

# *Still Call Australia Home: The Constitution and the Citizen's Right of Abode*

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## *Abstract*

The Australian Constitution contains no express references to Australian citizenship. Despite this, the constitutional validity of Commonwealth citizenship law is not in doubt. Until 2005, citizenship was largely regarded as a statutory matter, and the Commonwealth Parliament was considered free to define citizenship as it wished. Recently, however, a shift has been signalled, with McHugh J's suggestion in *Hwang v Commonwealth*<sup>1</sup> that citizenship law is shaped and limited by the Constitution itself. The question now arises: what is the constitutional character of Australian citizenship?

In this article, I argue that the constitutional concept of citizenship is defined, specifically, by the right of abode in Australia. This is not a freestanding concept, but is grounded in the constitutional heads of power that the High Court has, from time to time, identified as supporting citizenship laws, namely, the 'aliens' and 'immigration' powers (respectively, ss 51(xix) and (xxvii)). The relationship between citizenship and the right of abode has evolved but, as I seek to demonstrate, it has been recognised in Australian case law since 1908.

## *1. Introduction*

It has often been observed, and sometimes lamented,<sup>2</sup> that the Constitution of the Commonwealth of Australia makes no mention of Australian citizenship. There is no definition of citizenship, no provision governing the acquisition of citizenship, and no express legislative head of power with respect to 'citizenship'. The single use of the term 'citizen' is to be found in s 44 which lists the grounds on which a person is incapable of standing for, or sitting in, the Commonwealth Parliament. This provision, however, makes reference to foreign, not Australian, citizenship.

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\* Associate Professor, Faculty of Law, University of Sydney. Research for this paper has been assisted by an ARC Discovery Grant, jointly held with Professor Mary Crock, whom I warmly thank for her collaboration. I have benefited from discussions with my (now) former student, Hilbert Chiu, specifically on the case of *Koroitamana v Commonwealth* (2006) 227 CLR 31. I also wish to thank Kylie Brass and Susan Cirillo for research assistance.

1 *Hwang v Commonwealth* (2005) 222 ALR 83 ('Hwang').

2 Kim Rubenstein, 'Citizenship', in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) at 99–101.

Historically, as has been noted by more than one writer,<sup>3</sup> this lack of reference to citizenship is unsurprising. At the time of the Constitution's framing, the accurate term to describe an individual member of the British Empire (including Australia) was not 'citizen' but 'subject'.<sup>4</sup> This was recognised in the Australasian Federal Convention of 1897-98 during debate over motions to include in the Constitution a head of power over citizenship, or, alternatively, a definition of Commonwealth citizenship.<sup>5</sup> The expression 'subject of the Queen' rather than 'citizen', is, thus, found in the Constitution.<sup>6</sup>

Legal terminology aside, the absence of a head of legislative power is also unremarkable. Until 1914, British subject-status (except where acquired by naturalisation)<sup>7</sup> was governed by common law, not legislation. For the framers of the Constitution to have given the Commonwealth Parliament power to pass laws with respect to citizenship would have contemplated a departure from common law, at a time in history when the law governing personal membership of the British Empire was among the subjects in respect of which Britain sought to maintain imperial uniformity.<sup>8</sup>

Similarly, a constitutional definition of citizenship would have been an historical anomaly in the 1890s. With the exception of the provision in the Fourteenth Amendment of the United States Constitution which governs specifically the acquisition of citizenship,<sup>9</sup> no constitutional definition could be found in comparable parts of the world at that time (indeed a constitutional definition of citizenship is relatively rare today).<sup>10</sup> Although the framers of the Australian Constitution were strongly influenced by the United States Constitution, there were special reasons for this particular provision that did not apply in Australia. The Fourteenth Amendment was ratified in 1868 in the aftermath of the Civil War and was, among other things, expressly intended to 'naturalise' the African-American population, specifically the freed slaves.

This notwithstanding, the difference between Australian law and the position of citizens under the United States Constitution in the late nineteenth century was more apparent than real. In providing for citizenship, *jus soli*, the American

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3 Kim Rubenstein, *Australian Citizenship Law in Context* (2002); Helen Irving, *To Constitute a Nation* (1997).

4 John W Salmond, 'Citizenship and Allegiance' (1902) 18 *Law Quarterly Review* 49.

5 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne, 1898) at 1750-68, 1780-1802 ('Convention Debates').

6 Commonwealth Constitution, ss 34(ii), 117.

7 *Naturalization Act* 1870 (UK). Under s 16 of this Act, the self-governing colonies of the Empire were empowered to pass their own naturalisation laws. Naturalisation in a colony, however, did not confer subject-status in other parts of the Empire.

8 Immigration laws were principally at issue. The determination of the Australian colonies, and subsequently, the Commonwealth, to introduce immigration restriction Acts aimed at prohibiting 'coloured' immigration was controversial, and led on more than one occasion to the Vice-regal reservation for the Queen's assent or, more rarely, the disallowance of relevant Bills passed by the colonial Parliaments.

9 'All persons born or naturalized in the United States ... are citizens of the United States'.

10 This is discussed further in Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (2008).

provision, in fact, mirrored British common law. American citizenship and British subject-status were both acquired by the simple fact of birth in the relevant territory, or alternatively, by naturalisation.

The United States provision, it is worth noting, governed only acquisition. On its face at least, the Fourteenth Amendment provided no guarantee that citizenship, once acquired, could never be lost or alienated.<sup>11</sup> Throughout post-bellum history, cases can be found where citizenship was stripped from American-born citizens. To give one example — affecting numerically the largest group — under federal legislation passed in 1907, American women who married alien men automatically lost their American citizenship.<sup>12</sup> While the re-acquisition of citizenship became possible in 1922 with the repeal of this statute,<sup>13</sup> American-born women of Asian origin were excluded. It took another ten years before they could reclaim what might appear to have been their constitutional birthright.<sup>14</sup> In Britain, after the passage of the *Naturalization Act* in 1870, British women who married alien men lost their status as British subjects on the legislative assumption that their allegiance to the Crown had ceased.<sup>15</sup> Thus, constitutional citizenship in the United States, at that time, gave no greater protection than statutory citizenship in Britain and its colonies.

Legislation governing subject-status was introduced in Britain in 1914.<sup>16</sup> Under a 'common code' system, parallel Acts were passed in the Dominions,<sup>17</sup> and the law governing citizenship became henceforth more complex, less stable, and more susceptible to shifts in policy. Nevertheless, in Australia, citizenship by birth was retained until 1989. Since that time, as provided for in the *Australian Citizenship Act*, birth in Australian territory no longer confers citizenship of itself. The relevant criteria are: birth in Australia to at least one Australian citizen parent, or to a parent who holds Australian permanent residence.<sup>18</sup> Children born overseas to a citizen parent may acquire Australian citizenship by registration of their birth.<sup>19</sup> A person born in Australia, regardless of the status of his or her parent(s), may acquire citizenship after having been 'ordinarily resident in Australia' for a period of ten years 'beginning on the day the person is born.'<sup>20</sup>

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11 In the second half of the twentieth century, decisions by the United States Supreme Court have given greater certainty to the American citizen's constitutional right to retain his or her citizenship. In *Afroyim v Rusk* 387 US 253 (1967), the Supreme Court held that a US citizen cannot be stripped of citizenship without consent or voluntary relinquishment. In *Vance v Terrazas* 444 US 252 (1980), the Supreme Court ruled that the intention to give up citizenship could not be inferred, but must be indicated explicitly.

