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Breadth, Depth and Form? Pitching Constitutional Law Content in the Classroom

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BREADTH, DEPTH AND FORM? PITCHING CONSTITUTIONAL LAW CONTENT IN THE CLASSROOM

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I INTRODUCTION

Chief Justice French has described legal 'curriculum design' as nothing less than 'a battlefield'.[1] Inevitably, a number of obstacles face law schools in seeking to rethink legal courses and the units they contain. With public law subjects the challenges are no less confronting. As Kauper has explained in relation to the teaching of constitutional law:

> Our real problem as teachers is to marshall effectively for our own use the large body of materials pertinent to the subject and to work constantly at the task of improving our teaching techniques so that we excite the student's interest and incite him [or her] to the extra mile of his [or her] own reading and reflection.[2]

At the 2014 Gilbert + Tobin Constitutional Law Conference, Justice Mark Leeming of the New South Wales Court of Appeal identified that teachers of constitutional law in Australia must continually rise to this curriculum challenge. His Honour said:

> If we want to explain or teach constitutional law as a living, useful and relevant subject, there is a deal to be said for shifting its focus towards the areas which continue to yield new learning and reducing the focus on areas where principles are settled and well understood.[3]

This article seeks to respond to Justice Leeming's challenge in the context of the teaching of constitutional law within Australian law

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1 Chief Justice French, 'Curriculum Change: A Multidimensional Task' (Paper presented at University of New South Wales Law School, 20 October 2014) 1. See also Sally Kift, '21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law' (2008) 18 *Legal Education Review* 1, 2.

2 Paul Kauper, 'Constitutional Law Teaching: Problems and Perspectives' (1968) 20 *Journal of Legal Education* 487, 499.

3 Justice Mark Leeming, 'The Federal and State Courts on Constitutional Law: The 2013 Term' (Paper presented at Gilbert + Tobin Centre of Public Law Constitutional Law Conference, University of New South Wales, 14 February 2014) 3: <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2014_con_law_conf_papers_justice_leeming.pdf>.

schools. Law schools are increasingly focused on skills development and this needs to feature in constitutional law curriculum planning and redesign along with more content focused questions, including how both 'breadth' and 'depth'[4] can feature in constitutional law units. Fundamentally, the article explores what students need to know, what skills constitutional law can teach and ways to facilitate the learning process in constitutional law teaching settings. It concludes that how we answer many of these teaching challenges turns on how we define what 'constitutional law' means for us.

II RECONSIDERING THE CONSTITUTIONAL CURRICULUM?

It is first necessary to address the catalyst(s) for this focus on what should be taught in Australian Constitutional Law units. Justice Leeming explained:

> [T]he overwhelming majority of the [constitutional law] litigation concerns implied limitations on federal and state legislative power ... or the interaction between federal and state laws and the exercise of judicial power. This may have consequences for how we think about, and teach, constitutional law. I suspect there is no one in this room more enthusiastic than me for the teaching of so-called "dead" languages at school and university. Although reading and teaching the decisions on the trade and commerce power, or the industrial relations power, is an excellent introduction to the social and economic history of 20th century Australia, it is far removed from the practice of constitutional law as it now occurs, in a relatively mature constitutional setting in the 21st century.[5]

His Honour's observation concerns the fact that constitutional challenges are rarely about whether a Commonwealth law is with respect to the subject matter of a constitutional head of power – previously what Justice Leeming describes as the 'mainstay of the constitutional law course' that he studied under Professor Crawford.[6] Instead, express and implied constitutional limits, s 109 and intergovernmental immunities have begun to take precedence, over and above questions of whether a law is in fact with respect to the external affairs power (s 51(xxix)), the corporations power (s 51(xx)) or the taxation power (s 51(ii)). In the last few years, with some obvious exceptions focused on heads of power,[7]

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4 This is, of course, based on George Winterton's classic executive power nomenclature of 'breadth' and 'depth': George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 29-30. See also Law Admissions Consultative Committee, *Uniform Admission Rules* (2014) <http://www1.lawcouncil.asn.au/LACC/images/pdfs/Uniform_Admission_Rules_2014_-_June2014.pdf>.

5 Leeming, above n 3, 3

6 Ibid. See also George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory: Commentary & Materials* (Federation Press, 6th ed, 2014), Preface.

