

STATE CONSTITUTIONAL LAW: THE QUIET REVOLUTION

JAMES A THOMSON*

I. INTRODUCTION

Dwelling on the fringe¹ is not an apt metaphor for state constitutional law in Australia.² Continuous state constitutional amendments,³ judi-

- * BA LLB(Hons)(WA) LLM SJD(Harv); Barrister and Solicitor of the Supreme Courts of Western Australia, Victoria and New York and of the High Court of Australia. To a reader's lament - are footnotes necessary? - see J Balkin "The Footnote" (1989) 83 Nw UL Rev 275.
1. Compare the title and substance of A Hutchinson *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: Carswell, 1988) (politics capturing law and law reifying particular historical and contingent power relationships). For reviews see A Hunt "Living Dangerously on the Deconstructive Edge" (1988) 26 Osgoode Hall LJ 867; C Douzinas, S McVeigh and R Warrington "Thrashing in the Dwelling-House" (1989) 52 Mod L Rev 261; J Penner "Book Review" (1988) 47 U Toronto Fac L Rev 238. Other samples of Allan Hutchinson's jurisprudential scholarship include A Hutchinson "A Poetic Champion Composes: Unger (Not) on Ecology and Women" (1990) 40 U Toronto LJ 271; A Hutchinson "That's Just the Way It Is: Langille on Law" (1989) 34 McGill LJ 145; A Hutchinson "Democracy and Determinacy: An Essay on Legal Interpretation" (1989) 43 U Miami L Rev 541; A Hutchinson "The Three 'Rs': Reading/Rorty/Radically" (1989) 103 Harv L Rev 555; A Hutchinson and A Petter "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U Toronto LJ 278; A Hutchinson and P Monahan "Democracy and the Rule of Law" in A Hutchinson and P Monahan (eds) *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 97; A Hutchinson "Tribal Noises" [1986] Am B Found Res J 79.
 2. But see G Craven "Book Review" (1990) 1 PLR 199 (characterising "Australian State constitutional law" as an almost-forgotten field[] of endeavour ...).
 3. See *infra* n 28.

cial decisions,⁴ scholarly publications,⁵ and official reports⁶ are indicative of turmoil, not tranquillity. Similar interest can be discerned in

4. On the WA constitution see eg *Tonkin v Brand* [1962] WAR 2; *Western Australia v Wilsmore* (1982) 149 CLR 79; *Western Australia v Wilsmore* [1981] WAR 179; *Attorney-General for Western Australia (Ex rel Burke) v Western Australia* [1982] WAR 241; *Burke v Western Australia* [1982] WAR 248; *Wilsmore v Court* [1983] WAR 190. On the SA constitution see eg *Grace Bible Church v Reedman* (1984) 36 SASR 376; *West Lakes Ltd v South Australia* (1980) 25 SASR 389; *Gilbertson v South Australia* (1976) 15 SASR 66. On the Vic constitution see eg *McDonald v Cain* [1953] VLR 411; *Varty v Ives* [1986] VR 1. On the NSW constitution see *Attorney-General for New South Wales v Trethowan* (1931) 44 CLR 394 affirmed [1932] AC 526; *Clayton v Heffron* (1960) 105 CLR 214; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 (“*Union Steamship*”); *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (“*BLF case*”); *Clyne v East* [1967] 2 NSWLR 483; *Attorney-General (NSW) v Quin* (1990) 64 ALJR 327 (“*Quin*”); *Balog v Independent Commission Against Corruption* (1990) 64 ALJR 400; *Eastgate v The Honourable Kevin Rozzoli* (unreported) New South Wales Court of Appeal 1 June 1990 (noted in (1990) 1 PLR 263). On the Qld constitution see eg *Taylor v Attorney-General of Queensland* (1917) 23 CLR 457; *McCawley v the King* [1920] AC 691.
5. For a plethora of references see J Thomson “The Australia Acts 1986: A State Constitutional Law Perspective” (1990) 20 UWAL Rev 409; J Thomson “State Constitutional Law: Some Comparative Perspectives” (1989) 20 Rutgers L.J. 1059, 1061 n 7, 1068 n 31; J Thomson “State Constitutional Law: American Lessons for Australian Adventures” (1985) 63 Tex L Rev 1225; J Thomson “State Constitutional Law: Gathering the Fragments” (1985) 16 UWAL Rev 90; J Thomson “State Constitutions and Institutional Systems” in B Galligan (ed) *Australian State Politics* (Melbourne: Longman Cheshire, 1986) 177, 189-193; J Thomson “State Courts and the Judicial Process” in B Galligan (ed) *Comparative State Policies* (Melbourne: Longman Cheshire, 1988) 66, 74-78. See also J Thomson “International Relations of States of Regional and Federal Systems” in A Tay (ed) *Law and Australian Legal Thinking in the 1980s* (Sydney: University of Sydney, 1986) 463; J Thomson “Are State Courts Invulnerable?: Some Preliminary Notes” (1990) 20 UWAL Rev 61; P Hanks *Australian Constitutional Law: Materials and Commentary* 4th edn (Sydney: Butterworths, 1990); J Paul “Governors and Politicians: the Australian States principally in the 1940s and 1950s” in D Low (ed) *Constitutional Heads and Political Crises: Commonwealth Episodes, 1945-85* (London: Macmillan Press, 1988) 37. See generally G Craven “The States - Decline, Fall or What?” in G Craven (ed) *Australian Federalism: Towards the Second Century* (Melbourne: Melbourne University Press, 1991) (forthcoming).
6. See eg Western Australia, Parliament 1990 *Interim Report of Joint Select Committee on the [WA] Constitution*; Western Australia 1985 *Royal Commission into Parliamentary Deadlocks* (4 vols); Western Australia, Legislative Council 1990 *Standing Orders Committee Report on A Ruling of the President concerning the Carriage of Government Legislation by Parliamentary Secretaries*; Western

