

ENHANCING CRITICAL THINKING AND INTERNATIONAL COMPARATIVE APPROACHES TO CONSTITUTIONAL LAW EDUCATION IN AUSTRALIA

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ABSTRACT

Although legal academics tend to think of constitutional law education as a process that commences at University, its foundations are based on background knowledge acquired by students at school. The current school civics curriculum, *Discovering Democracy*, gives students little grounding in broad concepts such as the meaning of representation, the relationship between the individual and society and theories of government. The result is that students coming to University bring limited contextual knowledge that would assist them in their learning. Furthermore, the fact that constitutional law is compressed into a single semester at most Law Schools, means that the teaching of foundational topics, such as constitutional history and concepts such as democracy, representation and freedom –and in particular, the contested nature of those concepts – receive little space in the curriculum. The consequence is that we produce graduates who are well-equipped to apply the technicalities of the Constitution, but who have had little opportunity to engage in critical thinking about it, and who accept its current form as a given. This has broader societal implications, in that it contributes to the general conservatism of Australian society in relation to constitutional reform. This paper explores these issues, with a particular focus on two specific areas of our Constitution – electoral representation, and legislative scrutiny of the executive. The author urges Law Schools to expand the space allocated to constitutional law in the curriculum so that students take a foundational subject in constitutional law theory before studying the Constitution itself (where that is not already the case) and to incorporate into the curriculum international comparative material against which students can critique our institutions.

I. INTRODUCTION

This paper is the product of teaching constitutional law to undergraduate and research students over 25 years in three jurisdictions, including 15 years in Australia.¹ The first tutorial I usually set the students revolves around the issue of constitutional legitimacy, and requires them to do readings on positivism, natural law, and the Nuremberg trials and then to relate them to contemporary issues in Australian constitutional law. What strikes me most forcefully about my students' reaction to this exercise is the fact that many of them - often a majority - consider the Nuremberg trials to be nothing more than 'victors' justice', and are either puzzled by, or resistant to, the idea of values to which the legal system should be subject. The other striking reaction is that the majority of students appear happy with our current institutions despite what, in the light of constitutional theory, are its manifest flaws. The positivist mindset of young people - who one would think would usually be idealistic and critical - is surprising. The consequences become apparent in the way they engage with constitutional law - in particular their preparedness to accept the law as something that 'is' rather than as a set of norms that require analysis against a supra-legal set of values.

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1 The author previously taught constitutional law at the University of Natal, Pietermaritzburg, South Africa, the University of Waikato, New Zealand and at the University of Canberra.

This paper explores the extent to which Australian constitutional education in its broadest sense adequately prepares citizens and law graduates as critical thinkers about government. Part II discusses the state of civics education in schools, which is an important issue (and one not usually addressed by University law teachers) because for most students (other than those who have done legal studies in Years 11 and 12) civics education provides the only foundational knowledge they have about our constitutional system before arriving at University. Part III looks at the space allocated to constitutional law at Australian Law Schools, in order to determine the extent to which an opportunity is provided for critical and comparative work, and then discusses two key areas of constitutional law (among many) in need of reform - the electoral system and enhancement of parliamentary scrutiny of the executive - which could provide the opportunity to foster critical thinking in students. Part IV briefly discusses material from other jurisdictions which could be incorporated into our curricula in order to foster debate.

II. CIVICS EDUCATION

The school civics curriculum, *Discovering Democracy*, was released in 1997.² It was preceded by the publication of a report in 1994 by the Civics Expert Group established by the Commonwealth which stated that:

Our system of government relies for its efficacy and legitimacy on an informed citizenry; without active, knowledgeable citizens the forms of democratic representation remain empty; without vigilant, informed citizens there is no check on potential tyranny.³

Before discussing the content of the *Discovering Democracy* curriculum it is important to note that civic education faces a limitation imposed by the structure of education across Australia in that, after Year 10, the only mandatory subjects are English and mathematics. For this reason, the curriculum covers only middle primary, upper primary, lower secondary and middle secondary school - equivalent to Years 3 - 10.

On one level, *Discovering Democracy* is excellent. It explains the operation of the Constitution clearly, accurately and comprehensively. What then is missing? At the time when the Expert Advisory Group was doing its work, the following was stated in a discussion paper on civics and citizenship:

[Y]oung Australians often leave school imbued with democratic values, which they have picked up by a kind of osmosis. The weakness is that many of them might not have any clear idea of where those values come from, or even how to put them into words. How are they able to defend those values unless they know the processes by which those values and not others emerged? How are they to challenge values with which they do not agree, unless they see the processes by which a society can change?⁴

Similarly, a few years later, when the *Discovering Democracy* curriculum was being written, the following criticism was leveled at the historical state of civics education in Australia:

2 Australian Government, Department of Education, Employment and Workplace Relations *Discovering Democracy* <<http://www.civicsandcitizenship.edu.au/cce>>. See also Stacey Hattensen and Robyn Platt, *Australians All! Discovering Democracy Australian Readers – Lower Primary* (Curriculum Corporation, 2001).

3 Civics Expert Group, *Whereas the People... Civics and Citizenship Education – Report of the Civics Expert Group* (Australian Government Publications Service, 1994) 15-16.

