*Matilda Gillis**

A DOCTRINAL AND FEMINIST ANALYSIS OF THE CONSTITUTIONALITY OF THE AUSTRALIAN CITIZENSHIP REVOCATION LAWS

Abstract

This article examines the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (the '*2015 Amendment Act*') and the *Australian Citizenship Amendment (Citizenship Cessation Act*) 2020 (Cth) (the '*2020 Amendment Act*') (together, the '*Citizenship Revocation Laws*'). These Amendment Acts significantly extended the ways in which the Commonwealth government could deprive dual citizens of their Australian citizenship. This article argues that a classic doctrinal analysis of the *Citizenship Revocation Laws* does not give a clear answer as to their constitutionality. Rather, it results in two plausible but opposite outcomes. This article contends that this leaves space for other interpretive pathways and accordingly argues that a feminist approach could provide some useful guidance on the questions of constitutionality under consideration here. This feminist analysis suggests both that the *2015 Amendment Act* and *2020 Amendment Act* should be considered unconstitutional and, more generally, that Australian citizenship is inviolable.

'Ha, banishment? Be merciful, say 'death';
For exile hath more terror in his look,
Much more than death. Do not say 'banishment'.[1]

Romeo and Juliet

'I guess to strip the citizenship from the terrorists who are dual nationals is, if you like, the modern form of banishment'.[2]

The Hon Tony Abbott MP

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1 William Shakespeare, *The Oxford Shakespeare: Romeo and Juliet*, ed Jill L Levenson (Oxford University Press, 2000) 3.3 12–14.

2 'Dual Nationals to Be Stripped', *Lateline* (Australian Broadcasting Corporation, 2015) 0:2:24–0:2:31 <http://www.abc.net.au/lateline/content/2015/s4261423.htm>.

I Introduction

On 3 December 2015, the Commonwealth government passed the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (the '*2015 Amendment Act*') which amended the *Australian Citizenship Act 2007* (Cth) (the '*Citizenship Act*') and vastly extended the ways in which dual citizens could lose their Australian citizenship. In so doing, the government framed citizenship as a 'responsibility' not a 'right', and defined the concept of 'allegiance' narrowly.[3] On 17 September 2020, the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (the '*2020 Amendment Act*') was enacted, which replaced the 'operation of law' revocation of citizenship model in the *2015 Amendment Act* with a citizenship deprivation model based on ministerial discretion. The 2015 amendments were passed with the support of both sides of Parliament, and with supporting polls from the Australian public, while the 2020 amendments received little public attention in the first place. Questions, however, still remain as to the limits on the Commonwealth government's power to remove Australian citizenship.

This article examines what those limits, if there are any, might be. It first sets out the legal and normative conceptions of Australian citizenship and the effect of the *Citizenship Revocation Laws* on those conceptions. It then undertakes a doctrinal analysis of the constitutionality of those laws and demonstrates that a traditional constitutional analysis, drawing upon principles of statutory interpretation and legal precedent, does not provide adequate guidance in determining the Commonwealth government's power to withdraw citizenship.[4] A comprehensive review of, and justification for, the application of a feminist approach is not possible here. Instead, this article in turn puts forward the suggestion that a conceptual and historically-based feminist analysis of the issue, drawing on different and diverse branches of feminism, can help both to clarify the nature and existence of constitutional limits and provisionally support a conclusion that Australian citizenship is inviolable. If this conclusion is correct, then citizenship becomes an inappropriate target for government to manipulate in formulating the nation's strategic and legislative plans.

There is an argument increasingly made that many areas of law can appropriately be subjected to a feminist method and critique, while remaining both 'authentic' and 'legally plausible',[5] within mainstream thinking. The matter of citizenship deprivation has not yet been considered from a feminist perspective, despite such laws being

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3 See Revised Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 1 ('Revised Explanatory Memorandum 2015 Amendment Act').

4 It should be noted that while this article focuses on answering the question of *whether* citizens can be deprived of their citizenship, and not questions as to *how* citizenship can be taken away.

5 Heather Douglas et al, 'Introduction: Righting Australian Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 1, 1.

increasingly commonplace around the world, and despite feminism's traditional concern with and critique of citizenship matters.[6] This article attempts to rectify this.

II Conceptions of Australian Citizenship and the *Citizenship Revocation Laws*

A *Legal and Normative Conceptions of Australian Citizenship*

The concept of citizenship has been described as 'the key to so much that is at the heart of being Australian',[7] as being at 'the heart of Australian politics',[8] and as 'the cornerstone of our society and the bond which unites us as a nation'.[9] Both legal and normative conceptions of citizenship are relevant in the Australian context.

The legal notion of citizenship concerns the formal legal status of people within a particular nation-state and, accordingly, encompasses issues such as the 'acquisition and loss of citizenship, the criteria for citizenship by application, dual or multiple citizenship and discrimination based upon citizenship status'.[10] The normative conception sees citizenship as 'more than a passive belonging' to a nation-state, and understands it to be the substantive and active membership of a community.[11] Broadly, this conception considers the 'subjective experiences of participation and belonging'.[12] As Linda Bosniak has said, 'citizenship' is a term with 'an extraordinarily broad range of uses; it is invoked to characterise modes of participation

6 See below n 123 and accompanying text.

7 Sir Ninian Stephen, 'The First Half-Century of Australian Citizenship' in Kim Rubenstein (ed), *Individual, Community, Nation: Fifty Years of Australian Citizenship* (Australian Scholarly Publishing, 2000) 1, 2.

8 John Chesterman and Brian Galligan, 'Introduction' in John Chesterman and Brian Galligan (eds), *Defining Australian Citizenship: Selected Documents* (Melbourne University Press, 1999) 1, 1–2. See Baden Offord et al, *Inside Australian Culture: Legacies of Enlightenment Values* (Anthem Press, 2014) 41–2.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2006, 9 (Russell Broadbent).

10 Kim Rubenstein, 'Epilogue: Reflections on Women and Leadership through the Prism of Citizenship' in Joy Damousi, Kim Rubenstein and Mary Tomsic (eds), *Diversity in Leadership: Australian Women, Past and Present* (Australian National University Press, 2014) 335, 335.

11 Margaret Thornton, 'Embodying the Citizen' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 200; Kim Rubenstein, 'Citizenship in Australia: Unscrambling Its Meaning' (1995) 20(2) *Melbourne University Law Review* 503, 503–4, 517 ('Citizenship in Australia').

12 Sasha Roseneil, 'Beyond Citizenship: Feminism and the Transformation of Belonging' in Sasha Roseneil (ed), *Beyond Citizenship: Feminism and the Transformation of Belonging* (Palgrave Macmillan, 2013) 1, 3.

and governance, rights and duties, identities and commitments, and statuses'.[13] The normative conception identifies a 'citizen' as being a person who possesses not only legal power, but who also holds and wields 'social and political power'.[14]

While there is a disjuncture between the two conceptions, they can be linked. Citizenship, on both conceptions, is desirable and valuable,[15] and there is an important sense in each formulation that citizenship is about membership and belonging. In the context of citizenship revocation, the two conceptions are especially linked by the fact that the normative can be dependent upon the legal status and, specifically, on the protection against deportation that comes with that status. The loss of legal citizenship involves the 'permanent removal from a person's place of residence, community, family, workplace and other bonds of settled life',[16] amounting to, as Warren CJ in the Supreme Court of the United States has described it, 'the total destruction of the individual's status in organized society'.[17]

B *The Cessation of Citizenship Acts*

1 *The 2015 Amendment Act*

The *2015 Amendment Act* amended the *Citizenship Act* to provide that Australian citizenship could be lost in three circumstances, namely: (i) where a dual citizen committed prescribed (terrorist-related) conduct and did so while not in Australia, or where the dual citizen committed such conduct and left Australia before being tried;[18] (ii) where a dual citizen either fought for, or served in, a declared terrorist organisation;[19] or, (iii) where a dual citizen was convicted of one of the listed offences, and a prison sentence of at least six years was imposed.[20] In the first two circumstances, the citizenship loss was triggered automatically by the very conduct taking place and no conviction need first occur. In the third circumstance, citizenship loss

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13 Linda Bosniak, 'Citizenship Denationalized' (2000) 7(2) *Indiana Journal of Global Legal Studies* 447, 450.

14 Ediberto Román, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique* (New York University Press, 2010) 5; Rubenstein, 'Citizenship in Australia' (n 11) 517–8.

15 Román (n 14) 4; Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press, 2008) 96 ('*Gender and the Constitution*'). See generally Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002) ch 1.

16 Ben Saul, Submission No 2 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (30 June 2015) 5.

17 *Trop v Dulles*, 356 US 88, 101 (1958).

18 *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) ('*2015 Amendment Act*') s 3 amending *Australian Citizenship Act* 2007 (Cth) *('Citizenship* Act') ss 33AA(1)–(2), (7).

19 *2015 Amendment Act* (n 18) s 4 amending *Citizenship Act* (n 18) ss 35(1)(b)(i)–(ii).

