

NON-IMMIGRANTS, NON-ALIENS AND PEOPLE OF THE COMMONWEALTH: AUSTRALIAN CONSTITUTIONAL CITIZENSHIP REVISITED

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In recent years, despite the lack of express reference to a national citizenship in the Australian Constitution, arguments that Australian citizenship has a constitutional dimension have gained momentum amongst both scholars and members of the judiciary. These arguments identify a number of constitutional provisions that are relevant to notions of citizenship and community membership, as well as various conceptual bases which may aid the implication of citizenship rights. What is lacking, however, is an examination of the potential for a constitutional concept of citizenship to unfold in a manner that reconciles the jurisprudence with respect to each of these elements. This article commences this analysis. It argues that the potential for the implication of a constitutional concept of citizenship is strong, but that two things inhibit the coherent development of such a concept at this stage: the inability to point to a precise conceptual basis underpinning it, and a lack of certainty about the interaction between the Commonwealth's powers over aliens and immigration and the constitutional phrase 'the people of the Commonwealth'.

I INTRODUCTION

Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be.¹

— Chief Justice Warren

When Ecuador announced in August 2012 that it would grant asylum to Julian Assange, who faces extradition to Sweden to face questioning in relation to sexual assault charges, the WikiLeaks founder and Australian citizen was critical of his home country. Assange, who has expressed fears of political persecution at the

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1 *Perez v Brownell*, 356 US 44, 64 (1958).

hands of the United States,² said: ‘It was not Britain or my home country, Australia, that stood up to protect me from persecution, but a courageous, independent, Latin American nation’.³ Ecuador, too, was critical of Australia, with Foreign Minister Ricardo Patino publicly stating that ‘Mr Assange is without the due protection and help that he should receive from any state of which he is a citizen’.⁴ The Australian Government has repeatedly claimed that it has provided Assange with the same consular assistance as any other Australian in his situation would receive,⁵ and scholars have acknowledged that the actions open to it are limited and may be best exercised outside of the public domain.⁶ Yet the public perception that more should have been done remains.⁷ Criticisms echo those levied at the government with respect to its treatment of citizens David Hicks and Mamdouh Habib, both of whom were subject to lengthy periods of detention in Guantanamo

- 2 See, eg, Michael Ratner, ‘Julian Assange is Right to Fear US Prosecution’, *The Guardian* (online), 2 August 2012 <<http://www.guardian.co.uk/commentisfree/2012/aug/02/julian-assange-right-fear-prosecution>>; Philip Dorling, ‘Assange Felt “Abandoned” by Australian Government after Letter from Roxon’, *The Sydney Morning Herald* (online), 20 June 2012 <<http://www.smh.com.au/opinion/political-news/assange-felt-abandoned-by-australian-government-after-letter-from-roxon-20120620-20npj.html>>; Dylan Welch, ‘WikiLeaks Founder “Abandoned” by Government’, *The Age* (Melbourne), 8 November 2012. 3. An *Age* editorial points out that ‘[t]he saga of Julian Assange’s extradition ... could only have happened in a post-9/11 world’, and that ‘[b]efore the US-led coalition’s “war on terror” redefined the rule of law as dispensable, Assange’s fear of political persecution — the basis on which he has won asylum ... would simply have been ridiculous’: Editorial, ‘Assange Exploits Decade of US Folly’, *The Age* (Melbourne), 18 August 2012, 14.
- 3 See Peter Wilson and Mark Dodd, ‘Latin American Nations Rally to Take a Stand against Britain on Assange Case’, *The Australian* (Sydney), 18 August 2012, 21.
- 4 Lanai Vasek, ‘Australia Denies Failing to Help Julian Assange’, *The Australian* (online), 17 August 2012 <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/australia-denies-failing-to-help-julian-assange/story-fn59nm2j-1226452404388>>.
- 5 *Ibid.*
- 6 Professor Sarah Joseph, for instance, suggests that ‘one reason why the Australian government hasn’t provided the protection sought by Assange’ is that his claims of potential persecution are ‘highly speculative’, and ‘it is not common for diplomatic representations to be made with regard to things that haven’t happened yet’: Sarah Joseph, ‘Julian Assange’s Surprising Bid to Escape to Ecuador’, *The Conversation* (online), 21 June 2012 <<https://theconversation.edu.au/julian-assanges-surprising-bid-to-escape-to-ecuador-7831>>. See also Natalie Klein, ‘How Far Should Australia Go for Julian Assange?’, *The Conversation* (online), 17 August 2012 <<https://theconversation.edu.au/how-far-should-australia-go-for-julian-assange-8907>>.
- 7 For instance, in a series of protests in 2010, Australians demanded that greater government protection be extended to Assange: see Nathan Mawby and AAP, ‘Julian Assange Protest in Melbourne Sparks Peak-Hour Commuter Chaos’, *Herald Sun* (online), 10 December 2010 <<http://www.heraldsun.com.au/news/more-news/julian-assange-protest-in-melbourne-sparks-peak-hour-commuter-chaos/story-e6frf7kx-1225969132559>>. In April 2012, the ABC television show Q&A reported that 79 per cent of over 4000 respondents to a viewer poll voted that the Australian government had not ‘done enough to support Assange’: see ABC TV, ‘Philosophy and the World’, Q&A, 16 April 2012, 0:27:25 <<http://www.abc.net.au/tv/qanda/txt/s3473507.htm>>. It is worth noting that another poll conducted on the same subject by UMR Research yielded more mixed results, with 38 per cent of respondents voting that the government should do more to assist Assange, 36 per cent voting that it was doing enough, and 25 per cent voting that they were unsure whether the government was doing enough: see Phillip Coorey, ‘Most Australians Back Assange, Poll Finds’, *The Sydney Morning Herald* (online), 9 August 2012 <<http://www.smh.com.au/federal-politics/political-news/most-australians-back-assange-poll-finds-20120808-23uw.html>>.

Bay.⁸ Much of the rhetoric speaks of the ‘devaluation’ of Australian citizenship,⁹ and emphasises the idea that the government’s failure to protect Hicks, Habib and Assange leaves all Australians vulnerable.¹⁰ Jennifer Robinson, a member of Assange’s legal team, wrote in *The Sydney Morning Herald*: ‘Assange deserves the protection any of us as Australian citizens deserve. What if it were your son or brother or friend? Would you feel satisfied with our government’s response?’¹¹

A curious dichotomy between rhetoric and legal reality permeates Australian citizenship. On the one hand, the concept enjoys considerable rhetorical celebration — as indeed it does elsewhere in the world. Sir Ninian Stephen has described it as ‘the key to so much that is at the heart of being Australian’¹² — a sentiment echoed by John Chesterman and Brian Galligan, who place it at ‘the heart of Australian politics’.¹³ Professor Natalie Klein has noted that when Australian citizens — like Hicks, Habib and Assange — face detention, arrest, conviction and sentencing on foreign soil, ‘public pressure on the Australian government to “do something” ... [is] significant’.¹⁴ The idea of citizenship serving as a gateway to rights has popular appeal.¹⁵

On the other hand, defining what is, in legal terms, the key to Australian citizenship has proved notoriously difficult. It has been noted that Australian citizenship has never been defined by reference to rights,¹⁶ that its legal evolution has been ‘slow, staggered and disconnected’,¹⁷ and that there is more judicial guidance on what it

8 See, eg, Ratner, above n 2; Dorling, above n 2; Welch, above n 2; Editorial, above n 2.

9 See, eg, Robert McClelland, ‘Howard Lets US Military Commission Devalue Our Citizenship’ (Press Release, 9 July 2003) <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/PRT96/upload_binary/prt9611.pdf;fileType%3DApplication%2Fpdf>; WL Central, *2012–12–01 Former PM Condemns Australia for Abandoning Assange and Abdicating Sovereignty* (1 December 2012) <<http://wlcenral.org/node/2784>>.

10 Cf David Penberthy, ‘Make Way for Assange, the Political Stuntman’, *The Punch* (online), 14 December 2012 <<http://www.thepunch.com.au/articles/make-way-for-asasnge-the-political-stuntman/>>; Miranda Devine, ‘David Hicks’ Book Erasing Truths’, *Herald Sun* (online), 21 October 2010 <<http://www.heraldsun.com.au/opinion/david-hicks-book-erasing-truths/story-e6f6fhqf-1225941395713>>.

11 Jennifer Robinson, ‘Time for Government to Stand Ground and Protect Assange’, *The Sydney Morning Herald* (Sydney), 1 March 2012, 13.

12 Sir Ninian Stephen, ‘The First Half-Century of Australian Citizenship’ in Kim Rubenstein (ed), *Individual, Community, Nation: Fifty Years of Australian Citizenship* (Australian Scholarly Publishing, 2000) 3, 4.

13 John Chesterman and Brian Galligan, ‘Introduction: Reconstructing Australian Citizenship’ in John Chesterman and Brian Galligan (eds), *Defining Australian Citizenship: Selected Documents* (Melbourne University Press, 1999) 1, 1 (emphasis altered).

14 Natalie Klein, ‘David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the Legal Parameters of Australia’s Protection of Its Citizens Abroad’ (2011) 35 *Melbourne University Law Review* 134, 135.

15 Cf Greg Taylor, ‘Citizenship Rights and the *Australian Constitution*’ (2001) 12 *Public Law Review* 205, 213–14.

16 See the Introduction in David Dutton, ‘Citizenship in Australia: A Guide to Commonwealth Government Records’ (Research Guide No 10, National Archives of Australia, 2012) <<http://guides.naa.gov.au/citizenship/introduction.aspx>>.

17 Kim Rubenstein, ‘Citizenship and the Constitutional Convention Debates: A Mere Legal Inference’ (1997) 25 *Federal Law Review* 295, 297.

is not than on what it is. Professor Kim Rubenstein has pointed out that ‘there is a lot unresolved within the “heart” of Australia’.¹⁸

At the root of the lack of clarity about the legal implications of Australian citizenship lies a deep uncertainty about what the concept signifies constitutionally. It is well noted that the *Australian Constitution* is textually silent on any notion of a national citizenship.¹⁹ Nonetheless, in recent years the idea that a concept of citizenship might be implicitly enshrined in other constitutional phrases has gained traction amongst scholars as well as at least some members of the judiciary. Arguments that a constitutional concept of citizenship does, or could, exist in Australia are not uncommon today, and a number of conceptual bases upon which such a concept might be anchored have been suggested. What is lacking, however, is a complete analysis of how a constitutional concept of citizenship might unfold, in light of existing jurisprudence. Specifically, questions of how the aliens and immigration powers and the phrase ‘the people of the Commonwealth’ interact with each other, and what space this interaction leaves open for the formulation of a coherent and meaningful notion of citizenship, warrant consideration.

This article explores these questions. Part II provides a brief overview of the relevant textual provisions of the *Constitution*. Part III canvasses the arguments that have been advanced to date with respect to the existence of a constitutional concept of Australian citizenship, and examines the conceptual bases that these arguments draw upon. Parts IV and V suggest that there are two means via which a person could potentially hold constitutional citizenship: qualification as a ‘section 51 citizen’, a person free from the reach of the Commonwealth’s powers

- 18 Kim Rubenstein, ‘Looking for the “Heart” of the National Political Community: Regulating Membership in Australia’ (2007) 9 *University of Technology Sydney Law Review* 84, 84. Additionally, as Rubenstein has illustrated, the term ‘citizenship’ is used in a number of different senses in Australia. A number of citizenship scholars have noted that the question of who is formally considered to be a member of a state does not capture the full meaning of citizenship as a concept. For example, Christian Joppke and Linda Bosniak have suggested that citizenship is characterised by three dimensions: a status dimension, concerned with who holds the legal status of citizenship; a rights dimension, concerned with who holds the substantive rights that are typically associated with citizenship; and an identity dimension, concerned with the shared beliefs that tie individuals to particular political communities or nations: see Christian Joppke, *Citizenship and Immigration* (Polity Press, 2010) 28–30; Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006) 121. In the Australian context, Rubenstein has argued that there is, and has always been a disjuncture between the relatively narrow, exclusive notion of ‘formal citizenship’, and the much more inclusive notion of ‘normative citizenship’, which conceives of citizenship as involving ‘active, substantive membership of the community’ — a position that is affirmed by the fact that the majority of rights-conferring Commonwealth legislation does not discriminate between citizens and permanent residents: see generally Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook Co, 2002), especially ch 1. Rubenstein’s argument is further bolstered by the fact that High Court judgments have used the word ‘citizen’ inconsistently — sometimes to refer exclusively to a person who qualifies legally as an Australian citizen, and sometimes to refer to any person who holds the rights of a permanent or temporary resident. This practice has contributed to the confusion over what the term ‘citizenship’ means in Australia, and what rights it entitles an individual to enforce against the State: at 19–20.
- 19 See, eg, Rubenstein, *Australian Citizenship Law in Context*, above n 18, ch 2; Paul Martin, ‘*Re MIMIA; Ex parte Ame* — The Case for a Constitutional Australian Citizenship’ (2006) 6 *Queensland University of Technology Law and Justice Journal* 1, 11; Genevieve Ebbeck, ‘A Constitutional Concept of Australian Citizenship’ (2004) 25 *Adelaide Law Review* 137, 139; Helen Irving, ‘Still Call Australia Home: The *Constitution* and the Citizen’s Right of Abode’ (2008) 30 *Sydney Law Review* 133, 133; Christopher Tran, ‘New Perspectives on Australian Constitutional Citizenship and Constitutional Identity’ (2012) 33 *Adelaide Law Review* 199, 201.

over aliens and immigration, and qualification as a ‘person of the Commonwealth’. While either of these means could, potentially, be individually sufficient to ground a constitutional concept of citizenship, the models of citizenship to which they lend support differ somewhat. Accordingly, the question of the interaction between these two alternate avenues for constitutional citizenship becomes enlivened. Part VI considers this interaction. In particular, it considers what, if anything, might be gained by adopting a suggestion flagged in passing in the joint judgment of Gummow, Hayne and Heydon JJ in *Singh v Commonwealth* that any person who falls outside the scope of the aliens power might qualify as one of ‘the people of the Commonwealth’, and vice versa.²⁰

II THE AUSTRALIAN CONSTITUTIONAL TEXT

The *Australian Constitution* makes no direct reference to any concept of a national citizenship. It neither identifies a class of people who hold citizenship status as of right, nor prescribes the rights that flow from holding such a status. In fact, the *Constitution* does not even grant the Commonwealth a clear legislative power with respect to citizenship. This is in contrast to a number of written constitutions in overseas jurisdictions, which contain provisions that deal expressly with citizenship, or the rights that flow from it.²¹

The language of citizenship only features once in the *Australian Constitution* — in s 44(i), which provides that a person ‘shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives’ if he or she is ‘under any acknowledgement of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power’.

At the constitutional Convention Debates that preceded the drafting of the *Constitution*, a number of delegates argued in favour of including a concept of citizenship in the text of the document, though there was no consensus on the form that such a provision would take. One of the proponents, Tasmanian Attorney-General Andrew Inglis Clark, argued for the inclusion of an equal protection clause based on the *United States Constitution* amend XIV § 1, precluding the states from ‘abridg[ing] the privileges or immunities of citizens’ or ‘depriv[ing] any person of life, liberty, or property, without due process of law’.²² While no concept of Australian citizenship was ultimately codified, a variation of that clause persists in s 117 of the *Australian Constitution*, which provides: ‘A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State’.

20 (2004) 222 CLR 322, 382 [149] (‘*Singh*’).