4 Donald Horne and Penelope Leyland, *Teaching Young Australians to be Australian Citizens – A 2001 Centennial National Priority* (National Centre for Australian Studies, Monash University 1994) 2.

Students were presented with facts about Australia’s political history and political system, but were not encouraged to think critically about their political inheritance and what aspects, if any, they might think needed to be changed.⁵

Whereas the *Discovering Democracy* curriculum communicates an understanding of the mechanics of the Constitution, what is under-represented in the curriculum is content relating to values – and, equally importantly, competing values. The curriculum is not doing enough to teach students how to engage in critical analysis of our institutions and to evaluate the extent to which they actually serve the values that underlie our constitutional heritage. As one teacher responded when asked to comment on the curriculum:

Very few, if any, of the teachers indicated that their schools had specifically discussed or named the values they espoused, and upon which the civics and citizenship programmes of their schools could be laid. It is probable that in the absence of a set of negotiated and clearly articulated school values, individual teachers may fall back on their own values and mores.⁶

There are several examples of how the curriculum fails to do this. Although there is discussion of the idea of democracy and the right of each citizen to participate in the system of government by casting a vote, there is no debate on the question of whether the single-member electorate system used for the House of Representatives actually serves that value, and whether it could be better served through the adoption of proportional representation.⁷ Similarly, while the materials acknowledge that the composition of the Senate was the result of a compromise over a political issue that split the colonies at the time of the constitutional conventions, they present the outcome as the end of the story. Nowhere does the curriculum address the issue of the negative implications for the weighting of the individual’s voting power inherent in each State having equal representation in the Senate, or the problem that arose from giving the Senate the power to block supply. There is some brief (one page) discussion on whether Australia has too many levels of government, but no alternatives are offered to federalism.⁸ Similarly, although there is an exercise on the formation and operation of federation,⁹ the focus is on the reasons why federation came about, rather on a critique of its current operation. Federation is presented as an immutable and unquestioned feature of the constitutional landscape, rather than a mode of government that is open to question.

Often however, *Discovering Democracy* comes tantalisingly close to adopting a critical approach. For example, in the discussion of the concept of majority rule, the question is posed as to what students would feel if they were outvoted on a question, whether rule by a simple majority is fair, and what problems such a system might have,¹⁰ but there is no follow-through to posing the question of whether our unrestrained majoritarian system needs to be changed. In the discussion of the role of the Senate, the incompatibility of its power to block budgets with the operation of responsible government is recognised, but the conclusion reached is that ‘the patch up job (that is, the compromise upon which the federation was founded) continues to

5 Kate Krinks, ‘Creating the Active Citizen? Recent Developments in Civics Education’ (Research Paper No. 15, Parliamentary Parliament of Australia, 1998-99) 13.

6 Kerry Kennedy, *Teachers talking civics: current constructions of civics and citizenship education in Australian schools* (Australian Curriculum Studies Association Inc., 2003) 10.

7 Jane Angus (ed), *Discovering Democracy - Lower Secondary Units* (Curriculum Corporation, 2000) 17-30.

8 Jane Angus (ed) *Discovering Democracy - Upper Primary Units* (Curriculum Corporation, 2000) 111.

9 Ibid 48-68.

10 Jane Angus (ed), *Discovering Democracy – Middle Primary Units* (Curriculum Corporation, 2000)12.

work? ¹¹ Yet is this really true, given what happened in 1975, and wouldn't this be an appropriate place to canvass some alternatives?

The problem is therefore clear: the curriculum simply explains things as they are, without providing the students with an opportunity to debate what they might be. The Constitution is presented as representing the final culmination of an historical process, and the sub-text essentially is that the Constitution is the best that it can be.

It is true that a critical approach involves a discussion of values, and commentators have remarked on the apprehension that many teachers feel in relation to discussing values yet, as Krinks notes:

Civics education is therefore not a 'neutral' exercise; if it is to involve more than just governmental facts, it is inevitable that education for *active* citizenship will raise value questions about a political system. ¹²

This was also reflected in submissions by some teachers to the inquiry by the Joint Standing Committee on Electoral Matters, which noted that:

Accepting that Australian democracy is not value-neutral, a number of teachers were supportive of the use of critical analysis as a basic pedagogy for civics and citizenship education. Teachers acknowledged that students required a level of critical literacy in determining their own thoughts and opinions about the subject matter they learned in class. ¹³

It should also be remembered that in 1994 the Civics Education Group recommended that three sets of values be incorporated into a civics curriculum. These were: democratic process (including commitment to individual freedom and respect for different choices, viewpoints and ways of living), social justice (including concern for the welfare rights and dignity of all people and fairness and commitment to readdressing disadvantage and to changing discriminatory and violent practices), and ecological sustainability. ¹⁴ The policy statement accompanying the release of the *Discovering Democracy* curriculum said that the curriculum was based on the values of democratic processes and freedoms, government accountability, civility and respect for the law, tolerance and respect for others, social justice and the acceptance of cultural diversity. ¹⁵ However, although the curriculum mentions the importance of these values, nowhere does the curriculum explicitly call on students to engage in critical analysis of current institutions with a view to determining whether they do in fact support those values and, where they do not by presenting alternatives. In other words, the curriculum explains current institutions as owing their origins to these values, without evaluating the degree to which those institutions do in fact serve them.