20 *Citizenship* Act (n 18) s 35A(1)(a)–(b).

occurs where the relevant minister, or, rather where a 'Citizenship Loss Board' which 'operates in secret according to its own rules',[21] makes a decision to revoke the person's citizenship. The Revised Explanatory Memorandum expressly recognised the implications of revocation for both the legal and normative conceptions of citizenship, defining citizenship as the 'full *and* formal membership of the Australian community'.[22]

It is worth noting that the initial draft of the *2015 Amendment Act* conferred on the Commonwealth government more expansive powers with respect to citizenship deprivation than those which were ultimately set out in the final text of the Act. The initial text of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), for example, conferred on the relevant minister the power to strip the citizenship of a dual Australian citizen without there first being any charge or conviction made against that citizen. The relevant conduct for which citizenship loss could be triggered included a broad range of conduct such as, for example, the 'destroying or damaging' Commonwealth property.[23] The text of the initial Bill was revised, in part in response to the potential constitutional issues with the Bill raised by the Parliamentary Joint Committee on Intelligence and Security's advisory report.[24] However, the enactment of the final *2015 Amendment Act* was nevertheless still described as 'the most significant expansion of the grounds for citizenship loss in Australia since citizenship legislation was first entered into force',[25] and as 'one of the most important changes to Australian citizenship since the concept was introduced in 1948'.[26]

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21 George Williams, 'Stripping of Citizenship a Loss in More Ways than One', *Sydney Morning Herald* (online, 17 April 2016) <http://www.smh.com.au/comment/stripping-of-citizenship-a-loss-in-more-ways-than-one-20160417-go87as.html>; Sangeetha Pillai, 'Citizenship-Stripping Reforms Open to Challenge in Spite of Safeguards' [2016] (February) *Law Society of New South Wales Journal* 74, 75 ('Citizen-Stripping Reforms').

22 Revised Explanatory Memorandum 2015 Amendment Act (n 3) 1 (emphasis added).

23 Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (No 1) 2015 (Cth). See generally Margaret Harrison-Smith and Cat Barker, *Bills Digest* (Digest No 15 of 2015–16, 2 September 2015).

24 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Report, September 2015).

25 Pillai, 'Citizenship-Stripping Reforms' (n 21) 74.

26 George Williams, 'Citizenship Rights a Casualty of Terrorism', *The Age* (online, 16 November 2015) <http://www.theage.com.au/comment/george-williams-citizenship-rights-a-casualty-of-terrorism-20151114-gkz9gv.html>. Prior to the passing of the *ACA Act*, Australian dual citizens could lose their Australian citizenship if they served in the armed forces of a country 'at war' with Australia. However, the executive never used that revocation power: Harrison-Smith and Barker (n 23) 4. Citizenship loss could also occur if citizenship was obtained fraudulently: *Citizenship Act* (n 18) ss 34, 34A, 35. Section 35 was repealed by *Australian Citizenship Amendment Act (Citizenship Cessation) Act 2020* (Cth) sch 1 cl 9.

The Commonwealth government justified the enactment of the *2015 Amendment Act*, and the differentiation between Australian citizens who hold another citizenship and those who do not, on the basis of national security and the need for a 'multi-faceted approach' to counter security threats.[27] The Commonwealth government did not, however, frame the loss of citizenship as being in any way a 'punishment', despite it being generally considered to be 'an extraordinarily harsh' one.[28] This framing was deliberate. If the revocation of citizenship was characterised as a 'punishment', then the *2015 Amendment Act* would immediately fall foul of the *Constitution*, as a Minister would be exercising judicial power, which the High Court has held can only be exercised by a Ch III Court.[29] Accordingly, the government framed the revocation of citizenship as being an administrative, and almost contractual law matter. Citizenship was set out as a concept that 'does not simply bestow privileges or rights, but entails fundamental responsibilities',[30] and that, when dual nationals commit specified terrorist-related conduct, they 'betray Australia',[31] and should be taken to 'have severed that bond and repudiated their allegiance to Australia'.[32] Australian citizens, on this view, are not 'punished' when their citizenship is revoked. They have simply failed to fulfil their 'responsibilities' as citizens and must therefore be removed in order to protect other Australian citizens. These ideas were reiterated and built upon by key government ministers in public fora.[33]

The Australian public appeared to accept those government justifications and the *2015 Amendment Act* was well received, even in its more extreme initial form. Polling conducted by Australia's Fairfax Media found that 75% of people polled were in favour of the stripping of citizenship of those Australian citizens involved in terrorist

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27 Revised Explanatory Memorandum 2015 Amendment Act (n 3) 1.

28 Shai Lavi, 'Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach' (2011) 61(4) *University of Toronto Law Journal* 783, 809; Shai Lavi, 'Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel' (2010) 13(2) *New Criminal Law Review* 404, 425–6; Craig Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists"' (2014) 39(2) *Queen's Law Journal* 551, 565.

29 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269–70 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers Case*').

30 Revised Explanatory Memorandum 2015 Amendment Act (n 3) 1.

31 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7369 (Peter Dutton).

32 Revised Explanatory Memorandum 2015 Amendment Act (n 3) 1.

33 See, eg, Dan Tehan, 'To Be an Aussie is a Gift That Terrorists Seek to Destroy', *Herald Sun* (online, 16 May 2015) <http://www.heraldsun.com.au/news/opinion/to-be-an-aussie-is-a-gift-that-terrorists-seek-to-destroy/news-story/4006b90c4890b96fb8212dd1a34e8c0b>; Dan Conifer, 'Terror Citizenship Laws: Government Introduces to Parliament Bill to Strip Dual Nationals of Citizenship', *ABC News* (online, 24 June 2015) <http://www.abc.net.au/news/2015-06-24/government-introduces-citizenship-laws-bill-to-parliament/6569570>.

activity,[34] and one editorial pointedly stated that 'Prime Minister Tony Abbott knows he is on a vote winner with plans to strip Australian citizenship'.[35] When the final amendments passed 'almost nobody care[d] about' the legislation.[36]

2 *The 2020 Amendment Act*

In response to a report produced by the Independent National Security Legislation Monitor (the 'INSLM') in 2019, the *2020 Amendment Act* was enacted. Specifically, the *2020 Amendment Act* responded to the INSLM's recommendation that

> [the] current 'operation of law' model, whereby a dual-national's Australian citizenship is automatically renounced through their actions, be replaced by a Ministerial decision model, such that the Minister may take in to account a broader range of considerations in determining whether to cease an individual's citizenship.[37]

The *2020 Amendment Act*, accordingly, repealed ss 33AA, 35–35B and 36A of the *Citizenship Act* and inserted into that Act new sections — ss 36A–36L. The new sections, broadly speaking, provide that an Australian dual-citizen could lose their Australian citizenship, on the exercise of the Minister for Home Affairs' discretion, if the dual-citizen was found to have acted in a manner inconsistent with their allegiance owed to Australia by

- engaging in specified terrorism-related conduct;
- fighting for, or being in the service of, a declared terrorist organisation outside Australia. A declared terrorist organisation is any terrorist

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34 James Massola, 'Poll Shows Huge Support for Stripping Sole Nationals of Australian Citizenship', *Sydney Morning Herald* (online, 6 July 2015) <http://www.smh.com.au/federal-politics/political-news/poll-shows-huge-support-for-stripping-sole-nationals-of-australian-citizenship-20150706-gi6416.html>.

35 'Tony Abbott's Cynical and Risky Citizenship Stripping Plans', *Sydney Morning Herald* (online, 1 June 2015) <http://www.smh.com.au/comment/smh-editorial/tony-abbotts-cynical-and-risky-citizenship-stripping-plans-20150601-ghe6xc.html>.

36 Michael Bradley, 'How Can you Lose Your Citizenship? Let Me Count the Ways', *ABC News* (online, 3 December 2015) <http://www.abc.net.au/news/2015-12-03/bradley-how-can-you-lose-your-citizenship/6996496>. Interestingly, Peter Prince notes with respect to *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 ('*Ame*'), which, as discussed further below involved the revocation of Australian citizenship from an Australian-PNG dual citizen, that that case 'received little publicity': see Peter Prince, 'Mate! Citizens, Aliens and "Real Australians": The High Court and the Case of Amos Ame' (Research Brief No 4, Parliamentary Library, Parliament of Australia, 27 October 2005) 19.

37 Revised Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 (Cth) 1 ('Revised Explanatory Memorandum 2020 Amendment Act'); James Renwick, *Report to the Attorney-General: Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007* (Report No 7, 18 September 2019).

> organisation within the meaning of paragraph (b) of the definition of a terrorist organisation in subsection 102.1(1) of the *Criminal Code*, that the Minister, by legislative instrument, declares is a declared terrorist organisation for the purposes of this section;
>
> • engaging in conduct that results in conviction for a specified terrorism offence, and sentenced to a period of imprisonment of at least 3 years, or periods totalling at least 3 years.[38]

The *2020 Amendment Act* provides that the Minister must be satisfied both that the conduct of the dual-citizen demonstrates a repudiation of their allegiance to Australia, and that it would be contrary to the public interest for the person to remain an Australian citizen.[39]

III A Doctrinal Analysis of the *Citizen Revocation Laws*

Legal citizenship in Australia has traditionally, and predominantly, been governed by statute.[40] While the inclusion of the concept of citizenship in the *Constitution* had been advocated by some delegates at the Australasian Federal Convention Debates,[41] no consensus was reached on the matter and it was ultimately dropped.[42] The High Court has, however, found some protection for 'citizenship' in the *Constitution* by way of: (i) the Commonwealth government's power to legislate with respect to naturalisation and aliens in s 51(xix) of the *Constitution*;[43] and, (ii) the phrase, 'the people

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38 Revised Explanatory Memorandum 2020 Amendment Act (n 37) 1. See Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 sub-div B ('2020 Citizenship Cessation Bill').

39 See 2020 Citizenship Cessation Bill (n 38) ss 36B(1)(b)–(c), 36D(1)(c)–(d).

40 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 54 (Gaudron J) ('*Lim*'); Kim Rubenstein and Niamh Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 143, 145.

41 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1767–8 (John Quick).

