer or anyone else. Publicity is the safety valve, not the ballot. The independence of different classes of society in New Zealand meant that intimidation or undue influence could not be exercised. If the employer tried to influence the employee's vote the employee would leave the employment. The ballot would never protect an honest man who fearlessly and manfully avowed his opinion. The ballot would lead to the extinction of political spirit or to unblushing hypocrisy. The "amicable argument", that is to say that the ballot would protect good feelings between friends and neighbours, would not wash because friendships could not be destroyed by political differences. Further, if people pledged to a candidate and did not support that candidate they could not be found out. The ballot was "unmanly, cowardly and un-English."⁴³ It is not a good thing in itself. The position of landlord and tenant here is entirely reversed compared with that in England. The same is true in New Zealand of the relationship between master and servant. If people are not proof against bribery they have no right to ask for the franchise. There is no need for the ballot. We cannot legislate for posterity. To pass this resolution would be to lose our self-respect. By passing the secret ballot we will put in jeopardy the achievement of universal suffrage.

They favoured higher qualifications for members of the Upper House. It was a democracy lite, the constitutional policy favoured by the small minority in Nelson.⁴⁴ The width of participation and the openness with which the whole proceedings of the Great Public Meeting were conducted at this distance remains striking. It is hard to imagine such a meeting being held in contemporary New Zealand on what should comprise the elements of New Zealand's Constitution. It was remarkable how orderly the meeting was and how seriously the arguments were engaged with. The meeting was chaired by Francis Dillon Bell, who had been the agent for the New Zealand Company in Nelson; he intervened in the debate to oppose the resolution to allow a two-thirds vote to lead the recall of the Governor.

V THE INFLUENCES AT WORK

With the advantage of looking back and knowing what happened later it can be seen in the debates held in Nelson that a number of influences were at work. The first was opposition to untrammelled gubernatorial power as it impinged on the lives of the settlers. The antipathy toward Governor Grey was palpable. The passion for the universal franchise and the secret ballot was

43 Dr Monro "Great Public Meeting to Consider the Future Form of Government for the Colony" *The Nelson Examiner* (11 January 1851) at 181.

44 "To His Excellency Sir George Grey KCB, Governor-in-Chief of New Zealand" *The Nelson Examiner* (18 January 1851) at 188.

remarkable and perhaps reflected the relatively large numbers of working people in Nelson compared with the numbers of wealthier land owners. Also a powerful influence was the frustration the settlers felt being governed from England when they were far away in a place with totally different but difficult conditions.

I am persuaded on the evidence of the Nelson meeting, the composition of the sub-committee that drafted the proposals, Stafford's and Robinson's subsequent political careers, and the substantive content of the meeting's resolutions that the predominant intellectual influence that shaped the Nelson meeting was the work of the Chartists and their Charter. Universal suffrage, the secret ballot, limited term Parliaments and equal constituencies were all points from the Charter. The settlers felt that in this new land to which they had travelled the aims of the Charter were within their immediate grasp. First, as outlined earlier, at least two members of the Constitutional Association's drafting sub-committee had Chartist or quasi-Chartist connections: Stafford and Robinson. Further, many of the settlers would have been familiar with the Charter since it was devised in 1837 in England before any of them embarked for Nelson. The changes going on in England, especially the poor position of the lower classes, were among the forces that impelled many to emigrate to Nelson in the first place. Between 1837 and 1848 when the People's Charter was presented to Parliament in a petition there were numerous efforts by variety of means to secure political reform based on six demands. The aim was to secure the interests of people not represented in Parliament. It began with skilled artisans like JP Robinson, and Chartism was well publicised in England.

In England the First Reform Act 1832, known as the Great Charter of 1832, swept away 56 rotten boroughs and redistributed seats among towns and counties.⁴⁵ It created a £10 householder qualification to vote for those in boroughs, as well as a forty shilling threshold for freeholders of copyhold and leaseholds for terms of years and tenants-at-will paying fifty pounds a year.⁴⁶ The franchise was not extended further in England until the Reform Act of 1867.⁴⁷ According to Phillips and Wetherell the First Reform Act increased the overall electorate from over 400,000 to more than 650,000.⁴⁸

So in 1850 the Nelson constitutional opinion on the franchise was greatly in advance of the views in Britain. France, after the revolution, provided for adult male suffrage in 1792. Chartism in the United Kingdom was fuelled by poverty. "Chartism demanded in effect only what was granted

45 Representation of the People Act 1832 (UK) 2 & 3 Will IV c 45.

46 Thomas Pitt Taswell-Langmead *English Constitutional History from the Teutonic Conquest to the Present Time* (4th ed, Stevens & Haynes, London, 1890) at 762.

