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The Evolutionary Economic Implications of Constitutional Designs: Lessons from the Constitutional Morphogenesis of New England and New Zealand

by

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Abstract

This paper examines the constitutional morphogenesis of New England and New Zealand to determine the effects on their respective economic development—specifically in terms of economic complexity. New England had revolted against a dominion that limited the local autonomy of its colonies; alternatively, almost 200 years later, New Zealand abolished a quasi-federal provincial system in favour of a unitary state. Constitutional economics, through the works of its founding father, James Buchanan, is employed to explain the effects of these constitutional choices. The paper argues that empowering local government is the key to economic prosperity in a globalising world, where the role of the nation-state is increasingly marginalised. Nourishing local autonomy is important for constitutional aspirations.

Key-words

Subsidiarity, federalism, economic development, constitutional economics, globalisation

1. Introduction

This paper provides a comparative analysis of the constitutional instruments that prevailed in New England and New Zealand in the seventeenth and nineteenth centuries respectively. The hypothesis is that these constitutional choices had a lasting effect on economic development (*qua* economic complexity) in these jurisdictions. The analysis is grounded in the historical context of New England and New Zealand, and should not be interpreted as providing a general analysis on the effect of subsidiarity on economic development. It elaborates on James Buchanan's normative signals on the size of polities, and uses the economic complexity index, and the effect of globalisation on local governance, to advocate for subsidiarity as a guiding principle for constitutional designs in New Zealand.

New Zealand's early constitutional instruments were partly inspired by the New England colonies (Morrell 1932: 6):

> '[The New Zealand Company] believed the principle of individuality of settlement to be an important element in successful colonisation. In New England, the greatest colonising achievement of the Old Empire, which in many ways [the Company] took as their model, there had been at least five independent colonies … established between the forty-first and forty-third parallels of latitude within a period of twenty years; and the social unity to which the [Company], like the Puritans of New England, attached great importance was merely another aspect of this principle of individuality'.

This principle of individuality is closely related to the principle of subsidiarity; both are forms of bottom-up decentralisation through existing geo-social governance structures. This is especially relevant to the colonisation of both New England and New Zealand. Moreover, the analogy between New Zealand and New England aides understanding the rationale for introducing and abolishing a quasi-federal provincial system in New Zealand. Over time, the New England colonies evolved into states (subdivided into municipalities) under the (loose) control of a central council. This evolution was also envisaged for the

New Zealand colonies, at least by the New Zealand Company, as an optimal vehicle for systemic colonisation and hence economic development.

This analogy is strengthened not only by the relative similarity in size between New Zealand (268,000 square kilometres) and New England (187,000 square kilometres),[I] but also in the way their constitutional choices were influenced by Great Britain. In 1686, King James II introduced and appointed the office of Governor General to what he termed 'the Dominion of New England', which dispossessed the New England colonies of their colonial legislatures and placed power in the hands of the Governor General. However, these actions led to a rebellion, ending the Dominion only three years after it was introduced (1686–1689). Given the separatist movements in New Zealand (Wood 1965: 29; Herron 1959: 367), it is reasonable to suggest that abolishing the provincial system was intended to ensure a similar scenario would not materialise.

Early New Zealand constitutional instruments illustrate a clear commitment to localising legislative powers, at least within provinces. Later there was a shift towards centralisation. In New England, a similar shift was only short-lived. This commitment to local autonomy helps explain the differences in economic development, measured in terms of economic complexity, between the two polities (Hausmann *et al.* 2011).

The paper is structured as follows. Section two introduces the analytical lens through which I compare the merits of constitutional designs in New England and New Zealand. The following sections examine these designs in relation to two cases. Section five discusses further the economic implications. The paper ends with a call for making local autonomy a constitutional priority in New Zealand.

2. Insights from Buchanan's constitutional economics

Defined broadly, constitutional economics involves the economic analysis of the law. It draws on the political economy of regulation, new economic history, the economics of property rights, and public choice—that is, it applies economics to political science (Buchanan 1987: 585).[II] I employ Constitutional Political Economy (CPE), the normative branch of constitutional economics, to understand how states *ought to be* constituted. For the purposes of this paper, I focus on insights from James Buchanan, the father of constitutional economics, on how polities *should be* constituted. Later in the paper, I use

these insights to analyse the constitutional evolution of New England and New Zealand between unitary and (quasi) federal choices.[III]

CPE is based on the analogy between markets and politics (Buchanan 1991).[IV] The exchange component of this analogy carries 'relational' tones. In a Foucauldian sense, power (and hence politics) is relational (Foucault 2000: 324). In markets, such relational tones are reserved to meso communities, and are beyond the micro of the individual or very small groups (Silberbauer 1993: 17–18).

Sovereignty, one possible form of power relations, is at the centre of CPE discourse (Macdonald and Nielsson 1995; Rabkin 2005: 38, 51). CPE (in Buchanan's conception) does not accept the Hobbesian assumption of absolute sovereignty (Buchanan and Brennan 2000: 13–14). Nor does it accept the German tradition emphasising the organic nature of the state (Buchanan and Tullock 1962: 12).[V] Instead, CPE follows the Roman model whereby the state never has a distinct personality (Buchanan 1991: 109). This Wicksellian idea is at the foundation of CPE: the state is the sum of its citizens (Wicksell 1994).

To understand the form of sovereignty endorsed by Buchanan's CPE we need to look at the scalar calculus involved.[VI] There is a relationship between the scale of a polity and its ability to afford its members' choice in the decision-making process (Gussen 2013: 19).[VII] In particular, there are two separate and distinct elements in the expected costs of any human activity (Buchanan and Tullock 1962: 43–44, 62, 107). The first are 'external costs' that an individual is expected to endure because of the actions of others (within his political group), and over which he or she has no direct control. The expected present value of these costs is downward sloping with respect to the number of individuals required to take collective action (Buchanan and Tullock 1962: 61). The second element in the expected costs of any human activity is 'decision-making costs', which the individual expects to incur because of his or her participation in organised activity. These costs are upward sloping (Buchanan and Tullock 1962: 65). The objective of political organisation is to minimise these costs. Figure 1 shows these costs. The group size increases to $\boldsymbol{N}$, and this cost curve is shown in Figure 1 Panel I. When the size increases to $\tilde{\boldsymbol{N}}$ the limit cost (dotted line) will be higher than that for the size $\boldsymbol{N}$ group. However, the curve rise for the $\tilde{\boldsymbol{N}}$ group will be less steep. This can be attributed to the increased choices (options) from which a

consensus of N members of the group can be made. Hence, at N there is a lower cost under the larger group.

