

***RE MIMIA; EX PARTE AME* — THE CASE FOR A CONSTITUTIONAL AUSTRALIAN CITIZENSHIP**

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[This article discusses the recent High Court decision of *Re MIMIA; Ex parte Ame*,¹ arguing that the case's formulation of Australian citizenship — its nature and incidents — both challenges traditional notions of the term's meaning, and compels an amendment to enact a constitutional status of Australian citizenship. After reviewing the case's facts and the Court's reasoning, historical expressions of the status shall be explored, before the Australian citizenship experience is itself examined. Applying the resultant insights to the case's facts, it is argued that in light of the Court's decision and the constitutional and legal landscape underpinning such authority, in particular the aliens power of s 51(xix) of the *Australian Constitution*, as well as on account of the advanced stage in the nation's development, it is both necessary and apposite to amend the *Australian Constitution* to provide for an entrenched citizenship status.]

I INTRODUCTION

For most states, citizenship forms a key element in the institutional structure collectively known as government; over the course of history, the status has been an important guarantor of individual liberty, ensuring protection from the whim of government prerogative. Though the rise of human rights and other notions sculptured on universality has to some extent diminished citizenship's role, for most people it remains a significant ingredient in their status as free individuals.

Yet a recent decision of the High Court of Australia, *Re MIMIA; Ex parte Ame*,² reminds us that in Australia at least, this is not so. Concerned with the application of a

¹ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005).

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Papua New Guinean man claiming retention of his Australian citizenship in the face of the purported operation of legislative instruments providing for the independence of Papua New Guinea, in 1975, from administration by Australia,³ the case explored the nature and characteristics of Australian citizenship in detail.

In deciding the case, the Court revealed its opinion as to the status' limited effect in Australian law: not only does citizenship, of itself, guarantee a right of abode, but also is it vulnerable to interference by the legislature to limit its practical utility.⁴ Australian citizenship, moreover, remains liable to repeal, neither containing a due process guarantee nor requiring the holder's involvement for the relationship between her/him and the state to be voided.⁵ These were consequences said to flow from its position as a statutory status.

Re MIMIA; Ex parte Ame thus leads us to re-evaluate citizenship in the Australian context. After examining the case and its reasoning, this paper will briefly survey the historical background in which citizenship has operated. Following such analysis, the citizenship experience and its function in Australia will be considered. Applying the resultant insights to the Court's reasoning, it will be suggested it is both apposite and necessary to enact a constitutional status of Australian citizenship.

Containing, at minimum, rights of abode and of franchise, such a status would serve to better protect Australians from their current vulnerability to governmental authority. As such, it would more accurately reflect the country's status as a modern, independent, democratic nation.

II RE MIMIA; EX PARTE AME

A Facts

On 3 March 2005, a full bench of the High Court of Australia heard argument in the matter of *Re MIMIA; Ex parte Ame*.⁶ The plaintiff, Mr Amos Bode Ame, had brought proceedings against the Minister for Immigration, Multicultural and Indigenous Affairs seeking a declaration and writs of prohibition and mandamus.⁷ The Minister sought to remove the applicant from Australia pursuant to ss 189, 196 and 198 of the *Migration Act 1958* (Cth).⁸

² [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005).

³ Namely, the *Papua New Guinea Independence Act 1975* (Cth), the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth) and the *Papua New Guinean Constitution*. For more on the history of the Australian administration of both Papua and New Guinea, see J Griffin, H Nelson and S Firth, *Papua New Guinea; A Political History* (Heinemann Education Australia Pty Ltd, 1979).

⁴ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [22], [69]-[71], [73]-[74].

⁵ *Ibid* [34]-[37], [118].

⁶ See Transcript of Proceedings, *Re MIMIA; Ex parte Ame* (High Court of Australia, 3 March 2005).

⁷ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [4].

⁸ *Ibid*.

The case centred on the question of whether the applicant remained an Australian citizen. It was undisputed between the parties that the applicant, born in the Papuan highlands on 20 May 1967, originally possessed Australian citizenship.⁹ However, contention lay in the combined effect of the *Papua New Guinea Independence Act 1975* (Cth); the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth); and the *Papua New Guinean Constitution*, which together purported to transform the applicant and others like him into Papua New Guinean citizens.¹⁰

Initial enquiry focused on reg 4 of the *Papua New Guinea Independence Regulations 1975* (Cth), which provided that Australian citizens who became Papua New Guinean citizens on Independence Day by operation of the *Papua New Guinean Constitution* ceased to hold Australian citizenship.¹¹ The *Papua New Guinean Constitution* relevantly specified that:

65. Automatic citizenship on Independence Day

(1) A person born in the country before Independence Day who has two grand-parents who were born in the country ... is a citizen.

(4) Subsection (1) ... do[es] not apply to a person who —

(a) has a right (whether revocable or not) to permanent residence in Australia; ...

(5) A person to whom Subsection (4) applies may, within the period of two months after Independence Day ... in ... such manner as ... prescribed by ... Parliament, renounce ... his status as an Australian citizen ... and make the Declaration of Loyalty.¹²

The applicant maintained that reg 4 did not apply to him on account of s 65(4)(a) of the *Papua New Guinean Constitution*.¹³ This was said to be activated by his Australian citizenship, which ipso facto provided a right of permanent residence in Australia.¹⁴ This contention was denied by the respondent,¹⁵ who additionally pointed to prevailing migration law,¹⁶ which required persons such as the applicant to obtain an ‘entry permit’ to enter (mainland) Australia.¹⁷

⁹ Ibid [44].

¹⁰ Ibid.

¹¹ *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth) reg 4 states:

‘A person who-

(a) immediately before Independence Day, was an Australian citizen within the meaning of the Act; and

(b) on Independence Day becomes a citizen of the Independent State of Papua New Guinea by virtue of the provisions of the Constitution of the Independent State of Papua New Guinea, ceases on that day to be an Australian citizen’.

¹² *Constitution of the Independent State of Papua New Guinea* s 65. In line with s 65(1), two of the applicant’s grand-parents were ‘born in the country’. The applicant failed to renounce his Australian citizenship in accordance with s 65(5).

¹³ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [19].

¹⁴ Ibid [22].

¹⁵ Ibid [4], [17].

¹⁶ Ibid [22].

¹⁷ In accordance with s 5 of the *Migration Act 1958* (Cth). At the relevant time, the *Migration Act 1958* (Cth) sourced its definition of ‘Australia’ from s 17 of the *Acts Interpretation Act 1901* (Cth), which provided that the term meant ‘the Commonwealth of Australia and, when used in a geographical sense, includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory’. That is to say, the Act purported to excise certain

Subsequent concern rested with reg 4's validity. The applicant put that reg 4, in as much as it proposed executive alteration of an individual's fundamental rights and freedoms, was beyond the scope of regulations contemplated by s 6 of the *Papua New Guinea Independence Act 1975* (Cth),¹⁸ upon which reg 4 rested, given a lack of explicit intention in that provision to function thus.¹⁹

Alternatively, it was argued that s 6, to the extent that it authorized reg 4, was itself invalid in that it proposed to unilaterally strip the applicant of his Australian citizenship and thus exceeded the powers conferred on Parliament by the *Australian Constitution*, most notably the aliens' power of s 51(xix).²⁰ The respondent resisted each of these claims.²¹

B *The Court's Decision*

The court unanimously found in favour of the respondent on 4 August 2005.²² The majority judgment was delivered by Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ,²³ with Kirby J providing a separate, concurring opinion.²⁴

In the majority's opinion, Australian citizenship did not carry an ipso facto right of permanent residence.²⁵ More accurately, the meaning of s 65(4)(a) was not an abstract

areas of the country, including Papua, for migration purposes. Notably, s 5(1) of the *Australian Citizenship Act 1948* (Cth) contained no such limitation.

¹⁸ Which specified that: '[t]he Governor-General may make regulations making provision for or in relation to matters arising out of or connected with the attainment of the independence of Papua New Guinea, including regulations making modifications or adaptations of any Act': *Papua New Guinea Independence Act 1975* (Cth) s 6(1).

¹⁹ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [80]-[81]. This contention was made in accordance with a long line of related authority: see, eg, *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *Baker v Campbell* (1983) 153 CLR 52; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427.

²⁰ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [26]. Under s 51 of the *Australian Constitution*, Commonwealth Parliament has 'power, subject to the Constitution, to make laws for the peace, order, and good government of the Commonwealth' with respect to a number of matters, relevantly including 'naturalization and aliens' (s 51(xix)), 'immigration and emigration' (s 51(xxvii)), 'external affairs' (s 51(xxix)) and 'relations of the Commonwealth with the islands of the Pacific' (s 51(xxx)). It also retains power, under s 122, to 'make laws for the government of any territory ... placed by the Queen under the authority of and accepted by the Commonwealth'. This last power has often been described as unfettered or plenary: see, eg, *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [98].

²¹ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [46].

²² *Ibid* [41], [132].

²³ *Ibid* [1].

²⁴ *Ibid* [42].

²⁵ *Ibid* [22].

or theoretical question, but concerned practical reality.²⁶ In this regard, extant migration law was decisive, notwithstanding its discriminatory or prejudicial effect on the applicant and fellow citizens similarly positioned.²⁷

Kirby J took a comparable approach, additionally emphasizing the contemporaneous understanding of Australia's citizenship regime.²⁸ In course of judgment, he cited a Ministerial response to a question concerning the citizenship rights of Papuans:

We do not even give them the right to come to Australia. An Englishman who came to this country and complied with our electoral laws could exercise restricted rights as a British subject, whereas a native of Papua would be an Australian citizen but would not be capable of exercising rights of citizenship.²⁹

In the event, he too found that reg 4 operated to deprive the applicant of his Australian citizenship.³⁰

As regards reg 4's validity, the majority ignored the broad proposition advanced by the applicant, instead noting only that provisions relating to citizenship were clearly within the realm of potential regulations countenanced by s 6, given the context of its enactment.³¹

Kirby J, by contrast, was prepared to acknowledge the applicant's claims, but felt compelled to subordinate them to the concerns of the day.³² That is, he was persuaded by the relative frequency of similar legislative models in analogous colonial contexts,³³ and by the autochthonous foundation of PNG citizenship, which necessitated a diplomatic Australian response, effectuated by s 6 and reg 4.³⁴ His Honour further held that reg 4's limited ambit, in extinguishing few material rights of the applicant, justified both its form and its lack of explicitness.³⁵

As to s 6's constitutionality, the majority founded their reasoning on the broad power of s 122³⁶ of the *Australian Constitution*; a capacity to acquire external territory necessarily entailed a capacity to divest such territory, and incident to this ability, Parliament could establish (and hence disestablish) whatever relations between

²⁶ In the majority's words, the matter 'concerned an instrument of nationhood and government, dealing with a practical issue affecting the membership of a new Independent State': *ibid* [21].

²⁷ *Ibid* [22], [32].

