

## Abstract

This thesis examines a central issue of Australian history, using an historiographical model developed by British scholars. Historians exploring developments in Great Britain in the first half of the nineteenth century generally agree that modern methods of government and of conducting parliamentary business emerged there during that period. Some emphasise historical forces as the explanation for change, others the impact of ideas. Insofar as Australian historians have written about such issues, they have paid little attention to methods of government and the creative uses of authority in New South Wales.

A core problem for this thesis has been to consider how closely developments in mid-nineteenth-century New South Wales followed those in Great Britain and, in the process, to consider what colonial governments and legislators actually did in the field of law-making, especially in the 13 years leading up to the commencement of responsible government in 1856. While much was adapted from British experience in terms of legislative precedent and methods of government, New South Wales was no mere replica of its parent. The willingness of early “conservative” legislators to experiment in a creative and radical manner led to a period of dense and impressive social reform in the late 1840s and early 1850s.

Between 1843 and 1855, after the establishment of a partly elected legislature but before responsible government, increasingly potent methods of introducing public opinion and public accountability into the business of law-making were being perfected in New South Wales, petitions, the press and, especially, select committees of the legislature, all playing a part. At the same time, a growing emphasis was placed on the need for expertise in government and the public service, especially by adherents of utilitarianism. This study reveals a period of tremendous legislative and, even, nation-building effort which provided a strong launching pad for responsible government. However, the introduction of that form of government was itself followed by something of a legislative *dénouement*, the factionalism that accompanied the triumph of the liberal democrats and overwhelmed clear utilitarian priorities militating against the passage of all but a few landmark reforms in the parliament’s early years.

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## Introduction

This thesis is concerned with law-making in New South Wales in the middle decades of the nineteenth century. Historians exploring developments in Great Britain in the first half of the nineteenth century now generally agree that modern methods of government and of conducting parliamentary business emerged there during this period. However, there has been much debate about the timing and causation of change. Some have emphasised the importance of historical forces, others the impact of ideas. Writing to begin with in 1958 Oliver MacDonagh, the leading protagonist in the former camp, argued that the intolerable social evils of the age set in train an irresistible demand for change and legislative action. He and his adherents made little allowance for the influence of ideology, especially of Benthamism. Others however have considered that the impact of ideas, of laissez faire, individualism, utilitarianism and paternalism, cannot be discounted. These arguments are outlined in Chapter 1.

It is the aim of this thesis to ask similar questions about nineteenth-century New South Wales. Insofar as Australian historians have written about such issues, they have followed a variety of different paths. R.W. Connell, T.H. Irving and Alastair Davidson are representatives of the radical nationalist perspective, which treats government power as oppressive, whether emanating directly from Britain or from a colonial elite. Although such writers display an interest in the uses of power, the notion of government authority as a genuinely creative aspect of colonisation does not form part of their approach. The older liberal tradition, developed, for instance, by Michael Roe and John Ward in writing about New South Wales, takes a more positive approach but pays very little attention to what governments actually did. Overall then, what is lacking at present is an interest in the creative uses of authority in New South Wales. This is what this thesis aims to supply.

The thesis nevertheless draws to some extent on such earlier work. Connell and Irving argued in *Class Structure in Australian History: Poverty and Progress* (1980) that the unity of the ruling class in eastern Australia dissolved in the 1840s and that a struggle for control of the state developed, the conflict being projected on the political stage “in terms of rival social orders: plantation capitalism versus *laissez-faire* capitalism”.<sup>1</sup> They said that to

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<sup>1</sup> R.W. Connell and T.H. Irving, *Class Structure in Australian History: Poverty and Progress*, Longman Cheshire, Melbourne 1980 (2nd edn. 1992), p. 94.

understand class dynamics in Australia, it was necessary to view the white settlements as occupying a specific place in a highly differentiated global structure, a place that changed in response to both the dynamics of the whole system and local events.<sup>2</sup> In observations that support the argument of this thesis that New South Wales was not a British clone, Connell and Irving denied that the British state was simply transplanted into Australia. They described the state in general as a set of social relations that cannot be translated in their entirety to a new location, arguing that it needed to be reconstructed to meet new conditions. In Australia, they said, this task was undertaken deliberately, using British resources and features, but from the outset, it departed from the British model in a number of ways.<sup>3</sup> This is largely the approach taken by this thesis.

Connell and Irving referred to the struggle for land in the Australian colonies in the mid-nineteenth century largely taking the form of a struggle for control of state organisations, arguing that the fundamental connection between business, the state and the property system was made very plain in the process. Access to state power was sought because it directly affected private fortunes.<sup>4</sup> They also noted that while attention tended to focus on the interior, political power lay in the towns where the period of bourgeoisie hegemony began, the 50 years from 1840 heralding the era of the “hegemony of the mercantile bourgeoisie”—a point also of importance for this thesis. They pointed to a major contraction in state activity in the labour market early in this period, and to the movement to stop further transportation as a major factor in mobilising colonial workers and crystallising urban bourgeoisie politics, the movement achieving its ends when the gold-rushes convinced the British government that bourgeoisie dominance was feasible in the colonies.<sup>5</sup> When examining the transfer of state power and the change in the form of the state, Connell and Irving argued that the introduction of responsible government occurred not only in the context of a reorganisation of imperial relationships but also of a change in the balance of class forces within the colonies.<sup>6</sup> These are issues to be explored below, but from a different theoretical perspective. Connell and Irving’s discussion has particular relevance to the argument of this thesis that the rhetoric of the early 1850s regarding constitution-making was quite at odds with the reality of the work of the New South Wales legislative council as

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<sup>2</sup> Ibid., p. 13.

