CONSTITUTIONAL CRITERIA INFORMING MEMBERSHIP OF THE AUSTRALIAN POLITICAL COMMUNITY

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The Australian Constitution *'summoned the Australian nation into existence', thereby creating a new federal body politic. The High Court has grappled with questions about who comprises that body politic since Federation, including in cases concerning the relationship between citizenship and alienage, and the extent of the Commonwealth Parliament's powers to define and revoke Australian citizenship, to exclude aliens and immigrants from Australia, and to regulate the electoral franchise. These issues have frequently provoked deep divisions in the Court. This article provides a framework for understanding the relationship between three constitutional concepts that together provide the constitutional foundations for the Australian political community: 'aliens', 'the people', and 'electors'.*

I INTRODUCTION

The High Court has grappled with questions about membership of the Australian political community for most of the period since Federation. It has done so, for example, when considering the extent of Parliament's powers to create and define a concept of Australian citizenship, and the circumstances in which it is acquired or lost; when considering the extent of Parliament's powers to exclude people from Australia, including people who have immigrated to Australia and, more recently, non-citizen Indigenous people; and when considering the extent of Parliament's powers to regulate the electoral franchise.

Cases on these topics have provoked deep divisions in the High Court, with narrow majority judgments a regular occurrence. They have also attracted considerable attention from academic commentators, who have been critical of the Court's work in this area. Commentators have observed, for example, that '[t]he legal framework

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for membership of the Australian community is confused and unclear';[1] that there is 'deep uncertainty about what the concept [of Australian citizenship] signifies constitutionally';[2] and that 'what the "limits of the concept of 'alien'" are, or what principle underlies the drawing of those limits, remains uncertain'.[3] As those quotes suggest, despite extensive consideration by the judiciary and academy, there remain areas of uncertainty, imprecision, and complexity.

Against that background, my endeavour in this article is to set out a conceptual framework concerning the relationships and intersections between various concepts that are critical to identifying the boundaries and contours of membership of the Australian political community. The article's premise is that this subject matter is of the kind contemplated by Gleeson CJ in *Singh v Commonwealth* ('*Singh*'), when his Honour said:

> Sometimes the problem of meaning lies, not in understanding the concept that a particular word or expression signifies, but in understanding the relationship between a number of concepts referred to in the *Constitution*.[4]

II THE EMERGENCE OF THE AUSTRALIAN POLITICAL COMMUNITY

My entry point for this topic is, of course, the *Constitution* itself, which by uniting the former colonies within a new federal body politic[5] 'summoned the Australian nation into existence'.[6] But, as Gummow and Crennan JJ observed in *Thomas v Mowbray*, '[t]he notion of a "body politic" cannot sensibly be treated apart from those who are bound together by that body politic'.[7] To adopt the language of commentators at the time of Federation, it is the *people* of the Australian nation —

1 Kim Rubenstein and Jacqueline Field, *Australian Citizenship Law* (Lawbook, 2nd ed, 2017) 63 [3.10]. See also Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (1997) 25(2) *Federal Law Review* 295, 309.

2 Sangeetha Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited' (2013) 39(2) *Monash University Law Review* 568, 571.

3 Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 4th ed, 2018) 721 [10.324].

4 (2004) 222 CLR 322, 334 [15] ('*Singh*'). This approach to constitutional interpretation has been described in the United States as 'intratextualism': see generally Akhil Reed Amar, 'Intratextualism' (1999) 112(4) *Harvard Law Review* 747.

5 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 414. See also at 333.

6 *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

7 (2007) 233 CLR 307, 362 [142].

'a territorial community organized for all the purposes of political life'[8] — that the *Constitution* was designed to 'unite and govern'.[9]

In a very broad sense, the Australian community might be thought of as including all those people who at the relevant time are present within Australian territory — whether lawfully or unlawfully, and whether temporarily or permanently. After all, physical presence in Australia is enough to mean that such persons are subject to, regulated and protected by, our system of laws.[10] Such presence is sufficient to produce what was once referred to as 'temporary allegiance', although that language is no longer in vogue.[11] But it does not follow from the fact that physical presence is enough to mean that people are subject to, regulated and protected by Australian law that all such persons are therefore part of the political community that the *Constitution* established.

The *Constitution* uses various different concepts that relate in different ways to the new Australian political community, and it is these concepts that are the focus of this article. *First*, s 51(xix) confers legislative power on the Commonwealth Parliament with respect to 'naturalization and aliens'.[12] *Second*, there are repeated references to 'the people', including in the phrase 'the people' of the former colonies;[13] 'the people' of the States;[14] 'the people of the Commonwealth';[15] and, in one provision, just 'the people'.[16] *Third*, the *Constitution* contemplates a group of 'electors', being those eligible to vote for federal parliamentarians and at referenda under s 128 of the *Constitution*.[17] *Finally*, although not the focus of this article, the expression 'subject of the Queen' is used to identify the persons protected by s 117 from discrimination based on interstate residence, and to specify a qualification for being a member of the House of Representatives until Parliament otherwise provided (which of course it has done).[18]

8 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (G Partridge & Co, 2nd ed, 1910) 71.

9 Quick and Garran (n 5) 285.

10 See, eg, *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 521–2 (Brennan J), 528–9 (Deane J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ) ('*Lim*'); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 346 [39] (Kiefel CJ, Bell, Keane and Edelman JJ).

11 *Singh* (n 4) 387 [165], 388 [168] (Gummow, Hayne and Heydon JJ), 405 [225] (Kirby J).

12 *Constitution* s 51(xix).

13 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, preamble. See also at covering clause 3.

14 Ibid covering clause 5; *Constitution* ss 7, 25. See also *Constitution* s 127, repealed by *Constitution Alteration (Aboriginals) 1967* (Cth) s 3.

15 *Constitution* ss 24–5. See also *Constitution* s 127, repealed by *Constitution Alteration (Aboriginals) 1967* (Cth) s 3.

16 *Constitution* s 53.

17 Ibid ss 8, 30, 34(i), 123, 128. See also at s 41.

18 Ibid ss 34(ii), 117.

III HISTORICAL AND POLITICAL CONTEXT

Before coming to those constitutional concepts, I start with a little history. I do that because, as with many areas of constitutional law, an analysis of the constitutional dimensions of the Australian political community would be incomplete if undertaken without an appreciation of the historical and political context in which the *Constitution* came into being, and also of the substantial changes that the Australian nation progressively underwent after Federation as it transitioned into an independent nation. There are four key (though brief) points I wish to make concerning history and context.

First, it is a product of history that the only expressions in the *Constitution* relating to nationality are 'subject of the Queen' and 'naturalization and aliens'. At the time of Federation, it went without saying that the Australian people would be subjects of the Queen. At the time, most of the people within the territory that became Australia were already British subjects, largely as a result of the prevailing common law rule that,[19] subject to very limited exceptions,[20] people born within the realms of the Queen were automatically British subjects.[21] For those *not* born within the realms of the Queen, statutory reforms 30 years earlier in Britain had made it much easier to become a British subject by naturalisation. Once the status was acquired (whether through birth or naturalisation) it was 'indelible', meaning that, until the position was altered by statute in 1870, status as a British subject could not be renounced or lost.[22] The same statute for the first time allowed naturalisation to occur by grant of a certificate of naturalisation.[23]

19 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) bk 1, 354. See also *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377; AV Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 1896) 173.

20 In particular: (1) children of the King's ambassadors and their English wives were recognised as natural-born subjects, notwithstanding that they were born outside the sovereign's dominions; and (2) children of enemy aliens born within the sovereign's territory were not regarded as natural-born subjects, if at the time of birth the territory in which the child was born was not under the King's ligeance or obedience: see *Calvin's Case* (n 19). See also *Singh* (n 4) 414 [252] (Kirby J).

21 See *Love v Commonwealth* (2020) 270 CLR 152, 172 [9] (Kiefel CJ), 201 [104] (Gageler J) ('*Love*') and the authorities there cited.

22 See *Singh* (n 4) 390 [174] (Gummow, Hayne and Heydon JJ); *Naturalization Act 1870* (Imp), 33 & 34 Vict, c 14, ss 4, 6, 10 ('*Naturalization Act*'). Those changes were made in response to a 1869 Royal Commission report, which expressed the view that the doctrine of indelible subjecthood was 'at variance with those principles on which the rights and duties of a subject should be deemed to rest': see *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance: Together with an Appendix Containing an Account of British and Foreign Laws, and of the Diplomatic Correspondence Which Has Passed on the Subject, Reports from Foreign States, and Other Papers* (Report, 1869) v ('*Naturalization and Allegiance Royal Commission*').

23 Several centuries prior to Federation, British subject status could be obtained by persons who were not natural-born subjects by naturalisation. Initially that occurred only by the passage of a naturalisation bill through Parliament, but in the 19th century legislative steps were taken to liberalise the requirements for naturalisation, enabling the Home Secretary to grant a certificate of naturalisation on application by an alien: see Blackstone (n 19) 362; Quick and Garran (n 5) 601; *Naturalization Act* (n 22) s 7. See also *Aliens Act 1844* (Imp) 7 & 8 Vict, c 66, s 6, which

Second, even if the word 'aliens' at one stage had a fixed legal meaning within the British Empire,[24] by the end of the 19th century, that was no longer the case. As Gummow, Hayne and Heydon JJ recognised in *Singh*,[25] by 1900, 'the subjects of naturalisation, indelibility of allegiance, nationality and alienage were matters of lively controversy in Britain',[26] and they were subject to 'changing and developing policies',[27] with 'numerous legislative interventions'[28] modifying the common law. Those legal developments were products of the practical issues caused by the emergence of mass migration,[29] which had amplified difficulties associated with conflicting claims to allegiance arising from different States adhering to different theories of nationality and alienage.[30]

Third, and relatedly, by 1900 'the major legal systems of the Western world adopted different approaches to the concept of alienage, and to correlative concepts of citizenship or allegiance'.[31] There were two leading theories.[32] The first attached controlling importance to place of birth (that being the theory to which the English common law adhered), while the second (which was widely prevalent in Europe) attached controlling importance to descent, and thus to the nationality or citizenship of one or both parents. For reasons to which I will come, the existence of these two theories, and the fact that the Commonwealth came into being at a time when conceptions of citizenship were in a state of flux, are critical contextual factors in interpreting the *Constitution*.

Fourth, for nearly half a century after Federation, there was no distinctive Australian 'nationality' or 'citizenship'.[33] Throughout that period, the relevant

introduced an administrative form of naturalisation, whereby persons became entitled to the rights and capacities of a natural born subject, albeit that they did not *become* a subject; *Naturalization Act 1847* (Imp) 10 & 11 Vict, c 83, s 1, which granted colonial legislatures a limited form of naturalisation power within their own territorial jurisdictions.

24 When the common law rules for the conferral and acquisition of status as a subject were expounded in *Calvin's Case* (n 19).

25 *Singh* (n 4) 395 [190].

26 Ibid 391 [176].

27 Ibid 341[30] (Gleeson CJ). See also *Love* (n 21) 193–4 [86] (Gageler J).

28 *Singh* (n 4) 395 [190] (Gummow, Hayne and Heydon JJ).