12 Leti Volpp, 'Divesting Citizenship: On Asian American History and the Loss of Citizenship through Marriage' (2005) 53 *UCLA Law Review* 405.

13 *Married Women's Independent Nationality Act* 1922 (US), commonly known as the '*Cable Act*'.

14 Volpp, above n12.

15 Salmond, above n4.

16 *British Nationality and Status of Aliens Act* 1914 (UK).

17 In Australia, the *Nationality Act* 1920 (Cth).

18 *Australian Citizenship Act* 2007 (Cth) s 12 (1) (a).

19 *Australian Citizenship Act* 2007 (Cth) s 16.

20 *Australian Citizenship Act* 2007 (Cth) s 12 (1) (b).

## 2. *Heads of Power*

The history of the Constitution's framing throws no direct light on which, if any, of the existing constitutional provisions were intended ultimately to support such laws. Powers over 'naturalization and aliens', and 'immigration and emigration' (ss 51(xix) and (xxvii)), were adopted in the Federal Conventions of 1891 and 1897-98 without debate. When 'citizenship' was discussed at the 1897-98 Federal Convention, it appears to have been assumed that a separate head of power would be needed (or at least would make things easier) if citizenship were eventually to be defined under Australian law, but the significance of the absence of such a power with respect to future citizenship law was not considered.

Subsequent history does not clarify these matters. In his Second Reading Speech introducing the *Nationality and Citizenship Act* in 1948, Commonwealth Immigration Minister, Arthur Calwell, made no reference to the constitutional power from which the legislation was sourced.<sup>21</sup> The Second Reading Speeches for the (renamed) *Australian Citizenship Act* in 1973,<sup>22</sup> and for amendments to this Act, are similarly silent. Nothing in the preambles to the relevant Acts purports to identify either a source of constitutional power, or a constitutional concept of citizenship. Nevertheless, despite the absence of express references to 'citizenship' in the Constitution, the Commonwealth has not been prevented from passing laws governing Australian citizenship.

The constitutional power to pass such laws has drawn surprisingly little analysis,<sup>23</sup> and even less litigation. Most judicial references lie in *obiter dicta*. In *Nolan v Minister for Immigration and Ethnic Affairs*,<sup>24</sup> Gaudron J stated that '[t]here can be no doubt as to the power of the Parliament to enact laws prescribing the conditions ... for the acquisition of citizenship'.<sup>25</sup> In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*,<sup>26</sup> Gleeson CJ stated that 'under paras (xix) and (xxvii) of s 51 ... parliament has the power to ... create and define the concept of Australian citizenship, [and] to prescribe the conditions on which such citizenship may be acquired and lost'.<sup>27</sup> The Chief Justice repeated this view in *Singh v Commonwealth*.<sup>28</sup> In *Shaw v Minister for Immigration and Multicultural Affairs*,<sup>29</sup> discussing the historical emergence of the *Nationality and*

21 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 September 1948 at 1060.

22 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 11 April 1973 at 1312 (Al Grassby).

23 Exceptions include Rubenstein, above n3; Michael Pryles, *Australian Citizenship Law* (1981); Cheryl Saunders, 'Citizenship under the Commonwealth Constitution' (1994) 3 *Constitutional Centenary* 6.

24 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 ('Nolan').

25 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 190. As Kim Rubenstein points out, the 1994 Report of the Commonwealth's Joint Standing Committee on Migration referred to Gaudron J's statement in support of its conclusion that citizenship laws were constitutionally valid: Rubenstein, above n3 at 73.

26 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 ('Te').

27 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173.

28 *Singh v Commonwealth* (2004) 222 CLR 322 ('Singh') at 329 [4].

*Citizenship Act*, Gleeson CJ, Gummow and Hayne JJ, stated that '[u]ndoubtedly, to a significant degree, that statute depended upon the aliens power'.<sup>30</sup> In *Koroitamana v Commonwealth*,<sup>31</sup> Gummow, Hayne and Crennan JJ referred to 'the now settled position that it is for the Parliament, relying upon para (xix) of s 51 of the *Constitution*, to create and define the concept of Australian citizenship'.<sup>32</sup>

Until recently, the prevailing judicial view appears to have been that, while Australian citizenship law was validly supported by provisions in the Constitution (in particular the aliens power), the content of the law was purely a statutory matter, lacking a constitutional character. This view was put bluntly in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,<sup>33</sup> by Gaudron J, who stated that citizenship is 'entirely statutory'; 'it is not a concept which is constitutionally necessary, which is immutable or which has some immutable core element ensuring its lasting relevance for constitutional purposes'.<sup>34</sup>

In 2005, however, in *Hwang v Commonwealth*<sup>35</sup> — the only case where the *vires* of Australian citizenship law has been at issue — a shift was signalled. *Hwang* involved the claim that a child born in Australia and not qualified for citizenship under the *Australian Citizenship Act* was nevertheless not liable to deportation under s 198 of the *Migration Act* which provides for the deportation of non-citizens.<sup>36</sup> Section 5 of the *Migration Act* defines a non-citizen as 'a person who is not an Australian citizen' and 'citizen' is defined by reference to s 12 of the *Australian Citizenship Act*. The plaintiffs submitted, *inter alia*, that the Commonwealth lacked constitutional power to make laws with respect to citizenship.<sup>37</sup>

Sitting alone, McHugh J rejected the claim. His judgment confirmed earlier *obiter dicta* identifying the 'naturalization and aliens' and 'immigration' heads of power as foundations for the *Citizenship Act*. McHugh J also identified the power over citizenship as an inherent attribute of Australia's national sovereignty, assisted by these heads of power. Additionally, he suggested, '[t]he power to make laws with respect to naturalisation and aliens may itself be sufficient authority for the enactment of a citizenship Act'.<sup>38</sup>

29 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 ('*Shaw*').

30 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 40 [21].

31 *Koroitamana v Commonwealth* (2006) 227 CLR 31 ('*Koroitamana*').

32 *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 46 [48].

33 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

34 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 54.

35 *Hwang v Commonwealth* (2005) 222 ALR 83.

36 *Migration Act* 1958 (Cth).

37 The plaintiff also submitted, in the alternative, that citizenship law, if valid, relied upon, and was thus conditioned by, international law. This submission was also rejected.

38 *Hwang v Commonwealth* (2005) 222 ALR 83 at 89 [18].

More significantly, McHugh J went beyond the identification of specific heads of power. He acknowledged that citizenship is a concept with ‘a number of diverse meanings’, and not merely a legislative subject: legally, it defines persons who are members of a particular community.<sup>39</sup> The constitutional source of the concept, he stated, lies in the Constitution’s language, specifically in its frequent use of the expression “‘the people’ of the Commonwealth’ which is ‘[i]n its context ... a synonym for citizenship of the Commonwealth’.<sup>40</sup> Parliament, McHugh J added, has the power to determine who are citizens, but ‘does not have unlimited power to declare the conditions on which citizenship or membership of the Australian community depends’.<sup>41</sup>

Here, however, McHugh J stopped. He did not elaborate on the scope or nature of the relevant limitations on Commonwealth power. Nor did he give a constitutional definition of citizenship, other than to identify the body or class of Australian citizens as coterminous with ‘the people of the Commonwealth’.

