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Shaking the Foundations: Reading, Writing and Difference in Constitutional Texts

Judith Pryor

ABSTRACT
In his essay "Declarations of Independence", Jacques Derrida analyses the foundational *Declaration of Independence* of the United States; in particular, he examined its selflegitimating, constitutive effect upon the nation – and 'the people'– which it founds. This interest in the question of origins is not limited solely to Derrida's political texts: throughout his work he radically interrogated the foundations and legitimations of western philosophy, which he understood as the basis of western culture. This article draws out the implications of "Declarations of Independence" by examining foundational texts – specifically Aotearoa New Zealand's *Treaty of Waitangi* (1840), the United States' *Declaration of Independence* (1776) and the supposedly unwritten British constitution, in light of Derrida's deconstruction of the opposition between speech and writing. This article places the texts within a transnational diaspora in which apparently closed and finite texts of national definition can be inter-textually defined in a relation of difference with each other.

The announcement of Jacques Derrida's death on 8 October 2004 by the office of French President, Jacques Chirac, and the scale of eulogising, attested not only to Derrida's importance as a philosopher, but also to his status as a "founder of discursivity" (Foucault, 1988: 206). Derrida not only retroactively 'founded' the discourse known as deconstruction but also, throughout his work, radically called into question the founding assumptions of western philosophy and culture. One obituary described Derriddean deconstruction as "reveal[ing] deep fissures in the foundation of the western world's civilizations, cultures and creations" (Hodsdon, 2004). In this article, I want to contest this messianic notion of revelation, arguing instead that Derrida's insights must *actively* be put to work in order to analyse the process by which meanings are constructed. Derrida specifically interrogated what was at stake in constructing foundations, reflecting in several works on the problem of origins: his work challenged the ideas that the author is the origin of meaning; the subject is the origin of thought; and consciousness is the origin of meaning. To that end, one of the more reflective obituaries asserts:

> Derrida's starting point was his rejection of a common model of knowledge and language, according to which understanding something requires acquaintance with its meaning, ideally a kind of acquaintance in which this meaning is directly present to consciousness (Attridge & Baldwin, 2004).

It is significant that Attridge and Baldwin draw attention to a "*common* model of knowledge and language". In closely and critically attending to the equivocations and contradictions in a text, Derrida attempted to read in a way that de-naturalised those meanings that are most taken for granted: our communal and common-sense understandings and certainties about the world.

In this article, I draw on Derrida's reflections on writing, law and origins to problematise the notion of the origins or foundations in constitutional texts, especially in relation to prior indigenous claims. While foundational texts performatively write nations into being, they can be read in a way that can "activate the differences" (Lyotard, 1992: 25) on which they rely in order to produce meaning. Derridean theory will therefore be put to work in a *post*-colonial mode, attending to and activating difference within the hegemonic discourse such documents are conventionally thought to legitimate. Such a strategic move constructs what post-colonial critic Homi Bhabha has described as a "disjunctive temporality" that "creates a signifying time for the inscription of cultural incommensurability where differences cannot be sublated or totalized" (1994: 177).

The retroactive construction of origins

An apposite starting point for an analysis of originary texts is with the word 'origin' itself. The *Oxford English Dictionary* glosses it as:

> 1) The act or fact of arising or springing from something; derivation, rise; beginning of existence in reference to its source or course … 2) that from which anything arises, springs or is derived, source.

A unitary fixed point of origin is thus split from itself: it is both what follows from an originary point (a derivation) and that which precedes and guarantees the derivation (a source); however, the source is retroactively constructed by its derivation as part of a mutually constitutive process. Understood as both 'source' and 'derivation', the origin cannot be wholly or fully present to itself. Derrida elaborates further on the "broaching of the origin" throughout his work, arguing that an origin or centre only has meaning within a structure:

> The function of this center was not only to orient, balance, and organize the structure … but above all to make sure that the organizing principle of the structure would limit what we might call the *play* of the structure. By orienting and organizing the coherence of the system, the center of a structure permits the play of its elements inside the total form (1978: 351-52).

The origin is central in the sense of being intrinsic to a structure, but it is also outside it, marking an anterior point from which the structure orients itself. In historical and foundational narratives of origin, for example, the founding moment is central to the creation of the narrative; it could not be created without it. Yet it simultaneously remains 'outside' it, retroactively constituted by the very narrative of events it is perceived to inaugurate.

