A Western Australian Constitution? Documents, Difficulties and Dramatis Personae

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This article analyses the evolution of colonial and United Kingdom documents, personalities, theories of legal efficacy, politics and law that culminated in the Western Australian Constitution from its origins to 1890.

Rouse thee, Westralia! Awake
From thy "Swan's nest among the reeds"
Cast thy broad shadow on the lake,
And strongly glide where Fortune leads…[1]

INTRODUCTION

Chronologically, different people - Indigenous,[2] French,[3] Dutch,[4] and British[5] peoples explored - Western Australia. Initially, only the former and latter moved beyond

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1 HE Clay, 'Rouse Thee, Westralia', 'The Western Australian Constitution Movement 1829-1890', *The West Australian Newspaper* (commemorative pamphlet) 23 (reproducing Clay's song which, as indicated in FK Crowley, *Australia's Western Third – A History of Western Australia from the First Settlements to Modern Times* (MacMillan, 1960) 93, was the Proclamation Song for the 21 October 1890 Proclamation ceremony). See James A Thomson, 'Drafting Australian Constitutions: Historical Perspectives and Future Paths' in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic – Essays in Honour of Professor George Winterton* (Federation Press, 2010) 144, 165 n 37 (discussing poetry's various roles in drafting constitutions).

2 Ronald and Catherine Berndt, *The World of the First Australians – Aboriginal Traditional Life: Past and Present* (Aboriginal Studies Press, 6th ed, 1996) 1-3 (characterising Australian Aborigines as the 'first Australians').

3 See generally, Leslie Marchant, *France Australe* (Scott Four Colour Print, 1998) 3-5; RT Appleyard and Toby Manford, *The Beginning – European Discovery and Early Settlement of Swan River Western Australia* (University of Western Australia Press, 1979) 21-32; JS Battye, *Western Australia – A History from its Discovery to the Inauguration of the Commonwealth* (University of Western Australia Press, 1924), 14-18 (discussing French explorations and whether the French might have arrived after the Portuguese).

4 Battye, Western Australia, above n 3, 18-36; RT Appleyard and Toby Manford, *The Beginning – European Discovery and Early Settlement of Swan River Western Australia* (University of Western Australia Press, 1979) 14-19.

5 See generally, Appleyard and Manford, above n 4, 21-35 (discussing English explorers including William Dampier and James Cook).

exploration. Within legal concepts pertaining to the British Empire,[6] the Swan River Colony was formally established on 1 June 1829. While not necessarily constitutionally unproblematic,[7] Western Australia's initial status as a British settlement flowed, tripartitely from: imperial correspondence of 30 December

6 In this wider panorama, at least three scholarly discourses ought to be considered. First, the nature, usage and legal requirements of the British Empire's Imperial 'constitution'. Second, almost unilateral withdrawal from these imperial constitutional arrangements, exemplified by the American War of Independence (19 April 1775–3 September 1783) and Treaty of Paris (3 September 1783). Third, evolutionary withdrawal, exemplified by Australian colonies and federation (7 February 1788–3 March 1986). As to the first discourse, see generally, D B Swinfen, *Imperial Control of Colonial Legislation, 1813–1965: A Study of British Policy Towards Colonial Legislative Powers* (1970, Clarendon Press); John M Ward, *Colonial Self-Government: The British Experience* (McMillan, 1976). As to the second discourse, see generally Daniel Hulsebosch, *Constituting Empire – New York and the Transformation of Constitutionalism in the Atlantic World 1644–1830* (University of North Carolina Press, 2005) (postulating complex and changing ideas of colonial and United Kingdom constitutions and their multiple evolving relationships within the British Empire and challenging traditional notions of unvarying bilateral confrontations); Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Culture and the Empire* (Harvard University Press, 2004) (discussing legal relationships' development within an unwritten, evolving British empire constitution); Jack P Greene, *Peripheries and Centre: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607–1789* (University of Georgia Press, 1986); Jack P Greene, *The Constitutional Origins of the American Revolution* (Cambridge University Press, 2011) (discussing 'unfolding' 1689–1776 debates concerning distribution of constitutional authority inside 'the British Empire'); Barbara Black, 'The Constitution of Empire: The Case for the Colonists' (1976) 124 *University of Pennsylvania Law Review* 1157. As to the third discourse, see generally Alex Castles, *An Australian Legal History* (Law Book Co, 1982) 1-19 (discussing the British Empire's laws and practices); John M Ward, *Earl Grey and the Australian Colonies 1846–1857: A Study of Self-Government and Self-Interest* (1958, Melbourne University Press) (discussing Earl Grey's role, especially as Secretary of State for War and the Colonies 1846–1852, in advocating an Australian colonial federation); A C V Melbourne, *Early Constitutional Development in Australia: New South Wales 1788–1856; Queensland 1859–1922* (R. B. Joyce, ed. with introduction and notes to 1963) (University of Queensland Press, 2nd ed, 1963); Andrew Tink, *William Charles Wentworth: Australia's Greatest Native Son* (Allen & Unwin, 2009) 204-56, 301-5 (discussing proposed New South Wales' constitutions and demands for self-government and domestic legislative autonomy, including NSW colonists' references to the relationship between British intransigence and the American Revolution); Alex Castles & Michael Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia: 1836-1986* (Wakefield Press, 1987) 94-134 ('Constitution Making and Crises'); Douglas Pike, *Paradise of Dissent: South Australia 1827-1857* (Melbourne University Press, 2nd ed, 1867) (discussing constitutional developments, including UK legislation and the *Constitution Act* (No 2, 1855-1856) (SA); Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006); John Waugh, 'Framing the First Victorian Constitution, 1853-5' (1997) 23 *Monash University Law Review* 331; Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) pinpoint reference (discussing NSW constitutional development); Michael Stokes, 'The Constitution of Tasmania' (1992) 3 *Public Law Review* 99; Anne Twomey, *The Australia Acts 1986* (Federation Press, 2010) (discussing developments, negotiations, drafting and legal effects of the *Australia Acts 1986* (Cth and UK)).

7 See James Thomson, 'Western Australia' (1992) 3 *Public Law Review* 66, 66 n 1 (suggesting 'the original establishment and exercise of legal power in Western Australia [was] unconstitutional'). See also Taylor, above n 6, 23 (noting between its 1835 commencement and September 1836, Melbourne, now the capital of the State of Victoria, was 'an unauthorised settlement in the colony of New South Wales').

1828, followed by a British enactment of 14 May 1829 providing 'for the Government of His Majesty's Settlements in Western Australia, on the Western Coast of New Holland'[8] and Captain Stirling's proclamation on 18 June 1829.[9]

Western Australia, despite being recognised as a geographically separate colony before South Australia, Queensland or Victoria, was the last Australian colony to acquire, on 21 October 1890, a Constitution Act.10 This Western Australian evolution via documents and personalities from autocracy (1829–1870) to limited representative government (1870–1890) and subsequently, since 1890, to responsible government is, at least from constitutional law and history perspectives, important. 11 Reasons range from interpretative strategies: originalism, structuralism, and textualism to decision-making, including by courts, and, more generally, an understanding of WA's Constitution's status, legal

8 10 Geo. IV c.22 1829 (Imp). See Enid Russell, *A History of the Law in Western Australia from its Development from 1829 to 1979* (University of Western Australia Press, 1980), 101, Appendix I (reproducing 1829 UK Act).

9 Ibid, Appendix III, 334 (reproducing Stirling's proclamation). See generally, Pamela Statham-Drew, *James Stirling: Admiral and Founding Governor of Western Australia* (University of Western Australia Press, 2003).

10 See generally, W G McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979); RD Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 5th ed, 1991); Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 50.

11 Scholarship on Western Australian constitutional history includes Isla Macphail, *Highest Privilege and Bounden Duty: A Study of Western Australian Parliamentary Elections 1829–1901* (Western Australian Electoral Commission, 2008); W B Kimberly, *History of West Australia – A Narrative of her Past Together with Biographies of her Leading Men* (F W Niven, 1897). William F P Heseltine, *The Movements for Self-Government in Western Australia From 1882 to 1890* (BA (Hons) Thesis, University of Western Australia, 1950); Peter J Boyce, *The Role of the Governor in the Crown Colony of Western Australia, 1829–1890* (MA Thesis, University of Western Australia, 1961); K H Rogers, *An Enquiry Into the Withholding of Self Government from the Colony of Western Australia in 1850* (BA (Hons) Thesis, University of Western Australia, 1949); J McKenzie, *Survey of Western Australian Politics in the Period of Representative Government, 1870-1890* (BA (Hons) Thesis, University of Western Australia, 1936); Brian de Garis, 'The History of Western Australia's Constitution and Attempts at its Reform' (2003) 31 *University of Western Australia Law Review* 142, 143; Brian De Garis, 'Self-Government and the Evolution of Party Politics 1871-1911' in C T Stannage (ed), *A New History of Western Australia* (University of Western Australia Press, 1981) 326-51, 722-5; Brian de Garis, 'The First Legislative Council, 1832-1870' in David Black (ed), *The House on the Hill – The History of the Parliament of Western Australia 1832-1990* (Parliament of Western Australia, 1991) 21-39; Brian de Garis, 'Constitutional and Political Development, 1870-1890' in David Black (ed), *The House on the Hill – The History of the Parliament of Western Australia 1832-1990* (Parliament of Western Australia, 1991) 41-62; Peter Johnston, 'Freeing the Colonial Shackles: The First Century of Western Australia's Constitution' in David Black (ed), *The House on the Hill- The History of the Parliament of Western Australia 1832-1990* (Parliament of Western Australia, 1991) 313-41; Campbell Sharman, 'The Constitution of Western Australia, 1890 and 1990' in David Black (ed), *The House on the Hill – The History of the Parliament of Western Australia 1832-1990* (1991) 287-311; Narelle Miragliotta, 'Western Australia: A Tale of Two Constitutional Acts' (2003) 31 *University of Western Australia Law Review* 154; Lee Harvey, 'Western Australia's Constitutional Documents: A Drafting History' (2012) 36(2) *University of Western Australia Law Review* 48.

foundation and effect.

'ALL THE MEN…MERELY PLAYERS'?[12]

Within Western Australia and the United Kingdom several key Founding Fathers[13] negotiated, debated, drafted and facilitated construction of the legal foundation[14] for the Constitution Act 1889 (WA) and Western Australian Constitution Act 1890 (UK), both coming into operation on 21 October 1890.[15]

Sir Stephen Henry Parker, QC MLC

Stephen Parker (7 November 1846 – 13 December 1927), the son of Stephen Stanley Parker, an early Western Australian pioneer, was colourful and heretical. Immensely bright[16] with an eidetic memory,[17] his school principal forecast in 1863 that Parker 'may confidently expect to rise to the highest positions of importance in the colony'.[18] Teleologically, this prophecy eventuated. Parker obtained legal certification from the Board of Examiners[19] and worked for five years under the British-trained[20] Police Magistrate, Edward Landor.[21] Subsequently, Parker became 'a suspect radical in the eyes of officialdom',[22] after a dramatic Western

12 William Shakespeare, *As You Like It*, Act II, Scene VII, 190, 200 (W J Craig (ed), *Great Works – Williams Shakespeare*, The Book Company, 1996) ('All the world's a stage, And all the men and women merely players').

13 What role, if any, did women play as 'Founding Mothers' in relation to the *Constitution Act 1889* (WA). See generally, Thomson, 'Drafting Australian Constitutions', above n 1, 144, 163 n 24 (discussing 'founding mothers' in contexts of the Commonwealth and United States Constitutions).

14 Contextually, within processes of constitutional interpretation and decision-making, the Framers' relevance generates deep and diverse controversies. See, eg, Saul Cornell, 'The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism' (2011) 23 *Yale Journal of Law & The Humanities* 295 (discussing originalism's historiography, methodologies, and interpretative approaches including 'public meaning Originalism, original understanding Originalism, and semantic Originalism' and 'living Originalism'); Michael Dorf, 'Undead Constitution' (2012) 125 *Harvard Law Review* 2011 (contrasting semantic originalism and expected application originalism); Jamal Greene, 'On the Origins of Originalism' (2009) 88 *Texas Law Review* 1 (discussing originalism in the United States, Canada, and Australia); Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Frederick Schauer, 'Defining Originalism' (1995) 19 *Harvard Journal of Law & Public Policy* 343 (suggesting the answer to 'What is Originalism' is not 'a theory of language' nor 'an account of law' but rather 'the tendency...to disguise in the language of necessity what are in fact political, social, moral, economic, philosophical, or policy choices').

15 Except for Part III of the 1889 Act which commenced on 18 October 1893.

16 N Hasluck and H M Beatty, *Sir S.H Parker 1846-1927 – History IIA Annual Essay,* 1961, 1-2.

17 Ibid 10; Barbara Sewell, *The House of Northbourne Parkers 1830-1983* (B.Sewell, 1983) 80.

18 Sewell, above n 17, 80.

19 Kimberley above n 11, 17.

20 Russell, above n 8, 101.

21 Sewell, above n 17, 80.

22 Hasluck and Beatty, above n 16, 2.

Australian Supreme Court trial two years after his 1868 admission as a barrister, in which he was found in contempt of court for criticising Chief Justice Burt in a letter to the Editor published in the Inquirer and Commercial News.[23] As a consequence of establishing a reputation as a gifted horseman,[24] Parker was colloquially known as 'the people's Harry'.[25] Perhaps inevitably, within a small population,[26] a political career followed, which saw him first sit as an elected member of the WA Legislative Council on 29 May 1878.[27] As a politician and parliamentarian, Parker vociferously and strenuously advocated responsible government for Western Australia. Indeed, he was Western Australia's 'first constitutional reformer'.[28] In this context, his consistent political and legal strategies included opposing and voting against familial ties in the Legislative Council.[29] Indeed, Parker:

> [f]rom 1882 onwards…let [almost] no session of the Legislative Council… [end] without moving that it was time Western Australian politics fell in line with their eastern neighbours, by shaking off the heavy paternalism of …[the British government].[30]

Much of the eventual success of the colony's self-government movement must be attributed to Parker, who was a pivotal witness before the Select Committee of the House of Commons in 1890 and:

> with unusual farsightedness, had been earnest, in and out of season, in his advocacy for responsible government, and Western Australia owes not a little to the ability and astuteness with which he guided the [reformers who were]… favourable to it.[31]

While not a key force in the movement towards Federation,[32] Parker again visited

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23 Russell, above n 8, 216, 365-80.

24 Wendy Birman and G C Bolton, 'Parker, Sir Stephen Henry (1846-1927)', Australian Dictionary of Biography <http://adb.anu.edu.au/biography/parker-sir-stephen-henry-7957>; Sewell, above n 17, 81.

25 Hasluck and Beatty, above n 16, 3; Birman and Bolton, above n 24.

26 In 1878, WA's population was approximately 28,612 people: A H Chate, Bruce Graham and Glenda Oakley, *Date It! – A Western Australian Chronology to 1929* (Friends of the Battye Library, 1991) 23.

27 Kimberley, above n 11, 17.

28 de Garis, 'The History of Western Australia's Constitution', above n 11, 143.

29 Heseltine, above n 11, 23 (stating that his Father, Mr S.S Parker, opposed the 1882 attempt to introduce responsible government). For further debates where the Parkers took opposing sides, see: Western Australia, *Parliamentary Debates*, Legislative Council 12 July 1878, 218; 15 July 1878, 249; 30 August 1882, 246. Cf 18 April 1883, 37 (Stephen Parker Jr's resolution passed with his Father's concurrence 'nem con' (without dissent)).

30 G C Bolton, *Alexander Forrest – His Life and Times* (Melbourne University Press, 1958) 74.

31 Battye, above n 3, 393.

32 For overviews, see: J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972); J B Hirst, *The Sentimental Nation – The Making of the Australian Commonwealth* (Oxford University Press, 2000); Helen Irving, *To Constitute a Nation – A Cultural History of Australia's Constitution* (Cambridge University Press, 1997); Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).

London on 15 March 1900[33] to petition for greater concessions for Western Australia.[34] In 1906 he was appointed Chief Justice of the Supreme Court of Western Australia and knighted in 1908.[35]

Lord Knutsford

Henry Thurstan Holland (3 August 1825 – 29 January 1914), elevated to the peerage as Lord Knutsford, a lawyer and Conservative Party member in the House of Commons, was Secretary of State for the Colonies (1887–92).[36] He became a Privy Councillor in 1885 and a Viscount in 1895.[37] Lord Knutsford was known for his 'good looks, social charm, and the energy which he put into any work that he had to do'.[38] Even prior to becoming Secretary of State, Lord Knutsford seemed to appreciate that the colonies were distinctive jurisdictions which rebuffed homogenous legal solutions. For example, during a House of Commons debate concerning the Colonial Marriages Bill 1878 (UK) he argued that:

> conditions and relations of a Colony are so different from those of … [the United Kingdom], that no reasonable man can contend that a law which is just and proper for a Colony is necessarily just and proper, or suited to the requirements in the mother country [United Kingdom].[39]

This idiosyncratic colonial appreciation, at least among UK Parliamentarians during the 1880s, together with Lord Knutsford's description of Western Australia as 'one of [the United Kingdom's]…greatest Australian Colonies', made him an ideal Secretary of State to assist Western Australia obtain a Constitution providing for representative and responsible parliamentarygovernment and substantial, but not plenary nor unfettered legislative powers.[40]

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33 See, 'Chronology of Federation' (compiled by National Australian Archives) <http://www.naa.gov.au/naaresources/publications/research_guides/fedguide/chronology/chron7.htm>.

34 Birman and Bolton, above n 24.

35 Ibid.

36 'Hansard 1803-2005', <http://hansard.millbanksystems.com/people/sir-henry-holland>.

37 Oxford Dictionary of National Biography, 'Holland, Henry Thurstan', <http://www.oxforddnb.com.ezproxy.library.uwa.edu.au/view/article/33940?docPos=1>.