<sup>3</sup> Ibid., p. 35. See also R.W. Connell, *Ruling Class Ruling Culture: Studies of conflict, power and hegemony in Australian life*, Cambridge University Press, Cambridge 1977, p. 6.

<sup>4</sup> Ibid., p. 40.

<sup>5</sup> Ibid., pp. 70, 83-84.

<sup>6</sup> Ibid., pp. 87-90.

established in the 1840s. And here too MacDonagh's view of the paramountcy of historical forces, of great social and political changes—the rise of the middle class and, less obviously, the transformation of the nature of parliamentary government—driving change, will be tested against the actuality of local circumstances.<sup>7</sup>

Alastair Davidson has spoken of a struggle for control of state power and institutions in somewhat similar language. In *The Invisible State: The Formation of the Australian State 1788-1901* (1991), Davidson seeks to explain the relationship of the institutions within the Australian state to one another and to determine where the final power lies “in the labyrinth of structures of authority”. The answer is not obvious, Davidson says, but is invisible except in its public effect.<sup>8</sup> Davidson defines a state by reference to related structures, the legislature, judiciary and executive, “whose object is to ensure that all citizens perform their socially allotted duties”. He argues that in the Australian state the normal, expected consent of citizens to comply with the law has been extended so that the law denies the collective, democratic sovereign right of the people to override court decisions.<sup>9</sup> Davidson describes the Australian state as one with a different consensus from that in Britain, a different class of state officials having the last say about state arrangements and power.<sup>10</sup> He agrees with Connell and Irving that modern states are all different. They are not uniform, he says, because each “has emerged from a different history where remnants from past classes and structures resisted with greater or lesser success the hegemonising reorganisations of social practices or lives within certain borders”.<sup>11</sup>

Davidson argues that the judicial arm gained control of the state following the creation in 1823 of legal institutions, their use as “the place for public political activity” being evident in the movements for jury trial and a free press in the 1830s and 1840s.<sup>12</sup> He says that the habit of obsequiousness that the populace acquired in its public contacts with state

<sup>7</sup> See Oliver MacDonagh, *Early Victorian Government 1830-1870*, Weidenfeld and Nicolson, London 1977, pp. 3, 5-6.

<sup>8</sup> Alastair Davidson, *The Invisible State: The Formation of the Australian State 1788-1901*, Cambridge University Press, Cambridge 1991, p. xi.

<sup>9</sup> *Ibid.*, pp. xvi, 1 (quotation on p. 1). See Lord Shaw of Dunfermline, *Legislature and Judiciary*, University of London Press, London 1911, pp. 27-29 on the sovereignty of parliament and, ultimately, the people under the British constitution. See also, Zelman Cohen and D.P. Derham, “The Constitutional Position of Judges”, *Australian Law Journal*, vol. 29, April 26, 1956, pp. 705-713.

<sup>10</sup> *Ibid.*, pp. 16-17.

<sup>11</sup> *Ibid.*, p. 4.

<sup>12</sup> *Ibid.*, p. xv. See also David Neal, “Law and Authority: The Campaign For Trial by Jury” in C.L. Tomlins and I.W. Duncanson (eds.), *Law and History in Australia*, La Trobe University, Melbourne 1982 (2nd printing 1984), pp. 110-111, in which Neal describes the colonial legal system as a crucial political forum in the colony's first 50 years.

institutions during this period produced “the prototypical Australian political animal”, unwilling to be actively assertive against an autocratic authority. Given these early developments, Davidson argues that the movement for self-government between 1842 and 1856 was a drive by liberals and conservatives for control of institutions which were already united in a particular way.<sup>13</sup> For Davidson, the effect of the constitutional arrangements of 1855-56 was to shift all arguments about state power into the judicial arena, “the place of last resort in the State”.<sup>14</sup> Davidson blames the liberal leaders of the 1850s for the failure of the people to assert themselves in deciding where they wanted the ultimate power within the state to lie. These leaders did not wish to displace the commitment to private property and British law and order which the squatters also shared, they failed to secure popular representation in the legislative council and they permitted an alliance of lawyers and squatters to draft the new constitution. But, Davidson says, even if electoral reform had been secured before the constitution was drafted, Parkes, Cowper and the “masses” would “probably not have challenged the rule of law in the name of the sovereignty of the people”, as that would have entailed overthrowing the Queen, to whom they professed effusive loyalty.<sup>15</sup>

