By the early 1840s, British governments had asserted their formal territorial sovereignty across all of New Zealand. Defining sovereignty in such terms did not necessarily resolve a range of issues about the status and treatment of Mori within the colonial legal system, or within colonial civil government. Much recent historiography has approached the construction and nature of Crown authority by focusing on particular categories of rights or authority, such as “sovereignty”, “aboriginal title” or “jurisdiction”. Each of these concepts has a rich historiography of its own, and each has been suggested as a fundamental organising concept in the construction of colonial government. Each had a degree of autonomy – debates over notions of court jurisdiction, for instance, could be generated independently from questions of aboriginal title. Concepts of property and of jurisdiction could, however, interact in significant ways. Designing colonial government institutions meant adopting particular configurations of authority, property and status, and giving them legal or institutional form. Particular configurations of legal definitions and structures within the design of colonial state institutions were often promoted for political or commercial ends.¹

In this paper I highlight several issues about the legal structure of colonial courts’ operation in relation to indigenous peoples which highlight connections between different part of government and law. I also want to show how disputes about institutional structures and

definitions were shaped by colonial political contexts. The paper aims to engage with various legally orientated historiographies that have emerged from late twentieth century Australian and New Zealand debates about national identity, history and indigenous rights. Influential works in these debates have stressed common law thought, doctrine and processes in shaping colonial politics and constitutions. While seeking to show the significance of common law doctrines to the past, these works also present a narrative of colonial forgetfulness; of pluralistic and non-territorial notions of sovereignty and authority that were replaced in the early to mid-nineteenth century, leaving the settlers’ descendants with an ahistorical and unitary notion of “the Crown” as the holder of all sovereignty.

Such works focus largely on executive government policy and administration, and on decisions in the superior courts. In this paper, however, I want to draw attention to the role of lower courts, and the legislatures. Recent New Zealand histories of the nineteenth century have given limited attention to the legislatures, and the settler politics that surrounded them. The operation of legislatures as separate components of the colonial constitution has often been overlooked in favour of the “Crown” in its executive form. While undoubtedly significant, it is worth noting that select committees and legislation formed an important element of colonial governments’ Māori policy and politics throughout the nineteenth century. By the 1840s, legislation was seen as a primary means of adjusting English law to colonial environments. Governors, colonial indigenes and imperial agents sought to gain particular roles in legislative processes. In such a context, legislation about court structure was a potential policy tool for colonial administrators seeking to establish colonial authority. This reflected the importance of courts themselves. Court were forums through which actors might assert their own agendas or understandings of prerogative authority, and power, and a possible site or forum for the expression of indigenous political claims. The formal territorial authority

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4 Richard Boast draws attention to the variety of agreements, deeds and contracts reached by executive officials with Māori in the later nineteenth century. R. P. Boast, “Recognising multitectualism: Rethinking New Zealand’s Legal History” (2007) 37 V UFLR 547-82. Many of those agreements were pursuant to statute, or required legislation to have legal effect. For instance, the Governor’s endorsement of the Fenton Agreement (which Boast highlights) was pursuant to a statutory power. Such distinction mattered to actors at the time, and illustrate important points about the theory and practice of the colonial constitution.

5 The firm rejection of the older historiographical focus on representative legislatures and government can be seen in McHugh, “Historiography”, 349.
of the courts was asserted as a fundamental premise from which colonial government might design particular judicial and administrative structures or practices. Notions of personal status, and of social or political sources of authority, remained important in political or legal debate. Disputes about territorial definitions of authority end after the early 1840s. The control of executive discretionary authority, and the status of subjects within the colonial court system, remained controversial. Court structures remained items of political debate after the development of responsible government, (particularly in New Zealand) because they retained constitutional significance – their structure was perceived to have important implications for the distribution of political power between constitutional institutions, and for the particular relationship between property rights, status, and civil rights, in the colony. 6

The first section of the essay highlights the role of access to courts, and the structure of courts, in arguments about the establishment of new Australian colonies during the 1830s and 1840s. Claims about the civic education provided by courts, and by institutions such as juries, were part of wider political agendas or proposals for the institutional structure of British settlement in Australasia. An emphasis on involvement in legal systems, and on the tailoring of legal definitions to produce particular formal and substantive civic status, can also be seen in proposals for colonisation policies in what became the colonies of South Australia (1834) and New Zealand (1840). Proposals to alter the common law on the ability of non-Christian indigenes to give evidence in the courts highlight the way such definitions of legal status could become part of wider political strategies, particularly in relation to the legal and political relationship between sovereign and subjects. The political controversy surrounding the establishment of South Australia provides a useful example of this. That example is explored in the second section. The paper then briefly discusses the way indigenous evidence issues manifested in imperial and colonial legislation. This illustrates the way issues of status could operate quite differently across different imperial settings. It also shows the importance of legislative intervention to constructing colonial law and government.

The essay then moves to consider the structure of resident magistrate’s courts in New Zealand. Court structures were partly designed to attempt to balance or manage the political tensions involved in expanding British settlement. The Resident Magistrate’s Court was central to this in New Zealand. Debates regarding various proposals for alternative jurisdictional structures show the value in seeing territorial authority in the context of other configurations of political and legal authority. In the final section the relationship between

magistrate’s courts and Māori enfranchisement is highlighted as a further example of the way such localised lower courts contributed to the politics of colonial institutional development.

The essay builds on arguments that the construction of colonial governmental authority was more multi-faceted than the traditional historiographical stress on the Crown as a unitary Leviathan. Indeed, it may be useful to consider colonial politics in terms of attempts by individuals and groups to establish and consolidate particular institutional and personal relationships within government.7 Particular configurations of property, status and authority, and their expression in relation to government institutions, could gain constitutional significance at particular times and places. This constitutional significance was by no means guaranteed; the perceived importance of an issue was often itself a political claim. Particular colonial issues generated imperial attention in part because of the immediate political context of their debate. Thus, colonial issues were often dependent on their local political significance and context for their reception into imperial networks, even where that transcolonial transmission altered the way the issues were expressed. I focus here on New Zealand, but I also draw on South Australian examples, building on the work of Henry Reynolds.8 South Australia and New Zealand shared, particularly before 1850s, a series of political and correspondence networks that help highlight both imperial connection and colonial difference in debates over colonial government.9

Involvement in courts was seen as civic training

Many litigants, judges, jurors and witnesses in colonial courts were conscious that court events allowed a projection of status and relationships that went beyond the litigation at hand. In part, such views reflected a wider belief that participation in civil courts or in criminal juries was an education in the institutional framework of civil life. Through experience of juries, through the processes of grand jury presentments, and through the observation of supposedly

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9 On the connections between South Australian lobbyists and New Zealand lobbyists see, Douglas Pike, Paradise of Dissent, (Melbourne, 2nd ed., 1967) 194-7; S. Chenye, “Search for a Constitution: People and politics in New Zealand’s Crown Colony years” (PhD thesis University of Otago, 1975), 4; Angas to Governor Grey, 29 September 1842, Auckland Public Library (APL), GL:A16, G1, 21; Gawler to Angas, 23 June 1846, State Library of South Australia, Mortlock Collection (MLSA), PRG 174/21, 47. In 1842 George Fife Angas complained, “New Zealand enticed away from us all our original friends”. The virtual bankruptcy of South Australia by 1841, and controversy over land sale practices, further soured its reputation among the British political and financial elites. In 1846 Governor Gawler complained that South Australia had few political friends left. Conservatives shied away from what was seen as a colony of Radicals, while those “on the ‘liberal’ side”, Gawler noted, “have almost wholly cast [South Australia] off and gone in a body to the support of its rival New Zealand”.
learned and reasoned judicial conduct, settlers might prove themselves able to deal with broader decision-making authority.\textsuperscript{10}

Such views could, to some extent, be mobilised as justifications for withholding further authority or decision-making institutions to local settler communities. The public invocation of these ideas also reflected attempts by judges and officials to shape the dominant norms of young colonies and dispute, or disapprove of, other social practices or attitudes. In grand jury instructions, the praise of jury duty as civic education might accompany concerns over violent crime or civil disorder. It might also be designed to encourage settlers to undertake jury service. Such rhetoric was an expected performance, and one that inexperienced judges such as the first New Zealand chief justice William Martin did not always perform with ease.\textsuperscript{11}

Further, as Peter King’s work suggests, the importance of courts and the law should not be over-stated.\textsuperscript{12} The significance some officials placed on litigation and courtroom conduct was open to criticism and even ridicule. Even as they used cultural claims about law and courts in political debates, settlers might see litigation in instrumental terms. Settlers in outlying rural districts often felt economic imperatives outweighed the social obligations of jury participation in the townships. Further, interest in litigation was not always high-minded; in small Crown colony settlements the theatre of the courtroom was an accessible form of entertainment and gossip.\textsuperscript{13}

Nonetheless, even with these caveats, the idea of the development of settler communities across time and space, fashioning institutions suited to particular contexts, was a recurring theme for imperial and colonial administrators; jury membership would be training for local municipal councils, which in turn would prepare the community for legislative powers. Such institutions recognised, it was claimed, local political ability, and utilised local knowledge and


\textsuperscript{11}Henry Sewell, \textit{Journal}, 21 September 1855 (W. David McIntyre (ed), \textit{The Journal of Henry Sewell}, 1853-7 (Christchurch, 1980)). Martin had little or no court-room experience when appointed chief justice. See \textit{Southern Cross}, 25 July 1856 (reporting Hugh Carleton, an Auckland member of the General Assembly, remarking that the best that he could say of Martin was “that he had very much improved in his law since he came out to New Zealand”); cf Gore-Browne to Molesworth, 15 February 1856, ANZW G25/6, stating that Martin is “revered” by Maori. See also Sewell, \textit{Journal}, 21 September 1855 (“It is impossible not to like him greatly; … though no doubt it may be possible to get a more able lawyer, it will be difficult to fill his place better on the whole”).

\textsuperscript{12}Peter King, \textit{Crime, Justice and Discretion in England 1740-1820} (Oxford, 2000). See in particular 356-377. King concludes that legal ritual and theatre was of “marginal” value to any “hegemony” sustained by the criminal law.