other countries: the United States of America,⁷ Canada,⁸ India,⁹ Nigeria¹⁰ and Switzerland¹¹ provide some examples.¹² Australians have, however, most frequently turned to American constitutional law for intellectual inspiration.¹³ New theories, debates and conclusions frequently emerge from such a comparative enterprise. Perhaps, even more importantly, recourse to that experience illustrates what ought to be avoided. Professor Leshy's article¹⁴ admirably engages both criteria. Comparative Australian-American state constitutional law scholar-

Australia, Parliament 1989 *Report of the Parliamentary Standards Committee* (2 vols); Tasmania 1982 *Report of the Royal Commission into the Constitutions Act 1934 Tasmania* (4 vols); Victoria, Parliament 1985 *Legal and Constitutional Committee Report to Parliament on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights ("Defining and Protecting Human Rights")*; Victoria, Parliament 1990 *Legal and Constitutional Committee Report to Parliament Upon the Constitution Act 1975*.

7. In addition to bibliographies and other references in Thomson "Comparative Perspectives" supra n 5, 1060 n 4, see eg "Symposium on the Texas Constitution" (1990) 68 Tex L Rev 1337; "From Gold Dust to Silicon Chips: the California Constitution in Transition: California Constitutional Symposium" (1989) 17 Hastings Const LQ 1; B Neuborne "Foreword: State Constitutions and the Evolution of Positive Rights" (1989) 20 Rutgers LJ 881; "Developments in State Constitutional Law" *ibid* 903; E Maltz, R Williams and M Araten "Selected Bibliography on State Constitutional Law, 1980-1989" *ibid* 1903.
8. For references see Thomson "Comparative Perspectives" supra n 5, 1062 n 8, 1069 nn 34-35.
9. For references see *ibid*, 1063 n 9.
10. For references see *ibid*, 1063 n 11 (also West Germany and Yugoslavia).
11. For references see *ibid*, 1063 n 10.
12. See generally *ibid*.
13. See eg J Thomson "Comparative Constitutional Law: Entering the Quagmire" (1989) 6 Ariz J Int'l & Comp L 22, 46-49 (bibliography of comparative Australian-American constitutional law scholarship). See also S Kenny "Constitutional Fact Ascertainment (With Reference to the Practice of the Supreme Court of the United States and the High Court of Australia)" (1990) 1 PLR 134; J Eichhorst and R McCallum "*Garcia* and Judicially-Imposed Constitutional Protections of State Sovereignty: The Australian Experience" (1989) 4 Fla Int'l LJ 465; F Devine "American Exclusion of Unlawfully Obtained Evidence with Australian Comparison" (1989) 13 Crim LJ 188; G Moens "The Action-Belief Dichotomy and Freedom of Religion" (1989) 12 Syd L Rev 195; G Lindell "Proportionate Representation of States in the House of Representatives and Associated Issues - Some Recent Developments in Australia and the United States" (1988) 11 UNSWLJ 102; B MacChesney "Full Faith and Credit - A Comparative Study" (1949) 44 Ill L Rev 298.
14. J Leshy "The State of Constitutional Law in the States of the United States: Are There Any Lessons for Australia?" (1990) 20 UWAL Rev 373.

ship now appears to be emerging from obscurity.¹⁵ Hopefully, that will engender further excitement, and consequently more informative discourses, about state constitutional law.

