

# NEW ZEALAND, AUSTRALASIA AND FEDERATION

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And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen ...

Preamble, Commonwealth of Australia Constitution Act 1900 (UK)

‘The States’ shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called ‘a State.’

Commonwealth of Australia Constitution Act 1900 (UK), s 6

## I. INTRODUCTION

In the late nineteenth century the prospect that the Australian colonies might one day be united in a federal commonwealth was still only a possibility, and a very contingent one at that. It is only with the benefit of hindsight that we can sometimes tend to regard federation as the fulfilment of some kind of “manifest destiny”. Each of the Australian colonies – New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania – was very insistent upon its individual rights to local self-government and constitutional self-determination, and was not about to give these up to a newly consolidated government operating on a continental scale – especially not without reserving to itself the guarantee that it would continue to govern itself locally concerning matters it felt best reserved to itself.

And yet there was a difference between conceiving of a federation of the Australian colonies and contemplating, on an even larger scale, the even more remote possibility of a federation of the colonies of Australasia – a federation that might include not only the Australians, but also New Zealand and other South Pacific island colonies, such as Fiji. “Australia” has never meant the same thing as “Australasia”,<sup>1</sup> and a possible federation of the Australian colonies, although by no means a certainty, was always more likely than one

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1 The term “Australasia” appears to have been coined by French explorer Count de Brosses in his book *Histoire des navigations aux terres australes* (Durand, Paris, 1756), who used the term “Australasie” to describe “the lands south of Asia”, which included Australia, Tasmania, New Zealand, Papua New Guinea, Tonga, and the Fiji, Solomon and Cook Islands. The term “Australia” as applied to the island continent is generally attributed to Matthew Flinders, *A Voyage to Terra Australis* (G and W Nicol, London, 1814) (2 vols) p iii (note). Lachlan Macquarie, Governor of New South Wales, is reported to have used the term in his dispatches, and to have recommended to the Colonial Office that it be formally

that would include New Zealand and perhaps Fiji as well. For even though they were not yet federated, it was common to refer to the five “mainland colonies” together with Tasmania collectively as “Australia” and to mean by this a kind of collective whole, quite distinct from, and more unified than, the wider group of south Asiatic states known as “Australasia”.

Federating a collection of previously independent political communities depends upon many different kinds of factors: social, economic, military, political and constitutional, to name the most obvious. And the question of New Zealand’s possible participation in a federation with the Australian colonies was no exception to this rule. But while much scholarly consideration has been given to the federation of the Australian colonies mostly in isolation from the New Zealand question,<sup>2</sup> and substantial thought has also been given to the question why New Zealand in particular ultimately chose not to join the Australian colonies,<sup>3</sup> relatively little attention has been given to the way in which the same basic question of federal union confronted all seven Australasian colonies in essentially the same way – each colony here being conceived as an independent political community contemplating the possibility of federation with the others. For when looked at this way, the fundamental question was the same for each Australasian colony: whether to federate, or not.<sup>4</sup>

adopted. The term was also adopted by the Lords Admiralty in 1824, and was subsequently used to designate the colonies of South Australia and Western Australia, and of course the Commonwealth of Australia when the federation came into being in 1901.

- 2 JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, Melbourne, 1974); Winston Gregory McMinn, *Nationalism and Federalism in Australia* (Oxford University Press Australia, Melbourne, 1994); Helen Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution* (Cambridge University Press, Cambridge, 1997); John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, Melbourne, 2000); Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, Cambridge, 2009).
- 3 EJ Tapp, “New Zealand and Australian Federation” (1952) 5(18) *Historical Studies Australia and New Zealand* 244; FLW Wood, “Why Did New Zealand Not Join the Australian Commonwealth in 1900-1901?” (1968) 2(2) *New Zealand Journal of History* 115; A Chan, “New Zealand, the Australian Commonwealth and ‘plain nonsense’” (1969) 3(2) *New Zealand Journal of History* 190; M Fairburn, “New Zealand and Australasian federation, 1883-1901: another view” (1970) 4(2) *New Zealand Journal of History* 138; Keith Sinclair, *A Destiny Apart* (Allen and Unwin, Wellington, 1986); Keith Sinclair, “Why New Zealanders Are Not Australians: New Zealand and the Australian Federal Movement, 1881-1901” in Keith Sinclair (ed), *Tasman Relations* (Auckland University Press, Auckland, 1987) at 90; Ged Martin, “New Zealand, Australian Federation and The ‘Plain Nonsense’ Debate” (1998) 11 *British Review of New Zealand Studies* 67; Philippa Mein Smith, “New Zealand” in Helen Irving (ed), *The Centenary Companion to Australian Federation* (Cambridge University Press, Cambridge, 1999) at 400; Philippa Mein Smith, “New Zealand Federation Commissioners in Australia: One Past, Two Historiographies” (2003) 122 *Australian Historical Studies* 305; Joanne Smith, “Twelve Hundred Reasons Why There Is No Australasia: How Colonisation Influenced Federation” (2009) 27(1) *Australian Cultural History* 35.
- 4 As Ged Martin has pointed out, although FLW Wood’s essay was originally directed to the basic question facing all seven of the Australasian colonies, Wood’s own focus, as well as the subsequent debate over his controversial thesis (which debunked the standard reasons for New Zealand’s decision to remain separate) focused almost entirely on the New Zealand question. See Ged Martin, “New Zealand, Australian Federation and The ‘Plain Nonsense’ Debate” (1998) 11 *British Review of New Zealand Studies* 67 at 70-71, 85-87. Martin’s

Thus, the question confronting New Zealand was in essence no different from that confronting Western Australia, Queensland, and the other Australian colonies. Indeed, of all the Australian colonies, Western Australia and Queensland were the most hesitant, and they were hesitant for reasons not very different from those that made New Zealand reluctant as well. Like New Zealand, Western Australia and Queensland were concerned about the economic and fiscal implications of federation; like New Zealand also, it was not at all clear that the advantages that political union might bring made federation an obvious best choice for their respective peoples. But precisely because the decision facing each of the Australasian colonies was not altogether different, New Zealand's decision not to federate offers an important counter-factual that sheds light on what it meant for each Australian colony to sign up for federation; and it also sheds light on the kind of federation that emerged as a result.