²⁸ *Ibid* [69]-[77], [88].

²⁹ The Hon Arthur Calwell, Minister for Immigration, cited in *ibid* [69].

³⁰ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [78].

³¹ *Ibid* [25].

³² *Ibid* [83].

³³ *Ibid* [84].

³⁴ That is to say, there was 'a strong desire ... to provide a local or indigenous foundation for [Papua New Guinea's] new constitutional law ... [and] avoid notions of a "grant of independence"'. The somewhat 'elliptical' operation of s 6 and reg 4 was a (valid) means by which such a policy could be effected: *ibid* [82], [85].

³⁵ *Ibid* [89].

³⁶ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [80]-[81].

Australia and the territory's inhabitants that it saw fit.³⁷ Any intrinsic limits to the reach of the s 51(xix) power did not act to defeat s 122's effectiveness.³⁸

Moreover, s 6 could be supported by s 51(xix) itself: where a distinct, sovereign entity claiming ascendancy over a specified class of persons emerges out of territory externally acquired by way of s 122 — as occurred here — it is within power for Parliament to treat those persons as aliens, withdrawing their Australian citizenship.³⁹

Kirby J's logic was similar. His Honour upheld s 6's validity on account of both s 122 and s 51(xix), for the reasons given above.⁴⁰ He further noted, however, that because of its limited nature in practice, the applicant's citizenship did not preclude his coming within the scope of s 51(xix) before the commencement of s 6 and reg 4.⁴¹ The character of the citizenship and the historical circumstances of the time neither required Parliament, upon such commencement, to afford the applicant due process rights in relation to the abrogation of his citizenship.⁴²

C Implications

Re MIMIA; Ex parte Ame is one of a string of recent High Court decisions which form much of the jurisprudence on the nature and incidents of Australian citizenship.⁴³ Taken in conjunction with earlier authorities, the reasoning expounded by the Court leads to several implications which challenge traditional notions of what the status entails.

Firstly, Australian citizenship does not carry with it an inviolable right of abode. Despite earlier related authority,⁴⁴ the Court was prepared to uphold the idea that formal citizenship does not of itself confer unqualified rights of entry to, residence in and presumably, protection against deportation from Australia upon the holder.⁴⁵

Secondly, by upholding the artificial definition of 'Australia' appearing in the *Migration Act 1958* (Cth),⁴⁶ the Court implicitly acknowledged an ability for Parliament to limit

³⁷ Ibid [28]-[29], [37].

³⁸ Ibid [34].

³⁹ Ibid [37]-[38].

⁴⁰ Ibid [104]-[105], [116]-[117].

⁴¹ Indeed his Honour commented that it did so from his birth: *ibid* [119].

⁴² Ibid [118].

⁴³ 'Citizenship' in this context means membership of the Australian community as much as a formal legal status: see *Singh v The Commonwealth* (2004) 209 ALR 355; *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28; *Re Minister for Immigration & Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178.

⁴⁴ *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462. The Full Bench there noted that, '[t]he right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or "clearance" from the Executive': at 469.

⁴⁵ See *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [42], [21]-[22], [32], [69]-[77], [88], and accompanying text. Note that deportation is a separate issue from extradition; the High Court has ruled that Australian citizenship does *not* carry a specific protection against extradition, the lawfulness of such an action being a matter at any rate unrelated to legal status; see *DJL v Central Authority* (2000) 201 CLR 226, 278-9; *Barton v The Commonwealth* (1974) 131 CLR 477, 482.

⁴⁶ See *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005)[21]-[22], [32].

the freedom of movement of its citizens, in addition to its already existent power to regulate the entry and movement of aliens within the country.⁴⁷

Thirdly, by adopting the chosen interpretation of reg 4 and by maintaining its validity, the Court disavowed the argument put by the applicant in oral hearing that the Court, in both constitutional and legislative interpretation, is constrained by an unqualified duty to proceed in a manner consistent with protection of a citizen's rights.⁴⁸ Kirby J's assertion that the applicant was subject to the aliens' power from birth⁴⁹ may also be so classed.

Fourthly, in attesting s 6's constitutionality, the majority explicitly affirmed its position that citizenship is not a bilateral relationship, requiring involvement of the individual in any redefinition of the association between her/him and the state.⁵⁰

Fifthly, and relatedly, the Court's validation of s 6 served to confirm that no universally applicable right of due process exists in the event of proposed legislative repeal of an individual's citizenship status.⁵¹

Notwithstanding the uniqueness of the applicant's case and the (dubious) assertion that the foregoing principles may be confined to instances of citizenship acquired pursuant to Commonwealth exercise of its external acquisition power,⁵² the above provides cause for concern. Indeed, it is arguable any circumscription of the Court's findings to a limited class of individuals is in itself worrisome, establishing as it does a brand of second-class citizenship.

Re MIMIA; Ex parte Ame thus leads us to re-evaluate citizenship in the Australian context. In order to undertake such a venture fruitfully, it is necessary that the historical background in which citizenship has operated be considered. Such analysis will inform an understanding of the Australian experience and hence assist us to consider how Australians might be better protected from the vagaries of governmental authority.

⁴⁷ See *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [80]-[81]. It is unclear how such a power would interact with related constitutional freedoms such as the rights of interstate movement and of access to the seat of government, both founded in s 92 of the *Constitution*: see *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108 (Griffith CJ), 109-110 (Barton J).

⁴⁸ See Transcript of Proceedings, *Re MIMIA; Ex parte Ame* (High Court of Australia, Ms Rubenstein, 3 March 2005).

⁴⁹ See *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [104]-[105], [116]-[117].

⁵⁰ *Ibid* [36].

⁵¹ *Ibid* [34]-[35], [37], [118].

⁵² Indeed, much of the Court's analysis seemed to proceed from this position: see, eg, *ibid* [17]-[19], [30], [32], [95]-[96], [101]. Justice Kirby, in particular, was careful throughout his judgment to test his propositions for their effect on the broader swathe of the Australian citizenry: further to the relevant references above, see *ibid* [42]-[43], [81], [106], [117]-[118]. None of this implies, however, the invalidity of any of the foregoing implications. See, moreover Editorial 'Australia Must Renounce Official Policies of Suffering', below n 174 and *Minister for Immigration v Roberts* (1993) 41 FCR 82, 86 (Einfield J), cited in Rubenstein, below n 94, 2.

III CITIZENSHIP: A HISTORICAL OVERVIEW⁵³

A *Historical Beginnings*

It was Ancient Greece where citizenship was established as the formal linkage between individual entitlement and full membership of the community.⁵⁴ As a status of privilege conferred by the state upon an individual, Athenian citizenship was rooted in notions of commonality, freedom and civic identity, and hence emphasized duties more than rights.⁵⁵

Key incidents of such citizenship included rights to elect and stand for public office, and duties to pay taxes, to undertake military service, to serve on juries and to maintain law and order.⁵⁶ Indeed, the right to vote was conceptualized as duty as much as right, for the essence of the civic republican model was a tight-knit, well-organized political community. To that end, citizen involvement in public affairs was seen as crucial to the ongoing health of the state.⁵⁷ Thus the association between citizenship and democracy was formed.

Roman citizenship, like Athenian citizenship, was duty-oriented.⁵⁸ Most notable was its use as an incentivized policy device; as a status of value, its bestowal was deliberately adopted by the Empire as a means of avoiding war and amassing territory and inhabitants.⁵⁹ Detached from its traditional anchor of locality, citizenship thus became a tool by which to freely mould membership of the community.

With Rome's decline, and with the subsequent spread of monarchy across Europe however, the status retreated, not to fully re-emerge for several centuries.

B *The Modern Roots of Citizenship*

Entrenchment of monarchy led to a contraction of individual autonomy: the status of monarchical subject was characterized by widespread duties based on a 'personal, permanent and absolute' tie of allegiance owed to the sovereign,⁶⁰ and by a distinct lack of rights.⁶¹ In time, however, the mutuality of obligations between ruler and ruled was asserted and came to be accepted.⁶² With society's gradual secularization, this was developed into the idea of the social contract, most famously expounded by Rousseau.⁶³

⁵³ What follows is necessarily an abridged and arguably oversimplified version of a chronology for which there exists a voluminous outpouring of literature. For a more detailed and nuanced treatment of the topic, see the texts referred to below.

⁵⁴ D Heater, *A Brief History of Citizenship* (Edinburgh University Press, 2004) 6.

⁵⁵ Ibid 21-2, 24-5.

⁵⁶ Ibid 26-8.

⁵⁷ Ibid 28-9.

⁵⁸ Ibid 31.

⁵⁹ See *ibid* 33-7.

⁶⁰ *Singh v The Commonwealth* (2004) 209 ALR 355, 376 (McHugh J).

⁶¹ Heater, above n 54, 58.

⁶² Particularly influential in this regard was Thomas Hobbes: D Runciman, 'The Concept of the State: The Sovereignty of a Fiction' in Q Skinner and B Str ath (eds), *States & Citizens* (Cambridge University Press, 2003) 28, 29-30.

⁶³ See J-J Rousseau, *The Social Contract* (Yale University Press, 2002).

An extreme form of civic republican or duty-oriented citizenship, Rousseau's approach held that only by utter devotion to the state and repudiation of any pre-existing rights or bonds did the citizen manifest himself as such.⁶⁴ Rousseau's citizens were both constitutive of and subordinate to the 'general will' of the state, by which their rights were guaranteed and liberty could be best preserved.⁶⁵

By explicitly positing the citizen as the state's foundational unit, Rousseau firmly established the modern alliance between citizenship and nationhood.⁶⁶ Though radically democratic, the implementation of his ideas in Revolutionary France and their ultimate perversity demonstrated citizenship's greater concern with nationalism than democracy.⁶⁷ Future historical events confirmed and further strengthened this axiomatic linkage.⁶⁸

An alternative understanding of citizenship arose in the natural law theory of Locke.⁶⁹ Asserting, like Rousseau, the social contract's popular nature, he differed in attesting the pre-political character of individual rights, which endured despite government.⁷⁰ The liberal citizenship that emerged with the founding of the United States of America was accordingly marked by a coolness towards duties, focused instead on protecting rights from governmental interference.⁷¹

Embedding such rights in a written constitution was one means of achieving this: the averral of a pre-political social space carried the implication that limits existed to sovereign authority. Hence constitutionalism, as the manifestation of this doctrine, began gaining popular currency from the American Revolution onwards.⁷² As the centre of the socio-political structure, the citizen was the primary beneficiary of such a theory,⁷³ and the citizenship-constitution link was thus forged.

The institution of republican government in the USA and France renewed and further annealed the historical association between citizenship and democracy. As the antithesis of monarchical rule, the locus of sovereignty was held to reside with the people; as the constituent unit of the polity, it was the citizen who was posited as the embodiment of

⁶⁴ See R Nisbet, 'Citizenship: Two Traditions' in B Turner and P Hamilton (eds), *I Citizenship: Critical Concepts* (Routledge, 1994) 7, 11.