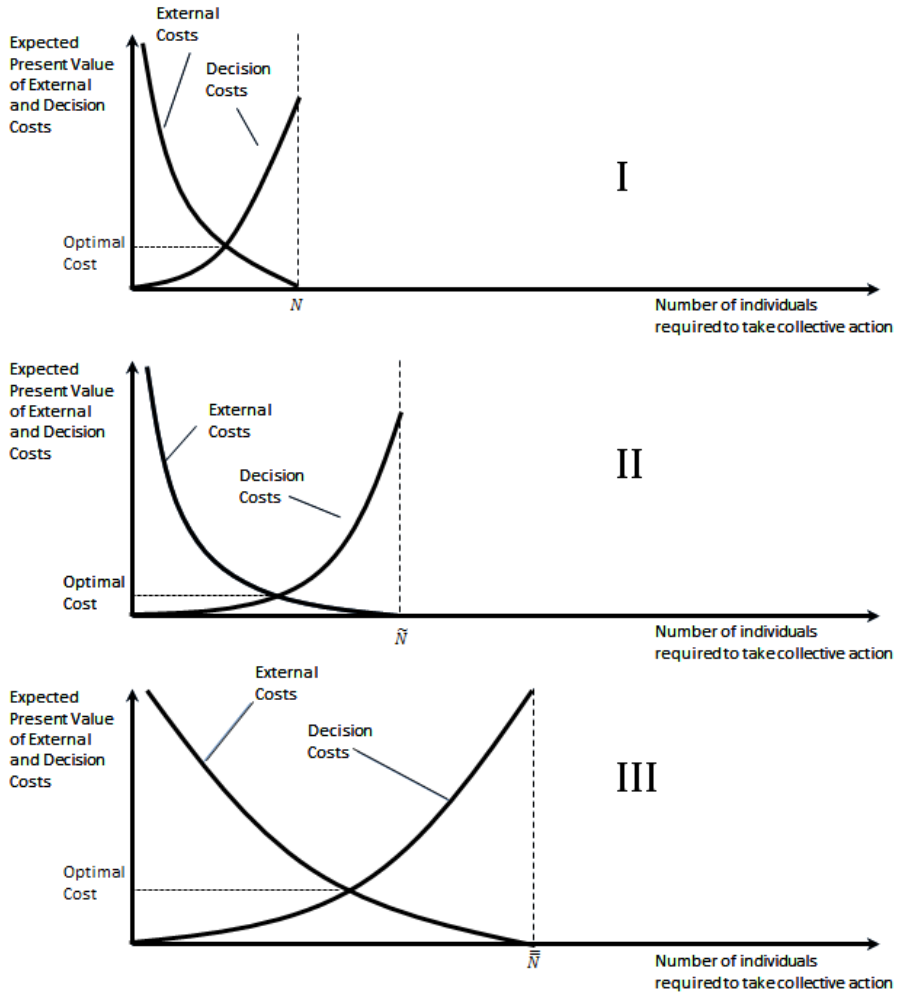

Figure 1: The External Costs and Decision-Making Costs Functions

Similarly, Figure 1 shows the external cost curves. The reason for the upward shift in these curves is similar to that for the decision costs—namely, the increase in uncertainty is due to the larger number of possible combinations (choices), which increases the costs for each group size.

As shown in Figure 2, these two effects produce a 'smile' curve, which suggests an optimal scale at which the expected present value of total costs is minimised. I will refer to this as the 'optimal size' for the political group.