The Australian education system is currently in the midst of significant change, with the development of a new national curriculum that will be used throughout the Australia from Years K - 12. In 2006 the Ministerial Council on Education, Employment, Training and Youth Affairs (consisting of State, Territory and Commonwealth education Ministers) developed a document entitled *Statements of Learning for Civics and Citizenship*, which describes a common agreed content for civics and citizenship education in an effort to harmonise what is taught throughout

¹¹ John Hirst, *Discovering Democracy – A Guide to Government and Law in Australia* (Curriculum Corporation, 1998) 32.

¹² Krinks, above n 5, 19.

¹³ Joint Standing Committee on Electoral Education, Parliament of Australia *Civics and Electoral Education* (2007) 53.

¹⁴ Murray Print, *Civics and Citizenship Education: An Australian perspective – Discovering Democracy Discussion Paper 4* (NSW Discovering Democracy Professional Development Committee, 2000) 18.

¹⁵ *Ibid* 19.

the country.¹⁶ As might be expected, its content corresponds very closely to the Discovering Democracy curriculum which has been widely in use since 1997. The curriculum for civics and citizenship education will be based on the 2006 statement.¹⁷ The new curriculum is being drafted during 2012-13.¹⁸ This means that the opportunity now exists to influence the way in which civics is taught. There is no doubt that *Discovering Democracy* provides a good resource – what needs to be added to it is material, particularly in the later years of the curriculum, which encourages students to question whether our current Constitution serves the values of freedom and democracy, and to provide them with alternatives to consider where it does not. Our objective must be to produce young people who engage in public debate rather than passively accept received (un)wisdom that our institutions are beyond improvement.

III. ENHANCING CRITICAL THINKING – ISSUES FOR CONSIDERATION

As one of the Priestley 11 subject areas, constitutional law is a mandatory part of the curriculum of any law degree leading to admission to legal practice. There are 31 Law Schools in Australia. Of these 19 prescribe one semester of constitutional law in their curriculum. The other 12 require students to take an introductory course in public law prior to studying constitutional law, and even these often do not contain material which requires students to critique current constitutional structures. In other words, in a majority of Law Schools lecturers are expected to teach fundamental constitutional principles, as well as the entirety of Commonwealth and State constitutional law in the space of 13 weeks. The consequence of this is, of course, that there is barely enough time to teach students the law governing our institutions as it is, much less to pause and invite them to critique those institutions and suggest alternatives.

As a constitutional lawyer with an interest in constitutional reform, I find the lack of space devoted to constitutional critique a matter of concern. The purpose of legal education must be more than just the production of technically-able graduates, equipped to give advice to future employers). It is a truism that, once they graduate, our students become not only practitioners of the law but, to a significant extent, gate-keepers of it. This is because of the fact that such is the complexity of the law that the broad mass of society is ill-equipped to understand much of it, and legal debate is therefore largely framed by law graduates. It is a truism that law graduates are over-represented at all levels of government, and that it is law graduates who have a dominant role in elective politics and the bureaucracy. It follows that unless the legal cadre of society is interested in reform, there is very little chance that reform will occur. The implication for us as legal educators is clear: the political importance of our sub-discipline imposes on us a unique responsibility to society to foster critical thinking in our students and to encourage them to be agents for social change. While it is doubtless true that we all include ‘critical thinking’ as a learning objective in our curricula, we need to recognise the distinction between critical thinking as a mere tool of legal reasoning used to decide legal problems, and critical thinking in the sense of a capacity to critique institutions and suggest alternative ways in which they might operate. I would argue that the evidence that Law Schools have not been fostering the latter type of thinking is provided by the lack of leadership on constitutional reform from our political classes, most of whom are our graduates. Furthermore, although there is a body of literature on

16 Curriculum Corporation, *Statements of Learning for Civics and Citizenship* (2006) Standing Council on School Education and Early Childhood <http://www.mceetya.edu.au/verve/_resources/SOL_CivicsCitizenship.pdf>

17 National Curriculum Board, *Shape of the National Curriculum: History*(2009) [6.3.4] Commonwealth of Australia, <http://www.acara.edu.au/verve/_resources/Australian_Curriculum_-_History.pdf>.

18 Australian Curriculum Assessment and Reporting Authority *The Shape of the Australian Curriculum - Version 3* (2012) [78] <http://www.acara.edu.au/verve/_resources/The_Shape_of_the_Australian_Curriculum_V3.pdf>

the use of critical methodology in the teaching of constitutional law,¹⁹ the same is not true in relation to reform of the *content* of the constitutional law syllabus through the incorporation of comparative material which would expose students to new ways of shaping institutions,²⁰ which is the focus of this paper. This lack of attention to constitutional reform persists despite the fact that, if considered from the perspective of fundamental principles of democracy, freedom and effective control over government, several areas of the Constitution are crying out for reform.

As an academic with a particular interest in constitutional reform, I think that there are many areas of our Constitution in need of attention. Here I have space to mention only two: electoral reform and parliamentary scrutiny of the executive.

