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TEACHING PUBLIC LAW: CONTENT, CONTEXT AND COHERENCE

GRAEME ORR*

I INTRODUCTION

Modern law owes its provenance and enforcement to one branch of government or another. But not all law is ‘public law’ simply because it emanates from public bodies, affects the public or serves public purposes. This paper begins by defining public law, compares its Australian, UK and US conceptions, and contrasts it with private law. It charts the conventional paradigm of public law as an umbrella sheltering constitutional and administrative law, built on the concept of government. This neat, if narrowing, idea of public law is reflected in the dominant themes in contemporary public law teaching and scholarship (such as accountability or representative democracy). Yet given the diversity of ideological and functional accounts of what government is ‘for’, public law lacks any unifying account.

A descriptive definition based on the notion of government captures the core *content* of public law, but a normative smorgasbord lies at its heart. This creates challenges – both positive and negative – for teachers of public law. As a result, and alongside the decline in black letter teaching in favour of case-study approaches, thematic first level courses in ‘principles’ of Australian public law have flourished. To engage commencing students who are often civics-ignorant, the pedagogical response has been to draw on contemporary policy and politics to lend *context* to such courses in public law. However such a ‘magazine-y’ approach poses challenges for *coherence*.

II DISCIPLINARY BOUNDARIES AND IDEOLOGIES: PUBLIC LAW AND PRIVATE LAW COMPARED

On its face, public law is a relatively defined field. The term ‘public law’ is classically used as an umbrella sheltering two related, if often siloed sub-fields, constitutional law and administrative law. This is so notwithstanding hazy borders and space constraints. The *Oxford English Dictionary* defines ‘public law’ merely as ‘the law pertaining to the relationship between the State and a person subject to it’. This is at once

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too hierarchical: what of the law governing political interactions not directly involving ‘the State’? It is also too individualized: this definition excludes the law about the very constitution of government and relations between its myriad bodies.

But dictionaries are for the public; public lawyers know that what lends ‘public law’ coherence, and offers boundaries to it as a field of study, is the concept of *government*. Government via the state, under and through law. ‘Government’ here, of course, embraces not just the political wings, the executive and legislature, but also the judicial branch and integrity agencies.¹ In comparison, private law is less easily scoped or contained in a descriptive definition. The paradigm or heart of private law is the law of civil obligations.² Yet ‘civil obligations’ is an amorphous jostle of often competing rules drawn from contract, equity, commercial and torts law.

Given all this, it is no surprise that courses with titles such as ‘Principles of Public Law’ are now quite common (see the Appendix). These ‘scaffolding’ courses introduce students to key concepts drawn from constitutional and administrative law, in an effort to break down the silos between those sub-disciplines. These introductory units also free up later-year courses, under the traditional titles, to focus more deeply on critically analysing legal doctrine. In comparison, it is hard to find first level courses in ‘Principles of Private Law’.³

Private law aficionados fear a colonising instinct in public law; as if the yang of public law will overwhelm the subtler yin of private law.⁴ The project of at least the first 80 years of the twentieth century was, after all, the erection of an expansive and enabling state, one that was not necessarily neutral in the relations between people (whether legal or natural) and which did not leave distributive justice purely to the market or family inheritance. Thus US academic Arthur Miller could write in 1960 that ‘[m]ore government means more public law, and it is the meshing of public law into a curriculum almost wholly private-law-oriented that has been a main pre-occupation of the legal educator in

¹ On the latter see Jim Spigelman, ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724.

² Eg Samuel Geoffrey, *The Law of Obligations* (Edward Elgar, 2010).

³ A few law schools have offered first-year courses in civil obligations (eg Griffith University’s former ‘Contacts and Civil Obligations’ course and Melbourne University’s current ‘Obligations’ course). But these are directed less at thematic principles than on breaking down black letter boundaries between torts, contract, restitution and equity. A few law schools have also attempted *capstone* courses bundling concepts inherent in private law. But private lawyers still squabble over whether first year students should be weaned on contract or tort to best introduce them to the joys of the common law governing individual interactions. This itself is a loaded question, given the contrasting ideologies of contract (freedom of exchange) and negligence (responsibility to others).

⁴ Eg Darryn Jensen, ‘Keeping Public Law in its Place’ (2014) 33 *University of Queensland Law Journal* 285. Of course the fear also runs the other way, at least for proponents of active and enabling forms of government, who fear that corporatization and de-regulation of government activities are eroding the role of government.

recent decades'.⁵ To stretch this idea further, the common law was once the creation of one branch of government in the form of the judiciary. But it is now overlaid increasingly with political compromises laid down in the legislature. Does this render private law as just a branch of public law, to be unpacked by jurimetrics (the study of judicial behaviour) and regulatory theory?

