A Constitutional Antinomy: The Principle in McCawley v The King *and Territorial Limits on State Legislative Power*

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Abstract

This article examines the relationship between two central elements of state constitutional law in Australia: (i) the predominantly 'uncontrolled' and 'flexible' nature of state *Constitution Acts* in accordance with the principle in *McCawley v The King*; and (ii) the limited powers of each state Parliament to enact legislation operating beyond its state's territorial limits. The article argues that these two elements have developed incongruently, resulting in fundamental inconsistencies within state constitutional law jurisprudence.

I Introduction

The High Court of Australia has repeatedly emphasised the importance of maintaining coherence in the law.[1] In Australia, the *Commonwealth Constitution* is the foundation stone of the legal system's coherence.[2] Indeed, constitutional law has itself been considered the 'clearest example of the law as [a] seamless web'.[3] Although state constitutional law is seemingly similarly coherent,[4] this article argues an antinomy exists between:

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1 See, eg, *Badenach v Calvert* (2016) 257 CLR 440, 451 [23] (French CJ, Kiefel and Keane JJ); *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, 201–2 [25] (French CJ), 239 [164] (Crennan, Bell and Keane JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 514 [25], 518 [34], 520 [38], 522 [43], 523 [45] (French CJ, Crennan and Kiefel JJ); *Miller v Miller* (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 406–10 [39]–[42] (Gummow, Heydon and Crennan JJ). See generally Michael Gillooly, 'Legal Coherence in the High Court: String Theory for Lawyers' (2013) 87(1) *Australian Law Journal* 33.

2 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, 555–6 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

3 Keith Mason, 'The Unity of the Law' (1998) 4(1) *Judicial Review* 1, 3.

4 See *Yougarla v Western Australia* (2001) 207 CLR 344, 354–5 [17] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Yougarla*').

(i) the principle clarified by the Privy Council in *McCawley v The King*[5] ('the *McCawley* principle'); and

(ii) territorial limits on state legislative power derived from 'peace, order and good government' provisions in state *Constitution Acts*, requiring, as a condition for validity, a real connection between the extraterritorial operation of legislation enacted by a state's Parliament and the state.

Unfortunately, these two elements have been analysed discretely. Juxtaposing the *McCawley* principle and extraterritoriality jurisprudence brings into sharp focus their inconsistency. Parts II and III of this article effect this juxtaposition. Part II considers *McCawley* and its consequences for state constitutional law. Under the *McCawley* principle, state *Constitution Acts* are 'uncontrolled' and 'flexible' instruments that, absent entrenchment, a state Parliament may alter in the same manner as its other enactments; that is, by express or implied amendment or repeal by subsequent inconsistent legislation enacted through ordinary parliamentary procedures. A corollary of *McCawley* is that implications derived from unentrenched legislative provisions do not condition or limit state legislative power. A state Parliament may simply override any such implication by enacting ordinary legislation inconsistent with the implication.

In Part III, it is submitted that, contrary to the *McCawley* principle, the High Court and Privy Council prior to the enactment of the *Australia Acts 1986* (Cth) and (UK) ('*Australia Acts*') derived territorial limits on state legislative power from unentrenched 'peace, order and good government' provisions in state *Constitution Acts*. Part IV explains that, despite the *Australia Acts* and subsequent suggestions of territorial limits on state legislative power under the *Commonwealth Constitution*, this antinomy is not merely of historical significance. Its resolution goes to the validity of pre-1986 extraterritorial state legislation, the proper construction of the *Australia Acts* and their relationship with the *Commonwealth Constitution*, and the nature and coherence of state Constitutions. Although it is beyond this article's scope to attempt to definitively resolve the constitutional antinomy identified in Part III, Part IV also notes briefly three alternative legal positions to coherently address the antinomy.

II The *McCawley* Principle: A Constitutional Bedrock

As Isaacs and Rich JJ noted in the High Court, *McCawley* raised questions of such 'enormous importance' that the case's significance could not be overstated.[6] Those questions arose 'on the cusp ... of the rule of recognition'[7] underlying the Constitutions of Australia's states. For this reason, the *McCawley* principle is

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5 [1920] AC 691 ('*McCawley*').

6 *McCawley v The King* (1918) 26 CLR 9, 44, 48. See also *McCawley* [1920] AC 691, 701 (Lord Birkenhead LC); *Cooper v Commissioner of Income Tax (Qld)* (1907) 4 CLR 1304, 1311 (Griffith CJ), 1326 (O'Connor J) ('*Cooper*').

7 Nicholas Aroney, 'Politics, Law and the Constitution in *McCawley's* Case' (2006) 30(3) *Melbourne University Law Review* 605, 653.

characterised as 'basic',[8] being regarded (although this article argues otherwise) as 'the essential proposition on which all subsequent State constitutional law in Australia has been founded'.[9] This Part first outlines the facts and reasoning in *McCawley* as a necessary point of reference for further analysis.[10] It then considers *McCawley's* impact on the identification and effect of constitutional implications at the state level.

A McCawley v The King

The controversy in *McCawley* stemmed from the appointment of Thomas McCawley as President of Queensland's Court of Industrial Arbitration ('Industrial Court') and, subsequently, as a judge of the State's Supreme Court. Queensland's Governor in Council appointed McCawley to those offices pursuant to s 6 of the *Industrial Arbitration Act 1916* (Qld) ('*Industrial Arbitration Act*'). That section established the Industrial Court as a superior court of record and a branch of Queensland's Supreme Court. Under s 6(2), the Governor in Council was directed to appoint up to three Industrial Court judges and designate one as the Court's President. Section 6(6) empowered the Governor in Council to appoint the President or any other Industrial Court judge as a judge of Queensland's Supreme Court and relevantly provided that:

> The President or any [Industrial Court] Judge … if so appointed … shall have… the rights, privileges, powers, and jurisdiction of a [Supreme Court] Judge … in addition to the rights, privileges, powers, and jurisdiction conferred by this Act, and shall hold office as a [Supreme Court] Judge … during good behaviour ...
>
> The President and each [Industrial Court] Judge … shall hold office as President and Judge of the [Industrial] Court for seven years from the date of their respective appointments, and shall be eligible to be reappointed by the Governor in Council as such President or Judge for a further period of seven years.

After appointing McCawley the Industrial Court's President, the Governor in Council issued a commission appointing McCawley to Queensland's Supreme Court pursuant to s 6(6) of the *Industrial Arbitration Act*. Under the commission, McCawley was to 'hold, exercise and enjoy the ... Office of Judge of [the Queensland] Supreme Court ... during good behaviour together with all the rights, powers, privileges, advantages, and jurisdiction thereunto belonging or appertaining'.[11] McCawley presented himself, with his commission, at a sitting of the Full Supreme Court and requested the Chief Justice, Sir Pope Cooper, to administer the oaths of office taken by Supreme Court justices.[12] Following the Chief Justice directing the Registrar to read and record the commission, two leading Queensland barristers, Arthur Feez KC and

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8 *Clayton v Heffron* (1960) 105 CLR 214, 272 (Menzies J) ('*Clayton*'); *Western Australia v Wilsmore* (1982) 149 CLR 79, 99 (Wilson J) ('*Wilsmore*').

9 Nicholas Aroney, '*Thomas McCawley v The King*' in George Winterton (ed) *State Constitutional Landmarks* (Federation Press, 2006) 69, 70.

10 For a detailed multi–disciplinary analysis of *McCawley*, see ibid; Aroney, above n 7. See also Malcolm Cope, 'The Political Appointment of TW McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland' (1976) 9(2) *University of Queensland Law Journal* 224.

11 *Re McCawley* [1918] St R Qd 62, 66–7.

12 Ibid 64–5.

Charles Stumm KC, challenged the validity of McCawley's appointment on several 'purely legal and constitutional grounds'.[13]

The most relevant of those grounds for present purposes asserted s 6(6) of the *Industrial Arbitration Act* was void for inconsistency with unentrenched provisions of the *Constitution Act 1867* (Qld) ('*Queensland Constitution Act*') safeguarding judicial independence, including s 15, which conferred life tenure during good behaviour on Supreme Court judges.[14] This ground was based on obiter dictum in *Cooper v Commissioner of Income Tax (Qld)*.[15] In *Cooper*, the High Court rejected Sir Pope Cooper's challenge to Queensland's income taxation laws, which Sir Pope argued reduced or diminished Supreme Court justices' salaries during their term of office contrary to s 17 of the *Queensland Constitution Act*.[16] However, a majority of the Court also rejected the Commissioner's argument that the income taxation laws impliedly repealed s 17 of the *Queensland Constitution Act*.[17] Their Honours considered that state *Constitution Acts* were not subject to implied amendment or repeal. The State Parliament could not simply disregard unentrenched provisions of its *Constitution Act*.[18] Instead, its enactments were invalid and inoperative to the extent of any inconsistency with those provisions.[19] An express amendment or repeal of the relevant provisions in the *Constitution Act* was required first.[20]

At first instance in *McCawley*, the Full Court of the Queensland Supreme Court held that s 6(6) of the *Industrial Arbitration Act*, inconsistently with the *Queensland Constitution Act*, purportedly authorised appointments to the Supreme Court for only so long as appointees sat on the Industrial Court.[21] For a majority, this meant that s 6(6) was void and inoperative based on the 'weighty expressions of opinion' in *Cooper*.[22] Although the majority questioned whether *Cooper* was reconcilable with *Taylor v Attorney-General (Qld)*,[23] their Honours considered *Cooper* binding until the High Court or Privy Council clearly indicated otherwise.[24] Accordingly, the Full Court held McCawley was not entitled to be sworn in, or sit, as a Supreme Court judge.[25] On appeal,[26] a narrow majority of the High Court affirmed the Full Court's decision. The majority's views were not, however,

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13 Ibid 64.

14 Ibid 83. The other relevant provisions of the *Queensland Constitution Act* authorised the removal of Supreme Court judges only by the Sovereign upon an address by both Houses of Queensland's Parliament (s 16) and secured the salaries of Supreme Court judges during their tenure (s 17).

15 (1907) 4 CLR 1304.

16 Ibid 1316–17 (Griffith CJ; Isaacs J agreeing at 1329), 1319–20 (Barton J), 1323–6 (O'Connor J), 1332–4 (Higgins J).

17 Ibid 1314–15 (Griffith CJ; Isaacs J agreeing at 1329), 1317–18 (Barton J), 1328–9 (O'Connor J). See also *Baxter v Ah Way* (1909) 8 CLR 626, 643 (Isaacs J).

18 (1907) 4 CLR 1304, 1314 (Griffith CJ), 1318 (Barton J), 1328 (O'Connor J).

19 Ibid 1315 (Griffith CJ), 1318 (Barton J), 1329 (O'Connor J).

20 Ibid 1314–15 (Griffith CJ), 1317 (Barton J), 1329 (O'Connor J).

21 [1918] St R Qd 62, 97.

22 Ibid (Cooper CJ, Chubb, Shand and Lukin JJ; Real J dissenting).

23 (1917) 23 CLR 457 ('*Taylor*').

24 [1918] St R Qd 62, 97 (Cooper CJ, Chubb, Shand and Lukin JJ).

25 Ibid 104.

26 *McCawley v The King* (1918) 26 CLR 9. The High Court held it lacked jurisdiction to hear an initial appeal by McCawley: *Re McCawley* (1918) 24 CLR 345, 347. See also Aroney, above n 7, 623.