7 *Fortescue Metals Group Ltd v Commissioner* (2013) 250 CLR 548; *Williams v Commonwealth* (2012) 248 CLR 156; *Williams (No 2) v Commonwealth* (2014) 88 ALJR 701; *CPCF v Minister for Immigration and Border Protection* (2014) HCA 1 (28 January 2015).

cases such as *Commonwealth v Australian Capital Territory*,[8] *Monis v The Queen*,[9] *Assistant Commissioner Condon v Pompano Pty Ltd*,[10] *Magaming v The Queen*,[11] *Momcilovic v The Queen*[12] and *Rowe v Electoral Commissioner*,[13] have highlighted the shifting focus of the High Court. This explains Justice Leeming's concern as to whether our unit outlines are beginning to bear less and less resemblance to the Court's constitutional preoccupations and the need to 'focus towards the areas which continue to yield new learning and reducing the focus on areas where principles are settled and well understood'.[14]

Before addressing these issues in the constitutional law context, there have been a number of paradigm shifts in legal education that feed into questions over how to structure law school units. As Huggins explains, there is a clear

> emphasis on active and student-centred learning, facilitating learning rather than transmitting knowledge, making learning objectives transparent, and aligning outcomes, assessment and teaching.[15]

The importance of a heightened focus on legal skills emerged out of the Australian Law Reform Commission's (ALRC) *Managing Justice* inquiry, particularly the fact that much Australian legal pedagogy was more focused on 'what lawyers need to know' than 'what lawyers need to be able to do'.[16] This lesson has been reinforced in much teaching scholarship.[17]

Skills represent a central part of the new Threshold Learning Outcomes for Law (TLOs), which emerged from an initiative of the Australian Learning and Teaching Council.[18] The TLOs highlight the importance of a range of skills, including 'Thinking Skills' (TLO 3), 'Research Skills' (TLO 4); and 'Communication and Collaboration' (TLO 5).

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8 (2013) 250 CLR 441.

9 (2013) 249 CLR 92.

10 (2013) 87 ALJR 458.

11 (2013) 87 ALJR 1060.

12 (2011) 245 CLR 1.

13 (2010) 243 CLR 1.

14 Leeming, above n 3, 3.

15 Anna Huggins, 'Incremental and Inevitable: Contextualising the Threshold Learning Outcomes for Law' (2015) 38(1) *University of New South Wales Law Journal* 264, 276.

16 Australian Law Reform Commission, *Discussion Paper 62 - Review of the Federal Civil Justice System* (1999), [3.23] <http://www.austlii.edu.au/au/other/lawreform/ALRCDP/1999/62.html#ch3Heading1>.

17 See, eg, Kift, above n 1, 10; Huggins, above n 15; Byron D Cooper, 'The Integration of Theory, Doctrine and Practice in Legal Education' (2002) 1 *Journal of the Association of Legal Writing Directors* 50.

18 See Council of Australian Law Deans, 'Juris Doctor – Threshold Learning Outcomes' (2012) <http://www.cald.asn.au/assets/lists/ALSSC.pdf>; Learning and Teaching Academic Standards Project Bachelor of Laws 2010, <http://www.olt.gov.au/system/files/resources/altc_standards.LAW_110211_rv2_0.pdf >.For current links to relevant Council of Australian Law Dean documents see: <http://www.cald.asn.au/education>. See, also, Huggins, above n 15, 264; Natalie Skead, Sarah Murray and Penny Carruthers, 'Taking up the Challenge: Embedding, Mapping and Maintaining Threshold Learning Outcomes in the Transition to the JD: The UWA Experience' (2013) 47(2) *The Law Teacher* 130-158.

In addition, the Law Admissions Consultative Committee (LACC) Uniform Admission Requirement[19] include certain content requirements, typically referred to as the 'Priestley 11' (for which there is currently discussion of some revision). [20] However, for Federal and State constitutional law the requirements are very general and not very prescriptive:

> State constitutions and constitutional systems.
>
> 1. The Commonwealth Constitution and constitutional system.
> 2. The constitution and operation of the legislature, executive and judiciary.
> 3. The relationship between the different institutions of government and the separation of power.
> 4. The relationship between the different levels of government.
>
> OR
>
> Topics of such breadth and depth as to satisfy the following guidelines.
>
> The topics should include knowledge of the major principles of both the relevant State or Territory Constitution and the Commonwealth Constitution, including the relations between the different Commonwealth and State or Territory laws. A general knowledge of the scope of both State or Territory and Commonwealth Constitutions is required, although the topics will differ in the depth of treatment of specific heads of power, particularly in the Commonwealth sphere.