Davidson suggests that from 1850, citizens, whatever their differences, were unified by “their possessive individualism and a desire to protect themselves as possessive individuals”. From that point of view, “they only wanted to control the institutions which had formed them, by adding to them British rights of representation, not to destroy those institutions and replace them with new ones”.<sup>16</sup> This idea of consensus as the basis of emerging forms of government is fundamental to the approach taken below. The preparation of the colony’s constitution of 1855-56 might also be compared with an equally momentous happening at the end of the nineteenth century, the preparation of the constitution of the Australian commonwealth. In both cases, political leaders, having debated the issue among themselves, found it hard to agree on a practical way forward. In the 1890s, they had the novel and, for the time, radical idea of asking each colony to stage a referendum. The question was put to the people, and was resolved, on a popular basis.<sup>17</sup> Given the current understandings of democracy, a referendum was not a possibility in the 1850s. However, it is striking that a

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<sup>13</sup> Ibid., p. xiv.

<sup>14</sup> Ibid., p. xv.

<sup>15</sup> Ibid., pp. xvii, 166 (quotation on p. 166).

<sup>16</sup> Ibid., pp. 88-89 (quotations on p. 89).

<sup>17</sup> See Helen Irving (ed.), *The Centenary Companion to Australian Federation*, Cambridge University Press, Cambridge 1999, pp. 10-12, 64-67, 74-84, 168-174, 212-214, 270-277, 318-322.

matter of such significance as the colony's new constitutional arrangements was handled quite as exclusively as it was because, as this thesis shows, the legislative process had been gradually opening up and becoming more widely consultative since the mid 1840s. The autocratic way in which the constitution was drafted has tended to obscure from historians the degree to which consensual law-making had evolved to that point.

Other writers have taken a more sympathetic view of the aspirations of New South Wales colonists with social and political authority. In his pioneering study of colonial ideas, *Quest for Authority in Eastern Australia 1835-1851* (1965), Michael Roe, when tracing the dénouement of conservative power in colonial New South Wales, came down on the side of ideologically-driven change. He argued that the brute force of the penal period was replaced, not by the charisma of an individual or small group of men, or a “sheer virtuosity” of governments, but by a set of ideas in the form of moral enlightenment. This movement grew from eighteenth-century thought. It was a new faith that mingled Romantic, Protestant, and liberal attitudes, developed by the upholders of secular culture and the temperance movement, who were intent on ensuring that everyone became good, wise, prosperous and responsible. Roe said that this movement triumphed over conservatism, which rested on two pillars, namely ideas represented by the Church of England and the interests of a landed gentry.<sup>18</sup> The cause of conservatism was also adversely affected, in Roe's view, by the “anarchism” involved in constant attacks on the executive government, attacks in which W.C. Wentworth played a prominent part, and by a lack of unity among its proponents as to how far the campaign for self-government should extend.<sup>19</sup>

Roe argued that the new faith influenced the development of colonial legislative policy, especially in the field of public education. He also detected its influence in many other seemingly disparate fields—science and communications; regulation of the liquor and gaming industries, marriage, and public administration (for example, in laws to improve the calibre of the constabulary and to eliminate corruption and inefficiency in city government); establishing general cemeteries; aiding the founding and operation of benefit societies, savings banks, building societies and art unions; public bathing, and enforcing Sunday observance; and preventing cruelty to animals. Roe referred to numerous paternalist laws aimed at improving public health, and to the efforts of colonial legislators to match their

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<sup>18</sup> Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, p. 6.

<sup>19</sup> *Ibid.*, pp. 77-79.

British counterparts in the area of law reform.<sup>20</sup> He also argued that moral enlightenment, by including the previously ignored or patronised working class, ensured a strong working-class influence on the Australian political and social character.<sup>21</sup> Roe's conclusions are especially important for this thesis because they demonstrate something of the power and complexity of educated public opinion in the period. However, in spite of the title of his book, he does not show in any detail the relationship between public opinion and law-making.

Roe returned to the same theme in 1974 when he wrote of the creed of moral enlightenment tending towards egalitarianism and hostility to privilege and pretension, especially of the clergy. Utilitarian emphasis on the greatest good for the greatest number became fused with the Romantic belief in everyman's perfectibility. He now emphasised the role of culture—in transforming society and individuals in the manner required by the new creed. Hence the importance of education and the need for government and politicians to commit to its provision as culture could thrive only among the educated. As well as referring to the importance of the print media in this context, Roe drew attention to the emergence of other means of self-improvement, such as mechanics institutes, libraries, reading rooms, museums and galleries, many of which were encouraged or subsidised by government.<sup>22</sup> While the ideals of self-perfection and moral rectitude had been embraced by much of the English-speaking world by the mid-nineteenth century, he argued that these ideals gained ground faster in the Australian colonies because of the relative absence of class division and traditional belief, the rapid material progress and the opportunities for individualist ambition.<sup>23</sup>

John Ward adopted a somewhat similar approach in various works, and most obviously in *James Macarthur: Colonial Conservative, 1798-1867* (1981). In this book, Ward criticised the Whiggish tendency to see Australian history as the triumph of liberals and radicals over entrenched and selfish conservatives.<sup>24</sup> He detected a clash between two kinds of conservatism in New South Wales in the first 30 to 40 years of the nineteenth century.