38 Ibid.

39 United Kingdom, House of Commons, *Parliamentary Debates*, 27 February 1878, vol 238 cc406-39.

40 See 'The Constitution Bill for Western Australia from the Debates in *The Times* with Articles from the English Journals' (Sydney, Charles Potter Government Printer, 1889) 1-9 (11 July 1889 House of Lords speech during Second Reading debate on 1889 Bill). Knutsford had detractors: see, House of Commons Debates, 27 February 1890, 1366, http://hansard.millbanksystems.com/commons/1890/feb/27/second-reading, (quoting Sir G Campbell's assertion: 'The Colonial Office are [*sic* – is] very anxious to get the [1899] Bill passed, but with all respect to the Under Secretary for the Colonies and Lord Knutsford that Office has meddled and muddled greatly in colonial affairs').

Sir Frederick Napier Broome

Sir Frederick Napier Broome (18 November 1842–26 November 1896), a poet[41] and journalist, was appointed Governor of Western Australia on 2 June 1883.[42] Previously, he had resided in other British colonies including New Zealand (1857–1864), where he had farmed, Natal (1875–1878) and Mauritius (1878–1883) being Colonial Secretary and, subsequently, Lieutenant-Governor.[43]

Initially in WA, Broome established a reputation as a volatile and fractious administrator.[44] Indeed, his 'bullying tactics' led to the WA Attorney-General, Alfred Hensman, resigning because it was 'impossible for a man of honour, or for one who has any respect for himself to do otherwise'.[45] However, in 1887 the House of Commons, despite a removal motion, did not acquiesce in Broome's dismissal.[46] Even so, these events are likely to have prompted the Queen to appoint Sir William Robinson as Governor from 20 October 1890.[47] Despite Broome's initial views, he eventually became a strong and persuasive advocate for Western Australia's constitutional ambitions, including responsible government. Together with Stephen Parker and Sir Cockburn-Campbell,[48] Broome was approved by the WA Legislative Council to be a member of the 1890 Western Australian delegation to the United Kingdom to press for the UK government and Parliament's approval of the Constitution Bill 1889 (WA).[49]

Sir John Forrest

Sir John Forrest (22 August 1847–2 September 1918) was a popular and imposing politician: Western Australia's first Premier (29 December 1890–14 February 1901); an effective WA delegate to the 1891 and 1897-1888 Australasian Constitution Conventions, with a reputation for major, intrepid explorations and surveying expeditions into Western Australia's western, central and northern

41 See Anita Selzer, *Governors' Wives in Colonial Australia* (National Library of Australia, 2002) 160-1 (reproducing some Broome poems),

42 Chate, Graham and Oakley, above n 26, 24.

43 Crowley, F. K., 'Broome, Sir Frederick Napier (1842–1896)', Australian Dictionary of Biography, <http://adb.anu.edu.au/biography/broome-sir-frederick-napier-3068/text4527>.

44 Ibid; Russell above n 8, 194.

45 Wendy Birman, 'Hensman, Alfred Peach (1834–1902)', Australian Dictionary of Biography, <http://adb.anu.edu.au/biography/hensman-alfred-peach-3756/text5917>; Russell above n 8, 194-15, 215.

46 Crowley, 'Broome, Sir Frederick Napier (1842–1896)', above n 43.

47 Ibid; Chate, Graham and Oakley, above n 26, 26.

48 Born 14 April 1845 and died 27 September 1892, Sir Cockburn-Campbell was a journalist and editor of the *West Australian* newspaper and (1873-1892) a member of the Legislative Council: O.K. Battye, 'Cockburn-Campbell, Sir Thomas (1845-1892), <http://adb.anu.edu.au/biography/cockburn-campbell-sir-thomas-3239>.

49 House of Commons Parliamentary Papers, *Further Correspondence Respecting the Proposed Establishment of Responsible Government in Western Australia* (February 1890), Sir Napier Broome to Lord Knutsford 12 November 1889, No 36, 28.

interiors.[50] One evaluation is revealing: 'what Cecil Rhodes…[was] to South Africa, and Sir Henry Parkes to New South Wales, Sir John Forrest…[was] to Western Australia'.[51] Similar to Hensman's difficulties with Governor Broome, relations between Forrest and Broome were fractured.[52] However, even 'vice-regal displeasure was no impediment to Forrest's inexorable rise'.[53] As a politician, Forrest was closely involved in reform efforts to obtain a new Western Australian Constitution. Despite this contribution, Forrest was not chosen by the WA Legislative Council to be a member of the WA delegation to the United Kingdom.[54] Also, his selection by the Legislative Council on 26 November 1889 to be a member of the 1890 WA delegation to other Australian colonies to procure support for the WA Constitution Bill 1889 was rebuffed by Lord Knutsford.[55] Overshadowing these rejections was the attainment of a more important office: Forrest, not Parker, was appointed by Governor Robinson as WA's first Premier.

STARTING OUT– CONSTITUTIONAL DOCUMENTS WITHOUT DILEMMAS?

Especially after 1783,[56] Colonial constitutional evolution within, not unilateral succession from, the British Empire was contemplated, anticipated and, perhaps reluctantly, welcomed by UK parliamentarians and legislation.[57] One obvious example is the *Australian Constitutions Act 1850* (UK).[58] In particular, ss 9 and

50 See generally, Frank Crowley, *Forrest: 1847-91: Apprenticeship to Premiership* (University of Queensland Press, 1971); Frank Crowley, *Big John Forrest 1847-1918: A Founding Father of the Commonwealth of Australia* (University of Western Australia Press, 2000).

51 Kimberly, above n 11, 1. On Rhodes (5 July 1853 – 26 March 1902) see, Robert I Rotberg, *The Founder: Cecil Rhodes and the Pursuit of Power* (Oxford University Press, 1988); Philip Ziegler, *Legacy: Cecil Rhodes, The Rhodes Trust and Rhodes Scholarships* (Yale University Press, 2008, Yale). On Parkes (27 May 1815–27 April 1896) see AW Martin, *Henry Parkes: A Biography* (Melbourne University Press, 1964).

52 Russell, above n 8, 214.

53 Chief Justice Robert French, 'John Forrest: Founding Father from the Far West' (2011) 35 *University of Western Australia Law Review* 205, 206.

54 Crowley, *Apprenticeship to Premiership*, above n 50, 216-18 (describing Forrest's manoeuvres to be appointed a delegate, newspaper support for S.H. Parker and the Legislative Council's 8 November 1889 decision).

55 House of Commons Parliamentary Papers, above n 49, Lord Knutsford to the Deputy Officer Administering the Government, 17 January 1890, No 41, 57; Kimberly, above n 11, 295.

56 See generally, above n 6 (discussing the American Revolution and Treaty of Paris). Some prominent UK parliamentarians, including Edmund Burke, supported the American colonists and wanted, via political and constitutional means, to retain the American colonies within the British Empire. See eg Edmund Burke, 'Speech on Conciliation with America' (1775) in David Bromwich (ed), *On Empire, Liberty and Reform: Speeches and Letters: Edmund Burke* (Yale University Press, 2000) 62-134 (discussing and reproducing Burke's 22 March 1775 House of Commons 'Speech on Moving His Resolutions for Conciliation with the Colonies').

57 See Taylor, above n 6, 26-7 (noting that 'the Colonial Office… learnt some lessons in North America in the late 18th century and was eager to grant locally elected and responsible governments to such colonies as existed'), 33 (noting 'the Colonial Office had no desire to 'limit unduly or without good reason the powers of self-government granted to the [Australian] colonies').

58 13 & 14 Vict. c. 59. What is this Act's appellation? Is it the *Australian Colonies Government*

32 of this 1850 UK Act established the legal and constitutional foundations for the movement from autocracy to majoritarian parliamentary representative and responsible government. Section 9 provided:

> …That upon the Presentation of a Petition signed by not less than One Third in Number of the Householders within the Colony of Western Australia, praying that a Legislative Council according to the Provisions of this Act be established within such Colony and that Provision be made for charging upon the Revenues of such Colony all such Part of the Expenses of the Civil Establishment thereof as may have been previously defrayed by Parliamentary Grants, it shall be lawful for the Persons authorized and empowered to make, ordain, and establish Laws and Ordinances for the Government of the said Colony by any Law or Ordinance to be made for that Purpose, subject to the Conditions and Restrictions to which Laws or Ordinances made by such Persons are now subject, to establish a Legislative Council within such Colony, to consist of such Number of Members as they shall think fit, and such Number of the Members of such Council as is equal to One Third Part of the whole Number of Members of such Council, or if such Number be not exactly divisible by Three, One Third of the next greater Number which is divisible by Three, shall be appointed by Her Majesty, and the remaining Members of the Council shall be elected by the Inhabitants of the said Colony ; and it shall be lawful for such Persons as aforesaid, by such Law or Ordinance as aforesaid, to make all necessary Provisions for dividing Western Australia into convenient Electoral Districts and for appointing and declaring the Number of Members of Council to be elected for each such District, and for the Compilation and Revision of Lists of all Persons qualified to vote at the Elections to be holden within such Districts, and for the appointing of Returning Officers, and for the issuing, executing, and returning of the necessary Writs for such Elections and for taking the Poll thereat, and for determining the Validity of all disputed Returns, and otherwise ensuring the orderly, effective, and impartial Conduct of such Elections ; provided that no Law or Ordinance establishing such Legislative Council within the said Colony of Western Australia shall have any Force or Effect unless provision be thereby made for permanently granting to Her Majesty, Her Heirs and Successors, out of the Revenues of the said Colony towards defraying such of the Expences of the Establishments of the said Colony, as may have been previously defrayed in whole or in part by Parliamentary Grants, a yearly

Act 1850 (UK)? (see eg *Western Australia v Wilsmore* (1982) 149 CLR 79, 88 (Aickin J)). Or, is it the *Australian Constitutions Act 1850* (UK)? (see g *Yougarla v Western Australia* (2001) 207 CLR 344, 354 [14] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). On this 1850 Act, see generally, Pike, above n 6, 411-21 (discussing 1850 UK Act's history and consequences in South Australia); Melbourne, above n 6, 366-83 (discussing 1850 UK Act's history and reception in NSW). See also, the *Colonial Laws Validity Act 1865* (UK). See generally, Swinfen, above n 6 (indicating this 1865 Act was initially perceived as expanding or liberating, not restraining, colonial legislative power).

> Sum not less in Amount than the Sum which may have been lastly before the making of such Law or Ordinance authorized by Parliament to be issued and applied out of the Aids or Supplies granted by Parliament to defray the Charge for One year of the said Colony, and for raising the yearly Sum so granted by means of sufficient Taxes, Duties, Rates, or Imposts to be levied on Her Majesty's Subjects within such Colony.

Section 32 provided:

> And be it enacted, That, notwithstanding anything herein-before contained, it shall be lawful for the Governor and Legislative Council of the Colony of New South Wales, after the Separation therefrom of the Colony of Victoria, and for the Governors and Legislative Councils of the said Colonies of Victoria, Van Diemen's Land, South Australia, and Western Australia respectively, after the Establishment of Legislative Councils therein under this Act, from Time to Time, by an Act or Acts to alter the Provisions or Laws for the time being in force under this Act, or otherwise, concerning the Election of the elective Members of such Legislative Councils respectively, the Qualification of Electors and elective Members, or to establish in the said Colonies respectively, instead of the Legislative Council, a Council and a House of Representatives, or other separate Legislative Houses, to consist respectively of such Members to be appointed or elected respectively by such Persons and in such Manner as by such Act or Acts shall be determined, and to vest in such Council and House of Representatives or other separate Legislative Houses the Powers and Functions of the Legislative Council for which the same may be substituted : Provided always, that every Bill which shall be passed by the Council in any of the said Colonies for any of such Purposes shall be reserved for the Signification of Her Majesty's Pleasure thereon ; and a Copy of such Bill shall be laid before both Houses of Parliament for the Space of Thirty Days at the least before Her Majesty's Pleasure thereon shall be signified.

Importantly, s 9 of the *Australian Constitutions Act 1850* (UK) permitted a two-thirds elected and one-third appointed colonial Legislative Council on a request from not less than a third of the colony's 'householders'. However, an attempted petition to bring this about on 29 June 1865 failed before the Legislative Council.[59] Eventually, six 'non-official' members were authorised by the UK government, as indicated in correspondence with the Colonial Office[60] dated 9

59 Western Australia, Minutes of the Proceedings of the Legislative Council (1832-1870), 1074; F R Beasley, 'The Legislative Council of Western Australia' (1946) *Res Judicatae* 149, 149-50.

60 See generally, J C Beaglehole, 'The Colonial Office, 1782-1854' (1941) 1(3) *Historical Studies: Australia and New Zealand* 182; Macphail, above n 11, 29-32.

July 1867,[61] and 27 March 1868[62] and five elected after being nominated by the Governor.[63] However, a further petition succeeded on 1 June 1870, under the Governorship of Weld, and, through the enactment of the *Legislative Council Ordinance 1870* (WA), resulted in an 18 member Council in which two-thirds (12 members) were elected and the remaining were appointed[64] a circumscribed embryonic representative, not responsible, government.[65] The Governor's executive, legislative and judicial powers were substantial and the Governor remained part of the Legislative and Executive Councils.[66] Consequently, 'the form of government in Western Australia was that of a Crown Colony, in which the Crown had the entire control of legislation, and administration was carried on by public officers under the control of the [UK] Government'.[67]

IMBROGLIOS - A NEW WESTERN AUSTRALIAN CONSTITUTION?

The first significant and focused endeavours by WA colonists to obtain a new Constitution commenced during Governor Frederick Weld's tenure (30 September 1869-3 January 1875).[68] For example, on 22 July 1874, James Lee-Steere moved in the Legislative Council for the establishment of a Committee to draft a Constitution to structurally and contextually secure and implement principles of responsible government.[69] In proposing this motion Lee-Steere claimed that 'a vast majority of the people of [this] colony' supported him in this endeavour and that the Governor's sympathies and experience with similar constitutional reforms were likely to assist its success.[70]

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61 House of Commons, *Copy or Extracts of any Correspondence Between the Secretary of State for the Colonies and the Governor of Western Australia upon the Proposed Changes in the Constitution of the Legislative Council of the Colony* (1867), No 45 (Despatch from the Duke of Buckingham and Chandos to Governor Hampton) 16.

62 Macphail, above n 11, 81.

63 The sixth member was appointed by the Governor because electors in the Champion Bay electoral district were reluctant to participate in such an election. See generally, Russell, above n 8, 46; Beasley, above n 59, 150; House of Commons, *Copy or Extracts of any Correspondence*, above n 61, 3; Crowley, above n 1, 53; Macphail, above n 11, 77. See generally, Macphail, above n 11, 65-70, 73-81.

64 *Legislative Council Act 1870* (33 Vic., No 13): Lumb, above n 10, 36-7; Russell, above n 8, 46, 193-4.

65 Hasluck and Beatty, above n 16, 3.

66 Russell, above n 8*,* 193.

67 Ibid 44.

68 Chate, Graham and Oakley, above n 26, 19.

69 Taylor, above n 6, 35 (noting the *Constitution Act 1855* (Vic) lacked explicit textual elucidation of the role for responsible government, a term which, at the time, was 'imperfectly understood' (quoting Jenks, *A History of the Australasian Colonies: from their Foundation to the Year 1893* (Cambridge University Press, 1893) 244). For a similar 'taciturn approach' (Taylor, above n 6, 35) to the textual elucidation of responsible government in the *Constitution Act 1889* (WA) see below at 17ff (referring to ss 28, 29, 72, 74 and 75). For a more textually explicit, though not absolute, recognition and endorsement of responsible government see, ss 44 (last paragraph), 64 of the *Commonwealth Constitution*.

70 Western Australia, *Parliamentary Debates*, Legislative Council, 22 July 1974, 49; Kimberly, above n 11*,* 228; Battye, *Western Australia*, above n 3*,* 293.

Following an amendment to the motion, Governor Weld was requested to draft a Constitution Bill.[71] Drawing heavily on the experience of the Constitutions of New South Wales, New Zealand, Victoria and South Australia,[72] a Constitution Bill, drafted by Governor Weld and Mr Frederick Barlee,[73] was introduced on 3 August 1874 into the Council by the Colonial Secretary, Mr Barlee[74] and had its second reading on 5 August.[75] The Bill provided for a bicameral Parliament with an 'elected [Lower] House' and a 'nominated [Upper] House', the latter not constituting a representative Chamber due to concerns about the influence of 'working classes'.[76] Barlee urged the Bill to be considered with a 'spirit of compromise and unanimity' to ensure a less 'endangered' UK parliamentary assenting process.[77] Lee-Steere, however, introduced a petition to postpone the Bill's progress in the Legislative Council to facilitate the public's consideration of the Bill on the basis that it was 'not in accordance with what he had always led his constituents to believe would be among the results of the adoption of Responsible Government'.[78] Lee-Steere's motion failed to garner a majority of Council votes. Even so, Governor Weld dissolved the Legislative Council on 6 August 1874 arguing that, although he had 'caused a [Constitution] Bill to be prepared', he felt it best to go to an election to give the 'country an opportunity of expressing its deliberate opinion' on the Bill and the introduction into Western Australia of a fundamental constitutional principle: responsible government.[79]

This election[80] clearly demonstrated significant public support in favour of constitutional reform. However, the impetus to erect a Constitution lost considerable momentum with Governor Weld's departure and instatement of William Robinson as the new vice-regal representative on 11 January 1875.[81] The

71 'The Western Australian Constitution Movement 1829-1890', above n 1, 4; T S Louch, 'Weld, Sir Frederick Aloysius (1823-1891)', Australian Dictionary of Biography, <http://adb.anu.edu.au/biography/weld-sir-frederick-aloysius-4829>, Kimberly, above n 11, 228; See also, Lord Carnarvon's despatch read in the Legislative Council on 22 January 1875 referring to Governor Weld's correspondence with the Imperial office as declaring that the Governor was to 'prepare such a Bill': Western Australia, *Parliamentary Debates*, Legislative Council, 22 January 1875, 28.

72 See generally, John M Ward, 'The Responsible Government Question in Victoria, South Australia, and Tasmania, 1851-56' (1978) 53 *Journal of the Royal Australian Historical Society* 221. See also, above n 6 (scholarship on third discourse).