What, then, follows from McHugh J’s conclusion that citizenship is a constitutional concept? Do rights or entitlements, or, alternatively, obligations attach to citizenship? Are constitutional references to ‘the people’ sufficient to guide the Commonwealth in the making of citizenship laws? Does an implied definition or, alternatively, limitations on the exercise of power arise from the heads of power that support citizenship laws?

### 3. *Rights and Obligations*

The preamble to the 1993 amendment to the *Australian Citizenship Act* defines citizenship as ‘formal membership of the community of the Commonwealth of Australia, and ... a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity ...’ Might this statutory definition assist us with our search for a constitutional definition of citizenship?

It is not unusual for citizenship to be conceptualised as inseparable from rights and obligations. However, the assumption that citizenship can be defined in this manner is historically and jurisprudentially problematic. To consider rights first, while citizenship is a necessary criterion for the enjoyment of some rights in Australia (such as the right to vote or to stand for Parliament), it is in almost all cases not sufficient. The rights that might appear to define citizenship are routinely denied to classes of citizen. This denial is neither arbitrary nor punitive. Moreover, the Constitution either fails to guarantee such rights or fails to protect them from legislative derogation. In other words, if we explore the constitutional text and the relevant case law, we find (with one exception, discussed below) that there is no support for the proposition that the constitutional definition of citizenship in Australia can be constructed by reference to rights.

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39 *Hwang v Commonwealth* (2005) 222 ALR 83 at 87 [12].

40 *Hwang v Commonwealth* (2005) 222 ALR 83 at 87 [14].

41 *Hwang v Commonwealth* (2005) 222 ALR 83 at 89 [18].

The difficulty of defining 'citizenship' by reference to rights was recognized in the Federal Convention of 1897-98 in debate on a motion to include a definition of citizenship in the Constitution.<sup>42</sup> In response to a suggestion that the right to vote might frame such a definition, it was quickly acknowledged that this would exclude many who would still be considered citizens. New South Wales delegate, Richard O'Connor (later one of the first justices of the High Court) began by suggesting that citizenship was defined by the franchise. South Australian delegate, Josiah Symon (later fourth Commonwealth Attorney-General) pointed out that the expression *citizen* included women (as well as 'infants and lunatics'). Yet, he pointed out, '[w]omen in most of the colonies except South Australia do not exercise the franchise, but no one can say that they are not citizens'.<sup>43</sup>

This is not merely a matter of past history. Despite the enlargement of the franchise since the time of the Constitution's framing, to define a citizen as a person who has the right to vote would still be inaccurate. Since 1984, citizenship has been a necessary pre-condition for enrolling to vote in Australia.<sup>44</sup> It is not, however, sufficient. Voting is an essential part of the representative democracy established by the Constitution<sup>45</sup> and (if we follow the reasoning in the 'one vote, one value' cases)<sup>46</sup> it presumably could not be abolished altogether. However, a citizen's right to vote is not protected by the Commonwealth Constitution. Indeed, the High Court has held that what appears on its face to be a general guarantee of sorts (in s 41)<sup>47</sup> applied only to persons eligible to vote in State elections in 1901.<sup>48</sup>

Legislative disenfranchisement of certain classes of citizen is not unconstitutional, so long as it is proportionate to a legitimate legislative purpose. In *Roach v Electoral Commissioner*,<sup>49</sup> the High Court confirmed that prisoners serving sentences of three years or more may be validly disqualified from voting, without contravening the Constitution's requirement that the Parliament shall be 'directly chosen by the people'.

Just as the Constitution does not guarantee citizens the right to vote, it does not make citizenship a qualification for the exercise of this right, either as a pre-requisite, or exclusively.<sup>50</sup> Non-citizens continue to vote in Australia; British

42 *Convention Debates* (Melbourne, 1898) at 1780-1802.

43 *Convention Debates* (Adelaide, 1897) at 1793-4.

44 *Commonwealth Electoral Act* (Cth) 1918 s 93(1)(b)(i).

45 See Daniel Guttman, 'Roach v Commonwealth: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?' (2007) 29 *Sydney Law Review* 297.

46 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.

47 'No adult person who has or acquires a right to vote elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth'.

48 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254.

49 *Roach v Electoral Commissioner* (2007) 239 ALR 1.

50 Sections 8 and 30 permit Parliament to provide for qualifications of electors for, respectively, the Senate and House of Representatives. The only limitation included in these provisions is a prohibition on plural voting.

subjects resident in Australia who were on the electoral roll prior to 1984 remain entitled, notwithstanding their status as aliens.<sup>51</sup> In *Te*, Gleeson CJ stated that the right to vote is not ‘necessarily incompatible with the status of alienage’.<sup>52</sup>

Other rights we might imagine to be ‘citizens’ rights’ are no more constitutionally secure than the franchise. The right for persons to stand as candidates for Parliament is constitutionally protected,<sup>53</sup> but it is only a ‘citizens’ right’ in the sense that citizenship is a precondition for its exercise.<sup>54</sup> Again, a constitutional definition could not accurately rest upon this right. Australian citizens who simultaneously hold, or are merely entitled to hold, the citizenship of another country, are ineligible to stand for Parliament.<sup>55</sup> The High Court has held that the disqualification or disenfranchisement of dual citizens is, indeed, constitutionally mandated.<sup>56</sup>

A citizen may be denied a passport on the exercise of executive discretion.<sup>57</sup> Citizens are not constitutionally protected from extradition.<sup>58</sup> The Constitution does not protect citizenship or prevent legislative deprivation of citizenship; susceptibility to deprivation, furthermore, is not confined to citizens by naturalisation, or to cases where individual conduct is relevant.<sup>59</sup>

The Preamble to the *Citizenship Act* also speaks of ‘obligations’. To seek a definition for citizenship in terms of obligations (rather than rights) does not, however, solve the problem. For example, to conceptualise citizenship as involving an obligation or duty to obey the law is legally meaningless. All persons in the relevant jurisdiction are required to obey laws of general application, regardless of whether they are citizens or aliens, residents or merely tourists in transit.

Some obligations do apply specifically to citizens. The legal obligation to register on the electoral roll, and thereafter to vote, is the obvious example but, as noted above, it could not serve to define citizenship both because it does not apply to all citizens, and because it still applies to a class of non-citizens. The duty or obligation to serve on a jury also applies to citizens and not aliens but, under law,

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51 *Commonwealth Electoral Act* 1918 (Cth) s 93(1)(b)(ii). All British subjects, including those who settled in Australia before 1984, have been defined as aliens since *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

52 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [30].

53 Commonwealth Constitution, ss 7, 8, 24, 34, 64, among others.

54 Commonwealth Constitution, s 34.

55 Commonwealth Constitution, s 44(i)

56 *Sykes v Cleary* (1992) 176 CLR 77; *Sue v Hill* (1999) 199 CLR 462.