II. SOME BASIC POSTULATES

Traditionally, two notions have been espoused concerning the legal grundnorm and nature of Australian state constitutions.¹⁶ First, United Kingdom parliamentary sovereignty¹⁷ and legislative enactment have entailed their characterisation, in most respects,¹⁸ as ordinary statutes.¹⁹ Consequently, constitutional amendments and interpretation questions have been considered as warranting treatment identical to other legislation. Secondly, state constitutions are visualised as emanating from the Australian Constitution. In particular, section 106 is treated as the foundation of state constitutional law²⁰ although other provisions might bolster this view.²¹ If this view is correct, all state constitutional law

15. See eg R Lumb "Methods of Alteration of State Constitutions in the United States and Australia" (1982) 13 FL Rev 1; Leshy supra n 14; Thomson "American Lessons" supra n 5. Generally on comparative state constitutional law see Thomson "Comparative Perspectives" supra n 5, 1059 n 2.
16. For similar notions in another context see J Thomson "The Australian Constitution: Statute, Fundamental Document or Compact?" (1985) 59 Law Inst J 1199.
17. See generally G Winterton "The British Grundnorm: Parliamentary Supremacy Re-Examined" (1976) 92 LQR 591; G Winterton "Parliamentary Supremacy and the Judiciary" (1981) 97 LQR 265; G de Q Walker "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 ALJ 276; A Ross "Diluting Dicey" (1989) 6 Auckland UL Rev 176; M Upton "Marriage Vows of the Elephant: The Constitution of 1707" (1989) 105 LQR 79; P Craig "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 LQR 105.
18. But not necessarily where manner and form requirements are imposed and entrenched. See generally J Goldsworthy "Manner and Form in the Australian States" (1987) 16 MUL Rev 403; G Winterton "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?" (1980) 11 FL Rev 167; G Carney "An Overview of Manner and Form in Australia" (1989) 5 QUTLJ 69.
19. See infra n 28.
20. Opposing views are set forth in *Western Australia v Wilsmore* [1981] WAR 179, 181-183; G Winterton *Monarchy to Republic: Australian Republican Government* (Melbourne: Oxford University Press, 1986) 141. See also G Craven "Would the Abolition of the States be an Alteration of the Constitution under Section 128?" (1988) 18 FL Rev 85, 90 (Australian Constitution recognises, but does not provide legal foundation for states' existence); G Craven "A Few Fragments of State Constitutional Law" (1990) 20 UWAL Rev 353, 367-371; N Douglas "The Western Australian Constitution - Its Source of Authority and Relationship with Section 106 of the Australian Constitution" (1990) 20 UWAL Rev 340; Goldsworthy supra n 18, 426-428.
21. See eg ss 9, 12, 15, 77(iii), 105A, 107, 108, 110, 111 and 112 of the Australian

would be merely a facet of federal constitutional law. State constitutions could be amended via the Australian Constitution's section 128 referendum process²² and all state law may be "federalised"²³ and, therefore, within the constitutional parameters of the Federal Court's jurisdiction.²⁴

A third - more radical - suggestion might draw sustenance from American experience. That is, a concept of autochthony: constitutions deriving their legal and political legitimacy from acceptance by "the people"²⁵ at a referendum and requiring similar electoral approval for any textual amendments.²⁶ Whether Australian courts would devise

Constitution. See also Thomson "Comparative Perspectives" supra n 5, 1073-1074 (American, Canadian, Indian and Nigerian situations).

