

POLITICS, LAW AND THE CONSTITUTION IN McCAWLEY'S CASE

NICHOLAS ARONEY*

[Discussion about the relationship between law and politics in Australian constitutional law is often conducted in abstract terms. McCawley's Case presents a unique opportunity to examine the relationship between law and politics in the context of a very rich set of specific circumstances, and to do so in a manner which distinguishes between the different dimensions of 'politics' and 'law', and the complex ways in which they can interrelate. With these objectives in mind, this article undertakes three tasks. First, it seeks to place McCawley's Case within the personal, political and legal contexts in which it arose, and to show why the case provides a particularly valuable opportunity to test our understanding of the relationship between law and politics. Second, the article aims to identify and distinguish the various political elements of the case in their personal, partisan and ideological dimensions, as well as the competing conceptions of law and constitutionalism upon which the judges relied. Third, the article evaluates the role of law, politics and constitutionalism in the case, arguing that rather than being purely legal or reductively political in character, the decisions are best understood as reflecting contrasting theories concerning the ideal purposes of constitutional law and the appropriate location of constituent power.]

CONTENTS

I	Introduction.....	606
II	Background.....	611
	A Political Context.....	612
	B Constitutional Background.....	619
	C Legal Proceedings.....	621
	D Previous Case Law.....	626
	1 <i>Cooper</i>	627
	2 <i>Taylor</i>	629
	3 Summary.....	632
III	Judicial Reasoning.....	632
	A Legal Arguments.....	633
	B Constitutional Theory.....	635
	1 Fundamental Law.....	636
	2 Parliamentary Sovereignty.....	639
	3 Limits of Constitutional Theory.....	642
	C Political Dimensions.....	644
	1 Personalities, Partisanship and Ideology.....	644
	2 Politico-Constitutional Theory.....	647

* BA (UNSW), LLB (Hons), LLM (UQ), PhD (Monash); Senior Lecturer, T C Beirne School of Law, The University of Queensland. This article is an expanded version of a chapter published in George Winterton (ed), *State Constitutional Landmarks* (2006). I wish to thank Professor George Winterton and the Sesquicentenary of Responsible Government Trust established by the New South Wales Government for providing funding to support this project. I also wish to thank Jonathan Fulcher and Scott Guy for their very capable research assistance. Thanks are also due to my colleagues at the Centre for Public, International and Comparative Law — especially Jon Crowe, Suri Ratnapala, Jim Allan, Reid Mortensen, Michael White and Nick James — for the opportunity to present my findings and to discuss them in a stimulating environment.

IV Conclusions 650

As to my own little matter, the Court reserved its decision ... I have no doubt that the decision will be adverse — the atmosphere of hostility, political, professional, and personal, certainly favours such a result.

— Thomas William McCawley to Henry Bournes Higgins, 2 February 1918¹

I INTRODUCTION

The appointments of Thomas William McCawley, first as President of the Queensland Court of Industrial Arbitration ('Queensland Arbitration Court') in early 1917, then as a judge of the Supreme Court of Queensland in late 1917, and finally as Chief Justice in 1922, were a series of decisions destined to provoke political controversy.² The establishment of the Queensland Arbitration Court was a central plank of the radical reforms proposed by the newly formed Labor Government of Thomas Joseph Ryan,³ and McCawley was hand-picked as someone having both the requisite technical skills and political temperament for appointment as the Queensland Arbitration Court's first President.⁴ Major changes, not only to industrial regulation, but also to the political and constitutional structure of the State of Queensland, were imminent — nothing less than the restructuring of the Supreme Court, and the abolition of the Legislative Council, which occurred in 1922.⁵ In this context, McCawley's appointment to the Supreme Court and his later elevation to Chief Justice were seen by detractors to be part of an attempt by the Labor Government to change the political profile of the Court, and to raise the status of the Queensland Arbitration Court to a comparable level.⁶

When, in December 1917, McCawley presented to the Supreme Court a commission appointing him a judge of that Court, two leading Queensland King's Counsel, Arthur Feez and Charles Stumm, contested the validity of the appointment on what were said to be 'purely legal and constitutional grounds'.⁷ Their most significant arguments were that the appointment was contrary to the *Constitution Act 1867* (Qld) ('*Constitution Act*'), and that the Queensland Parliament could not legislate inconsistently with this Act unless the relevant

¹ Letter from Thomas William McCawley to Justice Henry Bournes Higgins, 2 February 1918, in *Papers of Henry Bournes Higgins* (National Library of Australia) series 1.

² See generally M Cope, 'The Political Appointment of T W McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland' (1976) 9 *University of Queensland Law Journal* 224; Timothy Matthew O'Dwyer, *Amici Curiae — The Role of the Lawyers in the McCawley Case* (MA Thesis, Griffith University, 1994).

³ See D J Murphy, *T J Ryan: A Political Biography* (first published 1975, 1990 ed) 122.

⁴ See Ross Fitzgerald, 'Red Ted': *The Life of E G Theodore* (1994) 88; Justice B H McPherson, *The Supreme Court of Queensland 1859–1960: History, Jurisdiction, Procedure* (1989) 308.

⁵ *Constitution Act Amendment Act 1922* (Qld). See McPherson, above n 4, 298–9; O'Dwyer, above n 2, 78–9.

⁶ See O'Dwyer, above n 2, 55.

⁷ *Re McCawley* [1918] QSR 62, 64; Transcript of Proceedings, *R v McCawley* (Supreme Court of Queensland, Thomas Ryan and Arthur Feez, 6 December 1917) (Queensland State Archives, Archive No CRS/207, 1–2). Feez and Stumm appeared as amici curiae.

provision in the Act had first been deliberately and expressly repealed.⁸ Although Feez and Stumm admitted that the Parliament certainly had the power to amend constitutional statutes such as the *Constitution Act*, their contention was that it could not do so by implication — that is, simply by passing an Act which was inconsistent with the *Constitution Act*.⁹

At first instance, a majority of the Full Court of the Supreme Court upheld almost all of the constitutional and other legal objections raised against McCawley's appointment.¹⁰ While much of the Court's reasoning might readily be characterised as being 'purely legal' in nature, as will be seen, the Court was quite prepared to criticise both the Ryan Government¹¹ and the legislature¹² in a number of significant respects. On appeal, a majority of the High Court upheld the decision of the Supreme Court.¹³ Their reasoning was again couched in strictly legal terms, yet once more, the judges were willing to make a number of observations of a colourably 'political' character.¹⁴ However, when the matter was taken to the Judicial Committee of the Privy Council, the Australian decisions were overturned,¹⁵ their Lordships unequivocally finding that the Queensland Parliament possessed 'full power' to amend the Constitution of Queensland simply by legislating inconsistently with it.¹⁶ Moreover, the Privy Council's opinion, while at times abstract and theoretical,¹⁷ was limited to a largely technical review of the relevant Imperial legislation¹⁸ which avoided all reference to the politics and substantive merits of the appointment.¹⁹

The decidedly political nature of McCawley's Case,²⁰ juxtaposed with the 'strictly legal and constitutional' aspects of the reasoning, raises an obvious

⁸ *Re McCawley* [1918] QSR 62, 84 (Cooper CJ).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See Transcript of Proceedings, *R v McCawley* (Supreme Court of Queensland, Cooper CJ, 3 April 1918) (Queensland State Archives, Archive No CRS/207, 137). See, eg, below n 131 and accompanying text.

¹² See *Re McCawley* [1918] QSR 62, 82–3 (Cooper CJ). See further below nn 241, 287–8, 293 and accompanying text. Cf Queensland, *Parliamentary Debates*, Legislative Assembly, 3 October 1917, 1515 (Thomas Ryan, Premier), where Premier Ryan accused the Chief Justice of Queensland, Sir Pope Cooper, of 'want of integrity' in some of his judgments.

¹³ *McCawley v The King* (1918) 26 CLR 9.

¹⁴ *Ibid* 28 (Griffith CJ), 45 (Isaacs and Rich JJ); Transcript of Proceedings, *McCawley v The King* (High Court of Australia, Griffith CJ and Barton J, 12 September 1918) (Queensland State Archives, Archive No CRS/206, 299); Transcript of Proceedings, *McCawley v The King* (High Court of Australia, Gavan Duffy J, 10 September 1918) (Queensland State Archives, Archive No CRS/207, 310). See also below nn 295–300 and accompanying text.

¹⁵ *McCawley v The King* (1920) 28 CLR 106.

¹⁶ *Ibid* 112, 125–6 (Lord Birkenhead LC).

¹⁷ See, eg, *ibid* 114–17.

¹⁸ *Ibid* 117–28.

¹⁹ The Privy Council did observe, however, that it was 'intelligible that the Legislature should have desired to throw an atmosphere of judicial prestige around one whose duty it was to compose, or pronounce upon, matters of industrial dissention, for the duration of this important function': *ibid* 126.

²⁰ 'McCawley's Case' is used in this article to refer to the entirety of the litigation surrounding McCawley's appointment, which includes *Re McCawley* [1918] QSR 62, *Re McCawley* (1918) 24 CLR 345, *McCawley v The King* (1918) 26 CLR 9 and *McCawley v The King* (1920) 28 CLR 106 (Privy Council).

question: were the judges who resolved the dispute politically motivated?²¹ All of the Supreme Court judges who decided the case had been appointed by non-Labor governments, and there were allegations that members of the Court harboured a political bias against the newly formed Labor Government.²² Moreover, the sole dissenting judge, Real J, had a working class background (and was prepared to remind the Labor Government of this fact when tension between the Court and the Government reached its peak in the early 1920s).²³ The judges of the High Court who heard the appeal were similarly not without political connections. Of the majority judges, Griffith CJ was a former Premier and Chief Justice of Queensland, and Barton J had been Prime Minister of Australia.²⁴ Moreover, as politicians both Griffith and Barton had been liberal-conservative in political orientation — in sharp contrast to the radical-liberal politics of the two minority High Court judges, Isaacs and Higgins JJ, both of whom had been federal Attorneys-General.²⁵ Indeed, as President of the Commonwealth Court of Conciliation and Arbitration, Higgins held a position that corresponded at the federal level to McCawley's position as President of the Queensland Arbitration Court,²⁶ and was not unwilling to correspond privately with McCawley about the case itself.²⁷ Further, each of the judges were important figures in Australian politics because of their involvement in the debate over Australian federation in the 1890s, having taken leading,²⁸ and often opposing,²⁹ roles in that debate.

But what does it mean for a legal issue, and its resolution by judges, to be 'political' in nature? There are different, albeit overlapping, degrees to which a matter might be characterised as such. First, political controversies may be characterised as predominantly 'personal' in quality. Here, the contest is essentially one of individual ambition and pursuit of power, coloured perhaps by an element of personal aversion and, on occasion, by outright animosity. Second,

²¹ On the opposition mounted by Feez, Stumm and other members of the legal profession in Queensland, see O'Dwyer, above n 2, ch 4; Helen Gregory, *The Queensland Law Society Inc 1928–1988: A History* (1991) 48–55. In J R S Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (1979) 166, Forbes observes: 'It was said from bench and Bar table that the challenge was "purely legal" — a protest hardly borne out by the atmosphere of the hearing'.

²² For background on each of the judges, see Ross Johnston, *History of the Queensland Bar* (1979) 49–50, 65–75; McPherson, above n 4, 188–9, 195–7, 199, 253–8. Both authors note allegations of political bias on the part of Sir Pope Cooper and Justice Lionel Lukin. McPherson also notes a reputation for outspokenness on the part of Justice Patrick Real: at 189, 255.

²³ Cope, above n 2, 235, 240. See also below nn 143–9 and accompanying text.

²⁴ Roger B Joyce, *Samuel Walker Griffith* (1984) chs 4, 9; John Reynolds, *Edmund Barton* (first published 1948, 1999 ed) ch 15; Geoffrey Bolton, *Edmund Barton* (2000) chs 11–12.

²⁵ See generally Sir Zelman Cowen, *Isaac Isaacs* (2nd ed, 1993) ch 5; John Rickard, *H B Higgins: The Rebel as Judge* (1984) chs 4, 6.

²⁶ See Stuart Macintyre, 'Arbitration in Action' in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (2004) 55, 61–71.

²⁷ Higgins' letters to McCawley appear to have been lost. However, see Letter from McCawley to Higgins, 2 February 1918, above n 1, which plainly refers to a letter Higgins wrote to McCawley that discussed the opposition to McCawley's appointment.

²⁸ See, eg, J A La Nauze, *The Making of the Australian Constitution* (1974) 169, 278.

²⁹ See, eg, *ibid* 139, 150.

political differences may be characterised as ‘partisan’, in the sense that they depend upon formal or informal political alliances and party allegiances — the typical stuff of contemporary parliamentary politics. Third, political differences may be characterised as ‘ideological’. In this sense, the standard political classifications, such as ‘conservative’ and ‘progressive’, ‘liberal’ and ‘socialist’, ‘left’ and ‘right’, emerge.

Political ideologies are, however, more complex than simple left–right dichotomies suggest, and they typically involve a number of dimensions, including legal ones. Thus, particular political ideologies are often (although not necessarily) taken to imply particular theories about the nature, functions and purposes of law. For example, law may primarily be conceived in liberal terms as a facilitator of human choices and as a device by which governmental power is controlled. Alternatively, it may be conceived in progressive terms as a positive instrument of social change, or perhaps, in radical terms as an inevitably conservative institution that itself resists change. Moreover, associated with varying conceptions of law, political ideology can also imply a certain view of the structure and function of the courts, and of the role of the judiciary, as well as more abstract ideas about the institutions of the state generally, and of the ideal Constitution in particular. In other words, political theory can imply both a theory of adjudication and a theory of constitutionalism.

The relationship between political ideology and ideas about law, adjudication and constitutionalism is vexed. On prevailing liberal-democratic conceptions, the courts and the Constitution are politically neutral institutions which reflect fundamental political values that are widely shared by those who are in fact opposed in their more everyday personal, partisan and ideological commitments.³⁰ From a liberal-democratic point of view, therefore, a proposed change to the Constitution may represent a challenge to the fundamental ground rules of politics — with the potential to influence concrete political outcomes. Debates over constitutionalism and Constitutions, the law and the courts must, therefore, be understood in a context of both political contestation — and are thus political, and contested, in the deepest and most profound sense possible — but they are at the same time debates over the putatively neutral ground rules of politics.

McCawley’s Case involved a complicated chain of events that displayed political elements in each of these six dimensions — personal, partisan, ideological, legal, judicial and constitutional — and this article attempts to chart these elements. The interesting and difficult problem, however, concerns the interrelationship between them. What *is*, and what *ought to be*, the relationship between ‘politics’ and ‘law’? Here, the debate often centres on the question of whether adjudication is, can, or should be based upon law, and not politics. Sir Owen Dixon famously insisted that ‘strict and complete legalism’ was the only policy that could secure the confidence of the politically engaged.³¹ Sir Owen did not deny that there is a real sense in which political considerations are relevant to judicial decision-making, particularly in the context of constitutional interpretation. A Constitution is a ‘political instrument’, he said, in that it ‘deals

³⁰ See, eg, *Lochner v New York*, 198 US 45, 75–6 (Holmes J) (1905).

³¹ *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiv.

with government and governmental powers'.³² Considerations arising 'under the Constitution' are therefore unavoidably political in this sense.³³ However, Sir Owen insisted that the relevant considerations must at the same time be 'legal', in the sense that they must be derived from orthodox sources of law, such as previous judicial decisions, statutes and Constitutions.³⁴ Others, of course, deny that the line can be drawn so easily.³⁵

McCawley's Case provides an interesting test case for an enquiry into the relationship between law and politics in Australia, for it was an intensely political affair which was thoroughly litigated at a state, federal and Imperial level. Moreover, it illustrates this relationship at a critical point in the evolution of Australian constitutionalism. McCawley's Case was initiated towards the end of the First World War. To a substantial degree, Australia entered that war as a colony of the British Empire, but emerged as an independent nation-state.³⁶ Against this backdrop, McCawley's Case was principally about the constitutional foundations of the Australian states, the constituent political units of the Commonwealth of Australia, which was itself a member of a nascent Commonwealth of Nations. At stake, therefore, were the constitutional foundations of an emerging, independent federation of self-governing states. The judgments delivered in McCawley's Case concerned constitutionalism and the fundamental nature of the 'polity' and in this sense they were political decisions of the highest order. Yet, at the same time, the case was about the highly controversial appointment of McCawley. This controversy occurred at the 'ordinary' level of politics and was largely fuelled by allegations that personal, partisan and ideological considerations had motivated both the appointment and its opposition.

The judges called upon to resolve the dispute would have been tempted to descend to the ordinary politics of the matter, using the formalistic veil of legal and constitutional reasoning to conceal a 'result-oriented' decision. The personal and political connections of the judges on both sides of the political divide would have rendered this temptation a real and powerful one, yet, we must ask: can the constitutional reasoning used in the case be dismissed, simply, as ideological or partisan rhetoric?³⁷ As will be seen, according to one side in the debate, what was at issue was the principle of the separation of powers and the independence of the judiciary, as well as the status of the Constitution of Queensland as

³² *City of Melbourne v Commonwealth* (1947) 74 CLR 31, 82.

³³ *Ibid.*

³⁴ *Ibid.* 82–3. His Honour emphasised that, ultimately, legal and constitutional considerations provided the basis for the imposition of restraints on the power of the Commonwealth. He declared that '[i]t is not a question of whether the considerations are political, for nearly every consideration arising from the *Constitution* can be so described, but whether they are compelling.': at 82.

³⁵ See, eg, Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987) 38–9; Jeffrey Goldsworthy, 'Realism about the High Court' (1989) 18 *Federal Law Review* 27, 31; Brian Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40, 47–9; Jeffrey Goldsworthy, 'Reply to Galligan' (1989) 18 *Federal Law Review* 50, 51–2.

³⁶ See generally R D Lumb, 'The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change' (1988) 15 *University of Queensland Law Journal* 3.

³⁷ Cf McPherson, above n 4, x.

fundamental, organic or higher law. On the other side, was the view that the law — and therefore the courts, Parliament and Constitution of Queensland — ought to be instruments of social and economic progress, to which a strict separation of the judiciary and the executive, and an inflexible attitude to the relationship between the Parliament and the Constitution, must give way.

In this context, how is McCawley's Case to be understood? To what extent were the decisions motivated by political and legal considerations? In this article, it will be contended that while both kinds of considerations influenced the judges, distinguishing the 'political' dimensions of the case into personal, partisan and ideological aspects, and the 'legal' dimension into theories about law, adjudication and constitutionalism, enables a more nuanced assessment. It will be argued that rather than being adequately explained in terms which are either purely legal or reductively political, the decisions are best understood as reflecting contrasting theories of a politico-constitutional character concerning the ideal purposes of constitutional law and the appropriate location of ultimate, constituent power within the Australian states.

Part II of this article accordingly places McCawley's Case within the political and legal context in which it arose and shows why the case provides a particularly rich opportunity to test our understanding of the relationship between law and politics in Australian constitutional law. Part III turns to the reasoning adopted by the judges, examining the respective roles of technical legal argument, constitutional theory and political motivation in the various judgments. Part IV concludes by arguing that McCawley's Case cannot be explained entirely in terms of purely legal considerations, or by reference to its political dimensions. Instead, the case turned ultimately on competing conceptions of the ideal Constitution of a self-governing political community.

II BACKGROUND

Thomas McCawley was born on 24 July 1881, the son of a Toowoomba drover, and the sixth of eight children.³⁸ His father, James McCawley, was Irish-born; his mother, Mary (née Stenner), was born in Prussia. As befitted a Roman Catholic upbringing, he was duly educated at St Patrick's Boys' School in Toowoomba. The financial situation of his family meant that McCawley had to leave school at the age of 14, working first as a teacher, and soon thereafter as a clerk in a solicitor's office. Shortly before his 18th birthday, he passed the public service examinations and was appointed a clerk, first within the Queensland Government Savings Bank, later within the Public Service Board and finally within the Department of Justice. He soon became Attorney-General James Blair's private secretary and in this capacity he helped draft the *Workers' Compensation Act 1905* (Qld), and shortly thereafter co-authored a commentary on the Act with Blair and Thomas Macleod.³⁹ Studying after-hours, he passed the prescribed examinations and was subsequently admitted, on the motion of Blair,

³⁸ For biographical background, see generally Percival Serle, *Dictionary of Australian Biography* (1949) vol 2, 65–6; McPherson, above n 4, 306–9; O'Dwyer, above n 2, ch 1.