57 *Australian Passports Act* 2005 (Cth) ss 11–17. The reasons for denial include matters having no direct bearing on a person’s ‘character’ as a citizen, for example, under s 15, in cases where a passport is lost or stolen 2 or more times in a 5 year period.

58 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614.

59 See Kim Rubenstein, ‘Advancing Citizenship: The Legal Armory and Its Limits’ (2007) 8 *Theoretical Inquiries in Law* 509, for a discussion of the loss of Australian citizenship resulting from Papua New Guinea independence in 1975, specifically in regard to the Susan Walsh, and Amos Ame cases.

it does not apply to all citizens. Indeed, certain classes of citizen are disqualified from jury service.<sup>60</sup> The duty to perform military service in time of war is not exclusive to citizens; under the *Defence Act* resident aliens are equally liable to serve.<sup>61</sup>

To summarise, some rights and obligations have been historically available to, or binding on, some, but not all, citizens.<sup>62</sup> Some rights and obligations have been available to, or binding on, aliens as well as citizens. What distinguishes citizens, legally, as a class of persons distinct from aliens is something else. It is, I argue, the right of abode in Australia, free from the risk of *refoulement*, expulsion, or deportation. This is not merely a contingent or ancillary right, but goes to the core of what it means to be a citizen. The right of abode, I suggest, is conceptually inseparable from citizenship. Furthermore, it is embedded in the constitutional concept of citizenship in Australia.

#### 4. *Potter v Minahan*

Case law supports the proposition that the constitutional concept of citizenship embraces the right of abode. This right arises, by necessary implication, in contrast to the alien's non-right of abode.

Early cases, such as *Ah Yin v Christie*<sup>63</sup> confirmed the Commonwealth's power to exclude aliens from Australia.<sup>64</sup> *Potter v Minahan*<sup>65</sup> then tested, for the first time, whether the Commonwealth could exclude from residence in Australia persons other than aliens. It remains paradigmatic in supporting the right of the Australian citizen to live in Australia, and to call Australia home.

James Minahan (also known as James Kitchen, or Ying Coon) was a thirty-one year old man of mixed Anglo-Chinese parentage who arrived in Australia by boat from China in February 1908 after a twenty-six year absence. He carried with him a Victorian birth certificate which he tendered to immigration officials on arrival. He was, nevertheless, suspected of being an unlawful immigrant, and, as provided for in the *Immigration Restriction Act* of 1901, was subjected to an 'education' test.<sup>66</sup> Applying this test, an immigration officer dictated a passage of at least fifty words in a European language to an intending immigrant. If the person was unable to transcribe the passage correctly he or she was declared a prohibited immigrant. The officer was free to determine to whom the test should be applied, and (as the

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60 See Rubenstein, above n3 at 40.

61 *Defence Act* 1903 (Cth) ss 59, 60.

62 For a summary of the relevant law at the time of federation, see Salmond, above n4. For a comprehensive account of the distinctions between citizen and non-citizen in Australian law, see Rubenstein, above n3.

63 *Ah Yin v Christie* (1907) 4 CLR 1428. It concerned the question of whether the overseas-born minor children of an alien lawfully domiciled in Australia had the right to acquire their father's domicile.

64 These and other early immigration cases are also discussed in Mary Crock, *Immigration and Refugee Law in Australia* (1998) at 15–19.

65 *Potter v Minahan* (1908) 7 CLR 277 ('*Minahan*').

66 *Immigration Restriction Act* 1901 (Cth) s 3(a), repealed by the *Migration Act* 1958 (Cth).

High Court had earlier confirmed) free to choose the language.<sup>67</sup> The language chosen on this occasion was English.<sup>68</sup>

Minahan, who had lived in China from the age of five, spoke no English, and failed the test. He was subsequently charged with the offence of remaining in Australia as a prohibited immigrant, and was brought before a magistrate in the Victorian Court of Petty Sessions. Here, the matter of Minahan's identity became central. Was Minahan the person named on the birth certificate he carried? If so, he was legally a British subject and not an immigrant. The *Immigration Restriction Act* did not apply to him.

The immigration officer who had acted on this occasion testified that he 'was not satisfied that [Minahan] was the man referred to in the Birth Certificate'.<sup>69</sup> Witnesses, including Chinese residents of Victoria who had seen Minahan as a child both in Victoria and on their visits to China, gave evidence to the contrary. It is poignant to read in the records that, among other things, they recognised Minahan by his 'half-caste' features. Minahan himself testified to being socially ostracised in China for his appearance, and taunted by others as a 'foreign devil'.<sup>70</sup>

These accounts satisfied the magistrate. Minahan, he concluded, was a British subject, not an immigrant, and in coming to Australia, he was returning home. The charge was dismissed. The Commonwealth then appealed to the High Court. It did not dispute the fact that persons born in the Commonwealth or, prior to federation, in an Australian colony were by law British subjects. It did not challenge the right of British subjects of Australian birth to live in Australia. The Commonwealth disputed instead Minahan's right to continue to call himself a British subject, and submitted that he had lost his subject-status during the years of his absence. Minahan, it was claimed, had been a British subject at birth, but had been transformed into an immigrant.

The High Court dismissed the appeal. Griffith CJ and Barton and O'Connor JJ agreed that Minahan was not an immigrant, and was therefore not subject to the *Immigration Act*. He was, rather, a British subject of Australian birth, returning home, as he was entitled to do. In his judgment, Griffith CJ stated that 'every human being (unless outlawed) is a member of some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort when he thinks fit'.<sup>71</sup> For Griffith CJ, this entitlement arose from the fact of

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67 *Chia Gee v Martin* (1905) 3 CLR 649.

68 Some readers may be interested to know that the passage dictated to Minahan was this: 'A large part of the cheapening of steel has been brought about by this one device for using cheap inferior fuels. In the iron trade it was discovered many years ago that it paid to produce more of this particular gas than could be used in the purely metallurgical operations'. National Archives of Australia, Digital copy, item 3148841.

69 National Archives of Australia, Digital copy, item 3148842.

70 'I was five or six years of age when I went to school [in China]. The boys at school called me Ying Coon. They also called me foreign devil ... I cried very much when my father shaved my hair, and the people about called me the little foreign devil boy.' Transcript of cross-examination, James Minahan, through interpreter. National Archives of Australia, Digital copy, item 3148842.