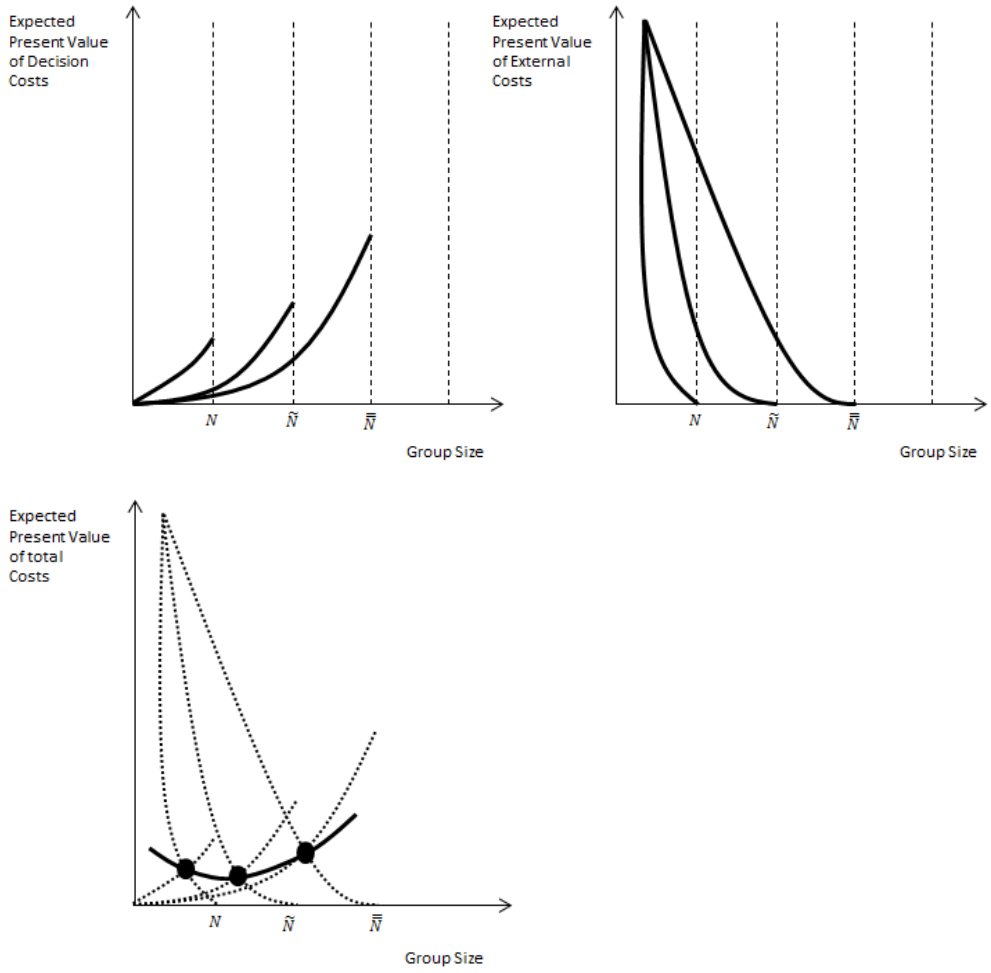

Figure 2: The Cost Curves as a Function of Group Size

The final analysis concludes with the following: 'if the organisation of collective activity can be effectively decentralised, this decentralisation provides one means of introducing marketlike [sic] alternatives into the political process' (Buchanan and Tullock 1962: 109). Therefore, '[b]oth the decentralisation and size factors suggest that, where possible, collective activity should be organised in small rather than large political units' (Buchanan and Tullock 1962: 110).

CPE endorses the principle of subsidiarity, which has its origins in ancient Greece (Millon-Delsol 1992: 15; Gosepath 2005: 157 & 162; Floriani 2012: 82–83),[VIII] as a form of

collective activities from the bottom up (Macdonald and Nielsson 1995: 10; Backhaus 1999: 136–8).[IX] The difference between decentralisation and subsidiarity is that the latter includes an ethical rationale that goes beyond the economic 'efficiency' inherent in decentralisation theories (Breton, Cassone and Fraschini 1998: 21).[X] The principle places a constitutional responsibility on higher levels of government not only to enable the autonomy of lower levels, but also to provide these lower levels with necessary support (Herzog 1998, 482).[XI] Under subsidiarity, decentralisation (and federalism) takes the shape of legislative powers at municipal or provincial levels. In other words, subsidiarity places decentralisation within existing geo-social structures.[XII]

The inextricable relationship between subsidiarity and the state does not suggest complementarity between subsidiarity and sovereignty. On the contrary, sovereignty is subsidiarity's polar opposite. Subsidiarity 'does not reconstitute the sovereign state as the object of its concern. It explicitly contemplates intervention and assistance for the purpose of protecting human dignity' (Carozza 2003: 58). While sovereignty implicitly gives permanence to the national scale, the strong version of subsidiarity removes that permanence (Hopkins 2002: 29).

Subsidiarity is a wider concept than federalism.[XIII] One way of limiting sovereignty is by vertically dividing sovereignty between different levels of government and then attempting to centralise some functions at the federal level. The rise of the federal states as exemplified by the United States saw a shift in the analysis towards this possible *divisibility* of sovereignty.[XIV] However, sovereignty can also be limited by local autonomy in a 'quasi-federal' arrangement where the central (federal) government continues to support lower levels of government. Under subsidiarity, there is a political exchange that sees a wide margin of local autonomy permeating multi-level governance structures.

CPE therefore emphasises limited sovereignty shared among small-scale jurisdictions. This confirms the concept as defined by Spinoza (Gussen 2013; Spinoza 1854; Buchanan and Tullock 1962). It is in opposition to Hobbesian sovereignty, which is absolute, and consequently cannot be shared or divided. Buchanan identifies the reality of the *Leviathan* state today with constitutional failure (Buchanan 1991: 2). He explains his idea of federalism as 'diversity among separate co-operative communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the *limits on* such authority' (emphasis in the original) (Buchanan 1991: 3–4). His use of 'shared

sovereignty' rather than 'divided sovereignty' is closer to a model of subsidiarity rather than federalism.[XV]

To inhibit the overextension of government, others also suggest separate jurisdictions with some protected powers within a constitutional federation (Van den Hauwe 1999: 112). Where migration is facilitated between such separate jurisdictions, there are similarities with the Tiebout model in relation to sorting individuals according to their preferences (Tiebout 1956: 416). There are also parallels in the scholarship of Elinor and Vincent Ostrom. Elinor's 'nesting principle', which refers to community-based environmental management at the local level, can be extended to larger scales through subsidiarity (McKean 2002: 80). For Vincent, polycentric 'connotes many centres of decision-making which are formally independent of each other…[but] may be said to function as a "system"' (Ostrom, Tiebout and Warren 1961: 831).[XVI] However, both polycentricity and the nesting principle have a strong functional 'taste' largely divorced from the power calculus at the heart of divided sovereignty—that is, from capping jurisdictional footprints in a framework of non-contiguous states.

3. Subsidiarity in New England and New Zealand

This section considers the New England and New Zealand constitutional designs based on the normative signal discussed earlier. These are the New England Confederation and the Treaty of Waitangi. A historical reconstruction of these designs expounds their relevance to the principle of subsidiarity.

3.1. The United Colonies of New England (1643-1684)

The first experiment in supra-national integration in America was a loose confederation of four New England colonies (Plymouth, Massachusetts, Connecticut and New Haven), created in 1643 under the name 'The United Colonies of New England'. The creation of the Confederation was nothing less than an act of absolute sovereignty on the part of the colonies (Palfrey 1865: 618). The Confederation originated in Plymouth and was probably inspired by the 'Republic of the Seven United Netherlands', which dominated world trade in the seventeenth century (Adams 1843: 31). The latter lasted from 1581 to 1795, when Napoleon set up a puppet state that later became the Kingdom of Holland. Each province

had its own legislative body and functioned independently. The supra-national government (*Staten-Generaal*) consisted of representatives of the seven provinces and was responsible for the common lands, which constituted only one fifth of the Republic's territory (Israel 1995: 276).

However, unlike the Dutch Republic, the chief purpose of the New England Confederation was security rather than trade—the ability to respond militarily to external threats from the Dutch, the French and the indigenous population. The Articles of Confederation stipulated a 'perpetual league…for offence and defence, mutual advice and *succor* upon all just occasions both for preserving and propagating the truth and liberties of the Gospel and for…mutual safety and welfare' (article 2; emphasis added). The objective was military cooperation in proportion to each colony's capabilities. The Confederation also dealt with the extradition of runaway criminals and servants (article 8).

