nonsense" approach to what is arguably one of the most difficult core subjects in the curriculum.

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Fajgenbaum and Hanks': *Australian Constitutional Law* (2nd ed.), by P. Hanks, Butterworths, 1980, xxxv + 724 pp. $48.00 (hard cover), $39.00 (limp cover).

This is a student casebook which has apparently been designed with an eye to first-year constitutional law courses that combine general and federal constitutional law. The book departs in important respects from the first edition. It omits all the material in the three chapters in the first edition which dealt with the judicial function: the chapters on the independence of the judiciary (including tenure, contempt of court and judicial immunity from suit), on the separation of federal judicial power and on the judicial power of the Commonwealth. The material on judicial review of the royal prerogatives has also been dropped. Because of these and other critical omissions, this book (unlike the first edition) cannot, despite its considerable strengths, unhesitatingly be recommended for use in courses on either general or federal constitutional law.

The author in his preface has anticipated such judgments:

> Undoubtedly, some people will criticize my choice of topics and material. I remind them that constitutional law has no clearly etched boundaries; that this book is not intended as a comprehensive coverage of that boundless subject. Rather, this book is intended as a careful examination of a series of fundamental issues *affecting the distribution of political power* in Australia (p. v; my emphasis).

The italicized language is significant. The same point is made quite starkly in the preface to the first edition, where the authors defined constitutional law as merely the "study of governmental authority".

The function of this "distribution of power" is not seen by the author as the creation of a known and predicable legal framework in which people are free to pursue their own ends, but the establishment of an edifice of social control, a relationship of command and obedience. Accordingly, as we have noted, there is no discussion of the function of the judiciary, and not even a mention of the rule of law, which, together with the sovereignty of parliament, is usually regarded as one of the two main pillars of the constitution. There is no analysis of the judicial control of the prerogative. There is not even a passing reference to such important constitutional developments as the revolutionary

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Administrative Decisions (Judicial Review) Act 1977 (Cth.) and Administrative Appeals Tribunal Act 1975 (Cth.), the new federal jurisdiction, freedom of information, the protection of civil liberties, the renewed interest in a Bill of Rights, *Sankey* v. *Whitlam*[1] or *Conway* v. *Rimmer*,[2] let alone to such classic authorities as *Entick* v. *Carrington*[3] or *Wolfe Tone's case*.[4] *Habeas corpus*, the common law's unique contribution to constitutional law, is not mentioned. There are many allusions to the political heroes and villains of the moment, but none to Sir Edward Coke or Magna Carta.

Does the author therefore go beyond the point at which selectivity becomes misleading? We will return to this question later, but first we should record some of the book's positive qualities. Among these should be noted the discussion of legislative procedures, delegated legislation, Imperial statutes and territorial limits, s. 109 of the Commonwealth Constitution and inter-governmental immunities. The two chapters on parliamentary control of revenue and the distribution of fiscal powers, and the sections on the franchise, are interesting, but of secondary importance compared with the material that is left out. The discussion of the anticipatory collection of customs duties should perhaps have mentioned s. 226 of the Customs Act (Cth.), which implicitly recognizes *Bowles* v. *Bank of England*[5] as applicable in Australia, a proposition that Mr. Hanks regards as doubtful (pp. 205-06).

Much of the discussion and comparison of the authorities contained in the commentary would be helpful to students. The analysis of cases is often perceptive and in at least one instance has recently proved to be prophetic — this is the conclusion that *Pickin* v. *British Railways Board*[6] might not survive intact in Australia[7] (p. 195). But the lengthy treatment of jurisdiction and discretion in relation to intervention by the courts to restrain a breach of entrenched legislative procedures omits to point out that three States have put the matter beyond doubt by amending their constitutions. In 1969 the South Australian parliament (after obtaining advice from Professor Geoffrey Sawer) inserted into the constitution of that State a new s. 10a which, besides entrenching the composition of the legislature, also gives any elector the right to seek an injunction, declaration or other remedy in the event of a threatened breach of the special procedures.[8] Western Australia and Queensland followed suit.[9] The discussion in the book