21 Examples of countries that include citizenship provisions in a written national constitution include the United States, Germany, Switzerland, Canada, South Africa, Finland, Ecuador, Bahrain, Bulgaria, Brazil, Colombia, Estonia, Albania and the Democratic Republic of the Congo.

22 See, eg, John M Williams, “‘With Eyes Open’: Andrew Inglis Clark and Our Republican Tradition” (1995) 23 *Federal Law Review* 149, 175–8.

While the *Constitution* does not bestow upon Parliament an express legislative power over citizenship, it does confer powers which enable the Commonwealth to exercise significant control over the membership of the Australian community. The most significant of these are the ‘immigration and emigration’ power under s 51(xxvii), and the ‘naturalization and aliens’ power under s 51(xix). The immigration limb of s 51(xxvii) allows Parliament to determine who may enter the Australian community, while the naturalisation and aliens power allows it to formally include people as community members, and exercise plenary power over those who qualify as aliens to Australia. Additionally, the High Court has acknowledged the existence of an ‘implied nationhood power’, which gives rise to legislative and executive power that does not flow from any express constitutional provision, but rather may be derived from the ‘very formation of the Commonwealth as a polity and its emergence as an international state’.²³

The *Constitution* also includes references to ‘the people’ of the states and the Commonwealth in various provisions. The preamble states that ‘the people of New South Wales, Victoria, South Australia, Queensland and Tasmania ... have agreed to unite in one indissoluble Federal Commonwealth’. Section 7 states that the senators representing each state shall be ‘directly chosen by the people of the State’, while s 24 provides that the members of the House of Representatives shall be ‘directly chosen by the people of the Commonwealth’. Section 25 and the now repealed s 127 provide for the exclusion of certain categories of persons from the ‘people of the Commonwealth’ for the purposes of elections.²⁴ Section 53 precludes the Senate from ‘amend[ing] any proposed law so as to increase any proposed charge or burden on the people’. Section 128, which outlines the procedure for ‘the electors’ changing the *Constitution* by referendum, has also been described as making indirect reference to ‘the people’.²⁵

Who comprises ‘the people’ is not defined by the *Constitution*. However, recent case law supports the idea that the expression refers to a ‘constitutional community’. That ‘the people’ are responsible for the election of the members of the Commonwealth Parliament was described by French CJ in *Rowe v Electoral Commissioner* as “‘constitutional bedrock’ ... [that] confers rights on “the people of the Commonwealth” as a whole’.²⁶ In the 2005 case of *Hwang*, McHugh J, sitting alone, suggested that the phrase ‘the people of the Commonwealth’ equated to a kind of constitutional citizenship.²⁷ This assertion, and the implications that flow from it, will be further discussed in Part V.

23 *Victoria v Commonwealth* (1975) 134 CLR 338, 364 (*AAP Case*).

24 *Hwang v Commonwealth* (2005) 87 ALD 256, 261 [16]–[17] (*Hwang*). For a deeper discussion of the effect of these provisions, see Elisa Arcioni, ‘Excluding Indigenous Australians from “the People”: A Reconsideration of Sections 25 and 127 of the *Constitution*’ (2012) 40 *Federal Law Review* 287; Anne Twomey, ‘An Obituary for s 25 of the *Constitution*’ (2012) 23 *Public Law Review* 125.

25 Elisa Arcioni, ‘That Vague but Powerful Abstraction: The Concept of “the People” in the *Constitution*’ (Paper presented at the Gilbert + Tobin Constitutional Law Conference, 20 February 2009) 2.

26 (2010) 243 CLR 1, 12 [1] (citations omitted) (*Rowe*).

27 (2005) 87 ALD 256, 260 [11], 261–2 [17]–[18]. See also 261 [15], quoting John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 450.

III CONCEPTUAL BASES FOR A CONSTITUTIONAL CONCEPT OF AUSTRALIAN CITIZENSHIP

In the 2000 case of *DJL v Central Authority*, Kirby J made an obiter dictum prophecy about the future relevance of citizenship rights in Australian constitutional law:

the growing sense of national independence and identity, also reflected in the decisions of this Court in both constitutional and non-constitutional cases, has seen new attention being given to the consideration of citizenship with the possibility that the status of citizenship may carry with it common law rights. ... A growing body of doctrine ascribes as the ultimate foundation of the *Constitution* the will of the people (meaning the citizens) of the Commonwealth. It therefore seems likely that further constitutional implications will be derived for the idea of citizenship to which the political institutions established by the *Constitution* give effect.²⁸

At the time, this proposition was met with little commentary, and some criticism.²⁹ However, a look at contemporary High Court jurisprudence and academic commentary suggests that Kirby J's hypothesis may be borne out. While much has been made of the fact that Australian citizenship is 'a concept which is entirely statutory, originating as recently as 1948',³⁰ in recent years, suggestions that, notwithstanding the *Constitution's* textual silence on the subject, 'Australian citizenship has a constitutional dimension'³¹ have become increasingly commonplace.³² Such suggestions, however, do not all conceive of citizenship's constitutional dimension in the same way. The purpose of this Part is to outline the primary conceptual bases that underpin arguments that Australian citizenship has constitutional elements.

Any constitutional implication must be inherent in the text or structure of the *Constitution*.³³ To date, arguments that the implication of constitutional citizenship rights can be supported have drawn on three broad conceptual bases.

The first of these bases is the idea that a person is afforded constitutional citizenship in return for their allegiance to Australia.³⁴ This conceives of a constitutional citizen as the obverse of an alien — a term which has been understood by several members of the High Court to be characterised by the presence of allegiance to a

28 (2000) 201 CLR 226, 278 [135] (citations omitted) ('*DJL*').

29 See Taylor, above n 15, 205, 208–14.

30 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 54 (Gaudron J) ('*Chu Kheng Lim*').

31 Kim Rubenstein and Niamh Lenagh-Maguire, 'Citizenship and the Boundaries of the *Constitution*' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 143, 144.

32 See generally Irving, above n 19; Ebbeck, above n 19. See also Tran, above n 19, 203–4.

33 *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ).

34 See, eg, Irving, above n 19, 149–52; Peter Prince, 'Mate! Citizens, Aliens and "Real Australians" — The High Court and the Case of Amos Ame' (Research Brief No 4, Parliamentary Library, Parliament of Australia, 2005–06) 15–16; Ebbeck, above n 19, 151–2.

foreign power, or the absence of allegiance to Australia.³⁵ At its most basic, such a concept protects constitutional citizens against subjection to the wide range of laws that can be passed under the ambit of the aliens power, which confers upon the Commonwealth plenary power to make laws with respect to aliens. However, some scholars have suggested that a constitutional concept of citizenship based in non-alienage and allegiance to Australia could run deeper than this, potentially serving as a source of positive rights, such as a right to abode in Australia.³⁶

A related but distinct basis for constitutional citizenship rights flows from the idea of substantive membership of the Australian community. High Court jurisprudence indicates that even very long-term residents of Australia, who do not hold statutory citizenship but share many or all of the substantive rights of citizens, can qualify as aliens for constitutional purposes.³⁷ In light of this, academic arguments do not typically suggest that substantive community membership alone renders someone a constitutional citizen — though some claim that the fact that it does not indicates a discord between legal and normative notions of Australian citizenship.³⁸ There is, however, judicial suggestion that some constitutional rights may flow from substantive membership of the Australian community alone. In *Street v Queensland Bar Association*, Toohey J adverted to the possibility that a resident of Australia that lacks any formal citizenship status might nonetheless fall within the meaning of ‘subject of the Queen’ for the purposes of s 117.³⁹ The possibility that the phrase ‘subject of the Queen’ in s 117 is synonymous with constitutional notions of citizenship has also been recognised by some members of the High Court.⁴⁰ Additionally, some members of the Court have suggested that in ‘extreme cases’, persons who have been absorbed into the Australian community might be constitutionally protected

35 It is worth noting, however, that this is not the only way in which alienage can be understood. Alternate conceptualisations are discussed further in Part IV(C)(2)–(3) below.

36 See generally Irving, above n 19. See also Ebbeck, above n 19, 160.

37 See, eg, *Pochi v Macphree* (1982) 151 CLR 101 (‘Pochi’); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 (‘Nolan’); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (‘Te’); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (‘Shaw’); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.

38 See, eg, Michelle Foster, ‘“An ‘Alien’ by the Barest of Threads” — The Legality of the Deportation of Long-Term Residents from Australia’ (2009) 33 *Melbourne University Law Review* 483, 500–1; Rubenstein, ‘Looking for the “Heart” of the National Political Community’, above n 18, 86.

39 (1989) 168 CLR 461, 554 (Toohey J) (‘Street’).

40 In *Street* (1989) 168 CLR 461, a number of judges considered the link between s 117 and constitutional citizenship rights. Toohey J held that s 117 serves as a ‘constitutional guarantee of equal rights for all citizens’: at 554. Deane J held that ‘[t]he reference in s. 117 to a “subject of the Queen” must be understood, in contemporary circumstances, as a reference to an Australian citizen’: at 525 (citations omitted). Dawson J agreed, stating that ‘[t]he phrase “subject of the Queen” in s. 117 must now be taken to refer to a subject of the Queen in right of Australia and hence to an Australian citizen’: at 541 (citations omitted). Brennan J adverted to the possibility that these words might be ‘synonymous with the term “Australian citizen”’, but concluded that it was unnecessary to decide the point: at 505. In *Singh* (2004) 222 CLR 322, McHugh J held that the concept of citizenship was, at Federation, ‘treated as identical ... [to being a] “subject of the Queen”’: at 367 [105]. His Honour said further that a natural born ‘subject of the Queen’ for the purposes of s 117 was necessarily both a ‘non-alien’ and a ‘constitutional citizen’: at 342–3 [35], 379–80 [139]. The joint judgment of Gummow, Hayne and Heydon JJ also considered that the terms ‘subject of the Queen’ and ‘non-alien’ might be synonymous, but their Honours did not go so far as to state this definitively, or to equate it to constitutional citizenship: at 382 [149].

against subjection to laws passed under the aliens power.⁴¹ In light of this, notions of substantive community membership remain conceptually relevant to questions of constitutional citizenship.

The final conceptual basis upon which constitutional citizenship might be founded, as Kirby J highlighted in *DJL*, lies in the idea that ‘the will of the people’ is the ‘ultimate foundation’ of the *Constitution*.⁴² This line of reasoning draws on the references to ‘the people’ in ss 7 and 24 of the *Constitution* — in particular the requirement that Parliament must be ‘directly chosen by the people’. It has been suggested that two related constitutional implications flow from these provisions. The more modest of these is the idea that the *Constitution* enshrines a system of representative government characterised by the direct choice of Parliament by the people. This constitutionally prescribed system of government underpins constitutional implications such as the freedom of political communication and the limited right to vote that was recognised in the recent cases of *Roach v Electoral Commissioner*⁴³ and *Rowe*.⁴⁴ The second implication is the somewhat more controversial idea of a constitutionally prescribed notion of popular sovereignty.

The idea that the phrase ‘the people of the Commonwealth’ serves as a synonym for constitutional citizenship has been hinted at by a number of High Court judges, but was first expressly proposed by McHugh J in *Hwang*. While his Honour’s judgment in this case considered the idea of constitutional citizenship in greater depth than ever before, it did not deal directly with the question of the extent to which notions of representative democracy or popular sovereignty underpin it. Both of these ideas, however, have the potential to shape notions of a constitutional Australian citizenship, and to serve as a source of positive citizenship rights, though the scope of the rights they each give rise to may differ.

The three conceptual bases outlined above give rise to two broad avenues via which a person may potentially hold constitutional citizenship in Australia. The first avenue, considered in Part IV of this article, conceives of a person as a constitutional citizen if they are a ‘section 51 citizen’: a person immune to the broad constitutional powers over aliens and immigration which enable the Commonwealth to exclude people from the Australian community — whether such immunity arises out of allegiance to Australia, substantive membership of the community, or some combination of these factors. The second avenue, considered in Part V, conceives of a person as a constitutional citizen if they qualify for inclusion amongst the class of people that constitute ‘the people of the Commonwealth’. Part VI delves deeper, considering the extent to which each of these avenues assists or impedes the development of the other, as well as the question of whether there is any potential for the development of a single concept of constitutional citizenship which reconciles all of the case law with respect to immigration, aliens and the ‘people of the Commonwealth’.

41 *Te* (2002) 212 CLR 162, 217–18 [200] (Kirby J), 229 [229] (Callinan J).

42 (2000) 201 CLR 226, 278 [135].

43 (2007) 233 CLR 162 (*Roach*).

44 (2010) 243 CLR 1.

IV 'SECTION 51 CITIZENSHIP': 'NON-IMMIGRANT NON-ALIENS' AS CONSTITUTIONAL CITIZENS?

There are four elements that warrant consideration when examining the question of whether a notion of citizenship could arise out of immunity to the immigration and aliens powers in s 51 of the *Constitution*, each of which will be considered here in turn. Part IV(A) analyses the relationship between ss 51(xxvii) and 51(xix), and the respective roles that these Commonwealth powers play in enabling Parliament to shape the membership of the Australian community. It concludes that due to the wide breadth of both powers, and their capacity to capture different classes of people, a constitutional concept of citizenship based in s 51 must involve not only freedom from laws passed under the aliens power, but from those made pursuant to the immigration power as well. Parts IV(B) and IV(C) examine judicial decisions to determine what is required for a person to be immune to laws passed under the immigration and aliens powers respectively. In doing so, these Parts consider the interaction between these powers and the notions of substantive community membership and allegiance to Australia, which were identified in Part III as potential conceptual bases for constitutional citizenship rights. Finally, Part IV(D) examines what flows from freedom from the immigration and aliens powers, and considers whether this can properly be described as a kind of constitutional citizenship.

A *Community Membership and Citizenship: The Relationship between ss 51(xix) and 51(xxvii)*

The exclusion of any express concept of Australian citizenship in the *Constitution* is in part explained by the inability of the delegates at the Constitutional Conventions to reach consensus on where the parameters of any such concept should be drawn. All delegates wished to grant full rights to 'those ... born in England',⁴⁵ while at the same time 'equip the Commonwealth with every power necessary for dealing with the invasion of outside coloured races'.⁴⁶ This meant that citizenship and any rights that flowed from it could not be limited to those born in or connected by descent with Australia, as this would have excluded English born Britons. However, a definition of citizenship that corresponded with British subject status — the only formal membership status in existence in the UK at the time — was also undesirable, as this would have enabled people who formed part of the broader British Empire, such as Hong Kong Chinese, to claim Australian citizenship.⁴⁷

However, while the Convention delegates were united in their desire to create a distinction between 'non-British' and those of 'British race' with respect to the right to enter and reside in Australia, they differed on the question of what

45 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1760 (Charles Kingston).

46 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 246 (Charles Kingston).

47 *Singh* (2004) 222 CLR 322, 367 [104]–[105] (McHugh J).

status to afford those already resident within the country. Some suggested that to deny the rights and privileges of citizenship to immigrants after they had been admitted to the country would be ‘monstrous’ and ‘degrading to [Australians] and [their] citizenship’.⁴⁸ Charles Kingston, for example, argued: ‘if you admit them and do not want them to be a standing source of embarrassment in connexion with your general government, treat them fairly, and let them have all the rights and privileges of Australian citizenship’.⁴⁹ Others, however, were strongly opposed to proposals for an equal citizenship that would extend to immigrants who were not of ‘British race’.⁵⁰

The consensus amongst the Convention delegates regarding the need for Commonwealth control over who could gain entry to Australia manifested in the inclusion of expansive legislative powers with respect to naturalisation and aliens and immigration, in ss 51(xix) and 51(xxvii) respectively. Combined, these provisions confer upon the Commonwealth significant power to control who is admitted to the Australian community. In order to analyse the potential for the evolution of a constitutional concept of citizenship derived from s 51, it is necessary to understand the manner in which they do this.