29 Ibid.

30 These difficulties led to the establishment of a Royal Commission into naturalisation and allegiance, although the Royal Commissioners did not consider that the rules for acquisition of natural-born status required substantial revision: see *Naturalization and Allegiance Royal Commission* (n 22) viii. See also ibid 414–15 [253] (Kirby J).

31 *Singh* (n 4) 340 [30] (Gleeson CJ).

32 Ibid. See also at 391–2 [178]–[179] (Gummow, Hayne and Heydon JJ), 413–14 [250]–[251] (Kirby J); *Koroitamana v Commonwealth* (2006) 227 CLR 31, 37 [9] (Gleeson CJ and Heydon J) ('*Koroitamana*').

33 See *A-G (Cth) v Ah Sheung* (1906) 4 CLR 949, 951 (Griffith CJ for the Court) ('*Ah Sheung*'); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 650 (Latham CJ) ('*Burgess*').

legal status was and remained 'British subject'.[34] That singular status became increasingly problematic as former British colonies moved gradually towards independence. As a result, not long after the Balfour Declaration of 1926, in which the Dominions of the British Empire were recognised as 'autonomous Communities',[35] negotiations commenced about the creation of distinctive nationalities for the dominions.[36] That process stalled with the outbreak of the Second World War.[37] However, after the war, and with effect from 26 January 1949, the Commonwealth Parliament for the first time established Australian citizenship.[38] Thereafter, while the status of 'British subject' remained on the statute book until 1984,[39] and attracted certain statutory rights,[40] it no longer signified formal membership of the Australian political community. That is evidenced by the High Court's acceptance (in some authorities addressed below) that, at least from the commencement of the *Nationality and Citizenship Act 1948* (Cth), British subjects in Australia who were not Australian citizens were aliens.[41]

Those are the historical foundations for the framework I will now develop in two stages, first by addressing the relationship between aliens and citizens, and second by focusing on the concept of 'the people' and how that concept relates to electors,

34 *Burgess* (n 33) 649–50 (Latham CJ).

35 *Chetcuti v Commonwealth* (2021) 272 CLR 609, 624 [18] (Kiefel CJ, Gageler, Keane and Gleeson JJ) ('*Chetcuti*'), quoting Parliament of Australia, *Imperial Conference, 1926: Summary of Proceedings* (Report, 23 March 1927) 10.

36 *Chetcuti* (n 35) 624–5 [18]–[19] (Kiefel CJ, Gageler, Keane and Gleeson JJ), quoting United Kingdom, *Imperial Conference, 1930: Summary of Proceedings* (Cmd 3717, 1930) 22 and citing at 19; United Kingdom, *Imperial Conference, 1937: Summary of Proceedings* (Cmd 5482, 1937) 25–6. See also Patrick Brazil, 'Australian Nationality and Immigration' in KW Ryan (ed), *International Law in Australia* (Law Book, 2nd ed, 1984) 210, 210, quoting *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, signed 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937) art 1; *Love* (n 21) 198–9 [97] (Gageler J).

37 See, eg, *Canadian Citizenship Act*, SC 1946, c 15.

38 *Nationality and Citizenship Act 1948* (Cth) ('*Nationality and Citizenship Act*'). At least by 1948 the Crown was no longer indivisible throughout the British Empire, with the consequence that reference in the *Constitution* to a 'subject of the Queen' is understood to refer to the 'monarch in right of Australia': *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 40 [20], 42 [28], 43 [30] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at 87 [190]) ('*Shaw*'); *Chetcuti* (n 35) 623 [16] (Kiefel CJ, Gageler, Keane and Gleeson JJ), citing *Shaw* (n 38) 37–8 [13]–[14], 39–40 [20], 42 [28] (Gleeson CJ, Gummow and Hayne JJ), 87 [190] (Heydon J); 633 [46] (Gordon J), citing *Shaw* (n 38) 40 [20] (Gleeson CJ, Gummow and Hayne JJ). Cf *Chetcuti* (n 35) 666–7 [131]–[132], 668 [134] (Steward J).

39 *Australian Citizenship Amendment Act 1984* (Cth) s 7 ('*Australian Citizenship Amendment Act*'). Earlier, s 6 of the *Citizenship Act 1969* (Cth) changed the status of Australian citizens from being British subjects to Australian citizens with 'the status of a British subject'.

40 *Pochi v Macphee* (1982) 151 CLR 101, 108–9 (Gibbs CJ) ('*Pochi*'); *Chetcuti* (n 35) 625 [20], 627 [25] (Kiefel CJ, Gageler, Keane and Gleeson JJ); Joint Standing Committee on Migration, Parliament of Australia, *Australians All: Enhancing Australian Citizenship* (Report, September 1994) 17 [2.40] ('*Enhancing Australian Citizenship*'), quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1948, 1060 (Arthur Calwell).

41 *Shaw* (n 38) 43 [32] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at 87 [190]); *Chetcuti* (n 35) 623 [15] (Kiefel CJ, Gageler, Keane and Gleeson JJ). British subjects were 'a class of aliens with special advantages in Australian law': *Shaw* (n 38) 40 [22] (Gleeson CJ, Gummow and Hayne JJ).

citizens, aliens who were once but who have ceased to be immigrants, and finally other resident aliens.

IV ALIEN/CITIZEN DICHOTOMY

Section 51(xix) of the *Constitution*, which confers legislative power with respect to 'naturalization and aliens',[42] has been the subject of a great deal of litigation in recent years.

Focusing on two recent cases, in both *Chetcuti v Commonwealth* ('*Chetcuti*')[43] in 2021, and *Alexander v Minister for Home Affairs* ('*Alexander*')[44] in 2022, Kiefel CJ, Gageler, Keane and Gleeson JJ described s 51(xix) as having two aspects. The first aspect is the 'power to determine who is and who is not to have the legal status of an alien',[45] subject to the limit (which has come to be referred to as the *Pochi* limit) that the Parliament cannot treat as an alien a person 'who could not possibly answer [that] description … in the ordinary understanding of the word'.[46] The second aspect is the power to 'attach consequences to [the] status' of alienage,[47] including (most significantly) exclusion from the Australian community and from Australian territory.[48] It is that aspect of the power that, for example, supports most of the provisions of the *Migration Act 1958* (Cth) ('*Migration Act*'), that being an Act that proceeds on the basis that all persons who are not citizens are aliens.[49]

The first aspect of the aliens power was in fact recognised long before *Chetcuti*, albeit using different language. It was, for example, recognised by the majority in *Shaw v Minister for Immigration and Multicultural Affairs* ('*Shaw*'),[50] and in statements in numerous other decisions over the past 20 years, including *Re*

42 The subject matters to which it refers are: 'persons of a legal status — "aliens" — together with the process by which that legal status can be changed — "naturalisation"': *Love* (n 21) 193 [83] (Gageler J). See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 171 [24] (Gleeson CJ), 192 [109] (Gummow J) ('*Ex parte Te*').

43 *Chetcuti* (n 35).

44 (2022) 96 ALJR 560, 572 [33] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing with the substance of the plurality's reasons at 583 [98]) ('*Alexander*').

45 *Chetcuti* (n 35) 622 [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

46 *Pochi* (n 40) 109 (Gibbs CJ).

47 *Chetcuti* (n 35) 622 [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ). See, eg, *Ex parte Te* (n 42) 175 [39] (Gleeson CJ); *Koroitamana* (n 32) 38 [11] (Gleeson CJ and Heydon J); *Love* (n 21) 187 [62] (Bell J), 197–8 [94] (Gageler J).

48 See *Lim* (n 10) 26, 26 n 54 (Brennan, Deane and Dawson JJ).

49 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 189–90 (Gaudron J) ('*Nolan*').

50 *Shaw* (n 38) 35 [2] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at 87 [190]). A category of non-citizen non-aliens (certain British subjects) was briefly recognised in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 ('*Re Patterson*'), but that decision was overruled in *Shaw* (n 38): at 45 [39] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at 87 [190]).

Minister for Immigration and Multicultural Affairs; Ex parte Te ('*Ex parte Te*'),[51] *Singh*,[52] and *Koroitamana v Commonwealth*.[53]

Nevertheless, particularly since the High Court's decision in *Love v Commonwealth* ('*Love*')[54] in 2020, there has been significant division of opinion about that aspect of the aliens power. Of the current Court, Gordon, Edelman and Steward JJ seemingly do not accept the existence of that aspect of the power, preferring the view that the content of the word 'aliens' is something to be identified by the Court as a matter of constitutional interpretation, or perhaps even as a matter of constitutional fact.[55] I will return to aspects of their Honours' reasoning. However, my aim for the moment is to explain why the settled understanding of the aliens power is correct.

A *First Aspect — Power to Determine Alienage*

As already noted, 'alienage' did not have an 'established and immutable legal meaning' at the time of Federation.[56] Instead, different theories accorded differing significance to place of birth and descent and, within the British Empire, the law on subjecthood and alienage was the subject of change and debate.

In that context, the High Court has had no difficulty accepting that the prevailing legal position in England as at 1900 'does not mark the boundaries'[57] of s 51(xix), and that the *Constitution* did not 'commit Australia to uncompromising adherence' to either leading theory of nationality.[58] Instead, it was left to Parliament to resolve

51 *Ex parte Te* (n 42) 170–2 [21]–[26], 173 [31] (Gleeson CJ), 219–20 [209]–[210] (Hayne J).

52 *Singh* (n 4) 329 [4] (Gleeson CJ).

53 *Koroitamana* (n 32) 38 [11] (Gleeson CJ and Heydon J), 46 [48] (Gummow, Hayne and Crennan JJ). See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 458–9 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ) ('*Ame*'); *Love* (n 21) 170–1 [5], 172–3 [10] (Kiefel CJ), 193–8 [84]–[94], 200 [100], 209–10 [131]–[132] (Gageler J), 217 [166], 219–20 [172] (Keane J).

54 See, eg, *Love* (n 21) 261–2 [295]–[296], 263–4 [300]–[304], 266 [311], 270–2 [327]–[330] (Gordon J), 288 [394], 291–2 [401], 301–8 [422]–[437] (Edelman J). See also at 187 [64], 190 [74] (Bell J), 244 [251]–[252], 245 [254] (Nettle J).

55 See *Chetcuti* (n 35) 630 [37], 634 [50] (Gordon J), 635–6 [53], 638 [60], 641–3 [65]–[69] (Edelman J), 654–5 [104]–[105], 671–2 [143]–[145] (Steward J); *Alexander* (n 44) 589–90 [133]–[136] (Gordon J), 600–1 [182]–[184], 602 [189], 602–9 [193]–[225] (Edelman J), 622 [291] (Steward J); *Thoms v Commonwealth* (2022) 96 ALJR 635, 648–50 [61]–[62] (Gordon and Edelman JJ), 654 [87] (Steward J) ('*Thoms*').

56 *Koroitamana* (n 32) 37 [9] (Gleeson CJ and Heydon J), citing *Singh* (n 4) 340–1 [30] (Gleeson CJ), 395 [190] (Gummow, Hayne and Heydon JJ), 414 [252] (Kirby J). See also *Singh* (n 4) 393–4 [183] (Gummow, Hayne and Heydon JJ); *Shaw* (n 38) 42 [28] (Gleeson CJ, Gummow and Hayne JJ); *Love* (n 21) 193–4 [86] (Gageler J, describing 'aliens' as a term of 'ineluctable fluidity').