A. Representation

One would think it obvious and uncontroversial to say that the electoral system should give any party, irrespective of the geographic spread of its voter support, the chance of forming government. Yet in Australia that is not the case, because under our current electoral system geography is destiny.

The following examples from two federal elections²¹ show how distorted are the results produced by our system:

Year	Party	Nationwide % of first preference votes	% of seats in House of Representatives
1990	Labor	39.4%	52.7%
	Coalition	43.4%	46.7%
1998	Labor	40.1%	45.2%
	Coalition	39.1%	54%

What is striking about these results is that clearly the ‘wrong’ party won both elections in that the victors (that is, the party which obtained a majority in the House of Representatives) were less popular in terms of nationwide share of the vote than the vanquished. Furthermore, this is by no means a rare occurrence: governments also came to power with fewer votes than were won by the opposition in 1954, 1961, 1969 and 1987).

The electoral system is particularly unfair to minor parties. In 1990 the 11.4% of first preference votes won by the Australian Democrats yielded not one seat for the party – yet the 8.4% of first preference votes cast for the Nationals yielded 9.5% of the seats in the House. In 2004 and 2007 the Greens won over 7% of the vote but achieved no representation in the House, and when they won one seat in the House 2010, that was after winning 11.7% of first preference votes nationwide.

19 See for example Haig Patapan, ‘The forgotten founding: Civics education, the common law and liberal constitutionalism in Australia’ (2005) 14 *Griffith Law Review* 91; Marlene Le Brun, ‘Reflections on Legal Studies Courses in Australian Secondary Schools: Instrumental or Liberal Education?’ (1990) 12 *Adelaide Law Review* 389; Tamara Walsh, ‘Putting Justice Back Into Legal Education’ (2008) 17 *Legal Education Review* 119 and Mark Israel, Elizabeth Handsley and Gary Davis, ‘It’s the Vibe: Fostering student collaborative learning in constitutional law in Australia’ (2004) 38 *The Law Teacher* 1.

20 Although see Afshin A-Khavari, ‘The Opportunities and Possibilities for Internationalising the Curriculum of Law Schools in Australia’ (2006) 16 *Legal Education Review* 75.

21 Australian Electoral Commission *Federal Elections* (2012) <http://www.aec.gov.au/Elections/Federal_Elections>.

In light of this data, one would think that electoral reform would be an area of significant debate in the curriculum, yet if one looks at the textbooks we write²² – and I use the term ‘we’ deliberately, because the same is true of myself as of other textbook writers – we discuss the electoral system and the failed High Court challenges to it,²³ and leave it at that. None of our texts critiques our electoral system against the principles of democratic representation, nor do they explore other electoral systems and what their implementation might mean for parliamentary government in Australia. Let me be clear in saying that the range of texts available to Constitutional law teachers is varied and of excellent quality – I do not mean to suggest that there is anything deficient in any of them in relation to how they address the law. What I do say, however, is that the pressures of time that we face in covering a very broad syllabus means that we do little to challenge our students to argue how the law might be, as distinct from understanding it as it is, and for law students who have not otherwise studied politics or government, constitutional law is the only subject in the LLB curriculum into which material relating to the electoral system happily fits.

B. Parliamentary Scrutiny Of The Executive

The final area of reform to consider is that of parliamentary scrutiny over the executive. A law is only as effective as is the capacity to enforce it, and the regrettable fact is that although we supposedly live under a system of responsible government, there is very little likelihood that a minister who does not want to subject him or herself to scrutiny by a parliamentary committee, or who prohibits a public servant from doing so, will face sanctions. In theory, parliamentary committees have significant powers. According to Harry Evans, who served as Clerk of the Senate for 21 years, the Senate has the power to issue a summons to compel witnesses to appear before its committees and to produce documents,²⁴ although usual practice is for an invitation to be sent to the person to attend, and for them to attend voluntarily.²⁵ Where a summons has been issued, failure to comply with it can be reported by the committee to the Senate which, if it finds that the refusal amounts to contempt, can impose a punishment of fine or imprisonment by virtue of s 7 of the *Parliamentary Privileges Act 1987* (Cth).²⁶ The same would apply to committees of the House of Representatives. On the face of it then, it would appear that the committee system provides MPs with a valuable weapon to use in ensuring government accountability by questioning ministers and public servants. However, in reality Ministers not uncommonly refuse to attend committees when requested to do so and also instruct public servants not to attend and / or answer particular questions.²⁷ A number of examples of this from the past decade include John Howard’s refusal to allow political advisors employed in his office and in that of the then defence minister Peter Reith, to appear at the inquiry into the Children Overboard

22 See for example Tony Blackshield and George Williams, *Australian Constitutional Law and Theory- Commentary and Materials* (The Federation Press, 5th ed, 2010) 381-397; Sarah Joseph and Melissa Castan, *Federal Constitutional Law – A Contemporary View* (Lawbook Co., 3rd ed, 2010) 467-72; Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks’ Australian Constitutional Law – Materials and Commentary* (Lexis-Nexis, 8th ed, 2009) 105-11; George Winterton, HP Lee, Arthur Glass and James Thompson, *Australian Federal Constitutional Law – Commentary and Materials* (Lawbook Co., 2nd ed, 2007) 744-74; Bede Harris, *Constitutional Law Guidebook* (Oxford University Press, 2009) 21-2; Imtiaz Omar *Constitutional Law* (Lexis-Nexis, 3rd ed, 2010) 107-10; Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law – Foundations and Theory* (Oxford University Press, 3 ed, 2012) 98 – 102.