The naturalisation limb of s 51(xix) provides for Commonwealth control over the formal inclusion of people in the Australian community. In the early years of Australian federation, this power was relied upon to support legislation that, via the issuance of naturalisation certificates, conferred upon grantees all the rights and privileges as well as obligations of a natural born British subject.⁵¹ Such legislation preserved the idea that British subject status was the fullest kind of formal community membership that a person could have in Australia. The rights and privileges of British subjects were not defined under statute, but the common law offered a yardstick: subjects were deemed to assume a duty of permanent allegiance to the sovereign, in exchange for the sovereign’s protection.⁵²

While the naturalisation limb of s 51(xix) allowed the Commonwealth to formally include non-British subjects in the Australian community, the aliens limb of this power enabled their exclusion from Australia. The early High Court afforded this power a wide interpretation, holding that it was ‘plenary within [its] ambit’

48 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 250 (Josiah Symon). See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 July 1881, 100 (Sir Henry Parkes, Premier): unless you ‘permit them to have the same rights and privileges as you possess to the full measure of citizenship — then ... you are simply supporting them in coming here in order to establish a degraded class ... an eternal curse to the country’.

49 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 247 (Charles Kingston).

50 James Howe, for instance, warned that ‘the cry throughout Australia will be that our first duty is to ourselves, and that we should ... make Australia a home for Australians and the British race alone’: *ibid* 251. These sentiments were echoed by John Quick: at 247, cited in Rubenstein, *Australian Citizenship Law in Context*, above n 18, 37.

51 *Naturalization Act 1903* (Cth) s 8. See also its successor provision in *Nationality Act 1920* (Cth) s 11.

52 See, eg, Kim Rubenstein, ‘“From This Time Forward ... I Pledge My Loyalty to Australia”: Loyalty, Citizenship and Constitutional Law in Australia’ in Victoria Mason and Richard Nile (eds), *Loyalties: Symposia Series* (API Network Press, 2005) 23, 24. The subject’s duty of permanent allegiance could not, at common law, be renounced, and ran deeper than the ‘local and temporary allegiance’ that alien residents owed to the foreign governments under which they lived: *Carlisle v United States*, 83 US 147, 154 (Field J) (1872), quoted in *Te* (2002) 212 CLR 162, 196 [123] (Gummow J).

and thereby enabled Parliament to legislate to exclude or deport aliens from the country.⁵³ However, the retention of British subject status as the fullest formal measure of Australian community membership meant that a plenary power over aliens — who were generally understood to be persons lacking British subject status — did not readily extend to enable the exclusion of those who qualified as British subjects, but were not of ‘British type’. The immigration limb of s 51(xxvii) was designed for this purpose. Like the aliens power, the Commonwealth’s power over immigration was interpreted as plenary in scope.⁵⁴ However, unlike the aliens power, it was not restricted in application to those who did not hold British subject status. Rather, it was held to supplement Parliament’s power over aliens by supporting the application of legislation that purported to exclude ‘intending immigrants’ from Australia to people that held British subject status, provided they could be properly described as ‘immigrants’.⁵⁵ In this fashion, the immigration power functioned to broaden the class of people who could be excluded from the community beyond those who clearly qualified as aliens.⁵⁶

Sections 51(xix) and 51(xxvii) thus combined to create a system under which the possession of a formal status characterised by allegiance was necessary but insufficient for a person to become a full member of the Australian community. Some degree of substantive connection with Australia was necessary for a person to escape the reach of the immigration power, even if they were a British subject. However, a substantive connection without formal community membership was not sufficient either — in the absence of British subject status or a naturalisation certificate, a person still remained vulnerable to laws passed under the aliens power.

Notwithstanding the *Constitution*’s silence on Australian citizenship, the immigration and aliens powers, with the wide interpretations they have been afforded, individually and collectively function as a clear denial of rights commonly associated with citizenship for those that fall within their ambit.⁵⁷ This

53 *Robtelmes v Brennan* (1906) 4 CLR 395, 415 (Barton J).

54 *Ibid* 415 (Barton J), 421 (O’Connor J).

55 See, eg, *A-G (Cth) v Ah Sheung* (1906) 4 CLR 949, 951; *Potter v Minahan* (1908) 7 CLR 277, 288–9 (Griffith CJ); *R v Macfarlane; Ex parte O’Flanagan and O’Kelly* (1923) 32 CLR 518, 531 (Knox CJ), 552 (Isaacs J), 576 (Higgins J), 580 (Starke J). An example of such legislation was the *Immigration Restriction Act 1901* (Cth).

56 See, eg, *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330, 338, where Gummow J stated that: ‘the placing in the hands of the Parliament of the Commonwealth of a power with respect to immigration and emigration ... was done with the avowed purpose of conferring a power of exclusion of British subjects not born or naturalised in Australia’ (citations omitted).

57 Citizens’ rights of entry and abode exist in a number of countries. For example, s 6(1) of the *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’) guarantees citizens the right to ‘enter, remain in and leave Canada’. Similarly, s 21(3) of the *Constitution of the Republic of South Africa Act 1996* (South Africa) provides that: ‘Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic’. In *United States v Valentine*, 288 F Supp 957, 980 (D PR, 1968), the Court held that ‘[t]he only absolute and unqualified right of [US] citizenship is to residence within the territorial boundaries of the United States; a citizen cannot be either deported or denied reentry’. In the UK, all persons who hold the status of ‘British citizen’ under pt I of the *British Nationality Act 1981* (UK) c 61 enjoy a right of abode in the UK: *Immigration Act 1971* (UK) c 77, s 2. It is worth noting, however, that there are other types of British nationality provided for in the *British Nationality Act 1981* (UK) c 61 — for instance, pt II provides for the status of ‘British overseas territories citizen’ and pt III provides for the status of ‘British Overseas Citizen’. Persons holding these statuses do not hold the same abode rights as those who hold ‘British citizen’ status.

raises the question of whether any constitutional protection flows to those who do not fall within the scope of these powers, and if so, whether this protection amounts to a kind of constitutional citizenship that is independent of any statutory concept of citizenship or community membership that is legislated for by Parliament.

The idea that ‘non-alienage’ may signify constitutional community membership or ‘constitutional citizenship’ has been adverted to on a number of occasions.⁵⁸ Whether the concept gives rise to sufficient rights to warrant such descriptions is debatable, and is explored in greater depth in Part IV(D) below. What is clear, however, is that if a constitutional citizenship derived from s 51 of the *Constitution* does exist, it would require immunity not only from the aliens power but also from the immigration power, as falling within the scope of either of these powers is sufficient to render a person vulnerable to complete exclusion from the Australian community. With this in mind, Parts IV(B) and IV(C) examine what is necessary for a person to fall outside the reach of ss 51(xxvii) and 51(xix) in turn.

B Substantive Community Membership and the Limits of the Immigration Power

In the early years of Australian federation, government policy focused on limiting unwanted migration to the country. This was achieved through legislation such as the *Immigration Restriction Act 1901* (Cth) (which equipped immigration officials with a discretionary power to administer a dictation test in any European language to any intending immigrant, and to deny entry to those who failed the test).⁵⁹ Such legislation unambiguously applied to non-British subjects, on the basis that they were constitutional aliens. The immigration power, however, functioned to extend its coverage to British subjects who qualified as constitutional immigrants. At least initially, the immigration power was, in practice, the broader of Parliament’s two powers over community membership, as the breadth of the British Empire meant that a large number of people of ‘non-British type’ qualified as British subjects, and, by extension non-alien.

This meant that, for a number of years, cases that tested the extent of the Commonwealth’s power to exclude people from the Australian community focused predominantly on the scope of the immigration power. The parameters of this power have largely been defined through litigation in which particular plaintiffs contested that they could not be excluded from the Australian community under immigration legislation, as they did not satisfy the constitutional definition

⁵⁸ See further Part IV(D) below.

⁵⁹ The *Immigration Restriction Act 1901* (Cth) s 3(a) enabled the exclusion of any immigrant who, ‘when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer’. The dictation test could be administered to any immigrant within one year of his or her entry to Australia: at s 5(2). Failure to pass the test resulted in a person being deemed a ‘prohibited immigrant’: at s 3, and required their departure from Australia: at s 6(b). It is worth noting that the dictation test — which, in practice, was initially only applied to persons who looked ‘Asian’ or ‘coloured’ — was enacted in place of any outright race-based immigration restriction on the grounds that the United Kingdom objected to legislation that overtly prohibited migrants on the basis of race: see, eg, Irving, above n 19, 144.

of ‘immigrant’. These cases, which are considered below, engage with two key questions: when, if at all, the immigration power extends to cover persons born in Australia; and when, if at all, it extends to cover persons who have established a residence in Australia. While extracting clear principles is often difficult, the jurisprudence with respect to both of these categories suggests that a degree of substantive membership of the Australian community is required for a person to fall outside the reach of s 51(xxvii).

1 Section 51(xxvii) and Persons Born in Australia

The first case to consider the question of whether a person born within Australia could fall within the scope of s 51(xxvii) was the famous 1908 case of *Potter v Minahan*.⁶⁰ The High Court considered whether the plaintiff, who was born in Australia to a white, British subject mother and Chinese father, but had spent most of his life in China, could be subjected to the dictation test provided for in the *Immigration Restriction Act 1901* (Cth) upon his return to Australia. A majority of the Court held that he could not, as he was not an ‘immigrant’.

While it is broadly regarded as a landmark decision, extracting a clear ratio from *Minahan* is difficult. Significantly, all judges, both those in the majority and those in the minority, agreed that a person’s return to their ‘home’ could not be regarded as immigration — providing an early suggestion that the scope of the immigration power is affected by questions of substantive community membership. However, the majority and minority differed on the question of how to determine a person’s home. The majority judgments of Griffith CJ and Barton and O’Connor JJ suggest that a person born in Australia was both a British subject with allegiance to the British Empire (ie, a non-alien) as well as a prima facie member of the Australian community,⁶¹ with the common law right to leave and return to the country unhindered.⁶² Their Honours, thus, suggested that a person’s birth in Australia gives rise to a presumption that they have a substantive connection with the Australian community that is sufficiently strong to take them outside the reach of the immigration power.⁶³ This presumption was regarded as rebuttable: a person’s birthplace could cease to be their home if they formed the subjective intention to permanently abandon it.⁶⁴ Griffith CJ and O’Connor J also suggested that it might be possible for a person’s common law right to re-enter

60 (1908) 7 CLR 277 (*‘Minahan’*).

61 *Ibid* 287 (Griffith CJ), 298–9 (Barton J), 305 (O’Connor J).

62 *Ibid* 289 (Griffith CJ).

63 For Griffith CJ, for example, birth in Australia was significant because, prima facie, it entitled a person to ‘regard himself as a member of the [Australian] community’: *ibid*. Similarly, for O’Connor J, birth in Australia served as ‘prima facie evidence that [a person’s] home in infancy was ... Australia ... nothing more’: at 306 (emphasis altered). Barton J suggested that a person’s birthplace is presumed to be both their domicile and their ‘permanent home’, unless evidence suggested that they had formed the intention to make a permanent home elsewhere: at 298–9.

64 *Ibid* 298–9 (Barton J), 306 (O’Connor J).

their homeland to be abrogated by clear words in a statute.⁶⁵ However, neither of these circumstances arose on the facts of the case.

The minority judges, Isaacs and Higgins JJ, conceived differently of the significance of birth in Australia. Their Honours disagreed with the implication by the majority that British subjects born in Australia had any greater right to call Australia their home than British subjects born elsewhere, on the basis that the allegiance ties of all British subjects were identical. Isaacs J drew a dichotomy between ‘immigrants’ and ‘the people of the Commonwealth’ — an argument that his Honour continued to develop in subsequent cases.⁶⁶ His Honour held that as all Commonwealth power under the *Constitution* was conferred for the peace, order and good government of ‘the people of the Commonwealth’, a person entering Australia, regardless of their birthplace, was an immigrant unless they qualified at the moment of entry as one of ‘the people of the Commonwealth’ — or the constituent members of the Australian community.⁶⁷

The majority and minority judgments in *Minahan* were akin in that they all regarded a substantive connection with the Australian community as necessary for a person to fall beyond the reach of the immigration power. However, they disagreed on the relevance of birth in Australia to determining whether a sufficient connection was present. Ultimately, conclusive determination of the relationship between s 51(xxvii) and birth in Australia was not central to the outcome of the case.⁶⁸

Subsequent cases have done little to clarify the parameters of this relationship. Twenty-two years later, in *Donohoe v Wong Sau*,⁶⁹ a differently composed High Court read *Minahan* to stand only for the proposition agreed upon by all judges: that a person did not qualify as an immigrant if, in attempting to enter Australia,

65 Ibid 289–90 (Griffith CJ), 305 (O’Connor J). It is worthwhile to note, however, that Barton J cast some doubts on Australia’s ability to exclude an Australian born British subject at all: at 299.

66 See further Part V below.

67 *Minahan* (1908) 7 CLR 277, 308.

68 Professor Helen Irving has, in a different vein, argued that the common thrust of the majority judges in *Minahan* was that a ‘British subject of Australian birth’ could not be a constitutional immigrant: Irving, above n 19, 142. With respect, I suggest that their Honours did not go quite so far. While Mr Minahan’s British subject status and birth in Australia were certainly factors relevant to the majority’s determination that he was, as a matter of fact, a member of the Australian community, none of the majority judges conclusively stated that these factors provided any *constitutional* protection against immigrant status (Barton J alone suggested that such constitutional protection might exist, but ultimately concluded that the case could be decided ‘without laying down so broad a doctrine’: *Minahan* (1908) 7 CLR 277, 294). What was ultimately decisive for all three members of the majority was that, in returning to Australia, Mr Minahan was ‘coming home’, as a ‘member of the Australian community’. This characterisation did not automatically flow from formal considerations of nationality or domicile, but was rather a *substantive* judgment arrived at by the majority taking into account all of the circumstances in the case: see above n 63. By contrast, the minority judges found that, substantively speaking, Mr Minahan could not be described as ‘returning home’ to Australia. This interpretation aligns with the reading of *Minahan* adopted by Knox CJ and Higgins J in *Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 63–5 (Knox CJ), 111 (Higgins J) (*‘Re Yates’*).

69 (1925) 36 CLR 404 (*‘Wong Sau’*).

they were ‘coming home’.⁷⁰ Despite broad fact similarity to *Minahan*, all judges found that the plaintiff in *Wong Sau* failed to satisfy this test, regarding the question as one of fact.⁷¹ Read together, the two cases suggest that some degree of substantive connection with the Australian community is necessary to take a person outside the ambit of the immigration power, and that birth in Australia does not necessarily confer such a connection. Clear judicial guidance as to the circumstances in which a person born in Australia might nonetheless be an ‘immigrant’ upon re-entry to the country after an absence, however, remains lacking.