## II. LOCAL SELF-GOVERNMENT IN THE AUSTRALASIAN COLONIES

British settlement in Australia was from its beginning marked by the autocratic and unitary powers of the Governor of New South Wales, premised on Britain's claims of imperial sovereignty over the territory.<sup>5</sup> In 1770 the British Crown annexed the eastern coast of Australia by proclamation and physical occupation, and in 1786 His Majesty's territory of New South Wales was declared by Order in Council to be a place for the reception of "felons and other prisoners". The next year Captain Arthur Phillip was appointed Governor and Vice-Admiral of the territory, and he and succeeding Governors ruled with very wide powers indeed, moderated only by their personal humanitarian qualities or the defiance of their officers.

Furthermore, the authority of the Governor of New South Wales extended over the entirety of the colony, which as late as 1825 included virtually two-thirds of the Australian continent (that is, stretching to the current border of Western Australia), and was also asserted to include "islands adjacent in the Pacific", explicitly including – albeit only for a very few months in 1840 – the islands of New Zealand. As such, the settlements at Hobart (1803), Moreton Bay (1824), Port Phillip Bay (1835/6) and New Zealand (1840) at one time or another formed part of or were subject to the government of

book length study, *Australia, New Zealand and Federation 1883-1901* (Menzies Centre for Australian Studies, London, 2001) by contrast seeks to examine and compare the arguments about federation advanced in *both* the Australian colonies and New Zealand.

5 See the text and sources cited in Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, Cambridge: 2009) at 134-7. See also HV Evatt, "The Legal Foundations of New South Wales" (1938) 11 *Australian Law Journal* 409; ACV Melbourne, *Early Constitutional Development in Australia* (University of Queensland Press, Brisbane, 1963); WG McMinin, *A Constitutional History of Australia* (Oxford University Press, Melbourne, 1979); David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991); Alistair Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* (Cambridge University Press, 1991).

New South Wales.<sup>6</sup> The colony of South Australia (1836) was also carved out of territory originally part of the “mother colony”. Only Western Australia (1829) occupied territory that fell outside the powers formally vested in the New South Wales Governor.

Separation from New South Wales, together with full powers of local self-government, was secured by the Australasian colonies only gradually. Van Diemen’s Land separated from New South Wales in 1825 (and was renamed Tasmania in 1856), Western Australia, South Australia and New Zealand were separately established in 1829, 1836 and 1841 respectively, Victoria was carved out of New South Wales in 1851 and Queensland in 1859. A Legislative Council for New South Wales had been instituted in 1823,<sup>7</sup> and expanded in 1828,<sup>8</sup> but did not include locally-elected representatives until 1842,<sup>9</sup> and an executive government responsible to the parliament was not established in New South Wales until 1855/6.<sup>10</sup> The other colonies secured responsible government at or soon after separation: Victoria, Tasmania, South Australia and New Zealand secured it between 1855 and 1857;<sup>11</sup> Queensland secured it upon separation in 1859; while Western Australia remained a Crown Colony until 1890.

By 1890, however, all seven Australasian colonies were fully self-governing and enjoyed, in addition to representative legislatures and responsible governments, a local power to alter their own constitutions, confirmed not only through specific Imperial instruments directed to each colony, but also through the general operation of the Colonial Laws Validity Act 1865.<sup>12</sup> Although this did not amount to constitutional autochthony for the Australasian colonies – for they remained subject to the sovereign authority of the Imperial Parliament at Westminster – it did represent a substantial measure of constitutional self-determination.

### III. CONSTITUTIONAL SELF-DETERMINATION AND THE POLITICS OF FEDERATION

Constitutional self-determination was fundamental to the politics of federation. Each Australasian colony regarded itself, both legally and politically, as mutually independent and self-governing. As a consequence,

6 From 1842/3, New South Wales was divided into electoral districts that included Sydney, Port Phillip Bay and, later, Moreton Bay, each returning its own members to a central legislature, the Legislative Council of New South Wales: see Australian Constitutions Act (No. 1) 1842 (UK).

7 New South Wales Act 1823 (UK).

8 Australian Courts Act 1828 (UK). Compare Western Australia Act 1829 (UK), establishing a similar Council for Western Australia.

9 Australian Constitutions Act (No 1) 1842 (UK), under which 12 members of the Legislative Council were appointed by the Queen and 24 were elected by the inhabitants of the colony.

10 Constitution Act 1855 (NSW), s 37.

11 Constitution Act 1855 (Vic), s 37; Constitution Act 1855-56 (SA), s 32; Constitution Act 1867 (Qld), s 14; Constitution Act 1889 (WA), s 74. See *Toy v Musgrove* (1888) 14 VLR 349 at 396-7. In New Zealand, responsible government was based upon the New Zealand Constitution Act 1852 (UK), but did not become established until after the second general election in 1856.

12 Colonial Laws Validity Act 1865 (UK), s 5.

federation could only occur with the consent of the colonies concerned, and its specific shape had to be the result of a fully negotiated agreement between them.

