

# Dividing Power in the First and Second British Empires: Revisiting Durham's Imperial Constitution

*David Schneiderman\**

*In his Report on the Affairs of British North America, Lord Durham proposed that "internal" government be placed in the hands of the colonists themselves and that a short list of subjects be reserved for Imperial control. Janet Ajzenstat maintains that Durham did not intend to formally restrict the authority of the new colonial legislature by dividing power. This paper argues otherwise: that Durham's recommendation fell squarely within a tradition of distinguishing between the internal and external affairs of the colony. This was the imprecise but pragmatic distinction that American colonists invoked during the Stamp Act crisis as a means of curtailing imperial authority over internal taxation while maintaining their allegiance to the British Crown. It also was a division that Charles Buller relied upon in a constitution for New South Wales that he proposed prior to sailing to Canada as Durham's principal secretary. Durham likely was drawing upon this tradition when he made his recommendation, a distinction that began to crumble away almost immediately. In the result, Canadians inherited a robust semblance of self-government, just as colonists during the Stamp Act crisis had desired, but without the need for revolution.*

*Dans son Report on the Affairs of British North America (rapport sur les affaires de l'Amérique du Nord britannique), Lord Durham suggéra de placer le gouvernement "interne" en mains propres des colons et de réserver une liste restreinte de sujets pour l'autorité impériale. Janet Ajzenstat soutient que Durham n'eut pas l'intention de limiter officiellement l'autorité de la nouvelle législature coloniale en partageant le pouvoir. L'auteur de cet article soutient le contraire, c'est-à-dire, que les recommandations de Durham s'inscrivaient complètement dans une tradition visant à distinguer entre les affaires internes et externes de la colonie. Ceci fut la distinction imprécise mais pragmatique que les colons états-unis invoquèrent lors de la crise de la loi sur le timbre (Stamp Act crisis) comme moyen de restreindre l'autorité impériale en matière d'impôts intérieurs tout en maintenant leur allégeance à la Couronne britannique. Il s'agit également d'une division sur laquelle compta Charles Buller dans une constitution pour la Nouvelle-Galles du Sud qu'il proposa avant de s'embarquer pour le Canada, où il fut le secrétaire principal de Durham. Il est probable que Durham puisait dans cette tradition lorsqu'il fit cette recommandation, une distinction qui commença à s'effondrer presque aussitôt. Il s'ensuivit que les Canadiens héritèrent un semblant solide d'autonomie gouvernementale, exactement comme l'avait désiré les colons pendant la crise de la loi sur le timbre mais sans la nécessité d'une révolution.*

\* Faculty of Law and Department of Political Science (by courtesy), University of Toronto. This paper is prompted by thoughts expressed initially in David Schneiderman, *Red, White, and Kind of Blue?: The Conservatives and the Americanization of Canadian Constitutional Culture* (Toronto: University of Toronto Press, 2015) at 52–53, 60–61. I am grateful to two anonymous reviewers, and to Dustin Gumpinger, for comments.

In the course of events leading up to the American Revolution, there arose calls for a division of power between imperial and colonial authorities. The argument evolved over the course of a few short years, with colonists essentially claiming that the metropole had no authority to impose an internal tax on the colonies for the single purpose of raising revenue. Imperial authority could raise revenue, however, as an incident to its external power of regulating trade of the colonies. Those matters that concerned the internal affairs of the colony alone, among them the subject of taxation, remained solely within the purview of the self-governing colonies. Over those matters external to the affairs of the colony, such as maritime trade and foreign affairs, the metropolitan authority in London could appropriately exert control. Though often made “casually,” even “inadvertently,” the internal-external binary was conscripted by colonials as a response to innovative revenue-generating mechanisms such as the *Stamp Act*.<sup>1</sup> The distinction quickly became “old-fashioned,” however, as both British ministers and colonists exhibited increasing dissatisfaction with the workability of the distinction.<sup>2</sup> Pragmatic constitutional theorizing failed to forestall full-blown revolt.

About seventy years later, Lord Durham suggested in his famous report that similar lines of accountability, together with responsible government, be adopted as a means of bridging the divide between British North America and the mother country. Durham identified a short list of subjects that imperial authority legitimately had an interest in mostly, but not exclusively, having to do with external realms; all other subjects remained for the self-governing Canadian colonists. There is no evidence that Durham or his advisors were familiar with the debates that preceded the American Revolution.<sup>3</sup> Indeed, they might have been unaware of these particular claims. This paper argues, instead, that Durham and his advisors were guided by the same pragmatic constitutional considerations that drove American colonists to propose the binary —

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1 Bernard Bailyn, “Transformation” in Bernard Bailyn, ed, *Pamphlets of the American Revolution 1750-1776*, vol 1 (Cambridge, Mass: Belknap Press of Harvard University Press, 1965) 90 at 125 [Bailyn, “Transformation”] [Bailyn, *Pamphlets*]; *Duties in American Colonies Act, 1765* (UK), 5 Geo III, c 12 [*Stamp Act*].

2 Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass: Belknap Press of Harvard University Press, 1967) at 226 [Bailyn, *Ideological Origins*]. See also Jack P Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788* (Athens, Ga: University of Georgia Press, 1986) [Greene, *Peripheries*]; Alison L LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass: Harvard University Press, 2010).

3 That is, no evidence in the published archival sources and secondary literature canvassed below.

one advanced previously by other respected authorities on government.<sup>4</sup> One of the solutions to the crisis in the second British Empire was to have recourse to nearly identical solutions offered on the eve of failure of the first.<sup>5</sup>

Janet Ajzenstat has raised doubts about whether Durham truly had such a division of authority in mind. She concludes that Durham did not mean to truncate the granting of responsible government to the colonists by dividing authority along internal and external lines. According to Ajzenstat, Durham “saw no need to formally restrict the powers of the colonial parliaments” because he expected colonists to consult “British interests” in any event.<sup>6</sup> He did not, she maintains, intend to lay down any “new law, policy, or scheme of any kind.”<sup>7</sup> Instead, he intended to grant to the colonies responsibility for any and all subjects without the need for imperial control. To recommend otherwise would only have irritated the colonists.

In this paper, I argue that the internal-external divide appeared as a recurring pattern, in both the first and second empires, for resolving the tension between colonial claims to self-government and the metropole’s desire for control. The proposed division of constitutional functions did not have the effect of forestalling revolution in America but, as proposed by Durham, it had the desired effect of accommodating British North American claims to responsible government while retaining important connections to the metropole. In the course of my argument, I respond to Ajzenstat’s claim that Durham did not intend to lay down any “new law, policy, or scheme of any kind.” On the contrary, it is clear that Durham was building on earlier precedent, if not in America

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4 Pownall quotes from Harrington as an authority on this point: see Thomas Pownall, *The Administration of the British Colonies*, 5th ed, vol 2 (London, UK: J Walter, 1774) at 33-34, online: Internet Archive <[https://archive.org/stream/cihm\\_39987#page/n5/mode/2up](https://archive.org/stream/cihm_39987#page/n5/mode/2up)>. Bailyn refers to Vattel as an influence: see Bailyn, “Transformation,” *supra* note 1 at 124, n 47. See also the discussion of these classical sources in LaCroix, *supra* note 2 at 18-20. According to Chester New, Durham merely followed the suggestion of his advisor, Charles Buller, who had made a similar recommendation for the new Constitution of New South Wales (discussed further below): see Chester New, *Lord Durham: A Biography of John George Lambton, First Earl of Durham* (Oxford: Clarendon Press, 1929) at 508. [New, Lord Durham].

