Looking Back In Anxiety:

REFLECTING ON COLONIAL NEW ZEALAND'S HISTORICAL-POLITICAL CONSTITUTION AND LAWS' HISTORIES IN THE MID-NINETEENTH CENTURY

This essay addresses a concept of political as opposed to legal constitutionalism, including how such a concept might assist legal-historical analysis. It does so with reference to what I have characterized as historical-political constitutionalism, focused upon expanding and diversifying areas of contestability and dissent in and through politics as opposed to relying on case-by-case legalism.[1] That is its essence, distilled in spare, introductory terms. In examining constitutionalism in this manner, this article foregrounds the ongoing political contestation that shaped and defined governmental power across various layers and interconnections of activity and thought, not only local or provincial but also trans-oceanic.[2] In this fashion, it also influenced interpretations of what might be characterized as colonial 'modernity' (a vexed term) through diversifying institutional, discursive and constitutional options for indigenous political actors and communities to negotiate and increasingly intensify access to, and co-opt parts of, a principally anglophone world-system albeit with undoubted risks to indigenous socio-political autonomies.[3] It also offers a perspective in favour of sensitively 'placing' the dynamism and continuities of political-legal histories through time with a need to attend to local variations and particularities – the ineluctable historicity of such constitutionalism.[4] Others, such as Bain Attwood, Tony Ballantyne and Damon Salesa, in important work have also approached their respective historical examinations of nineteenth-century questions of native title's legal histories in Australia, regional connectivities and race mixing with an eye to the persistent significance of power and place.[5] Ballantyne, in particular, has proposed using 'circulation' as a conceptual tool for prising open and tracing relations between economic activities and the so-called 'cultural domain'.[6] Focusing on the practical densities and contingency of particularity and place is certainly not novel. It recalls aspects of the stances of R.G. Collingwood, who expounded the salience of not being 'indifferent to space and time but having a where and a when of their own', and, importantly, Michael Oakeshott, as well as others.[7] Oakeshott mused on how 'the "historical" past' is a 'complicated world, without unity of feeling or clear outline: in it events

have no over-all pattern or purpose, lead nowhere, point to no favoured condition of the world and support no practical conclusions'; '[i]t is a world composed wholly of contingencies'.[8]

Elsewhere I have treated political constitutionalism as entailing a form of creative, untidy indeterminacy where multi-directional, plural relations are conditioned and reconditioned but seldom settled conclusively, even though there might be punctuated moments of settlement for a time.[9] It is persistently open-textured (within a broad framing peculiar to a community or set of interacting communities as discussed below) and agonistic, or in other words, attuned to the plural, contested striving and intermingling of political arguments as to what, if anything, is to be pursued through practical activity or policy.[10] It is predicated on an appreciation of the depths of politics, its sheer untidiness, its nuances and richness. Despite the perspectives of certain legal scholars, it does not preclude acknowledging the significance of legalism. Rather, it affords accented 'angles of vision' with which to examine and evaluate elements of activity and contestation otherwise ignored relative to the fragments of positive legal instrument (such as statute) or court decisions that might appear more accessible to legal-historical subsequent research.[11] 'Politics', as Hannah Arendt said, 'deals with the coexistence and association of different [people].'[12] Furthermore, politics is the 'sphere of the unsettled'; it is 'the locus of those issues not fully governed now by the unconscious play of tradition or the conscious control of administrative rationality'.[13] It may reflect 'the ambiguous and relatively open-ended interaction of persons and groups who [may or may not] share a range of concepts, but [even if they do] share them [then perhaps only] imperfectly and incompletely'.[14] With this active sensitivity demonstrably borne in mind, I have argued, we may ascertain how to access the myriad aspects of imperial and colonial political thought on a range of questions other than indigenous property rights or, say, the treaty first debated at Waitangi in February 1840.[15] In general, and despite some notable exceptions in the legal-historical arena, these elements of thought are not well served in historical, let alone legal, scholarship concerning colonial legal-political thought beyond certain colonial-indigenous jurisdictional issues or the Treaty of Waitangi during the mid-nineteenth century.[16] One may accomplish such a task not merely through immersing oneself fully within archival content and analyzing the material production and diffusion of such texts – tracing scattered 'trails of transmission' – although these techniques ought to be observed thoroughly, as Roger Chartier, Christopher Hilliard and others have suggested.[17] One ought also to examine in detail the relevant, often intermingling vocabularies or genres of legal-political thought, along with the changeable shades of disputes and shifting points of convergence

engaging those within interpersonal practices, communities or cohorts, whether interior to, say, legislatures, courts, village halls or departments, as well as how these related dynamically (or not) to questions of locale and practice.[18] Full contextualization of texts and strains of political discourse, and of their deployment and diffusion, calls for these efforts, as demanding as they may seem, and for examining the multiple interactions between the metropolitan and colonial within a single 'analytic field'.[19] Underlying such an approach to political constitutionalism, then, was a wish to better integrate concrete practices in assorted places on the ground with tangled intellectual histories; to avoid an appeal to political-legal texts as if they were disembodied abstractions; to recover the profound richness of their contexts, including their complex legacies or subsequent uses to which they might be put; and to get at the inextricable messiness of human lives.[20] Thus, I was interested in offering histories of political-legal thought in practice together with the material resources and activities interweaving with them. Undoubtedly, the risk is that by seeking to excavate the complexities of these intersections between practice and intellectual histories – the thwarting of aspirations, the dynamic frailties of policies and behaviour, the various missteps or failures – one offers a denser, less readily communicable or straightforward, if also more human, sense of pasts.[21] While this straitened essay cannot do the range of argument justice, it will venture some aspects of it here with reference to mid-nineteenth-century New Zealand, knowing all too well that it is omitting many details and illustrations.

Although the term 'political constitution' was certainly active in the particular pasts this essay is interested in, it is also for my purposes a heuristic device – one that allows us to use a speculative formulation to analyze past phenomena. At one level, then, 'political constitution' is a notoriously bare descriptor, used to account for how a given community or communities might frame the distribution of authority and power, albeit in a fashion that gives due weight or emphasis to the practised or 'lived' non-legal political orientations of that framing.[22] Various authors in the mid-nineteenth century, let alone earlier, might simply recount the presence of a 'political constitution' as an assumed fact of ordinariness, whether speaking of the United Kingdom, colonial New Zealand or other jurisdictions from an anglophone point of view across time. Hence, in October 1859 Henry Tancred, a member of the executive council and the secretary of Crown lands, wrote under the auspices of the Colonial Secretary's office, 'It is proper to observe that the existing remedies against illegal acts of the nature in question [illegal expenditure of public money], as entailing consequences of undue severity, appear ill suited to the present political constitution of the Colony, and his Excellency's Advisers therefore

contemplate the proposal of measures in the General Assembly for adapting the law to the circumstances of the Colony.'[23] Thomas Arnold, the well-known 'liberal Anglican' historian, asserted in 1830 that 'aristocracy of blood is naturally overthrown by the ordinary progress of a people in wealth and civilization' and that this might be 'effected [with little difficulty and danger] ... where the effort of the political constitution is neither hurried forward, nor violently checked, external circumstances combining also to favour it'.[24] Yet underlying the conception of a 'political constitution', often implicitly, was a set of normative intimations or framings whose implications for principle and practice in precise, localized settings or circumstances remain much contested, a point which Graham Gee and Grégoire Webber, as well as this writer with reference to New Zealand, have endeavoured to grapple with.[25] In other work, I have explored the historical, normative political positions regarding political constitutionalism and what these formulations required of constitutional design.[26] For instance, in the Whig-liberal or Whiggish thesis associated with the third Earl Grey or Thomas Babington Macaulay, legal mechanisms such as statute might be resorted to, in order to adjust aspects of politics to changing circumstances while preserving political constitutional norms of balance and diversity between politically salient interests.[27] As a concept deployed historically, political constitutionalism drew on and cannibalized diverse legalistic genres or ways of seeing and speaking, but was neither subordinate to those genres nor principally shaped by them. Seen as a site for contestation and ongoing contestability, it is as much an exercise in humility and anxiety as one in being on guard methodologically with a view to hearkening to, and contextualizing, a variety of voices.[28] Critically, however, this trope of political constitutionalism is not to be seen as an exclusive substitute for other methodological techniques used to recover imperial or colonial histories; that is, it is intended to supplement or to complement diverse conceptual tools for relational analysis already in existence, including those implied or suggested by 'metaphors of connection' such as a 'British world-system', 'webs' or 'networks'.[29] As Stephen Howe suggests, these labels do not necessarily preclude other ways of seeing or thinking but may permit subtle refinements through different points of departure or focus.[30]

As a host of scholars acknowledge, recovering messy, untidy pasts with a sense of humility in law's histories requires us to register the precariousness and anxieties underlying seemingly confident assertions or aspirations as to the spread of introduced legal jurisdiction or institutions.[31] Despite the seeming pervasiveness of the colonial telos – the perceived inexorability of embedded or fully nested colonial jurisdictions in an archipelago named New