71 *Potter v Minahan* (1908) 7 CLR 277 at 289.

a person's birth in a territory. In his words, 'until the right to remain in or return to his place of birth is lost, it must continue, and he is entitled to regard himself as a member of the community which occupies that place.'<sup>72</sup>

Isaacs and Higgins JJ dissented on this point.<sup>73</sup> Isaacs J acknowledged that every British subject enjoyed the common law right of entry into any part of the Empire. He stated, however (albeit with little authority), that absence from Australia could 'sever' a subject's relations to Australia, and that the test of 'whether a given person is an immigrant or not' was 'whether he is or is not at [the relevant] time a constituent part of the community known as the Australian people ... Nationality and domicil [sic]<sup>74</sup> are not the tests ... not the ultimate or decisive considerations.'<sup>75</sup>

Higgins J did not deny that Minahan was an Australian-born British subject, but rejected the argument that a subject 'has some peculiar right to resort to one particular part of the Empire as distinguished from other parts.'<sup>76</sup> There is not, he stated, 'one hint, from first to last, in [the Immigration Act] that Parliament, in providing against undesirable immigration, meant to make any distinction between those born and those not born in Australia.'<sup>77</sup>

Although the Court did not make direct reference to the law governing loss of British nationality at that time, none of the limited ways in which a person ceased to be a British subject included absence from British territory.<sup>78</sup>

## 5. *Subject to Citizen*

It might be thought that the reasoning in *Minahan* applied only to British subjects in the context of British common law, and was no longer applicable to Australians after the passage of the *Nationality and Citizenship Act* 1948 (Cth) or, alternatively, that it ceased to apply once birth in Australia no longer, of itself, conferred citizenship.

However, while prior to 1949 there was no separate legal category of Australian citizenship, it was increasingly accepted before then that Australians were a distinctive class of subject. This distinction was recognised informally, although not without authority, from 1901. Indeed, Sir Samuel Griffith, then Chief Justice of the Supreme Court of Queensland, said as much in his contribution to the press on the inauguration of the Commonwealth on 1 January 1901. On this day, he wrote, it 'is formally recognised ... that henceforth every Australian is a citizen of the new-born Commonwealth, itself an integral part of the British Empire'. He concluded with a reminder to his fellow Queenslanders, that '[h]enceforth we are Australians first, then Queenslanders, but always Britons'.<sup>79</sup>

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72 *Potter v Minahan* (1908) 7 CLR 277 at 289.

73 They agreed with the Court on a second matter, however, finding that the immigration officer in question had failed to apply the dictation test to Minahan as required under the *Immigration Act*.

74 The American spelling 'domicil' was used here. Except where quoting, I have used the English spelling 'domicile'.

75 *Potter v Minahan* (1908) 7 CLR 277 at 308.

The conceptual distinction between British subject and Australian British subject was assisted, in law, by the *Immigration Restriction Act*. The Act served the Commonwealth's policy of a fully 'white' Australian citizenship. Against this was the fact that many 'coloured' persons born within the British Empire (for example, in India or Hong Kong) were British subjects by birth, in common with white Australians. Like all British subjects they were entitled, at least in principle, to travel and live freely within the British Empire. Proponents of a white Australia found this an uncomfortable reality.

The British government (which had the power to advise the Queen to disallow Commonwealth laws)<sup>80</sup> opposed immigration restrictions based on race or colour precisely because these would have a discriminatory effect on coloured British subjects. Aware of this objection (and borrowing from an 1897 law of the colony of Natal), the Commonwealth incorporated the 'education' or dictation test into its first *Immigration Act*.<sup>81</sup> This Act, as noted, empowered an immigration officer to dictate a passage of not less than fifty words in any European language to any intending immigrant whom the officer singled out for the test. Those who failed the test were declared prohibited immigrants and expelled (or became liable to punishment for failure to leave).

In practice, as was well known, the test was applied, at least in the early years, only to persons who appeared Asian or 'coloured',<sup>82</sup> and was not intended for persons who could establish their British subject-status. Increasingly, however, the conceptual distinction between British subjects and *Australian* British subjects

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76 *Potter v Minahan* (1908) 7 CLR 277 at 321. Higgins J claimed that the High Court had 'already decided that the [Immigration] Act does apply so as to exclude even British subjects'. He referred to *Attorney-General (Cth) v Ah Sheung* (1906) 4 CLR 949. This judgment, with respect, does not appear to support such a proposition. Griffith CJ, for the Court, stated that, while the term 'immigration' in s 51 (xxvii) of the Constitution 'admittedly includes the power of exclusion of British subjects in general, it would not extend to persons of Australian nationality, whatever that may mean'. He went on to say, at 951–52, that 'the term "immigration" does not extend to the case of Australians—to use for the moment a neutral word—who are merely absent from Australia on a visit *animò revertendi*. Who in this view should be considered Australians, so as not to be "immigrants" on their return; whether the right to admission should depend on domicile in the ordinary legal acceptance of that term, or on bona fide residence; whether the Commonwealth Parliament has power, as an incident of its power to regulate immigration, to prescribe tests for determining whether a person seeking to enter the Commonwealth falls in fact within the suggested exception, and incidentally to appoint a special tribunal to determine the question; whether it did so by the Act of 1901, and, if so, whether the provisions of that Act are applicable to the present case, are all matters deserving serious consideration'. Griffith CJ did not elaborate further on these matters, and his judgment in *Potter v Minahan* would appear to answer at least some of the questions he raised here. It is noteworthy that the respondent, Ah Sheung, was a naturalised British subject. Variations in legal entitlements enjoyed by naturalized subjects, as opposed to those who acquired subject status by birth, were accepted after 1870, although this was not at issue here.

77 *Potter v Minahan* (1908) 7 CLR 277 at 323.

78 Salmond, above n4 at 57.

79 'The New Citizenship', *Brisbane Courier* (1 January 1901) at 1.

80 The Commonwealth Constitution, s 59, provides that the Queen 'may disallow any law within one year from the Governor-General's assent...'

81 *Immigration Restriction Act* 1901 (Cth) s 3(a), repealed by the *Migration Act* 1958 (Cth).

began to be recognised in law. Even in these early years we find the High Court grappling with the recognition that not all British subjects had an 'Australian' identity, and that, while a sense of Australian separateness could not form part of the *ratio* in immigration cases, some sort of legal consequences could not, at least eventually, be avoided in its recognition.

A distinction was already emerging between those British subjects entitled to call Australia home, and those not. For example, in *Minahan*, Griffith CJ stated that, with respect to nationality, 'no distinction is recognized between different possessions of the same Sovereign power'. However, for the purpose of domicile, he noted, 'a distinction is recognized between different parts of the territory of the same Sovereign':

Many definitions of domicil have been given, but they all embody the idea which is expressed in English by the word 'home,' *i.e.* permanent home ... And, as persons of the same nationality may have different homes, so they may have different domicils.<sup>83</sup>

In this case, as we have seen, the Court upheld the right of a British subject, born in Victoria, to return to, and reside in Australia, notwithstanding a long period of absence. While, legally, a British subject born in any part of the Empire enjoyed this right, in *Minahan* the fact of Australian birth (confirmed by a Victorian birth certificate) appeared decisive.

Within less than two decades, in the so-called *Irish Envoys' Case*,<sup>84</sup> the High Court affirmed that British subjects, not born in Australia, could come under the *Immigration Act* for the purpose of deportation. British subjects, in other words, could validly be refused the right to remain in Australia. Soon after, in 1925, the High Court held that even a British subject of Australian birth could come under the *Immigration Act*, by virtue of having lost her Australian identity.<sup>85</sup> With that came a concomitant loss of the right to regard Australia as home. Ten years later, in a case concerning an Indian-born woman of (white) English parents, the High Court confirmed that the scope of the *Immigration Act* had expanded even further. Indeed, it was now 'sufficiently wide to cover not only any person of European race, but British subjects of European race.'<sup>86</sup>

We see here, in the evolution of the immigration power, a growing distinction, not merely conceptual, but legal, between British subjects and *Australian* British subjects even before the passage of the 1948 *Nationality and Citizenship Act*. In other words, we see an emerging Australian citizenship, increasingly sketched out

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82 As noted, 'the test was never intended to be a real education test, or a provision guarding against the entry of illiterates. It was merely a convenient and polite device ... for the purpose of enabling the Executive Government of Australia to prevent the immigration of persons deemed unsuitable because of their Asiatic or non-European race': *R v Davey; Ex parte Freer* (1936) 56 CLR 381 at 386 (Evatt J).