Outside customary and folk law, in a sense all modern law – its *legitimacy as law* – stems from the idea of 'the public', understood as embracing both the state and the *demos*. All law is a form of governance, working to regulate the affairs of society. 'Public law' however does not therefore cover all law. Consumer protection may be an important everyday matter, rooted in policy compromises made by legislatures and judges, but we do not therefore label it a branch of public law. Human rights law, in contrast, is usually labelled public law because it embraces, amongst other things, civil and political rights and is rooted in obligations assumed by states in international law. Yet anti-discrimination law, also an aspect of human rights law, is not structurally different from consumer protection law. Both regulate power imbalances between private parties.⁶ The point is not to resolve these boundary disputes but to understand that the concept of 'public law' has both limits and hazy borders.

To contain the discipline of public law, then, its paradigm has been limited to law dealing with government through political processes associated with the state.⁷ It is centred, therefore, on law *about* state power, not necessarily everything emanating from state power.⁸ As Adam Tomkins concedes, the modern state 'is a variable and changing commodity' challenged by regionalism and globalism,⁹ and, we might add, by the waxing of corporate muscle. Nonetheless, this triad of the state, politics and government lends the field its central focus, hence its limits.

Many private lawyers have sought to discern a moral principle fertilising their field. Thus Darryn Jensen, in his recent essay 'Keeping Public Law in Place', draws on Lon Fuller and Friedrich Hayek to argue that private law is 'a distinct form of social ordering', namely 'organization by reciprocity'.¹⁰ Duties of care and good faith, rules of exchange, property rights and familial obligations are all bound together

⁵ Arthur S Miller, 'The Impact of Public Law on Legal Education' (1960) 12 *Journal of Legal Education* 483, 483.

⁶ Discrimination law, admittedly, has more obvious dignitarian aims.

⁷ '[T]he primary concern of public law is how the institutions of states operate to govern the people residing in their territories': Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2014) 4.

⁸ 'The state' here must be understood broadly, encompassing not just the nation-state, but the city-state, monarchical fiefdoms and tribal rule. Public law does not begin sometime in Europe in the 16th century, but is an ancient field.

⁹ Adam Tomkins, *Public Law* (Oxford University Press, 2003) 1.

¹⁰ Jensen, above n 4, 288, citing Fuller. There is resonance here with the claims of an inner morality to private law that precedes and is even unconcerned with its wider social impacts. Compare Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981).

in an ideal of mutual autonomy. The ideal is freedom, but freedom subject to assumed obligations.

Public law in contrast is ‘organization by common aims’;¹¹ in Kit Barker’s phrase it is the expression of the state’s role as ‘mediator of the public good’.¹² Put crudely, private law is an expression of individual choices and freedoms, evolving purposely; in contrast public law is potentially coercive, is certainly ‘imposed on the community’,¹³ and attempts to divine, balance and achieve collective aims.

Obviously this is a simplification of a more complex truth. Norms of reciprocity and citizen equality, forms of agreement and deal-making, concerns for liberty and participation, and arational, evolutionary forces all work within constitutional and administrative law. By the same token, private law is also shaped by utility considerations, judicial and legislative fiat, and collective, purposeful forces (including highly directed, powerful corporate groups and associations). But the simplification – private law with an internal metric of autonomy and directionless mutual obligation, and public law as a political endeavour, ideally democratic but ultimately inescapable and at times coercive – has some explanatory power, and is widely shared by scholars in each field. The desire to find an internal morality in a discipline or endeavour is a normal human state (and legal academics are human, if not always normal!).

Public lawyers are not guilty of harbouring colonising instincts. (If nothing else, there are not enough hours in the academic day.) But public lawyers usually have a passion for their field and a sense of its worthiness. Most of them see government and the questions it faces as being at the heart of the rule of law and the legitimacy of legal institutions, as well as a proxy for the *demos*. Despite cynicism about government amongst the wider public, it remains the umpire people look to and blame for all manner of unfairnesses, perceived and real. With apologies to the poet Kenneth Slessor, public law flows on a tide, with a grander timescale than the ‘little fidget wheels’ of contracts and commercial transactions.¹⁴

The nutshell just given is sketched at a high level of abstraction. Many types of nutmeat, however, grow inside nutshells. Public lawyers embrace various ideological visions for the purposes and role of government and the state. On the whole they are less likely than private lawyers to agree that their branch of law should, let alone does, embrace some concept such as ‘freedom’ or ‘autonomy’. Public law is about building a ‘public’, yet that ‘public’ may be economically anarchic (in Robert Nozick’s conception), welfare liberalist (in John Rawls’ conception) or ruthlessly

¹¹ Ibid (Jensen).