22. For various possibilities see J Thomson "Altering the Constitution: Some Aspects of Section 128" (1983) 13 FL Rev 323, 337-338.
23. See generally *Final Report of the Constitutional Commission* vol 1 (Canberra: AGPS, 1988) 68-72.
24. That jurisdiction can encompass all matters in ss 75 and 76 of the Australian Constitution. See *ibid* s 77(i).
25. "[T]hat government of the people, by the people, for the people, shall not perish from the earth." R Basler (ed) *The Collected Works of Abraham Lincoln* vol 7 (New Brunswick, New Jersey: Rutgers University Press, 1953) 17, 23. There are several versions of President Lincoln's 19 November 1863 Gettysburg Address and these last words. See eg Basler *ibid*, 17-23; J Randall *Lincoln the President: Springfield to Gettysburg* vol 2 (New York: Dodd, Mead & Co, 1945) 303-320. Compare Craven supra n 20, 360-361 (various meanings and consequences of the Australian Constitution's acceptance by the people).
26. For the autochthonous facet of American states' experience from before the 1776 Declaration of Independence until after the 1861-1865 Civil War see Thomson "American Lessons" supra n 5, 1229-1231. As to amendments see Lumb supra n 15, 4-10. See generally G de Q Walker *Initiative and Referendum: The People's Law* (St Leonard's, NSW: The Centre for Independent Studies, 1987). Three referendums have altered the NSW Constitution: establishing direct election of Legislative Council members (1978), extending the term of the Legislative Assembly from 3 to 4 years (1981) and requiring parliamentarians to disclose pecuniary interests (1981). See generally I Warden "Political Review" (September 1978) 50 no 3 Aust Q 114, 120-121 ("The reform of the NSW Legislative Council"); S Willis "Political Review" (1981) 53 Aust Q 476, 484 ("NSW elections"). Provisions in ss 73(2)-(6) of the (WA) Constitution Act 1889 and in s 53 of the (Qld) Constitution Act 1867 specify referendum requirements which have not, as yet, been used. The WA and Qld provisions were circumvented by ss 13 and 14 of the Cth and UK Australia Acts 1986. See also *infra* n 41. Is the Australian Constitution autochthonous? See generally G Lindell "Why is Australia's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 FL Rev 29. For a comparative Australian-American assessment see Thomson "American Lessons" supra n 5, 1229-1232.

new principles of constitutional interpretation to address this contingency remains a matter of speculation.²⁷

Greater difficulty is encountered in endeavours to locate Australian state constitutions. A host of documents, other than Constitution Acts or Constitution Amendment Acts,²⁸ jostle for recognition as part of a state's constitution.²⁹ The Australia Acts,³⁰ electoral legislation,³¹ financial controls,³² parliamentary privilege statutes,³³ Supreme Court statutes,³⁴ and Letters Patent³⁵ must be considered. No orderly or uniform Australian arrangements exist.³⁶ Diversity, differences and debate can, with beneficial results, therefore, thrive.

27. For literature on developing theories of American state constitutional law interpretation see Thomson "Comparative Perspectives" supra n 5, 1075 n 80. See also R Williams *State Constitutional Law: Cases and Materials* (Washington DC: Advisory Commission on Intergovernmental Relations, 1988) 179-234; G Tarr "Constitutional Theory and State Constitutional Interpretation" (1990) (unpublished paper).
28. See generally (WA) Constitution Act 1889-1987; (WA) Constitution Acts Amendment Act 1899-1990; (SA) Constitution Act 1934-1988; (Vic) Constitution Act 1975-1989; (NSW) Constitution Act 1902-1988; (Qld) Constitution Act 1867-1987; (Qld) Constitution Act Amendment Act 1896-1984; (Qld) Constitution Acts Amendment Act 1971-1987; (Tas) Constitution Act 1934-1988. For territorial constitutions see (Cth) Australian Capital Territory (Self Government) Act 1988; (Cth) Northern Territory (Self Government) Act 1978-1989.
29. It has been suggested that "in Australia a State Constitution is fissiparous ... in content and form. It is an elusive beast, hard to pin down." Lumb supra n 15, 4.
30. (Cth) Australia Act 1986; (UK) Australia Act 1986. See generally Thomson "The Australia Acts 1986" supra n 5.
31. See eg (WA) Electoral Distribution Act 1947.
32. See eg (WA) Financial Administration and Audit Act 1985.
33. See eg (WA) Parliamentary Privileges Act 1891; (WA) Parliamentary Papers Act 1891; ss 59 and 351 of the (WA) Criminal Code.
34. See eg (WA) Supreme Court Act 1935.
35. Hanks supra n 5, para 5.008 (Letters Patent Relating to the Office of Governor of Victoria). For variations in the Letters Patent see A Castles "The Tasmanian constitutional crisis and State Governors' powers after the Australia Acts" (1989) 63 ALJ 781, 783-784.
36. See supra n 28.