83 *Potter v Minahan* (1908) 7 CLR 277 at 288.

84 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518.

85 *Donohoe v Wong Sau* (1925) 36 CLR 404 ('*Wong Sau*').

86 *R v Davey; Ex parte Freer* (1936) 56 CLR 381 at 387 (Evatt J).

in cases where 'non-citizens' (including, eventually, British subjects) were excluded from the right to remain in Australia.

## 6. *The Right of Abode*

In *Minahan*, Griffith CJ placed emphasis on birth in Australia as the foundation of the right to return and remain in Australia. If we detach the manner of acquiring citizenship from the issue of what follows from being a citizen, we still find in *Minahan* the proposition that the Australian citizen is, prima facie, entitled to call Australia home.

The case of *Donohoe v Wong Sau*,<sup>87</sup> mentioned above, might appear to suggest otherwise. Lucy Wong Sau was born in Australia, and by law, was presumptively a British subject. Like Minahan, she had left Australia as a child, had lived in China for many years, and spoke no English. However, when she sought to return, she was held to have abandoned Australia as her home and to have thus been transformed into an immigrant. Although her circumstances were almost identical to Minahan's, her fate was the opposite. Having failed the *Immigration Restriction Act* dictation test, Wong Sau had been sentenced by a magistrate to a term of imprisonment for her failure to leave Australia. The New South Wales Court of Quarter Sessions then quashed her conviction. The Commonwealth appealed, successfully, to the High Court. Knox CJ stated that 'the mere fact that a person was born in Australia,' does not prevent 'him being an immigrant within the meaning of the Act whenever after an absence from Australia he desires to come back there'.<sup>88</sup> Higgins J added, in *obiter dicta*: 'If anyone were to ask a member of [Wong Sau's] family in China ... where was this lady's home, the answer would be surely that her home was in China.'<sup>89</sup> Here, the Court adopted what was the minority view in *Potter v Minahan*, namely, that such a person had no claim to call Australia home. For the majority in *Minahan*, James Minahan had been 'returning home' and was entitled to stay. Lucy Wong Sau, in contrast, was not.

While the Court was unanimous in finding against Wong Sau, Isaacs J alone held that nationality was not decisive.<sup>90</sup> His view did not, however, form part of the *ratio* of the case. The other justices did not conclude that, notwithstanding Wong Sau's status as a British subject of Australian birth, she was disentitled to regard Australia as her home. They ignored the question of nationality altogether, and asserted that Wong Sau had become an immigrant and that Australia was therefore not her home.

The right of abode was not exclusively available to citizens in the past. British subjects who were not Australian citizens but who had settled in Australia prior to 1987 and become 'absorbed' into the community, the High Court held in *Re Patterson; Ex parte Taylor*,<sup>91</sup> were beyond the reach of the aliens power, thereby

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87 *Donohoe v Wong Sau* (1925) 36 CLR 404.

88 *Donohoe v Wong Sau* (1925) 36 CLR 404 at 407.

89 *Donohoe v Wong Sau* (1925) 36 CLR 404 at 408. Higgins J observed, in addition, that unlike Wong, Minahan had an Australian born mother of 'European stock'.

90 *Donohoe v Wong Sau* (1925) 36 CLR 404 at 407.

gaining protection from deportation. However, in *Te*<sup>92</sup> the claim by two young men, former refugees from Vietnam, that they had become absorbed into the Australian community and therefore could no longer be considered aliens was dismissed. A year later, in *Shaw*,<sup>93</sup> the Court distinguished *Patterson* and affirmed that the right of abode is confined to citizens, British subjects being no exception. The power of the Commonwealth to deport non-citizens, regardless of their age at arrival or the length of time they had lived in Australia, was subsequently confirmed.<sup>94</sup>

*Air Caledonie International v Commonwealth*<sup>95</sup> also supports the proposition that Australian citizenship attracts the right of abode. Here the Court concluded that a purported 'fee' imposed under s 34A of the *Migration Act* for processing airline passengers arriving in Australia was constitutionally invalid with respect to Australian citizens. In the words of the Court, '[t]he right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or 'clearance' from the Executive.'<sup>96</sup>

## 7. Characterization

In *Potter v Minahan*, while finding for Minahan, O'Connor J recognised the possibility that the British subject's common law right of abode might be removed by 'express words or necessary implication' in a statute.<sup>97</sup> Almost a century later, in *Singh v Commonwealth*, Gleeson CJ stated that Parliament has the power, *inter alia*, 'to link citizenship with the right of abode.'<sup>98</sup> Does this mean that the Commonwealth has the power to *uncouple* citizenship from this right; that is, to pass legislation depriving citizens of the right to live in Australia? Might Isaacs J's conclusion in *Minahan* (which he restated in *Wong Sau*) that there is no necessary tie between nationality and the right of abode be correct?

I suggest not. While the Commonwealth is not constitutionally prohibited from stripping citizenship from persons or classes of person, it could not pass a law

91 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 ('*Patterson*').

92 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162.

93 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

94 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.

95 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462.

96 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 469. It might be thought that the case of the Australian communist, Wilfred Burchett, a citizen, whose attempt to return to Australia in the 1960s was repeatedly thwarted by the government's refusal to issue him a passport, rebuts this proposition. However, Cabinet Minutes of the time reveal that the government was well aware, on advice from the Attorney-General's Department, that Burchett could not lawfully be denied entry if he arrived in Australia. National Archives of Australia, 1969 Cabinet documents, Submission 345.

97 *Potter v Minahan* (1908) 7 CLR 277 at 304.

98 *Singh v Commonwealth* (2004) 222 CLR 322 ('*Singh*') at 329 [4]. The Chief Justice referred here to his previous statements in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31].

validly denying an Australian citizen the right to live in Australia. It is here, I suggest, that McHugh J's constitutional concept of citizenship is to be found.

In deriving its power over citizenship from its express powers over aliens and immigration, the Commonwealth is confined to a definition of citizenship that arises in relation to the definition of 'alien' or 'immigrant'.

What characterises a person as an alien or immigrant? Is it simply the fact of being a non-citizen? If this were the case, and 'alien' were to mean no more than 'non-citizen', while 'citizen' meant no more than 'non-alien' (as the Court concluded prior to *Hwang*) we would have merely a statutory definition.<sup>99</sup> The Commonwealth would remain entirely free to establish criteria by which a person enjoyed citizenship. In other words, there would be no *constitutional* concept of citizenship.

