CIVIL JURISDICTION, SETTLER POLITICS, AND THE COLONIAL CONSTITUTION, CIRCA 1840-58

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In early colonial politics, decisions about lower court jurisdiction often reflected competing ideas about the relationship between different parts and functions of government. In particular, court structure and jurisdiction could be seen as having important implications for the role and power of the governor. Appreciating the importance of jurisdiction as a way of defining, and arguing about, the distribution and exercise of political and legal authority in the colonial constitution allows connections to be drawn between different elements of settler politics in the 1840s and 1850s. The closing of the Court of Requests by Governor Grey in 1848, and the decisions of the Supreme Court judges in subsequent litigation, provide examples of this. Debate over the role of the governor in emerging systems of representative and responsible government after 1852 contributed to lower court jurisdiction remaining politically significant, particularly in relation to Māori. This is shown by considering parliamentary debates about the Stafford ministry's 1858 proposals for resident magistrates' jurisdiction over "native districts". The politics of jurisdiction were part of wider contests about the establishment and consolidation of particular political and institutional relationships within the colonial constitution. This multi-faceted construction of government authority suggests a need to reconsider elements of Pākehā colonial politics and law.

I INTRODUCTION

Attempts to assert or constrain the governor's authority were a fundamental part of early colonial politics. Different understandings of the Crown's prerogative authority competed for support. There

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was no single "settler" view on such issues. In particular, disputes over the jurisdiction of lower courts, and the relationship between governors and magistrates, or governors and judges, could become part of wider debates over the place of gubernatorial authority within the colonial constitution. Appreciating why and how the jurisdiction of lower courts could be presented as being constitutionally significant requires an examination of particular controversies in their broader political context. Considering the politics of jurisdiction allows links to be drawn between several elements of settler political debate, including claims about "Britishness" and the constitution. Legal and political views favouring extensive gubernatorial powers were highlighted by the Court of Requests dispute in 1848. Further, opposition to such views, and the changing ways in which jurisdiction was argued about in the 1850s, highlight the importance of representation and the legislature to much settler constitutional debate. In exploring these points, this essay treats colonial constitutional politics as involving various individuals' and groups' attempts to establish and consolidate particular political relationships within, and between, constitutional offices and institutions.[1] Though such an approach might include Māori groups and individuals, my focus here is on Pākehā actors. Considering settler politics in such terms gives a fuller appreciation of the differences between Pākehā politicians in several political disputes in the 1840s and 1850s.

Richard Boast and others have highlighted the use of jurisdictional distinctions as a response to political disputes over the structure and control of government institutions in the 1870s and 1880s.[2] However, such uses of jurisdiction can be seen in British discussions about New Zealand from the 1830s. Examining jurisdictional disputes and schemes may therefore illustrate the changing relationship between institutions of government and notions of "Crown" authority in New Zealand in the early colonial period. Such relationships developed, in part, from the particular role of courts and their jurisdiction in early colonial politics. In the absence of representative institutions, courtrooms could become arenas for political disputes over the way the colonial constitution did, and ought to, operate. With the introduction of a "representative" legislature, many settlers saw statutes as more effective than litigation for shaping the distribution of political authority within the colonial state. Political contests over the institutional relationship between parts of government contributed to shifts in the political discussion of law and jurisdiction by settlers.

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1 *Politics of Jurisdiction*, chapters 4-6; Ann Laura Stoler and Frederick Cooper "Between Metropole and Colony. Rethinking a Research Agenda" in Ann Laura Stoler and Frederick Cooper (eds) *Tensions of Empire. Colonial Cultures in a Bourgeois World* (University of California Press, City, 1997) 4, 6, 12-19. Mark Hickford "Settling some Important Principles of Colonial Law: Three 'Forgotten' Cases of the 1840s" (2004) 35 VUWLR 1, 2-3, 11, 19-31 ["Three Forgotten Cases"]; P G McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph *Essays on the Constitution* (Canterbury University Press, Christchurch, 1995) 344-367 ["Historiography"]; Mark Hickford "'Decidedly the Most Interesting Savages on the Globe': An Approach to the Intellectual History of Māori Property Rights, 1837-53" (2006) 27 History of Political Thought 122-167 ["Māori Property Rights"].

2 R P Boast "Recognising Multitextualism: Rethinking New Zealand's Legal History" (2007) 37 VUWLR 547-582.

I illustrate these arguments using several examples. The first section of the essay highlights the importance of arguments about governors' authority, and the appointment of judges and magistrates, to settler plans for colonisation and to the early settler politics of the colony. The following section uses the closure of the Court of Requests by the government in 1848 as an example of how governors' attempts to establish and consolidate particular institutional structures in new colonies could be interpreted by settlers as raising broader constitutional issues. In the Court of Requests controversy both Supreme Court judges refused to grant writs that were intended to reopen the court. The way in which the Supreme Court judges handled the Court of Requests cases illustrates the prominence of gubernatorial authority as an element of the colonial constitution.

Crown colony political disputes, such as the Court of Requests affair, encouraged many settler politicians to stress representative and then responsible government as an effective means of constraining gubernatorial authority. The New Zealand Constitution Act 1852 (UK) (the Constitution Act) shifted the way jurisdiction might gain constitutional significance, without removing its potential importance, particularly in relation to Māori. In the final section, I examine the Stafford government's proposals for resident magistrates' jurisdiction over "native districts" in 1858. This example, as with the Court of Requests example, suggests that a unitary notion of the "Crown" may only provide a preliminary description of the contours of colonial constitutional politics, which were premised on different assumptions and principles to those sometimes used in modern debate. Further, the native districts example indicates how settlers' politics of jurisdiction might change as institutional relationships and practices changed.

II HISTORIOGRAPHICAL CONTEXTS

My argument is not intended to revive an older "whiggish" form of history. Rather, in arguing for a more multi-faceted historical construction of government authority in New Zealand, this essay draws on a number of recent studies.[3] Previous generations of New Zealand historians focussed on settler politics and the growth of parliamentary government.[4] From the early 1970s this approach was often seen as too narrow and mono-cultural. More attention was given in political history to the perspectives, presence or absence of Māori actors. Political history itself became more concerned

3 Refer to the works cited in notes 1, 2, 6 and 7. See also Stoler and Cooper, above n 1, 4, 8-9, 12-14, 18-24.

4 D G Herron "The Franchise and New Zealand Politics, 1853-8" (1960) 12 Political Science 28-44; W P Morrell *The Provincial System in New Zealand, 1852-76* (2 ed, Whitcombe and Tombs, Christchurch, 1964) [*Provincial System*]; A H McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958); D G Herron "The circumstances and effects of Sir George Grey's delay in summoning the first New Zealand General Assembly" (1959) 8 Historical Studies Australia and New Zealand 364-382 ["Circumstances and effects"]; William L Renwick *Self-government and Protection: A Study of Stephen's Two Cardinal Points of Policy in their Bearing upon Constitutional Development in New Zealand in the Years 1837-1867* (MA thesis, Victoria University of Wellington, 1962).

with the cultural and social settings of politics.[5] Recently, however, drawing on a variety of different approaches in the fields of imperial and world history, a number of scholars have suggested a need to reconsider the institutional structures of colonial and imperial government.[6] Such works have had an uneven impact in New Zealand legal history. Much 19th century New Zealand history scholarship in the last twenty years has focussed on the relationship between Māori and the central government executive. The shifting relationship between parts of government over time is seldom seen as causally significant: the "Crown" is often treated as a unitary body in such works.[7] Similarly, settler notions of law and authority before 1876 are often described as being based on generalised and unitary categories.[8] Yet, as James Belich has noted, placing general categories or concepts at the centre of historical explanations may tell us little about the detail of why or how particular conflicts occurred.[9] Behind such general terms lie multiple, inter-connecting, histories.[10]

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5 See the criticism of older histories, and the call for new "contextualised" approaches, in McHugh "Historiography", above n 1, 363; Peter Gibbons "The Far Side of the Search for Identity: Reconsidering New Zealand History" (2003) 37 New Zealand Journal of History 39; Damon Salesa "Korero: A Reflection on the Work of Judith Binney" (2004) 38 New Zealand Journal of History 273. See also, Ian Hunter "Natural Law, Historiography, and Aboriginal Sovereignty" (2007) 11 Legal History 137-167.

6 Frederick Cooper *Colonialism in Question. Theory, Knowledge, History* (University of California Press, Berkeley, 2005) 23-5, 157-73; Lauren Benton "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State" (1999) 41 Comparative Studies in Society and History 563-589; Simon Potter "Webs, Networks and Systems: Globalization and the Mass Media in the Nineteenth- and Twentieth-century British Empire" (2007) 46 Journal of British Studies 621-46; Lyndsay Head "The Pursuit of Modernity in Māori Society. The Conceptual Bases of Citizenship in the Early Colonial Period" in Andrew Sharp and Paul McHugh *Histories, Power and Loss* (Bridget Williams, Wellington, 2001) 97-121; Tony Ballantyne and Brian Moloughney "Angles of Vision" in Tony Ballantyne and Brian Moloughney (eds) *Disputed Histories. Imagining New Zealand's Pasts* (University of Otago Press, Dunedin, 2006) 22 ["Angles of Vision"]; Mark Hickford "Māori Property Rights", above n 1, 122-167.

7 Michael Belgrave "The Tribunal and the Past: Taking a Roundabout Path to a New History" in Michael Belgrave, Mereta Kawharu and David V Williams (eds) *Waitangi Revisited. Perspectives on the Treaty of Waitangi* (Oxford University Press, South Melbourne, 2005) 37; Andrew Sharp "Recent Juridical and Constitutional Histories of Māori" in Sharp and McHugh, ibid, 31-60; Ballantyne and Moloughney, ibid, 22. See also, Mark Hickford "John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910-1920" (2008) 38 VUWLR, 853-924 ["John Salmond"].

8 Paul McHugh "A History of Crown Sovereignty" in McHugh and Sharp, ibid, 192-3 ["Crown Sovereignty"]; P G McHugh "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) 52 U Tor LJ 69-99, 74-5 ["Constitutional Origin"]. Compare Paul McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, Oxford, 2005) 4-58, 166-206 [*Aboriginal Societies*]. See also, Mark Francis *Governors and Settlers. Images of Authority in the British Colonies, 1820-60* (Canterbury University Press, Christchurch, 1992).

9 James Belich *Making Peoples* (Penguin, Auckland, 1996) 230-1. Similarly, statements of legal principles extracted from canonical cases may only provide starting points in explaining why specific policies and practices were used or rejected by governments or litigants. See, for instance, Hickford "John Salmond", above n 7, 853-924.

Approaching issues of constitutional authority in terms of multiple individuals' and groups' political attempts to establish and consolidate particular political relationships within and between the constitutional institutions gives a richer and more revealing picture of Pākehā political debate. Colonial politicians' concern about their positions and status within particular governmental relationships formed an underlying political pressure in the 1840s and 1850s.[11] This pressure meant that a range of political agendas might converge around particular issues, which became issues of constitutional authority. Such issues were more significant than their immediate focus or topic, because they raised (or were politically capitalised upon to raise) broader issues about the distribution of authority in the colonial constitution. In the nascent constitution, such issues could be used to establish or consolidate political authority within institutions in a way that limited (or, at least, might demarcate) possible rival sources of political authority, particularly the parts of the executive the governor retained direct control and patronage over. This concern with institutional establishment and consolidation was shared by various settlers, governors and other groups. This was not a bare struggle for power; political and legal argument might be used as part of tactical or strategic manoeuvres, but such manoeuvres were made in reference to normative frameworks that were genuinely acknowledged and aspired to by some Pākehā. Settler disputes in New Zealand, and in other British colonies, about the appropriate expression of political and social status through the language and protocols used in levees, councils and legislatures, indicate that a range of intertwining cultural and political factors might be explored as shaping politicians' conduct and attitudes.[12]

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10 P G McHugh "Historiography", above n 1, 360-7; Cooper, above n 6, 23-5, 157-73; Alan Ward "Review Article" [review of James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Penguin, Auckland, 1988)]; (1987) 21 New Zealand Journal of History 270-274; Paul McHugh's review of R W Kostal *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford University Press, Oxford, 2005) and Julie Evans *Edward Eyre, Race and Colonial Governance* (University of Otago Press, Dunedin, 2005) in (2007) 66 CLJ 465, 467; Stoler and Cooper, above n 1, 17-18. Several scholars have highlighted that rhetorically powerful labels such as "sovereignty" can be used in a way that conflates a range of ideas or categories of authority, each of which has its own history of competing interpretations and meanings. Such comments do deny the significance of the category; rather they highlight alternative ways of approaching such issues: Shaunnagh Dorsett and Shaun McVeigh "Questions of Jurisdiction" in Shaun McVeigh (ed) *Jurisprudence of Jurisdiction* (Routledge, Abingdon, 2007) 4-5; Ersun Kurtulus "Theories of Sovereignty: An Interdisciplinary Approach" (2004) 18 Global Society 347-370.

11 Keith Sinclair *Origins of the Māori Wars* (2 ed, New Zealand University Press, Wellington, 1961) 85-102; Herron "Circumstances and effects", above n 4, 364-382; *Southern Cross* (11 March 1848). Note also the references in 12 below.