73 Macphail, above n 11, 118 (noting a draft Bill 'was actually ready by 31 July 1874 when it was discussed in Executive Council' and that Governor Weld and Mr Barlee, 'probably surveyed a number of Australian colonial constitutions – all of which show evidence of wholesale cutting and pasting').

74 Western Australia, *Parliamentary Debates*, Legislative Council, 3 August 1874, 69.

75 Western Australia, *Parliamentary Debates*, Legislative Council, 5 August 1874, 89.

76 Western Australia, *Parliamentary Debates*, Legislative Council, 3 August 1874, 70-1.

77 Ibid 76.

78 Western Australia, *Parliamentary Debates*, Legislative Council, 5 August 1874, 90.

79 Western Australia, *Parliamentary Debates*, Legislative Council, 6 August 1874, 91.

80 See, David Black and Brian de Garis, *Legislative Council of Western Australia, Elections and Electoral Law 1867-1890* (Parliament of Western Australia, 1992) 16 (indicating polls were held on 23 and 30 September 1874 and 5, 6 and 20 October 1874).

81 Battye, *Western Australia*, above n 3, 294-5; Western Australia, *Parliamentary Debates*, Legislative Council, 12 July 1878, 223 (indicating Parker suggested his 'political views

Secretary of State, Lord Carnarvon,[82] indicated in a dispatch to Robinson that he disapproved of Weld's precipitous actions and that Carnarvon 'entertain[ed] grave doubts as to the prudence…of at present resorting [in WA] to a system of party Government by ministers responsible to Parliament'.[83]

Despite this UK government position, Stephen Parker became one of the pivotal Founding Fathers of the *Constitution Act 1889* (WA) and the 1890 UK Enabling Act. For example, on 12 July 1878, Parker moved a motion 'to introduce a Bill to establish a constitution for Western Australia'.[84] Sir Cockburn-Campbell, while referring to Parker's proposed Constitution Bill as 'no ordinary Bill' and as raising a question of vital importance to the whole Colony',[85] favoured a critical vote on a central question: should Western Australia progress to responsible government? Consequently, Parker was mocked for 'putting the cart before the horse' (in spite of being a 'very skilful rider') [86] by his motion to introduce the Bill (said to be a 'facsimile of Weld's 1874 one').[87] Parker's motion failed.[88] His attempt to introduce seven resolutions in relation to responsible government were also unsuccessful apparently because of concerns that significant public works initiatives in WA and Imperial funding might be jeopardised by a move towards responsible government.[89]

Confronting his parliamentary colleagues' mirth,[90] Parker renewed his responsible government reform on 30 August 1882 requesting the Governor to present a Constitution Bill because the colony now had sufficient educated men who were capable of administering a Constitution premised on representative and responsible government.[91] Parker robustly argued: 'a freer constitution and a consciousness of political equality with [Western Australia's] neighbors' would 'advance the interests of the colony, and render it no unworthy member of the Australian group'.[92] Again Parker's motion failed: 5 votes in support, 12 votes against. One factor was Mr Lee-Steere's concern about the reform movement's potential to jeopardise Imperial financial support and likelihood of the northern part of Western Australia being, as a matter of law and constitutional status,

were not so advanced as those of his predecessor').

82 Lord Carnarvon was UK Secretary of State (June 1866–March 1867) and (February 1874–January 1878): B.A. Knox, 'Carnarvon, fourth Earl of (1831–1890)', Australian Dictionary of Biography, <http://adb.anu.edu.au/biography/carnarvon-fourth-earl-of-3166>.

83 Western Australia, *Parliamentary Debates*, Legislative Council, 22 January 1875, 28-9; Battye, *Western Australia*, above n 6, 294-5; Kimberly, above n 11, 229; Crowley, *Australia's Western Third*, above n 1, 71.

84 Western Australia, *Parliamentary Debates*, Legislative Council, 12 July 1878, 213 (Mr S H Parker).

85 Ibid (Sir T Cockburn-Campbell).

86 Ibid 216-17 (Mr H.H. Hocking).

87 Macphail, above n 11, 139.

88 Western Australia, *Parliamentary Debates*, Legislative Council, 12 July 1878, 218.

89 Ibid 234 (Sir T Cockburn-Campbell); 236 (Mr Marmion).

90 Western Australia, *Parliamentary Debates*, Legislative Council, 30 August 1882, 227 (Parker stated: 'I observe some hon. Members smiling already but I do not think we ought to approach the consideration of this question with any degree of levity').

91 Ibid 239.

92 Ibid 237.

separated from the south.[93]

Obdurate, Parker was not deterred. On 18 April 1883, Parker, asserting that there was now greater support for reforming WA' legislative and executive institutional arrangements and powers, moved a motion that Governor Broome 'ascertain at the earliest possible opportunity from her Majesty's Secretary of State for the Colonies, for the information of… [the WA Legislative Council], the terms and conditions upon which Responsible Government will be granted to Western Australia'.[94] Parker particularly sought clarification on two issues: would the northern part of the colony remain under Imperial control and what financial support of the magistracy and police would continue? The motion was heralded as most 'sensible'[95] and as being much less 'right up into the clouds'.[96] The reward was unanimous Council approval.[97]

The Earl of Derby's[98] despatch dated 23 July 1883 responded to Governor Broome. While further reporting from the Colony would be required, the Earl of Derby was 'not disposed to anticipate that the request for Responsible Government will be strongly pressed at this time' and indicated that the northern territory of Western Australia would likely be excluded and made into a separate colony.[99] Indeed, subsequent correspondence dated 14 July 1884 referred to 'important political and financial questions' needing to be resolved if WA electors indicated support for Responsible Government.[100]

ERECTING AN EDIFICE: DECISIONS, DELIBERATIONS AND DISAGREEMENTS

On 6 July 1887 Parker obtained the Legislative Council's approval for two resolutions concerning Responsible Government.[101] Consequently, on 12 July 1887, Governor Broome wrote to the Colonial Office that the Legislative Council had passed resolutions that the 'Executive should be made responsible to the Legislature of the Colony' and that 'Western Australia should remain one and undivided under the new constitution'.[102] Broome, while awaiting further

93 Ibid 243-6.
94 Western Australia, *Parliamentary Debates*, Legislative Council, 18 April 1883, 33.
95 Ibid 35 (Mr Marmion), 36 (Mr Burges).
96 Ibid 36 (Mr Burges).
97 Ibid 37.
98 Edward Henry Stanley (21 July 1826-21 April 1893), the 15th Earl of Derby, served as the Secretary of State for the Colonies from 1882-1885: The Peerage, <http://thepeerage.com/p1383.htm>.
99 House of Commons Parliamentary Papers, *Correspondence Respecting the Proposed Introduction of Responsible Government into Western Australia* (June 1889), 1-3.
100 bid, Earl of Derby to Sir Napier Broome, 9.
101 Western Australia, *Parliamentary Debates*, Legislative Council, 6 July 1887, 121 (moving the resolution that 'in the operation of this Council the time has arrived when the Executive should be made responsible to the Legislature of the colony' and that 'it is further the opinion of the Council that Western Australia should remain one and undivided under the new Constitution').
102 House of Commons Parliamentary Papers, *Correspondence*, above n 99, 12-13 (Sir Napier

clarification from the UK, proceeded to work with the WA Attorney-General, Mr Charles Warton,[103] to prepare the necessary draft WA Constitution Bill.[104]

Much delay was occasioned by the Colonial Office, which expressed reservations in relation to: (i) the indigenous population, (ii) the ability of a local legislative and executive to control the Colony's northern territory, and (iii) whether the Constitution ought to provide for a single chamber with the possibility of an upper chamber subsequently being created with Her Majesty's approval.[105] The Legislative Council passed resolutions on 23 March 1888 and 6 April 1888 opposing the Colonial Office's three reservations.[106] The Council also expressed frustration at the Governor's delay in introducing a Constitution Bill.[107] Perhaps, because of these Legislative Council resolutions, some progress occurred: a draft Constitution Bill was sent to Lord Knutsford with Governor Broome's despatch on 28 May 1888.[108]

Between 14 April 1888 and 21 June 1889, numerous telegrams and despatches between Governor Broome and Lord Knutsford concerned the drafting of the Constitution Bill. What evolved were new provisions, amendments and other stylistic and substantive changes. The WA Constitution's text, structure and meaning were being moulded and formalised.[109] Letters of support from the neighbouring Australian colonies were also forthcoming and sent to the Colonial Office.[110] Prime sources of friction between the colony and Colonial Office related

Broome to Sir H T Holland, 12 July 1887).

103 Charles Nicholas Warton served as WA Attorney-General (1886-1890): Parliament of Australia, List of Australian Attorneys-General, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/attorneysgeneral#WA>. Warton's pension was reduced as part of the UK Parliament's amendments to the *Constitution Act 1889* (WA).

104 Western Australia, *Parliamentary Debates*, Legislative Council, 6 April 1888, 282 (Mr Marmion referred to the Governor as having 'prepared a bill'); Macphail, above n 11, 181 (noting it was described by Warton as a 'decent, respectable, conservative' Bill and that 'most of … [the draft Bill] did, in fact survive in recognisable form in Western Australian 1889 *Constitution Ac*t – or come into force not long after').

105 House of Commons Parliamentary Papers, *Correspondence*, above n 99, 23 (Sir Holland to Sir Napier Broome, 12 December 1887); 25 (Sir H T Holland to Sir Napier Broome, 3 January 1888).

106 Western Australia, *Parliamentary Debates*, Legislative Council, 23 March 1888, 6 April 1888, 220-87.

107 Western Australia, *Parliamentary Debates*, Legislative Council, 6 April 1888, 274-87. See also, House of Commons Parliamentary Papers, *Correspondence*, above n 99, Enclosure 3 in No 23, 6 April 1888, 30.

108 House of Commons Parliamentary Papers, *Correspondence*, above n 99, Serial Number 25, 34 and following, acknowledged Attorney-General Charles Warton's assistance in the drafting.

109 See generally, Harvey and Lawn, above n 11.

110 House of Commons Parliamentary Papers, *Further Correspondence*, above n 49, Sir Napier Broome to Lord Knutsford, 21 May 1889 No 2, 5. See eg, Colonial Secretary (NSW) to Agent-General (London) 29 July 1889 No 8, 11; Earl of Kintore (South Australia) to Lord Knutsford, 30 July 1889, Earl of Kintore (South Australia) to Lord Knutsford, 5 August 1889 No 19, 13; Lord Carrington (NSW) to Lord Knutsford, received 8 August 1889, No 13, 13; Sir HW Norman (Queensland) to Lord Knutsford, received 9 August 1889, No 14,

to the geographical extent of the territory in Western Australia to be governed by the WA Constitution, the composition and nature of the WA legislature and protections to be provided for the indigenous population.[111]

Territory was a major Imperial concern: Western Australia was too vast an area to be governed by its current population of approximately 45,000[112] and therefore, only land south of latitude 26° could be regulated by the WA Legislature with northern tracts remaining exclusively within the control of the British Crown.[113] Lord Knutsford envisaged that the *Waste Lands (Australia) Acts Repeal 1855* (UK) (Act 18 and 19 Vict c.56), which required under s 7 that Her Majesty would 'regulate the Sale, Letting, Disposal, and Occupation of Waste Lands of the Crown in Western Australia, and the Disposal of the Proceeds arising therefrom, until [the UK] Parliament shall otherwise provide' would continue to apply but only to the land north of the boundary.[114]

Disagreement over the proposed new WA legislature revolved around two questions: should there be a second chamber? If so, whether that proposed WA chamber[115] should be elected or appointed,[116] or appointed at least while the colony's population remained small?[117] Subsequently, Lord Knutsford explained:

> [T]he New [WA] Constitution is on the same lines as the Constitution which has been given to each of the other Australian Colonies, and under which those Colonies have so greatly flourished. The main question of difference that arose between Her Majesty's Government and the Colonial Government refers to the Constitution of the Legislative Council…Her Majesty's Government were and still are of opinion that in the first instance, at all events, the Upper House should be nominative and not elective…but looking to the fact that already in three Australian

13; Sir WCF Robinson (Victoria) to Lord Knutsford, 22 July 1889, No 15, 14.

111 See, for eg, Western Australia, *Parliamentary Debates*, Legislative Council, 2 November 1888, 181-5 (Stephen Parker expressing frustration at the Colonial Office's insistence on a nominated upper house when colonies such as Victoria and Tasmania had elected houses of review and disappointment that the Office was persisting with its view as to the division of the Colony and special provisions in relation to the indigenous population, although he was willing to concede these latter conditions for the sake of introducing the Constitution and proposing instead a compromise where the upper house would become elected after six years). Captain Theodore Fawcett exclaimed: 'let us have a sort of revolution, and show the Secretary of State that we mean to have an elected Upper House, or none at all' (at 203).

112 Chate, Graham and Oakley, above n 26, 26.

113 See eg, House of Commons Parliamentary Papers, *Correspondence* above n 99, Lord Knutsford to Sir Napier Broome 30 July 1888, No 30, 54-5. See also, Lord Knutsford to Sir Napier Broome 30 March 1889 No 52, 79; Lord Knutsford to Sir Napier Broome 24 April 1889, No 57, 80.

114 House of Commons Parliamentary Papers, *Correspondence*, above n 99, Lord Knutsford to Sir Napier Broome 30 July 1888, No 30.

115 Ibid, Sir Napier Broome to Lord Knutsford 27 July 1888, No 25, 34.

116 Ibid, Sir Napier Broome to Lord Knutsford 6 November 1888, No 42, 72; Lord Knutsford to Sir Napier Broome 15 January 1889, No 46, 75.

117 Ibid, Lord Knutsford to Sir Napier Broome 30 July 1888, No 30, 54; Sir Napier Broome to Lord Knutsford 6 November 1888, No 42, 71.

> Colonies - South Australia, Victoria and Tasmania – the elective principle prevails, Her Majesty's Government were prepared to agree to a compromise – that if, at the end of six years or after the population had increased to 60,000, the [WA] Ministers of the day were desirous that a change should be made from nomination to election,…[the UK Parliament and government] should not oppose it, and that compromise appears in the schedule of the [UK enabling] Bill.[118]

UK officials also strongly supported sufficient protections for indigenous people including appropriate funding of an Aborigines Protection Board[119] completely independent of the 'responsible [WA] Ministers of the day'.[120] Lord Knutsford explicated:

> The majority of the [WA]Legislative Council and perhaps, the public opinion [in WA]…, was against us on this point, but the [UK] Government adhered to the view that it is not unreasonable that the protection of an independent Board should be started independent of political circumstances and influences…[121]

Consequently, a separate Bill, the Aborigines Bill 1889 (WA), 'to provide for certain matters connected with the Aborigines' was passed by the WA Legislative Council and reserved for Her Majesty's pleasure on 29 April 1889.[122]

The Constitution Bill, on the motion of Sir Fraser, was read a first time in the WA Legislative Council on 19 October 1888[123] and a second time on 2 November 1888.[124] On 7 December 1888, Governor Broome dissolved the Legislative Council 'in order that the Bill may be finally dealt with after seeking the opinion of the constituencies'.[125] Disagreements regarding the composition of the proposed lower and upper chambers of the new WA Parliament were resolved by the public's willingness to accept an, initially, nominated upper house which after six years or an increase in population would be reconstituted as an elected chamber.[126] At the January 1889 election, the re-elected members, including Stephen Parker, were given a mandate to expedite the introduction of responsible government.[127] The Legislative Council re-convened on 13 March 1889 and the Constitution Bill was

118 *The Constitution Bill for Western Australia from the Debates in The Times with Articles from the English Journals'*(Charles Potter Government Printer, 1889) 6.

119 House of Commons Parliamentary Papers, *Correspondence* above n 99, 31 August 1888, Lord Knutsford to Sir Napier Broome, 56.

120 *The Constitution Bill for Western Australia*, above n 118, 9.

121 Ibid.

122 See AIATSIS Library 2006, <http://archive.aiatsis.gov.au/removeprotect/52770.pdf>.

123 Western Australia, *Parliamentary Debates*, Legislative Council, 19 October 1888, 91.

124 Western Australia, *Parliamentary Debates*, Legislative Council, 2 November 1888, 177.

125 Western Australia, *Parliamentary Debates*, Legislative Council, 7 December 1888, 487.

126 'The Western Australian Constitution Movement 1829-1890', above n 1, 9; Heseltine, above n 11, 109.

127 'The Western Australian Constitution Movement 1829-1890', above n 1, 9; Heseltine, above n 11, 111.

promptly read a first[128] and second time,[129] and sent to Committee, before being initially passed on 5 April 1889 and sent to the Colonial Office on 9 April 1889.[130]

On several occasions the Legislative Council received proposed amendments to the Bill, via Governor Broome from Lord Knutsford, which resulted in extended debates in the Council during April 1889 in relation to such matters as the civil and pension schedules and the timing concerning the Bill's commencement. The latter pertained to the vesting of waste lands of the Crown which involved a provision in the WA Constitution Bill indicating that the Bill would not come into operation until the WA Legislature obtained control over those lands.[131] Reluctantly, the Legislative Council removed this provision. After the Bill was finally approved by the Council on 26 April 1889, the Governor reserved, on 29 April 1889, the Bill for Her Majesty's Pleasure.[132]

The Constitution Bill 1889 (WA), slightly modified by the UK government and Parliament, and the UK enabling Bill were approved on 16 July 1889 by the House of Lords.[133] A raft of negative publicity in the UK encouraged Governor Broome to respond via a Letter to the Editor, published in The Times.[134] On the day the House of Lords approved the 1890 UK Enabling Bill (scheduling the 1889 Bill), The Times reported that this responsible government initiative would 'hand over the entire control of no less than 500,000 square miles of territory' '[t]o this diminutive but ambitious Colony' and asked: should 'this vast unoccupied territory be handed over to the control of a Colony so small as Western Australia'? For The Times the answer was clear: 'Imperial patrimony should not be squandered in this reckless fashion', disallowing the 'claims of the mother country'.[135] Similarly, The Pall Mall Gazette bemoaned: the proposed WA Constitution would give 'to a miserable handful of ex-convicts and others on the Swan River full and absolute authority over the one last territory where…[the UK] had a chance of doing anything on a large scale for the benefit of…[the UK's] people and the establishment of an Imperial Zollverein'.[136] This criticism had a significant impact

128 Western Australia, *Parliamentary Debates*, Legislative Council, 13 March 1889, 3.

129 Western Australia, *Parliamentary Debates*, Legislative Council, 18 March 1889, 23.

130 Western Australia, *Parliamentary Debates*, Legislative Council, 5 April 1889, 247; House of Commons Parliamentary Papers, *Correspondence* above n 99, Sir Napier Broome to Lord Knutsford, 9 April 1889, No 59, 81.