Derrida goes on to argue that "the origin" is:

> a central presence which has never been itself, has always already been exiled from itself into its own substitute. The substitute does not substitute itself for anything that has somehow existed before it (1978: 353).

Repetition of the substitute that is representation masks the absent presence at the origin. The continual reiteration of a foundational event thus constitutes that event, which can never be known in itself. This is not to say that events did not occur in the past, that the *Treaty of Waitangi*, for example, was not 'really' signed in 1840. Rather it is to say that this historical occurrence is intelligible as an event by subsequent iterative representations of it. The repetition of those representations institutes this moment as a foundational point of origin. When one looks for origins, or attempts to go back to the beginning, to the 'truth' of foundational events, one is in fact reinscribing the representations which constitute that origin and thus contributing to the construction of that point as a point of origin. The beginning of a discourse on the origin is, therefore, not the origin, but rather,

the representation of it as such. The origin is thus differed from itself. Furthermore, it is represented in the form of writing. Graphic writing institutes difference and deferral at its origin.

Declarations of Independence

While Derrida has been concerned with the deconstruction of origins throughout this work, the text which has most resonated with my own research on constitutional texts is from a brief paper that Derrida 'originally' delivered at the University of Virginia in 1976, subsequently published as "Declarations of Independence" (1986). In this article Derrida analyses how the performative text of the United States' *Declaration of Independence* has a self-legitimating, constitutive effect upon the nation – and 'the people'– which it founds. Derrida argues that 'the people' – the collective subject that authorised its representatives to sign – did not exist as an entity prior to the appending of signatures to this document. Just as 'the people' and 'the people's representatives' did not exist before the text, so the text "itself remains the producer and guarantor of its own signature" (1986: 10).

Furthermore, this text and its signatures will continue to signify in the absence of its signer, as a representation of the founding moment of the nation, or of the origin as unpresentable event. The text witnesses the event after the fact; the instant of constitution is fleeting and past. Yet, at the same time, it remains always to-come, containing a promise of the newly constituted nation in the future. The foundational text then is oriented at once towards the past, looking at existing models which it extends and radicalises, and to the future, constituting the promise of a unified nation in the future-to-come.[1]

In a later text, "Force of Law", Derrida reflects on the relationship between law and violence, noting that:

> A foundation is a promise …. And even if a promise is not kept in fact, iterability inscribes the promise as guard in the most irruptive instant of foundation. Thus it inscribes the possibility of repetition at the heart of the originary (1992: 38).

Even though the promise is oriented to the future-to-come, doubling and splitting the present "irruptive instant of foundation", it also looks to the past to find its models. Foundational moments thus have an uncertain temporality: they break out of existing structures to found something 'new', yet what that will have been can only be determined once the future itself has past. An origin, simultaneously a non-origin, never appears as it *is*, but is always already a repetition.

Derrida thus draws attention to how the process of founding a nation is concerned not only with constructing a moment of origin but also establishing a new law, founding state arrangements as it simultaneously constitutes a collective national subject:

> in a single coup of force, which is also a coup of writing, as the right to writing. The coup of force makes right, founds right or the law, gives right, *brings the law to the light of day, gives both birth and day to the law* (1986: 10. Original emphasis).

The law is legitimated – and continues to signify – because it is *written*. Derrida's reading of the US *Declaration* does not 'solve' the text, nor posit its true meaning. Instead, it generates a series of complex questions:

> How is a State made or founded, how does a State make or found itself? And an independence? And the autonomy of one which both gives itself, and signs, its own law? Who signs all these authorizations to sign? (1986: 13).

These questions engage with philosophies and strategies of writing and discourse of power both of which work to produce an external guarantee of meaning: the nation or 'people'.

Derrida argues in *Of Grammatology* that a text has no definitive external guarantee of meaning such as an author, God, or in the case of constitutional documents, the nation:

> [reading] cannot legitimately transgress the text toward something other than it, toward a referent … or toward a signified outside the text whose content could take place, could have taken place outside of language …. [I]n what one calls the real life of these existences … there has never been anything but writing … what opens meaning and language is writing as the disappearance of natural presence (1997: 158-9).