Zealand, which others, as well as this author, have warned about, whether implicitly or explicitly[32] – the contestation inherent within historical–political constitutionalism allows us to examine in nuanced ways localized inflections of place, particular relationships, discourses about the distribution of political authority and the luring in of parts of empire or anglophone settlements by degrees, without necessarily accepting any teleological assumptions freighted in by colonial politicking. As I have contended previously, indigenous actors, – whether chieftains, those aspiring to secure or enlarge political standing within or amongst hapū, or others – could act as interpreters of and participants in localized varieties or accents of political constitutionalism on the ground through relating to or interacting with incoming Europeans.[33] They could form and re-form many commentariats on the preferred nature or terms of these genres of political engagement or intermittent albeit intensifying access in some areas to diverse trading, political and intellectual options. These options were provided through an increasingly present anglophone 'world-system' focused on interpersonal exchanges, scattered homesteads, land-based and coastal routes, navigable river-ways, mission stations or coastal bridgehead settlements at places like Auckland, Whanganui and New Plymouth.[34] Angela Ballara was fully alert to the sophisticated manner in which various hapū throughout the 1830s and 1840s proved to be agile in adapting and adjusting aspects of the European newcomers' freighted norms, whether in tools for peaceable dispute resolution or in theology, and recognized that chiefly elites had to be 'multi-directional' in their political orientations.[35] That is, they 'needed to keep one eye strained towards the newcomers' as they kept 'the other trained across [within and beyond] tribal and community boundaries'.[36] There is, in short, an ongoing need to problematize people, place and power in order to get at and to nuance disparate legal-historical pasts with due caution and sensitivities.[37] In this sense, there is an undoubted affinity with Lisa Ford's view that exploring and evaluating myriad relations between, say, settler and indigenous governance is 'an inescapably empirical project', a point with which I concur.[38] Against this background, James Tully has argued correctly that one problematic 'hinge proposition', as he calls it, is the claim of exclusive jurisdiction over indigenous peoples as not only legitimate but as effective historically.[39] Tully's particular venture in getting under and challenging this claim is an example of what J.G.A. Pocock has called 'historiosophy' – a commingling of philosophy with historical analytics so that history itself becomes an object of philosophical reflection.[40] In this way, the many pasts recovered and recounted are seen as revelatory, as illuminating normative qualities or values, something Tully and Jeremy Webber as well as the philosopher Duncan Ivison have commented on.[41] Tully

is self-aware in pursuing this 'historiosophy' (to use Pocock's presentation of the term) and remains undeniably alive to the distinction between historical scholarship seeking to forensically recover or to excavate pasts and those normative understandings or stances deploying historicity as a basis for further reflection and understanding in the present.

Yet this is not to say we cannot learn from the approaches of Tully and Ivison in this space. Their queries pose challenges to historical analytics. It does not do to simply talk about totalizing 'myths of empire' as if the 'myths' of a consolidated, embedded colonial territorial jurisdiction were accepted or believed, or to assume that a bifurcated disjunction between categories of European and indigenous, colonialism and resistance ought to predominate analyses.[42] The risks with such an approach include foreshortening or abridging otherwise rich, densely nuanced accounts, including processes of change and irresolution, thereby implying or even stressing the contemporary situation as the obvious conclusion or endpoint. Nonetheless, anxieties as to the very precariousness of the rudimentary colonial bridgehead settlements along coastlines were commonplace, coursing through the mid-nineteenth century. Claiming an aspirational, overarching jurisdiction was one technique for accommodating or palliating chronic unease, even if such jurisdictional assertions were not as practically effective against indigenous polities. Yet it was certainly appreciated that neither such claims, whether as regards territorial jurisdiction or indigenous proprietary rights, nor the institutions experimented with, such as resident magistracies, were completely nested or embedded in practice.[43] Discerning how a number of autonomous indigenous polities and their constituents were lured into participating within introduced legal institutions and processes, and at what places, why, and at what periods in time, remains undeniably challenging. Peopling by way of an influx of European settlement is too simplistic a factor to account for the transitions between asserting exclusive territorial jurisdiction and nesting or embedding those *de jure* claims or aspirations in a grounded *de facto* manner.[44]

In endeavouring to recover indigenous historical motivations in pre-1840 and early colonial New Zealand, Lyndsay Head proffers 'citizenship' and 'a pursuit of modernity' as tools for explaining how indigenous communities related to incoming European sojourners and settlers.[45] She contends in a thought-provoking contribution that 'citizenship' emerged out of the third article of the treaty initially marked at Waitangi on 6 February 1840. That third article, it is to be recalled, 'extended to the Natives of New Zealand ... royal protection' and 'imparted to them all the rights and privileges of British subjects'.[46] Importantly, however, merely purporting to confer the 'rights and privileges of British subjects' by virtue of a treaty text does not,

in and of itself, necessarily impart or engage subject-hood as an ensuing status.[47] Nevertheless, Head sees 'citizenship' primarily as an interpretation of subject-hood with a view that is paradoxically Treaty-centric, including references to a singular, encompassing 'Treaty state'.[48] Thus, in a critical passage, she characterizes it as follows: 'what made Maori citizens – that is, subjects of the Crown rather than a people in free association with its representatives' was an agreement via a treaty document to let in colonial administration, provided that government was seen as 'just' in Māori terms.[49] According to Head's account, 'The war [emerging in late 1860 in the Taranaki concerning the ill-fated Waitara transaction] ended the experiment of Maori-driven citizenship', replacing it with an awareness that indigenous 'culture ... lacked support from the political and economic structures and values of the colony'.[50] More precisely, she argued that open warfare 'violated ... the concept of citizenship based on the equality between Maori and Pakeha mediated by a peaceable utu, or Justice'.[51] As with the underlying conception of a 'political constitution' approached historically, both 'citizenship' and 'a pursuit of modernity' are heuristic notions, analytical tools permitting one to interrogate varied phenomena through a certain lens or angle of vision. To adapt Pocock's expression, depending on how they are deployed, these analytical tropes of 'citizenship' may 'denote a condition in which processes go on, and which may be discussed independently of the narrative of what those processes have been', thereby shading from historiography into historicism of a twenty-first century sort.[52] This becomes a snare for legal scholars considering the abstractions and claims of jurisdiction and sovereignty at law, except insofar as they are self-conscious of what they are doing and why. Head's own stance, however, was to better get at 'events and processes that may be said to have happened and [could] be narrated and interpreted, possibly as still going on'.[53] Yet, unless carefully qualified, her conception of 'citizenship', as with the concept of 'subject-hood' for that matter, suggests concurrence in, and inclusion within, an overarching constitutional frame or condition, even if that very participation is presented as consensual, albeit conditional or contingent on the demonstrable observation of terms by others. Here, Tully's previously acknowledged caution as to 'hinge propositions' remains important.

Elsewhere, in contradistinction to 'citizenship', I have used the metaphors 'association' (or 'occasional association') together with 'consociation' (entailing divided decision-making autonomies and areas of mutual or shared influence).[54] Each term has its own imperfections but they are able to capture something of the precariousness, anxiety and negotiability of relations – the notion of coexistence. They reflect the very real anxieties expressed in Britain

as to the prospects of an imagined colonial New Zealand. Chichester Fortescue, Whig parliamentary under-secretary at the Colonial Office, characterized the issue crisply in an internal memorandum of March 1861 by deploying a metaphor of limited association both temporally and geographically bound. '[T]he Government', he said, 'conducts its relations with the native tribes by occasional *negociation* [sic], (as to Land buying, surrender of criminals &c) as though it were with foreigners, and performs scarcely any of the functions of a Gov[ernmen]t towards its *subjects*.'[55] Against the background canvas of historical-political constitutionalism, these terms also allow the possibility of seeing the association as particularly intense in certain areas of interaction or geographical districts, shading into or towards embedded 'subject-hood', and less intense in other places or types of interaction. That is, I have seen some relations as consistent with what might count as 'subject-hood', although conditional, but many others that are more associative and independent. Herein lay sources of profound anxiety and precariousness for the ongoing conduct of relations with an *arriviste*, largely coastally bound colonial administration. As I also noted, these associative relationships, if mediated by negotiation and introduced legal documents such as deeds of purchase or through the presence of itinerant European magistrates, were always vulnerable to interpretative risk, particularly at the margins of ambulatory European settlement, with the indigenous parties having been portrayed by others as ensnared conceptually within the assumptions of colonial law and jurisdiction.[56] Various indigenous communities or parts within were volunteers for, and vectors of, political change, despite preferring an ability to condition the terms of such optionality: 'terms [of association] that could be negotiated and renegotiated episodically with incoming [P]ākehā settlers together with the norms of behaviour, the intellectual sources, and the ways of seeing they brought with them'.[57] Hence, the practices of rūnanga or indigenous councils reflected varying senses of constitutional framing and interaction, with the Kīngitanga emerging in the late 1850s interpreting its own experimentation as an exercise in parallel government with its own magistracy.

Colonial New Zealand was a variegated, dynamic landscape of ambiguous relations to both territorial space and people. The archipelago was not a place of silence insofar as the formulaic recognition of indigenous proprietary rights was concerned, although concurrence on the substantive content of such rights remained contestable. Recognizing native title as was the case in colonial New Zealand not only disciplined the pace of anglophone settlement but also built in different transaction costs: recognition generated debate and made native title a focus of ongoing deliberation and contest. Native title presupposes indigenous normative orders and a sense of an anterior political

community – a community that sorts out to whom such rights might be allocated and on what terms, together with the content or incidents of such entitlements.[58] These sorts of questions lurk in the shadows, to this day; but they suggest, importantly, the governmental and jurisdictional dimensions of native title even though such characteristics or features might seem to be concealed or neglected. In exploring how these entangled relations of political constitutional salience might be examined with care, Paul Muldoon's observations appear to me to be useful here. Following Noel Pearson, he has observed how 'indigenous people are effectively engaged in a double game – non-Aboriginal and Aboriginal – in which one of the main drivers for participation in the former is the desire to bolster and create more autonomy for the latter'.[59] It is in this vein that the interiority-exteriority of indigenous politics and constitutionalism might be appreciated in its varieties and complexity, with 'exteriority' connoting engagement beyond the purview or comprehension of the *arriviste* constitutional order accompanying the coastal European enclaves. In this sense, we may see variants of 'extraversion', or a tendency for certain indigenous actors to seek to enhance their negotiating positions relative to their own constituents or cohorts through obtaining resources from strangers (such as traders or settlers).[60]