131 See eg, Western Australia, *Parliamentary Debates*, Legislative Council, 12 April 1889, 266-88; 17 April 1889, 339-53; 26 April 1889, 370-90; 'The Western Australian Constitution Movement 1829-1890', above n 1, 10-11; Heseltine above n 11, 118-20.

132 Western Australia, *Parliamentary Debates*, Legislative Council, 29 April 1889, 402.

133 *The Constitution Bill for Western Australia*, above n 118, 19. Note that an unsuccessful amendment in relation to the waste lands provision was moved by Lord Beauchamp (at 17). A successful amendment altered the provision in Schedule D concerning the Attorney-General's pension.

134 Published in *The Times* on 26 June 1889: Sir Napier Broome to Lord Knutsford 11 May 1889 No 1, 299; 'The Western Australian Constitution Movement 1829-1890', above n 1, 13; Heseltine, above n 11, 123.

135 *The Constitution Bill for Western Australia*, above n 118, 29, 30 (extracted from *The Times* 16 July 1889).

136 Ibid 32 extracted from *The Pall Mall Gazette*, 18 July 1889.

on the WA Constitution Bill and UK enabling Bill's reception when on 26 July 1889 they were introduced in the House of Commons. As predicted by The Home News,[137] both Bills confronted considerable parliamentary resistance and were accordingly delayed.[138] The result, much to the consternation of the WA colonists, was inevitable,[139] the debate was delayed to the next 1890 UK parliamentary session. It was agreed between Knutsford and Broome that a delegation from Western Australia should visit London to promote the passage of the UK enabling Bill through the House of Commons Select Committee process which was to begin in March 1890, chaired by Baron Henry de Worms.[140] The WA delegation approved by the Legislative Council comprised Stephen Parker, Sir Cockburn-Campbell and Governor Broome.[141]

The House of Commons Select Committee seemed especially influenced by two facts: it was unprecedented to split a Colony as was being contemplated[142] and the proposed separation of Western Australia into two colonies, practically and constitutionally, could be problematic should the Australian Colonies choose to federate.[143] Further Governor Broome, in his evidence, conveyed the colony's reluctance to be separated[144] but indicated that 'if [such separation]… be required to produce a good effect upon public opinion in England it is desirable to adopt it'.[145] This disinclination was reiterated by Sir Thomas Cockburn-Campbell[146] and Stephen Parker,[147] the latter emphasising that the new WA Parliament would refrain from investing any money in the northern territory in terms of public works or resource projects.[148] The WA delegates were also supported by similar

137 Ibid 32 (extracted from *The Home News*, 19 July 1889).

138 House of Commons Parliamentary Papers, *Further Correspondence*, above n 49, Lord Knutsford to Sir Napier Broome, 23 July 1889, No 6, 10.

139 Ibid, Sir Napier Broome to Lord Knutsford, 30 July 1889, No 17, 15; Lord Knutsford to Sir Napier Broome, 6 September 1889, No 18, 12; 'The Western Australian Constitution Movement 1829-1890', above n 1, 14 (citing the July 1889 Council resolution that 'the Imperial Government will reconsider their position in regard to the Enabling Bill and, in the interests of this colony, so seriously menaced by any further delay in the introduction of self-government').

140 House of Commons Parliamentary Papers, *Further Correspondence*, above n 49, Sir Napier Broome to Lord Knutsford, 17 August 1889, No 28, 23; Lord Knutsford to Sir Napier Broome, 12 October 1889, No 32, 26.

141 Ibid, Sir Napier Broome to Lord Knutsford 12 November 1889, No 36, 28.

142 Minutes of Evidence, 18 March 1890 (Mr Stanley Leighton's evidence) in *Report from the Select Committee on the Western Australian Constitution Bill together with the Proceedings of the Committee, Minutes of Evidence and Appendix* (6 May 1890) 12; 15 April 1890, 90, [1564]-[1565] (Sir Napier Broome); 22 April 1890 [2154] (Mr Stephen Parker).

143 Ibid 25 March 1890, 45 (Sir Napier Broome); 15 April 1890, 79 [1327], 91 [1569] (Sir Napier Broome); 18 April 1890 96 [1618]–[1619], [1660] (Sir T Cockburn-Campbell); 22 April 1890, 126 [2136]- [2138], 128 [2155] (Mr Stephen Parker).

144 Ibid 25 March 1890, 42 [652]-[653], 79 [1321]-[1322] (Sir Napier Broome).

145 Ibid 42 [656] (Sir Napier Broome).

146 Ibid 15 April 1890, 91 [1579]; 18 April 1890, 95 [1596], [1599], [1611], [1695]–[1696], [1716]–[1717].

147 Ibid 22 April 1890, 119 [2055]–[2057]; 124 [2102]–[2110], 128 [2153], 25 April 1890, 140 [2345]–[2349]; 146 [2456]–[2459], 148 [2507], 150 [2533].

148 Ibid 124 [2102]–[2110]; 25 April 1890, 137 [2293].

evidence from Governor Robinson, a previous Governor of Western Australia (11 January 1875–6 September 1877 and 16 April 1880–13 February 1883).[149]

Ultimately, all three WA delegates proved remarkably persuasive and successful. On 6 May 1890 the Select Committee's Report was tabled in the House of Commons, recommending significant amendments to the 1890 UK enabling Bill including repealing Clause 4 which exempted from local WA control the northern portion of the Colony and amendment of Clause 3 to grant the management of all waste lands within Western Australia to the colony's Legislature and executive. These amendments were accepted by the House of Commons which, on 4 July 1890, agreed to the 1890 UK Bill to which was scheduled the 1889 WA Bill.[150] On 25 July 1890 that Bill was also agreed to by the House of Lords.[151] The 1890 UK Bill received royal assent on the same day[152] and on 15 August 1890 Queen Victoria gave her assent to the 1889 scheduled Bill.[153] Both Acts were officially proclaimed and, other than Part III of the *Constitution Act 1889* (WA) containing ss 42–53 dealing with an elected Legislative Council, came into operation on 21 October 1890.[154]

THE TEXT: 1889

Unlike the United Kingdom,[155] commencement of the *Western Australian Constitution Act 1890* (UK) and *Constitution Act 1889* (WA) maintained a tradition, established by the 1829 UK Act authorising the making of Western Australian 'Laws and Ordinances'[156] and, for example, continued by the *Australian Constitutions Act 1850* (UK) as well as the *Colonial Laws Validity Act 1865* (UK)[157] and *Legislative Council Ordinance 1870* (WA), of written

149 Ibid 29 April 1890, 161 [2704]–[2707]; 168–9 [2805]–[2820], [2826]–[2829].

150 House of Commons, *Parliamentary Debates*, Third Reading, 4 July 1890, vol 346 cc813-8.

151 Battye, *Western Australia*, above n 3, 393; Kimberly, above n 11, 297.

152 Macphail, above n 11, 220.

153 Western Australian Government Gazette, No 49, 30 October 1890, 809. See also s 1 of the 1890 UK Enabling Bill (stating '[i]t shall be lawful for her Majesty by Order in Council to assent to the scheduled [1889 WA] Bill').

154 WA Government Gazette, No 47, 23 October 1890, 790-91 (reproducing the Proclamation). For Part III of the *Constitution Act 1889* (WA), which did not commence until 18 October 1893, see, WA Government Gazette, No 35, 18 July 1893, 727-28 (reproducing the Proclamation). See also s 7 of the 1890 UK Enabling Act (stating that '[t]his Act and the Order in Council signifying Her Majesty's assent to the scheduled Bill shall be proclaimed in Western Australia by the Governor or other person lawfully administering the government of Western Australia within three months after he has received a copy thereof, and this Act and the scheduled Bill shall, except as provided in section forty-two of the scheduled Bill, take effect in the colony from the day of such proclamation').

155 Despite the general proposition that, before and after 1889, the UK has an unwritten constitution, several statutes have a constitutional dimension or character including the *Bill of Rights 1689* and *Act of Settlement 1701*.

156 10 Geo. IV c, 22 1829 (UK).

157 See also, *Wilsmore v Western Australia* [1981] WAR 159, 176 (Smith J) (suggesting that the WA Parliament's power to amend the *Constitution Act 1889* (WA) 'is derived both from s 5 of the [*Western Australian Constitution Act 1890* (UK)] and s 5 of the *Colonial Laws Validity Act*').

constitutionalism. Indeed, to emphasise this phenomenon, rather than relying on the statutory interpretation doctrine of implied repeal,[158] s 57 of the *Constitution Act 1889* (WA) mandated that '[a]ll laws, statutes, and ordinances which at the commencement of this Act are in force within the colony' and 'repugnant to this Act' were 'to that extent hereby amended and repealed as necessary'. Consequently, subject to theories and uses of constitutional interpretation and linguistic conundrums,[159] one normative and empirical proposition emerges: words, phrases, numbers[160] and punctuation[161] in the 1889 and 1890 Acts are and ought to be not merely important but crucial.

A New Bicameral Legislature

As a matter of explicit textual adumbration and almost numerical primacy the grant of legislative power was explicated in s 2 of the *Constitution Act 1889* (WA):

> There shall be, in place of the Legislative Council now subsisting, a Legislative Council and a Legislative Assembly: and it shall be lawful for Her Majesty, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, order, and good government of the colony of Western Australia and its dependencies; and such Council and Assembly shall, subject to the provisions of this Act, have all the powers and functions of the now subsisting Legislative Council.[162]

158 In the United Kingdom's parliamentary sovereignty context, see *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) (suggesting that certain constitutionally significant legislation, for example, *Parliament Act 1911* (UK), *Parliament Act 1949* (UK), *European Communities Act 1972* (UK), and *Human Rights Act 1998* (UK), are not subject to the doctrine that subsequent statutes impliedly repeal earlier inconsistent statutes *pro tanto*). This is very similar to the position of State Constitutions prior to *McCawley's* case: see, *Cooper v Commissioner of Income Taxation (Qld)* (1907) 4 CLR 1304, 1314 (Griffith CJ), 1317 (Barton J). Contrast s 73 of the *Constitution Act 1889* (WA) (conferring power on the WA Legislature to amend the *Constitution Act 1889* (WA)). Of course, s 73 while simultaneously strengthening legislative power and diminishing the *Constitution Act 1889* (WA)'s resistance to textual change and repeal by the WA Parliament, itself is, to some extent, curtailed by manner and form limitations.

159 For general overviews, including textualism, structuralism and originalism, see American Constitution Society for Law and Policy, *It Is A Constitution We Are Expounding: Collected Writings on Interpreting Our Founding Document* (American Constitution Society for Law and Policy, 2009); Walter F Murphy et al, *American Constitutional Interpretation* (Foundation Press, 4th ed, 2008).

160 For differing views about the meaning of 'thirty five' in Article II, s 1, clause 5 of the *United States Constitution*, see, Thomson, 'Drafting Australian Constitutions', above n 1, 169 n 53.

161 For example as to the importance of a comma in s 92 of the *Commonwealth Constitution* and a semicolon in Article IV, s 3, clause 1 of the *United States Constitution* see Thomson, 'Drafting Australian Constitutions', above n 1, 161 n 22.

162 Additional grants of legislative power were provided, for example, by s 73 of the *Constitution Act 1889* (WA), s 5 of the 1890 UK Enabling Act and s 5 of the *Colonial Laws Validity Act 1865* (UK). Limitations were also imposed, for example, by those provisions and s 2 of the *Colonial Laws Validity Act 1865* (UK).

Institutional structures, electoral matters and nomination powers were expressly adumbrated in subsequent provisions. For example, there was to be a 30 member elected Legislative Assembly with a maximum four year duration unless sooner prorogued or dissolved by the Governor.[163] Initially, the Legislative Council exclusively comprised 15 members, including members filling 'vacancies', appointed by the Governor at least one of whom had to be simultaneously a member of the State's executive.[164] Chronologically, this appointed legislative chamber was to continue for the shorter of two periods: first, 'six years' commencing from the 'first summoning of the Legislative Council which occurred on 30 December 1890[165] or, second, when the colony's Registrar General 'certified by writing' that Western Australia's population, 'exclusive of aboriginal natives', had 'attained to 60,000 souls'.[166] Gold discoveries in the Kimberley and Kalgoorlie regions caused the latter to occur on 18 October 1893[167] and, together with amendments to the *Constitution Act 1889* (WA) and electoral legislation, a 1894 election[168] changed the Legislative Council to twenty one members with a six year term, with seven members terms ending every two years.

Executive Power

In marked contrast, responsible government's textual amplification and mandate from this 1889 WA Constitution's provisions and structure, in accordance with unwritten British constitutional tradition and practice,[169] is, at least in one respect, barely visible. That is, despite public rhetoric, debates and clamour engaged in by WA colonists and Governors, appointment, by the Governor, of members of the Executive Council to advise the Governor regarding exercises of colonial executive power, only from parliamentarians commanding or controlling a majority of votes in the Legislative Assembly accorded with British governmental conventions and principles, not an overt, detailed and codified constitutional text. Against this non-textual panorama, contextual and originalist interpretative principles need to be utilised to facilitate and maintain the constitutional warrant and edifice for responsible government. To assist, two inter-related aspects – appointment of Legislative Council and Legislative Assembly members to executive offices as Ministers of the Crown and parliamentary appropriation of money for executive expenditure – of responsible government have textual

163 See *Constitution Act 1889* (WA), ss 11, 14

164 See *Constitution Act 1889* (WA), s 6.

165 Western Australian Government Gazette, No 59, 18 December 1890, 947; Western Australian Minutes and Votes and Proceedings of the Parliament During the First Session of the First Parliament (1890-1), 1.

166 See also s 73 (contemplating a Bill could be 'passed for the election of a Legislative Council at any date earlier than [indicated] by Part III' and stipulating that such a Bill 'shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon').

167 See Western Australian Government Gazette, No 35, 18 July 1893, 727-8 (indicating that Part III of the *Constitution Act 1889* (WA) would be delayed by 3 months and not commence until 18 October 1893).

168 See generally D Ridley, *The 1894 Election for the Legislative Assembly in Western Australia* (1973, BA Thesis, UWA).

169 See above n 69 (referring to Taylor and s 64).

foundations in the *Constitution Act 1889* (WA).[170] Prominent provisions, which unlike s 6's first paragraph remained in operation after 1894,[171] include two other aspects of s 6. First, under s 6's second paragraph an appointed Legislative Council member could, despite the general prohibition on doing so, hold an 'office of profit under the Crown' if it were an office 'liable to be vacated on political grounds. Second, s 6's third paragraph mandated that '[o]ne at least of the executive offices liable to be vacated on political grounds shall always be held by a member of the Legislative Council'.[172]

To this, s 28 added a stipulation: 'there shall [always] be five principal executive officers of the Government liable to be vacated on political grounds'. A clear, but not mandatory textual linkage between the Legislative Council, Legislative Assembly and Executive was added by s 29(5): 'If any member of the Legislative Council or Legislative Assembly, after his nomination or election … [a]ccepts … any office of profit from the Crown … his seat shall thereupon become vacant: Provided that members accepting offices liable to be vacated on political grounds shall be eligible for re-election, or while the council remains nominated, for re-appointment.'[173] That is, Legislative Council and Legislative Assembly members accepting such an 'executive office' subsequently had to contest and win a by-election or until 1894, be reappointed by the Governor to the Legislative Council.[174] Who was to be offered an appointment and, upon acceptance, who was appointed to such an office where the holder was 'liable to retire from [that] on political grounds' was by s 74's mandatory terms 'vested in the Governor alone.' Importantly, from interpretative, practical and political perspectives, other than the stipulation in s 6, these executive office appointees did not, as a matter of law, have to be Legislative Council or Legislative Assembly members.[175]

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170 For comparisons, see, Taylor, above n 6, 35 (regarding the drafting of the 1855 Victorian Constitution and other Australian colonial constitutions); Waugh, above n 6, 350-1 (noting the 'contentious[ness]' of the principle of 'responsible government in colonial Australia' and that 'self-government of a sort could have developed without the full modern doctrine of responsible government'), 352 (noting only four of seven Ministers were required to be elected representatives under s 18 of the *Constitution Act 1855* (Vic)). See also, T Irving, 'The Idea of Responsible Government in New South Wales Before 1856' (1964) 11 *Historical Studies Australia and New Zealand* 192.

171 See, *Constitution Act 1889* (WA), s 43 (stating '[o]n the coming into operation of [Part III], the first paragraph of section 6 … shall … cease to have any operation').

172 Since 1984 this requirement has been in s 43(3) of the *Constitution Acts Amendment Act 1899* (WA). Cf *Commonwealth Constitution*, s 64.

173 As to persons who, immediately before 21 October 1890, were members of the Executive and Legislative Councils, see s 74 (indicating 'whereas by the operation of this Act certain officers of the Government may lose their offices on political grounds, and it is just to compensate such officers for such loss' they were to be paid the amount of money specified in Schedule D to the *Constitution Act 1889* (WA)).

174 See generally, Steven G Calabresi and Joan Larsen, 'One Person, One Office: Separation of Powers or Separation of Personnel?' (1994) 79 *Cornell Law Review* 1045, 1050-1, 1053-7 (explicating British antecedents and statutory provisions); Eugene A Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Oxford University Press, 1943) 226, 297-8 ('Appendix D; Abolition of Ministerial By-Elections').

175 See generally *A-G (WA) ex rel Burke v WA* [1982] WAR 241, 245 (Wickham J (implicitly accepting this legal position)).