12 Of course, such politics were also deeply shaped by personal relationships or animosities. Kirsten McKenzie *Scandal in the Colonies* (Melbourne University Press, Melbourne, 2004) 153-179; *Southern Cross* (7 October 1848); Penny Russell "The Brash Colonial: Class and Comportment in Colonial Australia" (2002) 6th Ser Transactions of the Royal Historical Society 431-453; Morrell *Provincial System*, above n 4, 61.

A Courts and the Scope of Executive Authority in Crown Colony Government

Giving attention to various parts of colonial government and Crown authority suggests that the relationship between different parts of government was not simply determined by the direct application of perceived constitutional principles or legal rules. Rather, while law played a role, such relationships may be seen as being constructed over time, by politics and practices that included, but were not always determined by, disputes about the law. For instance, in the 1820s and 1830s, senior judges in several colonies were explicitly involved in the legislative process, as members of the Legislative Council. In New South Wales and Van Dieman's Land, these same judges were required to certify that local statutes were not repugnant to the laws of England – a notoriously ill-defined test that generated a series of political disputes between colonial judges and governors in the mid-nineteenth century.[13] By 1832, James Stephen (then legal counsel, and later the permanent under-secretary, of the Colonial Office) had decided that the common law on what English laws applied in colonies was so vague it gave no practical guidance to judges.[14] Further, he suggested in 1842, a judge was "invariably, an ignorant or ill-informed Arbiter" when assessing "whether any particular law is or is not applicable to the circumstances of Society".[15] Stephen thought adapting English law to colonial contexts required the broader view of political debate rather than the particularity of litigation.[16]

In later Australasian Crown colonies, such as South Australia and New Zealand, judges were excluded from the Legislative Council. However, in such small government circles, judges still maintained close formal and informal roles in legislative drafting and law reform issues. When Martin CJ resigned, Henry Sewell told the Colonial Office that a willingness to analyse draft legislation was a more important qualification for a new Chief Justice than the ability to decide cases.[17] Martin's replacement, George Arney CJ, sat in the upper house for seventeen years.[18]

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13 P A Howell "The Van Dieman's Land Judge Storm" (1966) 2 U Tas LR, 254-269; Bruce Kercher *An Unruly Child. A History of Law in Australia* (Allen and Unwin, Sydney, 1995) 82-95.

14 Stephen, minute (14 July 1832) National Archives, Kew, CO 13/1, 273. Please note that all citations to Colonial Office files, sources in the Alexander Turnbull library and contemporary newspaper editions will be written in full, without cross-references.

15 Stephen to Stanley (29 September 1842) CO209/14, 361.

16 Stephen to Stanley (29 September 1842) CO209/14, 361.

17 Sewell to Gore-Browne (31 August 1857) Alexander Turnbull Library, Wellington ["ATL"] MS-Papers-0028: "We want not merely a lawyer, but a gentleman, of high principles, and good tone, who will exercise a salutary influence on the Colony socially, as well as do his judicial work properly. He should also have a constructive mind, and be ready to do what the Colony most wants, viz. form and improve the law. The court work of a Colonial Judge is so little as to be of comparatively small account, but the lawmaking work would occupy the mind and time of a very superior Man."

18 R Jones "Arney, Sir George Alfred" in A H McLintock (ed) *An Encyclopaedia of New Zealand* (Government Printer, Wellington, 1966) 80-81. Analysing the past roles of judges based on contemporary

Arney's legislative role suggests a need to more carefully historicise the relationship between "branches of government" in colonial New Zealand. In Canada, attempts to chart the shifting attitudes to law, and the relationship between different arms and functions of government authority, have contributed to rich debates over the historical construction of settler notions of self-government and Crown authority.[19] Such works give a platform for reconsidering the historical relationship between institutions of government and notions of Crown authority in New Zealand. Such relationships developed, in part, from the particular role of courts and their jurisdiction in early colonial politics, which is briefly surveyed below.

Before the constitutional changes that swept the Australasian colonies in the 1840s and 1850s, imperial authorities tried to keep a relatively close watch on the establishment and jurisdiction of colonial superior courts.[20] In the 19th century judges in England and Wales held office on good behaviour. In contrast, colonial judges enjoyed their office at the sovereign's pleasure. Attempts to give greater tenure to judges in New Zealand was one of the grounds for disallowing the first Supreme Court Ordinance of 1841.[21] The other reasons for that Ordinance's disallowance also illustrate the Colonial Office's concern for the political implications of court structures. Reviewing the Ordinance, the law officers admitted they did not know a great deal about how colonial legal systems were usually constructed. However, they concluded that the Ordinance was in many respects a sensible, if novel, adaptation of English legal principles and practice to a small colonial community. James Stephen was unimpressed by the analysis.[22] Stephen had raised a number of objections to the Ordinance. The Colonial Secretary, Lord Stanley, found Stephen's advice more

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jurisprudential or policy aspirations risks overlooking the particular constitutional attitudes and contexts of the time.

19 For example, David Murray "Law and British Culture in the creation of British North America" in Phillip Buckner and R Douglas Francis (eds) *Canada and the British World. Culture, Migration and Identity* (UBC Press, Vancouver, 2006); F Murray Greenwood *Legacies of Fear. Law and Politics in Quebec in the Era of the French Revolution* (University of Toronto Press, Toronto, 1993); P Romney "From Constitutionalism to Legalism: Trial by Jury, Responsible Government and the Rule of Law in the Canadian Political Culture" (1989) 7 Law & History Review 121-174 ["Constitutionalism to Legalism"]; Tina Loo *Making Law, Order and Authority in British Columbia, 1821-1871* (University of Toronto Press, Toronto, 1994); John McLaren "Reflections on the Rule of Law: the Georgian Colonies of New South Wales and Upper Canada, 1788-1837" in D Kirby and C Coleborne *Law, History, Colonialism. The Reach of Empire* (Manchester University Press, Manchester, 2001).

20 Stephen, minute (14 July 1832) CO13/2, 273-274; Stephen to Stanley (29 September 1842) CO209/14, 360-364. However, this vigilance should not be overstated. Compare D B Swinfen *Imperial Control of Colonial Legislation 1813-1865. A Study of British Policy Towards Colonial Legislative Powers* (Oxford, Oxford University Press, 1970) 159-162; Stephen to Hope (1 April 1843) CO13/26, 341-345.

21 Stanley to Hobson, 31 January 1843, CO209/14, 422.

22 Law Officers to Stanley (8 November 1842) CO209/17, 176; Stephen to Stanley (29 September 1842) CO209/14, 360-364. Stephen raised a number of concerns relating to imperial oversight of the justice system and the preservation of the prerogative.

persuasive than the law officers' opinion. Among Stephen's concerns was the role given to sheriffs; the Colonial Office instructed Governor Hobson to limit the role of sheriffs to their functions as officers of the court, rather than simply giving them all the powers and functions of an English sheriff. In England, sheriffs had the traditional role of convening public meetings of freeholders in a district, to discuss matters of public importance.[23] Public meetings were an important part of colonial political life, and the involvement of public officials in such meetings was sometimes of real concern to small colonial administrations.[24] Lord Stanley agreed with Stephen's suggestion that the "many vague and somewhat critical political rights" of the English office were a "larger delegation" than was appropriate for New Zealand. Further, clerks and other court officials were to be appointed by the governor. In England, superior court judges appointed their own officials. In Crown colonies, such patronage was to be kept under gubernatorial control.[25]

The Colonial Office's caution was due partly to the political significance of colonial courts to many settlers. In Crown colonies courts were significant in part because they were a site of authority and adjudication that could be used in political debate. Access to law courts often became politically symbolic and contentious, and cases might gain a social significance beyond the particular issue between the parties. Litigation was consciously used to test the limits of gubernatorial authority. Courts were also significant because in Crown colony society they became part of a nascent public sphere, and part of the public construction and projection of political status. Crown colony politics were characterised by settler arguments about, and appeals to, notions of constitutional principles that governors were critiqued against. Settler newspapers reported litigation and judges' jury directions in detail.[26] Newspaper reports, editorials and correspondence on legal issues entered

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23 Stephen and Hope, notations on and draft responses to Law Officers to Stanley (8 November 1842) CO209/17, 176-8. Stephen, notations on Law Officers to Stanley (29 November 1842) CO 209/17, 182. See also the references in note 24.

24 Damen Ward "Colonial Communication: forums for creating public opinion in Crown colony South Australia and New Zealand" in Simon J Potter *Imperial Communication. Australia, Britain, and the British empire c 1830-50* (Menzies Centre, London, 2005) 12-21 ["Colonial Communication"]. See also Paul A Pickering "The Oak of English Liberty: Popular Constitutionalism in New South Wales 1848-1856" (2001) 3 Journal of Australian Colonial History 10-26; Terry Irving, "A song for the future": A response to Paul Pickering" (2007) 92 Labour History 143-147.

25 Stephen to Stanley (29 September 1842) CO209/14, 363-366; draft letter to Attorney-General, CO209/17, 178. See Stephen, notations and minute on Law Officers to Stanley (8 November 1842) CO209/17, 176-8; Stanley to Hobson (31 January 1843) CO209/14, 422.

26 David Neal *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, Cambridge University Press, 1991) 55, 81, 95, 175, 181-185; *Nelson Examiner* (22 March 1844); (1 October 1844); (1 November 1844); (12 April 1845); Ward "Colonial Communication", above n 24, 11-20; Chapman J, instructions to the grand jury (12 April 1844) in H S Chapman (ed) "Reports of cases in the Supreme Court of New Zealand at Wellington and a few at Auckland. Collection No 1", Hocken Library, University of Otago, Chapman Pamphlets v 104/41, 14. See also the references in the following note.

imperial communication networks as part of often highly strategic and self-conscious attempts to shape notions of "public opinion" in the colony, metropole, and neighbouring colonies.[27]

An important strand of such debates rejected any characterisation of colonists as having legally distinct or limited constitutional liberties compared to subjects in the metropole. Such notions of empire-wide constitutional norms blended legal and political claims about Crown authority and obligation with ambiguous claims about access to the courts and judicial adjudication as a "birthright" of British settlers.[28] Such claims can often be seen as claims about "Britishness"; assertions about legal principles and legal or political practice that were described as being uniquely British, to which settlers overseas were automatically entitled. The extent to which the claimed legal principles existed in case law was open to question. Such arguments often sought to deploy legal language and precedents strategically as part of particular political disputes.[29] The various tropes of constitutional "Britishness" or "birthright" were often rhetorical props, used to appeal to sentiment, to amorphous civic aspirations and to general principles; "Britishness" was not an analytical tool that necessarily provided all the detail of constitutional design or operation.[30] In many ways, that was its advantage. C W Richmond told the colonial legislature in 1858 that talk of applying "British law" to Māori could only ever mean "the great foundation principles of British law and its free spirit. We do not mean every detail of rural or municipal police".[31] Thus, claims of colonial distinctiveness and claims of "Britishness" were not mutually exclusive. Indeed, appeals to

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27 Alex Castle "The Judiciary and Political Questions: The First Australian Experience, 1824-1825" (1973-76) 5 Adel L Rev 294, 299-311, 315-316; McKenzie, above n 12, 69-117, 180-184; Kercher, above n 13, 72-73; Alan Lester "British Settler Discourse and the Circuits of Empire" (2002) 54 History Workshop Journal, 24-48. See also the references in the preceding notes.

28 For example, *Southern Cross* (9 September 1843); (4 May 1844); (27 January 1849); *Nelson Examiner* (9 April 1842); (18 June 1846); (23 December 1843); Damen Ward "Constructing British Authority in Australasia. Charles Cooper and the legal status of Aborigines in the South Australian Supreme Court, c 1840-60" (2006) 34 Journal of Commonwealth and Imperial History, 483-504 ["Constructing British Authority"]; P G McHugh "The Common Law Status of Colonies and Aboriginal 'Rights': How Lawyers and Historians Treat the past" (1998) 61 Sask LR 393-429 ["Common Law Status"]. See also Daniel J Hulsebosch "*Imperia in Imperio*: The Multiple Constitutions of Empire in New York, 1750-1777" (1998) 16 Law and History Review, 319-379.

29 McHugh *Aboriginal Societies*, above n 8, 16-27; Ward "Constructing British Authority", ibid, 488-493; Hickford "Three Forgotten Cases", above n 1, 3-5, 13-16; J G A Pocock *Politics, Language and Time. Essays on Political Thought and History* (Metheun and Co, London, 1972); McHugh "Common Law Status", ibid, 393-429.

30 John Robert Godley "Lecture of the history of New Zealand (No 2)" ATL qMS-036 ["Lecture No 2"]; John Robert Godley *Self-government for New Zealand* (private circulation, London, 1852) 4-13; McHugh, "Crown Sovereignty", above n 8, 192; Ward *Politics of Jurisdiction*, above introductory note, 110-32, 253-260; S Cheyne, "Search for a constitution: People and politics in New Zealand's Crown Colony years" (PhD thesis, Otago University, 1975) 78, 90, 95-110.