57 *Koroitamana* (n 32) 41 [28] (Gummow, Hayne and Crennan JJ). See also *Singh* (n 4) 384 [157] (Gummow, Hayne and Heydon JJ), 414–15 [252]–[253] (Kirby J).

58 *Koroitamana* (n 32) 37 [9] (Gleeson CJ and Heydon J).

the 'cross-currents and uncertainties' in the law.[59] As Gageler J explained in his dissenting reasons in *Love*:[60] 'aliens' is a 'topic of juristic classification' (analogous to 'bankruptcy', 'copyrights, patents … and trade marks', and 'marriage') in that the law on the subject[61] was in a process of development both before and after Federation and s 51(xix) confers 'legislative authority to modify or replace the pre-existing law'.

1 Pochi *Limit*

In my opinion, although it is an opinion that some members of the High Court do not share,[62] to recognise the existence of the first aspect of the aliens power — and therefore to accept that status as an alien depends upon the content of legislation — is *not* to say that Parliament may define itself into power contrary to *Australian Communist Party v Commonwealth*.[63] That consequence is avoided because, as Gibbs CJ explained in *Pochi v Macphee* ('*Pochi*'), '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'.[64]

That formulation has been repeatedly endorsed by the Court. Its language is important, because that language does not provide any warrant for the Court to attempt to identify, and then apply, the 'ordinary understanding' of the word alien.[65] Instead, the *Pochi* limit is a constraint upon the criteria that Parliament may validly select when enacting legislation governing the acquisition and cessation of citizenship. To give an obvious example, Parliament could not validly select criteria that have nothing to do with alienage, such as hair colour or occupation. But if Parliament selects criteria that *are* relevant to alienage on the ordinary understanding of the word, then that selection is effective to resolve the 'cross-currents and uncertainties'[66] to which the first aspect of the aliens power is directed. For example, if Parliament were to provide that, irrespective of place of birth, a person is an alien unless one or both parents are Australian citizens, it

59 *Singh* (n 4) 341 [30] (Gleeson CJ), quoting *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 501 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Grain Pool*'). See also ibid 46 [50] (Gummow, Hayne and Crennan JJ); *Love* (n 21) 171–2 [6]–[7] (Kiefel CJ), 193–4 [86] (Gageler J), 218 [168] (Keane J), 244 [251] (Nettle J).

60 *Love* (n 21) 193–4 [86] and the authorities there cited.

61 Being a subject 'endogenous to the legal system': see James Stellios, 'Constitutional Characterisation: Embedding Value Judgements about the Relationship between the Legislature and the Judiciary' (2021) 45(1) *Melbourne University Law Review* 277, 290–320.

62 See, eg, *Love* (n 21) 270–2 [327]–[330] (Gordon J), 291–2 [401] (Edelman J); *Alexander* (n 44) 589 [133] (Gordon J), 602 [189] (Edelman J); *Thoms* (n 55) 648–50 [61]–[62] (Gordon and Edelman JJ). See also *Chetcuti* (n 35) 642–3 [69] (Edelman J).

63 (1951) 83 CLR 1.

64 *Pochi* (n 40) 109 (emphasis added).

65 *Love* (n 21) 170 [4] (Kiefel CJ), 194–5 [87]–[88] (Gageler J).

66 *Singh* (n 4) 341 [30] (Gleeson CJ), quoting *Grain Pool* (n 59) 501 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Koroitamana* (n 32) 46 [50] (Gummow, Hayne and Crennan JJ); ibid 171–2 [6]–[7] (Kiefel CJ), 193–4 [86] (Gageler J), 218 [168] (Keane J), 244 [251] (Nettle J).

would not thereby treat as aliens people who cannot possibly answer that description. That is because, by such a law, Parliament would have adopted the same criteria that were actually employed by many legal systems at the time of Federation.

For the reason just given, I respectfully suggest that it is not possible to identify an 'essential meaning' of aliens that can then be applied by the Court to determine a person's status as if it were a constitutional fact.[67] That is not possible because the word 'aliens' does not have an 'essential meaning'. Instead, it has a *range* of available meanings,[68] from which Parliament can validly select.

To illustrate, consider the position of a person born outside Australia to one Australian parent. In my view, the status of such a person cannot be determined as a matter of constitutional interpretation directed to explicating the meaning of the word 'alien'. Parliament could validly give determinative significance to *either* place of birth *or* parentage, without thereby treating as an alien a person who could not possibly answer that description consistently with the ordinary understanding of the word.[69] It is because of the *range* of available meanings of 'alien', and therefore the scope for valid choice by the Parliament, that the first aspect of the aliens power is necessary.

2 *The Prevailing Test for Membership of Body Politic Governs Alienage*

The focus of this article so far has been on the meaning of 'alien'. I now want to turn to the related concepts of 'citizenship' and membership of the Australian body politic.

I say related because, subject to one exception, the High Court has held that an 'alien' is a person who has *not been* admitted to *formal* membership of the Australian body politic according to the prevailing law governing such admission. As already noted, since 26 January 1949,[70] that prevailing law has been the *Australian Citizenship Act 2007* (Cth) ('*Citizenship Act*') (as variously named from time to time). Prior to that date, it was the common law regarding British subjecthood (as supplemented by statute).[71]

67 *Love* (n 21) 193–5 [86]–[88] (Gageler J). See also at 171–2 [7] (Kiefel CJ).

68 See generally Simon Evans, 'The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches' (2006) 29(3) *University of New South Wales Law Journal* 207.

69 *Singh* (n 4) 340–1 [30] (Gleeson CJ), 395 [190] (Gummow, Hayne and Heydon JJ), 414 [252] (Kirby J); *Koroitamana* (n 32) 37 [9] (Gleeson CJ and Heydon J), 46 [50] (Gummow, Hayne and Crennan JJ), 49 [62] (Kirby J). See also *Ame* (n 53) 482 [115] (Kirby J); *Love* (n 21) 171–2 [7] (Kiefel CJ), 200 [100] (Gageler J), 217–18 [167] (Keane J).

70 Upon the commencement of the *Nationality and Citizenship Act* (n 38).

71 *Pochi* (n 40) 107–8 (Gibbs CJ).

The exception arises from *Love*,[72] where four Justices held that Aboriginal Australians who satisfy the tripartite test articulated by Brennan J in *Mabo v Queensland [No 2]*[73] are not aliens even when they do not hold Australian citizenship.

There are aspects of the majority reasoning in *Love* that are hard to reconcile with the settled understanding of the aliens power.[74] In particular, the majority in *Love* treated alienage as a concept directing attention to notions such as 'otherness' or absence of 'belonging',[75] being notions to be applied by the Court itself independently of Parliament's choices. However, *Love* must be understood in light of the more recent decisions in *Chetcuti* and *Alexander*, in both of which a majority of the Court[76] treated *Love* as having departed from the settled understanding only with respect to the sui generis category[77] of people who satisfy the tripartite test.[78]

On that basis, it remains accurate to say that since 1949,[79] and subject only to the sui generis category in *Love*, alienage has been the obverse of citizenship.[80] Put differently, '"alien" … [has] become synonymous with "non-citizen"'.[81] Accordingly, while citizenship can accurately be described as a statutory status, it is a statutory status that has constitutional significance because Parliament, having defined the criteria for citizenship, has then proceeded to treat as an alien anyone who is *not* a citizen. That treatment can be seen most clearly in the detailed

72 *Love* (n 21) 192 [81] (Bell J).

73 (1992) 175 CLR 1, 70.

74 See especially *Love* (n 21) 261–2 [295]–[296], 263–4 [300]–[304], 266 [311] (Gordon J), 288 [394], 301–8 [422]–[437] (Edelman J). Cf at 187 [64], 190 [74] (Bell J), 244 [251]–[252], 245 [254] (Nettle J).

75 Those being concepts which persons who satisfy the tripartite test were held to fall outside due to their unique historical and spiritual connection to the lands and waters of Australia, such that they could not be treated as aliens: see ibid 183 [52], 189–90 [70]–[74] (Bell J), 260–1 [289]–[290], 262 [296]–[298], 263 [301], 272 [335], 274 [340], 276 [347]–[348] (Gordon J), 288 [394], 289 [396], 294–6 [405]–[410], 308 [437]–[438], 312–13 [447]–[448] (Edelman J). Cf at 253–4 [271]–[272], 256–7 [276], 258 [279] (Nettle J).

76 Despite the strong objections voiced by Gordon, Edelman and Steward JJ: see *Chetcuti* (n 35) 630 [37], 634 [50] (Gordon J), 635–6 [53], 638 [60], 641–3 [65]–[69] (Edelman J), 654–5 [104]–[105], 671–2 [143]–[145] (Steward J); *Alexander* (n 44) 589–90 [133]–[136] (Gordon J), 600–1 [182]–[184], 602 [189], 602–9 [193]–[225] (Edelman J), 622 [291] (Steward J). See also *Thoms* (n 55) 648–50 [61]–[62] (Gordon and Edelman JJ), 654 [87] (Steward J).

77 See, eg, *Love* (n 21) 183 [52], 188 [67], 189 [71], 190 [74] (Bell J), 262–3 [299], 269 [323], 272 [333], 272 [335], 276 [347], 280–1 [363], 282 [368], 284 [373] (Gordon J). See also at 254–5 [274], 256–7 [276], 257 [278] (Nettle J).

78 *Chetcuti* (n 35) 622–3 [14] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Alexander* (n 44) 572–3 [34] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 583 [98]).

79 *Chetcuti* (n 35) 623 [15] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

80 *Shaw* (n 38) 35 [2] (Gleeson CJ, Gummow and Hayne JJ), 87 [190] (Heydon J); *Love* (n 21) 170–1 [5] (Kiefel CJ), 219–20 [172], 230 [213] (Keane J); *Alexander* (n 44) 572–3 [34] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 583 [98]).

81 *Lim* (n 10) 25 (Brennan, Deane and Dawson JJ). See also *Thoms* (n 55) 641 [23] (Kiefel CJ, Keane and Gleeson JJ).

provisions of the *Migration Act* which, in reliance upon the aliens power, impose many obligations on and with respect to 'non-citizens', including the obligations to detain and remove non-citizens from Australia unless they have a visa.[82]

3 *A Minority View Based on a Concern about Breadth of Parliament's Power*

While I expect that the High Court would accept the accuracy of the description I have given of the existing law concerning the first aspect of the aliens power, several Justices would not accept that the existing legal position is correct. Underpinning the critique of this position is a concern about the breadth of Parliament's power to define membership of the body politic.[83]

In my opinion, that concern does not provide a persuasive reason to reject the settled understanding. I say that in part because heads of power should not be narrowly construed out of a concern that, if they are widely construed, those powers might be abused. To the contrary, it is well established that heads of legislative power should be construed 'with all the generality which the words used admit'.[84] Underlying that approach is the point made in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* that 'the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts'.[85] Thus, the *Constitution* proceeds on an assumption that — to quote Mason J — Parliament 'will act responsibly in the exercise of its powers'.[86] Further, it contemplates that, if Parliament does not act responsibly, the consequences will be political.[87] To interpret heads of power narrowly because of hypothetical examples of extreme laws that would be valid if the head of power is construed broadly[88] is to take on a responsibility that the *Constitution* leaves to the people.[89]

82 See *Thoms* (n 55) 644–5 [38]–[39] (Kiefel CJ, Keane and Gleeson JJ), 645 [45] (Gageler J), 648 [59], 650–2 [64]–[76] (Gordon and Edelman JJ).