III. EXECUTIVE POWER

Benign neglect characterised interest in executive power in Australia before 1975.³⁷ Subsequent events radically altered that position.³⁸ Actual and potential exercises of state executive power³⁹ have engendered controversy concerning the propriety and constitutionality of Governors' actions.⁴⁰ Parliamentary and judicial intervention have also occurred. For example, amendments to the Western Australian and Queensland constitutions have entrenched the office and some powers

37. Pre-1975 literature includes H Evatt *The King and His Dominion Governors* 2nd edn (Melbourne: F W Cheshire, 1967); H Evatt "The Discretionary Authority of Dominion Governors" (1940) 18 Can B Rev 1; W Craig "The Governor's Reserve Powers in Relation to the Dissolution of the Tasmania House of Assembly" (1960) 1 Tas UJL Rev 488; E Campbell "The Prerogative Power of Dissolution: Some Recent Tasmanian Precedents" [1961] Pub L 165; M Harris and J Crawford "The Powers and Authorities Vested in Him': The Discretionary Authority of State Governors and the Power of Dissolution" (1969) 3 Adel L Rev 303; J Fajgenbaum and P Hanks *Australian Constitutional Law: Cases, Materials and Text* (Melbourne: Butterworths, 1972) 14-31, 69-70, 71-76, 79-91, 94-96.
38. As to federal executive power see eg G Winterton *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne: Melbourne University Press, 1983); *Davis v Commonwealth* (1988) 166 CLR 79.
39. But see Australian Constitution ss 12 (Governor issues writs for Senate elections) and 15 (Governor can appoint Senators).
40. In WA see eg T Gilmour "Reid: 1975 crisis could be repeated" *The West Australian* 20 February 1984, 4; P Kennedy "Governor vows to walk a middle path" *The West Australian* 27 February 1990, 2; S Loxley "Libs, Nats split over Burt view" *The West Australian* 28 February 1990, 4.

In Vic see eg P Austin "Governor forced to resign" *The Australian* 4 October 1985, 1; R Taylor "Vic. Governor Resigns" *The West Australian* 4 October 1985, 1; P Cole-Adams "A governor's judgment is the crucial issue" *The Age* 5 October 1985, 11; C Howard "Why Cain had to demand Governor's resignation" *The Age* 7 October 1985, 13; I Willox "Cain would get first chance in an impasse" *The Age* 3 October 1988, 21; I Svendsen "No precedent for hung Parliament" *The Age* 5 October 1988, 4.

In Qld see eg A Blackshield "Can the Liberal Ministers Resign?" *The Age* 17 August 1983, 13; G Winterton "Crown can accept Ministers' resignations" *The Age* 19 August 1983, 12; M Robbins "Sir Joh facing defeat" *The Australian* 25 November 1987, 1; P Morley "Sackings mean Sir Joh will go" *The West Australian* 25 November 1987, 1; J Schauble and C Botten "Governor has power to force issue, says lawyer" *The Age* 26 November 1987, 7; R Callick "Qld Governor tosses up his options under the Constitution" *Australian Financial Review* 26 November 1987, 3; M Robbins "Defiant Premier will not resign" *The Australian* 26 November 1987, 1; P Lynch "Governor has power to sack Sir Joh" *The Australian* 26 November 1987, 4; R Robinson and G Thom "Joh Won't Go" *The West Australian* 27 November 1987, 1; M Robbins "Joh promises to go Monday" *The Australian* 27 November 1987, 1; G Sawer "Queensland joker

of the Governor.⁴¹ The Australia Act 1986 also impinges upon state executive structures, processes and powers.⁴² Clear limitations and enlargements of Governors' powers emerge.⁴³ Diverse interpretations can, however, be proffered in relation to the principal provision - section 7 - in the Australia Act 1986 concerning executive powers and functions.⁴⁴ The spectrum ranges from a mere designation of who - state governors - can exercise this power to a radical shift in the nature, repository and constitutional foundation of state executive power.⁴⁵

raises knotty points of law" The Canberra Times 26 November 1987, 2; C Howard "For Sir Joh, the chickens have come home to roost" The Age 28 November 1987, 11; Q Dempster "The End of Joh" (8 December 1987) 109 Bulletin 20; P McDermott "Queensland Revisited" [1988] Pub L 31; D Markwell "The Conventions of Ministerial Resignations: The Queensland Coalition Crisis of 1983" in Low supra n 5, 163.