'entirely harmonious upon the relevant questions'.[27] Apart from Higgins J,[28] the High Court substantively upheld the Full Court's construction of s 6(6) of the *Industrial Arbitration Act*.[29] Chief Justice Griffith and Barton and Powers JJ held that this rendered s 6(6) void in accordance with *Cooper*.[30] The remaining majority member, Gavan Duffy J, held McCawley's commission did not accord with s 6(6) and was therefore unauthorised by law.[31] However, his Honour did not accept s 6(6) was invalid because of its inconsistency with s 15 of the *Queensland Constitution Act*.[32] The three dissentients, Isaacs and Rich JJ and Higgins J, similarly held that, absent any manner and form provision, s 5 of the *Colonial Laws Validity Act 1865* (Imp) ('*CLVA*') empowered Queensland's Parliament to impliedly amend or repeal ss 15 and 16 of the *Queensland Constitution Act*.[33]

On a further appeal by McCawley, the Privy Council reversed the High Court's decision, upholding the validity of s 6(6) of the *Industrial Arbitration Act* and McCawley's commission. Lord Birkenhead LC delivered their Lordships' judgment, which was 'in almost complete agreement' with Isaacs and Rich JJ's dissenting judgment in the High Court.[34] As a starting point, their Lordships contrasted Constitutions alterable only by observing special procedures ('controlled' Constitutions) and Constitutions alterable in the same manner as other legislation ('uncontrolled' Constitutions).[35] In this regard, their Lordships emphasised that the consequences of a constitution being uncontrolled 'admit of no qualification', so that '[t]he doctrine is carried to every proper consequence with logical and inexorable precision'.[36] Accordingly, an uncontrolled Constitution occupies 'precisely the same position as a *Dog Act* or any other Act, however humble its subject-matter'.[37]

In rejecting the view that a state Parliament cannot alter its *Constitution Act* merely by an inconsistent enactment, their Lordships noted it was not the Imperial Parliament's policy 'at any relevant period, to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures'.[38] This conclusion was reinforced by a detailed analysis of the relevant constitutional instruments, including the *CLVA*. That Act was enacted to remove doubts surrounding colonial legislatures' constituent powers caused by members of South Australia's Supreme Court (most notably Boothby J) favouring technical objections

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27 *McCawley* [1920] AC 691, 700 (Lord Birkenhead LC).

28 (1918) 26 CLR 9, 70–2.

29 Ibid 27 (Griffith CJ), 41–2 (Barton J), 45–7 (Isaacs and Rich JJ), 79 (Gavan Duffy J), 80–1 (Powers J).

30 Ibid 21–2, 25, 27 (Griffith CJ), 28, 33–5, 42–3 (Barton J), 86 (Powers J).

31 Ibid 80.

32 Ibid 78–9. It is therefore incorrect to say the majority of the High Court in *McCawley* applied *Cooper*: *contra*, eg, John Pyke, 'Book Review: HP Lee and George Winterton (eds), *Australian Constitutional Landmarks*' (2004) 4(1) *Queensland University of Technology Law & Justice Journal* 121, 123 nn 14.

33 (1918) 26 CLR 9, 55–8 (Isaacs and Rich JJ), 72–5 (Higgins J).

34 [1920] AC 691, 701 (Lord Birkenhead LC, Viscount Haldane, Lord Buckmaster, Lord Dunedin and Lord Atkinson).

35 Ibid 703–4.

36 Ibid 704.

37 Ibid.

38 Ibid 706.

against colonial legislation's validity.[39] Significantly, the first limb of s 5 of the *CLVA* confirmed every colonial legislature had:

> full power within its jurisdiction to establish Courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein.

The Privy Council considered it 'difficult to conceive how the [Imperial Parliament] could more plainly have indicated an intention'[40] for colonial legislatures to have sufficient power to enact laws such as the *Industrial Arbitration Act*.

Their Lordships also rejected the respondents' arguments that the *Queensland Constitution Act* was a controlled Constitution or that particular unentrenched sections of the Act had that character.[41] Absent any contrary indication, no special character was attributable to only particular unentrenched sections. Accordingly, it was not legitimate to characterise some unentrenched sections as fundamental and alterable only in a special manner, but classify other unentrenched sections as equivalent to ordinary statutory provisions.[42] The terms of the *Queensland Constitution Act* supported the conclusion that the Act was an uncontrolled Constitution. Section 2 relevantly provided that within Queensland, the State's Parliament had power 'to make laws for the peace, welfare and good government of the colony in all cases whatsoever'. Again, the Privy Council opined that '[i]t would be almost impossible to use wider or less restrictive language'.[43] Only in one 'isolated … special and individual' section, s 9, did Queensland's Parliament limit its power to enact legislation 'in the ordinary way, by a bare majority'.[44] Prior to its repeal in 1908,[45] s 9 required Bills altering the Legislative Council's Constitution to, among other things, obtain two-thirds majorities at the second and third readings in both houses as a prerequisite for royal assent. Invoking the language used to characterise s 9,[46] the Privy Council characterised Queensland's Parliament as 'master of its own household, except in so far as its powers have in special cases been restricted'.[47] No such restrictions applied to enacting legislation affecting judicial tenure, such as the *Industrial Arbitration Act*.[48]

Justice Evatt encapsulated *McCawley's* significance in *New South Wales v Bardolph*[49] in considering s 45 of the *Constitution Act 1902* (NSW) ('*NSW Constitution Act*'). That section contemplates appropriations from the State's consolidated revenue fund will be for 'specific purposes' but is not entrenched.

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39 *McCawley v The King* (1918) 26 CLR 9, 48–50 (Isaacs and Rich JJ). See generally D B Swinfen, 'The Genesis of the *Colonial Laws Validity Act*' [1967] *Juridical Review* 29.

40 [1920] AC 691, 710–11.

41 Ibid 711–13.

42 Ibid 713–14.

43 Ibid 712.

44 Ibid.

45 *Constitution Act Amendment Act 1908* (Qld) s 2. The High Court upheld this Act's validity in *Taylor* (1917) 23 CLR 457, 467 (Barton J; Gavan Duffy and Rich JJ agreeing at 477), 471 (Isaacs J), 479 (Powers J).

46 *Bribery Commissioner v Ranasinghe* [1965] AC 172, 197–8 (Lord Pearce). Cf *Queensland v Together Queensland* [2014] 1 Qd R 257, 266 [18] (The Court) ('*Together Queensland*').

47 *McCawley* [1920] AC 691, 714.

48 Ibid 713.

49 (1934) 52 CLR 455.

His Honour held that the section was of a flexible character and subject to the terms of any subsequent Act passed by the State's Parliament because:

> the principle of *McCawley v The King* is that, in dealing with public moneys or indeed any other subject not governed by a special method of law-making, Parliament is not bound to adhere to the letter or spirit of s 45, but is, on the contrary, empowered to make any provision it thinks fit, whether consistent or not with s 45.[50]

B *The* McCawley *Principle and Constitutional Implications*

A corollary of the *McCawley* principle is that implications in a state's Constitution limit its Parliament's legislative power only if derived from entrenched provisions. This is not to suggest other implications are of no constitutional significance. For example, references in unentrenched provisions of state *Constitution Acts* to 'officers liable to retire from office on political grounds'[51] obliquely imply responsible government.[52] However, *McCawley* entails that such implications do not affect state legislation's validity.[53] This section considers briefly two examples of this application of *McCawley*: (i) the absence of a separation of state judicial power; and (ii) implied freedoms at the state level. Of course, the distinction between singly entrenched and doubly (or self) entrenched provisions[54] raises the question whether constitutional implications conditioning state legislative power arise from both types of entrenched provisions. An antecedent question, on which leading constitutional scholars and jurists have expressed different views,[55] is whether a state Parliament must expressly repeal or amend a manner and form provision that is not itself entrenched, before enacting legislation without observing the provision's purported requirements. Addressing these questions is beyond this article's scope. For present

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50 Ibid 466. See also Peter Congdon and Peter Johnston, 'Stirring the Hornet's Nest: Further Constitutional Conundrums and Unintended Consequences arising from the Application of Manner and Form Provisions in the Western Australian Constitution to Financial Legislation' (2013) 36(2) *University of Western Australia Law Review* 297, 316–17, 320–1.

51 See, eg, *NSW Constitution Act* s 47 (as enacted); *Constitution Act 1889* (WA) ('*WA Constitution Act*') s 74; *Constitution Acts Amendment Act 1899* (WA) s 43(1).

52 *Egan v Willis* (1998) 195 CLR 424, 450–1 [40] (Gaudron, Gummow and Hayne JJ); *Egan v Chadwick* (1999) 46 NSWLR 563, 569 [28] (Spigelman CJ); *Stewart v Ronalds* (2009) 76 NSWLR 99, 111 [37] (Allsop P).

53 For example, in *Jarratt v Commissioner of Police (NSW)*, McHugh, Gummow and Hayne JJ commented in relation to s 47 of the *NSW Constitution Act* (as it then stood) that '[the section] is not entrenched and frequently has been impliedly amended by subsequent legislation': (2005) 224 CLR 44, 67 [74].

54 Regarding double or self-entrenchment, see *Wilsmore* (1982) 149 CLR 79, 99–100 (Wilson J); *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 414 (Zelling J). See also *Marquet, Clerk of the Parliaments (WA) v A–G (WA)* (2002) 26 WAR 201, 249 [200] (Steytler and Parker JJ).

55 For the view that singly entrenched manner and form provisions are subject to implied amendment/repeal, see Anne Twomey, 'Implied Limitations on Legislative Power in the United Kingdom' (2006) 80(1) *Australian Law Journal* 40, 44. See also Jeffrey Goldsworthy, 'Manner and Form in the Australian States' (1987) 16(2) *Melbourne University Law Review* 403, 406 nn 19; Robert French, 'Manner and Form in Western Australia: An Historical Note' (1993) 23(2) *University of Western Australia Law Review* 335, 344 (positing that Western Australia's Constitution is 'uncontrolled' outside the area of operation of doubly entrenched manner and form provisions). For the contrary view, see Gerard Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *Queensland University of Technology Law Journal* 69, 93–4.

purposes, it is sufficient to note that, on any reading of *McCawley*, unentrenched provisions in a state's *Constitution Act* do not condition or limit its Parliament's legislative power.

1 *The Absence of a Separation of State Judicial Power*

McCawley is one reason state Constitutions contain no entrenched separation of powers doctrine. Attempts to establish such a doctrine by reference to the Privy Council's decision in *Liyanage v The Queen*[56] have been unsuccessful.[57] A critical point of distinction has been that Ceylon's *Constitution*,[58] as considered in *Liyanage*, included entrenched provisions impliedly vesting judicial power exclusively in the judicature.[59] On the other hand, the Australian state Constitutions under consideration have either been uncontrolled in all relevant respects[60] or included entrenched provisions that, properly construed, did not sustain the suggested implications.[61] For example, as Dawson J explained in *Kable v Director of Public Prosecutions (NSW)*, legislation constituting an exercise of a judicial function or conferring non-judicial functions on the State's Supreme Court would not repeal or amend entrenched protections of judicial independence in the *NSW Constitution Act* so as to engage the relevant manner and form requirements.[62] Because the *NSW Constitution Act* was otherwise relevantly uncontrolled, ordinary legislation could simply disregard any implied separation of powers doctrine.[63]

2 *Implied Freedoms at the State Level*

The *McCawley* principle has also impacted the extent to which state *Constitution Acts* fetter their respective Parliaments' powers to enact laws affecting political communication and representative democracy. In Western Australia, s 73(2)(c) of the *WA Constitution Act* entrenches a requirement that the State's two legislative chambers be composed of members 'chosen directly by the people' unless altered by referendum. That section mandates direct popular election of legislators[64] and also underpins an implied freedom of political communication in Western Australia's Constitution, as recognised in *Stephens v West Australian Newspapers*

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56 [1967] 1 AC 259 ('*Liyanage*').

57 *South Australia v Totani* (2010) 242 CLR 1, 45 [66] (French CJ).

58 *Ceylon Independence Act 1947* (Imp); *Ceylon (Constitution and Independence) Orders in Council 1947* (Imp).

59 [1967] 1 AC 259, 286–8 (Lord Pearce).

60 *Clyne v East* (1967) 68 SR (NSW) 385, 400–1; *Nicholas v Western Australia* [1972] WAR 168, 173; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 400–1 (Kirby P), 407 (Glass JA), 419 (Priestley JA) ('*BLF Case*'). See also *Together Queensland* [2014] 1 Qd R 257, 266–7 [18], 269 [34] (The Court).

61 *City of Collingwood v Victoria (No 2)* [1994] 1 VR 652, 662–3; *Kable v DPP (NSW)* (1996) 189 CLR 51, 65–6 (Brennan CJ), 77–80 (Dawson J), 92–4 (Toohey J), 109 (McHugh J, agreeing with Brennan CJ and Dawson J) ('*Kable*').

62 (1996) 189 CLR 51, 80.

63 Ibid 78 (Dawson J). See also ibid 66 (Brennan CJ).

64 *McGinty v Western Australia* (1996) 186 CLR 140, 178 (Brennan CJ), 189 (Dawson J), 253–4 (McHugh J), 299–300 (Gummow J) ('*McGinty*').