Finally, textual linking of the Executive and parliamentary chambers was given, via revenue raising and public expenditure provisions, a monetary dimension. Section 64 stipulated that all Crown revenues, including 'taxes, imposts, rates, and duties' in relation to which 'the Legislature [had the] power of appropriation' were to 'form one Consolidated Revenue Fund to be appropriated to the public service of the colony'. In this context, appropriation and taxation bills could only, under s 66, 'originate in the Legislative Assembly' and, under s 67, could not be passed by the Legislative Assembly without a 'message of the Governor'. In practice, the constitutionally sanctioned result was responsible government: the Governor appointed members of the Legislative Council and the Legislative Assembly to advise him on the exercise of executive power; to be responsible to the Parliament and, indirectly, the electorate, for the exercise of that executive power; and to impose taxes and obtain, via appropriation legislation, money from the Consolidated Revenue Fund to enable the Executive to carry on government and implement public works.[176]

More elaborate and detailed explicit textual support was given to the Governor's executive powers in four documents: Western Australian Constitution Act 1890 (UK); *Constitution Act 1889* (WA); the Governor's 25 August 1890 Letters Patent; and the Governor's 25 August 1890 Instructions.[177] As to the former, proviso (a) in s 2 indicated that UK legislation relating to 'the reservation of Bills for the signification of Her Majesty's pleasure thereon, and the instructions to be conveyed to Governors for their guidance in relation to the matters aforesaid' continued to apply to Bills passed by the WA Legislative Council and Legislative Assembly. Provisions in the *Constitution Act 1889* (WA) conferring power on the Governor included ss 3, 6, 9, 12, 13, 14, 67, 68 and 74. In relation to the quest for responsible government, clause VII of the Letters Patent indicated that:

> There shall be an Executive Council for the Colony, and the said Council shall consist of such persons as are now members thereof or may at any time be members thereof in accordance with any Law enacted by the Legislature of the Colony, and of such other persons as the Governor shall, from time to time, in Our name and on Our behalf, but subject to any Law as aforesaid, appoint under the Public Seal of the Colony to be Members of Our said Executive Council.

176 The Executive Council appointed on 29 December 1890 comprised Governor Robinson, John Forrest, Septimus Burt, George Shenton, W E Marmion and H W Venn: Western Australian Government Gazette, No 61, 29 December 1890, 971. See, de Garis, 'Self-Government' above n 11, 338.

177 Western Australia, *Minutes and Votes and Proceedings of the Parliament during the 1st session of the 1st Parliament 1890-9*, Parliamentary Paper (No 27) (reproducing Letters Patent and Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Colony of Western Australia and its Dependencies). See generally, Heseltine, above n 11, 145-8 (discussing Letters Patent and Instructions); de Garis, 'Self-Government', above n 11, 337 (suggesting the WA Governor retained 'impressive "reserve" powers as the representative of the [UK] crown').

At least two points emerge. First, clause VII envisaged that the WA legislature had, under ss 2 and 73 of the *Constitution Act 1889* (WA), power to enact legislation regulating who could be members of WA's Executive Council and the manner in which they attained such membership as well as the Governor's power of appointment. Presumably, the latter would have required an amendment of s 74. Secondly, as a matter of constitutional law, even if not in practice, this authorised the Governor to appoint 'other persons' who, except for the executive office required by the third paragraph of s 6 of the *Constitution Act 1889* (WA) to 'be held by a member of the Legislative Council', were not members of the WA legislature to the Executive Council.[178]

Of course, in relation to Western Australia, the United Kingdom Crown retained and, on the advice of UK Ministers, exercised executive power including the appointment of Governors and promulgation of Letters Patents and Instructions. Additionally, power to geographically render asunder Western Australia and create new legislatures and governments was conferred on the United Kingdom Crown. Section 6(1) of the 1890 UK Enabling Act provided:

> It shall be lawful for Her Majesty, if at any time or times Her Majesty so thinks fit, by Order in Council, to divide the colony of Western Australia by separating therefrom any portion thereof, and either to erect that portion or any part thereof into a separate colony or colonies under such form of government and legislature as Her Majesty may think fit to establish therein, or to unite the same or any part thereof to any other Australian colony, and further to sub-divide any separate colony so created as aforesaid and to establish in such sub-division any form of government and legislature which Her Majesty may think fit, and to re-unite to the colony of Western Australia any part of any colony so created.

Indeed, s 61 of the *Constitution Act 1889* (WA) had even prior to s 6's enactment accepted this legal possibility and provided:

> Nothing in this Act contained shall prevent Her Majesty from dividing the Colony of Western Australia as she may from time to time think fit, by separating therefrom any portion thereof, and either erecting the same or any part thereof into a separate Colony or Colonies under such form of Government as she may think fit, or from subdividing any Colony so created, or from re-uniting to the Colony of Western Australia any part of any Colony so created.179

178 Compare clause VII of the 14 February 1986 WA Letters Patent, Western Australia Government Gazette, No 25, 28 February 1986, 684 (indicating 'the members of the Executive Council shall be appointed by the Governor under the Public Seal of the State and shall hold office during the Governor's pleasure').

179 But see s 123 of the *Commonwealth Constitution* (stipulating requirements for increasing, diminishing or altering 'the limits of [a] State'). Consequently, s 61 of the *Constitution Act 1889* (WA) may, since 1 January 1901, be inoperative.

Judicial Power

Three provisions, ss 54, 55, 56 and 58 of the *Constitution Act 1889* (WA), alluded to courts and judges. The principal provision, s 58 provided:

> All Courts of Civil and Criminal Jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, or ministerial, within the Colony at the commencement of this Act shall except in so far as they are abolished, altered, or varied by this or any future Act of the Legislature of the Colony or other competent authority, continue to subsist in the same form and with the same effect as if this Act had not been passed.

FLEEING FROM THE DOCUMENT: A NEW CONSTITUTIONAL REFUGE?

Under Premier John Forrest, during the period 1893-1899, constitutional amendments proliferated. For example, extensive amendments were made to the *Constitution Act 1889* (WA) concerning WA parliamentarians' qualifications and the composition of the Assembly and Council.[180].

One, not inevitable, consequence of these post-1890 amendments was a propagation of separate Acts: the *Constitution Act Amendment Act 1893* (WA);[181] *Constitution Act 1889 Amendment Act 1894* (WA);[182] and *Constitution Act Amendment Act 1896* (WA).[183] All three statutes amended the *Constitution Act 1889* (WA). Even so, this amendment process did not, as a textual matter, culminate in a single consolidated WA Constitution.[184] Why did this occur? From a legal perspective one suggestion has been proffered:

> [the 1893, 1894 and 1896] amendments…[took] the form of repealing particular provisions of the [1889 WA] Constitution Act and making a fresh provision on the same subject matter but in a different form in a separate [WA] Act entitled a 'Constitution Act Amendment Act'.[185]

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180 The Legislative Council ceased to be nominated by 1893 due to the Colony's population exceeding 60,000 as by 1893 it had reached 64,923: Chate, Graham and Oakley, above n 26, 27. This population increase was prompted by an influx of migrants in search of gold: de Garis, 'The History of Western Australia's Constitution', above n 11, 145-6; Russell, above n 8, 196.

181 For example, this Act provided for the election of Legislative Council members, alteration of the number of electoral districts for the Legislative Assembly and amending the qualification for voters and Legislative Assembly members.

182 Implementing amendments as to forfeitures, penalties or sums of money under 1889 Act.

183 Amongst other minor amendments, this Act altered the Legislative Assembly's electoral provinces and Legislative Council's districts.

184 For eg, s 1 of the *Constitution Act Amendment Act 1896* (WA) stipulated that amendments were to 'be incorporated and read as one Act with the *Constitution Act 1889* … and the *Constitution Act Amendment Act 1893*'.

185 *Western Australia v Wilsmore* (1982) 149 CLR 79, 90 (Aickin J). See also 95 (Wilson J) (indicating that the 1899 Act 'assumes an identity which is quite distinct from any of the preceding Acts, including the 1889 Act').

On 22 August 1899 Forrest introduced a consolidating Bill, the Constitution Acts Amendment Bill 1899 (WA) (retitled by 5 September 1899 the Constitution Act Consolidation Bill 1899 (WA)), which proposed to amend the 1889 Act and simultaneously locate all the post-1890 amendments into the original Constitution Act 1889 (WA).[186] Eventually this 1899 Bill was amended so that, instead of consolidating the numerous post-1889 constitutional amendments, the Bill's purpose was to create a second Constitution Act: the *Constitution Acts Amendment Act 1899* (WA). The immediate results included altering the franchise and the numerical size of the Legislative Council and Assembly. Ultimately, this approach has had at least three significant consequences: Western Australia possesses two State Constitutions;[187] their interpretation and scope of application can and does vary;[188] and quests to integrate them into one consolidated, but not necessarily comprehensive, State Constitution have remained politically and legally elusive and challenging.[189]

Given these consequences, why did Forrest abandon the August 1899 Constitution consolidation proposal? One suggestion is that Forrest justified this retreat from the original 1899 Bill as preserving the integrity of the Constitution Act 1889 (WA).[190] A second, perhaps more legal perspective, is the suggestion that he was motivated by a desire to avoid the manner and form provision protecting the constitution of the Legislative Assembly and the Legislative Council in s 73 in the Constitution Act 1889 (WA):

> It could be regarded as suspicious that a government ostensibly keen to preserve the original [1889] Act for posterity would select an amendment procedure which would have the practical effect of transferring many sections of the CA [*Constitution Act*] 1889 into a separate statute. Such a strategy, diligently pursued, would eventually render the original [1889] Act a shell.[191]

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186 The 1899 Bill's long title was 'An Act to amend the *Constitution Act 1889*, and to amend and consolidate the Acts amending the same.': Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 August 1899, 973 (First Reading); 29 August 1899, 1033, (Second Reading). Forrest explained that: 'I have come to the conclusion, since the Bill was laid on the table, that it is not wise nor in accord with precedent to altogether consolidate the Constitution Acts, because that would remove from the statute books the landmarks of the original constitution').

187 de Garis, 'The History of Western Australia's Constitution', above n 11, 147; Sharman, above n 11, 294; See also, Western Australia v Wilsmore (1982) 149 CLR 79, 95 (Wilson J).

188 See, eg, *Western Australia v Wilsmore* (1982) 149 CLR 79, 85 (Gibbs CJ noted the first proviso to s 73 applies only 'to laws which repeal or alter the *Constitution Act 1889* (WA), and not to laws which, without repealing or altering that Act, nevertheless change the constitution of the Legislative Council or of the Legislative Assembly'), 91 (Aickin J), 102 (Wilson J), 105 (Brennan J).

189 Miragliotta, above n 11, 163-6.

190 Ibid 157-60 (citing Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 August 1899, 1033). See also de Garis, 'The History of Western Australia's Constitution', above n 11, 147.

191 Miragliotta, above n 11, 157.

That is, confronted by a choice – consolidate the 1893, 1894 and 1896 amendments into the *Constitution Act 1889* (WA) and, into the future, maintain the position of having only one Western Australian Constitution, not two Constitutions or avoiding the application and consequences of s 73's absolute parliamentary majority manner and form requirements in relation to subsequent constitutional amendments – Forrest and the WA Parliament chose the latter, not the former, option. As a matter of law, this choice was correct. Section 73 in its original 1889 text, by using the terminology 'to repeal or alter any of the provisions of this Act', only applies to amendments made to the 1889 *Constitution Act's* text.[192] Amendments made to the *Constitution Acts Amendment Act 1899* (WA) do not have to obtain absolute majorities in the Legislative Assembly and Legislative Council.

Of course, in this context, given the 1978 amendments to s 73, made by the *Acts Amendment (Constitution) Act 1978* (WA), at least three outcomes ensue. First, s 73(2)'s terminology, '[a] Bill that', which starkly contrasts with 'to repeal or alter any of the provisions of this Act', appears, from a textualist perspective, to require s 73(2)'s absolute parliamentary majority and state referendum requirements relating to constitutional amendments specified in s 73(2)(a)-(e) be applied to Bills which amend the *Constitution Act 1889* (WA) or any other Western Australian legislation.[193] Consequently, the choice open to Forrest in 1899 has, depending on s 73(2)'s scope, been considerably narrowed. Second, the 1978 amendments to s 73, if constitutionally valid,[194] may well have an important political and practical consequence: the *Constitution Act 1889* (WA) will not be reduced to a 'shell'.[195] Third, especially because of s 73(2)'s manner and form requirements, the opposite position has also not eventuated: combining and codifying the *Constitution Act 1889* (WA) and the *Constitution Acts Amendment Act 1899* (WA) into one WA Constitution.[196]

RUMMAGING AROUND: WHY IS THE CONSTITUTION ACT 1889 (WA) LEGALLY EFFICACIOUS?

Several bases can be postulated as the source of constitutional legitimacy for the original Constitution Act 1889 (WA) which was scheduled to the *Constitution Act 1890* (UK). These include Professor Dicey's doctrine of UK parliamentary

192 *Western Australia v Wilsmore* (1982) 149 CLR 79.

193 Section 73(2) did not apply to the enactment of s 14 of the *Australia Acts 1986* (Cth & UK): see, *Sharples v Arnison* [2002] 2 Qd R 444, 458 [25] (McPherson JA) (McMurdo P and Davies JA agreeing).

194 For example, did s 73(2) require approval by WA electors? For an affirmative implication, see: *McGinty v Western Australia* (1996) 186 CLR 140, 297 (Gummow J); *A-G (WA) v Marquet* (2003) 217 CLR 545, 617 [216] (Kirby J); Peter Johnston, '*Attorney-General (WA) v Marquet:* Ramifications for the Western Australian Parliament' (2005) 20(1) *Australasian Parliamentary Review* 117, 120, 123.

195 Miragliotta, above n 11, 157.

196 See eg, Joint Select Committee of the Legislative Assembly and Legislative Council, Parliament of Western Australia, *Final Report of the Joint Select Committee on the Constitution- Volumes I and II* (1991).

sovereignty;[197] American popular sovereignty doctrine;[198] and the Commonwealth Constitution.[199]

UK Parliamentary Sovereignty

Two fundamental questions arise. First, why was the Constitution Bill 1889 (WA) sent to the England for enactment by the UK Parliament? Second, was the UK Parliament the source of the Constitution Act 1889 (WA)'s legal efficacy?[200]

One consistent legal perspective has been postulated. The suggestion is that the Constitution Bill 1889 (WA) was, like the equivalent New South Wales and Victorian Constitutions[201]

197 A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 10th ed, 1959) 37-180 (formulating and discussing parliamentary sovereignty's nature and consequences). See generally, Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford University Press, 1957); Taylor, above n 6, 465-70; Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999); Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010).

198 This doctrine was pithily encapsulated by President Lincoln's immortal phrase 'government of the people, by the people, for the people': Roy Basler (ed), *The Collected Works of Abraham Lincoln* (Rutgers University Press, 1953) vol 7, 17-23 (reproducing the 11 November 1863 Gettysburg Address); G. Wills, *Lincoln at Gettysburg: The Words That Remade America* (Simon & Schuster, 1992). See also below n 255-61 (discussing popular sovereignty and US Constitution).

199 See especially, s 106 of the *Commonwealth Constitution.*

200 See generally *Western Australia v Wilsmore* [1981] WAR 179, 183 (Burt CJ concluding that 'the sole source of authority for [State] Constitutions is the Imperial Act or Acts which created them').

Compare Twomey, *The Constitution of New South Wales*, above n 6, 21 (posing 'the substantive question of whether the [NSW] *Constitution Act 1855* is an indigenous New South Wales Act of Parliament or a British Act of Parliament' and suggesting '[i]n fact, [the 1855 NSW Constitution Act] appears to be neither' although, 'the source of its operation was a British law', namely s 8 of the NSW *Constitution Statute 1855* (UK)); Waugh, above n 6, 357-60.

201 Carney, above n 10*,* 50; Lumb, above n 10, 17 (suggesting '[n]o power was given by this section [s 32 of the *Australian Constitutions Act (No 2)* (Imp)] to vest in the local legislature authority over Crown lands. Consequently, a new enabling [UK] Act had to be passed and to this new Act the New South Wales Constitution Bill in its amended form was attached as a schedule…The ultimate legal support for the New South Wales Constitution is therefore to be found in an imperial enactment'); Twomey, *The Constitution of New South Wales,* above n 6, 12, 16; Waugh, above n 6, 357 (noting s 54 of the Victorian Constitution Act exceeded the Victorian Parliament's powers and therefore could not 'come into force until the repeal of British legislation inconsistent with it'). As to Queensland, see Melbourne, above n 6, 445-6 (indicating that a UK 'Order-in-Council [dated 6 June 1859] gave [to Queensland] a constitution identical with that of NSW as described in the schedule to the Imperial Act of 1855. That [NSW] constitution was, indeed, incorporated in the Order-in-Council and declared to be in force in Queensland until altered by the Queensland Legislature…. In 1861 an Imperial Statute [24 & 25 Vic c.44] was passed to validate the Order-in-Council of 1859 and all actions performed under its authority' (footnotes omitted)).

(and unlike South Australia[202] and Tasmania[203]), required, from a legal perspective, to be scheduled to an Imperial Act and enacted by the UK Parliament. Three interrelated reasons necessitated this position. First, the UK Parliament possessed full parliamentary sovereignty over Australian colonies. Second, the WA Legislative Council was acting beyond its legal and constitutional powers conferred by s 32 of the *Australian Constitutions Act 1850* (UK).[204] Third, the Constitution Act 1889 (WA) would have been repugnant to some earlier Imperial legislation.[205]

Of course, there was precedent for scheduling colonial Constitutions to UK enabling legislation. This was especially so, but not confined to, the 1855 New South Wales and Victorian Constitutions.[206] However, was such scheduling necessary as a matter of constitutional law, or did it occur for reasons of political expediency, or to legitimise or expedite the process of obtaining colonial Constitutions? At least in relation to Victoria, it has been suggested that there may have been an 'idea of having the [1855 Victorian] Constitution enacted locally'[207] as occurred in Tasmania and South Australia.[208] However, in relation to the 1855 Victorian *Constitution* and, perhaps, the 1855 New South Wales *Constitution*, this local or colonial enactment 'idea' was, for several reasons, abandoned.[209]

202 Castles and Harris, above n 6, 109 (indicating '[a]s far as [Lord John Russell, Secretary of State for the Colonies] was concerned, provided that the legal defects in the original [1853 South Australian Constitution] bill, any proposed new [SA] constitution would come into effect without any special enactment of the British Parliament, a symbolic benefit which had been denied all the other [Australian] colonies except Tasmania'). See also, Twomey, *The Constitution of New South Wales*, above n 6, 17 (noting '[t]he South Australian Constitution Bill had originally included provisions to which the British Government objected, but [the SA Bill] was returned to the colony and a new [SA Constitution Bill] enacted [by the SA Legislative Council] which did not include the objectionable provisions. It therefore received assent without British legislative involvement.').