5 British imperial history is divided into two distinct phases, the “first” and “second” empires, typically demarcated by the American Revolution and the signing of the Treaty of Peace in 1783. There remains some dispute as to the precise moment when the first empire ended and the second began. See discussion in PJ Marshall, “The First British Empire” in Wm Roger Louis, ed, *The Oxford History of the British Empire*, vol 5 (Oxford: Oxford University Press, 1999) at 43-52.

6 Janet Ajzenstat, *Discovering Confederation: A Canadian’s Story* (Montreal & Kingston: McGill-Queen’s University Press, 2014) at 114 [Ajzenstat, *Discovering Confederation*].

7 Janet Ajzenstat, *The Political Thought of Lord Durham* (Montreal & Kingston: McGill-Queen’s University Press, 1988) at 43.

then in New South Wales,<sup>8</sup> when he made his recommendations. Durham was not proposing a new “statutory” constitution that divided authority, such as the one he recommended for uniting the two colonies. Instead, he intended the division to be assimilated as part of the customary imperial Constitution. It was meant to be, in Joseph Howe’s words, a “fair and judicious” division that would be worked out by the “good sense of all parties concerned.”<sup>9</sup>

This paper is also meant to contribute to the study of comparative constitutional law. The relationship between Canada’s origins and the American Revolution, for instance, is often overlooked, and so the paper is intended as a modest contribution to that end. I draw out that relation by undertaking a comparative constitutional law exercise spanning the two phases of the British Empire (divided by the American Revolution). In the first part, I draw upon a discourse that represented a “substantial body of sentiment” among British North American colonists in the two years following the enactment of the *Stamp Act*.<sup>10</sup> In the second part, I turn to Durham’s recommendations and situate them within their imperial context. In the last part, I discuss Ajzenstat’s insistence that Durham did not mean what he said about the division of powers.

## **I. Crisis in the First Empire**

The beginning and the end of the internal and external distinction in the first British Empire is tied to the life of the controversial *Stamp Act*. The Seven Years War, culminating in the British conquest of the French in North America, resulted in an acute increase in British national debt accompanied by a worry that Louis XV would seek to repossess the former French territories.<sup>11</sup> If, in prior decades, the British were cautious about intruding into the internal affairs of the colonies, Parliament was anxious for new sources of revenue and thought it appropriate for the colonists to contribute to their own self-defence. If the passage of the *Sugar Act*,<sup>12</sup> which lowered duties on the importation of sugar

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8 See discussion of the influence of the work of Charles Buller on Durham’s thinking at text accompanying notes 64-73.

9 “Joseph Howe to Lord John Russell” in WPM Kennedy, ed, *Statutes, Treaties and Documents of the Canadian Constitution 1713-1929*, 2nd ed (Toronto: Oxford University Press, 1930) 398 at 399 [Kennedy, *Documents*].

10 Jack P Greene, *The Constitutional Origins of the American Revolution* (Cambridge, UK: Cambridge University Press, 2011) at 92 [Greene, *Constitutional Origins*].

11 Edmund S Morgan & Helen M Morgan, *The Stamp Act Crisis: Prologue to Revolution*, revised ed (New York: Collier Books, 1963) at 37-38.

12 (UK), 4 Geo III, c 15 [*Sugar Act*].

from the British West Indies, portended new revenue measures,<sup>13</sup> the passage of the *Stamp Act* in February 1765 brought to the surface divisive constitutional questions regarding Parliament's jurisdiction over the colonies.

Colonists tolerated the *Sugar Act*, characterizing it as having to do with the regulation of trade. The *Stamp Act*, by contrast, was intolerable: it had nothing to do with commerce or navigation.<sup>14</sup> Instead, the act imposed a tax — by means of stamped paper approved by the British Treasury Office — on all variety of legal and commercial documents and on the sale of newspapers, pamphlets, and cards (even dice), in order to raise revenue to support British troops in North America.<sup>15</sup> Though abandoned in the subsequent year, the *Stamp Act* precipitated a great constitutional debate about the scope of British parliamentary authority over the colonies.

Colonists in British North America had been exercising fulsome self-government for some time over the objections of metropolitan-appointed governors.<sup>16</sup> With governors dependent upon local legislatures for the provision of supplies to cover government expenditures, colonists were under the impression that they had secured the same quality of self-government as had Britons following the Glorious Revolution.<sup>17</sup> Any attempt at “engross[ing] all power” into the hands of the royal governor was, so pleaded a cadre of Virginians in the early eighteenth century, “a great alteration of government, much to the dissatisfaction of this Country.”<sup>18</sup> Though colonists did not initially refute the theoretical omnipotence of Parliament, they could not fathom Parliament having untrammelled authority over their lives and estates, certainly not without the consent of the governed.<sup>19</sup> Colonists had “up to half a dozen theories [of] why parliamentary sovereignty had limits,” observes Reid.<sup>20</sup> An influential set (among them John Adams, Alexander Hamilton, and James Wilson) went so far as to deny the legitimacy of parliamentary authority entirely, conceding imperial jurisdiction only to the King, in the exercise of his prerogatives.

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13 John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Tax* (Madison: University of Wisconsin Press, 1987) at 28-29 [Reid, *Authority to Tax*].

14 Morgan & Morgan, *supra* note 11 at 58.

15 Sir William Holdsworth, *A History of English Law*, vol 11 (London, UK: Methuen & Co, 1938) at 110.

16 Jack P. Greene, “The origins of new colonial policy, 1748-1763” in Jack P. Greene & J.R. Pole, eds, *The Blackwell Encyclopedia of the American Revolution* (Cambridge, Mass: Basil Blackwell, 1991) 95 at 98.

17 Greene, *Peripheries*, *supra* note 2 at 64.

18 J. Lightfoot et al. “Charges Against Governor Nicholson” (1896) 3:4 *Virginia Magazine History & Biography* 373 at 375.

19 Greene, *Peripheries*, *supra* note 2 at 81.

20 John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Legislate* (Madison: University of Wisconsin Press, 1991) at 80.

Practically speaking, this was a reversion to the time of the Stuart kings, denying to Parliament the gains that had been made consequent to the Glorious Revolution.<sup>21</sup> The emerging dominant constitutional discourse relied upon by imperial authorities, by contrast, was one of a supreme Parliament with a law-making authority as capacious as that of the Crown in its exercise of the royal prerogative.