42 Sangeetha Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited' (2013) 39(2) *Monash University Law Review* 569, 572 ('Non-Immigrants'); Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (1997) 25(2) *Federal Law Review* 295, 295 ('Constitutional Convention Debates'); Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legalbooks, 1995) 957. See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1782 (Josiah Symon).

43 *Constitution* s 51(xix). Section 51(xix) works in parallel with s 51(xxvii), which gives the Parliament legislative power in relation to immigrants until they '[become] a member of the Australian Community': *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 64 (Knox CJ).

of the Commonwealth' in s 24 of the *Constitution*.[44] Legal citizenship in Australia, therefore, is increasingly understood to have a 'constitutional dimension'.[45]

These constitutional pathways to citizenship are examined here and, for each pathway, a more classic, formal methodology of legal interpretation, which draws on such sources as constitutional text, framers' intent, precedent and existing doctrine,[46] is undertaken. That analysis is completed with a view to yielding positive and persuasive answers to the issue at hand, namely, the constitutionality of the *Citizenship Revocation Laws*. It is demonstrated that such a methodology cannot provide a clear or determinate answer to the constitutional questions raised.

A *The Aliens Power*

Section 51(xix) of the *Constitution* provides that the Commonwealth Parliament shall have the power to make laws 'with respect to … naturalization and aliens'. The overriding position at the Convention Debates was that the Parliament should have 'expansive legislative powers with respect to naturalisation and aliens'.[47] The High Court, despite the absence of any mention of citizenship in the section, has 'accepted, without deciding expressly'[48] that s 51(xix) is also the constitutional head of power under which the Parliament may legislate with respect to citizenship. The High Court has, however, placed some limits on how exactly the Parliament can regulate citizenship under this power.[49]

The key limitation to the Parliament's power to legislate with respect to citizenship under the alien's power is the definition of 'alien'. The High Court has found that Parliament cannot simply create its own definition of 'alien' and extend s 51(xix) of

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44 *Constitution* s 24.

45 See Rubenstein and Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' (n 40) 144; Genevieve Ebbeck, 'A Constitutional Concept of Australian Citizenship' (2004) 25(2) *Adelaide Law Review* 137; Pillai, 'Non-Immigrants' (n 42).

46 Judith Baer, *Our Lives before the Law: Constructing a Feminist Jurisprudence* (Princeton University Press, 1999) 89; James Harris, 'Overruling Constitutional Interpretations' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 231, 232–3.

47 Pillai, 'Non-Immigrants' (n 42) 578; Rubenstein, 'Constitutional Convention Debates' (n 42) 304; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1753, 1756 (Richard O'Connor).

48 Rubenstein and Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' (n 40) 144.

49 *Singh v Commonwealth* (2004) 222 CLR 322, 329 [4], 341 [30] (Gleeson CJ) ('*Singh*'); *Koroitamana v Commonwealth* (2006) 227 CLR 31, 38 [11] (Gleeson CJ and Heydon J), 46 [48] (Gummow, Hayne and Crennan JJ) ('*Koroitamana*'); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 173 [31] (Gleeson CJ) ('*Ex parte Te*'); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 40 [21] (Gleeson CJ, Gummow and Hayne JJ) ('*Shaw*'); *Hwang v Commonwealth* (2005) 222 ALR 83, 89 [18] (McHugh J) ('*Hwang*').

the *Constitution*, 'to include persons who could not possibly answer the description of "aliens" in the ordinary meaning of the word'.[50] The High Court has generally considered that a person who holds Australian statutory citizenship cannot meet the description of an alien,[51] and a majority of the High Court held, more recently, that Indigenous Australians cannot meet the description of 'alien'.[52] This finding with respect to Indigenous Australians was on the basis of the unique and deep relationship Indigenous Australians have with Australia.[53] As articulated by Gordon J,

> [t]he constitutional term 'aliens' conveys otherness, being an 'outsider', foreignness. The constitutional term 'aliens' does not apply to Aboriginal Australians, the original inhabitants of the country. An Aboriginal Australian is not an 'outsider' to Australia.[54]

Aside from these specific situations, the majority of the case law in the early 21st century suggests that whether or not a person is an alien within the meaning of s 51(xix) of the *Constitution* is determined by questions of allegiance.[55] As Elisa Arcioni describes it, allegiance has become 'the marker of membership and therefore of non-alien status'.[56] Conversely, an alien is someone who does not owe allegiance to Australia. There are three key cases in which the High Court has investigated this

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50 *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ) ('*Pochi*'). *Pochi* was subsequently affirmed by the Court in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), 192 (Gaudron J) ('*Nolan*'); *Singh* (n 49) 329 [4]–[5] (Gleeson CJ); *Koroitamana* (n 49) 38–9 [11]–[14] (Gummow, Hayne and Crennan JJ), 49 [62] (Kirby J), 54–5 [81]–[82] (Callinan J); *Love v Commonwealth* (2020) 375 ALR 597, 600 [7] (Kiefel CJ), 609 [50] (Bell J), 618 [87] (Gageler J); 636–7 [168] (Keane J), 650–1 [236] (Nettle J), 673–4 [310] (Gordon J); 703–4 [433] (Edelman J) ('*Love*').

51 See, eg, *Shaw* (n 49) 53 [69] (Kirby J). *Shaw* overturned *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, where the High Court had held that long-term British immigrants could not meet the description of 'alien' on the basis that they held those rights, such as voting rights, held by those with Australian statutory citizenship. Cf *Ame* (n 36).

52 *Love* (n 50).

53 Ibid 615 [74] (Bell J), 664 [272] (Nettle J), 671 [298] (Gordon J), 689–90 [391], 690–1 [394] (Edelman J). The dissenting judges held that being of Indigenous dissent was irrelevant to whether or not a person was an 'alien' and that, given the plaintiffs did not have statutory citizenship and had the citizenship of another country, they were aliens within the meaning of s 51(xix) of the *Constitution*: see the judgments of Kiefel CJ beginning 598 [1], Gageler J beginning 616 [83] and Keane J beginning 632 [142].

54 Ibid 670 [296].

55 Pillai, 'Non-Immigrants' (n 42) 592. See, eg, *Singh* (n 49); *Koroitamana* (n 49). Matters of 'absorption into the Australian community' are no longer relevant: see Ebbeck (n 45).

56 Elisa Arcioni, 'Identity at the Edge of the Constitutional Community' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 42 ('Identity at the Edge').

concept of 'allegiance': *Singh v Commonwealth* ('*Singh*'),[57] *Ame*,[58] and *Koroitamana v Commonwealth* ('*Koroitamana*').[59]

In *Singh*, the majority found that the plaintiff, who had lived in Australia for her whole life, but who held Indian citizenship by descent, was an alien.[60] The plaintiff in that case lacked allegiance because she was not an Australian citizen, but her owing obligations to a foreign power (namely India) were also key to the finding that she lacked allegiance. Obligations to a foreign power were described by Gummow, Hayne and Heydon JJ as 'the central characteristic of what is meant by "aliens"'.[61]

Unlike *Singh*, the decision in *Ame* concerned a plaintiff who held the legal status of Australian citizen. The High Court held in *Ame* that the plaintiff, a Papuan who had held formal Australian citizenship since birth, became an alien in 1975, as result of the operation of the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth).[62] Those regulations stripped dual Australian-Papua New Guinea ('PNG') citizens of their Australian citizenship, following the enactment of the new *Constitution of the Independent State of Papua New Guinea*, which contained a prohibition on dual citizenship or, more precisely, a prohibition on the holding of 'real foreign citizenship' while holding a PNG citizenship.[63] The High Court again held that the owing of 'allegiance to a foreign sovereign power', here being those obligations the plaintiff owed to PNG, was a critical characteristic of alienage.[64] This was apparently so essential a characteristic that even a legal Australian citizen could be treated as an alien if they owed obligations to a foreign power. As Arcioni notes, *Ame* demonstrated that allegiance to Australia alone 'was not sufficient to safeguard membership of the constitutional community'.[65]

To justify the decision that an Australian citizen could be an alien, the judgments in *Ame* focused on the fact that the Commonwealth Parliament had always 'denied the political rights normally linked to citizenship from Papuans — such as voting, jury

57 *Singh* (n 49).

58 *Ame* (n 36).

59 *Koroitamana* (n 49).

60 *Singh* (n 49) 400 [205] (Gummow, Hayne and Heydon JJ).

61 Ibid 399 [201]. See also Kim Rubenstein, 'From Supranational to Dual to Alien Citizen: Australia's Ambivalent Journey' in Simon Bronitt and Kim Rubenstein (eds), *Citizenship in a Post-National World: Australia and Europe Compared* (Federation Press, 2008) 38, 47 ('From Supranational').

62 *Ame* (n 36) 440–1.

63 *Constitution of the Independent State of Papua New Guinea* ss 64–5; *Ame* (n 36) 448 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 464 (Kirby J).