Arguably, the Confederation had its origins in Puritan theology (Perue 2004), and the Confederation was a new version of the historical Puritan covenant doctrine (Miller 1961: 478). Parallels can be drawn between the logic of this union and the principle of subsidiarity, with its origins in similar ethical considerations.[XVII] Johannes Althusius's writing (1557–1638) supports this argument, both on the principle of subsidiarity (in its territorial interpretation) and the covenant doctrine,[XVIII] as do the Articles of Confederation themselves, for these are in the spirit of subsidiarity as envisaged by CPE (see the previous section). A rule of assistance can be discerned in the preamble: 'to enter into a present Consociation among ourselves, for mutual help and strength in all our future concernments'. Similarly, article 2 stipulates 'mutual advice and succor' (Thorpe 1909). Each colony maintained its independence in managing internal affairs. The colonies were willing to give up a limited amount of autonomy in exchange for improved security.

This Confederation was an evolutionary progression of *de facto* self-governance (Osgood 1902: 206). Isolated from England, New England colonies evolved representative governments through town meetings and deputy houses. Under the written constitution of the Confederation, each colony retained its local government. A rule of non-interference is evident in article 3 of the Articles of Confederation:[XIX]

> 'It is further agreed that the Plantations which at present are or hereafter shall be settled within the limits of the Massachusetts shall be forever under the Massachusetts

and shall have peculiar jurisdiction among themselves in all cases as an entire body, and that Plymouth, Connecticut, and New Haven shall each of them have like peculiar jurisdiction and government within their limits'.

As discussed in the previous section, CPE posits a similar arrangement whereby jurisdiction is preserved at the local scale. Each of the six colonies had its own legislative powers and was sovereign in relation to internal affairs. A commission of eight men, two from each colony, ran the Confederation. A vote of six was required to carry a measure, and their vote was final (William 1904). The commission functioned as a legislative body, although its powers did not develop beyond making recommendations and overseeing administration. The ultimate power remained in the hands of the general courts, leaving the commission with no prospects of evolving legislative powers (Ward 1961: 60). This design aligns with that envisaged by CPE in terms of the bottom up approach to governance and the subsidiary role of central government (the commission).

3.2. The United Tribes of New Zealand and the Treaty of Waitangi (1840)

This section analyses the New Zealand Confederation of 1834 and the Treaty of Waitangi through the lens of autonomy. The analysis illustrates a commitment to distributed legislative powers in relation to the aboriginal population of New Zealand: the Māori.

The Confederation was a union between the Māori tribes in the North Island of New Zealand. Just like the New England Confederation, it came about through concerns of security and trade. Similar to the New England context, the French were considering part of the North Island for colonial expansion. With the help of the British Resident, James Busby, the tribes signed a Declaration of Independence (*He Wakaputanga o te Rangatiratanga*) in 1835; and, like the New England colonies, declared themselves sovereign. William IV recognised the Confederation in 1836.

The English text of the Declaration started with article 1, in which the tribes declared their independence and the independence of their state. The second article assigned '[a]ll sovereign power' to the Confederation exclusively. Article 2 explicitly stated that the Confederation:

'will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled'.[XX]

Article 3 elaborated on the functions of the Congress, which included 'the preservation of peace and good order' and 'the regulation of trade'. This article also invited the Southern tribes to join the Confederation. The fourth article went on to request William IV acknowledge the Confederation and its flag, and become its 'Protector from all attempts upon its independence'. These two articles served as the basis for what became known as the Treaty of Waitangi, which expounded on the inclusion of the Southern tribes and the protection provided by the English monarch. Nevertheless, after the signing of the Treaty of Waitangi, the Confederation was largely assimilated into the settlers' government, due largely to power imbalances between the tribes and the British settlers. Notwithstanding, the Declaration helped reconstruct the subsidiarity dimensions flowing from the Treaty (Moon 2002).

In New Zealand, the Declaration of Independence in 1835 played the same role as the Articles of Confederation of 1643 did in the New England context. Both were precursors to supra-national constitutional arrangements in the form of the Treaty of Waitangi in 1840 and the Declaration of Independence in 1776. The Articles of Confederation were a first step towards imagining a new American identity beyond the regional confines of New England (Conforti 2001). The Treaty of Waitangi was a similar extension of a novel concept of national identity towards Māori tribes in the South Island. It refined article 3 and 4 of the Declaration by delineating the architecture of New Zealand governance.[XXI]

A teleological reading of the Treaty suggests that the Māori were to be given wide legislative powers, in line with the Declaration of Independence in 1835 (Gussen 2012).[XXII] In the following, the praxis of this local autonomy is analysed as an example of the principle of subsidiarity (Millon-Delsol 1992).

The preamble to the English text of the Treaty deemed it necessary to recognise the British monarch as the New Zealand sovereign. This was 'to protect [the] just Rights and Property [of Māori] and to secure them the enjoyment of Peace and Good Order' and 'to establish a settled form of Civil Government with a view to avert the evil consequences

which must result from the absence of the necessary Laws and Institutions'. Article 1 of the Treaty ceded the sovereignty as envisaged in the preamble; while article 3 confirmed that the sovereign 'extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects'. This accorded with the invitation issued to the English monarch under article 4 of the Declaration: 'to be the parent of their infant State,' and to 'become its Protector from all attempts upon its independence'.

This is an instance of a political exchange analogous to exchanges in markets under constitutional economics. The exchange is evident in the wording of article 3, which starts with the words '[i]n consideration thereof'. There is an exchange of sovereignty for a bundle of rights and privileges.

In article 2, the sovereign:

> 'guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess'.

The purpose of the Māori text of the Treaty was to provide a government while securing tribal autonomy; under article 1, Māori leaders gave the Queen 'te Kāwanatanga katoa', or complete government over their land.

In the Māori text, article 2 stated that Māori were guaranteed 'te tino rangatiratanga', or the unqualified exercise of their chieftainship over their lands, villages and all their property and treasures, echoing the language used in article 2 of the Declaration. Article 3 of the Treaty, similar to the English text, assured Māori people of the Queen's protection and all the rights (tikanga) accorded to British subjects.

The Treaty can be understood as emanating from the core principle of subsidiarity.[XXIII] The transfer of sovereignty to the nation of New Zealand (under the British monarch) would have negated the possibility of territorial divisions enjoying state-like autonomy. However, this does not eliminate the possibility of subsidiarity as understood through its three sub-principles.