83 *Alexander* (n 44) 604 [201] (Edelman J).

84 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ), quoted with approval in *Grain Pool* (n 59) 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *New South Wales v Commonwealth* (2006) 229 CLR 1, 103–4 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

85 (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

86 *Western Australia v Commonwealth* (1975) 134 CLR 201, 271 (Mason J, McTiernan J agreeing at 233) ('*Western Australia*'). See also at 275 (Jacobs J), 287 (Murphy J).

87 See Moore (n 8) 78; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 229 (McHugh J); *McCloy v New South Wales* (2015) 257 CLR 178, 227 [113] (Gageler J).

88 See, eg, *Alexander* (n 44) 604 [200] (Edelman J). See also at 600 [182], 608–9 [223] (Edelman J). Cf at 604 [201] (Edelman J).

89 See, eg, *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 380–1 [88] (Gummow and Hayne JJ) ('*Kartinyeri*'); *Shaw* (n 38) 43 [32] (Gleeson CJ, Gummow and Hayne JJ).

B *Citizenship Cessation*

Once it is accepted that status as a citizen or alien generally depends upon whether a person satisfies criteria specified by Parliament, it appears logically to follow that — just as Parliament may specify criteria by which citizenship is *attained* — it may specify criteria by reference to which it is *lost*. If that is correct, then Parliament can in some circumstances provide that a person who was previously a citizen is thereafter to be treated as alien.

Before turning to whether the cases support that proposition, I want to attempt to head off a potential misunderstanding. Even if Parliament has the power, pursuant to the first aspect of the aliens power, to specify the circumstances in which certain categories of people may lose their citizenship, the existence of that power has no effect on a person's status unless and until such a law is actually enacted. In other words, *while* a person holds the statutory status of citizen, such a person is not an 'alien' *even if* the person is within the reach of the first aspect of the aliens power. Being within reach of the first aspect of the power means only that the person could possibly answer the description of an alien on the ordinary understanding of the word. A person's status as a citizen or alien depends upon how Parliament has *exercised* the first aspect of the aliens power within the range of available choices. It does *not* depend upon the fact that a person's characteristics (such as birth overseas, foreign citizen parents and perhaps dual citizenship) mean that Parliament has a choice to make.

Prior to *Alexander*, the High Court had not squarely considered the scope of Parliament's power to take away Australian citizenship.[90] Nonetheless, there were statements in the authorities — including a statement by six Justices in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* — indicating that Parliament's power to create and define Australian citizenship extends to prescribing 'conditions on which citizenship may be … *lost*',[91] and rejecting suggestions that a person could be converted from citizen to alien only 'with[] the consent of the individual'.[92]

Those propositions were confirmed in *Alexander*. That case concerned the validity of s 36B of the *Citizenship Act*, which purported to confer power on the Minister to deprive dual citizens of Australian citizenship if the Minister was satisfied that they had engaged in certain terrorism-related conduct that demonstrated that they

90 Cf *Meyer v Poynton* (1920) 27 CLR 436, 441 (Starke J), concerning revocation of naturalisation; *Ame* (n 53) 458 [34], 459 [38] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 483 [117]–[119] (Kirby J), in the particular context of withdrawal of Australian citizenship of persons who became citizens of Papua New Guinea (a former external territory of Australia) when it became independent (supported by both the territories power in s 122 of the *Constitution* and the aliens power). See also *Koroitamana* (n 32) 40 [24], 46–7 [51] (Gummow, Hayne and Crennan JJ).

91 *Ame* (n 53) 458 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ) (emphasis added). See also *Ex parte Te* (n 42) 173 [31] (Gleeson CJ); *Singh* (n 4) 329 [4] (Gleeson CJ); *Nolan* (n 49) 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

92 *Ame* (n 53) 458–9 [34]–[35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ). See also *Singh* (n 4) 397 [195], 397–8 [197]–[198] (Gummow, Hayne and Heydon JJ).

had repudiated their allegiance to Australia, and that it was in the public interest that they ceased to be citizens.

While a majority of the Court found s 36B invalid on the basis that it was contrary to ch III of the *Constitution*, six Justices (Gordon J not deciding)[93] held that the provision was supported by the aliens power. Further, the entire Court[94] accepted that the aliens power will support laws providing for the deprivation of Australian citizenship where persons have engaged in conduct demonstrating they have repudiated their allegiance to Australia (such as by conduct 'exhibiting … extreme enmity to Australia'[95] or that is 'inimical to Australia's interests'[96]).

While there is much of interest in *Alexander*, for present purposes I wish to highlight only two aspects of the decision.

First, in a joint judgment, Kiefel CJ, Keane and Gleeson JJ (with whom Gageler J relevantly agreed) accepted that Parliament has significant power to enact laws providing for deprivation of Australian citizenship. That power seemingly is not *confined* to circumstances involving voluntary renunciation,[97] repudiation of allegiance,[98] or changes in sovereign identity or territory.[99] Their Honours framed the power much more broadly, stating that

> Parliament has the power under s 51(xix) to attribute the constitutional status of alien to a person who has lost the statutory status of citizenship. By the same power, Parliament can define the circumstances in which that occurs.[100]

As that statement makes plain, their Honours emphatically rejected the proposition that 'once a citizen always a citizen'.[101] To the contrary, they emphasised that, '[a]s a general principle, where the Parliament may confer rights by the exercise of legislative power, it may also take them away',[102] citing in support passages in

93 *Alexander* (n 44) 594–5 [156] (Gordon J).

94 Ibid 573 [35], 574 [42], 575 [46], 575 [49], 577 [63] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 583 [98]), 590 [137], 590 [139], 591 [143] (Gordon J), 601 [185], 609–10 [229], 610–11 [232]–[234] (Edelman J), 621 [286], 622 [289]–[290], 623 [297], 624 [301], 627 [317] (Steward J).

95 Ibid 573 [35] (Kiefel CJ, Keane and Gleeson JJ).

96 Ibid 577 [63] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 583 [98]). See also at 601 [185], 610–11 [233]–[234] (Edelman J), 621 [286], 622 [289]–[290] (Steward J).

97 Ibid 575–6 [50]. Their Honours described such an approach to the status of citizenship as 'incoherently one-sided'.

98 Cf ibid 601 [185], 610–11 [233]–[234] (Edelman J), 621 [286], 622 [289]–[290], 623 [297], 624 [301] (Steward J). See also at 594 [154], 594–5 [156] (Gordon J).

99 Cf ibid 590 [137], 590 [139], 591 [143] (Gordon J), 609–10 [229] (Edelman J).

100 Ibid 573 [35] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 583 [98]). See also at 573 [37] (Kiefel CJ, Keane and Gleeson JJ).

101 Ibid 573 [37].

102 Ibid 573–4 [38]. Cf *Ame* (n 53) 481–2 [114] (Kirby J).

Kartinyeri v Commonwealth[103] to the effect that '[t]he power to make laws includes a power to unmake them'.[104] That reasoning strongly suggests that the first aspect of the aliens power has the same breadth with respect to the deprivation of citizenship as it has with respect to the conferral of citizenship.

One interesting question that this analysis raises is whether it would be open to Parliament to revoke the Australian citizenship of dual citizens (perhaps after giving them a reasonable opportunity to avoid that revocation if they renounced their foreign citizenship by a specified future date). The question arises in part because many authorities suggest that the ordinary meaning of 'alien' is nothing more than a subject or citizen of another country.[105] In light of those authorities, it is very difficult to see how a law of the kind hypothesised would infringe the *Pochi* limit, because to treat a foreign citizen as an alien is not to give the word a meaning it cannot possibly bear. Subject to ch III, the logic of the majority's reasoning in *Alexander* suggests that such a law should be valid, with the constraint on the enactment of such a law being political or democratic, rather than constitutional.

Having said that, it may well be that a majority of the High Court as presently constituted would hold such a law to be invalid,[106] notwithstanding the difficulty that would arise in reconciling such a result with established constitutional principles[107] and with historical practice. With respect to such practice, laws enacted both before[108] and after Federation[109] (until as recently as 2002)[110] provided for loss of nationality or citizenship where a person was naturalised in a foreign state. So, for more than a century, foreign citizenship has been a criterion on which Parliament has drawn when attributing the status of alien to particular people.[111] The fact that Parliament, in the last 20 years or so, has decided that people who apply for foreign citizenship no longer automatically lose their

103 *Kartinyeri* (n 89) 355–6 [12]–[14] (Brennan CJ and McHugh J), 372 [57] (Gummow and Hayne JJ).

104 Ibid 355 [13] (Brennan CJ and McHugh J).

105 See *Singh* (n 4) 340–1 [30], 342 [32] (Gleeson CJ), 381 [144], 395 [190], 398 [200], 400 [205] (Gummow, Hayne and Heydon JJ), 419 [272] (Kirby J); *Ame* (n 53) 458–9 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 482 [116] (Kirby J). See also *Nolan* (n 49) 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

106 See *Love* (n 21) 268–9 [318]–[322] (Gordon J), 304–5 [430] (Edelman J). See also at 188 [66] (Bell J), 248–9 [263] (Nettle J); *Chetcuti* (n 35) 672–3 [146] (Steward J); *Alexander* (n 44) 594–5 [156] (Gordon J), 600 [181]–[182], 601 [185], 604 [200], 609 [224]–[225] (Edelman J).

107 As acknowledged in Michelle Foster, 'Membership in the Australian Community: *Singh v the Commonwealth* and Its Consequences for Australian Citizenship Law' (2006) 34(1) *Federal Law Review* 161, 179–80.

108 *Naturalization Act* (n 22) s 6.

109 *Nationality Act 1920* (Cth) s 21; *Nationality and Citizenship Act* (n 38) s 17, as enacted; *Australian Citizenship Amendment Act* (n 39) s 13.

110 *Australian Citizenship Legislation Amendment Act 2002* (Cth) sch 1 item 1, repealing *Australian Citizenship Act 1948* (Cth) s 17.

111 While there was increasing acceptance of dual nationality throughout the world by the end of the 20th century, there remained a variety of different approaches: see *Enhancing Australian Citizenship* (n 40) 182–8 [6.17]–[6.36].

Australian citizenship reflects a different choice by the Parliament, but should say nothing about the 'constitutional power' to withdraw Australian citizenship from dual citizens. It is a different question whether such a policy choice would be acceptable to the electorate (particularly having regard to the large percentage of Australians who are dual citizens).[112]

The *second* point to make about *Alexander* is that, having recognised the width of the power s 51(xix) confers to remove citizenship, six Justices went on to hold that in certain situations the power to deprive a person of their citizenship falls within the exclusively judicial power to adjudge and punish criminal guilt, and therefore can validly be conferred only upon a court.[113] Chapter III therefore operates as a considerable constraint on Parliament's choice as to *how* citizenship deprivation may be achieved. The extent of that constraint remains to be explored.