³⁹ James William Blair, Thomas Macleod and Thomas William McCawley, *The Workers' Compensation Act of 1905* (1906).

to the Queensland Bar in 1907.⁴⁰ McCawley's work within the Department of Justice must have been impressive,⁴¹ for in 1910 he was appointed Crown Solicitor by Blair under the Liberal-Labor Government of William Kidston.⁴² His public service career reached further heights in 1915, when he was appointed Under Secretary for Justice under the newly formed Ryan Labor Government.⁴³

A Political Context

The Ryan Government was the first Labor administration in Queensland to be elected with a clear majority in the Legislative Assembly.⁴⁴ True to its platform, the Government embarked upon an elaborate reform programme during its first term in office that included the establishment of a number of state enterprises, the reform of workers' compensation and the introduction of compulsory voting, as well as unsuccessful attempts to dissolve the Legislative Council, to abolish the death penalty and to introduce a form of direct democracy through popular initiative and referenda.⁴⁵ This radical reform agenda attracted political opposition from conservative members of Parliament, particularly in the Legislative Council, many of whom were lawyers.⁴⁶ Moreover, a disposition on the part of the Government to use its executive and legislative powers in novel ways, and to the fullest extent possible, led to court challenges, and thus to a series of confrontations between the Government and the Supreme Court.⁴⁷

⁴⁰ O'Dwyer, above n 2, 12–13, points out that in 1907 McCawley and Macleod also initiated, as founding editors, *The Queensland Justice of the Peace and Local Authorities Journal*, which was succeeded in 1973 by *The Queensland Lawyer*.

⁴¹ See McPherson, above n 4, 306, who writes of McCawley's 'ability and assiduity'. See also O'Dwyer, above n 2, 12–24; Johnston, above n 22, 75–7.

⁴² On the opposition to this appointment within the Parliament and legal profession, see O'Dwyer, above n 2, 14–16.

⁴³ On the close working relationship between Ryan and McCawley, see generally Murphy, *T J Ryan*, above n 3, ch 6.

⁴⁴ Denis Murphy, 'Thomas Joseph Ryan' in Denis Murphy, Roger Joyce and Margaret Cribb (eds), *The Premiers of Queensland* (revised ed, 1990) 263, 271–2; D J Murphy, 'Organization, Structure and Finance' in D J Murphy, R B Joyce and Colin A Hughes (eds), *Labor in Power: The Labor Party and Governments in Queensland 1915–57* (1980) 3, 3.

⁴⁵ Charles Arrowsmith Bernays, *Queensland Politics during Sixty (1859–1919) Years* (1919) 183–4; Murphy, *T J Ryan*, above n 3, chs 5–6. The Labor Government was finally successful in abolishing the Legislative Council in 1922. Bills attempting to abolish the Legislative Council were passed by the Legislative Assembly in 1915, 1916, 1918, 1919 and 1921: A C V Melbourne, *Early Constitutional Development in Australia: New South Wales 1788–1856, Queensland 1859–1922* (2nd ed, 1963) 480. The *Parliamentary Bills Referendum Act 1908* (Qld) already provided for the resolution of parliamentary deadlocks by referendum. A more wide-reaching Bill providing for indirect constitutional initiative, indirect legislative initiative and voters' veto was passed by the Legislative Assembly on four occasions between 1914 and 1919, but failed each time to secure the support of the Legislative Council: see George Williams and Geraldine Chin, 'The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?' (2000) 35 *Australian Journal of Political Science* 27, 33–4.

⁴⁶ See Malcolm I Thomis, *Thynne and Macartney, 1893–1993* (1993) ch 4, for the political confrontation between the Ryan Government and two leading solicitors, Andrew Thynne and Edward Macartney.

⁴⁷ On the tension between the Ryan Government, the Legislative Council and the Supreme Court, see McPherson, above n 4, 279–80, who suggests that 'actual or prospective opposition' to the Government's initiatives in the Legislative Council led the Government to avoid 'parliamentary

One of the principal legislative initiatives of the Ryan Government was the *Industrial Arbitration Act 1916* (Qld) ('*Industrial Arbitration Act*').⁴⁸ In conjunction with Edward Theodore as Secretary for Public Works, McCawley, as Crown Solicitor, played a key role in drafting the Act in its original form.⁴⁹ While the Act was presented as a measure designed to secure 'industrial peace',⁵⁰ it was clearly intended to lay the foundations for an arbitration system that would strengthen the role of industrial unions and promote the interests of the working class.⁵¹

At the centre of the Act was the new Queensland Arbitration Court. Section 6(1) established the Court and s 6(2)–(3) empowered the Governor-in-Council, by commission, to appoint judges of the Court, one of whom was to be designated President. Under s 6(5), the Court was deemed to be a 'branch' of the Supreme Court and every judge of the Queensland Arbitration Court was deemed to have the 'status' of a Supreme Court judge. Section 6(6) provided that the President and judges of the Court were to be appointed for a term of seven years, and were eligible for reappointment. Problematically, however, s 6(6) of the Act also provided that judges of the Queensland Arbitration Court could be appointed to the Supreme Court, bypassing the specific provisions for the appointment of Supreme Court judges contained within the *Constitution Act*, which required that they be granted life tenure during good behaviour and which set the maximum number of judges at five.⁵² McCawley was appointed to the Supreme Court under *Industrial Arbitration Act* s 6(6), and it was this provision that would be the subject of the constitutional challenge in McCawley's Case, on the ground of its inconsistency with the *Constitution Act*.

Under the *Industrial Arbitration Act*, the Queensland Arbitration Court was invested with wide reaching jurisdiction to make binding awards 'in any question arising out of any industrial matter',⁵³ from which there was no right of appeal.⁵⁴ The Court was thus empowered to determine standard working hours and minimum wages so as to guarantee a basic standard of living.⁵⁵ The Act also

enactment', preferring instead to use 'regulations and proclamations' to achieve its policy goals, even though such mechanisms were 'vulnerable to challenge'.

⁴⁸ On the Act and its background, see generally Ross Fitzgerald and Harold Thornton, *Labor in Queensland: From the 1880s to 1988* (1989) 25–7; B H Matthews, 'A History of Industrial Law in Queensland with a Summary of the Provisions of the Various Statutes' (1948) 4 *Royal Historical Society of Queensland Journal* 150, 156–62; Murphy, *T J Ryan*, above n 3, 122–3, 209, 212; Fitzgerald, above n 4, 66–9, 85; Cope, above n 2, 224; Bernays, above n 45, 487–9.

⁴⁹ Cope, above n 2, 224. Cf Murphy, *T J Ryan*, above n 3, 122; Fitzgerald, above n 4, 66; O'Dwyer, above n 2, 29–30; Bernays, above n 45, 487.

⁵⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 2 September 1915, 577 (Edward Theodore, Secretary for Public Works).

⁵¹ See *ibid* 570 (Edward Theodore, Secretary for Public Works).

⁵² *Constitution Act* ss 15–17; see also *Supreme Court Acts Amendment Act 1903* (Qld) s 3 ('*Supreme Court Acts Amendment Act*'). For further discussion of the constitutional provisions for the appointment and tenure of judges, see below Part II(B).

⁵³ *Industrial Arbitration Act* s 7(1).

⁵⁴ *Industrial Arbitration Act* s 19.

⁵⁵ *Industrial Arbitration Act* s 9(3)(d)(i), under which the minimum wage was defined as being sufficient to maintain a well-conducted employee of average health, strength, and competence, and his wife, and a family of three children in a fair and average standard of comfort, having

provided for the registration of industrial unions and gave them the right to enter into agreements with employers, to be parties to disputes and to be represented before the Queensland Arbitration Court.⁵⁶ Most controversially, the original Bill gave the Court explicit jurisdiction to grant preference in employment to unionists in particular industries.⁵⁷

With partisan motives and for ideological reasons, the Opposition focused its attention upon the union preference clause and, in the course of a highly charged parliamentary debate, was able to secure the rejection of the Bill by the Legislative Council largely on this basis.⁵⁸ At a subsequent conference between members of both Houses, the Labor Government agreed to delete the preference clause (taking the view that the Queensland Arbitration Court would, in any case, have discretion to grant preference to unionists).⁵⁹ The Opposition saw this backdown by the Government as a victory. However, the Government's interpretation of the Bill was soon vindicated in a judgment delivered by McCawley during the first year of his presidency.⁶⁰

By the time of his appointment to the Queensland Arbitration Court, McCawley had deeply imbibed progressive socialist beliefs. He had read the Fabian Tracts and other democratic socialist writings by George Bernard Shaw and Sidney Webb.⁶¹ McCawley has since been described as 'a social reformer who saw the law as being a potential instrument of reform, rather than remaining an instrument of conservatism and reaction against reform'.⁶² In particular, McCawley was greatly influenced by Henry Bournes Higgins, President of the Commonwealth Court of Conciliation and Arbitration, and Justice of the High Court of Australia.⁶³ Correspondence between McCawley and Higgins reveals a warm

regard to the conditions of living prevailing among employees in the calling in respect of which such minimum wage is fixed ...

⁵⁶ *Industrial Arbitration Act* s 7(1)(i).

⁵⁷ Industrial Arbitration Bill 1916 (Qld) cl 4(i). See further Queensland, *Parliamentary Debates*, Legislative Council, 5 October 1916, 1108 (Frederick Brentnall).

⁵⁸ See, eg, Queensland, *Parliamentary Debates*, Legislative Council, 3 October 1916, 1024–6 (Arthur Hawthorn); Queensland, *Parliamentary Debates*, Legislative Council, 5 October 1916, 1108–9 (Frederick Brentnall); Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 1916, 1389–93.

⁵⁹ See Cope, above n 2, 224–5; O'Dwyer, above n 2, 31–2, 50; Murphy, *T J Ryan*, above n 3, 209; Fitzgerald, above n 4, 85; Bernays, above n 45, 488.

⁶⁰ See below n 81 and accompanying text.

⁶¹ See Cope, above n 2, 228; see also Fitzgerald, above n 4, 66, who calls McCawley 'an avid proponent of Fabianism'. Fabianism was a political movement premised on Sidney Webb's theory of a gradual evolution from capitalism to socialism through various social reforms consequent upon the development of universal suffrage and representative government. The Fabian Tracts were a series of popular booklets which applied Fabian theories to various questions of public policy: see G D H Cole, 'Fabianism' in Edwin R A Seligman (ed), *Encyclopaedia of the Social Sciences* (1931) vol XI, 46–9.

⁶² Denis Murphy, 'Edward Granville Theodore: Ideal and Reality' in Denis Murphy, Roger Joyce and Margaret Cribb (eds), *The Premiers of Queensland* (revised ed, 1990) 293, 304, added (with perhaps some exaggeration) that McCawley combined 'a meticulous knowledge of the law and an amazing capacity for draftsmanship'.

⁶³ D J Murphy, 'Labour Relations — Issues' in D J Murphy, R B Joyce and Colin A Hughes (eds), *Labor in Power: The Labor Party and Governments in Queensland 1915–57* (1980) 246, 249, has said that McCawley was 'something of a disciple' of Higgins, a view repeated by Fitzgerald, above n 4, 66.

and courteous relationship, in which they exchanged books⁶⁴ and discussed various political and legal issues, confiding on a number of industrial relations matters which had appeared before them (or would appear in the near future) in their respective judicial offices — including McCawley's Case itself.⁶⁵ McCawley was at times effusive in his praise of Higgins. He regarded Higgins to have been the 'sheet anchor'⁶⁶ of the entire system of industrial regulation in Australia and to have contributed 'a lasting service to the community' by 'lifting the subject [of industrial relations] out of the domain of party politics'.⁶⁷ As President of the Queensland Arbitration Court, McCawley would soon show himself to be a dedicated disciple of his Victorian mentor.⁶⁸ In this context, the Higgins–McCawley correspondence relating to the politics of McCawley's appointment⁶⁹ raises serious questions about the appropriateness of Higgins J sitting on the High Court appeal in McCawley's Case.

Edward Theodore seems to have been the prime mover behind McCawley's appointment to the Queensland Arbitration Court and the Supreme Court.⁷⁰ He explained that the Government was 'anxious to secure men of legal standing and ability, who were also temperamentally fitted for work of this kind'.⁷¹ It has been suggested that all Theodore meant by this was someone possessing 'suitable knowledge' to administer a 'new form of law' and that it was in this sense that McCawley's appointment was politically consistent with the values of the Labor Party.⁷² A similar view was suggested by McCawley himself when he later observed that what was required was someone not 'diametrically opposed to the contemporary attitude of intelligent students of industrial problems.'⁷³ The

⁶⁴ See especially Justice Henry Bourne Higgins, 'A New Province for Law and Order' (Pt 1) (1915) 29 *Harvard Law Review* 13; Justice Henry Bourne Higgins, 'A New Province for Law and Order' (Pt 2) (1919) 32 *Harvard Law Review* 189; Justice Henry Bourne Higgins, 'A New Province for Law and Order' (Pt 3) (1920) 34 *Harvard Law Review* 105, subsequently published as Justice Henry Bourne Higgins, *A New Province for Law and Order: Being a Review by Its Late President of Fourteen Years of the Australian Court of Conciliation and Arbitration* (1922).

⁶⁵ Letter from Thomas William McCawley to Justice Henry Bourne Higgins, 20 August 1917, in *Papers of Henry Bourne Higgins* (National Library of Australia) series 2; Letter from Thomas William McCawley to Justice Henry Bourne Higgins, 10 October 1917, in *Papers of Henry Bourne Higgins* (National Library of Australia) series 2; Letter from McCawley to Higgins, 2 February 1918, above n 1; Letter from Thomas William McCawley to Justice Henry Bourne Higgins, 17 December 1920, in *Papers of Henry Bourne Higgins* (National Library of Australia) series 2; see also Rickard, above n 25, 254–5.

⁶⁶ Letter from McCawley to Higgins, 17 December 1920, above n 65.

⁶⁷ Letter from McCawley to Higgins, 20 August 1917, above n 65. Urging Higgins to write a book on industrial issues, McCawley went so far as to say that 'for the sake of social progress you should do so for the world cannot afford to lose your garnered wisdom': Letter from McCawley to Higgins, 17 December 1920, above n 65.

⁶⁸ Higgins' influence on McCawley is evident in Thomas William McCawley, *Industrial Arbitration* (1924). See also the essays by McCawley in which he described Higgins as a 'great lawyer': Thomas McCawley, 'Industrial Arbitration in Queensland' (1922) 5 *International Labour Review* 385, 408; Thomas McCawley, 'Industrial Arbitration in Queensland' (1922) 7 *Queensland Industrial Gazette* 287, 295.

⁶⁹ See especially Letter from McCawley to Higgins, 2 February 1918, above n 1.

⁷⁰ See O'Dwyer, above n 2, 38; Fitzgerald, above n 4, 88; Murphy, *TJ Ryan*, above n 3, 223; Cope, above n 2, 228.

⁷¹ "'Temperamental' Appointments', *The Brisbane Courier* (Brisbane), 9 January 1917, 6.

⁷² Cope, above n 2, 228.

⁷³ McCawley, 'Industrial Arbitration in Queensland' (1922) 7 *Queensland Industrial Gazette* 287, above n 68, 290. McCawley argued that for this reason the tenure of Queensland Arbitration

Queensland Arbitration Court should be staffed, he said, by men of ‘great altruistic qualities’, rather than by those who desired power for its own sake.⁷⁴ Altruistic attitudes, suitable knowledge and an intelligent grasp of the issues were no doubt necessary qualifications for the position. However also required, it seems, was a strong commitment to the ‘progressive’ social objective of industrial reform and the alleviation of social injustice through compulsory industrial arbitration.⁷⁵

McCawley’s sympathy for the Labor Government’s substantive policy goals was illustrated from the beginning of his term at the Queensland Arbitration Court. Reflecting a particular view or ideal of the law, McCawley declared that the Queensland Arbitration Court would not be bound by precedent and strict legal rules, but would be guided by ‘equity and good conscience’.⁷⁶ As an instrument of ‘social justice’, the Queensland Arbitration Court would set wages by reference to the cost of living as determined by statistical evidence, but this would be modified so as to ensure that workers were guaranteed a ‘fair and average standard of comfort’ which would advance ‘as the wealth of the community increases’.⁷⁷ To do so, he continued, the Court would not allow its discretion to be fettered by a ‘rigid rule’ based on ‘considerations of consistency’.⁷⁸ The ‘new sciences’ of economics, statistics and political science would provide the data necessary to formulate industrial awards which would secure the improvement of working conditions and wages.⁷⁹ In this way, McCawley enthusiastically embraced the movement ‘from contract to status’ that the new regime of industrial arbitration embodied.⁸⁰

The expectations of the Government were realised — and those of the Opposition dashed — when in June 1917, McCawley P decided that the Queensland Arbitration Court had jurisdiction to order employers to make union membership a condition of employment.⁸¹ However, the Government’s objective was not

Court judges should be for a fixed term rather than for life, as this would ensure that such judges would continue to possess ‘a reasonably modern industrial outlook’: at 290.

⁷⁴ Cope, above n 2, 229 fn 26, citing the private papers of Thomas McCawley.

⁷⁵ See McCawley, ‘Industrial Arbitration in Queensland’ (1922) 7 *Queensland Industrial Gazette* 287, above n 68, 287; McCawley, *Industrial Arbitration*, above n 68, 35–50; McPherson, above n 4, 308.

⁷⁶ McCawley, *Industrial Arbitration*, above n 68, 58–9; see also Cope, above n 2, 229.

⁷⁷ *Queensland Government Gazette*, Vol 109, No 5, 6 July 1917, 46. Cf Higgins, ‘A New Province for Law and Order’ (Pt 1), above n 64, 14–15.

⁷⁸ *Queensland Government Gazette*, Vol 109, No 5, 6 July 1917, 46. On McCawley’s approach to determining a minimum wage, see Murphy, ‘Labour Relations’, above n 63, 246, 249–51.

⁷⁹ McCawley, *Industrial Arbitration*, above n 68, 34–5, 58–9.

⁸⁰ *Ibid* 18, 75. McCawley’s reference to ‘contract’ and ‘status’ was in all likelihood an allusion to the famous thesis of Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (1861) 126, 128, 168–9, and to the ensuing discussion: see, eg, Roscoe Pound, ‘The End of Law as Developed in Juristic Thought’ (1917) 30 *Harvard Law Review* 201, 219; Nathan Isaacs, ‘The Standardizing of Contracts’ (1917) 27 *Yale Law Journal* 34.

⁸¹ *Queensland Government Gazette*, Vol 108, No 226, 21 June 1917, 1899; *Industrial Arbitration Act of 1916 (7 Geo V, No 16)* [1917] QWN 11; see also McCawley, ‘Industrial Arbitration in Queensland’ (1922) 7 *Queensland Industrial Gazette* 287, above n 68, 294. On the Opposition’s response to the decision, see O’Dwyer, above n 2, 48–51; Bernays, above n 45, 489.

only industrial ‘justice’ but also industrial ‘peace’,⁸² and this implied an attempt to arbitrate between the conflicting demands of workers and employers.⁸³ The resolution of industrial disputes through arbitration was therefore preferred to collective bargaining, even though such a policy placed Ryan, Theodore and McCawley in conflict with some of the more militant unions.⁸⁴ For example, when strikes erupted in northern Queensland in 1919, McCawley observed that ‘the majority of the strikes in the north were due to the desire to punish the employers for their departure from the method of collective bargaining and for approaching the Arbitration Court’.⁸⁵ McCawley’s relatively moderate approach to industrial relations was reflected in his insistence that award wages should be struck at a rate which industry could in fact afford to pay,⁸⁶ and by his unwillingness to side with those who ‘habitually disregard the provisions of the law’.⁸⁷ This conception of law as an instrument of reform undergirded the preference for arbitration over collective bargaining. It also dovetailed neatly with the idea that the Parliament and the Government should be free of any constitutional constraints that would prevent them from efficiently enacting and administering laws for the betterment of society.

In this context, opposition to the *Industrial Arbitration Act* and to McCawley’s appointment was simultaneously personal, sectarian, partisan and ideological in character.⁸⁸ Other more senior lawyers were passed over in respect of McCawley’s appointments to both the Queensland Arbitration Court and the Supreme Court, so the opposition was not without a personal element.⁸⁹ Religious sectarianism also added an important dimension to the controversy. Ryan, Theodore and McCawley were Roman Catholic; their opponents were mostly Protestant.⁹⁰ When the Anglican Bishop, Henry Frewen Le Fanu, entered the fray by delivering an entire sermon on the Ryan Government’s various appointments, he was answered immediately by the Catholic Archbishop, Dr James Duhig.⁹¹ The resistance was likewise partisan and ideological. Within the arguments of

⁸² See, eg. Queensland, *Parliamentary Debates*, Legislative Assembly, 2 September 1915, 568–9 (Edward Theodore, Secretary for Public Works). Cf *Industrial Arbitration Act of 1916*, ss 8(1), 9(1), (3) (7 *Geo V, No 16*) [1921] QWN 2, 10 (McCawley P): ‘if justice is the price of industrial peace, it is obvious that we are not paying the price, and also obvious that in this respect this Court has not the power to do such justice.’

⁸³ See McCawley, ‘Industrial Arbitration in Queensland’ (1922) 5 *International Labour Review* 385, above n 68, 390; cf Higgins, ‘A New Province for Law and Order’ (Pt 1), above n 64, 16, 34, 38.