64 *Ame* (n 36) 458 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

65 Arcioni, 'Identity at the Edge' (n 56) 43.

service, and freedom of movement in and out of the mainland'.[66] This, accordingly, meant that the Australian citizenship held by the plaintiff was only 'nominal', and 'not in fact or law full or real citizenship'.[67] It was, simply, 'a veneer of Australian citizenship' and a 'flawed citizenship' of a 'fragile and strictly limited character'.[68] This was itself recognised by PNG, which viewed Australian citizenship as not being 'real foreign citizenship' which would fall foul of the PNG *Constitution*.[69] Justice Kirby did emphasise *Ame*'s limited precedential value and noted that it reflected 'an incident to the achievement of the independence and national sovereignty of a former Territory' and so, afforded 'no precedent for any deprivation of constitutional nationality of other Australian citizens whose claim on such nationality is stronger in law'.[70] However, the reasoning of the High Court in the more recent case of *Re Canavan* does share similarities with the Court's reasoning in *Ame*.[71] The High Court in *Re Canavan* was not examining the aliens power, but rather the eligibility of certain Parliamentarians to sit in Parliament in light of s 44 of the *Constitution* which, in effect, prohibits dual citizens from sitting in Parliament. The High Court, in *Re Canavan*, held that Senator Nick Xenophon was not a dual citizen on the basis that his 'British Overseas Citizenship' was not a 'real' citizenship, because it did not encompass a right to enter or stay in the United Kingdom, nor, most interestingly, did it involve any obligation of loyalty (ie allegiance) being owed to the United Kingdom.[72]

Koroitamana extended the ideas of allegiance presented in both *Singh* and *Ame*, namely, that there would be a lack of allegiance where obligations were owed to a foreign power.[73] While the plaintiffs in *Koroitamana* were entitled to Fijian citizenship, they did not, unlike the plaintiffs in *Singh* and *Ame*, actually hold that foreign citizenship.[74] Accordingly, the plaintiffs did not owe allegiance to a foreign power. This was not, however, held to be a distinguishing feature and the plaintiffs in

66 Kim Rubenstein and Niamh Lenagh-Maguire, 'Thick and Thin Citizenship as Measures of Australian Democracy' in Glenn Patmore and Kim Rubenstein (eds), *Law and Democracy: Contemporary Questions* (Australian National University Press, 2014) 41 ('Thick and Thin Citizenship'); *Ame* (n 36) 449 [12], 457 [30] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 470 [73] (Kirby J).

67 *Ame* (n 36)), 471 [76] (Kirby J). See also Rubenstein and Lenagh-Maguire, 'Thick and Thin Citizenship' (n 66) 41.

68 *Ame* (n 36) 474 [88], 483 [118] (Kirby J).

69 *Constitution of the Independent State of Papua New Guinea* s 64.

70 *Ame* (n 36) [117] 483.

71 *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* (2017) 263 CLR 284 ('*Re Canavan*').

72 Ibid 328–9 [132]–[133] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

73 *Koroitamana* (n 49) 41–2 [28] (Gummow, Hayne and Crennan JJ).

74 Ibid 53 [76] (Kirby J).

Koroitamana were found to be aliens.[75] This implies, as Sangeetha Pillai argues, that 'allegiance to a foreign power' is not a 'determinative element of alienage'.[76] Rather, it is enough that there be an absence of allegiance to Australia.[77]

The Commonwealth government, in the Revised Explanatory Memorandum for the *2015 Amendment Act*, stated that the relevant head of power supporting the *ACA Act* was the aliens power,[78] on the basis that the power can operate, in effect, to turn an Australian dual citizen into an alien. The Commonwealth government also, albeit implicitly, stated that the supporting head of power for the *2020 Amendment Act*, was similarly s 51(xix) of the *Constitution*.[79]

The judicial precedents of *Singh* and *Ame* and, to an extent, *Koroitamana*, as set out above, demonstrate that a person will be an alien where that person owes obligations to a foreign power and, on that basis, lacks allegiance. These precedents in effect mean that there is a potential argument that all dual nationals, who, by definition, owe obligations to foreign powers, lack allegiance and are 'aliens' within the meaning of s 51(xix) of the *Constitution*. *Ame*, most significantly for the purposes of this argument, demonstrated that even the holding of formal Australian citizenship was not necessarily a barrier to finding a lack of allegiance and, therefore, alienage, in circumstances where obligations are owed by the citizen to a foreign power.[80] As Kim Rubenstein argues, 'the consequence is that anyone who formally owes an obligation to a foreign power … can be both citizens and aliens at the same time',[81] possibly eventuating in a dual citizen being

> detained and possibly deported or removed to the country of their citizenship, even if they had spent their whole life in Australia and had no real connection to that country.[82]

On this analysis, the *Citizenship Revocation Laws* find constitutional support in the aliens power on the basis that dual nationals lack the requisite allegiance and could be, therefore, validly deported as aliens. Both Gordon J and Edelman J in *Love*, however, cast doubt on whether dual citizens, for that status alone, could be considered aliens.[83] As the Court in *Singh* did not directly contemplate questions of dual citizenship, and the limited precedential value of *Ame* was emphasised throughout Kirby J's judgment as not applying to those 'other Australian citizens'

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75 Ibid 38–9 [14]–[16] (Gleeson CJ and Heydon J), 46–7 (Crennan, Gummow and Hayne JJ), 55 [82]–[83] (Kirby J), 56 [86] (Callinan J).

76 Pillai, 'Non-Immigrants' (n 42) 592.

77 Ibid.

78 Revised Explanatory Memorandum 2015 Amendment Act (n 3) 2.

79 Revised Explanatory Memorandum 2020 Amendment Act (n 37) 7.

80 *Ame* (n 36) 458 [35].

81 Rubenstein, 'From Supranational' (n 61) 47.

82 Ibid.

83 *Love* (n 50) 675 [317]–[318] (Gordon J), 703 [430] (Edelman J).

who hold 'real citizenship', there are potentially very salient differences between those precedents and the potential issues under the *Citizenship Revocation Laws*.

Of course, a clear textual argument is available to support the constitutionality of the *Citizenship Revocation Laws*, namely that there is no inherent limitation in the text of the 'naturalisation and aliens' power 'that prevents that power being applied unilaterally to change a person's status from non-alien to alien'.[84] In any case, the government's key argument for constitutionality, as expressed in the Revised Explanatory Memorandums for both the *2015 Amendment Act* and the *2020 Amendment Act*, focused almost entirely on the *Koroitamana* precedent, which held that an absence of allegiance is sufficient to find alienage.[85] The *Citizenship Revocation Laws* took that legal precedent and extended it. Both Amendment Acts define allegiance, and thus, what constitutes a lack of allegiance, in a particular way, by drawing on the ordinary meaning of 'allegiance' and interpreting it as 'the obligation of a subject or citizen to their sovereign or government; duty owed to a sovereign or state'.[86] On the basis of this definition, the Commonwealth government argued that when terrorist-related conduct occurs, the dual citizen may be taken to be in breach of his or her obligations to Australia, as having 'severed th[e] bond', and therefore, as lacking allegiance.[87] The dual citizen thus becomes a constitutional alien subject to deportation. If this definition of allegiance (and, accordingly, what constitutes an absence of allegiance) is indeed accepted as logical, then the constitutional validity of both the *2015 Amendment* Act and the *2020 Amendment Act*, at least on this point, is not in question. This is a plausible outcome, particularly in light of what Pillai describes as the High Court's traditional 'great deference to statutory concepts when determining whether the criteria for non-alienage are met'.[88]

This reading of allegiance may, however, be oversimplified because a focus on allegiance as something 'exclusive and insoluble'[89] to 'a' state is, arguably, a very 'traditional and narrow' way to consider the concept.[90] The High Court might take a more nuanced approach and read 'allegiance' as a term with 'multiple legal,

84 *Ame* (n 36) 441.

85 Revised Explanatory Memorandum 2015 Amendment Act (n 3) 2; Revised Explanatory Memorandum 2020 Amendment Act (n 37) 7.

86 Revised Explanatory Memorandum 2015 Amendment Act (n 3) 2, quoting *Macquarie Dictionary* (5th ed, 2009) 'allegiance'.

87 Revised Explanatory Memorandum 2015 Amendment Act (n 3) 2; Revised Explanatory Memorandum 2020 Amendment Act (n 37) 8.

88 Pillai, 'Non-Immigrants' (n 42) 607. See also *Lim* (n 40) 54 (Gaudron J).

89 Kim Rubenstein and Niamh Lenagh-Maguire, 'More or Less Secure: Nationality Questions, Deportation and Dual Nationality' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 264, 265.

90 Joshua Neoh, Donald R Rothwell and Kim Rubenstein, 'The Complicated Case of Stern Hu: Allegiance, Identity and Nationality in a Globalised World' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised*

political and social meanings',[91] and one that is, therefore, not definable. On such a reading, a person can have many varying allegiances and it would be impossible for the government to define precisely what is meant by a lack of allegiance and what conduct may constitute it. Further, such a reading of 'allegiance' would bring into question how the *ACA Act* can only apply to dual nationals if it is 'possible to have a connection to a country other than Australia, without that undermining one's commitment to being a member of the Australian community'.[92] In any case, the High Court, as argued by Helen Irving and Rayner Thwaites, 'may consider it a different matter for the law to re-define citizens as aliens' where the person otherwise meets 'formal citizenship eligibility'.[93] Pillai supports this argument, saying the 'Parliament cannot, through statute, convert a constitutional non-alien into an alien'.[94] The *ACA Act* may, on this line of analysis, be unconstitutional.

More generally, a close examination of the judgments and, therefore, of the state of precedent on the scope of the aliens power in the *Constitution* set out above, reveals a lack of unanimity in the decisions, and significant shifts with each case on important matters of principle. This helps to create significant uncertainty on the issue of the constitutionality of the *ACA Act* and how the High Court is likely to approach it.

B *The 'People of the Commonwealth'*

Australian citizenship may also have another constitutional foundation in 'the people of the Commonwealth'.[95] The phrase is found in s 24 of the *Constitution*, which provides that the 'House of Representatives shall be composed of members directly

World (Cambridge University Press, 2014) 453, 476. See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897, 1012–3 (Edmund Barton).