The ALRC acknowledged that skills and legal content go hand in hand, that law students need 'a basic grounding in the major areas of substantive law' and that there are real difficulties with imparting skills training in 'a substantive vacuum'.[21] This means that skills development in the classroom needs to be considered alongside content-based decisions.

III MAKING CHOICES IN THE CONSTITUTIONAL LAW CLASSROOM

Professor Kauper, from the University of Michigan, argued in 1968 that constitutional law training in law schools in the United States should encompass

- core constitutional principles and institutions and how these have developed historically;
- constitutional interpretative approaches (both past and present);
- the position and influence of policy on the Supreme Court;
- current constitutional dilemmas; and

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19 Law Admissions Consultative Committee, above n 4.

20 See Law Council of Australia, *Review of Academic Requirements for Admission* (2014) <http://www1.lawcouncil.asn.au/LACC/images/pdfs/01.12.14__Review_of_Academic_Requirements_for_Admission.pdf>.

21 ALRC, above n 16, [3.24].

- critical analytical problem solving abilities.[22]

Any such list is likely to prove controversial, but its merits lie in showcasing the need for not only content but also wider real-world context and the development of analytical skills. And Kauper, along with Justice Leeming, can ease us from complacency with our constitutional law teaching.

This article addresses three related issues in responding to this challenge: (1) the need for 'breadth' and 'depth' as well as 'form' and how to reconcile these within semester long units; (2) building on (1), how to keep our units 'living, useful and relevant'; and (3) how we define 'constitutional law' and ultimately help in narrowing down the complex teaching choices to be made in (1) and (2).

A *Breadth and Depth but also Form*

How should the typical 12 or 13 week semester constitutional law unit be shaped? Breadth, depth and form all need to be part of the constitutional law teaching picture, but what do these denote in this article? 'Breadth' refers to the content or topics selected as units of study, 'depth' refers to the level of detail engaged with by particular content or a set topic, and 'form' refers to the shape of the learning and teaching methods used or the process by which learning takes place. All three present a range of challenges to those designing and teaching constitutional law.

In the constitutional law space, how can these various aspects of what to teach and how to teach be juggled and conceived to bring about better teaching outcomes, and what lessons can we take from Kauper and Justice Leeming?

B *Form in Constitutional Law Teaching*

While breadth and depth of content are important curriculum considerations set by the Priestley 11, it is also necessary to think about a third dimension: the 'form' of the learning and teaching that takes place. There is increasing concern about teachers over-focusing on material – what McNeil calls the 'fallacy of content',[23] where instructors over-concentrate on '*what* students study rather than *how* they study'.[24] McNeil emphasises that 'the process of learning is more important than the content'.[25]

Teaching 'form' focuses on how learning occurs and the role students play in that process. The benefits of ensuring that 'deep learning'[26] is happening in classrooms and tutorials is also well accepted so that students question, critically engage with and tease out the material in

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22 Kauper, above n 2, 489-493.

23 John McNeil, *Contemporary Curriculum in Thought and Action* (John Wiley & Sons, 7th ed, 2009) 89.

24 Ibid.

25 Ibid.

26 Paul Ramsden, *Learning to Teach in Higher Education* (Taylor and Francis, 2nd ed, 2003) Ch 4 generally and at 60 where he notes that this 'allows students to use academic knowledge to control and clarify the world outside academic knowledge'.

ways that allow for greater comprehension and retention of material. This needs to be prioritized over a superficial or surface learning approach, which is about 'quantity without quality'.[27] Such shallow learning sees students transferring notes into their examination booklets, often quickly forgetting the content once it has been 'parroted off'. Aspiring to deeper learning is also consistent with the Threshold Learning Outcomes, which particularly emphasise critical thinking skills and advanced cognitive processing abilities ('Thinking Skills' (TLO 3)).