V 'THE PEOPLE' — RELATIONSHIP WITH ELECTORS, CITIZENS AND ALIENS

I turn now from aliens and citizens to the concept of 'the people'. That expression is used throughout the *Constitution*. Most significantly, ss 7 and 24 respectively provide that Senators and Members of the House of Representatives shall be directly chosen by 'the people of the State[s]' and by 'the people of the Commonwealth'. In addition, covering clause 5 provides that the *Constitution* and all laws made under it are binding on the 'people of every State and of every part of the Commonwealth'.

Those provisions contemplate a body of 'people' who collectively constitute the Australian community. But who are those people? Is membership of 'the people' limited to those who hold statutory citizenship, or those who are eligible to vote, or those who reside within Australia, either temporarily or permanently, or lawfully or unlawfully? As Heydon J queried (in dissent) in *Rowe v Electoral Commissioner* ('*Rowe*'), why should 'the people' not include

> permanent residents … people with long term visas … lawful resident[s] … [o]r even unlawful residents? … Are not all these persons in a sense part of 'the Australian people', 'the Australian nation', 'the Australian community'?[114]

112 See *Ame* (n 53) 482 [116] (Kirby J).

113 It was unnecessary for the Court to address certain other limits on the first aspect of the aliens power suggested by the plaintiff: see answers to questions (1)(b)–(d) in *Alexander* (n 44) 634. See also at 568 [3] (Kiefel CJ, Keane and Gleeson JJ), 588–9 [132] (Gordon J), 600 [180], 601 [186] (Edelman J). Cf at 627–8 [318]–[324] (Steward J). Four Justices (Kiefel CJ, Keane, Gleeson and Steward JJ) specifically rejected the plaintiff's argument that the power was subject to a limit that it be exercised only for a 'substantial reason' (a limit said to derive from the references to 'the people' in ss 7, 24 of the *Constitution*): *Alexander* (n 44) 575 [45]–[46] (Kiefel CJ, Keane and Gleeson JJ), 627–8 [318]–[319] (Steward J). Cf at 583 [98] (Gageler J, agreeing only with the substance of the plurality's reasons for concluding that s 36B is a law with respect to aliens, but infringes ch III), 588–9 [132] (Gordon J, not deciding), 601 [186] (Edelman J, not deciding).

114 (2010) 243 CLR 1, 93 [279] ('*Rowe*').

I will largely focus on 'the people *of the Commonwealth*' (which clearly incorporates 'the people of the States'). I recognise that on prevailing authority 'the people of the Commonwealth' in s 24 does not include people of the *Territories*.[115] However, the expression in covering clause 5 is broader, capturing 'the people' throughout the national community established by the *Constitution*. There is little doubt that this includes the people of the Territories, that being a position supported by observations in many High Court authorities by individual Justices.[116]

'[T]he people of the Commonwealth' has been described as a 'vague'[117] and 'elusive'[118] expression. Professor Zines went further, saying that it connoted a 'mystical body of … people'.[119] Individual High Court Justices have attributed to the expression a bewildering array of meanings, referring for example to 'members of the Australian community';[120] 'the represented';[121] 'the governed';[122] 'citizens of the Commonwealth';[123] and (less punchily) 'the body of subjects of the Crown inhabiting the Commonwealth regarded collectively as a unity or whole, and the sum of those subjects regarded individually'.[124]

Those descriptors do not shed much light on who 'the people' actually are. Is membership of 'the people' limited to citizens, or to those who are eligible to vote, or does it extend to some or all resident aliens? Those questions direct attention to how the expression 'the people' relates to other constitutional concepts, that being the focus of the remainder of this article.

115 See *A-G (NSW) ex rel McKellar v Commonwealth* (1977) 139 CLR 527, 542 (Gibbs J) ('*McKellar*'). See also at 554 (Stephen J, Mason J agreeing at 562).

116 See, eg, *Spratt v Hermes* (1965) 114 CLR 226, 269–70 (Menzies J); ibid 542 (Gibbs J); *Queensland v Commonwealth* (1977) 139 CLR 585, 611 (Murphy J); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 279 (Brennan, Deane and Toohey JJ), 285–6 (Gaudron J); *Kruger v Commonwealth* (1997) 190 CLR 1, 165–6 (Gummow J). See also *Leeth v Commonwealth* (1992) 174 CLR 455, 484 (Deane and Toohey JJ).

117 Elisa Arcioni, 'That Vague but Powerful Abstraction: The Concept of "The People" in the Constitution' (Research Paper No 14/15, Sydney Law School, 10 February 2014). See also *Langer v Commonwealth* (1996) 186 CLR 302, 342 (McHugh J) ('*Langer*').

118 Robert French, 'The Constitution and the People' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 60, 80.

119 Leslie Zines, 'The Sovereignty of the People' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91, 100.

120 *Levy v Victoria* (1997) 189 CLR 579, 622 (McHugh J).

121 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 335 (Deane J) ('*Cunliffe*').

122 *McGinty v Western Australia* (1996) 186 CLR 140, 201 (Toohey J) ('*McGinty*'), quoting *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ). See also *McGinty* (n 122) 167 (Brennan CJ), 182 (Dawson J).

123 *Hwang v Commonwealth* (2005) 80 ALJR 125, 130 [17] (McHugh J) ('*Hwang*').

124 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 35 (McTiernan and Jacobs JJ) ('*McKinlay*'). See also at 36 (McTiernan and Jacobs JJ).

A *Electors — A Subset of the People*

While ss 7 and 24 make clear that federal parliamentarians must be chosen by 'the people', not *all* of 'the people' are entitled to participate in that choice. That is a logical consequence of ss 8 and 30 of the *Constitution*, which envisage that there will be a class of 'electors' who are eligible to vote in federal elections and referenda.[125] It is ss 8 and 30, together with s 51(xxxvi), that confer on Parliament what the High Court has recognised as a 'broad'[126] power to specify the qualifications of 'electors'.[127]

As is well known, for years after Federation the class of 'electors' was significantly narrower than it is today. Although it differed from State to State,[128] there were exclusions from the franchise (for example) for women,[129] Aboriginal persons,[130] and persons in receipt of charitable aid. None of those exclusions survive, the franchise now having been extended, subject to limited exceptions, to all Australian *citizens* over 18 years of age, and also to a residual category of non-citizen British subjects who were enrolled to vote before 26 January 1984.[131]

There are statements in some authorities that give the impression that 'the people' in ss 7 and 24 is synonymous with 'electors'.[132] If that were correct, persons disqualified from the franchise in 1900 would not have formed part of 'the people' of 1900, with the content of 'the people' changing over time to reflect the franchise becoming more inclusive. However, the proposition that most Australian women did not form part of the people of the Commonwealth in 1900 strikes me as obviously untenable.

125 *Constitution* s 128.

126 *Alexander* (n 44), 575 [46] (Kiefel CJ, Keane and Gleeson JJ). See also *Ruddick v Commonwealth* (2022) 275 CLR 333, 389 [149] (Gordon, Edelman and Gleeson JJ, Steward J agreeing at 398 [174]) ('*Ruddick*').

127 Section 122 supports laws providing for the qualification of electors in the Territories: see generally *Western Australia* (n 86); *McKellar* (n 115); *Bennett v Commonwealth* (2007) 231 CLR 91 ('*Bennett*').

128 See generally Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28(1) *Federal Law Review* 125, 144–5; Jennifer Norberry, 'The Evolution of the Commonwealth Franchise: Tales of Inclusion and Exclusion' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 80, 82–90.

129 The *Commonwealth Franchise Act 1902* (Cth) granted women the right to vote at federal elections ('*Franchise Act*').

130 It was not until 1949 that the Commonwealth franchise was extended to certain Aboriginal peoples who were or had been members of the Defence Force: see *Commonwealth Electoral Act 1949* (Cth) s 3. Then, in 1962, all Aboriginal peoples were granted the right to vote: see *Commonwealth Electoral Act 1962* (Cth).

131 *Commonwealth Electoral Act 1918* (Cth) s 93(1) ('*Electoral Act 1918*').

132 See, eg, *McKinlay* (n 124) 44 (Gibbs J); *Langer* (n 117) 342 (McHugh J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 304 [355] (Heydon J); *Hwang* (n 123) 130 [18] (McHugh J). See also French (n 118) 75–6; Twomey (n 128) 144–6, 151.

The better view is that ss 8 and 30 confer power on the Parliament to identify a *subset* of 'the people' as 'electors'.[133] The fact that the *Constitution* confers a power of this kind signals that some individuals who form part of 'the people' in ss 7 and 24 may nevertheless validly be prevented from participating in the 'direct choice' of parliamentarians. But who may be excluded, and according to what criteria?

The answer the High Court has given to that question in the line of cases including *Roach v Electoral Commissioner*,[134] *Rowe*, and *Murphy v Electoral Commissioner*[135] is that laws that impose impediments to universal adult suffrage,[136] whether directly or in their substantive effect, will be valid only if justified by a 'substantial reason'.[137] The existence of that limitation has the consequence that, if members of 'the people' are to be prevented from participating in the direct choice identified in ss 7 and 24, that can validly occur only for reasons that can withstand judicial scrutiny.[138]

So understood, the 'substantial reason' limitation is not concerned with Parliament's power to determine or select *who* constitutes 'the people' (if, indeed, Parliament has any such power).[139] Nor is it concerned with requiring substantial reasons to justify any reduction of the *existing statutory franchise* (which, if that were the concern, would mean that legislation extending the franchise would operate as a kind of constitutional ratchet).

Instead, the more conceptually satisfying analysis is to view these cases as identifying an implied limitation on Parliament's power to define the *class* of

133 *Ruddick* (n 126) 390 [151] (Gordon, Edelman and Gleeson JJ, Steward J agreeing at 398 [174]). See also Kiefel CJ and Keane J referring to the 'people as electors': at 343 [3], 347 [16]. See also Gageler J using similar terminology: at 350–1 [27]. See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 80 [149], 81 [155] (Keane J) ('*Murphy*'); *Alexander* (n 44) 575 [46] (Kiefel CJ, Keane and Gleeson JJ); Justice Patrick Keane, 'The People and the *Constitution*' (2016) 42(3) *Monash University Law Review* 529, 539.

134 (2007) 233 CLR 162 ('*Roach*').

135 *Murphy* (n 133).

136 In *Rowe* (n 114), the majority used the language of 'disentitle', 'exclude', or 'disqualify' persons otherwise entitled to vote from voting: at 12 [3] (French CJ), 59 [160], 61 [167] (Gummow and Bell JJ), 119 [381], 120–1 [384] (Crennan J). See also ibid 59 [55]–[56] (Kiefel J). In *Murphy* (n 133), members of the Court referred to laws that: impose 'any detriment to, or burdening of, the ability to vote': at 60 [60] (Kiefel J); 'impose legal or practical exclusions from the franchise': at 68 [87] (Gageler J); 'have a substantive effect on the entitlement to vote, which, in turn, affects the franchise': at 107 [244] (Nettle J); and effect a 'restriction on, or exclusion from, the franchise': at 125 [308] (Gordon J).

137 See, eg, *Ruddick* (n 126) 388 [148] (Gordon, Edelman and Gleeson JJ, Steward J agreeing at 398 [174]); *Murphy* (n 133) 68 [87] (Gageler J).