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<sup>20</sup> Ibid., pp. 151-152, 158-159, 191-198. See also C.M.H. Clark, *A History of Australia*, vol. 3, *The Beginning of an Australian Civilization 1824-1851*, Melbourne University Press, Melbourne 1973, pp. 409-414 on the influence of religion and moral enlightenment, especially in the area of education, in the 1840s.

<sup>21</sup> Ibid., p. 205.

<sup>22</sup> Michael Roe, "1830-50", in F.K. Crowley (ed.), *A New History of Australia*, Thomas Nelson Australia Pty Ltd, Melbourne 1974, pp. 112-114.

<sup>23</sup> Ibid., p. 116.

<sup>24</sup> John M. Ward, *James Macarthur: Colonial Conservative, 1798-1867*, Sydney University Press, Sydney 1981, pp. ix-x.

One was imposed by British policy and was formally embodied in rule by the governor and his officials. The other, Ward said, grew out of private land ownership and private trading wealth, and it called on supposed precedents from eighteenth-century England to justify its pretensions. However, the latter also embraced traditional paternalistic assumptions about the rights and duties of the landed elite to carry the burden of political responsibility and social leadership.<sup>25</sup> Ward argued that the conditions that had facilitated the earlier ascendancy of the colonial conservatives passed away early in the middle decades of the nineteenth century. However, he said, although the conservatives suffered formal defeat, they survived, remaining politically formidable, socially powerful and economically strong, continuing to shape the colony's conservative tradition.<sup>26</sup>

Two authors who have carried forward and refined this understanding of the causes of change in New South Wales, thereby exploring a distinctively Australian way of doing things, are John Hirst and Alan Atkinson. In *The Strange Birth of Colonial Democracy: New South Wales 1848-1891* (1988), Hirst traces the development of democracy in New South Wales and the evolution of colonial liberalism, his analysis concerning in part the period covered by this thesis. For Hirst, the colony's mid-nineteenth century social order, comprised of a landed gentry on large estates, serviced by tenant farmers, supported by the local church and dispensing local justice, came closer than that of anywhere else in the empire at that time to recreating English experience. This is an important insight for this thesis, which attempts a direct comparison between events in England and in New South Wales. The landed class expected that the colony would reproduce England's system of government, Hirst says, and that they, together with a few leading Sydney merchants and lawyers, would assume political power. The colony's legislative council was composed of this conservative elite, he says. Hirst mentions a brief period of opposition, led by merchants and professionals, when the colony's new constitution was being prepared in the early 1850s. However, while this opposition movement was described as liberal and had popular support, Hirst notes that it was far from democratic. Its leaders objected to a monopoly of power being conferred on landholders and squatters but they did not wish the people to have political power. The only committed democrats, he says, were workers and small tradesmen of low social status and with little influence. He notes that the conservatives held power from the commencement of the new constitution in 1856 for a little over a year with one month's

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<sup>25</sup> Ibid., pp. 8-9.

<sup>26</sup> Ibid., p. 2.

break, “and never held it again”. The liberals won the 1857 general election and then, Hirst says, moved to the left, shedding most of their men of substance. They made radical amendments to the conservative constitution, thereby giving power to small men who were the social inferiors of both the conservatives and those leading the liberal push, their triumph being completed with the passage of a radical land law in 1861 that broke the pastoralists’ grip on the interior.<sup>27</sup> Hirst’s study offers a good explanation for the rapid process by which the conservative constitution was upset and democracy established, and it also examines in detail the nature of the new political order.

Martin and Loveday had argued that during the second half of the nineteenth century the prevailing faction system in parliament provided New South Wales with effective government. Hirst notes that this view has been disputed and points to the inefficiencies and shortcomings of faction governments and to the general disgust among contemporaries with the faction system.<sup>28</sup> This thesis will demonstrate that, in the early parliamentary years, that system inhibited, at the very least, passage of all but a few reformist measures, so that law-making was much more fruitful in the 13 years before 1856 than for a number of years afterwards. Hirst also examines the growth of central power in New South Wales. He observes that after the liberals came to power local authorities became weaker. Under the liberals, the rule of officials of the central government over the people was embraced and greatly extended.<sup>29</sup> He argues that the explanation for this phenomenon lies in the adaptation, in the 1850s, of the system of crown land commissioners that had controlled the colony’s pastoral interior for decades to the circumstances of the goldfields.<sup>30</sup> This observation is of considerable interest because, as I say in Chapter 1, MacDonagh placed great emphasis on the importance of field executives—full-time experts operating in the field as the crown land commissioners did—in driving legislative change in Great Britain in the 50 years from 1825. In this thesis, I ask how far MacDonagh’s approach might explain centralisation in New South Wales.

In an article written in 1988 dealing with early conservative thinking in New South Wales, Alan Atkinson refers to a tendency among historians of New South Wales to split the

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<sup>27</sup> J.B. Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884*, Allen and Unwin, Sydney 1988, pp. viii-ix (quotation on p. ix).