Ltd.[65] However, in *McGinty v Western Australia*, the High Court held that the phrase 'chosen directly by the people' does not require a 'one vote, one value' electoral system.[66] No other entrenched provision prevented the State Parliament establishing malapportioned electoral districts.[67] Absent any relevant entrenchment, the State Parliament could legislate inconsistently with any democratic principles implied in its Constitution.[68]

Following *Stephens* and *McGinty*, the High Court has declined to address whether other state *Constitution Acts* contain similar implied freedoms.[69] However, Queensland's Court of Appeal distinguished *Stephens* and *McGinty* in *R v Brisbane TV Ltd; Ex parte Criminal Justice Commission (No 2)*.[70] Queensland's *Constitution Act* contained no entrenched equivalent to s 73(2)(c) of the *WA Constitution Act*, so did not similarly restrict that State's legislative power.[71] As McPherson JA noted, this meant that every enactment inconsistent with any implied principles of representative government or corresponding freedom of political communication embodied in Queensland's *Constitution Act* impliedly amended those principles and/or that freedom.[72] Reaching a contrary conclusion would entail departing from or overruling *McCawley*.[73]

III A Divergence from the *McCawley* Principle: Territorial Limits on State Legislative Power

Part II's analysis of the *McCawley* principle and its applications leads to one primary conclusion — unentrenched provisions in a state's *Constitution Act* do not condition or limit its Parliament's legislative power. However, this Part argues the High Court and Privy Council implicitly departed from the *McCawley* principle in the context of territorial limits on state legislative power. That departure stemmed from territorial limitations being derived, prior to enactment of the *Australia Acts*, from unentrenched provisions in state *Constitution Acts* referring to the power of state Parliaments to legislate for the 'peace, order [or welfare] and good government' of their respective states.[74] An example of such a provision, and the focus of this Part's analysis, is s 5 of the *NSW Constitution Act*, which provides:

> The Legislature shall, subject to the provisions of the *Commonwealth of Australia Constitution Act*, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.

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65 (1994) 182 CLR 211 ('*Stephens*').

66 (1996) 186 CLR 140, 178 (Brennan CJ), 189 (Dawson J), 253–4 (McHugh J), 299–300 (Gummow J).

67 Ibid 254 (McHugh J).

68 Ibid 254 (McHugh J), 299 (Gummow J).

69 See, eg, *Levy v Victoria* (1997) 189 CLR 579, 599–600 (Brennan CJ), 609 (Dawson J), 619–20 (Gaudron J), 626 (McHugh J), 643–4 (Kirby J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 547 [16] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 563 [71] (Keane J).

70 [1998] 2 Qd R 483.

71 Ibid 495 (McPherson JA).

72 Ibid 496.

73 Ibid.

74 As to the different formulations of provisions expressing state legislative power, see *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9 (The Court) ('*Union Steamship*').

> Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.

A *Extraterritoriality Jurisprudence Preceding the* Australia Acts

Each Australian state Parliament has only limited powers to enact legislation applying to persons, acts, things or events beyond its land margins or the low-water mark off its coastline. Subject to the extended legislative powers conferred as a result of the offshore constitutional settlement,[75] it is essential to the validity of a state's legislation operating beyond its boundaries[76] that a real connection exists between the state and the extraterritorial persons, acts, things or events on which the law operates.[77] Obscurity surrounds the legal foundations of these territorial limits.[78] This is at least partly attributable to the limits first emerging not in the courts, but in colonial office opinions regarding reservation and disallowance of colonial legislation during the 19th century.[79] Although once considered to stem from colonial legislatures' subordinate status and supposed similar limits on the United Kingdom Parliament's power,[80] during the 20th century the High Court and Privy Council identified state *Constitution Acts* as the source of territorial limits on state legislative power.[81] This line of authority traces to the Privy Council's decision in *Ashbury v Ellis*.[82] Their Lordships upheld New Zealand legislation permitting the Colony's courts to grant leave to parties to contracts executed, or to be performed, in New Zealand to commence proceedings for breach of such a contract against a defendant absent from the Colony. That legislation was within the limits of the power conferred on New Zealand's legislature under s 53 of the *New Zealand Constitution Act 1852* (Imp) ('*NZ Constitution Act*') to 'make laws for the peace, order and good government of New Zealand'.[83] Significantly, at that time, New Zealand's legislature had no power to amend s 53 of the *NZ Constitution Act*.[84]

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75 *Coastal Waters (State Powers) Act 1980* (Cth) s 5.

76 In relation to state boundaries, see, eg, *South Australia v Victoria* (1911) 12 CLR 667; *New South Wales v Commonwealth* (1975) 135 CLR 337.

77 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 372 (The Court) ('*Port MacDonnell*').

78 *R v Foster; Ex parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256, 308 (Windeyer J) ('*Foster*'). See also Daniel O'Connell and Ann Riordan, *Opinions on Imperial Constitutional Law* (LawBook, 1971) 84; Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 196. No Imperial statute expressly imposed territorial limitations on colonial legislative power: M Crommelin, 'Offshore Mining and Petroleum: Constitutional Issues' (1981) 3(1) *Australian Mining & Petroleum Law Journal* 191, 200.

79 Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 216. See also *Wacando v Commonwealth* (1981) 148 CLR 1, 21 (Mason J) ('*Wacando*').

80 *MacLeod v A-G (NSW)* [1891] AC 455, 458–9 (Lord Halsbury LC). This case has been regarded 'as bad law for many decades': *Burns v Corbett* (2017) 343 ALR 690, 704 [53] (Leeming JA).

81 Christopher Gilbert, 'Extraterritorial State Laws and the *Australia Acts*' (1987) 17(1) *Federal Law Review* 25, 26.

82 [1893] AC 339 ('*Ashbury*').

83 Ibid 344–5 (Lord Hobhouse).

84 Frederic Brookfield, 'Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach' (1984) 5(4) *Otago Law Review* 603, 606.

Two High Court justices cited *Ashbury* in 1916 in *Delaney v Great Western Milling Co Ltd*.[85] Gavan Duffy and Rich JJ identified s 5 of the *NSW Constitution Act* as the source of the New South Wales Parliament's legislative power and the touchstone in determining the validity of enactments operating beyond the State's limits.[86] The previous year, in *Commissioner of Stamps (Qld) v Wienholt*, the Court had held the Queensland Parliament's power under s 2 of the *Queensland Constitution Act* to legislate 'for the peace, welfare and good government of the Colony in all cases whatsoever' was necessarily limited to its territory in imposing taxation.[87] Of course, *Wienholt* and *Delaney* were decided after *Cooper*, but before *McCawley*. The analysis in both cases is not inconsistent with the High Court's obiter dictum in *Cooper*, given the relevant 'peace, order and good government' provision was, and remains, on the respective State's statute book.

Following *McCawley*, however, the High Court still applied the same analysis of territorial limitations, again holding that s 5 of the *NSW Constitution Act* limited the New South Wales Parliament's territorial competence in *Commissioner of Stamp Duties (NSW) v Millar*.[88] Legislation of the New South Wales Parliament purportedly imposed death duties on the estates of persons dying resident and domiciled outside of New South Wales in respect of the whole value of shares the deceased held in certain companies registered and incorporated outside the State, but carrying on business in the State. Justices Rich, Dixon and McTiernan held that the impugned legislation's connection to the State was too remote to describe the law as 'for the peace, welfare and good government of New South Wales' under s 5 of the *NSW Constitution Act*.[89] Although some connection existed between the deceased shareholder and New South Wales, the enactment went beyond legislating in respect of that connection.[90] *Millar* is consistent with Dixon J's reasons earlier in 1932 in *Barcelo v Electrolytic Zinc Company of Australasia Ltd*.[91] In *Barcelo*, his Honour held, noting the Privy Council's advice in *Croft v Dunphy*[92] that same year, that territorial limitations of a 'constitutional character' applied to Victoria's Parliament because it was empowered to make laws only 'in and for' Victoria.[93] *Croft* established that the validity of extraterritorial legislation of Canada's Federal Parliament turned on whether the legislation was within that Parliament's legislative competence based on the 'peace, order and good government' provision in s 91 of the *British North America Act 1867* (Imp) ('*BNA Act*').[94] However, similarly to s 53 of the *NZ Constitution Act* as considered in *Ashbury*, Canada's Parliament had no power to alter the *BNA Act* when *Croft* was decided.

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85 (1916) 22 CLR 150 ('*Delaney*').
86 Ibid 173–5.
87 (1915) 20 CLR 531, 540 (The Court) ('*Wienholt*').
88 (1932) 48 CLR 618 ('*Millar*').
89 Ibid 632. See also ibid 635–6 (Starke J).
90 Ibid 633 (Rich, Dixon and McTiernan JJ).
91 (1932) 48 CLR 391 ('*Barcelo*'). See also *Re The Victoria Steam Navigation Board; Ex parte Allan* (1881) 7 VLR (L) 248, 261 (Stawell CJ).
92 [1933] AC 156 ('*Croft*').
93 (1932) 48 CLR 391, 425–6.
94 *Croft* [1933] AC 156, 163 (Lord MacMillan).

The High Court subsequently applied the limits formulated in *Millar* to other New South Wales laws[95] and also adopted the same analysis for other jurisdictions.[96] Although not expressly referring to s 5 of the *NSW Constitution Act*, in *Broken Hill South Ltd (Public Officer) v Commissioner of Taxation (NSW)*,[97] Dixon J elaborated on the requirement for a territorial nexus:

> The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicil, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers.[98]

Applying this test, in *Welker v Hewett* the High Court invalidated road maintenance laws imposing liability on the interstate directors of interstate companies with vehicles travelling on New South Wales' roads.[99] Section 5 of the *NSW Constitution Act* was again held to limit the New South Wales Parliament's power to legislating for the State's 'peace, welfare and good government'.[100] Justice Dixon's analysis in *Broken Hill South* also formed the basis of the 'real connexion' test expounded by Gibbs J in *Pearce*,[101] which the High Court has twice unanimously approved.[102] Similarly, in *Johnson v Commissioner of Stamp Duties*, the Privy Council approved *Millar* and *Broken Hill South* as proceeding on the right principle.[103] Their Lordships held the New South Wales Parliament was a subordinate legislature, with the powers set out in s 5 of the *NSW Constitution Act*.[104] Legislation on any subject matter with no relevant territorial connection with the State fell outside those powers.[105]

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95 See, eg, *Welker v Hewett* (1969) 120 CLR 503, 511 (Kitto J); *Union Steamship* (1988) 166 CLR 1, 8–10, 12–14 (The Court).

96 See, eg, *Commissioner of Stamps (Qld) v Counsell* (1937) 57 CLR 248, 255–7 (Latham CJ); *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42, 51–2 (Barwick CJ), 58–60 (Kitto J), 67–8 (Menzies J); *Cox v Tomat* (1972) 126 CLR 105, 109–10 (Barwick CJ), 114 (Menzies J) ('*Cox*'); *Pearce v Florenca* (1976) 135 CLR 507, 512 (Barwick CJ), 515–20 (Gibbs J), 524 (Mason J), 526 (Jacobs J) ('*Pearce*'); *Robinson v Western Australian Museum* (1977) 138 CLR 283, 294–5 (Barwick CJ), 331 (Mason J) ('*Robinson*').

97 (1937) 56 CLR 337 ('*Broken Hill South*').

98 Ibid 375.

99 (1969) 120 CLR 503. See also *Cox* (1972) 126 CLR 105.

100 (1969) 120 CLR 503, 511 (Kitto J; Barwick CJ agreeing at 506; Menzies J agreeing at 514).

101 (1976) 135 CLR 507, 517–18 (Gibbs J). See also *YBL v DPP (WA)* (2013) 45 WAR 432, 443 [74] (McLure P) ('*YBL*').

102 *Union Steamship* (1988) 166 CLR 1, 14 (The Court); *Port MacDonnell* (1989) 168 CLR 340, 372 (The Court). In *Mobil Oil Australia Pty Ltd v Victoria* ('*Mobil Oil*'), Gaudron, Gummow and Hayne JJ considered that this test should be regarded as settled law: (2002) 211 CLR 1, 34 [48].

103 [1956] AC 331, 352–3 (Lord Keith).