The first sub-principle of subsidiarity is the 'rule of assistance', which requires the central government to support local communities where they cannot perform the functions of governance. The Treaty referred to this positive aspect of subsidiarity in the preamble and in articles 1 and 3. The Treaty intended first to establish a central government that could 'avert the evil consequences which must result from the absence of the necessary Laws and Institutions' and then provide protection, peace and order. In this sense, the Treaty was intended to assist the local communities in carrying out their tasks.

Article 2 contains the second sub-principle, the 'ban on interference', in which 'full exclusive and undisturbed possession' and unqualified exercise of chieftainship was imparted to the Māori as representative of the local communities. The qualifier 'undisturbed' is a clear indication of the ban on any interference in the affairs of local communities.

The third sub-principle, 'helping local governments help themselves', occurs simultaneously in articles 1 and 2. The Treaty envisaged putting in place laws and institutions to help the Māori to help themselves in their 'exclusive and undisturbed possession' and their exercise of their chieftainship. This sub-principle emphasises the evolutionary and dynamic aspects of subsidiarity within which local governments improve their ability to govern over time.

An interpretation of the Treaty through the principle of subsidiarity reconciles the differences between the English and Māori texts. The possibility of ceding sovereignty to the British monarch does not distract from the intended subsidiarity platform; while it could be possible to have subsidiarity where the constitutional design envisages a divided sovereignty, it does not follow that where sovereignty is otherwise, there could be no subsidiarity. Through the principle of subsidiarity, the difference between the English and Maori texts is between a weak and a strong version of subsidiarity.

The local autonomy rationale of the Treaty of Waitangi flowed through to the design of New Zealand's early constitutions of 1846 and 1852. In the following section I trace the centralisation efforts in both New England and New Zealand to demonstrate the approach and outcome in each jurisdiction.

4. Centralisation in New England and New Zealand

In 1643, delegates from Plymouth, Massachusetts Bay, Connecticut and New Haven, met in Boston and formed a confederation intended as a defence alliance. The Confederation was dissolved after the Massachusetts charter was revoked in 1684. In 1686, the Crown created a highly unpopular Dominion of New England. By 1689, the advent of the Glorious Revolution, *inter alia*, ended the Dominion. By 1754, another exigency for defence, the French and Indian War, would see these colonies consider the Albany Plan of Union, a proposal for a federated colonial government. This eventually led to the American Revolution.

Similarly, the 1846 and 1852 New Zealand Constitution Acts were intended to furnish a constitutional design in the spirit of the Treaty of Waitangi. Those who shaped these Acts called for local autonomy in the form of municipal corporations with wide legislative powers,[XXIV] mimicking strong sentiments for autonomy in New Zealand in the 1850s (Morrell 1932: 15). The final designs, however, provided a 'quasi-federal' constitutional architecture for New Zealand (Morrell 1932: 2; Herron 1959: 1; Watts 2002).[XXV] The 'quasi' qualifier is necessary as there was no formal division of sovereignty, and 'the provinces were financially very much dependent on the General Assembly' (Morrell 1932: 55–57). The Constitution was 'quasi-federal' in a way not very different from the British North America (BNA) Act 1867, which evolved into the Canadian federal system we know today (Mallory 1967: 127).

Section 4.1 below traces local autonomy, beginning with the shift from confederation to dominion in New England. Section 4.2 traces a similar shift through the creation and abolition of a quasi-federal system in New Zealand between 1852 and 1876.

4.1. The New England Dominion (1686-1689)

Just before the 1689 Glorious Revolution, the English government under James II believed its colonies had been granted too much latitude in observing the Navigation Laws passed in 1662 under Charles II (from the original ordinance of 1651). These laws restricted the use of foreign shipping for trade between England and its colonies to ensure that the colonies traded only with England or other English possessions. The laws also prohibited the colonies from manufacturing goods produced in the mother country. For

England, poor enforcement of these laws resulted in lost taxes and higher prices. The continuing military threat posed by the other European powers (especially France) was an additional reason to tighten control of the colonies.

To rectify the situation, James II supported a 'royalisation' of New England, and imposed the status of dominion, inspired by the French administrative model, an instrument for a *Leviathan*-style absolute sovereignty. The Massachusetts charter was annulled in 1684, in practice disestablishing the New England Confederation. In 1686, all the constituent units of New England were joined together in an administrative merger. Joseph Dudley served briefly as the first president of the Dominion (from May to December 1686), but was replaced by Sir Edmund Andros. In 1688, New York, East Jersey, and West Jersey were also added to the New England Dominion. The Dominion established a large jurisdictional footprint (*qua* territory), from the Delaware River in the south to Penobscot Bay in the north—in a reversal of the prior normative principle of small-scale jurisdictions discussed earlier in this paper. With the addition of New York and the New Jerseys, the Dominion was almost the size of the modern day Federal Republic of Germany (around 350,000 square kilometres) and double the size of the disestablished Confederation.

The Royal Governors wanted to centralise the legislative powers, which were in the hands of locally elected officials. The Dominion was to be governed with the assistance of an appointive council that was to replace the colonial assemblies. The colonies resisted this usurpation of their independence and liberties, and as a result efforts to consolidate the administration in the Dominion were unsuccessful. Dudley was unable to raise revenues in the Dominion due to the repeal of existing revenue laws by the colonies in anticipation of the revocation of their charters, and his inability to introduce new revenue laws (Barnes 1960: 59–61). Similarly, the lack of funding proved fatal to Andros' efforts to unify colonial military responses.