23 *AG (Cth ex rel McKinlay v Commonwealth)* (1975) 135 CLR 1 and *McGinty v Western Australia* (1996) 186 CLR 140.

24 Harry Evans (ed), *Odgers’ Australian Senate Practice* (Department of the Senate, 11th ed, 2004) 30, 57 and 377.

25 *Ibid* 378.

26 *Ibid* 416-7 and 423.

27 For examples see Evans, above n 24, 378.

affair,²⁸ the prohibition against a defence force officer appearing before the inquiry into what knowledge ADF personnel had of torture at Abu Ghraib,²⁹ and the prohibition against public servants appearing before the inquiry into the AWB scandal.³⁰

Why then does practice diverge so strikingly from the law? The answer to this question is partly legal, partly political. The legal difficulty derives from the fact that much of the law in this area remains untested in the courts. The law which governs the powers of Parliament, called the law of parliamentary privilege, is contained partly in the *Parliamentary Privileges Act 1987* (Cth), and partly in the common law. The Act does not deal with all aspects of Parliamentary privilege, and expressly states that anything not addressed in the act continues to be regulated by the common law rules, adopted into Australian law by s 49 of the Constitution. It is here that the difficulty arises, because although s 7 of the Act confirms that the houses of Parliament have the power to fine or imprison anyone who commits an offence against Parliament, it does not define what those offences are, other than to say (in s 5) that an offence is anything which interferes with the free exercise of the functions of Parliament, its committees or its members. This means that it is ultimately up to the courts, as a part of their every day function of developing the common law, to determine what constitutes a breach of parliamentary privilege.

Assuming then that a government minister or public servant refused to attend a parliamentary committee or to answer questions, would that amount to conduct which could be punished as contempt of Parliament? Although, as stated above, parliamentary officers, such as Harry Evens, claim that it does - and at face value it would indeed seem logical that failure to answer questions amounts to conduct interfering in the functioning of Parliament - the fact remains that a rule of the common law can be stated definitively only by the courts. Although there is case authority relating to the Legislative Council of the New South Wales Parliament to the effect that the chamber has the power to compel a minister who is a member of that chamber to produce documents requested by the chamber, and to suspend him if he does not,³¹ the question as it relates to the Commonwealth Parliament has not been contested before the courts. Even if the precedent from the New South Wales Parliament was found to be applicable at the Commonwealth level, the ability of a committee to secure the attendance of witnesses and to punish them if they fail to answer questions faces a political hurdle which stems from the fact that committees are not free agents and do not themselves have power to punish witnesses. That power vests in the house of Parliament that established the committee. This means that no individual member of a committee, or even the committee as a whole, can enforce rules of attendance - it is up to the house which established the committee to do so.³² A committee which encounters an uncooperative witness must refer the matter to the house which created it, and the house will then decide what action, if any, to take. This exposes a significant weakness in the committee system, and provides a reason why a committee of the House of Representatives will not receive assistance from the House if a minister, or a public servant acting on the instructions of a minister, refuses to give evidence. Since the government, by definition, has a majority in the House, it will obviously block any attempt to punish one of its own ministers.

What then of Senate committees? At times when a government lacks a majority in the Senate, surely the opposition and minor parties would use their majority to force a minister to answer questions to punish him or her if he or she did not - if necessary testing before

28 Tony Harris, 'The Buck Stops Over There', *Australian Financial Review* (Sydney), 2002, 62 and Patrick Walters, 'A fearless public servant', *The Australian* (Sydney), 17 August 2004, 4.

29 ABC Television, 'Major "Kane barred from Senate estimates hearing on prisoner abuse' *The World Today* 1 June 2004. <http://www.abc.net.au/worldtoday/content/2004/s1120461.htm> >.

30 See Samantha Maiden, 'Gag in Senate illegal, clerk warns', *The Australian* (Sydney), 12 April 2006, 4 and Ross Peake, 'Cover-up claim as officials gagged', *Canberra Times* (Canberra), 14 February 2006, 2.

31 *Egan v Willis* (1998) 195 CLR 424 and *Egan v Chadwick* (1999) 46 NSWLR 563.