104 Ibid 350–1 (Lord Keith).

105 Ibid. See also *Thompson v Commissioner of Stamp Duties* [1969] 1 AC 320, 335–6 (Lord Pearson).

B *'Peace, Order and Good Government' Provisions in State* Constitution Acts

An unexamined premise of pre-1986 extraterritoriality jurisprudence is that the 'peace, order and good government' provision in a state's *Constitution Act* limits its Parliament's legislative power. For example, the majority in *Clayton* opined that the reference to 'New South Wales' in s 5 of the *NSW Constitution Act* 'doubtless[ly]'[106] implied territorial limits on the State Parliament's legislative power. Assessing the consistency of this jurisprudence with *McCawley* requires, as a first step, considering the nature of those provisions. As the preponderance of case law concerns New South Wales legislation, this article focuses on s 5 of the *NSW Constitution Act* in considering this issue. It is submitted that no manner and form provision has entrenched s 5 in a way that sustains deriving territorial limits from that provision in a manner consistent with *McCawley*.

Section 5 of the *NSW Constitution Act* is not, and has never been, expressly entrenched. That was also the case for the section's predecessor, s 1 of the *Constitution Act 1855* (NSW) ('*1855 NSW Constitution Act*'). Until 1977, no state's *Constitution Act* expressly entrenched its 'peace, order and good government' provision.[107] Indeed, prior to the 1970s, state *Constitution Acts* typically included few entrenched provisions. As originally enacted or scheduled to Imperial enabling legislation, most colonial *Constitution Acts* imposed manner and form requirements for alterations to the 'constitution' of one or both houses of the colony's legislature.[108] Special procedures also applied to a miscellany of other provisions and subjects, ranging from electoral district apportionment[109] to an annual appropriation from consolidated revenue to an Aborigines Protection Board.[110] In some instances, these requirements were effectively manner and form provisions imposed upon colonial legislatures by Imperial legislation.[111]

These manner and form provisions do not provide a basis for reconciling extraterritoriality jurisprudence and the *McCawley* principle. First, Imperial enabling legislation explicitly contemplated colonial legislatures repealing or altering these provisions qualifying their constituent powers.[112] Indeed, in 1857, the New South Wales legislature removed special majority requirements in ss 15 and 36 of the *1855 NSW Constitution Act*, although reservation requirements remained.[113] In 1902, the State Parliament, exercising its powers under s 4 of the *Constitution Statute 1855* (Imp) ('*Constitution Statute*'), repealed the *1855 NSW Constitution Act*, including s 1 and the remnants of ss 15 and 36, and enacted the *NSW Constitution*

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106 (1960) 105 CLR 214, 250 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

107 *Constitution Act Amendment Act 1977* (Qld) s 7 (referendum entrenching s 2 of the *Queensland Constitution Act*).

108 *Queensland Constitution Act* s 9; *Constitution Act 1856* (SA) s 34; *Constitution Act 1855* (Vic) s 60; *WA Constitution Act* s 73.

109 *1855 NSW Constitution Act* s 15.

110 *WA Constitution Act* s 70.

111 *A-G (WA) v Marquet* (2003) 217 CLR 545, 569–70 [65] (Gleeson CJ, Gummow, Hayne and Heydon JJ) ('*Marquet*').

112 *Smith v The Queen* (1994) 181 CLR 338, 352 (Deane J).

113 *Two-Thirds Majority Repeal Act 1857* (NSW) ss 1–2.

Act in its place.[114] Plainly, the provisions of the *1855 NSW Constitution Act* could not subsequently sustain territorial limitations in that jurisdiction. Second, the provisions were, of course, not cited in the line of authority identifying state *Constitution Acts* as the basis for territorial limits on state legislative power. Traditional jurisprudence instead analysed the validity of extraterritorial enactments simply in terms of the relevant state's power to enact that legislation, not as a question as to the manner and form of its enactment.[115] That analysis is problematic given the power expressly conferred on several colonial legislatures to amend their respective *Constitution Acts*, subject to observing limited conditions on that power.[116] Third, it is doubtful these manner and form provisions actually indirectly entrenched provisions referring to a state Parliament's plenary legislative power. Of course, colonial and state legislation did not alter the miscellany of entrenched provisions and subjects referred to above merely because it operated extraterritorially. The concept in other entrenched provisions of the 'constitution' of Parliament and its houses has also repeatedly been construed narrowly.[117] In *Marquet*, Gleeson CJ, Gummow, Hayne and Heydon JJ construed 'constitution' in s 6 of the *Australia Acts* relatively broadly, but their Honours expressly declined to explore the scope of Parliament's 'powers' under the section.[118] Although the concepts of a Parliament's 'powers' and its 'constitution' likely overlap to some extent,[119] it is, at best, unclear whether a Parliament's constituent and lawmaking powers form part of its 'constitution'.[120]

Against that background, territorial limits on New South Wales' legislative power based on an indirect entrenchment of s 5 of the *NSW Constitution Act* would raise constitutional curiosities. Any such limits would have been self-imposed by the State Parliament given the *NSW Constitution Act* is 'clearly a New South Wales statute'.[121] Although not addressing extraterritoriality issues, Twomey suggests s 7A of the *NSW Constitution Act* may indirectly entrench s 5.[122] Under s 7A, any bill for the purpose of altering the Legislative Council's powers requires electoral approval at a referendum before receiving royal assent. The 'powers' referred to in s 7A are the Legislative Council's powers in its lawmaking function as part of the State's legislature.[123] In *Egan v Willis*, Gaudron, Gummow and Hayne JJ explained that s 5 of the *NSW Constitution Act* indicates the Legislative Council's primary function: the exercise, as an element of the State's legislature, of its power to make laws for

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114 See *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 428 (Dixon J) ('*Trethowan*'); *Clayton* (1960) 105 CLR 214, 270 (Menzies J).

115 Cf *McCawley v The King* (1918) 26 CLR 9, 57 (Isaacs and Rich JJ).

116 See, eg, *Western Australia Constitution Act 1890* (Imp) s 5 ('*1890 WA Imperial Act*'); *WA Constitution Act* s 73.

117 See *Clydesdale v Hughes* (1934) 51 CLR 518; *McDonald v Cain* [1953] VLR 411; *Wilsmore* (1982) 149 CLR 79; *A-G (WA) ex rel Burke v Western Australia* [1982] WAR 241.

118 (2003) 217 CLR 545, 572–3 [74]–[76].

119 *Marquet, Clerk of the Parliaments (WA) v A-G (WA)* (2002) 26 WAR 201, 263 [264] (Steytler and Parker JJ).

120 See Congdon and Johnston, above n 50, 309.

121 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 23. See also *Clayton* (1960) 105 CLR 214, 251 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

122 Twomey, above n 121, 312.

123 *Arena v Nader* (1997) 42 NSWLR 427, 436 (The Court), special leave refused in *Arena v Nader* (1997) 71 ALJR 1604.

the peace, welfare and good government of New South Wales.[124] As Twomey notes, an amendment to s 5 of the *NSW Constitution Act* that altered the Legislative Council's powers could breach s 7A.[125]

At first blush, s 7A might therefore be thought to provide a basis consistent with *McCawley* for imposing territorial limits on the New South Wales Parliament's power since its enactment in 1929. However, it is submitted that the section's restrictive procedures do not apply to Bills that, under traditional extraterritoriality jurisprudence, lack a sufficient territorial nexus to New South Wales to be described as for the State's 'peace, welfare and good government' for the purposes of s 5 of the *NSW Constitution Act*. Such a bill would not necessarily have the 'purpose' of altering the Legislative Council's powers so as to fall within s 7A.[126] Moreover, in *Arena v Nader*, the New South Wales Court of Appeal held that legislation *enlarging* the Legislative Council's powers does not 'alter' the Council's powers under s 7A of the *NSW Constitution Act*.[127] 'Altered' was interpreted in light of s 7A's history and its purpose of preventing the Council's dissolution or abolition except in accordance with s 7A.[128] This limits s 7A's application to 'alteration[s] of [the Legislative Council's] powers by their diminution or limitation'.[129] On that basis, an enactment's extraterritorial operation does not, of itself, 'alter' the Council's powers for the purposes of s 7A because such an operation does not diminish or limit those powers.

No other manner and form provision applies (or applied) to New South Wales legislation too remotely connected to the State to be described as a law 'for the peace, welfare and good government of New South Wales' under s 5 of the *NSW Constitution Act*. Absent an applicable manner and form provision, *McCawley* entails that such extraterritorial enactments impliedly amended s 5, overriding any purported territorial limitations in that section inconsistent with the enactments' extraterritorial operation. However, as detailed above, the High Court and Privy Council instead identified s 5 of the *NSW Constitution Act* as the basis for territorial limits on the State Parliament's legislative power. This inconsistency between the *McCawley* principle and extraterritoriality jurisprudence cannot be reconciled by simply differentiating s 5 from other provisions of the *NSW Constitution Act*. In *McCawley* itself, the Privy Council held no special character was attributable to only particular unentrenched sections of state *Constitution Acts*.[130] The inconsistency also exists irrespective of whether territorial limitations derive from the words 'for'[131] and 'New South Wales'[132] or the phrase 'peace, welfare and good government' in s 5 of the *NSW Constitution Act*.

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124 (1998) 195 CLR 424, 454 [49].
125 Twomey, above n 121, 312.
126 Ibid 303–4.
127 (1997) 42 NSWLR 427, 436 (The Court).
128 Ibid.
129 Ibid.
130 [1920] AC 691, 714.
131 Cf Carney, above n 79, 218. See also Ian Killey, '"Peace, Order and Good Government": A Limitation on Legislative Competence' (1989) 17(1) *Melbourne University Law Review* 24, 40–1; Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 283.
132 *Clayton* (1960) 105 CLR 214, 250 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

C *Related Critiques of Extraterritoriality Jurisprudence*

Extraterritoriality jurisprudence has, of course, received extensive criticism.[133] In *Robinson v Western Australian Museum*, Gibbs J characterised the doctrine of extraterritoriality as 'colonial in its origins, vague and uncertain in its nature and often inconvenient in its operation'.[134] The most relevant criticism for present purposes was first raised by Trindade in an article in the *Australian Law Journal* in 1971.[135] Trindade argued that s 5 of the *CLVA* removed, or at least empowered colonial legislatures to remove, territorial limits on colonial legislative power. His primary position was that the full power conferred on every representative colonial legislature under s 5 to make laws respecting its 'powers' impliedly repealed any previous limits on those legislatures' powers either at common law or under previous Imperial legislation.[136] This implied repeal included any territorial limits arising under colonial Constitutions themselves, nearly all of which were enacted before the *CLVA's* passage. In the alternative, Trindade argued s 5 of the *CLVA* empowered colonial legislatures to remove territorial limitations. In view of s 5, a territorial limitation implicit in the phrase 'peace, welfare and good government' in a colonial Constitution would have 'a *precarious existence*'.[137] It could be removed easily by the colonial legislature itself by amending its Constitution to add the words 'and laws having extraterritorial operation' to the section empowering the legislature 'to make laws for the peace, welfare (or order) and good government' of the colony.[138] Trindade suggested such an amendment would withstand any legal challenge given the conferral of constituent power on each colonial legislature and the full power to make laws respecting its powers under s 5 of the *CLVA*.[139]

Justice Gibbs subsequently expressed a similar view in *Pearce*.[140] His Honour noted that because the High Court and Privy Council had so often repeated the traditional explanation of territorial limitations, 'it seem[ed] necessary to regard it as correct'.[141] His Honour recognised, however, that accepting territorial nexus requirements derived from the fact that each colonial legislature was empowered to legislate only for its colony's 'peace, order and good government' raised 'logical difficulties'.[142] This was because:

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133 See, eg, John Salmond, 'The Limitations of Colonial Legislative Power' (1917) 33 *Law Quarterly Review* 117; Daniel O'Connell, 'The Doctrine of Colonial Extra-territorial Legislative Incompetence' (1959) 75 *Law Quarterly Review* 318; Alex Castles, 'Limitations on the Autonomy of the Australian States' [1962] *Public Law* 175, 196–200; O'Connell and Riordan, above n 78, vi.

134 (1977) 138 CLR 283, 303.

135 F A Trindade, 'The Australian States and the Doctrine of Extra-territorial Legislative Incompetence' (1971) 45(5) *Australian Law Journal* 233.