91 Neoh, Rothwell and Rubenstein (n 80) 476; Karen Knop, 'Relational Nationality: On Gender and Nationality in International Law' in Thomas Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press, 2001) 89, 113.

92 Kim Rubenstein, 'Dual Reasons for Dual Citizenship' (1995) 3(3) *People and Place* 57, 57.

93 Helen Irving and Rayner Thwaites, 'Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)' (2015) 26(3) *Public Law Review* 137, 145.

94 Pillai, 'Non-Immigrants' (n 42) 593.

95 This article focuses on the phrase itself and idea that the people are sovereign. Citizenship may also be protected because revocation would lead citizens to lose their 'right to vote' as encompassed in s 24 of the *Constitution*. However, that right is 'contingent and conditional': see Irving and Thwaites (n 93) 147; Leslie Zines, 'The Sovereignty of the People' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91, 91.

chosen by the people of the Commonwealth'.[96] The shorter phrases, the 'people',[97] and the 'electors',[98] are also found in the *Constitution*.

The idea that 'the people' recognises a constitutional Australian community 'has been hinted at by a number of High Court judges'.[99] As Sir John Quick and Sir Robert Garran set out, the phrase the 'people of the Commonwealth' may be 'the nearest approach in the *Constitution* to a designation equivalent to citizenship'.[100] This idea was drawn upon by McHugh J in *Hwang v Commonwealth* ('*Hwang*').[101] In that case, the plaintiffs were born in Australia, but in immigration detention.[102] They were, ultimately, considered to be 'unlawful non-citizens'.[103] Notably, McHugh J stated that citizenship was not just a legislative matter.[104] There seemed to be 'no doubt', in his Honour's mind, that at federation 'being one of "the people of the Commonwealth" was recognised as synonymous with the concept of being a citizen of Australia'.[105]

As Rubenstein and Niamh Lenagh-Maguire point out, the constitutional text itself does not 'classify the people to whom it applies in terms of their status as Australian citizens'.[106] Who 'the people' are remains undefined. Arcioni's examination has found that the High Court has 'generally avoided delving into the details of how membership of the constitutional "people" is determined'.[107] Several of the judgments in *Love* demonstrate a recent example of this very avoidance on the part of the High Court to say precisely who are 'the people'.[108] Justice McHugh's judgment in *Hwang* still remains perhaps the most detailed precedent on this question. His Honour said that it was in the Parliament's power to decide who constitutes 'the people', though this power was not an 'unlimited power to declare the conditions

96 *Constitution* s 24.

97 Ibid preamble, cl 5, ss 7, 53.

98 Ibid ss 8, 30, 123, 128. The 'people' and 'electors' are 'not identical concepts' but, arguably, 'have converged': Elisa Arcioni, 'The Core of the Australian Constitutional People: "the People" as "the Electors"' (2016) 39(1) *University of New South Wales Law Journal* 421, 421 ('The Core of the Australian People'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 19 [21] ('*Rowe*').

99 Pillai, 'Non-Immigrants' (n 42) 576. See, eg, *DJL v Central Authority* (2000) 201 CLR 226, 278 [135] (Kirby J) ('*DJL*'); *Love* (n 47) 683 [355] (Gordon J).

100 Quick and Garran (n 42) 957.

101 *Hwang* (n 49).

102 Ibid 84 [3].

103 See Ibid 84–5 [4]; See also Pillai, 'Non-Immigrants' (n 42) 599.

104 *Hwang* (n 49) 89 [19].

105 Ibid 87 [11].

106 Rubenstein and Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' (n 40) 144.

107 Arcioni, 'Identity at the Edge' (n 56) 51.

108 *Love* (n 50) 639 [178] (Keane J), 670 [295] (Gordon J), 705 [436] (Edelman J).

on which citizenship or membership of the Australian community depends'.[109] His Honour stated further that Parliament could not, for example, exclude 'those persons who are undoubtedly among "the people of the Commonwealth"', but could exclude persons among 'the people' for particular purposes, such as by restricting 'the qualification of electors of members of the House of Representatives'.[110] The valid exclusion of both 'an entire class of British citizens resident in Australia' in *Shaw*,[111] and those Australian-Papuan citizens in *Ame*, may also give some indication that the meaning of 'undoubtedly among the people of the Commonwealth' should be understood to be narrow.

A formal legal analysis which draws upon the text of the *Constitution* and these precedents interpreting the phrase 'people of the Commonwealth' seems to also reveal an absence of a clear, determinate principle to provide guidance on the constitutionality of the *Citizenship Revocation Laws*.

Given the emphasis on the existence of a foundational, broad parliamentary discretion to determine 'the people' and the *Ame* precedent which demonstrated that legal citizenship is not a safeguard against being brought outside 'the people', it could very well be that the Parliament is entitled to determine that those dual nationals who have engaged in terrorist activity are not 'undoubtedly among the people' in light of their activities. The *Citizenship Revocation Laws* may be constitutionally valid.

There are, however, also strong grounds for distinguishing *Ame* and it may be that the statutory Australian citizenship held by dual nationals places them 'undoubtedly among the people'. As noted above, Kirby J emphasised the limited precedent value of *Ame* and indicated that there might be some constitutional protection for legal citizens. Justice Kirby went so far as to say that the deprivation of nationality would be 'such a common affront to fundamental rights that I would not, without strong persuasion, hold it to be possible under the *Constitution*'.[112]

As Peter Prince argues, the position of dual nationals is, in any case, highly distinguishable from the position of the Papuan plaintiff in *Ame*, given that dual nationals have 'real' statutory Australian citizenship which, he says, usually entails 'the right to freely enter the country, vote in elections and work in the public service'.[113] He argues that, in light of this, dual nationals 'receive protection against deprivation of citizenship by their membership of the "people of the Commonwealth"'.[114] Dual nationals would not only lose their legal citizen status if citizenship revocation

109 *Hwang* (n 49) 88–9 [17]–[18].

110 Ibid 89 [18]. But Parliament's ability to restrict the qualification of electors is limited: see *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*'); *Rowe* (n 98).

111 Rubenstein and Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' (n 40) 154; *Shaw* (n 49) 43 [31].

112 *Ame* (n 36) 476–7 [96].

113 Prince (n 36) 11.

114 Ibid.

occurred but, significantly, also those rights held by citizens. The 'right to vote' is of particular note because, as discussed, it enjoys some constitutional protection. Pillai supports this, saying that it is, arguably, those who 'escape the ambit of both the aliens and immigration powers' (that is, legal citizens) who 'could form part of the "undoubted people of the Commonwealth"'.[115] Since the *Citizenship Revocation Laws* operate to take dual nationals outside of 'the people of the Commonwealth', they could, on this argument, be unconstitutional.

An examination of legislative precedent, however, might support the view that the *Citizenship Revocation* Laws are constitutional. As noted above, there were, before 2015, existing deprivation of citizenship provisions in the *Citizenship Act*, which would, if exercised, have had the effect of taking citizens outside the parameters of the 'people of the Commonwealth'. Section 17 of the *Australian Citizenship Act 1948* (Cth), repealed in 2002, is of particular note. The section only applied to dual nationals. When Australian citizens obtained another nationality, they could, under this section, be removed from 'the people'.[116] Section 17 read:

> (1) A person being an Australian citizen who has attained the age of 18 years, who does any act or thing:
>
> (a) the sole or dominant purpose of which; and
>
> (b) the effect of which;
>
> is to acquire the nationality or citizenship of a foreign country, shall upon that acquisition, cease to be an Australian citizen.
>
> (2) Subsection (1) does not apply in relation to an act of marriage.

However, s 17 received significant criticism, on the basis that the section, arguably, 'fell beyond the limit of constitutional power' because it excluded persons from being among 'the people of the Commonwealth'.[117] This was the opinion of Ron Castan, who advised the government in 1995 on the constitutional validity of s 17. The advice was tabled before Parliament in 2002.[118] Policy arguments were also put forward to repeal s 17 at that time on the grounds that it was 'outmoded and discriminatory' and 'anachronistic that one section of the Australian population should be disadvantaged

115 Pillai, 'Non-Immigrants' (n 42) 607.

116 *Australian Citizenship Act 1948* (Cth) s 17, repealed by *Australian Citizenship Amendment Act 2002* (Cth) sch 1.

117 Kim Rubenstein, 'The Vulnerability of Dual Citizenship: From Supranatural Subject to Citizen to Subject?' in Jatinder Mann (ed), *Citizenship in Transnational Perspective* 245, 249 ('The Vulnerability of Dual Citizenship').

118 Ron Castan, 'The Australian Citizenship Act 1948: Section 17 Memorandum of Advice' in Commonwealth, *Parliamentary Debates*, Senate, 14 March 2002, 787–96 (Nick Bolkus).

by a prohibition on accessing more than one citizenship'.[119] Rubenstein pointed to this argument in her submission to the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the *2015 Amendment Act*.[120]

In any case, the idea that there may be some constitutional protection to be found in the phrase 'the people of the Commonwealth' has still only really been 'hinted at by a number of High Court judges',[121] and the only strong precedent affirming the phrase remains the single judge decision in *Hwang*. There is therefore considerable scope for the High Court to reason broadly about the issue of the *Citizenship Revocation Laws'* constitutionality in reference to the phrase. In fact, Arcioni argues that this limited precedent has already led to a (wrongly) purposive approach. She says that the lack of definition in 'the people of the Commonwealth' has seen the High Court previously take into account such factors as cultural identity, race and 'historical geographic connection' to influence its decisions as to who 'the people' are.[122] In the future, there arguably remains a 'real risk' that members of the judiciary will simply construct who the 'people' are to reflect themselves.[123] This again contributes to uncertainty on the issue of whether the *Citizenship Revocation Laws* are constitutional.