Not only does a text have no transcendent and true guarantee of meaning, but, by constantly deferring its final 'external' referent, a text also continually exceeds its boundaries. Drawing on Derrida's notion of the text as a "differential network, a fabric of traces" that "refers endlessly to something other than itself " (1991: 256-57), I examine how constitutional documents, reified as finite, foundational and 'self-evidently' meaningful are intertextually related to other constitutional texts in a relation of difference.

Within constitutional discourse, graphic writing separates modern nations from ancient 'unwritten' ones. This opposition is interrogated throughout the rest of this article, as I argue that nations with written foundational texts – including Aotearoa New Zealand – *depend upon* the idea of the British constitution's immemorial origins in order to legitimate themselves. They then continue to disseminate the value of this 'unwritten' origin in order to conserve the hegemony of the respective colonial states they found.

Reading the Treaty of Waitangi

Signed on 6 February 1840 between representatives of the British Crown and some (but not all) Mäori chiefs, the *Treaty of Waitangi* has been defined as the founding document of Aotearoa New Zealand.[2] This definitive moment of colonial encounter and subsequent conflicts about its meaning for the colony it established and the indigenous people it marginalised, hinges on the question of sovereignty. Various interpretations of what was ceded and what was retained highlight how a treaty which is conventionally perceived as a peaceful covenant between peoples represents rather a collision between cultures. This collision, moreover, is defined by a relationship to writing and modernity.

Existing in two language versions, there are two key differences between the Mäori text (as written) and the English text of the Treaty. The first is between *kawanatanga*, which can be translated as 'governorship' or 'government', and sovereignty. In the English version, Mäori ceded sovereignty to the British Crown. In the Mäori version, 'governorship' conveys a much weaker sense of authority, believed to have been comparable to the authority wielded by Biblical governors such as Pontius Pilate, and possibly by the Governor of New South Wales (Laurie, 2002: 255). Furthermore, the root '*kawana*' was not an existing Mäori word but, rather, a transliteration of the English word 'governor'. Hugh Kawharu asserts, therefore, that the European concept of sovereignty had no cultural precedent in Mäoridom (1989: 319).[3]

The second point of contention is that Mäori were guaranteed *tino rangatiratanga* (chieftanship) in the equivalent Mäori clause promising "full exclusive and undisturbed possession of their Lands and Estates, Forests and Fisheries". *Tino rangatiratanga* has been taken to mean autonomous self-determination and is a term thought to more indicative of 'sovereignty'; the root word here – *rangatira* – is Mäori for 'chief '. Indeed, Mäori sovereignty movements are predicated on the desire for legal and political recognition of *tino rangatiratanga*. The English text gives the British Crown a right of pre-emption of these lands, while the Mäori version translates this more innocuously as *hokonga* (buying and selling). These different understandings, among others in the text and elsewhere, precipitated the colonial land wars of the later nineteenth century and have been the source of continuing controversy and conflict.

Such inequitable translations worked to structurally disadvantage Mäori in the establishment of the new colonial state. Close attention to the text, however, reveals another contradiction: one that is constituted by the relationship between speech and writing in the text. The significant passage comes after the three articles. In English, the text closes with the declaration that:

> we the Chiefs …. Having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks.

In the Mäori text, this is given as "we, the Chiefs … having seen the shape of these words which we accept and agree to record our marks and our names thus". Furthermore, the chiefs, in the Mäori text, are asked to 'record' their signatures or marks rather than merely 'attach' them as a witness to the agreement.

These disparate translations of the various extant Treaty texts highlight a tension between orality and the written word. The English text uses the terms "full spirit and meaning" of the Treaty which, by its own terms, is *not* fully contained within the written words of the text. This "full spirit and meaning" exceeds the frame of the document, as the chiefs must be "made fully to understand its provisions". The written text alone is not enough to guarantee the cession of sovereignty. Conventional analyses point to the *Mäori* text as being the one that does not guarantee the cession of sovereignty, but the English text also implies that cession is not guaranteed until the meaning of the Treaty is made clear in all its plenitude. However, by making this a condition of the Treaty's validity, the text is caught in a double-bind: if the 'full' meaning of the text exceeds its frame, then its 'true' meaning is deferred, as it cannot be contained within the written document. The necessity of obtaining signatures to the document, in order to preserve and stabilise its meaning – in this case, an agreement to a cession of sovereignty – supplements the verbal entreaty or bond; it is offered as proof or 'witness' that this took place. In order for the written text to be valid it must be verbally agreed and in order for the verbal agreement to carry the force of law it must be witnessed in a signature or mark. The mark must supplement the agreement in order to guarantee it.