The Dominion's effect on economic growth in New England was disastrous. Between 1650 and 1680, there was a rapid increase in real wealth per capita, which stemmed primarily from increases to productive capacity and a rise in accumulated savings. However, the last three decades of the seventeenth century showed little or no growth (Anderson 1975: 171; Anderson 1979: 243). Given that the first step towards establishing the Dominion was in 1683, with the legal proceedings towards vacating the Massachusetts

charter, and that another charter for Massachusetts began operating only in 1692, I would suggest that the Dominion had a central role in slowing economic activity in New England. The 1680s saw the per capita income in New England drop to 25.5 English pounds sterling, compared to 39.5 in the motherland (Anderson 1975: 171).[XXVI]

External forces precipitated the end of the Dominion. James II wanted to return England to Catholicism. When his Queen gave birth to a potential Catholic heir in 1688, his government invited Protestant Holland's leader William of Orange, who was married to James' daughter, to invade England and force James off the throne. The Revolution in England legitimised the overthrow of the Dominion. The Dominion collapsed with the removal of James from the throne in the bloodless revolution of 1688–1689 and the ensuing Puritan rebellion. The same Puritan ideals would form the intellectual heritage that imbued the American revolutionary era in the eighteenth century. The revolution that brought about the American constitution had its genesis in the regionalism exemplified by New England. It was the constitutional acknowledgement of the importance of regionalism that brought about what came to be known as the United States (Conforti 2001: 57–59).

In summary, the Confederation was a bottom up constitutional design: it emerged from its constituent parts and was only as dominant as the parts were willing to allow it to be. The Dominion was a top down design imposed externally to strip the colonies of autonomy and independence. Only the Confederation embodied the constitutional design norms I explained in the previous section.

While the colonial governments displaced by the Dominion returned to power, they were not to be formally united again until 1776, when as newly formed states they declared themselves independent in a larger (but not yet federalist) union called the United States. England never again attempted a large-scale unification experiment in the American colonies (Miller 1968: 459). However, a similar consolidation in New Zealand has endured over the last 138 years (from 1876 to 2014). The following elaborates on this constitutional development.

4.2. The New Zealand Provincial System (1852-1876)

In 1845, a speech by a British politician, John Arthur Roebuck, provided a clear articulation of the reasoning adopted by those advocating for centralised legislative powers:

'New Zealand should govern itself, not by giving to it municipal powers…a course which would split the country into sections—into a north and South Island—which would make an Ireland and an England, a Rhode Island and a Connecticut, of it; but, if they kept the country one, with one central government, with a county administration, with no municipal, that is to say, with no legislative powers, then there would be a chance of governing the country well, and of rendering it prosperous'.[XXVII]

Hence, when the Premier, Sir Julius Vogel, attempted to create a major afforestation plan for New Zealand, and encountered hostility from provinces unwilling to transfer lands to the General Government, he supported the abolition of the provinces and public opinion, made up largely of new settlers, sided with him. The call to abolish the provinces was debated in the General Assembly as early as 1871. This was finally enacted by the Abolition of Provinces Act 1876. By 1907, New Zealand, by Royal Proclamation, changed its name to reflect its dominion status. The royalisation process was complete in 1953 when the British monarch proclaimed a separate Royal Title for use in New Zealand.

There are no accurate figures on the real wealth per capita in New Zealand before and after the abolition. However, the following excerpt provides an understanding of the effect, describing how one of the most prosperous provinces at the time, Otago, located in the South Island of New Zealand, would be affected (McIndoe 2014: 86):

'Another effect will be that those Provinces which have been making the greatest strides in prosperity and advancement will be checked, and brought to a stand-still in their career. Otago will be by far the greatest sufferer … till now it stands far before any of the rest, both as regards population, revenue, commerce, productions, industries, and institutions, so that by the entire removal of its own affairs from its own territory to a distant and jealous centre, there will be a re-action on its prosperity to a greater extent than on any other of the Provinces'.

In 2001, the nominal per capita figure for Otago was around 25,000 New Zealand dollars,[XXVIII] well below the national average of around 31,000. The regions that had the highest per capita were in the North Island.

Arguably, New Zealand was suffering from problems that necessitated the introduction

of the provincial system only as an *interim solution*.[XXIX] In the 1850s, there was insufficient settlers able and willing to make politics a profession (Wood 1965: 1, 64–65). Moreover, New Zealand's social fabric was rapidly changing (Morrell 1932: 263), and the concept of provincialism became insufficiently rooted in, and supported by, the new settlers. Soon afterwards, the public developed a strong sentiment that the provinces should be abolished.[XXX] These demographic changes also fomented a (perceived) risk of political fission (Wood 1965: 29, 367). Additionally, well-documented transportation problems facing the first New Zealand Parliament (Wood 1965: 37; Herron 1959: 389) and communication technologies available at the time meant that in the early stages of New Zealand's colonisation, it was difficult to keep settlers abreast of intended legislative measures. Later, technological advancements made it feasible to govern through a central government.

The reason often given for the abolition of the provincial system is public finance (Attard 2012: 101), and it is conceded that the provinces' large-scale borrowing precipitated the budget deficits. However, there is also an argument to be made regarding the General Government's role in this financial instability. When the General Government intervened, through the Provincial Audit Act 1866, to take a more active role in regulating provincial borrowing and expenditure, it left many provinces dependent upon hand-outs. A closer look at provincial finances shows that financial difficulties were due to the '[General] Government's borrowing policy that provided both the incentive to and the means of indulging in the land-gambling which caused the private debts' (Condliffe 1959: 33). Moreover, the abolition was not a panacea for the financial difficulties New Zealand was facing at the time. In particular, it did not result in the promised savings nor changed the need for subsidies to local bodies (Morrell 1932: 252).

Today, New Zealand has a three-tier governance structure under the Local Government Act 2002 and its amendments, where the authority of the central government creates regions. Local government in New Zealand has only the powers conferred upon it by Parliament (Local Government Act 2002). These powers have traditionally been distinctly fewer than in some other countries. For example, police and education are run by central government, while providing low-cost housing is optional for local councils. Many councils once controlled gas and electricity supply, but nearly all of that was privatised or centralised in the 1990s.

5. The Economic evidence today

The reason for the creation of the New England Dominion has strong parallels with the abolition of the New Zealand provinces—even with the New Zealand we know today:

> 'A trend toward a closer control of [New England] by England appeared in the Revenue Act of 1673…A single government…would be far less expensive to England than the maintenance of six or eight separate colonies…if England established a uniform, all-powerful government over [New England,] its resources might be developed so as to divert the people from manufacturing and foreign trade. They might develop lead and copper mines and produce hemp and naval stores, thus obtaining staple raw materials that could be exchanged directly for English manufactures' (Curtis 1963: 297; Barnes 1960: 29).[xxxi]

This analysis partially explains why New Zealand never excelled in manufacturing. The New Zealand colonies carried out independent trade with Great Britain but had little trade between them (Morrell 1932: 13). Their trade was largely in whaling, sealing and timber (Condliffe 1959: 16). For the period from 1853 to 1873, 95 per cent of total exports came from forestry, agriculture, gold mining and pastoral development. Gold mining alone accounted for 60 per cent of the exports, while agricultural products accounted for 30 per cent (Condliffe 1959: 516). To this day, machinery constitutes less than two per cent of all New Zealand exports (Hausmann *et al.* 2011: 259). In contrast, New England exports consist mainly of weapons and machines (US Department of Commerce 2002).