Skills development is also a vital part of law teaching. While overlapping with questions of breadth and depth, it also relates to 'form' and the teaching methods that are used to impart and allow students to practice legal skills. While skills-mapping[28] needs to be integrated across the curriculum rather than purely within a single unit, there is considerable scope to think about the skills that are most amenable to instruction through constitutional law and how these can lead to more meaningful learning experiences. There are many skills that can be explored in this setting and there is much teaching scholarship to assist in focusing on Thinking Skills (TLO 3),[29] Communication and Collaboration (TLO 5)[30] and Self-Management (TLO 6),[31] whether through problem-solving activities (as advocated by Kauper), peer-to-peer feedback or active learning activities. These activities can impart content while providing students with a practical context for their learning and allowing for a more dynamic and collaborative classroom experience.[32]

At the University of Western Australia (UWA), as part of a Juris Doctor (JD) course-wide mapping exercise,[33] the unit *Foundations of Public Law* specifically focuses on TLO 5 (Communication and Collaboration) through a tutorial based advocacy assessment that requires students to run a constitutional law moot with a partner acting as junior/senior counsel. This allows the unit to integrate Kauper's currency, policy and problem-solving recommendations. In the follow-up unit *Constitutional Law*, the focus is upon TLO 4 (Research Skills) through both a point-in-time legislative library exercise integrated into the tutorial program (and which contemporaneously teaches characterisation,

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27 Ibid 45.

28 Normann Witzleb and Natalie Skead, 'Mapping and Embedding Graduate Attributes Across the Curriculum' in Sally Kift, Michelle Sanson, Jill Cowley and Penelope Watson (eds), *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, 2011) 31.

29 For an excellent discussion of the role of critical thinking in legal education see: Gabrielle Appleby, Peter Burdon and Alexander Reilly, 'Critical Thinking in Legal Education: Our Journey' (2013) 23(2) *Legal Education Review* 345, 367-374, where Appleby focuses on strengthening critical thinking in the teaching of constitutional law.

30 See, eg, 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.

31 Appleby, Burdon and Reilly, above n 41; Anna Huggins, Sally Kift and Rachael Field, 'Implementing the Self-Management Threshold Learning Outcome for Law: Some Intentional Design Strategies from the Current Curriculum Toolbox' (2011) 21 *Legal Education Review* 183.

32 Frank Strong, 'The Pedagogic Training of a Law Faculty' (1993) 25 *Journal of Legal Education* 226.

33 See Skead, Murray and Carruthers, above n 18.

severance and reading down) and through a case note research assignment. However, courses need to tap into these skills in a broader range of ways. Classes need to make time for problem solving, discussion and workshop-style sessions. This means shifting from lectures being all about the teacher to being as much about our students.[34]

As Bunjevac explains, this transformation involves the classroom entailing 'a process of constructing rather than acquiring knowledge, in which teachers are involved as co-creators of knowledge'.[35] This prepares students not only for a future as constitutional lawyers, but also as practitioners who may only encounter constitutional law tangentially but who still have the training to know when a constitutional issue has raised its head.

Many constitutional law topics are arguably amenable to such learning techniques and their utilization can make a difference to how students conceptualize a topic. Take the judicial technique of severance in a constitutional law setting. Teaching this in a problem-based environment has the potential to not only demonstrate to students the limits of constitutional heads of power but also judicial technique and how reading down or red-lining can be a very powerful constitutional tool. Alternatively, take the difference between transformation and incorporation theories of international law (with a basic introduction to international law becoming part of many foundational public law units). One means that can be used to try to convey this difference is to adopt a moot-style communication class exercise (TLO 5) to allow students to see a practical example of how the transformation theory severely limits the legal arguments available to an advocate. Through this exercise, students, in groups of three, undertake either the role of plaintiff, defendant or judge in *Minogue v Williams*[36] to explore whether a prisoner's rights under the *International Covenant on Civil and Political Rights* are being violated by the small array of vegetarian meal options from a prison cafeteria. Classroom experiences such as these not only actively engage students in the learning process, but also allow them to absorb the distinction between these important public law theoretical approaches in a more profound way, while also having the currency advocated by Kauper and Justice Leeming.

Tutorials provide even greater flexibility to explore more diverse teaching forms. As noted above, mooting skills at UWA are actively taught and assessed in *Foundations of Public Law*, which allows for knowledge to be acquired and assessed (TLO 1) alongside TLO 3 (Thinking Skills), TLO 4 (Research), TLO 5 (Communication and Collaboration) and TLO 6 (Self-management). Students have to

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34 See, for example, Robert Davidow, 'Teaching Constitutional Law and Related Courses Through Problem-Solving and Role-Playing' (1984) 34 *Journal of Legal Education* 527. See generally John Biggs, 'What the Student Does: Teaching for Enhanced Learning' (1999) 18(1) *Higher Education Research & Development* 57.

35 Tin Bunjevac, 'Critical Reflection and the Practice of Teaching Law' (2013) 5(1&2) *Journal of the Australasian Law Teachers Association* 1, 5. See also Strong, above n 44, 228-229 discussing a 'student-oriented learning environment' with an emphasis on '[l]earning-by-doing'.