32 *Hamsher v Swift* (1992) 33 FCR 545, 563-64, *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA) 528, 536, 540; *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) 9.

the courts the question of whether the refusal to co-operate with the committee amounted to contempt? The answer to this question was revealed in telling circumstances in 2002, when the Senate was holding an inquiry into the Children Overboard affair. The critical issue in contention was at what stage information from defence personnel to the effect that children had not been thrown overboard was communicated to ministers in the then coalition government, who were in the midst of an election campaign in which they alleged that the children had been thrown overboard. The then defence minister, Peter Reith, refused to give evidence before the Senate committee, and the cabinet also ordered that his staffers not comply with the committee's requests to attend. At the time, the Coalition lacked a majority in the Senate, which meant that Labor, in conjunction with the minor parties, had sufficient numbers in the Senate to compel attendance, and could have used their majority in the upper house to impose a fine or imprisonment if the committee met with recalcitrance. If the legality of that had been contested, the matter could have been tested in the courts. The reason that this point was not reached was that despite the fact that the Australian Democrats and Greens supported such a step, Labor refrained from using its Senate votes to exercise the contempt powers.³³ This demonstrates the political cynicism that afflicts what is the two-party system in Australia: As a party which might come to power in the future, Labor was unwilling to establish the precedent that ministers, advisors and public servants should be compellable witnesses before legislative committees.³⁴ The most that ever occurs to ministers who refuse to provide evidence to Senate committees is that a motion of censure (in other words, a formal slap on the wrist) is passed against them - a remedy which the major parties are happy to use because it causes political embarrassment to the government but does not establish a precedent that would expose ministers to significant penalties such as a fine or imprisonment.

These flaws lie at the heart of the operation of responsible government, yet they receive little or not attention from textbook writers, most of whom confine themselves to a discussion of the theory of parliamentary government, and a mechanical treatment of the number and portfolios covered by committees, without inviting students to critique how the system operates - or fails to operate - in practice.³⁵

IV. INTRODUCING COMPARATIVE MATERIAL

Assuming that reform issues were incorporated as an accepted part of the constitutional law syllabus, there is a wealth of comparative material that lecturers could draw upon in order to engage students and to challenge them to visualize alternative constitutional futures. In this part of my paper I suggest jurisdictions whose experience we could use as a basis for debate on constitutional reform, focusing on the issues discussed above. There is, of course, an enormous volume of material from many jurisdictions that could be used. I have drawn upon select material that I found useful when delivering a postgraduate comparative constitutional law subject, but which could equally be introduced into the undergraduate curriculum, assuming that there were two constitutional law subjects in the degree

33 See for example the failure of the Labor-controlled committee inquiring into the children overboard affair to summons political advisors who had been serving in the offices of the Prime Minister and the Minister of Defence - Megan Saunders, 'Truth is out there, somewhere', *The Australian* (Sydney), 25 October 2002, 12.

34 For discussion of this political dimension of this issue see Laurie Oakes, 'Hypocritical oath', *The Bulletin* (Sydney), 13 March 2002, 17; Margo Kingston, 'Labor backdown opens black hole of accountability', *Sydney Morning Herald On-line*, 1 August 2002 < <http://www.smh.com.au/articles/2002/07/31/1027926912621.html> >; and Margo Kingston, 'Labor's latest travesty', *Sydney Morning Herald On-line*, 23 October 2002, < <http://www.smh.com.au/articles/2002/10/23/1034561546910.html> >.

35 Although note that there is critique of the ineffectual nature of parliamentary control over the executive in Ratnapala and Crowe, above n 22, 63-6.

A. Representation

Although there is an enormous range of proportional representation systems that could be adopted in place of the current electoral system used for elections to the House of Representatives, the two most commonly recommended alternatives are the Mixed Member Proportional (MMP) Single Transferrable Vote (STV) systems. The closest example of the MMP system - under which half the members of the legislature are elected from single-member constituencies and half are elected from party lists so that the overall percentage of a party's representation in parliament is the same as its share of the party list vote - is that adopted in New Zealand in 1993. I was fortunate to be in New Zealand when referenda were held on whether to replace the first past the post single-member electorate system with proportional representation, and on which system of proportional representation should be adopted. This period was notable for the sophisticated level of vigorous public debate on the concept of fairness in representation, and for the fact that arguments based on pragmatism, and the alleged governmental instability that proportional representation would bring - which experience in New Zealand and other jurisdictions using MMP has shown to be groundless - were not allowed to divert the focus of the debate from the issue of fairness. There is, therefore, a good deal in the New Zealand experience that we could use to teach our students, not only about the operation of the MMP system itself, but also in relation to not allowing public apathy and the opposition of powerful interests to deter us from pursuing constitutional reform. The other electoral system commonly proposed as an alternative to single-member electorate system is STV, which is based on multi-member electorates which, although it does not lead to the same degree of proportionality as the MMP system, has the advantage that all MPs are answerable to a specific electorate, rather than being elected through a party list. Here we have domestic electoral systems to look to as examples of how STV operates - it is used for the Commonwealth Senate and all State upper houses (barring Tasmania), as well as in the houses to which governments are responsible in Tasmania and the ACT. However, it is also useful to compare the Australian experience with that of the Republic of Ireland - particularly in relation to how the number of members returned by multi-member electorates affects the proportionality of elections. There is therefore no dearth of material that we could - and should - expose our students to as we encourage them to question the fairness of our current electoral arrangements.³⁶