British North American colonists apparently would have been content, initially, if metropolitan authorities had kept merely to their own sphere of concern by respecting the very unrefined distinction between “internal” and “external” affairs. Colonial leadership maintained that local legislative bodies had full authority over internal affairs of the colony, such as the power to tax. These were matters of “internal police” within the colony, addressing matters of everyday concern.<sup>22</sup> The Imperial Parliament only had authority over the colony’s external affairs, things commonly associated with trade regulation, such as excise duties on trade.<sup>23</sup> In his three-hour appearance before the House of Commons in 1766 opposing the *Stamp Act*, Benjamin Franklin invoked this distinction as representing a common sense solution to imperial-colonial tensions.<sup>24</sup> As a consequence of Franklin’s testimony, Bailyn advises, its “usage took on ... importance and became the subject of powerful attacks.”<sup>25</sup> The binary figured prominently in Richard Bland’s 1764 tract against the exercise of the King’s prerogative power in Virginia, described as the “first explicitly federal vision of the relationship between Crown and colony in the British empire”<sup>26</sup>:

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21 Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (Cambridge, Mass: Harvard University Press, 2014) at 33.

22 Bailyn, *Ideological Origins*, *supra* note 2 at 203.

23 Edmund Burke observed that these sorts of regulations, associated with the navigation acts, were tolerated by the colonists until 1764, the year of the *Sugar Act*, at which point Britons began contemplating new sources of parliamentary revenue: see Edmund Burke, “Speech on American Taxation (1774) in *The Works of the Right Honourable Edmund Burke*, vol 2 (London, UK: Oxford University Press, 1906) 89 at 113. The controversial *Stamp Act* was introduced in the following year.

24 Benjamin Franklin, “Franklin’s Examination Before the Committee of the House of Commons, 1766” in Edmund S Morgan, ed, *Not your usual founding father: Selected Readings from Benjamin Franklin* (New Haven: Yale University Press, 2006) at 194; Thomas P Slaughter, “The Tax Man Cometh: Ideological Opposition to Internal Taxes, 1760-1790” (1984) 41:3 *William & Mary Q* 566 at 575. Reid claims that Franklin’s usage was “part of a strategy to suppress discussion of the larger constitutional issues” (Reid, *Authority to Tax*, *supra* note 13 at 37). But Reid makes no case that Franklin was claiming colonial authority over subjects assimilated under the heading of “external.”

25 Bailyn, *Ideological Origins*, *supra* note 2 at 213.

26 Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (Cambridge, UK: Cambridge University Press) at 175. See also Andrew C McLaughlin, “The Background of American Federalism” (1918) 12:2 *American Political Science Rev* 215 at 218. Tucker and Hendrickson deny that the proposed imperial division of power was “federal in principle ... or

If then the people of this colony are freeborn and have a right to the liberties and privileges of English subjects, they must necessarily have a legal constitution, that is, a legislature composed in part of the representatives of the people who may enact laws for the INTERNAL government of the colony and suitable to its various circumstances and occasions.<sup>27</sup>

This perspective contrasted with matters concerning external government, which Bland did not identify in any detail. Denying the possibility that colonists could be ‘virtually’ represented in the British Parliament, Daniel Dulaney’s 1765 pamphlet maintained that Parliament could not impose a tax for the purpose of raising revenue: “It appears to me that there is a clear and necessary distinction between an act imposing a tax for the single purpose of revenue and those acts which have been made for the regulation of trade and have produced some revenue in consequence of their effect and operation as regulations of trade.”<sup>28</sup>

British parliamentarians were, for the most part, confused by this distinction. If regulations of trade could incidentally raise revenue, why would this not be as oppressive as direct taxation? Moreover, if the British Parliament was sovereign over its colonies, how could this power be divided? The logic of the internal-external divide was that Parliament did not have undivided sovereignty, a denial of the achievement secured by the Glorious Revolution and anathema to British parliamentarians. British Whigs maintained that such a division of labour was impossible. Parliamentary authority was not divisible: either the colonies were subject to imperial authority or they had an independent existence that dissolved their union with the British Crown.<sup>29</sup> The colonies, in their view, had no independent constitutional existence, their authority being no greater than domestic corporations within Britain with the power to make by-laws.<sup>30</sup>

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in practice.” The dependence of the regional government on the general one made it “neither federal in theory nor federal in fact,” though it did have “federal features”, see Robert W Tucker & David C Hendrickson, *The Fall of the First British Empire: Origins of the War of American Independence* (Baltimore: Johns Hopkins University Press, 1982) at 174-75.

27 Richard Bland, “The Colonel Dismounted” (Williamsburg: Joseph Royle, 1764) in Bailyn, *Pamphlets*, *supra* note 1 at 320.

28 Daniel Dulany, “Considerations on the Propriety of Imposing Taxes in the British Colonies for the Purpose of Raising Revenue, by the Act of Parliament” (Annapolis: North American, 1765) in Bailyn, *Pamphlets*, *ibid* at 637.

29 Bailyn, *Ideological Origins*, *supra* note 2 at 218; Gordon S Wood, *The Creation of the American Republic 1776-1787* (Chapel Hill: University of North Carolina Press, 1969) at 349-50 [Wood, *American Republic*].

30 George Bancroft, *History of the United States of America From the Discovery of the Continent*, revised ed, vol 3 (Boston: Little, Brown, and Company, 1879) at 450 (quoting Yorke). See also Greene, *Constitutional Origins*, *supra* note 10 at 97. For examples of Dulany’s negative appraisal of the

The British, moreover, were getting mixed signals. While newspapers and pamphleteers invoked the internal-external binary, official protests from colonial assemblies just as often did not.<sup>31</sup> Indeed, in short order (by 1769), colonists began to abandon it themselves, following the lead of the Bostonian James Otis who could find “no foundation for the distinction.”<sup>32</sup> It was a common sense view, after all, that was never intended to be subject to rigorous critique.<sup>33</sup> It was “helpful as a tool” for working through the debates about imperial authority, an “established piece of intellectual equipment” even if “vague” nor “universally adopted.”<sup>34</sup> It was offered by colonists, together with a handful of British parliamentarians, as a middle ground by which metropolitan authorities could extricate themselves from the hardening of positions on both sides. Burke, for instance, pleaded with fellow parliamentarians to respect the distinction between internal and external affairs “originally moved by the Americans themselves” and in which they had acquiesced.<sup>35</sup> Thomas Pownall’s *Administration of the Colonies*, authored by the former governor of Massachusetts, went through five editions by 1774 and explicitly conscripted the internal-external binary throughout.<sup>36</sup> Pownall urged that Parliament was, as head of a grand commercial empire, the supreme power — with the caveat that the “colonies have a right to be governed within this jurisdiction by their own laws, made by their own internal will ... it would be against the law of nature, nations, of our own constitution, if even the omnipotence of parliament itself was to interfere to the obstructing or superceding of this freedom.”<sup>37</sup> Pownall proceeded to describe the colonies as “shoots which the old tree in the vigour of its health had put forth.”<sup>38</sup> He “viewed them as spreading branches of the same organized plant, advancing in its natural vegetation.” If they drew their sustenance from the “parent stock, they have been permitted to strike a separate root, the beginning of a new and separate plant.”<sup>39</sup> What was required was the complete “renunciation” by Great Britain of all “powers of internal leg-

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analogy between colonies and corporations, see Dulany, *supra* note 28 at 14; Bailyn, *supra* note 1 at 618.