2 Section 51(xxvii) and Residents of Australia

Later cases have considered the question of whether laws passed under the immigration power could apply to a person who was not Australian born, but who was resident within the Australian community. The *Immigration Act 1901–25* (Cth) purported to do this, authorising the issuance of deportation orders with respect to persons born outside Australia in certain circumstances.⁷² In 1925, in *Re Yates*,⁷³ the High Court considered whether the immigration power extended to authorise the deportation under this Act of two Irish born British subjects who had migrated to Australia as adults, but had lived in the country as members of the community for several decades. By majority, the Court held that the plaintiffs

70 Ibid. Knox CJ stated that the case was ‘a bare question of fact’, and that Ms Wong Sau qualified as an immigrant because ‘in attempting to enter Australia, [she] was not coming home’: at 407. Isaacs J cited his own (dissenting) judgment in *Minahan*, in which his Honour stated that ‘[t]he ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people’, and that ‘[n]ationality and domicile are not the tests; they are evidentiary facts of more or less weight in the circumstances, but they are not the ultimate or decisive considerations’: at 407, quoting *Minahan* (1908) 7 CLR 277, 308. His Honour went on to say in *Wong Sau* that the only test is a ‘practical one’ — whether the person ‘at the moment of entry’ is a ‘constituent part of the Australian community’: at 408 (emphasis altered). Higgins J affirmed Knox CJ’s judgment, and stated that the test was whether Ms Wong Sau was coming to Australia ‘as to a new home’ or ‘as to her old home’: at 408. Rich J held that he had ‘no doubt that [Ms Wong Sau] was not returning home as part of the Australian community’, and accordingly that she was an immigrant: at 409. Starke J merely stated his agreement with the outcome of the case: at 409. The case has sometimes been described as one in which the Court upheld the dissenting judgments of Isaacs and Higgins JJ in *Minahan*: see Irving, above n 19, 146; Rubenstein, *Australian Citizenship Law in Context*, above n 18, 59. Notably, however, only Isaacs J reached judgment by reference to (his own) dissenting judgment in *Minahan*. None of the other judges sought to overrule the case, merely concluding that, despite her Australian-born British subject status, Ms Wong Sau was an immigrant as Australia had ceased to be her ‘home’. Higgins J drew attention to factual differences between Mr Minahan’s situation and that of Ms Wong Sau, suggesting a willingness to reconcile the outcome in *Wong Sau* with the decision in *Minahan*: *Wong Sau* (1925) 36 CLR 404, 409.

71 The circumstances in *Wong Sau* have been described as ‘almost identical’ to those in *Minahan*: see, eg, Irving, above n 19, 146. Both Mr Minahan and Ms Wong Sau were British subjects at birth, both had lived in China from a young age and returned to Australia only as adults, and both were unable to speak English. However, some differences between the facts of the two cases allow their respective decisions to reconcile. In *Minahan*, the fact that Mr Minahan and his father had maintained a sustained desire to eventually return to Australia was regarded as significant, whereas the fact that Ms Wong Sau had come to Australia because she had married a man who lived here was seen as an indication that she was not returning to her old home, but rather coming to a new one: see, respectively, *Minahan* (1908) 7 CLR 277, 287 (Griffith CJ); *Wong Sau* (1925) 36 CLR 404, 408 (Higgins J).

72 *Immigration Act 1901–25* (Cth) s 8AA.

73 (1925) 37 CLR 36.

had been immigrants at the time of their arrival to Australia, but ‘in course of time and by force of circumstances’ they had ceased to qualify, and had become members of the Australian community.⁷⁴ Accordingly, deportation orders made under the Act could not be applied to them.

Isaacs J entered a strong dissent, arguing that a person who enters Australia as an immigrant cannot lose the status ‘by the momentary leap over a barrier which magically and instantaneously transforms [him] ... into an Australian’.⁷⁵ His Honour held that an immigrant’s “movement” of immigration is uncompleted until he adopts Australia as a home ‘without intention of ever leaving’.⁷⁶ Even so, Isaacs J held that a person entering Australia as an immigrant could only adopt Australia as a home subject to the will of the Australian people.⁷⁷ Moreover, consent to absorb an immigrant into the community could be revoked by the people at will, through, for example, the enactment of retrospective legislation.⁷⁸ Isaacs J adopted the maxim ‘once an immigrant always an immigrant’⁷⁹ — while a person could move out of the ambit of the immigration power, he or she would remain at risk of being moved back within it by *legislative* enactment.

Most of the judgments in *Re Yates* reaffirm the idea expressed in *Minahan* and *Wong Sau* that substantive membership of the Australian community is the key to escaping the reach of the immigration power.⁸⁰ Isaacs J’s dissent, however, suggests that a person who first enters Australia as an immigrant can never attain full and constitutionally protected community membership: while such a person could pass beyond the reach of the immigration power through inclusion and acceptance as a substantive member of the Australian community, they would always remain susceptible to rejection from the community, which would render them once again vulnerable to laws passed under s 51(xxvii). While Isaacs J was in dissent in *Re Yates*, this element of his reasoning received some support over 20 years later, in *Koon Wing Lau v Calwell*.⁸¹ In this case, Latham CJ (with whom McTiernan and Webb JJ agreed)⁸² rejected the idea that a person could ‘by his own act ... make himself a member of the community if the community refuses to have him as a member’.⁸³ Latham CJ held that the decision to accept a person into the Australian community is one for the Australian community, who are spoken for by Parliament.⁸⁴ Further, his Honour held that as ‘what Parliament grants, Parliament may withdraw’, any person who first entered Australia as an

74 Ibid 64 (Knox CJ), 109–12 (Higgins J), 137–8 (Starke J).

75 Ibid 82.

76 Ibid 84.

77 Ibid 82.

78 Ibid 86.

79 Ibid 87.

80 Ibid 64 (Knox CJ), 82–4 (Isaacs J), 109–12 (Higgins J), 137–8 (Starke J). The exception is Rich J, who merely stated that s 51(xxvii) was capable of applying to any person except those who had been in Australia since prior to federation: at 127.

81 (1949) 80 CLR 533 (*Koon Wing Lau*).

82 Ibid 583 (McTiernan J), 593–4 (Webb J).

83 Ibid 561.

84 Ibid.

immigrant remains susceptible to laws with respect to their entry, settlement and remaining in Australia, even after they have made it their permanent home.⁸⁵

Although three of the six judges in *Koon Wing Lau* endorsed Latham CJ's analysis, his Honour's comments on the scope of the immigration power did not form part of the ratio of the case. The more recent case of *R v Director-General of Social Welfare (Vic); Ex parte Henry*⁸⁶ seems to incline towards a narrower interpretation of s 51(xxvii). While all judges in this case affirmed that 'the concept of immigration extends beyond the actual act of entry into Australia to the process of absorption into the Australian community',⁸⁷ their Honours also agreed that *Re Yates* stood for the proposition that an immigrant who has been 'absorbed into the community' has passed beyond the reach of the immigration power.⁸⁸ Mason J stated that the 'wider view' of the immigration power promulgated by Isaacs J had been rejected in *Re Yates*.⁸⁹ However, as *Henry* was not concerned with the question of whether acceptance of an immigrant into the Australian community is irreversible, the Court's comments on this point remain obiter. Accordingly, the wider view of the power promulgated by Isaacs J and Latham CJ has never been conclusively rejected.

3 Section 51(xxvii): Contemporary Applications

The immigration power cases discussed above suggest three things. First, s 51(xxvii) is broad: it enables both the exclusion or removal from Australia of persons that fall within its scope, as well as the regulation of such persons within Australia — at least until the point at which they become a constituent part of the Australian community.⁹⁰ Second, the power is capable of applying to both persons born in Australia and persons who have established a residence in Australia. Finally, to fall outside the scope of the power, it seems necessary that a person is to some degree a substantive member of the Australian community. Whether passage beyond the reach of the immigration power is a one-way process, such that a person who has done so becomes permanently immune to laws passed under the power, remains open: strong obiter dicta both for and against this proposition exist.

This final section concerns the relationship between statutory citizenship and s 51(xxvii). It is clear that, at federation, the immigration power was capable of encompassing persons who qualified formally as British subjects — the

85 Ibid 566.

86 (1975) 133 CLR 369 ('Henry').

87 Ibid 376 (Stephen J). See also 372–3 (Barwick CJ), 373–4 (Gibbs J), 379 (Mason J), 383 (Jacobs J). McTiernan J agreed with the reasons of Mason and Jacobs JJ: at 373.

88 Ibid 372 (Barwick CJ), 373–4 (Gibbs J), 377 (Stephen J), 380 (Mason J), 383 (Jacobs J).

89 Ibid 380.

90 It is worth noting that the *Migration Act 1958* (Cth) s 34(2) ('*Migration Act*') provides for a category of 'absorbed person visas' which are deemed to have been granted to persons who, through absorption into the Australian community, have ceased constitutionally to be 'immigrants'. An absorbed person visa entitles the holder to remain permanently in Australia, but does not enable re-entry into the country, in the event of departure: at s 34(1).

fullest formal indicator of Australian community membership at the time.⁹¹ The introduction of Australian citizenship legislation in 1949 and Australia's evolution into a legally independent nation (culminating in the passage of the *Australia Acts* in 1986), however, have seen statutory citizenship categorically replace British subject status as a formal indicator of community membership. A question thus arises as to whether a person who holds statutory Australian citizenship could nonetheless fall within the scope of the immigration power.

There is limited authority on this question, and the little that exists relates to a relatively unique type of Australian citizenship: that held by people born in the former Australian territory of Papua. Formerly, the *Citizenship Act 1948–75* conferred citizenship automatically on those born in Australia, including Papua. However, in 1975, when Papua New Guinea attained independence, its *Constitution* conferred automatic citizenship on most persons born in the country. Simultaneous Australian regulations made pursuant to the *Papua New Guinea Independence Act 1975* (Cth) purported to divest all Australian citizens who acquired automatic Papua New Guinean citizenship of their Australian citizenship.⁹² There were several exceptions to this general framework. Relevantly, where a person enjoyed a right (revocable or otherwise) of permanent residence in Australia, automatic acquisition of Papua New Guinean citizenship and consequent loss of Australian citizenship did not occur.

The statutory framework in place in Australia at the time did not determine whether a person had a right to permanent residence by reference to the status of Australian citizenship. Rather, it drew on the immigration power. Under the *Migration Act 1958–83* (Cth), an 'immigrant' who proposed to enter Australia was subjected to entry controls, and therefore did not have a right to permanent residence.⁹³ 'Australia', for the purposes of the *Migration Act*, was taken to exclude external territories such as Papua. In *Minister for Immigration and Multicultural and Indigenous Affairs v Walsh*,⁹⁴ the Federal Court considered whether a person who had held Australian citizenship by virtue of birth in Papua prior to the independence of Papua New Guinea was an 'immigrant' for the purposes of the *Migration Act*. The Court held that, notwithstanding her Australian citizenship, the plaintiff was an 'immigrant', and therefore lacked a right to permanent residence in Australia.

Central to this decision was the idea that s 51(xxvii) is a power to regulate the movement to and settlement in Australia of 'persons who are not members of

91 In *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330, 338 Gummow J stated: 'the placing in the hands of the Parliament of the Commonwealth of a power with respect to immigration and emigration ... was done with the avowed purpose of conferring a power of exclusion of British subjects not born or naturalised in Australia'. As discussed above, the decision in *Wong Sau* (1925) 36 CLR 404 suggests that, at least in certain circumstances persons born in Australia, and British subjects by virtue of that fact, were also capable of falling within the scope of s 51(xxvii).

92 See *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth) reg 4.

93 *Migration Act 1958–83* (Cth) s 6. In 1984, the *Migration Act* was amended to regulate the entry to Australia of 'non-citizens' rather than 'immigrants'. The amending legislation, the *Migration Amendment Act 1983* (Cth), was enacted pursuant to the aliens power: see *Minister for Immigration and Multicultural and Indigenous Affairs v Walsh* (2002) 125 FCR 31, 36 [17].

94 (2002) 125 FCR 31 ('*Walsh*').

the Australian community'.⁹⁵ Thus, the decision affirms the significance of a substantive community connection to s 51(xxvii). The Court stated that while '[p]ossession of Australian citizenship may be an important factor in determining whether a person ... [falls] outside the immigration power ... it may not be decisive'.⁹⁶ It went on to suggest that '[a]n Australian national may, in some circumstances, enter Australia as an immigrant and regulation of such entry is within the constitutional competence of the Commonwealth Parliament'.⁹⁷

Whether an Australian statutory citizen — a formal member of the Australian community — could fall within the scope of s 51(xxvii) where external territories have no bearing has never arisen for judicial consideration. In oral submissions in the 2005 case of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*,⁹⁸ the Commonwealth drew on *Minahan* and *Wong Sau* to suggest that it would be constitutionally permissible for Parliament to treat as an immigrant an Australian citizen who, in attempting to enter the country, was not 'returning to [his or her] home'.⁹⁹ The Commonwealth suggested that examples of citizens who might fall within the scope of s 51(xxvii) included citizens who had 'live[d] overseas for more than three years', and 'Australian citizen[s] born overseas of Australian parents'.¹⁰⁰ Gummow and Kirby JJ, while emphasising that these questions did not need to be resolved in the case at hand, received the Commonwealth's suggestions with some trepidation, casting doubt on whether such arguments would ultimately be accepted by the Court.¹⁰¹ Nonetheless, the reasoning employed by the Court in s 51(xxvii) cases, and the historical extension of the provision to persons that satisfied formal criteria for membership of the Australian community, leaves room for such arguments to be raised.

A related — and deeper — question is whether a person who satisfies the *constitutional* requirements for non-alienage could, in contemporary times, fall within the scope of the immigration power. Once again, the case law as it stands seems to leave open this possibility, as the tests applied to determine alienage and immigrant status vary in nature.¹⁰² Part IV(C) examines the scope of s 51(xix), and the defining characteristics of constitutional alienage. In Part IV(D), the potential for a class of immigrant non-alien to exist is considered in greater depth.

95 Ibid 36 [19].

96 Ibid.

97 Ibid.

98 (2005) 222 CLR 439 ('Ame').

99 Transcript of Proceedings, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCATrans 66 (3 March 2005).

100 Ibid.

101 Ibid. In response to such suggestions, Kirby J stated: 'We do not really have to resolve it in this case, but I really doubt that you could impose a duty on any Australian citizen to get a visa or something, some permission to get back into Australia because they are just not immigrants. They are not within the immigration power'. Gummow J also stressed that the argument was not central to the case, but suggested it ventured into 'dangerous waters'. This suggests that, should an appropriate case arise, the latent potential of the immigration power to extend to authorise laws of the kind suggested may be closed off by the Court. Both Gummow and Kirby JJ have, however, since retired from the High Court.