\textsuperscript{13}Charles Hawker, \textit{Early Experiences in South Australia} (Adelaide, 1899), 43. Cooper/Colonial Secretary, 11 June 1853, South Australia State Records Office (SASRO) GRG 24/6/1853/1401. Chapman, charge to the grand jury, 12 April 1844; minute fining settlers for non-appearance as jurors, 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, 4. Fox, \textit{The Six Colonies of New Zealand} (Wellington, 1851) 130.
In turn, disputes over jury powers and process were often characterised by debate over the “respectability” and “independence” of the British men involved. This juridical expression of an active, public, subjecthood might be the first step in achieving a particular kind of political subjecthood; a supposed progression that was echoed in debate on indigenous status.

However, the promoters of colonial schemes in South Australia and New Zealand emphasised that, in their view, settlers were already well equipped for some degree of self-government. In their proposals, promoters made claims about the content and form of British colonial subjecthood; not simply in legal terms, but in moral and political terms. “Systematic colonisation” plans for colonies in both countries stressed the moral and economic redemption that an open but carefully structured land market would bring, and the growth in independence and respectability that would follow if Crown government gave an alchemical “sufficient” support to settlers. The notion of ‘Britain redeemed in the South Seas’ is often connected with New Zealand. However, the idea of a “Britain of the South Seas”, founded in peaceful compact with indigenes, was a rhetorical theme that many New Zealand promoters had first experimented with during their involvement with South Australia.

A range of proposals for British colonisation in Australia and New Zealand produced in the 1830s and 1840s regularly sought extensive grants of self-government to either the colonisation promoters, or the settler community itself. Their social and moral character deserved, the promoters reasoned, institutional recognition within the constitution.

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15 S. Hack to Maria Hack, 26 June 1839, MLSA PRG 456/1/31. Register, 3 June 1837; 25 May 1839. Chapman, instructions to Wellington jury, 2 April 1844, “Reports”. HS Chapman to H Chapman, 17 June 1849, Alexander Turnbull Library (Wellington) (ATL) qMS-0419. Note also the offence taken by some General Assembly members by a suggestion that a jury that convicted a Pkeh accused of murdering a Maori rejected the possibility of insanity because they were intimidated by Maori protests over the murder; Southern Cross, 15 July 1856; Nelson Examiner, 30 August 1856 (relating to the well-known Marsden case).

16 Grand jury presentments and municipal councils were seen as expressions of local social and political ability, often couched in rhetoric about “birthright” and status that arguably expressed a relationship with the Crown as much as subjecthood under it. C. Mann, Report of the Speeches Delivered at a Dinner Given to Capt. John Hindmarsh, R.N., on his Appointment as Governor of South Australia (London, 1835), 8-15. Whitmore to Goderich, 8 June 1832, CO 13/1, 103. Torrens to Goderich, 9 July 1832, CO 13/1, 218. R. Torrens, Colonization of South Australia, (London, 1835). EG Wakefield to New Zealand Company, 12 September 1843, GBPP 1844 xxi (556), appendices, 569.


18 C. Mann, Report of the Speeches Delivered at a Dinner Given to Capt. John Hindmarsh, R.N., on his Appointment as Governor of South Australia (London, 1835), 8-15. Whitmore to Goderich, 8 June 1832, CO 13/1, 103. William Hutt, MP, declared in the House of Commons in 1838 South Australia alone has treated the aborigine with uniform kindness and humanity: and what is the consequence .. there is not a single soldier in the colony of South Australia... they have in found in the practice of moderation, justice and benevolence, a security from the natives that all the bayonets of your military could never have given them.”, South Australian, 1 December 1838.
Promoters’ political and social agendas were deployed with a particular sense of history, in which generous readings of previous North American colonies mixed with a variety of vague claims about the advances provided by economic theory.¹⁹ These proposals were often aimed at generating commercial and, particularly, political interest and support. To build political coalitions, and to present a “respectable” face to government and the public, promoters stressed the moral and economic independence offered by emigration, and the greater freedom of action offered by colonial settings.²⁰ In the case of South Australia and New Zealand, many such promoters were connected with notions of “colonial reform” and “systematic colonisation”. Such proposals, of course, were not without their critics. Many of the promoters were associated with radical politics. Some, like Edward Gibbon Wakefield, had questionable pasts.²¹ The perception of speculation persisted around the South Australian scheme. When initial lobbying over South Australia failed in 1832, lobbyists formed literary and indigenous “protection” groups to illustrate their claimed “respectable” public image.²² In British debates colonies could be presented as being socially fragile, bereft of the stability that long-standing institutions of law, religion and property might be seen as giving a society. To try to counter such perceptions, schemes associated with systematic colonisation often involved detailed webs of relationships and institutions. The detail of such proposals often varied according to the politics of the author and intended audience.²³


²⁰ Ward, “Politics of jurisdiction”, chapter 2. See the references cited above. Speeches by Torrens, Morphett and Hindmarsh in Mann, Report, 5-12.


²² A “South Australia Association” was formed in 1833, and a South Australia Literary Association in October 1834. Robert Gouger, a key figure in both groups, had been involved in setting up a Society for the Protection of the Aborigines of South Australia sometime in late 1834 or early 1835. The chair of that society, William Higgins, also ran the Society for the Benefit and Protection of Aborigines in British Colonies. The two protection organisations may have, in fact, been one and the same. South Australia Literary Association, minutes, 3 October 1834, 7 August 1835, SROSA GRG 44/83. Prospectus of the Society for the benefit and protection of the Aborigines of the British colonies, undated, ATL 89-096. See also, the speech by Higgins in Mann, Reports. On Higgins’ organisations and the Commissioner’s plans to use them to their public relations advantage, see Ward, “Politics of Jurisdiction”, chapter 2.

²³ In the South Australian lobbying, claims about the order and civilisation free settlers would bring to South Australia were often made out of frustration with the Colonial Office, or at the Office’s prompting. After the promoters formed a new ‘South Australia Association’ in late 1833, Robert Gouger and a Quaker businessman, George Fife Angas, led attempts to cultivate a more respectable persona for the group. The Colonial Under-Secretary, John Shaw-Leveque met informally with Gouger, privately detailing Colonial Office attitudes to the scheme and suggesting ways forward for the Association. Whitmore to Goderich, 18 June 1832, CO 13/1, 126. Morning Chronicle, 24 April 1832.
Across the 1830s, colonial lobbyists connected with systemic colonisation and colonial reform ideas increasingly referred to the use of courts (and legislation about courts) in their schemes, particularly in relation to indigenous peoples. An interest in litigation, Saxe Bannister suggested, was "a valuable quality with which to work in attaining civilization"²⁴ Participation in law and legal institutions was to be a means and measure of civilisation, and an expression of the theory and practice of a particular type of colonial subjecthood.²⁵

Attention has been given to the treatment of land rights and court jurisdiction in such schemes. One neglected element of many of these colonisation proposals is the attention given to the law on indigenous testamentary capacity as a vital part of any assimilationary framework. The extent to which non-Christian indigenes could give evidence in court, and the measures necessary to secure admissible testimony, were contested in courts across the empire. The common law threshold was often summarised as an ability to appreciate the spiritual or ethical consequences of giving false evidence under oath. With indigenes, a religious or supernatural perception of the weight of an oath was often looked for. Admitting indigenes’ evidence might therefore involve admitting the general capacity of Aborigines to perceive right and wrong, and (implicitly) to participate in proceedings based on a common sense of “truth” and falsehood. (It was this general testamentary capacity, presented as an element of culture or race, rather than a function of individual character, which was disputed in many debates).²⁶

Debate over such issues raised questions about the assessment of indigenous “civilisation” and society that were often approached on a more personalised level than questions of property; they raised questions of the status and legal capacity of indigenes as legal persons — their incorporation or differentiation within colonial institutions — in ways that could be presented as being prior to questions of title.²⁷ For Saxe Bannister, the former New South Wales law officer and colonial lobbyist, denying Aborigines the capacity to testify stopped


²⁴ Bannister, *Humane policy; or Justice to the Aborigines of new settlements* (London, 1830), 41.
²⁵ Ward, "Means and Measure".
²⁶ See, for instance, Charles Wentworth’s references to Aboriginal evidence as “the chatterings of the ourang-outang” (in relation to the Myall Creek trials); cited in RWH Reece, *Aborigines and Colonists. Aborigines and Colonial Society in New South Wales in the 1830s and 1840s* (Sydney, 1974), 180-1.
²⁷ Cooper, *Colonialism in Question*, 23.
civilisation “at the threshold”\textsuperscript{28} The ability to give evidence was repeatedly described as a basic step in the civilisation and assimilation of indigenous peoples.\textsuperscript{29} For Edward Eyre, the ability to give evidence was the most pressing issue of South Australian race relations by 1843. Eyre insisted, “no permanent improvement of [Aboriginal] character or conduct can ever be expected” without being able to draw Aborigines into juridical networks of interaction with whites. The provision of courts to adjudicate disputes was central to this, and allowing Aboriginal evidence a necessary part of such a court system.\textsuperscript{30} If Aborigines could not give evidence, the legal system was not a viable alternative way of resolving disputes and expressing authority; the violence of customary law, as Eyre saw it, would remain unchecked.\textsuperscript{31} In 1845 the London Aborigines Protection Society ranked the issue second in importance only to indigenous land rights.\textsuperscript{32}

Altering the law on oaths and evidence was a recurrent issue among lobbyists and commentators on imperial affairs in the early to mid-nineteenth century. Issues of slave and indigenous evidence proved of particular concern to the Colonial Office. A series of contentious reforms in 1809 and again in 1828 allowed indigenous unsworn testimony in the Cape, as part of a wider attempt to assert control over, and anglicise, Cape institutions and social structures.\textsuperscript{33} Following the abolition of slavery, the Office sought to prevent colonial assemblies restricting the admissibility of evidence by ex-slaves.\textsuperscript{34}

The perceived significance of evidence law to the structure of colonial legal systems meant that groups that took different views on aboriginal land rights might agree on the need for evidence law reform. The Aborigines Protection Society supported reform. Various (ostensibly) “philanthropist” groups set up in association with the South Australian

\textsuperscript{28} Bannister, \textit{Humane Policy} 243 [tbc]. See also, Eyre/Colonial Secretary, 1 February 1843, GRG 24/6/1843/170, 6. S. Bannister, evidence to Buxton Committee, 31 August 1835, GBPP 1836 vii (538), 176.


\textsuperscript{30} Eyre to Colonial Secretary, 1 February 1843, SASRO GRG 24/6/1843/170.