⁶⁵ See *ibid.*

⁶⁶ D Heater, *What is Citizenship?* (Polity Press, 1999) 51.

⁶⁷ In this regard, figures such as Robespierre and the advent of the Great Terror are illustrative: see C Tilly, 'The Emergence of Citizenship in France and Elsewhere' in C Tilly (ed), *Citizenship, Identity and Social Theory* (Press Syndicate of the University of Cambridge, 1996) 223.

⁶⁸ In particular, the authoritarian regimes of Hitler and Mussolini: *ibid* 233.

⁶⁹ See J Locke, *Two Treatises of Government* (Cambridge University Press, 1998).

⁷⁰ See M Somers, 'Romancing the Market, Reviling the State: Historicizing Liberalism, Privatization, and the Competing Claims to Civil Society' in C Crouch, K Eder and D Tambini (eds), *Citizenship, Markets and the State* (Oxford University Press, 2001) 24, 30-1.

⁷¹ Heater, above n 54, 74-6.

⁷² That is, 'constitutionalism' not in the sense of limited government per se, but in the sense of circumscription of those limits in a written document; H Belz, *A Living Constitution or Fundamental Law?* (Rowman & Littlefield, 1998) 2.

⁷³ V C Jackson, 'Citizenship and Federalism' in T A Aleinkoff and s Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace, 2001) 127, 129.

democracy.⁷⁴ Liberalism's spread was not confined to these two nations however, and across Europe, the legitimacy of monarchical rule was increasingly questioned.

In England, particularly, great strides had been made against the pretensions of absolutist rule. Freedom of conscience emerged from the religious disputations of the sixteenth and seventeenth centuries, with the resultant pluralism affirming freedom from royal prerogative, freedom from cruel and unusual punishment and freedom from a standing army, among others.⁷⁵ These and the related rights of habeas corpus, equality before the law and due process formed the core of protections accorded to subjects and, in time, essential elements of liberal citizenship.⁷⁶

Further liberties retained by British subjects integral to the liberal citizenship model included freedoms of speech, religion, movement and peaceable assembly, as well as the right to petition the sovereign.⁷⁷ With limited rights of franchise,⁷⁸ subject status came to be functionally equivalent to, if theoretically distinct from, citizenship.⁷⁹ However while citizens were generally able to source their rights in a written constitution, it was the common law that largely secured the freedoms of British subjects,⁸⁰ meaning their materiality depended chiefly on adherence to principles of responsible government.

C *Citizenship's Modern Dominance*

With time, the citizenship-nationality tie continued to strengthen, though the latter conveyed a different meaning from that admitted today; with the exception of politically mature, well-defined nations like Britain and France, 'nation' denoted a socio-cultural term as much as a political one when used vis-à-vis citizenship.⁸¹ With the broad emergence of the modern nation-state throughout the nineteenth century then, citizenship became a key aspect of nation-building and the politics of identity associated therein.⁸²

Indeed, as a central tenet of 'the civil religion of modern society',⁸³ citizenship formed, as in Roman times, the 'membrane of social membership'.⁸⁴ By establishing boundaries for inclusion in or exclusion from the polity, states were able to shape civil society

⁷⁴ Tilly, above n 67, 228.

⁷⁵ See *Bill of Rights Act 1689*, 1 Wm & M; B P Dauenhauer, *Citizenship in a Fragile World* (Rowman & Littlefield, 1996) 21.

⁷⁶ Heater, above n 66, 5-6; see *United States Constitution* amends I-X.

⁷⁷ Dauenhauer, above n 75, 21; *Bill of Rights Act 1689*, 1 Wm & M; see *United States Constitution* amends I-X.

⁷⁸ See Heater, above n 66, 5-6.

⁷⁹ Theoretically distinct in as far as the monarch retained her/his position as the ultimate source of sovereignty, in contradistinction to (popular) republican government.

⁸⁰ See, eg, *Bill of Rights Act 1689*, 1 Wm & M, *Habeas Corpus Act 1679*, 20 Car 2; cf *United States Constitution* amends I-X.

⁸¹ Heater, above n 54, 89.

⁸² Germany being a particularly good example of this: *ibid* 90-2.

⁸³ B Turner and P Hamilton, 'General Commentary' in B Turner and P Hamilton (eds), *I Citizenship: Critical Concepts* (Routledge, 1994) i, ii.

⁸⁴ *Ibid* v.

through the process of social closure — in defining and specifying ‘others’, unity amongst those counted in the nation as citizens could be guaranteed.⁸⁵

Citizenship’s actual content continued to wax and wane with the socio-political matters of the day and the historical traditions of the society in which they were debated.⁸⁶ Importantly, extension of the franchise continued until viewed as a standard incident of citizenship,⁸⁷ and with crystallization of the nation-state structure, the right of abode became similarly classed.⁸⁸ With the rise in influence of socialist thought, welfare benefits and affiliated concepts were judged by many also to be among citizenship’s essential features.⁸⁹

Citizenship thus emerged as the locus around which transactions between the state and its constituent units were conducted. As the bond linking government with governed, the status became a solution to the problem of tacit coordination; that is, citizenship came to represent an accepted and well-understood bargain between actors, conferring benefits upon its holders on the one hand, and ensuring stability of the state on the other.⁹⁰ This combination of utility and necessity assured both its moral and legal force and its ongoing place at the heart of civic life, as a status to be proud of and jealously protect.⁹¹

Though citizenship has now passed such a high-water mark,⁹² it remains for most people the touchstone of their status as free individuals.⁹³ In light of this, and of the Court’s reasoning as expounded above, it is appropriate to turn to the citizenship experience in Australia. Such exploration will assist us to understand both the Court’s decision, and how, in Australia, the status might be re-formulated to provide a more meaningful protection against governmental interference.

IV THE AUSTRALIAN EXPERIENCE

Australian citizenship is most notable for its absence from the *Australian Constitution*. While constitutional authority to legislate with respect to citizenship clearly exists,⁹⁴ the

⁸⁵ A W Marx, ‘The Dynamics of Racial Identity and Social Movements’ in C Tilly (ed), *Citizenship, Identity and Social Theory* (Press Syndicate of the University of Cambridge, 1996) 159, 163.

⁸⁶ See Heater, above n 54, 115-120.

⁸⁷ Extension in the sense both of applying to groups previously excluded from voting, such as the landless, and women, and also as regards members of nations transformed from authoritarian to democratic regimes: *ibid* 117, 120, 125-9.

⁸⁸ Y Zilbershats, *The Human Right to Citizenship* (Transnational Publishers, 2002) 43-4, 47, 51; Heater, above n 66, 95-105.

⁸⁹ See, eg, T H Marshall, *Class, Citizenship and Social Development* (Anchor, 1965).

⁹⁰ Heater, above n 66, 84.

⁹¹ See *ibid* 102-5.

⁹² Owing to the rise of human rights and related notions based on universality, and to the extension of core aspects of liberal citizenship such as equality before the law and due process rights to all people: see, eg, B S Turner, ‘Outline of a Theory of Human Rights’ in Bryan Turner and Peter Hamilton (eds), *II Citizenship: Critical Concepts* (Routledge, 1994) 461; *ibid* 85.

⁹³ S Castles and A Davidson, *Citizenship and Migration* (Basingstoke, 2000) vii. In this regard, the limits posed by ‘cultural relativism’ to universal human rights and the (relative) legal poverty of (non-citizen) migrants are particularly relevant: see, eg, Castles and Davidson at vii, 57, 188, 229.

⁹⁴ Though not explicitly; such a power most likely exists through a combination of the power contained in s 51(xix) of the *Constitution* and that inherent to the implied nationhood power developed by the High Court, which gives Commonwealth Parliament power to legislate on

status itself is merely statutory, not constitutional. The explanation for this rests in the peculiarities of Australian history.

A *Early Days*

As members of the British Empire, the early colonists took immense pride in being British subjects. Indeed by the 1850s, with the Empire at its zenith, it was felt there existed no greater claim than that of serving the Queen, under God, with the appurtenant liberties and protections that the common law provided.⁹⁵ To be British was to be civilized, that is, materially more advanced and thus culturally superior to all other races.⁹⁶

In this environment, the idea of federating the six separate colonies emerged. Though not to occur for several decades, the concept was intuitively appealing as well as practically grounded.⁹⁷ The need for a common immigration policy was particularly felt, as the influx of Chinese into Victoria and New South Wales, together with the importation of Kanaka labourers into Queensland, challenged traditional notions of the country as British.⁹⁸

This sparked discussion as to what it was to be Australian. It meant, of course, being British, but did it mean anything else?⁹⁹ Thus the debate about and cultivation of a distinct national identity commenced, in turn highlighting two recurrent themes of Australian history: the unique malleability of Australian nationality, and the concern to consciously craft a state along utopian lines.¹⁰⁰

Certainly, to be Australian was to be civically-oriented. It was to be loyal and law-abiding, with duties towards family and community; it was also to serve God and the British Empire.¹⁰¹ Though to furthermore enjoy the freedoms of a liberal society, it was not to be self-asserting; instead, the image of an active, if respectable, member of the public predominated.¹⁰² Most crucially, it was to be white.¹⁰³

B *The Colonial Legacy*

This was the manner in which ‘citizenship’ was used throughout the 1890s and was understood by the Framers in discussing its possible inclusion in the new *Australian Constitution*. Despite the theoretical nonsense attesting potential installation of such a

intrinsically national matters: see *Davis v The Commonwealth* (1988) 166 CLR 79. For further discussion, see K Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002) 71-5.

⁹⁵ G Nadel, *Australia's Colonial Culture* (Harvard University Press, 1957) 41-2.

⁹⁶ H Irving, *To Constitute A Nation* (Cambridge University Press, 1997) 73.

⁹⁷ See *ibid* 3.

⁹⁸ See R Evans et al, *1901: Our Future's Past* (Macmillan, 1997) 27-8. Many Chinese came to Australia in the wake of the 1851 gold rushes in Ballarat and Bathurst. Kanaka labourers mainly worked in the sugar cane industry from 1863 onwards: see S Macintyre, *A Concise History of Australia* (Cambridge University Press, 1999) 103-5.

⁹⁹ See S Alomes and C Jones, *Australian Nationalism* (Collins/Angus & Robertson, 1991) 47.

¹⁰⁰ See Irving, above n 96, 25-8, 33-4, 36-8; Evans et al, above n 98, 51-4.

¹⁰¹ S Macintyre, *A Colonial Liberalism* (Oxford, 1991) 5; Macintyre, above n 98, 115; J Rickard, *Australia: A Cultural History* (Longman, 1988) 84, 91; R Birrell, *A Nation of Our Own* (Longman Cheshire, 1995) 84-5.