⁸⁴ Fitzgerald and Thornton, above n 48, 27–36; Cope, above n 2, 230; Murphy, ‘Labour Relations’, above n 63, 252. See also Murphy, *T J Ryan*, above n 3, chs 10–11, 17; Fitzgerald, above n 4, chs 3–4.

⁸⁵ *Queensland Government Gazette*, Vol 112, No 49, 12 February 1919, 426. Cf Higgins, ‘A New Province for Law and Order’ (Pt 1), above n 64, 32.

⁸⁶ See Cope, above n 2, 229; cf Higgins, ‘A New Province for Law and Order’ (Pt 1), above n 64, 17.

⁸⁷ *Queensland Government Gazette*, Vol 112, No 49, 12 February 1919, 426.

⁸⁸ Cope, above n 2, 224–8; O’Dwyer, above n 2, 35–48.

⁸⁹ See ‘“Temperamental” Appointments’, above n 71, 6; O’Dwyer, above n 2, 38–41, 47; McPherson, above n 4, 338–9.

⁹⁰ See Cope, above n 2, 226–7; O’Dwyer, above n 2, 41–2.

⁹¹ See, eg. ‘“Misuse of Power” — The Anglican Prelate’s View — State Government Criticised — “Drifting into the American Method”’, *The Daily Mail* (Brisbane), 8 January 1917, 7.

the opposition, for example, it is possible to discern the liberal-conservative values of equality of opportunity and free enterprise, as well as the view that the essential task of government and law is to facilitate the operation of the market.⁹² Thus, when Theodore stated that McCawley was ‘temperamentally fitted’ for the appointment, the opposition leapt on the political implication.⁹³ Leading the attack, Edwin Fowles suggested that the appointment had been made on the basis of ‘politics’, ‘religion’ and ‘personal friendship’ rather than ‘merit, efficiency, and seniority’.⁹⁴ However, William Hamilton, the Secretary for Mines, responded that McCawley’s sympathy for the objectives of the *Industrial Arbitration Act* did not mean that the appointment was made on the basis of ‘his politics or his religion’.⁹⁵ Hamilton denied that the decision was political in a partisan sense, but was certainly prepared to defend the appointment on the basis of ideological affinity.⁹⁶

While the controversy surrounding McCawley’s appointment was therefore predominantly political in character, it also had a definite legal dimension. According to the liberal-conservative political philosophy of the opposition, law was understood primarily as a facilitator of private choices and economic exchange, as well as a limit on governmental power. On this view, a close association between the Government and the courts would undermine the independence of the judiciary and prevent it from functioning effectively as a constraint on government power. The Leader of the Opposition, William Vowles, argued that the idea of elevating industrial judges to Supreme Court status was an ‘interference with the existing rights of the present occupants of the Supreme Court bench.’⁹⁷ He also expressed concern that conferring arbitral and judicial functions on industrial judges would mix both legislative and judicial power in the same office.⁹⁸ During debate over an amendment that would have given judges of the Queensland Arbitration Court tenure for life, Vowles argued that it was ‘one of the foundations of our political institutions that the judge should be independent, and that was attained by making them irremovable during good behaviour.’⁹⁹ Two years later, in relation to McCawley’s Case, Arthur Feez

⁹² Cope, above n 2, 225. See Queensland, *Parliamentary Debates*, Legislative Council, 10 November 1915, 1936 (Edwin Fowles), where Fowles expressed his opposition to laws which give ‘preference to a class’, rather than ‘merit and efficiency’ together with ‘equality of opportunity’.

⁹³ See Queensland, *Parliamentary Debates*, Legislative Council, 14 February 1917, 3200–11 (Edward Theodore). See also criticisms in ‘“Temperamental” Appointments’, above n 71; ‘New Appointments — Mr McCawley and Judge Macnaughton — Some Questions Asked — Government’s Chance to Reply’, *The Daily Mail* (Brisbane), 8 January 1917, 7.

⁹⁴ Queensland, *Parliamentary Debates*, Legislative Council, 14 February 1917, 3209 (Edwin Fowles).

⁹⁵ *Ibid* 3210 (William Hamilton, Secretary for Mines).

⁹⁶ *Ibid*.

⁹⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 September 1915, 855 (William Vowles, Leader of the Opposition).

⁹⁸ *Ibid* 855–6 (William Vowles, Leader of the Opposition). See also above n 52 and accompanying text.

⁹⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 7 October 1915, 1208 (William Vowles, Leader of the Opposition); see also Queensland, *Parliamentary Debates*, Legislative Assembly, 5 October 1916, 1109 (Edwin Fowles).

would maintain that appointments to the Supreme Court should only be ‘bestowed’ upon a member of the legal profession ‘who by his integrity, his learning, his ability and his experience has publicly proved himself fitted for the position.’¹⁰⁰ McCawley’s ideological affinity with the Labor Government may have made him temperamentally suited to the Government’s objectives, but too close an association between the Government and the judicial branch would, it was argued, undermine the capacity of the courts to hold the Government accountable to the law. It would interfere, in other words, with one of the fundamentals of liberal-democratic constitutionalism.

B Constitutional Background

The Constitution of Queensland can be traced to a statute of the Imperial Parliament enacted in 1855 which conferred a Constitution upon the colony of New South Wales.¹⁰¹ At the time, the territory of what is now Queensland was part of New South Wales. However, ss 6–7 of the *New South Wales Constitution Statute* authorised the Queen to alter the northern boundary of New South Wales by separating territory from that colony, and to establish the severed country as a new colony or colonies. It also empowered the Queen to provide, by Letters Patent or an Order in Council, for the government of any new colony, including the establishment of a legislature with full power to make further provision in that regard.¹⁰²

Letters Patent¹⁰³ and an Order in Council¹⁰⁴ issued on 6 June 1859 exercised the power conferred by the *New South Wales Constitution Statute*, creating the colony of Queensland and establishing its Constitution. Clause 2 of the *Order in Council* conferred upon the newly established Queensland legislature the power to make laws for the colony ‘in all cases whatsoever’. Clause 22 made clear that this included ‘full power and authority’ to amend or repeal the *Order in Council* ‘in the same manner as any other laws’.¹⁰⁵ At the same time, cl 15 of the *Order in Council* adopted ss 38–40 of the *Constitution Act 1855* (NSW),¹⁰⁶ which dealt with the commissions, removal and salaries of judges of the Supreme Court. In

¹⁰⁰ Transcript of Proceedings, *R v McCawley* (Supreme Court of Queensland, Arthur Feez, 6 December 1917) (Queensland State Archives, Archive No CRS/207, 2).

¹⁰¹ *An Act To Enable Her Majesty To Assent to a Bill as Amended of the Legislature of New South Wales To Confer a Constitution on New South Wales and To Grant a Civil List to Her Majesty 1855* (Imp) 18 & 19 Vict, c 54 (*‘New South Wales Constitution Statute’*). See Anne Twomey, *The Constitution of New South Wales* (2004) 19–20; R D Lumb, *The Constitutions of the Australian States* (5th ed, 1991) 34–6; Melbourne, above n 45, 443–502.

¹⁰² See *McCawley v The King* (1918) 26 CLR 9, 29 (Barton J).

¹⁰³ *Letters Patent Constituting the Colony of Queensland*, 6 June 1859 (Imp).

¹⁰⁴ *Order in Council Empowering the Governor of Queensland To Make Laws and To Provide for the Administration of Justice in the Said Colony*, 6 June 1859 (Imp) (*‘Order in Council’*).

¹⁰⁵ Clause 22 provided, inter alia:

The Legislature of the Colony of Queensland shall have full power and authority from time to time to make laws altering or repealing all or any of the provisions of this Order in Council, in the same manner as any other laws for the good government of the colony.

¹⁰⁶ A Bill passed by both Houses in the New South Wales Parliament in 1853 (17 Vict No 41) had been reserved for the signification of Her Majesty’s pleasure and was eventually given force, in a slightly amended form, as sch 1 to the *New South Wales Constitution Statute 1855*. The scheduled Act is commonly known as the *Constitution Act 1855* (NSW). See Twomey, above n 101, 11–20; Lumb, *The Constitutions of the Australian States*, above n 101, 16–17.

adopting these provisions of the New South Wales Act, cl 15 of the *Order in Council* implemented the key guarantees of judicial tenure and salary which had been secured by the *Act of Settlement 1701*, 12 & 13 Wm 3, c 2 (*'Act of Settlement'*).

Pursuant to a thorough consolidation of the Constitution of Queensland in 1867, ss 38–40 of the *Constitution Act 1855* (NSW) were reproduced within two important Queensland statutes, the *Supreme Court Act 1867* (Qld) (*'Supreme Court Act'*), as ss 9–10, and the *Constitution Act*, as ss 15–17. The scheme of consolidation introduced by these Acts was comprehensive, embracing as many as 29 Acts and other instruments.¹⁰⁷ This included the repeal of the *Order in Council*, but with one very important exception: cl 22, containing the power to amend or repeal the *Order in Council* itself, remained untouched.¹⁰⁸ Thus, while the location of at least some of the provisions that would prove relevant to McCawley's Case were changed, the basic content remained the same: first, the fundamental power to amend the 'Constitution', including the *Order in Council*, the *Constitution Act* and the *Supreme Court Act*; and second, the constitutional protection of the tenure and salaries of judges of the Supreme Court, as entrenched by those Acts.

The enactment of the *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63 (*'Colonial Laws Validity Act'*), itself intended to eliminate doubts concerning the powers of colonial legislatures to amend their Constitutions,¹⁰⁹ was also relevant. Section 2 of the Act provided that any colonial law repugnant to an Imperial law, regulation or order would — to the extent of the repugnancy — be void and inoperative. Section 5, however, confirmed that every colonial legislature would have full power to establish, abolish and reconstitute the courts of the colony, including a power to alter the constitution of its courts and to make provision for the administration of justice within the colony generally. It also gave all 'representative' legislatures full power to make laws with respect to the constitution, powers and procedure of the legislature itself. Section 5 clearly reinforced, therefore, the extensive powers possessed by the colonial legislatures to amend their Constitutions. However, s 2 maintained the principle that colonial laws would continue to be subject to the rule of repugnancy to Imperial laws. With respect to McCawley's Case, this left open the argument that because the provisions of the *Constitution Act* relating to the tenure of judges derived their force from the *Order in Council* (itself authorised by an Imperial enactment), the Queensland legislature could not legislate in a manner repugnant to those provisions without first repealing them.

¹⁰⁷ See *McCawley v The King* (1918) 26 CLR 9, 31 (Barton J). In 1861, ss 38–40 of the *Constitution Act 1855* (NSW) were reproduced in *Supreme Court Constitution Amendment Act 1861* (Qld) ss 5–6. The latter Act was soon repealed, but not before these provisions were embodied in the *Supreme Court Act* and the *Constitution Act*.

¹⁰⁸ *Repealing Act 1867* (Qld) s 3. Clause 14 of the *Order in Council* was also exempted from repeal, but was not critical to the issues in McCawley's Case.

¹⁰⁹ *Colonial Laws Validity Act* s 1.

The *Commonwealth Constitution* was also thought to be relevant to McCawley's Case. Section 106 provides:

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

It could be argued that this provision supported the proposition that the Constitution of each state would have to be amended deliberately and explicitly before a state legislature could legislate inconsistently with it. However, this argument depended on the meaning of the words 'altered in accordance with the Constitution of the State' — the very question at issue in McCawley's Case. Section 106 of the *Commonwealth Constitution*, like ss 2 and 5 of the *Colonial Laws Validity Act*, was therefore relevant, but not necessarily dispositive.

Finally, the number of Supreme Court judges and the quantum of judicial salaries had been progressively increased in Queensland between 1862 and 1903.¹¹⁰ The *Supreme Court Acts Amendment Act* had most recently provided that the number of judges must not be less than four and must not exceed five.¹¹¹ Immediately prior to the issue of McCawley's commission in 1917, there had been in fact five Supreme Court judges, so the appointment of McCawley as a judge under the *Industrial Arbitration Act* was inconsistent with the *Supreme Court Acts Amendment Act* because his appointment increased the number of Supreme Court judges to six. Thus, an additional issue in McCawley's Case concerned this inconsistency and the question of whether the *Industrial Arbitration Act* had validly amended the *Supreme Court Acts Amendment Act* in this particular.

C Legal Proceedings

The controversy relating to McCawley's appointments began on 12 January 1917, when the Governor of Queensland, upon the advice of the Executive Council, issued a commission appointing McCawley as a judge of the Queensland Arbitration Court, and designating him President of the Court 'for a period of seven years'.¹¹² McCawley duly began to perform the duties of judge and President of the Court, along with Judge Macnaughton, who had been a judge of the old Industrial Court of Queensland, and who was appointed judge of the new Queensland Arbitration Court at the same time.¹¹³

On 12 October 1917, the Governor, again upon the advice of the Executive Council, issued a further commission appointing McCawley a Justice of the

¹¹⁰ See *Supreme Court Constitution Act Amendment Act 1861* (Qld); *Supreme Court Act 1874* (Qld); *Supreme Court Act 1889* (Qld); *Chief Justice's Salary Act 1892* (Qld); *Chief Justice's Salary Act 1901* (Qld); *Supreme Court Acts Amendment Act*.

¹¹¹ *Supreme Court Acts Amendment Act* s 3.

¹¹² It is relevant to note that six days later, the Governor gave approval to an Executive Minute which fixed McCawley's salary at the rate of £2000 per annum for the period 12 January – 30 June 1917, even though, oddly enough, it emerged that the Governor had also agreed to an earlier Executive Minute dated 5 January fixing McCawley's salary at £2000 per annum. The existence of the Minute of 5 January became an issue: see below n 130 and accompanying text.

¹¹³ Cope, above n 2, 225.

Supreme Court, under which he would hold office ‘during good behaviour’.¹¹⁴ At a sitting of the Full Court of the Supreme Court on 6 December 1917, McCawley presented his commission and requested that the Chief Justice administer the oath of office.¹¹⁵ When Feez and Stumm made their objections to the appointment on ‘various purely legal grounds’,¹¹⁶ the Court suggested that it make a pro forma decision against the validity of the appointment so that the matter could be determined ‘in some appropriate manner’ by a ‘Court of Appeal’, being either the High Court or the Privy Council.¹¹⁷ However, McCawley asked that the matter be treated as an ordinary matter coming before the Full Court.¹¹⁸ Feez and Stumm therefore proceeded to make submissions against the validity of the appointment,¹¹⁹ followed by Attorney-General Ryan and H D Macrossan, who argued in support of its validity.¹²⁰ On 12 February 1918, a little over two months later, Cooper CJ delivered a lengthy opinion of the Supreme Court in which it concluded by a 4:1 majority that McCawley was not entitled to have the oath administered or to take his seat as a member of the Supreme Court.¹²¹ The principal reason for the decision was that *Industrial Arbitration Act* s 6(6), in providing for the appointment of Supreme Court judges for a tenure of only seven years, was inconsistent with *Constitution Act* ss 15–16, and that cl 22 of the *Order in Council*, read in the light of *Colonial Laws Validity Act* ss 2 and 5, did not give the Parliament power to legislate inconsistently with the *Constitution Act* without first expressly amending the relevant provisions of that Act.¹²² Real J dissented on the ground that any inconsistency between the *Industrial Arbitration Act* and the *Constitution Act* must be regarded as an implied amendment of the earlier Act, and thus valid.¹²³

On 15 February 1918, the Supreme Court further decided that McCawley’s appointment as President and judge of the Queensland Arbitration Court was unlawful because no salary had been fixed prior to the appointment, pursuant to *Industrial Arbitration Act* s 6(8).¹²⁴ The Court continued, however, to recognise the need for these issues to be finally resolved by some other, more independent

¹¹⁴ It was suggested that Macnaughton had declined appointment to the Supreme Court because he had doubts about the legality of the relevant provisions of the *Industrial Arbitration Act*: ‘Mr Justice McCawley’, *The Brisbane Courier* (Brisbane), 16 October 1917, 6.

¹¹⁵ See *Re McCawley* [1918] QSR 62, 64.

¹¹⁶ See *ibid* 63.

¹¹⁷ *Ibid* 64.

¹¹⁸ *Ibid*.

¹¹⁹ On McCawley’s active involvement in the case, see O’Dwyer, above n 2, 56–7.

¹²⁰ Ryan was Attorney-General at the time as well as Premier: McPherson, above n 4, 289.

¹²¹ *Re McCawley* [1918] QSR 62; see also *Re McCawley* (1918) 24 CLR 345, 346.

¹²² *Re McCawley* [1918] QSR 62, 83–4, 97 (Cooper CJ), following *Cooper v Commissioner of Income Tax (Qld)* (1907) 4 CLR 1304 (‘Cooper’).

¹²³ *Re McCawley* [1918] QSR 62, 97–8 (Cooper CJ), referring to Real J’s dissent.

¹²⁴ *Ibid* 100–4 (Cooper CJ). The argument that McCawley did not meet the qualification for appointment set out by *Industrial Arbitration Act* s 6(7) — namely, being ‘a barrister or solicitor of not less than five years’ standing or a Judge of the Supreme Court or District Court’ — was rejected: at 98–100 (Cooper CJ).

agency. It suggested that all doubts could be put to rest ‘either by the intervention of Parliament or by the decision of some final Court of Appeal’.¹²⁵

McCawley immediately applied for leave, or alternatively for special leave, to appeal from that decision to the High Court. The High Court, however, declined to grant leave to appeal on the ground that the order was not a ‘judgment’ within the meaning of *Commonwealth Constitution* s 73 and *Judiciary Act 1903* (Cth) s 35.¹²⁶ Having failed on this point, and in order to bring the matter to a head, on 6 March 1918, McCawley appeared before Judge Macnaughton (in his capacity as judge of the District Court), took the oaths required to be taken by Supreme Court judges and thereafter claimed all the rights belonging to a judge of the Supreme Court.¹²⁷ An application for *quo warranto* was then issued by G A Carter (McCawley’s successor as Under Secretary for Justice), which initially came before Cooper CJ on 8 March 1918, and was heard by the Full Court on 12 March.¹²⁸ On 19 March, Feez and Stumm were added as relators to the proceedings,¹²⁹ and on the same day, Ryan appeared with an affidavit recounting the discovery of an Executive Minute of 5 January 1917, gazetted the next day, which appointed McCawley as President of the Queensland Arbitration Court at a salary of £2000 per annum.¹³⁰ On its face, this suggested that McCawley’s salary had in fact been fixed prior to his appointment as President, so that when the Supreme Court subsequently made the *quo warranto* order absolute, the order only related to McCawley’s appointment to the Supreme Court. However, on 3 April, Cooper CJ called the parties back to the Court for an explanation as to why, upon closer inspection, the relevant gazetted notice, while referring to the appointment, contained no reference to the fixing of salary. His Honour maintained that: ‘the Court [had been] misled in a very material particular on an occasion when they were entitled to expect not only the exercise of the utmost care by officials in framing their affidavits but also the observance of the utmost good faith.’¹³¹

¹²⁵ *Ibid* 104 (Cooper CJ).

¹²⁶ *Re McCawley* (1918) 24 CLR 345, 347 (Barton J). Section 73 of the *Commonwealth Constitution* limits the appellate jurisdiction of the High Court to appeals from ‘all judgments, decrees, orders and sentences’.

¹²⁷ See *McCawley v The King* (1918) 26 CLR 9, 14; *McCawley v The King* (1920) 28 CLR 106, 111 (Lord Birkenhead LC); McPherson, above n 4, 284; O’Dwyer, above n 2, 68–9; see also ‘Legal Notices’, *The Brisbane Courier* (Brisbane), 7 March 1918, 6.

¹²⁸ ‘Mr Justice McCawley — Called on To Show Authority — His Supreme Court Judgeship — Argument before the Full Court’, *The Brisbane Courier* (Brisbane), 13 March 1918, 7; see also Murphy, *T J Ryan*, above n 3, 358.

¹²⁹ Order 81 of the Rules of the Supreme Court made provision for the prerogative writ of *quo warranto* upon application by a relator. The writ was abolished by the *Judicial Review Act 1991* (Qld) s 42(1).

¹³⁰ See Transcript of Proceedings, *R v McCawley* (Supreme Court of Queensland, Cooper CJ, Lukin J and Thomas Ryan, 15 March 1918 [sic]) (Queensland State Archives, Archive No CRS/206); Transcript of Proceedings, *R v McCawley* (Supreme Court of Queensland, Cooper CJ, 3 April 1918) (Queensland State Archives, Archive No CRS/207, 134, 136). Cf *Queensland Government Gazette*, Vol 108, No 19, 12 January 1917, 26.

¹³¹ Transcript of Proceedings, *R v McCawley* (Supreme Court of Queensland, Cooper CJ, 3 April 1918) (Queensland State Archives, Archive No CRS/207, 137). The issue was particularly pointed, as a challenge to the good faith of the executive government had been upheld by the Supreme Court only the year before: see below nn 155–7 and accompanying text.