\textsuperscript{31} Eyre, \textit{Journals of Expeditions of Discovery into Central Australia and Overland from Adelaide to King George's Sound... including an account of the Manners and Customs of the Aborigines and the State of their Relations with the Europeans}, (2 vols., London, 1845), 6-9, 147.


colonisation scheme advocated allowing unsworn indigenous testimony. As systematic colonisation lobbyists moved to formulate proposals for New Zealand settlements, the volume of British interest in New Zealand and Mori encouraged promoters to theorise how Mori society might interact with colonial government and society. Admitting Mori testimony became a stock means of claiming an “informed” and “enlightened” approach to colonisation.  

However, such references to evidentiary capacity in colonisation proposals had limited impact on government. Requests for general reform were politely deferred. Imperial legislation was predominately reactive. In the absence of a particular political controversy there was limited political will to respond to abstract appeals of principle. Colonial legislation, however, was considered a better field for innovation. This proved significant in relation to testamentary capacity. However, the desire to allow governors’ latitude to respond to local circumstances could also clash with a concern that governors preserve prerogative and institutional bases through which government could ensure “ordered” settlement and administration.  

Creation of courts as fundamental element of prerogative, and of assimilation  

Sensitivity over evidence reform reflected not just concern over permitting individuals to a particular status of competency and civic status; it reflected British governments’ more general caution about the speed and nature of locally-directed legal reform of superior courts.  

As late as 1840, within some British departments at least, access to a court system containing certain distinctive elements of “British” law could be seen a “fundamental” right only the imperial legislature could alter. Early New Zealand legislation that abolished grand juries was rejected as repugnant to the laws of England. The Colonial Office expressed alarm at similar steps in South Australia. In 1840 the British law officers had viewed elements of the law of


37 In 1840 Governor Hobson was alarmed by the establishment of independent courts by the first Wellington settlers (in advance of any formal Crown authority). The appointment of magistrates was “insulting to the Sovereign Power of the Queen”; Hobson to Shortland, 23 May 1840, Hoc MS 0052/4. On colonial legislation see also Stanley to Hobson, 9 January 1843, CO 209/14, 414, 418-20.  

38 By the 1850s, the reform of the grand jury system in South Australia was accepted by the Colonial Office for South Australia, leaving Benjamin Boothby to fight a fierce battle for an alternative understanding of the capacity of colonial legislatures and the scope of “fundamental” elements of British law. See the voluminous account in Hague, History of the Law in South Australia, (Adelaide, 2005) 291-474.
evidentiary capacity as fundamental parts of “British jurisprudence”. They rejected a New South Wales ordinance designed to alter the common law, because the ordinance recited that Aborigines did not perceive the significance of an oath or the importance of truthful testimony, and were outside the common law test.\(^{39}\) For the law officers, such elements of “British jurisprudence” could be seen as a thread linking colony and metropole, which therefore required careful assessment by London.

Let me develop this point further in relation to court structures. This stress on access to courts, and status before the court, as a fundamental element of imperial law, intersected with debates over indigenous customary law. The colonial lobbyists’ proposals for colonial legal systems often including provisions for indigenous custom. Modern formulations of the common law, focusing on customary title to land, have stressed that customary rights could continue in place after British sovereignty. This has been interpreted by some as suggesting customary law was recognised and (automatically) incorporated into colonial common law. This “doctrine of continuity” may now be better appreciated as a later reformulation of common law; it appears that few colonial courts or officials in this period approached the common law on indigenous custom precisely in this way. As Shaunnagh Dorsett has recently explored, customary law was often seen in terms of “abrogation”; indigenous customs not contrary to the “law of humanity” continued, unabrogated by the new British sovereignty.\(^{40}\) Crucially, however, that continuing custom was not positively enforceable at common law in colonial courts. Arguably, Lord John Russell framed the issue in this way in instructions to Governor Hobson in 1839.\(^{41}\) Dorsett shows that the New Zealand judge, Henry Samuel Chapman adopted such an approach extra-judicially in 1847. Such an approach meant the question of the justiciability of custom was potentially separate from the question of the court’s territorial jurisdiction.\(^{42}\)

Abrogation was one way, among many overlapping and competing approaches, to conceptualise the treatment of indigenous custom in colonial legal system.\(^{43}\) Under the abrogation approach, legislation would be necessary to provide for the positive enforcement


\(^{40}\) Draft paper on file with the author.

\(^{41}\) Russell to Hobson, 9 December 1839 *GBPP* 1841 xxvii (311), 28.

\(^{42}\) See also, Ward, “Constructing British Authority”.

\(^{43}\) I have suggested elsewhere that the dominant approach in relation to New Zealand was to address the recognition and operation of custom through colonial legislation, through a system of “exceptional laws”. That approach reflected the assimilationist aims of British policy and the importance of assessments of civilisation and stadial development. “Abrogation”, “continuity” and non-recognition approaches, in different ways, all stressed the importance of colonial legislation as a tool for dealing with the issue of customary law; Ward, “Means and Measure”.

DAMEN WARD – DRAFT ONLY
of custom. This might involve a “selection” or “codification” of such custom. Such legislation might also set out the particular forum in which custom could be recognised.\textsuperscript{44} Reviewing Robert Fitzroy’s account of the causes of New Zealand’s Northern War in 1846, James Stephen felt that the failure to provide courts to resolve M\textsuperscript{o}ori disputes was a key trigger for the conflict. For Stephen, the failure to establish an institutional structure for M\textsuperscript{o}ori disputes meant that simply allowing custom to remain in operation between M\textsuperscript{o}ori (the “maintenance” of custom), was no longer a viable policy option. Stephen told Earl Grey that the maintenance of custom had always been intended since 1840, but had been opposed in practice by that spirit of legal pedantry from which no English Society is ever emancipated, and by the contempt and aversion with which the European race everywhere regard the Black races.

Stephen continued, “I am not aware that any benefit would result from insisting again on this principle.”\textsuperscript{45}

In 1846, Octavius Hadfield, a prominent missionary at Otaki near Wellington, reached a similar conclusion in a memorandum to Governor Grey. Hadfield, an important advisor to Grey in this period, thought that the chance to “draw a line of distinction” between M\textsuperscript{o}ori and P\textsuperscript{keh}, and to formally disavow any intention to enforce British law beyond the bounds of the settlements, had been lost.\textsuperscript{46} Cultural contact and British settlement had set in place immense changes in M\textsuperscript{o}ori society. Hadfield thought that to turn away from “amalgamation” at this point would be “highly absurd and highly dangerous”. He argued that the British had drastically altered chiefly authority through propagating Christianity and promoting British law.

He warned Grey that any move by government to draw back from the promotion of British laws and institutions would leave M\textsuperscript{o}ori worse off, particularly since the “cession of sovereignty” meant that chiefs had “for many year foregone authority which they could not now recover”. The nature of contact between M\textsuperscript{o}ori and P\textsuperscript{keh} worlds had altered the fabric of M\textsuperscript{o}ori society in a way that could not be reversed for the better. For Hadfield, this

\textsuperscript{44} Proposals for “exceptional laws” often advocated such a process, though often framing the issue as one of modification of English law as much as “abrogation” of custom. See, Damen Ward “A Means and measure of civilisation. Colonial authorities and indigenous law in Australasia” (2003) 1 History Compass 1-24

\textsuperscript{45} James Stephen, 26 February 1846, minute on Fitzroy to Stanley, 16 August 1845, CO 209/35, 47.

\textsuperscript{46} Hadfield to Grey, 15 June 1847, APL GL-NZ, H1(2). June Starke, “Hadfield, Octavius 1814-1904”, Dictionary of New Zealand Biography available at <www.dnzb.govt.nz>. Hadfield continued, “If, on the acquisition of the sovereignty of New Zealand the Government had allowed the native laws and usages to continue in force among themselves; while English laws were enforced in the settlements, & and (sic) a few (as few as possible) exceptional laws were enacted to meet the case of the necessary intercourse between the two races: - then, by degrees, as the native laws and usages were better understood, and as they themselves became more civilised, from time to time a proclamation might have been issued, abrogating such of them as might be considered prejudicial and bad, and extending over either the whole, or such parts of New Zealand as might have been deemed advisable.”
also meant that various British proposals for more cautious assimilationist policies had to be reconsidered.47

On this approach, providing for custom, (or for some transitional system to promote the “immediate union” of the races, as Hadfield favoured), required some specifically constituted jurisdiction or specifically endorsed justiciability. This meant that legislating, particularly for courts, was potentially a critical part of colonial government.48

South Australia and the politics of administrative structures

Settler colonisation groups certainly saw court structures and judicial officers as significant, but this significance was often framed in terms of attempting to constrain gubernatorial power, and extend their own control over discretionary authority. South Australia offers an example of the way in which the role of executive and judicial officers became part of wider political contests and negotiations, and the way particular attitudes to property and jurisdiction were shaped by relationship to broader institutional structures and relationships affecting personal status of settlers and indigenes.