47 Representation of the People Act 1867 (UK) 30 & 31 Vict c 102.

48 John A Phillips and Charles Wetherell "The Great Reform Act of 1832 and the Political Modernization of England" (1995) 100 *The American Historical Review* 411 at 413–414.

in 1867 and 1884, that is to say the enfranchisement of the classes left out by the Bill of 1832".⁴⁹ Chartism was a movement for political reform in Britain driven by the poverty of working people. It took its name from the People's Charter of 1848 as it was presented to Parliament, but the points had been in continuous discussion since they were first formulated in 1837. The Charter had six points of the People's Charter, several of which bear a strong resemblance to the constitutional policies agreed in Nelson in 1850. The six points of the Chartists' demands of the 1837 Charter were:⁵⁰

1. A vote for every man twenty one years of age, of sound mind, and not undergoing punishment for crime.
2. THE BALLOT – to protect the elector in the exercise of his vote.
3. NO PROPERTY QUALIFICATION FOR MEMBERS OF PARLIAMENT – thus enabling the constituencies to return the man of their choice, be he rich or poor.
4. PAYMENT OF MEMBERS, thus enabling an honest tradesman, working man, or other person, to serve a constituency, when taken from his business to attend the interests of the country.
5. EQUAL CONSTITUENCIES, securing the same amount of representation for the same number of electors, instead of allowing small constituencies to swamp the votes of larger ones.
6. ANNUAL PARLIAMENTS, thus presenting the most effectual check to bribery and intimidation, since though a constituency might be bought once in seven years (even with the ballot), no purse could buy a constituency (under a system of universal suffrage) in each ensuing twelvemonth; and since members when elected for a year only, would not be able to defy and betray their constituents as now.

The advanced view of universal suffrage for males in New Zealand may well have prepared the ground for votes for women in 1893 in New Zealand, a world first. Class and privilege did not travel well from England to New Zealand and there are repeated references to the artisans and working people in the Nelson debates. Despite the fact that the heavy political lifting was in the hands of the settlers who could be classed as "gentry", who were well educated and had means, there was an egalitarian cast to the proceedings. Some of the speakers identified themselves as not coming from the gentry, or what passed for gentry in colonial New Zealand. The reason why the class system and privilege did not travel well seems to be due to the absence of sufficient numbers of capitalists being attracted by the New Zealand Company. Once in New Zealand people wanted land to farm for themselves. There was no rentier system as in England. Political order in New Zealand could not be controlled by the elite because the systems of land tenure were different from those in England. In

49 GM Trevelyan *History of England* (3rd ed, Longmans Green and Co, London, 1952) at 642.

50 HJ Hanham (ed) *The Nineteenth-Century Constitution 1815–1914: Documents and Commentary* (Cambridge University Press, London, 1969) at 270.

the Nelson settlement there was a high degree of economic independence that led to political independence. There was no place for tenant farming in the new world.

The class questions in New Zealand, even at this early stage, look very different from those in England. The questions relating to Māori who were then the majority of the population in New Zealand had to be skirted around delicately. They posed a problem for the advocates of universal suffrage, who were not proposing so it seems, that most Māori could vote, or at least not yet, a point that the conservatives used to try and defeat universal suffrage. There were quite a number of references to the political arrangements in the United States, in particular the presence of two elected Houses in legislatures and the secret ballot. The discussion of the American experience was quite noticeable. The settlers did not want Provincial Governments, although they were established, but many witnessed their demise, including Stafford who supported their abolition in Parliament 25 years later.

VI LATER DEVELOPMENTS

Once the New Zealand Constitution Act 1852 was passed in Westminster and came into force, Nelson secured an elected Provincial Council.⁵¹ The Constitutional Association had not wanted this and several other features of what was passed in London were against their wishes. Members of the Provincial Council were elected on the same franchise as the House of Representatives, although the members of the Upper House in the General Assembly were appointed for life. The franchise was not universal suffrage, there were property qualifications: male franchise at 21 years, and the required property interests were freehold worth £50, or leasehold worth £10, or a house with an annual value of £10, or a house outside town of annual value of £5.⁵² The qualifications for being a member were the same as for voting. The colonists got much of what they wanted – they got rid of nominees and they secured an elected House of Representatives, they had a much greater measure of self-government and substantial power was transferred to elected persons. In 1854 responsible government was explicitly conceded by dispatch from the Secretary of State, without the need for any statutory changes.⁵³ Power to amend in New Zealand many of the provisions of the 1852 Act was given by the United Kingdom in 1857.⁵⁴ The 1852 Act said nothing about how the ballot was to

51 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72. For the nature of the New Zealand system of Provincial Government see WP Morrell *The Provincial System in New Zealand, 1852–1876* (2nd ed, Whitcombe and Tombs Ltd, Christchurch, 1964).

52 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72, s VII.