When Ryan appeared before the Court on 26 April 1918, there followed a lengthy and heated exchange. Ryan disputed the jurisdiction of the Court, declined to produce or disclose the contents of the telegram in which he claimed the Governor had approved the Executive Minute and insisted that the Court must accept the terms of the affidavit on its face. Only after extended argument did the Court eventually, but reluctantly, allow the original order to stand.¹³² An information for *quo warranto* requiring McCawley to show by what authority he claimed to be a judge of the Supreme Court was ultimately filed on 16 August and the Full Court pronounced a judgment of ouster against McCawley on 22 August.¹³³

McCawley then initiated an appeal to the High Court, which heard argument from 10 to 12 September 1918, and delivered its judgment on 27 September, by majority affirming the judgment of the Supreme Court.¹³⁴ The ground of the decision was that McCawley's commission was unauthorised by law and therefore invalid. Two reasons were given. First, Griffith CJ, Barton and Gavan Duffy JJ concluded that if the commission was, on its proper construction, for life, it would be contrary to the *Industrial Arbitration Act*, which authorised appointment to the Supreme Court only during his tenure as a member of the Queensland Arbitration Court.¹³⁵ Alternatively, reasoned Griffith CJ, Barton and Powers JJ, if the Supreme Court commission was, consistent with the *Industrial Arbitration Act*, for a fixed term of seven years, both the Act and the commission would be invalid because of inconsistency with the requirement of the *Constitution Act* that Supreme Court judges enjoy life tenure, subject to good behaviour.¹³⁶ Isaacs and Rich JJ dissented in a joint judgment on the ground that the Queensland Parliament had sufficient power under both the *Colonial Laws Validity Act* and the *Constitution Act* to legislate inconsistently with the *Constitution Act*,¹³⁷ thereby exercising its power of amendment by implication and authorising McCawley's appointment for what amounted to a term of seven years.¹³⁸ Higgins J agreed with this conclusion,¹³⁹ but also found that McCawley's appointment was in fact for life, and preferred a construction of the

¹³² Transcript of Proceedings, *R v McCawley* (Supreme Court of Queensland, Cooper CJ, 3 April 1918) (Queensland State Archives, Archive No CRS/207, 171–211). See also O'Dwyer, above n 2, 75; Cope, above n 2, 235; McPherson, above n 4, 285, 288–9; J B Thomas, 'The Time of Cooper' (1989) 14(2) *Royal Historical Society of Queensland Journal* 61, 72–4.

¹³³ See *McCawley v The King* (1920) 28 CLR 106, 111 (Lord Birkenhead LC). The judgment of ouster on 22 August 1918 was based on the Court's opinion of 12 February 1918: see Transcript of Proceedings, *R v McCawley* (Supreme Court of Queensland, 22 August 1918) (Queensland State Archives, Archive No CRS/207, 219, 219–31).

¹³⁴ *McCawley v The King* (1918) 26 CLR 9.

¹³⁵ *Ibid* 27 (Griffith CJ), 43 (Barton J), 80 (Gavan Duffy J).

¹³⁶ See *ibid* 27 (Griffith CJ), 43 (Barton J), 86 (Powers J). Griffith CJ emphasised the inconsistency between the commission and the *Constitution Act*; Barton and Powers JJ emphasised the inconsistency between the *Industrial Arbitration Act* and the *Constitution Act*.

¹³⁷ *Ibid* 57–8, 63.

¹³⁸ *Ibid* 67.

¹³⁹ *Ibid* 73–6.

Industrial Arbitration Act which authorised appointments for life, so that there would, in fact, be no inconsistency with the *Constitution Act*.¹⁴⁰

McCawley thereupon appealed to the Privy Council. Given the general constitutional significance of the case, the Attorney-General for England intervened. The matter took some time to be heard, but on 8 March 1920 the Privy Council allowed the appeal, reversing the decisions of the Supreme Court and the High Court.¹⁴¹ Lord Birkenhead LC delivered the opinion of the Privy Council, largely adopting the reasoning of Isaacs and Rich JJ, and categorically affirmed the capacity of the Queensland Parliament to amend the Constitution of Queensland simply by legislating inconsistently with it.¹⁴² The legality of his appointment to the Supreme Court having been affirmed, McCawley duly took his seat in May 1920, while continuing to act as President of the Queensland Arbitration Court.

Ryan, Theodore and McCawley had seemingly been vindicated, but this came at the expense of a rapidly deteriorating relationship between the Government and the Supreme Court, not only in respect of McCawley's Case itself, but over a number of other issues.¹⁴³ When Theodore replaced Ryan as Premier in 1921,¹⁴⁴ he introduced the Judges' Retirement Bill 1921 (Qld), which required the existing judges of the Supreme Court to retire at the age of 70. As might have been expected, the Bill was opposed by the judges on the ground that it attacked the principle of judicial independence and neutrality.¹⁴⁵ However, Attorney-General John Mullan replied that the Government was proposing something entirely within the law since the Privy Council's decision in McCawley's Case established that the 'Parliament has an unquestionable right to amend the *Constitution Act*, or any other Act relating to judicial tenure, so long as public welfare requires it.'¹⁴⁶ The Act was passed and came into operation on 31 November 1921. It meant that Cooper CJ (aged 75), Chubb J (aged 76) and Real J (aged 74) were forced to retire from office immediately.¹⁴⁷ Feez exclaimed that the action was unprecedented;¹⁴⁸ *The Brisbane Courier* alleged that the Act was an attempt to 'remodel the Judiciary more in accordance with Caucus ideas'.¹⁴⁹ On 1 April 1922, the Attorney-General announced that McCawley would be appointed Chief Justice.¹⁵⁰ He held that office until his untimely death three years later.¹⁵¹

¹⁴⁰ Ibid 69–72.

¹⁴¹ *McCawley v The King* (1920) 28 CLR 106.

¹⁴² Ibid 112, 125–6.

¹⁴³ See, eg, McPherson, above n 4, 273–7; Cope, above n 2, 238–9.

¹⁴⁴ See generally Fitzgerald, above n 4, ch 4.

¹⁴⁵ See Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 1921, 1002–6 (Real J, appearing before the Bar of the Legislative Assembly).

¹⁴⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 1921, 1007 (John Mullan, Attorney-General). See also Cope, above n 2, 240.

¹⁴⁷ Cope, above n 2, 240.

¹⁴⁸ McPherson, above n 4, 305, citing *The Daily Mail* (Brisbane), 31 March 1922.

¹⁴⁹ 'The Judiciary Changes', *The Brisbane Courier* (Brisbane), 31 March 1922, 6.

¹⁵⁰ See the very positive account of McCawley's career and appointment in 'The New Judges', *The Daily Mail* (Brisbane), 3 April 1922, 7.

¹⁵¹ For obituaries upon McCawley's death, see 'Obituaries', *The Brisbane Courier* (Brisbane), 17 April 1925, 6; 'Justice T W McCawley', *The Brisbane Courier* (Brisbane), 18 April 1925, 9; 'Late Chief Justice McCawley: Impressive Scenes at State Funeral', *The Daily Mail* (Brisbane),

D Previous Case Law

In order to appreciate the legal and political significance of McCawley's Case, it is important to view it in the context of a number of important constitutional controversies in Queensland that came before the courts between 1907 and 1920.¹⁵²

In a series of state insurance cases decided in 1916 and 1917, the Supreme Court and the Privy Council were called upon to interpret Queensland legislation intended to create a state monopoly over the provision of workers' compensation.¹⁵³ The private insurance companies that brought the matters sought to delay the implementation of the state monopoly, thereby clearly challenging a key plank of Labor Government policy. It is sufficient here to note that the companies were not able to delay substantially the application of the law, and the outcome of the cases has therefore been characterised as a 'virtual win' for the Labor Government.¹⁵⁴ The state insurance cases were thus of considerable political significance, particularly at an ideological and partisan level.

In *Duncan v Theodore*,¹⁵⁵ the challenge to the Government involved political issues that were not only ideological, partisan and even personal in character, but also concerned points of fundamental constitutional law. The case involved the compulsory acquisition of privately-owned bullocks by Queensland police under the *Sugar Acquisition Act 1915* (Qld). In the course of the litigation, the Supreme Court, High Court and finally the Privy Council had to adjudicate the remarkable allegation that there had been an absence of good faith on the part of the Government in authorising the seizure.¹⁵⁶ The case therefore had the potential to ignite an acute confrontation between the courts and the Government which could not fail to have significant political ramifications. But when Viscount Haldane delivered the opinion of the Privy Council holding that the good faith of the executive could never be questioned in a court of law,¹⁵⁷ the Government enjoyed yet another victory, both constitutionally and politically.

Despite their constitutional significance, the *Duncan v Theodore* cases concerned the executive power of the Queensland Government, so their relevance to

18 April 1925, 12; 'Late Chief Justice McCawley — Impressive Scenes at Funeral Ceremony — Vast City Concourse Views Long Cortege', *The Telegraph* (Brisbane), 18 April 1925, 4; 'Queensland Mourns Her Noble Son', *The Worker* (Brisbane), 23 April 1925, 1; 'A Great Australian Dead — Sudden and Tragic Death of Chief Justice McCawley', *The Age* (Melbourne), 25 April 1925, 8–10; 'The Late President — Chief Justice McCawley' (1925) 10(5) *Queensland Industrial Gazette* 340.

¹⁵² See McPherson, above n 4, 279–87. On McCawley's own involvement as Crown Solicitor in the first two of these sets of cases, see O'Dwyer, above n 2, 20–4.

¹⁵³ *Australian Alliance Insurance Co v A-G (Qld)* [1916] QSR 135; *Australian Alliance Insurance Co v Goodwyn* [1916] QSR 225; *Australian Alliance Insurance Co v A-G (Qld)* [1917] AC 537.

¹⁵⁴ See 'Workers Compensation — State Monopoly Challenged', *The Daily Mail* (Brisbane), 14 June 1916, 9.

¹⁵⁵ (1919) 26 CLR 276.

¹⁵⁶ *Duncan v Theodore* [1917] QSR 250; *Duncan v Theodore* (1917) 23 CLR 510; see also *Duncan v Queensland* (1916) 22 CLR 556.

¹⁵⁷ *Duncan v Theodore* (1919) 26 CLR 276, 282. This proposition remained a part of Australian law until *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170, 192–3 (Gibbs CJ), 202–4 (Stephen J), 221–4 (Mason J), 265 (Aickin J), 283–4 (Wilson J).

the issues in McCawley's Case was tangential at best. However, in two further cases, *Cooper*¹⁵⁸ and *Taylor v Attorney-General (Qld)*,¹⁵⁹ the constitutional powers of the Queensland Parliament were directly in issue. Indeed, much of the constitutional reasoning in McCawley's Case would be derived from *Cooper* and *Taylor*. It is therefore necessary to discuss these two cases in some detail.

1 Cooper

Cooper involved a constitutional challenge to a series of income tax statutes brought by the then Chief Justice of the Supreme Court, Sir Pope Cooper. The Chief Justice, on behalf of the Court, argued that the enactments, in purporting to impose a tax on their judicial salaries, were inconsistent with the Constitution of Queensland. Clause 16 of the *Order in Council* and s 17 of the *Constitution Act* both provided that 'such salaries as are settled upon ... Judges of the Supreme Court' should be 'paid and payable ... so long as the patents or commissions of them ... shall continue and remain in force'. It was argued that the income tax statutes constituted a 'reduction or diminution' of their judicial salaries, contrary to the guarantee secured by these provisions. As such, the case involved a remarkable confrontation between the judges and the Government over two very fundamental constitutional issues: first, the independence of the judiciary, and second, the legislative powers of the Queensland Parliament. Of course, these were precisely the issues that had to be considered in McCawley's Case.

When the Commissioner for Income Tax for the State of Queensland claimed from Sir Pope the payment of income tax on his salary, Sir Pope resisted payment on the ground that the taxing statutes were unconstitutional and void. A police magistrate upheld Sir Pope's argument, but this was reversed by a District Court judge and by the Supreme Court itself.¹⁶⁰ The High Court rejected his appeal, on the principal ground that the income tax statutes were not inconsistent with the relevant provisions of the Constitution of Queensland. While the provisions of the *Order in Council* and the *Constitution Act* prevented any 'reduction or diminution' of a judicial salary during a term of office, it was held that a general tax on the aggregate income of all taxpayers, derived from all sources, was not a deduction from the judge's salary.¹⁶¹

However, Griffith CJ (with whom, significantly, Isaacs J agreed), as well as Barton and O'Connor JJ, addressed the more fundamental issue raised by the case: whether the power to amend the *Constitution Act* includes a capacity to amend it by implication, by merely legislating in a manner inconsistent with the Act. On this point, all of the judges except Higgins J considered that the *Constitution Act* would have to be deliberately repealed before the Parliament could

¹⁵⁸ (1907) 4 CLR 1304.

¹⁵⁹ (1917) 23 CLR 457 ('*Taylor*'); see also *Taylor v A-G (Qld)* [1917] QSR 208. See further *Fielding v Thomas* [1896] AC 600, 610 (Lord Halsbury LC), which dealt with an amendment to the Nova Scotia Constitution, as cited in *McCawley v The King* (1918) 26 CLR 9, 53–4 (Isaacs and Rich JJ).

¹⁶⁰ See *Re Income Tax (Consolidated) Acts, 1902–1904, and the Income Tax Declaratory Act of 1905* [1907] QSR 110.

¹⁶¹ *Cooper* (1907) 4 CLR 1304, 1315–16 (Griffith CJ), 1319–20 (Barton J), 1321–6 (O'Connor J), 1331–4 (Higgins J). Isaacs J agreed with Griffith CJ: at 1329.

legislate in a manner (otherwise) inconsistent with it — and even Higgins J was prepared to accept this proposition for the purposes of argument.¹⁶²

The decision in *Cooper* was thus very relevant to the issues raised in McCawley's Case. One particular question that the Supreme Court had to consider in McCawley's Case was the extent to which the opinions expressed by members of the High Court in *Cooper* on the question of implied repeal were in fact binding, since the conclusion that there was no inconsistency with the *Constitution Act* was sufficient to decide the case.¹⁶³ After closely reviewing the High Court judgments, the Supreme Court in McCawley's Case concluded that it was bound by what was held with regard to that fundamental question.¹⁶⁴ After all, Griffith CJ and O'Connor J had characterised the question of implied repeal as being of 'great'¹⁶⁵ and 'far-reaching' importance,¹⁶⁶ and Barton J seems to have agreed.¹⁶⁷ Griffith CJ and Barton J thus addressed the implied repeal question first and the inconsistency question second, treating them both as determinative.¹⁶⁸ Notably, however, O'Connor J pointed out that the implied repeal issue was 'not essential' to the determination of the case,¹⁶⁹ and addressed the question after the inconsistency point only because of its sweeping significance.¹⁷⁰ Moreover, Higgins J thought that the 'curious and delicate points'¹⁷¹ raised by the constitutional issue could be avoided altogether, and decided the matter solely on the basis of the inconsistency issue.¹⁷² His Honour expressed the view that if the implied repeal should ever come up for definite decision then

it will be well if it can be approached as a fresh subject uninfluenced by any expression of opinion made in a case that has been solved on other and narrower grounds. I do not think that the mind bestows the same searching scru-

¹⁶² Ibid 1311–15 (Griffith CJ), 1317–18 (Barton J), 1326–9 (O'Connor J), 1329 (Isaacs J), 1331 (Higgins J).

¹⁶³ *Re McCawley* [1918] QSR 62, 91 (Cooper CJ).

¹⁶⁴ Ibid 97 (Cooper CJ). In coming to this conclusion, the importance of the question of implied repeal was emphasised and the judgments of Griffith CJ, Barton and O'Connor JJ in *Cooper* were characterised as containing 'weighty', 'clear' and 'explicit' expressions of opinion to which the Supreme Court was bound until they were displaced by a subsequent decision of equal or greater authority: see at 88, 97 (Cooper CJ). See also the description of the judgments of Griffith CJ, Barton and O'Connor JJ as 'very decided opinion[s]': at 85 (Cooper CJ).

¹⁶⁵ *Cooper* (1907) 4 CLR 1304, 1311 (Griffith CJ).

¹⁶⁶ Ibid 1326 (O'Connor J).

¹⁶⁷ The tone and organisation of Barton J's judgment reflected the importance he attributed to the issue: see ibid 1317–18. See especially the unequivocal character of Barton J's opening words: 'The legislation of a body created by and acting under a written charter or constitution is valid only so far as it conforms to the authority conferred by that instrument of government': at 1317. Higgins J also thought the case involved 'a principle of the greatest importance': at 1329. However, this was not the question of implied repeal but of 'the independence and purity' of the courts as guaranteed by the protection of judicial salaries against diminution during office: at 1330 (Higgins J).

¹⁶⁸ Ibid 1311–15 (Griffith CJ), 1317–18, 1320 (Barton J).

¹⁶⁹ Ibid 1320, 1326.

¹⁷⁰ Ibid 1326–9.

¹⁷¹ Ibid 1331.

¹⁷² Ibid.

tiny on a point which is not necessary for a decision as on a point which is necessary.¹⁷³

That the expressions of opinion in *Cooper* concerning implied repeal were mere obiter would prove to be critical to the dissenting joint judgment of Isaacs and Rich JJ in *McCawley v The King*¹⁷⁴ (upon which the Privy Council heavily relied). This is especially so given that Isaacs J had, in *Cooper* and again in *Baxter v Ah Way*,¹⁷⁵ expressed agreement with the judgment of Griffith CJ, which contained fundamental statements of principle which flatly contradicted the conclusions adopted by Isaacs and Rich JJ in *McCawley v The King*.¹⁷⁶

2 Taylor

Whereas *Cooper* suggested that the Constitution of Queensland was in the nature of a ‘fundamental law’ and rejected the possibility of ‘implied repeal’,¹⁷⁷ the decision of the High Court in *Taylor*¹⁷⁸ emphasised quite the opposite idea: namely, that the Queensland Parliament had ‘full power’ to legislate with respect to its own ‘constitution’.¹⁷⁹

The two critical questions that had to be addressed in *Taylor* were whether the *Parliamentary Bills Referendum Act 1908* (Qld) (*Referendum Act*) had been validly enacted and whether there was power under the *Constitution Act* to abolish the Legislative Council by a statute passed in accordance with the special procedures stipulated under the *Referendum Act*.¹⁸⁰ The *Referendum Act* provided that if a Bill was twice passed by the Legislative Assembly and each time rejected by the Legislative Council, the Bill could nonetheless be presented to the Governor for royal assent if the Bill were to be approved by a majority of Queensland voters in a referendum. The *Referendum Act* thus purported to qualify the requirement that the Legislative Council consent to legislation, a step that was inconsistent with the *Constitution Act* as it then stood. While the Act ‘professed’ to be an amendment of the *Constitution Act*, its operative provisions were, as Barton J observed, ‘merely ... at variance’ with the *Constitution Act*.¹⁸¹

¹⁷³ Ibid 1331–2.

¹⁷⁴ (1918) 26 CLR 9.

¹⁷⁵ (1909) 8 CLR 626, 643 (citations omitted), where Isaacs J categorically affirmed the principle that:

the power of the legislature must depend upon the terms of the *Constitution* as it exists at the given moment. It is not a sound argument that, because a change might be deliberately made by Parliament in a *Constitution*, therefore any ordinary Act whatever may be passed, though in contravention of constitutional provisions as they stand. The case of *Cooper v Commissioner of Income Tax*, is a clear authority against such a contention.

¹⁷⁶ (1918) 26 CLR 9, 66.

¹⁷⁷ (1907) 4 CLR 1304, 1313 (Griffith CJ), 1317 (Barton J), 1327 (O’Connor J), 1329 (Isaacs J), 1333 (Higgins J).

¹⁷⁸ (1917) 23 CLR 457, overruling *Taylor v A-G (Qld)* [1917] QSR 208; see also *Taylor v A-G (Qld)* [1918] QSR 194.

¹⁷⁹ See *Colonial Laws Validity Act* s 5. For the five questions that came before the High Court on a special case stated, see *Taylor* (1917) 23 CLR 457, 467 (Barton J).

¹⁸⁰ The referendum to abolish the Legislative Council held in 1917 under the *Referendum Act* was in fact unsuccessful. However, the decision, together with the result in the case of *McCawley v The King* (1918) 26 CLR 9, provided the necessary constitutional foundation for the success of a later legislative attempt in 1922: see *Constitution Act Amendment Act 1922* (Qld).

¹⁸¹ *Taylor* (1917) 23 CLR 457, 469.