203 Lumb, above n 10, 33-4 (indicating that, '[t]he [Tasmanian] bill, which had not, as in the case of the other colonies, exceeded the powers conferred by the 1850 Act, receive[d]? the royal assent. Its immediate validity therefore rests on local enactment'.) (footnotes omitted).

204 For this view see Justice Robert French, 'Manner and Form in Western Australia: An Historical Note' (1993) 23 *University of Western Australia Law Review* 335, 336; Lumb, above n 10, 37, 45 n 94 (attributing waste lands as the reason why the 1889 Bill was exceeding powers conferred by s 32 of the 1850 UK Act because 'the Waste Lands Repeal Act 1855 had not been extended to Western Australia'); de Garis, 'The History of Western Australia's Constitution', above n 11, 144; Johnston, 'Freeing the Colonial Shackles', above n 11, 314; Peter W Johnston, 'The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust' (1989) 19 *University of Western Australia Law Review* 318, 318 n 2 (asserting that the Constitution Bill 1889 (WA) was 'ultra vires in certain respects touching upon the "wastelands of the Crown"'); I Killey, 'Peace, Order and Good Government, A Limitation on Legislative Competence' (1989) 17 *Melbourne University Law Review* 24, 28; Neil Douglas, 'The Western Australian Constitution: Its Source of Authority and Relationship with Section 106 of the Australian Constitution' (1990) 20 *University of Western Australia Law Review* 340, 340 n 1.

205 Douglas, above n 204, 341.

206 Taylor, above n 6, 33 n 66; Waugh, above n 6, 358-60.

207 Taylor, above n 6, 33.

208 *South Australian Constitution Act* (No 2, 1855-56); *Constitution Act 1855* (Tas).

209 Taylor, above n 6, 33-4 (suggesting reasons including delays in returning from the

Given the Tasmanian and South Australian precedents, as well as the removal, by the WA Legislative Council, of provisions in the 1889 WA Constitution Bill relating, for example, to waste lands of the Crown, two interrelated questions emerge: Why was the 1889 Bill, after the WA Legislative Council's approval, sent to London to be scheduled to a UK Act? Why was this scheduling procedure utilised?

An answer inheres in a prevalent general assumption: UK parliamentary and executive government involvement, as a matter of law, was required. This view was clearly expressed, as early as 22 August 1897, by Governor Broome:

> It would be well, I think, that the Constitution Act should be confirmed, as in the case of New South Wales and the other Colonies by an Act of the Imperial Parliament.[210]

This understanding also prevailed in the WA Legislative Council debates[211] and was confirmed in evidence before the House of Commons Select Committee. At least three specific legal theories have been postulated as to why UK parliamentary involvement was, as a matter of law, required. First, were ultra vires concerns relating to colonial legislative control relating to waste lands of the crown, and secondly, two repugnancy issues arising from s 73 in the 1889 Bill (WA). Thirdly, there were suggestions that two provisions in s 32 of the *Australian Constitutions Act 1850* (UK) applied to the Constitution Bill 1889 (WA).

Disposing of Waste Lands: UK Legislative and Executive Control and Regulation?

A confident assertion to the Select Committee about waste lands was made by John Bramston, Legal Adviser to the Colonial Office (1876–1897)[212]:

> [The *Waste Lands (Australia) Acts Repeal 1855* (Imp)] contains a section…specially relating to Western Australia. It empowers the Queen, by instructions made by Order in Council, or through one of the Secretaries of States, 'to regulate the sale, letting, disposal, and occupation of waste lands of the Crown in Western Australia, and the disposal of the proceeds

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Colonial Office and reconsidering the proposed Victorian Constitution and possible public discussions about 'things best left unsaid').

210 House of Commons Parliamentary Papers, *Correspondence*, above n 99, No 11, 12-17 (Governor Broome to Sir Holland, 22 August 1887). Compare the concept of 'confirmed' with concepts of 'recorded' and 'approval' (Twomey, *The Constitution of New South Wales*, above n 6, 18) used in relation to the 1855 NSW Constitution scheduled to the NSW *Constitution Act 1855* (UK) (although known by various names it is most readily identifiable as 18 & 19 Vic, c 54: Twomey at 20).

211 See eg, Western Australia, *Parliamentary Debates*, Legislative Council, 21 March 1888, 216 (Mr Alfred Hensman): 'that Bill would certainly have to lie on the table of the House of Commons for so many days before receiving the Royal Assent, and, not improbably, it would be followed – inasmuch as we wished to deal with the waste lands of the Crown – by an Act of the Imperial Parliament …'.

212 R.B Joyce, 'Bramston, Sir John (1832-1921)', *Australian Dictionary of Biography*, <http://adb.anu.edu.au/biography/bramston-sir-john-3044> (indicating Bramston lived in Queensland, and was a Legislative Council member and Queensland Attorney-General).

> arising therefrom until Parliament shall otherwise provide'… that power or regulation being now vested in the Queen, [UK] Parliament must do away with it in order to give the colony the control of its lands.[213]

Bramston explained that the involvement of the United Kingdom Parliament would not have been required to only attain responsible government. However, the WA Legislative Council's legal power in relation to crown lands required the enabling UK legislation.[214]

Additionally, Stephen Parker noted that:

> under the Imperial Statute 13 & 14 Vict c 59, …[WA's] present Legislative Council is empowered by Act to establish responsible Government in the colony. That is a power that the Imperial [Parliament] has given [the WA Legislative Council], not for a portion of the colony but for the whole of Western Australia. Western Australia has been defined for the last 60 years as it is now defined; therefore there can be no question as to what is meant by Western Australia; it means the whole of the territory. There is no power reserved under the Imperial Statute for a division of the colony, but [WA's colonists] are entitled to responsible Government for the whole. What I mean by the compromise is, that we have now consented to allow the Imperial Government to divide the colony at a future date in consideration of [the UK Parliament] giving [WA] control of the whole of the lands for the present until [the UK Government]… make[s] the division.[215]

There was a precedent in relation to the experience of New South Wales and Victoria:

> The [NSW and Victorian] Bills purported to amend Imperial Acts by claiming the power to regulate the disposal of the waste lands of the Crown…The solution adopted was to include each of the New South Wales and Victorian Bills in a Schedule to an Imperial Act which authorised the Queen to assent to each Bill. Before doing this, each Bill was amended to restore [in the Bills] the full imperial veto power

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213 Minutes of Evidence, 18 March 1890 (John Bramston's evidence) in *Report from the Committee,* above n 142, 3 (referring to and quoting s 7). See also, at 9 (Bramston noting that the Legislature's power to alter its constitution does not extent to a power in relation to Crown land).

214 Ibid 13. Section 4 of the enabling UK Act repealed s 7 of the *Waste Lands (Australia) Acts Repeal 1855* (Imp) (18 & 19 Vic c 56). Consequently, control of waste lands throughout Western Australia was vested in the WA legislature. There had been discussions about the division of WA into two separate colonies, for the purpose of placing in the UK waste lands north of 'the 26th parallel of latitude' and in the WA legislature waste lands south of this parallel. This proposal did not, as a matter of law, require dividing WA into two separate colonies. However, there was (and remains) provision for WA to be so divided (see s 61, 62 and 63 of the *Constitution Act 1889* (WA) and s 6 of the UK enabling Act. Cf s 123 of the *Commonwealth Constitution* (enabling a State to be divided and, at least by implication, repealing ss 61, 62 and 63 of the 1889 Act).

215 Minutes of Evidence, 25 April 1890 (Stephen Parker's evidence) in above n 142, 134 [2239], 148 [2506]-[2507].

> by removing the clauses which confined the powers of reservation and disallowance to [other NSW and Victorian] Bills dealing with imperial matters. In return, the entire management of the waste lands of the Crown was conceded to the colonial legislatures by the Imperial Act.[216]

At least in one respect the 1890 UK enabling Act was similar to the 1855 UK enabling Acts in relation to NSW and Victoria because s 3 of the former provided:

> The entire management and control of the waste lands of the Crown in the colony of Western Australia, and of the proceeds of the sale, letting, and disposal thereof, including all royalties, mines, and minerals, shall be vested in the legislature of that colony.

Seeking Answers: What Does s 73 of the 1889 Bill Reveal?

A second suggestion of why the 1889 Bill required UK Parliamentary involvement relates to s 73 of the 1889 Bill. This suggestion has two components. First, such involvement, via s 5 of the 1890 UK Act,[217] was required in view of the possibility that, as the 1889 Bill was scheduled to the 1890 Imperial Act, post-1890 amendments made by the WA Parliament to the 1889 WA Act might be seen as repugnant to the Schedule to the 1890 Act because the 1889 Bill had by this parliamentary scheduling procedure been enacted by the UK Parliament.[218]

Of course, pursuant to s 2 of the *Colonial Laws Validity Act 1865* (UK), a legal consequence of such repugnancy would have been the invalidity of any post-1890 amendments made by the WA Parliament to the *Constitution Act 1889* (WA). However, it has been suggested that scheduling other Australian colonial Constitutions to a UK Act merely indicated UK parliamentary approval of the colonial Constitution for purposes of royal assent of that Constitution, not substantive enactment, as UK legislation, of the Constitution.[219] If so, there would

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216 Carney above n 10, 43; Waugh, above n 6, 358. On these events, involving the UK Crown Law officers, Colonial Office and UK Parliament, see Melbourne, above n 6, 417-26 (quoting letter of 23 September 1854 from Sir Frederick Rogers, 1st Baron Blachford (1859-1871 Permanent Under-Secretary of State for the Colonies) to RW Church in GE Marindon (ed), *Letters of Frederick Lord Blackford* (John Murray, 1896), 157 (noting the NSW, Victorian and South Australia Constitution Bills were 'little less than a legislative Declaration of Independence on the part of the Australian colonies….[T]hey have sent to [the United Kingdom] laws which may be shortly described as placing the administration of the colony in a ministry dependent on the representative assembly, and abolishing the Queen's right of disallowing colonial acts. What remains to complete colonial independence, except command of the land and sea, I don't quite see.')).

217 See above n 157 (suggesting s 5 of 1890 UK Act provides power to amend 1889 WA Act).

218 See generally, Peter Johnston, *Manner and Form Provisions in the Western Australian Constitution: Their Judicial Interpretation* (SJD Thesis, University of Western Australia, 2005) 22-3 (suggesting s 5 of the 1890 UK Act was inserted to obviate repugnancy issues for WA Parliament's amendments to the *Constitution Act 1889* (WA) which, as a Bill, was scheduled to the 1890 UK Act); Twomey, *The Constitution of New South Wales*, above n 6, 272 (referring to the possibility of 'suggestion[s] that there was no power to amend the [NSW 1855] Constitution Act because [that NSW Constitution Act] was enacted under the authority of the Imperial Parliament'); *Clayton v Heffron* (1960) 105 CLR 214.

219 Twomey, *The Constitution of New South Wales*, above n 6, 18, 20 (concluding 'the [1855

be no repugnancy of post-1890 parliamentary amendments of the *Constitution Act 1889* (WA). Contrary to the latter supposition, the UK Parliament enacted s 5 of the 1890 UK Act to give the WA Parliament circumscribed power to amend the *Constitution Act 1889* (WA). Such an express grant, in a UK statute, of an amendment power authorised the WA Parliament to enact, in this context, colonial legislation repugnant to UK legislation and, therefore, to this extent, the 1890 UK Act and *Constitution Act 1889* (WA) impliedly repealed s 2 of the *Colonial Laws Validity Act 1865* (UK), but only to the extent of the amending the scheduled 1889 Act.[220]

Two important predecessors to s 5 of the 1890 UK Enabling Act existed: s 4 of the *New South Wales Government Act 1855* (UK) and s 4 of the Victorian *Constitution*

Constitution] Bill passed by the New South Wales Legislative Council, and reserved for Her Majesty's assent, was not the same as the [NSW Constitution] Bill to which Her Majesty assented' and 'the…[UK] Parliament did not itself enact the New South Wales *Constitution Bill* either… [The UK Parliament] merely reordered [the] form [of the 1855 NSW Constitution Act], as amended, in a schedule [to the 1855 UK Act], and gave legislative approval for Her Majesty to assent to [the 1855 NSW Constitution Act]… The [1855 NSW Constitution] Bill assented to [by Queen Victoria on 21 July 1855] is different in form, and has different section numbers, to [the 1855 NSW Constitution Bill] as passed by the [NSW] Legislative Council. On the other hand, … although the [1855 NSW] *Constitution Act* can be identified in the schedule [1] to [the 1855 UK] Act, [the 1855 NSW Constitution Act], was not enacted by [the 1855 UK Act].' (footnotes omitted)). See also Jenkyns, above n 249, 280 (asserting '[t]he [UK] Act of 1855 gave power to the Queen to assent to the reserved [1855 NSW Court] bill, but did not expressly enact [the] validity [of that 1855 NSW Constitution Bill].' However, see Twomey, *The Constitution of New South Wales*, above n 6, 22 (suggesting scheduling the 1855 NSW Constitution Bill to the *Constitution Statute 1855* (UK) 'appears to have given [the *Constitution Act 1855* (NSW)] the "authority" of a British statute'). In relation to the Victorian and New South Wales Constitutions, see, Waugh, above n 6, 359-60 (pondering whether the Constitutions were 'enactments of the Legislative Councils, as the form of the British acts implied, or of the British parliament' and quoting Lord Russell's suggestion that it was the latter that gave the Constitutions their legitimacy on the basis that 'the commencement provisions in the two British acts were sufficient to bring the new constitutions into operation and overcome any doubts about the ability of royal assent by itself to them the force of law' and referring to the 'generally regarded' view that the Constitution ultimately derives its legitimacy 'by virtue of the British Act' as 'the British [P]arliament was the only legislature to pass the constitution in its final form').

220 See generally Johnston, *Manner and Form Provisions*, above n 218, 22-3 (discussing, in the repugnancy context, s 5 of the 1890 UK Act and the power conferred by s 73 of the *Constitution Act 1889* (WA) on the WA Parliament to amend that 1889 Act). As to the relationship between s 4 of the New South Wales *Constitution Act 1855* (UK) and s 5 of the *Colonial Laws Validity Act 1865* (Imp), see, Twomey, *The Constitution of New South Wales*, above n 6, 270-1, 273-4 (noting s 4 of the 1855 Act [UK] 'conferred [on the NSW Parliament] the power to amend the [1855 NSW] *Constitution Act*' which was 'broader than s 5' which granted to the NSW Parliament the power to amend the NSW Parliament's 'constitution, powers, and procedure' and that, because of their chronology, s 5 'arguably repealed' s 4). In the WA context, the chronology is reversed and, therefore, s 5 of the 1890 UK Enabling Act 'arguably' repealed s 5 of the *Colonial Laws Validity Act 1865* (UK)). (Cf Peter Congdon and Peter Johnston, "Stirring the Hornet's Nest: Further Constitutional Conundrums and Unintended Consequences arising from Application of Manner and Form Provisions in the Western Australian Constitution' (2012) 36(2)See also s 3 *University of Western Australia Law Review* 295).

Statute 1855 (UK).[221] In the repugnancy context, an important question emerges: Why were these sections, conferring on the NSW and Victorian Parliaments legislative power to amend their colonies' Constitutions (which were contained in schedules to the UK enabling legislation) inserted by the UK Parliament?

For NSW, two suggestions exist: flexibility and repugnancy. Most prominent is flexibility. The s 4 legislative power to amend the NSW Constitution was inserted by the Colonial Office into the enabling Bill, which, unlike the 1890 UK Enabling Act, had been drafted by the NSW Government.[222] Section 4 was enacted by the UK Parliament because the NSW Constitution Bill 1853 only enabled amendments to NSW electorates and Legislative Assembly representation. Other aspects of the NSW Constitution would not have been able to be amended by the NSW Parliament.[223] Such entrenchment of the NSW Constitution was not popularly endorsed in NSW and the UK Government and Parliament preferred, in accordance with British constitutional traditions, a more flexible NSW Constitution.[224] That is, s 4 was intended to convert a strictly controlled Constitution into a more British-style, flexible Constitution.

Relatively less prominent is the repugnancy reason: the NSW Parliament would have had 'no power to amend the [1855 NSW] Constitution Act because [the 1855 NSW Constitution Act] was enacted under the authority of the Imperial Parliament'[225] in Schedule 1 of the *New South Wales Government Act 1855* (UK). On this view, s 4's inclusion in the 1855 UK Act was to enable the NSW Parliament to make laws which were repugnant to UK legislation on the basis that the 1855 enabling UK Act had a greater substantive enacting effect, rather than merely approving the NSW Constitution. On this view, such scheduling, as a matter of law, converted the NSW Legislative Council's Constitution Bill into UK legislation, rather than the UK Parliament merely approving the NSW Constitution Bill, and, therefore, s 4's inclusion in the 1855 UK Act was legally necessary to enable the NSW Parliament to enact statutes repugnant to UK legislation.

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221 See generally, Twomey, *The Constitution of New South Wales*, above n 6, 19 n 115 (discussing other titles of this UK Act, including the New South Wales *Constitution Statute 1855* (UK)) and the Victorian *Constitution Statute 1855* (UK).