IV A Feminist Approach to the *Citizenship Revocation Laws*

The above analysis has shown, in rough outline, that a more classic doctrinal analysis of the *Citizenship Revocation Laws* yields cogent arguments which can be made, based on text and precedent, on both sides of the issue. The absence of certainty or even of a strong indication of the likely outcome is particularly undesirable in light of the significant consequences for individuals and for communities that flow from the deprivation of citizenship. A space accordingly exists for other interpretive pathways. As Judith Baer states, classic constitutional law analysis does not necessarily exclude other methods of interpretation and 'the interpreter can combine a search for original meaning, a textual analysis … and an effort to make interpretation responsive to change'.[124]

A feminist approach is one such method of interpretation that can be employed alongside a doctrinal analysis, and this section will demonstrate this in the context of questions surrounding the constitutionality of the *Citizenship Revocation Laws*

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119 Joint Standing Committee on Migration, Parliament of Australia, *Australians All: Enhancing Australian Citizenship* (September 1994) 206 [6.90]. See also Australian Citizenship Council, *Australian Citizenship for a New Century* (Report, February 2000) 60–6.

120 Kim Rubenstein, Submission No 35 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (20 July 2015) 5.

121 Pillai, 'Non-Immigrants' (n 42).

122 Arcioni, 'Identity at the Edge' (n 56) 49–50.

123 Ibid 50.

124 Baer (n 46) 89.

This section first sets out what the taking of a 'feminist approach' or feminist method of interpretation entails, at least for the purposes of this article, and briefly justifies the taking of such an approach here. It then demonstrates how a feminist method of interpretation can sit alongside the hitherto doctrinal analysis of the *Citizenship Revocation Laws* and provide both guidance and answers to the question of the constitutionality of the Amendment Acts.

A *The Feminist Approach*

This article takes a feminist approach in a similar way to that taken in the Australian Feminist Judgments Project. That is, it seeks to draw upon a 'feminist consciousness', alongside a doctrinal analysis, in order to yield answers.[125] The drawing upon a 'feminist consciousness' does not involve taking a deeply theoretical or particularly critical feminist approach, nor does it involve the reinventing of, intervening in or attacking of existing judicial precedent.[126] It does not draw on a particular branch of feminism, but rather involves, as the below analysis with respect to the constitutionality of the *Citizenship Revocation Laws* demonstrates, drawing upon aspects of various branches of feminism. These branches include: liberal feminism, radical feminism, relational feminism, post-modern feminism and intersectional feminism. In this way, it would perhaps be more accurate to employ the plural of 'feminists' consciousnesses' and 'feminists' approaches'. Margaret Davies, for example, suggests using the term 'feminisms' in her analysis, as the singular 'feminism' is not 'unproblematic' and might

> suggest that there is a common theoretical approach shared by those of us who believe that women are marginalised and devalued in society and that we must work towards the eradication of such disadvantage and oppression.[127]

Having said this, it is still of some use to give at least a rough description as to what, broadly speaking, the drawing upon of a 'feminist consciousness', for the purposes of this article at least, might involve. In this vein, it might be described as

> a focus on gender as a central organising principle of social life; an emphasis on the concept of power and the ways that it affects social relations; and an unwavering commitment to progressive social change.[128]

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125 See, eg, Douglas et al (n 5) 7; Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 42, 42–3.

126 See Kate Fitz-Gibbon and Jane Maher, 'Feminist Challenges to the Constraints of Law: Donning Uncomfortable Robes?' (2015) 23(3) *Feminist Legal Studies* 253, 263.

127 Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4th ed, 2017) 232.

128 Susan Millns and Noel Whitty, 'Public Law and Feminism' in Susan Millns and Noel Whitty (eds), *Feminist Perspectives on Public Law* (Cavendish Publishing, 1999) 1, 1. See also Margaret Thornton, 'The Development of Feminist Jurisprudence' (1998) 9(2) *Legal Education Review* 171, 179–80; Rian Voet, *Feminism and Citizenship* (Sage Publications, 1998) 17.

And, it might generally involve, as Margaret Thornton discusses, an emphasis on discourse and on real, lived experience as important tools of interpretation and analysis.[129]

This article does not seek to invoke a feminist consciousness or method on the basis that the *Citizenship Revocation Laws* particularly affect women. In fact, citizenship deprivation laws disproportionately affect men, given that men are most often charged with, and convicted of, terrorist offences.[130] Rather, a feminist approach is being used here to resolve the constitutional issues at hand because it can offer, as Susan Millns and Noel Whitty describe it, 'the means to interrogate all aspects of modern public law and policy'.[131] More precisely, Millns and Whitty suggest that a feminist method can provide two things, namely: (i) a proper, useful and potent critique of public law;[132] and, (ii) a tool which can 're-vision' the political as it seeks 'to provide a normative framework for just relationships between the state and civil society'.[133] Davies, similarly, describes broadly that the application of, or at least the drawing upon of, 'feminisms' can have a 'transformative purpose' as feminism in all its forms 'is always practical and political in the sense that it aims for a transformation of social relationships'.[134] The below application of a feminist approach to the issue of constitutionality will itself demonstrate these arguments for feminism to be correct.

Of course, there are many other persuasive and diverse critical theories that might, and do, make similar claims. The undertaking of a feminist approach in this article does not seek to exclude or deny that the application of other approaches, critiques or methods might not also yield interesting and plausible answers and guidance to the constitutional issue. It is, however, worth noting that there is another reason for specifically engaging with a feminist approach on this particular topic.

Feminists have a unique and significant history of analysing, debating and critiquing citizenship. Briefly, women have, on both legal and normative conceptions of citizenship, been historically viewed and treated as 'second-class citizens'.[135] In the Australian context in particular, women have been, as noted by Patricia Crawford

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129 See Thornton, 'The Development of Feminist Jurisprudence' (n 128) 179–80; See also Janice Richardson and Ralph Sandland, 'Feminism, Law and Theory' in Janice Richardson and Ralph Sandland (eds), *Feminist Perspectives on Law and Theory* (Cavendish Publishing, 2000) 1, 7.

130 See generally Andrew Lynch, George Williams and Nicola McGarrity, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth Publishing, 2015).

131 Millns and Whitty (n 128) 1.

132 Ibid.

133 Ibid.

134 Davies (n 127) 229.

135 See generally Irving, *Gender and the Constitution* (n 15) 107; Voet (n 128) 11–12; Linda C McClain and Joanna L Grossman, 'Introduction' in Linda C McClain and Joanna L Grossman (eds), *Gender Equality: Dimensions of Women's Equal Citizenship* (Cambridge University Press, 2009) 1, 4.

and Philippa Maddern, 'the largest single category excluded from citizenship'.[136] Citizenship for women has been incomplete, partial, ambivalent and fragmented.[137] As Linda McClain and Joanna Grossman argue, the 'gendered history of citizenship' still continues to shape citizenship law and policy.[138] Citizenship has, accordingly, operated 'as both an aspirational and an analytical concept'[139] for feminists who have, depending of course on the branch of feminism, demanded that 'women too should be accorded the status of citizens',[140] and that the very concept of citizenship and the citizen is male and should be deconstructed and rethought.[141] The revocation of citizenship in any capacity and the 'dramatic change in the balance of power' it represents, is, and should be, of immediate and significant concern to feminists.[142]

B *The Citizenship Revocation Laws and a Feminist Argument for Unconstitutionality*

The strictly doctrinal analysis of whether the *Citizenship Revocation Laws* are constitutionally valid illustrated the centrality of the concept of 'allegiance'. The issue of constitutionality was found to depend on how the concept of 'allegiance' is interpreted, with a narrow approach to 'allegiance' leading to a finding that the amendments are constitutional, and a broader, perhaps more fluid approach to the concept yielding the opposite conclusion. A feminist approach may be able to provide clearer guidance and insight as to how the High Court should interpret the 'allegiance' concept, if called upon to decide the issue.

The narrow notion of 'allegiance', which sees it as a singular concept that can be owed only to one country, is gendered and, specifically, male. 'Allegiance' in the narrow sense is usually understood to be demonstrated by performance and activity in the public sphere. The clearest example of this is, of course, to fight for one's country

136 Patricia Crawford and Philippa Maddern, 'Conclusion' in Patricia Crawford and Philippa Maddern (eds), *Women as Australian Citizens: Underlying Histories* (Melbourne University Press, 2001) 214, 215.

137 Margaret Abraham et al, 'Rethinking Citizenship with Women in Focus' in Margaret Abraham et al (eds), *Contours of Citizenship: Women, Diversity and Practices of Citizenship* (Ashgate Publishing, 2010) 1, 4.

138 McClain and Grossman (n 135) 4.

139 Roseneil (n 12) 1.

140 Alison M Jagger, 'Arenas of Citizenship: Civil Society, the State and the Global Order' in Marilyn Friedman (ed), *Women and Citizenship* (Oxford University Press, 2005) 91, 92.