As Sir Samuel Griffith of Queensland put it at the Australasian Federation Conference held at Melbourne in 1890: the colonies had been “accustomed for so long to self-government” that they had become – in their own minds at least – “practically almost sovereign states, a great deal more sovereign states, though not in name, than the separate States of America”.<sup>13</sup> As Griffith further explained at the Australasian Federal Convention held at Sydney in 1891, this meant that the “essential” and “preliminary” condition of federation was that:<sup>14</sup>

the separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves.

The vast bulk of those engaged in the debate over federation thought likewise. Richard Baker of South Australia maintained that federation is in essence a “compact made between the constituent states”.<sup>15</sup> John Cockburn, also of South Australia, said that federation is “a compromise and essentially a bargain”.<sup>16</sup> Even Alfred Deakin of Victoria, although comparatively less anxious to preserve the powers of the colonies over their own internal affairs, pointed out that the Convention would need to come up with a constitution that would take into proper consideration the legitimate concerns of the governments and peoples of the seven Australasian colonies.<sup>17</sup> Charles Kingston, soon to be Premier of South Australia, reminded the Convention, in terms very similar to those used by Griffith, that:<sup>18</sup>

we are dealing with autonomous States, who have long enjoyed the blessing of self-government, and who should not be asked – and who, if asked, would not be likely to accede to the request – to sacrifice any of their existing powers other than those which it is absolutely necessary should be surrendered in the national interest.

As John Cockburn also put it, “local government, self government, and government by the people are analogous terms. ... centralization is opposed to all three, and there can be no government by the people if the Government is far distant from the people.”

Following this line of reasoning, Griffith later argued that a “federation” is best understood as:<sup>19</sup>

13 *Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne* (Government Printer, Melbourne, 1890) at 10.

14 *Official Report of the National Australasian Convention Debates, Sydney* (Acting Government Printer, Sydney, 1891) at 31-2; see, likewise, Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (Government Printer, Sydney, 1896) at 6-7, 10.

15 *Convention Debates, Sydney* (1891) at 111.

16 *Convention Debates, Sydney* (1891) at 197, 199.

17 *Convention Debates, Sydney* (1891) at 69-70.

18 *Convention Debates, Sydney* (1891) at 153.

19 Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects*, above n 14, at 5.

a political union of several States, which, for certain purposes, and within certain limits, is complete, so that the several States form one larger State with a common Government acting directly upon the individual citizens as to all matters within its jurisdiction, while, beyond those limits, and for all other purposes, the separate States retain complete autonomy.

And even within the limited sphere of authority that would be granted to the federation, there was a widespread view, strongly endorsed by Griffith and many others, that each of the colonies ought to be equally represented in one of the houses of the federal parliament (the Senate) and that this house should have virtually equal power with the lower house (the House of Representatives).<sup>20</sup>

Proposing that the Senate should have virtually equal power with the House of Representatives implied a potentially very important qualification on the way in which parliamentary responsible government would operate at a federal level. Responsible government as it had traditionally developed in the United Kingdom and was practised throughout the colonies involved the principle that the government of the day was primarily responsible to the lower house of parliament. To make this effective, certain conventional or legal restraints on the legislative powers of the upper house were imposed, particularly in relation to money bills. But delegates like Richard Baker of South Australia, Andrew Inglis Clark of Tasmania and several others, including Griffith, expressed doubts about the appropriateness of adopting the traditional system of parliamentary responsible government within a federal system. A genuinely federal system, they thought, required a powerful Senate that could effectively represent the peoples of the constituent states of the federation – just as it did in the United States and in Switzerland.<sup>21</sup>

#### IV. THE NEW ZEALAND CONTRIBUTION

This same set of basic principles was fundamental to the position articulated by the two New Zealand representatives at the Conference of 1890, Sir John Hall, then Premier of New Zealand, and Captain William Russell, Colonial Secretary for New Zealand. Much of the debate over New Zealand's decision not to federate with the Australian colonies has focused on the reasons Hall and Russell cited for New Zealand's hesitancy articulated at the Conference of 1890.<sup>22</sup> But there are several features of Russell's and Hall's arguments, generally overlooked, but fundamental to their position, on which Griffith and most of the other Australians would have heartily agreed.

For what it was worth, both Russell and Hall expressed strong support for the proposition that the Australian colonies should be federally united, but they at the same time cautioned that New Zealand's participation would have

20 *Convention Debates*, Sydney (1891) at 31-2.

21 Richard Baker, *Executive in a Federation* (Government Printer, Adelaide, 1897); Andrew Inglis Clark, *Australian Federation (Confidential)* (Attorney-General's Office, Hobart, 1891) at 5-7; Samuel Griffith, *Notes on the Draft Federal Constitution Framed by the Adelaide Convention of 1897* (reprinted Queensland Legislative Council, Journal (1897), vol 47, pt 1) at 4-5.

22 See the publications cited in nn 3 and 4 above. See also William Pember Reeves, "The Attitude of New Zealand", first published in (1901) *Empire Review*, vol 1, no 1.

to be viewed as a more distant possibility. Among the barriers they foresaw, they drew attention to geographical distance, divergent economic interests, underlying cultural differences, a concern to preserve New Zealand's financial and political autonomy, and the view that continuing free trade, cooperation and mutual military support would be possible without the need for full federation.<sup>23</sup>

A key assumption in their reasoning was reflected in Sir John Hall's important statement of principle, expressed in terms very similar to the language later used by John Cockburn, that "[d]emocratic government must be a government not only for the people, and by the people, but, if it is to be efficient ... it must be in sight and within hearing of the people".<sup>24</sup> From this starting point, Hall argued, any decision by New Zealand to enter federation would have to depend on an emerging "community of interest" with the Australian colonies, and it must also be accompanied by a constitutional guarantee of the continuing independence of each constituent state, including an adequate degree of representation in the federal parliament.<sup>25</sup> Captain Russell clearly thought likewise, strongly maintaining that the possibility of New Zealand entering the federation must be viewed as a more distant prospect than a federal union among the Australian colonies.