102 See further Part IV(C) below.

C *The Limits of the Aliens Power*

From the second half of the twentieth century, cases concerning the ambit of the immigration power have become increasingly infrequent, while those concerning the scope of the aliens power have become increasingly common. This trend coincided with the entry into force in 1949 of Australia's first citizenship legislation, the *Nationality and Citizenship Act 1948* (Cth) (later renamed the *Australian Citizenship Act 1948* (Cth)), and the progressive replacement of British subject status with Australian statutory citizenship as an indicator of formal membership of the Australian community. This replacement was gradual. In its earliest form, citizenship legislation formalised an independent concept of Australian citizenship,¹⁰³ bringing Australia into line with other British colonies such as Canada,¹⁰⁴ but was introduced alongside an express commitment from the Minister for Immigration, Arthur Calwell to preserve to the fullest extent the 'advantages and privileges which British subjects who may not be Australian citizens enjoy in Australia'.¹⁰⁵ Until 1984, British subjects held the same substantive rights as Australian citizens, including full voting rights.¹⁰⁶ Until 1987, citizenship legislation retained the term 'British subject', defining it as a status denoting membership of the Australian community, and an 'alien' as, substantially, a person lacking British subject status.¹⁰⁷ Since then, however, the term has been absent from the legislation. Following the severance of formal ties between Australia and the UK, British subject status has ceased to signify any level of membership of the Australian community, and, consequently, no longer serves as the obverse of alienage.¹⁰⁸

This decoupling of British subject status and the notion of 'non-alienage' has meant that the immigration power is no longer needed to support legislation seeking to exclude British subject immigrants, as these persons now fall within the scope of the aliens power. Accordingly, it is more common today for all exclusionary legislation to be passed under the ambit of the aliens power, which

103 See *Nationality and Citizenship Act 1948* (Cth) pt III.

104 Rubenstein, *Australian Citizenship Law in Context*, above n 18, 63–4.

105 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1948, 1062 (Arthur Calwell).

106 In 1984, electoral law was changed to link voting rights with the status of Australian citizenship rather than British subject status, but British subjects who had been on the electoral roll prior to this legislative change were not disenfranchised, and remain entitled to vote until this day: see *Commonwealth Electoral Act 1918* (Cth) s 93(1).

107 In 1987 the term 'British subject' was removed from the *Australian Citizenship Act 1948* (Cth) by the *Australian Citizenship Amendment Act 1984* (Cth).

108 For a comprehensive overview of the historical evolution of Australian citizenship legislation, see Rubenstein, *Australian Citizenship Law in Context*, above n 18, ch 4.

is even more wide-ranging than the immigration power, as it supports any law made with respect to those persons who qualify as aliens.¹⁰⁹

Ascertaining the scope of s 51(xix) is difficult. Three things emerge from the jurisprudence with respect to the power. The first is that, unlike s 51(xxvii), the power has not typically been characterised by notions of substantive community membership or absorption. This reasoning has been used to extend the notion of alienage to include people who, without holding statutory citizenship, have lived in Australia for virtually their entire lives, in some instances in possession of rights contemporaneous with those of Australian citizens. The second is that whether a person is an alien has been linked with notions of allegiance — a nexus which has origins in the early common law.¹¹⁰ The final thing that emerges from the cases is the possibility that neither the irrelevance of substantive community membership nor the centrality of allegiance is absolute when determining questions of alienage. There have been some suggestions, in obiter dicta, that in extreme circumstances, substantive community membership alone might be sufficient to render someone a non-alien. Other cases raise questions about the nature of the allegiance that makes a person a non-alien, and in doing so challenge whether allegiance is sufficient to guarantee a status of constitutional non-alienage. These issues will be explored in turn.

1 Section 51(xix) and Substantive Community Membership

The general irrelevance of substantive community membership to questions of alienage was established in the 1982 case of *Pochi*.¹¹¹ *Pochi* concerned a long-term resident of Australia who did not hold citizenship (however he had lodged an application for citizenship which had been approved but not finalised due to an administrative mistake). The Court held that despite '[having] become totally absorbed into the Australian community', and therefore not qualifying as an immigrant, the plaintiff remained an alien for constitutional purposes until formally naturalised, which, according to the common law, 'could only be achieved by Act of Parliament'.¹¹² *Pochi*, thus, established the proposition that the degree of community membership required to take a person outside the ambit of the immigration power was not sufficient to take them outside the aliens

109 The primary current example of such legislation is the *Migration Act*. As noted in above n 93, since 1984 this legislation has focused on the regulation of non-citizens, and has drawn on the aliens power for support. Section 4(1) of the current *Migration Act* expressly states that its object is 'to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'. To the extent that 'non-citizens' are constitutional aliens, the aliens power is wide enough to support the regulation of both their entry into Australia and their presence in the country. The immigration power, which had previously been relied upon as the primary basis for the *Migration Act* is, as Higgins J suggested in *Re Yates* (1925) 37 CLR 36, 109–10, somewhat narrower: it supports laws made with respect to the process of 'immigration', but not all laws with respect to 'immigrants' or their presence in Australia. In *Henry* (1975) 133 CLR 369, 381, Mason J endorsed this point, but noted that, in many cases, a law with respect to immigration will also be with respect to immigrants.

110 See, eg, Sir William Holdsworth, *A History of English Law* (Sweet and Maxwell, 3rd ed, 1944) vol IX, 72, cited in *Singh* (2004) 222 CLR 322, 386 [164] (Gummow, Hayne and Heydon JJ).

111 (1982) 151 CLR 101.

112 *Ibid* 111 (Gibbs CJ).

power. It also drew a link between the possession of statutory citizenship and the constitutional status of non-alienage.

In a series of cases between the late 1980s and early 2000s, these principles were affirmed and extended. In *Te*, Gleeson CJ described the idea that absorption into the community is relevant to the status of alienage as ‘wrong in principle’.¹¹³ His Honour stressed that the aliens power is wider in ambit than the immigration power, and enables Parliament to ‘decide who will be entitled to membership of the Australian body politic’.¹¹⁴ While Parliament’s capacity to define the body politic is not unqualified, in Gleeson CJ’s view, it ‘extends to denying such membership to a person who arrived in [Australia] as an alien, and has never taken up Australian citizenship’.¹¹⁵

In *Nolan*¹¹⁶ and *Shaw*,¹¹⁷ the Court went further, confirming that long-term British subject residents, who had settled in Australia after the introduction of citizenship legislation but before the passage of the *Australia Acts*, could qualify as constitutional aliens if they lacked Australian citizenship. This was because Australia’s evolution into a legally independent nation and the development of Australian citizenship meant that British subject status had ceased to serve as an indicator of formal community membership in Australia. British subject residents could be aliens even where, at the time of their entry to Australia, the statutory framework had conceived of them as ‘non-aliens’, and had conferred upon them rights contemporaneous with those held by Australian citizens, which they had never lost.¹¹⁸ *Nolan* and *Shaw* thus affirm that it is possible for an individual’s constitutional relationship with Australia to change, despite a lack of action on their part,¹¹⁹ and a lack of any substantial change in the rights they hold.¹²⁰

113 (2002) 212 CLR 162, 176 [42].

114 *Ibid* 175 [39].

115 *Ibid*.

116 (1988) 165 CLR 178.

117 (2003) 218 CLR 28.

118 Though the status of ‘British subject’ was removed from the *Australian Citizenship Act 1948* (Cth) in 1987, substantive rights that had been conferred upon British subject residents prior to this date by other legislation, including the right to vote, were never lost by the British subjects who held them.

119 See also *Ame* (2005) 222 CLR 439, 459 [36] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

120 In *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (*‘Re Patterson’*), a majority of the High Court affirmed the dissenting judgment of Gaudron J in *Nolan* (1988) 165 CLR 178. Kirby J, with whom Callinan J agreed, hinted at a constitutional concept of nationality, or non-alienage, and the idea that people who fell within its ambit could not be rendered aliens simply by the creation of a statutory citizenship that did not include them. His Honour stated: ‘[t]he introduction by statute, and then only in 1948, of the non-constitutional notion of citizenship scarcely justified the retrospective imposition, on a very large class of non-citizen British subjects in Australia, of the constitutional status of alien. Such imposition is especially untenable where members of that class have long since been absorbed amongst the people of the Commonwealth and accorded by them the full civil and political rights and duties of Australian nationality’: *Re Patterson* (2001) 207 CLR 391, 491 [302]. Two years later, however, *Re Patterson* was confined to its non-constitutional elements by *Shaw* (2003) 218 CLR 28, following a change in the composition of the Court.

2 Section 51(xix) and Allegiance

Subsequent cases have held that the concept of alienage extends even further, and that it is, in some circumstances, capable of encompassing both people who were born within Australia as well as those who hold statutory Australian citizenship. These cases have typically been decided by reference to notions of allegiance. The first category of cases followed amendments to the *Australian Citizenship Act 1948* (Cth) in 1986, which, for the first time, removed the automatic conferral of citizenship upon all persons born within Australia, imposing the additional requirement that at least one parent hold Australian citizenship or permanent residency at the time of birth.¹²¹ These cases raised new questions with respect to the parameters of alienage, and the capacity of Parliament to link it with non-citizenship. Unlike previous cases, they did not concern plaintiffs who had arrived as immigrants and had subsequently failed to take out citizenship, but people who, despite having been born in Australia, had never been given the opportunity to hold citizenship.

In *Singh*, the plaintiff was a child who was born in Australia to parents who were not citizens or permanent residents of Australia. Though she held Indian citizenship by descent, she had lived her whole life in Australia. The Court considered whether these circumstances took her outside of the ambit of the aliens power. By a 5:2 majority, it concluded that they did not. The joint judgment of Gummow, Hayne and Heydon JJ affirmed that an alien was a person who owed obligations to another sovereign power.¹²² The plaintiff's possession of Indian citizenship was evidence of such obligations. Contrary to the minority, who held that birth in Australia gave rise to an obligation of permanent allegiance to Australia and, correspondingly, entitled a person to non-alien status,¹²³ the majority held that previous common law ideas of birthright nationality had been 'overtaken by statute'.¹²⁴

*Koroitamana v Commonwealth*¹²⁵ involved very similar facts to *Singh* — the distinguishing features being that the plaintiffs in question did not hold citizenship of a foreign state. While entitled to register for Fijian citizenship by descent, they had refrained from doing so, affirming their allegiance to Australia. The Court

121 These changes were implemented via the *Australian Citizenship Amendment Act 1986* (Cth) s 4. As Rubenstein has noted, the amendments were prompted by the case of *Kioa v West* (1985) 159 CLR 550, in which it was argued that a child whose parents had been subjected to a deportation order was an Australian citizen with an entitlement to natural justice. Although this argument was not adopted by the High Court, the possibility that it might be adopted in the future precipitated 'precautionary legislative change': Rubenstein, *Australian Citizenship Law in Context*, above n 18, 93.

122 *Singh* (2004) 222 CLR 322, 384 [154], 395 [190], 398–9 [200]–[201] (Gummow, Hayne and Heydon JJ).

123 Ibid 430–1 [308] (Callinan J), 377–8 [133] (McHugh J).

124 Ibid 384 [157] (Gummow, Hayne and Heydon JJ).

125 (2006) 227 CLR 31 ('*Koroitamana*').

held that, notwithstanding these differences, the plaintiffs were aliens, and their case was not materially distinguishable from *Singh*.¹²⁶

If, as the joint judgment in *Singh* suggests, the question of whether a person is an alien or a non-alien is determined by their allegiance, the decision in *Koroitamana* suggests two things. First, while ‘allegiance to a foreign sovereign power’ has often been stated as the determinative element of alienage,¹²⁷ it is not required for a person to qualify as an alien — the absence of allegiance to Australia is sufficient. Second, whether a person has allegiance to Australia is not determined subjectively — feelings of loyalty to or a connection with Australia do not suffice. This latter point is bolstered by the case of *Ame*, in which the High Court held that a Papuan born man who had acquired formal Australian citizenship at birth by virtue of this fact was — in spite of his formal citizenship status and his subjective sentiments of allegiance to Australia — an alien at the time that Papua New Guinea acquired sovereignty. Accordingly, he could be validly divested of his Australian citizenship.¹²⁸

3 Alternate Conceptions of s 51(xix)

However, neither the idea that the aliens power is unconcerned with questions of substantive community membership, nor the idea that it is characterised by notions of allegiance is abundantly clear. With respect to substantive community membership, it has been suggested in obiter dicta that the expression ‘a subject of the Queen’ in s 117 of the *Constitution* might be seen as providing an antonym of ‘alien’.¹²⁹ In *Street*, Toohey J — also in obiter dicta — adverted to the possibility that protection under s 117 might extend to non-citizens who are resident in

126 Callinan J held that the case was ‘indistinguishable’ from *Singh*: *ibid* 56 [86]. Gleeson CJ and Heydon J acknowledged the factual differences between the case and *Singh*, but affirmed the decision of the Full Federal Court, that ‘the outcome of the case was dictated by the reasoning of the majority of [the High Court] in *Singh*’: at 36 [5], 39 [16]. Gummow, Hayne and Crennan JJ held that the applicants’ case failed, in large part because High Court authority did not support either the proposition that those born in Australia held ‘constitutional citizenship’, or the ‘retention of that character until supervening dissociation with the Australian community by the constitutional citizen’: at 46 [48]–[49]. These propositions were rejected by the majority in *Singh*: see above n 122. Kirby J held for the applicants to qualify as non-aliens, their ‘birth in Australia without any other present nationality’ would have to confer upon them ‘the constitutional status of Australian nationality’ — a proposition his Honour held was incompatible with *Singh*: at 54 [80]. His Honour acknowledged that the Commonwealth Parliament cannot ‘expand the power under s 51(xix) to include persons who could not possibly answer the description of “aliens” in the ordinary understanding of the word’ by imposing an ‘artificial’ or ‘extreme’ meaning on the word ‘alien’: at 54–5 [81]. However, in his view, neither *Koroitamana* nor *Singh* qualified as an extreme case: at 55 [82].

127 See, eg, *Singh* (2004) 222 CLR 322, 398 [200] (Gummow, Hayne and Heydon JJ); *Ame* (2005) 222 CLR 439, 458 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

128 Significant to the decision, however, was the fact that the statutory rights that had stemmed from the Australian citizenship conferred upon Papuans were less than full, as, unlike other citizens, they had not enjoyed any right to enter or remain in mainland Australia. The Court rejected the idea that Parliament was constitutionally obliged to bestow residence or voting rights on citizens who were inhabitants of external territories: *Ame* (2005) 222 CLR 439, 454 [22] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

129 *Singh* (2004) 222 CLR 322, 382 [149] (Gummow, Hayne and Heydon JJ).

Australia.¹³⁰ While both these suggestions are far from being widely accepted, if they were to gain acceptance it would challenge the idea that substantive community membership is irrelevant to questions of alienage. The potential relevance of substantive membership has also been expressly recognised: in *Te*, Kirby J (with whom Callinan J agreed) suggested that in ‘exceptional’ cases, long term residents who were never naturalised as Australian citizens might fall beyond the reach of the aliens power.¹³¹

Additionally, the decision in *Koroitamana* raises questions about the extent to which allegiance remains the defining characteristic of alienage. As suggested above, if the idea that alienage is determined by reference to allegiance is accepted, *Koroitamana* may be read as merely indicating that something more than subjective allegiance to Australia is required for a person to qualify as a non-alien. Alternatively, however, the case may be read as suggesting that while questions of allegiance may be relevant when considering whether a person is an alien or a non-alien, they are not determinative. Significantly, in contrast to the cases of *Singh* and *Ame*, in which joint majority judgments affirmed the nexus between allegiance to a foreign power and alienage, the decision in *Koroitamana* merely emphasised that denying citizenship to the plaintiffs in question was within the capacity of Parliament, without identifying either the limits of this legislative capacity or the criteria which brought the plaintiffs within them.¹³² The relationship between non-alienage and statutory citizenship was thus affirmed; its dependence upon allegiance was not.