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1 (1978) 53 A.L.J.R. 11.
2 [1968] A.C. 910.
3 (1765) 19 St. Tr. 1030.
4 (1798) 27 St. Tr. 614.
5 [1913] 1 Ch. 57.
6 [1974] A.C. 765.
7 *Namoi Shire Council* v. *A.-G. (N.S.W.)* [1980] 2 N.S.W.L.R. 639.
8 Constitution Act, 1934 (S.A.), s.10a.
9 Constitution Act, 1890 (W.A.), s. 73(6); Constitution Act, 1867 (Qld.) s. 53(5).

refers to the entrenching aspects of those amendments (p. 117), but not to the jurisdiction and the individual right of action that they give. New South Wales in 1979 also added further entrenching provisions of this type, but without expressly confirming the existence of a right to seek an injunction.[10] On the other hand, it did not take the opportunity of excluding the private right of action either.

The use of considerable amounts of non-legal material helps to fill in the background to the decided cases, although only that material which supports a positivist, concentration-of-power approach is used. The standard of proof-reading is reasonable, most of the errors in the extracted cases being errors in the original (except, e.g., a critical "not" for "now" on p. 367). But in the next printing the occasional "unequivocably", "contractural", and "depreciating" (for "deprecating") (pp. 86, 178, 180), should be corrected, and the line or lines omitted on page 352 should be put back.

A chapter titled "The Crown and its Ministers" deals with the reserve powers of the Crown, the main burden of the discussion being a heated and subjective review of the events of November, 1975, a subject which comes up again and again in the book. This topic is one which should be covered in any constitutional law course, but today's students tend to find the treatment of it in this work obsessive and irrelevant. The author fully sets out the sequence of events leading up to November 11, except for Mr. Whitlam's attempts to raise money outside parliament, a move which itself had constitutional implications dating back at least to Charles I. Again, the author helpfully reproduces the principal speeches and documents that are relevant to those events and to his argument that serious breaches of convention occurred. However, he omits any reference to the earlier Senate speech of Senator L. K. Murphy (as he then was) describing the "tradition" that his party would, "oppose in the Senate any tax or money bill or other financial measure whenever necessary to carry out our principles and policies",[11] or Mr Whitlam's promise at that time that his party would, "vote against the [appropriation] bills here and in the Senate. Our purpose is to destroy this budget and to destroy the government which has sponsored it".[12] These omissions also are unfortunate, since such statements must cast light on the existence or strength of the conventions on which Mr Hanks relies.

The most crippling omissions, however, are of a different order. The first, as has already been indicated, is the lack of any feeling for history. The work takes for granted the freedoms that we enjoy, although they have existed only since the seventeenth century and are today almost unknown outside the common law countries, western

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[10] Constitution Act 1902 (N.S.W.), ss. 7B(1), 26-29.
[11] (1970) 44 *Parliamentary Debates (Senate)*, 2647.
[12] (1970) 69 *Parliamentary Debates (H. of R.)*, 463.

Europe and Japan. Two consequences flow from this amnesic approach. First, since the role of the common law courts in the seventeenth and eighteenth centuries in winning those liberties is passed over in silence, the author is able to disparage and mock the court system and the judiciary without the slightest discussion of their constitutional role or positive attainments. Judges do not draw distinctions, they "exploit" them (p. 92); their reasoning is "value-dominated" (p. 14), and annoyingly emphasizes the "nature of the rights, duties, powers and privileges which [a law] changes, regulates or abolishes" (quoting Kitto, J. with disapproval, p. 579); judges are normally mesmerized by "legalism" (*passim*), but at times surrender their reasoning faculties to "sentimental conservatism" (p. 340). Judges may occasionally be capable of performing an "impressive trick" (p. 669), but on the whole the scene is one of "High Court-dominated constitutional pathology" (p. 392). In a setting of references to "deceptions" and "pay-offs" in relation to Sir John Kerr (p. 429), there is a palpable innuendo against Aickin, J. (p. 422).