31 Slaughter, *supra* note 24 at 578.

32 James Otis, “The Rights of the British Colonies Asserted and Proved” (Boston: Edes and Gill, 1764) in Bailyn, *Pamphlets*, *supra* note 1 at 450.

33 Bailyn, *Ideological Origins*, *supra* note 2 at 213.

34 LaCroix *supra* note 2 at 44, 58. See also Robert Middlekauff, *The Glorious Cause: The American Revolution 1763-1789* (New York: Oxford University Press, 1982) at 125.

35 Burke, *supra* note 23 at 144.

36 See e.g. Pownall, *supra* note 4 at 5.

37 *Ibid* at 42.

38 *Ibid* at 10.

39 *Ibid*. Pownall’s arborial terminology, anticipates by some 146 years, Viscount Sankey’s “living tree” doctrine: see *Edwards v Canada (AG)* (1929), [1930] AC 123 (PC).



isolation.”<sup>40</sup> The external power of Parliament, so necessary to the “union” and “safety” of the empire,<sup>41</sup> which extends to the making of “laws binding upon the colonies in all cases whatsoever”<sup>42</sup> — what he calls the “intendement and remembrance of the law” — is bounded by the line of internal right.<sup>43</sup>

Pushed to the brink, the internal-external distinction was rendered old-fashioned within a decade and colonial leadership drew the line elsewhere — at independence.<sup>44</sup> The first Continental Congress in its “Declaration of Colonial Rights and Grievances,” nevertheless, invoked it in a last-ditch attempt at reconciliation. Drafted by John Adams, the colonists claimed an entitlement to exclusive authority “in all cases of taxation and internal polity,” while “cheerfully” consenting to the operation of Parliamentary enactments “as are bona fide, restrained to the regulation of our external commerce,” excluding “every idea of taxation, internal or external.”<sup>45</sup> Rakove maintains that emphasis should be placed upon the adverb “cheerfully consent,” which remained that “lone conciliatory gesture” the colonists would offer.<sup>46</sup> With the onset of armed conflict, colonial representatives in their 1776 “Declaration of Independence” abandoned all appearance of compromise, accusing the British of, among other things, having “suspended” the operation of laws, “dissolved” representative houses of assembly, making judges “dependent” on executive patronage, “imposing” taxes without consent, “suspending our own Legislatures, and declaring [the British Parliament] invested with power to legislate for us in all cases whatever,” extending an “unwarrantable jurisdiction over us.”<sup>47</sup> Each of these complaints would later resonate in the colonies that would join together to become the Dominion of Canada. Most would be managed by working out a version of the internal-external distinction in constitutional affairs.<sup>48</sup>

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40 Pownall, *ibid* at 94.

41 *Ibid* at 43.

42 *Ibid* at 41.

43 *Ibid* at 43, 95.

44 Wood describes such attempts at dividing Parliament’s power as “futile.” Given the choice between the doctrine of parliamentary sovereignty and no authority, most Americans decided that Parliament had no power to make any laws for them”: Gordon S Wood, *The Americanization of Benjamin Franklin* (New York: Penguin Press, 2004) at 123-24.

45 Continental Congress, “The Declaration of Colonial Rights and Grievances (1 October 1774)” in *English Historical Documents IX: American Colonial Documents to 1776*, Merrill Jensen, ed (London, UK: Eyre & Spottiswoode, 1969), 806 at 807; G Edward White, *Law in American History, Volume 1: From the Colonial Years Through the Civil War* (New York: Oxford University Press, 2012) at 129-30.

46 Jack Rakove, *Revolutionaries: A New History of the Invention of America* (Boston: Houghton Mifflin Harcourt, 2010) at 62.

47 Continental Congress, “Declaration of Independence” in *English Historical Documents, American Colonial Documents to 1776*, Merrill Jensen, ed (London, UK: Eyre & Spottiswoode, 1969) 877 at 878-79.

48 John W Daffoe, *Canada: An American Nation* (New York: Columbia University Press, 1935) at 20.

## II. Crisis in the Second Empire

With few exceptions, scholars have almost uniformly overlooked that Lord Durham invoked the same antonyms — so “fundamental” and “obvious” in the eighteenth century<sup>49</sup> — in his *Report on the Affairs of British North America*, published in 1839.<sup>50</sup> Durham admits that the system he proposes “would in fact, place the internal government of the colony in the hands of the colonists themselves.”<sup>51</sup> He knows not “in what respect it can be desirable that we should interfere with their internal legislation in matters which do not affect their relations with the mother country.”<sup>52</sup> Indeed, Lucas observes that “the whole basis of Lord Durham’s view on responsible government was that a line could be drawn between matters of colonial or internal concern and matters of imperial concern.”<sup>53</sup> His “distinction between Imperial and Canadian matters,” adds Chester New, “was not to be a vague one. He drew the line.”<sup>54</sup>

In which matters might the mother country’s interests be engaged? The matters of concern to imperial authority were “very few” and included the “constitution of the form of government,” “the regulation of foreign relations, and of trade with the mother country, other British colonies and foreign nations,” and the “disposal of the public lands.”<sup>55</sup> These were “the only points on which the mother country requires a control” and would thereby secure the “advantages which it finds in the continuance of its connexion with the Empire.”<sup>56</sup> That connection “certainly is not strengthened, but greatly weakened, by a vexatious

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49 Bailyn, *Ideological Origins*, *supra* note 2 at 209.

50 I have found two exceptions: the first, by John W Dafoe before this paper was completed (Dafoe, *supra*, note 48 at 20); and the second, by WPM Kennedy after this paper was nearly complete (WPM Kennedy, “The Conception of the British Commonwealth” (1924) 239 *Ed L Rev* 227 at 232). Dafoe writes that a division of authority “might afford a solution for the imperial problem of that day” only “occurred” to Lord Durham. Kennedy is more explicit, though without any confirming evidence, referring to the “distinction made by John Adams between “internal” and “external” affairs which Durham developed in his *Report*” (Dafoe, *ibid* at 20). Craig, by contrast, describes this part of the report as “new [but] not very sound” (Gerald M Craig, “Introduction” in Gerald M Craig, ed, *Lord Durham’s Report* (Toronto: McClelland & Stewart, 1963) i at xi [Craig, *Durham’s Report*]).

51 Earl of Durham, *Lord Durham’s Report on the Affairs of British North America*, vol 2 (London, UK: Clarendon Press, 1912) at 281 [Durham, vol 2] (note that Durham uses the term “imperial” rather than “external”).

52 *Ibid* at 282.

53 *Ibid* at 281, fn 1. Ajzenstat points to Lucas as the first to interpret Durham’s recommendations as amounting to “something like a division of powers” (Ajzenstat, *Discovering Confederation*, *supra* note 6 at 45).