This raised the same question that had arisen in *Cooper*, which would also shortly arise in McCawley's Case: namely, whether the *Referendum Act* could amend or repeal the *Constitution Act* by implication, or whether it would have to be preceded first by a deliberate and explicit constitutional amendment.¹⁸²

On this last question, the Supreme Court held, following *Cooper*, that the *Referendum Act* was simply invalid.¹⁸³ However, when the matter came before the High Court, Barton J acknowledged that he himself had 'a great deal of doubt' about the matter and 'for some time' had been 'much impressed' by the reasoning of the Supreme Court.¹⁸⁴ His Honour also considered that the decision in *Cooper* would 'normally' be applicable, with the result that the *Referendum Act* would be invalid on the ground of its inconsistency with the *Constitution Act*.¹⁸⁵ Yet, after further considering the matter, Barton J concluded that *Colonial Laws Validity Act* s 5 nullified the application of the principle in *Cooper* in respect of the particular kind of legislation that it authorised.¹⁸⁶ Section 5 provided that every representative legislature of a British colony would have 'full power to make laws respecting the constitution, powers and procedure of such legislature'. According to Barton J, the *Referendum Act* was a law 'respecting' the powers and procedure of the legislature, and thus s 5 covered the case.¹⁸⁷ The other members of the High Court appeared to agree.¹⁸⁸ Isaacs, Gavan Duffy and Rich JJ said that the 'plain [and] natural meaning' of the words used in the *Colonial Laws Validity Act* amply covered the legislation in question.¹⁸⁹ The decision of the High Court on this central point was unanimous.

The High Court was also unanimous in concluding that there was power under the *Constitution Act* to abolish the Legislative Council through a law passed under the referendum procedure.¹⁹⁰ In coming to this conclusion, however, the Court had to address the argument that the power in *Colonial Laws Validity Act* s 5 could not extend to the alteration of certain features of the Queensland Parliament that were deemed 'essential'.¹⁹¹

The first of these fundamentals was relatively easy to establish. The power relied upon in s 5 was conferred only upon 'representative legislatures', and was

¹⁸² See *ibid*.

¹⁸³ *Taylor v A-G (Qld)* [1917] QSR 208, 241 (Lukin J).

¹⁸⁴ *Taylor* (1917) 23 CLR 457, 467–8.

¹⁸⁵ *Ibid* 469.

¹⁸⁶ *Ibid* 469–70.

¹⁸⁷ *Ibid*; see also at 480 (Powers J).

¹⁸⁸ *Ibid* 472–4 (Isaacs J), 477 (Gavan Duffy and Rich JJ), 481 (Powers J). Notably, in *Taylor*, the second limb of *Colonial Laws Validity Act* s 5 was specifically relevant and relied upon by the Court, whereas in McCawley's Case, the first limb was in issue: see, eg, *McCawley v The King* (1918) 26 CLR 9, 53 (Isaacs and Rich JJ). The Court would recognise two important differences between the two limbs. The first difference was that while the first limb dealt with the judicature, the second dealt with the constitution of the legislature: see *McCawley v The King* (1918) 26 CLR 9, 53 (Isaacs and Rich JJ). The second difference was that the first limb applied to all colonies, whereas the second applied only to colonies possessing 'representative' legislatures: see *Taylor* (1917) 23 CLR 457, 468 (Barton J), 474 (Isaacs J).

¹⁸⁹ *Taylor* (1917) 23 CLR 457, 474 (Isaacs J), 477 (Gavan Duffy and Rich JJ).

¹⁹⁰ *Ibid* 470 (Barton J), 476 (Isaacs J), 477–8 (Gavan Duffy and Rich JJ), 481 (Powers J).

¹⁹¹ This was the view taken by Cooper CJ and Lukin J in the Supreme Court: *Taylor v A-G (Qld)* [1917] QSR 208, 239 (Lukin J), referring to his views and those of Cooper CJ.

a power to make laws with respect to the constitution of ‘such [a] legislature’. It therefore appeared to all members of the Court that the power conferred by s 5 could not be used to abolish the representative character of the Parliament.¹⁹² The second fundamental was more difficult, in so far as it did not rely on the actual words used in s 5.¹⁹³ The plaintiffs had argued that if s 5 were read without qualification, it would ‘authorize the total elimination of the Crown as part of the legislature.’¹⁹⁴ Isaacs J (with whom Powers J agreed), responded that the reference to ‘the Legislature’ in s 5 did not include the Crown, but referred only to the Houses of Parliament. The reason for this was that it was a ‘fundamental conception’, basic to the ‘very nature of our constitution as an Empire’, that the Crown could not be included in the ‘ambit of such a power.’¹⁹⁵

Barton and Isaacs JJ also had to address the fact that they had concurred in the decision in *Cooper*. For Barton J, s 5 was simply conclusive; how it could make all the difference in *Taylor* and not in *Cooper* was not explained.¹⁹⁶ For Isaacs J, *Cooper* was likewise ignored, except on another point altogether: that cl 22 of the *Order in Council* was yet another fundamental element of the Constitution of Queensland — it too could not be repealed, either using the power that cl 22 itself conferred, or by the power conferred by *Colonial Laws Validity Act* s 5. As Isaacs J put it, ‘clause 22 stood, and ... still stands, as a permanent power of the Queensland Legislature outside the express working provisions of the *Constitution* for the time being.’¹⁹⁷

Barton and Isaacs JJ’s judgments in *Taylor* thus appear to be quite inconsistent with their respective decisions in *Cooper*. Barton J’s judgment also seems to be completely inconsistent with his decision in *McCawley’s Case*.

Isaacs J’s judgment in *Taylor* is noteworthy for two further reasons. First, we find in his judgment a concern for the ‘plain meaning’ of the ‘text’ awkwardly juxtaposed against the extra-textual idea of a ubiquitous Imperial Crown as a ‘fundamental’ of the British, Australian and Queensland Constitutions. Notably, an insistence upon textual literalism together with a belief in the fundamentality of the Crown — indivisible and omnipresent — was one of the critical (and perplexing) features of the reasoning of the joint judgment in the more famous *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,¹⁹⁸ a decision which Isaacs J is reputed to have drafted.¹⁹⁹ The extra-textuality of this latter conception suggests, at least, that Isaacs J’s resistance to other ‘fundamentals’ in *McCawley’s Case* (that is, the idea of the Constitution as ‘fundamental law’) and in the *Engineers’ Case* (that is, the implied immunities and reserved powers doctrines derived from the idea of ‘federalism’), cannot be interpreted simply as an outworking of a rigorous and consistent textualism. For Isaacs J, what was at

¹⁹² *Taylor* (1917) 23 CLR 457, 468 (Barton J), 474 (Isaacs J), 477 (Gavan Duffy and Rich JJ), 481 (Powers J).

¹⁹³ See *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 432 (Dixon J), 445 (McTiernan J).

¹⁹⁴ *Taylor* (1917) 23 CLR 457, 473 (Isaacs J).

¹⁹⁵ *Ibid* 474 (Isaacs J), 481 (Powers J).

¹⁹⁶ *Ibid* 468–9. See also at 473–4 (Isaacs J).

¹⁹⁷ *Ibid* 476.

¹⁹⁸ (1920) 28 CLR 129 (*Engineers’ Case*).

¹⁹⁹ See Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 130.

issue in *Taylor* was the capacity of a ‘self-governing community’ to determine what combination of institutions would be ‘sufficient as its organ of legislation’.²⁰⁰

A similar conception of what it meant for a political community to be ‘self-governing’ would likewise underlie, as will be seen, his Honour’s commitment to parliamentary sovereignty in McCawley’s Case, not to mention the expansive view of Commonwealth legislative power that was articulated in the *Engineers’ Case*. In this sense, Isaacs J was prepared to articulate a profoundly ‘political’ conception of what the ‘Constitution’ is and should be, a conception which cannot be defended simply by reference to literalism or legalism. This does not mean, however, that Isaacs J’s judgments can be dismissed simply as ideological and outcome-oriented. Barton J — as well as Griffith CJ and the other judges in McCawley’s Case — likewise had their own ‘political’ conceptions of the ideal Constitution. Indeed, as will be seen, McCawley’s Case would be the opportunity for these judges to articulate their respective hopes and aspirations regarding the constitutional foundations of the Australian political system.

3 Summary

As politically and constitutionally momentous as *Cooper* and *Taylor* were, it has been said with good reason that McCawley’s Case was ‘by far the most important’.²⁰¹ McCawley’s Case concerned not only the status and independence of the Supreme Court, but also the fundamental power of the Queensland Parliament to alter the Constitution of Queensland itself.²⁰² Since the *Constitution Act* derived from a series of Imperial enactments which themselves gave the Queensland legislature power to alter the Constitution of Queensland, the case involved the allocation of ultimate politico-constitutional authority in Queensland — the most fundamental of constitutional questions. When in 1920 the Privy Council concluded that the Parliament of Queensland was, for all intents and purposes, in a position analogous to the Imperial Parliament itself, there could be no doubt as to whether the Parliament had power to recompose the Supreme Court and to abolish the Legislative Council. For all practical purposes, the Queensland Parliament was in the position of a sovereign legislature.

III JUDICIAL REASONING

What, then, was the reasoning that led the judges in McCawley’s Case, as well as in *Cooper* and *Taylor*, to their respective conclusions? To what extent was the reasoning ‘strictly legal and constitutional’? To what extent was it ‘political’?

²⁰⁰ (1917) 23 CLR 457, 474.

²⁰¹ McPherson, above n 4, 283.

²⁰² See *ibid* 284, where McPherson suggests that the Ryan Government deliberately delayed appointing McCawley to the Supreme Court until after the High Court’s decision in *Taylor* (1917) 23 CLR 457. On doubts within the Government and on the part of Judge Macnaughton, see O’Dwyer, above n 2, 53–4.

A preliminary point to note when considering the arguments on either side of the debate in *McCawley's Case* is the fact that the legal texts, as they stood, did not directly address the question of implied repeal of the *Constitution Act*. Indeed, the texts were quite consistent with either answer to this question, so that its resolution depended not simply on the relevant constitutional documents, but also on the wider constitutional theories which informed either side of the debate. And these rival theories were liable, as the Privy Council put it, to be 'carried to every proper consequence with logical and inexorable precision'.²⁰³

The underlying premises on each side of the argument entailed a complicated series of implications and corollaries, such that it is possible to describe and summarise the arguments invoked in various ways, placing the emphasis on one or another of the various lines of logical implication. However, two constitutional theories dominated the reasoning: one that was premised upon the idea that the Constitution of Queensland was a kind of 'fundamental law', and the other premised on a conception of the Queensland Parliament as a kind of 'sovereign legislature'. While these conceptions were expressed primarily in legal and constitutional terms, each tended to reflect a particular legal ideology — a model of what the law ought to be, understood as a matter of constitutional theory and, indeed, a particular political conception of what an ideal Constitution would look like.

This Part aims to explain the various ingredients on both sides of the debate. It begins with the specific legal arguments and interpretations of the written law, before turning to the various explicit references to constitutional and legal theory articulated throughout the judgments. The Part then concludes by closely analysing the fundamental political principles and assumptions that underpinned the constitutional and legal dimensions of the argument.

A Legal Arguments

As discussed, a number of foundational constitutional texts were relevant to *McCawley's Case*, including: the *New South Wales Constitution Statute*; the *Constitution Act*; the *Supreme Court Act*; the *Order in Council*, especially cls 15, 16 and 22; *Colonial Laws Validity Act* s 5; and *Commonwealth Constitution* s 106.²⁰⁴

It was accepted by both sides of the debate that, as statutes and orders derived ultimately from the Imperial authority of the United Kingdom Parliament, these Acts operated within Australia with paramount force, such that any colonial law repugnant to them would 'remain absolutely void and inoperative', as s 2 of the *Colonial Laws Validity Act* affirmed.²⁰⁵ The judges who found *McCawley's* appointment to be unconstitutional — such as Griffith CJ, Barton and O'Connor JJ — focused determinedly on the paramount force of Imperial law. Their Honours reasoned that such force attached not only to the relevant Imperial

²⁰³ *McCawley v The King* (1920) 28 CLR 106, 115 (Lord Birkenhead LC).

²⁰⁴ See above Part II(B).

²⁰⁵ See *Cooper* (1907) 4 CLR 1304, 1315 (Griffith CJ), 1329 (O'Connor J); *Taylor* (1917) 23 CLR 457, 476 (Isaacs J); *McCawley v The King* (1918) 26 CLR 9, 24–5 (Griffith CJ), 73 (Higgins J); *McCawley v The King* (1920) 28 CLR 106, 121 (Lord Birkenhead LC).

enactments, but also to the two consolidating statutes of the Queensland Parliament: the *Constitution Act* and the *Supreme Court Act*, both of which re-enacted the protections accorded to the judiciary previously contained in the *Order in Council*.²⁰⁶ Even though Parliament clearly had the power to amend, to the extent to which it sought fit, these ‘ordinary’ statutes which now embodied the ‘constitutional’ protections accorded to the judiciary, it was argued that these protections continued to have paramount force until repealed. This was because their legal force was ultimately derived from an Imperial statute and they were a verbatim re-enactment of provisions originally contained therein.²⁰⁷ Unless amendments were first made to the guarantee of life tenure for Supreme Court judges, s 6(6) of the *Industrial Arbitration Act* — which allowed judges to be appointed for a limited term of years — would be void for repugnancy.²⁰⁸ Since no amendments had been made to the two constitutional statutes prior to the enactment of the *Industrial Arbitration Act*, it followed that s 6(6) was invalid, thus rendering McCawley’s appointment to the Supreme Court under that section illegal and ineffective.²⁰⁹

On the other hand, the reasoning of those judges who found McCawley’s appointment to be legally valid — Isaacs and Higgins JJ, as well as Lord Birkenhead LC — focused upon the virtually unlimited scope of the legislative and constitutive power initially conferred upon the Queensland Parliament by cl 22 of the *Order in Council*. This power was taken up by *Constitution Act* s 2, and was confirmed under *Colonial Laws Validity Act* s 5.²¹⁰ In light of these provisions, the *Constitution Act* was considered to be nothing more than an ordinary statute amenable to subsequent alteration or repeal by another statute.²¹¹ Moreover, according to general principles of statutory interpretation, a later statute could amend an earlier one either by expressly and deliberately doing so, or merely by containing provisions inconsistent with it.²¹² Because *Industrial Arbitration Act* s 6(6) was in fact inconsistent with the relevant provisions of the *Constitution Act*, this had the effect, it was concluded, of amending the earlier Act by necessary implication. Section 6(6) was therefore a valid provision under which McCawley could be legally appointed.²¹³

²⁰⁶ *Constitution Act* ss 15–17; *Supreme Court Act* ss 16–17. See *Cooper* (1907) 4 CLR 1304, 1311–15 (Griffith CJ), 1317 (Barton J), 1327–8 (O’Connor J); *Re McCawley* [1918] QSR 62, 93 (Cooper CJ); *McCawley v The King* (1918) 26 CLR 9, 21–5 (Griffith CJ), 37 (Barton J).

²⁰⁷ *Cooper* (1907) 4 CLR 1304, 1318 (Barton J); *Re McCawley* [1918] QSR 62, 94 (Cooper CJ); *McCawley v The King* (1918) 26 CLR 9, 21–2 (Griffith CJ), 38 (Barton J).

²⁰⁸ *Cooper* (1907) 4 CLR 1304, 1315 (Griffith CJ), 1317–18 (Barton J).

²⁰⁹ *Re McCawley* [1918] QSR 62, 97 (Cooper CJ); *McCawley v The King* (1918) 26 CLR 9, 25, 27 (Griffith CJ), 28, 37 (Barton J), 86 (Powers J).

²¹⁰ *Re McCawley* [1918] QSR 62, 97 (Cooper CJ); *McCawley v The King* (1918) 26 CLR 9, 53–4, 61 (Isaacs and Rich JJ), 72–3 (Higgins J); *McCawley v The King* (1920) 28 CLR 106, 121, 123 (Lord Birkenhead LC).

²¹¹ *Re McCawley* [1918] QSR 62, 97–8 (Cooper CJ), referring to Real J’s dissent; *McCawley v The King* (1918) 26 CLR 9, 52, 54 (Isaacs and Rich JJ), 73 (Higgins J), 83–4 (Powers J); *McCawley v The King* (1920) 28 CLR 106, 115–16, 125 (Lord Birkenhead LC).

²¹² *McCawley v The King* (1918) 26 CLR 9, 63 (Isaacs and Rich JJ).

²¹³ *Ibid* 67 (Isaacs and Rich JJ), 75 (Higgins J); *McCawley v The King* (1920) 28 CLR 106, 125 (Lord Birkenhead LC).

Couched in this way, the reasoning on both sides was founded upon a shared premise: that the relevant powers of the Queensland Parliament, as well as any limits on those powers, derived entirely from Imperial sources and were subject to principles derived from Imperial law. On the one side, the principle of repugnancy and the paramount force of Imperial laws was used to elevate the provisions of the *Constitution Act* relating to judicial tenure and salaries to the status of higher law. On the other side, the undoubted capacity of the Queensland Parliament to legislate with respect to the Constitution of Queensland together with the *lex posteriori derogat lex anteriori* principle was used to affirm the capacity of the Parliament to legislate inconsistently with those provisions.

While the relevant legal texts thus seemed to be capable of sustaining the interpretation adopted by either side, the strength of the arguments depended upon greater emphasis being given to the particular provisions and principles which happened to support each line of reasoning. It was thus quite possible for each side to alter their focus in order to point to anomalies which undermined the other's argument. For example, Isaacs and Rich JJ and Lord Birkenhead LC were able to draw attention to the legislative history of the *Colonial Laws Validity Act* to support the conclusion that s 5 was intended to put to rest the kind of argument being made by the other side.²¹⁴ However, Griffith CJ, Barton and O'Connor JJ could just as easily point to the later enactment of the *Commonwealth Constitution*, s 106 of which gave the state Constitutions the force of an Imperial statute.²¹⁵ Neither side could claim, therefore, that the relevant texts unequivocally dictated a particular result. It was necessary to appeal to wider considerations and principles.

B Constitutional Theory

Legal and constitutional theory, or what the judges referred to as 'jurisprudence'²¹⁶ and the opinions of 'text-writers',²¹⁷ played a considerable role in the judgments on both sides. In the course of his Honour's judgment in *Cooper*, Griffith CJ drew attention to the distinction between 'fundamental' and 'ordinary' laws, which, while known to 'jurisprudence' and perfectly familiar to those governed by a written Constitution, was unlikely to be familiar to English lawyers because no such distinction is drawn in the English Constitution: Parliament is 'supreme' and can make any laws it thinks fit.²¹⁸ While the point made was mainly analytical, it was cast in terms that implied a certain disparagement of English lawyers, together with their principle of legislative supremacy.

²¹⁴ See, eg, *McCawley v The King* (1918) 26 CLR 9, 48–51 (Isaacs and Rich JJ); see also *McCawley v The King* (1920) 28 CLR 106, 120–2 (Lord Birkenhead LC).

²¹⁵ *McCawley v The King* (1918) 26 CLR 9, 22 (Griffith CJ), 33 (Barton J); *Cooper* (1907) 4 CLR 1304, 1327–8 (O'Connor J). Section 106 clearly affirmed that both the Commonwealth and the states possessed 'Constitutions' — without any explicit suggestion, at least, that state Constitutions were somehow less 'fundamental' than the *Commonwealth Constitution*.

²¹⁶ See, eg, *Cooper* (1907) 4 CLR 1304, 1313 (Griffith CJ).

²¹⁷ *McCawley v The King* (1918) 26 CLR 9, 28 (Barton J); *McCawley v The King* (1920) 28 CLR 106, 114–15 (Lord Birkenhead LC).

²¹⁸ *Cooper* (1907) 4 CLR 1304, 1313–15.

Lord Birkenhead LC, as if deliberately wishing to show that an English lawyer need not be as ignorant as Griffith CJ seemed to suggest, was at pains to demonstrate his familiarity with the analyses of ‘writers upon the subject of Constitutional Law’ on the difference between what his Lordship called ‘controlled’ and ‘uncontrolled’ Constitutions.²¹⁹ In so doing, his Lordship may possibly have wished to distance himself from the relatively simplistic and wooden proposition that had been adopted by the Privy Council in *Webb v Outtrim*:²²⁰ that in Australia, in contrast to the United States, there was no such thing as judicial review, in the sense of courts having jurisdiction to declare statutes constitutionally invalid.²²¹ In a strongly worded response to *Webb v Outtrim*, Griffith CJ replied in *Baxter v Commissioners of Taxation (NSW)*²²² that, while of course no ‘disrespect’ was implied, the Privy Council’s analysis of the Australian Constitutions could be likened to an attempt by an ‘astral intelligence’ to interpret those instruments with the assistance of a ‘dictionary’!²²³ Privy Councillors, his Honour said, would not necessarily be ‘familiar with the history or conditions of the remoter portions of the Empire’, nor have ‘any sympathetic understanding of the aspirations of the younger communities’.²²⁴ In the context of the issues raised in *Webb v Outtrim* and *Baxter*, those aspirations included very specific theories about federalism, constitutionalism and judicial review.²²⁵ Lord Birkenhead LC’s opinion in *McCawley v The King* seems to have been deliberately calculated to avoid any suggestion that his approach was somehow rigidly technical and without an appreciation for the relevant theoretical and political background.²²⁶

1 *Fundamental Law*

The idea that the Constitution of Queensland amounted to a kind of fundamental or organic law was particularly prominent in the judgments of Griffith CJ, Barton and O’Connor JJ in *Cooper* and *McCawley v The King*.²²⁷ According to their Honours, the *Constitution Act* both defined and limited the powers of the Queensland Parliament such that state legislation would be valid only insofar as it conformed to the authority conferred by the Constitution of Queensland.²²⁸ In

²¹⁹ *McCawley v The King* (1920) 28 CLR 106, 114–15. See generally *McCawley v The King* (1918) 26 CLR 9, 51–2 (Isaacs and Rich JJ).