¹⁰² Macintyre, above n 101, 5, 194; Rickard, above n 101, 84-5, Birrell, above n 101, 42, 44, 48.

¹⁰³ See Evans et al, above n 98, 22-3.

status in a governmental system crowned by monarchy,¹⁰⁴ many felt the need for a fulcrum of national identity greater than subject status.¹⁰⁵

However, pinning down what citizenship should entail proved difficult, in practice — common usage of the tag did not mean agreement about its legal incidents.¹⁰⁶ Firstly, it was unclear whether citizenship was merely a legal status; if so, who would be classed a citizen?¹⁰⁷ Was the criterion to be the same as for subject status? Furthermore, if rights and responsibilities were to attach the status, which were to be enshrined?¹⁰⁸ Moreover, what would such a regime imply for control of immigration?¹⁰⁹

For many delegates, the term was simply superfluous: as British subjects, Australians already had the assurances of the common law as guaranteed by Parliament.¹¹⁰ Not only would introducing such a status be fraught with unfamiliarity — in contrast to retention of the status quo — but in reserving its ultimate interpretation to the courts, such an arrangement would be to deny the efficacy both of responsible government and the underlying system of representative democracy.¹¹¹

Undoubtedly, citizenship's republican connotations also troubled many delegates. Despite its association with the forging of Australian identity, Federation was not understood as challenging British sovereignty or the superiority of its institutions,¹¹² which formal legal citizenship arguably did.

Greatest concern, however, lay with the potential effect of citizenship on the ability to regulate immigration. Any restrictions on the project of making the nation 'a home for Australians and the British race alone'¹¹³ were anathema; in particular, the fear of being forced to admit Hong Kong Chinese as British subjects (and hence citizens) loomed large.¹¹⁴ While several delegates were comfortable with a discrimination-based citizenship, others were not.¹¹⁵

In the event, unimpaired freedom to regulate aliens was seen as the best guarantor of a shared feeling of nationhood.¹¹⁶ The idea of inserting citizenship into the *Australian*

¹⁰⁴ Citizenship generally having republican and thus anti-monarchical connotations: see Irving, above n 96, 158.

¹⁰⁵ Ibid 157. Chief among them were Dr John Quick, The Hon Richard O'Connor, The Hon Isaac Isaacs and The Right Hon Charles Kingston: see ibid 158-9.

¹⁰⁶ Ibid 157.

¹⁰⁷ Rubenstein, above n 94, 29.

¹⁰⁸ Ibid.

¹⁰⁹ See Irving, above n 96, 158-9.

¹¹⁰ This indeed was the opinion of Mr William Trenwith: see Rubenstein, above n 94, 29. At common law, people born within the monarch's dominions became, by virtue of their birth, British subjects, enjoying the liberties and protections discussed above: see above nn 76-81 and accompanying text. Statutory modification later allowed British subject status to be obtained by naturalization. For further discussion, see *Singh v The Commonwealth* (2004) 209 ALR 355 and Rubenstein, above n 94, 48-9.

¹¹¹ Rubenstein, above n 94, 29.

¹¹² See W J Hudson and M P Sharp, *Australian Independence* (Melbourne University Press, 1988) 26-8.

¹¹³ The Hon James Howe, cited in Rubenstein, above n 94, 37.

¹¹⁴ Rubenstein, above n 94, 36-7.

¹¹⁵ Among those comfortable with the concept was Dr John Quick. Delegates opposing this group included Mr Henry Higgins and Mr Josiah Symon: see ibid 37.

¹¹⁶ See ibid 38.

Constitution faded, overshadowed by specific powers to legislate with respect to aliens,¹¹⁷ immigration,¹¹⁸ and relations with the islands of the Pacific.¹¹⁹

C *An Infant Nation*

A nation half-sure of itself thus stole into the dawn of the twentieth century. The decision to omit citizenship from the *Australian Constitution* indicated a country more confident of what it wasn't than what it positively was; by instead emphasizing the power to exclude, the pattern of defining Australia from the outside in found footing in the deepest channels of governmental structure.

Indeed, such a framework served to infuse a notion of 'privilege' into membership of the Australian community, and establish an imbalanced relationship between the state and its constituent units;¹²⁰ without the equal platform of a constitutionally-entrenched status to defend oneself from, the legislature could aver itself supreme, drawing the boundaries for membership of the polity as it saw fit.¹²¹

Yet this was not wholly so, for an independent judiciary¹²² and a written constitution testified to a belief in definitive limits to governmental authority. In fact, the hybridized, Anglo-American model of government that emerged from the Convention Debates explains much of the tension surrounding the subject; on the one hand, a strident belief in the imperial model of responsible government, on the other, a republican desire to fix the limits of such government in a superior written text, backed by impartial review of its terms.¹²³

It is ironic then, that in a constitution devised by popularly-elected delegates and ratified by the people themselves, no categorical statement defining for whose benefit it was drafted appears.¹²⁴ The Australian government was thus uniquely positioned to fashion national identity not around an inviolable rock of citizenship, but on an amorphous notion of alienage.

¹¹⁷ See *Constitution* s 51(xix).

¹¹⁸ See *Constitution* s 51(xxvii).

¹¹⁹ See *Constitution* s 51(xxx). This head of power was included out of fear that the status of some Pacific Islands as British possessions (such as Fiji) might preclude Commonwealth Parliament's ability to enact relevant legislation under the external affairs power of s 51(xxix): see R D Lumb and K W Ryan, *The Constitution of the Commonwealth of Australia* (Butterworths, 3rd ed, 1981) 184; see also J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1976) 637-8. Also notable was the power granted to Commonwealth Parliament under s 51(xxvi) to legislate with respect to 'the people of any race ... for whom it is deemed necessary to make special laws'. The purpose of this power has generally been held to relate to the 'influx' of Kanaka labourers to the Queensland sugar cane industry: see n 99 and Lumb and Ryan at 170-1.

¹²⁰ It is possible to draw an association between the project of nation-building and this notion of 'privilege': see, eg, above n 101 and accompanying text.

¹²¹ It should be stressed this is not advanced as a threat actually perceived during Federation — at least as far as it could be used upon others than those deemed by all to be undesirables, such as Kanakas and Chinese — only that it existed as a logical corollary of the constitutional structure adopted.

¹²² See *Constitution* ch III.

¹²³ For an excellent study on the competing approaches of delegates on either side of this divide during the Convention Debates, see J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

¹²⁴ The *Constitution* refers to the 'people' of the respective States in both the Preamble and s 7, to the 'people of the Commonwealth' in s 24 and to 'subject[s] of the Queen, resident in any State' in s 117.

Such ‘citizenship’ as developed in the nation’s early years then — for the term continued use, despite its absence from the formal legal landscape¹²⁵ — was in practice a collection of attributes by which the holder could not thus answer the description of either ‘alien’ or ‘immigrant’ as interpreted by the High Court.¹²⁶ Prepared to assert power of a largely plenary nature, the Court hence affirmed a civically-oriented concept of community membership, loaded with explicitly racist overtones.¹²⁷ The position of responsible government as the underwriter for liberty thus betrayed its first signs of unsteadiness.

Notably, the right of franchise was among the ‘sacred cows’ evidencing non-alien status.¹²⁸ This can be explained by theorizing that no government acting responsibly would treat individuals upon whom its legitimacy was based as aliens.¹²⁹ Hence, the disenfranchisement of certain classes simultaneously allowed to retain British subject status,¹³⁰ while further attesting the contingent nature of Australian freedoms, disclosed the centrality of the vote, more than subject status or ‘citizenship’, to Australian civic identity.¹³¹

The judiciary’s use of ‘citizenship’ as a residuum¹³² thus stationed it as a posterior status; that is, as resulting from membership of the community rather than guaranteeing

¹²⁵ See, eg, Birrell, above n 101, 190-1, 193-4; indeed, the High Court itself was happy to use the term in an informal or non-technical manner: see, eg, *Ex parte Walsh; In Re Yates* (1925) 37 CLR 36, 66 (Knox CJ), 103-4 (Isaacs J); *R v MacFarlane; Ex parte O’Flanagan and O’Kelly* (1923) 32 CLR 518, 574 (Higgins J); see also *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [22]-[23], [111], [119].

¹²⁶ While both powers were used, it was in fact the latter that was emphasized in the nation’s early years: see *Robtelmes v Brenan* (1906) 4 CLR 395 and *Potter v Minahan* (1908) 7 CLR 277; *Donohoe v Wong Sau* (1925) 36 CLR 404; *Ex parte Walsh; In Re Yates* (1925) 37 CLR 36; *Christie v Ah Sheung* (1906) 3 CLR 998; *Ah Yin v Christie* (1907) 4 CLR 1428; *R v Lindbergh; Ex parte Jong Hing* (1906) 3 CLR 93. See also D Dutton, *Citizenship in Australia: A Guide to Commonwealth Government Records* (1999) 59.

¹²⁷ See, eg, *Potter v Minahan* (1908) 7 CLR 277; *Donohoe v Wong Sau* (1925) 36 CLR 404; *Ex parte Walsh; In Re Yates* (1925) 37 CLR 36; *Christie v Ah Sheung* (1906) 3 CLR 998; *Ah Yin v Christie* (1907) 4 CLR 1428; *R v Lindbergh; Ex parte Jong Hing* (1906) 3 CLR 93.

¹²⁸ See Dutton, above n 126, 14.

¹²⁹ *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 327-8 (Brennan J), 335-6 (Deane J) would appear to support this position. Notably, the case under discussion does not appear to alter this stance: see *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [30], [117]-[118].

¹³⁰ Notably, indigenous Australians: see Rubenstein, above n 94, 29, 43, 53.

¹³¹ See *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28, 45, 48, 72, 87; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 398, 413, 437, 475, 507, 518; *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178, 186, 195-6. As does the grant of franchise to women in 1902, at a time when such a feature was generally lacking from most other electoral landscapes: see Audrey Oldfield, *Australian Women and the Vote* (1994) 66. Andrew Robb AO MP, “*Formal Citizenship Test*” discussion paper released (2006) Office of the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs <<http://www.minister.immi.gov.au/parlsec/media/media-releases/medrel06/300610.htm>> at 28 October 2006, where it is asserted ‘Australian citizenship is a privilege not a right’.

¹³² While both powers were used, it was in fact the latter that was emphasized in the nation’s early years: see *Robtelmes v Brenan* (1906) 4 CLR 395 and *Potter v Minahan* (1908) 7 CLR 277; *Donohoe v Wong Sau* (1925) 36 CLR 404; *Ex parte Walsh; In Re Yates* (1925) 37 CLR 36; *Christie v Ah Sheung* (1906) 3 CLR 998; *Ah Yin v Christie* (1907) 4 CLR 1428; *R v Lindbergh; Ex parte Jong Hing* (1906) 3 CLR 93. See also D Dutton, *Citizenship in Australia: A Guide to*

it in the first instance. Indeed, it is arguable this conception persists and is visible in the Court's decision in *Re MIMIA; Ex parte Ame*.¹³³ Thus, when citizenship finally entered the Australian legal lexicon in 1949, it found itself eclipsed not only by the aliens' power and by the vote, but also by an established extra-legal familiarity with the term.