Evidently, it was open to colonial actors to ascribe legal or *de jure* significance to *de facto* independence or plural autonomies or not. Arguments concerning these very points suffused the 1850s and 1860s, with Whig-Liberal and Liberal-Tory perspectives influencing constitutional framing and design in colonial New Zealand. As opposed to a singular, one-instance approach to incorporating indigenous polities within the colonial body politic and its infantile institutions, the assumptions focused on ambulatory incorporation 'by degrees' while maintaining plural indigenous orders for a time as a form of discipline on colonial politicking.[61] As I have explored in detail elsewhere, New Zealand was a place of and for constitutional design, as well as experimentation and contestation. Furthermore, if the English constitution showed change through benign stealth, the colonial theatres of New Zealand, Australia and the Cape Colony were also places for deliberative framing and design as much as gradual change. In 1852 New Zealand was seen as a striking place, not simply because it was a theatre for war or the threat of warring, as Ceylon and the Cape of Good Hope were seen, but because it was also a space for contemplating bespoke colonial constitutions and their architecture, as in Australia and southern Africa. Section 71 of the New Zealand Constitution Act, enacted by the imperial legislature at Westminster in June 1852, envisaged that 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'.[62] Its drafting drew on section 10 of the 1846 constitution – there was no textual innovation of any substance.[63] Earl Grey saw the provision as animated by the principle 'that the laws and customs of the native New Zealanders, even though repugnant to our own laws, ought, if not at variance with general principles of humanity, to be for the present maintained for their government in all their relations to and dealings with each other'.[64] His orientation on this point may be garnered from his views in favour of chiefly political elites remaining supported, with a view to transitioning such elites towards steady support for an introduced regime with an ambulatory jurisdiction that was most effectively nested within coastal settlements and adjacent areas. Hence, in a criticism of Sir George Grey's first governorship from 1845 until 1853, expressed privately in August 1853, he thought the 'absence of any provision for maintaining the position in society of the Chiefs' to be unsatisfactory: 'Experience 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' was needed if they were to 'remain really affected to the Government & contented'.[65] In this fashion, Earl Grey's approach, as expressed in 1853, resonated with the constitutional inclinations of a Whig-Liberal paramount or chief in accommodating existing elites on a premise that these elites were themselves adjustable by degrees over time. With New Zealand, Earl Grey regarded a civil list insulated from change by a legislature as an important counterbalance to popular colonial opinion on relations with hapū (eventually £7,000 per annum out of £16,000 was reserved for 'native purposes' in the schedule to the Constitution Act). Earl Grey's Tory successor, Sir John Pakington, preserved this aspect of the Constitution Bill. In private correspondence to the colonial governor George Grey in 1851, Earl Grey suggested Grey might wish to appropriate certain monies for purposes before a representative legislature were established, such as 'grants for the benefit of the Aborigines'.[66] There was no 'alibi' of the sort that Karuna Mantena has sought to identify in her well-received work on Henry Maine. Mantena has diagnosed a shift in what she characterizes as 'liberal' imperial thought, policy and practice as something that moved from assimilative tendencies towards pragmatic policies stressing the apartness of indigenous communities and their buttressing through colonial tenure and legal regimes.[67] If anything, then, the third Earl Grey's perspective indicates

an anglophone intellectual trope serving to sustain existing indigenous political structures, for a time, different from the trope identified by Mantena as expressly tied to the jurist Henry Maine from the later 1850s and early 1860s. The chronology and argument is too crude, however. In New Zealand a number of these views were already inherent amongst those conventionally thought of as expressing 'humane' perspectives, including William Martin, the first chief justice, and George Augustus Selwyn, the bishop of New Zealand.[68]

In practice, notwithstanding the continued persistence of some scholars to simply repeat the point that section 71 was never explicitly activated or engaged, so-called 'native districts' were recognized to exist, albeit with some complexity on occasion and some deliberate administrative elision on other occasions. Thus, 'native districts' were very much within the lexicon of colonial governance as it imagined fragmentary space throughout the New Zealand archipelago, defining such districts broadly and explicitly as areas 'over which the Native title has not been extinguished'. Thus, to give merely a few examples, we have the Native Districts Regulation Act 1858, the proposed Native Circuit Courts Act 1858, and the disallowed Native Territorial Rights Act 1858. These legislative experiments suggested the importance of native title as a normative and an unstable or fluid spatial metaphor for continuing indigenous autonomies and as a transitional space or category pending deeper or more thorough forms of incorporation; that is, asserting an ability to identify and manipulate customary law or norms as to territorial space, and the issuing (eventually) of Crown grants to land. Otherwise, interior governmental discussions regarding 'native districts' were extensive, with Thomas Gore Browne, the governor from 6 September 1855 until 3 December 1861, for one, remarking in September 1859 that 'English law prevails in the English settlements, but in native districts the Maoris are not yet willing to accept it'.[69] Many of these statutory and non-statutory policy experiments failed or did not proceed – often through the complex trans-oceanic working of imperial and colonial politics. But they remain useful for what they illuminate about developing constitutional orders and tensions within liberal or humanitarian preoccupations in anglophone politics. Section 71 of the New Zealand Constitution Act 1852, along with section 73, which provided for the unlawfulness of any person 'other than Her Majesty, Her Heirs or Successors, to purchase or in anywise acquire or accept from the aboriginal Natives Land of or belonging to or used or occupied by them as Tribes or Communities', was represented as an enacted '*charter* of the Native race' in the House of Commons in 1860. Fortescue's arguments cleaved to a Whiggish-Liberal view of maintaining a diversity of

politically salient interests and a balance between them in any constitutional order. These perspectives contended with more 'radical' or Benthamite viewpoints, associated with a range of politically active settlers such as William Fox and James Fitzgerald, who operated actively and with comfort in both Britain and New Zealand and advocated fully fledged responsible representative government. As with 'native districts', likewise with 'native title': there was an awareness of complexity, although legislative language might seek to elide such complexities with a view to promulgating something more workable. Some colonial legislative proposals, for example, might deem lands to be caught within the category of 'native title' for the purposes of a particular statute, including, say, section 10 of the Native Districts Regulation Act 1858, which deemed lands 'specially granted [by the Crown] as homesteads to persons of European race domiciled in Native districts, ... where the same abut upon lands over which the Native title has not been extinguished, ... to be lands [nevertheless] over which the Native title [had] not be extinguished'. William Swainson incorrectly claimed in 1862 that it had 'since been admitted by the Colonial Department that the New Zealand Constitution was framed in forgetfulness of the large Native Tribes within the dominions in which it was intended to apply'.[70] Despite Swainson's assertion, the archival fragments show deliberate thought and entangled dialogue on this score.

The ongoing presence of hapū-centred polities and indigenous norms also contributed to the overall sense of diversity and contest within the introduced constitutional settings themselves, inflecting points of design. This presence was reflected in different ways in a number of drafts of what became the New Zealand Constitution Act 1852, as well as in drafts of an alternative constitution put forward by those not aligned with Lord John Russell's Whig ministry. For one thing, a number of Tory-Liberal and radical critics of the third Earl Grey's administration of the colonies in London, as well as critics of Sir George Grey's governorship in diverse settlements such as Wellington, Nelson and Auckland, coalesced in developing this alternative constitutional draft or set of drafts in 1851 and 1852. Known as the 'MS project' to officials in the Colonial Office, it was reflected in two extant drafts. One of these drafts, dating from approximately 1851 or very early in 1852, arose out of the conjoined drafting efforts in England of William Fox (who arrived from New Zealand for a sojourn in the United Kingdom from June 1851 and departed in 1852), the Tory parliamentarian Charles Adderley, Edward Gibbon Wakefield, Henry Sewell and Baron Lyttelton, the brother-in-law of William Ewart Gladstone; the other dated from later in the first quarter of 1852 and was forwarded to the Colonial Office for review against the

third Earl Grey's draft in March of that year. Gladstone possessed a copy of the earlier draft in his personal papers. Both of these alternative proposals were predicated on strong provincial or municipal government, with elective provincial legislatures. The first draft referred to the 'native territory', comprising space over which indigenous titles remained unextinguished, as a distinct jurisdictional field to be subject to a governor-in-chief under instructions from London but constrained politically through acting 'by and with the advice of the executive council' and fiscally by what the 'general parliament' voted 'out of the general revenues' of the colony for expenses arising out of the 'government of the native territory'. Once Crown-mandated purchase had occurred and the 'native title' had been extinguished, then the land would be 'added to the province nearest adjacent or most conveniently situated for the purpose of union'.

The Colonial Office examined this proposal as adapted and enunciated in the later draft submitted to the Office on 21 March 1852. By that time, the third Earl Grey was no longer in office as secretary of state for colonies, with Sir John Pakington having assumed that position from late February 1852 in the brief Tory administration of the fourteenth earl of Derby (previously Viscount Stanley). The draft Bill Fox and others submitted to Gladstone was substantially the same as the version handed to Pakington but various details and clause numbers had been added in the Colonial Office copy. For example, a civil list of £5000 was reserved, which could not be varied (clause 24), most likely revealing that pencilled feedback from Gladstone on the first draft had probably succeeded before the 'MS project' was submitted to imperial officials for further testing.[71] This was a form of politics aiming to present the 'MS project' as a plausible compromise through an awareness of the influences already operating on the official draft of the New Zealand Constitution Bill inherited from the preceding Whig administration. Dialogue behind the scenes saw the sharing of drafts with Pakington and his officials. On the question of dealing with 'native territory' and 'native title', Colonial Office feedback was supportive in principle of the proposals in the 'MS project' but negative as to the practical workability of administering such an ambulatory approach. Herman Merivale, permanent undersecretary at the Colonial Office, mused that '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.'[72] 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'. Indeed, the ongoing presence of hapū-centred polities and indigenous norms also contributed to the overall

sense of diversity and contest within introduced constitutional settings. As Merivale noted, 'In 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'. While Merivale acknowledged the latter proposal as a 'more complete method', he considered it to be difficult in practice: 'lands are purchased from the natives, not in compact districts, but in bits here & there, there will be as it seems to me much intersection & confusion between districts within the provinces & districts subject to the Governor'.