¹² Ibid 285.

¹³ Ibid 297.

¹⁴ Kenneth Slessor, ‘Five Bells’ in *Poems* (Angus & Robertson, 1957) 103: ‘Time that is moved by little fidget wheels / Is not my time, the flood that does not flow’.

egalitarian (in some brands of socialism).¹⁵ There is no agreed metric of the ‘common good’ to steer public law’s inherent direction.

Even if internal morality and a functional account of public law were sought, a consensus would be no nearer. Tomkins offered a quasi-functional definition of public law as providing ‘the institutions that exercise political power, and ... the mechanisms of holding the exercise of such power to some form of *account*’.¹⁶ Accountability of public power is thus a key and overarching theme woven through many courses on the principles of public law.

However accountability is hardly the only function of public law, let alone a timeless one. It is a contemporary, liberal ideal. But it is different from the neo-liberal approach that stresses individual liberties as a bulwark against a powerful state. In other times and places, a conservative might insist on the reverse, appealing to a Hobbesian state’s role in ordering and keeping order. In a more positive vision of public law, the accent might be more pragmatic, on good governance. Or it might be a questing account, of the state as enabler and empowerer of goals such as communal welfare and equal opportunity for all citizens.

In short, public law has a relatively simple definition, in terms of coverage. It is law about government about the roles, powers, obligations, relationships and workings of the various branches of the state. That, in turn, is often focused, via constitutional and administrative law, on a core of political processes. However, once we peel away the definition of scope, we find a field alive with ideological disagreement about purpose and function.

III CONTENT: THEMES, PRINCIPLES AND VALUES

At the outset, I gave the usage-based definition of public law as an umbrella for constitutional and administrative law. In Australia there is explicit agreement around this. David Clark’s text states upfront: ‘In practice, public law may be divided into constitutional and administrative law.’¹⁷ Tony Blackshield, Roger Douglas and George Williams’ compendium of materials does not even need to acknowledge it: it simply splices together sections from their respective books on constitutional and administrative law.¹⁸

Every academic and teaching discipline presents hazy borders, and faces space constraints. There is no doubt that topics in media law, electoral law and anti-corruption law could and probably should form part of the broader public law curriculum, if space permits. Yet what of taxation law (revenue raising through economic and social policy

¹⁵ Compare Robert Nozick, *Anarchy, State and Utopia* (Blackwell, 1974) arguing for a limited, night-watchman state with John Rawls, *A Theory of Justice* (Belknap Press, 1971) arguing for distributive justice through a welfare state.

¹⁶ Tomkins, above n 9, vii-viii. Emphasis added.

¹⁷ David Clark, *Introduction to Australian Public Law* (LexisNexis Butterworths, 4th ed, 2013) 4.

¹⁸ See Publisher’s Note to Tony Blackshield et al, *Public Law in Australia: Commentary and Materials* (Federation Press, 2010).

choices), workplace law and corporate law (non-state sources of power and regulation) or criminal law (the state's monopoly on force)? It is far less clear if the essential elements of these areas are pre-requisites for, or need to be woven into, any overview of public law.¹⁹

Miller offered a compendious definition of public law:

Public law is that law which regulates the character and the structure of the state (constitutional law), the legal relations with other states (international law), the organisation and position of the agencies of the state (administrative law), and the relations between the state and the individual law (criminal law, sovereign immunity, and legal procedure).²⁰

Whatever view one takes of whether criminal law or legal procedure belong in that definition, it is clear that they differ in quality from the core of constitutional, administrative and international law, which define state power and governmental process.

Content however is not immutable. The law evolves, and what is of present-day relevance shifts. Further, as we have just noted, public law is alive with fundamental ideological contentions about its purpose. Nonetheless we can distil a set of themes and general principles that enjoy a contemporary consensus in the teaching of public law, especially at introductory levels. These are:

- democratic principles,
- executive accountability,
- good governance (ethics and integrity),
- institutional inheritances and history,
- judicial review,
- liberty, equality and rights,
- responsible and representative government,
- rule of law (constitutionalism and government under law),
- separation of powers (both amongst branches, and federally),
- sovereignty and Indigenous peoples, and
- unitarism, federalism and regionalism.

These are listed alphabetically rather than in order of priority. They are not canonical. While they are not passing either, they wax and wane in practical and intellectual importance depending on the times. While some are interlinked, there is no lexical ordering of them. So as teachers there is enormous leeway in when, how and to what degree we might stress them. Then, of course, there is a spectrum of ideological positions we might take on the subject matter.