136 Ibid 238–9.

137 Ibid 238 (emphasis added).

138 Ibid 240. In 1972, the New South Wales Law Reform Commission recommended the State request the United Kingdom Parliament to enact legislation, based on the *Statute of Westminster 1931* (Imp), conferring, among other things, 'full power to make laws having extraterritorial operation' upon the State's Parliament: NSW Law Reform Commission, *Working Paper on Legislative Powers* (1972) 103–5, 111–12.

139 Trindade, above n 135, 240.

140 (1976) 135 CLR 507.

141 Ibid 515.

142 Ibid.

> [b]y s 5 of the [*CLVA*] every representative legislature was given 'full power to make laws respecting the constitution, powers and procedure of such legislature' and it is difficult to see why, if the suggested limitation arises from the words of the constitution of a State, that limitation might not simply be removed, nowadays at least, by the State legislature itself amending its constitution and increasing its own powers.[143]

Doubts exist whether s 5 of the *CLVA* empowered colonial legislatures to enact such amendments.[144] Leaving aside that section for the moment, with respect, it is submitted that the gravamen of Trindade and Gibbs J's criticisms is valid, but does not go far enough. In several jurisdictions, an even clearer basis than s 5 of the *CLVA* existed for effecting this 'removal'[145] — provisions such as s 4 of the *Constitution Statute*, which provided that:

> It shall be lawful for the Legislature of New South Wales to make Laws altering or repealing all or any of the Provisions of the [*1855 NSW Constitution Act*], in the same Manner as any other Laws for the good Government of the said Colony, subject, however, to the Conditions imposed by the [*1855 NSW Constitution Act*] on the Alteration of the Provisions thereof in certain Particulars, until and unless the said Conditions shall be repealed or altered by the Authority of the said Legislature.

There are several difficulties with any argument that the 'peace, order and good government' provision in s 1 of the *1855 NSW Constitution Act* stood in a different position to other sections of that Act in relation to amendment or repeal. The first is the breadth of the phrase 'all or any of the Provisions' in s 4 of the *Constitution Statute*. Second, as noted above, in *McCawley* the Privy Council emphatically rejected an argument that a different character could be attributed to particular unentrenched provisions of the *Queensland Constitution Act*. Third, the New South Wales Parliament's express repeal of the *1855 NSW Constitution Act* (including s 1) in 1902 was pursuant to its powers under s 4 of the *Constitution Statute*.[146] Indeed, the High Court in *Clayton* also suggested that the State Parliament could exercise its constituent powers to remove part of s 5 of the *NSW Constitution Act* — the proviso requiring money Bills to originate in the Legislative Assembly.[147] As Kirby J noted in *Mobil Oil*, territorial restrictions must ultimately stem from a more fundamental source than a state's *Constitution Act* since state Parliaments may amend their respective Constitutions.[148]

Analogously, New Zealand's Parliament was granted full constituent power in relation to the *NZ Constitution Act* by the *New Zealand Constitution (Amendment) Act 1947* (UK) ('*1947 NZ Act*') and in 1973 expressly repealed s 53 of the *NZ Constitution Act*. As noted above, that section originally expressed the New Zealand Parliament's legislative power as a power 'to make laws for the peace, order and good government of New Zealand' and was cited in *Ashbury* as the basis for

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143 Ibid.

144 Crommelin, above n 78, 202; H P Lee, 'The *Australia Acts 1986:* Some Legal Conundrums' (1988) 14(4) *Monash University Law Review* 298, 308.

145 See James Thomson, 'The *Australia Acts 1986*: A State Constitutional Law Perspective' (1990) 20(2) *University of Western Australia Law Review* 409, 418 nn 35. Cf Gilbert, above n 81, 41 nn 113.

146 See *Trethowan* (1931) 44 CLR 394, 428 (Dixon J); *Clayton* (1960) 105 CLR 214, 270 (Menzies J).

147 (1960) 105 CLR 214, 250 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

148 (2002) 211 CLR 1, 53–4 [112].

territorial limits on that Parliament's power. In its place, the New Zealand Parliament substituted a new provision expressing its power as 'to make laws having effect in, or in respect of, New Zealand ... and laws having effect outside New Zealand'.[149] The 1973 amendments were directed to removing any residual territorial fetters on the New Zealand Parliament's legislative competency in light of the New Zealand Supreme Court's decision in *R v Fineberg*.[150] Justice Moller accepted that the *1947 NZ Act* empowered New Zealand's Parliament to amend or repeal s 53 of the *NZ Constitution Act*, but noted that Parliament had not yet expressly done so.[151] On that basis, his Honour held that, despite the grant of full constituent power to New Zealand's Parliament in 1947, New Zealand legislation could still be ultra vires based on territorial limitations stemming from s 53 of the *NZ Constitution Act*.[152]

D *Taking the Criticisms a Step Further: A Constitutional Antinomy*

Justice Moller's analysis in *Fineberg* has been criticised for ignoring the effect of implied amendment and repeal.[153] This criticism applies equally to the analyses of both Trindade and Gibbs J, which also address only an *express* amendment or repeal of the phrase 'peace, order and good government' in state *Constitution Acts*. This is plain from Trindade's suggestion of including additional words following that phrase ('and laws having extraterritorial operation').[154] It is also implicit in the notion of territorial limitations having a 'precarious existence'.[155] Analogous reasoning underlies Gibbs J's suggestion that a state Parliament could 'remove' the limitations by 'amending its constitution and increasing its own powers'.[156] These views exhumed *Cooper's* ghost, echoing the distinction Griffith CJ drew between state Parliaments' 'authority to alter or extend the limits of their powers, and … to disregard the existing limits'.[157]

Although basing his primary position on the doctrine of implied repeal and noting this doctrine applied equally to colonial legislatures,[158] Trindade did not extend this reasoning to its logical conclusion in relation to his alternative position. That conclusion is that under the *McCawley* principle an unentrenched provision in a state *Constitution Act* referring to the state Parliament's power to legislate for the state's 'peace, order [or welfare] and good government' does not limit the state's legislative power. Since their enactment, or at least the passage of the *CLVA*, those provisions were of the same nature as s 53 of the *NZ Constitution Act* following the *1947 NZ Act* and not the previous position of that section as considered in *Ashbury*.

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149 *New Zealand Constitution Amendment Act 1973* (NZ) s 2.
150 [1968] NZLR 119 ('*Fineberg*').
151 Ibid 122.
152 Ibid.
153 B V Harris, 'The Law-Making Powers of the New Zealand General Assembly: Time to Think About Change' (1984) 5(4) *Otago Law Review* 565, 567–71; Philip Joseph, 'Foundations of the Constitution' (1989) 4(1) *Canterbury Law Review* 58, 63–7. See also *R v Fineberg (No 2)* [1968] NZLR 443, 449–50 (Turner J).
154 Trindade, above n 135, 240.
155 Ibid 238.
156 *Pearce* (1976) 135 CLR 507, 515.
157 *Cooper* (1907) 4 CLR 1304, 1314.
158 Trindade, above n 135, 238–9.

Consequently, state Parliaments were not required to first 'remove' territorial limits purportedly derived from those provisions before enacting legislation exceeding those 'limits'. On the *McCawley* view of state *Constitution Acts*, the unentrenched nature of the provisions meant no such limits in fact existed.

IV The Present Significance of the Constitutional Antinomy

The constitutional antinomy identified in Part III of this article relates to extraterritoriality jurisprudence preceding the *Australia Acts*. However, this Part explains that the commencement of the *Australia Acts* on 3 March 1986 did not render the antinomy of only historical interest. The antinomy still impacts not only the validity of extraterritorial state legislation enacted before 3 March 1986, but also the constitutional framework applying to such legislation enacted after that date. As noted in the Introduction, it is beyond this article's scope though to attempt to definitively resolve the antinomy. Although that task is an article in itself and must await another day, this Part also notes briefly three alternative paths to address the antinomy.

A *Extraterritorial State Legislation Enacted before the* Australia Acts

The antinomy's most obvious effect is in assessing the validity of extraterritorial state legislation enacted prior to proclamation of the *Australia Acts*. Since the *Australia Acts* are not expressed to operate retrospectively,[159] the starting point for that assessment is the legal position prior to 3 March 1986. Plainly, the antinomy casts a shadow over the law in this respect as it was understood at that time. Although each state has enacted legislation purporting to give the *Australia Acts* a retrospective operation,[160] doubts exist regarding the validity of these provisions.[161] At any rate, the Western Australian provision, s 76A of the *Interpretation Act 1984* (WA), expressly does not operate to invalidate legislation that would otherwise be valid.[162] It is also likely that the equivalent *Interpretation Act* provisions in other jurisdictions do not invalidate otherwise valid legislation.[163] On that basis, if the antinomy renders territorial limitations recognised prior to the *Australia Acts* merely illusory, state laws enacted before 3 March 1986 are not subject to invalidation based on those limitations (although such laws are subject to any limits under the *Commonwealth Constiution* as discussed below). As Mason J noted in *Wacando*, 'it may seem strange ... [to] now enunciate the law in terms diametrically opposed to informed legal thinking'[164] at that time. However, it is both legitimate and necessary

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159 D G Hill, 'Constitutional Power and Extraterritorial Enforcement' (1996) 19(1) *University of New South Wales Law Journal* 45, 54.

160 *Interpretation Act 1987* (NSW) s 34A; *Acts Interpretation Act 1954* (Qld) s 9A; *Acts Interpretation Act 1915* (SA) s 22B; *Acts Interpretation Act 1931* (Tas) s 46C(2); *Interpretation of Legislation Act 1984* (Vic) s 58(1); *Interpretation Act 1984* (WA) s 76A(1).

161 Twomey, above n 121, 288–91. But see *Yougarla v Western Australia* (1998) 146 FLR 128, 145–8 (Murray J).

162 *Interpretation Act 1984* (WA) s 76A(2)(a).

163 Twomey, above n 121, 291.

164 (1981) 148 CLR 1, 21.

to do so if that thinking was erroneous. A matter raising questions regarding the alteration of a state's *Constitution Act* and its legislative competence necessarily falls within federal jurisdiction.[165] Case law addressing those questions cannot be merely prospectively overruled as this would be inconsistent with the exercise of federal judicial power.[166]

B *The Constitutional Antinomy, the* Australia Acts *and the* Commonwealth Constitution

The antinomy also affects both the proper construction of the *Australia Acts* and their relationship with the *Commonwealth Constitution*. Section 2(1) of the *Australia Acts* expressly recognises the power of state Parliaments to enact legislation operating extraterritorially, providing that:

> It is hereby declared and enacted that the legislative powers of [each State Parliament] include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.

Two constructions of the section have been advanced. On one reading, the 'full power' conferred by s 2(1) removed all fetters on the territorial competence of state Parliaments.[167] On the other hand, s 2(1) has been read as simply codifying the limits developed in extraterritoriality jurisprudence preceding the *Australia Acts*.[168] Consistent with that view, the High Court in *Union Steamship* in considering s 2(1) opined that it was appropriate to maintain the need for some territorial limitation in conformity with the terms of the grant of power to each state Parliament to enact laws for its state.[169] The Court considered that the 'new dispensation' in s 2(1) did not affect express or implied territorial limitations of state legislative powers inter se in the *Commonwealth Constitution* and may have simply recognised 'what ha[d] already been achieved in the course of judicial decisions'.[170]

This construction of s 2(1) may require reassessment given the antinomy indicates that what those decisions 'achieved' did not reflect the actual legal position before the *Australia Acts*.[171] The constitutional antinomy arguably supports the view that s 2(1) did not preserve territorial limits on state legislative power. For instance, Moshinsky (now Moshinsky J) considered it 'ironic' if the phrase 'peace, order and good government' in s 2(1) enshrined those limits given Gibbs J and Trindade's arguments that a state Parliament could previously have removed such limitations

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165 *Western Australia v Wilsmore* [1981] WAR 179, 184 (Burt CJ); *Boath v Wyvill* (1989) 85 ALR 621, 634 (Sheppard, Beaumont and Gummow JJ); *McGinty* (1996) 186 CLR 140, 296 (Gummow J). Cf *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648, 654 (Rogers CJ Comm Div).

166 *Ha v New South Wales* (1997) 189 CLR 465, 503–4 (Brennan CJ, McHugh, Gummow and Kirby JJ).

167 Mark Moshinsky, 'State Extraterritorial Legislation and the *Australia Acts 1986*' (1987) 61(12) *Australian Law Journal* 779, 780.