It is unclear what, if anything, would have the potential to replace allegiance as a reference point for alienage. It has been suggested that alienage is signified by no more than the absence of statutory citizenship.¹³³ This may be true in practice given the current formulation of the statutory concept of citizenship, but to elevate it to a statement of constitutional principle would fall foul of both the principle that Parliament cannot, through statute, define the scope of its own constitutional power,¹³⁴ as well as the High Court’s repeated assertion that an ‘alien’ is not merely ‘whatever Parliament wants it to mean’.¹³⁵

The actual relationship appears to be more subtle. Parliament cannot, through statute, convert a constitutional non-alien into an alien. However, the development of citizenship through statute is one of the factors that shape the *constitutional* meaning of alienage. In *Singh*, Gleeson CJ held that ‘questions of nationality,

130 (1989) 168 CLR 461, 554.

131 *Te* (2002) 212 CLR 162, 217–18 [200]. See also 229 [229] (Callinan J).

132 *Koroitamana* (2006) 227 CLR 31, 38–9 [13]–[15] (Gleeson CJ and Heydon J), 46–7 [47]–[51] (Gummow, Hayne and Crennan JJ), 54–5 [80]–[82] (Kirby J).

133 In *Shaw* (2003) 218 CLR 28, 43 [32], Gleeson CJ, Gummow and Hayne JJ held that the scope of the aliens power extends to ‘all those persons who entered this country after the commencement of the *Citizenship Act* on 26 January 1949 and who were born out of Australia of parents who were not Australian citizens and who had not been naturalised’. This reading of alienage encompassed all persons who fell outside of the statutory concept of citizenship at the time. More directly, in interpreting the word ‘alien’ in *Chu Kheng Lim* (1992) 176 CLR 1, 25, Brennan, Deane and Dawson JJ stated that ‘s 51(xix) of the *Constitution* [has] become synonymous with “non-citizen”’.

134 See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J).

135 *Singh* (2004) 222 CLR 322, 329 [5] (Gleeson CJ).

allegiance and alienage were matters on which there were changing and developing policies, and which were seen as appropriate for parliamentary resolution'.¹³⁶ The Court in *Koroitamana* endorsed this idea, and affirmed that Parliament's power to influence notions of alienage through its configuration of statutory citizenship is broad,¹³⁷ and that it may draw on both birth and descent criteria when exercising this power.¹³⁸

Where the limit to Parliament's power in this area lies has never been established, and there has been substantial judicial silence on the question. Kirby J has expressly contemplated the question, suggesting in several cases that if Parliament were to 'attempt to push the "aliens" power into extreme instances ... [the] Court [could] be trusted to draw the necessary constitutional line'.¹³⁹ As Sydney Tilmouth has noted, however, case law to date leaves us relatively uninformed as to the principles that inform where that 'not so bright line' might be drawn.¹⁴⁰ Indeed, Kirby J's judgments might be taken to suggest that the line will not be drawn by reference to a set of clear principles at all, but rather, that established principles — such as the idea that substantive community membership is irrelevant to questions of alienage — might give way in an 'extreme' case.

D The Potential for Section 51 Constitutional Citizenship?

The foregoing analysis has sought to clarify the nature and limits of the Commonwealth's powers over immigration and aliens, so far as is possible upon current authority. This section considers whether a person who falls outside the scope of these powers could be said to hold 'constitutional citizenship', and if so, what characterises such citizenship.

The idea that alienage may be the antonym of constitutional citizenship has been suggested on a number of occasions.¹⁴¹ It has also been argued that the sheer breadth of the aliens power means that only those who qualify as non-aliens, free from regulation under s 51(xix) can claim to enjoy 'full legal membership of the Australian community'.¹⁴² The analysis in Parts IV(B) and IV(C) of this article suggests that in order to hold such membership, escaping the reach of the aliens power is necessary but not sufficient: freedom from regulation under the similarly wide ambit of the immigration power is also required.

136 Ibid 341 [30].

137 (2006) 227 CLR 31, 38 [11] (Gleeson CJ and Heydon J).

138 Ibid 49 [62] (Kirby J).

139 *Singh* (2004) 222 CLR 322, 418 [269] (Kirby J). Kirby J made similar suggestions in *Te* (2002) 212 CLR 162, 217–18 [200]; *Koroitamana* (2006) 227 CLR 31, 55 [82].

140 Sydney Tilmouth, 'Citizenship as a Constitutional Concept: *Singh v The Commonwealth of Australia* and *Rasul v Bush, President of the United States*' (Paper presented at the Gilbert + Tobin Centre for Public Law Constitutional Law Conference and Dinner, Art Gallery of New South Wales, 18 February 2005) 12.

141 See, eg, *Koroitamana* (2006) 227 CLR 31, 49 [61] (Kirby J); *Singh* (2004) 222 CLR 322, 380 [139] (McHugh J).

142 See, eg, Prince, above n 34, 21.

In general, in light of the decoupling of British subject status and non-alienage, a person who qualifies as a non-alien is unlikely to fall within the ambit of the immigration power today. However, ss 51(xix) and 51(xxvii) were designed to capture different people, and the potential for them to function in this manner today or in the future remains. The High Court has not conclusively closed off the possibility that a person who entered Australia as an immigrant but has passed beyond the reach of the immigration power via absorption into the community could, through the revocation of community acceptance or the loss of a substantive connection with Australia, fall back within its scope. The Commonwealth's suggestion in oral submissions in *Ame* that Australian citizens could be subject to regulation under the immigration power after a sustained absence from Australia,¹⁴³ indicates that the argument over whether this is possible is more than merely academic and, further, suggests that it might even be possible for the immigration power to encompass certain statutory citizens whose citizenship was acquired at birth rather than by naturalisation.¹⁴⁴

To the extent that these possibilities remain open, the deeper question of whether a person could qualify as a constitutional immigrant even if they have satisfied the typically more onerous criteria for constitutional non-alienage also remains at large. Resolution of this question requires both a conclusive judicial determination on whether or not a person can pass in and out of the scope of the immigration power based upon their level of absorption into or substantive connection with the Australian community, as well as a clearer delineation of the criteria for non-alienage than arises from the cases at present.¹⁴⁵ Until this occurs, questions remain about whether a class of immigrant non-alien, vulnerable under s 51(xxvii), could exist.¹⁴⁶

143 See Part IV(B) above.

144 The Commonwealth expressly suggested, for instance, that an 'Australian citizen born overseas of Australian parents' would qualify as an immigrant upon entry to the country. Such a person, under current citizenship legislation is entitled to become an Australian citizen at birth, under the 'Citizenship by descent' provisions in pt 2 div 2 of the *Australian Citizenship Act 2007* (Cth). Unlike citizens born in Australia to Australian parents, persons with purely descent based claims to citizenship do not gain citizenship automatically at birth — an application is required: at ss 16(2), 16(3). However, where such an application is made, it must generally be approved: at s 17(2). The Commonwealth also suggested that the return to Australia of Australian citizens who had resided overseas for over three years could be subject to regulation under the immigration power. Whether this was intended to apply to all Australian citizens was not clarified: Transcript of Proceedings, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCA Trans 66 (3 March 2005).

145 If the suggestions of Kirby and Callinan JJ in *Te* that in an 'extreme case' substantive community membership alone might be sufficient to take a person outside the reach of the aliens power are ultimately accepted (see above n 41 and accompanying text), this might suggest that satisfying the criteria for non-alienage might similarly protect a person against subjection to laws passed under the immigration power. However, as these comments were only made in obiter dicta, and their application was expressly limited to 'extreme cases', their likely effect remains uncertain.

146 Determining the types of people who would be most likely to qualify as non-alien immigrants in this scenario is challenging, due to the lack of a clear conceptual basis for alienage in the jurisprudence. For instance, an example of an Australian citizen who might appear more susceptible than most to qualification as a constitutional immigrant is a person who holds dual citizenship, and who seeks to enter Australia after residing in a foreign country for a long period of time. The current case law on s 51(xix), however, leaves unclear the question of whether such a person would qualify as a non-alien: if alienage is characterised by an absence of allegiance to Australia they would appear to be a non-alien; however if it is characterised by allegiance to a foreign power, their position would be less clear.

To successfully argue that those who fall outside the reach of ss 51(xix) and 51(xxvii) are constitutional citizens, the question of what would flow from such a citizenship must be determined. Arguably, mere freedom from subjection to laws made under the aliens or immigration powers, in the absence of any ostensible positive rights protection, is insufficient to warrant description as ‘citizenship’, particularly in light of the deliberate exclusion of any express concept of citizenship or citizenship rights from the text of the *Constitution*.

The answer to this challenge may perhaps be found in the role that the wide breadth of the aliens power has played in enabling the circumvention of ordinary constitutional protections for those who fall within its scope. An example is the increased vulnerability of aliens to executive detention. In the absence of any national bill of rights in Australia, the separation of judicial power in Ch III of the *Constitution* has assumed a heightened role as a source of protection against detention of this nature. However, as Brennan, Deane and Dawson JJ noted in *Lim*, the ‘protection which Ch III of the *Constitution* provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process’ is ‘significantly ... diminish[ed]’ in the case of an alien.¹⁴⁷ In *Al-Kateb v Godwin*, in which the indefinite detention of a stateless alien under the *Migration Act* was upheld as constitutionally valid, a majority of the High Court went further, casting doubt on the question of whether the separation of powers affords any protection against detention to aliens at all.¹⁴⁸ This suggests that despite the absence of positive rights protection in the *Constitution*, there may be a degree of fundamental rights protection that flows from the structure of the text which extends in full to non-aliens — and to s 51 ‘constitutional citizens’ — but not to aliens.¹⁴⁹

Identifying what other rights might flow from a constitutional citizenship held by those who fall outside the scope of ss 51(xix) and 51(xxvii) necessitates consideration of the conceptual basis for such citizenship. This is difficult for two reasons. First, the individual breadth of the immigration and aliens powers requires that both powers be escaped for constitutional citizenship to eventuate. However, there is no single conceptual basis that carries a person beyond the reach of both powers: while substantive community membership is central to freedom from the immigration power, it is generally irrelevant to questions of alienage, which is instead traditionally understood by reference to notions of allegiance. This does not pose insurmountable challenges: it is conceivable that substantive

147 *Chu Kheng Lim* (1992) 176 CLR 1, 29. For a detailed analysis, see Rayner Bartholomew Thwaites, *Judicial Responses to the Indefinite Detention of Non-Citizens Subject to Removal Orders: A Comparative Study of Australia, the United Kingdom and Canada* (SJD Thesis, The University of Toronto, 2010) 34 <https://tspace.library.utoronto.ca/bitstream/1807/26248/1/Thwaites_Rayner_B_201011_SJD_thesis.pdf>.

148 See, eg, Thwaites, above n 147, 61; *Al-Kateb v Godwin* (2004) 219 CLR 562, 649 [262] (Hayne J).

149 A relationship between qualifying as a constitutional alien and a lack of fundamental rights protection is articulated here primarily because it is s 51(xix) of the *Constitution* that has been relied on most heavily to facilitate exclusion from the community in recent years. However, as there is no reason why s 51(xxvii) could not be used to similar effect against those who fall within its ambit, it would be more accurate to state that the fundamental rights protection suggested only extends to people who fall outside the reach of both powers.

community membership — required to pass beyond the reach of the immigration power but generally regarded as insufficient to render someone a non-alien — might entitle a person to certain limited rights (including, potentially, protection under s 117 of the *Constitution*), but that access to other rights would only flow to those who also lie beyond the reach of the aliens power.

This, however, raises the second difficulty, which is harder to overcome: while the rights that may stem from freedom from the aliens power vary depending on what characterises alienage, current authority renders this characterisation uncertain. If constitutional non-alienage has at its heart common law notions of permanent allegiance to Australia, this may allow the implication of corresponding constitutional obligations incumbent upon the Commonwealth, also derived from the common law — for example, a ‘duty of protection’,¹⁵⁰ or, as Professor Helen Irving has suggested, a constitutional right of abode that Parliament cannot abrogate.¹⁵¹ Accepting that alienage is defined by allegiance does not guarantee that such rights will exist in any constitutionally protected form: this remains a matter for debate.¹⁵² However, if allegiance has ceased to serve as the defining element of non-alienage, arguments that these rights do attract constitutional protection lose their basis.¹⁵³ The High Court’s recent reluctance to tie constitutional alienage to any essential conceptual characteristics, emphasising instead Parliament’s power to determine the meaning of the concept within broad boundaries, thus renders uncertain any constitutional rights that may stem from non-alienage.

A final question arises as to the strength of any protection that could be derived from a constitutional concept of citizenship based in s 51. The fact that a person who is a ‘non-immigrant’ for s 51(xxvii) purposes may still be vulnerable as an alien (and, potentially, vice versa) presents a challenge. As suggested above, if different rights flow from ‘non-immigrant’ and ‘non-alien’ status, this difficulty is mitigated somewhat: non-immigrants and non-alien would hold the constitutional rights that flow from immunity from ss 51(xxvii) and 51(xix) respectively, with the full range of s 51 citizenship rights reserved for those who qualified as both non-immigrants and non-alien. However a broader question is raised: it is unclear how ss 51(xix) and 51(xxvii) interact not only with each other, but also with other heads of power that could be relied upon to support exclusionary laws: for example the defence power, the external affairs power and the implied nationhood power. Qualification as a non-immigrant non-alien

150 See, eg, *Singh* (2004) 222 CLR 322, 377 [131] (McHugh J), 387 [166] (Gummow, Hayne and Heydon JJ), citing Glanville Williams, ‘The Correlation of Allegiance and Protection’ (1948) 10 *Cambridge Law Journal* 54.

151 Irving, above n 19, 150.

152 In *Minahan* (1908) 7 CLR 277, for instance, only Barton J suggested that the Commonwealth might be constitutionally precluded from abrogating the common law right of a non-alien who held substantive membership of the Australian community from entering their homeland: at 299. Griffith CJ and O’Connor J, by contrast, expressly suggested that this right could be abrogated by clear words in a statute: at 289–90 (Griffith CJ), 305 (O’Connor J). In contrast, Irving acknowledges this, but argues that the allegiance required of constitutional non-alien demands a ‘quid pro quo’, in the form of a right of abode in Australia: Irving, above n 19, 147–50.

153 Irving, for instance, suggests that if we cannot point to a reciprocal relationship between citizenship and allegiance, with the right of abode at its heart, then ‘citizenship is meaningless’: Irving, above n 19, 150.

may protect against intrusive laws that are supported exclusively by either of these powers, but not against equally intrusive laws that can be supported in their entirety by another head of power.¹⁵⁴

The analysis above draws attention to a number of challenges that must be confronted in order for a constitutional citizenship based in s 51 of the *Constitution* to be clearly articulated. The identification of these challenges does not suggest that the development of such a concept is unlikely or impossible. Conversely, the active suggestion by some judges that non-alien hold constitutional citizenship, and the fact that others have not sought to deny this prospect indicate that the notion is promising. However, while the questions outlined above remain unresolved, and in the absence of any clear conceptual basis for a constitutional concept of citizenship characterised by immunity from ss 51(xxvii) and 51(xix), its capacity to unfold in a full and coherent fashion will remain limited.

V 'THE PEOPLE OF THE COMMONWEALTH' AS CONSTITUTIONAL CITIZENS?