D *Modern Australian Citizenship*

The passage of the *Nationality and Citizenship Act 1948* (Cth) signified a country growing in self-confidence. Yet the Act's designation of Australian citizenship as (merely) providing British subject status¹³⁴ tempered nationalist excitement, and indicated citizenship's retention as a culturally normative status. Indeed, its silence regarding the consequences of citizenship was noteworthy; it was instead left to individual pieces of legislation to discriminate on the basis of legal status.¹³⁵ Mostly, British subject status was the relevant threshold requirement.¹³⁶ Indeed, the relative unimportance of citizenship in this regard perseveres; a survey by Rubenstein¹³⁷ shows the status material only vis-à-vis voting,¹³⁸ the holding of a passport,¹³⁹ and immunity from operation of the *Migration Act 1958* (Cth).¹⁴⁰ Even here citizenship is not decisive, as the ability of British subjects on the electoral roll before 26 January 1984 to continue to vote demonstrates.¹⁴¹

Relatively empty then, legally speaking, citizenship was promoted as conclusive evidence of full commitment to the Australian community.¹⁴² Heavily integrated with the assimilationist experiment of large-scale, non-Anglo-Saxon migration marking the 1950s and 60s, the status was cast as 'the ultimate achievement for newcomers'.¹⁴³ Indeed, as a novel concept under Australian law, citizenship was throughout this period generally associated with naturalization.¹⁴⁴

Commonwealth Government Records (1999) 59. See, eg, *Potter v Minahan* (1908) 7 CLR 277; *Donohoe v Wong Sau* (1925) 36 CLR 404; *Ex parte Walsh*; *In Re Yates* (1925) 37 CLR 36; *Christie v Ah Sheung* (1906) 3 CLR 998; *Ah Yin v Christie* (1907) 4 CLR 1428; *R v Lindbergh*; *Ex parte Jong Hing* (1906) 3 CLR 93.

¹³³ See *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [22]-[23], [111], [119].

¹³⁴ See Rubenstein, above n 94, 79-80, 29.

¹³⁵ *Ibid* 80.

¹³⁶ *Ibid*.

¹³⁷ *Ibid* 177-256.

¹³⁸ See, eg, *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b)(i).

¹³⁹ *Australian Passports Act 2005* (Cth) s 7(1).

¹⁴⁰ See, eg, *Migration Act 1958* (Cth) ss 4, 13(1), 14(1), 29(1), 189, 196, 198. Citizenship is also relevant vis-à-vis employment in the public service, where it may be used as a discriminating factor in the hiring of employees: see *Public Service Act 1999* (Cth) ss 22(6), (8), and Rubenstein, above n 94, 225-7. The more relevant status as regards rights and responsibilities under Australian law is that of permanent resident: see Rubenstein at 254.

¹⁴¹ *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b)(ii). The recent (mistaken) incarceration and deportation of several Australian citizens (see R Skelton, 'How We Wrongly Locked Away 60 People', *The Sunday Age* (Melbourne), 15 January 2006, 1) arguably provides further evidence as to the limits of citizenship in the Australian context.

¹⁴² A-M Jordens, *Alien to Citizen* (Allen & Unwin in association with the Australian Archives, 1997) 173-4.

¹⁴³ B Murphy, *The Other Australia* (Cambridge University Press, 1993) 146.

¹⁴⁴ See Jordens, above n 124, 171-4, 180-5, 188.

Control over eligibility remained strongly regulated however,¹⁴⁵ and thus citizenship as a privilege, promised by the nation's constitutional structure, was mirrored in statutory practice: citizenship announced membership of a club, carrying moral and legal weight equally.¹⁴⁶ With the success of such a regime, and immigration more broadly, requirements were relaxed and the status given more stability, without its object being altered.¹⁴⁷ As the British Empire declined, a nation gradually emerged from its shell; with the above-given exception, British subject status had disappeared from Australian law by 1987.¹⁴⁸

Citizenship endures in such guise today, resultant from and subordinate to the greater project of nation-building — as Dauvergne notes, migration law, not citizenship law, constitutes the biggest hurdle to full membership of the nation.¹⁴⁹ The first Citizenship Minister was in fact only appointed in 2001, the portfolio's responsibilities having until that time been part of the Immigration Minister's activities.¹⁵⁰ Though nation-building remains on-going, signs of increased self-assuredness and conviction regarding national identity continue to be manifested; a recent legislative amendment now allows eligible Australian-born citizens to hold dual citizenship.¹⁵¹

Having briefly surveyed the history of Australian citizenship then, it is appropriate to return to the paper's focus: the Court's decision and associated illumination of individual Australians' vulnerability to governmental authority. Applying the foregoing insights to the case's reasoning, it will be suggested reform to enact a constitutional status of citizenship is both apposite and necessary in light of the Court's decision.

V A CATALYST FOR REFORM

A *Citizenship Devalued*

Veritably, citizenship in Australia has had a 'slow, staggered, and disconnected legal evolution'.¹⁵² As discussed earlier, the status usually denotes formal membership of the community, carrying an associated array of freedoms or limitations on governmental authority with it, foremost of which — but not exhaustive of — today are the right to reside in the community (the right of abode) and the right to shape its direction (the right of franchise). In this way, citizenship ensures the integrity of the community and its administration, as well as providing that of the community members themselves.

¹⁴⁵ See Murphy, above n 143, 146, 160, 162.

¹⁴⁶ See, eg, *ibid* 145-8.

¹⁴⁷ See Jordens, above n 142, 177-8, 193, 207-8.

¹⁴⁸ Rubenstein, above n 94, 86.

¹⁴⁹ C Dauvergne, 'Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics' (2000) 24 *Melbourne University Law Review* 280, 286-9. Compare also the combined 105 pages of the *Australian Citizenship Act 1948* (Cth) and the *Australian Citizenship Regulations 1960* (Cth) with the 2,685 pages collectively occupied by the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth).

¹⁵⁰ Rubenstein, above n 94, 70 fn 30.

¹⁵¹ On account of the repeal of s 17 of the *Australian Citizenship Act 1948* (Cth), by the *Australian Citizenship Legislation Amendment Act 2002* (Cth). This legislation remedied the previously-existing inequality which allowed naturalized Australian citizens to retain their original citizenship, while preventing natural-born Australian citizens from taking up additional citizenships for which they were eligible.

¹⁵² Rubenstein, above n 94, 26.

However, far from being the site around which the government-governed relationship has been based, citizenship has been the forgotten poorer cousin of Australian constitutional law: not only is it a contingent or statutory status, but it confers few rights upon its holders. This is not to say that Australian law, in both its common law and statutory forms, provides insufficient liberties or restrictions upon governmental authority, but these are generally impugnable or not beyond attack, as recent legislation suggests.¹⁵³ The result then, is a gap between citizenship as a formal status and as an active, actual membership of the community.¹⁵⁴

This is clearly seen in the Court's decision. Despite the proposition's apparent absurdity, it was held the applicant's citizenship was hollow at law, owing to its lack of substantive rights and immunities.¹⁵⁵ That is, its practical attributes were allowed to circumscribe its legal operation, and not the reverse. In fact, citizenship was cast in such purely administrative terms that even a definitionally inseparable concept such as the right of abode was unable to be imputed in light of contravening executive practice and in the absence of explicit textual support.¹⁵⁶

Such absurdity is mitigated by its constitutional underpinnings however; the immigration, aliens and territories powers have long been drawn as government trumps, able to justify a large range of legislative measures.¹⁵⁷ Thus the applicant's citizenship could be rendered meaningless: unable to guarantee residence, unable to guarantee freedom of movement and unable to assure immunity from the fickleness of government whim.

Aside from affirming full legal citizenship as a culturally normative status, the Court's decision, in averring the capacity of citizenship's appurtenances to determine its ultimate legal force, is notable for supporting a legislative ability to 'deal citizens ... in

¹⁵³ See *Anti-Terrorism Act (No. 2) 2005* (Cth) sch 7, which expands the definition of sedition and arguably impinges upon freedom of speech. See also Law Council of Australia, 'Summary Comment on the Anti-Terrorism Bill (No. 2) 2005' (Press Release, 14 November 2005).

¹⁵⁴ Rubenstein, above n 94, 62.

¹⁵⁵ See *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [22], [30], [89], [111], [117].

¹⁵⁶ See *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462. The Full Bench there noted that, '[t]he right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or "clearance" from the Executive': at 469; *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [42], [21]-[22], [32], [69]-[77], [88], and accompanying text. Note that deportation is a separate issue from extradition; the High Court has ruled that Australian citizenship does *not* carry a specific protection against extradition, the lawfulness of such an action being a matter at any rate unrelated to legal status; see *DJL v Central Authority* (2000) 201 CLR 226, 278-9; *Barton v The Commonwealth* (1974) 131 CLR 477, 482.

¹⁵⁷ See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562; *MIMIA v Al-Khafaji* (2004) 219 CLR 562; *R v Bernasconi* (1915) 19 CLR 629; *Teori Tau v The Commonwealth* (1969) 119 CLR 564; *Lamshed v Lake* (1958) 99 CLR 132 and *Singh v The Commonwealth* (2004) 209 ALR 355; *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28; *Re Minister for Immigration & Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178; *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 327-8 (Brennan J), 335-6 (Deane J) would appear to support this position. Notably, the case under discussion does not appear to alter this stance: see *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [30], [117]-[118].

and out of the legislative pack'¹⁵⁸ and thus the national polity: the want of practical utility attending the applicant's citizenship flowed not from the source *Australian Citizenship Act 1948* (Cth), but from legislative provisions building on such a status.¹⁵⁹ The Court hence implicitly upheld a capability to indirectly deprive an individual of her/his citizenship status.¹⁶⁰

The applicant's situation, of course, was the obverse of that encountered in the British subject cases.¹⁶¹ Here, the question arose of whether long-term British residents in Australia, electing not to take up Australian citizenship despite legislative amendments removing the status of 'British subject' from the *Australian Citizenship Act 1948* (Cth), could fall within the aliens power. After prolonged wrangling, the Court has resolved they may,¹⁶² despite the absorption and full membership of such individuals in the Australian community.

Taken collectively then, neither formal citizenship nor substantive community membership alone assures citizenship in the sense of being beyond the aliens' power. Given this, and ongoing uncertainty associated with potentially protective constitutional phrases like 'the people of the Commonwealth',¹⁶³ it is discomfiting to know individual liberty rests somewhat upon the goodwill of a (ir)responsible legislature. Indeed, it is at variance with the country's status as a modern, independent, democratic nation.

¹⁵⁸ Rubenstein, above n 94, 255.