138 The amendments to the *Electoral Act 1918* (n 131) held invalid in *Roach* (n 134) disqualified persons serving a sentence of imprisonment, regardless of duration, from voting (expanding the disqualification). The amendments held invalid in *Rowe* (n 114) removed the existing statutory grace period which allowed an opportunity to enrol up to seven days after the issue of the writs, and shortened the grace period for transfers of enrolment.

139 *Rowe* (n 114) 20–1 [25] (French CJ). Cf *Hwang* (n 123) 130 [18] (McHugh J).

electors. On that analysis, what has changed with the passage of time since Federation is not the composition of 'the people', but rather what will be regarded as a 'substantial reason' to exclude a subset of 'the people' from the class of 'electors'.[140] That way of seeing the issue was accepted by the majority in *Ruddick v Commonwealth*, who said:

> What a court will accept as a substantial reason will vary over time, including with changing social conditions. For instance, whether or not they could ever have been justified, there could not be any justification for the laws that existed in all States except South Australia and Western Australia that denied the vote at the first Commonwealth election to women, or the laws … that banned Aboriginal people from the electoral roll.[141]

Thus, the fact that many Australian women were excluded from voting in 1901 does not mean those women were not *part of* 'the people'. To the contrary, they were, even when they were not 'electors'. Parliament's exercise of its power under ss 8 and 30 progressively to extend the franchise was a 'historical development of constitutional significance',[142] not because the legislation operated as a ratchet, but because it embodied Parliament's recognition that some reasons that may previously have been accepted as 'substantial reasons' for excluding subsets of 'the people' from being 'electors' according to social attitudes at the time *no longer* justified that exclusion.[143]

Nevertheless, we have not reached a position where all of the people are now electors. Most obviously, children form part of 'the people', but are not electors. That does not raise any constitutional problem for, leaving aside possible debate at the margins, there is no doubt that the exclusion of children from the franchise is justified.

B *'The People' and Citizens*

If 'electors' are a subset of 'the people', is the same true of 'citizens'?

For the reasons I have already addressed, citizenship is a statutory status that has constitutional significance, because with limited exceptions, non-citizens will be aliens. However, in addition to its constitutional significance, citizenship is also a status that other statutes use as a hook by reference to which they confer or impose

140 This bears resemblance to the High Court's approach to the essential features of trial by jury for the purposes of s 80 of the *Constitution*: see *Cheatle v The Queen* (1993) 177 CLR 541, 560–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), referred to by analogy in *McGinty* (n 122) 200–1 (Toohey J).

141 *Ruddick* (n 126) 389 [148] (Gordon, Edelman and Gleeson JJ) (citations omitted).

142 *Roach* (n 134) 174 [7] (Gleeson CJ). See also at 187–8 [49] (Gummow, Kirby and Crennan JJ).

143 Ibid 173–4 [6]–[7] (Gleeson CJ); *McKinlay* (n 124) 36 (McTiernan and Jacobs JJ, Murphy J dissenting at 69). See also *McGinty* (n 122) 166–7 (Brennan CJ), 286–7 (Gummow J); *Rowe* (n 114) 18–19 [20], 19 [22] (French CJ); *Murphy* (n 133) 48 [28] (French CJ and Bell J), 69 [90]–[91] (Gageler J).

rights, privileges, and responsibilities.[144] As Gaudron J put it in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, citizenship 'is and can be pressed into service for a number of constitutional purposes'.[145] Perhaps most importantly,[146] since 1981[147] it has been foundational to the entitlement to enrol to vote,[148] with *non-citizens*[149] excluded from the franchise except for a limited category of British subjects who enrolled before 26 January 1984.[150] Citizenship is also a condition for eligibility to be elected as a member of the Commonwealth Parliament[151] and to serve on a jury.[152]

The close practical alignment between citizenship and the right to participate in the democratic and political life of the body politic prompts this question: is there a dichotomy between 'aliens' and 'the people' such that, by determining who is and who is not to have the legal status of a citizen (and therefore, reciprocally, who is an alien), Parliament also indirectly identifies 'the people'? Put differently, with the exception of the sui generis class in *Love*,[153] are 'the people' and 'citizens' synonymous? Put differently again, is the first aspect of the aliens power functionally equivalent to a power to define 'the people'?

1 *Support for View that There Is an 'Alien'/'the People' Dichotomy*

There are quite a number of statements in High Court authorities, as well as some academic commentary,[154] that suggest that the answer to these questions is 'yes'.

144 *Love* (n 21) 198 [95] (Gageler J); *Alexander* (n 44) 572 [31] (Kiefel CJ, Keane and Gleeson JJ).

145 *Lim* (n 10) 54.

146 See *Roach* (n 134) 174 [7] (Gleeson CJ), 198 [81], 198–9 [83] (Gummow, Kirby and Crennan JJ); *Rowe* (n 114) 111–12 [344] (Crennan J); *Love* (n 21) 198 [95] (Gageler J). See also *Judd v McKeon* (1926) 38 CLR 380, 385 (Isaacs J), describing the franchise as conferring 'a political right of the highest nature'.

147 See *Statute Law (Miscellaneous Amendments) Act 1981* (Cth) s 32.

148 *Electoral Act 1918* (n 131) s 93(1)(b)(i).

149 Before 1981, since shortly after Federation, only British subjects who had lived in Australia for a specified period were within the class of 'electors': see, eg, *Franchise Act* (n 129) s 3; ibid ss 39(1)–(2), as enacted.

150 *Electoral Act 1918* (n 131) s 93(1)(b)(ii).

151 Ibid s 163(1)(b).

152 Every State and Territory specifies that a person is (subject to disqualifications) eligible for jury service if they are enrolled as an elector in the relevant State or Territory: see *Juries Act 1967* (ACT) s 9; *Jury Act 1977* (NSW) s 5; *Juries Act 1962* (NT) s 9(1); *Jury Act 1995* (Qld) s 4(1)(a); *Juries Act 1927* (SA) s 11; *Juries Act 2003* (Tas) s 6; *Juries Act 2000* (Vic) s 5; *Juries Act 1957* (WA) s 4. See also *Federal Court of Australia Act 1976* (Cth) s 23DH(1)(b). Only Australian citizens and certain British subjects are eligible to enrol to vote in the States and Territories: see, eg, *Electoral Act 1992* (ACT) s 72(1)(a); *Electoral Act 2017* (NSW) ss 30(1)(b), (2)(a); *Constitution Act 1975* (Vic) s 48(1)(a); *Electoral Act 1907* (WA) s 17(1)(a).

153 *Love* (n 21) 187 [62]–[63], 192 [81] (Bell J), 258 [279] (Nettle J), 276–7 [348]–[349], 278 [353] (Gordon J), 288 [394], 290 [398], 301–2 [424], 308 [438] (Edelman J).

154 See, eg, Patrick Keyzer, Christopher Goff and Asaf Fisher, *Principles of Australian Constitutional Law* (LexisNexis Butterworths, 5th ed, 2017) 20, stating '[a]liens are not "people" for the purposes of ss 7 and 24 of the *Constitution*'.

In *Alexander*, for example, Kiefel CJ, Keane and Gleeson JJ (with whom Gageler J agreed) referred to the first aspect of the aliens power as 'empower[ing] the Parliament to give practical content to the expression "the people"'.[155] Their Honours also quoted with approval Gageler J's remark in *Love* that, pursuant to the aliens power, Parliament may

> *bring a measure of precision* to the identification of … 'the people', by laying down criteria for determining with specificity which persons were and which persons were not to have the legal status of members of the body politic of the Commonwealth …[156]

That statement strongly implies that *only* citizens form part of 'the people'.[157] That is consistent with observations in a number of other cases. To give just two examples among many: first, in *Rowe*, French CJ said that 'the adoption of universal adult-*citizen* franchise' has caused the concepts of 'the people' and 'the electors' to 'converge', as the 'non-inclusion of *non-citizens* [and] minors', among others, 'leaves little relevant room for distinguishing between "the people" and those entitled to become electors'.[158] Second, in *Hwang v Commonwealth*, McHugh J observed that Parliament's power to make laws with respect to citizenship arises, in part, 'by implication out of the Parliament's … entitlement *to define who are "the people"* who make up the Australian community'.[159] His Honour said there was 'no doubt that being one of "the people of the Commonwealth" was recognised as synonymous with … being a citizen'.[160]

Even where the expression 'universal *adult* franchise' is used (as opposed to universal adult citizen franchise) to identify a baseline franchise, exclusion from which must be justified by a substantial reason, the context generally suggests it was intended to be descriptive of the *existing* franchise[161] (which, as I have explained, does not include non-citizens except for a residual class of British subjects).

155 *Alexander* (n 44) 574 [44].

156 Ibid, quoting *Love* (n 21) 197–8 [94] (emphasis added).

157 See also *Alexander* (n 44) 575 [46], where Kiefel CJ, Keane and Gleeson JJ (Gageler J agreeing with the substance of their Honours' reasons at 583 [98]) referred to a person repudiating 'the obligations of citizenship on which membership of the people of the Commonwealth depends'. See also Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 4th ed, 2018) 722 [10.325].

158 *Rowe* (n 114) 19 [21] (emphasis added). See also *McGinty* (n 122) 204 (Toohey J), observing that 'we are speaking of a representative democracy in which each citizen is entitled to be represented in government. The goal is effective representation of all citizens'.

159 *Hwang* (n 123) 128 [10] (emphasis added).

160 Ibid 129 [11].

161 See, eg, *McKinlay* (n 124) 36 (McTiernan and Jacobs JJ), stating that 'the long established universal adult suffrage may now be *recognized as a fact*' (emphasis added); *McGinty* (n 122) 201 (Toohey J), referring to 'universal adult franchise', but then at 204 referring to 'each citizen' being 'entitled to be represented in government'; *Roach* (n 134) 173–4 [6]–[7] (Gleeson CJ), 199 [85] (Gummow, Kirby and Crennan JJ). See also at 174 [7] (Gleeson CJ), referring to universal adult suffrage as 'an *historical development* of constitutional significance' (emphasis added); *Rowe* (n 114) 73 [213] (Hayne J), 119 [376] (Crennan J).

Underpinning those observations is the implicit proposition that the pool of 'people' from which electors may permissibly be drawn does not include people who do not 'belong' to the body politic — that is, that it does not include aliens.[162]

2 *The Better View Is that There Is No 'Alien'/'the People' Dichotomy*

Notwithstanding the statements in *Alexander* and the other authorities to which I have just referred, there is a good argument that the position is more complex. Further, as none of those observations were specifically directed to the question whether aliens may be part of 'the people', they do not preclude that possibility as a matter of authority.

In my opinion, the better view is that, while laws enacted under the first aspect of the aliens power do bring 'a measure of precision'[163] to the identification of 'the people', they do so *only* by defining a class of person who *definitely* fall within 'the people'[164] (even then, putting to one side a possible complication for citizens who are living overseas for an extended period).[165] However, such a law does not bring precision to 'the people' by being definitional of that class.[166]

3 *Resident Aliens Absorbed into the Community Are Part of 'the People'*

In developing the argument in support of that claim, I start with longstanding High Court authority to the effect that some aliens are part of the Australian community. The aliens in question are those who came to Australia as immigrants, and who thereafter became *absorbed* into the Australian community. It is well settled that such absorption takes those persons beyond the reach of the immigration power in

162 See, eg, *Alexander* (n 44) 574 [39], 577 [62]–[63] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 583 [98]), 591 [142] (Gordon J), 601 [186], 604 [199], 610 [232] (Edelman J), 621 [286] (Steward J).