²²⁰ (1906) 4 CLR 356.

²²¹ *Ibid* 359 (Earl of Halsbury). To be sure, the Privy Council acknowledged that a state law which was repugnant to an Imperial statute extending to the colony would be inoperative to the extent of the repugnancy, but denied that this would amount to a declaration that the statute was ‘unconstitutional’.

²²² (1907) 4 CLR 1087 (*‘Baxter’*).

²²³ *Ibid* 1106, 1109, 1111.

²²⁴ *Ibid* 1112.

²²⁵ Nicholas Aroney, ‘The Griffith Doctrine: Reservation and Immunity’ in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003) 219.

²²⁶ On Lord Birkenhead’s judgments as Lord Chancellor, including in *McCawley v The King* (1920) 28 CLR 106, see John Campbell, *F E Smith, First Earl of Birkenhead* (1983) 486–97.

²²⁷ See *Cooper* (1907) 4 CLR 1304, 1313–14 (Griffith CJ), 1317–18 (Barton J), 1326–9 (O’Connor J); *McCawley v The King* (1918) 26 CLR 9, 28, 31–3 (Barton J).

²²⁸ *McCawley v The King* (1918) 26 CLR 9, 24–5 (Griffith CJ), 37–9 (Barton J).

appealing to the concept of fundamental law, the judges invoked a principle of much wider application than the legal rule that Imperial statutes have paramount force. The concept of a fundamental or organic law can be discerned in a wide range of institutions, private and public, ranging from the constitution of a company, to the Constitution of an independent nation-state. For that reason, arguments derived from case law relating to the internal affairs of joint stock companies²²⁹ were deemed to be as relevant to the issues in *McCawley's Case* as the principles of constitutional law contained in statutes such as the *Colonial Laws Validity Act* and the *Commonwealth Constitution*.²³⁰

While there were no general philosophical arguments made in favour of a political system of this kind, the judges who supported the fundamental law argument certainly seem to have favoured such a system on wider theoretical grounds. Griffith CJ, Barton and O'Connor JJ clearly felt the question to be one of 'great and general importance'²³¹ and insisted that if Queensland were to have a 'genuine Constitution' it must be in the nature of a fundamental law.²³² While their Honours could not deny that the Queensland Parliament was 'supreme' — in the sense that it had full power to amend the Constitution of Queensland — they concluded that the Constitution must first be altered by an explicit and deliberate amendment before otherwise inconsistent ordinary legislation could be validly enacted.²³³ Griffith CJ provided a principled reason for this conclusion when his Honour argued that requiring a formal constitutional amendment would ensure that the general political and legal significance of any proposed constitutional change received the careful attention it deserved within the legislature and among the voting public.²³⁴

Griffith CJ, Barton and O'Connor JJ, as well as the judges of the Supreme Court, also emphasised the practical and political importance of securing the independence of the judiciary by constitutionally protecting the tenure and salaries of judges.²³⁵ Cooper CJ said that judicial independence was one of the 'cherished characteristics of the system under which justice is administered throughout our Empire'.²³⁶ Griffith CJ called it a 'great constitutional principle'.²³⁷ O'Connor J had further suggested that judicial independence existed in order to 'better secur[e] the rights and liberties of the subject'.²³⁸ Of course, as Isaacs and Rich JJ pointed out, to understand the principle to be entrenched as a matter of fundamental law was to go further than had occurred even in the

²²⁹ Ibid 22–4 (Griffith CJ), 35–7 (Barton J).

²³⁰ *Cooper* (1907) 4 CLR 1304, 1313 (Griffith CJ); *McCawley v The King* (1918) 26 CLR 9, 21–2 (Griffith CJ), 33 (Barton J), relying on *Commonwealth Constitution* s 106.

²³¹ See *Cooper* (1907) 4 CLR 1304, 1311 (Griffith CJ), 1317–18 (Barton J), 1326 (O'Connor J).

²³² Ibid 1313 (Griffith CJ), 1328 (O'Connor J); *McCawley v The King* (1918) 26 CLR 9, 24–5 (Griffith CJ), 32 (Barton J), 82–3 (Powers J). Barton J thought the absence of a fundamental law to be a kind of 'deprivation': at 32.

²³³ *Cooper* (1907) 4 CLR 1304, 1311–15 (Griffith CJ), 1317 (Barton J), 1327–8 (O'Connor J).

²³⁴ Ibid 1315.

²³⁵ See ibid 1318–19 (Barton J), 1324 (O'Connor J); *Re McCawley* [1918] QSR 62, 68 (Cooper CJ); *McCawley v The King* (1918) 26 CLR 9, 22 (Griffith CJ).

²³⁶ *Re McCawley* [1918] QSR 62, 68.

²³⁷ *McCawley v The King* (1918) 26 CLR 9, 22.

²³⁸ *Cooper* (1907) 4 CLR 1304, 1324.

United Kingdom, where the *Act of Settlement* and subsequent legislation certainly bound the Crown but did not bind the British Parliament.²³⁹ But Griffith CJ, Barton and O'Connor JJ, as well as Cooper CJ and the other members of the Supreme Court majority, were determined to treat the Constitution of Queensland as a kind of fundamental law which bound not only the government, but also the legislature. In support of this conclusion, Barton J had observed in *Cooper* that the British Parliament had never attacked the independence of the judiciary and would not even dream of doing so.²⁴⁰ Similarly, Cooper CJ suggested that no 'self-respecting Legislature' would willingly confer upon the executive such 'extensive powers' as would enable it to undermine the independence of the courts.²⁴¹ Certainly, these observations were expressed as matters of positive political morality, rather than binding constitutional law. But the mere fact that these judges were prepared to conclude that the protection of judicial tenure was a matter of fundamental law shows that the idea of what a 'self-respecting Legislature' ought to refrain from doing supported a particular conception about what it must, as a matter of law, refrain from doing. For these judges, the *ought* of normative constitutional theory underlay the *is* of positive constitutional law.

While the judgments were silent on this point, the conclusion that the Constitution of Queensland was a kind of fundamental law derived not only from the British concept of the paramount force of Imperial law, but also from the American constitutional tradition, in which written Constitutions function as 'higher law' and the courts have jurisdiction to ensure that legislation conforms to it.²⁴² Griffith CJ and Barton J had favoured many aspects of the American approach to constitutionalism during the debate over the *Commonwealth Constitution* in the 1890s.²⁴³ As High Court judges, their Honours had also incorporated American principles into their interpretation of the *Commonwealth Constitution*, particularly in the development of the implied immunities and state reserved powers doctrines.²⁴⁴ In *McCawley's Case*, their Honours applied the same general principles, as far as they could, to the *Constitution Act*.

²³⁹ *McCawley v The King* (1918) 26 CLR 9, 58–60.

²⁴⁰ (1907) 4 CLR 1304, 1319.

²⁴¹ *Re McCawley* [1918] QSR 62, 82, where the majority avoided an interpretation of the *Industrial Arbitration Act* which would have enabled the Labor Government to 'pack' the Supreme Court with an unlimited number of judges. Cf the joint judgment in the *Engineers' Case* (1920) 28 CLR 129, 151, where Knox CJ, Isaacs, Rich and Starke JJ argued that the possibility of an 'abuse' of power is no reason in the common law for limiting the legal powers of Parliament.

²⁴² See, eg, *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

²⁴³ See, eg, *Official Report of the National Australasian Convention Debates*, Sydney, 6 March 1891, 91–5 (Edmund Barton); *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 489–91 (Sir Samuel Griffith).

²⁴⁴ See, eg, *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585; *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488; *Baxter* (1907) 4 CLR 1087; *R v Barger* (1908) 6 CLR 41; *A-G (NSW) ex rel Tooth v Brewery Employees Union of New South Wales* (1908) 6 CLR 469; *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

2 Parliamentary Sovereignty

Against the argument of fundamental law, Lord Birkenhead LC, as well as Isaacs, Rich and Higgins JJ, were quite prepared to embrace the alternative maxim of parliamentary sovereignty.²⁴⁵ According to these judges, there could be no middle ground: the *Constitution Act* was either fundamental law or an ordinary statute; it was either ‘controlled’ or it was not.²⁴⁶ Since the Queensland Parliament undoubtedly had power to alter the Constitution of Queensland in any manner which it thought fit, they concluded that the *Constitution Act* could not be a fundamental law and, as a corollary, the Queensland Parliament was in the position of a quasi-sovereign legislature within its territory.

Admittedly, this commitment to parliamentary sovereignty was most evident in the judgment of Isaacs and Rich JJ. In *Cooper*, Higgins J altogether avoided what his Honour called the many ‘curious and delicate points’ raised by the arguments about fundamental law and parliamentary sovereignty, deciding the case on the narrow legal ground of statutory interpretation.²⁴⁷ When in *McCawley’s Case* it became impossible for his Honour to avoid the issue, Higgins J’s judgment, as well as the opinion delivered by Lord Birkenhead LC for the Privy Council, focused almost entirely on the relevant constitutional provisions and their interpretation, understood in technical legal terms.²⁴⁸

By contrast, Isaacs and Rich JJ seemed to favour the case for parliamentary sovereignty, not only as a matter of law, but also as a matter of normative constitutional theory. For example, when their Honours explicitly adopted A V Dicey’s description of the *Colonial Laws Validity Act* as a ‘charter of colonial legislative independence’,²⁴⁹ they must have been aware that this would associate the powers granted to the colonial legislatures with Dicey’s famous thesis concerning the sovereignty of the British Parliament. Thus, the question in issue, their Honours said, was whether the ‘Parliaments of Queensland and the other States of this Commonwealth have powers of the noble character broadly framed by the Parliament of the Empire’,²⁵⁰ or whether their powers ‘are still open to the embarrassing doubts and technical impediments that according to some opinions fettered the legislative action of a colony over half a century ago’.²⁵¹ The question, in other words, was whether the Constitution of Queensland ‘affords ... ample means for translating the public will into public law’.²⁵² To impose constitutional constraints upon the Queensland Parliament was a kind of deprivation — the abdication of a power conferred ‘for the benefit of the commu-

²⁴⁵ It may be worth noting that while Lord Birkenhead LC positively embraced the combination of executive, legislative and judicial functions embodied in his office as Lord Chancellor, his Lordship at times actively intervened to protect the independence of the judiciary from executive interference: *Campbell*, above n 226, 467–8, 479–81.

²⁴⁶ See especially *McCawley v The King* (1920) 28 CLR 106, 114–17 (Lord Birkenhead LC).

²⁴⁷ See especially *Cooper* (1907) 4 CLR 1304, 1331.

²⁴⁸ See, eg, *McCawley v The King* (1918) 26 CLR 9, 72–6 (Higgins J); see also *McCawley v The King* (1920) 28 CLR 106, 117–28 (Lord Birkenhead LC).

²⁴⁹ *McCawley v The King* (1918) 26 CLR 9, 44, citing A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915) 101.

²⁵⁰ *McCawley v The King* (1918) 26 CLR 9, 44.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

nity'.²⁵³ All of these considerations pointed to the *preferability*, in their Honours' view, of a political system in which the legislature is sovereign.

Reflecting, then, upon the approach the courts should take to such questions, Isaacs and Rich JJ cited the opinion of Lord Selborne in *R v Burah*²⁵⁴ to the effect that 'it is not for any Court of justice ... to enlarge constructively' the 'conditions and restrictions' which might be imposed upon a colonial legislature by the terms of an Imperial grant.²⁵⁵ Of course, it was in *R v Burah* that the Privy Council had described the Indian Parliament as being in possession of 'plenary powers of legislation, as large, and of the same nature, as those of [the Imperial] Parliament itself'.²⁵⁶ While Higgins J did not cite *R v Burah*, his Honour agreed that the courts had 'no right to give a meaning to the words of the Constitution which the words do not bear in themselves',²⁵⁷ even if that is to secure a worthy constitutional goal, such as the protection of judicial independence. Such questions were 'a matter for the framers of the Constitution.'²⁵⁸

In effect, Higgins J appears to have been just about as supportive of the principle of parliamentary sovereignty as were Isaacs and Rich JJ. Like them, Higgins J had exhibited a certain aversion to the various American constitutional principles that had been adopted by Griffith CJ, Barton and O'Connor JJ in their interpretation of the *Commonwealth Constitution*, and his Honour had displayed a general preference for the principles enunciated by the Privy Council concerning the constitutional status of the British colonies.²⁵⁹ All of this, of course, foreshadowed the decision that would be made in the landmark *Engineers' Case*,²⁶⁰ in which Isaacs and Rich JJ would soon join and Higgins J concur. Just as the decisions of Griffith CJ, Barton and O'Connor JJ on state constitutional law need to be read with their decisions on the *Commonwealth Constitution*,²⁶¹

²⁵³ Ibid 57.

²⁵⁴ (1873) 3 App Cas 889.

²⁵⁵ *McCawley v The King* (1918) 26 CLR 9, 64–5, citing *R v Burah* (1873) 3 App Cas 889, 905 (Lord Selbourne).

²⁵⁶ (1873) 3 App Cas 889, 904 (Lord Selborne). Cf *Hodge v The Queen* (1883) 9 App Cas 117, 132, where Lord Fitzgerald described the powers conferred upon the Ontario legislature to be 'as plenary and as ample within the limits prescribed ... as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits ... the local legislature is supreme'. See also *Powell v Apollo Candle Co* (1883) 10 App Cas 282, applying these principles to the legislature of New South Wales.

²⁵⁷ *Cooper* (1907) 4 CLR 1304, 1333.

²⁵⁸ Ibid.

²⁵⁹ For example, Higgins J specifically ruled out the applicability of the decision of the High Court in *Deakin v Webb* (1904) 1 CLR 585, a case in which the High Court had adopted the 'American' approach to federal constitutionalism. In so doing, his Honour cast considerable doubt upon *Deakin v Webb*, referring instead to the Privy Council's response in *Webb v Outtrim* (1906) 4 CLR 356, which had rejected the position taken by the High Court (and was the object of Griffith CJ's criticism in *Baxter* (1907) 4 CLR 1087). See also *Cooper* (1907) 4 CLR 1304, 1330 (Higgins J), citing *Deakin v Webb* and *Webb v Outtrim*. Isaacs and Rich JJ likewise cited *Webb v Outtrim* and repeatedly suggested that the fundamental law argument amounted to a kind of 'implied prohibition' which lacked any textual foundation (by way of an explicit 'negative provision') in the Constitution of Queensland: see *McCawley v The King* (1918) 26 CLR 9, 57, 60, 64–5 (Isaacs and Rich JJ).

²⁶⁰ (1920) 28 CLR 129.

²⁶¹ See, eg, above n 244 and accompanying text.

so must the decisions of Isaacs, Rich and Higgins JJ on the state Constitutions be read with their approach to federal constitutional law.²⁶² The same goes for the Privy Council, whose decision in *Webb v Outtrim* clearly foreshadowed the position it took in *McCawley's Case*.²⁶³

When delivering the opinion of the Privy Council, Lord Birkenhead LC sought to acknowledge at least some of the considerations which might lead a particular political community to favour the American approach of treating the Constitution as a kind of fundamental law.²⁶⁴ However, his Lordship explained that the British people had

not in the framing of Constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors, in spite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived.²⁶⁵

For this reason, his Lordship continued, the Imperial Parliament had deliberately chosen not to 'shackle or control' the legislative powers conferred upon the 'nascent' Australian legislatures.²⁶⁶ Complete legislative powers were conferred in the 'fully justified' belief that 'these young communities would successfully work out their own constitutional salvation'.²⁶⁷ The Queensland Parliament, his Lordship concluded, *is* — and seemingly *should* be — the 'master of its own household'.²⁶⁸

The question, then, for Lord Birkenhead LC, as well as for Isaacs, Rich and Higgins JJ, was whether the Queensland legislature would have sufficient power to govern the community, 'unshackled' by constraints imposed by a Constitution which is enforced by the judiciary as a kind of fundamental law. Their concern seems to have been to ensure that the legislature, deciding by ordinary majority, would be free to legislate as it thought fit and, more particularly, possess a 'sufficiently elastic constitutional means of amendment' to ensure that the Constitution of Queensland could be kept up to date with the ever-changing requirements of the Queensland community.²⁶⁹ A commitment to majoritarian legislative supremacy was fundamental to this objective.

²⁶² For example, the judgments of Isaacs, Rich and Higgins JJ in *McCawley v The King* (1918) 26 CLR 9 should be read with the submissions of Isaacs (as King's Counsel) in *Deakin v Webb* (1904) 1 CLR 585, 596–7, and with their Honours' judgments in the *Engineers' Case* (1920) 28 CLR 129.

²⁶³ See *Webb v Outtrim* (1906) 4 CLR 356, 359 (Earl of Halsbury).

²⁶⁴ The considerations were put, however, in rather feeble terms: the framers of such Constitutions, his Lordship said, 'must be supposed to have believed that certainty and stability were ... the supreme desiderata': see *McCawley v The King* (1920) 28 CLR 106, 115.

²⁶⁵ *Ibid* 114–15.

²⁶⁶ *Ibid* 117.

²⁶⁷ *Ibid*.

²⁶⁸ *Ibid* 125.

²⁶⁹ *McCawley v The King* (1918) 26 CLR 9, 64 (Isaacs and Rich JJ). It is in this sense, it seems, that Isaacs J referred in *Taylor* (1917) 23 CLR 457, 474, to the necessary capacity of a 'self-governing community' to determine what combination of institutions would be 'sufficient as its organ of legislation'.

3 *Limits of Constitutional Theory*

If constitutional theory was an essential part of the reasoning on both sides, there was at the same time a distinct limit to the extent to which each theoretical framework provided a coherent theoretical foundation for their respective conclusions.

Lord Birkenhead LC, Isaacs, Rich and Higgins JJ sought to ground the plenary powers of the Queensland Parliament in a series of Imperial statutes — in particular, *Colonial Laws Validity Act* s 5. But in so doing, they could not dispense altogether with the idea of fundamental law, at least in the form of Imperial law operating in Queensland by paramount force. It was undeniable that the powers, not only of the Commonwealth Parliament, but also of the Parliaments of the Australian states, were limited by Imperial statutes and that the courts certainly had jurisdiction to declare colonial legislation invalid on the ground of repugnancy.

The recognition of the existence of fundamental law in this sense was most clearly articulated by Isaacs J in his judgment in *Taylor*. As discussed, Isaacs J accepted that the power conferred by *Colonial Laws Validity Act* s 5 was subject to a number of important ‘fundamental’ constraints: in particular, the ‘representative’ character of the Parliament, the ‘fundamental conception’ of the Crown and the original power contained in cl 22 of the *Order in Council*.²⁷⁰ As Barton J later pointed out, Isaacs J had regarded the idea that the Parliament had power to amend or repeal cl 22 as ‘unthinkable’.²⁷¹ Although in *McCawley’s Case*, Isaacs and Rich JJ skirted the issue, Higgins J was also prepared to affirm the idea that cl 22 was in this sense ‘fundamental’.²⁷² The conclusion that these aspects of the Constitution of Queensland were fundamental was not, however, explicitly required by the provisions of the relevant Imperial instruments. Such a view turned upon the highly contested *theoretical* question of whether the rule by which sovereign (or sovereign-like) power is conferred upon a particular legislature is itself within the legal competence of that legislature.²⁷³ When examined closely, the conclusion that the representative character of the legislature must be maintained likewise rested upon an interpretation of *Colonial Laws Validity Act* s 5 which was supported by the conviction that such legislatures *should* remain democratic.²⁷⁴ Similarly, the insistence on the indispensability of the Crown showed that Isaacs J was prepared to postulate certain fundamentals based on a conception of what the Constitution *ought* to be.²⁷⁵

²⁷⁰ *Taylor* (1917) 23 CLR 457, 474–6, citing *Cooper* (1907) 4 CLR 1304, 1314 (Griffith CJ).

²⁷¹ *McCawley v The King* (1918) 26 CLR 9, 39, citing *Taylor* (1917) 23 CLR 457, 476 (Isaacs J).

²⁷² See *McCawley v The King* (1918) 26 CLR 9, 60–2 (Isaacs and Rich JJ), 75 (Higgins J), citing *Cooper* (1907) 4 CLR 1304, 1314 (Griffith CJ).

²⁷³ See, eg, H W R Wade, ‘The Basis of Legal Sovereignty’ [1955] *Cambridge Law Journal* 172; Sir W Ivor Jennings, *The Law and the Constitution* (5th ed, 1959) ch 4; Geoffrey Marshall, *Constitutional Theory* (1971) ch 3; Paul Craig, ‘Sovereignty of the United Kingdom Parliament After *Factortame*’ (1991) 11 *Yearbook of European Law* 221.