Shifts in ministry at Westminster could be vitally important insofar as the idiosyncratic trajectories of constitutional design in distant spaces might be concerned. As with indigenous populations, we see what I have called an 'empire of variations' in play, albeit one with broadly shared themes.[73] Section 2 of the Australian Constitution Act 1850 reflected the third Earl Grey's preferences in a way that the New Zealand Constitution Act 1852 did not. The appointment of the legislative council for New South Wales was to be divided into thirds, with the Crown appointed one third and the remaining two thirds to be elected: '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'. A similar approach was recommended for New Zealand. Yet Sir John Pakington did not concur, with the Tory ministry adopting a completely Crown-nominated legislative council. Nevertheless, a nominated upper chamber was also perceived as providing 'balance' between politically salient interests in a constitutional order, comparable thematically if not precisely to those proposals Earl Grey had preferred in his draft version of the legislation and subsequently bequeathed to the succeeding Tory administration when Lord John Russell's Whig-led government faltered, falling from office in February 1852.[74]

In essence, then, positive law and legal genres buttressed and suffused this nuanced and variable historical-political constitutionalism but did not subsume it, thereby imparting an impression of mixed or intermingling legal-political vocabularies. Leveraging off political constitutionalism allows legal and other historians to explore the constitutional significance of proprietary interests like native title in the making while also considering a range of historical phenomena, including the dynamic interactions of

policy formulators, indigenous political actors (whether chieftains or others), corporate entities proposing systematic colonization, missionaries and judges (acting judicially and extra-judicially). Through diversifying and broadening the gaze in and across the archival fragments, through tracing and examining the fraught political disputes and the contextual place of both introduced and adapted anglophone political constitutionalism, as well as indigenous varieties of constitutionalism adapting or coalescing with introduced genres, we may illuminate complex constitutional histories speaking to people, power and place. As I have explored elsewhere, what to some contemporary eyes might appear to be non-governmental matters, including proprietary interests or issues concerning ecclesiology or confessional status, were imbued nevertheless with political and constitutional import.[75] Damen Ward has argued likewise in relation to proposals concerning criminal law, the colonial judiciary and courts.[76] Various interpretations of indigenous constitutionalism relied on 'law' and whakapono (the true faith) to mediate disputes, or proselytized these techniques as ways of achieving peaceable dispute resolution in contradistinction to what strangers from across the seas might accomplish. In this way, a vision of conditional coexistence and alliance could be promulgated.

Possible political choices could be complex: some members of hapū aimed to diversify their risk through parts of the descent group allying with those in active conflict with colonial policies, while other parts chose to remain indifferent or neutral.[77] Hapū did not see themselves as passive receivers of introduced law, but as interpreters and makers of law under a godly presence distinct from the person of the governor or his servants. In essence, they purported to exercise a constituent power – in other words, a community's capacity to make and unmake institutional arrangements irrespective of the aspirations of the fledgling colonial polity.[78] On 13 March 1860 at Waiuku to the south of Auckland, the elective Māori king, Pōtatau Te Wherowhero, issued a proclamation through the missionary Robert Maunsell. This proclamation resonated with religious and legal tropes, appealing to a present no longer informed by the 'god' of 'former times' (namely Uenuku, kaitangata – the eater of men), unrestrained war or the absence of peace.[79] This constitutional and theological rhetoric allowed certain chiefs to portray the colonial governor as the inverter of things, as the harbinger and lightning rod for warfare and stress rather than peaceable behaviour. It was not empty posturing, however, but an orientation aligned with particular forms of practice. Hence, in November 1860, Māori chieftains attending a meeting at Pā Whakairo (the pā of Tāreha Te Moananui) with the local Hawke's Bay provincial superintendent, Thomas Fitzgerald, critiqued

the governor's behaviour as ill-tuned and incompetent in having spawned hostilities in the Taranaki during 1860. The airing of disputes in the open and their subjection to searching scrutiny and resolution were vaunted as the way forward. Differences were to be negotiated in the constitution of associates or of 'occasional negociation' [sic]. Subsequently, in 1861, Kawepō penned a letter to Fitzgerald repeating the rhetoric of Te Wherowhero, suggesting that the conduct of the governor in not resolving the disputes concerning the purchase of land at Waitara in the Taranaki had orphaned not merely Te Wherowhero but also Kawepō: 'I alone was left to worship his God, whilst he, the Governor, went off to pick up (ki te hamea haere) my castaway god, Uenuku, the cannibal.'[80] He concluded, 'And now the Governor, the [one-time] supporter (kaupapa) of Jehovah has stepped forward and carried off Uenuku the cannibal to Taranaki as his god for the destruction of man.'[81]

Theological tropes and indigenous uses of an adapted legalism also enabled the Crown across the seas, expressed in the person of the monarch, to be distanced from its less-than-able or disappointing counsellors within the coastal European settlements. The aim was to secure peace as between associates in government in parts of the archipelago, not as 'citizens' or 'subjects' of the colonial administration or its institutions. In this fashion, one may begin to discern varieties of indigenous constitutional thought relative to the presence of strangers from across the seas. Interaction among and between Māori political-economic communities – hapū or constellations of hapū – and imperial or colonial participants in politics contributed to an *agonistic* sense of politics and constitutionalism, as well as a sense of negotiated, contested empire.[82] The resources of empire might be lured in often at the behest or with the connivance of particular indigenous clusters or political actors.[83] These senses of constitutionalism did, for a time, invest *de facto* or material indigenous autonomy with juristic significance, at least for some key settlers and politicians if not all. Agonism or contest did not preclude violence, of course. Warring did occur, often amongst hapū with different interpretations as to how the relations with the European settlements ought to be managed. These conflicts, such as those amongst Te Ātiawa in the Taranaki in 1860 or between elements of Ngāti Kahungunu in 1856 and 1857, may be characterized as 'civil wars', but not from the vantage point of the claims of colonial jurisdiction.[84] Unless one accepts the notion of British 'subject-hood' as having applied regardless, it is perhaps difficult to say they were 'civil' in the strictly technical or orthodox sense of having been fought between fellow citizens (*cives*), within the frame of a single polity (*bellum civile* in the Latin). The rupture might better be thought of as one amongst descent groups who could tie themselves back to common geneaological

ancestors and who might otherwise share a source of customary authority in a chiefly cohort. The contest was as much about indigenous interpretations of the political, tactical and strategic horizon looking forward, whether in the short, medium or longer term, and how to get there in circumstances where the presence of strangers was increasing or at least stressing the range of political and commercial options for engagement. Ongoing negotiated associations with parts of (and possibly within) a wider 'British world-system' were in the offing. Yet change and the possibilities of novel commercial, familial and political relations were not admitted on any terms. Influential leaders and sources within fluid hapū-Māori politics were conscious of needing to manage both anticipated and unanticipated change and the attendant risks.

By contrast, 'legal constitutionalism' tends to elevate a focus on the introduced courts as users of justiciable legal rights, often with the assistance of codified fundamental laws or a substantive rule of law, in order to exert constraints on political activity.[85] This is not to deny the importance of studies that seek to pursue the so-called 'internal legal history' of a court or a legal doctrine as applied in the courts.[86] We still require such work to be undertaken in relation to indigenous participation in the colonial courts, for instance, as Richard Boast, Shaunnagh Dorsett, Geoffrey McLay, Damen Ward and I have pursued in other places.[87] With a view to contextualizing certain cases of significance to colonial legalism, David Williams and I have also produced new accounts of *Wi Parata v Bishop of Wellington* (1877) and *Regina v Symonds* (1847) respectively.[88] But the risk with deploying the assumptions of legal constitutionalism in legal history or in studies of law and history – whether wittingly, inadvertently or unconsciously – is that this deployment may unwittingly imply that the absence of legal-constitutional remedies or a substantive 'rule of law' actively constraining executive branch activity through court action is something against which colonial polities ought to be assessed.[89] Recalling the criticisms of W.H. Oliver and Andrew Sharp of juridical or presentist histories in the Waitangi Tribunal context, it has the anachronistic effect of teleology – that is, it tends to elide or to obscure nuanced changes in and through time while presuming and focusing on the supposedly inexorable endpoint of democratic governance within a national jurisdiction known as New Zealand.[90] This has been an element of legal-historical forays into the New Zealand Constitution Act 1852 and, as Paul McHugh increasingly realized in the last decade of the twentieth century, imperial common law with reference to indigenous rights.[91] Legal scholars have sought to distil the culture of both contemporary and historical constitutionalism somewhat seamlessly in, say, nineteenth and twentieth or twenty-first-century New Zealand as 'pragmatic' and 'ad hoc', thereby flattening differences of temporality and space.[92] It is,

in my view, analytically inadequate to resort to the usual descriptors such as these in accounting for constitutionalism within what became New Zealand or in seeing it as silent on intellectual influences interacting with the inexorable messiness of political practices. Political constitutionalism does not suggest the absence of legal or other norms, as executive activity or legislative activity – the dynamic interaction of policy formulators, political activists and others – deploys law and its varied genres, and may be disciplined by it. Moreover, the law-making or law-promulgating picture was a diverse one. Law-making is a political exercise or activity, something appreciated within certain indigenous groupings or clusters. An assembly of Ngāti Mahuta discussed one proposed 'code of laws' in April 1857, redolent with various theological precepts (including the first commandment), demonstrating an autonomous, 'jurisgenerative' orientation much to the anxiety of the colonial administration.[93]