While McHugh J held, in *Singh*, that the Constitution precluded the statutory definition of a person born in Australia as an 'alien', his was a dissenting view. The High Court established in this case that the Commonwealth was free to provide for the manner of *acquisition* of citizenship. The manner of acquiring citizenship is, thus, at large, to be determined by legislation, but, if McHugh J's conclusion in *Hwang* is to make sense — for citizenship to be a constitutional concept — there must be *content* in the concept. This content is to be identified, I suggest, in the characterisation of a citizenship law as a law with respect to aliens or immigrants.

In the past the legal response to the question of whether an alien was simply a non-citizen — that is, whether there was only one alternative to being a statutory citizen — would have been qualified. The class of non-citizens included not only aliens, but also British subjects, or at least those born before 1987 when amendments to the *Australian Citizenship Act* removing the status of British subject from Australian citizenship came into force. In *Pochi v Macphee*<sup>100</sup> Gibbs CJ stated that Parliament 'cannot, simply by giving its own definition of "alien", 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.'<sup>101</sup> While British subjects would have been included in the class of such persons at that time (but are no longer), Gibbs CJ's statement has been reaffirmed on a number of occasions post 1987, including by Gaudron J in *Nolan*<sup>102</sup> and Gleeson CJ in *Singh*.<sup>103</sup> In *Koroitamana*, Gleeson CJ and Heydon J quoted Gibbs CJ from *Pochi* with approval,<sup>104</sup> as did Kirby J.<sup>105</sup>

In the past, the class of persons who 'could not possibly answer the description of aliens' was conceptualized as those owing allegiance to the Crown. An alien, in contrast, did not owe such allegiance. As Gaudron J stated in *Nolan*,

99 Unless 'alien' has a constitutional meaning, as McHugh J (in dissent) concluded in *Singh v Commonwealth* (2004) 222 CLR 322.

100 *Pochi v Macphee* (1982) 151 CLR 101 ('*Pochi*').

101 *Pochi v Macphee* (1982) 151 CLR 101 at 109.

102 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 192.

103 *Singh v Commonwealth* (2004) 222 CLR 322 at 329 [4].

104 *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 38 [12].

105 *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 54 [81].

where membership of a community depends on citizenship, alien status corresponds with non-citizenship; in the case of a community whose membership is conditional upon allegiance to a monarch, the status of alien corresponds with the absence of that allegiance.<sup>106</sup>

To bring this concept into the twenty-first century, the non-alien, or citizen, in Australia owes allegiance to the Queen of Australia, or the Commonwealth of Australia.

Alien allegiance is conceptualised as allegiance to a foreign country.<sup>107</sup> This is captured, among other things, in s 44(i) of the Constitution, which disqualifies persons from standing for or sitting in Parliament where they are 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power', as well as those who are citizens or subjects of a foreign power. However, where such persons hold dual Australian/foreign citizenship they do not cease to be Australian citizens by virtue of their foreign allegiance, so long as they retain allegiance to Australia. The *Australian Citizenship Act* makes provision for loss of citizenship where allegiance to Australia has been actively abandoned, in cases where a person is 'a national or citizen of a foreign country' and 'serves in the armed forces of a country at war with Australia'.<sup>108</sup>

In *Al-Kateb v Godwin*<sup>109</sup> the High Court held that a stateless person, having no allegiance to any state or any entitlement to citizenship, was an alien for the purposes of s 51 (ix). This was confirmed in *Koroitamana v Commonwealth*<sup>110</sup> which concerned two children who were born in Australia (and had never left Australia) but were not qualified for Australian citizenship. The children did not deny that they were not Australian citizens under the Act, but they denied that they were stateless. They made this claim, despite the fact that the children's parents had not exercised their right under the Fijian Constitution to register their children as Fijian citizens by descent, and did not intend to do so. The children claimed allegiance only to Australia and, as paraphrased by Gummow, Hayne and Crennan JJ, claimed that they 'owed no allegiance to a foreign power and had not dissociated themselves from the Australian community.'<sup>111</sup> The Court rejected their claim and confirmed the position it has held since *Shaw*, namely that absence of statutory citizenship and alienage are the same thing.

106 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189.

107 In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR at 173 [28], Gleeson CJ referred (in *obiter dicta*) to the concept of 'local allegiance' and stated that 'local allegiance is not incompatible with the status of alienage.' However, this concept embraces only temporary allegiance, in the sense of obedience to the local laws and, as such, attracts only the temporary right to remain, conditionally and with the sovereign's permission, in the relevant territory.

108 *Australian Citizenship Act* 2007 (Cth) s 35. Until amended in 2002, the *Australian Citizenship Act* 1973 (Cth) also provided that an Australian citizen, who 'by some voluntary and formal act, other than marriage, acquires the nationality or citizenship of a country other than Australia, shall thereupon cease to be an Australian citizen'.

109 *Al-Kateb v Godwin* (2004) 219 CLR 562.

110 *Koroitamana v Commonwealth* (2006) 227 CLR 31.

111 *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 42 [33].

The identification of an alien in Australian law thus no longer entails positive allegiance to a foreign state, but absence of allegiance to Australia. This absence is not subjective, but is signified by nothing more than a person's status as a non-citizen under the *Australian Citizenship Act*. The settled position now appears to be that an alien is a person owing no allegiance to Australia, either by virtue of owing foreign allegiance, or by owing no allegiance at all. Such a person does not have the right to regard Australia as home. He or she remains susceptible to exclusion or expulsion.

In *Robtelmes v Brennan*<sup>112</sup> the High Court confirmed that it is an inherent power of the sovereign state to exclude or expel an alien and, in the words of Griffith CJ, to 'annex what conditions it pleases to the permission to enter'. Thus, Griffith CJ concluded, the state

may make it one of those conditions that the residence [of the alien] shall only continue so long as the supreme power [of the state] thinks fit; that is, that the permission to the alien to enter may be a conditional permission, so that as soon as the supreme power thinks that it is undesirable that the alien should continue to be within its boundaries, it may order his removal.<sup>113</sup>

Under principles of characterisation, a law cannot be fairly described as a law with respect to a constitutional subject of power in the absence of a relationship between the actual operation of the law and the subject of the power.<sup>114</sup> If the power to pass laws with respect to citizenship derives from the 'aliens' or 'immigration' powers — that is, if the legal definition of 'citizen' arises by contrast with 'alien'—citizenship must have the qualities or characteristics that make it the antonym or obverse of alien or immigrant.<sup>115</sup>

If what defines an alien is non-allegiance to Australia, then what defines a citizen, *per contra*, arises from his or her allegiance. (As confirmed in the cases discussed above, immigrants are a class of aliens; citizens cannot be 'immigrants'). What do citizens get in return for allegiance? What, to put it bluntly, is the *quid pro quo*? It is the right not to be excluded or expelled; that is, the right of abode. This, I suggest, is not merely a contingent legal right, but is at the core of the definition of citizenship, both conceptually, and constitutionally. Although examples exist in the world where legal citizenship does not confer the right of abode,<sup>116</sup> such cases, I suggest, depart from the core concept of citizenship. Without the right of abode — without the reciprocal relationship between allegiance and abode — citizenship is meaningless.

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112 *Robtelmes v Brennan* (1906) 4 CLR 395.