Such utterances seem to reflect a thesis advanced by numerous sociology tutors (and some law lecturers) that the law has never been anything more than a giant conspiracy by the property-owning elite to keep the proletariat in its place. If students were exposed to a few of the classic cases on the rule of law, they could make up their own minds about such assertions. *Entick* v. *Carrington*, for example, shows one member of that elite (Lord Camden, C.J.) excoriating another (the King's Secretary of State) for trespass to the land and goods of a member of the common populace. Likewise in *Wolfe Tone's case*; the immediate beneficiary in this instance being a traitor whose views the judges and their class would have hated and despised. Admittedly, a certain failure of judicial nerve can be seen in the 19th century and most of the 20th, but recent decisions show a perceptible toughening of the judicial attitude towards coercion of the individual by those in power.[13]

The other consequence of the lack of historical depth in this work is a fostering of the impression that the problems of modern society are unprecedented, unforeseeable and will prove soluble only if we surrender up most of our remaining liberties to the political state. More legislation, more government controls, and all will be well. This thesis is explicitly laid bare in a passage quoted later.

This leads to the second, and most remarkable, omission: the absence of any reference whatever to the doctrine of the rule of law. True it is that the concept is hard to define, but then, so is the notion

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[13] *E.g. Commonwealth* v. *John Fairfax & Sons Ltd.*, (1980) 32 A.L.R. 485; *Watson* v. *Lee* (1979) 54 A.L.J.R. 1; *Laker Airways Ltd.* v. *Department of Trade* [1977] Q.B. 643; *Burmah Oil Co. Ltd.* v. *Bank of England* [1979] 3 W.L.R. 722; *Conway* v. *Rimmer, supra* n. 2; *Sankey* v. *Whitlam, supra* n. 1; *Anisminic Ltd.* v. *F.C.C.* [1969] 2 A.C. 147.

of law itself.[14] It is also true that A. V. Dicey's formulation of the doctrine suffers from defects which make it difficult to apply in the modern context. But this is no reason to discard the doctrine of the rule of law altogether. It did not, after all, begin with Dicey. Some of its previous incarnations were in classical Greece, republican Rome, and mediaeval Europe. Again, the corollary that the constitutional order of a free people must include both the right to participate *in* government and the right to be protected *from* government was adopted by the French revolutionaries in their *Declaration of the Rights of Man and of the Citizen* (1789), which even today forms part, at least in theory, of French constitutional law.

In any event, quite apart from its historical pedigree, the doctrine of the rule of law has recently been resoundingly reaffirmed by the establishment of the system of judicial review of federal executive action embodied in the Administrative Decisions (Judicial Review) Act 1977 (Cth.) (the "ADJR Act") and the Administrative Appeals Tribunal Act 1975 (Cth.) (the "AAT Act"). In ADJR there is no mistaking parliament's determination to reaffirm the spirit of *Entick* v. *Carrington* and to extend its operation by rationalizing the grounds for relief and by simplifying procedures. But the AAT Act, providing as it does for review of the merits of an executive act by a tribunal presided over by a real judge, is a gigantic extension of rule of law concepts, a vast expansion of the province of the judiciary at the expense of the executive. This development is unprecedented in the common law world and has been described as taking Australian constitutional and administrative law into regions untouched even by the French Conseil d'Etat. Whether it has gone too far, by involving real judges in policy polemics that could jeopardize the independent status of the judiciary, is a matter for debate. But to omit all reference to ADJR and AAT in a book on constitutional law is quite inexplicable, unless on the basis that the author is not interested in constitutional developments occurring after November 1975.

It is true that the book reproduces and discusses a great many cases which are themselves illustrations of the working of the rule of law in a modern context. But without some theoretical foundation of this nature, the law of judicial review lacks an organizing principle and a basis for action. The cases become a mere collection of disconnected instances with no explanation as to why the courts have the right to take jurisdiction of these matters in the first place. Given the waspish tone which the book takes towards the judiciary, and its denunciation of the legalistic, value-dominated, class-biased, form-obsessed and reactionary nature of their reasoning, a student could not be blamed for asking why there should not be established a system of

[14] See, e.g., *Milirrpum* v. *Nabalco Pty Ltd* (1970) 17 F.L.R. 141 at 266-68.