31 C W Richmond (18 May 1858) [1858-60] NZPD 446.

"Britishness" were sometimes designed to legitimate political or social innovation by presenting that innovation as an adaptation of latent principles of government and law to the new colonial context. Australasian settlers' claims to a wide franchise, or to legislative and judicial structures that differed markedly from metropolitan models, were advanced and critiqued against often ambiguous notions of "British law" and the "true" character of male British settlers. In this way, claims to Britishness, and to the adaptation of Britishness to local circumstances, could be merged together for particular rhetorical or political effect.[32]

Notions of "British" law should not be viewed separately from the prominence given to arguments about representation and the legislature in settler politics. Although no longer as historiographically prominent as it once was, representation – the ability to (at least) elect the majority of a legislative chamber – was a central political ambition for many of the would-be political elite in New Zealand, as in other Australasian colonies. The various, competing, political proposals for representative government encapsulated, in constitutional form, a range of claims about political authority, who was qualified to wield it, and the appropriate institutional loci of such authority. (This included debates over the appropriate franchise, and the composition of any upper house).[33] Proponents of representative legislative bodies often insisted that such bodies were both a measure and means of settler "respectability" and "independence". Importantly, however, such claims were not limited to discussions about legislatures. Membership of juries, and the selection of foremen, was discussed in terms of the "respectability" and good judgement of jurymen, reinforcing the political significance of courts in a Crown colony society.[34]

Such arguments were linked to an abiding theme of colonial politics – the nature and extent of the legal authority held by the governor. As is discussed below, a range of arguments were rehearsed

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32 Irving, above n 24, 143-147; Godley "Lecture (No 2)", above n 30, 123, 130, 141. See the debates on Māori policy, (15 August 1860); (21 August 1860) [1858-60] NZPD 307-320; 365-374; C W Richmond (12 July 1858) [1858-60] NZPD 7; Carleton (12 July 1858) [1858-60] NZPD 7-10.

33 Support for representative government was by no means necessarily an endorsement of manhood suffrage. Accounts of settler constitutionalist thought ought to consider the range of views on representative bodies as an integral part of that discourse. For example, Stephen, memorandum (14 July 1832) CO13/1, 265-283; Charles Mann *Report of the Speeches Delivered at a Dinner given to Capt. John Hindmarsh, RN, on his appointment as Governor of South Australia* (W Clowes, London, 1835) 5-12; *New Zealand Gazette* (18 April 1840); *Nelson Examiner* (27 December 1845); Cheyne, above n 30, 228-291. *New Zealand Journal* (5 December 1840); (15 January 1841); (30 January 1841); H S Chapman to H Chapman (24 August 1849); (28 July 1850) ATL qMS-0419; Ged Martin *Bunyip Aristocracy. The New South Wales constitution debate of 1853 and hereditary institutions in British colonies* (Routledge, London, 1986). See also the references in 4 above.

34 Ward "Colonial Communication", above n 24, 10-25; Chapman J, instructions to the grand jury (12 April 1844), "Collection No 1", above n 26, 14; McKenzie, above n 12, chapter 3. See H S Chapman to H Chapman (6 March 1848) ATL qMS-0419 on the calculated "affront" offered to William Wakefield when Wakefield was not made foreman of a grand jury in Nelson, and the political message interpreted as being behind the snub.

in public debate and private lobbying over the way the prerogative powers of the Crown might be applied in new colonies, and the political obligations that ought to guide their exercise. The scope of the governor's authority and power was fiercely disputed and debated by the settler press. As Zoë Laidlaw has explored, governors formed an awkward, somewhat isolated, part of Crown colony society and politics, and sought to buttress their moral, political and legal authority as best they could with the limited resources and competing demands of a colonial administration.[35]

In the absence of representative legislatures, litigation was one possible way to contest gubernatorial power and policies. Circumstances were often consciously engineered, by one or both parties, to lead to litigation.[36] Although the Colonial Office's preference was usually to address policy issues involved in such disputes through legislation (if necessary), governors themselves might use the technique of a test case. In 1847, Governor Grey arranged for the suit in *R v Symonds* to test the legality of his predecessor's land policies (and, in doing so, to assert his own political and legal authority over the land policy debate).[37] An example of settler consciousness of such strategies is found in the *Nelson Examiner* in 1843. The paper complained of the legal and practical difficulties of trying alleged assaults by Māori who insisted their land had been not included in sales to the New Zealand Company. It claimed that "in England, a nominal assault, or a forcible opening or breaking of a door or window, would be the utmost means adopted" to assert a title to land that might be tested in court.[38] However, the *Examiner* insisted that where Māori were challenging title, the alleged assaults should be treated as criminal matters rather than civil disputes. In part, this reflected the paper's opposition to further political or legal protection of Māori land interests. Thus, representations of metropolitan legalism were not merely a point of reference for their replication in colonial practice. Supposed English practice might be used to highlight colonial difference, in a way that privileged local assessments of how the broad principles of particular metropolitan practices were to apply in a colony. However, many settler observers felt such assessments of local circumstances were largely political (rather than strictly legal or judicial) matters. The perceived failure of governors to give significant weight to settler views in their decision-making was a regular theme of those colonists arguing for greater constitutional constraints on gubernatorial authority and practice.

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35 Zoe Laidlaw *Colonial Connections 1815-1845. Patronage, the Information Revolution and Colonial Government* (Manchester University Press, Manchester, 2005), 61-93 [*Colonial Connections*].

36 Notably, in *R v Magistrates of Sydney, The Australian* (24 October 1824); *R v Magistrates of Hobart Town*, *Hobart Town Gazette* (22 July 1825); Castle, above n 27, 301-312.

37 *R v Symonds* (1847) NZPCC 387; D V Williams "*The Queen v Symonds* Reconsidered" (1989) 19 VUWLR 385-402.

38 *Nelson Examiner* (1 April 1843).

B Jurisdictional Boundaries as a Way of Regulating Authority: Competing Views of the Governor's Authority in Metropolitan and Colonial Proposals

In New Zealand, and elsewhere in Australasia, provision of effective judicial fora was presented as an obligation of the Crown and (often in a more radical key) a fundamental part of the relationship between subject and sovereign.[39] Those settlers who demanded local courts or tribunals often stressed the need to be able to enforce contracts or collect debts. Despite such immediate or material motives, the question of the form of the tribunals, and the law they would apply could easily escalate into more overtly political questions about the relationship between the executive and the magistracy or judiciary, the extent to which "central" government would grant local settler communities discretionary powers to administer their own legal disputes, and the priority given to particular settlements or communities in government decision-making.[40] Disputes over criminal jurisdiction could become issues of constitutional authority in colonies because criminal law often starkly raised questions about the form and substance of the executive's deployment of coercive force. As a number of historians of empire have explored, the links settlers might draw between jurisdiction and the forms of colonial government meant that civil jurisdiction could also generate constitutional issues.[41]

What some settlers saw as questions of abstract political entitlement, governors and administrators might present in more pragmatic terms. Providing effective courts to a number of scattered settlements, all surrounded by indigenous communities with their own customary law systems, was not an easy task. Defining jurisdiction (whether by territorial jurisdiction, purely by subject-matter or a combination of both) was one way colonial governments sought to manage such issues. In New Zealand, governors sought to create separate jurisdictions for small disputes and experimented with jurisdictions for disputes involving Māori.[42] In the case of indigenous jurisdiction, governments still faced a range of questions about how such a distinction might work, what law applied in certain situations, and whether particular jurisdictional models were consistent with other economic or social goals.[43] Further, because such jurisdictional techniques often involved specially appointed commissioners or stipendiary magistrates rather than lay magistrates

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39 *Southern Cross* (4 May 1844); *Nelson Examiner* (9 April 1842); (9 July 1842). Ward "Constructing British Authority", above n 28, 486-489.

40 *Nelson Examiner* (9 April 1842); (9 July 1842); (23 December 1843); (24 August 1844).

41 Romney "Constitutionalism to Legalism", above n 19, 130-7; Lauren Benton *Law and Colonial Cultures. Legal Regimes in World History 1400-1900* (Cambridge, Cambridge University Press, 2002); Alan Ward "Law and Law-Enforcement on the New Zealand Frontier 1840-1893" (1971) 5 New Zealand Journal of History 128-149. Ward, "Constructing British Authority", above n 28, 483-504.

42 See, for instance, Court of Requests Ordinance 1841 4 Vict 6, County Courts Ordinance 1841 5 Vict 2, Native Exemption Ordinance 1844 7 Vict 18, Resident Magistrates Court Ordinance 1845 10 Vict 16.

43 Ward "Constructing British Authority", above n 28, 487-489.

appointed from the local settler community, questions of the perceived constitutional relationship between the gubernatorial executive and settler-subjects might still arise.[44]

Even before 1840, using jurisdiction as an analytical category to delineate different roles within colonial government was an important tool in metropolitan lobbying about colonial policy, and in colonial debates about the implementation of government policy.[45] In relation to New Zealand, systematic colonisers, missionary groups and others devised jurisdictional schemes to try to convince the Colonial Office of the wisdom and respectability of their respective colonisation proposals.[46] These usually included proposals for colonial legislatures or local municipal councils, and proposals for religious and educational institutions. Debate within British politics over the treatment of indigenous peoples intensified in the wake of wars in southern Africa and associated "humanitarian" lobbying of government.[47] Some lobbyists sought to reflect this heightened interest in indigenous legal rights in their proposals for colonial government.[48]

Such metropolitan theorising served multiple purposes. By developing such schemes, lobbyists promoted themselves as respectable, considered commentators, with policy proposals to hand. This facilitated political lobbying and coalition building.[49] The detail of jurisdictional proposals might

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44 Domett to St Hill (5 July 1849); (23 July 1849) Archives New Zealand, Wellington ("ANZW") NM10/9, 714, 752; *Nelson Examiner* (29 July 1843); Ward "Constructing British Authority", ibid, 487-9. *Otago Witness* (11 October 1851); (18 October 1851).

45 Saxe Bannister *Humane Policy; or, Justice to the Aborigines of new settlements* (London, 1830); Montague Hawtrey "Exceptional laws in favour of the Natives of New Zealand", Appendix A in E G Wakefield *The British Colonization of New Zealand* (John W Parker, London, 1837) [*British Colonization*]; D Coates, Rev John Beecham and Rev William Ellis, evidence to Select Committee on Aborigines (6 June 1836) Great Britain Parliamentary Papers ("GBPP") (1836) vii (538), 481-492, 503-504, 515-517; Lisa Ford, "Empire and Order on the Colonial Frontiers of Georgia and New South Wales" (2006) 30 Itinerario: Geographies of Empire 95-113; Damen Ward "A Means and measure of civilisation. Colonial authorities and indigenous law in Australasia" (2003) 1 History Compass 1-24 ["Means and measure"].

46 S Hinds, evidence to the House of Lords select committee on the present state of the islands of New Zealand (1 May 1838) GBPP (1837-38), xxi (680), minutes of evidence, 125-38; Arthur James Johnes *Legislation applied to infant colonies. A letter addressed to the Association for the British Colonization of New Zealand* (H Hooper, London, 1838); Hawtrey, ibid; Robert Torrens, proposal for a "Provisional Government" in New Zealand, enclosed in Torrens to Stephen (6 October 1838) CO209/3, 297-309. See Ward "Means and measure", ibid.

47 Zoe Laidlaw "Integrating metropolitan, colonial and imperial histories" in T Banivanua Mar and J Evans (eds) *Writing Colonial Histories: Comparative Perspectives* (University of Melbourne Press, Melbourne, 2002) 75-91.

48 See above n 45, 46. Ward *Politics of Jurisdiction*, above introductory note, chapters 3 and 4.

49 John Brown, journal (5 January 1836); (7 January 1836) Mortlock Library, State Library of South Australia, Adelaide, PRG1002/2; Crawford to TF Buxton (7 January 1836) CO13/5, 171; Francis Baring to Viscount Melbourne (21 November 1837) CO209/2, 393-402; Ward *Politics of Jurisdiction*, ibid, ch 3 and 4. See, in relation to property rights, Hickford "Māori Property Rights", above n 1, 138-163.

also indicate other political aims. The relative role of judges, settlers and indigenous peoples in the plans was often related to particular views of the appropriate method and speed of colonisation and assimilation. Historians have noted the importance of such jurisdictional schemes for expositing and debating ideas about indigenous "civilisation".[50] Here, I want to draw attention to another element of the jurisdictional debate; attempting to define the role of the governor and the prerogative relative to other parts of the colonial government and constitution, including judges or magistrates. Early proposals for a South Australian colony sought to devolve the prerogative powers to a local settler council to such an extent that James Stephen called them "republican". Such attempts to constrain the prerogative, or to place it in settler hands, were not simply concerned with the regulation of land grants and sales. One early proposal for South Australia sought the power to appoint and remove judges.[51] The New Zealand Association sought similar powers in its 1838 proposal for a colony.[52] When support for that plan faltered, Robert Torrens instead proposed a complex system of Māori and British magistrates, Māori high sheriffs, British resident commissioners, and Māori "aldermen".[53] Montague Hawtrey proposed using circuit magistrates to administer "exceptional laws" designed to promote assimilation. He wanted to give senior chiefs magisterial powers to encourage their connection to the Crown.[54] By 1838, Edward Gibbon Wakefield, eager to prove his humanitarian credentials, had abandoned his previous scepticism of Māori political organisation and was promoting various institutional mechanisms for gaining Māori co-operation with colonial government and law.[55] Māori property rights, and how they might be purchased or dealt with, were

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50 Ward "Means and measure", above n 45, 1-24; Alan Ward *Show of Justice. Racial 'amalgamation' in nineteenth century New Zealand*, (rev ed, Auckland University Press, Auckland, 1995), 28, 35-39 [*Show of Justice*]; H Roberts "Satisfying the Saints – Colonial entrepreneurs in the 1830s and 1840s and the elasticity of language" in Mar and Evans (eds) *Writing Colonial Histories: Comparative Perspectives*, above n 47, 7-21.