An alternate foundation for an Australian constitutional citizenship may be found in the phrase 'the people of the Commonwealth'.¹⁵⁵ The earliest judicial suggestions of this idea can be found in the judgments of Isaacs J with respect to the immigration power. In *Re Yates*, his Honour held:

there is also and always one great and fundamental principle — call it a basic condition, if you will — that is, there resides in the Parliament, and subject only to the provisions of the *Constitution* itself, a power which it can never surrender or abridge or by its action or inaction abandon, namely, to declare at any moment the legislative will of the people of Australia respecting the various matters entrusted to it by the *Constitution* as from the birth of the Commonwealth.¹⁵⁶

154 In *Singh* (2004) 222 CLR 322, 380 [139], the dissenting judgment of McHugh J suggested that constitutional powers that could be drawn on to give the Commonwealth Parliament authority to determine citizenship — specifically the naturalisation power, the implied nationhood power and the external affairs power — do not empower the Parliament to 'deprive a non-alien of her constitutional citizenship'. However this raises again the question of what rights are central to constitutional citizenship.

155 As Elisa Arcioni has noted, the concept of 'the people' points to much 'unfinished constitutional business' — its implications for constitutional citizenship are just one element of this: see Arcioni, 'The Concept of "the People" in the *Constitution*', above n 25, 1. Much of Arcioni's work focuses in depth on the various facets of this concept: see, eg, Arcioni, 'Excluding Indigenous Australians from "the People"', above n 24; Elisa Arcioni, 'Some Comments on *Amici Curiae* and "the People" of the *Australian Constitution*' (2010) 22(3) *Bond Law Review* 148; Elisa Arcioni, 'Identity at the Edge of the Constitutional Community' (Working Paper, University of Sydney, 3 April 2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244614>. The final Arcioni paper is due to be published as a chapter in the forthcoming Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014). The discussion in this article does not aim to comprehensively explore the complexities of the phrase 'the people of the Commonwealth' in all its dimensions, but merely to highlight and analyse the judicial interpretations of the phrase that impact most directly on the potential development of a constitutional concept of citizenship.

156 (1925) 37 CLR 36, 83.

Isaacs J's judgments seem to suggest that this constitutional community — 'the people' — can, through Parliament, determine its own bounds. It could broaden its membership, through the acceptance and absorption of immigrants or the naturalisation of aliens; but it could also contract, to exclude people who had previously been included in this fashion.¹⁵⁷ While his Honour's broad interpretation of the immigration power, and his maxim 'once an immigrant always an immigrant' have received limited support in subsequent courts, the underlying idea of an Australian constitutional community membership vested in the phrase 'the people of the Commonwealth' has increasingly gained acceptance.

In *Re Patterson*, Kirby J (Callinan J agreeing) held, in a strong dissent, that the introduction of statutory citizenship could not impose constitutional alien status upon 'a very large class of non-citizen British subjects', particularly when they had 'long since been absorbed amongst the people of the Commonwealth and accorded by them the full civil and political rights and duties of Australian nationality'.¹⁵⁸ In *DJL*, as noted in Part III above, his Honour suggested that 'the people' of the Commonwealth are the citizenry. In *Singh*, the joint judgment of Gummow, Hayne and Heydon JJ acknowledged that '[w]ithin the text of the *Constitution* the expressions "people of the Commonwealth" (s 24) and "a subject of the Queen" (s 117) might be seen as providing antonyms of "alien"'.¹⁵⁹ However, the case did not call for this question to be determined, and accordingly their Honours preferred to speak of those who did not qualify as aliens as merely non-alien, as adopting either phrase as an antonym of alien would 'necessarily [foreclose] the exploration of some questions about the proper construction of s 51(xix)'.¹⁶⁰

The idea that a concept of constitutional citizenship might be enshrined in the phrase 'the people of the Commonwealth' was first advocated in depth by McHugh J, sitting alone, in *Hwang*. *Hwang* involved a challenge to the validity of the *Australian Citizenship Act 1948* (Cth). The plaintiff, Bonnie Hwang, was born in Australia to non-resident parents and as such was ineligible for automatic citizenship at birth under the *Citizenship Act*. Accordingly, she was considered an 'unlawful non-citizen' under the *Migration Act*, and was subjected to a deportation order under s 198(1) of this Act.

As *Singh* had been decided only a year before, Hwang did not attempt to argue that her birth in Australia rendered her a non-alien. Instead, she challenged the

157 For example, Isaacs J has held that a person entering Australia is an immigrant subject to regulation under s 51(xxvii) if he 'is not in fact at the moment he enters one of the people of the Commonwealth' — ie a 'constituent part of the [Australian] community': *Minahan* (1908) 7 CLR 277, 308, quoted in *Wong Sau* (1925) 36 CLR 404, 408. In *Re Yates* (1925) 37 CLR 36, 81–2, his Honour held that '[a] person arriving as an immigrant ... has no right to enter Australia against the will of its people. He can enter only in pursuance of their will, and subject to their constitutional right to qualify or withdraw that permission at any time or under any circumstances they think proper'. See also Elisa Arcioni, 'Democracy and the High Court — The People Deciding the Identity of "the People"' (Paper presented at Public Law Weekend, Australian National University, 21 September 2012).

158 (2001) 207 CLR 391, 491 [302]. While Kirby J was in dissent in *Re Patterson*, the majority's disagreement was not with respect to this statement, but rather with the idea that the plaintiffs in question qualified as full members of the Australian community, in light of the evolution of Australian legal independence.

159 *Singh* (2004) 222 CLR 322, 382 [149] (Gummow, Hayne and Heydon JJ).

160 *Ibid.*

constitutionality of the *Citizenship Act*, arguing that the Commonwealth had no constitutional power over citizenship — and consequently that neither the *Citizenship Act* nor s 198 of the *Migration Act* could stand. In the alternative, she argued that if the Commonwealth had acquired a power over citizenship, this power was subject to ‘extra-constitutional international law obligations’.¹⁶¹ Specifically, she suggested that any legislative power over citizenship did not exist at federation, but rather was the ‘product of international law operating on Australia’s emergence as a fully independent sovereign nation at some point after federation and probably not before 1948’.¹⁶² As a result, the plaintiff submitted, international law was the source of the constitutional power to make laws with respect to citizenship, and therefore the content of international law imposed limits on this legislative power.

McHugh J dismissed the plaintiff’s submissions in their entirety. His Honour strongly affirmed the Commonwealth’s power to make laws with respect to citizenship, stating that ‘[i]t is hardly to be supposed that the national government of an independent sovereign state such as Australia does not have the power to declare to the world who are the citizens of Australia’.¹⁶³ McHugh J cited a number of bases for this legislative power, some of which he stated were themselves sufficient to authorise the making of the *Citizenship Act*. First, the emergence of Australia as a sovereign nation, supported by the implied nationhood power¹⁶⁴ has meant that at least since the adoption of the *Statute of Westminster* in 1942, Parliament has had the power to declare the citizenry, subject to any express or implied constitutional restrictions.¹⁶⁵ Moreover, while as a matter of practice the enactment of citizenship law at the time of federation was made impossible by the existence of UK legislation, the power to make such law nonetheless existed, supported by the implied power to ‘define who are “the people” who make up the Australian community’, combined with the ‘express power to make laws with respect to immigration, naturalisation and aliens’.¹⁶⁶

Thus, McHugh J held that there were three constitutional anchors for Parliament’s power to pass citizenship laws: the fact of Australian sovereignty, the naturalisation and aliens power, and the immigration power. The first two bases were individually sufficient to give rise to such legislative power. Particular emphasis was placed on the breadth of the naturalisation and aliens power: McHugh J noted that in *Singh* the Court had affirmed that Parliament ‘has a wide discretion to declare who are aliens for the purpose of the power conferred by s 51(xix)’, and that

161 *Hwang* (2005) 87 ALD 256, 257 [3].

162 *Ibid* 258 [6].

163 *Ibid* 259 [9].

164 Amongst other things, the implied nationhood power has been held to create legislative powers that ‘arise from the national status of the Commonwealth as a sovereign body and a polity who speaks to the world on behalf of Australians’: *Hwang* (2005) 87 ALD 256, 259 [9]. See also *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 269 (*‘Pharmaceutical Benefits Case’*); *New South Wales v Commonwealth* (1975) 135 CLR 337, 373–4, 388–9, 470, 505 (*‘Seas and Submerged Lands Case’*); *Davis v Commonwealth* (1988) 166 CLR 79, 94.

165 *Hwang* (2005) 87 ALD 256, 259 [9].

166 *Ibid* 259–60 [10].

‘[i]t must follow that the parliament also has a wide discretion to determine the persons who are not aliens, which is simply a negative description of a person who is not a citizen of the country where that person is located’.¹⁶⁷ However, McHugh J also recognised the existence of constitutional limits which curtailed these powers. In his Honour’s opinion, these limits flow from the phrase ‘the people of the Commonwealth’, which he described as ‘a synonym for citizenship of the Commonwealth’.¹⁶⁸

McHugh J reached this conclusion via a two-step reasoning process. He argued that while citizenship has many diverse meanings and may be impossible to exhaustively define, in a legal sense it identifies ‘the persons who are members of a particular community’.¹⁶⁹ The references to ‘the people’ in the *Constitution* serve as constitutional recognition that there is an ‘Australian community of people’, and accordingly serve as a synonym for citizenship.¹⁷⁰ His Honour went so far as to state — somewhat debatably — that despite the silence on Australian citizenship in the constitutional text, there ‘seems no doubt’ that at federation ‘being one of the “people of the Commonwealth” was recognised as synonymous with the concept of being a citizen of Australia’.¹⁷¹

Similarly to Isaacs J, McHugh J acknowledged Parliament’s capacity to determine who the ‘people of the Commonwealth’ are. After pointing out that ss 25 and 127 plainly excluded certain persons from membership of the Commonwealth,¹⁷² and that the aliens and immigration powers allowed Parliament to ‘exclude certain persons from becoming members of the Australian community’ while the naturalisation power enabled it to ‘include certain persons among the “people of the Commonwealth”’, his Honour went on to say:

Why then should it be thought that at federation the Parliament of the Commonwealth had no power to declare the conditions upon which other persons who are not aliens or immigrants are to be numbered among the people of the Commonwealth? That is to say, to declare the conditions upon which persons living in or connected to the Australian community were citizens of Australia. It is not lightly to be supposed that at federation the national Parliament of Australia did not have the power to declare to the world who were the citizens of Australia.¹⁷³

167 Ibid 262 [18]. His Honour cited the *Macquarie Dictionary*’s definition of alien: ‘The *Macquarie Dictionary* defines “alien” as “1. one born in or belonging to another country who has not acquired citizenship by naturalisation and is not entitled to the privileges of a citizen ... 4. residing under another government or in another country than that of one’s birth, and not having rights of citizenship in such a place of residence”’: at 262 n 12.

168 *Hwang* (2005) 87 ALD 256, 260–1 [14].

169 Ibid 260 [12].

170 Ibid 260 [11].

171 Ibid.

172 It is worth noting that these provisions have ceased to have effect today: s 127 was repealed by the 1967 referendum, and the development of Commonwealth anti-discrimination legislation has meant that s 25 has fallen into disuse.

173 *Hwang* (2005) 87 ALD 256, 261–2 [17].

Curiously, this view seems to extend beyond merely recognising a parliamentary power to include aliens and immigrants amongst ‘the people’ — rather, it suggests that the constitutional citizenship that flows from this phrase is not necessarily guaranteed even to those who do not fall within these categories. McHugh J stressed, however, that ‘Parliament does not have unlimited power to declare the conditions on which citizenship or membership of the Australian community depends’.¹⁷⁴ Parliament cannot ‘exclude from citizenship, those persons who are undoubtedly among “the people of the Commonwealth”’.¹⁷⁵

The constitutional concept of citizenship articulated by McHugh J in *Hwang* is, as Elisa Arcioni has noted, a ‘vague notion’, the implications of which are unclear.¹⁷⁶ First, *Hwang* provides little guidance on how to determine the identity of ‘the people of the Commonwealth’. While McHugh J regarded the term ‘the people of the Commonwealth’ as synonymous with constitutional citizenship, his reasoning seems to suggest that it is not everybody who holds this status, but only those who are *undoubtedly* people of the Commonwealth who are constitutionally protected against being removed from the category by Parliament. This seems to create at least two tiers of constitutional citizenship, in addition to the statutory concept of citizenship provided for in the *Citizenship Act*. It is not clear, for instance, whether McHugh J’s concept leaves room for Isaacs J’s suggestion that a person who enters Australia as an immigrant and subsequently becomes both absorbed into the community and naturalised by an Act of Parliament would fall within the ‘people of the Commonwealth’, and if so, whether such a person could nonetheless be removed from this category by Parliament on the grounds that they did not ‘undoubtedly’ belong there. Whether any form of constitutional protection flows towards those who are ‘people of the Commonwealth’, but not ‘undoubtedly’ so, is also unclear.

Further, the substantive rights and obligations, if any, that flow from being counted amongst the ‘people of the Commonwealth’ were not discussed in any depth in *Hwang*. McHugh J canvassed the issue in passing, stating that Parliament ‘could not declare that persons who were among “the people of the Commonwealth” were not “people of the Commonwealth” for any legal purpose’.¹⁷⁷ It can, however, declare that particular categories of people are not ‘people of the Commonwealth’ for particular purposes: ‘for example, in exercising the power conferred by s 30 concerning the qualification of electors of members of the House of Representatives’, it may declare that ‘infants are not “people of the Commonwealth” for the purposes of s 24 of the *Constitution*’.¹⁷⁸ This lends further support to the idea that, upon McHugh J’s understanding, the ‘people of the Commonwealth’ are not a homogenous group of people who enjoy equal rights that flow from that status — rather, the status appears to incorporate

174 Ibid 262 [18].

175 Ibid.

176 Arcioni, ‘The Concept of “the People” in the *Constitution*’, above n 25, 8–9.

177 *Hwang* (2005) 87 ALD 256, 262 [18].

178 Ibid.

a number of different protected groups, not all of which are open to all members of the constitutional community.¹⁷⁹

Part III of this article suggested that two potential constitutional implications might serve as conceptual bases for a constitutional concept of citizenship derived from the phrase ‘the people of the Commonwealth’: the constitutional prescription of representative democracy, and the idea that the *Constitution* enshrines a notion of popular sovereignty. *Hwang* did not attempt to pinpoint the conceptual underpinnings of the constitutional concept of citizenship proposed. However, as is the case with a constitutional citizenship based in non-alienage, what these underpinnings are ultimately determined to be may significantly influence the rights that flow from any citizenship held by ‘the people of the Commonwealth’. The rights that stem from a constitutional citizenship based in notions of representative democracy might well be limited to those which protect the exercise of political rights to facilitate the direct choice of Parliament by the collective body of ‘the people’. A citizenship built upon the idea that the people are sovereign may, as Professor Leslie Zines has suggested, go much further, potentially encompassing protection for individuals against expulsion from the sovereign body (*contra* Isaacs J’s suggestion in *Re Yates*), or constitutionally requiring that Parliament only pass laws which are ‘for the benefit of the people’.¹⁸⁰

Case law post *Hwang* points to at least one substantive right that may flow from a constitutional citizenship held by ‘the people of the Commonwealth’ — a right to political participation that cannot be revoked by Parliament. The scope of the protection afforded by this idea has been considered in two recent cases: *Roach* and *Rowe*, which concerned legislative attempts to restrict the franchise. In both cases, the Court affirmed that while the development of a universal adult franchise was something which had resulted from legislative action under ss 51(xxxvi), 8 and 30 of the *Constitution*, the concept of ‘the people of the Commonwealth’, grounded in ss 7 and 24, precluded the legislative removal of universal suffrage.¹⁸¹

In *Roach*, the plaintiff argued that there is an “irreducible minimum” core of persons’ — made up of ‘those citizens who are qualified members of “the people”’ whose entitlement to vote is constitutionally protected.¹⁸² In accepting the existence of an implied constitutional right to vote, Gleeson CJ stated that ‘deprivation of the franchise takes away a right associated with citizenship, that is, with full membership of the community’.¹⁸³ Similarly, Gummow, Kirby and Crennan JJ affirmed that ‘the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic’.¹⁸⁴ In *Rowe*, French CJ held that the requirement that Parliament be ‘directly chosen by the people’ is ‘constitutional bedrock’, that ‘confers rights on “the people of the

179 See generally Arcioni, ‘The Concept of “the People” in the *Constitution*’, above n 25.

180 Leslie Zines, ‘The Sovereignty of the People’ in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91, 100–4.

181 *Roach* (2007) 233 CLR 162, 173 [6] (Gleeson CJ).