222 A draft enabling Bill was sent to the UK together with the NSW Constitution Bill. It was contained in the 28 July 1853 Report of the NSW Legislative Council Select Committee: Twomey, *The Constitution of New South Wales*, above n 6, 13, 16. It appears that the 1853 NSW Committee Report of 17 September 1852 may have contained a draft enabling Bill: Twomey at 12, fn 66 (referring to draft Bills).

223 See Twomey, *The Constitution of New South Wales*, above n 6, 21 (indicating that '[t]he 'reserved bill' [passed by the NSW Parliament] only contained an express power to alter [ss 7 and 42 of the Bill] by a special manner and form. It did not contain a general power permitting the New South Wales Parliament to amend the [1855 NSW] *Constitution Act*') (footnote omitted). Of course, whether the NSW Parliament possessed or lacked legislative power to amend the 1855 NSW Constitution, the UK Parliament retained, under the doctrine of UK parliamentary sovereignty, legislative power to amend or repeal the 1855 NSW Constitution).

224 Ibid 269-270. See also at 271-3 (discussing competing views about s 4's substantive operation).

225 Ibid 272.

Lord Russell's despatch dated 20 July 1855 to the New South Wales Governor concerning the NSW Constitution Bill suggested that 'if this Bill had been passed in the exercise of the legitimate functions of the [NSW Legislative] Council and required only the assent of the Crown to give [this Bill legal] force, this power [of constitutional amendment] would have been implied. The new [NSW] Legislature might alter anything done by the former [Legislative Council]…'. However, Lord Russell also indicated that 'inasmuch as the sanction of [the UK] Parliament was required, the several provisions of the [NSW Constitution] Bill would have become, in a legal point of view, sections of an Act of [the UK] Parliament…'. Finally, Lord Russell postulated one consequence: 'it might be very doubtful at least whether in the absence of special provision, the new [NSW] Legislature could have in any way meddled with [the several provisions of the NSW Constitution Bill]'.[226]

That is, the UK Parliament included s 4 in the *Constitution Statute 1855* (UK) to remove any doubts about whether the NSW Parliament possessed legislative power to amend the NSW *Constitution Act 1855* (NSW).[227] As a result, Twomey concludes that 'the inclusion of the [NSW] *Constitution Act 1855* [(NSW)] in Sch[edule] 1 to the *Constitution Statute 1855* [(UK)] appears to have given [the NSW *1855 Constitution Act*] the "authority" of a British statute.'[228]

In relation to s 4 of the *Victorian Constitution Statute 1855* (UK), this repugnancy reason has been more broadly paraded:

> The result of the constitutional deliberations in Melbourne and their consideration in London was therefore that the legislature of Victoria had passed a Bill which the Colonial Office was largely willing to approve, but not without the omission of some provisions. The question was what to do next. The enabling statute gave no guidance. The Bill could have been sent back [from London] to Melbourne with instructions to try again, but this would have caused further delay ... [T]he procedure adopted ... was to abandon the idea of having the [Victorian] Constitution enacted locally and to enact the draft [Victorian] Constitution minus the offending provisions as Schedule 1 to the Victoria Constitution Act 1855 (Imp).... As [the 1855 Victorian Constitution] was ... contained in [the Victorian Constitution Statute 1855 (UK)] an Imperial Act applying [in Victoria] by paramount [legal] force, [the Scheduling] procedure would in fact have given [,as a matter of law, the 1855 Victorian Constitution] too much binding force - [the 1855 Victorian Constitution] would have been unalterable except by [the UK Parliament] - but [this] too was taken care of ... [by the UK Parliament enacting] s 4 of the Constitution Statute [1855 (UK) which] granted power to the Victorian legislature to alter the

226 Ibid 21 (quoting dispatch).

227 Ibid 21-2 (quoting *Clayton v Heffron* (1960) 105 CLR 214, 270-1 (Menzies J) ('the reason for s 4 of the *Constitution Statute* [1855 (NSW)] lay in the particular circumstance that the *Constitution Act 1855* [(UK)] had the direct authority of the Imperial Parliament – a circumstance which it was anticipated would prove [to be] an obstacle to the power of the New South Wales Legislature to make constitutional amendments').

228 Ibid 22.

> [1855 Victorian] Constitution Act itself…[229]

The second aspect relating to s 73 concerns 'potential repugnancy'[230] involving amendments to the Constitution Act 1889 (WA) made by virtue of s 73 and manner and form requirements in s 33 of the 1842 UK Act and s 7 of the 1844 Act (which both applied to WA pursuant to s 12 of the 1850 Act) and s 32 of the 1850 UK Act.[231] This 'potential repugnancy' was clarified by s 2 of the 1890 UK Enabling Act which:

> Recognise[d] the repugnancy of those statutes to the WA Constitution Act but nevertheless, for particular purposes, … continue[d] the operation of some provisions of the 1842 Act and the 1850 Act. Neither proviso [(a) or (b) in s 2] saved any part of the 1844 Act.[232]

Section 2, therefore, had an unusual legal effect:

> 'repugnancy' is usually applied in Imperial affairs to give primacy to Imperial over local laws. Here, given the character of the WA Constitution Act, the paramount legislation for the operation of s 2, the situation was reversed so as to favour the local law.[233]

Section 2, however:

> was not a departure from previous Imperial legislation which had dealt with the other Australian colonies. For example, it followed the terms of s 3 of *The New South Wales Constitution Act* 1855 (Imp) and s 3 of *The Victorian Constitution Act* 1855 (Imp). These statutes had provided respectively for the establishment of bicameral legislatures in New South Wales and Victoria.[234]

However, it is not necessarily the case that s 2, at least in the form of the 1890 UK Enabling Act, was constitutionally required. Any presumed or 'potential repugnancy' could have been averted by a separate UK enactment, without the need for the Constitution Bill 1889 to be scheduled to a UK enabling Act.

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229 Taylor, above n 6, 33 (footnotes omitted). See also 33-4 (noting that s 4 of the 1855 UK Act did not give the Victorian Parliament legislative power to amend the 1855 UK Act). See also, *Smith v Queen* (1994) 181 CLR 338, 350 (Deane J) (noting that s 4 of the *Victorian Constitution Statute 1855* (Imp) 'expressly contemplated both the repeal of the 1855 [Victorian] *Constitution* and the alteration of its entrenchment provisions'). See also Waugh, above n 6, 359 (noting the inconvenience of the 'delay' that would have resulted if the Bill had been sent back to the Victorian Parliament).

230 Johnston, *Manner and Form Provisions*, above n 218, 23.

231 Ibid.

232 *Yougarla v Western Australia* (2001) 207 CLR 344, 355 [19] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

233 Ibid 354-5 [17].

234 Ibid 356 [24].

Two Provisos: An 1850 UK Act

Expressly and specifically, after authorising Governors and Legislative Councils to establish representative legislatures with legislative powers and functions, s 32 of the *Australian Constitutions Act 1850* (UK) stated:

> Provided always, that every Bill which shall be passed by the [Legislative] Council in any of the said Colonies for any of such Purposes shall be reserved for the Signification of Her Majesty's Pleasure thereon; and a Copy of such Bill shall be laid before both Houses of [the United Kingdom] Parliament for the Space of Thirty Days at the least before Her Majesty's Pleasure thereon shall be signified.

Of course, neither requirement – reservations for Royal Assent and tabling in the House of Commons and House of Lords – required such colonial Bills to be scheduled to a United Kingdom enabling Act whether for the purpose of being enacted or approved by the UK Parliament.

John Bramston on 18 March 1890 confidently asserted a legal proposition that:

> Western Australia has the power now under Acts of [the United Kingdom] Parliament to introduce responsible government upon such terms, as to the election or nomination of members, and as to the qualification of electors or of members, as it thinks fit, without recourse to the Imperial Parliament.[235]

However, as a matter of law, was Bramston correct? For example, s 1 of the *Australian Colonies Government Act Amendment Act 1862* (UK) provided that:

> [*e*]*very Act passed for the purposes mentioned in the [Australian Constitutions Act 1850 (UK)] by the Legislative Council of any of the said colonies, and assented to in Her Majesty's name by the Governor of such colony, shall be deemed to be and to have been from the date of such assent as valid and effectual for all purposes whatever as if the same Act had been reserved for the signification of Her Majesty's pleasure, and as if the same had been duly laid before both Houses of Parliament, and as if Her Majesty's assent had been duly given to the same, and signified in the colony at the date aforesaid.*

The New South Wales, Victoria, Tasmania and South Australian, but not Western Australian, legislatures had enacted such legislation after 1850 but prior to 1862. Stephen Parker, on 22 April 1890, indicated to the House of Commons Select Committee that:

> The principle with regard to our having self-government has been affirmed and confirmed to us by the Imperial Statute; it is specially provided that we may have responsible government so soon as we pass a Bill in our local Legislature in favour of self-government, and that Bill

235 Minutes of Evidence, 18 March 1890 (evidence of Mr John Bramston) in *Report from the Select Committee*, above n 142, 2; Macphail, above n 11, 219.

has lain for 30 days on the Table of the House of Commons.[236]

Additionally, it has been suggested that '[n]umerous examples can be cited where post-1862 [UK] secretaries of state [for the Colonies], colonial [Office] secretaries, [and WA] newspaper editors… referred to Western Australia *still* being bound by the double provisos' in s 32.[237]

Confronted by the express terms of the 1862 UK Act, Stephen Parker appears to have enunciated a more sustainable legal position and conclusion. However, even if the Parker view prevails, Bramston's proposition had two distinct political advantages. First, 'it helped created an impression at the [Select Committee hearings] that the House of Commons was only getting an opportunity to appraise Western Australia's constitutional arrangements, as Governor Broome indicated, "by a sidewind as it were" (i.e. because of the [waste] land question) and [secondly] that, as Broome confirmed, "[the UK] Parliament may not think it right to take advantage of such an opportunity"' to amend the Constitution Bill 1889 (WA).[238].

Other Quirks and Peculiarities Relating to the UK Parliament's Involvement

Three significant constitutional conundrums emerge. First, unlike New South Wales[239] and Victoria,[240] the UK Government, in the drafting process, and UK Parliament did not make significant amendments to the text of the WA Constitution Bill, after its approval by WA electors in January 1889, its passage through the WA Legislative Council on 26 April 1889 and prior to it receiving the royal assent. Only, one amendment, reduction in the Attorney-General's annual pension contained in Schedule D to the 1889 Constitution Bill, was made by the UK Government and Parliament to the 1889 Bill.[241] Consequently, from one perspective, the WA position is legally comparable to the NSW Constitution

236 Minutes of Evidence, 22 April 1890 (evidence of Mr Stephen Parker) in *Report from the Select Committee*, above n 142, 118; Macphail, above n 11, 219. (noting that Parker 'flatly contradicted Bramston's view').

237 Macphail, above n 11, 219 (emphasis in original).

238 Ibid (quoting Governor Broome's evidence to the Select Committee).

239 Twomey, *The Constitution of New South Wales*, above n 6, 17-18 (indicating several amendments including UK Crown's assent, reservation and disallowance powers).

240 Waugh, above n 6, 359 (noting that the Victorian *Constitution Act* 'was no longer in the form in which the [Victorian Legislative] Council had passed it, following the British government's amendments' such that 'the Victorian Legislative Council never formally agreed to the amendments made in London').

241 See discussion at 34 (discussing 3rd para in Preamble and Schedule D amendment). The 1890 UK Enabling Act was published in the WA Government Gazette, No 49, 30 October 1890, 806-9 (noting in relation to the First Schedule that 'This Schedule is identical with "*The Constitution Act 1889*" with the exception of the substitution of £333 6s.8. for £400 as the Attorney General's Pension'); *Western Australia v Wilsmore* (1981) 149 CLR 79, 103 (Brennan J) (noting that '[a]ssent to the Bill in a slightly amended form was authorized by an Imperial Act, the *Western Australian Constitution Act 1890* (53 & 54 Vict. c.26), in a schedule to which the amended Bill was set forth'). But see, Battye, *Western Australia,* above n 3, 390 (suggesting that 'some alterations had been made in the [1889] Constitution [Bill] by the Colonial Office' after this [1889] Bill was 'passed by the Legislative Council of Western Australia').

where 'with that itch for meddling'[242]:

> Her Majesty ultimately assented to measures which had not actually been passed by the colonial legislatures, and it is very doubtful whether, by strict law, the constitutions thus curiously produced are in order.[243]

However, from a broader perspective, the provisions in the 1889 Bill, such as clause 76 relating to waste lands, which might have made the Bill repugnant to, or beyond the scope of, powers conferred by UK legislation, were removed by 26 April 1889.[244] That is, compared to the United Kingdom Parliament's amendments to the NSW 1855 Constitution Bill, only one small amendment, perhaps substantively insignificant in a constitutional law context, was made in the United Kingdom to the 1889 WA Constitution Bill.

Secondly, concerns regarding the possibility that the 1853 NSW Constitution Bill was repugnant to several UK statutes were raised in 1855 in the House of Commons relating to clauses in the NSW Constitution Bill which might, therefore, have been unconstitutional:

> The New South Wales Constitution Act, as enacted in 1855, has a peculiar status…the Bill passed by the New South Wales Legislative Council, and reserved for Her Majesty's assent, was not the same as the Bill to which Her Majesty assented, which was in a form changed by the British Parliament and recorded in a schedule to the Imperial Act of 1855.[245]

These concerns meant that there was the potential that the NSW Constitution would be a constitutional 'nullity'.[246] Consequently, as indicated above, clauses were removed from the NSW Bill by the Colonial Office and UK Government and the redrafted NSW Bill enacted, or at least approved, by the UK Parliament. However, this type of invalidity could not, given the various amendments made to the 1889 Bill's content during the WA Legislative Council debates, apply to the 1889 WA Constitution Bill.

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242 Jenks, *A History of the Australasian Colonies* (Cambridge University Press, 1895) 235.

243 Ibid, 234-5 quoted by Twomey, *The Constitution of New South Wales*, above n 6, 17.

244 In relation to South Australia, see Castles and Harris, above n 6, 108-9 (indicating that 'by May [1855], Lord John Russell agreed that the [Legislative] Council in South Australia should consider afresh its attitude on the colony's new constitution, particularly the much-disputed issues of the structure of the [proposed new SA Legislature's] upper house. In addition, there were various legal and constitutional difficulties with the drafting of the original [1853 SA Constitution] bill which needed to be addressed before it could be allowed to come into force. That local [SA Legislative] councillors, too, as Russell pointed out, should have no fears that the new British Government [under Prime Minister Lord Palmerston] would deny any proposed new system of colonial government the right to take charge of selling crown lands, despite what might have been believed in consequence of what had transpired previously. Arrangements were in hand in the British Parliament for the purpose of passing of what was to become [on 16 July 1855] the [*Waste Lands (Australia) Acts Repeal Act 1855* (UK)], which would ensure that this would be done'.)

245 Twomey, *The Constitution of New South Wales*, above n 6, 18.

246 Ibid 18-19.

Thirdly, was the 1889 Constitution Bill enacted or merely approved by the UK Parliament? Despite the textual amendments that had been made to the NSW Constitution Bill in London, a further legal proposition has been asserted:

> The Westminster Parliament did not itself enact the New South Wales Constitution Bill [1855]…. It merely recorded its form, as amended, in a schedule, and gave legislative approval for Her Majesty to assent to it [NSW Constitution].[247]

A starkly different conclusion has been reached in relation to the Victorian Constitution 1855:

> This procedure [of placing the Victorian Constitution Bill 1855 in Schedule 1 to the Victoria Constitution Act 1855 (UK)] was undoubtedly to give the [Victorian] Constitution Act [1855] binding force within Victoria.[248]

Assume that the constitutional position in relation to the NSW Constitution[249] necessarily applies to the *Constitution Act 1889* (WA). If so, the legal consequence is clear: unlike the Commonwealth Constitution which is contained in s 9 of the *Commonwealth of Australia Constitution Act 1900* (UK), legislative sovereignty of the UK Parliament embodied in the 1890 UK Enabling Act does not provide the legal foundation for the WA Constitution.

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247 Ibid 18. This appears to suggest that for the amendments inserted in London into the NSW Constitution there is neither UK legislative authority nor NSW parliamentary authority nor NSW voters' authority. So why are these amendments legally binding? Is it because of the NSW people's subsequent acquiescence with, and agreement to, them? Note, however, that Twomey 'appears' to qualify the 'recorded' and 'approval' characterisations by also suggesting that 'the inclusion of the [NSW] Constitution Act 1855 [NSW] in Sch 1 to the *Constitution Statute 1855* [UK] appears to have given…[the 1855 NSW *Constitution Statute*] the "authority" of a British statute': at 22. For a starker contrast, see, Lumb, above n 10, 17 (asserting that 'a new enabling [UK] act had to be passed and to this new act the New South Wales Constitution Bill in its amended form was attached as a schedule.... The ultimate legal support for the New South Wales Constitution is therefore to be found in an Imperial enactment'); Taylor, above n 6, 33 (concluding that the 1855 UK Act gave the 1855 Victorian Constitution 'binding [legal] force within Victoria').

248 Taylor, above n 6, 33. See also Waugh, above n 6, and discussed above n 223 (and note that (at 359) Waugh refers to a series of newspaper articles on the matter which ultimately prompted the Victorian Attorney-General and Solicitor-General to declare in the Victorian Parliament that '[w]e attribute its [Victorian Constitution's] efficacy not to the power of the Colonial but of the Imperial Legislature, and the assent given by Her Majesty to the Bill as above amended, such assent having been made by the Imperial Legislature, a condition precedent to the measure coming into operation').

249 There are inter-related constitutional problems. First, issues of repugnancy involving, for example, the power of the NSW Parliament to amend the NSW Constitution (see above n 223). Secondly, why the NSW Constitution is legally binding (see above n 219). Third, whether the NSW Constitution 1855 (NSW) conferred on the NSW Parliament power to amend the NSW Constitution. See Twomey, *The Constitution of New South Wales*, above n 6, 22 (noting the argument that, except for the retrospective legislative power conferred on the NSW Parliament by the *Colonial Laws Validity Act 1865* (UK), 'the foundation of the legislative power of the New South Wales Parliament might be open to some doubt') (quoting H Jenkyns, *British Rule and Jurisdiction beyond the Seas* (Clarendon Press, 1902) 280).