51 Stephen, minute (14 July 1832) CO13/1, 273-274.

52 Samuel Hinds (1 May 1838); F Baring (1 May 1838) evidence to the House of Lords Select Committee on New Zealand, GBPP (1837-38) xxi (680), minutes of evidence, 138, 154-155.

53 Torrens to Stephen (6 October 1839) CO209/3, 297-311, 324-346.

54 Montague Hawtrey *An Earnest Address to New Zealand Colonists* (John W Parker, London, 1840) 130-132; Hawtrey proposed giving Māori chiefs a non-voting role in the legislature as an interim step.

55 In 1836, after the negotiations over establishing a South Australian colony, Wakefield believed Māori lacked the necessary "understanding" to enter into valid land contracts or treaties, and that full-scale colonisation was necessary to protect Māori from the excesses of convict and whalers. By 1838, he was borrowing from a Church Missionary Society proposal for special naval consuls to enforce English law against British subjects already in New Zealand, and arguing that Māori were possessed of "sovereign rights" that could be acquired by written agreement to establish small British colonies. This shift appears more a matter of political pragmatism than philosophical reflection. E G Wakefield, evidence to Select Committee on the Disposal of Lands (22 June 1836) GBPP (1836) xi (512), 108; E G Wakefield, *British Colonization*, above n 45, 54; Ward, *Politics of Jurisdiction*, above introductory note 77-82.

a central focus of many such proposals.[56] Court structures, and the judicial and quasi-administrative functions to be given to judges and magistrates, nonetheless formed an important theme; promoters of colonial expansion sought to make the relationship between prerogative authority, courts and any colonial legislature an item for political contest and negotiation.

Differing approaches to the governor's authority in these debates can be seen as arguments about how British law and government should operate in new colonies, whether "settlement" colonies or otherwise. As noted, despite the lobbyists' enthusiasm, British governments generally sought to avoid colonial legislative encroachments on the colonial prerogative regarding courts, judges and administrative officers in the 1830s. Imperial administrations reformed a number of colonial legal systems across the 1820s and 1830s, seeking to create more formalised and standardised legal structures.[57] Nonetheless, a tradition of favouring broad executive and prerogative discretion, as a perceived political necessity as well as constitutional principle, remained an important strand in debates over colonial government, even after the development of forms of "responsible government" from the 1840s. Underlying such views was a sense that colonies were not constitutional carbon copies of the metropole, but nascent and immature polities often requiring firm government.[58]

Many Crown Colony governors were convinced that a strong gubernatorial executive would be best placed to guide colonial economic and political development. Recalled governors bemoaned a perceived lack of power. George Gawler, Governor of South Australia from October 1838 to May 1841, insisted that a new colony was like "a bateau on the rapids". At such a distance from London, he said, the risk of "sudden expensive changes" in economic and social conditions required "the concession of something near to absolute authority, to the supreme local dictator".[59] In 1846, Robert FitzRoy, by then the former Governor of New Zealand, concluded that "a more efficient executive power" was necessary than that provided by English law. FitzRoy offered the use of martial law in

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56 See Hickford "Māori Property Rights", above n 1.

57 Laidlaw *Colonial Connections,* above n 35, 48-9; Timothy Keegan *Colonial South Africa and the Origins of the Racial Order* (Leicester University Press, London, 1996) 100-111.

58 In the House of Commons in 1848, William Gladstone defended Governor Denison's decision to suspend the Van Dieman's Land Chief Justice by insisting that colonial judges were not always in the same position as English judges; the challenges of governing Crown colonies meant that the executive might regularly have to "interfere" with judges. Gladstone (12 July 1848) cvii GBPD ser 3 col 251-260. See xciv GBPD ser 3, col 250, 256; Howell, above n 13, 265. See also, minutes by Smith and Lord John Russell (c 19 February 1841) CO13/16, 106-7; B J Dalton *War and Politics in New Zealand*, *1885-1870* (Sydney University Press, Sydney, 1967) 88-91; H Merivale *Lectures on colonization and colonies, delivered before the University of Oxford in 1839, 1840 and 1841* (2 ed, Longman, Orme, Brown, Green and Longmans, London, 1861) 496-9, 513-516, 521; George Cornewell Lewis *An Essay of the Government of Dependencies* (John Murray, London, 1841).

59 G Gawler *The Present State of the Moral Principle in the Supreme Government of the British Colonial Empire Described in a Petition which was left for Presentation to Her Majesty on the 3d* [sic] *July, 1850* (G Barclay, London, 1850) 3-4.

seventeenth century Virginia as a model.[60] Both men felt that settlers tended to have unrealistic views of the ease with which colonial prosperity could be secured. They complained that settlers were too quick to fall into factional intrigue, choosing personal aggrandisement over the "public interest". Such views, indirectly, supported a continuing supervisory role for the imperial government.[61] In 1843, Lord Stanley disallowed a New Zealand Ordinance because, among other things, it gave municipal councils the power to erect lighthouses. The control of lighthouses was a prerogative power, and the imperial government baulked at its devolution to local townships. Stanley felt that the gubernatorial executive had a "skill and stability of purpose" for managing colonial development which settlers did not yet have.[62]

C Jurisdiction as a Means of Establishing and Consolidating Gubernatorial Policies

In this context, the use of specially appointed commissioners (rather than magistrates) for local courts in Crown colonies was often a gubernatorial policy choice based on political instinct as much as jurisprudential preference. Governors were sometimes wary of lay magistrates (justices of the peace) claiming a political role in their role as justices, or claiming that their appreciation of local context entitled them to a wide discretion independent of central oversight. A role that tied many of the magistrates' functions to a broader administrative role under the governor's executive authority was often seen as preferable.[63]

Governors and judges were well aware, however, of the practical limitations of their administrations and courts, and the ever-present threat of the distinction between authority and power being exposed in practice.[64] Jurisdictional reforms were partly designed to manage such tensions. Both Gawler and FitzRoy experimented with the structure and jurisdiction of courts, and magistrates' powers, to try to provide more effective local government and civil dispute resolution.

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60 Robert FitzRoy *Remarks on New Zealand: in February 1846* (John W Parker, London, 1846) 60-61.

61 Improved communications and information management allowed British governments to strengthen this role through the 1830s and 1840s; see Laidlaw *Colonial Connections,* above n 35, 31-60, 165-204.

62 Stanley to Hobson (9 January 1843) CO209/14, 414. See also James Taylor "Private Property, Public Interest, and the Role of the State in Nineteenth-Century Britain: the Case of the Lighthouses" (2001) 44 Historical Journal 749-771.

63 Kercher *Unruly Child*, above n 13, 108; Alex Castle *An Australian Legal History* (Law Book Co, Sydney, 1982) 72-89; Domett to St Hill (5 July 1849); (23 July 1849) ANZW NM10/9, 714; 752; Richard Hill *Policing the Colonial Frontier* (Government Printer, Wellington, 1986) 192, 325-327 [*Policing*].

64 Gawler to Secretary of State (15 August 1840) CO13/16, 79-82; [Governor] Grey to McCleverty (20 November 1846) Auckland Public Library ("APL") NZ MSS 227. It was not just the executive that was sensitive to the public performance of authority and power. Bishop Selwyn recorded that when he and Chief Justice Martin visited a district for the first time, Martin would almost "invariably" introduce himself to local Māori by referring to the first Māori executed under colonial law, as "'te Matenga, nana nei a Maketu i whakaae kia mate': the Martin, who condemned Maketu to death [sic]"; Selwyn to FitzRoy, (November 1845), ANZW G 19/1, 132.

Gawler's successor as governor in South Australia, George Grey, also implemented a series of jurisdictional reforms and experiments. These changes were tied to administrative reforms in the executive departments.[65] Such reforms, taken together, can be seen as attempts by governors to establish and consolidate their institutional authority, often as a first step in attempting to deploy greater substantive government authority.

For example, in South Australia from 1841-4, and New Zealand 1845-53, Governor Grey sought to improve the provision of summary proceedings by strengthening the police magistrates system. This served to cut costs, but (through new administrative structures and reporting requirements)it also brought the constabulary more formally under the governor's supervision.[66] In New Zealand, Grey introduced resident magistrates' courts. Resident magistrates were given the same powers as police magistrates.[67] The Resident Magistrates Ordinance allowed decisions on the basis of "equity and good conscience", and made special provision for dealing with Māori inter se and Māori-Pākehā suits.[68]

As noted, the positions of resident and police magistrates were sometimes seen as gubernatorial impositions on a lay magistracy drawn from local civic leadership. The positions were perceived as having implications for the political relationships between "central" government, in the form of the governor, and the local administration of justice by lay magistrates.[69] The unclear relationship between the functions of stipendiary magistrates and the other justices of the peace produced a steady stream of controversies throughout the 1840s.[70] Magistrates' complaints were often influenced by social insecurity and sensitivity, but also were part of political disputes about how the legal system was to be adapted to local circumstances. Benches of magistrates were charged with a range of administrative, judicial and quasi-judicial functions. When seeking to assert their opinions on administrative and legal questions, magistrates might make particular claims about English local

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65 R M Hague *History of the Law in South Australia* (University of Adelaide Barr Smith Press, Adelaide, 2005) 674-92; R Foster "Feasts of the Full Moon: the Distribution of Rations to Aborigines in South Australia: 1836-61" (1989) 13 Aboriginal History, 68-69.

66 Clyne *Colonial Blue. A history of the South Australian police force 1836-1916* (Wakefield Press, Adelaide, 1987) 69-71, 81; Hill *Policing*, above n 63, 192, 249-259, 310, 325-327.

67 Resident Magistrates Courts Ordinance 1846 10 Vict 16, s 28.

68 Resident Magistrates Courts Ordinance 1846 10 Vict 16, ss 13, 25.

69 Letter by "Metoikos" *Southern Cross* (15 August 1851); Domett to St. Hill (5 July 1849); (23 July 1849); ANZW NM10/9, 714; 752; Hill *Policing*, above n 63, 192, 325-327; *Otago Witness* (11 October 1851); (2 July 1853).

70 *Nelson Examiner* (11 July 1846); Erik Olssen *History of Otago* (University of Otago Press, Dunedin, 1987) 40-43; Domett to St Hill (5 July 1849); (23 July 1849) 714; 752 ANZW NM10/9; Hill *Policing*, ibid, 192, 325-327.

magisterial responsibility. Wellington magistrates did so in May 1846 when they demanded a say in issuing orders to the military, and when they distributed weapons to "friendly" Māori.[71]

Varying attitudes towards the appropriate relationship between administrative and judicial or magisterial elements of government encouraged rhetoric about courts and their constitutional role. This rhetoric about courts was a means of disputing underlying issues about the nature of gubernatorial authority and settler influence on it. The 1848 Court of Requests controversy is a useful example of how such rhetoric might be generated. The controversy shows both the tradition of extensive executive discretion discussed above, and the sympathy judges might have for such views.

III THE COURT OF REQUESTS CONTROVERSY: THE GOVERNOR AND THE COURTS IN 1848

A Court of Requests Ordinance was first passed in 1841, with further statutes in 1842 and 1844. By 1844 the court's jurisdiction was limited to claims "for the recovery of small debts", with jurisdiction over all claims worth less than twenty pounds where one party resided within the court district. As with many colonial statutes, the system depended on the Governor-in-Council proclaiming the jurisdictional districts.[72] Importantly for the 1848 controversy, the Ordinance stipulated that the court would sit on particular days. Auckland's *Southern Cross* newspaper praised the court as "the people's Court".[73] The paper saw the court as a localised forum, focussed on facilitating commerce, and designed to be free from domination by professional advocates.[74] This perception may have reflected English practice. Most principal English cities had a court of requests, or a similar "court of conscience". Many had been created by statute following a petition from local inhabitants.[75] In Crown colony communities settler demands for local courts were often bound up with assertions of the respectability of settlers and the civic and commercial potential of

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71 Ian Wards *The Shadow of the Land. A Study of British Policy and racial Conflict in New Zealand, 1832-52* (Government Printer, Wellington, 1968) 271-273; *Nelson Examiner* (11 July 1846).

72 Courts of Requests Ordinance 1844 7 Vict 8, preamble, ss 2-3.

73 *Southern Cross* (23 November 1844). On the paper's support for settler self-government and its association with the Auckland "Senate" see Russell Stone "Auckland's Political Opposition in the Crown Colony Period 1841-53" in Len Richardson and W. David McIntyre (eds) *Provincial Perspectives. Essays in Honour of W J Gardner* (Canterbury University Press, Christchurch, 1980) 15-35.