Less starkly but just as invidiously, an elevation of legalism through examining case law per se or indigenous participation in courts without careful qualification can risk what Tully, Alfred Taiake and Muldoon have cautioned about – namely, permitting an account of indigenous politics and histories internal to the genres or vocabularies of introduced legalism without necessarily examining the relations of what Muldoon construed as 'exteriority'.[94] Joshua Getzler, too, has warned about treating legal history as a discipline that simply considers cases before courts.[95] As with earlier work, the interest in what I have characterized as 'political constitutionalism' – an imperial perspective with distinctive, idiosyncratic colonial accents in New South Wales, the Cape colony or New Zealand – is explored with a view to looking anew at colonial New Zealand's manifold constitutional histories, and recovering those pasts with much more granularity and nuance.[96] It is also an endeavour along with Damen Ward (who comes from a different perspective focused largely on jurisdiction) to revive an interest in constitutional histories where, notwithstanding notable exceptions such as Daniel Hulsebosch, John Darwin and J.P. Greene, it has long ceased to be fashionable to write histories of empire from the perspectives of constitutionalism or manifold interpretations of constitutionalism in contest.[97]

The above points suggest that it behoves historians and legal scholars to be wary of extending the weight of treaties or other documents presented as somehow 'foundational' in legal-historical narratives or as always speaking historically. Despite the well-developed and longstanding insights of the so-called Cambridge school of political thought associated with Quentin Skinner, Pocock and others, or the allied albeit more recent cautions of Peter Mandler, attention must still be focused on how the appreciation and interpretation of texts change or are peculiar to time and place.[98] For one thing, we still find a number

of historical works treating the Treaty as the controlling feature of the narrative or analytical arc – the centrepiece explaining and framing Crown-hapū relations or, in a related move, as a single legal-historical construction not varied from place to place, from signing site to signing site or through time.[99] Andrew Sharp has recognized that there 'is as yet no ambitious attempt to produce histories of competing Māori judgments of, and uses of the Treaty; and the dominant influence of Claudia Orange's ground-breaking *Treaty of Waitangi* [in 1987] with its tendency towards a unified history and interpretation suggests that such histories may be some way off' (although the present author has focused on the interpretative varieties of the Treaty as understood amongst a range of Pākehā, together with 'political constitutionalism' as exemplified through myriad deeds of purchase, assorted indigenous codes of law and rūnanga or councils).[100] Nor, with the noteworthy exception of Richard Boast, is the Treaty necessarily seen or analyzed as part of a series of ongoing texts or rather textual engagements – repeated, refined, replaced – with strangers or foreigners, including those who settled precariously in coastal enclaves at places that came to be known as Auckland, Nelson, Dunedin, Christchurch, Wellington and New Plymouth.[101] It is still relatively commonplace to find historical or legal works setting out the articles of the Treaty and pointing out the differences in the two language texts, while then using that as setting the scene for a tense contest between 'governorship' and te tino rangatiratanga (the high or eminent, complete or full chieftainship) residing with the 'chiefs and tribes of New Zealand, and ... the respective families and individuals thereof' (if one follows one of the official English-language texts). The Treaty thereby becomes a principal organizing concept for both analysis and narrative – an abstracted device itself but an oddly singular one comprising two texts at risk of leading to the mischaracterization or obscuring of what might have influenced historical behaviours or strains of thought. Thus, in a powerfully written and alluring set of passages in his important *Racial Crossings*, Damon Salesa sets up the expected distance between the first article of the Treaty text at Waitangi and the second article, which allows an analysis to hinge on 'two forms of authority' or kāwanatanga (governorship) as against rangatiratanga (chieftainship).[102] We also witness this tendency in Michael King's *History of New Zealand*.[103] Head, too, argues in her invaluably thought-provoking doctoral study that 'a fundamental premise of [her thesis is that] the Treaty of Waitangi provided a formal context for Maori to realise their hopes for the modernisation of their way of life'.[104]

Following this curtain-raiser, so some of the conventional accounts say, the narrative and concept that is colonial New Zealand then applies throughout the islands: the superintending colonial jurisdiction of an incoming Crown is measured against the terms of a heuristic Treaty. None of this challenge to

seeing the Treaty simply as shaping or organizing the grand narrative arc for these post-1840 islands is to marginalize an historical Treaty or, preferably, treaties plural. Instead, it is one way to evade the risks posed by teleological history whereby the true, empirical contingencies, missteps, brittleness and frailties are obscured or elided. Nor is it to criticize the ways in which law and policy deal with the Treaty in the here and now.[105] The point, as Damen Ward commented in 2003, is to avoid 'fail[ing] to distinguish between normative legal and descriptive historical claims'. Moreover, he continued, not respecting the dissonant points of focus between legal-policy arguments in the here and now and historical scrutiny 'risks over-simplifying the relationship between historical analysis and legal analysis'.[106] It is important, however, to see the *historical* Treaty more as something comprising two interpretative starting points or frames, two texts with many treaties as explored and filled out orally at a number of places, whether at Manukau, Waikato Heads, Tauranga, Kāwhia or elsewhere. The challenge is to get to the heart of how and in what ways that deliberation and those interpretative strains changed or did not change in a *temporal* sense – in and through time – as well as to analyze with sensitivity those groups or persons who did not see the treaty as speaking to them but rather to or for other tribal groupings. Those multiple, deliberative historical treaties comprised or floated upon many rich discourses of intellectual and political thought – anglophone ones from across the seas and ones generated and contested *within* and *amongst* hapū or in intermingling with European newcomers. Scholars such as Moana Jackson and Māmari Stephens have mentioned those contributions elsewhere, but we still need to acquire a sense of the diversity, contestability and richness of those voices. Stephens, for one, is offering interesting insights in her recent missive on Māori constitutionalities:

> As identified by Mark Hickford[...] political constitutionalism represents a flexible way of framing the distribution of political and legal authority within a polity (polis) as well as a culture and ways of resolving disagreements about what is to be done. These disagreements may be addressed through political or juridical contests or both. The most enduring and salient feature of political constitutionalism in colonial [New Zealand], according to Hickford, was Māori insistence on treating any agreement with the Crown as never final, but only as 'punctuated moments in conversations without end'. … From the perspective of political constitutionalism the Treaty of Waitangi generates a kind of positive uncertainty.[107]

Against this background, and with the assistance of political constitutionalism as contested and flexible, we require further and richer analysis of the ranging and varied ways in which the most important indigenous political communities, hapū or elements of hapū, allied

themselves from time to time, or did not, with introduced legal norms. As Christopher Bayly does in considering British southern Asia, we ought to try to recover and to historicize the varied strains of, and differences within, indigenous political and constitutional thought ranging across particular hapū or interacting clusters or alliances of hapū.[108] This historical exercise remains an important scholarly challenge which is easier said than done. In doing so, we also need to have a sense of scale or scalability in the context of indigenous chiefly politics. By scale, I mean studies in scalar leaps in influence – the emergence of hegemonic chiefdoms mobilizing and centrally co-ordinating resources in order to develop and exert influence or power.[109] This is something which Ballara and Head have pointed to but on which we still lack a thoroughgoing debated, back-and-forth literature, something to be regretted. We also need to factor in those groups endeavouring to evade the hegemonic aspirations of some chiefdoms or tribes, whether through using the incoming Pākehā settlers from across the seas as useful allies or buffers disciplining the conduct of other tribes or through coalescing around new, infantile European settlements.

Either way, the Treaty was an object of deliberation after 1840. It is an object of deliberation in the here and now. In this sense it has persevered historically although, despite that high-level continuity, it has had many lives. It enriches the various constituencies engaged in debate and deliberation on it, even where those views may be strewn with inaccuracy and misinformation. Such is the fate of any legal-historical text or texts, and to think that we will reach a nirvana of nuanced scholarship on such questions throughout diverse communities is perhaps a vanity that should be abandoned. By deliberation here I mean the subject becoming one of contestability and conversation, occasionally uncivil – conversations without end.[110] We can see rhythms in its treatment in the hands of those who deliberated on it. Likewise, at a broader level, the distribution of power across these islands called New Zealand was an object of deliberation. In the foregoing, I have made a plea for recovering the multiple historicities of colonial-indigenous constitutional history with reference to its peculiar accents *throughout* the archipelago now known as New Zealand. It is a venture I have explored in much greater detail elsewhere but at its core is an argument that a searching, forensic engagement with historical-political constitutionalism affords useful ways of intersecting with and contextualizing legal-political histories, supplying in its turn a sense of the anxieties and frailty of those contexts.

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NOTES

1 2008 New Zealand Law Foundation International Research Fellow; Advisor to the Prime Minister (Legal and Justice), Prime Minister's Policy Advisory Group, Department of the Prime Minister and Cabinet, New Zealand. The views are strictly personal to the author, drawing on research for my doctoral thesis at the University of Oxford completed in 1999 and my recent monograph published through Oxford University Press in 2011. This article is based on a keynote paper presented to the Australia and New Zealand Law and History Society conference at the University of Otago in November 2013. It comprises part of a triptych of essays reflecting on aspects of law's histories, each of which addresses an aspect of what I have presented as 'historical, political constitutionalism' in construing and analyzing imperial histories: Mark Hickford, 'The Historical, Political Constitution – Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Qualities', *New Zealand Law Review*, 4, (2013) pp.585–623 (hereafter 'The Historical, Political Constitution'); and the tentatively titled 'Considering the Historical, Political Constitution – Thoughts on some Constitutional "Traditions" and the Imperial Inheritance', forthcoming, *New Zealand Journal of Public and International Law* (2014). I am grateful for the comments of Jacinta Ruru, Tony Ballantyne, Lauren Benton, Shaunnagh Dorsett and Lisa Ford. I also appreciate the valuable insights of the anonymous reviewers.