168 Gilbert, above n 81, 30–5; Anne Twomey, 'The Effect of the *Australia Acts* on the Western Australian Constitution' (2013) 36(2) *University of Western Australia Law Review* 273, 273–4.

169 (1988) 166 CLR 1, 14 (The Court).

170 Ibid.

171 Cf *Wacando* (1981) 148 CLR 1, 21 (Mason J); *Bonser v La Macchia* (1969) 122 CLR 177, 225 (Windeyer J).

by expressly amending that phrase in its own *Constitution Act*.[172] Following the *Australia Acts*, no state alone could amend that phrase in s 2(1) of the *Australia Acts*. Such an amendment could be effected only pursuant to s 128 of the *Commonwealth Constitution* or by Commonwealth legislation passed at the request, or with the concurrence, of all state Parliaments.[173] Thus, the states would be in a 'worse position' than prior to 1986 if s 2(1) preserved territorial limitations.[174] Of course, this reasoning applies even more forcefully if the *McCawley* principle entails there were no such limitations under state *Constitution Acts* prior to the *Australia Acts*.

Colonial Parliaments' extraterritorial legislative powers may also affect the operation of s 2 of the *Australia Acts* given that provision is expressly subject to the *Commonwealth Constitution*.[175] Under s 107 of the *Commonwealth Constitution*, every power of a Parliament of a colony that became a state continued as at Federation unless exclusively vested in the Commonwealth Parliament or withdrawn from the State Parliament. Gilbert notes that as a result of s 107, if Trindade and Gibbs J's views on s 5 of the *CLVA* were correct, extraterritorial legislative powers conferred on the Australian colonies by that Act might have 'survived' the *Australia Acts*.[176] Of course, the antinomy may entail that there is a further basis upon which Colonial Parliaments might have exercised unfettered extraterritorial powers as at Federation. Section 2(1) of the *Australia Act 1986* (Cth) would be beyond the Commonwealth Parliament's power if it purported to withdraw a legislative power that s 107 confers on or confirms to state Parliaments.[177] That is so even though the *Australia Act 1986* (Cth) was enacted pursuant to a reference of power from the state Parliaments under s 51(xxxviii) of the *Commonwealth Constitution*.[178]

The antinomy may also affect the scope of s 51(xxxviii) of the *Commonwealth Constitution* itself. That subsection confers legislative power on the Commonwealth Parliament with respect to the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all states directly concerned, of any power that at Federation only the United Kingdom Parliament or the Federal Council of Australasia could exercise. In *Port MacDonnell*, the High Court held the powers falling within the subsection are those legislative powers 'which, before federation, could not be exercised by the legislatures of the former Australian colonies'.[179] Legislative powers that were exercisable by colonial

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[172] Moshinsky, above n 167, 782; Mark Moshinsky, 'State Extraterritorial Legislation: Further Developments' (1990) 64(1) *Australian Law Journal* 42, 43. See also Trindade, above n 135. Cf Lee, above n 144, 308.

[173] *Australia Acts* s 15(1).

[174] Moshinsky, above n 167, 782. See also Thomson, above n 145, 418; Goldsworthy, above n 55, 425. Cf *Commissioner for Railways (Qld) v Peters* (1991) 24 NSWLR 407, 424 (Kirby P).

[175] *Australia Acts*, s 5(a). See *Union Steamship* (1988) 166 CLR 1, 14 (The Court).

[176] Gilbert, above n 81, 41 nn 114.

[177] *Western Australia v Commonwealth* (1995) 183 CLR 373, 464 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*').

[178] See generally *Sue v Hill* (1999) 199 CLR 462, 490–1 [61]–[62] (Gleeson CJ, Gummow and Hayne JJ); *Marquet* (2003) 217 CLR 545, 570–1 [67] (Gleeson CJ, Gummow, Hayne and Heydon JJ). Cf *Port MacDonnell* (1989) 168 CLR 340, 381 (The Court). Section 107 did not protect state legislative and constituent powers from legislation enacted by the United Kingdom Parliament, including the *Australia Act 1986* (UK): *McGinty* (1996) 186 CLR 140, 172 (Brennan CJ).

[179] (1989) 168 CLR 340, 378 (The Court).

legislatures are, therefore, beyond s 51(xxxviii)'s scope.[180] The antinomy potentially affects the scope of colonial extraterritorial legislative power and, in turn, Commonwealth legislative power under s 51(xxxviii). Section 51(xxix) of the *Commonwealth Constitution* may also be impacted. Territorial nexus requirements for state legislation have been cited to support construing the external affairs power as extending to legislation in respect of places, persons, matters or things physically external to Australia.[181] Given those nexus requirements, the High Court has held that the 'geographical externality' limb of the external affairs power ensures no 'gap'[182] or 'lacuna'[183] exists in the combined legislative powers of the Australian Parliaments.

C *Territorial Limits on State Legislative Power under the* Commonwealth Constitution

McCawley does not affect any limitations on state legislative power under the *Commonwealth Constitution*. Accordingly, the antinomy draws focus to judicial suggestions of territorial limitations derived from the *Commonwealth Constitution's* federal structure. Those limitations have added significance because the issues the antinomy raises for other sources of territorial limitations are not applicable to the *Commonwealth Constitution*. This does not mean though that the antinomy does not impact extraterritorially jurisprudence. As explained below, the *Commonwealth Constitution* is not a panacea for all issues the antinomy raises. Instead, the antinomy highlights the importance of identifying the nature and extent of the limits under the *Commonwealth Constitution*, separately from any other ostensible sources for territorial limitations.[184]

In *Union Steamship*, the High Court referred obliquely, and without further elaboration, to territorial limitations on state legislative power under the *Commonwealth Constitution*.[185] Since *Union Steamship*, these limits have remained 'somewhat vague and ill-defined',[186] as the High Court has not definitively addressed their nature, scope or interaction with the real connexion test and associated jurisprudence. The limitations were not referred to in *Port MacDonnell*,[187] but were revisited briefly by Brennan CJ, Dawson, Toohey and Gaudron JJ in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*.[188] Their Honours opined, obiter dictum, that *Union Steamship* recognised that: 'No doubt there remain

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180 Ibid 380 (The Court).

181 *New South Wales v Commonwealth* (1975) 135 CLR 337, 497–8 (Jacobs J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 529–30 (Mason CJ), 602–3 (Deane J), 638 (Dawson J) ('*Polyukhovich*'); *XYZ v Commonwealth* (2006) 227 CLR 532, 542 [15]–[16] (Gleeson CJ), 549–50 [40] (Gummow, Hayne and Crennan JJ) ('*XYZ*').

182 *New South Wales v Commonwealth* (1975) 135 CLR 337, 498 (Jacobs J); *Polyukhovich* (1991) 172 CLR 501, 602–3 (Deane J), 638 (Dawson J); *XYZ* (2006) 227 CLR 532, 550 [41] (Gummow, Hayne and Crennan JJ), 565 [93] (Kirby J).

183 *Polyukhovich* (1991) 172 CLR 501, 602–3 (Deane J).

184 See *Mobil Oil* (2002) 211 CLR 1, 53–4 [112] (Kirby J).

185 (1988) 166 CLR 1, 14 (The Court).

186 *Mobil Oil* (2002) 211 CLR 1, 24 [13] (Gleeson CJ).

187 (1989) 168 CLR 340.

188 (1996) 189 CLR 253.

territorial limitations upon the legislative powers of the States which arise from the federal structure of which each State is a part.'[189]

Justices Gaudron, Gummow and Hayne in *Mobil Oil* subsequently cited this passage in noting that territorial limitations 'perhaps' stemmed from the *Commonwealth Constitution's* federal structure.[190] Despite this measured language, their Honours' reasons have been interpreted as accepting territorial limitations based on federal structure.[191] *Mobil Oil* has also been subject to differing views regarding whether a majority recognised limitations of that nature.[192] To the extent such limitations were recognised in *Mobil Oil*, the majority split between whether the limits differed from,[193] or were coextensive with,[194] the real connexion test. That test was subsequently applied, without reference to federal structure, in *APLA Ltd v Legal Services Commissioner (NSW)*.[195] Most recently, Gleeson CJ, Gummow, Kirby and Hayne JJ in *Sweedman v Transport Accidents Commission* reaffirmed the real connexion test as a corollary of the general proposition that extraterritorial state laws are not necessarily antithetical to federalism.[196] However, their Honours noted that general proposition was subject to a qualified caveat that 'in a federal system one does not expect to find one government legislating for another'.[197]

Territorial limitations under the *Commonwealth Constitution* are not a panacea though for all issues the antinomy raises with extraterritoriality jurisprudence. Most obviously, those limitations cannot explain the colonial origins of territorial limitations or address the potential consequences identified above if the antinomy entails that colonial legislative power was territorially unfettered prior to Federation. Equally, simply pointing to textually-based limits under colonial and state *Constitution Acts* does not properly explain why territorial limitations are 'logically or practically necessary'[198] for preserving the integrity of the constitutional federal structure.[199] The extent of a state's legislative power under its *Constitution Act* is a 'different question' to the extent of any implied limitations derived from the *Commonwealth Constitution* 'controlling the exercise of that power'.[200] Yet, the *Mobil Oil* plurality seemingly regarded the real connexion test as properly articulating any territorial limitations existing under the *Commonwealth*

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189 Ibid 271.

190 (2002) 211 CLR 1, 33–4 [47].

191 Perry Herzfeld, 'Constitutional Limitations on State Choice of Law Statutes' (2005) 16(3) *Public Law Review* 188, 196.

192 Compare ibid 195–6; *Julia Farr Services Inc v Hayes* [2003] NSWCA 37 (28 April 2003) [56] (Giles JA); Kathleen Foley, 'The *Australian Constitution's* Influence on the Common Law' (2003) 31(1) *Federal Law Review* 131, 158.

193 (2002) 211 CLR 1, 24–6 [13]–[17] (Gleeson CJ), 53–4 [112], 63–4 [138]–[141] (Kirby J).

194 Ibid 33–4 [47]–[48] (Gaudron, Gummow and Hayne JJ).

195 (2005) 224 CLR 322, 354 [40] (Gleeson CJ and Heydon J), 388–9 [154]–[159] (Gummow J), 449 [375] (Hayne J), 482–3 [465]–[466] (Callinan J) ('*APLA*').

196 (2006) 226 CLR 362, 398 [18] ('*Sweedman*'). See also *Mobil Oil* (2002) 211 CLR 1, 26 [16] (Gleeson CJ); *APLA* (2005) 224 CLR 322, 389 [158] (Gummow J).

197 *Sweedman* (2006) 226 CLR 362, 399–400 [22] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

198 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty* (1996) 186 CLR 140, 168–9 (Brennan CJ), 230–2, 234 (McHugh J); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ) ('*Durham Holdings*').

199 Herzfeld, above n 191, 194. Cf *Kable* (1996) 189 CLR 51, 71–2 (Dawson J).

200 *Mobil Oil* (2002) 211 CLR 1, 54 [113] (Kirby J).

Constitution. Intuitively, territorial limitations derived from the constitutional federal structure are likely to differ in nature from limits implied in 'peace, order and good government' provisions in state *Constitution Acts*.[201] Limitations derived from federal structure are 'difficult, if not impossible' to express other than in 'negative terms which are cast at a high level of abstraction'.[202] The antinomy's impact on the real connexion test's jurisprudential foundations underscores the need to consider afresh the content of territorial limitations derived from the *Commonwealth Constitution*'s federal structure.

A similar reassessment is required for the geographical scope of territorial limitations on state legislative power. Federal structure alone may not sustain all limits placed on state Parliaments' territorial competence under traditional extraterritoriality jurisprudence. In particular, federal structure is a problematic basis for territorial limitations applying to state legislation purportedly operating on extraterritorial persons, things or events beyond the low-water mark ('external territorial limits').[203] Judicial analysis of territorial limitations based on federal structure has focused on state legislation purportedly operating in respect of persons, things or events in another state or in a territory ('internal territorial limits'). For example, in *Mobil Oil*, Kirby J held that implied limitations derived from the *Commonwealth Constitution*'s federal structure prevented the 'legislative chaos' that could otherwise result if 'overreaching' state legislation 'purported to impose obligations upon persons resident *in other States*, by reference to events occurring *in such other States*'.[204] Analogously, prior to *Union Steamship*, Gibbs J identified the modern rationale for territorial limitations in the Australian Federation as preventing or mitigating the incidence of conflicting state legislation by controlling the operation of state legislation 'within the territory of another [state]'.[205] However, traditional extraterritoriality jurisprudence has applied the same test, although perhaps not with equal rigour, for external territorial limits and internal territorial limits. That reflects the real connexion test's textual basis in 'peace, order and good government' provisions in state *Constitution Acts*. Conversely, territorial limitations implied from the *Commonwealth Constitution*'s federal structure validly extend only so far as necessary to preserve that structure's integrity.[206] Whether, and what, limitations are necessary in this respect may vary depending on whether the relevant extraterritorial persons, things or events are in another state or territory or are outside Australia.[207] That is, the federal structure does not necessarily require both, or coextensive, external territorial limits and internal territorial limits. For example, different tests could apply for external territorial limits and internal territorial limits.[208]

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201 Moshinsky, above n 172, 49; Herzfeld, above n 191, 197–8.