To this end, the New Zealand delegates insisted that the question of an Australian federation be separated from the possibility of New Zealand forming part of it. At the outset of the Convention of 1890, Henry Parkes had presented a motion calling for "an early union" of the Australasian colonies.<sup>26</sup> However, Russell and Hall asked that the resolution be changed, so that it would refer only to the Australian colonies, and at the same time proposed a second resolution that referred to the entitlement of "the remoter Australasian Colonies" to admission into the federation at some time indefinite time in the future – "on such conditions as may be hereafter agreed upon".<sup>27</sup>

But if New Zealand's participation in federation was a more remote possibility, the New Zealand delegates were nonetheless happy to concur in a further resolution that called on the delegates to induce their respective parliaments to appoint delegates to a National Australasian Convention "empowered to consider and report upon an adequate scheme for a Federal Constitution".<sup>28</sup> This resolution was framed specifically to include the New Zealand delegates so that they would have some say in the formation of the constitution under which federation would possibly occur.<sup>29</sup> Accordingly, at the National Australasian Convention duly convened in 1891, New Zealand was again represented, this time by Russell, together with Sir Harry Atkinson, a former Prime Minister of New Zealand, and Sir George Grey, a former Governor of South Australia, Cape Colony and twice of New Zealand, as well as for a short time Premier of New Zealand.

23 *Conference Debates, Melbourne* (1890) at 123-9 (Russell), 174-84 (Hall).

24 *Conference Debates, Melbourne* (1890) at 176.

25 *Conference Debates, Melbourne* (1890) at 175-6.

26 *Conference Debates, Melbourne* (1890) at 19-20, 33.

27 *Conference Debates, Melbourne* (1890) at 26, 245.

28 *Conference Debates, Melbourne* (1890) at 30, 246.

29 *Conference Debates, Melbourne* (1890) at 30, 245 (Russell), 246 (Deakin), 253 (Hall).

At the Convention of 1891 Russell elaborated on the basic line of argument that he and Hall had maintained in 1890. Thus, as a matter of first principle, Russell argued that the colonies should not be aiming at the “unification of Australasia” through the formation of “one large colony [centred] on the continent of Australia”, but should rather seek to form a genuinely “federal constitution” to which the colonies might one day agree to attach themselves, “should they now or hereafter think fit to do so”.<sup>30</sup> Continuing to express an ambivalence about New Zealand’s participation in a federation with the Australian colonies, Russell acknowledged that while New Zealanders were not entirely “inimical to the idea”, they did indeed “hesitate ... to submit [themselves] to federation” with the Australian colonies. As he put it, the New Zealanders remained “unwilling to abrogate any of the powers of government necessary [to their] internal management”, although they were possibly willing to submit to some very general policies articulated by an Australasian confederation in relation to specific issues of common concern.<sup>31</sup>

What was needed, Russell argued, was “a system of federation as loose as possible”, one that would allow “all the more outlying portions of Australasia ... to work out their own destinies”.<sup>32</sup> For Russell, the constitutional destiny of New Zealand lay fully within its own hands, and its role within any Australasian federation would have to leave adequate room for New Zealand to pursue its own political destiny in relation to matters thought best to be reserved to itself. Moreover – like Australians such as Griffith, Baker and Clark – Russell favoured a powerful Senate that would represent all of the constituent colonies equally. As Russell put it:<sup>33</sup>

It has been said that the people should have the entire power, seeing that they represent the purse. That is a truism. It has become, I think I may almost say, a fetish throughout all British-speaking communities, that the power in every question should rest with the bare majority. That majority is often very bare and very narrow; and though to the very fullest extent I concede that the power must rest with the people, it is a very open question whether countries ought to be submitted to the cyclonic effects of popular gusts of passion, unchecked by any authority whatsoever, and I venture to affirm, though it may seem paradoxical, that the senate might possibly more truly represent the majority of Australasia than might the people’s representatives in the house of assembly. In the first place, I would say that it is absolutely essential if the weaker colonies are to come into a federation that they shall have a numerical majority for the time-being, because we are not speaking now for an ancient people in a country fairly populated, but we are speaking for large territories which yet have to be colonised, in which great numbers of people will be settled on places which at present are waste and uncultivated-and if we say that the sole power shall rest in the hands of those who chance at the moment to represent a majority of the colonised portions of Australasia, how can we expect that we shall have a true federal union? How can we imagine that the outlying districts will submit themselves to what, I believe, may be the tyranny of a chance majority? Let us give to the senate, then, full power, seeing that in all probability it will represent numerically the majority of Australasia rather than those who chance to be the people’s delegates for the moment in the house of representatives.

30 *Convention Debates, Sydney* (1891) at 64, 66, 826.

31 *Convention Debates, Sydney* (1891) at 67.

32 *Convention Debates, Sydney* (1891) at 66.

33 *Convention Debates, Sydney* (1891) at 64-5.