Of course, given the doctrine of UK parliamentary sovereignty, the UK Parliament could have addressed and obviated any repugnancy issues, without scheduling the WA Constitution Bill, by enacting completely separate UK legislation. In such a context, subject to timing of the WA Legislative Council's enactment of any WA Constitution Bill, its commencement could have been delayed until after the UK Act commenced operations to ensure that any repugnancy issues were addressed. If applied this counter-factual legal scenario would have had at least two constitutional consequences. First, there would have no legal necessity to send the WA Constitution Bill to the UK Parliament. Secondly, like the situation in South Australia and Tasmania, the legal efficacy for the WA *Constitution* might flow from the WA Parliament, WA electors or the 1850 UK Act.

A UK Parliamentary Source of Power?

The question, therefore, arises: does s 32 of the Australian Constitutions Act 1850 (UK) provide a legal foundation for the *Constitution Act 1889* (WA)?[250] If the 1889 WA Act was wholly within the scope of s 32, at least one consequence ensues: an affirmative answer. However, that same answer cannot be provided if and to the extent that the 1889 WA Act goes beyond the scope of the power provided in s 32 of the UK Act. At least one example, in relation to the *1855 NSW Constitution*, has been proffered:

> [T]he [UK] Act of 1850…empowered the [colonial] legislative council, by any Bill establishing a parliament, to confer on that parliament the powers of the council, and thereby to confer on [that parliament] the full legislative power [to make laws for the peace, order and good government of the colony].
>
> But the reserved [1855] Constitution Bill of New South Wales (scheduled to the Imperial Act of 1855) did not vest in the [NSW] parliament the powers of the [NSW] legislative council, but expressly conferred a new legislative power to make laws. The Imperial Act of 1855 further repealed such provisions of the [UK] Acts of 1842 and 1850 as are repugnant to the reserved [1855 NSW] bill, and therefore repealed the statutory authority conferred on the [NSW] colonial legislative council to make laws.
>
> The Act of 1855 gave power to the Queen to assent to the reserved [1855 NSW] Bill, but did not expressly enact its validity.
>
> Consequently, the foundation of the legislative power of the parliament of NSW might be open to some doubt, but for s. 5 of the Colonial Laws Validity Act, 1865 [UK], which expressly declares, with retrospective

250 Of course, given that the South Australian *Constitution Act* (No 2, 1855-56) (SA) and the Tasmanian Constitution were not placed in a schedule to UK legislation, the same question, but not the same repugnancy issues arise: see generally, Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 6 (indicating that the SA Constitution was 'enacted' by a SA Legislative Council which had been established pursuant to the 1850 UK Act and that the SA Parliament constituted by that Constitution 'derived' its legal powers from that 1850 UK Act); Stokes, above n 6, 101 (noting that '[a]s the [Tasmanian] Legislative Council, unlike those in the other colonies, did not exceed the powers which had been granted to it, the [Tasmanian Constitution] Bill was passed in 1854 and received Royal Assent in 1855').

> effect, the power of a colonial legislature to make laws respecting its own powers, a power which was exercised by the reserved [1855 NSW Constitution] Bill of 1855.[251]

Perhaps the UK Government and Parliament, as well as WA colonists, were aware of these legal issues when drafting clause 2 of the Constitution Bill 1889 (WA). In stark contrast to *Constitution Act 1855* (NSW), this provision, which was retained and entrenched by the 1978 WA constitutional amendments, explicitly adds to the proposed new WA Parliament's legislative powers 'all the powers and functions of the now subsisting Legislative Council'.

In relation to the *Constitution Act 1889* (WA) it has been suggested that the WA Parliament's legislative powers might not stem from s 32 of the 1850 Act:

> The effect of the imperial act of 1890, followed by the Statute Law Revision Act, 1893 [(UK)], is that the enactments of the [UK] Act of 1850 conferring powers on the Legislature of Western Australia are repealed, and the powers of the legislature of that colony depend (except for the Colonial Laws Validity Act, 1865 [(UK)]) entirely upon the Constitution Act of 1890 [(UK)]. The position, therefore, of Western Australia is precisely similar to that of New South Wales.[252]

For several reasons, the Western Australian position does not 'depend…entirely upon' the 1890 UK Enabling Act. In particular, provisos (a) and (b) to s 2 of that Act expressly continue the operation of the 1842 and 1850 UK Acts. For example, it has been suggested that by proviso 2(b) 'so much of the 1842 and 1850 statutes "[a]s relate to the constitution, appointment and power of the Legislative Council" of Western Australia' remained 'but only until the initiation of the bicameral system to be established in pursuance of the WA Constitution Act [1889] by the issue of the first writs for the election of members to serve in the Legislative Assembly'.[253]

Further elucidation of the complex legal relationship between these various UK provisions has been provided:

> Several points may now be made respecting s 32. First, the effect of s 32, broadly put, was to empower the [WA] Legislative Council established in 1870 to alter the laws otherwise providing for (i) the election of the elective members of the [WA] Legislative Council and the qualification of electors and elective members; (ii) the establishment of a bicameral legislature; and (iii) the vesting in that bicameral legislature of the powers and functions of the [WA] Legislative Council. Secondly, that empowerment would be spent, or the occasion for its exercise would no longer arise, once proviso (b) to s 2 of the 1890 Imperial Act became

251 Jenkyns, above n 249, 280 (footnotes omitted).
252 Ibid 291.
253 *Yougarla v Western Australia* (2001) 207 CLR 344, 355 [20] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

> effective and the new bicameral system was instituted; the repeal of s 32 by s 2 of the 1890 Imperial Act for repugnancy to the WA Constitution Act would then be effective and, as a provision of the 1850 Act relating to 'the constitution, appointment, and powers of the Legislative Council of the colony of Western Australia' (the words of proviso (b)), s 32 would no longer 'continue in force'….[254]

Finally, although s 32 was no longer in force by 1893, as a consequence of s 1 of the *Statute Law Revision (No 2) Act 1893* (UK), 'a proviso to s 1 stated that the repeal of any provision did not affect any enactment in which the repealed provision had been applied, incorporated or referred to'.[255] Consequently, it appears that s 32 of the 1850 UK Act is the legal foundation for the *Constitution Act 1889* (WA).

An Autochthonous Constitution: Popular Sovereignty as a Legal Foundation?

Two despatches from Governor Broome clearly allude to a popular sovereignty foundation for the *Constitution Act 1889* (WA). First, Sir Napier Broome's despatch to Lord Knutsford of 19 November 1888 stated that 'It will be necessary, I think, that a general election should take place before the Bill be finally passed'.[256] Secondly, on 31 January 1889 Governor Broome reinforced the importance of seeking the electorate's approval of the WA Constitution Bill by warning that 'it would be a mistake to hold a general election upon a Bill containing alterations not yet submitted to your Lordship, and to some of which you might possibly not be able to agree'.[257]

On two occasions: September–October 1874 and January 1889 WA electors had the opportunity to consider and approve different WA Constitution Bills. Electors, nationally, approving the *Commonwealth Constitution* in 1898, 1899 and 1900 referendums and WA electors approving the 1889 Constitution Bill both did not give their consent to the final text of these Constitutions. The former was altered by the Colonial Office and the UK Parliament after the referendums took place. The latter was subsequently altered by the WA Legislative Council, under Lord Knutsford's beguiling 'guidance', before being sent to London on 29 April 1889. Subsequently, one small alteration was made to the 1889 Constitution Bill which was scheduled to the 1890 enabling Act. This alteration to Schedule D of the 1889 WA Constitution Bill reduced the Attorney-General's annual pension. Indeed, this alteration was foreshadowed in Lord Knutsford's despatch of 21 June 1889[258] which indicated that an amendment to the 1889 Bill would be moved at the Committee stage in the House of Lords. Further, this alteration was expressly

254 Ibid 363 [43].
255 Ibid 356 [23].
256 House of Commons Parliamentary Papers, *Correspondence,* above n 99, Sir Napier Broome to Lord Knutsford, 13 October 1888, No 40, 70-1.
257 Ibid, Sir Napier Broome to Lord Knutsford, 31 January 1889, No 49, 77.
258 House of Commons Parliamentary Papers, *Further Correspondence Respecting the Proposed Introduction of Responsible Government into Western Australia* (June 1889), Lord Knutsford to Sir Napier Broome on 21 June 1889, No 6, 34-5.

recognised in the third paragraph of the Preamble to the 1890 enabling Act.[259] Of course, if the 1890 UK Enabling Act merely approved, but did not enact, the 1889 Constitution Bill, the legal significance of this Schedule D alteration does not obviate a popular sovereignty foundation. Similarly, the 1890 UK Enabling Act's preamble reference to the Schedule D alteration has, on ordinary principles of statutory interpretation, no significant or substantive legal effect.

Even if this 1889 WA Legislative Council and WA electors' acquiescence did not in 1890 or during subsequent decades legally constitute an autochthonous WA Constitution, can this absence of popular sovereignty's role in state constitutional law be reversed? For example, it has been suggested by the High Court and scholars[260] that the legal foundation of the *Commonwealth Constitution* flows, not from UK parliamentary sovereignty and the 1900 UK Act, but from the electors' consent in the 1898, 1899 and 1900 referendums; subsequent successful s 128 referendums and the people's acquiescence in and retention of the *Commonwealth Constitution's* text.

Despite three events – the amendments to the 1889 Bill approved by the Council after the January 1889 election; the amendment to Schedule D and the 1890 UK Enabling Act's approval, but not enactment, of the 1889 WA Constitution Bill – does the same legal concept of popular sovereignty support the constitutional validity of the *Constitution Act 1889* (WA)? Some suggestions, while not addressed to the 1889 Act, raise the possibility that a WA Constitution should and can be legally founded on this concept.[261] More persuasively, American scholars have debated the relationship between popular sovereignty and, in a constitutional law context, the authoritativeness of the US Constitution and its amendments.[262]

Since s 6 of the *Acts Amendment Constitution Act 1978* (WA) came into operation on 22 December 1978, some recognition has been given to the legal possibility that popular sovereignty has at least some role in the concept of the legal legitimacy of an amendment to the WA Constitution. That is, s 73(2)(g) of the *Constitution Act 1889* (WA) requires approval by WA electors at a State referendum of amendments concerning subject matters and specified sections adumbrated in s 73(2)(a)-(e). Despite the WA Parliament's endorsement of referendums as a constituent component of the constitutional amendment process in Western Australia, as yet,

259 'And whereas it is expedient that Her Majesty be authorised to assent to the …[1889 Constitution] Bill, subject to an amendment thereof as to the pension of the Attorney-General'.

260 See, Geoffrey J Lindell, 'Why is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 37; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ). Cf Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103, 124 (suggesting reasons for the *Commonwealth Constitution* being binding might lie more with its 'moral authority' than popular sovereignty).

261 Martyn Webb, *Sovereigns, Not Subjects – A New Constitution for the People of Western Australia* (M. Webb, 1990) viii.

262 Bruce Ackerman, *We, The People – Foundations* (Harvard University Press, 1991); Akhil Reed Amar, *America's Constitution - A Biography* (Random House, 2005) 292, 295-7.

there has been no such referendum.

A Commonwealth Constitutional Foundation?

Perhaps, inevitably in a Federation, a central constitutional law question arises: do state Constitutions depend upon the federal or national Constitution for their legal efficacy? At one end of the spectrum an affirmative answer is textually obvious. An example is India.[263] At the other extreme, there is a complete legal separation between state Constitutions and federal or national Constitutions. A prominent example is the United States.[264] Approximately, at a middle point, is Australian constitutional law. Already, there have been indications that some High Court justices take the view that, at least/most, s 106 of the *Commonwealth Constitution* is the textual and constitutional foundation for state Constitutions. If this position prevails, several consequences ensue. For example, state Constitutions can be amended by the s 128 process (so that, for example, a state's Constitution might be amended against the wishes of that state's electors/people) and state constitutional law becomes a matter of federal constitutional law.[265]

CONCLUSION

Delving into the constitutional conundrums confronting Western Australia's constitutional history is, in addition to its relevance to interpretative dialogues concerning originalism, enlightening for at least four interrelated reasons. First, because, inevitably, an awareness of '[t]he colonial background can deepen… understanding of…modern constitutional landscape[s]'.[266] Secondly, these perspectives facilitate deeper jurisprudential explorations and questions about the legal legitimacy or foundations of Western Australia's constitution. For example, are the *Constitution Act 1889* (WA) and subsequent amendments constitutionally valid? Indeed questions probing the constitutional validity of Constitutions

263 See generally, James A. Thomson, 'Australian and Indian State Constitutional Law: Some Comparative Perspectives' in Ian Copland and John Richard (eds), *Federalism: Comparative Perspectives from India and Australia* (Manohar, 1999) 45, 46-9, 56-60 (discussing encapsulation within Indian Constitution of Indian State Constitutions).

264 Mark Tushnet, *The Constitution of the United States of America – A Contextual Analysis* (Hart Publishing, 2009) Ch 5.

265 See generally, Thomson, 'Australian and Indian State Constitutional Law', above n 262, 49-52, 60-5 (discussing relationship, via s 106 of the *Commonwealth Constitution*, between State Constitutions and the *Commonwealth Constitution* and postulating consequences); Johnston, 'Freeing the Colonial Shackles', above n 11, 341 at n 104; Benjamin Spagnolo, 'Several Constitutions: Exploring s 106 and the Relationship Between the Commonwealth and State Constitutions' (LLB (Hons) Thesis, University of Western Australia, 2004). See also, *Victoria v Commonwealth* (1971) 122 CLR 353, 371-2 (Barwick CJ); *New South Wales v Commonwealth* (1975) 135 CLR 337, 372 (Barwick CJ); *Commonwealth v Queensland* (1975) 134 CLR 298, 337 (Murphy J) (asserting that the Commonwealth 'Constitution Act is the authority for the Constitution of Queensland and the powers of its Parliament'). Cf *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 182 (Barwick CJ) indicating the 'view [State Constitutions now derive their authority from s 106 of the *Commonwealth Constitution*] has not been taken'.

266 Waugh, above n 6, 361.

and their amendments are not novel.[267] Of course, as an initial proposition it might seem improbable that the legal or constitutional status of such constituent documents would be susceptible to judicial scrutiny or review. However, some courts have not been reluctant to assert and, on occasions, exercise the power to declare constitutional amendments unconstitutional.[268] Third, constitutional history illuminates a fundamental political and legal question: are Western Australia's constitutional documents ordinary legislative 'statutes'[269] or do the *Constitution Act 1889* (WA) and *Constitution Acts Amendment Act 1899* (WA) fall within Chief Justice Marshall's immortal admonition to 'never forget that it is a constitution…[being] expound[ed]'?[270] Inevitably, a definitive answer remains elusive. Finally, these conundrums expose an important distinction – express invocations of extra-legal, extra-ordinary revolutionary powers based on natural rights or popular sovereignty theories which rupture and discard existing grundnorms versus exercises of legal rights and powers pursuant to constitutionally sanctioned and designated procedures – especially its application in specific contexts of abandoning, making or amending constitutions.[271] For

267 See, eg, James A Thomson, 'Using the Constitution: Separation of Powers and Damages for Constitutional Violations' (1989) *Touro Law Review* 177, 182-3 n 20 (noting discussions concerning constitutional validity of the US Constitution and 13th, 14th and 15th Amendments); John Harrison, 'The Lawfulness of the Reconstruction Amendments' (2001) 68 *University of Chicago Law Review* 375 (discussing validity of US Constitution's 13th, 14th and 15th Amendments); Gary Jeffrey Jacobsohn, 'An Unconstitutional Constitution: A Comparative Perspective' (2006) 4 *International Journal of Constitutional Law* 460 (discussing judicial adumbrations or creation of implied substantive limitations on formal constitutional amendments and contrasting judicial views about unconstitutional constitutional amendments in US, Irish and Indian Constitutions). Is s 73(2) of the *Constitution Act 1889* (WA) unconstitutional?: see, above n 194.

268 See, eg, *Boland v Hughes* (1988) 83 ALR 673, 675 (Mason CJ) (suggesting s 128 amendments could be unconstitutional on procedural and substantive grounds). For the Indian Supreme Court's enunciation and application of the basic structure doctrine to invalidate constitutional amendments, see, eg, *Minerva Mills v Union of India* (1980) 2. S.C.C. 591; David Morgan, 'The Indian "Essential Features" Case' (1981) 30 *International and Comparative Law Quarterly* 307; Burt Neuborne, 'The Supreme Court of India' (2003) *International Journal of Constitutional Law* 476, 489-95; S P Sathe, *Constitutional Amendments 1950-1988: Law and Politics* (N M Tripathi, 1989) (analysing the history, politics and law involving judicial review of amendments to India's Constitution); S P Sathe, 'India: From Positivism to Structuralism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 215, 242-8 (evaluating judicial invalidation of Indian constitutional amendments).

269 *McCawley v The King* [1920] AC 691, 703 (analogizing the Queensland Constitution to a mere '*Dog Act*').

270 *McCulloch v. Maryland*, (1819) 17 US 316, 407. See generally, Richard Ellis, *Aggressive Nationalism: McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic* (Oxford University Press, 2007); Mark Killenbeck, *McCulloch v. Maryland: Securing a Nation* (University Press of Kansas, 2006).

271 See generally, A. Christopher Bryant, 'Stopping Time: The Pro-Slavery and "Irrevocable" Thirteenth Amendment' (2003) 26 *Harvard Journal of Law & Public Policy* 501 (enunciating and applying a revolutionary-legal distinction to the creation and implementation of the 1787 US Constitution, including the Article V amendment power and the proposed, but never operative, 'irrevocable' 1861 13th Amendment and suggesting how the 1787 Framers applied, and how future Framers might initiate and utilise, 'revolutionary authority').

example, merely enunciating the query – are Western Australia's and other states' constitutional arrangements constitutionally valid – reveals these larger and more conceptually challenging revolutionary or evolutionary enigmas[272] which, in turn, suggest possible answers to the question concerning the legal efficacy of the *Constitution Act 1889* (WA).

272 See above n 6 (elaborating 'second' and 'third' discourses).