54 New, Lord Durham, *supra* note 4 at 508; Craig, *Durham’s Report*, *supra* note 50 at vii.

55 Durham, *supra* note 51 at 282.

56 *Ibid*.

interference on the part of the Home Government, with the enactment of laws for regulating the internal concerns of the Colony," Durham opined.<sup>57</sup>

Metropolitan authorities had learned a couple of things from the rebellion of the Thirteen Colonies. First, popular assemblies in the colonies needed to be counter-balanced by powerful aristocratic and monarchical elements.<sup>58</sup> Second, authorities should avoid interfering in internal colonial affairs. The first policy was taken up immediately. The second, only slowly — ostensibly, in practice, by about the third decade of the nineteenth century under the influence of British reformers, who had long promoted a division of authority along these lines.<sup>59</sup> Speaking in the House of Commons in 1828 on the eve of the appointment of a select committee on civil government in Lower Canada, Sir James Mackintosh declared that the only means by which the "almost incurable evil of distant government can be ... mitigated" was by leaving the regulation of the "internal affairs of the colonies to the colonists, except in cases of the most urgent and manifest necessity."<sup>60</sup> This also turned out to be the unanimous recommendation of the select committee that reported to the House that same year.<sup>61</sup> By 1835, Lord Glenelg could instruct Lieutenant Governor Sir Francis Bond Head that, "Parliamentary legislation on any subject of exclusively internal concern, in any British colony possessing a representative assembly, is as a general rule, unconstitutional."<sup>62</sup> Governors, nevertheless, found it difficult not

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57 *Ibid.*

58 Greater care would be taken to "preserve a due mixture of the Monarchical, & Aristocratical parts of the British Constitution" in "Discussion of Petitions and Counter Petitions Re Change of Government in Canada" enclosed with correspondence from William W Grenville, Secretary of State, to Lord Dorchester, Governor of Canada (20 October 1789) in Adam Shortt & Arthur G Doughty, eds, *Documents Relating to the Constitutional History of Canada 1759-1791*, 2nd revised ed, part 2 (Ottawa: King's Printer, 1907) at 983.

59 Phillip A Buckner, *The Transition to Responsible Government: British Policy in British North America 1815-1850* (Westport, Conn: Greenwood Press, 1985) at 18.

60 Sir James Mackintosh, "Speech on the Civil Government of Canada; delivered in the House of Commons, May 2, 1828" in *The Miscellaneous Works of the Right Honourable Sir James Mackintosh* (Boston: Phillips, Sampson and Company, 1858) 564 at 565.

61 The committee was desirous of:

recording the principle ... which should be applied to any alterations in the Constitution of the Canadas which was imparted to them under the formal act of the British legislature of 1791. The principle is to limit the alterations which it may be desirable to make by any future British act, as far as possible, to such points as from the relation of the mother country with the Canadas, can only be disposed of by the paramount authority of the British legislature; and they are of the opinion, that all other changes should, if possible, be carried into effect by the local legislatures themselves, in amicable communication with the local government ("Select Committee on the State of Civil Government of Canada" in Kennedy, *Documents*, *supra* note 9, 254 at 258). See also Buckner, *supra* note 59 at 142-43 (on deliberations within the Select Committee)

62 "Glenelg to Head" in Kennedy, *Documents*, *supra* note 9, 319 at 323.

to meddle in internal affairs, with their accomplices in the Executive Council, thereby flouting this general constitutional rule.<sup>63</sup>

Durham and his associates picked up on the principle and ran with it. Charles Buller, member of the British Parliament representing the borough of Liskeard, seems to have had a lot to do with this. Buller accompanied Durham on his voyage to Canada, serving as principal secretary to the Governor General. In his text *Responsible Government for the Colonies*,<sup>64</sup> published in the year after Durham's report, Buller emphasizes how it was Durham's policy of granting the "whole of the internal policy" to the colony.<sup>65</sup> Buller insists on the colonists "being allowed to manage their own internal affairs, and that interference of the Imperial Government ... be confined to the very few points on which Imperial interests are affected by what passes in the Colonies."<sup>66</sup> Those subjects — having to do with foreign relations, trade, immigration, and disposal of unoccupied lands<sup>67</sup> — mirrored those enumerated in Durham's Report. On those few matters, Buller maintains, "a colony must be subservient to the empire."<sup>68</sup> This "division of power"<sup>69</sup> would have the benefit of preventing further disorders that were prompted by a policy "which subjects the internal affairs of a people to the will of a distant authority not responsible to anybody."<sup>70</sup>

According to Chester New, in dividing up power along these lines, Durham merely was following Buller's advice. Buller proposed a similar division of authority, acting as Parliamentary Advocate for the Patriotic Association, for the Constitution of New South Wales.<sup>71</sup> He strongly resisted a constitutional proposal for New South Wales (NSW) issuing out of the Colonial Office that would have established only subordinate municipal bodies, while empowering

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63 As Tucker and Hendrickson argue, in the context of the first British empire, it is difficult to maintain the distinction when regional governments "in their very composition, were dependent on the general government for their chief executive officer" (Tucker & Hendrickson, *supra* note 26 at 174).

64 Charles Buller, "Responsible Government for Colonies" (1840) in EM Wrong, *Charles Buller and Responsible Government* (London, UK: Oxford University Press, 1926) at 86.

65 *Ibid* at 89.

66 *Ibid* at 109.

67 *Ibid* at 105-06.

68 *Ibid* at 108.

69 *Ibid* at 101, 107.

70 *Ibid* at 164-65.

71 New, *supra* note 4 at 508. See also ACV Melbourne, *Early Constitutional Development in Australia*, ed by RB Joyce (St. Lucia: University of Queensland Press, 1963) at 235-44 (on Buller's role as London agent for the Australian Patriotic Association in these unsuccessful negotiations). He apparently received a salary of £1,200 per year for the four years he served as agent: see R Gwynn Grills, "Charles Buller and Radical Imperialism" (1948) 174 *Contemporary Rev* 365 at 366.

a governor and council with authority to “make laws.”<sup>72</sup> Buller proposed, immediately before proceeding to Canada, a colonial legislature for NSW composed of a mixture of elected and nominated members. The legislature would have “the power to enact what laws it chooses, save:

- (I) Passing laws repugnant to imperial statutes, specifically binding the colony or the colonies in general;
- (II) Imposing duties in external trade;
- (III) Treaty making, or entering into any relation of peace or war with foreign nations;
- (IV) Interfering with the appropriation of waste lands, or of revenue arising therefrom.”<sup>73</sup>

It might be considered anomalous to have excluded the disposal of public lands from among the subjects falling within the internal elements of colonial self-government. Colonial reformers like Gibbon Wakefield and Buller were of the view that orderly colonization was among the foremost concerns for the Imperial Parliament because of the press of population growth in the British Isles.<sup>74</sup> As Durham notes, colonization was expected to be self-funded; all that was required was appropriate legislation.<sup>75</sup> It turns out that control of public lands was one of the first subjects to be pried from the grip of the metropole: it was “still-born in the Report in which it was recommended,” chides Chester Martin.<sup>76</sup>

It might also be thought that the division of powers between external and internal matters was one promoted by colonial reformers.<sup>77</sup> J.L. Morison asserts that Durham’s “exceptions” — those few matters left for imperial control —

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72 Edward Sweetman, *Australian Constitutional Development* (Melbourne: Macmillan & Co, 1925) at 142-43.

73 *Ibid* at 147, s 15. Wrong describes these reservations as “interesting, for they are those set to responsible government by Durham only nine months later” (Wrong, *supra* note 64 at 19).