While Russell here referred to the need for some counter-veiling “authority” as a check for “popular gusts of passion”,<sup>34</sup> the core of his argument was that simple majoritarian conceptions of democracy are misplaced when applied to complex associations of political communities such as the envisaged federation of the Australasian colonies. A powerful Senate, representative of each of the constituent states, was necessary in order to secure a genuinely democratic system of government, appropriate to a federation of self-governing communities. Russell also accordingly expressed a certain scepticism about parliamentary responsible government and its appropriateness within a federal system. Like Griffith, Baker and Clark, he realised that a powerful Senate, though essential to a federal system as he understood it, ran counter to the principle of government responsibility to the lower house as practiced in those systems influenced and shaped by the Imperial Parliament at Westminster.<sup>35</sup>

In these fundamental ways, the principled positions adopted by Griffith, Baker, Clark and Russell were essentially the same. This was even recognised by one of their opponents in the debate, Alfred Deakin, when he took issue particularly with Griffith’s and Russell’s call for a powerful Senate and their attacks on the traditional model of parliamentary responsible government. It is noticeable that from Deakin’s standpoint, the positions of Griffith and Russell were indistinguishable on these two points.<sup>36</sup> The only difference between the two, thought Deakin, was that Russell had rather unfairly expressed reservations about New Zealand’s participation in the federation while at the same time daring to lay down “with great fullness” what kind of federation he believed should be created.<sup>37</sup>

Of the two other New Zealand delegates at the Convention of 1891, it has to be said, Sir Harry Atkinson’s contribution was very minimal,<sup>38</sup> while Grey’s contribution, although very extensive indeed, was not particularly influential. This was largely because, in contrast to the firm pragmatism of Russell and Hall, Grey was prone to idealistic and often impractical schemes – many of which he had advocated but largely failed to implement whilst in public office. Moreover, while posturing as a progressive liberal at the Convention of 1891, as Governor he had tended to govern autocratically and had at times actually resisted the development of representative and responsible government.<sup>39</sup>

34 Cf Philippa Mein Smith, “New Zealand Federation Commissioners in Australia”, above n 3, at 314.

35 *Convention Debates, Sydney* (1891) at 65–66. Russell later suggested that there was considerable room for compromise in relation to the powers of the Senate over money bills, but that the pragmatic course of giving the Senate full power was more likely to secure popular support for federation: *Convention Debates, Sydney* (1891) at 405–6.

36 *Convention Debates, Sydney* (1891) at 69, 83–4.

37 *Convention Debates, Sydney* (1891) at 68–9.

38 It is true, however, that Atkinson’s characteristic concern to maintain the integrity of the colonial finances was a point taken up other delegates, including his colleague, Captain Russell. See *Convention Debates, Sydney* (1891) at 670–71 (Atkinson), 672 (Russell), 673 (Bird), 678 (Burgess), 838 (Deakin). Russell was perhaps prophetic when he expressed concern about the virtually unlimited taxing powers that were to be conferred upon the Commonwealth, predicting that nothing would stand in its way if it were to seek to monopolise the sources of revenue: *Convention Debates, Sydney* (1891) at 828.

39 “Grey, Sir George (1812–1898)” *Australian Dictionary of Biography* (Melbourne University Press, Melbourne, 1966) vol 1, at 476–480. Grey resisted the implementation of the New Zealand Constitution Act 1846 (UK), although he oversaw the implementation of the New

Grey's contributions to the discussion at the Convention of 1891 were often extravagant and almost always impractical. A supporter of a grandiose scheme of federation on an imperial scale, Grey went so far as to suggest that the Australasian Convention – although called to consider the federal union only of the Australasian colonies – ought to envision a “federation of *all* English-speaking people”, including not only Australia and British colonies in the Pacific, but also, it seems, the people of the United States!<sup>40</sup> And while he was ambivalent about the prospect of New Zealand actually federating with the Australian colonies,<sup>41</sup> he did not hesitate to lecture the delegates about the shape that an Australian federation should take.

Grey's conception of federation, and of the purposes for which the Convention had been called, was idiosyncratic, to say the least. One of his most persistent preoccupations – of only tangential relevance to the central questions that the Convention had been convened to discuss – was that each of the colonial constitutions should be amended to remove plural voting and the property franchise, in a manner by-passing the already existing capacity, enjoyed by each colonial parliament, to alter its own constitution.<sup>42</sup> The protestations of numerous delegates that the fundamental reform of the colonial constitutions raised issues that lay well outside the proper concerns of the federal convention, seemed to fall on deaf ears, such was the persistence with which Grey tilted at this particular windmill.

Moreover, in sharp contrast to the positions articulated by Griffith, Russell and many others, Grey's conception of what it would mean for the colonies to unite in a federal commonwealth looked more like an essentially unitary system, rather than a federation of the kind most of the delegates envisaged. Thus, Grey proposed that the whole federation should rest, not on the consent of the people of each independent colony, but upon “the people” of the nascent nation as a whole,<sup>43</sup> and that the federal constitution should be amended only with the consent likewise of “the people”.<sup>44</sup> He also argued that the federal parliament ought to be given unlimited jurisdiction to legislate on any topic whatsoever – a truly extraordinary suggestion that if implemented would have effectively relegated the state parliaments to the position of subordinate legislatures within a unitary system of government.<sup>45</sup> In the same vein, Grey also proposed that the Governor-General and Governors should

Zealand Constitution Act 1852 (UK), under which both representative and responsible government was eventually established.

40 *Convention Debates, Sydney* (1891) at 140-42 (emphasis added).

41 *Convention Debates, Sydney* (1891) at 137.

42 *Convention Debates, Sydney* (1891) at 327-8, 330-32, 422-3, 453-5, 477-9, 486-9, 493-5, 889-90, 924-7.

43 *Convention Debates, Sydney* (1891) at 900, 903-4, 937.