74 *Southern Cross* (23 November 1844).

75 H W Arthurs *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, Toronto, 1985) 13-15, 25-26. The 1846 County Court reforms in England were, in some part, designed to address the proliferation of local jurisdictions. The Resident Magistrates Ordinance 1846 provided for an express "equity and good conscience" jurisdiction, unlike the Court of Requests Ordinance 1844. Governor Grey emphasised this when justifying the abolition of the Court of Requests to the Colonial Office: Grey to Earl Grey (23 March 1848) CO209/59, 430.

particular townships. Establishing Courts of Requests was seen by some as acknowledgements of such claims.[76]

In January 1848, shortly before leaving on a trip to the "Cook Strait settlements", Governor Grey told his officials that he did not want the Auckland Court of Requests to accept any further cases. Litigants were to be directed to the Resident Magistrates Court. Several days later the Colonial Secretary issued a written notice announcing the court's closure. The *Southern Cross* concluded that Grey had personally ordered the "shutting up" of the court, and condemned the governor's conduct as unconstitutional.[77] The closure was challenged in the Auckland Supreme Court in February 1848. David and Robert Graham, two prominent Auckland merchants, sued in the Court of Requests to recover a debt. When the clerk of the court, Mr Tye, refused to issue a summons to the debtor, they applied in the Supreme Court for mandamus to compel Tye to issue the summons. The case was, from the outset, a political test case; the Grahams refused to accept payment of the debt from their customer when it was offered. They insisted that the case be tested in court.[78]

Appearing before Martin CJ, the applicants stressed the "unjustified, unconstitutional, and illegal" nature of Grey's command. They argued the governor had no power to suspend an Ordinance, just as the Queen could not suspend an Act of Parliament.[79] Martin, however, refused to be drawn into a debate on the scope of the governor's power, pointing out there was no evidence before the Court that Grey had ordered the suspension. Instead, Martin queried whether mandamus could issue against Tye in his "ministerial" function as a court official. Martin suggested that ensuring Tye did his duty was the task of the Commissioner, and the Court of Queen's Bench in England would not interfere in how an inferior court judge supervised their own officials for fear of "usurping" the role of that judge. (Tye had given evidence that the Commissioner had told him not to issue any more summons). Graham's counsel, Thomas Houghton Bartley, argued that the Supreme Court could issue mandamus consistent with English practice because Tye was appointed by the governor rather than the judge, and therefore held an independent position that the court

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76 *New Zealander* (9 February 1848); *Southern Cross* (18 May 1844); (7 August 1847); (3 September 1847).

77 *Southern Cross* (12 February 1848); William Tye (5 January 1848) Journal, ATL MS 2191.

78 *New Zealander* (9 February 1848). Robert Graham was later superintendent of Auckland Province (1862-65), a Member of the Provincial Council (1855-57, 1865-69), and a Member of the House of Representatives (Southern Division, Auckland 1855-67, Franklin, 1865-69). He was a prominent (and at times controversial) figure in the promotion of tourism and the purchase of Māori land in the Rotorua and Taupo districts. Douglas Graham "Graham, Robert" in W H Oliver (ed) *Dictionary of New Zealand Biography (Volume One, 1769-1869)* (Allen & Unwin, Wellington, 1990).

79 *New Zealander* (9 February 1848).

could supervise.[80] There was no Crown appearance, and no suggestion that English precedents were not relevant to the colonial setting.

Bartley's arguments were unsuccessful. In his judgment, Martin insisted that the only question was whether he had jurisdiction to grant mandamus in this situation; whether Tye ought to have issued the summons was a subsequent issue "with which we have nothing to do". Martin decided that Tye had been acting in a ministerial capacity, and that it was not the practice of the Queen's Bench in England to direct a writ to any ministerial officer of an inferior court, for fear of infringing that court's authority over its officers. He cited English authority that mandamus did not extend to the court issuing a writ simply "wherever any officer has neglected his duty".[81]

Martin went on to note that the Commissioner had "ceased to act", and that the Colonial Secretary's notice "very distinctly" implied that no new commissioner would be appointed. Any writ would be worthless because the court was "no longer in operation". In closing, Martin said that if the "modes of proceeding which now remain [the Resident Magistrates Court], are found less convenient than the Court of Requests", the remedy must be sought in the political sphere. Martin said he could not compel the appointment of a new commissioner. The Court could not "directly or indirectly, assume to itself a function which belongs to the Government of the country."[82]

In April 1848, Chapman J heard a challenge to the closure of the Court of Requests in Nelson, *White v Richmond*.[83] The closure of the Court of Requests had been announced in the Wellington *Government Gazette* on 17 February 1848. It appears that the local Commissioner's post was already vacant, and no new Commissioner was to be appointed.[84] White challenged the authority of the Resident Magistrate (Richmond) to issue a summons for a debt action that was within the Court of Requests' jurisdiction. Resident Magistrates had no jurisdiction if there was a Court of Requests

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80 *New Zealander* (9 February 1848); (12 February 1848). *Southern Cross* (12 February 1848). The main text relied on by bench and bar appears to have been Matthew Bacon *A New Abridgement of the Law* (7 ed, A Strahan, London, 1832) v, 270-280 (and the cases discussed in that section). Bartley also argued that Tye's position was analogous to an officer of a corporation, to whom mandamus could issue. On ministerial functions, see also Joseph Chitty *A Treatise on the Law of the Prerogatives of the Crown* (J Butterworth and Son, London, 1820) 75-78.

81 *New Zealander* (19 February 1848) citing *King v Jeyes* 3 Ad & Ell 416; 111 ER 47.

82 *New Zealander* (19 February 1848). "It is the right and the duty of this Court to superintend all other Courts of Law, so long as they are in operation: but it cannot go further."

83 *White v Richmond* (7 April 1848) in "Collection No 1", above n 26; *Nelson Examiner* (18 April 1848). White sought mandamus and a rule nisi to call Richmond to show why White should not have a writ quo warranto. Chapman noted that such a process was a "modern" method of quo warranto. He did not raise any concerns about the use of such a writ in a colony, unlike the New South Wales court in *Ex Parte Gaunson* (1846) 1 Legge 348. White represented himself. Chapman "dissented" from the proposition that quo warranto and mandamus were "the right of the meanest subject", "Collection No 1", ibid, 42.

84 *Nelson Examiner* (22 January 1848); (18 March 1848); (15 April 1848).

within ten miles of the defendant's residence. White argued that the Court of Requests was still legally in operation and therefore the Resident Magistrate lacked jurisdiction. White quoted Bartley's submissions in *Graham's* case, and attacked Martin's decision. Like his colleague in Auckland, Chapman J showed little sympathy for a constitutionalist argument, and a strong preference for stare decisis.[85] Chapman refused White's application for several reasons, including that White did not have standing to bring the case.[86]

A **Graham** *and* **White** *as Examples of Judicial Approaches to Gubernatorial Power*

These cases cast important light on approaches to prerogative writs and gubernatorial power. The disposition of each case reflected the judges' focus on the particular legal disputes at hand; the common law often provided only an indirect means of dealing with constitutional points.[87] However, my focus here is not on the detail of the reasoning on ministerial functions in *Graham*, or the scope of the writs sought in *White.* Rather, it is worth noting that the decisions appear to have been influenced by underlying views on the role of the governor in a Crown Colony constitution.[88]

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85 *Nelson Examiner* (15 April 1848). When faced with an appeal to the court to protect the constitutional liberties of "the meanest subject" from the "absolute fiat of one individual", Chapman "asked the learned counsel [White] if he could refer to any *precedents* in support of his application, and when he replied that he thought he could cite some cases analogous, he was stopped and asked it he had any directly on point. Mr White then observed, that he did not come there to search for precedents, but if needs must, to create one". *White v Richmond*, ibid, 41-43. White's subsequent submissions attacking the doctrine of precedent did not move the judge.

86 Chapman appears to have focused on the quo warranto proceeding. White had not shown that he would be personally "aggrieved" by the Resident Magistrate exercising the claimed jurisdiction, and so had no standing to make the application. Further, Chapman suggested, where the complaint was against a particular decision of the magistrate, quo warranto was the wrong action. *White v Richmond*, above n 84, 42-43. Chapman stressed that, in his view, the Court of Queen's Bench would not grant the claimed relief in such circumstances.

87 McHugh *Aboriginal Societies*, above n 8, 32-37; Ward "Constructing British Authority", above n 28, 486-488; Hickford "Three Forgotten Cases", above n 1, 4.

88 H S Chapman to H Chapman (20 May 1848) ATL qMS-0419; McHugh *Aboriginal Societies,* above n 8, 41. Martin and Chapman's reasoning in the land grant cases of 1847-9 suggests a willingness to reach decisions based on their own assessment of the facts and law, rather than considering the immediate concerns of the government. See also, Hickford "Three Forgotten Cases", ibid. Martin's approach in *Graham* is not necessarily contrary to the judge's pamphlet *England and the New Zealanders* (Bishops' Press, Auckland, 1847). There, Martin attacked Earl Grey's proposed Māori land policy. The Chief Justice treated the Treaty of Waitangi as expressing the Crown's obligations under jus gentium and common law. In 1848, such obligations, which Martin considered of great weight, appeared beyond the scope of any English cause of action (cf an issue raised indirectly, as in *Symonds*, or through statute, as in *Snowdon v Baker* (20 January 1844) in H S Chapman (ed) "Collection No 2: Reports of Cases in the Supreme Court of New Zealand at Auckland", Hocken Library, University of Otago, Chapman pamphlets v 104/1-3, discussed below). That such Crown obligations were not directly actionable may have made their perceived breach by the Crown seem even more objectionable to Martin. Martin had begun writing *England and the New Zealanders* in November 1847, before he heard *Graham* (Guy Lennard *Sir William Martin* (Whitcombe and Tombs,

Graham and *White* help highlight such views in early New Zealand jurisprudence. They suggest a need to consider Martin and Chapman's jurisprudence in a broader legal context than may have dominated in the past.

Chapman and Martin are primarily remembered in New Zealand legal history for their treatment of Māori native title in *R v Symonds*.[89] The decision in *Symonds* upheld a Crown grant as better title to land than a purchase directly from Māori (without a grant) under a pre-emption waiver certificate. The reasoning turned on the scope of the governor's prerogative authority to grant title to land, the extent to which that prerogative authority was constrained by statutory frameworks, and the technicalities required for its valid exercise. Martin's reasoning in *Graham* was consistent with his sympathy for extensive gubernatorial power and authority in *Symonds*. In *Symonds*, Martin defended Crown pre-emption as a means of ensuring that the "Supreme Authority" of the colony was free to pursue policies in the public interest. This, he said, was recognition of the difficulties of founding a new colony. The decisions of the governor about how best to develop the colony were, generally, beyond the Court's purview.[90] Similarly, subsequent land law decisions by Martin and Chapman after *Symonds* were premised on colonial common law allowing the governor extensive prerogative authority, which only clear statutory language could limit.[91] This attention to statutory demarcations of the colonial law had been signalled in Chapman's first sitting in Wellington, when he refused to receive unsworn evidence from Māori, contrary to local practice. The common law

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Christchurch, 1961) 66-67). It had been privately distributed within New Zealand by October 1848 (Claudia Orange *Treaty of Waitangi* (Allen and Unwin, Wellington, 1987) 283).

89 See the discussion in Hickford "Three Forgotten Cases", ibid, 2-3; Hickford, "Māori Property Rights", above n 1, 148-150, 160-168

90 *Symonds*, above n 37, 395-396 Martin CJ; the pre-emption rule "does not forbid a careful and equitable regard to the circumstances of particular cases (as in the instance of the original land claims) but it reserves the entire discretion to the Sovereign Power. … In general, it asserts nothing as to the course which shall be taken for the guidance of colonization, but only that there shall be one guiding power."