163 *Love* (n 21) 197 [94] (Gageler J).

164 Zines (n 119) 100, observing that '[p]resumably all citizens are notionally part of the mystical body of the people, even if they cannot all effectively contribute to the exercise of sovereign power'. See also *Roach* (n 134) 174–5 [8] (Gleeson CJ).

165 As to such people, see Bryan Mercurio and George Williams, 'The Australian Diaspora and the Right to Vote' (2004) 32(1) *University of Western Australia Law Review* 1, 14. As it happens, certain Australian citizens who live overseas for extended periods (and who do not intend to return to Australia within specified periods) are not entitled to be treated as 'eligible overseas elector[s]' and are therefore unable to enrol to vote: see *Electoral Act 1918* (n 131) ss 94(1)(c), (1A)–(1B), (5)(c), (8)–(9), (11)(b), (13), 94A(1)(d), (2)(c). See also at s 4(1) (definition of 'Eligible overseas elector').

166 See Elisa Arcioni, 'Citizenship' in Cheryl Saunders and Adrienne Stone (eds), *Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 339, 354.

s 51(xxvii).[167] It is, however, also well settled that such absorption has no effect upon a person's status as an alien.[168]

The 'notion of an Australian community and of the absorption into it of persons not born in Australia'[169] can be traced back to *Potter v Minahan*,[170] which was decided in 1908. There, Isaacs J (who, at the time, was in dissent) explained that 'immigration connotes two facts; the first, that there is an entry into Commonwealth territory, and the second, that the person entering is not in fact at the moment he enters one of the *people of the Commonwealth*'.[171] His Honour went on to state 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*'.[172]

That reasoning was subsequently endorsed by the Court, which has held that, 'vague as it may be',[173] whether a person has been absorbed into the Australian community is a question of constitutional fact[174] of a 'multi-dimensional character'.[175]

167 See, eg, *Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 62–5 (Knox CJ), 109–10 (Higgins J), 137–8 (Starke J) ('*Re Yates*'); *O'Keefe v Calwell* (1949) 77 CLR 261, 277 (Latham CJ); *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168, 172–4 (Barwick CJ).

168 *Pochi* (n 40) 111 (Gibbs CJ, Mason J agreeing at 112, Wilson J agreeing at 116); *Cunliffe* (n 121) 295 (Mason CJ); *Ex parte Te* (n 42) 171–2 [24]–[26], 175–6 [40]–[42] (Gleeson CJ), 180 [58] (Gaudron J), 186 [82] (McHugh J), 194 [116] (Gummow J); *Love* (n 21) 175 [19] (Kiefel CJ), 246 [257], 248 [261] (Nettle J), 299–300 [418]–[420] (Edelman J).

169 *Re Patterson* (n 50) 472 [246] (Gummow and Hayne JJ).

170 (1908) 7 CLR 277 ('*Potter*'). See also *Ah Sheung* (n 33) 951–2, where Griffith CJ (on behalf of the Court) observed that 'there is much force in the view … that the term "immigration" does not extend to the case of *Australians* … who are merely absent from Australia on a visit', whilst refraining from expressing a view as to who should be considered 'Australians, so as not to be "immigrants" on their return' (emphasis added).

171 *Potter* (n 170) 308 (emphasis added). See also at 299 (Barton J), 305 (O'Connor J).

172 Ibid 308 (emphasis added).

173 *Ex parte Te* (n 42) 172 [26] (Gleeson CJ). See also *Re Patterson* (n 50) 444–5 [160] (Gummow and Hayne JJ), quoting *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 577 (Dixon J) ('*Koon Wing Lau*').

174 *Re Patterson* (n 50) 472–3 [247] (Gummow and Hayne JJ).

175 It requires consideration of factors such as the length of time a person has spent in Australia, any intention to settle permanently here, strength of familial, economic and community ties to Australia, and any criminal record: *Johnson v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 136 FCR 494, 510–11 [46] (French J), quoted with approval in *Moore v Minister for Immigration and Citizenship* (2007) 161 FCR 236, 247–8 [49] (Gyles, Graham and Tracey JJ). The High Court refused an application for special leave to appeal from that decision: see Transcript of Proceedings, *Moore v Minister for Immigration and Citizenship* [2008] HCATrans 204. See also *Ex parte Te* (n 42) 218 [201] (Kirby J), 228–9 [227] (Callinan J).

Many different formulations have been used to describe the nature of the inquiry to identify when an immigrant ceases to hold that status.[176] There are, for example, references to a person becoming: 'absorbed into the Australian community';[177] 'a member of the Australian community';[178] 'a *full* member of the Australian community';[179] 'a part of the people of Australia';[180] 'part of the community known as the Australian people';[181] 'one of the people of Australia';[182] and a person 'who belong[s] to the Australian community'.[183]

These formulations suggest that the *reason* people who have been absorbed into the Australian community cease to be within the reach of the immigration power is that they have become part of 'the people' of the Commonwealth,[184] notwithstanding the fact that absorption does not affect their status as aliens.[185] To my mind, coherence in constitutional interpretation suggests that, once a person becomes part of 'the people' for that purpose, they should equally be part of 'the people' for the purposes of ss 7 and 24. These cases therefore suggest that at least some aliens do form part of 'the people'.

It is interesting to note that, while there has been only limited consideration of the issue,[186] the United States Supreme Court has approached the meaning of 'the people' in the Bill of Rights in a similar way. Of particular relevance, in *United States v Verdugo-Urquidez* ('*Verdugo-Urquidez*'), the majority held that

176 See, eg, *Koon Wing Lau* (n 173) 561 (Latham CJ), 588–9 (Williams J); *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369, 372–3 (Barwick CJ), 373–4 (Gibbs J), 376–7 (Stephen J), 379–81 (Mason J), 383–5 (Jacobs J), 388 (Murphy J) ('*Ex parte Henry*'); *Nolan* (n 49) 194 (Gaudron J).

177 See, eg, *Cunliffe* (n 121) 295 (Mason CJ); *Ex parte Te* (n 42) 171–2 [25] (Gleeson CJ); *Ex parte Henry* (n 176) 374 (Gibbs J), 382 (Mason J), 385 (Jacobs J).

178 See, eg, *Ex parte Henry* (n 176) 379 (Mason J). See also *Re Yates* (n 167) 65 (Knox CJ).

179 See, eg, *Ex parte Henry* (n 176) 373 (Gibbs J) (emphasis added).

180 See, eg, ibid 374 (Gibbs J). See also *Re Yates* (n 167) 62 (Knox CJ), referring to 'members of the Australian community' as 'persons who had made their homes in Australia and become part of its people'.

181 See, eg, *Potter* (n 170) 308 (Isaacs J), quoted with approval in *Re Yates* (n 167) 137 (Starke J). See also at 65 (Knox CJ).

182 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518, 580 (Starke J); *Koon Wing Lau* (n 173) 589 (Williams J).

183 *Koon Wing Lau* (n 173) 577 (Dixon J).

184 See, eg, Pillai (n 2) 606–8.

185 *Pochi* (n 40) 111 (Gibbs CJ, Mason J agreeing at 112, Wilson J agreeing at 116), citing William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 8th ed, 1778) bk 1, 374, Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (1820) 14–15 and WS Holdsworth, *A History of English Law* (Methuen, 3rd ed, 1926) vol 9, 76; *Cunliffe* (n 121) 295 (Mason CJ); *Ex parte Te* (n 42) 171–2 [24]–[26], 175–6 [40]–[42] (Gleeson CJ), 180 [58] (Gaudron J), 185–6 [82] (McHugh J), 194–5 [116] (Gummow J); *Love* (n 21) 175 [19] (Kiefel CJ), 246 [257], 247–8 [261] (Nettle J), 299–300 [418]–[420] (Edelman J).

186 See Note, 'The Meaning(s) of "the People" in the Constitution' (2013) 126(4) *Harvard Law Review* 1078, 1078 ('The Meaning(s) of "the People" in the Constitution').

> 'the people' protected by the Fourth Amendment, and by the First and Second Amendments … refers to a class of persons who are part of a national community *or who have otherwise developed sufficient connection with this country to be considered part of that community*.[187]

The majority held that 'aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country'.[188] Four Judges dissented on this issue, but those Judges took even wider views of 'the people', holding that the term encompassed 'aliens who are lawfully present in the United States'[189] or 'the governed'.[190] Thus, no member of the Supreme Court would have confined 'the people' to citizens. In that regard, the judgment stands in stark contrast to the notorious judgment in 1856 in *Scott v Sandford*, where on this issue the Supreme Court said that '[t]he words "people of the United States" and "citizens" are synonymous'.[191]

4 *Aliens Who Usually Reside in Australia Probably Part of 'the People'*

While the absorption cases in Australia point *at least* to a similar answer to that given by the majority of the United States Supreme Court in *Verdugo-Urquidez*, there is reason to think that the Australian position might more closely reflect the dissenting views taken in that case, in that 'the people' might include aliens who are permanently resident in Australia, even if they have *not* been absorbed.

That possibility derives some support from reading the reference to 'the people of the Commonwealth' in the first paragraph of s 24 in the context of the provision as a whole. The second paragraph of s 24 states that '[t]he number of members chosen in the several States shall be in proportion to the respective numbers of their people' and that, until Parliament otherwise provides,[192] the number of members for each State 'shall be ascertained by dividing the number of the people of the

187 494 US 259, 265 (Rehnquist CJ for the Court) (1990) (emphasis added) ('*Verdugo-Urquidez*').

188 Ibid 271. Later, in 2008, in *District of Columbia v Heller*, 554 US 570, 580 (2008) ('*Heller*'), the Court quoted from ibid with approval, although it made some observations that seem in tension with it (eg, referring to 'the people' as 'all members of the political community': *Heller* (n 188) 580; and stating that the Second Amendment rights inure at least to 'law abiding, responsible *citizens*': at 635 (emphasis added)). See 'The Meaning(s) of "the People" in the Constitution' (n 186) 1078–9; *United States v Meza-Rodriguez*, 798 F 3d 664, 669–72 (Wood CJ) (7th Cir, 2015).

189 *Verdugo-Urquidez* (n 187) 279 (Stevens J dissenting on this point).

190 Ibid 284, 287 (Brennan and Marshall JJ, Blackmun J agreeing at 297). See also *Kwong Hai Chew v Colding*, 344 US 590, 596 (Burton J for the Court) (1953).

191 60 US 393, 404 (Taney CJ for the Court) (1857).

192 Parliament has 'otherwise provided' in s 48(2) of the *Electoral Act 1918* (n 131), which relevantly requires the Electoral Commissioner to ascertain a quota 'by dividing the number of people of the Commonwealth, *as ascertained in accordance with section 46*, by twice the number of the senators for the States' (emphasis added). See also *Representation Act 1905* (Cth) ss 2, 4, schs A–B.

Commonwealth, *as shown by the latest statistics of the Commonwealth*, by twice the number of senators'.