The provincial system was intended to ensure New Zealand's successful colonisation. After its abolition, other forms of local government were instituted to ensure the same outcome. It does not take a huge leap of faith to see that what came to be known as 'economic development' is an extension of colonisation (Nafziger 2012; Galbraith 1964; Blair & Carroll 2009). Both aim to grow the economic activity in a given locale to improve its standard of living. Both require an empowerment of 'meso' levels of political organisation that modulate the power between the individual and the nation-state.

Today New England has a GDP of around one trillion US dollars, compared to a GDP

of USD 125 billion for New Zealand. The New England per capita is around USD 66,000 compared to USD 35,000 for New Zealand. In terms of the Economic Complexity Index (ECI), New Zealand is ranked 42th (in 2012), below Turkey and above Bosnia and Herzegovina (Hausmann *et al.* 2011); by comparison, the New England economy is seven times larger than that of New Zealand, and being a microcosm of the US economy, it ranks twelfth in the world in terms of economic complexity (Hausmann *et al.* 2011).

External factors promoted the constitutional designs in New England and New Zealand. Today globalisation (*qua* economic integration) is ushering in a new era of local autonomy. Globalisation encompasses a complex array of factors, including economics, technology, cultural convergence and indigenous renaissance. But it carries a common denominator of increased mobility and dependence across the globe. The 2008 Global Financial Crisis (GFC) attests to this dynamic of complex interrelations between nation-states. Decision making is migrating towards supra-national organisations. The widely held belief is currently that nation-states are unable to tackle issues that have ramifications on a global scale; climate change is a prime example. Globalisation hence provides a normative signal of weakening national sovereignty (Lee 2006: 29). Instead the increased integration is proceeding through nodes of urbanisation—alpha and beta cities that are functioning as connectors in a global network (Sassen 1991; Kearney 2012), and where citizens are embedding decision making in local structures.

Some argue, however, that states never enjoyed complete sovereignty, and that the concept of sovereignty itself is too nebulous to suggest that sovereignty *per se* is undermined (Krasner 1999: 34). The claim that sovereignty is being undermined by globalisation is usually made through an analysis of its effect on Westphalian sovereignty as a benchmark. In particular, the claim is that the universality of human rights discourses promoted by globalisation has brought the Westphalian system under unprecedented assault. However, historically (from the middle of the seventeenth century to the first part of the nineteenth century) external scrutiny of sovereignty is evidenced, specifically through concerns about religious tolerance (Krasner 1999: 43; Helleiner and Gilbert 1999: 151-152).

A more convincing argument is that sovereignty is not the absolute it used to be (Loughlin 2006: 107–8; Buchanan and Tullock 1962: 301). It is now relative, divided and shared. A large body of literature suggests that the nation-state is not the best organisational level for socio-economic activities—the nation-state is obsolete and is no

longer the optimal unit for organising economic activity (Ohmae 1995; Guehenno 1995; Chernilo 2007; Smith, Solinger and Topik 1999). A decentralised political community would better meet heterogeneous individual preferences (Buchanan and Tullock 1962; Hayek 1983; Bell 1991; Barnett 1998). A new conception of the nation-state has emerged: the state as a network (Agnew and Corbridge 1995: 89; Allen and Cochrane 2007: 1161; Morgan 2007: 1238). Here the emphasis is on maximising constitutional options rather than deciding among constraints (Frey and Eichenberger 1999).

Such non-contiguous states are at the centre of Spinoza's discourse (Prokhovnik 2001: 300–1; Spinoza 1951: 347–8, 356–7, 370, 383, 384). Buchanan echoes Spinoza when he explains his idea of *federalism* as 'diversity among separate co-operative communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the *limits on* such authority' (Buchanan 1990: 3-4) (emphasis in the original). Buchanan envisaged a 'federal union within which members of separate units cooperate' and share sovereignty, where constitutional requirements guarantee free trade, and with a monetary constitution based on competing national currencies. However, Buchanan was clear that the European Union should not follow the centralised US model in the post-Lincoln era (Buchanan 1990: 6, 17). Specifically, Buchanan warned that '[e]xcessive Europe-wide regulations, controls, fiscal harmonization, fiat-issue monopoly…would…destroy much of the gain that economic integration might promise' (Buchanan 1990: 18).

The evolving global importance of local governments 'manifests itself in international legal documents and institutions, transnational arrangements, and legal regimes within many countries' (Blank 2006: 264). Localities are now given domestic jurisdiction based on international law instruments.[XXXII] International organisations such as the World Bank and supra-national entities such as the European Union (EU) promote subsidiarity. A new world order is evolving in which local governments are becoming the key actors on the 'international' stage (Blank 2006: 269). This trend is increasing the need for coordination between localities and suggests a growing need for local governments to have a say in creating and adjudicating 'international norms' (Blank 2006: 272-273). The question now is 'who will grant [localities] the global "charter" to incorporate, and under what conditions'? (Blank 2006: 278) The principle of subsidiarity and Spinoza's rendition of sovereignty could provide the platform for answering this question.

6. Conclusion

The paper promotes local autonomy as a backbone for constitutional design based on economic considerations, and as delineated in the constitutional evolution of New England and New Zealand.

Normative signals from constitutional economics (in Buchanan's conception) endorse small jurisdictional footprints (territories) where sovereignty is shared in an Althusian strand of subsidiarity based on existing geo-political communities and inspired by Puritan theology. Signs of these signals are evident in the Articles of Confederation of 1643 and the Declaration of Independence in 1835. The Declaration played a role in New Zealand analogous to that played by the Articles of Confederation in the United States. Both instruments led to imagining new supra-national identities in the form of the Treaty of Waitangi in 1840 and the Declaration of Independence in 1776.