Proposals for South Australian colonies sought wide judicial powers. Importantly, it was Crown control of judicial and executive officers that were critical to Colonial Office concerns about the scheme. Attempts to ensure that Protectors of Aborigines were Crown officers, and that the Land Fund (the revenue from land sales, to be used to subsidise emigration) was at least partly at the Crown’s disposal, caused as much dispute in late 1833-4 as issues of potential aboriginal title. Such issues were debated as part of political negotiations, in which native title and the institutional structure of government in relation to it were items for tactical bargaining as much as legal analysis.49

The South Australian colony was authorised by Act of Parliament. The South Australia Act provided for a Commission to control land sales and emigration.50 The Commissioners’ initial publications contrasted the virtue of free settlers with the convicts of New South Wales, using

47 Hadfield to Grey, 15 June 1847, APL GL:NZ, H1(2).
48 While judges might well have to adjust common law to local circumstances, New Zealand judges expected the legislature to take the lead. See Martin CJ, address to the grand jury (4 March 1844) “Collection No 2”, I: “… we may not depart or swerve from the rule of English law; we must be content to grow up to it.” Chapman J nonetheless looked forward to such cases as an opportunity to deploy all his learning – importantly, he noted that such cases seldom came to trial but tended to settle out of court: HS Chapman to H Chapman 17 March 1849, ATL qMS-0419.
49 I have argued elsewhere that the Colonial Office’s treatment of the South Australian scheme reflected the limited resources and political pragmatism of Ministers and staff rather than a thorough or ideological engagement with the protection of Aboriginal rights: Ward, “Means and Measure”. Certainly, Stephen’s frustration at ambiguity in the financial clauses of the Bill, and his alarm that a colony might be promulgated across the entire potential area set by the Act, did trigger a debate within the Office about land rights. Stephen to Hay, 14 February 1835, CO 13/3, 23.
50 4 & 5 Will IV c.95.
a language of “savagery” and disorder predominately in relation to convicts and whalers rather than Aborigines.\footnote{Colonization Commissioners of South Australia, \textit{New Colony in South Australia} (London, 1836). Ward, “Politics of Jurisdiction”, chapter 2.} Aboriginal title emerged as a concern within the British government as part of a belated attempt to ensure greater Crown oversight of the colonisation scheme.\footnote{James Stephen had been hostile to the promoters’ attempts to restrict the Crown prerogative from the first 1832 proposal. Stephen to Gardiner, undated, [c. 8 December 1835], CO 13/3, f. 122. Stephen, memorandum, 14 July 1832, CO 13/1, ff. 269-2. Grey to Torrens, 15 December 1835, CO 13/3, f. 112. Stephen raised a number of issues about prerogative authority and the statute with his colleagues and ministers, including native title.} The Commissioners rallied their evangelical political support, including that of Thomas Fowell Buxton, by agreeing to appoint Protectors of Aborigines and provide a “protection plan”\footnote{Buxton wrote to the Colonial Office; “So strangely mad am I that I would rather carry that measure through the Cabinet than be the Victor of Waterloo… I am sure it will save more lives than Waterloo destroyed.” T.F. Buxton to Stephen, 9 January 1836, CO 13/5, f. 169. On hearing rumours that the Colonial Secretary would insist on appointing a Protector, Torrens dispatched John Brown, the Commission’s emigration agent, to secure Buxton’s support. Brown was related to G.A. Robinson, the Tasmanian Protector of Aborigines. Buxton was impressed by Brown’s “views and principles”, and wrote to James Stephen endorsing Brown’s nomination as Protector. Brown, Journal, 7 & 8 January 1835, SLSA PRG 1002/2.} but it was attempts to give the governor greater control over land sales and revenues that generated considerable debate between the government and the Commissioners.\footnote{Brown, Journal, 12 and 16 January 1836, 4 January 1837, SLSA PRG 1002/2. Grey to Torrens, 11 January 1836, CO 13/4, ff. 175, 176. Ward, “Politics of Jurisdiction”, 66-9. Torrens to Grey, 28 December 1835, CO 13/3, ff. 161, 168-169. Commissioners, \textit{New Colony in South Australia}, 2-3.} Underlying the Commissioners’ resistance was not simply a belief that Aborigines lacked the social organisation to claim legal “occupation” of land.\footnote{Brown, Journal, 16 December 1835, SLA PRG 191. Brown recognised, “What is to be the interpretation of the word ‘occupy’ is the question.” Brown felt that South Australia was “not occupied according to any law regulating possession which is recognised by a civilized people”. See also, Torrens to Grey, 28 December 1835, CO13/3, 161, where Torrens insisted that in Australia it had been assumed that “the unlocated tribes have not arrived at that stage of social improvement, in which a proprietary right to the soil exists”. Stephen minuted in the margin, “This must be a wrong assumption”. Torrens agreed to acknowledge such “rights of property in Land, should such a right be anywhere found to exist”. Torren’s approach indicates he thought such rights most unlikely. On the intellectual background to such an approach, see Mark Hickford, “‘Decidedly the Most Interesting Savages on the Globe’: An approach to intellectual history of Maori property rights, 1837-53, (2006) 27 History of Political Thought 122-168.} That was certainly important, but also of great weight was a determination to use the South Australian Act, and the separate locus of power provided by the Board of Commissioners, to limit the scope of gubernatorial discretion and authority. The paternalism of the Crown was to be resisted, whether it related to accounting rules or the ascertainment of property rights. Such views had come to the fore in 1835, when Charles Napier declined to be South Australian governor because the colony lacked sufficient funds, troops and planned infrastructure. The Commissioners replied that he had overlooked the character of the colonists, and the supposedly successful use of the “self-supporting principle” in early North American colonies.\footnote{Napier to the South Australian Commissioners, 20 May 1835, CO209/13, 54. Napier said South Australia would be a small colony, "without discipline, suffering more or less from privation (sic) and with plenty of liquor! Experience has taught me, what scenes this would produce, unless the leader had a controuling (sic) physical force...". For the reply, see Hill to Napier, 22 May 1845, CO209/13, 56.}
The association between access to English law courts and “civilised”, “free”, settlement was used by those seeking to critique gubernatorial power and policy across British colonies in the mid-nineteenth century. In the 1830s and 1840s it was also formed part of debates over assimilation and other native policies in Australasia; a renewed desire to control frontier expansion, and to use law as a tool of structuring colonisation. In the case of New Zealand, perceptions of Mori political and military organisation, and assessments of Mori capacity for “civilisation” were critical to the production of colonisation blueprints. Land rights were one part of an array of relationships and institutions into which Mori would enter, or be placed.

Such issues proved of real importance in colonial government practice. By the late 1830s, colonial governors were increasingly asserting a general territorial jurisdiction, and the general (statutory) territorial jurisdiction of the Supreme Court. That legal jurisdiction did not, at law, depend upon recognising or extinguishing native title. The assertion of general territorial jurisdiction meant that, in theory, all people within the colony could claim whatever legal rights they might have in the court. The notion that indigenous peoples within colonies were not fully subject to the sovereign’s authority was increasingly unacceptable to government. A series of colonial controversies led to British and colonial governments stating their views on such points in the late 1830s and 1840s. However, the tension between theory and practice remained significant. Governors advocated the general territorial authority of the Crown and Crown courts as a primary expression of sovereignty even as they urged discretion in the exercise of territorial jurisdiction by the courts. Such an approach preserved the formal ability of the colonial courts to adjudicate on any cognisable dispute, but often left difficult issues about the practical operation of courts and the substantive questions of what rights might be claimed in court for ongoing debate in the political sphere. What was critical in colonial politics was who was entitled to control the decisions over practice, and set the terms for its exercise.\(^{57}\)

Jurisdictional issues created most attention when they were directly related to wider questions of the governor’s authority and the weighting to be given to particular settler interests in the exercise of Crown coercive powers. It was at the point where particular agendas or concerns intersected that political controversy might be generated across imperial networks.

Issues of criminal jurisdiction that raised questions about governor’s broader attitude to expanding settlement, caused considerable transcolonial and imperial correspondence.

Jurisdictional policies were debated in House of Commons’ select committees on South Australia and New Zealand in 1841 and 1844. The New Zealand select committee in particular produced significant volumes of material. A number of settlements had been established in New Zealand by the New Zealand Company. The New Zealand Company and its supporters had a well-organised campaign for gathering information and lobbying British parliamentarians.\footnote{Report of Select Committee on New Zealand, GBPP 1844 xiii (556), xvi-xix. Howick, Journal, 8 July 1844, DUL GRE/Vc3-4. Mark Hickford, “Making ‘territorial rights of the natives’: Britain and New Zealand, 1830-1847”, (DPhil thesis University of Oxford, 1999), 238-41.} They presented “exceptionalist” and “maintenance” approaches to jurisdiction over indigenes as indicative of a failure to sufficiently assert the benefits of British rule and settlement. Certainly, issues of jurisdiction were secondary to issues of land title in the select committee debates. However, Company lobbyists stressed the failure of enforcing British authority as indicative of a general failure in government. The earlier South Australian select committee treated jurisdiction in a similar way.\footnote{Select Committee on South Australia, 1841 (119), (394). See also, Ward, “Means and measure”.}

Unsworn evidence – imperial and colonial law reform

The significance of court structure to Crown authority in New Zealand meant that the Colonial Office maintained a close interest in issues of criminal jurisdiction. However, evidentiary capacity indicates another manifestation of imperial and colonial interactions. The significance of testamentary capacity to British lobbying was highlighted above. Here I want to note the particular politics that generated imperial change, and the limited resonance of that change transcolonially.

Imperial action on evidence law reform occurred for pragmatic reasons. The Colonial Office staff and ministers had been surprised by the rejection of the 1840 New South Wales Ordinance. Indeed, they seemed to think the approach overly legalistic; though James Stephen had opposed evidence law reform early in his career at the Colonial Office, by 1840 he thought the common law flawed, and in need of reform.\footnote{Stephen minute on Gipps to Normanby, 14 October 1839, CO 201/287, cited in Historical Records of Victoria, v. 2b, 761. Smith to Russell, [October 1840], CO 201/304, 267. Stephen, 8 September 1840, minute, CO 201/304, 264 (Arguing, with a reference to Bentham, that the rejection of religious ideas might indicate "some great moral taint", but the "absolute ignorance of them, in the absence of all instruction, may be consistent with the habitual respect for truth. Indeed, in all men, good or bad, civilized or savage, the habit is to speak truth, and falsehood is the exception. If I had the power, I would abolish the rule of inadmissibility of evidence universally so far as it proceeds on mere personal disqualification, or supposed want of veracity. Probably, however, this is too great an innovation to be ventured on." On Stephen’s earlier concerns about unsworn evidence, see Swinfen, 157.)} The law officers’ views slipped from officials’ recollection, and by 1841 the Colonial Office had instructed the Western Australian government to pass local reform laws, as part of ongoing concerns over the
treatment of Aborigines at the hands of local magistrates.\textsuperscript{61} It may have been thought that the Western Australian ordinance would avoid the characterisation of Aborigines that had invalidated the New South Wales law. The law officers, however, returned a similar analysis to 1840. The Colonial Secretary, Lord Stanley was faced with having to disallow a law he had requested, and was forced to instruct staff to prepare imperial legislation.\textsuperscript{62} The bill requested by Stanley quickly became the Colonial Testimony Act of 1843.\textsuperscript{63} The legislation, “one of the most important and certainly one of the most neglected pieces of legislation on colonial aboriginal issues”, attracted little opposition in Parliament, or in the metropolitan press.\textsuperscript{64}

The only colonies to immediately enact local versions of the Act were New Zealand (July 1844) and South Australia (August 1844).\textsuperscript{65} Repeated attempts to pass local ordinances in New South Wales caused considerable controversy.\textsuperscript{66} However, it is worth noting that the imperial Act did not achieve a lasting reputation in the Empire. The New South Wales governor Charles FitzRoy raised the status of aboriginal evidence anew with the Colonial Office in 1846. (The Colonial Office sent a further copy of the 1843 Act). In the mid-1860s the status of indigenous unsworn testimony emerged as a significant issue in Vancouver Island. With few copies of imperial or British statutes available, local authorities were unaware of the Colonial Testimony Act. The purchase of a copy of South Australian statutes may have contributed to the passage of a Native Exemption Ordinance in British Columbia in 1865.\textsuperscript{67}

\textsuperscript{61} Hutt to Russell, 24 January 1842, CO 18/33, 67, 78, 79. The Western Australian law had previously been amended to allow aboriginal evidence in death penalty cases. Hutt, somewhat reluctantly, introduced a new ordinance to the Legislative Council. Several members of the Legislative Council entered formal protests against the bill. The Surveyor-General, John Roe, complained bitterly that the law permitted aborigines to give evidence in civil cases where their “interests or liberties” were not directly at risk. The bill’s opponents complained that evidence from “infidels” with a “total ignorance or disregard of any moral obligation to adhere to truth” should be admitted to an English court. Aboriginal evidence, they argued, should only be admissible in situations of extreme necessity.