<sup>28</sup> *Ibid.*, p. 191, Hirst referring in footnote 68, p. 291 to P. Loveday and A.W. Martin, *Parliament, Faction and Parties: The First Thirty Years of Responsible Government in New South Wales, 1856-1889*, Melbourne University Press, Melbourne 1966, pp. 3-5.

<sup>29</sup> *Ibid.*, p. 195.

<sup>30</sup> *Ibid.*, pp. 198, 201, 203.

nineteenth century into two parts divided either at 1851, with the discovery of gold, or at 1855-56 with the introduction of responsible government. Atkinson says that this approach clouds the importance of both the influx of free immigrants to the colony in the 1830s, as an equally significant turning point, and the long-term development of political ideas and methods of government in the colony. He asserts that his observations are borne out by an examination of conservative thinking as it evolved in the colony between the 1820s and 1854. Atkinson points to ambiguities in the use of the term “conservative”. Roe and Ward had argued that colonial conservatives were reactionary in their support of the privileges of the landed gentry and Church of England, and yet certain aspects of conservative thinking were in fact radical. When examining colonial law-making in the six years or so leading up to responsible government, Atkinson refers to a supposition that the legislation of this period was the work of reactionary conservatives who dominated the legislature, forestalling the rise of liberal democracy and producing a constitution that the liberals were able to white-ant within a few short years after 1856. This interpretation of events, he says, was invented by the liberals, and is untrue. In fact, during these years the conservatives produced and obtained the passage of an impressive array of social measures, Atkinson pointing to a significant increase in legislative activity in which both government and elected members participated in the six years from 1849. This matter is also explored by this thesis. For Atkinson, the conservatives’ work in this period was no less important for the formation of Australian political traditions than that of liberal legislators in their first years in office.<sup>31</sup>

Atkinson refers to frictions and philosophical differences between conservatives and liberals, and within these groups, over various legislative measures in this period. He points to the liberals’ advocacy of laissez-faire and free trade policies, while noting the conservatives’ concern that the state should give a distinct form to society and be responsible for ensuring equity in arrangements between ranks in the social hierarchy.<sup>32</sup> He points to a history of over two generations of government intervention in the lives of New South Wales residents by the mid-nineteenth century, arguing that this was not simply because of the presence of convicts. He observes that conservatives had long supported state involvement in areas such as allocation and management of land and other resources including labour, and in the licensing of a range of commercial activities. He says that as the origins of New South Wales were as a place for punishment and reform, its activities had become absolute and

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<sup>31</sup> Alan Atkinson, “Time, Place and Paternalism: Early Conservative Thinking in New South Wales”, *Australian Historical Studies*, vol. 23, no. 90, April 1988, pp. 1-3.

<sup>32</sup> *Ibid.*, pp. 3-8.

permeated with “moral ambition”. The achievement of this ambition depended on the right allocation of resources. He suggests that the colony’s landed gentry, by controlling land and convict labour, saw themselves as a semi-official class that shared responsibilities with the state. He argues that those of this class who had grown up with the convict system, and here he includes James Macarthur, W.C. Wentworth, G.R. Nichols and James Martin, and those bureaucrats, such as Edward Deas Thomson, who had worked within it, naturally saw the state as being immensely powerful in the ordering of society.<sup>33</sup> Like Ward, Atkinson says that conservative thinking in early New South Wales had two distinct facets, but he describes the two differently. For Atkinson, the first reflected European and North American ideas, many conservative reforms being “fragments of utilitarianism adapted from a British to an Australian setting”. Secondly, from an early date (the 1820s) local conservative thinking had a distinct moral thrust and depended on an attachment to things peculiar to the colony. This strain was central to the attitudes of white native-born Australians, including James Macarthur, Wentworth and Nichols. Martin also came within this group. Though born abroad, he was less than two years old when his parents migrated and, Atkinson says, self-consciously associated with the attitudes of the native-born. Taking a view different from Roe’s, Atkinson argues that there was something unique in the behaviour and thinking of this cohort and in the way in which these attributes coloured their political ideals and in their perceived attachment to the soil.<sup>34</sup>

Atkinson also disagrees with Roe’s view that cultural pursuits were the province of moral enlightenment triumphing over conservatism. Atkinson points to the early association of the educated native-born “sons of the soil” with the press and with cultural activities, their interest in education, their introspection and attachment to the local landscape, their Australian patriotism and their concern, with increasing prosperity and influence, for law, order and morality. These ideas were also reflected in the thinking of the conservative James Macarthur and combined with his paternalist ideals. These men (apart from Wentworth) had little in common with “mammoth and absentee squatters”.<sup>35</sup> Atkinson argues that a distinctly colonial brand of idealism with a somewhat romantic radical streak, which emphasised an active role for government in “creating and distributing resources, in supporting and

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<sup>33</sup> Ibid., pp. 9-10. See also Alan Atkinson, *The Europeans in Australia: A History*, vol. 2: *Democracy*, Oxford University Press, Melbourne 2004, pp. xiii, 266, Australian governments being described as “a perpetual backstop”, with strong habits of “dictatorial benevolence” always being present.