¹⁹ Given each of these areas straddles the divide between public (collective power, distributive justice) and private (individuals, corrective justice). For a nuanced account of this hoary boundary see Kit Barker, 'Private Law: Key Encounters with Public Law' in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) ch 1.

²⁰ Miller, above n 5, 483.

A leading Australian textbook on public law opens with discussion of a core set of ‘values underpinning public law’: freedom, equality, community.²¹ Lest this sound like nothing more than a verbalisation of the French revolutionary motto, it is prefaced by detailed elaborations of the rule of law ideal (which can be thick or thin),²² and of the dichotomy of ‘empowerment and constraint’.²³ The empowerment and constraint dichotomy deserves to be stressed. There is a tendency, in common law countries at least, to exhaust the value of public law in appeals to liberalist constraints on governmental power. This is born of a focus on the rule of law, rights and accountability, through the eyes of a negative liberalism, antagonistic to state power. This approach ignores the positive vision of public law as a source of both the common good or weal, and government’s obligation to empower citizens. But to say this is to put my social democratic biases on display.

While we may lay out a smorgasbord of values informing public law, there is a vast and distinct array of palates or cuisines we can serve up from it.

A Porousness and Britishness

Returning to the traditional and neutral idea of public law as a place-marker for and overview of the twin sub-disciplines of constitutional and administrative law, it is worth remembering that in the Westminster inheritance there was no strict separation of these domains. In Westminster there was no constitutional law per se; there was certainly not a ‘Constitution’ in the Australian, US or continental European sense. Nor, especially to followers of Dicey, was there any clear British tradition of administrative law, especially compared to the French. Big-ticket constitutional issues and finer-grained administrative regulation and practice were not carved in distinct channels, but formed porous categories.

British public law thus came to be seen as a moving feast. Some of this open-ended quality is peculiar to its history and politics: Crown prerogatives and essentials of revenue collection, for instance, have more prominence in British public law than elsewhere. Until recently, the role of Empire and colonial relationships also featured heavily. The bleeding boundaries of public law are apparent when one opens staple, English student texts from the 20th century. Collections of *Leading Cases in Constitutional Law* for instance, in both the 1920s and 1960s, included numerous tort and statutory cases on trade union law.²⁴ A similar

²¹ Appleby, Reilly and Grenfell, above n 7, 25-9.

²² James Allan, ‘Reasonable Disagreement and the Diminution of Democracy: Joseph Raz’s Morally Laden Understanding of “the Rule of Law”’ in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis Butterworths, 2011) 79.

²³ Appleby, Reilly and Grenfell, above n 7, 11-18.

²⁴ Hugh Bellot, *Thomas and Bellot’s Leading Cases in Constitutional Law* (Sweet & Maxwell, 6th ed, 1927) 274-99; O Hood Phillips, *Leading Cases in Constitutional and Administrative Law* (Sweet & Maxwell, 3rd ed, 1967) 213-28. Hood Phillips incorporated these in a broader theme of ‘Rights and Duties of the Citizen’.

collection from the late 1970s included almost 80 pages on military and martial law, yet nothing on electoral law.²⁵

Some of this may be explained as the flotsam of history. For example, incorporating trade union law in the canon in the 1920s and 1960s reflected more radical and turbulent times. But it also reflects different value-landed emphases about what is 'political' (unions were understood once as essentially political entities and not merely workplace bargaining agents). The porousness of the British idea of 'public law' also means that the tort law of public liability is less likely to be overlooked as a public law issue than it is elsewhere.²⁶

British academic HW Clarke, in seeking to open 'New Fields in Public Law Teaching' in 1972, noted first that 'criminal law ... is generally reckoned as part of public law'.²⁷ He then argued that the older focus on constitutional and administrative law, with local government law thrown in as an elective, had to give way to regarding planning law, public health and housing, environmental and immigration law as part of the public law curriculum.²⁸ To this we would now add social security law, civil rights law and probably anti-discrimination law. All these areas in the Australian approach are accepted as part of the wider public law curriculum in the sense of important areas of research and potential elective study. But aside from some headline aspects of human rights law, they have not permeated the core of the idea of 'public law', understood as the key principles of government embedded in constitutional and administrative law.

The British tradition has been critiqued as having a flaw, or at least as involving a difference that diminishes it, in the absence of a written, let alone entrenched, constitution. The Westminster model lacked prominent edifices – there was no bill of rights, no separation of powers and no formally entrenched parliamentary or monarchical institutions. Devotees of political constitutionalism saw this as liberating.²⁹ In the traditional British public law model there was no Mosaic constitutional moment on Mt Sinai, just a sea of evolving political and pragmatic practices. To navigate this sea, one needed the sextant of a good sense of political history. Pity the poor British undergraduate student looking for anchor points. However the British tradition is a useful tonic to the siloing effect of distinctions both between 'constitutional' and 'administrative' law, and between those two areas of law and the broader terrain of 'public law'.