2 Hickford, 'The Historical, Political Constitution', pp.586–603, 622–3.

3 As is well appreciated, 'modernity' is a problematic concept, prey to various assumptions as identified by John Darwin in *After Tamerlane: The Global History of Empire*, London, 2007, pp.25–27, which requires that it be used with caution and care (compare with Christopher Bayly, *The Birth of the Modern World 1780–1914: Global Connections and Comparisons*, Malden and Oxford, 2004, pp.9–12). Simon Gunn and James Vernon, as well as others, have signalled and explored its utility as a 'discourse' that might be analyzed historically and sceptically with reference to 'how it was claimed and by whom': Simon Gunn and James Vernon, 'What was Liberal Modernity and Why was it Peculiar to Imperial Britain?', in Simon Gunn and James Vernon, eds, *The Peculiarities of Liberal Modernity in Imperial Britain*, Berkeley and Los Angeles, 2011, pp.3–7. Also refer to the extensive discussions on 'modernity' and 'modernities' (alternative or plural) in Frederick Cooper, *Colonialism in Question: Theory, Knowledge, History*, Berkeley and Los Angeles, 2005.

4 Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire*, Oxford, 2011, pp.3, 456–7, 460–2. Raymond Geuss has cautioned appropriately that, when studying politics, 'Looking for a set of formulae that are as historically invariant as possible and assuming those formulae will allow us to grasp what is most important will point one in the wrong direction' (Raymond Guess, *Philosophy and Real Politics*, Princeton, 2008, p.15).

5 Bain Attwood, 'Returning to the Past: The South Australian Colonisation Commission, the Colonial Office and Aboriginal Title', *Journal of Legal History* (JLH), 34, 1 (2013), pp.50–82; Attwood, 'Law, History and Power: The British Treatment of Aboriginal Rights in Land in New South Wales', *Journal of Imperial and Commonwealth History* (JICH), 42, 1 (2014), pp.1–22 (compare Bain Attwood, *Possession: Batman's Treaty and the Matter of History*, Melbourne, 2009); Tony Ballantyne, *Webs of Empire: Locating New Zealand's Colonial Past*, Wellington, 2012, pp.287–8, 294–5; Damon Salesa, 'Racial Crossings: Victorian Britain', *Colonial New Zealand and the Problem of Race Mixing*, Oxford, 2011, pp.10–11.

6 Tony Ballantyne, 'On Place, Space and Mobility in Nineteenth-Century New Zealand', *New Zealand Journal of History* (NZJH), 45, 1 (2011), p.50.

7 R.G. Collingwood, *The Idea of History*, Oxford, 1993, p.234. This point is also recognized by Paul Halliday, 'Laws' Histories: Pluralisms, Pluralities and Diversity', in Lauren Benton and Richard Ross, eds, *Legal Pluralism and Empires, 1500–1850*, New York, 2013,

pp.267–8. See also Michael Oakeshott, *Rationalism in Politics and Other Essays*, Indianapolis, 1991, pp.182–3.

8 Oakeshott, p.182.

9 Mark Hickford, *Lords of the Land*, pp.9, 24. See also Hickford, 'The Historical, Political Constitution', pp.596–7, 619–20.

10 Mark 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 and New York, 2011, pp.152–181; Hickford, *Lords of the Land*, pp.22, 457–8; Hickford, 'The Historical, Political Constitution', p.617. This approach is aligned with Graham Gee who, in an important analytical contribution, has also seen political constitutionalism as *agonistic*: Gee, 'The Political Constitutionalism of J.A.G. Griffith', *Legal Studies*, 28 (2008), pp.20–45.

11 For the useful phrase 'angles of vision', refer to Tony Ballantyne and Brian Moloughney, 'Introduction' in Tony Ballantyne and Brian Moloughney, eds, *Disputed Histories: Imagining New Zealand's Pasts*, Dunedin, 2006, pp.9–24. Such a stress on 'political constitutionalism', as I have interpreted it in this article and other work, does not lead to the downplaying of the significance of 'legalism' or 'legal constitutionalism' (Hickford, 'The Historical, Political Constitution', pp.586, 622, for instance). Compare with Adam Tomkins, 'What's Left of the Political Constitution?', *German Law Journal*, 14, 12 (2013), p.2292.

12 Hannah Arendt, *The Promise of Politics*, New York, 2005, p.93. On historical 'politics' generally relative to 'political constitutionalism', see Hickford, 'The Historical, Political Constitution'.

13 William E. Connolly, *The Terms of Political Discourse*, 3rd ed., Oxford, 1993, p.227.

14 Ibid., p.6 (my deliberate interpolations render Connolly's proposition less determinate, more uncertain and contingent as befits a demandingly historicized stance).

15 Refer to, for example, Hickford, 'The Historical, Political Constitution', pp.598–601, 604–9.

16 Illustrations include, at least in relation to colonial legal thought, G. McLay, 'The Problem with Suing Sovereigns', *Victoria University of Wellington Law Review* (VUWLR), 41 (2010), pp.403–25; Stuart Anderson, '"Grave Injustice", "Despotic Privilege": The Insecure Foundations of Crown Liability for Torts in New Zealand', *Otago Law Review*, 12 (2009), pp.1–21.

17 Roger Chartier, *The Author's Hand and the Printer's Mind*, Cambridge, 2014; Christopher Hilliard, 'Textual Museums: Collection and Writing in History and Ethnology, 1900–1950', in Bronwyn Dalley and Bronwyn Labrum, eds, *Fragments: New Zealand Social & Cultural History*, Auckland, 2000, pp.129–34. On 'trails of transmission' see Hickford, *Lords of the Land*, pp.47–61.

18 As examined in Mark Hickford, '"Decidedly the Most Interesting Savages on the Globe": An Approach to the Intellectual History of Māori Property Rights, 1837–1853', *History of Political Thought*, 27 (2006), pp.122–67; Hickford, 'John Salmond and Native Title in New Zealand: Developing a Crown theory on the Treaty of Waitangi, 1910–1920', VUWLR, 38 (2007), 853–924; Hickford, *Lords of the Land*.

19 See Anthony Grafton, 'The Power of Ideas', in Ulinka Rublack, ed., *A Concise Companion to History*, Oxford, 2011, pp.376–9; Hickford, 'Framing and Reframing the Agōn'. On 'Analytic field' see F. Cooper and Ann Laura Stoler, 'Between Metropole and Colony: Rethinking a Research Agenda', in *Tensions of Empire: Colonial Cultures in a Bourgeois World*, Berkeley and Los Angeles, 1997, p.15.

20 Hickford, *Lords of the Land*, pp.3–5, 7, 32, 35–36. On the manifold complexities of analysis that might emerge from contextual approaches of the sort advocated here and by those associated with members of the so-called 'Cambridge school' of intellectual history, such

as J.G.A. Pocock and Quentin Skinner, P. Withington's review of Noel Malcolm's impressive edition and study of Thomas Hobbes' *Leviathan* noted how Malcolm's approach 'is also a reminder of the limitations of the contextual approach to ideas and texts. Not only is the method extremely difficult to apply properly. It also needs to account for the adoption and genealogy of ideas after their initial formulation; for the many subsequent contexts; and for the possibility, even, that these ideas eventually become part of the conceptual repertoire of early modern historians' (P. Withington, 'Modernity's Bodyguard', *London Review of Books*, 35, 1 (2013), p.16).

21 For comments on the invariable densities of *Lords of the Land*, see David V. Williams, review, http://www.anzlhsejournal.auckland.ac.nz/pdfs_2013/Williams%20review%20of%20Hickford.pdf (last accessed 9 February 2014); S. Carpenter, review, NZJH, 47, 1 (2013), pp.84–85; Māmari Stephens, review, *Māori Law Review* (MLR), December 2013, http://maorilawreview.co.nz/2013/12/book-review-lords-of-the-land-indigenous-property-rights-and-jurisprudence-of-empire/ (last accessed 16 February 2014); and Māmari Stephens, 'Māori Constitutionality (and the Treaty of Waitangi)', MLR, June 2013, http://maorilawreview.co.nz/2013/06/maori-constitutionality-and-the-treaty-of-waitangi/ (last accessed 9 February 2014).

22 J.A.G. Griffith famously characterized the anglophone 'political constitution' as a frame for the political management of inescapable conflict and disagreement such that 'The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also': Griffith, 'The Political Constitution', *Modern Law Review*, 42 (1979), p.19. Partly owing to Griffith's presentation of his insights, it has become commonplace in parts of the relevant legal literature to treat the concept of a 'political constitution' as merely 'descriptive': J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects*, Cambridge, 2007, pp.33–35; Vernon Bogdanor, *The New British Constitution*, Oxford, 2009, p.19.

23 Henry Tancred, Colonial Secretary's Office, Auckland, 8 October 1859, in *Taranaki Herald*, issue 377, 22 October 1859, emphasis added (for the context see Hickford, *Lords of the Land*, pp.317–18). Other examples include [Alexander Hamilton], 'The Federalist no. 1', 27 October 1787, in Alexander Hamilton, James Madison and John Jay, *The Federalist with Letters of 'Brutus'*, Terence Ball, ed., Cambridge, 2003, p.1: 'whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force'; and Edmund Burke, *Reflections on the Revolution in France: And on the Proceedings on Certain Societies in London relative to that Event*, 1790, London, 2004, p.153.

24 Thomas Arnold, 'On the Social Progress of States', in *The Miscellaneous Works of Thomas Arnold*, D.D., 2nd ed., London, 1858, p. 98. Please note, however, that the reference implies the (prescriptive or normative) significance for Arnold of a political constitution proving to be sufficiently flexible to adjust organically in and through time. On Arnold as a 'liberal Anglican', see Duncan Forbes, *The Liberal Anglican Idea of History*, Cambridge, 1952.