113 *Robtelmes v Brennan* (1906) 4 CLR 395 at 400.

114 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 186 (Latham CJ).

115 '[C]itizenship may be seen as the obverse of the status of alienage': *Shaw v Minister for Immigration and Multicultural Affairs* (2004) 218 CLR 28 at 35 [2] (Gleeson CJ, Gummow & Hayne JJ).

116 For example, the citizenship 'enjoyed' by those defined as a 'British National (Overseas)' in Hong Kong.

Legal permanent residents may, of course, have security of abode, but this remains conditional. For a period, as noted above, the High Court held that British subjects who did not hold Australian citizenship but were living in Australia before 1987 (when the relevant amendments to the *Australian Citizenship Act* took effect) were protected from deportation.<sup>117</sup> This is no longer the case.<sup>118</sup> As we have seen, even where a person has become absorbed (culturally, linguistically, socially) into the community, that person remains an alien so long as he or she is not a legal citizen. The person has no right of abode and remains liable to expulsion.

Australian citizens alone have the unconditional right to live in Australia. If this is correct, and if the right of abode is constitutional, arising by implication through characterisation of 'citizenship' laws as laws with respect to 'aliens' or 'immigration', Parliament is not free to pass a law disentitling any Australian citizens from living in Australia.

## 8. *The People of the Commonwealth*

As McHugh J recognized in *Hwang*, the Constitution makes reference to 'the people of the Commonwealth'. Is this expression, as he suggested, a 'synonym' for 'citizenship of the Commonwealth'?<sup>119</sup> Might it (rather than the heads of power discussed above) be the source of an implied constitutional definition of citizenship? I suggest not.

The expression 'people of the Commonwealth' is found in s 24.<sup>120</sup> This section provides for the means of choosing members of the House of Representatives. Here, the 'people of the Commonwealth' is synonymous with 'the electors'. If the expression here were to serve as a definition, it would define citizenship by the right to vote. However, as discussed above, there is no constitutional guarantee of an individual's right to vote, and classes of citizen are validly disenfranchised. Moreover, classes of non-citizen remain entitled to vote in Australian elections.

'The people' in this provision is thus both narrower and more extensive than 'the citizens'. The expression 'people of the Commonwealth' in s 24 is, I suggest, intended merely to refer to the electors counted across the nation as a whole; that is, demographically, as distinct from the electors in individual States. The companion reference (in s 7) to the Senate, composed of senators chosen by 'the people of the State' tends to support this interpretation, as does s 128, which provides for constitutional alteration by popular referendum and uses the expression 'the electors' rather than 'the people'.

117 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

118 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

119 *Hwang v Commonwealth* (2005) 222 ALR 83 at 87 [14].

120 Section 25 also refers to 'the people of the State or of the Commonwealth', with respect to the possibility that State laws may disqualify persons on racial grounds from eligibility to vote. Section 127, deleted in 1967, referred to 'reckoning the numbers of the people of the Commonwealth, or of a State'. The use of the expression in these sections tends to support the view that the expression 'people of the Commonwealth' has a demographic meaning.

In contrast, ‘the people’ referred to in the Constitution’s preamble, are the people of the various colonies (not yet the Commonwealth) who ‘agreed to unite in one indissoluble Federal Commonwealth’. While in a technical sense, the expression ‘the people’ here is confined to the electors (those who voted in the referenda on the Constitution Bill between 1898 and 1900), it must be wider if it is to meet the description found in Quick and Garran’s *Annotated Constitution*, to which McHugh J adverts. Quick and Garran write that the words in the preamble ‘proclaim that the Constitution of the Commonwealth of Australia is founded on the will of the people whom it is designed to unite and govern’.<sup>121</sup> For this to be meaningful, those who are united must include more than the electors. ‘The people’ in this context may be *all* the citizens (at least, if we accept that ‘the people’ of the colonies equalled ‘subjects of the Queen’ at the time, and that the latter expression is now coterminous with ‘Australian citizens’). However, while the idea of unity is attractive, it does not in itself give content to a constitutional definition of citizenship; that is, unless unity and allegiance are interdependent, so that what gives Australian citizens unity is their common allegiance to the ‘indissoluble federal Commonwealth’ and the Constitution.

Other constitutional references to ‘the people’ suggest that it is not a term of art, and must be understood in its context. For example, s 53 provides, among other things, that, with respect to ‘[p]roposed laws appropriating revenue or moneys, or imposing taxation’, the Senate ‘may not amend any proposed law so as to increase any proposed charge or burden on the people’. Here, again, ‘the people’ must be wider and more extensive than the citizens, since any fiscal burdens will necessarily fall on non-citizens, as well as citizens.

## 9. Conclusion

To source a constitutional concept of citizenship in the Constitution’s references to ‘the people’, or even specifically ‘the people of the Commonwealth’ is to suggest that citizenship is defined by attributes that the Constitution either does not guarantee to all citizens, or that apply to aliens as well as citizens. It does not assist in our search for the content of the constitutional concept. The alternative sources of power — the aliens and immigration powers — provide us with a definition that is both conceptually satisfactory and supported by case law. It is a definition of the citizen as a person who, having acquired citizenship according to law, has the right to live in Australia.

Should the Constitution be amended to include an express definition of citizenship, or alternatively, a head of power with respect to the subject? Without attempting a full response to this question, I make a few concluding observations here.

Kim Rubenstein suggests that a constitutional concept of citizenship ‘might give the Court more flexibility in using the term in the broader sense of rights-

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121 *The Annotated Constitution of the Australian Commonwealth* (1901) at 286, quoted by McHugh J in *Hwang v Commonwealth* (2005) 222 ALR 83 at 88 [14].

bearing persons, endowed with rights that might extend well beyond the common law'.<sup>122</sup> Were this to be contemplated, it is likely that similar difficulties to those which confronted the Constitution's framers in attempting to define citizenship would be encountered. As discussed, many of the rights one might imagine to give content to a definition of citizenship have already been subject to legitimate legislative derogation, and this has, in a number of cases, found support in constitutional jurisprudence. In addition, normatively, constitutional entrenchment of certain common law rights under a title of 'citizen's rights' may be problematic. Common law rights such as due process and procedural fairness, among others, would suffer derogation if confined by constitutional definition, either expressly or by implication, to citizens alone, rather than retained for all persons, citizens or aliens, subject to legal process in Australia.

However, if my analysis is correct, we can identify at least one core (or 'connotative') right or definitional criterion of citizenship already lying in the Constitution. This is the right of abode in Australia. Whether this should be made express in the Constitution will depend, in part at least, on whether it is considered normatively desirable to confine the right of abode to citizens, leaving aliens susceptible to exclusion or expulsion.<sup>123</sup> That is a much larger question.

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122 Rubenstein, above n2 at 101.

123 The consequences of distinguishing between 'insiders' (citizens) and 'outsiders' (aliens) with respect to rights are discussed in Mary Crock, 'Defining Strangers: Human Rights, Immigrants and the Foundations for a Just Society' *Melbourne University Law Review* (forthcoming 2008). See also Belinda Wells, 'Aliens: The Outsiders in the Constitution' (1996–1997) 19 *University of Queensland Law Journal* 45.