²⁵ FH Lawson and DJ Bentley, *Keir and Lawson's Cases in Constitutional Law* (Clarendon Press, 6th ed, 1979) 174-250.

²⁶ Ibid 315-90 includes a long section on 'Liability for Civil Wrongs' under a broader rubric of 'Judicial Control of Public Authorities'.

²⁷ HW Clarke, 'New Fields in Public Law Teaching' (1972) 6(1) *The Law Teacher* 28, 28.

²⁸ Ibid 28-9. Similarly, from the US perspective, see Miller, above n 5, 484-5.

²⁹ For a classic description see JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1. For a contemporary defence see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

B *Writtenness, Siloing and Australianess*

Westminster may have been the model for public law in the Australian colonies. However two ruptures ensured Westminster would not be the model for Australian public law over the past century. Each involved a shift to a 'writtenness', that is, a preference for a legislated and even codified approach to public law rather than one resting primarily on judicial inheritance. The first rupture was the fact of federation and the text of the *Australian Constitution* of 1901. The second has been the evolution, statutory codification and explosion of administrative law since the dawn of the 'new' administrative law in the 1970s (which brought FOI, merits review of administration decisions and ombudsmen). Each of these ruptures was then deepened by judicial review, both of legislation and of administrative action.

These ruptures ensured, if it were not already in place analytically, a fairly solid distinction between the twin pillars of 'constitutional' and 'administrative' law. In Australia, as in the US, constitutional law is the more glamorous sub-discipline, administrative law the more intricate. One could think of the difference between air force pilots and foot soldiers, but the analogy is inexact since constitutional law is more general and fundamental and hence tends to be more newsworthy. Siloing, implicit in the sub-disciplinary distinction between constitutional and administrative law, has strengthened over time. This is partly a self-fulfilling prophecy, and partly the product of the simple weight of developments. Notable amongst those developments has been the flourishing of administrative law remedies and avenues of review,³⁰ and the punctuated evolution of basic constitutional principles and methods (in key areas such as implied rights and federalism).³¹

In the meantime, legal education itself evolved across the twentieth century, from an apprentice model reliant on part-time practitioner-lecturers into a fully-fledged academic discipline. While Australia for a long-time hewed to British influences in everything from legal taxonomy to judicial and jurisprudential philosophy, the Australian pedagogical approach has been more influenced by US developments and fashions. First, Charles Langdell's 'scientific' approach to law emerged. It was rightly described as 'an intellectual Model T, a wholly complete and unified conceptual universe to fill the mind of the standard student'.³² This case-based method was in time overlaid with two further developments. One was legal 'realism', with its accent on the social embeddedness and empirical aspects of law. Leading Australian public law teachers, such as Geoffrey Sawer, channelled socio-political and

³⁰ These include judicial review, administrative appeals tribunals, specialist review tribunals, Ombudsmen, information commissioners, etc.

³¹ On the latter, see Theunis Roux, 'Reinterpreting "the Mason Court Revolution": An Historical Institutionalist Account of Judge-Driven Constitutional Transformation in Australia' (2015) 43 *Federal Law Review* 1.

³² JH Schlegel 'Between the Harvard Founders and the American Legal Realists: The Professionalisation of the American Law Professor' (1985) 35 *Journal of Legal Education* 311, 323.

realist approaches into Australian constitutional law.³³ Later came critical legal studies, which opened law to a dizzying variety of theoretical and economic analyses. As a result, the case-method, centred on the parsing of judicial pronouncements and statutory texts, was augmented and increasingly even displaced by case-studies and theory-based critique.

Another, more particular, educational development, specific to addressing the siloing problem, has been the emergence of first-level 'introduction to public law' courses in Australian law schools. These are explained and listed in the Appendix. While they are not all cut from the same cloth, what unites these courses is a curriculum aiming to expose early-year law students to key principles and themes in public law, distilled from both constitutional and administrative law (and occasionally public international law). They differ, therefore, from the kind of 'Administrative and Regulatory State' courses championed by professor Elizabeth Garrett in the first level US curriculum, which are designed to steep US freshers in consideration of law's fit with political processes.³⁴ Australian 'introduction to public law' courses are principles-oriented rather than practical or political, pitched at introductory level and barely concerned with regulatory theory.