91 Hickford "Three Forgotten Cases", above n 1, 2-4, 18-20, 25-30. In *Symonds* questions of customary title were discussed as part of deciding which of the settlers had a better title to land; see the discussion of *Symonds* by Chapman J in *R v McDonald* (20 January 1849) "Collection No 1", above n 26, 61 (priority was given to a grant under the Colonial Seal over the "promise" of a grant in a pre-emption waiver; no interest in land can pass from the Crown to a subject except under the Colonial Seal); *New Zealand Spectator* (3 February 1849). Compare the impact of statutory language in *Snowdon v Baker* (20 January 1844) "Collection No 2", above n 88; Martin (with whom Chapman agreed) found that the language of the Land Claims Ordinance 1840 4 Vict 2 allowed a suit for payment for a land sale (in May 1840) between settlers where the vendor had his title directly from Māori (with no Crown grant), even though the Ordinance made any interest conveyed "void", and any later recognition contingent on the land claims commissioner's inquiry. All that was conveyed was the contingent opportunity to receive a land interest through the land claims process: *Southern Cross* (16 September 1843).

required the witness to be sworn, Chapman said, and a deviation from the common law required statutory authorisation.[92]

B Political Reactions to Graham*: Perceptions of "Despotism" and the Management of Government*

The Auckland press saw *Graham* as threatening the supposedly distinctive constitutional liberties of British subjects; the decision was seen as leaving settlers subject to the governor's whim. The *New Zealander* newspaper complained of Martin's "timidity". It felt that the decision lacked "that free and decisive tone which an English Judge is not only privileged, but required by his very position, to adopt".[93] The *Southern Cross,* usually the editorial opponent of the *New Zealander,* was more forthright, complaining that the Supreme Court had declared that Governor Grey was above the law, able to suspend laws in disregard of the Bill of Rights 1688.[94] Both newspapers expressed alarm at Martin's comments that a writ would be of no value because the Commissioner had "ceased to act". There was, they said, no direct confirmation of this in the evidence. The editorial writers of both papers speculated that the judge may have taken notice of information not before the Court, possibly from Grey himself. As a result, the *New Zealander* warned, the dignity and independence of the court was called into question.[95]

It is important to note that the *Southern Cross* also framed its criticism around the "despotism" allegedly allowed by the Resident Magistrates Court Ordinance. Resident magistrates did not need to be lawyers and, the paper noted with concern, military officers might hold the post.[96] Resident

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92 "Collection No 1", above n 26; *New Zealand Gazette and Wellington Spectator* (1 May 1844) (The case is not named in the report – Chapman's comments related to evidence to a grand jury in a case where all the witnesses and the accused were Māori). Chapman said the common law allowed non-Christian Māori to give evidence if the witness was sworn according to appropriate Māori custom, but that the local County Court practice of simply allowing unsworn evidence, "however desirable", had no legal basis. He said he could "not break in upon the law". He pointed to the recent imperial statute allowing colonial legislation on this point (Colonial Evidence Act 1843 (Imp) 6 Vict, c 22). The local legislature later passed the Unsworn Testimony Ordinance 1844 7 Vict 16. See also R Smandych "Contemplating the testimony of 'others': James Stephen, the Colonial Office, and the fate of the Australian Aboriginal Evidence Acts, circa 1839-1849" (2006) 10 AJLH 97-143. See also Martin CJ, address to the grand jury (4 March 1844) "Collection No 2", above n 88, [i]: "… we may not depart or swerve from the rule of English law; we must be content to grow up to it."

93 *New Zealander* (23 February 1848).

94 *Southern Cross* (15 January 1848). The paper said Grey's conduct breached the Treaty of Waitangi because it denied Māori the benefit of English law based courts in which to resolve disputes.

95 *New Zealander* (23 February 1848) (including an analysis of case law on mandamus, suggesting what the paper said were sounder legal grounds for treating Tye as a ministerial officer, but objecting entirely to the reasoning in the second half of the judgment); *Southern Cross* (19 February 1848).

96 The absence of lawyers from small claims courts had previously been praised by the *Southern Cross*. In attacking the governor, professional legal training was now presented as a buffer against bias or improper influence.

Magistrates sat without juries, and their decisions were not subject to appeal. Such a court was contrasted with the judge and jury process of the Supreme Court and the supposedly responsive and independent Requests Commissioner. Here, too, the political implications of jurisdiction and court structure were highlighted. Grey was presented as favouring a system that gave him and his nominees considerable power, insulated from any system of British jurors, and the supposedly greater independence of superior court judges. Those concerns reflected broader debates over the status of magistrates and juries mentioned above.[97]

Graham's case reinforced attitudes among many politically active settlers about the "despotism" permitted in the absence of representative institutions.[98] The response of a group of leading Auckland settlers was to appeal to London decision-makers.[99] However, the Colonial Office seems to have seen little reason for concern about the Court of Requests issue. Unlike the Auckland colonists, officials did not see the affair as raising issues of constitutional authority that required political intervention from London. This view was perhaps helped by the colonists' decision to hurriedly send a memorial with a handful of signatures rather than gather more support. Grey was careful to stress that the memorial was signed by only a few settlers; he said that the body of Auckland opinion was unconcerned by the closure of the court.[100]

From distant London, what was perceived largely as gubernatorial impatience did not generate issues of sufficient scale or consequence to require Colonial Office intervention, even in the face of settlers' appeals to constitutional principle. In the absence of metropolitan or imperial political imperatives, local responses were judged to be the best means of addressing any issues about the small claims courts. Stephen's successor as departmental under-secretary, Herbert Merivale, noted that the Governor had exceeded his power, but that by the time any answer reached him "his"

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97 *Southern Cross* (7 August 1847); (5 February 1848); (19 February 1848); *Otago Witness* (10 January 1852).

98 *Southern Cross* (19 February 1848); (11 September 1848); (15 August 1851); *Nelson Examiner* (11 January 1851).

99 Memorial of the Inhabitants of Auckland (9 March 1848) CO 209/59, 444. Many of signatories were members of the Auckland "Senate" grouping. See, Stone, above n 73, 25-35.

100 Grey to Earl Grey (23 March 1848) CO209/59, 430. The governor insisted that he had simply intended the Resident Magistrates Ordinance to replace the Court of Requests, and had made this policy clear to his officials. (As noted, the Resident Magistrates Ordinance's intra-settler civil jurisdiction only arose where the defendant was more than ten miles from a Court of Requests. This suggests the two jurisdictions were intended to co-exist). Grey also insisted that the Court of Requests practice led to unfair results that would not be acceptable in other colonies. He contrasted the imprisonment of debtors under the Court of Requests jurisdiction with the more explict "equity and good conscience" jurisdiction of the resident magistrates court. On the particular debt case that appears to have concerned Grey see *New Zealander* (11 March 1848); (15 March 1848); C Patridge *Calumny Refuted, the Colonists Vindicated [...] or a Brief Review of Mis-government in New Zealand. The Causes of the Native Rebellion* (Creighton and Scales, Auckland, 1864) 33-34.

legislative council "will probably have repaired the error".[101] The Colonial Office staff accepted the governor's analysis of the preferable civil court structure. The settlers' constitutionalist arguments did little to counter such administrative reasoning. The Colonial Secretary told Grey he had exceeded his powers, but accepted that the governor had acted out of concern for the public good.[102]

IV SHAPING NEW CONSTITUTIONAL PRACTICES UNDER THE CONSTITUTION ACT 1852

This section highlights the multi-faceted nature of settler politics in the early years of representative and responsible government. It shows how jurisdiction remained an issue that could be used to contest the power and authority of governors within the new institutions and the subtle shifts in notions of jurisdiction and law that occurred after 1852. The interaction of jurisdictional issues with racial attitudes in settler politics is also touched on.

I have argued above that the construction of lower courts, like the Court of Requests or Resident Magistrates Court, could have considerable constitutional significance because lower courts might raise particular issues about the distribution of authority within and between government institutions. The Court of Requests controversy became one point of reference in arguments about whether settlers' claims to a representative legislature, and the form government involving such a legislature might take.[103] The eventual introduction of such a legislature under the Constitution Act 1852 provided settlers with new forums for debating the distribution of constitutional authority, and for arguing about who was best qualified to exercise such authority.[104]

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101 Merivale, minute (23 September 1848) CO209/59, 440.

102 Earl Grey to Governor Grey (26 October 1848) GBPP (1848) xxxv [1120], 106; B Hawes, H Merivale, minutes (c 23 September 1848) CO209/59, 440-2. Earl Grey told Grey he trusted that the legislature would act to ensure that no "practical inconvenience has been experienced". Grey had insisted that the Resident Magistrates Ordinance had been enacted to remedy defects in the Court of Requests jurisdiction and that he was "at a loss" to understand the memorial by Auckland businessmen complaining of his conduct. Governor Grey to Earl Grey (23 March 1848) GBPP (1848) xxxv [1120], 12; *Southern Cross* (15 August 1851).

103 In the 1850s the prominent Wellington settler William Fox cited the Court of Requests controversy as an important example of the "despotism" tolerated in a non-representative constitution. The necessary response, Fox insisted, was a grant of self-government for the colony. W Fox "Minute on the government of New Zealand" enclosed in W Fox to F Peel (24 January 1852) GBPP (1852) 179, 5; *Southern Cross* (11 September 1849); (15 August 1851); (8 May 1855). See the debate in the Legislative Council in August 1849: *New Zealander* (28 August 1849). Governor Grey promised "to bring the Court of Requests Ordinance into operation again, if the public would signify that they preferred the operation of that Court". The Attorney-General later acknowledged that the Ordinance was still in force: *New Zealand Spectator* (9 June 1849).

104 *Southern Cross* (19 February 1848); (27 January 1849); J M Ward *Colonial Self-Government: the British Experience, 1759-1856* (Macmillan Press, London, 1976) 290-329; D Monro to E Stafford (20 October 1857) ATL MS-Papers-0028 ("The great question of all others … are we to take American or British Institutions as our model"); Sinclair, above n 11, 85-102; Herron "Circumstances and effects" above n 4, 28-44; Cheyne, above n 30, 146-291.

In arguing about how new representative institutions might operate, the particular significance of "native policy" in questions about the relationships of parts of government could be interpreted in the colony, and in London, as something that made New Zealand distinctive from other British colonies.[105] However, the debate about the governor's authority in relation to the ministry or the legislature, and how this affected the relationship between those branches and judicial institutions, provided an underlying political tension for a number of native policy disputes within settler politics.[106]

This section considers how particular local imperatives – "native policy" – interacted with the debates about the gubernatorial role, in shaping notions of Crown authority. I use an element of judicial or magisterial roles that was raised in the Court of Requests controversy, the jurisdiction of resident magistrates, as an example, in the context of the 1858 Native Districts Regulations Act. Resident Magistrates' jurisdiction had the potential to be an issue of constitutional authority, particularly when raised in relation to Māori.[107]

In New Zealand, Governor Gore-Browne insisted on keeping Māori affairs outside the responsibilities of the ministry established under the new constitutional arrangements. This was part of an older vision of independent gubernatorial authority in relation to Māori, reworked for a new institutional environment.[108] Initially, at least, several prominent settler politicians, such as C W Richmond and Henry Sewell, also feared that provincial rivalry and fragile ministries would

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105 Herbert Merivale thought the particular geographic and political imperatives to consider constitutional provisions for Māori rights made New Zealand unique in the empire; Henry Sewell recorded Gore-Browne's frustration at being unable to identify a colony that he thought could provide a policy model for New Zealand; Sewell, Journal (21 May 1860) ATL qMS-1786; Merivale to Hawes, (12 July 1849) CO209/63, 388-389.

106 In New Zealand, the form of recognition of Māori property rights and the regulation of the market for Māori land was often such an issue of constitutional authority. However, arguments over gubernatorial and prerogative power were a theme of Australasian politics generally at this time, and were not exclusively generated by aboriginal property rights. See, for instance, *Advocate-General v Paxton* (28 July 1848) in Robe to Earl Grey (31 July 1848) CO13/59, 462-473, 501; Hague, above n 65, 168-171 (prerogative rights to minerals in South Australia). In New South Wales, the first responsible ministry fell, in part, as a result of controversy over the role of judges in the Legislative Council: J M Bennett *Colonial Law Lords. The Judiciary and the Beginning of Responsible Government in New South Wales* (Federation Press, Sydney, 2006) 4-13.

107 The Resident Magistrates Act 1858 confirmed that Resident Magistrates were to be appointed by the Governor only, and deemed any resident magistrates appointed by superintendents to have been centrally appointed.

108 Gore-Browne to Merivale (15 October 1856) ATL Micro 207; Minute (15 April 1856) AJHR 1856 A-12; Minute (28 August 1856) GBPP (1869) xl [2719] 362-363; Gore-Browne to Ball (26 August 1857) ATL Micro 207; Gore-Browne to Sewell (13 June 1859) ATL Micro 207; Gore-Browne to Sir George Grey (12 March 1856) ANZW G25/6, 259.

inhibit effective policy-making.[109] With the establishment of a responsible ministry, the governor kept some independent advisors, but the ministers drawn from the General Assembly advocated their own policy. The ministry and the governor were distinct substantive parts of the executive, each with their own sphere of discretionary decision-making. Those spheres were not clearly defined by the Constitution Act: they were defined, sometimes ambiguously, through political practice and compromise. As has been well traversed by Keith Sinclair and others, the system led to what Henry Sewell called "back-stairs double government".[110] The new constitution also had a system of six provincial governments, with directly elected "superintendents" at the head of the provincial executive. Provincial assemblies and the General Assembly had concurrent legislative capacity on some issues. Grey's delay in calling the General Assembly together led to provincial governments taking primary charge of a range of government functions. This posed political difficulties for politicians who favoured effective "general" or national government, particularly since provincial superintendents could serve as Members of Parliament. Though the General Assembly had an unfettered plenary legislative power, some "provincialist" politicians insisted the system was "federal".[111] "Provincialist" or "centralist" positions were often adopted according to the particular issue or broader political coalitions involved in debates, rather than being distinct political ideologies. Nonetheless, the range of constitutional interpretations and disputes generated by this structure is worth noting; even allowing for, arguably, a narrower field of settler political discourse than other settlement colonies, here was a constitution whose practice, politics and law were open to debate and public contest.[112]

The nature of "responsible government" was, therefore, defined over time.[113] With Gore-Browne reluctant to over-use his ability to withhold royal assent, the Assembly chipped away at the

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109 Sewell, Journal (5 April 1859); (8 April 1859) ATL qMS-1786; C W Richmond to R Pheney (18 May 1856); C W Richmond to J C Richmond (1 June 1856) in Guy Scholefield (ed) *The Richmond-Atkinson Papers* (Government Printer, Wellington, 1960) i, 222, 226-227 [*RAP*].