Furthermore, the direction in the Mäori text, that the chiefs must see "the shape of these words", while alluding to the primarily oral nature of Mäori culture at this time, also points to the power of the written word as a stabiliser and guarantor of meaning. It is not necessary to understand the words as they are written but only to see the mark they make on the page. These written marks, as the extension and repetition of the agreement, also threaten the (verbal) agreement, as its meaning is constantly deferred, requiring continual interpretations of the 'true' meaning of the text. Derrida notes that, traditionally, "representation follows a first presence and restores a final presence" (1997: 296). That is, the written text, as well as the signature as written guarantee, refers outside itself to an imagined 'full' and true meaning, which is present to itself and which is supposedly more immediate in speech. While writing is seen as being only a representation of this meaning, it can be read as if it were transparent in order to attain a final true meaning. It contains the promise of understanding without containing meaning in itself. The true meaning therefore is endlessly deferred, the written texts rather referring only to themselves and other texts in an endless chain of signification. Moreover, the assumption of a prior and idealised speech that is represented within writing, which is closer to meaning, justifies and legitimates the 'fall' into writing. This direction in the Treaty text also suggests that what is at stake for the chiefs is not understanding of the written text but of the display of technological superiority and power to which they were required to submit.

What this contradictory process of 'entreating' alludes to is that speech is posited as the guarantor of genuine and true meaning, while writing is seen as the witness to, and medium of, a personalised face-to-face encounter. In practical and historical terms, the verbal debate at Waitangi was necessary to convey the terms of the Treaty and to annex Mäori into a western (specifically, British) discourse of writing which they could 'witness' but not participate in. This textual encounter with an oral culture reveals the contradiction which drives western colonising processes. On one

hand, orality is privileged as being closer to truth. On the other hand, however, it is the use of the technical written apparatus of the imperial state, along with an assumption of superiority because of this modernity, that is the means by which power was imposed and exercised.

What puts the Treaty and Aotearoa New Zealand in an unusual position is the perceived absence of a written constitution, although there are moves afoot to review the legal status of the Treaty as evident in the findings of a 2005 government inquiry into existing constitutional arrangements (see Young, 2004; *Inquiry*, 2005). Like Britain, Aotearoa New Zealand is perceived to have an unwritten constitution. Somewhat paradoxically, a written document has been reified as foundational, while an 'unwritten' constitution guarantees it as the expression of the natural and immemorial original contract. This deferral of a pre-literate origin is put to ideological use in order to naturalise the imposition of a colonial state formation. Paul McHugh observes:

> English institutions had taken root in the New Zealand soil with remarkably little trouble. And this history of the trouble-free transplantation of the English Constitution … has since allowed constitutional lawyers to say that there is no 'theory' of the New Zealand constitution (2001: 198).

The 'immemorial constitution' guarantees the written one at the same time as being opposed to it. Continued reference to the 'spirit' or 'principles' of the treaty indicate the precedence of a quasi-religious 'natural' writing, which is somehow 'truer' than the more 'artificial' supplementary writing contained in the text (cf. Derrida, 1997: 15-7).[4]

In the next section, I trace the ways in which the meaning of the 'unwritten' contract is retroactively defined in a relation of difference with 'written' foundational documents, by deconstructing the idea of the 'unwritten' British constitution.

An unwritten constitution?

It is an axiom of British legal theory that Britain's constitution is unwritten. A recent textbook on constitutional history asserts:

> Britain's unique and unwritten constitution is the product of a process of evolution over many centuries and, unlike most others, is not wholly or even predominantly the child of an identifiable event or period of time (Lyon, 2003: xxxvii).

Britain has long been thought to have a unique and ancient constitution grounded in the immemorial common law. J. G. A. Pocock, for example, states:

> [t]he law was immemorial and there had been no legislator …. Its eyes were turned inward, upon the past of its own nation which it saw as making its own laws, untouched by foreign influences, in a process without a beginning (1987: 41).