IV CONTEXT AND CRITIQUE

While public lawyers may have a sense (at times overweening) of the worthiness of their field, not all students share this. First of all, Australian law students – at least Bachelor of Laws (LLB) rather than Juris Doctor (JD) students – enter law school very young, typically in their 18th year. UK university students tend to be at least a year older, while in the US and Canada, law is usually a graduate-entry degree, the inaptly named JD.³⁵ North American students thus enter law school at a much later age than most Australian students, and study a shorter law degree than in Australia, where the LLB is four to five years long and more staged. A first level public law course in Australia thus must be generalist. The difference in age of admission also affects the background knowledge, interest and motivations law students bring to their studies.

This is not to say that law students in Australia lack enthusiasm and motivation. But there is a disjunction between enthusiasm and intellectual interest amongst many school-leavers enrolling directly in an LLB. This disjunction is partly aspirational and partly generational. It is 'aspirational' because many law students are motivated not by intrinsic interest in law or justice, but by a desire for a professional qualification. And it is 'generational' in that the 'public sphere' is changing. Traditional news outlets are shrivelling and faith in organised politics and government in nation-states is waning. Rising in their stead are more

³³ Michael Cope, 'Geoffrey Sawer and the Art of the Academic Commentator' (2014) 42 *Federal Law Review* 389, 407.

³⁴ Elizabeth Garrett, 'Teaching Law and Politics' (2003) 7(11) *NYU Journal of Legislation and Public Policy* 11.

³⁵ 'Inaptly named' as a short, graduate entry, first degree in law is hardly at 'doctor' level.

fragmented social media and political practices drawn from the market place. Infotainment and partisan branding dominate over policy discourse. Even within policy debates, attention to single issue groups and the transactional approach of political deal-making dominate over any collective discussion or political philosophy. To top this off, increasing numbers of law students come from overseas or from immigrant families, and have to adjust to Australian public affairs, even if they bring a good knowledge of another political culture.³⁶

So, shocking as it is to those steeped in public law – interested in the politics, power-plays and philosophical aims that animate it – the typical law student is not by birth a public law ‘junkie’. They are, however, inquisitive and argumentative by nature. Since public law is inherently political, in all senses of the word, it need not be a dry subject. It manifests itself daily in current affairs discussions and controversies of governance. At any point in time, there is a vast selection of issues and sources one can draw on to stimulate class discussions, concretise tutorial questions or illustrate key concepts.

Introducing such contextual examples and case-studies is not, alas, a simple matter, for a variety of reasons. First and most obvious are constraints of space and time. Second is the inescapable question of ideology. It is possible in a ‘liberal’ education to offer students alternative viewpoints but, in the case studies we choose and the emphases we put on issues, we cannot help but risk indoctrinating the less attentive students and alienating many of the more attentive students.

Third is the problem of carts and horses. The ‘republican’ question, for example, was a staple of Australian public law courses and texts. Yet it has too often presented as an issue in isolation (unsurprisingly, given that is how it has been treated politically in Australia). Republicanism is a fairly symbolic sideshow when it is not linked to deeper questions of constitutional continuity and identity, popular sovereignty, or rights and powers.

Fourth is the problem of focus. Marriage equality is currently the perfect topic to bring to life questions of natural rights, judicial review of legislation, and state versus national powers. But spend a tutorial discussing that topic and you realise how hard it is for new law students in particular to separate form from substance, and the question of the proprieties of power from its individual uses. Sometimes the ‘sexiest’ case-studies distract attention from the underlying themes we want to develop as legal educators.

There are also differences in sub-disciplines. While constitutional issues tend to be big picture, administrative issues often are not. As Michael Head notes, many students have particular difficulty conceptualising the scope and character of administrative law, so that infusing its teaching with ‘topical issues’ may improve and deepen

³⁶ On the limitations students face conceptualising Australian administrative law, see Michael Head, ‘Deep Learning and “Topical Issues” in Teaching Administrative Law’ (2007) 17 *Legal Education Review* 159, 160-2.

learning.³⁷ The trick here is to avoid students grasping the colour and contemporary relevance of public law but not the underlying principles. There is always the risk of students being fascinated by the different trees but not grasping the shape of the forest.

Finally there is the challenge of keeping genuine contemporary relevance. It is one thing to have to find space for the latest big Supreme or High Court judgment, or the latest key administrative report. It is another thing to have to winnow a cherished case study or confront one's own prejudices. Republicanism may be the focus of the last referendum put to the Australian people, but it is fairly stale given that it has been 15 years since that referendum. In contrast federalism – not so much Commonwealth legislative powers compared to those of the States, but the practical questions of fiscal imbalance, horizontal or interstate equalisation, and co-operative versus competitive federalism – is a less sexy and discrete topic, but a more lasting one.