202 *Austin v Commonwealth* (2003) 215 CLR 185, 246 [115] (Gaudron, Gummow and Hayne JJ).

203 Moshinsky, above n 167, 780.

204 (2002) 211 CLR 1, 51 [106] (emphasis added). His Honour held that legislation purporting to regulate traffic, or expropriate land, in another state attracted this 'implied constitutional restriction': at 63–4 [138]. See also *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, 458–9 [143] (Kirby J) ('*Schultz*').

205 *Robinson* (1977) 138 CLR 283, 303–4 (Gibbs J).

206 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (The Court).

207 Cf *Polyukhovich* (1991) 172 CLR 501, 638 (Dawson J); *XYZ* (2006) 227 CLR 532, 543 [18] (Gleeson CJ), 549–50 [39]–[40] (Gummow, Hayne and Crennan JJ).

208 Brian Opeskin, 'Constitutional Dimensions of Choice of Law in Australia' (1992) 3 *Public Law Review* 152, 164; Herzfeld, above n 191, 199; Carney, above n 79, 225, 227.

Characterising external territorial limits as a necessary implication from the constitutional federal structure is problematic given ss 51(xxix) and 109 of the *Commonwealth Constitution*. Both those sections inform what implications are necessary to preserve that structure.[209] As a result of those two sections of the *Commonwealth Constitution*, external territorial limits apply only to state legislation intended to operate in respect of geographical areas where the Commonwealth Parliament has paramount power. In *Robinson*, Gibbs J noted territorial limitations achieve 'no useful purpose' in geographical areas over which 'another but paramount legislature' has power.[210] The paramount legislature's enactments necessarily prevail over conflicting state legislation. In *Pearce*, his Honour noted the Commonwealth Parliament could legislate to render invalid state legislation it considered infringed a rule of international law relating to offshore waters.[211] The prevailing construction of the external affairs power extends the Commonwealth Parliament's paramountcy in this respect beyond offshore waters. Based on that construction, at least from the Commonwealth's perspective,[212] external territorial limits on state legislative power are not necessary.[213]

The potential for conflicting legislation of different states to operate in respect of the same offshore territorial area also does not necessarily entail that external territorial limits are required to preserve the constitutional federal structure's integrity. This potential contingency may provide a policy justification for some external territorial limits,[214] but that does not mean that those limits are necessary in the relevant sense,[215] particularly given the High Court's jurisdiction to resolve conflicts between legislation of different states.[216] In this respect, the High Court in *Port MacDonnell* indicated that state legislation operating in an offshore fishery and satisfying the real connexion test may still:

> fail in its intended effect … if the extra-territorial operation claimed by it … exceeds what might properly be claimed having regard to the legislative powers which adjoining States might exercise over the same fishery.[217]

This passage seemingly refers to the problem of conflicting state laws,[218] not any territorial limitation distinct from the real connexion test. The Court subsequently noted the constitutional difficulties arising if two states with the requisite connection both enacted legislation to manage a fishery.[219] Their Honours explained, though, that if a state law does not directly operate 'in the territory of another', these difficulties arise only if two or more states enact legislation affecting the same persons, transactions or relationships.[220]

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209 *Mobil Oil* (2002) 211 CLR 1, 25 [15] (Gleeson CJ).
210 (1977) 138 CLR 283, 304.
211 (1976) 135 CLR 507, 519.
212 Ibid 519–20 (Gibbs J).
213 Circularity issues arise though as the prevailing construction itself draws on external territorial limits.
214 See *Robinson* (1977) 138 CLR 283, 303–4 (Gibbs J).
215 *APLA* (2005) 224 CLR 322, 352 [33] (Gleeson CJ and Heydon J), 453 [389], 454 [393] (Hayne J).
216 *Commonwealth Constitution* ss 74, 75(iv). See generally *Sweedman* (2006) 226 CLR 362, 405–7 [44]–[52] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
217 (1989) 168 CLR 340, 373 (The Court).
218 Ibid 374 (The Court).
219 Ibid.
220 Ibid.

There are additional difficulties basing external territorial limits applying beyond offshore waters on federal structure. The limited judicial analysis of implications from federal structure directed to internal territorial limits is inapposite. That analysis has focused on how territorial limitations ensure that each state's legislative power is compatible with other states' legislative powers.[221] However, for some persons, things or events beyond offshore waters, no state may have even a remote or general connection[222] or be able to 'properly'[223] claim legislative power vis-à-vis the other states. Any limitations in this respect based on federal structure are also not sustained by simply repeating the traditional, textually-based, position that state legislation purportedly regulating those matters is invalid because it is not for the state's 'peace, order and good government'.[224] Of course, hypothetical examples can be raised, absent external territorial limits, of states legislating 'gratuitously in respect of foreign persons in foreign territory'.[225] However, gratuitous extraterritorial operation is not a ground for invalidating Commonwealth legislation.[226] In that context, it is a question for the Commonwealth Parliament whether legislation otherwise within power is for the Commonwealth's 'peace, order and good government'.[227] The difference between that approach and the states' position under traditional extraterritoriality jurisprudence has been noted frequently.[228] The antinomy further exposes the starkness of this distinction. Territorial limitations have been derived from the phrase 'peace, order and good government' in *unentrenched* provisions in state *Constitution Acts*, but not from the *entrenched* s 51 of the *Commonwealth Constitution*.

D *The Constitutional Antinomy's Present Impact on State* Constitution Acts

Following *Union Steamship*, 'peace, order and good government' provisions in state *Constitution Acts* have still been recognised as *a* source of territorial limitations, alongside limits under the *Australia Acts* and *Commonwealth Constitution*. In *Mobil Oil*, Gaudron, Gummow and Hayne JJ held that legislation regulating the procedure for dealing with claims made, or that could be made, against a defendant amenable to the Victorian Supreme Court's jurisdiction was a law 'in and for' Victoria for the purposes of s 16 of the *Constitution Act 1975* (Vic).[229] Intermediate appellate courts

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221 *Union Steamship* (1988) 166 CLR 1, 14 (The Court); *Mobil Oil* (2002) 211 CLR 1, 50 [104] (Kirby J); *Schultz* (2004) 221 CLR 400, 458 [142] (Kirby J).

222 *XYZ* (2006) 227 CLR 532, 542 [16] (Gleeson CJ).

223 *Port MacDonnell* (1989) 168 CLR 340, 373 (The Court).

224 See *Trustees Executors & Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220, 235–6 (Evatt J).

225 *Foster* (1959) 103 CLR 256, 306 (Windeyer J).

226 Ibid.

227 Ibid, 308 (Windeyer J); *Polyukhovich* (1991) 172 CLR 501, 529 (Mason CJ), 605–6 (Deane J), 636 (Dawson J), 695 (Gaudron J), 714 (McHugh J).

228 *Pearce* (1976) 135 CLR 507, 515–16 (Gibbs J); *Polyukhovich* (1991) 172 CLR 501, 635–6 (Dawson J); Moshinsky, above n 167, 782; Moshinsky, above n 172, 43; Herzfeld, above n 191, 192.

229 (2002) 211 CLR 1, 38 [61]. See also Gleeson CJ's reasons: at 23 [10]. See further, *Lipohar v The Queen* (1999) 200 CLR 485, 553 [170] (Kirby J).

have also cited state *Constitution Acts* as a continuing source of territorial limitations.[230]

For states with entrenched 'peace, order and good government' provisions, this raises additional questions once extraterritoriality issues are viewed through a manner and form lens in light of the constitutional antinomy. For example, does a source of legal efficacy bind the Parliament to observe the relevant manner and form requirements in enacting legislation operating extraterritorially? In particular, is such legislation properly characterised as respecting Parliament's 'constitution, powers or procedure' for the purposes of s 6 of the *Australia Acts*? Broader consequences might flow if an Act contains provisions exceeding territorial limitations implied in an entrenched 'peace, order and good government' provision and is enacted without observing a valid and binding manner and form provision. There is a risk that in those circumstances the *entire* Act, including constitutionally unobjectionable provisions, will be of no force or effect.[231]

The constitutional antinomy also has a distinct significance for states with unentrenched 'peace, order and good government' provisions, such as New South Wales. This is because *McCawley* equally precludes deriving non-territorial limits on state legislative power from such provisions. Of course, as a matter of statutory construction, the High Court has rejected arguments the words 'Legislature'[232] and 'laws'[233] and the phrase 'peace, welfare and good government'[234] in s 5 of the *NSW Constitution Act* support such implied limitations. As Dawson J explained in *Kable*, 'no non-territorial restraints upon parliamentary supremacy arise from the nature of a power to make laws for peace, order (or welfare), and good government'.[235] However, the *McCawley* principle constitutes a further and more fundamental hurdle to those rejected arguments beyond simply the proper construction of s 5 of the *NSW Constitution Act*.

E *Addressing the Constitutional Antinomy*

Given its present impact, the antinomy cannot be simply quarantined within constitutional law jurisprudence as a historical anomaly. Coherence in the law requires that the antinomy be addressed. This Part notes three alternative reconfigurations of extraterritoriality jurisprudence and/or the *McCawley* principle that might resolve the incongruence between these two elements of state constitutional law.

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230 See, eg, *YBL* (2013) 45 WAR 432, 442 [68]–[69]; *Commissioner of State Revenue v OZ Minerals Ltd* (2013) 46 WAR 156, 199 [242]; *Babington v Commonwealth* (2016) 240 FCR 495, 504 [41], 505 [47] (The Court).

231 See Twomey, above n 121, 287–8. Cf Carney, above n 79, 195.

232 *Clayton* (1960) 105 CLR 214, 251 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

233 *Kable* (1996) 189 CLR 51, 64 (Brennan CJ), 76–7 (Dawson J), 109 (McHugh J agreeing with Brennan CJ and Dawson J on this point); *Duncan v New South Wales* (2015) 255 CLR 388, 406–7 [38]–[40] (The Court).

234 *Union Steamship* (1988) 166 CLR 1, 10 (The Court). See also *Durham Holdings* (2001) 205 CLR 399, 408 [9], 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ), 424–5 [55] (Kirby J). *Contra BLF Case* (1986) 7 NSWLR 372, 382–5, 387 (Street CJ), 421–2 (Priestley JA).

235 (1996) 189 CLR 51, 76.

The first alternative is reconsidering *McCawley's* primacy and a concomitant reassessment of the nature of state *Constitution Acts*. *McCawley* has not escaped scrutiny. Lord Hope in *R (Jackson) v Attorney-General* considered that the British Constitution was no longer, if it ever had been, uncontrolled in the sense used in *McCawley*.[236] Similarly, Chief Justice Spigelman, speaking extra-curially, doubted *McCawley* would be decided the same way today.[237] Others have expressed 'hope that one day the High Court will return to the sensible and logical doctrine that it had developed in *Cooper*'.[238] A very similar doctrine to *Cooper* was posited by the English High Court in *Thoburn v Sunderland City Council*.[239] Lord Justice Laws suggested recognising a statutory 'hierarchy', with legislation classified as either 'ordinary' or 'constitutional'.[240] Within the hierarchy, constitutional statutes have a 'special status' and are not, unlike ordinary statutes, subject to implied amendment or repeal. Instead, the *Thoburn* test for amendment or repeal of a 'constitutional' statute asks whether Parliament's '*actual* — not imputed, constructive or presumed — intention was to effect the repeal or abrogation' and is not satisfied by ordinary implied repeal principles.[241] In *R (Miller) v Secretary of State for Exiting the European Union*, the United Kingdom Supreme Court adopted Laws LJ's analysis in *Thoburn* in relation to the *European Communities Act 1972* (UK).[242] If *Thoburn* applies in Australia instead of *McCawley*, unentrenched parts of state *Constitution Acts* are likely to be immune from implied amendment or repeal.[243] However, the analysis in *Thoburn* is questionable. Although *Thoburn* might operate analogously to the principle of legality,[244] the notion of a judicial determination of Parliament's 'actual' intention distinct from its imputed, constructive or presumed intention is inconsistent with the judicial function in Australia's constitutional system.[245] In that respect, it is significant that, as noted above, matters regarding the alteration of state *Constitution Acts* attract federal jurisdiction.[246] An intermediate position is to recognise extraterritoriality jurisprudence and associated 'peace, order and good government' provisions as an exception to the *McCawley* principle. As Gillooly notes, '[t]wo apparently conflicting legal principles might be reconciled by characterising one as a general principle and the other as an exception to it'.[247] Of course, identifying a principled basis for an ad hoc exception is problematic, especially given the Privy Council's unqualified enunciation of the *McCawley* principle.