In Tas see eg Editorial "What Robin Gray should do" The Canberra Times 31 May 1989, 8; D Solomon "Gray's power: the looming crisis" The Australian 5 June 1989, 15; G Winterton "Constructive no-confidence" The Australian 8 June 1989, 16; M Lester "Constitutional lawyers agree and warn Gray: Poll bid may be legal - but it's 'wrong'" Mercury 10 June 1989, 1; M Lester "Petition push just a flight of fantasy" Sunday Tasmanian 11 June 1989, 9; D Solomon "Governor ready to break deadlock" The Australian 28 June 1989, 2; A Darby "Gray clings to power" The Age 29 June 1989, 1; G Reilly "Premier tries to postpone the inevitable" The Age 29 June 1989, 1; C Saunders "Confidence in the choice of those we have chosen" The Age 29 June 1989, 13; G Reilly "Grey must go if motion is passed, say experts" The Age 29 June 1989, 16; P Austin and C McGee "Gray pulls out an ace in bid to force new poll" The Australian 29 June 1989, 1; D Solomon "Whatever advisers say, it's Sir Phillips's call" The Australian 29 June 1989, 2; "Gray Fiasco: It's Up to Governor" Daily News 29 June 1989, 1; Editorial "Gray's belated resignation" The Canberra Times 30 June 1989, 8; Editorial "Mr Gray's elegy, no democracy's" The Age 30 June 1989, 13; P Austin and C McGee "Labor-Greens alliance wins Governor's nod" The Australian 30 June 1989, 1; D Solomon "Sir Phillip saved from tough decision" The Australian 30 June 1989, 1; Note "Tasmania" (1989) 61 Aust Q 310; A Castles "Post-Election Constitutional Usage in the Shadow of Mount Wellington: Tasmania's Constitutional Crisis, 1989" (1990) 12 Adel L Rev 292.

41. (WA) Acts Amendment (Constitution) Act 1978; (Qld) Constitution Act Amendment Act 1977. See also ss 13 and 14 of the Cth and UK Australia Acts 1986. As to the constitutional validity of these sections of the (Cth) Australia Act 1986 see Western Australia, Legislative Assembly 1985 *Debates* vol 256, 1549 (A Mensaros). On Governors see Winterton supra n 20, 29-52.
42. See ss 7, 8, 9, 13 and 14 of the Cth and UK Australia Acts 1986.
43. See *ibid* s 9. See also *ibid* s 8 (Queen's disallowance power).
44. The heading to s 7 of the Cth and UK Acts states: "Powers and functions of Her Majesty and Governors in respect of States."
45. For an analysis of the interpretations and their consequences see Thomson "The Australia Acts 1986" supra n 5, 424-426.

Judicial activism has principally⁴⁶ sought to make state executive action⁴⁷ subject to familiar common law limitations of good faith, relevant considerations and natural justice.⁴⁸ Should courts judicially review other facets of the manner in which Governors exercise executive power? A principal target might be the circumstances and extent to which state Governors can only act pursuant to ministerial advice.⁴⁹ Minimising or maximising that obligation would, subject to the possibility of legislative rectification,⁵⁰ promote or curtail executive autonomy.