<sup>34</sup> Ibid., pp. 10-11 (quotation on p. 10). See also Atkinson, *Europeans*, vol. 2, pp. 266-267, especially regarding the ramifications of utilitarianism.

<sup>35</sup> Ibid., pp. 12-15 (quotation on p. 15).

controlling education, and in subsidising religious effort”, inspired conservative legislative activity between 1849 and 1854.<sup>36</sup> This interventionist aspect of colonial conservatism has links with the practices of the English paternalists that are the subject of Kim Lawes’ book (see Chapter 1). Atkinson contends that the conservatives made this radicalism Australian in the way they linked state sponsored moral enlightenment and other forms of progress with official support for individual effort, the state having a Christian duty to be “father or ‘uncle’” to the people”. Atkinson says that the situation was little altered with the coming of democracy.<sup>37</sup>

Another point with particular relevance to New South Wales should be noted here. It concerns the tendency of many writers to overlook or ignore the legislative contributions of colonial lawmakers before 1856. Shirley Fitzgerald’s work in the field of public health in Sydney (1982, 1987) is characteristic of the received view. She largely discounts almost all early efforts at reform during that period. Similarly, she fails to set such reforms against a British background. Her 1982 article suggests that the reforms of the late nineteenth century were motivated by the changing requirements of the pastoralist exporting sector and by financial and mercantile considerations, and had little or nothing to do with reforms that had been taking place in Great Britain from the 1830s.<sup>38</sup>

The main flaw in the traditional approach to this period in New South Wales, especially in Connell and Irving and in Davidson, is the assumption that the history of the relationship of government and subject in Australia is merely one of control and resistance. Roe and Ward did not take this approach, and neither did Hirst nor Atkinson. However, none on either side has been interested in the creative power of the state to the extent of trying to apply the English debates to New South Wales. A more sympathetic treatment of the creative power of the state has been adopted by Geoffrey Serle, David Dunstan and Stuart Macintyre when writing about colonial Victoria, with Dunstan deliberately taking the British arguments on board.

Serle, in *The Golden Age: A History of the Colony of Victoria, 1851-1861* (1983),

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<sup>36</sup> Ibid., p. 17. See also Atkinson, *Europeans*, vol. 2, pp. xiv-xv, 197-286 for a detailed consideration of the implications of literacy among European Australians between the 1820s and 1870s and of the global revolution in communications that occurred in the middle decades of the nineteenth century.

<sup>37</sup> Ibid, p. 18.

<sup>38</sup> See Shirley Fisher (as Fitzgerald then was), “The Pastoral Interest and Sydney’s Public Health”, *Historical Studies*, vol. 78, April 1982, pp. 73-75, 89 and Shirley Fitzgerald, *Rising Damp: Sydney 1870-90*, Oxford University Press, Melbourne 1987, pp. 69-100.

commented on the “invisible luggage”, the beliefs that migrants carried with them to the colony.<sup>39</sup> He referred to a sharing by most migrants of political assumptions of liberal protestantism and of democracy, together with a veneration for traditional British institutions. He asserted that the remedial social legislation enacted in Britain in the 1840s opened up the “long road to the welfare state”, saying that if *laissez faire* never stood a chance in Victoria this was largely because the question had been decided before that state was created.<sup>40</sup> Dunstan, in *Governing the Metropolis: Politics, Technology and Social Change in a Victorian City: Melbourne 1850-1891* (1984), referred to the colonists of the gold generation coming to maturity when the values of economic individualism, which played a great part in nineteenth-century liberalism, were in the ascendant. He maintained that even though the march towards state socialism dates from this period, there were still occasions when the doctrine of *laissez faire* was invoked.<sup>41</sup> It was not unusual, he said, for public statements concerning increased government activity in the mid-nineteenth century to be expressed in terms of regret or, in an Australian case, explained as a result of “the imperfect stage of development that pertains to a very young country”. Dunstan argued that mid-nineteenth century Britons (including Australian colonists) had no great tradition of state intervention, recalling instead a primarily agrarian society with remarkably weak central control and remarkably autonomous local bodies and small units of local government. The period had been stereotyped, he said, as “of an ‘age of *laissez-faire*’ in which governments refused, on principle, to interfere with the ‘free’ workings of society”.<sup>42</sup>

Dunstan referred to Oliver MacDonagh’s argument (see Chapter 1, below) that the expansion of the British state was provoked above all by “the irreducible brute matter” of unprecedented social problems, themselves products of massive social changes, with only government, and strong government at that, having the capacity to respond to the new societal problems. Dunstan argued, however, that in general the role of ideology may not have been as one-sided as MacDonagh maintained, noting in particular the role of the Benthamite utilitarians. Dunstan asserted that the only way to test competing arguments about the role of ideology and of individual reformers is to examine the growth of government in its appropriate historical context, referring here to the comment made by

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<sup>39</sup> Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861*, Melbourne University Press, Melbourne 1963 (reprint 1968), p. 60.

<sup>40</sup> *Ibid.*, pp. 61-62.

<sup>41</sup> David Dunstan, *Governing the Metropolis: Politics, Technology and Social Change in a Victorian City: Melbourne 1850-1891*, Melbourne University Press, Melbourne 1984, p. 15.