Section 24 provides no detail as to what the 'latest statistics' were to measure in identifying the 'number of the people of the Commonwealth'.[193] Parliament has provided that detail, with the *Commonwealth Electoral Act 1918* (Cth) requiring the Electoral Commissioner to ascertain the numbers of the people of the Commonwealth and the people of each State,[194] 'using the statistics for … *populations* … compiled and published in a regular series under the *Census and Statistics Act 1905*'.[195]

According to the Australian Bureau of Statistics, those 'population' figures[196] are ascertained by a methodology that 'includes all people who usually live in Australia (regardless of nationality, citizenship, or visa status), with the exception of people present for foreign military, consular or diplomatic reasons'.[197] In other words, Parliament has treated 'the people of the Commonwealth' in the first paragraph of s 24 as including all non-citizens who 'usually live' in any Australian state (subject to the exceptions just mentioned).[198]

Aspects of the drafting history of s 24 — and certain other provisions that refer to 'the people'[199] — likewise support the view that 'the people' should be equated

193 As noted in *McKellar* (n 115) 537 (Gibbs J).

194 *Electoral Act 1918* (n 131) ss 46(1)(a)–(b).

195 Ibid s 46(1B) (emphasis added). Section 9(1)(a) of the *Census and Statistics Act 1905* (Cth) provides that the Statistician 'may from time to time collect such statistical information in relation to the matters prescribed for the purpose of [s 9] as he or she considers appropriate'. The results of any statistical information collected under that Act (or abstracts of results) must be published and disseminated: at s 12(1). Item 38 of s 13 of the *Census and Statistics Regulation 2016* (Cth) relevantly prescribes that statistical information about 'population' may be collected for publication.

196 See, eg, Australian Bureau of Statistics, *National, State and Territory Population, December 2021* (Catalogue No 3101.0, 28 June 2022).

197 See 'National, State and Territory Population Methodology', *Australian Bureau of Statistics* (Web Page, 28 June 2022) <https://www.abs.gov.au/methodologies/national-state-and-territory-population-methodology/dec-2021#>.

198 The Court having held in *McKellar* (n 115) that the 'people of the Commonwealth' in s 24 does not include the people of the territories, thereby upholding the predecessor of s 45 of the *Electoral Act 1918* (n 131).

199 *First*, much like s 24, s 105 (which is concerned with the Commonwealth taking over public debts from the states) refers to the number of the people of the states 'as shown by the latest statistics of the Commonwealth'. Earlier drafts of that provision referred to 'the *populations* of the several States as ascertained by the latest statistics': see, eg, John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 606 (emphasis added), reproducing cl 98 of the draft Constitution Bill framed and approved in Adelaide in 1897. *Second*, as enacted, the heading to the now repealed s 127 of the *Constitution* (providing that '[i]n reckoning the numbers of the *people* of the Commonwealth, or of a State … aboriginal natives shall not be counted' (emphasis added)) was in the following terms: 'Aborigines not to be counted in reckoning *population*' (emphasis added).

with the 'population'.[200] Indeed, earlier drafts of s 24 specifically referred to 'the population' of the Commonwealth.[201]

Some support for the view that 'the people' in ss 7 and 24 includes non-citizens *resident* in Australia can also be found in the authorities.[202] In particular, some Justices have contemplated that it is *open* to Parliament to include resident aliens among the 'electors', thereby proceeding on the implicit premise they are part of 'the people' (because — as I have explained — electors are a subset of the people). For example, in *Re Patterson; Ex parte Taylor*, Gummow and Hayne JJ stated that in most respects 'the selection of those of the *population* from among whom electors would be selected was left by s 30 of the *Constitution* to laws made by the Parliament'.[203] Their Honours observed that the fact that 'the Parliament has included among the electors it selects … persons who are not citizens does not thereby deny to those persons the character of aliens'.[204] In *Ex parte Te*, Gleeson CJ said the right to vote was not 'necessarily incompatible with the status of alienage', and that Parliament may 'extend the franchise to certain kinds of *resident alien*, just as it [may] … deny the right to vote to some citizens'.[205] And, in *Shaw*,

200 See also *McKinlay* (n 124) 21–2, 28, 30, 33 (Barwick CJ), 75 (Murphy J); Quick and Garran (n 5) 450, 454.

201 An earlier draft of s 24 provided that

> the quota shall … be ascertained by dividing the *population of the Commonwealth* as shown by the latest statistics of the Commonwealth by twice the number of members of the Senate, and the number of members to which each State is entitled shall be determined by dividing the *population of the State* as shown by the latest statistics of the Commonwealth by the quota.

Williams (n 199) 589 (emphasis added), reproducing cl 24 of the draft Constitution Bill framed and approved in Adelaide in 1897. See also Williams (n 199) 192, reproducing cl 21 of the draft Constitution Bill as considered on the voyage of the *Lucinda*, with annotations changing references from 'populations' and 'inhabitants' to 'people'. Cf Williams (n 199) 322, reproducing cl 24 of the draft Constitution Bill as adopted by the Constitution Committee in Sydney in 1891, after the voyage of the *Lucinda*; 863, reproducing cl 24 of the draft Constitution Bill as amended on 1 March 1898 at the Melbourne Session of the Convention.

202 Treating residence within a place as sufficient to allow the resident to form part of 'the people' of that place is consistent with McHugh J's analysis in *Street v Queensland Bar Association* (1989) 168 CLR 461, 583–4 ('*Street*'), where his Honour observed (albeit in the context of s 117 of the *Constitution*) that 'the people of each State' and 'the residents of a State' are 'basically interchangeable concepts'. By contrast, however, Quick and Garran (n 5) treated 'subject[s] of the Queen*,* resident in any State' and 'the people' as synonymous ('subject of the Queen' being the status governing formal membership of the body politic prior to the creation of Australian citizenship): at 449, 957. See also *Singh* (n 4) 382 [149] (Gummow, Hayne and Heydon JJ); *Street* (n 202) 522–5 (Deane J), 541 (Dawson J). Cf at 505 (Brennan J), 554 (Toohey J), not deciding whether 'subject of the Queen' in s 117 is synonymous with 'Australian citizen'.

203 *Re Patterson* (n 50) 468 [233] (emphasis added), citing *McGinty* (n 122) 279 (Gummow J). Cf *Rowe* (n 114) 46 [115] (Gummow and Bell JJ), referring to the 'selection by the Parliament of those among the population who are to be taken to answer the constitutional expressions in ss 7 and 24 respectively "by the people of the State" and "by the people of the Commonwealth"'.

204 *Re Patterson* (n 50) 468 [234]. That observation was made in circumstances where counsel for Ms Patterson had specifically contended that there was a dichotomy between the 'people of the Commonwealth on one hand and aliens on the other': see Transcript of Proceedings, *Re Patterson; Ex parte Taylor* [2000] HCATrans 735, 1100–4 (P Le G Brereton SC).

205 *Ex parte Te* (n 42) 173 [30] (emphasis added) (citations omitted).

the majority saw no difficulty with the franchise being extended to certain British subjects resident in Australia, despite holding that they were nevertheless aliens.[206]

Even if it is correct that 'resident aliens' may form part of 'the people', I doubt that an alien who just happens to be visiting Australia on polling day would have that status.[207] It is more likely that aliens form part of 'the people' only if they are habitually or ordinarily resident in Australia. Such persons constitute part of the population, or the 'permanent population', of Australia.[208] They are part of the community 'governed'[209] by the Parliament and the executive government of the Commonwealth.

One consequence of acceptance of the argument I have just developed is that, to the extent 'the people' includes resident aliens, it is not only *open* to Parliament to extend the franchise to some non-citizens, but it would be impermissible to *withhold* the franchise from them unless that is justified by a substantial reason. For my part, however, I do not regard that as a troubling proposition, because I have little doubt that, at least as a general rule, citizenship would be a sufficient 'basis for discriminating between those who will and those who will not be permitted to vote'.[210] To hold otherwise would be inconsistent with longstanding practice both in Australia and elsewhere.[211]

VI CONCLUSION

How, then, do the concepts outlined at the start of this article interrelate? There are, in my view, four propositions that can be extracted. *First*, subject to the sui generis category in *Love*, all people who are not citizens pursuant to the *Citizenship Act* are 'aliens' (constitutionality being ensured by the fact that any amendment to that

206 *Shaw* (n 38) 38 [16] (Gleeson CJ, Gummow and Hayne JJ). See also at 84 [176] (Callinan J, dissenting, but agreeing that voting rights were not determinative of alienage). See also *Chetcuti v Commonwealth* (2020) 272 CLR 457, 476–7 [54] (Nettle J). His Honour's decision was upheld on appeal: *Chetcuti* (n 35).

207 See, eg, Quick and Garran (n 5) (in the context of the meaning of 'resident' in s 117 of the *Constitution*), stating that '"a resident in any State" means a person who *permanently lives* in a State; one who is not a mere visitor or sojourner; one who by his [or her] continued residence in a State has become identified with it and is regarded as one of its people': at 960 (emphasis added). See also at 477 (in respect of the requirement that members of Parliament must have been resident within the limits of the Commonwealth for at least three years).

208 Cf *Love* (n 21) 308 [438] (Edelman J).

209 To the extent that 'the governed' might be understood to extend beyond natural persons to corporations and other entities in some constitutional contexts, they are plainly outside 'the people', artificial entities never having been entitled to participate in the direct choice of representatives contemplated by ss 7 and 24: see, by analogy, *Street* (n 202) 504 (Brennan J).

210 *Roach* (n 134) 175 [8] (Gleeson CJ), citing *Bennett* (n 127). See also *Re Patterson* (n 50) 493 [305] (Kirby J), observing that '[n]ationality is usually, but not always, a requirement for voting rights'.

211 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 25, which recognises the right of *citizens* to participate in public affairs, to vote, and to access the public service.

Act must comply with the *Pochi* limit). *Second*, while a person is a citizen, that person is also one of 'the people of the Commonwealth'. *Third*, citizens do not exhaustively comprise 'the people'.[212] In addition, 'the people' probably also include aliens who have become absorbed into the Australian community, and quite possibly also other aliens who usually reside in Australia. *Fourth*, electors are a subset of 'the people', with any difference between the class of 'electors' and 'the people' being required to be justified by a substantial reason sufficient to explain why some of 'the people' are being excluded from participation in the direct choice contemplated by ss 7 and 24 of the *Constitution*. While the exclusion of non-citizens from the franchise is very likely constitutionally justified, such exclusion is not constitutionally required.

As a final note, I emphasise that in most respects decisions about membership of the Australian political community are entrusted by the *Constitution* to Parliament. In particular, it is Parliament that specifies the criteria to determine whether aliens may become Australian citizens, or whether aliens may otherwise lawfully reside in Australia, thereby becoming part of 'the people' who together comprise the body politic. It is also Parliament that decides, within that class, which subset is entitled to become 'electors'. While there are judicially enforceable limits upon both of those powers, those limits do not mean that criteria for membership of the Australian political community can be identified as a matter of constitutional interpretation. Instead, the *Constitution* leaves considerable room for the Australian community itself to determine the criteria for membership of that community through the democratic process.

212 See *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1, 87 [212] (Edelman J), citing Jean-Jacques Rousseau, 'The Social Contract' in Sir Ernest Barker (ed), *Social Contract: Essays by Locke, Hume and Rousseau* (Oxford University Press, 1947) 237, 257–8.