²⁷⁴ See *Taylor* (1917) 23 CLR 457, 468 (Barton J), 474 (Isaacs J), 477 (Gavan Duffy and Rich JJ). See also above n 190 and accompanying text.

²⁷⁵ Cf the role which the ubiquity of the Crown played in the joint judgment in the *Engineers’ Case* (1920) 28 CLR 129, 152–4 (Knox CJ, Isaacs, Rich and Starke JJ).

If the difficulty for Isaacs J was to explain how these aspects of the Constitution of Queensland were fundamental when the independence of the judiciary was not, the difficulty for Griffith CJ was to show precisely how the fundamental aspects of the Constitution of Queensland could be distinguished from the ordinary aspects of the statutory law of Queensland. Apart from being contained within a Queensland statute which was labelled 'constitutional', there was no formal set of criteria by which constitutional and ordinary provisions within that statute might be distinguished. As Isaacs, Rich and Higgins JJ argued, there was nothing 'magical' in the mere label 'Constitution', even when affixed to the short title of a particular enactment.²⁷⁶ Indeed, parts of the Constitution of Queensland were contained in statutes that were not labelled as 'constitutional',²⁷⁷ and there was no single document which could be identified as Queensland's 'written Constitution'.²⁷⁸ The problem, therefore, was how the Constitution of Queensland could be a kind of 'fundamental law' despite the fact that it was contained in an ordinary statute susceptible to amendment by ordinary enactment. As Lord Birkenhead LC put it, a polity having both sets of characteristics would be 'unique in constitutional history'.²⁷⁹ In a 'genuinely controlled Constitution', his Lordship pointed out, it is possible to point to 'specific articles in the legislative instruments or instruments which created the *Constitution*, prescribing with meticulous precision the methods by which, and by which alone, it could be altered.'²⁸⁰ The absence of any such 'special formality' in the case of the Constitution of Queensland — its liability to be amended by ordinary statute — meant that the respondents had been driven into 'dialectical difficulties which are embarrassing and even ridiculous.'²⁸¹

There was a definite limit, therefore, to the claim that Queensland possessed a written Constitution which operated as a kind of fundamental law. Ultimately, the argument rested not upon the derivation of the Constitution of Queensland from 'the people of Queensland' or upon some other autochthonous constituent authority, but rather upon its derivation from the Imperial Parliament. This removed one of the leading rationales for the existence of a fundamental law. Written Constitutions that are in nature fundamental laws are usually enacted (and amended) through some special process or institution (for example, a constituent assembly, specially elected convention, referendum or special majority voting rule) which is distinct from the ordinary legislative procedure (for example, a simple majority of both Houses of the legislature). It is a commonplace assumption that the distinction between fundamental and ordinary law is founded upon the difference between the two procedures — one 'constitu-

²⁷⁶ *McCawley v The King* (1918) 26 CLR 9, 47, 52 (Isaacs and Rich JJ), 73 (Higgins J). Isaacs and Rich JJ maintained that Queensland only had a 'Constitution' in the sense of a law which defines the composition and powers of the various institutions of government: at 52.

²⁷⁷ See, eg, *Supreme Court Act*.

²⁷⁸ See *McCawley v The King* (1918) 26 CLR 9, 51–2 (Isaacs and Rich JJ). Cf *Cooper* (1907) 4 CLR 1304, 1314 (Griffith CJ). See also *A-G (NSW) v Ray* (1989) 90 ALR 263, 277 (Young J); *Stuart-Robinson v Lloyd* (1932) 47 CLR 482, 491 (Evatt J).

²⁷⁹ *McCawley v The King* (1920) 28 CLR 106, 117.

²⁸⁰ *Ibid* 116.

²⁸¹ *Ibid* 114, 116 (Lord Birkenhead LC). His Lordship also characterised their submissions as 'neither clearly conceived, nor intelligibly described': at 124.

tive' and the other 'legislative' — and the idea that a special 'constituent' power is responsible for the fundamental law of the Constitution, whereas the 'constituted' power of the ordinary legislature itself derives from this prior, constitutive act. But since the Queensland Parliament clearly had power to legislate to amend both the *Order in Council* and the *Constitution Act* by ordinary statute, there were no formal criteria that could be used to distinguish ordinary from fundamental or constitutional enactments.

C Political Dimensions

Why, then, did the judges adopt the positions they did in McCawley's Case? If constitutional theory took them only part of the way, in what sense, and to what degree, were they influenced by wider political conceptions of the province and task of the public institutions of government? To what degree were they influenced by the specific policies of the Labor Government and thus of partisan, political and even personal motives?

1 Personalities, Partisanship and Ideology

A majority of the judges of the Supreme Court certainly appear to have disagreed with many of the policies adopted by the Labor Government. Cooper CJ clearly believed there had been no increase in the work of the Court that necessitated the appointment of additional Justices.²⁸² Well aware of the fact that McCawley had not worked as a barrister in private practice, his Honour said that a 'stricter qualification' would have been preferable — that 'actual practice in the legal profession', rather than mere admission, is necessary in order to 'equip' a judge for the 'competent performance of the important and multifarious duties which he will be called upon to discharge'.²⁸³ Even though these comments were directed to the legislation and not to the appointment of McCawley in particular, they cast rather obvious aspersions on McCawley's competence and qualifications. It is little wonder that McCawley's personal response to the judgment was to characterise it as 'strained', 'offensive' and 'little short of ridiculous'.²⁸⁴ McCawley also observed that the 'atmosphere of hostility' at a 'political, professional and personal' level made an adverse result highly predictable.²⁸⁵

Underlying the Supreme Court's conclusions, however, was a particular view of the proper relationship between the Parliament, the executive government, the Supreme Court and the Constitution of Queensland.²⁸⁶ The Court was concerned that the legislature had 'surrendered to the Executive Government power to pack the Supreme Court Bench with any number of Judges which the Executive Government may think fit to appoint' and 'to increase indefinitely the charges

²⁸² See *Re McCawley* [1918] QSR 62, 65.

²⁸³ *Ibid* 99.

²⁸⁴ 'Reasons for Judgment with Notes by Mr McCawley' in Brief for Appellant, *McCawley v The King* (High Court of Australia) 37, 46 (Queensland State Archives, Archive No CRS/206).

²⁸⁵ Letter from McCawley to Higgins, 2 February 1918, above n 1.

²⁸⁶ For a similar analysis, see McPherson, above n 4, 288, who observes that although Cooper CJ was 'unsympathetic' to Labor Party policies, his 'more fundamental' motive was one of 'constrain[ing] the growth of Executive power irrespective of the party exercising it.'

imposed on the revenues of the State'.²⁸⁷ If the Government were given an unfettered discretion to commit state revenues to the salaries of additional judges so appointed, the capacity of the Parliament to control Government expenditure would be compromised. Moreover, if the government were able to 'flood' or 'pack' the Court in this way, the capacity of the Court to act as an independent check upon the executive power would be severely compromised. A 'less comprehensive' and a 'more comprehensible' interpretation of the legislature's intention — so as to avoid 'unthinkable' consequences such as these — was therefore preferable.²⁸⁸

However, the political ideology of the Labor Government suggested a conception of the law and the courts in which law can and should be an instrument of social reform, so long as the power to make, administer and adjudicate upon the law is held by those possessing the 'appropriate' knowledge, experience and goodwill.²⁸⁹ On this view, the constitutional discipline and restraint imposed by judicial review of legislation might in fact hinder, rather than facilitate, desirable social change. In argument before the Supreme Court, Ryan (who was both Premier and Attorney-General at the time) submitted that in this case artificial constitutional constraints on political power were not necessary because 'no self-respecting Government would be likely to abuse these extensive powers'.²⁹⁰ Thus, Ryan was not altogether opposed to the separation of powers.²⁹¹ He certainly thought that the courts should not interfere with matters which were properly the concern of Parliament and the executive government: 'whether the Act should be upon the Statute Book is a matter for Parliament. Whether the Executive should appoint another Judge is a matter for the Executive; it is not a matter for this Bench.'²⁹²

The Supreme Court, however, rejected Ryan's arguments and, by implication, the premises upon which they were based. It replied that 'no self-respecting Legislature would be willing to confer such powers upon the Executive Government'.²⁹³ Implicit in this reply was the proposition that constitutional constraints on governmental power are designed to prevent an abuse of power, in particular by the executive government. In concluding that the Constitution of Queensland could only be amended or repealed by a deliberate and explicit

²⁸⁷ *Re McCawley* [1918] QSR 62, 82 (Cooper CJ). Remarkably, the Court wrote *as if it were Ryan's argument* that the legislation had 'surrendered' to the executive the power to 'pack' the Court. The fear of court-stacking is most likely to have been the Court's own.

²⁸⁸ *Ibid* 76, 82 (Cooper CJ).

²⁸⁹ Fitzgerald and Thornton, above n 48, 26, observe that a 'Labor government ... could safeguard the unions' welfare through the appointment of sympathetic, or at least "neutral", persons to the arbitral benches.'

²⁹⁰ *Re McCawley* [1918] QSR 62, 82 (Cooper CJ). Again, these words are likely the Court's own restatement of Ryan's submissions. The characterisation of the powers as 'extensive' is unlikely to have been Ryan's.

²⁹¹ According to Murphy, 'Thomas Joseph Ryan', above n 44, 280, 'Ryan was always a constitutionalist who upheld the law.' On Ryan's support for the legal profession in the face of radical labour denunciations, see Johnston, above n 22, 36, 39.

²⁹² Transcript of Proceedings, *R v McCawley* (Supreme Court of Queensland, Attorney-General Ryan, 6 December 1917) (Queensland State Archives, Archive No CRS/207, 30). Cf Murphy, *T J Ryan*, above n 3, 373, who ascribes to Ryan the simple belief that 'the elected representatives had full power to decide the laws of the State.'

²⁹³ *Re McCawley* [1918] QSR 62, 82 (Cooper CJ).

enactment to that effect, the Court determinedly imposed a constitutional constraint upon a legislature which had been gripped, it thought, by ‘an almost feverish anxiety’.²⁹⁴

Reflecting, perhaps, on some of the more intemperate observations of the Supreme Court, Isaacs and Rich JJ in the High Court asserted that a judge must not assume that anything ‘absurd or unjust’ is intended by the legislature, and that a judge certainly has no right to ‘brand as absurd or unjust any policy which he personally might not approve’.²⁹⁵ However, this did not prevent members of the High Court from making a number of observations of a noticeably personal and partisan nature. Like Cooper CJ before him, Griffith CJ doubted, for example, whether McCawley possessed the necessary qualifications for appointment as a judge, characterising McCawley as a ‘mere clerk’.²⁹⁶ Likewise, during argument, Barton and Gavan Duffy JJ described the Queensland Arbitration Court deprecatingly as a kind of ‘drafting area’²⁹⁷ and a ‘sort of incubator’²⁹⁸ for prospective Supreme Court appointees. By contrast, Higgins J clearly thought that there was good reason for appointment of judges from the Queensland Arbitration Court to the Supreme Court²⁹⁹ and, notably, his Honour alone concluded that McCawley’s appointment to the Supreme Court was not limited to that time during which he continued to hold office as a judge or President of the Queensland Arbitration Court.³⁰⁰ Higgins J’s personal, professional and ideological sympathy for McCawley’s position is understandable, given that his Honour held the equivalent federal positions of both President of the Queensland Arbitration Court and High Court judge. However, his Honour’s private correspondence with McCawley over these very matters casts a rather dark shadow over his willingness to sit and hear the case.³⁰¹

In this context, Ryan, Theodore and McCawley could certainly be forgiven for thinking that the ‘constitutional’ opposition that they encountered in the courts was, at base, politically motivated.³⁰² Just as clearly, however, their opponents could point to the way in which the theory of parliamentary sovereignty favoured

²⁹⁴ Ibid.

²⁹⁵ *McCawley v The King* (1918) 26 CLR 9, 45.

²⁹⁶ Ibid 28. Griffith CJ’s exact words were: ‘the person in question was generally known as a mere clerk and not as a barrister’. This echoed the submission made before the High Court that McCawley had acted as nothing more than a ‘junior clerk’: Transcript of Proceedings, *McCawley v The King* (High Court of Australia, Hayden Starke, 12 September 1918) (Queensland State Archives, Archive No CRS/207, 474).

²⁹⁷ Transcript of Proceedings, *McCawley v The King* (High Court of Australia, Barton J, 12 September 1918) (Queensland State Archives, Archive No CRS/207, 299).

²⁹⁸ Transcript of Proceedings, *McCawley v The King* (High Court of Australia, Gavan Duffy J, 10 September 1918) (Queensland State Archives, Archive No CRS/207, 310).

²⁹⁹ Ibid (Higgins J, 10 September 1918) (Queensland State Archives, Archive No CRS/207, 320).

³⁰⁰ *McCawley v The King* (1918) 26 CLR 9, 69–72.

³⁰¹ See Letter from McCawley to Higgins, 2 February 1918, above n 1.

³⁰² The opinion of the Privy Council was generally free from some of the more caustic comments made by members of the two Australian courts. During argument, Lord Dunedin stated that the Privy Council would have ‘nothing to do with ... the personal side of the matter’ and was ‘without sympathy to one side or the other’: Transcript of Proceedings, *McCawley v The King* (Privy Council, Lord Dunedin, 2 February 1920) (Queensland State Archives, Archive No CRS/207, 33).

by Isaacs, Rich and Higgins JJ facilitated the political objectives of the Labor Government. What, then, of the supposed neutrality of the Constitution of Queensland as embodying the fundamental ground rules upon which all sides of politics might agree? In rejecting revolutionary methods, the Fabians had certainly embraced the potential of parliamentary and legal methods to achieve social justice objectives. But this did not mean an acceptance of the constitutional status quo. Instead, it meant reform of a wide range of constitutional fundamentals, such as the electoral system and the Legislative Council. In *McCawley's Case*, it also meant a rejection of the 'fundamental law' theory that had been advanced by Griffith CJ, Barton and O'Connor JJ.

It would not have been an easy matter, however, for the Labor Government to initiate an amendment to the *Constitution Act* separately and prior to the passage of the *Industrial Arbitration Act*. Passage of the latter Act had proved difficult enough, particularly given the determined opposition of the Legislative Council. Yet, as Griffith CJ suggested, a deliberate and explicit alteration to the *Constitution Act* would have brought the issues of constitutional principle to the forefront of public and parliamentary debate. A debate of this kind would have enabled opponents to argue, with some force, that the constitutional protection of the independence of the judiciary was very much at stake. The terms of debate could thus have become more clearly constitutional in character, abstracted from the immediate implications for partisan politics.

2 Politico-Constitutional Theory

It is tolerably clear, then, that the legal conclusions adopted by the judges tended to correspond generally to their respective personal, partisan and ideological commitments. Indeed, while the decision of the Privy Council was free of any explicit suggestion of a 'political' interest in the outcome, it could be said that Lord Birkenhead LC's sympathy for moderate social reform within the frame of Conservative Party politics³⁰³ was at least compatible with the conclusion that the Parliament of Queensland should be 'master of its own household'.³⁰⁴ But can the reasoning of the judges be *reduced* to expressions of personal preference, partisan commitment and ideological bias? What *was* the basis for the decision?

While a definitive answer to this question will probably remain elusive, it seems to be at least arguable that the critical ground of the decision was neither purely legal, nor reductively political, but lay somewhere between these two poles — at the point of contact, as it were, between fundamental constitutional theory on one hand and fundamental political philosophy on the other. In other words, the case was ultimately decided in terms of contrasting theories of a 'politico-constitutional' nature. As Sir Owen Dixon once observed:

An inquiry into the source whence the law derives its authority in a community, if prosecuted too far, becomes merely metaphysical. But if a theoretical answer be adopted by a system of law as part of its principles, it will not remain a mere

³⁰³ On Lord Birkenhead's interest in social reform as a kind of 'progressive Tory', see Campbell, above n 226, 527.

³⁰⁴ *McCawley v The King* (1920) 28 CLR 106, 125 (Lord Birkenhead LC).

speculative explanation of juristic facts. It will possess the capacity of producing rules of law.³⁰⁵

The decision in McCawley's Case to opt for either fundamental law or parliamentary sovereignty seems ultimately to have turned on a conception of what 'constitutional law' ought to be.³⁰⁶ Is it a 'fundamental law' that limits the power of the legislature, or is it, at base, merely a 'positive law' ultimately derived from the legislature? A choice between these two conceptions has to be made. And at this point, abstract political theory provides some important guidance. In politico-constitutional terms, the question can be reformulated as: should constitutional law be seen principally as a facilitator of social and economic reform, ultimately controlled and directed by a popularly elected legislature, or should it be conceived primarily as a means by which governmental and legislative power is controlled, so that a sphere of private freedom can be maintained? Abstract political theory — along either social democratic or liberal lines — can in this way provide a reason for opting for one conception of constitutional law over another.

Thus, the decision seems to have turned upon competing conceptions of what it meant for Queensland to be a 'self-governing community'.³⁰⁷ While all agreed that the mark of a self-governing community was that it would be fully able to determine the shape of its own Constitution,³⁰⁸ there were different views of what it meant for a community to possess this kind of self-constituting power. According to Lord Birkenhead LC, as well as Isaacs, Rich and Higgins JJ, constituent power is and ought to be vested in the Queensland Parliament, and constituent power, by its very nature, cannot be limited by constitutional law.³⁰⁹ However, Griffith CJ, Barton and O'Connor JJ maintained that there must be a constituent power lying behind the Constitution of Queensland more fundamental than the legislature, and their ultimate reason for this was, quite bluntly, that they favoured the conception of the Constitution as a kind of fundamental law.³¹⁰ Thus, the political question of what it meant to be a self-governing community returned, ultimately, to a constitutional question about the nature and location of constituent power.

Almost 30 years earlier, at the Federal Convention of 1891, Griffith had himself articulated a conception of what that constituent power might be. During

³⁰⁵ Sir Owen Dixon, 'The Statute of Westminster' in Severin Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (1965) 82, 82.

³⁰⁶ See *McCawley v The King* (1918) 26 CLR 9, 22–4 (Griffith CJ), 32 (Barton J), 47, 52, 57–8 (Isaacs and Rich JJ), 73 (Higgins J), 83 (Powers J); *McCawley v The King* (1920) 28 CLR 106, 114–15 (Lord Birkenhead LC). See also *Cooper* (1907) 4 CLR 1304, 1313 (Griffith CJ), 1328 (O'Connor J).

³⁰⁷ See, eg, *McCawley v The King* (1918) 26 CLR 9, 60 (Isaacs and Rich JJ).

³⁰⁸ Cf *Taylor* (1917) 23 CLR 457, 474 (Isaacs J); *McCawley v The King* (1920) 28 CLR 106, 117 (Lord Birkenhead LC).

³⁰⁹ Cf the submissions of Lukin and Henchman, that the Queensland Parliament is a 'constituent' body, that is able to amend its own Constitution by an ordinary statute: see *Cooper* (1907) 4 CLR 1304, 1309–10 (O'Connor J).

³¹⁰ See *McCawley v The King* (1918) 26 CLR 9, 24–5 (Griffith CJ), 28, 31–3 (Barton J); see also at 83 (Powers J). See also *Cooper* (1907) 4 CLR 1304, 1313–14 (Griffith CJ), 1317–18 (Barton J), 1326–9 (O'Connor J).

debate over the terms of the proposed Constitution for an Australian federation, Griffith expressed the wish that the Australian colonies might some day adopt the ‘American theory’ that ‘all constitutions are the act of the individual members of the community, and that they delegate their power to the legislature, and that that legislature can only work within the authority given to it.’³¹¹ It is significant that Griffith’s remarks were made in the context of the debate over what would eventually become the *Commonwealth Constitution* s 51(xxxviii).³¹² The framers of the *Commonwealth Constitution* were at the time conscious that some provision would have to be made for the exercise, within Australia, of the fundamental legislative powers exercisable by the Imperial Parliament. While the ultimate decision on s 51(xxxviii) would be to confer upon the Commonwealth and state Parliaments the capacity to exercise those powers, Griffith was acutely aware of the limitations of such a provision. Griffith acknowledged, in particular, that the English approach had in fact been adopted in the Australian colonies, for the Parliaments had power to alter their own Constitutions.³¹³ But he appears to have been rather hostile to the legislative sovereignty that this implied, and he emphasised, at least, that in exercising their powers, the colonies could not go so far as to renounce their allegiance to the Crown.³¹⁴

When Griffith CJ’s judgments in *Cooper* and *McCawley v The King* are assessed in this light, it appears that his Honour was striving to interpret the Constitution of Queensland in a manner that came as close as possible to embodying the ‘American’ theory of popular sovereignty. While his Honour could not actually assert that the people of Queensland had established the Constitution of Queensland by virtue of their fundamental constitutive power, Griffith CJ could at least conclude that they possessed a kind of fundamental law which bound — if only in a formal sense — the legislative powers of the Queensland Parliament. Moreover, it is not without significance that Griffith CJ described the American theory as locating ultimate constitutive authority in the *individual* members of the community. The theory of constitutionalism to which his Honour appealed was to this extent a liberal-individualist one — a politico-constitutional theory in which law, and particularly constitutional law, is essentially a means by which governmental power is strictly defined and limited.