V COHERENCE

Excessive context, in either quantity or complexity, can pose risks for coherence. This will especially be so with students new to law, for whom the continuum of policy–principle–law is yet to be grasped. The discipline of law can appear to be unbounded and uncontained. As was just noted, a 'magazine-y' course can be more interesting to study, but harder to draw together. Students are inherently likely to struggle to find a 'structure' to public law, and fret about how to apply their learning to inherently discursive assessment items.

In contrast, the black-letter method is coherent, if narrow.³⁸ The method is sometimes described as 'traditional', with positive connotations of 'sound' and negative connotations of 'passé'. Either way it keeps returning, at least for those who see their discipline as having a canon of core topics, since the amount of significant case law (especially in constitutional law) and statute law (especially in administrative law) builds over time.

A simple comparison of two radically different textbooks may illustrate. *The Constitution of the Commonwealth of Australia Annotated* by Darrell Lumb and Kevin Ryan of the University of Queensland was a popular text first offered by Butterworths in 1974. It continued into a 7th edition under Gabriel Moëns and John Trone. Its average edition ran to just under 400 pages, with detailed discussion of each section of the Australian Constitution, in series. The work is not acontextual – it has an originalist tint – but its clear purpose was to explain each provision of the Constitution and the key case law elucidating it. Its worldview was not expansive. Rather, it avoided imposing any thematic overlay on the field, and concentrated on leading students through the evolution of the law.

³⁷ Ibid.

³⁸ For a predominantly black-letter account of Australian public law and its evolution, see the early editions of David Clark, *Introduction to Australian Public Law* (Lexis-Nexis, 1st-3rd editions).

In contrast, *Australian Constitutional Law and Theory: Commentary and Materials*, pioneered by Tony Blackshield and George Williams, then at Macquarie University and ANU respectively, was first offered by The Federation Press in 1996.³⁹ Its latest edition (the 6th) contains almost 1400 pages and is popular with teachers, if not chiropractors. The work is thematically ordered, dense with curated case extracts and commentary, and littered with secondary writings from Agamben to Zines. It would be misleading to characterise how different it is to the annotated Constitution by noting that the earlier text is a highly ordered reference work and the later one a multi-dimensional teaching resource. After all, each is both a student text and a work of legal reference. Nor are these books just products of different eras; in fact their editions overlap for nearly a generation. Rather they are products of entirely distinct approaches, both academic and publishing.

The coherence of ‘black-letter’ as both a method distinct to law and as a narrowing of focus is offset, however, by its brittleness and aridity. Even those areas of law that are reducible to formulaic rules need to be understood in either their real world effects or their philosophical rationales (and preferably both).⁴⁰ Without those insights, no student is likely to remember the underlying principles that inform the law. Nor will they, on graduation, be ready to make sense of the law to their clients, as practitioners, or engage in reform debates, as citizens. In short, the black letter approach integrates neatly, but only within its own terms: a form of coherence is achieved through a self-contained boundedness.

In this lies an old story. Classical first year courses such as contract law, tort law and criminal law threw students into the deep end of doctrine and analysis of judgments. This narrower approach lent a neat focus (case method skills, and learning and applying elements of black-letter law in a relatively contained field). It also offered a contained focus for new students, who naturally struggle with the novel demands of legal language, reading and argumentation. But it came at the expense of any broader sense of what the law ‘is’, of the law as a set of principles connected to a social and political dimension. Public law by its nature is inextricably intertwined with questions of politics, governance, power, regional and national identity and so on. First year courses in principles of public law, therefore, are more than just a springboard to constitutional and administrative law, they present students with a broader way of thinking about law.

VI CONCLUSION

Public law has a coherent, descriptive definition as the law of government, understood as a set of political processes centred on the idea and power of the state. It is not the law affecting everything ‘public’, nor a catch-all for any form of regulation emanating from any branch of

³⁹ Initially with Brian Fitzgerald as co-author.

⁴⁰ This is what educationalists call ‘deep’ versus ‘shallow’ approaches to learning. See, eg, Head above n 36.

government. Those would be unruly and limitless categories. Its core is constitutional and administrative law and, to limit siloing, increasing numbers of Australian law schools offer introductory level 'principles of public law' courses.

This definition of public law, however, is beguilingly simple. Australia's written constitutional tradition has a centripetal pull on the idea of public law, especially when contrasted to the more expansive idea in the UK. But public law is much broader than constitutional, administrative and even international law, as elective offerings in everything from immigration and social security law demonstrate.

A definition of public law centred on the powers of the state and governmental processes offers a focus for the kind of *content* that should be covered in courses on 'public law'. There is also, in any era, a set of contemporary *themes* to inform the teaching of that content (such as accountability, representation, etc). But no definition can mandate a sense of purpose or approach to public law. There are simply too many *ideologies* about the proper role and function of government, and no appeal to 'mediating the common good' can alleviate that.