The Anglo-British constitution grounded in the common law became an assertion of both national identity (English/British) and, latterly, international identity (Imperial/Greater British). Appeals to the continuity and antiquity of the common law and the constitution preserve and maintain an idea of modern Britain as being the same as it always had been. To rename the country, following the Acts of Union, 'Great Britain', while also referring to the English common law as the basis for the Anglo-British constitution, was to retroactively construct a former unity (ancient Britain) which was fragmented by foreigners (Romans, Danes, Normans) and which the modern political union would restore. The *English* laws in the *British* constitution thus draw part of their hegemonic authority from a presumed shared British past.

England becomes Britain – most particularly in its constitutional framework – as part of imperial expansion. Imperial historian J. R. Seeley, for example, noted:

> the modern character of England, as it has come to be since the Middle Ages, may also be most briefly described on the whole by saying that England has been expanding into Greater Britain (1883: 64-5).

This expansion began even before England itself was a recognisably modern nation and, as Antony Easthope (1999: 27) has pointed out, required a sacrifice of a part of itself in order to preserve itself (as well as grow and expand). 'England' simultaneously fragmented as it united.

Britain was thus initially constituted with both difference and deferral as its foundation. Instead of characterising the (natural) growth of the common law as an insular process, Paul Brand argues that the *making* of the common law was not confined to England, but was rather an integral part of the plantation of Ireland and the establishment of the English rule of law there, as "the need to state clearly what the English rule was may, paradoxically, have helped to create a single, fixed rule in England" (1992: 463).

Britain as a collective subject is perceived as the supreme author of its own actions: Britain *had* an empire, it *made* an empire, Britain *was* and continues to be the origin of the rule of law and modern constitutions. It is also, however, subject to those actions: Britain is defined, in a relation of difference with its colonies, as an imperial centre. This can be traced especially in regard to its constitution which, in contrast with those of its colonies, is 'unwritten'. By reference to this example, Britain's difference can also be seen as a deferral; its supposed 'lack' is constituted outside itself. The perceived absence of first, a constitution, and, second, a unitary nation and territory, suggests that both Britain's exceptionalism and its originality are retroactive constructions. Bhabha argues:

> What is "English" in these discourses of colonial power cannot be represented as a plenitudinous presence; it is determined by its belatedness. As a signifier of authority, the English book acquires its meaning *after* the traumatic scenario of colonial difference, cultural or racial, returns the eye of power to some prior, archaic image or identity (1994: 107).

If we read 'rule of law' for 'English book' in this quotation, Bhabha's comments illuminate the uncertain temporality of Britain's constitution. The *meaning* of its 'unwritten' constitution and its position as the origin of the rule of law comes *after* the fact of empire and colonisation; it is, as Bhabha notes, determined by belatedness.

Read in this way, the foundations of 'Britain' can be seen as constructed in imperial conquest and imposition of laws. This process can, however, be both located and dislocated in the specific written documents of its former colonies, especially those of the United States. Recourse to the written texts which have helped constitute this notion of US 'originality' can open up the terms in which to think about the (dis)location of the British constitution. The US Constitution (1789) opens with the preamble:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

It is 'the people', a collective subject created in the *Declaration of Independence* (1776) who found and guarantee the US Constitution; this originary document itself has to constitute an origin in order to legitimate itself. Positioned as revolutionaries by the British parliament, the American colonists sought to defend and guarantee their rights and liberties as *Englishmen*, and it is these which they claim in this text. Patriot James Otis, for example, was thanked by the people of Boston for his "undaunted Exertions in the Common Cause of the Colonies, from the Beginning of the present glorious Struggle for the Rights of the British Constitution". In citing this example, John Phillip Reid asserts that the American colonists were searching for "English rights under the British constitution" (1986: 9). Ralph Turner notes that not only the quest for liberty, but also the idea of a codified document would guarantee it can be traced back to Magna Carta:

> The colonists held Magna Carta to be fundamental law, standing above both King and Parliament and unalterable by statute. Americans' dedication to fundamental law increased in the years after 1688, an age when British political thinkers were discarding it in favour of parliamentary sovereignty. Their commitment to such higher law as Magna Carta fortified their inclination toward written constitutions (Turner, 2003: 35).

This attachment to ideals of British rights and liberties is still more apparent in the 1776 *Declaration*, which textualised the colonists' initial secession:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed (1776, retrieved 2004).