B. Legislative Scrutiny Of The Executive

In thinking about better models of legislative scrutiny over the executive, it is, paradoxically, the United States, which does not have a parliamentary system of government, where committees of Congress enjoy far greater oversight powers over cabinet ministers than does the Australian Parliament. The right of Congress to subpoena non-members to appear before it, and to punish them if they do not, is long established. In 1821 in the case of *Anderson v Dunn*,³⁷ the Supreme Court held that an investigative power was implicit in Congress' legislative power and that a subpoena power was a necessary element of that investigative power. The leading case on this issue is now *McGrain v Daugherty*,³⁸ in which the Court held that a power to investigate

36 See for example Scott Bennett and Rob Lundie, 'Australian Electoral Systems' (Research Paper No 5, Parliamentary Library, Parliament of Australia, 2007); David Farrell, *Electoral Systems – A Comparative Introduction* (Palgrave Macmillan, 2001); Commission on Legislative Democracy, *Facts on Proportional Representation* (2004) Elections New Brunswick <http://www.gnb.ca/elections/2004commissionlegdemoc-e.asp>. See also David Farrel and Ian McAllister, 'Voter Satisfaction and Electoral Systems: Does Preferential Voting in Candidate-Centred Systems make a Difference?' (Discussion Paper, Center for the Study of Democracy, University of California, Irvine, 2004) <<http://escholarship.org/uc/item/4c51z9mt#page-1>> and H Catt, P Harris and N Roberts, *Voter's Choice: Electoral Change in New Zealand?* (Dunmore, 1992).

37 19 US (6 Wheat.) 204 (1821).

38 273 US 135 (1927).

is “an essential and appropriate auxiliary”³⁹ to the legislative power of Congress. The court also held that the investigative power of Congress can be exercised not only when considering specific legislation, but “for legislative purposes”,⁴⁰ which includes investigations of whether the executive branch is properly discharging its functions.⁴¹

The principle of compellability of cabinet members is balanced by the doctrine of separation of powers, which prevents interference by one branch in the affairs of the other. In *Senate Select Committee on Presidential Campaign Activities v Nixon*,⁴² the Federal Court held that evidence would be compelled from the executive only where it was “demonstrably critical” to the legislature’s inquiry. The doctrine of separation of powers is of particular relevance where the executive raises a claim of executive privilege (equivalent to public interest immunity in Australia), which was recognised in *United States v Nixon*.⁴³ Although this case involved the question of the extent to which executive privilege can serve to defeat a subpoena in which information or attendance of a witness is sought by the judicial branch (in other words, in court proceedings), what was said in this case is generally thought to be of equal relevance to cases where information is sought from the executive by the legislative branch.⁴⁴ The court held that the executive cannot be compelled to give information if the possibility that communications would be subject to disclosure would impair the confidentiality and candour of policy deliberations within the executive.⁴⁵ The court explicitly asserted however that the executive’s mere claim of privilege is not determinative – any case involving such a claim will be decided by the courts,⁴⁶ balancing the competing demands of the interest to be served by disclosing the information against the executive’s claims to confidentiality.⁴⁷ In *Nixon* the court held that claims of executive privilege will be particularly strong in relation to information relating to foreign affairs, diplomacy and national security,⁴⁸ but even in a case where a claim of privilege is made based on state secrets the executive must satisfy the court that such an issue is involved, if necessary by providing evidence to the court *in camera*.⁴⁹ The Supreme Court re-stated these rules on executive privilege in *Nixon v Administrator of General Services*,⁵⁰ in which it held that there was no general undifferentiated right to executive privilege,⁵¹ and that a claim of privilege would succeed only where the executive could show that disclosure would

39 Ibid 174.

40 Ibid 177.

41 Ibid.

42 498 F.2d 725 (D.C. Cir. 1974), 732-33.

43 418 US 683 (1974).

44 See Laurence Tribe, *American Constitutional Law – Volume One* (Foundation Press, 3rd ed, 2000), 784.

45 Ibid 705, 708.

46 Ibid 703.

47 Ibid 711-12. See also *Senate Select Committee on Presidential Campaign Activities v Nixon* 498 F.2d 725 (D.C. Cir 1974) and *United States v A T & T* 521 F.2d 384 (D.C. Cir 1976) and 567 F. 2d 121 (D.C. Cir 1977).

48 418 US 683 (1974), 710-11.

49 *United States v Nixon* 418 US 683 (1974) 713-14. See also *United States v Burr* 25 Fed. Cas. 187 (1807) 190-92 and *United States v Jolliff* 584 F. Supp 229 (1981). The most recent instance of an *in camera* evaluation of the validity of a claim of executive privilege was in 1990, when Federal District Court Judge Greene privately viewed the personal diaries of former President Ronald Reagan, the release of which had been sought by former National Security Advisor, John Poindexter, when he was tried for offences committed as part of the Iran-Contra affair. Having reviewed the diaries, Judge Greene held that they added nothing of substance to evidence already before the court, and upheld the claim of executive privilege – see Mark Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* (Johns Hopkins Press, 1994) 127-30.

50 433 US 425 (1977).

51 Ibid 446-47.

significantly impair the executive branch's ability to achieve its constitutional function.⁵² This line of cases thus demonstrates that the concept of executive privilege exists, but also that it is by no means a trump that will defeat any congressional request for information.