\textsuperscript{62} The law officers did not explicitly recommend disallowance, further confusing the Colonial Office. It may have been thought that a narrower repugnancy approach would have applied; by 1841 Stephen and other officials were inclined to treat the repugnancy rule, in practice, as discretionary principle rather than a clear rule. Gardiner, minute on Law Officers/Colonial Office, 28 October 1842, CO 18/33, 55. Cf. Law Officers to Stanley, 24 December 1842, CO 18/33, 165. Cf. Leferve/Stephen, 24 July 1842, CO 18/33, 106. Stephen to Hope, 27 July 1842, CO 18/33, 107 which suggests officials and ministers were aware of the law officers’ stated approach. Given the significance of evidence law to humanitarian lobbying, the episode tempers accounts of the Colonial Office staff as having a clear ideological purpose.

\textsuperscript{63} Colonial Office to Attorney-General, draft, 9 March 1843, CO 18/33, 106-107.


\textsuperscript{65} See, for instance, Court of Requests Ordinance 1841 4 Vict 6, County Courts Ordinance 1841 5 Vict 2, Resident Magistrates Court Ordinance 1845 10 Vict 16., Native Districts Regulations Act 1858, Native Circuit Courts Act 1858.


In New Zealand and South Australia, adaption of the imperial Act reflected governors who were determined to implement assimilationist policies. Both Robert Fitzroy (in New Zealand) and George Grey (in South Australia) looked to indigenous involvement with (modified) colonial courts as critical means of assimilation. The political style and acumen of the two men was very different, and there were important differences in their preferred systems of assimilation, but both saw indigenous evidence as an important part of engagement with courts. In New Zealand, Fitzroy’s Evidence Ordinance was part of a set of “exceptional laws” that modified the way colonial law applied to Māori. George Grey had advocated the admission of all indigenous evidence in his 1840 memorandum on the application of English law to Aboriginal peoples. He saw the reform of lower courts as an important element of assimilationist policies in both South Australia and New Zealand.

How Māori evidence was treated by courts and juries requires further detailed research by New Zealand historians. However, what is worth noting here is that the admission of evidence per se did not pose the same political challenge or implications to New Zealand or South Australian settlers that it may have in New South Wales. In New South Wales and Western Australia evidence law reform was bound up with attempts to assert government authority and policies over rural districts, and opposition to indigenous evidence was part of

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68 In practice, the South Australian ordinance had a troubled history, with a series of amendments across the 1840s in an attempt to clarify the weight to be given to Aboriginal evidence, and make admission of evidence easier. The law still required interpreters to be sworn even if witnesses were not. As settlement expanded, the lack of competent translators caused considerable difficulties. (It is unclear why this was not completely rectified by legislation, as the Colonial Office suggested). In any event, South Australian juries proved reluctant to give any weight to Aboriginal testimony. See Cooper to Robe, [c. 27 March 1847], GRG 24/6/1851/1564; Cooper J, instructions to jury, R v Wikieki Nha reni Jack 9 June 1845 Judge’s Common Notebook [JCNB], Adelaide Supreme Court Archives, 1845. By the late 1840s the general instruction to Aboriginal witnesses appears to have been to “tell what they know, or be punished”. A belief that Aboriginal languages had no word for abstract truth shaped courtroom disputes over evidence; R v Donnelly, Register 17 March 1847. Moorhouse, “Report respecting the value of native evidence in a Court of Justice”, 14 July 1846, GRG 24/6/1846/879; R v Makara et al, 21 September 1846, JCNB criminal sitting September 1846 folio 4. Moorhouse to Gray, 20 April 1855, SASA GRG 52/7.

69 Register, 17 July 1844, 10 August 1844. The paper found the bill “too abhorrent” to support. Criticism of evidence law reform was stronger in South Australia than in New Zealand. On the New Zealand debate, Southern Cross 13 July 1844. On Grey’s views see “Report upon the best means of promoting the civilization of the Aboriginal inhabitants of Australia”, enclosed in Grey to Russell, 8 June 1840, CO 201/304, 245. An earlier version was published in South Australia, Register 18 April 1840.

70 Local New Zealand practice prior to 1844 seems to have taken for granted the admissibility per se of Māori testimony. Various elements of European assessments of Māori society, and Māori engagement with Europeans and their cultures and material intertwined to structure the context of Pōkehā engagement with Māori in different ways from those between colonists and Aborigines in South Australia. Many Māori had converted to Christianity, which indicated the spiritual element of the capacity test. Māori forms of political organisation, engagement and deliberation had long attracted Pōkehā attention as indicating a particular level of (actual or perceived potential) social sophistication. Engagement with colonists for rights to land had preceded formal British intervention in 1840. Missionaries and traders provided a body of potential translators (and, as importantly, a knowledgeable audience that could debate translations from the public gallery). The dialectical differences between various iwi were relatively minor compared to the linguistic complexity that would confound Charles Cooper and other judges in South Australia. The Land Claims Commission that investigated pre-1840 land transactions appears to have taken for granted that unsworn Māori evidence could be heard. Pōkehā objection to Māori evidence per se seems to have been muted. Cf. Bay of Islands colonist William Brodie’s complaints that the Land Commission preferred (unsworn) Māori evidence to that of “respectable English witnesses”. Brodie, who was an unsuccessful claimant, expressed his disgust that “an honest Englishman’s oath [was] considered defective… we are British subjects; then pray give [us] British law”; cited in David Armstrong, “The Land Claims Commission: Practice and Procedure, 1840–5”, evidence to the Waitangi Tribunal (Wai 45; doc #4), 1996, 122-6, 144-6.

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settler opposition to such policies. In New Zealand, proponents of competing particular interpretations of native title or Māori rights all deployed Māori evidence in court. The very significance of Māori testimony to local litigation and politics limited the relevance of admissibility per se as an issue in imperial debate. There was considerable dispute over the content and weight to be given to Māori evidence in relation to property rights. These were arguments about the operation of the law in practice; few New Zealand settlers seem to have felt that indigenous evidence should be inadmissible per se, even where firm doubts about the ability of Māori to give truthful testimony remained. British perceptions of Māori society as “semi-civilised” in important respects were no doubt important in shaping Pākehā views. So was the visible level of Maori Christianity and literacy, and the degree and manner of political engagement between Pākehā officials and Māori leaders in the settlements.

Debate about testamentary capacity reflected Pākehā assessments of Māori societal characteristics and an assessment of status in relation to civic authority, shaped by racialised notions of “civilisation”.

By the mid-1850s, the status of indigenous evidence did not appear to pose the same difficulties within British government that it had in the 1830s. The declining sense of evidence capacity as a problem of imperial policy may reflect a number of factors. Events in Jamaica and South Africa (and elsewhere) across the 1830s and 1840s had dulled the faith of evangelical movements in the effectiveness of law and legal institutions to achieve social and moral change. Increasingly, access to political, representative, forums were the centre of political debate in colonies. Evidence law had been of real interest to humanitarian lobbyists, but once addressed in 1842 the issue seldom manifested itself in a way that directly required imperial concern or expenditure. This was evident by 1847, when the South Australian governor raised queries. He was advised to refer the matter to the local legislature.

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71 Pakington, quoted in Reginald Good, “Admissibility of testimony from non-Christian Indians in the colonial municipal courts of Upper Canada/Canada West” (2005) 23 Windsor Yearbook Access to Justice, 73-4. Responding to concerns of Governor Douglass in [Canada], Sir John Pilkington discussed amenability without emphasising the religious character of the admissibility test. He considered there was little difficulty with admitting indigenous testimony unsworn: “[t]his evidence of all persons is receivable in our courts, if they have any mode of solemnly relating the truth which is held binding among themselves and any perception of principles of moral right & wrong”. *Southern Cross*, 13 July 1844; 20 July 1844.

72 This comment is not intended to suggest some comparative assessment of “better” race relations; rather it points to differing institutional capacities for law and courts in structuring elements of colonisation in New Zealand and Australia.


74 Earl Grey to Fox Young, 27 April 1848, *Historical Records of Australia* ser. 1, v. 26.
An underlying shift may be identified here. The development of representative and responsible government affected the ways particular configurations of property, authority and status, might attract colonial and imperial political attention. The constitutional changes of the 1840s and 1850s were part of imperial systems. Ideas and issues operated across colonies rather than being firmly limited to particular locations; nonetheless, colonies could form discrete sites for policy and politics. The British concern with domestic stabilisation after 1848, and the transformation of representative government into responsible government by local legislatures, combined to widen the permissible scope for colonial legislative innovation. This was by no means a smooth, pre-ordained transition (as the experience of Natal and Jamaica showed). Nonetheless, the political significance of court-room status and institutional political structures altered within colonial politics as part of the constitutional changes of the 1840s and 1850s.

In the next section I want to return to questions of jurisdictional structure and practice as a question of political management. As noted, jurisdiction over indigenes retained a constitutional significance in New Zealand compared to South Australia. Debates over jurisdiction were linked to political contests over institutional relationships within P keh politics. Territorial theories of government authority did not necessarily resolve questions of government practice. Choices about institutional structure and patterns of political relationships shaped how those debates occurred and shaped whether particular issues of court structure and function were seen as having constitutional significance. Settlers expected development of British substantive authority across time and space within the colony.