"People's Courts" staffed by "experts" who could be relied upon to carry out obediently the perceived will of the government. Some legal commentators regularly suggest "reforms" along these lines.[15] And although few observers seem to have notice it, this kind of anti-rule of law approach *is* having an effect on the students and recent graduates of some Australian law schools. Numbers of them seem to have the kind of legal mind that one encounters among Cairo taxidrivers — strong on accusations and authoritarian solutions, weak on principles and analysis. It was recently reported, for example, that the 1981 Australasian Law Students' Conference seriously entertained a proposal for the censorship, by means of a system of pre-publication restraint, of the publications of certain religious organizations.[16]

The author's attacks are not confined to the judiciary and the rule of law, however. Nor does the fact that there is no unifying theme for the cases discussed mean that there is no unifying theme in the book. For if there is one premise which casts its shadow on every page, it is, to borrow Walter Lippman's words, that there is no limit to man's ability to govern others. If your reviewer has understood Mr. Hanks correctly, anything that stands between the power of the elected government and the individual is bad. Anything that hampers the establishment of a solid relationship of command and obedience between the governors and the governed should be ignored or neutralized. Anything that prevents a majority from doing what it likes to minorities is a denial of political reality.

Thus, as we have seen, the rule of law is ignored and the judiciary and the common law are disparaged. The reserve powers of the Crown are so many "trappings of autocracy" (p. 431). The notion of the monarchy is, "a relic of medieval reality, retained in this more populist age because it is a convenient facade" (p. 340). (While sharing Mr Hanks's exasperation with the continuance of the monarchy in the Australian context, this reviewer would consider that a fair discussion of this topic should include at least some reference to the perfectly respectable arguments which can be raised in support of the monarchy. Better not to comment on the topic at all than to purport to deal with it in a few tart sentences, with bigoted disregard for the opinions of the many intelligent people who hold rational views to the contrary.)

Houses of review tend to be viewed in simple Marxian terms: "the Upper Houses tended to represent the interests of property and capital; the Lower Houses represented more popular interests, particularly those of labour" (p. 80), as if in twentieth century Australia no workers owned any property or capital and no property-owner ever

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[15] Letter to the editor, *Australian Financial Review*, July 17, 1980; *Sydney Morning Herald* July 6, 1981 for a reported attack on the evils of "our ponderous democratic process" and the system of appeals to courts in tax matters.

[16] This proposal was put forward in the course of the conference's deliberations on the subject of "civil liberties".

did any work (an equally debatable premise being that the only interests served by the protection of property are those of persons who *currently* hold property). The issue of entrenched legislative procedures is stated in the most tendentious way imaginable:

> Should the courts accept that an elected parliament, facing a series of contemporary problems, is denied the power to deal with those problems in the way which seems appropriate to it, because an earlier parliament (which could have had no real understanding of the nature of the problems generated by our society) had decreed that a special and restrictive legislative procedure must be followed by any future parliament? Are the courts to endorse what is, in essence, a denial by yesterday's generation of politicians that today's generation of politicians lack prudence and sound political judgment? (p. 141).

Besides overlooking, as noted above, the recent constitutional amendments in at least half the States that might themselves require these questions to be answered "Yes", this passage illustrates how the ahistorical approach referred to above is used in this book to support the call for greater and greater concentrations of power. Earlier generations of constitutionalists are presumed to have suffered from the same lack of historical perspective, since they "could have no real understanding of the nature of the problems generated by our society". In fact, of course, many of them, such as David Hume and Edmund Burke, had an excellent understanding of the nature of the problems that would be generated by our society. Alexis de Tocqueville, constitutionalist, sociologist and member of the French parliament, described those problems 150 years ago with a percipience that the mushy mind of the late twentieth century seems unable to attain.

Consistently with the book's underlying theme, most of the protective limitations on legislative power contained in the Federal Constitution, such as s. 80, s. 51(xxxi), s. 116 and s. 117, are discussed only in passing or not at all. Even s. 92 is dealt with summarily, for the most part in a new chapter titled "Control of Economic and Commercial Activity". In this chapter, the age-old academic disdain for "trade" rises to passionate levels. People do not engage in economic activity, they "control" or "dominate" it.[17]

> Ask yourself: who dominates the mining or production of such basic commodities as iron, steel, bauxite, aluminium, copper, coal, oil, uranium, natural gas? Who dominates the petrochemical industry? Who controls the major communications media throughout Australia? Who controls transport? Who controls the distribution and sale to the public of commodities? (p. 681).

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[17] This phrase seems to originate from s. 50 of the Trade Practices Act 1974 (Cth.), which prohibits mergers having the effect of creating or reinforcing a position of control or dominance of a market.