In "declar[ing] the causes which impel them to the separation", the American colonists believed they were establishing a truer and more perfect government which would be more in line with "the Laws of Nature and of Nature's God". Although famously rhetorical in terms of its writing style, the *Declaration* constituted an idea of government and nationhood *outside* the text as 'truths' that were 'self-evident', natural and above all, authored by the supreme authority himself. These 'self-evident' truths are, however, a monument to the immemorial nature of the British constitution which simultaneously (re-)iterate the idea of its being immemorial. Moreover, the US *Declaration* draws specifically on a British tradition of political philosophy, referring not only to Locke's thesis on government by the consent of the governed but also to his theory of property: these rights are seen as inalienable. They are thus constituted as rights proper to a subject, both belonging to it (as property) and defining it (as proper or correct and as a proprietor). In defining the new American nation in this way, the colonists also retroactively constituted the British constitution as a point of 'self-evident' origin.

The 'unwritten' British constitution was constituted in the first instance by the seceding American colonists and, latterly, in the writings of nineteenth-century legal theorists. Constitutional commentator Nevil Johnson has pointed to the "builders of the Victorian theory of the Constitution" who gave such a large place to unwritten conventions, as the Constitution was thought to be "founded on habits and traditions expressive of the genius of the people which, like the rock of ages, would endure" (1977: 33). These writers self-consciously and actively constructed this meaning for the British constitution and they continue to be influential. Dicey, for example, claimed:

> the very term "constitutional law" … is of comparatively modern origin; and … before commenting on the law of the constitution [the English commentator] must make up his mind what is the nature and the extent of English constitutional law (1959: 6).

As Johnson points out, then, to a certain extent the *idea* of the English constitution as something separate from, but dependent on, the rule of (common) law, was itself constituted relatively recently.[5] The constitution is, thus, "half made as it is in the process of being made" (cf. Bhabha, 1990: 3). I would go further and suggest that this emphasis on convention and, hence, on the 'true' constitution being 'unwritten' was a product not only of the nineteenth century, but also of the imperialism of that age. The appeal to tradition, stability, and above all, the 'rule of law' (in tandem with the benefits of industrial capitalism) was what legitimated the annexing of territories and peoples around the world in the name of progress and modernity.

This characterisation has not, however, disappeared with the post-war collapse of the British Empire. On the contrary, similar sentiments can be found in a recent speech given by Lord Woolf, the current Lord Chief Justice of England and Wales, warning against the dangers of a written constitution:

> Our ability to manage very well, thank you, without one of those written constitutions which we so generously drafted for our former colonies, was probably also assisted by the fact that, as Dr Robert Stevens points out; with the exception of the 17th century: *traditionally the growth of the English Constitution has been organic, the rate of change glacial* (Woolf, 2004: 3. Original emphasis).

This quotation – simultaneously ironic and defensive – illustrates not only a belief in British exceptionalism and the value of an unwritten constitution, but also the imperialist ideology of the benevolent law-giver, dispensing the correct model of the law to "our former colonies", which had to explicitly state what could go without saying in Britain itself. Woolf repeats and reinforces the idea that Britain is the origin, as well as the former proprietor of all "our former colonies". This tends

to suggest that current constitutional debates (understood in the broadest sense) are located within the framework of empire, whether the fact is explicitly acknowledged or not. Claims to an unwritten constitution or claims for a written one tend to immediately qualify their assertions with the caveat of common sense: the "unwritten" constitution is not *really* unwritten, it is rather uncodified; a written constitution, while desirable, does not *really* guarantee a good government or society. Interestingly, Dicey (1959) performs a similar disavowal in his critique of Blackstone:

> The harm wrought is, that unreal language obscures or conceals the true extent of the powers, both of the Queen and of the Government … We have all learnt from Blackstone, and writers of the same class, to make such constant use of expressions which we know not to be strictly true to fact, that we cannot say for certain what is the exact relation between the *facts* of constitutional government and the more or less *artificial phraseology* under which they are concealed (1959: 11).