Any coherent map of the terrain of public law will be a static, and partial one. We may know the landscape, but we also know there are many ways to traverse it. The black-letter scholars predominate, burrowing tunnels through the topography, with a bias for using judicial determinations as their lodestone. They predominate, but there are also those informed by political and social science perspectives, who are more like meteorologists and seismologists. And then there are those looking down from the clouds, of which there are many vantage points as there are philosophical approaches (eg liberal, communitarian, structuralist or Hobbesian).

At a high level of abstraction, public law enjoys a relatively simple descriptive definition as the study of the law of government through political processes associated with the state. Introductory public law courses are now a staple of 14 out of 34 Australian law curricula (see Appendix), offering overviews of key themes, principles and institutions drawn from traditional constitutional and administrative law. But while public law has a more coherent set of topics and themes than private law, public law is riddled with deep ideological and philosophical disputes. These are not just infusions, needed to understand particular topics (eg the liberal conception of representative democracy) but intractable disputes about what public law and governance as a 'mediator of the common good' might mean.

This is a challenge, especially to the liberal model of legal education. But it is a challenge in both the negative and positive sense. Public law can seem abstract to the lives or understandings of most commencing law students. The only way to meet that challenge is to teach contextually and critically. (To avoid it is to treat public law as an engineering exercise: a set of mechanisms of state power and a set of safeguards against risks of its excesses). But in doing so, the philosophical biases of the teacher cannot be disguised, least of all when using contemporary case-studies

and material implicating sometimes raw social and political cleavages. In turn, while contextual teaching lends spice to a course, it also carries risks of students focusing on a few trees rather than the broader forest, and to the coherence of a curriculum squashed into 13 weeks and juggling depth and breadth.

APPENDIX: AUSTRALIAN LAW SCHOOLS AND ‘PUBLIC LAW’ COURSES

For professional accreditation, all Australian law courses must cover certain core academic issues in Australian public law.⁴¹ Most LLB programmes require students to study semester long stand-alone courses in constitutional law and in administrative law. Constitutional law is usually treated as a second level course and administrative law as a later level course.

For a majority of law schools (20 of 34), that is all. Typically first level students do one or two generalist courses with titles such as ‘Introduction to Legal Systems’, ‘Foundations of Law’ or ‘Law in Context’. These mix information about legal systems, basic skills in legal research and comprehension, and introductory questions in law and justice. A few of these courses expose students, in a single week or so, to the written Australian Constitution or to an introduction to the history and place of the parliament and executive in government. More often however the overwhelming emphasis is on courts as a distinctive symbol and source of law.

For a significant minority of law schools (14 of 34), a dedicated first level course introducing students to key concepts in public law is mandated.⁴² Occasionally these courses contain a component to develop the skill of statutory interpretation.⁴³ But the essential aim of these courses is to provide a foundation of principles relating to the modern state by exploring the three branches of government, constitutionalism and executive power and accountability.

This has been a trend in the past decade or so. It echoes the older British model where ‘public law’ was a first-year course,⁴⁴ but differs in that those courses combined constitutional and administrative black-letter law. In the longer Australian LLB there is room both for an introductory ‘public law’ course and, later, dedicated constitutional and administrative law courses.

These 14 law schools include all the older and more elite (‘Group of Eight’) law schools. Often seen as ‘traditional’, these schools are perhaps better resourced to engage in curriculum reform. Nonetheless, several of the newer law schools have adopted this model.

In alphabetical order, the universities concerned are:

Adelaide University – Principles of Public Law

⁴¹ These are known as the ‘Priestley 11’, and were first set by the national Law Admissions Consultative Committee in 1992.

⁴² Bond Law School will be introducing an Introduction to Public Law course following its recent curriculum review. Bond Law School already offers Australian Government and Politics, a first level elective which it encourages its large international cohort and any civics-naïve local students to take. Australia’s only privately owned law school is thus the only one to offer its new students a course whose title, at least, acknowledges that law and ‘politics’ are symbiotic.

⁴³ This is made explicit in the title of Monash University’s course.

⁴⁴ Clarke, above n 27, 28.

ANU – Australian Public Law

Australian Catholic University – Public Law

Flinders University – Introduction to Public Law

Charles Darwin University – Introduction to Public Law

La Trobe University – Principles of Public Law

Monash University – Public Law and Statutory Interpretation

Sydney University – Public Law

University of Melbourne – Principles of Public Law

University of NSW – Principles of Public Law

University of Queensland – Principles of Public Law

University of Tasmania – Foundations of Public Law

University of Western Australia – Foundations of Public Law

Victoria University – Introduction to Public Law.