44 *Convention Debates, Sydney* (1891) at 889-90.

45 *Convention Debates, Sydney* (1891) at 137.

be directly elected,<sup>46</sup> and that the principle of “one man, one vote” should be adopted, not only at a state level, but be mandated for the federation as a whole.<sup>47</sup>

Grey’s general outlook, it has to be noted, was echoed by small number of other delegates at the Conventions of 1891 and 1897-8. HB Higgins of Victoria, for example, similarly maintained that the federation ought to be founded upon the consent of the people of the entire Australian nation, and that consequently both houses of the federal parliament should be representative of the people in proportion to population, without any special representative rights being given to the smaller states.<sup>48</sup> Isaac Isaacs and a minority of others expressed similar views, although – unlike Grey – they at no time went so far as to suggest that the federal parliament should be given the power to legislate on any topic that it chose.<sup>49</sup>

Grey’s proposals accordingly met with widespread resistance on just about all counts. Even Grey’s colleague from New Zealand, Captain Russell, openly disagreed with him on a number of these issues.<sup>50</sup> In particular, there was strong resistance to Grey’s suggestion that provision be made in the federal constitution for the total redesign of the colonial or state constitutions – principally on the ground that it was not the concern of the federal convention to be dictating to the colonies how their own constitutional arrangements should be structured.<sup>51</sup> The constitutions of the states were to be presupposed by the federal constitution, they insisted, not established by it.<sup>52</sup>

Samuel Griffith was prepared to say that it was important that the state constitutions be genuinely representative, but this certainly did not mean that that the federal parliament should be given any power to interfere with their constitutions.<sup>53</sup> Sir John Forrest, as Premier of Western Australia, went further, expressing concern that Grey’s proposal implied that the states would somehow be made subordinate to the federal government.<sup>54</sup> Forrest’s

46 *Convention Debates, Sydney* (1891) at 138, 487, 561-4, 565-6, 568-70, 572-3. Responses to Grey’s proposal about the Governor-General were made by several leading delegates, some of them arguing that election of the Governor-General would be contrary to the principles of parliamentary responsible government: see *Convention Debates, Sydney* (1891) at 564-5 (Munro), 566-7 (Griffith), 567 (Kingston), 567-8 (Russell), 570-71 (Deakin), 571-2 (Downer).

47 *Convention Debates, Sydney* (1891) at 615-7, 621-2. Note, however, that for Grey, as with most of his contemporaries, this did not mean a requirement that electorates be of the same size or population, but that plural voting be abolished. See Aroney, *The Constitution of a Federal Commonwealth*, above n 2, at 209-10, 232-7.

48 *Official Report of the National Australasian Convention Debates, Adelaide* (Government Printer, Adelaide, 1897) at 98; *Official Record of the Debates of the National Australasian Convention, Sydney* (Government Printer, Sydney, 1897) at 259-60.

49 See Aroney, *The Constitution of a Federal Commonwealth*, above n 2, at ch 10.

50 *Convention Debates, Sydney* (1891) at 877.

51 *Convention Debates, Sydney* (1891) at 327 (Gillies), 328-9 (Playford), 332-3 (Munro), 335 (Deakin), 336 (Barton), 338 (Wrixon), 340 (Thynne), 478 (Parkes), 489-93 (Forrest), 497 (Russell).

52 Cf *Convention Debates, Sydney* (1891) at 486-7 (Grey, arguing to the contrary). See, further, Aroney, *The Constitution of a Federal Commonwealth*, above n 2, at ch 9.

53 *Convention Debates, Sydney* (1891) at 489-90.

54 *Convention Debates, Sydney* (1891) at 490.

immediate claim was overblown,<sup>55</sup> but his deeper concern was exactly to the point. As Forrest's line of argument pointed out, the Australian Constitution (like the American and Swiss Constitutions before it) was to be predicated upon the agreement of the states as constituent bodies politic, and this entailed an entire logic of federation that was the reverse of that which prevailed in Canada. The British North America Act 1867 deliberately reconstituted the various Canadian colonies as *provinces* of the Dominion of Canada, denying them an independent constitutional existence as constituent *states*, thus conferring original and general legislative powers on the Dominion, and leaving a mere residue of power to the provinces.<sup>56</sup> For Forrest, as well as for the overwhelming majority of his colleagues, the Australian system should follow the American model and presuppose the existence of the colonies as constituent bodies politic, conferring only specific and limited powers on the federation, while reserving the balance of *original* powers to the constituent states.<sup>57</sup>

Grey's other major proposal – that the federal constitution make provision for a federal parliament with unlimited legislative power – was rejected with virtually no debate at all,<sup>58</sup> for it went without saying that such a scheme would involve the creation of a near unitary system, where the powers of the state parliaments would effectively be made subject to the unfettered discretion of the federal parliament. Indeed, such a proposal was plainly contrary to the stated objective of the Convention to formulate a constitution under which “the powers and privileges and territorial rights of the several existing colonies” would “remain intact” – except only to the extent as would “be agreed upon as necessary and incidental” to the creation of a “National Federal Government”.<sup>59</sup>

Grey's proposal that the federal constitution be ratified directly by the people of Australia was also widely resisted on the ground that the federation would need to be predicated upon the voluntary agreement of each colony.<sup>60</sup> How each colony would express that agreement, it was argued, would need to be determined by the legislature of each colony – the legislatures might choose to scrutinise the proposed federal constitution themselves, they might decide to invoke a specially-elected convention or they might refer the matter directly to the people – but the most important principle was that the elected representatives of each colony would determine this question for themselves.