**Resident Magistrates**

While the Crown’s coercive reach was limited in practice in the mid-19th century, it is worth noting that the “zones” of P keh settlement and M ori settlement were often porous in particular districts, most noticeably at the margins of “settled” districts, or where established P keh -M ori networks had been active from before 1840. Governments were conscious that a single criminal dispute could generate significant political entanglements between M ori and government. The perceived practical difficulty of effectively controlling traffic between M ori and P keh, and a reluctance to abandon the formal ability to intervene in outlying districts, contributed to some administrators rejecting a formal “native districts” model, in which particular territorial areas would continue to operate under the “maintained”

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customary law. The way in which interactions between M ori and P keh could reverberate in the politics of both communities was of constant concern to administrators.\(^\text{77}\)

Hadfield had noted the difficulty of preventing or structuring interaction between settlers and M ori in 1846. This was a common imperial problem. The first governor of New Zealand, William Hobson, had proposed a registration system for out-settlers, but had been forced to abandon the plan because of settler opposition. As Mark Hickford has explored, attempting to control P keh interaction with M ori over land through pre-emption was an important means of trying to structure P keh settlement. Land was not the only focus of such intervention, nor was it the only type of interaction that showed the difficulties involved. When proposing the Arms Ordinance to the Legislative Council, Grey noted that M ori had purchased guns in Auckland and then provided or sold the weapons to tribes in the north. This had caused considerable frustration amongst the military at the time of the Northern War. The Arms Ordinance and the Spirits Ordinance proved difficult to enforce and the controversy over the regulation of such goods caused ongoing debate across the 1840s and 1850s.\(^\text{78}\)

The need to manage, both politically and legally, disputes between M ori and P keh, was a pressing concern, particularly given the tendency of many settler lobbyists to claim that the Crown had a fundamental obligation to enforce criminal law against M ori, and that “toleration” of custom denied colonists the protection of their Crown. Robert FitzRoy’s preference for a gradualist assimilationist policy, with missionaries and government officials as a deliberate buffer between settler and indigenes was seen by the New Zealand Company lobby as encouraging M ori claim-making and military resistance to settlement.\(^\text{79}\) On his return to England, FitzRoy found Lord Grey convinced that “that had more firmness been exercised from the beginning all would have gone on well!”.\(^\text{80}\)

Grey, with the advantage of more resources, consolidated his institutional power and authority against FitzRoy’s missionary allies as well as in relation to settler political groups. Governor Grey’s approach to the tension between the theory and substantive of colonial courts’ jurisdictional authority is worth noting. Robert Fitzroy’s Native Exemption Ordinance 1844 gave “chiefs” a formal degree of authority in relation to the colonial legal

\(^{77}\) Nelson Examiner, 2 January 1847.

\(^{78}\) Craig Innes, “Arms Control in New Zealand, 1854-61” (Massey University, MA thesis, 2005).


\(^{80}\) FitzRoy to Clarke Sr, 29 September 1846, Hoc MS 0052/51.
system outside of townships and gave them a limited role for offences within townships. Settler groups highlighted such approaches as unmanly and demeaning to the Crown, and the Ordinance was subject to criticism in the 1844 select committee.\(^{81}\) Grey’s Resident Magistrate Ordinance softened the express acknowledgement of the geographic limitations of authority. However, key elements of the Native Exemption Ordinance were retained, particularly restricts on ordinary magistrates to deal with Mori litigants. These were important political moves on Grey’s part — they softened the tone of exceptionalism offered by the ordinance. Grey was careful to present the Ordinance as a firm rejection of Fitzroy’s scheme. Politically, the formal assertion of criminal jurisdiction was presented as an important shift. Civil jurisdiction, however, retained important exceptionalist structures. Grey looked to civil litigation and arbitration as an important means of drawing Mori into economic and institutional relationships with Pkeh. This was in keeping with his wider policies, which he assured the Colonial Office were designed to generate “artificial wants” among Mori, encouraging wage labour, and generating an appreciation of the benefits of peaceful engagement. Grey had advocated such approaches, in particular emphasising the importance of Crown promotion, and regulation, of indigenous labour, since 1839.\(^{82}\)

Engagement in civil litigation was seen as an indicator of growing engagement with European society and economy, but Grey’s preference was to avoid an overly legalistic civil system. He promoted courts of “equity or good conscience” rather than common law courts. What was critical to the government was not the reliance within an adjudicative forum linked to the Crown.\(^{83}\) Grey succeeded in persuading the British Government to endorse a policy of using courts and magistrates as part of government. The Royal Instructions of 1847 had indicated that judges and courts might be used to enforce Mori custom inter se. Grey’s preference was to use resident magistrates overseeing arbitration courts for inter se cases, as part of an approach to jurisdiction and colonial law discussed below. Earl Grey remained concerned that Grey’s policies did not sufficiently protect chiefly authority, thereby weakening social and political controls within Mori society that might be used to ensure peaceful relations between Mori and Pkeh. However, as he did with disputes over the development of a “native law”

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81 Native Exemption Ordinance 1844 7 Vict 18. Report of Select Committee on New Zealand, GBPP 1844 xiii (556), v, vii, x, xvi-xix See also, GBPP 1844 xiii (556), appendices. Nelson Examiner, 28 December 1844. Junius Zealandi, To his Excellency, Robert FitzRoy, R.N. etc ([Auckland], 1845).


83 Grey to Earl Grey 29 March 1847, GBPP 1847-8 [892], 11, enclosing a return from the Resident Magistrates Court in Auckland detailing Maori as plaintiffs in 49 civil actions against P keh, defendants in 16 actions. Grey to Earl Grey, 15 December 1847, GBPP 1847-8 [1002], 55. See also, Legislative Council proceedings and commentary, Nelson Examiner, 2 January 1847.
system in Natal in 1846, the Secretary of State placed weight on the assessments of local officials.  

It is important to see Governor Grey’s use of resident magistrates in their broader role of consolidating gubernatorial networks of government. Grey promoted the role of resident magistrate as a fulcrum between the Governor’s administration and local government in the townships. Resident magistrates were to be key officials in dealing with Mori. Resident magistrates were expected to form an important conduit of information to central government. In the townships, settler memorials to the Governor appear to have been sent via the local resident magistrate. Resident magistrates were told to report to government on issues of concern to government. They were also the senior members of the local magistrate’s bench. This reflected the potential political significance of magistrates. New Zealand colonial ordinances sometimes gave magistrates a role in making the enforcement decrees that brought statutes into local effect. This balance between local decision-making and central government had a striking example in 1848 when magistrates refused to make the bench resolutions necessary to bring into effect the Provincial Councils Ordinance in districts of New Munster, effectively undermining an important part of Governor Grey’s policy on settler institutions.

Such events indicated a localised contestability of authority in colonial settings, and the extent to which consolidation of institutional authority still required attention to personal lobbying and politics. In such contexts, the Governor had powers of patronage and nomination that proved valuable. In 1850 in Wellington, Justice Chapman suspected that Grey was preparing to “stack” the bench to ensure a more cooperative set of magistrates. Similarly, disputes over Mori enfranchisement in Dunedin were seen both as the result of bench-stacking and likely to encourage further stacking. The protests over the Dunedin bench indicated that the


85 Strode to Colonial Secretary, 12 January 1852, 28 July 1853, Hoc MS 0089.

86 Eyre to Grey, 19 August 1850, G7/11, NA Well. The magistrates were protesting against the “nominee” nature of the council.

87 Justice Chapman considered Edward Eyre had made a critical mistake as lieutenant governor of New Munster by not having more dinner parties. “A dinner once a fortnight mixing up 4 or 5 settlers with four or five official and military folk would have made a good mixed party. In three months he might have gone all through all the presentable people, and by a smaller “pot luck” dinner … now and then, he might have obtained a very accurate knowledge of the leading people and their views without unduly disclosing his own”; HS Chapman to H Chapman, 17 April 1848, ATL qMS-0419. For an excellent account of the significance of such politics in small settler societies, see Kirsten McKenzie, Scandal in the Colonies, Melbourne, 2004.

88 HS Chapman to H Chapman, 3 February 1850, ATL qMS-0419. Otago Witness, 11 October 1851, 1 January 1853; 15 January 1853, 19 March 1853. Chapman privately complained that such tactics generated limited concern among
centrality of the resident magistrate was not entirely uncontested. Similarly, in the mid-1850s Maori chiefs were invited to attend various Wellington public meetings about provincial politics (and to endorse candidates) during election campaigns. The invitations reflected and reshaped settler political networks that were outside the “official” channels of the resident magistrate, and appear to have been intended to rival it. Without exaggerating the impact of such Maori involvement, it is clear that by broadening our focus from the central executive alone, a number of layers to colonial politics emerge. Further, as Damon Salesa has shown, colonial administrators relied on, and were often troubled by, the networks formed by “half-caste” and Maori interpreters, messengers, constables and teachers, who provided vital channels of information and connection with Maori communities. In Maori cases resident magistrates worked with Maori assessors, who were usually senior men. The role and influence of assessors appears to have varied widely, but (unsurprisingly) many magistrates highlighted their importance to effective arbitration of disputes.

Outside of the main Pākehā settlements in the North Island, the operation of colonial law and courts often remained a matter of negotiation and diplomacy — indeed, where Maori were concerned negotiation was often involved in cases within the townships, especially in criminal cases. Thomas Beckham, the Auckland Resident Magistrate, indicated the situation to a select committee in 1856. He emphasised the extent to which the enforcement of the law outside the township depended on communication and negotiation with “chiefs”. If chiefs refused to assist, “the point to be considered would be whether it would be prudent to employ sufficient force to enforce the law” or to allow the case to stand over until one of the accused ventured into town. A warrant would generally be issued nonetheless; Beckham said that the issuing of a warrant could have the effect of encouraging chiefs to deliver up alleged offenders.

Such approaches caused ongoing frustration to many settlers, but proposals to address such frustrations emerged haltingly across the late 1850s. Attempts to fashion governmental and
colonists; an example, he thought, of the lack of constitutional awareness or culture among many colonists. The complaint that settlers cared little for political principles (and more for material gain) was common among aspiring Pākehā leaders; see for instance, HS Chapman to H Chapman, 17 April 1848, ATL qMS-0419; 30 May 1848, John Robert Godley, “Lecture of the History of New Zealand (no 2)” ATL qMS-036; Sewell.