On the other hand, the view of parliamentary sovereignty articulated by Isaacs and Higgins JJ coalesced rather neatly with the reformist conception of govern-

³¹¹ *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 490 (Sir Samuel Griffith); see also *Official Report of the National Australasian Convention Debates*, Sydney, 6 March 1891, 91–5 (Edmund Barton).

³¹² Section 51(xxxviii) provides that the Commonwealth Parliament shall have power to make laws with respect to
the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this *Constitution* be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

See generally Nicholas Aroney, ‘Sir Samuel Griffith’s Vision of Australian Federalism’ in Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 179, 194–7.

³¹³ *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 490 (Sir Samuel Griffith).

³¹⁴ *Ibid.*

ment which they both supported — and had articulated during the Convention Debates in the 1890s, often in opposition to the views of Griffith, Barton and others.³¹⁵ On this conception, while fundamental law in liberal-conservative hands is liable to function as an impediment to desirable social change, governmental power when in socially progressive hands can be a very effective instrument of social reform. And, as Professor W G McMinn once observed, the approach to interpreting the *Commonwealth Constitution* adopted by Isaacs and Higgins JJ enabled the document to be treated as ‘an organism capable of growth and adaptation to changing forces in society, rather than a carefully regulated machine for the balancing of these forces’.³¹⁶ Their Honours’ decision in McCawley’s Case, it seems, was nothing but an outworking of essentially the same fundamental politico-constitutional theory in the context of the Constitution of Queensland.

IV CONCLUSIONS

The appointment of McCawley to high judicial office was a decision destined to provoke political controversy. While the objections to his appointment were outwardly ‘legal’ and ‘constitutional’ in character, they were undoubtedly motivated by underlying ideological, partisan and even personal factors. Moreover, the ‘political’ orientations of the judges who heard the case were very consistent with their ultimate ‘legal’ conclusions. The radical-liberal political perspectives of Isaacs and Higgins JJ, for example, dovetailed neatly with their decision to uphold Queensland legislation setting up a Queensland Arbitration Court, as well as to affirm the plenary powers of the state Parliament. Furthermore, Higgins J had been appointed to a position at a federal level which mirrored McCawley’s own position, and also had close personal and professional ties with McCawley. His Honour even engaged in correspondence with McCawley concerning his appointment and the associated controversy, yet did not withdraw from hearing the case.

Does this mean that the conclusions of Isaacs and Higgins JJ were outcome-oriented, influenced by a desire to see a man with McCawley’s specific political convictions appointed to a position which enabled him to pursue policies with which they agreed? By the same token, Griffith CJ, Barton and O’Connor JJ, as well as Cooper CJ and most of the other members of the Supreme Court, held very different political views from those of the Queensland Labor Government, and Cooper CJ had clashed heatedly with Premier Ryan on more than one occasion. Does this mean that their Honours found fault with

³¹⁵ See, eg, the exchange between Isaacs and Barton in *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 179–81 (Edmund Barton, Isaac Alfred Isaacs); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 31 March 1897, 388–9, 392, 394 (Isaac Alfred Isaacs, Edmund Barton). See also *Official Record of the Debates of the Australasian Convention*, Adelaide, 15 April 1897, 641–9 (Henry Bournes Higgins); *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 September 1897, 259–65 (Henry Bournes Higgins); *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 10 September 1897, 345–51 (Henry Bournes Higgins).

³¹⁶ W G McMinn, *A Constitutional History of Australia* (1979) 137.

McCawley's appointment for partisan reasons? If not, why the remarkable coincidence?

Both sides accepted that Australian law and institutions of government derived, ultimately, from the overarching sovereignty of the United Kingdom Parliament. It was also accepted that ordinary political endeavour must be pursued within the existing framework of law, and that the locus of legitimate law-making and governing power was the system of responsible government established under the Constitution of Queensland. Beyond this, however, consensus broke down. There was disagreement, both prescriptively and descriptively, between the competing ideals of fundamental law and parliamentary sovereignty. There was also disagreement over whether it was practically possible or conceptually coherent for there to be a middle ground in which Parliament is competent to alter the Constitution of Queensland by ordinary legislation, but cannot legislate in a manner that would otherwise be inconsistent with the Constitution without first deliberately and explicitly amending it.

These disagreements were explicitly legal and constitutional, and they engaged both positive constitutional law and normative constitutional theory. However, they were at the same time clearly related to normative positions of a more politico-constitutional character, relating to the nature and function of law and government generally. On one hand, law could be conceived essentially as a facilitator of private transactions and engagements, and constitutional law as a means by which the power of government to make and administer law is defined and limited. On the other hand, law could be conceived as a means of stimulating social and economic reform, and constitutional law as that which facilitates such interventions.

Closely related to these conceptions of law, moreover, were purely political beliefs concerning the functioning of the market economy and the potential for economic intervention. The establishment of a special Queensland Arbitration Court with power to resolve industrial disputes by granting awards which determined wages and other working conditions was clearly an attempt to reform the labour market along Fabian socialist lines. The Labor Government's initiative was obviously political, in a partisan and ideological sense, as was the political opposition. The appointment of McCawley, a man who evidently sympathised with governmental policy, over other more experienced candidates, was just as clearly ideological, partisan and personal in motivation, as was, again, the opposition to the appointment.

Do these connections between the legal, constitutional and adjudicative dimensions, as well as the ideological, partisan and personal dimensions, evident in McCawley's Case, render the judgments of the Supreme Court, High Court and Privy Council ultimately ideological, partisan and even personal in character? There is no doubt that the judges had relevant political commitments and that their legal decisions on the specific constitutional questions were generally consistent with these commitments. However, to suggest that their decisions can be *reduced* to either personal animosity, political partisanship or ideological prejudice is to go further than the evidence suggests. It is not necessary to appeal to personal or partisan motives in order to explain the reasoning and results in the cases. The politico-constitutional theory which lies at the intersection of

political theory and constitutional theory is sufficient to explain the evidence. What does it mean for a state to be a 'self-governing community'? Where is ultimate constitutive authority to be located? Is it to be in the Parliament or in a constituent power even more fundamental than this? Competing answers to these fundamental questions were invoked by both sides in the litigation. Yet well before the specific issues relating to McCawley's appointment ever came before them, the judges had themselves articulated clearly formulated positions on these questions. Moreover, as regards the resolution of the case at hand, the particular ideological, material or personal reasons why these positions were originally adopted were irrelevant. The critical departure point was a difference in politico-constitutional theory over the nature and location of ultimate constitutive authority in Queensland.

Such a conclusion tends to confirm the approach of legal theorists who emphasise that on questions concerning the ultimate constitutional foundations of a legal system, moral or political considerations are unavoidably decisive. For natural law theorists, such as John Finnis, questions such as these necessarily turn on general principles of practical reason, the identification and application of which engage moral considerations.³¹⁷ For legal positivists, such as H L A Hart, the identification of the ultimate 'rule of recognition' within a legal system depends upon a social fact: the attitude of the officials within that system.³¹⁸ Hart was not particularly concerned with *why* particular officials might accept a particular rule of recognition as binding; they might do so for moral, traditional, conformist or self-interested reasons.³¹⁹ Finnis, however, has maintained that in the 'central or standard instance' such reasons will be essentially moral in nature,³²⁰ and T R S Allan has argued that such questions will turn on the 'political theory' or 'political morality' on which the system is based and justified.³²¹ Rolf Sartorius has likewise said that in such cases, the courts unavoidably turn to extra-legal moral reasons, which are wrapped up with 'the total judicial theory of the constitution'.³²² Neil MacCormick has similarly remarked that:

possible alternative rulings on fundamental constitutional points must be evaluated in terms of constitutional values as understood by the judges and as expressed in principles concerning the right basis of authority and allocation of authority in the state.³²³

³¹⁷ See J M Finnis, 'Revolutions and Continuity of Law' in A W B Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (1973) 44; John Finnis, *Natural Law and Natural Rights* (1980) 245–54, 266–70.

³¹⁸ H L A Hart, *The Concept of Law* (2nd ed, 1994) 100.

³¹⁹ *Ibid* 198–9, 226, 257.

³²⁰ Finnis, 'Revolutions and Continuity of Law', above n 317, 74–6.

³²¹ T R S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993) 265–6, following Ronald Dworkin, *Law's Empire* (1986). See also Finnis, *Natural Law and Natural Rights*, above n 317, 281–90.

³²² Rolf Sartorius, 'Hart's Concept of Law' in Robert S Summers (ed), *More Essays in Legal Philosophy: General Assessments of Legal Philosophies* (1971) 131, 151–61.

³²³ Neil MacCormick, *Legal Reasoning and Legal Theory* (1978) 133. For further statements of 'moral attitude positivism', see Kent Greenawalt, 'Hart's Rule of Recognition and the United

The fact that the judges in McCawley's Case looked, in the final analysis, to considerations of a politico-constitutional character to help resolve the case tends to corroborate the proposition that judges usually (if not invariably) draw upon reasons of political morality — rather than simply traditional, conformist or self-interested considerations — when dealing with such questions. From a Hartian perspective, McCawley's Case was technically a 'hard case': the judges could not avoid exercising a law-making discretion in order to make clear whether the amending power in *Order in Council* cl 22 and *Colonial Laws Validity Act* s 5 meant that the Queensland Parliament could alter the *Constitution Act* merely by implication. However, the case was also on the cusp, as it were, of the rule of recognition itself. And today, the termination of the legislative authority of the Imperial Parliament in 1986³²⁴ means that the effect of the decision in McCawley's Case has been to transform the amending power conferred upon the Queensland Parliament into something resembling an ultimate, constitutive power. If Griffith CJ's interpretation had prevailed, however, the rule of recognition in Queensland could well have evolved into something of a very different nature indeed.

Recent assessments of McCawley's appointments, the case and the constitutional outcome may be enlightening in this respect. Even though McCawley's Case was in its day a highly charged political affair, current appraisals are remarkably unanimous on a number of specific points. Most significant amongst these is the conclusion that the Privy Council's ultimate decision effectively imposed a system of parliamentary 'despotism' upon the people of Queensland. Professor R D Lumb, for example, perceived in the decision a 'thoroughly Diceyan approach to parliamentary sovereignty'.³²⁵ Likewise, Justice Bruce H McPherson has read it as importing Dicey's doctrine of '[a]bsolute legislative despotism', under which 'an Executive which succeeded in controlling Parliament occupied a position from which it was able to dominate all the organs of State.'³²⁶ Indeed, according to Justice McPherson:

In fashioning an instrument of unlimited power for their own use the politicians of that era lacked the wisdom to foresee, or perhaps to care, that control of it would one day pass to their opponents. Those who now regret the ambit of Executive authority in Queensland can be in no doubt who were responsible for creating it.³²⁷

Most notably, even the current President of the Queensland Arbitration Court, D R Hall, recently characterised Dicey's theory of parliamentary sovereignty — on which McCawley's Case rested — as a 'dogma' and a 'doctrine of legislative

States' (1988) 1 *Ratio Juris* 40; Neil MacCormick, 'The Concept of Law and *The Concept of Law*' in Robert P George (ed), *The Autonomy of Law: Essays on Legal Positivism* (1996) 163; Richard Holton, 'Positivism and the Internal Point of View' (1998) 17 *Law and Philosophy* 597.

³²⁴ See *Australia Act 1986* (Cth) and *Australia Act 1986* (UK) c 2, both discussed in *Sue v Hill* (1999) 199 CLR 462, 490–2 (Gleeson CJ, Gummow and Hayne JJ).

³²⁵ R D Lumb, *Australian Constitutionalism* (1983) 133.

³²⁶ McPherson, above n 4, 298. Cf Sir Owen Dixon, 'The Law and the Constitution' in Severin Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (1965) 38, 49.

³²⁷ McPherson, above n 4, 399.

despotism.³²⁸ Moreover, reflecting on the initial appointment of McCawley to the Queensland Arbitration Court, he has also said that ‘anyone with ears to hear would recognise that the position of President had been politicised’.³²⁹ Professor Malcolm Cope, while also characterising the appointment as ‘political’, has certainly endeavoured to make the McCawley appointment at least comprehensible in terms of Labor Party policy,³³⁰ judging McCawley’s ‘temperamental fitness’ and his ‘fundamental political role’ to be ‘vindicated’ by the growth in union membership and the integration of unions into the industrial relations process under his presidency.³³¹ However, Cope remains sensitive to the issue of judicial independence, observing that the decision of the Privy Council ‘gave free rein to Parliamentary control of the Judiciary by a simple Act of Parliament.’³³² John Pyke goes even further, expressing regret that the Privy Council did not take the opportunity ‘to promote the doctrine of *constitutionalism* to a higher place in State constitutional law’,³³³ and articulating the hope that the High Court might one day revive ‘the sensible and logical doctrine that it had developed in *Cooper*, that a law inconsistent with a State Constitution Act is invalid.’³³⁴

One’s assessment of McCawley’s Case may still depend, as Justice McPherson has put it, ‘upon the political allegiance of the narrator’.³³⁵ However, while a number of eloquent and powerfully argued defences of the general doctrine of parliamentary sovereignty have emerged in recent times,³³⁶ criticism of the ‘legislative despotism’ in Queensland that is said to have resulted from the case is widely shared among those who have examined McCawley’s Case in detail. The fact that commentators representing a wide range of positions on the political spectrum have expressed at least some regret regarding the constitutional consequences of McCawley’s Case may suggest that the issues in the case no longer give rise to the sharply divided ideological conflict that they once did. Among practising lawyers and legal scholars, at least, a consensus about the problematic politico-constitutional implications of the decision seems to have developed.

In the light of this consensus, it is perhaps not surprising that, despite McCawley’s Case, many aspects of the Australian state Constitutions are today effectively entrenched through manner and form provisions which require special procedures to be followed in order to amend the relevant constitutional provi-

³²⁸ D R Hall, ‘The McCawley Story’ (Paper presented at the Industrial Relations Society of Queensland Inc Education Seminar, Brisbane, 29 July 2003) 3 <http://www.irsq.asn.au/irsq_two_2003.pdf>.

³²⁹ *Ibid.*

³³⁰ Cope, above n 2, 235.

³³¹ *Ibid.* 232.

³³² *Ibid.* 242.

³³³ John Pyke, ‘Book Review’ (2004) 4 *Queensland University of Technology Law and Justice Journal* 121, 122–3 (emphasis in original).

³³⁴ *Ibid.* 123.

³³⁵ McPherson, above n 4, 399.

³³⁶ See especially Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999).

sions.³³⁷ Many of these procedures involve the holding of a popular referendum or passage of the legislation by a special majority in the relevant Parliament. Some, however, are simply concerned to ensure that amendments to constitutional provisions are only enacted following explicit and deliberate consideration of the constitutional issues involved — that is, the very point that was at issue in McCawley's Case. For example, *Constitution Act 1975* (Vic) s 85(5) requires that constitutional amendments relating to the jurisdiction of the Supreme Court of Victoria be made explicitly, rather than by implication. Similarly, the Queensland Constitutional Review Commission recently recommended that the entire *Constitution Act* be entrenched through the requirement that any Bill to amend the Constitution of Queensland undergo a delay of one calendar month between the First and Second Readings, that there be a report on the Bill by the Legal, Constitutional and Administrative Review Committee before the Second Reading and that the Bill have the words 'Constitution Amendment' in its short title.³³⁸ The objective here, as for the majority judges of the Supreme Court and High Court in McCawley's Case, was that constitutional amendments should only occur deliberately and explicitly, rather than inadvertently and implicitly.³³⁹

The entrenchment of aspects of the state Constitutions represents a qualification of the elementary principle determined by the Privy Council in McCawley's Case that the state Parliaments enjoy full power to amend their Constitutions in any manner whatsoever. And yet their Lordships clearly recognised the possibility of such qualifications in stating that the Queensland Parliament is 'master of its own household, *except insofar as its powers have in special cases been restricted*.'³⁴⁰ Thus, McCawley's Case is fundamental, not only in respect of the 'sovereign' powers of the state legislatures, but also in relation to the effectiveness of manner and form provisions which place restrictions upon those powers. Moreover, while their Lordships did not say so explicitly, it is consistent with the reasoning of the Privy Council that any such restrictions would have to be derived ultimately from the authority of the Imperial Parliament. Hence, the only generally accepted and judicially sanctioned foundation for the effectiveness of manner and form provisions depends specifically upon Imperial legislation or legislation ultimately derived from Imperial legislation operating in Australia by paramount force, initially s 5 of the *Colonial Laws Validity Act*, and now s 6 of

³³⁷ See, eg, *Constitution Act 1902* (NSW) ss 7A, 7B; *Constitution Act* s 53; *Constitution Act 1934* (SA) ss 8, 10A, 64A, 88; *Constitution Act 1934* (Tas) s 41A; *Constitution Act 1975* (Vic) ss 18, 85; *Constitution Act 1889* (WA) s 73.

³³⁸ Queensland Constitutional Review Commission, Queensland Government, *Report on the Possible Reform of and Changes to the Acts and Laws That Relate to the Queensland Constitution* (2000) ch 12.

³³⁹ The Legal, Constitutional and Administrative Review Committee of the Parliament of Queensland, supporting the proposal, observed that such requirements would 'reinforce the superior status of the Constitution and assist to prevent implied repeal without inhibiting the capacity of the Parliament to respond appropriately to the changing needs of society.': Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *Review of the Queensland Constitutional Review Commission's Recommendations Regarding Entrenchment of the Queensland Constitution* (2003) 23.

³⁴⁰ *McCawley v The King* (1920) 28 CLR 106, 125 (Lord Birkenhead LC) (emphasis added).

the *Australia Act 1986* (Cth), itself based upon the *Commonwealth Constitution* s 51(xxxviii).³⁴¹

Significantly, these provisions apply only in respect of laws which concern the ‘constitution, powers or procedures’ of each state Parliament — they do not protect just any provision which happens to be contained within a state Constitution.³⁴² Thus, also consonant with *McCawley’s Case*, the High Court has concluded that the existence of *Australia Act 1986* (Cth) s 6 leaves little if any room for the operation of the wider, so-called ‘*Ranasinghe* principle’ that ‘a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law’.³⁴³ As Kirby J has suggested, unless the ‘instrument’ in question affords some ‘higher source of law’ that is paramount to the legislative powers of the Parliament, the purported entrenchment will be ineffective.³⁴⁴ In characterising the *Constitution Act* as a kind of ‘fundamental law’, the majority of the High Court in *McCawley’s Case* were ascribing to that Act paramount force in much the same sense. However, as Lord Birkenhead LC pointed out, the problem was the absence of any special method by which the *Constitution Act* had to be amended. Notably, members of the High Court have likewise cast doubt upon the legitimacy of manner and form provisions inserted into a state Constitution through the ordinary legislative process yet which impose more onerous procedures, such as a popular referendum or a special majority, for their amendment.³⁴⁵

In these diverse ways, *McCawley’s Case* remains fundamental to state constitutional law in Australia, and yet also in tension with the widespread consensus that at least some aspects of the state Constitutions should lie beyond the ordinary legislative powers of the state legislatures. Whether, however, this broadly felt desire for constitutional restraints on governmental power will translate into bipartisan political support for thorough constitutional reform in Queensland — or in any of the other Australian states — is of course another question. The Parliament of Queensland has recently given the people of Queensland a new Constitution,³⁴⁶ but a Constitution truly derived from the people — a Constitution of the kind envisaged by Sir Samuel Griffith — has not, as yet, materialised.

³⁴¹ *McGinty v Western Australia* (1995) 186 CLR 140, 297 (Gummow J); *A-G (WA) v Marquet* (2003) 217 CLR 545, 574 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 616–17 (Kirby J). Cf George Winterton, ‘Can the Commonwealth Parliament Enact “Manner and Form” Legislation?’ (1980) 11 *Federal Law Review* 167; Jeffrey D Goldsworthy, ‘Manner and Form in the Australian States’ (1987) 16 *Melbourne University Law Review* 403; Lumb, *The Constitutions of the Australian States*, above n 101, ch 7; Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006) ch 6.

³⁴² *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 429–30 (Dixon J).

³⁴³ *Bribery Commissioner v Ranasinghe* [1965] AC 172, 197 (Lord Pearce), considered in *A-G (WA) v Marquet* (2003) 217 CLR 545, 574 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 616–17 (Kirby J).

³⁴⁴ *A-G (WA) v Marquet* (2003) 217 CLR 545, 617 (Kirby J).

³⁴⁵ *McGinty v Western Australia* (1996) 186 CLR 140, 297 (Gummow J); *A-G (WA) v Marquet* (2003) 217 CLR 545, 611 (Kirby J).

³⁴⁶ *Constitution of Queensland 2001* (Qld). See also *Parliament of Queensland Act 2001* (Qld).