141 Abraham et al (n 137) 8. See also Thornton, 'Embodying the Citizen' (n 11) 198.

142 Rubenstein, 'The Vulnerability of Dual Citizenship' (n 117) 255. See generally Catherine Albiston, Tonya Brito and Jane E Larson, 'Feminism in Relation' (2002) 17(1) *Wisconsin Women's Law Journal* 1, 5; Uma Narayan, 'Towards a Feminist Vision of Citizenship: Rethinking the Implications of Dignity, Political Participation and Nationality' in Mary Lyndon Shanley and Uma Narayan (eds), *Reconstructing Political Theory: Feminist Perspectives* (Pennsylvania State University Press, 1997) 48, 63.

or to be active in the political arena. This is the sphere, and these are the activities, from which women have traditionally been, and often continue to be, not part of and actively excluded from. Alison Jagger, for instance, labels the activities of 'fighting' and 'governing' as both the primary obligations of citizenship and as 'masculine'.[143] Ben Herzog and Julia Adams similarly note that women's allegiance to the state has usually been thought to be of less importance than that of men because 'loyalty and disloyalty' have been 'assessed with respect to military service and security issues from which women were traditionally excluded'.[144] As Irving explains more fully, the duties associated with allegiance are 'those of defence (military and personal), paying taxes, performing military service where necessary, and defending the king's person and honour'.[145] She describes that these duties, at least traditionally to be

> attached to men and were not available to women. They were masculine duties, masculine tests of 'belonging' or identification. Women did not perform military service, and nor in many countries did they swear oaths of allegiance…the duties were conceptually male: the duties of persons with a public identity, duties that overrode family obligations or loyalties.[146]

Women, as Baer notes, are traditionally confined to the private sphere 'of marriage and family',[147] and as Irving describes it, 'the social role historically performed by women has tended to be excluded from definitions of the civic or public sphere'.[148] Allegiance, as understood in a narrow way, has thus operated to exclude women and the concept has in turn itself become gendered and male.

A feminist approach to the concept of allegiance accordingly calls for an understanding of the concept that is inclusive and fluid. Liberal feminists, for instance, are focused on women achieving the same rights and opportunities as men and. As Davies sets out, this branch of feminism generally advocates that

> [w]omen should have the right to own private property, to litigate as independent citizens, to vote, to be educated, to hold public office, and in general to lead separate lives as rational individuals.[149]

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143 Jagger (n 140) 92.

144 Ben Herzog and Julia Adams, 'Women, Gender, and the Revocation of Citizenship in the United States' (2018) 5(1) *Social Currents* 15, 24. See also Meyer Kestnbaum, 'Mars Revealed: The Entry of Ordinary People into War among States' in Julia Adams, Elisabeth Clemens and Ann Shola Orloff (eds), *Remaking Modernity: Politics, History and Sociology* (Duke University Press, 2005) 249, 279.

145 Helen Irving, *Citizenship, Alienage, and the Modern Constitutional State: A Gendered History* (Cambridge University Press, 2016) 40 ('*Citizenship, Alienage, and the Modern Constitutional State*').

146 Ibid.

147 Baer (n 46) 6.

148 Irving, *Gender and the Constitution* (n 15) 91.

149 Davies (n 127) 242.

Accordingly, it might be expected that liberal feminists argue that allegiance cannot be conceived of in such a way that only men can owe it and reap the consequent benefits. There must, on this feminist view, be 'equality' and women must also be able to demonstrate allegiance. If we in turn draw upon this liberal feminist approach and apply it to the specific issue of constitutionality here, we might argue that there must be 'equality' in the concept of allegiance and in how it is owed. Specifically, we might contend that there must be equality between solely Australian citizens and dual citizens, in that both kinds of citizens can and must be able to owe allegiance, despite the differences in how that allegiance might be owed.

We might also expect intersectional feminists, similarly, to argue that allegiance must not be understood in the conventional, narrow and, accordingly, 'male' way, though we might expect them to make this argument in a broader way than liberal feminists do and to view the concept as something fluid, multifaceted and plural. Intersectional feminists critique the essentialism of liberal feminists' arguments and contend that

> social identities and experiences of power are not just based on a male-female dichotomy, but also on divisions of race, ethnicity, sexuality, nationality, able-bodiedness, class, and so forth.[150]

Intersectional feminists view identity as being informed by 'a large number of social meanings and material conditions which all come into play, or intersect, in distinct ways for different groups of people'.[151] Relational feminists, in a somewhat similar way, view people and identities as being situated in a 'region of family relations, friendship, group ties, and neighbourhood involvement'.[152]

If we draw upon both these feminist approaches and apply them to the concept of allegiance, we might argue that allegiance can be owed by different and diverse people (such as dual citizens) but also that to whom precisely allegiances are owed is undefined and diverse. As Joshua Neoh, Donald Rothwell and Rubenstein argue, perhaps unconsciously drawing upon these feminist approaches, people might have a variety of loyalties, worlds and spheres and fit uneasily into a legal regime which imposes a 'limiting legal and political identity on the [individual]'.[153]

Radical and post-modern feminists would similarly call for allegiance to be understood in a broad and inclusive way, though these approaches would arrive at that conclusion in a different way to, say, intersectional feminists. Radical and post-modern feminists view meaning as being formed through notions of hierarchy and exclusion, and they seek, in turn, to deconstruct such meaning.[154] We might expect, particularly in light of the earlier discussion in this section about allegiance, radical

150 Ibid 268.

151 Ibid.

152 Knop (n 91) 92.

153 Neoh, Rothwell and Rubenstein (n 90) 473.

154 Davies (n 127) 293.

and post-modern feminists to deconstruct allegiance as an inherently hierarchical and exclusionary concept, which for instance, does not prioritise dual citizens who are more likely to be migrants to a country and in a greater position of vulnerability than sole citizens. These feminist approaches would thus also be likely to call for a pluralistic and fluid understanding of allegiance, as opposed to the narrow, singular and traditional understanding of the concept.

An historical feminist approach can aid a theoretical and conceptual one,[155] and it is worth setting out briefly women's historical denaturalisation, that took place both in Australia and around the world on the basis of the narrow and singular concept of allegiance.[156] The practice of 'marital expatriation' or 'dependent nationality' mandated an outcome whereby, when a woman married a foreigner, she would at the same moment lose her own citizenship and acquire his.[157] Irving has investigated this practice extensively and she describes the impact of this practice on women's normative, as well as legal, citizenship:

> Maritally denaturalised women experienced the withdrawal of the protection of their former state; they were literally alienated. This experience was both formal (reclassification as an alien with all the consequent disabilities; loss of entitlement to a particular passport, loss of legal protection abroad) and existential (the loss of 'home', the experience of alienage).[158]

By extension, in times of war, if a woman's husband was classified as an 'enemy alien', women were also classified as such. As Irving describes: 'In their own (now-former) country, the wives of enemy aliens, who, by marriage, were already "statutory" aliens, were transformed further into enemy aliens'.[159]

The loss of citizenship on the part of women in this way was on the basis of a narrow and singular concept of allegiance. Women could not owe two allegiances. As Irving explains, 'multiple allegiances were considered impossible' and she describes:

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155 Thornton, 'The Development of Feminist Jurisprudence' (n 128) 184.

156 Helen Irving, 'When Women Were Aliens: The Neglected History of Derivative Marital Citizenship' (Research Paper No 12/47, Sydney Law School, University of Sydney, July 2012) 2; Radha Govil and Alice Edwards, 'Women, Nationality and Statelessness: The Problem of Unequal Rights' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2016) 169, 178; Leti Volpp, 'Divesting Citizenship: On Asian American History and the Loss of Citizenship through Marriage' (2005) 53(2) *University of California Los Angeles Law Review* 405.

157 Tanja Sejersen, '"I Vow to Thee My Countries": The Expansion of Dual Citizenship in the 21st Century' (2008) 42(3) *International Migration Review* 523, 539–40. See, eg, *Nationality Act 1920* (Cth) s 18; *Nationality Act 1936* (Cth) s 6(2).

158 Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 239 (emphasis omitted).

159 Ibid 124.

> Married women were assumed to be allegiant to their husbands (notwithstanding the growing recognition of women's independent legal capacity in domestic national laws); women who married foreign men were, therefore, a dilemma for the international order of reciprocal citizenship recognition … marital denaturalisation (and at least an assumption of reciprocal naturalisation) was, effectively, the solution. A man owed allegiance to, and therefore belonged to his own country; a woman owed allegiance to her husband, and therefore belonged to her husband's country.[160]

Dual nationality would have been a 'bigamous marriage',[161] and so, as Radha Govil and Alice Edwards explain, having 'only a single (and shared) nationality' meant that 'conflicts of loyalty' could be avoided.[162] In the context of wartime, marriage to a foreigner was more explicitly viewed as 'an act of disloyalty' and, because 'women's allegiance was subjective and derivative', she was 'assumed also to share her husband's predisposition to disloyalty'.[163] Underlying these views was of course the assumption that women had a choice; women knew the consequences, with respect to their nationality, of marrying a foreigner and so they could always, in this knowledge, choose not to marry the foreigner.[164] As an aside, it is interesting in this vein to note the similarities between this assumption underlying marital denaturalisation and the discourse surrounding the *Citizenship Revocation Laws*, which framed citizenship revocation as, in effect, a 'choice', given that those charged and convicted of terrorist offences had a 'choice' in whether or not to engage in the prohibited conduct.

This practice, alongside campaigns for equal political rights, was targeted early on by growing feminist mobilisation.[165] As a result of the campaigns of women's groups, denaturalisation legislation was challenged in courts (albeit with little success), and the issue was discussed at various international conferences on nationality, such as at the League of Nations conference in 1930.[166] Irving explains how these efforts began to lead to governments' growing recognition that the revocation of citizenship of 'one of their "own"' was practically difficult. The practice often left (denaturalised) women without particular social benefits and property, and the resultant statelessness

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160 Ibid 73.