<sup>42</sup> *Ibid.*, p. 23.

Henry Parris in relation to the British situation, that the issue is really one of balance between the interests of private and public enterprise. Dunstan suggested that perhaps ideology proved itself adaptable at the time, noting John Stuart Mill's dictum, from his 1848 *Principles of Political Economy*, that generally laissez faire should apply unless some great good required a departure from it. Dunstan wondered how many colonial radicals, who, Serle asserted, looked to the *Principles* "as a guiding light", were encouraged to review laissez-faire doctrine accordingly.<sup>43</sup>

Dunstan suggested that the advance of colonial socialism in Victoria under "pretexts of necessity and underdevelopment" had some similarity to MacDonagh's view of government "growing in fits and starts by stealth and crisis, but never conscious design, only to emerge fully-drawn into the twentieth century as a welfare state." Equally however, Dunstan argued that this view might be compared with the experiences of colonial administrators and opinion makers who, he suggested, probably applied ideas derived from Britain when faced with social problems. Dunstan referred here to Louis Hartz's idea of colonial society as a "fragment", which on foundation drew much of its social and political identity from its parent. However, Dunstan made the obvious point, as did Connell, Irving and Davidson, that one must not assume that the colonial fragment will be either "static or necessarily faithful to its perceived parentage". The idea of "simplistic determinism" needs to be avoided, Dunstan said, especially if there are extensive differences of scale and circumstance between the colony and parent, since "fresh inputs" from the parent and other societies also required consideration.<sup>44</sup> Dunstan questioned whether exponents of laissez faire resisted the expansion of the colonial state, or whether, as Serle asserted, full-blown laissez faire never stood a chance in Victoria. He concluded that while Serle's view was persuasive, it was interesting to see the problems of colonial development being contested in these terms and to find that opponents of an orthodox view of the roles of government and private enterprise made their views public. This would hardly have been necessary, he said, if the question had already been settled.<sup>45</sup>

Although concerned largely with events occurring after those dealt with by this thesis,

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<sup>43</sup> Ibid., pp. 24-25. Jeremy Bentham was a major influence on J.S. Mill (1806-1873), a British philosopher and economist, but Mill modified utilitarianism's goal of the greatest happiness for the greatest number by adding idealism, ethics and the need for long-term satisfaction.

<sup>44</sup> Ibid., p. 25, Dunstan referring in footnote 5, p. 327 to Louis Hartz, *The Founding of New Societies*, New York 1964.

<sup>45</sup> Ibid., p. 26.

Macintyre's approach in *A Colonial Liberalism: The Lost World of Three Victorian Visionaries* (1991) is of interest when compared with that of Roe. Macintyre, in discussing three individuals who were in fact directly concerned with law-making, is closer to the coalface than Roe, who was mainly concerned to discuss the evolution of more abstract ideas. Macintyre describes his book as an exercise in comparative history, aiming to place three colonial Victorian liberals in their imperial context. He seeks to demonstrate the existence of a colonial liberal tradition that was more a code of conduct than a political programme, but which nevertheless had powerful political implications. The liberals' model citizen was a reasonable, morally responsible, self-sufficient individual who believed in tolerance, privacy and the rule of law. Macintyre says that the liberals believed that citizens should be free from interference and the hierarchical constraints of traditional society. They favoured representative government, both as a check to despotism and because citizens should possess equal political rights.<sup>46</sup> Macintyre complains that historians have neglected liberalism, viewing it as part of "the cultural baggage" that colonists brought with them to Australia, only to be discarded as irrelevant to their practical concerns in a new country. He argues for a more positive approach, disputing the idea that the principles of colonial government lacked intellectual meaning and depth and querying the meaning the sceptics have attached to "liberalism". Macintyre says that their definition depends on a group of seminal figures who articulated its core principles, including Bentham's utilitarianism and Mill's individualism. This approach, Macintyre says, "has no room for the creative contribution of nineteenth-century Australians".<sup>47</sup> This thesis uses Macintyre's insight in a closely related context.

It seems that a more wholehearted approach than those offered above is appropriate for New South Wales and that there is room to do much more in exploring the creativity of the state in mid-nineteenth century Australia. What this thesis aims to do is to take up the MacDonagh insights in a thorough-going fashion and apply them to New South Wales, a colony where Anglo-Australian parallels are especially clear. While it is possible to begin the process of inquiry also for Van Diemen's Land where MacDonagh began it for Britain, in the 1820s, it is only in New South Wales that political and constitutional arrangements were sufficiently sophisticated, at least by the mid 1830s, to make the exercise worthwhile. Van Diemen's Land had a large, but unelected legislative council until 1851, and perhaps the

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<sup>46</sup> Stuart Macintyre, *A Colonial Liberalism: The Lost World of Three Victorian Visionaries*, Oxford University Press, Melbourne 1991, pp. vii, 5.