Grey's contribution to the Convention was for these reasons almost entirely ineffectual. The Convention settled on a Constitution Bill that was predicated on the status of the several colonies as pre-existing self-governing

55 Forrest seemed to qualify it almost immediately: see *Convention Debates, Sydney* (1891) at 493 (arguing that Grey's proposal was essentially unnecessary, rather than dangerous).

56 Admittedly, s 91 of the British North America Act included an explicit list of powers conferred upon the Dominion Parliament, but this list was included “for greater certainty”, and “not so as to restrict the generality” of the powers conferred.

57 *Convention Debates, Sydney* (1891) at 490-91.

58 Cf *Convention Debates, Sydney* (1891) at 166 (Fitzgerald).

59 *Convention Debates, Sydney* (1891) at 431 (Routledge), cf 523 (Griffith).

60 *Convention Debates, Sydney* (1891) at 900-901 (Griffith), 902-3 (Munro, Deakin, Dibbs), 927-8 (Griffith).

communities, each entitled to decide what its constitutional destiny might be. As it turned out, the political leaders of the colonies, when presented with the Bill for various reasons allowed the momentum towards federation engendered by the gatherings of 1890 and 1891 to lapse, and it was not until 1895 that the movement was reinvigorated. A second federal convention was convened in 1897-8 at which all of the Australasian colonies were represented, except Queensland and New Zealand. Queensland was itself torn by divisions between its southern, central and northern regions, and the possibility that it might be sub-divided into two or three separate colonies was a real possibility, while the political leaders of New Zealand seemed to lose interest in Australasian federation altogether. The Convention of 1897-8 produced a Constitution Bill very largely based on the Bill of 1891, albeit altered in a form that involved a more direct role for “the people(s)” of the colonies in both the ratification of the Constitution by referendum on a state-by-state basis and in the mechanism for its amendment in the future, and it was this Constitution that was enacted by the Imperial Parliament in 1900 and under which the Australian colonies federated in 1901.

#### V. NEW ZEALAND AS A COUNTER-FACTUAL

Although they were well aware that New Zealand’s political leaders had become disinterested in federation, the Australian delegates at the second Federal Convention of 1897-98, were solicitous to ensure that room was given for New Zealand to enter the federation at some time in the future. Thus, in the Constitution that emerged from the second Convention and was ultimately enacted into law by the British Parliament, the hope that the other “Australasian Colonies” of the region might one day be admitted to the Commonwealth of Australia was expressed in the Preamble, and explicit provision for the inclusion of New Zealand was made in covering clause 6.<sup>61</sup> Thus, although at the insistence of the New Zealanders, what was envisaged was the creation of a “Commonwealth of Australia” (and not of “Australasia”),<sup>62</sup> the Constitution looked forward to the possible future admission of New Zealand and other “Australasian Colonies” upon terms agreeable to both parties.<sup>63</sup>

However the fact remained that, for the rest of the 1890s, New Zealand had decided, either deliberately or by default, to take a different path. The politics of the day was dominated by the wily and somewhat formidable figure of Prime Minister Richard Seddon, who famously opposed or else avoided the issue of federation. As something of a sup to the issue, a New Zealand Federation Commission visited the new Australia in March and April of 1901 to inquire and then report on the question, but nothing particularly came of it as far as the possibility of New Zealand’s participation in the federation was concerned.

61 The general provision for the addition of new states appears in s 121 of the Australian Constitution.

62 See *Conference Debates, Melbourne* (1890), 129 (Russell), 175 (Hall), 245 (Russell).

63 Commonwealth of Australia Constitution Act 1900 (UK), preamble and covering clause 6; Constitution of the Commonwealth of Australia, s 121.

Nonetheless, the fundamental principles articulated by Australian and New Zealand delegates at the official federal gatherings of 1890, 1891 and 1897-8 were largely the same. Why, then, did New Zealand remain outside the federation? The central concern here is not so much with the reasons why New Zealand remained separate per se, but the light that these reasons, as a set of counter-factuals, shed on the kind of constitution under which the Australian colonies eventually federated.

A central reason, often advanced at the time, was a concern to preserve New Zealand's political autonomy in the face of fears of domination by the larger Australian colonies. Russell himself expressed concern that New Zealand, with a population of around only 700,000, would be outnumbered in the federal parliament by representatives of the Australian colonies with a collective population approaching 4 million, dominated in particular by New South Wales, Victoria and Queensland collectively boasting over 2.5 million people.<sup>64</sup> In this connection, however, it is instructive to notice that the Tasmanian Treasurer, Bolton Stafford Bird, pointed out in 1890 that his own colony, with only 150,000 in population, like Western Australia with little over 40,000, was in an even weaker position numerically. However, this did not pose any fundamental obstacle to federation, he argued, provided that the terms of federation proceeded, as Henry Parkes had proposed, "on principles just to the several colonies" – meaning for Bird that the "basis of representation" in the federal parliament would have to assure the people of the smaller colonies that they would have a sufficiently significant role in the formation of federal policy.<sup>65</sup> For the representatives of the smaller colonies – Tasmania, Western Australia and New Zealand included – equal representation in the Senate was of prime importance, for it would ensure that the "numerical" inequality between the colonies did not altogether undermine the fundamental principle of their constitutional equality.<sup>66</sup>

Another important set of factors were economic. Russell, a committed free trader, was concerned lest protectionists in Australia might use federation as a way of increasing tariffs – a development that Russell believed would be contrary to the interests of New Zealand.<sup>67</sup> Historians have indeed observed that New Zealand's economic interests had evolved in a different way to those of the Australian colonies, and these different interests cautioned New Zealanders against federation with its economically more powerful neighbours.<sup>68</sup> Other concerns, such as geographical distance and the inherent difficulties in organising a pan-Australasian defence, were also raised as important factors. There was also the recurrent assertion that New Zealanders constituted a superior "British type", unblemished by the convict origins of New South Wales and Van Dieman's Land.<sup>69</sup>

64 *Conference Debates, Melbourne* (1890) at 128.