161 Thomas Aleinikoff and Douglas Klusmeyer, 'Plural Nationality: Facing the Future in a Migratory World' in Thomas Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press, 2001) 63, 63.

162 Govil and Edwards (n 156) 172.

163 Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 122, 124.

164 Ibid 45.

165 Helen Irving, 'Gender and Constitutional Citizenship: Combining Historical, Theoretical and Doctrinal Perspectives' (2012) 6(3) *Gender Equality and Multicultural Conviviality Journal* 38, 42 ('Gender and Constitutional Citizenship'); David Martin, 'New Rules for Dual Nationality' in Randall Hansen and Patrick Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 34, 37.

166 Irving, 'Gender and Constitutional Citizenship' (n 165) 44.

that occurred in some instances came with its own practical difficulties.[167] Governments felt it also, 'culturally uncomfortable' to treat women as enemy aliens during times of war 'when loyalty had heightened content with harsh consequences for breach'.[168] The system of denaturalisation eventually ended, at least in Australia, in the late 1940s,[169] and today men and women have essentially 'the same right to maintain their nationality in marriage and to pass it on to their children'.[170]

As Irving and Thwaites state, '[w]e would not, for example, now accept that a woman's marriage to a foreign man was sufficiently disallegiant to justify the revocation of her citizenship'.[171] But what this historical analysis shows is that women's legal citizenship in Australia was at a time precarious and was so on the basis of an understanding of the concept of allegiance as something narrow and singular, in the same way as the *Citizenship Revocation Laws* frame it. As Ediberto Román argues, a 'global history of partial membership and subordinate rights cries out for a truly inclusive notion of citizenship'.[172]

An approach to 'allegiance' that sees allegiance as something inclusive, diverse and multifaceted, and as something more than a single concept, accordingly, accommodates feminist arguments and concerns. Applying a feminist approach to the issue of the constitutionality of the *Citizenship Revocation Laws* would thus provide guidance to the hitherto doctrinal analysis of the Act and yield a finding that citizenship deprivation laws, such as the *Citizenship Revocation Laws* specifically, are not validly supported by the aliens power in s 51(xix) of the *Constitution* and that citizenship more broadly is inviolable.

The doctrinal analysis of whether the *Citizenship Revocation Laws* take Australian citizens outside the meaning of the phrase 'the people of the Commonwealth' demonstrated the importance of determining those who are 'undoubtedly among the people'. A narrow approach to the meaning of 'the people' supports a conclusion that the *Citizenship Revocation Laws* are constitutionally valid and a more expansive approach entails the opposite conclusion.

The 'people' is, prima facie, a neutral and inclusive term. But this is illusory and the phrase is exclusive and, specifically, gendered and male. Suzanne Romaine, among others, argues that when gender-neutral terms 'are introduced into a society still dominated by men, these words … lose their neutrality' and are 're-politicised by

167 Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 125; Irving, 'Gender and Constitutional Citizenship' (n 165) 43.

168 Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 125.

169 Irving and Thwaites (n 93) 145.

170 Randall Hansen and Patrick Weil, 'Introduction: Dual Citizenship in a Changed World' in Randall Hansen and Patrick Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 1, 3.

171 Irving and Thwaites (n 93) 146.

172 Román (n 14) 152.

sexist language practices of the dominant group'.[173] Romaine points specifically to the term 'people' as an example of this and argues that it is, in fact, essentially male.[174] Irving applies this analysis to the Australian context, arguing that 'the people' as referenced in the *Constitution* never really included women.[175] The term 'people' in the *Constitution* was introduced into a society dominated by men.[176] Although Irving importantly points to the ways women, at least from the 1890s, played a role in the movement for federation and influenced constitutional drafting,[177] as Rubenstein notes in her analysis, no women participated in the Constitutional Conventions and the status of women only arose once in the discussion on citizenship.[178] Arcioni also describes the fact that Australian women, at the time of federation, were not considered to be part of 'the people', but were, rather, characterised as being only 'emerging' and 'potential members' of 'the people'.[179] More generally, the same criticisms that attach to the word and notion of 'citizen' also attach to the notion and phrase 'the people'. One such criticism is given by Stuart Hall and David Held, who for instance argue that there exists

> an irreconcilable tension between the thrust to equality and universality entailed in the very idea of the 'citizen', and the variety of particular and specific needs, of diverse sites and practices which constitute the modern political subject.[180]

It would now, of course, be unthinkable or at least deeply controversial and antagonistic, to exclude women from the meaning of 'the people of the Commonwealth'. Chief Justice Gleeson implicitly affirmed this in *Roach*,[181] as did French CJ in *Rowe*.[182]

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173 Suzanne Romaine, 'A Corpus-Based View of Gender in British and American English' in Marlis Hellinger and Hadumod Bußmann (eds), *Gender Across Languages: The Linguistic Representation of Women and Men* (John Benjamins, 2001) vol 1, 153, 169; Sandra Petersson, 'Locating Inequality: The Evolving Discourse on Sexist Language' (1998) 32(1) *University of British Colombia* 55, 59. See also Irving, *Gender and the Constitution* (n 15) 44; Penelope Eckert and Sally McConnell-Ginet, *Language and Gender* (Cambridge University Press, 2nd ed, 2013) 226.

174 Romaine (n 173) 157. See also Petersson (n 173) 58; Katharine de Jong, 'On Equality and Language' (1985) 1(1) *Canadian Journal of Women and the Law* 119, 132.

175 See, eg, Helen Irving, 'A Gendered Constitution: Women, Federation and Heads of Power' (1994) 24(2) *University of Western Australia Law Review* 186, 187–8.

176 Ibid.

177 Helen Irving, 'Who Are the Founding Mothers: The Role of Women in Australian Federation' (Papers on Parliament No 25, June 1995) 65.

178 Rubenstein, 'Constitutional Convention Debates' (n 42) 298; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1794 (Josiah Symon).

179 Arcioni, 'The Core of the Australian People' (n 98) 428, 430, 433, 447.

180 Stuart Hall and David Held, 'Left and Rights' [1989] (June) *Marxism Today* 16, 17.

181 *Roach* (n 110) 173 [5]; David Brown, 'The Disenfranchisement of Prisoners: Roach v Electoral Commissioner & Anor' (2007) 32(3) *Alternative Law Journal* 132, 134.

182 *Rowe* (n 98) 19 [21]. See also *Langer v Commonwealth* (1996) 186 CLR 302, 342 (McHugh J).

Arcioni argues that the position of women as members of 'the people' 'is now assured by the High Court's reasoning' in those decisions'.[183] The restrictive approach that once excluded women from 'the people', however, is nonetheless what the *Citizenship Revocation Laws* do to other demographics, proposing in effect, that designated groups of people, such as those dual citizens designated by the Amendment Acts, can be excluded from the Commonwealth and its citizenry.

Along the same lines as the reasons set out above with respect to the notion of allegiance, we might expect a feminist approach to 'the people' to call for an inclusive, diverse and fluid understanding of the concept. Ruth Lister, for example, provides one such approach. She notes the difficulties with universal and seemingly neutral concepts, such as 'citizen', that, like 'the people', are 'predicated on the very exclusion of women', but says that feminists must still take on these concepts and transform them to be rounded and inclusive.[184] Davies similarly argues that intersectional feminism provides 'a crucial method of challenging identities that are in some way normalised and taken for granted'.[185] We might, for instance, consider 'the people' to be inherently inclusive but a feminist approach, particularly an intersectional one or perhaps also a radical one, requires us to reconsider seemingly neutral phrases and identities and to transform them into fluid and diverse concepts that are truly inclusive of any and all. Importantly, as Irving notes, taking a more expansive approach to 'the people' in this way does not remove anyone else from being included in the concept. She notes that

> [t]he extension of citizenship to others, or the fact that others hold citizenship, does not diminish a person's enjoyment or entitlement (just as an increase in family membership does not erode a person's status as a member, or diminish a family's 'family-ness').[186]

Accordingly, when a feminist consciousness is brought to bear on the issue of who are 'undoubtedly among the people', the term must be viewed as, in Irving's words, 'capable of expansion, inclusiveness and genuine neutrality'.[187] Interpreting the term as such still fits within, but provides further guidance to, the hitherto doctrinal analysis and yields a finding that dual Australian citizens cannot be removed from the constitutional 'people'. On this view, the *Citizenship Deprivation Laws* fall foul of the *Constitution* and Australian citizenship may indeed be inviolable.

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183 Arcioni, 'The Core of the Australian People' (n 98) 447.

184 Ruth Lister, *Citizenship: Feminist Perspectives* (Springer, 2nd ed, 2003) 195; Ruth Lister, 'Citizenship Engendered' (1991) 11(32) *Critical Social Policy* 65; Ruth Lister, 'Dilemmas in Engendering Citizenship' (1995) 24(1) *Economy and Society* 35. See also C Lynn Smith, 'Is Citizenship a Gendered Concept?' in Alan Cairns et al (eds), *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* (McGill-Queen's University Press, 1999) 137.

185 Davies (n 127) 269.

186 Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 273.

187 Irving, *Gender and the Constitution* (n 15) 107.

V Conclusion

This article demonstrated that the application of a formal doctrinal analysis to answer questions about the constitutionality of the *Citizenship Revocation Laws* may yield two plausible but opposite outcomes. It argued that a feminist consciousness may validly and persuasively be applied to, and provide further guidance for, a doctrinal analysis. A feminist approach, sitting alongside a doctrinal analysis, was shown to provide a more plausible and cogent conclusion, namely that the *Citizenship Revocation Laws* are not unconstitutional and that Australian citizenship is inviolable.