¹⁵⁹ See Rubenstein, above n 94, 177-256; *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b)(i); *Australian Passports Act 2005* (Cth) s 7(1); *Migration Act 1958* (Cth) ss 4, 13(1), 14(1), 29(1), 189, 196, 198. Citizenship is also relevant vis-à-vis employment in the public service, where it may be used as a discriminating factor in the hiring of employees: see *Public Service Act 1999* (Cth) ss 22(6), (8), and Rubenstein, above n 94, 225-7. The more relevant status as regards rights and responsibilities under Australian law is that of permanent resident: see Rubenstein at 254; *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b)(ii). The recent (mistaken) incarceration and deportation of several Australian citizens (see R Skelton, 'How We Wrongly Locked Away 60 People', *The Sunday Age* (Melbourne), 15 January 2006, 1) arguably provides further evidence as to the limits of citizenship in the Australian context; Jordens, above n 142.

¹⁶⁰ See *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [78]; *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28, 35, 87, however.

¹⁶¹ See *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178.

¹⁶² *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28.

¹⁶³ The *Constitution* refers, in the Preamble, to the 'people' of the respective States agreeing to 'unite in one indissoluble Federal Commonwealth'. This, together with references to the 'people of the State' and the 'people of the Commonwealth' in ss 7 and 24 respectively — which collectively provide for a system of representative democracy by establishing the methods for electing the Senate and the House of Representatives respectively — as well as reference to the method for qualification of such electors (ss 8 and 30), has been held by some to provide a broad constitutional guarantee of franchise, and as such, a broad guarantee of membership of the Australian body politic, unable to be deprived by the legislature, at least in the absence of extraordinary circumstances. The concept is not well developed in law, though there is arguably some authority for the proposition: see *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 327-8 (Brennan J), 335-6 (Deane J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 411 (Gaudron J); *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [30], [117]-[118].

The key feature of the Court's decision is its expansion of the aliens' power. Prior to the Court's judgment and that handed down in *Singh v The Commonwealth*¹⁶⁴ ('*Singh*') a year earlier, it was settled law that the statutory status of citizen was coincident with the constitutional status of non-alien.¹⁶⁵ Yet *Singh's* holding that alienage connoted the owing of allegiance to a foreign sovereign¹⁶⁶ laid the ground for an enlarged reading of the power, attained in the Court's holding that formal citizenship does not prohibit such an individual being classed an alien.¹⁶⁷

While the Court's remarks in *Re MIMIA; Ex parte Ame* regarding the reach of the aliens power are ultimately constrained by the case's facts, and by the repeated emphasis on the territories power more than the aliens power as a tool of de-citizenship, the Court's opinion was novel in that the applicant, unlike previous parties before the Court in allied circumstances, had never held other than Australian citizenship.¹⁶⁸ As Prince notes, the case raises questions as to the status of Australians holding dual nationality;¹⁶⁹ this appears to be so, whether the individual's citizenship is by birth or by naturalization.

Indeed, more than 100 years after its inception, the aliens' power has now reached a new, disturbing zenith. Despite judicial mutterings that its application is not infinite and that the term cannot be defined as broadly or distortedly as Parliament wishes,¹⁷⁰ several justices do not seem as willing to constrain the legislature.¹⁷¹ Moreover, assurances that the aliens power could not be used to deprive the citizenship of individuals with claims 'stronger in law and fact'¹⁷² than the applicant may be regarded as hollow; in light of the foregoing analysis and given the bond in Australia between the right of franchise and the constitutional status of non-alien, dual citizens ineligible to vote¹⁷³ may at the least adjudge their citizenship as more susceptible to annulment than that of the remainder of the Australian community.

The above demonstrates that truly, Australian citizenship has been devalued. With the continued deportation of individuals having spent nearly their entire life in Australia,¹⁷⁴ citizens 'in all but law',¹⁷⁵ and with government threats to strip dual nationals of their

¹⁶⁴ (2004) 209 ALR 355.

¹⁶⁵ *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28, 35, 87.

¹⁶⁶ *Singh v The Commonwealth* (2004) 209 ALR 355, 367, 414.

¹⁶⁷ *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [37]-[38], [116]-[117].

¹⁶⁸ See *ibid* [116].

¹⁶⁹ P Prince, 'Mate! Citizens, Aliens and 'Real Australians' — The High Court and the Case of Amos Ame' (Research Brief, Parliamentary Library of Australia, 17 October 2005) 11.

¹⁷⁰ See, eg, *Singh v The Commonwealth* (2004) 209 ALR 355, 357 (Gleeson CJ); *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ).

¹⁷¹ See, eg, *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28, 87 (Heydon J); *Singh v The Commonwealth* (2004) 209 ALR 355, 413-5 (Gummow, Hayne and Heydon JJ). Indeed, the evolution of the aliens' power over the last decade suggests just this.

¹⁷² *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [117].

¹⁷³ See *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [41], [132].

¹⁷⁴ See Editorial, 'Australia Must Renounce Official Policies of Suffering', *The Age* (Melbourne), 10 January 2006, 10.

¹⁷⁵ *Minister for Immigration v Roberts* (1993) 41 FCR 82, 86 (Einfield J), cited in Rubenstein, above n 94, 2.

Australian citizenship if convicted of terrorist offences¹⁷⁶ — some of which contain worrying levels of ambiguity in their drafting¹⁷⁷ — it is not alarmist to assert alternatives to the current arrangement need be considered.

B *The Case For Reform*

McHugh J reflected in *Singh* that he found it difficult to designate a natural-born subject of the Queen an ‘alien’ for constitutional purposes.¹⁷⁸ The dissentient nature of his comments shows how much things have changed; as noted above, one reason for excluding citizenship from the *Australian Constitution* was the protection Australians retained as common law subjects. The foregoing discussion indicates that the system of responsible government upon which the worth of such a status was predicated has failed, at least in the Australian context.

One reason for this might be the existence of the *Australian Constitution* itself. It was suggested above there exists inherent tension between the notions of constitutionalism and of responsible government — it may well be that in a battle between the two, it is natural for the former to prevail. That is to say, where expansive powers exist under a written document, these will generally overwhelm the connate protections of a historically-bound system of restraint. Certainly, governments are not usually averse to affirming an expanded understanding of their abilities.¹⁷⁹

Indeed, such a description fits the foregoing characterization of the two theories; responsible government as avowing unabridged sovereignty, limited only to the extent that it is divided between actors, constitutionalism as averring a pre-political social space.¹⁸⁰ In a constitution like Australia’s then, containing virtually no assurances of individual liberty,¹⁸¹ this pre-political space is small; it makes sense that government

¹⁷⁶ See The Hon John Howard MP, *Joint Press Conference with Attorney-General* (2003) Office of the Prime Minister <<http://www.pm.gov.au/news/interviews/Interview1553.html>> at 10 December 2005; see also Ray Martin, Interview with The Hon Peter Costello MP (Melbourne, 23 August 2005) <<http://www.treasurer.gov.au/tsr/content/transcripts/2005/124.asp>> at 26 November 2005. The government has, for the moment, apparently shelved such plans: see J Kerr, ‘Convicted Terrorists Will Keep Citizenship’, *Sydney Morning Herald* (Sydney), 10 November 2005, 4.

¹⁷⁷ See, eg, *Criminal Code Act 1995* (Cth) s 101.4, which creates an offence of possessing a ‘thing’, where that thing ‘is connected with preparation for, the engagement of a person in, or assistance in a terrorist act’.

¹⁷⁸ *Singh v The Commonwealth* (2004) 209 ALR 355, 368 (McHugh J).

¹⁷⁹ Indeed, the present case would appear to support this argument.

¹⁸⁰ Even admitting the influence of Lockean thought on the development of common law freedoms and liberties, it is possible to argue the above given the historical context of absolute, unabridged dominion underpinning the theoretical relationship between monarch and subject. While practically speaking, such a connection no longer abides, the self-same structure endures; hence, it may be asserted that while the balance of rights and obligations between monarch and subject has altered, their sum total subsists at the same (greatly expansive) level as before: see discussion above at Part III.B and the texts there referred to.

¹⁸¹ The freedoms explicitly provided by the *Constitution* are contained in ss 41, 51(xxxi), 80, 116 and 117. Largely, though not in all instances, these have been construed so as to provide hollow protection, such as s 41’s guarantee that ‘[n]o adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth’, which has been read to guarantee only those voting rights that existed prior to Federation, before Commonwealth Parliament provided for uniform federal franchise in 1902: see *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254. Additionally, the High Court has ruled that the *Constitution* contains a number of implied constitutional freedoms, such as a

would thus seek to enlarge its domain under the rubric of responsible government, using the *Australian Constitution* itself as the legitimating leverage.

While the adoption of responsible government as the leitmotif of Australian constitutional structure was a wholly natural consequence of Federation, it was misplaced in as far as it asserted the pertinence of the system's historical underpinnings to Australian society. Australia's history, however, was nothing like that of England — never were there despotic monarchs to be resisted, never were there undiscovered freedoms to claim and fight for; by contrast, the narrative was a rather pedestrian one, laced only with xenophobic mistrust.¹⁸²

Thus, without historical imperative to act as a brake on government, a constitution like Australia's with its reliance on the common law was destined to prove a poor substitute. It might have been supposed that in fact, government itself needed controlling, lest it ordain itself emperor. This holds despite the peaceful nature of Australian independence; the American Revolution's violence only made it plainer that governments were to be equally as feared as monarchs.

Yet the Framers weightily supposed that being in control of government from the outset, they would be able to stamp their authority and vision on the system forever, ensuring it would not deviate from their ideals.¹⁸³ Power, however, is a remarkably slippery thing; while the racism colouring the nation's birth has faded (though not disappeared),¹⁸⁴ the aliens power remains as virile as ever, as this paper has demonstrated. Thus the nation retains only a definitive, all-pervasive capacity to exclude, lacking an equivalent inclusive capability.

C *A Constitutional Citizenship*

The disease being constitutional, so must be the solution. While Australian identity has proved remarkably pliable, from the days of the White Australia Policy,¹⁸⁵ through assimilation¹⁸⁶ and integration¹⁸⁷ to the multiculturalism we embrace today,¹⁸⁸ it is time

freedom of political communication (*Australian Capital Television v The Commonwealth* (1992) 177 CLR 106)), and freedoms of interstate movement and of access to the seat of government (*R v Smithers; Ex parte Benson* (1912) 16 CLR 99)). Individual judges have further discerned additional freedoms, most notably Justice Murphy: see, eg, *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670; *Taylor v Taylor* (1979) 143 CLR 1, 20; *Sillery v The Queen* (1981) 180 CLR 353, 362. For further discussion, see P H Lane, *Lane's Commentary on the Australian Constitution* (Law Book Co, 2nd ed, 1997).

¹⁸² See discussion above Part IV.