46. For judicial assaults on other executive domains see eg *Bropho v Western Australia* (1990) 93 ALR 207 (weakening presumption of state Crown immunity from state legislation).
47. As to judicial review of federal executive action see Winterton supra n 38, 123-143; J Thomson "Executive Power, Scope and Limitations: Some Notes From a Comparative Perspective" (1983) 62 Tex L Rex 559, 588-589; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 special leave to appeal refused by the High Court in *Peko-Wallsend Ltd v Minister for Arts, Heritage and Environment* (1987) 165 CLR 668 (see reasons for refusal in *Peko-Wallsend Ltd v Cohen* [1987] 21 Leg Rep SL 1 and D Solomon "Kakadu: court upholds supremacy of Cabinet" *The Weekend Australian* 14-15 November 1987, 11); *Cohen v Peko-Wallsend Ltd* (1986) 68 ALR 394; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. See also *Burt v Governor-General* [1989] 3 NZLR 64 (no judicial review of prerogative of mercy).
48. See eg *The Queen v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *South Australia v O'Shea* (1987) 163 CLR 378; *MacRae v Attorney-General for New South Wales* (1987) 9 NSWLR 268; *Wilsmore v Court* supra n 4; *R v The Parole Board; Ex parte Burnie* (unreported) Full Court of the Supreme Court of Western Australia 19 June 1987 Supreme Court Library no 214; *Ahern v Hawkins* (unreported) Full Court of Supreme Court of Queensland 5 April 1990 (noted in (1990) 1 PLR 263). See generally M Harris "The Courts and the Cabinet: 'Unfastening the Buckle?'" [1989] Pub L 251. For legislation protecting executive power from judicially imposed natural justice requirements see ss 22 and 42 of the (WA) Acts Amendment (Imprisonment and Parole) Act 1987. See also supra n 45 (possibility that since 1986 Governors' powers are statutory, not prerogative).
49. For arguments advocating such a result in relation to the Governor-General see Winterton supra n 38, 124-127.
50. Are any areas of state executive power inviolable from legislative intrusion? As to the doctrine of separation of powers in state constitutions see *Clyne v East* supra n 4, *BLF* case supra n 4; *Quin* supra n 4 Mason CJ, 333-334. See also *Bropho v Western Australia* supra n 46. For responses to the same question under the Australian Constitution see Winterton supra n 38, 93-110; Thomson supra n 47, 579-587.

IV. LEGISLATIVE POWER

Reformation of state legislative power is also occurring. Examples are the imposition and entrenchment of manner and form requirements erecting a barrier to parliamentary amendment of some parts of state constitutions,⁵¹ and Commonwealth legislation seeking to provide state parliaments with a new source of legislative power.⁵² More dramatic, complex and possibly far-reaching are provisions in the Australia Act 1986.⁵³ Again, a mixture of extensions and retractions of state legislative power may be the result.⁵⁴

Courts continue to participate in this readjustment. Elucidation and extension of the constitutional parameters of state parliaments' plenary law-making powers, particularly in relation to extra-territorial offshore areas, has occurred.⁵⁵ Endeavours to generate implied limitations - a Bill of Rights - from fundamental rights doctrines and state constitutions' terminology - "peace, order and good government" - conferring legislative power, however, seem to have been rebuffed.⁵⁶ Whether

51. See eg s 6 of the (WA) Acts Amendment (Constitution) Act 1978 inserting s 73(2) into (WA) Constitution Act 1889; s 7 of the (Qld) Constitution Act Amendment Act 1977 inserting s 53 into the (Qld) Constitution Act 1867.
52. See eg ss 4 and 5 of the (Cth) Coastal Waters (State Powers) Act 1980. For differing views as to the effect of this Act vis-a-vis state legislative power see K Booker "Section 51(xxxviii) of the Constitution" (1981) 4 UNSWLJ 91, 109 n 2 ("preserved"); M Crommelin "Offshore Mining and Petroleum: Constitutional Issues" (1981) 3 Aust Mining & Petroleum LJ 191, 193-194 ("confers" or "adds to"); E Freeman "Comment" *ibid* 227-229 ("confirms"). See also *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 (s 5(c) of (Cth) Coastal Waters (State Powers) Act 1980 constitutional).
53. See ss 2-6 of the Cth and UK Australia Acts 1986.
54. For the various permutations see Thomson "The Australia Acts 1986" *supra* n 5, 417-424.
55. See eg *Pearce v Florenca* (1976) 135 CLR 507; *Union Steamship* *supra* n 4; *Port MacDonnell* *supra* n 52; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 Brennan J, 335. See also *Boath v Wyvill* (1989) 85 ALR 621, 633-638 (interstate extra-territorial competence); *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648.
56. See eg *BLF* case *supra* n 4; *Union Steamship* *supra* n 4, 10 (leaving open whether state peace, order and good government legislative power "is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ..."). See generally G Winterton "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 FL Rev 223, 228-235, 239; N O'Neill "Constitutional Human Rights in Australia" (1987) 17 FL Rev 85, 118-121.

express bills of rights will be incorporated in state⁵⁷ constitutions remains a matter of conjecture.⁵⁸