89 Wellington Independent, 14 August 1858, 3 May 1858. Spectator, 24 February 1858.
91 Wyatt to Domett, 3 January 1849, 18 July 1849, ATL MS 179. Martin, Memorandum on Native Affairs, enclosed in Gore-Browne to Secretary of State, 22 May 1860, ANZW G 19/1. Flight to McLean, 8 November 1852, ATL McLean papers, reel 053. See also the various views expressed to the 1856 Board of Inquiry, 1860 GBPP [2719].
92 Beckham continued, “... we are in this position - we are the weaker party attempting to coerce the stronger. .... I think the influence of the law will increase as Europeans become more numerous in Native districts”; evidence to Select Committee on the Native Offenders Bill 1856, AJHR 1860 ESA.
judicial structures in relation to Maori were also caught up in wider disputes between provincial and general government, and the awkward development of responsible government. The Constitution Act 1852 established six provincial governments within New Zealand. The general government maintained its control over resident magistrates and other courts, and Gore-Browne attempted to ensure the governor retained independent control over Maori policy. The grant of representative government also saw moves to grant judges life tenure, as supposedly befitted the “recovery” of the “ancient liberties” of British subjects. However, the establishment of provincial governments provided a further set of institutions through which status or authority might be generated. The provinces formed the focus of the political life of the colony. Provincial governments experimented with their own forms of responsible government, and often engaged with Māori communities and leaders for labour, land (for roads) and for political support and favour. It was provincial elections that generated much of the controversy over Māori enfranchisement, the role of military officers in politics, and the extent of electoral corruption.

Yet the 1850s reforms did not constitute a rupture in political practice in the colonies. Particular configurations of property, status and authority were altered, but courts retained a political significance in this new institutional context, including in relation to personal status and rights. Representative government made the status of elector highly significant. It was the prospect of greater civil legislative authority that promoted attention to the relationship between territory, title and authority among many Pkeh. In the late 1840s, Edward Gibbon Wakefield and Charles Buller had made various separate proposals to define, in territorial terms, the areas in which representative government would apply, and areas where the Crown would govern directly through a governor. These proposals were designed to justify and demarcate settler legislative powers, and suggested distinct colonies. Māori districts — assessed largely by unextinguished native title — would be directly ruled by the governor. Such proposals were viewed by the Colonial Office against the background of wider self-government campaigns by settler lobbyists. Though internal administrative divisions were made within New Zealand, the colony was not divided on the basis on property.

94 Resolution of the Legislative Council, 1854-5 NZPD 2 June 1854. Southern Cross, 25 July 1856
title status. The politics of settlement, and governors’ attempts to retain legal administrative capacity, meant the impact of title status was more complicated than a simple dichotomy allowed. When establishing electoral districts for the new representative constitution Governor Grey gazetted electorates that did not cover all of the territory of the colony. Grey included within some electorates areas held on customary title which were leased to Pkeh by Mori (leases that were illegal under colonial law). Wakefield complained bitterly of the prospect of Maori being enfranchised while settler outside electorates were left without the opportunity to vote. Here, too, few observers considered the issue to be one purely of principles or theories; in London, Herman Merivale noted that Wakefield was manoeuvring to build a political base. Merivale saw the complaints over the electorates as part of Wakefield’s wider political and legal campaign against Grey’s land regulations.

The governorship of Thomas Gore-Browne, however, saw a sharper association between property, the distribution of authority within the constitution, and notions of “sovereignty”. Gore-Browne sought to consolidate gubernatorial control over native policy, preferably in an “irresponsible” Native Council. Settler politicians became increasingly frustrated at Gore-Browne’s insistence that Mori policy was for the governors, and increasingly resentful of the power of Donald McLean, Gore-Browne’s native secretary. Attempts to demarcate authority within the colonial constitution were also shaped by increasing Mori organisation and complaint about British policy. The 1850s saw increasing concern among some officials that Mori “civilisation” was imperilled by a lack of clear action and institutions – concerns that those favouring greater settler control, and those favouring greater gubernatorial control, tended to blame on the others’ policies. Even those who were frustrated at the petty competitions of provincial rivalry, such as the Canterbury politician Henry Sewell, came to see attempts to secure extensive gubernatorial power as a vestige of the “plenary absolutism” of the Crown colony system. Gallingly for such settlers, the Governor’s view seemed to call into question their judgment as respectable men.

Proposals to use native title as the formal boundary of authority – which Gore-Browne considered reflected practice “on the ground” – gained renewed attention through the governor’s Board of Inquiry into native policy in 1856. Building on suggestions by Bishop Selwyn and others, Gore-Browne eventually suggested that the Assembly’s legislative power be restricted to areas “over which native title has been entirely or in great part extinguished” (my emphasis). Gore-Browne felt, however, that one clear sovereign authority was necessary to

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97 Merivale, minute on E.G. Wakefield to Duke of Newcastle, 21 May 1853, CO 209/121, 355. EG Wakefield was also lobbying to prevent the enforcement of Grey’s reform of the land sale regulations, which would have lowered the price of land, contrary to Wakefield’s preferred theory.
ensure stable colonial development, and that a special cadre of officers should exercise Crown authority in Māori areas until the “contract” of sovereignty contained in the Treaty could be “matured”.

Native Offenders Bill

Nonetheless, proposals to alter the formal scope of the general government’s territorial authority in 1856 failed to win political support. The Native Offenders Bill sought to give the Governor sweeping powers to ban communication by any person with a proscribed district or tribe. The Bill appears to have been proposed in response to two events. The first was the theft of a large quantity of gunpowder from Kawau Island by a Ngati Haua group. The theft was followed by protracted negotiations for the return of the powder. The other factor was concerns among Taranaki settlers after the murder of Rawiri, a leading assessor, by another rangatira, Katatore, as part of the “Puketapu feud”. This inter-tribal conflict, shaped largely by disputes over land sales, starkly illustrated the vulnerability of New Plymouth to any Māori military activity, and the weakness of the Crown to enforce British criminal law in Māori rural districts. The Native Offenders Bill was strongly supported by the Taranaki Provincial Superintendent, William Brown.

In response to criticism of the bill, the Colonial Secretary (and head of the responsible ministry), Edward Stafford, stressed it was not a ministry proposal, but a bill “sent down” by the Governor. The bill may have reflected Gore-Browne’s frustration at the limited scope of gubernatorial power at a time when the General Assembly was increasingly critical of even the theoretical scope of the Governor’s role. The Native Offenders Bill signalled a departure from previous practice in New Zealand. Prior to 1856, governors had preferred to continue to use jurisdictional mechanisms to try to structure courts in a way that might minimise conflict and demarcate, to an extent, territorial operations. This often involved setting court jurisdiction through ordinances which provided the Governor discretion to set the territorial bounds of jurisdiction, or required further gubernatorial decrees to bring the ordinance into

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99 Gore-Browne to Newcastle, 22 May 1860, *GBPP* 1860 xlvi (552) 1, enclosing various memorandums. Selwyn, memorandum on native questions, & Selwyn to FitzRoy [November 1845] ANZW G 19/1.
100 Paul Monin, *This Is My Place: Hauraki Contested, 1769-1875* (Wellington, 2001), 149-51
102 The government was forced to withdraw what it conceded was a “despotic” measure after a select committee concluded the weaknesses in the system of negotiation did not justify such a sweeping measure. Tellingly, the bill also attracted strong criticism for leaving authority with the Governor and his non-responsible advisers. *Southern Cross*, 15 July 1856, 25 July 1856. *Nelson Examiner* 13 August 1856, 30 August 1856. Report of Select Committee on Native Offenders Bill, 1856 - AJHR E5A.
effect. This could cause confusion in settlements where communication with the capital about such decrees was limited, but it allowed the Governor a means of reconciling the theory and practice of formal territorial sovereignty. On this approach, the Supreme Court had a general territorial jurisdiction, but lower courts had a statutory jurisdiction that often had specific territorial boundaries. The prominence of these methods has been long over-looked. They are a useful reminder that, in Crown Colony New Zealand at least, the formal sovereignty of the Crown was a premise that secured the gubernatorial branch of government a constitutional means to structure particular substantive institutions. (Just as importantly, this approach could leave a wide field for political engagement, into which colonial courts were reluctant to enter) Managing the tension between formal and practical authority and power was the stuff of politics, and governors sought to ensure that they, not elected settler ministries (or M ori politicians), dominated the politics of native policy.

In turn, groups of settler politicians increasingly sought to limit the powers of the governor. In 1858 the Stafford ministry sought to create M ori districts, using resident magistrates as key advisors. Tellingly, however, the ordinance required the districts to be created by the Governor-in-Council rather than the governor — the point on which much of the debate in the Assembly turned. Stafford’s native districts scheme reflected a number of points that had been part of P keh debate over political institutions since 1840. The Native Districts Regulations Act 1858 envisaged local decision-making bodies, making by-laws on a range of issues, subject to the oversight of the Resident Magistrate and the Governor-in-Council. The system rested on a perceived distinction between maintaining “custom” and facilitating supposedly new codes or laws, posted by M ori communities to reflect the changing


104 In April 1848, for instance, several settlers complained that to Wanganui Resident Magistrate that he had no authority to impound their wandering cattle, because the Cattle Trespass Ordinance had not been promulgated for the township, and the township district had not been established. The Magistrate insisted that the Ordinance applied, and that the posting of the ordinance on the “Obelisk near the Old Goal” meant the stock owners had no valid complaint. Wyatt to Colonial Secretary, 3 April 1848, Wanganui Resident Magistrate’s letterbook, ATL MS 179. On Wyatt’s confusion about whether some other ordinances applied to the township, see his letters of 2 May 1848, and 28 September 1850.