36 [2000] FCA 125 (17 February 2000).

determine the relevant constitutional law issues, divide them between junior and senior counsel, prepare written submissions, and engage in a moot with a tutor-judge. For many students this is their first experience of this form of legal communication and provides an excellent introduction into the range of skills lawyering can require, within the constitutional knowledge setting,[37] while also exposing students to the nature of constitutional law litigation, in the form Justice Leeming describes.

These represent only a few examples of the potential for more interactive constitutional law classes.

IV CONSTITUTIONAL LAW CONTENT – BREADTH AND DEPTH?

To arm students with constitutional law knowledge, both 'breadth' and 'depth' need to be incorporated into our curricula. However, as identified by Justice Leeming, there are also real questions as to what we choose to focus upon. Addressing this is particularly challenging in light of the restructuring of many courses with one introductory public law unit, followed by more advanced constitutional law and administrative law units?[38] In this context, unit design needs to be meticulous to ensure that content is presented at the right point and at the appropriate level so that learning can be suitably scaffolded.

Breadth of content does not mean that every case, head of power and constitutional provision needs to be taught.[39] Similarly to Justice Leeming, Kauper has observed that:

> Coverage is not the most important objective. There is no point in trying to teach students everything. We have to choose, and we choose to emphasise the Constitutional Law subjects we deem important and probably in some cases the subjects in which we are most knowledgeable.[40]

It is clear that units need to be constructed with much more than just content in mind, as this is insufficient to prepare students for the legal coalface that awaits them. However, content questions still play an important role. Courses need to be structured to provide a reasonable working knowledge of the core aspects of constitutional law study. But it is difficult, and even unwise, to draw definitive bright lines around what such 'core aspects' might entail. We might conclude that a unit 'shopping list' includes the three arms of government, constitutional law principles (eg. representative government, federalism, separation of powers), the processes of constitutional amendment, state constitutions, the process of characterisation, the mechanics of heads of power and the constitutional limitations which curb these legislative heads of power. However, any

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37 Teaching mooting skills provides an excellent way to engage law students in a deeper way with legal material: Andrew Lynch, 'Packing Them in the Aisles: Making Use of Moots as Part of Course Delivery' (1999) 10 *Legal Education Review* 83.

38 For example, the JD at the University of Western Australia, Sydney University, University of New South Wales, Australian National University, University of Queensland and Melbourne University, and the LLB at the University of Adelaide.

39 Kauper, above n 2, 494.

40 Ibid.

such 'list' must be ambulatory and unit outlines need to be constantly revisited in light of current constitutional preoccupations.

Following Justice Leeming's advice, there is frequently cause for a fine-tuning of courses to ensure that topics are not there because 'they were what we learnt' or have always been on the curriculum but because they continue to be necessary. The question becomes: what breadth we can omit? While topics such as the corporations power (s 51(xx)), the external affairs power (s 51(xxix)), the defence power (s 51(vi)) and the finance powers (ss 51(ii), 61, 81-83, 96) might seem 'essential' learning, we need to make sure that we are flexible enough to see that this is not necessarily always going to be the case. The focus must be on giving students a working understanding of the Commonwealth Constitution, however that might best be achieved at a particular point in time. The trap is the tradition that Justice Leeming alludes to of cramming a course with the 'old' without room for the 'new' (or with *all* of the 'old' and *all* of the 'new'). What is vital is that, as Justice Leeming advocates, units are structured to make space for current cases and constitutional preoccupations, which at this point necessitates a discussion of constitutional limitations, and particularly, the implied freedom of political communication, s 109 and Chapter III.

One question that often causes a headache is how much constitutional history to incorporate. Many students undertake the study of constitutional law with little, if any, knowledge of federation and the historical circumstances in which the state and federal constitutions were formed.[41] Additionally, with clear exceptions, there is a paucity of basic 'civics' understanding,[42] which can make it essential to outline, and set reading on, the basic parliamentary structure and the electoral system before embarking on the nuts and bolts of the *Territorial Senators* cases,[43] *Roach v Electoral Commissioner*[44] or *Rowe v Electoral Commissioner*.[45] While a range of methods can address this, including classroom quizzes, optional extra classes and Parliament House tours, it is inevitable that some coverage of this introductory material is necessary as adjusted to suit the knowledge of the particular cohort being taught.