110 Sewell, Journal (5 April 1859) ATL qMS-1786; Sinclair, above n 11, 89-94. Dalton, above n 58, 21-92, 143.

111 Morrell *Provincial System*, above n 4, 65-69; C W Richmond to J C Richmond (1 June 1856) in *RAP*, above n 109, i, 226-227. Legislation by the General Assembly prevailed over provincial Ordinances.

112 C W Richmond to R Pheney (10 May 1856) in *RAP*, ibid, i, 219; (18 May 1856) 220; C W Richmond to J C Richmond (1 June 1856) 226; Morrell *Provincial System*, ibid, 59-90, 99-121; Russell Stone, "Auckland Party Politics in the Early Years of the Provincial System, 1853-58" (1980) 14 New Zealand Journal of History 153-178. For a critique of the scope of settler politics, see Francis *Governors and Settlers*, above n 8, 3-20. On the various forms of responsible government in the provinces, see Morrell *Provincial System*, ibid, 287.

113 Though they sought to use their new institutions to their advantage, many leading colonists still saw the imperial tie represented by the Governor as highly significant. William Fox *The Six Colonies of New Zealand* (John W Parker, London, 1851) 158 [*Six Colonies*]; C W Richmond to R Pheney (10 May 1856) in *RAP*, above n 109, i 9; (18 May 1856) 220; Sewell, Journal (5 April 1858) ATL qMS-1786.

Governor's authority by passing laws requiring him to act only with the advice and consent of the Executive Council, and proved reluctant to grant funds to the governor alone.[114] Gore-Browne was eventually forced to agree to let ministers see all official correspondence, though he maintained the right to depart from advice on Māori issues.[115]

These broader politics affected debate about the design and jurisdiction of courts to hear Māori disputes. Gore-Browne convened a "Board of Native Affairs" in 1856 to consider policy options. The Board's inquiry highlighted a range of Pākehā views over how best to structure Māori-Pākehā and intra-Māori civil affairs, and advocated some form of the resident magistrates system as a primary legal and administrative institution.[116] Francis Fenton's well-known resident magistrate's circuit in the Waikato in 1857-8 also placed the office of magistrate at the centre of attempts to establish colonial institutions in Māori communities.[117] As with many of the earlier jurisdictional proposals, many Pākehā politicians who favoured such steps were attempting to respond to Māori engagement and agency in law-making and local government. As noted, jurisdictional debates had particular resonances in settler politics, and partly reflected particular settler traditions and pre-occupations that structured the way the issues were considered. While this essay has focused on under-appreciated elements of Pākehā debates, it must be acknowledged that jurisdictional debates about Māori were by no means purely intra-settler affairs.[118]

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114 Sinclair, above n 11, 89-90.

115 Gore-Browne may have intended to restrict encroachments on his authority, but, in practice, he was forced to concede significant ground to the ministry. Gore-Browne to Ball (28 August 1857) ATL Micro MS 207; C W Richmond to T Richmond (8 December 1856) in *RAP*, above n 109, i, 246; Sewell, Journal (25 March 1859); (5 April 1859) ATL qMS-1786; Ward *Show of Justice*, above n 50, 105-113, 115-118; Sinclair, above n 11, 90-95. Compare Francis *Governors and Settlers*, above n 8, 232.

116 GBPP 1860 xl [2719], 235-336. The original circulars and reports are in ANZW G51/4. Donald McLean argued for a form of the system that more overtly combined magisterial and political functions, suggesting that "political agents" with magistrates' powers be used in inland Māori areas; McLean, memorandum (5 June 1856) G51/4; GBPP 1860 [2719] xl, 393. See also Donald Loveridge "The Origins of the Native Land Acts and the Native Land Court" (evidence to the Waitangi Tribunal, Hauraki District Inquiry, doc #P1) 46-55 ["Origins"].

117 See the select committee inquiry and evidence in AJHR 1860 F-3, F-4. Fenton's journal is in AJHR 1860 E-1C. I am grateful to Dr Don Loveridge for discussing Fenton's circuit, and its settler political context, with me.

118 Considerable debate about the appropriate institutions or authorities to marshal and express political authority was underway in Māori communities. Orange, above n 88, 141-146; Evelyn Stokes *Wiremu Tamihana*: *Rangatira* (Huia, Wellington, 2002); Lyndsay Head "Wiremu Tamihana and the mana of Christianity" in John Stenhouse (ed) *Christianity, Modernity and Culture: New Perspectives on New Zealand History* (ATF Press, Adelaide, 2005).

A Māori Policy and Competing Attempts to Establish Constitutional Practice

In 1858 the Stafford ministry sought to give a new legislative structure to magisterial operations in predominately Māori areas. As part of a package of native policy Bills, the ministry proposed a statute allowing the creation of "native districts". The Governor-in-Council would be able to approve bylaws for those districts on specified issues. The Bill provided that these regulations were to be made "as far as possible" with the "general assent" of local Māori, to be ascertained "in such manner as the Governor may deem fitting".[119] Local bylaws would prevail over General Assembly and Provincial laws. Customary tenure and Māori jurisdiction were linked – native districts regulations would apply only in areas where native title predominated.[120] Although there is no mention of rūnanga (Māori councils) in what became the Native Districts Regulation Act, it seems to have been presumed that rūnanga would form the basis of the system.[121] The ministry hoped the system would facilitate local laws governing land use and land sale, but the scheme's scope was much broader than that. It complemented a Bill to create Native Circuit Courts in Māori districts, giving Resident Magistrates and Māori assessors wide criminal and civil jurisdiction. Taken together, the proposals anticipated resident magistrates acting as local advisors to rūnanga as well as adjudicators of particular disputes.[122] This was consistent with a view that such local institutions, centred on engagement with magistrates and involving participation in court proceedings as jurors and litigants, were an appropriate "transitional" step in the process of "civilising" Māori political

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119 Native Districts Regulations Act 1858, ss 2-3.

120 The legislation was intended to apply only to areas where Māori customary title was unextinguished. The often porous nature of "native districts" presented a challenge to this aim. To achieve the desired legal dichotomy between customary and Crown tenure, land within a district that had been granted by the Crown to Māori, or granted for religious, educational or charitable purposes, was treated for the purposes of the Act as unextinguished native title (so that such land could be included within jurisdictional native districts). Land "specially granted [by the Crown] as homesteads" to Europeans "domiciled in Native districts" was also deemed to be unextinguished native title for jurisdictional purposes. Such a deeming provision was included in the Native Circuit Courts Act (s 4) and Native Districts Regulations Act (s 10).

121 C W Richmond (18 May 1858) [1856-58] NZPD 446-448.

122 In parts, the proposal envisioned Māori rūnanga exercising powers akin to English grand juries' power of presentments on issues of local concern, with the resident magistrate then assisting with the drafting of by-laws to address the concerns identified by the rūnanga.

practice.[123] A common theme of the 1850s legislative debates was that Māori society's "transition" from a state of "savagery" to being "civilised" required magisterial supervision.[124]

In 1848 the Colonial Office had accepted Governor Grey's advice that the Resident Magistrates Ordinance provided a better policy for promoting assimilation and providing access to courts than declaring "native districts" under particular provisions in the 1846 Charter. The royal instructions accompanying the Charter were amended as a result.[125] By 1858, a handful of resident magistrates had been operating in Māori areas under the Resident Magistrates Court Ordinance, with mixed results.[126] The Colonial Treasurer, C W Richmond, acknowledged that the legislative proposals were a reaction to Māori demands.[127] The growth of Māori rūnanga was seen as offering a new opportunity for magistrates' jurisdiction.[128]

The 1858 legislative debates about jurisdiction over Māori repeatedly returned to how the structure of that jurisdiction might affect the relative powers of branches of the colonial government.[129] Racial ideas were an abiding presence in 1850s political debate, but purely by itself "race" does not explain the different views of various Pākehā politicians on the 1858 proposals. Rather, the debates over the relationship between gubernatorial power, inferior courts and the legislature (which the Court of Requests affair had highlighted) intertwined with debates about race, assimilation and Māori political organisation.

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123 (18 May 1858) [1856-58] NZPD 445-6; C W Richmond (15 August 1860) [1858-60] NZPD 307-9. See also the evidence given the Board of Inquiry.

124 The rhetorical importance placed on the unpaid magistracy as a reflection of settler respectability and liberty remained, even as resident magistrates became a central part of government policy. In 1860, for instance, Edward Stafford justified the government's reluctance to pay for more stipendiary magistrates by saying that doing so would be "a prominent step towards the un-Anglo-Saxonizing [sic] of the colony". E Stafford (31 August 1860) [1858-60] NZPD 424.

125 Earl Grey to Governor Grey (7 July 1848) GBPP (1847-8) [1002], 175. Earl Grey felt the system might have given a greater role for chiefs, but deferred to the judgment of the local governor.

126 Ward *Show of Justice*, above n 50, 69-103, 108-113.

127 Richmond considered that Māori "resembled" Europeans in that they wanted a large say in the local administration of law. Both peoples, he said, wanted "a finger in every pie". Richmond said the Native Circuit Courts bill included plans for Māori jurors in an attempt to ensure greater popular support for and involvement with the legal system. Richmond took a leading role in promoting the Stafford ministry's native policy bills. C W Richmond (18 May 1858) [1856-58] NZPD 446-449.

128 C W Richmond (18 May 1858) [1856-58] NZPD 447-448 and passim; Gore-Browne "Memorandum on Native Policy" GBPP 1860 xlvi [2719] 393-394.

129 Native Districts Regulation Act 1858, ss 2, 7, 9; "Report of debate in the legislative council on Native Bills, July 1858" enclosed in Gore-Browne to Bulwer-Lytton (14 September 1858) GBPP (1860) ix (492), 7-15; C W Richmond (18 May 1858) [1856-58] NZPD 445-rr9. See also, Salesa above n 5, 278, 287; McHugh *Aboriginal Societies* above n 8, 123-130.

Settler politicians often analysed Māori policy against the wider setting of colonial politics, using political disputes between superintendents and the general government, and between parliamentarians over the operation of the new constitution, as reference points for considering Māori political initiatives as well as Pākehā proposals.[130] This comment does not deny the significance of racial thought, or of Māori agency. Support for particular jurisdictional structures in relation to Māori were part of broader disputes about authority, power and institutional relationships within colonial politics. Approaching such issues as multi-faceted issues of constitutional authority rather than simply in terms of a unitary "Crown" position avoids obscuring this underlying dynamic and may help explain the specific ways broader notions of race and authority manifested in a particular policy debate.

B The Role of the Governor in the 1858 Native Districts Proposals

The 1858 legislation was part of the ministry's attempt to affirm its political and constitutional role in government in relation to whole territory of the colony, as opposed to openly disavowing territorial legislative competency over parts, or admitting that only gubernatorial leadership could appropriately deal with Māori issues (as some of the governor's supporters argued, and as the creation of native districts under section 71 of the Constitution Act might have suggested).[131] Some historians have stressed that assertions of extensive British legal authority were at odds with the substantive power of the government in the 1850s.[132] However, it is worth noting that, in the politics of the time, the particular de jure proposal made by the ministry was still a significant one.[133] Legislating to allow the Governor-in-Council to make native district regulations endorsed a particular means of managing political authority in relation to other institutions, as well as in relation to Māori. The legislation implicitly sought to fashion constitutional practice, and to consolidate the role of the ministry (as opposed to the governor, the legislature, or rūnanga). This was highly significant to those Pākehā involved and to government in London. It helped structure the ways Pākehā politicians assessed possible responses to Māori political initiatives, and the way

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130 Henry Sewell to C W Richmond (14 October 1857) in *RAP*, above n 109, i, 311-312. "Report of debate in the legislative council on Native Bills, July 1858" enclosed in Gore-Browne to Bulwer-Lytton (14 September 1858) GBPP (1860) ix (492), 7-15; C W Richmond (18 May 1858) [1856-58] NZPD 445-9; Swainson (29 July 1858) [1858-60] NZPD 62-63; Renwick, above n 4, 282-284.

131 Swainson (6 July 1858) [1856-58] NZPD 584-5; Kenny (5 July 1858) [1856-58] NZPD 580; Gilfillan (6 July 1858) [1856-58] NZPD 584; Whitaker (6 July 1858) [1856-58] NZPD 583; "Report of debate in the legislative council on Native Bills, July 1858" enclosed in Gore-Browne to Bulwer-Lytton (14 September 1858) GBPP (1860) ix (492), 7-15; C W Richmond (18 May 1858) [1856-58] NZPD 445-449.