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236 [2006] 1 AC 262, 303 [104].

237 Chief Justice James Spigelman, 'The Application of Quasi-Constitutional Laws' (Speech delivered at The McPherson Lecture Series, University of Queensland, 11 March 2008).

238 Pyke, above n 32, 123.

239 [2003] QB 151 ('*Thoburn*').

240 Ibid 186 [62].

241 Ibid 186–7 [63] (Laws LJ) (emphasis in original).

242 [2017] 1 All ER 593, 620 [66]–[67] (Lord Neuberger P, Lady Hale DP, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).

243 Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25(1) *Adelaide Law Review* 103, 120–1.

244 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 217–18 [55] (French CJ).

245 See George Williams and Daniel Reynolds, 'The *Racial Discrimination Act* and Inconsistency under the *Australian Constitution*' (2015) 36(1) *Adelaide Law Review* 241, 250 nn 49.

246 *Western Australia v Wilsmore* [1981] WAR 179, 184 (Burt CJ); *McGinty* (1996) 186 CLR 140, 296 (Gummow J).

247 Gillooly, above n 1, 47.

A second alternative is that colonial legislatures were not subject to territorial limitations on their legislative power and state legislatures are not subject to such limits except under the *Commonwealth Constitution* and, perhaps since 1986, the *Australia Acts*. In *Union Steamship*, the High Court rejected a submission by New South Wales' Solicitor General that no territorial restraints applied to that State's Parliament.[248] As noted above, Trindade also advanced such an argument as his primary position based on the full power conferred by s 5 of the *CLVA* on every representative colonial legislature to enact legislation respecting its 'powers'. He argued the section impliedly repealed any limits, including territorial limitations, on colonial legislative power at common law or under previous Imperial legislation. Similarly, in *Trethowan*,[249] Dixon J advanced a relatively broad construction of the term 'powers' in s 5 of *CLVA*, holding that a colonial legislature's

> power to make laws respecting its own powers would naturally be understood to mean that it might deal with its own legislative authority. Under such a power a legislature, whose authority was limited in respect of subject matter or restrained by constitutional checks or safeguards, might enlarge the limits or diminish or remove the restraints.[250]

The term 'powers' in s 5 of the *CLVA* must though be 'read with care'.[251] Lee also queried Trindade's view on the section on the basis that the phrase 'in respect to the Colony under its jurisdiction', qualifying the powers conferred under s 5, might have inhibited a colonial legislature freeing itself of territorial limitations on its power.[252] However, Trindade considered that phrase was simply an extended form of 'respectively' and did not preserve those limitations.[253] At any rate, as Isaacs and Rich JJ noted in *McCawley*, s 5 of the *CLVA* must be read consistently with s 2 of that Act, which rendered a colony's laws void and inoperative to the extent of any repugnancy with applicable Imperial legislation.[254] That presupposes that Imperial legislation continued to limit colonial legislatures' powers despite the declaration that every representative colonial legislature had power to make laws respecting its 'powers'. Irrespective of how s 5 of the *CLVA* is construed though, unless *McCawley* is reconsidered or qualified, no territorial limitations arose from unentrenched 'peace, order and good government' provisions in state *Constitution Acts*. That raises the question whether there was any other legal basis for those limitations.

This leads to the third potential reconfiguration: recognising an alternative source for territorial limits on colonial and state legislative power consistent with the *McCawley* principle and broader constitutional framework. As noted above, the *Commonwealth Constitution* is such a source for state legislative power, but the nature and extent of territorial limitations derived from that source may well differ from those assumed in previous extraterritoriality jurisprudence. In addition, the *Commonwealth Constitution* was plainly not a basis for territorial limits on colonial

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248 (1988) 166 CLR 1, 13–14 (The Court).
249 (1931) 44 CLR 394.
250 Ibid 430.
251 Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2nd ed, 2007) 344.
252 Lee, above n 144, 308.
253 Trindade, above n 135, 238. Cf *Gould v Brown* (1998) 193 CLR 346, 376 [12] (Brennan CJ and Toohey J).
254 (1918) 26 CLR 9, 50.

legislative power. For New South Wales, one potential pre-Federation source of those limits in a superior law is s 29 of the *Australian Constitutions Act 1842* (Imp) ('*1842 Imperial Act*'), which relevantly provided that

> the governor of the said colony of New South Wales with the advice and consent of the said legislative council shall have authority to make laws for the peace welfare and good government of the said colony.

Section 14 of the *Australian Constitutions Act 1850* (Imp) ('*1850 Imperial Act*') granted equivalent powers to the legislatures of Victoria, Van Diemen's Land, South Australia and Western Australia.

The reference to 'peace, welfare and good government' in these provisions of Imperial legislation seemingly offers a neat way to reconcile extraterritoriality jurisprudence and the *McCawley* principle. However, the difficulty is that the constitutional history of the Australian colonies varied after this point.[255] While the *1850 Imperial Act* underpinned the local *Constitution Acts* in South Australia[256] and Tasmania,[257] the position in New South Wales, Victoria and Western Australia was different due to bespoke Imperial legislation applying to those colonies. Focusing again on New South Wales, in 1855 the United Kingdom Parliament passed the *Constitution Statute*, which incorporated the *1855 NSW Constitution Act* as a schedule. Section 2 of the *Constitution Statute* repealed so much and such parts of the *1842 Imperial Act* and *1850 Imperial Act* as related to New South Wales and were repugnant to the scheduled *1855 NSW Constitution Act*.[258] This reversed the usual notion of repugnancy by giving primacy to local over Imperial laws.[259]

The *Constitution Statute*'s effect is critical to whether any Imperial legislation imposed territorial limitations on the colony's legislative power. For example, did the *Constitution Statute* and *1855 NSW Constitution Act* repeal s 29 of the *1842 Imperial Act*? If so, did the *Constitution Statute* itself limit the legislature's territorial competence? In *Attorney-General v Australian Agricultural Company*, Jordan CJ considered that s 1 of the *1855 NSW Constitution Act* did not prevent the colony's legislature assuming all powers conferred by s 29 of the *1842 Imperial Act*.[260] On that basis, his Honour considered s 5 of the *NSW Constitution Act* 'correctly defines the scope of the Legislative power with which the Legislature of New South Wales has been invested by the Imperial Parliament'.[261] If s 2 of the *Constitution Statute* did not repeal s 29 of the *1842 Imperial Act*, that latter provision may, subject to any implied repeal effected by the *CLVA*, resolve the antinomy at least for New South Wales. On the other hand, Sir Henry Jenks considered that s 2 of the *Constitution Statute* repealed provisions of the *1842 Imperial Act* conferring statutory authority on the colony's Legislative Council to make laws because of the express conferral of a 'new' legislative power on the colony's legislature in s 1 of

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255 See generally Sir Henry Jenks, *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press, 1902) 286.
256 *Port MacDonnell* (1989) 168 CLR 340, 371 (The Court).
257 *Re Scully; Re an Application for a Hotel Licence* (1937) 32 Tas LR 3, 36–7 (Clark J).
258 See also *1890 WA Imperial Act* s 2.
259 *Yougarla* (2001) 207 CLR 344, 354 [17] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
260 (1934) 34 SR (NSW) 571, 575–6.
261 Ibid 576.

the *1855 NSW Constitution Act*.[262] Sir Henry's view is supported by the fact that under s 1 of the *1855 NSW Constitution Act* two legislative chambers, a Council and Assembly, were established 'in the place of' the previous Legislative Council. Unlike under the *1842 Imperial Act*, the Governor was no longer authorised to legislate for the peace, welfare and good government of New South Wales with the advice and consent of only the colony's Legislative Council — the Legislative Assembly's advice and consent were also required.

The *Constitution Statute* itself contained no equivalent provision to s 29 of the *1842 Imperial Act* or s 14 of the *1850 Imperial Act*. The closest provision was s 4 of the *Constitution Statute*. However, that section assumed the existence of, rather than conferred, a power on the colony's legislature to legislate for the good government of the colony. The power to enact such laws was instead expressed in s 1 of the *1855 NSW Constitution Act*. Although this section underpinned the assumption in s 4 of the *Constitution Statute*, the section was subject to express or implied amendment or repeal by the colonial legislature as a result of s 4 of the *Constitution Statute* itself. On Sir Henry's view, the key to resolving the antinomy is, perhaps, whether the assumption in s 4 of the *Constitution Statute* was a sufficient basis for territorial limits on the colony's legislative power. That question is complicated if after the repeal of the remnants of the *1855 NSW Constitution Act* in 1902 s 4 of the *Constitution Statute* 'ceased to have any further operation'[263] or the power conferred by the section was 'exhausted' or 'spent'.[264] Further difficulties arise if Trindade's construction of s 5 of the *CLVA* is correct and that section impliedly repealed any territorial limitations arising as a result of the assumption in s 4 of the *Constitution Statute*. Those difficulties are compounded when it is recognised that in Western Australia the 'chronology is reversed':[265] the *1890 WA Imperial Act* postdates the *CLVA*. Whether the *1890 WA Imperial Act* itself repealed s 14 of the *1850 Imperial Act* in its application to Western Australia for repugnancy with s 2 of the *WA Constitution Act* is also a question the subject of different views.[266] As is apparent from even a brief overview of these issues, what is ultimately required to identify an alternative (and coherent) source or sources for territorial limitations across multiple colonial jurisdictions is to enter what Kirby J in *Yougarla* appositely characterised as the 'labyrinth'[267] of 19th century Imperial legislation applying to the Australian colonies.

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262 Jenks, above n 255, 280.

263 *Clayton* (1960) 105 CLR 214, 270 (Menzies J).

264 *Trethowan* (1931) 44 CLR 394, 428–9 (Dixon J). Cf *A-G (NSW) v Trethowan* [1932] AC 526, 539 (Viscount Sankey LC).

265 Sarah Murray and James Thomson, 'A Western Australian Constitution? Documents, Difficulties and *Dramatis Personae*' (2013) 36(2) *University of Western Australia Law Review* 1, 34 nn 220. See also Congdon and Johnston, above n 50, 311.

266 Compare Jenks, above n 255, 291 and Killey, above n 131, 28.

267 (2001) 207 CLR 344, 371 [72].

V Conclusion

In the *Marriage Act Case*, Windeyer J opined that 'the only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law of today by seeing how it took shape'.[268] Juxtaposing the historical expositions in Parts II and III of this article highlights that two central elements of state constitutional law developed incongruently. On the one hand, *McCawley* recognised that unentrenched provisions in a State's *Constitution Act* do not condition or limit its Parliament's legislative power. Conversely, extraterritoriality jurisprudence developed territorial limits on state legislative power based on such unentrenched provisions. As noted in Part IV of this article, the incongruence between the *McCawley* principle and extraterritoriality jurisprudence cannot be ignored or quarantined. The antinomy in the historical development of state constitutional law distorts its present shape. These unstable foundations must be uprooted and the antinomy resolved to establish coherence in this area of the law. The brief overview in Part IV of potential alternatives to address the antinomy highlights the difficulties inherent in that task. However, these difficulties do not remove the need for a resolution and, until one is forthcoming, state constitutional law will remain in an unsatisfactory shape.

[268] *A-G (Vic) v Commonwealth* (1962) 107 CLR 529, 595.