25 Graham Gee and Grégoire C.N. Webber, 'What is a Political Constitution?', *Oxford Journal of Legal Studies*, 30 (2010), pp.273–99; Hickford, 'The Historical, Political Constitution', pp.593–6, 600–04. See also Graham Gee and Grégoire Webber, 'A Grammar of Public Law', *German Law Journal*, 14, 12 (2013), pp.2137–55.

26 Hickford, *Lords of the Land*, pp.234–42; Hickford, 'The Historical, Political Constitution', pp.604–12, 613–15.

27 On 'Whig-Liberals' see Boyd Hilton, *A Mad, Bad, & Dangerous People? England 1783–1846*, Oxford, 2006, pp.519–20 (the third Earl Grey [Viscount Howick until 1845] was counted as such in Boyd Hilton's account). For Macaulay as a Whig, see J.W. Burrow, *A Liberal Descent: Victorian Historians and the English Past*, Cambridge, 1983. Compare with Catherine

Hall, 'Macaulay: A Liberal Historian?', in Gunn and Vernon, eds, *The Peculiarities of Liberal Modernity in Imperial Britain*, pp.23–24, 35–36.

28 On the methodological implications, refer to Hickford, *Lords of the Land*, pp.3–5, 457–62. As is well appreciated, there is an awkward need for balance in the recovery of the untidiness: Primo Levi, *The Drowned and the Saved*, London, 1988, p.31: 'Without a profound simplification the world around us would be an infinite, undefined tangle that would defy our ability to orient ourselves and decide upon our actions. In short, we are compelled to reduce the knowable to a schema. ... We also tend to simplify history ...'.

29 For 'metaphors of connection', see Zoë Laidlaw, 'Breaking Britannia's Bounds? Law, Settlers, and Space in Britain's Imperial Historiography', *Historical Journal*, 55, 3 (2012), p.816. Overall, see S. Howe, 'British Worlds, Settler Worlds, World Systems, and Killing Fields', JICH, 40, 4 (2012), pp.691–725, and Zoë Laidlaw, ibid.; for 'British world-system', see John Darwin, *The Empire Project: The Rise and Fall of the British World System, 1830–1970*, Cambridge, 2009, pp.1–3, 17; John Darwin, *Unfinished Empire: The Global Expansion of Britain*, London, 2012, p.26; for 'webs of empire', see Ballantyne, *Webs of Empire*, pp.14–15, 294–5 (note that Darwin speaks of 'web[s] of British connection' in *The Empire Project*, p.1).

30 Howe, 'British Worlds'.

31 Hickford, *Lords of the Land*, pp.12–14, 17–19, 20–31, 31–34, 37–39, 228–34, 244–6, 273–83, 330–34 (for example); Damen Ward, 'Territory, Jurisdiction, and Colonial Governance: "A Bill to Repeal the British Constitution", 1856–60', JLH, 33 (2012), pp.313–33; Attwood, 'Returning to the Past'.

32 Tony Ballantyne, 'On Place, Space and Mobility', pp.55–57; Hickford, *Lords of the Land*, 12–14, 17–19, 37–39; Hickford, 'Framing and Reframing the *Agōn*', pp.154–5.

33 In this essay, I use 'indigenous', fully alive to the point made by Salesa in *Racial Crossings*, pp.21–25, where he preferred 'tangata whenua' (see also Tim Rowse on the shifting, adaptable meanings of 'indigenous' in his 'The Identity of Indigenous Political Thought' in Lisa Ford and Tim Rowse, eds, *Between Settler and Indigenous Governance*, Abingdon, 2013, pp.95–107). In my own *Lords of the Land*, pp.4–5, I noted the historical use of the term 'Maori' or 'tangata Maori' from the 1840s and through the 1850s (in addition to 'New Zealanders', 'aboriginal' and 'native').

34 Hickford, *Lords of the Land*, pp.14, 38–39, 460–61.

35 Angela Ballara, *Taua: 'Musket Wars', 'Land Wars' or 'Tikanga'? Warfare in Māori Society in the Early Nineteenth Century*, Auckland, 2003, pp.435, 436–43, 455–7, for example.

36 Ibid., p.457 (my interpolation).

37 For broader-based comparative approaches, see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*, Cambridge, 2010.

38 Lisa Ford, 'Locating Indigenous Self-Determination in the Margins of Settler Sovereignty: An Introduction', in Lisa Ford and Tim Rowse, eds, *Between Settler and Indigenous Governance*, p.10.

39 James Tully, *Public Philosophy in a New Key: Volume I: Democracy and Civic Freedom*, Cambridge, 2008, pp.276–7.

40 J.G.A. Pocock, 'Quentin Skinner: The History of Politics and the Politics of History', *Common Knowledge*, 10, 3 (2004), pp.532–50. Owing to a misprint in Pocock's *Political Thought and History: Essays on Theory and Method*, Cambridge, 2009, p.140, the reprint of his Common Knowledge article uses the term 'historiography' erroneously in place of Pocock's specific deployment of the neologism 'historiosophy'.

41 Jeremy Webber, 'Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples', *Osgoode Hall Law Journal*, 33 (1995), pp.623–60; Jeremy Webber, 'Beyond Regret: *Mabo*'s Implications for Australian Constitutionalism', in Duncan Ivison, Paul Patton, and Will Sanders, eds, *Political Theory and*

the Rights of Indigenous Peoples, Cambridge, 2000, pp.60–88; Duncan Ivison, 'Afterword: The Normative Force of the Past', in Belmessous, ed., *Native Claims*, pp.253–7.

42 On 'myths of empire', see James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century*, Auckland, 1996, pp.231–2; Belich, 'Riders of the Whirlwind: Tribal Peoples and European Settlement Booms, 1790s–1900', in Richard Boast and Richard Hill, eds, *Raupatu: The Confiscation of Maori Land*, Wellington, 2009, pp.36–38. Although Belich's accounts elsewhere acknowledge European awareness of the brittleness of asserted legal jurisdiction in practice, 'myths of [substantive] empire' represent in his analysis a key driver motivating the further embedding of jurisdiction, albeit actualized in practice through demographic swamping and military conquest: for instance, a 'British desire for substantive sovereignty' in Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, 1988, p.78; also Belich, 'How Much Did Institutions Matter? Cloning Britain in New Zealand', in J. Greene, ed., *Exclusionary Empire: English Liberty Overseas, 1600–1900*, Cambridge, 2010, pp.257–8. On bifurcated disjunctions to be avoided, see Hickford, 'Framing and Reframing the *Agōn*', pp.152–3.

43 Hickford, *Lords of the Land*, pp.30–31, 34–35, 213–14, 229–30, 273–83, 396–7, 427–8 (and maps at pp.448–9); Ward, 'Territory, Jurisdiction, and Colonial Governance'; Hickford, 'Framing and Reframing the *Agōn*'.

44 Compare with James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783–1939*, Oxford, 2009, p.361 and 'Exploding Wests: Boom and Bust in Nineteenth-Century Settler Societies', in Jared Diamond and James A. Robinson, eds, *Natural Experiments of History*, Cambridge, Massachusetts, 2010, p.67.

45 Lyndsay Head, 'Land, Authority and the Forgetting of Being in Early Colonial Maori History', PhD thesis, University of Canterbury, 2006, p.187.

46 For an insightful discussion of the Treaty texts, see P. Parkinson, '"Preserved in the Archives of the Colony": The English Drafts of the Treaty of Waitangi', *Revue Juridique Polynésienne*, 11 (2005), pp.1–110.

47 See also the discussion in Hickford, *Lords of the Land*, pp.37–38, 405–7.

48 Head, 'Land, Authority and the Forgetting of Being', p.253.

49 Ibid., pp.200–01.

50 Ibid., p.215.

51 Ibid., pp.220–21.

52 Pocock, 'Quentin Skinner', p.548.

53 Ibid.

54 Hickford, *Lords of the Land*, pp.34, 37–38, 273–83, 330–32, 378–9, 399–401, 403–4. The term 'consociationalism' is not used, therefore, in the narrower, specialized sense of Nico Krisch in his *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, 2010.

55 Fortescue, minute, 12 March 1861, Colonial Office (CO) 209/156, folio 168a, National Archives, Kew, London (TNA) (emphasis in original); Hickford, *Lords of the Land*, pp.328–79.

56 Hickford, *Lords of the Land*, pp.14, 28, 38–39, 230–31, 260, 461–2 (interpretative autonomies and interpretative risk).

57 Ibid., pp.273–6.

58 Ibid., pp.10–20, 28, 228–30.

59 Paul Muldoon, '"The Very Basis of Civility": On Agonism, Conquest, and Reconciliation', in Will Kymlicka and Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies*, New York, 2008, p.134.

60 This notion of 'extraversion' need not assume that the external environment or resources drawn upon are placed in an asymmetrical relationship with the indigenous actor luring them in but, to the extent there are asymmetries, then they might operate bilaterally with

dimensions of a relationship being asymmetrical and these asymmetries altering across time. Compare with F. Cooper, 'Africa and the World Economy', *African Studies Review*, 24 (1981), pp.1–86.

61 For the trope of 'discipline' in this context, see Hickford, *Lords of the Land*, pp.7, 24–26, 90–93, 99, 108, 121–2, 451.

62 An Act to grant a Representative Constitution to the Colony of New Zealand, 30 June 1852, 15 & 16 Vict 72.

63 An Act to make further provision for the Government of the New Zealand Islands, 28 August 1846, 9 & 10 Vict 103.

64 Earl Grey to Grey, 23 December 1846, *Great Britain Parliamentary Papers 1847*, 38 [763], p.70.

65 Earl Grey to Grey, 24 August 1853, GNZ Mss35(13), folios 63–64, Auckland Public Library, cited in Hickford, *Lords of the Land*, p.240.