V. JUDICIAL POWER

Pre-eminent among state constitutional renovations are those affecting state courts. Changes to the structure and processes of judicial systems are one facet.⁵⁹ Cross-vesting of jurisdiction between federal and state courts is the other.⁶⁰ This movement towards unified jurisdiction while restraining a tripartite - federal, state and territory - judiciary has tended⁶¹ to eradicate federal-state jurisdictional controversies and obviate the loss of state courts' jurisdiction.⁶² Even so, the pre-1976⁶³ state judicial dominance has been irretrievably lost.⁶⁴

Parliamentary and executive supervision of courts is not limited to judicial appointments; investing and divesting of jurisdiction; enforcement of court orders; and the provision of finance to pay judicial salaries and superannuation, and to build and maintain court premises. Removal and disciplining of state judges has again⁶⁵ become promi-

57. As to the Australian Constitution see eg *Street v Queensland Bar Association* (1989) 63 ALJR 715 Deane J, 737; M Coper *Encounters with the Australian Constitution* (North Ryde, NSW: CCH Australia, 1987) 315-358; O'Neill supra n 56. See generally P Bailey *Human Rights: Australia in an International Context* (Sydney: Butterworths, 1990).
58. A Declaration of Rights and Freedoms was recommended for inclusion in the (Vic) Constitution Act 1975: *Defining and Protecting Human Rights* supra n 6, xvii-xx.
59. See eg *Papers Presented at the Eighth Annual ALJA Seminar* (Carlton South, Vic: Australian Institute of Judicial Administration, 1990).
60. See eg B O'Brien "The Constitutional Validity of the Cross-Vesting Legislation" (1989) 17 MUL Rev 307; Thomson "Comparative Perspectives" supra n 5, 1089 n 178 (references).
61. But see eg D Kovacs "Cross-Vesting of Jurisdiction: New Solutions or New Problems?" (1988) 16 MUL Rev 669.
62. On these pre-cross-vesting phenomena see Thomson "American Lessons" supra n 5, 1248-1263.
63. (Cth) Federal Court of Australia Act 1976.
64. Of course, the Commonwealth Parliament could - subject to judicial tenure requirements in s 72 of the Australian Constitution - repeal the (Cth) Federal Court of Australia Act 1976.
65. For previous removal proceedings see J Thomson "Removal of High Court and Federal Judges: Some Observations Concerning Section 72(ii) of the Australian Constitution (Part 1)" [1984] Aust Current L 36033, 36042-36043 (references).

ment.⁶⁶ Inevitably, critics of the resultant diminution of judicial independence have emerged.⁶⁷ Others, not as enamoured of the legal system and judicial hegemony in constitutional matters, may be less concerned.⁶⁸

VI. CONSTITUTIONAL THEORY

Absent from this turmoil is even a glimmer of constitutional theory. Some esoteric - at least for Australian state constitutional law - issues, such as separation of powers and implied rights and limitations, are present.⁶⁹ Debates concerning the nature of state constitutions, their interpretation and the role of a state and federal judiciary have not emerged. Movement towards those issues can be assisted by recourse to foreign lands.⁷⁰ If Australian state constitutional jurisprudence is to mature, those ventures should be undertaken.

66. See eg M McLelland "Disciplining Australian Judges" (1990) 64 ALJ 388.

67. Ibid.

68. Eg, critical legal scholars. See eg supra n 1.

69. See supra nn 50 and 56.

70. See eg S Griffin "What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition" (1989) 62 S Cal L Rev 493; M Perry "Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)" (1989) 6 Const Com 231; "Colloquy: Does Constitutional Theory Matter?" (1987) 65 Tex L Rev 766; R Saphire "Constitutional Theory in Perspective: A Response to Professor Van Alstyne" (1984) 78 Nw UL Rev 1435; R West "Progressive and Conservative Constitutionalism" (1990) 88 Mich L Rev 641; "Symposium: Michael J Perry's *Morality, Politics, and Law*" (1989) 63 Tul L Rev 1283; B Ackerman "Constitutional Politics/Constitutional Law" (1989) 99 Yale LJ 453; M Tushnet *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988); A Rosenbaum (ed) *Constitutionalism: The Philosophical Dimension* (New York: Greenwood Press, 1988). See also supra n 7 (state constitutional law references).