74 See Charles Buller, “Report to this Excellency the Governor General on Public Lands and Emigration”, Sir CP Lucas, *Lord Durham’s Report on the Affairs of British North America*, vol 1 (London, UK: Clarendon Press, 1912) at 152-98; Sir CP Lucas, *Lord Durham’s Report on the Affairs of British North America*, vol 3 (London, UK: Clarendon Press, 1912) at 34-130. See also Hugh Edward Egerton, *A Short History of British Colonial Policy*, 8th ed (London, UK: Methuen & Co, 1928) 281-301 (on Wakefield’s influence on colonial policy).

75 Durham, vol 2, *supra* note 51 at 328.

76 Chester Martin, *Empire & Commonwealth: Studies in Governance and Self-Government in Canada* (London, UK: Oxford University Press, 1929) at 331 [C Martin, *Empire & Commonwealth*].

77 Two recent monographs regrettably make no mention of the distinction: see Michael S Cross, *A Biography of Robert Baldwin: The Morning Star of Memory* (Don Mills: Oxford University Press,

were “in exact accordance with the wishes of the wisest Canadian reformers,” like Robert Baldwin.<sup>78</sup> Gerald Craig is of the opposite view, that the “one important distinction,” that between internal and external affairs, was one “which the reformers had never clearly made.”<sup>79</sup> In a long letter dated July 1836 to colonial secretary Lord Glenelg, written while Baldwin was seeking, without success, a personal interview with Glenelg,<sup>80</sup> Baldwin refers several times to “internal affairs” of the province as being within the preserve of the colonists.<sup>81</sup> He does not, in this letter, other than by implication, distinguish between those matters that are of internal concern and those that are of external or imperial concern. He also alludes to the distinction two years later in a letter to Durham, in which he encloses a copy of his letter to Glenelg.<sup>82</sup> Baldwin explained to Durham that “these were the views that he laid before [Lieutenant Governor of Upper Canada] Sir Francis Head when he sent for me on his first arrival in the Province” and which he again “pressed upon the consideration of Lord Glenelg and Lord John Russell when in England in 1836.”<sup>83</sup> Chester New infers that it may have been Baldwin’s letter to Glenelg that “probably suggested to Lord Durham the ideas that revolutionized the British Empire.”<sup>84</sup> Without more specificity, we must surmise that New is referring to Baldwin’s “great and all absorbing grievance,” namely, the cause of responsible government.<sup>85</sup>

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2012); Benjamin T Jones, *Republicanism and Responsible Government: The Shaping of Democracy in Australia and Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2014).

78 J.L. Morison, “The Mission of the Earl of Durham” in WPM Kennedy, ed, *The Cambridge History of the British Empire*, vol 6 (London, UK: Cambridge University Press, 1930) 287 at 306. Morison cites Baldwin’s correspondence with Lords Glenelg and Durham see Robert Baldwin to Lord Glenelg” (13 July 1836) in Arthur G Doughty, *Report of the Public Archives for the Year 1923* (Ottawa: FA Acland, 1924) 329.

79 Gerald M Craig, *Upper Canada: The Formative Years, 1784-1841* (Toronto: McClelland & Stewart, 1963) at 262.

80 George F Wilson, *The Life of Robert Baldwin: A Study in the Struggle for Responsible Government* (Toronto: Ryerson Press, 1933). He was advised on 28 June 1836 that “any communication he might wish to make should be made in writing”, see *ibid* at 50.

81 Doughty, *supra* note 78 at 331-32, 334-36.

82 “The Imperial Parliament is the tribunal in whose hands should be retained all the powers of general legislation essential to the welfare of the Empire as a whole; And for all legislation of a local character the Legislatures of the respective Provinces will I am convinced be found the best adapted”: “Robert Baldwin to Lord Durham” (23 August 1838) in Doughty, *supra* note 78 at 327. Baldwin’s “famous memorandum” to Glenelg was also published in *The Times* and in the Parliamentary Papers: see Chester Martin, *Foundations of Canadian Nationhood* (Toronto: University of Toronto Press, 1955) at 143.

83 Doughty, *ibid* at 328.

84 New, *supra* note 4 at 345.

85 Letter from Robert Baldwin to Peter Perry (1836), cited in Stephen Leacock, *The Makers of Canada: Baldwin Lafontaine Hincks* (Toronto: Morang & Co, 1907) at 40. Buckner writes that the term “responsible government” was never used expressly in Durham’s Report, only in the marginal notes: Buckner, *supra* note 59 at 258. See e.g. Duram, vol 2, *supra* note 51 at 278, 298 (“Repsonsibility of Government in England” and “An irresponsible Government necessarily weak”). With the aid of

So, Craig is incorrect to say that Baldwin did not work with the distinction.<sup>86</sup> But, Morison's assertion is not entirely accurate either. Baldwin did not lay down exceptions that were in "exact accordance" with those laid down in Durham's report. There was no such precision to Baldwin's contentions. He wished to emphasize, instead, the need to migrate the model of the responsible British cabinet to the province.<sup>87</sup> Lower Canadian constitutional thinkers were preoccupied with British precedent,<sup>88</sup> though this would evolve as the sources for comparison became more varied.<sup>89</sup> Reformers such as Louis-Joseph Papineau moved toward republicanism and preferred to adopt American constitutional habits of electing all three branches of government.<sup>90</sup> So, while the American revolutionary tradition was increasingly relevant to radical Patriotes,<sup>91</sup> what was not of interest were the failed and "awkward" strategies that preceded the American revolution.<sup>92</sup>

Indeed, none of the published archival sources or secondary literature reveals linkages between Durham's recommendations and the solution to the

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Google books' search engine, we learn, to the contrary, that the term "responsible government" is invoked in the text (*ibid* at 168, 261, 309, 312) and that "responsibility" of the Executive is mentioned throughout (*ibid* at 76, 78, 94, 100, 111, 147, 150, 157, 168, 280, 285, 298).

86 Papineau refers repeatedly to subjects of an "internal nature" as being the exclusive preserve of British colonies in 1836 correspondence: see "Papineau to Bidwell" (13 March 1836) in *Despatches from Sir F.B. Head on the Subject of Canada* (London, UK: House of Commons, 1839) at 270-71.

87 Oscar D Skelton, *The Canadian Dominion: A Chronicle of Our Northern Neighbor* (New Haven: Yale University Press, 1919) at 75. For some of the influences operating upon reformers in Upper Canada, see Buckner, *supra* note 59 at 159-60.

88 Lawrence AH Smith, "Le Canadien and the British Constitution, 1806-1810" in Ramsay Cook, Craig Brown & Carl Berger, eds, *Constitutionalism and Nationalism in Lower Canada* (Toronto: University of Toronto Press, 1969) 17 at 29, 31.

89 Lamonde writes that the Patriote leaders, Etienne Parent, Louis-Joseph Papineau and François-Xavier Garneau looked to "Poland, Italy, Belgium, Greece and the countries of South America" for the purposes of comparison: see Yvan Lamonde, *The Social History of Ideas in Quebec, 1760-1896*, translated by Phyllis Aronoff & Howard Scott (Montreal & Kingston: McGill-Queen's University Press, 2013) at 175.