<sup>47</sup> *Ibid.*, p. 11.

lack of thorough-going representation explains why there was no experimentation in that colony of the kind pursued in New South Wales. It may be that the unique Australian approach to methods of government that commenced in the early 1840s in New South Wales (which then encompassed Port Phillip) had important implications for the development of the type of government in use elsewhere in Australia from the mid 1850s, especially as evidenced by the interventionist tendencies described by David Dunstan for Victoria from that period. Thus the arguments of this thesis may throw light on the evolution of law-making, and of government more broadly, in Australia as a whole.

This thesis begins with a chapter examining the explanations offered by scholars for events, associated with law-making, which occurred in Great Britain in the nineteenth century, especially after 1832, and which are said to have heralded the birth of modern government and the beginning of the collectivist welfare state. Particular attention is paid to the model developed by Oliver MacDonagh to explain what he described as an administrative or governmental revolution. While some scholars have supported this approach, others have argued that change occurred mainly in response to the force of doctrines and ideas, much of the disputation centring on the issue of whether or not Benthamism influenced the course of events. Chapter 1 closes with a brief examination of the place of paternalism in nineteenth-century developments in social reform.

From this point, the chapters in the thesis are arranged in broadly chronological order. I seek where possible to apply MacDonagh's insights regarding developments in government and the management of legislative business in Great Britain when considering what law-makers did in New South Wales, especially in the 13 years before the commencement of responsible government in 1856. In the process, I consider the impact of historical events and of ideas on this activity, and the increasing emphasis placed on the need for expertise in government and in the public service, especially by adherents of utilitarianism. I am also concerned to examine the introduction of public opinion into the business of law-making before the advent of responsible government, and the means by which this was achieved, pointing in particular to the growing importance of select committees, as well as to the use of petitions and the role of the popular press.

Chapter 2 provides a background for my subsequent study of the way in which laws were developed in New South Wales and of the relationship between the legislature, the

executive and public opinion, by examining three aspects of early colonial history. The first concerns the constitutional basis for early colonial law-making, the second the evolution of colonial public administration while the third relates to law-making by the colony's first three legislative councils in the years between 1824 and early 1843.

Chapter 3 examines the nature of the relationship which evolved between the executive and the fourth legislative council, the first with elected members, from its commencement in 1843 until the end of the administration of Governor Sir George Gipps in 1846. Here, a major concern is to consider how and at whose instance laws were being made. Once again, this involves exploring the impact of expertise and public opinion. Whereas Chapter 3 is concerned with the dynamics of debate within the legislative council chamber itself, Chapter 4 explores the impact on the legislature and law-making of the expression of public opinion outside the chamber in the period between 1843 and 1846. The first portion of the chapter deals with public awareness as evidenced by petitions to the council and in the press, while the second examines the role of the council's select committees as law-making bodies and as alternative forums for debate.

Chapter 5 deals with the legislative activity of the fourth council in the early years of the administration of the new governor, Sir Charles FitzRoy, from 1846 to 1848, looking at both the work of select committees and the impact of petitions and other influences on law-making. Chapter 6 covers the legislative work of the fifth legislative council and its newly elected members. After an overview of select committee and petitioning activity and legislative output, it examines the work of lawmakers in two broad areas, namely the city and the bush and the regulation of private property, especially in the city. The chapter concludes with a discussion of the origin of ideas applied in this law-making activity. Chapters 7, 8 and 9 explore aspects of the law-making work of the sixth council which sat from October 1851 until the end of 1855. Chapter 7 deals with the Sydney Corporation, Chapter 8 with public health and sanitation and Chapter 9 with law and police reform.

Chapter 10 examines aspects of the preparation of the colony's constitution of 1855-56, namely the use made of select committees and the ideas expressed about the constitution of the proposed upper house, these issues being germane to the principal concerns of this thesis, while Chapter 11 describes briefly what happened to government and the legislative process when the New South Wales parliament was established in 1856. This last chapter considers

how the methods of accountability in law-making, established over the past 13 years, fared under responsible government. It shows that the introduction of responsible government was itself followed by something of a legislative dénouement. Factionalism accompanied the triumph of the liberal democrats and overwhelmed clear utilitarian priorities of the earlier years, militating against the passage of all but a few landmark reforms in the early parliamentary period.

The evidence clearly establishes that the colonial approach to law-making differed significantly from that described by MacDonagh and others as operating in Great Britain from the early 1830s. Colonial legislators in the years before 1856, and especially several of those elected from 1843, were intent on remaking colonial society and they demonstrated a readiness either to develop their own laws without reference to imperial models or to adapt British precedents for their own purposes. A play of both historical forces and of ideas was also present in the complex pattern of attitudes and priorities evident in New South Wales law-making. Intolerable conditions and pressures obviously played a part but so too did ideas—paternalism, laissez faire and Benthamite utilitarianism all having a significant impact in the colonial sphere. And yet the truth of many other aspects of MacDonagh's analysis of nineteenth-century governmental change and its applicability to New South Wales is admitted, especially his emphasis on expertise in law-making and government, and on the crucial position of public servants and the bureaucracy—on central control by experts. So too his emphasis on the critical importance of select committees which became a dominant force in the colonial legislative process, facilitating the introduction of outside opinion and expertise as government itself became more specialised.