One gets the feeling that in answer to these questions we are meant to chorus "Monopoly capitalism!", or "International Freemasonry!" or whatever the current slogan may be. In fact, answering these questions could be quite complex. Certainly there are clear cases of important markets being controlled or dominated, chiefly by the statutory government monopolies in such industries as telecommunications, wheat marketing, electricity generation and the bulk handling of grain. But the correct answer to questions such as "Who controls transport?", and "Who controls the distribution and sale to the public of commodities?", might well be "Nobody". Australia's interstate road transport of goods, for example, is carried out by a multitude of enterprises working in a competitive environment which is largely immune from government control because of s. 92 of the Constitution. It is probably no coincidence that this totally unregulated industry is widely regarded as being the most efficient of its kind in the world.[18] Long-distance road transport has in fact become one of Australia's few multinational industries. So when one reads the categorical assertion that "it is true that a consideration of economic factors would justify very substantial Commonwealth power over what might otherwise be intra-state commerce" (p. 674), one wonders when was the last time the author spoke to an economist about such matters.

Still, this line of attack is also consistent with the theme of the book. For despite the ever-growing network of government regulation, the economic enterprise remains an important field for independent, decentralized decision-making. The scope for individual initiative provided by the private sector is the last major non-governmental source of power remaining in our society.[19] The other major institutions that formerly buffered the impact of state power on individual life have been emasculated. The family has been pulverized. The church is irrelevant. The local community has become a mere geographical expression; indeed, as the sociologist Martin Pawley has pointed out, the word "community" itself is now mainly used by political con-men. The university, once a centre of independent thought which commanded an influence disproportionate to the physical resources under its control, has been neutralized by the process of politicization that was completed by the early 1970s. Academics and students who stand for elected office now use "unity tickets". University issues are decided, not on scholarly or objective argument, but through the use of caucasing, block voting and the other shoddy trappings of branch politics.

But though we may find the book unbalanced and misleading, we cannot claim that we were not warned. The preface makes it quite

[18] See Walker, "Recent Cases" (1980) 54 *A.L.J.* 356 at 358.

[19] Though of mainly economic rather than political power, since for a cause or organization to be known to have business backing is a political handicap.

clear that this is above all a book about power, not about law. It is not an analysis of the constitutional order of a free people. It is a manual for those who believe, like Sir Francis Bacon, that a path to personal power can be blasted through the ruins of a declining social order. In Bacon's case, this involved the demolition of the last feudal institutions, such as the common law, which might impede the full development of the royal prerogative, to which he had hitched his fortunes. Today, the waning of the *Weltanschauung* of technological materialism could provide an avenue for the rise of mombers of the "New Class" to positions of unlimited power, but only if remaining impediments such as the rule of law, the judiciary and the independent economic enterprise can be discredited and neutralized. Bacon knew that he could triumph only by defeating the main champion of common law liberties, Sir Edward Coke, and to that end secured Coke's dismissal from the court of King's Bench. But in the end, the principles which Coke had developed and disseminated defeated Bacon, though Baconian ideas triumphed everywhere else in Europe. If the next generation of lawyers learns about the constitution from this book, we will have no shortage of Bacons; but who will be their Coke?

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The Protection of Trade Secrets, by W. R. McComas, M. R. Davison and D. M. Gonski, Sydney, Butterworths, 1981, xiv + 98 pp. $19.50.

There has long been a need for a well researched, well written and comprehensive treatment of the law of confidence and of trade secrets. This work does not set out to satisfy that need. The three authors, in their slender piece, disclaim the onerous burden in favour of a limited goal. Their object is to explain "the basics and necessities of the law" [sic] and designedly, they do not cover "every point", "all arguments". It would, thus, be unfair to criticize this work simply upon the grounds that the authors have failed to treat, or to give guidance upon, some important and contentious topics. Yet to this reviewer there is cause for surprise in their self restraint. No mention for example, is made of the protections afforded to confidential information in the processes of litigation: *cf. Australian Broadcasting Commission* v. *Parish*[1] and the cases noted therein. Damages for breach of confidence is discussed without even passing reference to Equity's compensatory jurisdiction: *cf.* (1981) 9 *Syd. L. Rev.* 415 *et seq.* It is simply not enough now to leave the public interest exception with the remark that "no clear limitation on the width of the exception is

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[1] (1980) A.T.P.R. 40-154.