90 See e.g., "Petition of the House of Assembly of Lower Canada" (1833) in Kennedy, *Documents*, *supra* note 9 at 263; "The Ninety-Two Resolutions of 1834" (1834) in Kennedy, *Documents*, *ibid* at 278-79: 43. Resolved, That the constitution and form of government which would best suit this colony are not to be sought solely in the analogies offered by the institutions of Great Britain, where the state of society is altogether different from our own; and that it would be wise to turn to profit by the information to be gained by observing the effects produced by the different and infinitely varied constitutions which the Kings and Parliament of England have granted to the several plantations and colonies in America. ... 44. Resolved, That the unanimous consent with which all American states have adopted and extended the elective system, shows that it is adapted to the wishes, manners and social state of the inhabitants of this continent.

91 See Louis-Georges Harvey, *Le Printemps de l'Amérique française: Américanité, anticolonialisme et républicanisme dans le discours politique québécois, 1805-1837* (Montreal: Éditions Boréal, 2005) at 122 (who refers to the rehabilitation of the American revolution among lower Canadian patriotes).

92 Wood, *American Republic*, *supra* note 29 at 349.

crisis in Imperial authority precipitated by the *Stamp Act* — which is not to say that there are no such linkages. As mentioned, metropolitan authorities became, in the decades after the American Revolution, increasingly inclined to yield to colonial self-determination as regards purely internal matters.<sup>93</sup> There were other more recent precedents, however, that were more salient to key figures operating within the colonial office, namely, British policy in Ireland and in the West Indies.<sup>94</sup> Indeed, the West Indian case looks to be a stand-in for the pre-revolutionary American one in so far as West Indian leaders did not seek a complete break from Britain.<sup>95</sup> If it is unlikely that the murky division of authority proposed in the years preceding the Revolution weighed on the minds of the relevant actors, it comes as less of a surprise that conceding authority to the colonies along external/internal lines would have been a fitting response.<sup>96</sup> Though wielding imperial authority in different centuries, conditions in both the Thirteen Colonies and in the Canadas precipitated a common solution to strikingly similar constitutional conditions. Their “common marginality” precipitated a pragmatic response that would keep the imperial connection alive, all the while conceding more and more self-governing space to the periphery.<sup>97</sup>

Durham’s call for responsible government — self-government regarding the internal affairs of the colonies — would be hemmed in by the short yet non-trivial list of subjects concerning foreign affairs, trade, colonization, and internal constitution. That the affairs of the province would be conducted by “Men possessed of the public confidence, whose opinions and policy would be in harmony with the opinions and policy of the Representative of the People”<sup>98</sup> fell firmly within established British constitutional practice of the time, respecting notions of parliamentary responsibility. It departed, instead, from British imperial practice. Echoing the earlier objections of British Whigs, parliamentarians in the mid-nineteenth century resisted Durham’s proposition that metropolitan authority be subservient to the wishes of colonial assemblies. A governor could not follow both the desires of an elected assembly and that of his political master in matters such as foreign affairs, declared Secretary of State for the Colonies, Lord John Russell. Russell interpreted Durham as having

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93 Buckner, *supra* note 59 at 18. Interestingly, this was the state of affairs in British North America in the decades prior to the *Stamp Act* crisis.

94 Buckner, *ibid* at 165, 195.

95 Buckner, *ibid* at 165.

96 Tucker and Hendrickson argue, in the context of the first British empire, that the argument came “naturally to men on both sides of the Atlantic, when forced”, see Tucker & Hendrickson, *supra* note 26 at 175. I prefer avoiding a discourse of naturalism.

97 See Bernard Bailyn, “Three Trends in Modern History” in Bernard Bailyn, ed, *Sometimes an Art: Nine Essays on History* (New York: Alfred A Knopf, 2015) 53 at 62.

98 “Robert Baldwin to Lord Durham” (23 August 1838) in Doughty *supra* note 78 at 332.



laid down “this broad principle ... that all external matters should be subject to the home Government and all internal affairs should be governed according to the majority of the Assembly ... could you carry that principle into effect?” he asked. “I say we cannot abandon the responsibility which is cast upon us as ministers of this great empire,” he answered.<sup>99</sup> Despite having paid lip service to a customary constitutional rule, dividing authority along these lines would be resisted by imperial governors just as it was in the decade leading up to American independence.

The brilliant Nova Scotia politician, Joseph Howe, claimed no such conflict would arise if “British statesmen ... confine themselves to those general arrangements affecting the whole empire, of which we admit them to be the best judges, and of which we never asked to take a part ... .”<sup>100</sup> Durham’s recommendations had the effect of appeasing Canadian reformers like Howe. Indeed, none took immediate objection to his reservation of imperial powers.<sup>101</sup> Howe’s pragmatism (as of that of the American colonists like Franklin and of British parliamentarians such as Burke) anticipated the ensuing compromise: “if the duties and responsibilities of government are fairly and judiciously divided between the Imperial and Colonial authorities, no such case as that assumed by your Lordship can occur; and if it should, surely the good sense of all parties concerned may safely be trusted, to avoid any violent or unpleasant collision.”<sup>102</sup>

### III. A Formula for Imperial Rule?

There is no hint that Howe expected such a division of authority to be reduced to statute and so given the force of written law. Indeed, Janet Ajzenstat resists the notion that Durham ever intended to impose such a division of legislative authority. He had no intention of imposing this dualism or “dyarchy” by “officially” allocating powers to the colonies and others to the metropole.<sup>103</sup> This was no “formula for imperial rule.”<sup>104</sup> Employing a reading she associates with the “plain sense of the text,” Durham’s intention was to reaffirm imperial authority in these domains despite the grant of responsible government to

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99 “Lord John Russell on Canadian Affairs, June 1839” in Kennedy, *Documents*, *supra* note 9 at 383.

100 “Joseph Howe to Lord John Russell” in Kennedy, *Documents*, *supra* note 9 at 399.

101 John Manning Ward, *Colonial Self-Government: The British Experience 1759-1856* (Toronto: University of Toronto Press, 1976) at 287, 289.

102 Kennedy, *Documents*, *supra* note 9 at 399.

103 Janet Ajzenstat, “Introduction to the 2006 Edition” in *Lord Durham’s Report*, GM Craig, ed (Montreal & Kingston: McGill-Queen’s University Press, 2007) at xv [Ajzenstat, “Introduction”]. She describes the latter as “crucial powers of control and compliance” (*ibid*).