182 *Ibid* 165 (citations omitted).

183 *Ibid* 176 [12] (Gleeson CJ).

184 *Ibid* 199 [83] (Gummow, Kirby and Crennan JJ).

Commonwealth” as a whole’.¹⁸⁵ The development of voting rights and obligations through legislation must thus occur ‘in aid of the requirement of direct choice by the people’.¹⁸⁶ Accordingly, any law that denies voting rights to people who are qualified to be enrolled ‘can only be justified if it serves the purpose of [this] constitutional mandate’.¹⁸⁷ Although in 1901 universal suffrage was not required by the words ‘people of the Commonwealth’, changed circumstances and legislative history had rendered a universal adult-citizen franchise a long established¹⁸⁸ and constitutionally protected fact. French CJ in *Rowe* affirmed the statement of Gleeson CJ in *Roach* that

[b]ecause the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.¹⁸⁹

Gleeson CJ held that an ‘arbitrary exception’ to universal suffrage would not pass this test, as it would be ‘inconsistent with choice by the people’.¹⁹⁰ To be constitutionally valid, the exclusion of a person or group from the franchise would ‘need to have a rational connection with the identification of community membership or with the capacity to exercise free choice’.¹⁹¹ Thus, statutory citizenship, which signifies formal membership of the Australian community, could be established as a necessary qualification for voting.¹⁹² Significantly, as ‘civic responsibility and respect for the rule of law’, and ‘reciprocal rights and obligations’ are central to community membership, ‘serious offending’, which demonstrates disrespect for the community, may warrant the temporary suspension of the right to vote, which is one of the rights of membership.¹⁹³

The High Court’s reasoning in *Roach* and *Rowe* was solidly underpinned by the idea that representative government is constitutionally mandated in Australia, and did not comment on popular sovereignty in any broader sense. Commentators have suggested that, as is the case with the implied freedom of political communication, this may mean that the implied right to vote is less concerned with the protection of individual rights than with preserving representative democracy.¹⁹⁴ Support for this argument can be found in the Court’s significant concern in *Rowe* for the number of voters disqualified by the law in question, and, more directly, in the Supreme Court of South Australia’s recent dismissal of the argument in *Holmdahl*

185 *Rowe* (2010) 243 CLR 1, 12 [1] (French CJ).

186 *Ibid.*

187 *Ibid* 12 [2] (French CJ).

188 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 35–6 (McTiernan and Jacobs JJ).

189 *Roach* (2007) 233 CLR 162, 174 [7], quoted in *Rowe* (2010) 243 CLR 1, 20 [23].

190 *Roach* (2007) 233 CLR 162, 174 [8] (Gleeson CJ).

191 *Ibid.*

192 *Ibid* 174–5 [8].

193 *Ibid* 176–7 [12]–[14].

194 See, eg, Anne Twomey and Elisa Arcioni (Speeches delivered at ‘The Constitutionality of Compulsory Voting: The Implications of *Holmdahl* for Australian Democracy’, University of Sydney, 26 November 2012).

*v Australian Electoral Commissioner [No 2]*¹⁹⁵ that compulsory voting legislation infringes upon the right of a ‘person of the Commonwealth’ to choose whether or not to exercise their right to vote.¹⁹⁶

The extent to which the implied right to vote amounts to a personal right that cannot be stripped from anyone who qualifies as a ‘person of the Commonwealth’ remains to be determined. In *Holmdahl*, Gray J suggested otherwise, holding that ‘[t]he *Commonwealth Constitution* does not vest a personal right in ... any elector to vote in a federal election’.¹⁹⁷ The proposition expressed in *Roach* and *Rowe* that in order to be consistent with ‘choice by the people’ there must be a ‘substantial reason’ for the disenfranchisement of any group of adult citizens, however, invokes the questions raised by *Hwang* about the extent of Parliament’s capacity to determine ‘the people of the Commonwealth’ through the configuration of statutory citizenship. Could the requirement of ‘choice by the people’, for instance, compel Parliament to confer statutory citizenship upon any individual that constitutionally qualifies as a ‘person of the Commonwealth’, at least so long as voting rights are made contingent upon the possession of such citizenship? Alternatively, could it limit Parliament’s power to revoke citizenship conferred by statute — and if so, do the legitimate bases for disqualifying a person from voting rights and from citizenship necessarily align? The determination of such issues awaits a future case.

A number of other questions pertaining to the scope of a constitutional citizenship that resides in ‘the people of the Commonwealth’ also await future resolution. For instance: what other rights might flow from such a notion of constitutional citizenship, and might these also be denied to a person who breaches the obligations of community membership? What are the obligations of citizenship, and if they are only to be found in statute, to what extent can they be invoked to exclude a person from *constitutional* citizenship, or the rights that flow from it? Does the equation of the ‘people of the Commonwealth’ with constitutional citizenship mean that other constitutional rights that might be grounded in the phrase do not extend to aliens, or other people who fall outside this class? These questions, along with the uncertainties highlighted above with respect to the determination of those who are ‘undoubtedly people of the Commonwealth’ and the extent of constitutional protection for those who are not, illustrate that the idea put forward by McHugh J in *Hwang* is very much in its infancy. Nonetheless, as Arcioni notes, the concept is one with the potential to be powerful. This is particularly so given its clear capacity to serve as a source of positive rights.¹⁹⁸

195 [2012] SASFC 110 (24 September 2012) (*Holmdahl*).

196 On 12 April 2013, special leave to appeal the decision in *Holmdahl* was denied by the High Court on the grounds that there were no reasonable prospects of success: Transcript of Proceedings, *Holmdahl v Australian Electoral Commissioner [No 2]* [2013] HCATrans 72 (12 April 2013).

197 *Holmdahl* [2012] SASFC 110 (24 September 2012) [26].

198 See Arcioni, ‘The Concept of “the People” in the *Constitution*’, above n 25.

VI 'THE PEOPLE OF THE COMMONWEALTH' AS NON-ALIENS?

Parts III, IV and V of this article have identified and examined three constitutional notions which are relevant to the question of whether constitutional citizenship rights exist in Australia: alienage, immigration and the idea of 'the people of the Commonwealth'. What remains to be considered is how these three notions affect each other. Understanding the relationships between these concepts is central to gaining a meaningful appreciation of the implications of any potential constitutional citizenship model.

Parts IV and V considered the potential for a constitutional citizenship deriving from freedom from the immigration and aliens powers, and for one built upon the phrase 'the people of the Commonwealth' as alternative models. Another possibility, which has been adverted to but not explored in depth, is that alienage and membership of 'the people of the Commonwealth' may be seen as antonymic, such that any person who qualifies as a person of the Commonwealth is also a 'non-alien', and vice versa. The potential for this was adverted to by Gummow, Hayne and Heydon JJ in *Singh*. Their Honours suggested that 'the expressions "the people of the Commonwealth" and "a subject of the Queen" might be seen as providing antonyms of "alien"', but refrained from stating this as a principle on the grounds that it might foreclose a full exploration of the proper construction of the aliens power.¹⁹⁹

As the limits of the aliens and immigration powers remain undefined, and the nature of the citizenship that may flow from the phrase 'the people of the Commonwealth' is relatively unexplored, a comprehensive examination of the effect of reconciling these concepts is not possible. Nonetheless, a number of broad implications may be identified.

Firstly, conceiving of 'the people of the Commonwealth' as non-aliens may establish some additional limits to Parliament's power to define the citizenry. Current High Court jurisprudence suggests that Parliament's capacity to determine both who will be treated as an alien and who will be included amongst 'the people of the Commonwealth' is relatively broad. If these categories are read as antonymic, while Parliament would retain this broad power to determine each group, it would be compelled to determine them in opposition to each other. The limits to its discretion to define either group would thus apply to both groups: those who are 'undoubtedly people of the Commonwealth' could not be converted through legislation into aliens, and those incapable of satisfying the constitutional definition of alien could not be excluded from 'the people of the Commonwealth', or divested of the rights that flow constitutionally from this status.

Secondly, the protection that stems from a constitutional concept of citizenship that is based in both s 51 of the *Constitution* and membership of the 'people of the Commonwealth' is likely to be stronger than that which arises under either

199 *Singh* (2004) 222 CLR 322, 382 [149] (Gummow, Hayne and Heydon JJ).

of the independent models discussed in Parts IV and V. Such an understanding would mitigate the challenge of identifying rights that stem from a constitutional citizenship based in non-immigrant, non-alien status in the absence of a clear conceptual basis for alienage. This is because the representative democracy or popular sovereignty rights that derive from membership of the 'people of the Commonwealth' would be imported, in addition to any rights that flow from being a non-alien or a non-immigrant. Moreover, a constitutional concept of citizenship that involves membership of 'the people of the Commonwealth' in addition to freedom from the immigration and aliens powers seems more likely to give rise to protection against laws passed under other heads of power. *Roach* and *Rowe* suggest that while Parliament may infringe upon rights that stem from membership of 'the people of the Commonwealth', it may only do so in a manner consistent with the continued authority of 'the people of the Commonwealth'. The mere support of any one head of power may not always be sufficient to meet this standard.

Finally, conceiving of non-alien as 'people of the Commonwealth' may force a much-needed clarification of the relationship between the constitutional concepts of immigration, alienage and 'the people of the Commonwealth'. At present, the jurisprudence relating to the immigration power suggests that once a person who enters Australia as an immigrant becomes absorbed into the Australian community, they pass beyond the scope of the immigration power because they have become one of 'the people of the Commonwealth'.²⁰⁰ The aliens power cases, however, suggest that such a person could still fail to qualify as a non-alien, if they lack a formally recognised allegiance to Australia. This would seem to create a situation in which an individual could be a person of the Commonwealth for the purposes of the immigration power, but not a person of the Commonwealth in any sense that aligns with a broader notion of non-alienage.

Such an outcome is not necessarily in conflict with the notion of 'the people of the Commonwealth' outlined by McHugh J in *Hwang*, as his Honour actively envisaged that Parliament would have the capacity to declare that particular categories of persons were not 'people of the Commonwealth' for particular purposes. Arguably, only those who escape the ambit of both the aliens and immigration powers could form part of the 'undoubted people of the Commonwealth' who Parliament is constitutionally prohibited from excluding from citizenship. Upon such a reading, those who fall short of this standard, but are nonetheless recognised as absorbed into the community, would fall within the group of persons who are rendered 'people of the Commonwealth' under the discretion of 'the people of the Commonwealth' themselves.

This understanding raises two related concerns. First, the combination of making non-alienage an essential element of a protected constitutional citizenship and the High Court's great deference to statutory concepts when determining whether the criteria for non-alienage are met seems to leave open the danger of allowing Parliament to use its legislative power to create two classes of citizenship.

200 See *Henry* (1975) 133 CLR 369.

Second, the extent of the vulnerability of those people who are ‘people of the Commonwealth’ but not undoubtedly so remains difficult to define. It is unclear, for instance, whether people in this group would be entitled to all the constitutional rights that are held by non-alien who are ‘undoubtedly people of the Commonwealth’, to some lesser suite of rights, or to no constitutional rights at all. It is also unclear whether, as Isaacs J suggested, people in this group could be subsequently ejected from it for any reason, or whether the approach adopted by the High Court in *Roach* and *Rowe* could be extended to limit this once a person has been recognised as a ‘person of the Commonwealth’.

Ultimately, it is difficult to draw precise conclusions about the consequences that would flow from considering membership of ‘the people of the Commonwealth’ to be the antonym of alienage. It is also, perhaps, unlikely that the High Court will expressly adopt such a reading of the two concepts before they have independently been more fully explored in jurisprudence. It is clear, however, that conceiving of the two terms in this manner would force a more rigorous consideration of the relationship between the inherently interconnected concepts of the Commonwealth’s authority with respect to aliens and immigration, and its subjection to the authority of the people of the Commonwealth than has been undertaken to date.

VII CONCLUSION

At the start of this article, I suggested that while citizenship in Australia is poorly understood, it is widely regarded as a concept of strong normative significance. I also suggested that this normative weight gives rise to a community perception that the Australian Government ought to protect the ‘rights’ of citizens. This article has investigated the extent to which such ‘citizens’ rights’ exist, in a constitutional sense.

Despite the lack of overt reference to any concept of Australian citizenship in the *Australian Constitution*, it has increasingly been accepted by both judges and scholars that the concept is one with a constitutional dimension. However, its constitutional significance may be conceived of in a number of different ways: there are several different conceptual bases that may support the implication of citizenship rights, and several constitutional provisions with the power to affect the development of any such rights. So far, the relevance of these elements has been identified by numerous commentators, but there has been limited consideration of how they interact with each other.

This article has endeavoured to consider this interaction. It suggests that there are two potential anchors for a constitutional concept of citizenship: constitutional citizens may be conceived of as ‘section 51 citizens’, immune from the reach of the immigration and aliens powers, or as members of ‘the people of the Commonwealth’. Each of these avenues offers constitutional architecture upon which a constitutional concept of citizenship might be based, and the capacity to both establish broad limits on Parliament’s power to define the citizenry as

well as to serve as a basis for the implication of citizenship rights. Combined with increasing judicial support for the idea, the potential for some notion of constitutional citizenship to develop seems strong.

However, numerous uncertainties remain with respect to the nature of any such concept. Questions of which people would hold constitutional citizenship, what rights such a concept would give rise to, the extent of constitutional protection for such rights and the likely relationship between constitutional and statutory notions of citizenship do not, at present, have clear answers. The inability to point to a clear conceptual basis underpinning either a constitutional citizenship derived from s 51 of the *Constitution*, or one held by ‘the people of the Commonwealth’ exacerbates these uncertainties.

Similarly unclear is the question of how a constitutional concept of citizenship would interact with other constitutional concepts. This includes the question of how the constitutional provisions relevant to citizenship — the Commonwealth’s powers over aliens and immigration and the idea that it is subject to the authority of ‘the people of the Commonwealth’ — affect each other. One possible answer is that membership of ‘the people of the Commonwealth’ may be seen as antonymic to alienage and ‘immigrant’ status. Such an interpretation has been judicially foreshadowed, and would potentially lead to the development of a stronger notion of constitutional citizenship than would otherwise be possible. Moreover, it would compel a deeper consideration of the interaction between the immigration and aliens powers and the notion of ‘the people of the Commonwealth’ than has been undertaken to date. As this article has sought to demonstrate, understanding this relationship is critical to the development of coherent and meaningful constitutional citizenship rights. It is worth noting, however, that even if the development of such rights ultimately occurs, it is uncertain how far this would go towards resolving the disjuncture between rhetorical and legal notions of citizenship in Australia. The rights that citizens such as Hicks, Habib and Assange stand to derive from a constitutional concept of citizenship may fall far short of public expectations.