It should not however be thought that, because the courts have the ultimate role in deciding inter-branch disputes, contests between the legislature and the executive are frequently the subject of litigation in the United States. The legislature generally obtains the information it seeks, simply because of the executive pays a political price of appearing to have something to hide in instances where it claims executive privilege.⁵³ In most cases, the two branches reach a political compromise,⁵⁴ and it is a quite normal feature of the political process in the United States for members of the executive, including members of the cabinet, to appear voluntarily before public hearings of congressional committees,⁵⁵ or for information to be provided in a confidential briefing to members of a committee.⁵⁶ Disputes are thus almost always settled by negotiation between Congress and the administration.⁵⁷ The fact that the judicial branch is the ultimate determiner of the degree to which the executive is accountable has not led to the courts being confronted with policy questions that they are incapable of deciding without becoming involved in party-political disputes – there is sufficient case law for the courts to engage with in determining whether a claim of executive privilege is valid. It is a matter of supreme irony that the legislative branch in the United States has far greater power than is the case under the system of responsible government we have in Australia, which supposedly subjects the executive to legislative control.

How then could the level of scrutiny available in the United States be made a feature of the parliamentary system in Australia? One way would be through the enactment of legislation (or a constitutional amendment) which conferred on individual members of parliamentary committees the power to compel witnesses to give evidence before Parliamentary committees and, subject to a defence of public interest immunity, to make non-compliance an offence.

A similar proposal was made In 1994, when Senator Kernot of the Australian Democrats introduced a Bill to amend the *Parliamentary Privileges Act 1987* (Cth) which would have made it a criminal offence, prosecutable in the Federal Court at the instance of a House of Parliament, to fail to comply with an order of a House or a committee.⁵⁸ The Bill would also have empowered the court to order compliance with the legislature's request. Public servants who had been instructed by a minister not to comply with a legislative request could have had a compliance order issued against them but would not have faced the criminal penalty. The Bill provided for a public interest immunity defence, with the onus being on the accused to prove that the public interest in not complying outweighed the need for open parliamentary inquiries. Courts could conduct *in camera* hearings to determine whether the defence had been established. The Bill was considered by the Senate Privileges Committee, which recommended that it not be proceeded with on the ground that virtually all witnesses objected to the courts determining disputes between the legislature and the executive, and that the Senate should continue to use such existing mechanisms as it had at its disposal to address government refusals to give evidence to its committees.

52 Ibid 443.

53 On the political ramifications of claims of executive privilege see Louis Fisher, 'Congressional Access to Information: Using Legislative Will and Leverage' (2002) 52 *Duke Law Journal* 323.

54 Ibid, 325.

55 See the examples cited in Fisher, above n 53, 394-401. Although an incumbent President has never been summoned to appear before a congressional committee, President Ford agreed to do so voluntarily to answer questions relating to his pardon of former president Nixon – see Rozell, above n 49, 90.

56 Rozell, above n 49, 150.

57 William Marshall, 'The Limits on Congress's Authority to Investigate the President' (2004) *University of Illinois Law Review*, 806-08.

58 For a discussion of the Bill and its fate see Evans above n 24, 477-78.

The Kernot Bill would have materially advanced the cause of governmental accountability to the legislature because it would have established as part of statute law the obligation of the executive to comply with legislative requests, rather than leaving it, as at present, to be governed by un-litigated, and thus uncertain, common law. Leaving it to the courts to determine the parameters of public interest immunity would also have been beneficial. One defect in the Bill was, however, that court action could have been instituted only by the chamber as a whole – a fact which left un-remedied the problem that neither of the major parties would have been likely to institute an action for fear that the boot might one day be on the other foot. Indeed, it was opposition on the part of the major parties to the project which ensured that the Bill met its demise in committee. The reform I have proposed would address this issue by vesting in *individual members of committees* the power to subpoena members of the executive.

An attempt must be made to restore the element of responsibility – in the sense of accountability – to responsible government. As Harry Evans, Clerk of the Senate said in a speech to the National Press Club in 2002:

Responsible government was a system which existed from the mid 19th century to the early 20th century, after which it disappeared. It involved a lower house of parliament with the ability to dismiss a government and appoint another between elections. This system has been replaced by one whereby the government of the day controls the lower house by a built-in, totally reliable and “rusted on” majority. Not only is the government not responsible to, that is, removable by, the lower house, but it is also not accountable to it. The government’s control of the parliamentary processes means that it is never effectively called to account in the lower house.⁵⁹

The reform proposed in this paper would reverse the power imbalance that exists between legislature and executive, and would make government truly responsible to the legislature - which is what our system is supposed to do.

V. CONCLUSION

Unless we expand the space allocated to constitutional law in the curriculum so as to include a pre-cursor subject to federal constitutional law which teaches students about the political doctrines that underpin constitutionalism and how to critique institutions in light of those doctrines, we will continue producing students who, are infected with a smug self-satisfaction that it is the best possible. As I have sought to illustrate, the Australian Constitution is far from ideal and requires reform in the areas I have discussed, as well as others that I have not had time to address. Only if we produce graduates who are aware of the need for reform and interested in promoting it can the necessary constitutional development occur.

⁵⁹ Speech delivered by Mr Harry Evans at the National Press Club, Canberra, 11 April 2006, a copy of which is on file with the author.