66 Earl Grey to Grey, 19 February 1851, Gre/B99/6C/40, Palace Green section, Durham University Library.

67 Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*, Princeton, 2010.

68 Hickford, *Lords of the Land*, p.245.

69 Gore Browne, 'Remarks by the Governor on Mr Daldy's letter', CO209/151, folio 259, TNA. For other illustrations and various interpretations, see Hickford, *Lords of the Land*, pp.273–83, 285–6, 291–4, 332.

70 William Swainson, *New Zealand and the War*, London, 1862, p.10.

71 'A Bill entitled an Act to settle the constitution of the colony of New Zealand and the several settlements therein', undated (c.1851), British Library (BL) AddMss 44567, folio 152, Gladstone Papers, London.

72 Merivale to Pakington, 24 March 1852, CO209/159, folios 291–291a (emphasis in original), TNA.

73 Hickford, *Lords of the Land*, pp.2–4, 5, 7, 13–14, 41.

74 Earl Grey was critical of Pakington's move in favour of a nominated legislative council, which he characterized as an 'oligarchical body above all control either by the Crown or the people': Earl Grey, 'New Zealand Bill', (undated; mid-1852), Gre/B147/58, Palace Green, Durham University Library. Also refer to Hickford, 'The Historical, Political Constitution', p.609.

75 Hickford, *Lords of the Land*, pp.17–18, 38; Hickford, 'Framing and Reframing the *Agōn*', pp.155–7.

76 Damen Ward, 'Civil Jurisdiction, Settler Politics, and the Colonial Constitution, circa 1840–1858', VUWLR, 39 (2008), pp.497–532.

77 Hickford, *Lords of the Land*, pp.37–38; Judith Binney, 'Te Upokokohua: The Curse of Confiscation on Te Urewera', in Richard Hill and Richard Boast, eds, *Raupatu: The Confiscation of Māori Land*, Wellington, 2009, pp.222–32.

78 Martin Loughlin, *The Idea of Public Law*, Oxford, 2003, pp.99–113.

79 From the original printed placard in the Alexander Turnbull Library, Wellington (original spelling reproduced): 'I mua ko tou a tua e te maori ko uenuku kai tangata'.

80 Renata Tamakihikurangi, *Ko Te Korero me te Pukapuka a Renata Tamakihikurangi, no te Pa Whakairo; ki a te Kai-whakahaere tikanga o nga Pakeha ki Ahuriri: Renata's speech and letter to the Superintendent of Hawke's Bay on the Taranaki War Question*, Wellington, 1861, 14L.

81 Ibid.

82 Hickford, 'Framing and Reframing the *Agōn*'.

83 This is how we might view Waata Kukutai's stance, for instance, in relation to assuming

a magistracy, establishing himself as a key political waypoint for Pākehā negotiations: Hickford, *Lords of the Land*, ppp.279–80.

84 Hickford, *Lords of the Land*, pp.274, 280–81, 327, 380, 385, 404.

85 For recent discussions, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge, 2007; Marco Goldoni, 'Two Internal Critiques of Political Constitutionalism', *Institutional Journal of Constitutional Law*, 10, 4 (2012), pp.926–49. See also Liam Murphy's comments on Ronald Dworkin in his 'The Political Question of the Concept of Law', in Jules Coleman, ed., *Hart's Postscript: Essays on the Postscript to the Concept of Law*, Oxford, 2001, pp.371–409.

86 Anthony Musson and Chantal Stebbings 'Introduction', in Anthony Musson and Chantal Stebbings, eds, *Making Legal History: Approaches and Methodologies*, Cambridge, 2012, p.5.

87 See Richard Boast, *The Native Land Court 1862–1887: A Historical Study, Cases and Commentary*, Wellington, 2013.

88 David Williams, *A Simple Nullity? The* Wi Parata *Case in New Zealand Law and History*, Auckland, 2011; Hickford, *Lords of the Land*, pp.202–15, 221–22.

89 See, for example, David Washbrook, 'India 1818–1860: Two Faces of Colonialism', in Andrew Porter, ed., *The Oxford History of the British Empire: Volume III, The Nineteenth Century*, Oxford, 1999, p.407; see Laidlaw, 'Breaking Britannia's Bounds?', p.822, where this point in Washbrook's essay is noted but not analyzed with reference to what it suggests regarding the role of actionable legal rights and remedies to constrain political activity. On the various legal remedies available in relation to the Crown, see Stuart Anderson, 'Public Law', in William Cornish, Stuart Anderson, Raymond Cocks, Michael Lobban, Patrick Polden, and Keith Smith, eds, *The Oxford History of the Laws of England: Volume XI, 1820–1914: English Legal System*, Oxford, 2010, pp.366–84; Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere*, Cambridge, 2012.

90 On juridical or presentist histories, refer to W.H. Oliver, 'The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia', in Andrew Sharp and Paul McHugh, eds, *Histories, Power and Loss: Uses of the Past–A New Zealand Commentary*, Wellington, 2001, pp.9–29; Andrew Sharp, 'History and Sovereignty: A Case of Juridical History in New Zealand/Aotearoa', in Michael Peters, ed., *Cultural Politics and the University in Aotearoa/New Zealand*, Palmerston North, 1997, pp.159–81.

91 P.G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights*, Oxford, 2011, pp.274–80, 309–11. On prior treatments of the New Zealand Constitution Act, see P.G. McHugh, 'The Historiography of New Zealand's Constitutional History', in Philip Joseph, ed., *Essays on the Constitution*, Wellington, 1995, pp.344–67.

92 M.S.R. Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, Wellington, 2008, pp.279 and 281–2.

93 'Code of laws', enclosed with Thomas Gore Browne to Labouchere, 9 May 1857, CO209/141, folios 516–517a, TNA. For 'jurisgenerative' as a term, see Robert Cover, 'Nomos and Narrative', *Harvard Law Review*, 97, 4 (1983–1984), pp.4–68.

94 Muldoon, p.134.

95 J. Getzler, 'Michael Taggart, *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply', Modern Law Review*, 66 (2003), pp.819–22.

96 Hickford, 'The Historical, Political Constitution', pp.598–9, 623.

97 Private conversations between John Darwin and the author; Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830*, Chapel Hill, North Carolina, 2005; J.P. Greene, *The Constitutional Origins of the American Revolution*, Cambridge, 2011; Frederick Madden and David Fieldhouse, *Imperial*

Reconstruction, 1763–1840: The Evolution of Alternative Systems of Colonial Government, Westport, Connecticut, 1987. On the previous period of interest in imperial constitutional histories, see William Roger Louis, 'Introduction', in Robin Winks, ed., *The Oxford History of the British Empire: Volume V, Historiography*, Oxford, 1999, pp.27–28.

98 Peter Mandler, 'The Problem with Cultural History', *Cultural and Social History*, 1 (2004), pp.94–117.

99 There are exceptions, including D.F. McKenzie's invaluably suggestive classic work (*Oral Culture, Literacy and Print in early New Zealand: The Treaty of Waitangi*, Wellington, 1985) and Andrew Sharp's challenge in 'The Treaty in the Real Life of the Constitution', in M. Belgave, M. Kawharu and David Williams, eds, *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, Melbourne, 2005, pp.308–29.

100 Sharp, 'The Treaty in the Real Life of the Constitution', p.326, note 13. Compare with Hickford, *Lords of the Land*, pp.9–10, 229–30, 434.

101 Richard Boast, 'Recognising Multitextualism: Rethinking New Zealand's Legal History', VUWLR, 37 (2007), pp.547–82; Richard Boast, 'Bringing the New Philology to Pacific Legal History', VUWLR, 42 (2011), pp.399–416.

102 Salesa, *Racial Crossings*, pp.99–103. Salesa does acknowledge that rangatira of a number of hapū did not sign or affix their marks to the Treaty document, yet the core point remains that the divide between Article I of the Treaty (kawanatanga or 'governorship') and Article II (rangatiratanga) drives the narrative structure (ibid., p.103). By way of a contrast, refer to Hickford, *Lords of the Land*, pp.390-407 on some incipient or developing indigenous constitutionalism(s) concerning mana, theological tropes and the placing of the Crown as a metaphor.

103 Michael King, *The Penguin History of New Zealand*, Auckland, 2003, pp.158–67.

104 Head, 'Land, Authority and the Forgetting of Being', p.33. Elsewhere, however, important nuances are introduced – for instance, at p.69: 'From a viewpoint within Maori culture, the Treaty of Waitangi was a conclave of chiefs, in which political decision-making was staked on the notions of power in Maori culture; it certainly did not depend on the wording of a document.'

105 On which see Matthew Palmer, and, more recently, a number of court decisions, including the Supreme Court decision in *Attorney-General v New Zealand Māori Council* [2013] 3 NZLR 31.

106 Damen Ward, 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia', *History Compass*, 1 (2003), AU 049, 001-023, p.16.

107 Moana Jackson, 'Finding a Place for the Treaty', Treaty Debates, 24 January 2013, http://www.radionz.co.nz/national/lecturesandforums/thetreatydebates (last accessed 6 February 2013); Stephens, 'Māori Constitutionality (and the Treaty of Waitangi)'.

108 C.A. Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire*, Cambridge, 2012.

109 Mary C. Stiner, Timothy Earle, Daniel Lord Smail and Andrew Shryock, 'Scale', in Andrew Shryock and Daniel Lord Smail, eds, *Deep History: The Architecture of Past and Present*, Los Angeles, 2011, pp.242–72.

110 On 'conversations without end', see Hickford, *Lords of the Land*, pp.9, 37–39, 457.