104 *Ibid* at xvi.

the colony.<sup>105</sup> Durham laid down no “new law, policy, or scheme of any kind,” Ajzenstat maintains. It could not have been Durham’s intention to “bolster imperial powers in the colonies, or to “institutionalize” them with a proposal for a division of powers.”<sup>106</sup> This is because it would not have fit with his conceptions of freedom and equality within the empire: colonists should not be subject to the rule of others.<sup>107</sup> Rather than being an argument for subordination of the colony it was, instead, “a list of reasons why the colonies will be eager to promote the imperial connection,” she claims, and also to forestall objections to responsible government in London.<sup>108</sup>

Ajzenstat chides those commentators who read the Report as having carved out a domain for imperial authority, thereby sullyng Durham’s reputation. Lucas, for instance, notes “how very limited were the powers” Durham proposed conferring upon the colonies “by way of responsible government, and to what extent the limits have been swept away.”<sup>109</sup> Craig agrees that Durham’s division was not very generous to the colonists and “began to break down almost at once.”<sup>110</sup> Martin maintains that Durham’s reputation is vastly overrated, having blithely disposed of the difficulty of dividing up spheres of authority.<sup>111</sup> His plan, Martin complains, would have confined colonial authority to the narrowest of subjects, not easily capable of division, and likely would have given rise to unresolved tensions between metropole and colony. Control over the disposition of public lands and customs and excise, in particular, would have amounted to a “substantial invasion” of the Colonial Assembly’s authority.<sup>112</sup> Within twenty years of the report’s publication, the colony claimed full authority to fix its own tariffs. Control over disposal of public lands was also ceded to the colony in short order. As for trade and relations with foreign powers, this too, albeit more slowly, devolved into Canadian hands. So, Durham fails because his division of authority turns out to have been unsustainable. If he did not propose such a division, Ajzenstat offers by way of rejoinder, then his plan was not a failure.

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105 Ajzenstat, *Discovering Confederation*, *supra* note 6 at 46–47.

106 *Ibid* at 49.

107 *Ibid* at 49.

108 *Ibid* at 47; Ajzenstat, “Introduction”, *supra* note 103 at xvi.

109 Durham, vol 2, *supra* note 51 at 282, n 1.

110 Craig, *Durham’s Report*, *supra* note 50 at xi.

111 Ged Martin, *The Durham Report and British Policy* (Cambridge, UK: Cambridge University Press, 1972) at 54.

112 *Ibid* at 60.

Ajzenstat makes no mention of the early colonial history in which the binary worked as an “established piece of intellectual equipment,”<sup>113</sup> nor does she have recourse to Buller’s activities on behalf of the Australian Patriotic Association of New South Wales. She simply denies that such a “formula” fit within Durham’s liberal outlook. She goes too far, however, in arguing that this proposal offered “no new law, policy, or scheme of any kind.” Durham, instead, was seeking a pragmatic solution to the distribution of authority in a case where some precision was called for.

There was, after all, not only the choice of reducing the proposed division into a “legal enactment” — what Chester Martin calls a “statutory constitution” — as in the cases of the *Quebec Act of 1774*, the *Constitutional Act of 1791*, and what would become the *British North America Act of 1867*.<sup>114</sup> Instead, “[c]ontrol” over this list of imperial subjects, Durham reassures readers, were “now sufficiently secured by the authority of the Imperial Legislature,” that is, by statutory precedent — the very thing the American colonists had resisted. Only a “wise system of colonization” needed to be executed and administered.<sup>115</sup> As for the division of powers, nothing further was required. What was expected, instead, was the continued subordination of the colony in respect of these subjects.

The same could be said for the institutionalization of responsible government. This required no change of legislation, only “a single dispatch containing such instructions” would suffice.<sup>116</sup> If “legal enactment” were required, Durham continued, it need only be one requiring that official acts of the Governor be “countersigned by some public functionary,” meaning a minister as head of a department, in order to “induce responsibility for every act of government.”<sup>117</sup> Otherwise, “very simple remedies yet remain to be resorted to for the very first time.”<sup>118</sup>

Durham does expressly recommend a new imperial statute when he turns to his proposal for legislative union. Here, he proposes repealing the *Constitutional Act of 1791* and replacing it with a new imperial enactment governing the united province. He offers detailed suggestions for the new scheme

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113 LaCroix, *supra* note 2 at 58.

114 G Martin, *supra* note 111 at 327.

115 Durham, vol 2, *supra* note 51 at 282, 328-29.

116 *Ibid* at 280. This too was Baldwin’s view: “The Concession of the principle therefore calls for no legislative interference - It involves no sacrifice of any constitutional principle” (“Robert Baldwin to Lord Durham” (23 August 1838), in Doughty *supra* note 78 at 333).

117 Durham, vol 2, *ibid* at 280.

118 *Ibid* at 330.

of government including composition of the Legislative Council, rules concerning the introduction of money bills, and independence of the judiciary.<sup>119</sup> Only a handful of these recommendations would receive codification in the *Union Act of 1840*.

Ajzenstat is correct to say that Durham did not intend, by his proposals, to bolster imperial authority. Indeed, his recommendations would have diminished that authority as least as regards the colony's internal affairs. It cannot be said with certainty, as Ajzenstat puts it, that he was "institutionalizing" a "formula" for the division of powers. We might instead make the more modest claim that Durham thought it worthwhile, in working out a solution for governing the affairs of British North America, to draw on the stock-in-trade distinction between internal and external affairs. We should admit that the distinction, as LaCroix reminds us in the context of the *Stamp Act* debates, is "muddy and complex" but "worked well in describing the *modus vivendi* of imperial power on the ground."<sup>120</sup> In the mid-nineteenth century context, we might say the binary served as a *modus operandi* to the mutual benefit of both sides of the divide.

By not reducing these imperial subjects to any further writing, they were left to work themselves out in practice — a representative case of what F.H. Underhill ascribes as the "British genius for avoiding definition."<sup>121</sup> Things played out just as Durham, Joseph Howe, and even Charles Buller, had anticipated:<sup>122</sup> the "good sense of all parties concerned" would prevail.<sup>123</sup>

## IV. Conclusion

Distinguishing between internal and external colonial affairs emerged as a handy device for mediating between the claims of colonists and metropole authorities in the first and second British Empires. If it failed to forestall revolution in America, it generated a pragmatic means of formulating a compromise that would accommodate colonial legislatures for the first time operating under responsible government. By the time of the meetings in Charlottetown and Quebec, another division of powers was at issue: that between the local

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119 *Ibid* at 323ff.

120 La Croix, *supra* note 2 at 64.

121 Frank H Underhill, *The British Commonwealth: An Experiment in Co-operation Among Nations* (Durham: Duke University Press, 1956) at 20.

122 Ajzenstat, "Introduction," *supra* note 103 at xv.

123 Ajzenstat describes Howe as "captur[ing] Durham's views exactly", see Ajzenstat, *Discovering Confederation*, *supra* note 6 at 48.

internal affairs of the provinces and those matters of concern to the federation. Even then, one of Canada's early treatises on constitutional law would admit that there is "no possible kind of legislation relating to the internal affairs of Canada which cannot be enacted either by the Dominion parliament or by the provincial legislatures."<sup>124</sup> The division of powers between the former colony and metropole still had some salience, at least as regards the prerogatives of making war and peace, until after the First World War. By then, it could be said that all of Durham's reservations for imperial authority had "gone by the board in whole or in part, in practice if not in theory."<sup>125</sup> In spite of the metropole's desire to hem in the list of "internal" matters, Canada achieved levels of self-government as fulsome as that of the United States, without its limitations on legislative power, and without the need for revolution.

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124 AHF Lefroy, *Canada's Federal System being a Treatise on Canadian Constitutional Law under the British North America Act* (Toronto: Carswell Co, 1914) at 96.

125 C Martin, *Empire & Commonwealth*, *supra* note 76 at 334.