53 See McIntyre and Gardener, above n 18, at 91.

54 New Zealand Constitution (Amendment) Act 1857 (Imp) 20 & 21 Vict c 53. For an account of the New Zealand Parliament's acquisition of full law-making power see Department of Justice *Reports of an Officials Committee on Constitutional Reform: Second Report* (1986) at 28–32. For early constitutional developments see also JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (2nd ed, Stevens & Sons, London, 1967) at 1–20.

be exercised, and the secret ballot was not adopted in New Zealand until 1870.⁵⁵ Stafford took part in the parliamentary debates in 1870. Monro was then the Speaker of the House. Stafford referred in the debates that his own support for the ballot went back 35 years. Stafford said that he had spoken in support of it publicly in Edinburgh on an occasion known to Monro.⁵⁶

Just to go a little further with the story of Edward Stafford, following the 1852 Constitution Act. The people in Nelson who had purchased land from the New Zealand Company, which folded in 1850, tended to be what might be called the gentry and they had distinct political interests. They formed an institution called "The Supper Party" because of their habit of having dinner meetings in one another's houses.⁵⁷ On the other side was the "Nelson Political Union" which was committed to liberal principles and supported by artisans and small business people. In the first contest for Provincial Superintendent in 1853 the rival candidates were Edward Stafford for the Nelson Political Union interest and Francis Jollie for the Supper Party. Jollie's strongest supporter was Dr David Monro from Waimea West. There was a third candidate, John Saxton, who had also been endorsed by the Union. There was no ballot initially and Stafford was declared the winner by applause and a show of hands. And when a ballot was called for Stafford won easily.⁵⁸ In 1855 he was elected the member for Nelson in the House of Representatives. He became Premier first in 1856.⁵⁹

The confidence with which the settlers dealt with London, sending their requests direct to the Secretary of State, probably reflected the close relationship the New Zealand Company had with London and all the lobbying Edward Gibbon Wakefield had spearheaded. There exists a rich narrative about what happened in London concerning the New Zealand Constitution Act. As Dr Mark Hickford points out, William Fox developed an alternative constitution, referred to in the Colonial Office as the "MS project". WE Gladstone received a fully drafted copy, together with extensive minutes outlining the proposals for constitutional reform made at settlers' meetings held in Auckland, Otago, Canterbury, Wellington and Nelson. The MS proposal was, says Dr Hickford, "infused with the constitutional preferences of radicals, such as Fox."⁶⁰ It advocated a localized

55 "Cleaning Up Elections" (20 December 2012) New Zealand History Online <www.nzhistory.net.nz>.

56 (22 June 1870) 7 NZPD 64.

57 HF Allan *The Nelson Provincial Council* (Nelson Historical Society, Nelson, 1974).

58 At 12–13.

59 *The New Zealand Parliamentary Record* (WAG Skinner Government Printer, Wellington, 1925) at 19.

60 Mark Hickford "Considering the Historical, Political Constitution – Thoughts on Some Constitutional Traditions' and the Imperial Inheritance" (paper presented to the Unearthing New Zealand's Constitutional Traditions Conference, Wellington, 29–30 August 2013). A revised version of this paper is published in this issue of the journal: see Mark Hickford "Considering the Historical-Political Constitution and the Imperial Inheritance in Mid-nineteenth Century New Zealand: Balance, Diversity and Alternative Constitutions" (2014) 12 NZJPIL 145.

process for constitution-making rather than having the design settled in London. The process was designed to give greater weight to settler opinion as it had been mobilized in New Zealand.⁶¹ The details differed considerably from the Nelson recommendations agreed at the "Great Public Meeting". There were to be two elective chambers in each province. The Nelson meeting's measures were close to the New Zealand constitutional arrangements that had emerged by the end of the nineteenth century.

I cannot in this essay explore the interactions between the metropolitan and colonial sources of constitutional action that resulted in the 1852 Constitution. But I recognize that these interactions are important. I do accept, however, that much more historical excavation should be done in order to dispel the orthodox New Zealand approach hitherto that expounds uncritically a whiggish view.⁶²

The amount of scholarship on New Zealand constitutional history is not extensive and I suspect many treasures remain buried waiting to be discovered. No modern, definitive constitutional history of New Zealand has been written. It is a worthy scholarly task and should be undertaken. Too many of our constitutional traditions are derivative, and if we examine our own history we may find there, springing from our own soil and our own experience, matters to admire and that inspire us for the constitutional journeys ahead.⁶³

61 Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at 242.

62 PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 345. He points out that the Whig paradigm represents a means of legitimating contemporary constitutional arrangements through a particular historical style.

63 NA Foden *The Constitutional Development of New Zealand in the First Decade (1839–1849)* (LT Watkins Ltd, Wellington, 1938) at iii. In his Foreword to this book HH Cornish remarks:

Mr Foden has for some years past made a close study of the early constitutional history of New Zealand. In order that he might examine documents that were not locally available, he took leave of absence from the law firm in which he was a partner and spent a considerable time in England, reading relevant early records in the British Museum and the Public Records Office. He has, therefore qualified himself to speak with some authority on the topic of this book.

No doubt such study was beneficial, but there is within this book little reference to what was going on in New Zealand and what the constitutional aspirations were of its inhabitants.