Unfortunately, New Zealand abandoned a semi federal provincial system in 1876 in favour of a unitary state, whereas a similar attempt for centralisation was successfully resisted in New England (1689). The economic ramifications can be ascertained in that historical context, but more so today. A comparison between the economic complexity of New England and New Zealand (as a proxy for economic development) provides evidence as to the contra-evolutionary effect of the dominion option followed in New Zealand.

Today, there is a growing emphasis on local autonomy. In New Zealand, this suggests giving increasing power to local governments. Moreover, it is argued that the introduction and subsequent abolition of the provincial system were largely driven by external considerations. The whole experiment exemplified a pragmatic approach to constitutional change. If this proposition is correct, New Zealand is heading to another constitutional change driven by external considerations. This time, globalisation would see a shift of power from the central government towards municipal governments, resulting in an arrangement similar to that envisaged under the *original* 1852 constitutional design—that is, municipal corporations with wide legislative powers.

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in law. His dissertation is entitled: *The Case for Subsidiarity in New Zealand.*

[I] The North Island alone is around 114,000 square kilometres, while the South Island is around 150,000 square kilometres.

[II] For a better understanding of constitutional economics see Leipold 1990: 47, Tiebout 1956, and Ostrom, Tiebout and Warren 1961.

[III] My reference to CPE should be limited to the works discussed in this paper, saliently the works by James Buchanan.

[IV] See also Buchanan 1990. Also of interest is Hayek 1976, Wiebe 2010, Long 2008, and Wiseman 1990. There are important insights on the scalar anchor in Buchanan's works from his Economic Theory of Clubs. These however will need to be addressed in a separate paper. For my purposes here I focus on his contribution to constitutional economics. For a review article on Club Theory see Sandler and Tschirhart 1997, and Buchanan 1993: 69.

[V] See generally Chapter 2. See in contrast Udehn 2001: 100, and Weber 1981: 159. See also Bodin, 1955 [1576]: IV, 6. Contrast with the work by Vincent Ostrom where not every decision by the individual is voluntary; where in the post-constitutional phase 'self-governing institutions can exercise authority over members'. See for example Herzberg 2005: 191. Also refer to Buchanan 1991: 40 (ft 13).

[VI] I delineate the arguments based on the work by James Buchanan and others.

[VII] For a more theoretical treatment see also Friedman 1990, and Kohr 1978: 59.

[VIII] Note that subsidiarity is not limited to any particular number of levels of government. A useful account of subsidiarity can also be found in Evans and Zimmermann 2014.

[IX] In the context of Catholic teachings, see Leo XIII 'Rerum Novarum: Encyclical Letter on Capital and Labor' (May 15, 1891) in Carlen 1990a: 250–251, para 36; Pius XI 'Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order' (May 15, 1931) in Carlen 1990b: 421 at paras 79–80.

[X] For a more radical view see also Livingston 1996.

[XI] See also Carozza 2003. For a critique of the principle of subsidiarity in the context of the European Union see Kirchner 1998.

[XII] Other salient models leading to similar conclusions include Dahl and Tufte 1974; Ostrom, Tiebout and Warren1961; and Tiebout 1956. For the closely connected principle of polycentricity see Aligica and Tarko 2012.

[XIII] This explains why the US and Australia constitutions do not make provision for local government.

[XIV] See *Chisholm vs. Georgia,* 2 Dallas 435 (1792), and Merriam 1900: 163 for other pronouncements by US Courts. See also Jackson 2006: 21.

[XV] See also Wagner 2002: 115 and 120. On the mutual exclusivity between liberal and social democracies refer to 116. See also Augustine 1958; Hayek 1983: 46; Wagner and Gwartney 1988: 32 and 35. Jane Jacobs suggests city-regions as the appropriate territorial footprint. See generally Jacobs 1984 and Hayek 1967.

[XVI] Also see the analysis in Wagner 2005.

[XVII] For a detailed account of the theological origins of subsidiarity, and for its counterpart in Calvinism, see Van Til 2008.

[XVIII] See Friedrich 1932. See also the subsidiarity taxonomy provided by Føllesdal 1998. See also Endo 1994.

[XIX] Available at the Lillian Goldman Law Library, The Avalon Project, Yale law School (10 September 2014) http://avalon.law.yale.edu/17th_century/art1613.asp.

[XX] The Articles of Confederation of the United Colonies of New England, Lillian Goldman Law Library, The Avalon Project, Yale law School (10 September 2014) http://avalon.law.yale.edu/17th_century/art1613.asp.

[XXI] The nature of the relationship between the Treaty and the Declaration is currently under review by the Treaty of Waitangi Tribunal, under the *Te Paparahi o te Raki inquiry* (Wai 1040), filed by Nga Puhi iwi of Northland in 2010.

[XXII] This analysis takes a wide interpretation of Māori as representing all local communities in New Zealand.

[XXIII] Subsidiarity is also evident in Treaty of Waitangi jurisprudence. The principles that emanated from *New Zealand Māori Council v. Attorney-General* [1987] 1 NZLR 641 all emerge from the principle of subsidiarity. I do not pursue this point in detail in this paper, preferring instead to leave this to future enquiry. For the sub-principles of subsidiarity see for example Gosepath 2005: 162, Floriani 2012: 82-83.

[XXIV] Morrell 1932: 22. See also the views of Sir Robert Peel and Lord John Russell (19 June 1845) 81 GBPD HC 934 and 950, and Sir John Pakington (2nd Baronet) (4 June 1852) 122 GBPD HC 18.

[XXV] According to Watts, quasi-federalism is where 'the overall structure is predominantly that of a federation but the federal or central government is constitutionally allocated some overriding unilateral powers akin to

those in unitary systems that may be exercise in certain specified circumstances' at xx.
[xxvi] Note that per capita income here is synonymous with per capita GDP.
[xxvii] (30 July 1845) 82 GBPD HC 1236.
[xxviii] Statistics New Zealand figures.
[xxix] Similar arguments can be seen in relation to the role of concurrent powers under s51 of the Commonwealth of Australia Constitution Act 1900 (Imp).
[xxx] (23 July 1875) 17 NZPD HC 50.
[xxxi] See also Nettels 1963: 263, and Barnes 1960: 29.
[xxxii] *Ltee v. Hudson (Ville)* [2001] 2 SCR 241.

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