65 *Conference Debates, Melbourne* (1890) at 166.

66 See *Convention Debates, Sydney* (1891) at 64-5, discussed above.

67 *Conference Debates, Melbourne* (1890) at 128.

68 New Zealand was also going through a major depression at the time – a depression that had not yet fully reached Australia – and public debt was a major issue of concern. See James Belich, *Paradise Reforged: A history of the New Zealanders From the 1880s to the Year 2000* (University of Hawai'i Press, Honolulu, 2001) at 32-52.

69 See, for example, Joanne Smith, "Twelve Hundred Reasons Why There Is No Australasia: How Colonisation Influenced Federation" (2009) 27(1) *Australian Cultural History* 35.

Related to this last point was the view that New Zealand had engaged in a distinct mode of colonisation, in part constituted by the view that New Zealand's climate was better suited to British colonisation, and in part constituted by the view that the status of the Maori was in some sense superior to the treatment received by Australia's indigenous peoples.<sup>70</sup> Historians have for some time interrogated the question of race and national identity in New Zealand's decision. However, there is an interesting side to this issue that sheds light, not simply upon prevailing conceptions of race and national identity and their role in New Zealand's decision to remain separate, but specifically upon the fundamental constitutional question of what it meant for any one of the Australasian colonies to agree to federate in the first place.

Captain Russell's contribution to the debate at the Convention of 1891 is of particular importance here. As has been seen, it was Russell's firm view that, if New Zealand were to federate, what would be needed was "a system of federation as loose as possible", and one in which "all the more outlying portions of Australasia [would] be allowed to work out their own destinies".<sup>71</sup> In this connection, Russell strikingly argued that New Zealand was in a unique situation in that, in contrast to the Australian colonies, it already had "what [might] be termed a foreign policy", constituted by its dealings with the Maori. Russell alluded in particular to special laws that had been enacted in relation to New Zealand's first nations and to the issues of native title that arose in the context of the unique relationship that was developing between Maori and British settlers. By referring to a kind of "foreign policy" he could possibly have been alluding even to the Treaty of Waitangi, although he certainly does not seem to have endorsed a particularly robust view of Maori rights under the treaty.<sup>72</sup> But whatever his specific intent and concerns, it is clear that Russell believed that New Zealand needed to maintain this level of independence if it were to enter into federation.

To understand New Zealand's governing capacities in this way was to go further than even the most ardent "state righters" among the Australians were prepared to contemplate. Even Samuel Griffith, who spoke of the colonies as possessing the power of "sovereign states" was not actually prepared to suggest that the colonies should maintain a claim to a kind of international personality in its dealings with indigenous or other peoples. Griffith, like Andrew Inglis Clark and others, certainly does seem to have wanted to see Australia become an independent nation-state one day, but he did not conceive the individual colonies as aspiring to that kind of status apart from their participation within the federation.<sup>73</sup>

By contrast, Russell wanted to preserve the independence of New Zealand as a separate colony, and seems to have implied that what was required was a very loose confederation of independent states, each with its own foreign

70 *Conference Debates, Melbourne* (1890) at 125-6 (Russell).

71 *Convention Debates, Sydney* (1891) at 66.

72 *Convention Debates, Sydney* (1891) at 66. See P Mein Smith, "New Zealand Federation Commissioners in Australia", above n 3, at 321.

73 On this, see Aroney, *The Constitution of a Federal Commonwealth*, above n 2, at 329-32. See also the discussion in *New South Wales v Commonwealth* (1975) 135 CLR 337 at 373 (Barwick CJ).

policy, implying a nascent kind of international personality under the law of nations. Indeed, placing New Zealand in a position to negotiate the terms of a “reciprocal treaty” with Australia on an equal basis may well have been Prime Minister Richard Seddon’s ultimate intention.<sup>74</sup> Back in 1835, the official “British resident” in New Zealand, James Busby, had cooperated with certain Maori tribal leaders to issue a Declaration of Independence which asserted the independence of Nu Tirene under the rule of the “United Tribes of New Zealand”. Sixty-five years later, as James Belich has suggested, New Zealand’s decision not to federate with the Australian colonies was a kind of declaration of independence issued a second time.<sup>75</sup>

What made New Zealand take a path different to that taken by the Australians was that in the application of what were largely the same principles, different conclusions were drawn relative to the different conditions, circumstances and aspirations of the several colonies. If New Zealand since then has not only pursued a path of international independence, but has also been in a position to negotiate on an equal basis all the many kinds of specially agreed arrangements with Australia that have nonetheless bound the two countries so closely together since then, it is due to New Zealand’s fateful decision in 1901 not to unite with the Australian colonies, but to insist on its own independent constitutional path, in due time culminating in New Zealand becoming an independent state among the nations of the world.

74 Philippa Mein Smith draws attention to the instructions to the New Zealand Federation Commission in 1901 that if they decided that participating in federation was “premature or inadvisable” they should report alternatively on the “establishment of a reciprocal treaty” with Australia. See P Mein Smith, “New Zealand Federation Commissioners in Australia” above n 3, at 319, citing “Report of the New Zealand Federation Commission”, *Appendices to the Journal of the House of Representatives* (New Zealand, 1901), A-4, vi.

75 Belich, *Paradise Reforged*, above n 68, at 46.