Besides content, the other practical consideration is how to deal with the dilemma of depth. How can a unit provide sufficient breadth while still leaving room for deep exploration of contemporary issues such as the implied freedom of political communication or Chapter III?[46] There is no

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41 Ibid 490.

42 Bede Harris, 'Enhancing Critical Thinking and International Comparative Approaches to Constitutional Law Education in Australia' (2012) 5 (1&2) *Journal of the Australasian Law Teachers Association* 1.

43 *Western Australia v Commonwealth (First Territorial Senators Case)* (1975) 134 CLR 201; *Queensland v Commonwealth (Second Territorial Senators Case* (1977) 139 CLR 585.

44 (2007) 233 CLR 162.

45 (2010) 243 CLR 1.

46 Leeming, above n 3, 3. Pollman sees the Gary Larson cartoon where a pupil puts up his hand and asks to leave the classroom, announcing 'my brain is full' as describing many law school teaching environments: Terrill Pollmann, 'The Sincerest Form of Flattery: Examples and Model-Based Learning in the Classroom' (2014) 64(2) *Journal of Legal Education* 198, 301.

point going into inordinate detail on a few 'classic' heads of power and having no time for a thorough discussion of pressing constitutional questions. As Kauper warns '[o]ften the material sacrificed to … scanty treatment is the most interesting current material'.[47] Inevitably, choices must be made as to where depth is required. This might mean, for example, that a detailed study of the sprinkling of rights in the Commonwealth Constitution is not always going to be possible, but an awareness of these or even detailed analysis of some provides a great platform for studying Bills of Rights (whether Charters are desirable or even constitutionally possible) and why s 128 is a difficult provision through which to achieve this.

Decisions about the 'depth of treatment of specific heads of power' (as the Priestley 11 sets down) may be influenced by areas of particular interest or topicality. For example, the defence power in s 51(vi) often only received cursory treatment in many law school courses prior to *Thomas v Mowbray*.[48] However, post-September 11 and in the current climate of terrorism, the defence power is a head of power which justifies dedicated class time. It also provides an excellent platform through which to integrate international context into our law teaching as set down by TLO 1 ('Knowledge').[49] Shifting many of the fundamental constitutional law concepts (such as federalism, representative government and the separation of powers) and a workable understanding of the Commonwealth Constitution to an introductory public law course provides one mechanism to tackle questions of depth, so that students start the more advanced constitutional law unit already well versed in the basics and ready (and with class-time) for a thorough digging into the 'new'. In the revised course structure at UWA following introduction of the JD, and similar to that found in many JD courses, students undertake *Foundations of Public Law* in first year and *Constitutional Law* in second year, which has (even alongside the inclusion of additional material on International Law and Administrative Law) allowed a scaffolding of learning as well as a nesting the learning within a broader 'public law' setting.[50] Admittedly, the ability to do this is influenced by the course structure and the extent of the time that has elapsed between students taking related public law units.[51]

Another tool that can be used very successfully is distinguishing between material that is best undertaken in class, and material that can be digested by students in their own time, whether facilitated by tools such as structured study questions or the possibilities of a 'flipped

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47 Kauper, above n 2, 494, commenting that '[o]ften the material sacrificed to this scanty treatment is the most interesting current material'.

48 (2007) 233 CLR 307.

49 See also Duncan Bentley et al, *Internationalising the Australian Law Curriculum for Global Legal Practice* (Office for Learning and Teaching, 2012) <http://www.olt.gov.au/project-internationalising-australian-law-curriculum-enhanced-global-legal-education-and-practice-20>.

50 While the JD structure can provide additional class time, it can also require the inclusion of additional broader public law course material (such as on the fourth arm of government or the concept of judicial review).

51 The author wishes to thank Professor Rosalind Dixon for her thoughts in relation to this.

classroom'.[52] This might mean, for example, that selected case law on readily accessible powers selected for the unit can be looked at outside of class followed by an interactive workshop with students to explore the intricacies of the relevant powers in more detail or explore questions that are yet to be answered by the courts.

V KEEPING UNITS 'LIVING, USEFUL AND RELEVANT' (OR 'WHERE IS THE FUN?')