132 For instance, Belich *The New Zealand Wars*, above n 10, 77-80, citing Gore-Browne's comments in 1860.

133 Gore-Browne to Bulwer-Lytton (14 September 1858) GBPP (1860) ix (492), 7-15; C W Richmond (18 May 1858) [1856-58] NZPD 445-449; Memorandum by Ministers (6 May 1857) 1858 AJHR E-5, 8-9. On the significance of the 1858 bills in the context of the legislative session, see Loveridge "Origins", above n 116, 72-73.

they considered how best to manage potential tensions between government's legal authority and substantive power.[134]

This broader context was clear from Richmond's speech introducing the Native Districts Regulation Bill to the lower house. Distinctions between "maintenance" of Māori custom by the Crown, "exceptional laws" to be applied by special tribunals, and the "strict application" of colonial laws were often distinctions of the detail or speed of assimilationist policy.[135] Importantly, however, Richmond's speech presented these distinctions as having constitutional implications, affecting the structure and tone of colonial government and the relationship between imperial and colonial administrations. Richmond surveyed several possible means of applying "British law" to Māori. One option was the recognition of Māori custom. Richmond rejected this, on the basis that Māori remained in a system of "barbarism" rather than a "low type of civilisation" as "in India or China". He felt that allowing custom without alteration would simply "perpetuate barbarism".[136] The second option was "the Cook Strait" view of the strict application of English law to Māori. Richmond presented George Grey and the well-known 1844 House of Commons Select Committee on New Zealand as favouring this approach.[137] Richmond dismissed such ideas as abstract theorising, impractical and "manifestly absurd". He said that Grey had not applied his own theories of strict application in New Zealand, but had rather sought to "insinuate or induce" Māori into following English law by a gradual process. Richmond endorsed this policy, presenting it as locally generated. In a rhetorical step not uncommon in colonial politics, Richmond claimed that colonial practice had shown the folly of metropolitan theorising, and left local settlers best placed to judge which specific policies best adapted the "foundation principles" of British law to local circumstances. Settler legislatures (not the governor), he implied, were best placed to take active steps to extend British substantive authority.[138]

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134 Swainson (6 July 1858) [1856-58] NZPD 584-585; Kenny (5 July 1858) [1856-58] NZPD 580; "Report of debate in the legislative council on Native Bills, July 1858" enclosed in Gore-Browne to Bulwer-Lytton (14 September 1858) GBPP (1860) ix (492), 7-15; Swainson (9 July 1858) [1858-60] NZPD 1. This applied also to the Native Territorial Rights Bill, which in many ways was the centrepiece of the Stafford government's proposals. The Bill provided for the conversion of Māori customary title into a form directly actionable in colonial courts, and for the consequent enfranchisement of Māori as electors. However, it also provided for private purchase of Māori land, something Gore-Browne (and ultimately the imperial government) opposed. See Gore-Browne to C W Richmond (19 May 1858); (21 May 1858) in *RAP*, above n 9, i, 399-400; Loveridge "Origins", above n 109, 70-75.

135 Ward "Means and Measures", above n 45, 1-24.

136 C W Richmond (18 May 1858) [1856-58] NZPD 445. On Richmond's speech, see Loveridge "Origins", above n 109, 70-75.

137 On Grey's views, see Ward "Means and Measure", above n 45. The 1844 committee was chaired by Viscount Howick (later the third Earl Grey); Report on the state of New Zealand and the proceedings of the New Zealand Company GBPP (1844) xiii (556).

138 C W Richmond (25 May 1858) [1858-60] NZPD 446.

Thus, the 1858 Bills sought to define resident magistrates' jurisdiction in a way that consolidated the role of the ministry. As noted, it was the "Governor-in-Council", not the governor alone, who could declare districts, and make regulations for such districts. The Colonial Office had allowed the 1856 Native Reserves Act, which restricted the governor's independent power over Māori land.[139] The 1858 legislation sought a similar restriction regarding jurisdiction and Māori law, and should be seen in light of Gore-Browne's own, ultimately unsuccessful, efforts to establish a statutory council to administer native policy independent of ministerial control.[140]

Competing views of the appropriate gubernatorial role emerged clearly in the upper house during the passage of the Bills. The non-ministry members of the Legislative Council staunchly opposed giving the responsible ministry further power over native policy. William Swainson advocated "one law for all" but insisted that Māori affairs should proceed under gubernatorial control in order to reach that goal. However, the Attorney-General, Frederick Whitaker, rejected the suggestion that the unelected upper house might alter the ministry's native policy.[141]

Gore-Browne eventually decided to assent to the Native Circuits Court Act and the Native Districts Regulations Act. He withheld assent to an Act on Māori territorial rights, reserving it for consideration in London.[142] When the statutes reached London, the Colonial Office analysis of the laws focused on their implications for the constitutional relationship between the Secretary of State, the governor, ministry and legislature. The Colonial Office was uneasy about the inroads to the governor's independent authority over native policy, but decided that the Native Districts Regulations Act was "wise and useful". That Act was allowed on the condition that a section was inserted giving the Colonial Office the power to disallow regulations made under the Act.[143]

C Perceptions of Legislation and Positive Law in the 1858 Debates

Thus, the nature of specific political debates was shaped by attempts to establish and consolidate constitutional authority within the emerging system of responsible government. Decisions to adopt or reject particular policy proposals are best seen in this broader context. The ministry's distrust of

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139 Gore-Browne to Labouchere (26 August 1856) GBPP (1860) xlvi [2719]; Circular on Native Policy (31 July 1856) GBPP (1860) xlvi [2719] 365.

140 See Loveridge "Origins", above n 109, 38-42, 86-125; Governor's Circular on Native Policy (31 July 1856) GBPP (1860) xlvi [2719] 365.

141 Swainson (6 July 1858) [1858-60] NZPD 584-5; Kenny (5 July 1858) [1858-60] NZPD 580; Gilfillan (6 July 1858) [1858-60] NZPD 584; Whitaker (6 July 1858) [1858-60] NZPD 583. Whitaker threatened that the ministry would resign if the Bills were rejected. Gore-Browne to Bulwer-Lytton (15 October 1858) and enclosures GBPP (1860) ix (492) 160.

142 Gore-Browne to Whitaker (13 July 1858) in *RAP*, above n 109, i, 413.

143 Carnarvon to Gore-Browne (18 May 1859) GBPP (1860) xlvii (492), 171. See also the final draft, CO 209/146, 374. The Native Territorial Rights Act was disallowed.

gubernatorial control of native policy encouraged settler politicians who favoured extensive ministerial power to insist that any system for recognition of Māori law or local government had to be compatible with their perception of the appropriate role of the responsible ministry and the legislature in the constitution.[144] In this, the particular policy debate about native districts converged with the more general debate within Pākehā politics about racial assimilation. As noted, in the 1850s, some settler politicians saw rūnanga activities as evidence that the adaptation of custom to new European influences required law posited independently of "traditional", "savage", custom. The Native Districts Regulation Act expressly anticipated regulations that would suppress "injurious" customs and replace customary remedies with new forms of "compensation".[145]

The perception that rūnanga were making positive law to reflect new practices, and to supersede previous custom, was significant for Pākehā observers. It reinforced underlying strands of Pākehā debate about the need for making new law to fit the development of a colonial society. Politicians speaking in the 1858 debates were discussing positive law to be supplied by the legislature, and tailored by them to fit the local circumstances. Laws posited by statute – passed by settler-controlled legislatures – were presented as being more ordered and effective than gubernatorial politics and diplomacy. Such views were not new, but they gained new currency in the politics of the 1850s, combining the search for transitional "civilising" institutions in many of the jurisdictional proposals of the 1830s and 1840s with the broader settler politics of establishing and consolidating the role of the ministry and legislature in relation to other parts of government. In the General Assembly, ministers tended to emphasise that new statutory systems would be free from the personal influence and arbitrary discretion they claimed characterised gubernatorial government (and chiefly rule). Richmond urged the Assembly to "[i]naugurate the reign of law, and cease to rely on mere personal influences".[146]

Such political rhetoric, of course, does not tell the whole story. Though ministers might take a particular position in political debate in the Assembly, administrative practice posed its own challenges. For much of the 1850s, whether under Grey's ordinance or Richmond's Act, a handful of resident magistrates were involved in a wide variety of local interactions, relationships, and juridical experiments with Māori communities and individual litigants. The magistrates' reports and results were mixed.[147] This meant that politicians with experience of Crown-Māori engagement (or, at

144 C W Richmond (18 May 1858) [1856-58] NZPD 444-rr9; Whitaker (6 July 1858) [1856-58] NZPD 582-584; Swainson (9 July 1858) [1858-60] NZPD 1; (6 July 1858) [1856-58] NZPD 587.

145 Native Districts Regulation Act, s 2(16).

146 C W Richmond (18 May 1858) 1856-58 NZPD, 444-449. The stress on positive law did not immediately displace notions of common law birthright, which were still used and disputed in debates.

147 Ward *Show of Justice*, above n 50, 74-86, 114-124.

least, its administration) were aware that personal influence and discretion remained valuable.[148] In 1858 the Resident Magistrates Act was amended to allow a Resident Magistrate to delay enforcing a judgment against a Māori for as so long as the magistrate deemed "it expedient to do so".[149]

As this reform suggests, there is little indication in the 1858 debates that legislators thought that the colonial Parliament simply needed to express the legislature's will in order to achieve their aims.[150] Rather, an overlapping set of debates can be identified about the exercise of constitutional authority and the relationship between parts of government, in which many politicians were acutely conscious of the distinction between the legislature, the ministry, and the governor. The impact of those distinctions, and the distinctions between general and provincial governments, were widely debated. There were legislators, however, who thought that the positing of law by a representative assembly that also had strong influence over executive officials would produce outcomes that adapted law and policy "better" to local circumstances than the Crown Colony system, and who thought that using legislation in particular ways could help consolidate their preferred institutional structures and practices. This attention to attempts to establish and consolidate institutional structures helps explain elements of settler politics in the mid-1850s more effectively than an emphasis on a unitary "Crown".

V CONCLUSION

In a constitutional system where authority was diffused between provincial governments, the gubernatorial executive, the ministry and the legislature, "native policy" was by no means simply a matter of "the Crown" and "Māori". Even where the ministry and governor might speak of "the Crown" in asserting a unitary British authority to Māori audiences, questions about who controlled the voice of the Crown, and the institutions within government that designed and implemented Crown policy, were highly contested.[151] Māori debates and initiatives were a critical factor within the settler context. However, this essay suggests that strands of Pākehā constitutional politics and their connection with various parts of jurisdictional debates themselves deserve further study.

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148 C W Richmond (15 August 1860) [1858-60] NZPD 307-311; Heale (15 August 1860) [1858-60] NZPD 313-314. Compare Gore Browne to Gardiner (18 October 1856) ATL Micro MS 207. On the significance of discretion and practice, see, for instance, Edward Eyre's suggestion, while Lieutenant-Governor of New Munster, that the Wanganui resident magistrate continue his practice of using Māori assessors in any case involving Māori, even though that ordinance provided for assessors only in Māori-Māori litigation; Domett to Resident Magistrate, Wanganui (25 July 1849) ANZW NM 10/9. Eyre advised that the assessors should be used as "informal advisors" in mixed cases "with as much virtual authority" as when sitting in Māori cases. Care had to be taken, he said, to avoid formally recording the assessor's involvement in case that raised legal challenges.

149 Resident Magistrates Courts Act 1858, s 7. See also C W Richmond (15 August 1858) [1858-60] NZPD 307-308.

150 Here I differ from McHugh "Tales of Constitutional Origin", above n 8, 74-75.

151 See above n 119.

In the Legislative Council in 1860, Arney CJ noted that the Native Territorial Rights Act 1858 had denied the Supreme Court jurisdiction over legal issues arising out of the Act's scheme for converting native title to a Crown-derived certificate. The Act had never become law, having been refused assent by the governor and the imperial government.[152] The Chief Justice, however, seemed bemused at having been "selected … as the only man in our Colonial Parliament not capable of forming an opinion upon Māori title".[153] Behind the jest was a more serious point. The structure of courts and their jurisdiction was central to the construction of British authority in a new colony. Decisions about lower court jurisdiction often rested on competing notions of the relationship between different parts and functions of government. Those competing ideas, and the politics by which different notions were embodied in institutional design or practice, were an important part of the creation of the colonial constitution. Disputes over the scope of the governor's powers and role were central to these debates. Support for extensive gubernatorial discretion can be identified from 1840, including in the judgments of Martin CJ and Chapman J.

In 1865, when the Legislative Council debated the proper relationship between the ministry and the governor, J C Richmond described the constitution as "organic", with "limbs" that were defined not by statute but by practice and discretion.[154] The disputes over which institutions within government would control particular discretions were not abstract elements of legalism. They were important parts of the structure of colonial politics. "Foundation principles" of common law doctrine or constitutional theory did not necessarily provide a clear basis for constitutional law and practice. Competing notions of governmental and legislative power were given particular operation through political debate, and from the 1830s many British politicians saw statutory jurisdiction as an important means of giving particular political relationships institutional form in New Zealand. Having so effectively dismantled previous historical accounts of the colonial constitution, historians should reconsider the particular patterns of Pākehā politics and debate. Doing so may reveal a more complex tapestry of debates about the nature of the colonial constitution, which helped shape 19th century New Zealand before the Wars and beyond.

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152 Gore-Browne to Bulwer-Lytton (15 October 1858) GBPP (1860) ix (492), 60; Loveridge "Origins", above n 116, 80, 107.

153 Arney (30 August 1860) [1858-60] NZPD 413.

154 J C Richmond (24 October 1865) [1864-66] NZPD 704.