¹⁸³ See discussion above Part IV.B and Rubenstein, above n 94, 24-45.

¹⁸⁴ See, eg, 'Mob Violence Envelops Cronulla', *Sydney Morning Herald* (Sydney), 11 December 2005, at <<http://www.smh.com.au/news/national/mob-violence-envelops-cronulla/2005/12/11/1134235936223.html>>.

¹⁸⁵ While never formally enunciated as such, the White Australia Policy was a discriminatory immigration policy favouring white, generally Anglo-Celtic immigrants, in operation for the first 50 or so years of the nation's life. It was associated with the infamous dictation test, whereby customs officers could require entrants to transcribe fifty words in a European language of the officer's choosing: see H I London, *Non-White Immigration and the 'White Australia' Policy* (Sydney University Press, 1970) 3-25.

¹⁸⁶ The prevailing immigration policy throughout the 1950s and the early part of the 1960s, assimilation's emphasis was on discouraging ethnic expression, instead stressing cultural homogeneity: see Jordens, above n 144, 147-52.

to ensure a stability commensurate to the distinctiveness of our nationality. This can be achieved through reform to enact a constitutional status of citizenship.

Such a status need only be as strong as the threat faced from other parts of the *Australian Constitution*; thus, for example, it would not be necessary to attach freedom of religion to any potential citizenship.¹⁸⁹ In this respect, it should be stressed that rights of entry, of residence and of protection from deportation are vitally important and as such, should be explicitly established in the form of a right of abode.¹⁹⁰ Indeed, in an era where the domestic law term ‘citizenship’ corresponds with the international law term ‘nationality’,¹⁹¹ there is probably no more fundamental element of citizenship than the right of abode.

Though citizenship’s concern with nationality remains unmatched, its affiliation with democracy runs a close second. As noted above, states built upon the will of their constituent units have been deeply associated with citizenship, and thus it is apposite for any such constitutional status to reflect this notion. Such a provision should be crafted so as to complement the system of representative democracy established by ss 7 and 24 of the *Australian Constitution*;¹⁹² one possible alternative appears in the Appendix at the end of this paper.¹⁹³

Indeed, welding citizenship to the right to vote is, in the Australian context, crucial. As previously suggested, the right of franchise has long been conceived as more central to civic identity than citizenship itself, as the abovementioned example of indigenous Australians illustrates.¹⁹⁴ The unanimity of the *Re MIMIA; Ex parte Ame* verdict,¹⁹⁵ in

¹⁸⁷ Following assimilation, integration was official immigration policy. While underscoring absorption into the mainstream of Australian community, it left greater space for cultural pluralism. It operated from the mid-1960s until the mid-1970s: see *ibid* 153-4.

¹⁸⁸ From the mid-1970s onwards, multiculturalism has been the operative government immigration policy. Its essence is celebrating cultural diversity while at the same time emphasizing national unity: see *ibid* 227-38. See also Department of Immigration and Multicultural and Indigenous Affairs, *Fact Sheet No 6: The Evolution of Australia’s Multicultural Policy* (2005).

¹⁸⁹ Owing to its explicit protection under the *Constitution*: see *Constitution* s 116.

¹⁹⁰ See Appendix para (8).

¹⁹¹ Zilbershats, above n 88, 4.

¹⁹² See *Constitution* ss 7, 24; see also *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28, 35, 87.

¹⁹³ See Appendix para (9). It should be noted the right of franchise contemplated in the Appendix is non-derogable, subject only to the requirement that the citizenship holder be of the age of 18 years or older on the day the election is to occur, contrary to the provisions of s 93(8) of the *Commonwealth Electoral Act 1918* (Cth), which prevent those incapable of understanding the nature and significance of enrolment and voting by reason of being of unsound mind, those serving a sentence of three years or longer for an offence against a law of the Commonwealth or of a State or Territory, and those convicted of treason or treachery who have not been pardoned, from voting. The contemplated provision further runs counter to ss 94-95 of the *Commonwealth Electoral Act 1918* (Cth), which provide, inter alia, for the ineligibility to vote of those enrolled and those eligible to be enrolled to vote where such persons have resided outside of Australia for more than six years continuously. Although arguably controversial, such a provision is entirely appropriate given the professed inclusive rationale underlying the proposed citizenship regime. It should be noted that the proposed amendment does not prevent the right of franchise being possessed by British subjects on the electoral roll before 26 January 1984, or indeed by other classes deemed worthy of possession by Parliament.

¹⁹⁴ See Rubenstein, above n 94, 29, 43, 53; *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28, 45, 48, 72, 87; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 398, 413, 437, 475, 507, 518; *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178, 186,

contrast to the split of opinion surrounding the British subject cases,¹⁹⁶ merely provides further support for this thesis.¹⁹⁷

Such an arrangement would elevate the worth of citizenship in the public mind. This in turn might lead to a more assertive polity; as earlier intimated, the evolution of national identity has reached a point where a relationship of privilege between the government and its people just cannot abide.¹⁹⁸ Though as an institution Parliament possesses a proud history of championing the liberty of individuals, the discussion above illustrates that in Australia it has betrayed that legacy in context of citizenship.

In a modern, independent, democratic state like Australia, prosperous and free, it is incongruous that the very individuals responsible for creating such an environment do not have an inviolable stake in it. Thus, far from removing control of citizenship from a democratically elected Parliament, providing for a constitutional status of citizenship can be seen as relocating the status to more fortified surrounds where it will better serve the interests of those for whom it exists.

Added motivations arise for enacting citizenship as a constitutional status. As many works have documented,¹⁹⁹ Australia has grown from a colonial outpost based on crude ideas of eugenics to a nation-state teeming peacefully with a variety of ethnicities. The success of the Australian experiment is somewhat remarkable, especially when compared with other nations' experiences,²⁰⁰ and the societal celebration of diversity, combined with legislative traits like the ability to hold dual citizenship, speaks of maturity and self-assuredness vis-à-vis national identity.

It is apposite that this be reflected in the *Australian Constitution* itself then, the actual and symbolic contract between government and governed. Indeed, such a move would serve to affirm the success of the Australian experience, act as a renewal of vows and acknowledge the sincerity of the bond between the state and its constituent units. Such

195-6. As does the grant of franchise to women in 1902, at a time when such a feature was generally lacking from most other electoral landscapes: see Audrey Oldfield, *Australian Women and the Vote* (1994) 66. Andrew Robb AO MP, "Formal Citizenship Test" discussion paper released (2006) Office of the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs <<http://www.minister.immi.gov.au/parlsec/media/media-releases/medrel06/300610.htm>> at 28 October 2006, where it is asserted 'Australian citizenship is a privilege not a right'.

¹⁹⁵ See *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005) [41], [132].

¹⁹⁶ See *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28, 45, 48, 72, 87; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 398, 413, 437, 475, 507, 518; *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178, 186, 195-6; see also Jordens, above n 142 and accompanying text.

¹⁹⁷ As does the grant of franchise to women in 1902, at a time when such a feature was generally lacking from most other electoral landscapes: see A Oldfield, *Australian Women and the Vote* (Cambridge University Press, 1994) 66.

¹⁹⁸ See, eg, A Robb AO MP, "Formal Citizenship Test" discussion paper released (2006) Office of the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs <<http://www.minister.immi.gov.au/parlsec/media/media-releases/medrel06/300610.htm>> at 28 October 2006, where it is asserted 'Australian citizenship is a privilege not a right'.

¹⁹⁹ See, eg, Jordens, above n 144; Macintyre, above n 98; P Knightley, *Australia: A Biography of a Nation* (Jonathan Cape, 2001).

²⁰⁰ See, for example, the recent riots in France: G Kitney, 'Paris Riots Lay Bare Deeper Problems', *Australian Financial Review* (Sydney), 5 November 2005, 9.

ends may be advanced as particularly invaluable given the arguable emergence in recent times in Australia of a rising antipathy towards multiculturalism.²⁰¹

The criterion appropriate for circumscribing citizenship is a separate issue from that of its content. It should be noted that two main strands exist within the citizenship tradition: *jus soli* (citizenship by birth) and *jus sanguinis* (citizenship by descent).²⁰² The Australian regime retains elements of each, with birthright citizenship more pivotal and restrictions operating on both.²⁰³ As discussed above, citizenship can also be acquired by naturalization, subject to fulfilment of the prescribed criteria as adjudged by the Minister; these include maintenance of permanent residency status for at least two years and possession of a basic knowledge of English.²⁰⁴

No reason exists to believe the current regime lacks efficacy or is inappropriately adapted in terms of policy focus. It needs remembering, moreover, that it is indeed migration law and not citizenship law which is the nation's true shaping device; the current concern is simply to cement and affirm the status of those already members of the community, not to impinge upon a rightly separate function. As such, the criteria regulating the operation of citizenship by birth and by descent should be incorporated into the *Australian Constitution* in their present form, modified only to ensure harmony with relevant naturalization provisions.²⁰⁵

As regards citizenship by grant — naturalization — its non-automatic character raises difficulty as to the form in which it should appear in the *Australian Constitution*. Relevant to this is a noteworthy proposal advanced by Rubio-Marín, who argues citizenship outmoded and length of residency more relevant in determining who constitutes the community.²⁰⁶ Under her proposal, all those living in a liberal

²⁰¹ See, eg, n 186 above; M Baume, 'Social fabric frays at seam', *Australian Financial Review* (Melbourne), 30 October 2006, 62.

²⁰² Historically, the former was favoured in the United Kingdom and throughout the British Empire (see above n 111), as well as in the United States and many Latin American countries. By contrast, the latter was the norm in Prussia, Austria-Hungary and other European states, emphasizing patrimonial lineage. For further discussion, see above Part III.C and Heater, above n 54.

²⁰³ See *Citizenship Act 1948* (Cth) ss 10, 10B, 10C, 11.

²⁰⁴ *Citizenship Act 1948* (Cth) ss 13, 15. A Bill before Parliament would, if passed, amend this two-year period: see *Citizenship Act 1948* (Cth) ss 10(3)-(5), 10B(1A)-(4), 10C, 11, 13(1A)-(17), 14A-14C, 18-23B. Other important criteria include being 'of good character' and possessing an 'adequate knowledge of the responsibilities and privileges of Australian citizenship': see *Citizenship Act 1948* (Cth) ss 13(1)(f), 13(1)(j). Citizenship does not actually take effect until the certificate of Australian citizenship has been issued and a pledge of commitment has been made in the manner provided by the Act: see *Citizenship Act 1948* (Cth) s 15(1)(a). Citizenship may also be acquired by adoption, where a permanent resident, while in Australia, is adopted under State or Territory law by an Australian citizen or jointly by two persons, at least one of whom is an Australian citizen: *Citizenship Act 1948* (Cth) s 10A. Special provisions, here overlooked, further exist providing for registration as a citizen where the relevant person would otherwise be stateless, and for conferral of citizenship upon the members of a territory where that territory is incorporated into Australia: see *Citizenship Act 1948* (Cth) ss 23D, 33.