Justice Leeming is entirely accurate in his call for constitutional law teaching to remain 'living, useful and relevant', and his insistence that this requires that space be made for 'new learning'.[53] This focus is inevitably entangled with the questions of breadth, depth and form discussed above. What we choose to teach and how our students learn will be influenced by what we identify as the pressing constitutional issues of the day. However, it merits a separate discussion to thoroughly explore the potential for 'fun' in constitutional law teaching. Ultimately, constitutional law units should strive to create learning environments that spark students' 'curiosity' to dig in deeper on their own.[54]

Topics such as the Commonwealth's executive power, and particularly the 'power to contract and spend', or the scope of non-statutory executive power have been injected with considerable interest of late. Bringing this into the classroom offers a myriad of benefits. It allows lectures to be fresh, research-driven and full of practical context. It facilitates current topics that are being aired in the news, such as the detention of asylum seekers and the constitutionality of executive funding programs (such as the funding of chaplains in schools),[55] to be debated in lecture theatres and seminars. There is also substantial research suggesting that students learn better through examples, and varied ones at that,[56] and that classes need to provide diverse platforms for these. As Michael Head has argued in the administrative law context,[57] this allows students to see the legal significance and the 'fun' of core material and what it means for the functioning of Australian governmental life. It also encourages students to be active participants and contribute to their own and others' learning in the classroom.[58] This means that how and what we teach might also be influenced by the interests of the student cohort, as well as topicality. Presenting students with options, where possible, provides an excellent means to engage students in the learning process. It

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52 See, eg, Angela Upchurch, 'Optimizing the Law School Classroom through the "Flipped" Classroom Model' (2013) Fall *The Law Teacher* 58; Alex Berrio Matamaros, 'How Flipping the Classroom Made My Students Better Legal Researchers and Me A Better Teacher' (2014) Spring *The Law Teacher* 16.

53 Leeming, above n 3, 3.

54 Parham Aarabi, *The Art of Lecturing* (Cambridge University Press, 2007) 39.

55 *Williams v Commonwealth* (2012) 248 CLR 156; *Williams (No 2) v Commonwealth* (2014) 88 ALJR 701.

56 See, eg, Pollman, above n 60, 315, 321-322.

57 Michael Head, 'Deep Learning and "Topical Issues" in Teaching Administrative Law' (2007) 17 *Legal Education Review* 159.

58 McNeil, above n 35, 75; Ramsden, above n 38. Cf discussion of traditional 'passive' learning in Bunjevac, above n 47, 4.

might for example, entail a class on the constitutional challenges presented by Julian Assange running for the Australian Senate, with this allowing a practical exploration of the importance of s 44(i) of the Constitution. Alternatively, recent cases provide a great way to bring constitutional law action, and the spectrum of constitutional law issues a matter can present to a court, into the curriculum. *Kuczborski v Queensland*[59] or *Monis v The Queen*,[60] are excellent examples of cases that can be used for such class workshops as they both allow explorations of key concepts (Chapter III and the implied freedom of political communication, respectively) as well as broader discussion of issues such as standing, judicial dissent and the current role of the High Court. Hands-on case exploration sessions using party submissions and High Court transcripts can be particularly successful if students can see the practical relevance of the decision. The High Court decision in *Pape*[61] provides an excellent example of this. As it concerned the constitutionality of the Commonwealth's fiscal stimulus campaign during the Global Financial Crisis, students can see the real-world relevance of the decision, not to mention its potential impact on their own ability to receive the fiscal stimulus payment.

One of the best practitioners of this 'hot topic' technique in the classroom was Professor Peter Johnston, who taught at the UWA Law School for many years. What was evident after his tragic passing and recent funeral was the degree to which he had inspired his students to see, and truly appreciate, the 'buzzing' dimensions of constitutional law. He combined practice with teaching and would frequently delve into cases reserved or recently handed down by the Courts. For instance, he would present electric classes on the case of *Kable*,[62] the current direction that the post-*Kable* case law was taking, and what this might mean for future State legislative agendas. The long-running case of *Zentai*,[63] in which he was involved as pro bono counsel for many years, provided a further smorgasbord of constitutional law issues that he would tease out with his classes.

Ultimately, the merits of injecting lectures and tutorials with contemporary constitutional law conundrums are numerous. Through 'hot topics' – or as Head suggests, issues that students themselves bring to the class[64] – students not only begin to relate to the content but they are also prepared for the kinds of issues that the High Court is grappling with at the coalface.

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59 [2014] HCA 46 (14 November 2014).
60 (2013) 249 CLR 92.
61 *Pape v Commissioner of Taxation* (2009) 239 CLR 1.
62 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.
63 *Minister for Home Affairs of the Commonwealth v Zentai* (2012) 246 CLR 213; *Zentai v Republic of Hungary* (2009) 180 FCR 225.
64 Head, above n 72, 165.