105 R v Symonds (1847) NZPCC 387. White v Richmond (7 April 1848) in Chapman, “Reports”. Ty v Graham (1848), reported in New Zealander (19 February 1848).

economic and social character of Mori society. Primary and secondary legislation were to be key elements of both assimilation and a degree of local autonomy.\(^{107}\)

Importantly, the Native Districts Regulations Act sought to reconcile categories of authority and property. Mori r nanga (councils) under the Ordinance would only have jurisdiction in areas of native title, and the Ordinance deemed certain Crown grants to be native title for the purposes of the ordinance. Although Supreme Court jurisdiction did not depend on native title, it was common for P keh politicians to see native title as denoting continuing Mori political autonomy, and consequently, in the many districts, the limits of substantive Crown power. Land sales, in both Mori and government perspectives, were exercises in political “incorporation” into civil community and institutions. (Perceptions of the nature and consequence of such incorporation varied.) However jurisdiction remained problematic for colonial government in New Zealand partly because interaction between Mori and P keh defied attempts to establish discrete institutional divisions. The Native Offenders Bill, its opponents noted, would have been impossible to enforce. The range of economic and social interactions between Mori and P keh in areas like Hauraki were too numerous, personal, and (some suggested) too casual to be able to proscribe an entire tribe or area.\(^{108}\)

In 1856 Stafford had insisted, somewhat unconvincingly, that the Native Offenders Bill was intended to apply only to native title.\(^{109}\) The deeming clauses of the 1858 Native Districts legislation, and similar clauses in other legislation, were perhaps a response to questions raised in the debates over the Native Offenders Bill. Attempts to give a legal clarity to social and political ambiguity or variety may also reflect broader settler sensitivity about status and institutional authority. The establishment of provincial government and representative central

\(^{107}\) See, Ward, “Civil jurisdiction”. See also the discussion of the 1858 legislation in Donald Loveridge, "The Origins of the Native Land Acts and the Native Land Court" (evidence to the Waitangi Tribunal, Hauraki District Inquiry, doc #P1).

\(^{108}\) Southern Cross 15 July 1856. Nelson Examiner 13 September 1856. Wellington Independent 10 January 1857. Select committee on the Native Offenders Bill 1856 AJHR 1860 E5A. McLean told the Select Committee that the Bill would be of limited assistance in the Taranaki quarrels because the underlying problem was the traffic in guns and ammunition among Mori. He remarked that “the Waitara is purely Native; there is no Customhouse, and no means to prevent the introduction of such goods, except by the provisions of such a Bill”. McLean had highlighted an underlying problem about the general government’s limited resources and substantive power. However, at the same time that the Bill was being considered, the Assembly was criticising McLean’s administration of Mori affairs and seeking to limit his independent expenditure. McLean’s concern at the absence of manifest authority at Waitara went unremarked in the committee. Few politicians wanted to publicly advocate giving McLean further funds. (Not until 1859–1860 would assertion of gubernatorial authority in the Waitara district converge with the political agendas of the Ministry’s supporters.

\(^{109}\) Nelson Examiner, 13 December 1856. In other discussions Stafford referred to the Bill applying in “native districts”, which in general usage was not necessarily the same as areas of native title. Brown and Stafford insisted that the declaration of districts would be consistent with Mori “usage” and that it amounted to rendering a district tapu. In English terms, they drew comparisons with martial law. When the Bill came for its second reading on 17 July Stafford insisted that the character of the Bill had been misunderstood again emphasising that “disturbed native districts” were “virtually foreign states” and that there were (unnamed) individuals undermining in an overt and open manner the authority of the Queen.
government saw a number of disputes and quarrels over the public presentation of civil authority in the Pkeh townships. At a time of sensitivity over such issues, stark displays of the distance between the theory and practice of Crown authority (and Pkeh authority more generally) were more keenly felt. By 1861 there were no longer any Mori constables policing the Wellington or Auckland settlements. The Arms Ordinance was amended in 1858, in acknowledgement that it was seldom observed, so that the weakness of Crown authority might be less obviously displayed.

Franchise

If the relationship between the title and authority was an ongoing challenge for politicians, specific questions of Mori enfranchisement provided a new touchstone around which political coalitions could form. In 1859 the imperial law officers’ gave an opinion on Mori enfranchisement under the Constitution Act. The officers found that native title could not qualify as a freehold interest, and that Mori habitation of houses was unlikely to qualify as a householder interest under the Act. The opinion was requested by the General Assembly, after a series of bitter disputes in Auckland, Wellington and Dunedin over franchise qualifications. Much remains to be explored about this opinion and the politics leading up to it. I am conscious that other papers at this symposium may explore such themes in more detail. My interest here is the continuing role of courts as a part of broader political disputes, particularly the role of “Courts of Revision” to review franchise qualifications. These sessions of the commissions of the peace meant that the magistracy (and in particular the resident magistrates) played an important role in a number of electoral disputes. The disputes also need to be seen in their provincial contexts: it was often attempts to assert local institutional relationships and authority that encouraged settlers to argue over Mori franchise in certain ways. However, the role of the courts and provinces was downplayed in the framing of the disputes for national and imperial consideration.

In Dunedin, Auckland and Wellington, arguments about Mori participation in the electoral process were made part of Pkeh competition and dispute, with limited consideration of Mori motivation or perspectives. Conflicts over Maori enfranchisement were initially centred on provincial institutions. At one level, a carefully limited indigenous engagement with the Pkeh public sphere had been a purported aim of early colonisation proposals.

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110 Law Officers to Newcastle, 7 December 1859, CO 209/152, 288. See also, “Papers relative to the Right of Aboriginal Natives to the Elective Franchise” AJHR 1860 E7.


However, the debates over registration highlighted the views of many Pkeh about the limits of Mori political subjecthood. Much of the immediate legal debate about franchise related to the householder qualification and the nature and supposed sophistication of Mori buildings and living arrangements. Strands of older notions of personal status and subjecthood remained parts of such debates. For instance, in the Dunedin Court of Revision in 1853, John Gillies argued that the constitution was granted to the Colony of New Zealand, and that Mori could not be colonists.113

As part of the Wellington controversy, Mori testimony in court was critical to the rejection of registration attempts by other Mori, as the Bench grappled with assessing the value of raupo huts and the level of civilisation disclosed by some Mori housing.114 In Dunedin and Wellington, however, the revision courts were fora for much wider political struggles, and the engagement of broader networks. This was particularly the case in Wellington, where a bitter series of disputes over Mori enfranchisement became part of Superintendent Featherston’s struggle with the “Rowdy Radicals” led by Jerringham Wakefield. Enfranchisement also became a part of complex Mori politics in Otaki, where Hadfield’s (shifting) political influence over his congregation was increasingly a matter of tension with Tamihana Te Rauparaha.115 Local courts became critical forums for these disputes, but the specific provincial background gave way to broader questions when the Assembly debated electoral qualifications and reforms in 1858. A bitter and protracted battle for control of Wellington provincial government meant many Wellington members stayed away from the national parliament of 1858, allowing the Stafford government to pass a number of “centralist” measures. The absence of these Wellington members also meant that Auckland concerns dominated the Assembly, possibly shaping the way that issues of Mori franchise were approached.

The historiography of debates over Mori enfranchisement has been dominated by a focus on official correspondence, and discussions by the Governor’s Board of Inquiry into Native Affairs in 1856. However, the local court disputes played an important role in wider

113 Otago Witness, 9 July 1853. Gillies, along with New Munster Attorney-General Daniel Wakefield, had provided legal opinions to the Otago Settlers Association on the question of Maori qualifications to vote.
networks. The requirement to personally serve objections on applicants re-energised lobbying organisations that had been formed to support constitutional reform.\(^{116}\) Newspaper accounts of the Dunedin franchise controversy encouraged Henry Sewell to consider the legal status of native title in more detail, shaping his views in later debates.\(^{117}\) More significantly, the Wellington controversy involved M\textsuperscript{ori} leaders who were already closely involved in M\textsuperscript{ori} movements and debates about kotahitanga (tribal unity and cooperation) and the possible establishment of a M\textsuperscript{ori} King. Matene Te Whiwhi and Tamihana Te Rauparaha, had promoted the selection of a M\textsuperscript{ori} king in 1853. The two rangatira had made the original request for a P\textsuperscript{keh} missionary to be sent to the Kapiti district in 1839, and their careers as missionaries, assessors and political leaders in many ways embodied the tensions and transformations of Maori societies in the 1840s and 1850s. (Across 1857-8 there were a number of disputes between various leading Maori on the Kapiti Coast, Hadfield, and Featherston, many played out via the rival Wellington newspapers). Te Whiwhi hosted an electoral campaign meeting at his “P\textsuperscript{keh} style” house in February 1858 (competing with a meeting for the candidate endorsed by Te Rauparaha). In August 1858, at a public meeting to mark an election campaign, the invited M\textsuperscript{ori} rangatira announced plans to “elect a M\textsuperscript{ori} superintendent” to work under the M\textsuperscript{ori} King’s authority and in concert with “the P\textsuperscript{keh} superintendent”\(^{118}\).

The impact of revision court disputes, and their role in local and colonial politics, deserves further attention. Such debates occurred not *simply* in the context of “race relations” or “Treaty history”, but in a broader “inter-cultural praxis” that shaped the operation of the colonial state.\(^{119}\) Disputes about (and in) lower courts in new colonies often reflected differing constitutional and political agendas. Attempts to structure discretionary executive and judicial authority and power could involve a number of different definitions and issues, as the debate over testamentary capacity and the court of revisions illustrate. The assertion of territorial sovereignty by the Crown was one part of a much wider process of constructing settler and indigenous status in relation to courts and colonial government. Particular political coalitions and strategies often operated in relation to particular colonial institutions, not least the local legislatures. Here, a critical attention to the process and detail of colonial politics and law may


\(^{118}\) Benton, *Law and Colonial Cultures*, 257: “The very definitions of separate legal authorities are produced through an interactive cultural praxis”. However, such exchanges were often asymmetrical relationships. Indeed, it is well to bear in mind the older “unsentimental tradition of imperial history” in which “networks of power are centred in authority and self-interest, not just mutual exchange”; Saul Dubow, “How British was the British World? The Case of South Africa”, *Journal of Imperial and Commonwealth History* 37 (2009) 1-29, at 20; also see Potter, “webs”.

\(^{119}\)
be valuable. Pēkehā politics was not simply an attempt to recreate or engage Westminster politics on another stage. It was not a function of a binary engagement between a Leviathan Crown and homogenous Maori. Giving attention to the shifting coalitions and debates over the structure and use of particular institutions and legal definitions may suggest fruitful intersections between legally-focused and other historiographies. Histories which focus on the institutions of the colonial state may still have a role of play in describing the “transposition of empire”.