²⁰⁵ That is, the time period listed in s 10(2)(b) of the *Citizenship Act 1948* (Cth) should be altered from 10 years to five years: see *Citizenship Act 1948* (Cth) s 10(2)(b), Appendix paras (3)(b), (6), *Citizenship Act 1948* (Cth) ss 10(3)-(5), 10B(1A)-(4), 10C, 11, 13(1A)-(17), 14A-14C, 18-23B. The criteria governing citizenship by adoption should be similarly incorporated into the *Constitution*: see Appendix paras (3)-(5).

²⁰⁶ R Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press, 2000).

democratic state on a permanent basis would be recognized as community members, entitled to full political and social membership within that group.²⁰⁷

Such a scheme presents as attractive, given the phenomenon of mass migration and the politicization of citizenship, as an aspect of community membership, attendant to this trend.²⁰⁸ As such, citizenship by naturalization should be incorporated into the *Australian Constitution* so as to operate in a self-executing manner after a qualifying permanent residency period; five years would seem appropriate, given the current combination of a two-year waiting period balanced with Ministerial discretion.²⁰⁹ Retention of the English language requirement is desirable to ensure commonality at the heart of the citizenship bargain.²¹⁰

The current regime's exceptions and qualifications²¹¹ would have to be significantly rationalized to be incorporated into the *Australian Constitution*. While consolidation is one means to achieve this, it is preferable to allow those currently eligible to apply for citizenship to remain so under the altered scheme, to license Parliament to waive eligibility criteria where it deems appropriate, and to permit debarment to be prescribed similarly, subject to a core standard sufficiently tight to prevent bad faith legislative exploitation; allowing parliamentary interference only where those to be deemed ineligible have committed acts inimical to the interests of the Australian community is an apposite yardstick.²¹²

It should be noted that a full-scale bill of rights is not being advanced.²¹³ As suggested above, constitutional citizenship need only be as strong as is necessary to offset aspects of the *Australian Constitution* which impinge on individual liberty. It is important that constitutional citizenship not replicate its common law and statutory relations in either allowing a space to emerge or providing a focal point for exclusionism; the above proposal acknowledges this by creating a citizenship that is robust, yet narrow in its entitlements and broad in its accessibility.

²⁰⁷ Ibid 6.

²⁰⁸ See, eg, S Castles and M J Miller, *The Age of Migration* (Guildford Press, 2nd ed, 1998) 269-74, 281-2.

²⁰⁹ See Appendix para (6); *Citizenship Act 1948* (Cth) s 13(1). A Bill currently before Parliament would lift this two-year period to three years: see Citizenship Bill 2005 (Cth) s 22(1). Amendments to the Bill extending the period to four years were introduced into Parliament on 2 November 2006: see Department of Immigration and Multicultural Affairs, *Australian Citizenship Bill amendments tabled in Parliament* (2006) Department of Immigration and Multicultural Affairs <<http://www.citizenship.gov.au/law-and-policy/legislation/changes200406-announce.htm>> at 11 November 2006. Parliament in fact already recognizes the principle advanced by Rubio-Marin in providing for citizenship by birth where the person born in Australia is ordinarily resident in Australia for the first 10 years of her/his life: see *Citizenship Act 1948* (Cth) s 10(2).

²¹⁰ See Appendix para (6). Other currently-listed requirements should be omitted so as to eliminate the inequality currently burdening citizenship by grant as compared with the other citizenship forms provided for by the present regime. Provision should be retained for Parliament to limit the ability of individuals of insufficient character to obtain citizenship: see below n 214 and accompanying text.

²¹¹ See *Citizenship Act 1948* (Cth) ss 10(3)-(5), 10B(1A)-(4), 10C, 11, 13(1A)-(17), 14A-14C, 18-23B.

²¹² See Appendix paras (7), (11), (12).

²¹³ For discussion of such a proposal, see P Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, Australian National University, 1994).

Given the Court's decision, it is necessary to include a clause to guarantee freedom of movement.²¹⁴ What other features should also be definitely attached is beyond the immediate scope of this paper. While argument certainly exists to support incorporation of traditional common law rights into any amended regime, the considerations underlined in the preceding paragraph suggest the citizenship proposal advanced in this paper is adequate to address the issues discussed above.

Given the popular nature of the proposed amendment, reason exists to believe that despite the poor strike rate attached to constitutional referenda in Australia, such an alteration to the *Australian Constitution* could be passed. As guarantor of the people's interests then, the Australian government should earnestly proceed to introduce legislation consonant with the above proposal. A representation of what this might look like appears in the Appendix at the end of this paper.

VI CONCLUSION

It is unlikely, however, that such a course of action will be pursued. Since coming to office in 1996, the Howard government has displayed a consistent disregard for the legally entrenched rights and freedoms of individuals.²¹⁵ Under its watch, centuries old liberties have been wound back, and the status of Australians made less secure, as this paper has demonstrated.

Re MIMIA; Ex parte Ame forms part of this trend. While the decision itself is perhaps beyond criticism, the reasoning employed by the Court certainly cannot be so classed; Australian citizenship was formulated in such purely administrative terms so as to be meaningless — the Court felt unable to attach to it a right of abode, a right to not have the status repealed by executive order, or a right to due process in the event of proposed repeal.

Such a conception of citizenship is at clear odds with historical expressions of the status. While the civic republican model differs from its liberal counterpart in emphasising the primacy and unity of the state over the autonomy and ultimately, the inviolability, of the individual, neither mandates the imbalanced and unequal relationship characterizing Australian citizenship.

The reasons for Australian citizenship being so constituted are largely historical. Building the country from a background of racial superiority, the Framers were concerned to maintain such a project's impetus. It was felt constitutional citizenship would impinge upon this, and a plenary power to regulate aliens, when considered with the liberties Australians retained as common law subjects, was agreed a more effective means to national unity. When the term did enter the legal landscape in 1949, in

²¹⁴ See Appendix para (10). As drafted, this provision would protect freedom of movement as established elsewhere in the *Constitution* (see *Re MIMIA; Ex parte Ame* [2005] HCA 36 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005)[21]-[22], [32]), as well as other, similar rights (see above n 183), while at the same time adhering to the principle enunciated above of installing a citizenship only as strong as is necessary to offset aspects of the *Constitution* which impinge on individual liberty. Relatedly, s 116 of the *Constitution* should be amended so as to provide that the rights contained therein apply to holders of Australian citizenship, and s 34(ii) of the *Constitution* should be repealed and replaced with text requiring that potential members hold Australian citizenship.

²¹⁵ Its treatment of asylum seekers and refugees being particularly notorious in this regard.

statutory form, it thus found itself subject to an order in which national identity was shaped from the outside in.

Always, then, has citizenship occupied a modest role under Australian law. Arguably, this is inappropriate in light of the Court's decision and other, related authority which, when taken collectively, highlights the continued expansion of the aliens power and the vulnerability of Australians to governmental prerogative. It is incongruous that in a modern, prosperous, democratic state like Australia, its people should be forced to rest upon promises of responsible government in the face of continued violation of its most basic premises.

Thus, an amendment should be introduced to enact a constitutional status of Australian citizenship. As mentioned, such a status need only be as strong as is necessary to counter threats from other parts of the *Australian Constitution*. Preliminary analysis has suggested the rights of abode and of franchise as its chief elements; further work, however, is required to determine its exact shape. If Australian citizenship truly is to be 'a way of uniting ... the people of Australia as one',²¹⁶ this needs reflecting in law as well as rhetoric.

APPENDIX

Australian Citizenship

- (1) There shall be a legal status known as Australian citizenship.
- (2) Australian citizenship shall be obtainable only by the means stated in this section.
- (3) (a) Subject to this sub-section, a person born in Australia after the commencement of
 - this section shall hold Australian citizenship.
 - (b) A person born in Australia after the commencement of this section shall hold Australian citizenship by virtue of that birth if and only if:
 - (i) a parent of the person held, at the time of the person's birth,
 - Australian citizenship or permanent residency status; or
 - (ii) the person has, throughout the period of five years commencing on the
 - day on which the person was born, been ordinarily resident in Australia.
 - (4) A person, not holding Australian citizenship, who:
 - (a) under a law in force, is adopted by a holder of Australian citizenship or jointly
 - by two persons at least one of whom holds Australian citizenship; and
 - (b) at the time of the person's adoption is present in Australia as a permanent resident;
 shall hold Australian citizenship.
 - (5) A person born outside Australia (in this subsection referred to as the relevant person)

²¹⁶ Department of Immigration and Multicultural and Indigenous Affairs, *Why Australian Citizenship?* (2004) Department of Immigration and Multicultural and Indigenous Affairs <<http://www.citizenship.gov.au/why.htm>> at 16 January 2006.

shall hold Australian citizenship if:

- (a) the name of the relevant person is registered for the purposes of this subsection
 - at an Australian consulate, and the registration is the result of an application made within 25 years of the person's birth to register the person's name for those purposes; and
 - (b) a person, being a parent of the relevant person at the time of the birth of the relevant person:
 - (i) held at that time Australian citizenship, acquired otherwise than by descent; or
 - (ii) held:
 - (A) at that time Australian citizenship, acquired by descent; and
 - (B) at any time before the registration of the name of the relevant person, including a time before the birth of the relevant person, was present in Australia, otherwise than as a prohibited immigrant, as a prohibited non-citizen, as an illegal entrant, as an unlawful non-citizen, or in contravention of a law of a prescribed Territory, as deemed by Parliament, for a period of, or for periods amounting in the aggregate to, not less than two years.
- (6) A person, not holding Australian citizenship, who:
- (a) has been ordinarily resident in Australia for a continuous period of five years or more while a permanent resident; and
 - (b) possesses a basic knowledge of the English language;
- shall hold Australian citizenship.
- (7) Any person holding Australian citizenship or eligible to apply for Australian citizenship immediately before the commencement of this section shall, under this section, continue to hold Australian citizenship or be eligible to apply for Australian citizenship after its commencement.
- (8) Australian citizenship shall possess as a characteristic a non-derogable right of abode.
- (9) Australian citizenship shall possess as a characteristic a non-derogable right to vote for the Senate and for the House of Representatives of the Parliament of the Commonwealth, subject only to the requirement that the citizenship holder be of the age of 18 years or older on the day the election is to occur.
- (10) The foregoing rights of Australian citizenship are not to be interpreted as exhaustive of or in derogation of other citizenship rights elsewhere established in this Constitution; all such rights are to be construed without prejudice as to residency status in either State or Territory.
- (11) Parliament may make laws expanding, but not diminishing, the class of persons holding Australian citizenship.
- (12) Parliament may make laws concerning the ineligibility of persons to obtain Australian citizenship, where such laws concern acts committed by those to be deemed ineligible and the acts concerned are inimical to the interests of the Australian community.