VI WHAT IS 'CONSTITUTIONAL LAW'? CONCLUDING THOUGHTS

As Justice Leeming puts it, it 'may be constructive to step back and re-evaluate what we understand "constitutional law" to mean'.[65]

It would seem that part of addressing the issue of how and what to teach is entangled in Justice Leeming's insight (made in his paper in a separate context) regarding the need to properly define or re-define what we conceive as the bounds of 'constitutional law'. Exploring this with our students as well as for ourselves is crucial and central to answering questions of breadth, depth and form in unit and teaching design. Our answers to what constitutes 'constitutional law' will shape what we fill our courses with, how we teach them and what it means to master 'constitutional law'. As Professor Michael Paulsen of the United States has claimed:

What we think the point is of teaching Constitutional Law should, of course, greatly affect both how we teach Constitutional Law and what we teach as "Constitutional Law." … More than that: thinking about these questions can inform what "students" of all ages – including informed citizens of all ages – should be studying, and what questions they should be thinking about, when they set out to learn about the Constitution. What is the point? What is the proper object of study? Why is it important? … If Constitutional Law is to be rescued from utter uselessness, the course needs to be demolished, redesigned, and rebuilt almost entirely, from the ground up. And the first step is to think about what we're trying to build and why.[66]

How do teachers and students go about determining the scope and meaning of constitutional law and where its fundamental importance lies for them? Different answers abound. Harris has contended that we need to train our students to one day become 'not only practitioners of the law but, to a significant extent, gate-keepers of it' and, for this reason, Harris sees it as vital that the discipline of constitutional law imparts 'critical thinking' to ensure that law graduates are able to be 'agents for social change'.[67] He makes it clear that this is not just about being able to solve complex multi-issue hypotheticals in the class-room and exam room but also being able to bring an inquiring mind to the 'institutions' of government.[68] Kauper contended that the significance of constitutional law instruction is that it imparts a fundamental understanding of 'our [the United States] constitutional system' in terms of the 'allocation of political power and the rights of the person in a democratic society', and that our future lawyers are key to 'maintaining the integrity and continued vitality of this constitutional order'.[69]

The author is of the view that in teaching constitutional law we are teaching about power and the ways this can be wielded. How best to

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65 Leeming, above n 3, 3.

66 Michael Paulsen, 'The Uselessness of Constitutional Law' on *Library of Law and Liberty* (31 January 2012) <http://www.libertylawsite.org/liberty-forum/the-uselessness-of-constitutional-law/>.

67 Harris, above n 54, 5. See also Kauper, above n 2, 507.

68 Harris, above n 54, 5.

69 Kauper, above n 2, 488.

convey this should be guided by currency, as Kauper and Justice Leeming recommend, the skills that we want to focus on, as well as students' interests. In taking these into account, questions of breadth, depth and form become much easier to answer. Further, we need to ensure that the 'living' element of constitutional law is conveyed: the scope of the exercise of power is not only what is argued before the High Court. Much constitutional law happens outside of this and is the appropriate subject of 'hot topic' class discussion[70] – we do not need to go back to the 1975 Whitlam dismissal to find examples of this. There has, for instance, been much excitement and discussion prompted by the recent proposals to amend the *Commonwealth Constitution* to recognize Aboriginal and Torres Strait Islander Peoples.[71] Students of constitutional law need to have a working knowledge of the *Commonwealth Constitution*, an understanding of current constitutional problems and the skills and inclination to begin to be able to solve these. To achieve this the teaching of constitutional law faces a momentous challenge: it must be ambulatory, real and inspiring. The topics we teach need to be constantly revisited in terms of their breadth, the depth in which we impart them and the form in which learning and teaching takes. What is core for one group of students will not necessarily be core for the next, and we need to allow for change in content, focus and learning styles. In continually asking ourselves what 'constitutional law' and the teaching of it means, we are identifying precisely the question that will allow us to begin to face the challenge of learning and teaching Australian constitutional law.

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70 For a light-hearted consideration of this in the US context see Paul Horwitz, 'Things You Ought to Know if You Teach Constitutional Law' on *Prawfsblawg* (27 July 2010) <http://prawfsblawg.blogs.com/prawfsblawg/2010/07/things-you-ought-to-know-if-you-teach-constitutional-law.html>.

71 Such important and topical issues provide excellent material for class discussion and exploration of constitutional law issues including constitutional reform, the scope of s 128 of the Constitution and the Race Power in s 51(xxvi).