Commentary on the British constitution – what it is, where it might be located and whether or not it should be changed – is inextricably linked to writing. Graphic, phonetic writing, as a sign of modernity, is what distinguishes modern nation-states from their predecessors. The British constitution, however, is marked out as different; there has been a large investment in the notion that, by contrast with other constitutions (both 'old' and 'new world'), the British one is 'unwritten'. Effacing the textuality of numerous charters, acts and interpretations, arche-speech in the form of a 'natural' writing not only distinguishes the British constitution but marks it as the origin and, moreover, a more perfect origin, as it is closer to the 'spirit' of the law. Graphic writing is thus viewed with suspicion because it is perceived to represent only the 'letter' of the law. Yet it is in the graphic writings of the American colonists and Victorian legal theorists that the British constitution can be (dis)located.

Post-colonial Derrida?

Derrida's theories on writing, law and especially on origins, which I have put to work in a discussion of constitutional texts, 'founded' a discourse: deconstruction. Foucault describes a "founder of a discursivity" as "unique in that they are not just the authors of their own works. They have produced something else: the possibilities and the rules for the formation of other texts". Furthermore:

> they make possible not only a certain number of analogies, but also (and equally important) a certain number of differences. They have created the possibility for something other than their own discourse, yet something belonging to what they founded (1998: 206).

Such discourses also open themselves up for re-readings which transform the discourse itself. Even though Derrida's work has been characterised as apolitical, it not only transforms the foundations from which it is possible to think the political, but can also be put to use strategically to deconstruct the ideologies of colonial and political discourse. In line with post-colonial critic, Robert Young, I argue that Derrida can be described as a post-colonial theorist *avant le lettre* (2001: 412).[6]

In this article, I have traced the way in which, at the moment of the origin, constitutional documents defer to another origin, an anterior law which guarantees and legitimates their existence. Such documents also represent a disseminated epistemological violence in their repudiation of prior models. They can thus be seen as *quasi*-original: points of origin that are repeated, reinforced and, hence, legitimated within national cultures; at the same time, however, deferring to an originary law which they themselves construct. It should be noted that this is a specifically Western narrative of temporality, which, precisely by deploying graphic writing as a technological innovation, is located in, and helps constitute, the time of modernity. In my readings of constitutional documents, I therefore seek to "activate the differences" in the texts and refuse to close down meaning within conventional parameters. This refusal can be understood as both positive and political, enabling these documents to act as continued sites of struggle regarding what, if anything, *the* nation might be.

Notes

1. The phrase "future-to-come" derives from a translation of the French *avenir / à venir*. Derrida uses the neologism "*l'à-venir*" which comprehends both the noun *l'avenir* (the future) and the infinitive of the verb *à venir* (to come) thus indicating that the future is always in the process of becoming. The use of the ordinary noun for future however also has this sense of coming or advent. This usage recurs throughout Derrida's work. See, for example, Derrida, 1994: xix, and translator's note, 177.
2. Throughout this article I use the designation 'Aotearoa New Zealand', combining Mäori and Päkehä names, in order to juxtapose two contesting national narratives.
3. Likewise, in order to reconcile the differences in various treaty versions, Paul Moon has radically interrogated the conventional idea of sovereignty ceded in the Treaty, arguing that *national* sovereignty was not known among the disparate *iwi* of Aotearoa New Zealand. He asserts that it was rather governorship solely of the European settlers – not Mäori – by the British government to which the chiefs assented (Moon, 2001: 99, 110).
4. 'Natural' writing is seen as being innate; it is the site of the *logos* as God or consciousness itself; and it is "immediately united to the voice and to breath". The metaphor of writing confirms the privilege of the *logos* as a site of truth and founds the "literal" meaning of writing: that of "a sign signifying a signifier" (see Derrida, 1997: 15-7).
5. Martin A. Kayman (2005) notes that this immemorial common law was itself "in large part a retrospective creation of the seventeenth and eighteenth centuries" (211), based on the work of Coke, Hale and Blackstone. He comments further: In his pursuit of continuity, Coke had Brutus bringing the law to England from Troy! "Time immemorial" itself in fact had a conventional date (the beginning of the reign of Richard I in 1189), established … by statute in 1290 (218).
6. In *Postcolonialism: An Historical Introduction*, Young apostrophises Derrida thus: "I knew it all along, for you showed it to me in your writings from the first: whereas other philosophers would write of 'philosophy', for you it was always 'western philosophy'. Whiteness, otherness, margins, decentring: it was obvious to me what you were up to, what possibilities you were striving towards, what presuppositions you were seeking to dislodge" (2001: 412).

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