THE CONSTITUTIONAL CENTENARY, CITIZENSHIP, THE REPUBLIC AND ALL THAT — ABSENT FEMINIST CONVERSATIONALISTS

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[This article argues that the current debate on the Australian Constitution, in the lead-up to its centenary, is marred by an important exclusion: a feminist perspective. Despite exhortations from public figures inviting broad involvement, the discussion remains remarkably narrow and uncritical. The growing number of feminist perspectives on issues of citizenship and democracy, which are canvassed in this article, have had little impact on the mainstream debate. At this point it appears that there is little hope that the exclusionary processes that formed the constitution in the first place will face any substantial challenge one hundred years on.]

> If, as the Democrats leader Senator Cheryl Kernot says, the tenor of the republican debate is that of an exclusive boys' club, where does that leave talk about the Constitution and a bill of rights?[1]

I INCITEMENTS TO JOIN CONSTITUTIONAL CONVERSATIONS

This article is an attempt to join constitutional conversations in Australia. It makes some suggestions about how a poststructuralist feminist theorist might contribute to the project of rethinking Australian constitutional democracy at this historical moment — surely one of the most self-conscious and, hoping to be, one of the most reflexive moments in 'our' Australian history. As 'we' move inexorably towards Australia's constitutional centenary, amidst renewed calls for the establishment of a republic, there is a veritable incitement to speak, to join in constitutional conversations about our polity. For example, the hawkers of the constitutional centenary implore us to consider that Australia has had a democratic, federal constitution for nearly a century. It follows, according to Sir Ninian Stephen, former High Court judge and now chairman (*sic*) of the Constitutional Centenary Foundation, that

> this is now very much the time for examination of our political system and its structures, in this decade leading into the 21st century and with the centenary of federation and of the Constitution approaching.[2]

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1 Sheena MacLean, 'Voice of Women Cries Out to be Heard as Boys Dominate Rights Talkfest', *Age* (Melbourne), 18 February 1995. In the same article, Jocelynne Scutt responds that women's voices are being excluded from constitutional decision-making and that the representation of women at the Australian Rights Congress in Sydney in February was 'absymal and minimal'.

2 Sir Ninian Stephen, 'The Constitutional Decade' (1992) 1 *Constitutional Centenary: Newsletter of the Constitutional Centenary Foundation Inc* 1.

Indeed, he informs us that the Foundation was formed in order to promote such an examination, as well as 'discussion, debate, education, enquiry and even perhaps a certain amount of controversy'.[3] This examination, he assures us, is not to be narrowly construed: 'the "Australian constitution" really embraces a complex of constitutions and laws, as well as political practices and conventions' and there is 'much outside the formal constitutions which affect the nature of *our* polity'.[4] But while, apparently, the right of 'individuals' to participate in government is of 'special relevance', Sir Ninian insists that the object of the debate over the decade leading to the centenary is 'to air all significant issues fully and frankly' in order to 'improve understanding' of the Australian system of government.[5] In brief, the debate should 'embrace the whole constitutional system'.[6]

Of course, there are other official and government-sponsored incitements to speak matters constitutional in this most historical time, to make the 'best use of the constitutional decade', as Cheryl Saunders, the deputy chairman (*sic*) of the Constitutional Centenary Foundation, puts it.[7] According to Professor Saunders, the issues 'likely to loom large'[8] in constitutional conversations in the 1990s are those noted in the 'Agenda for the Decade' drawn up by the Constitutional Centenary Conference in 1991. These key issues are firstly, the Australian democratic process, including methods for guaranteeing basic democratic rights; secondly, the federal system; thirdly, the judicial system; and fourthly, the position of Aboriginal and Torres Strait Islander peoples in the Australian constitutional system.[9] Like Sir Ninian, Professor Saunders insists that the constitutional debate must consider 'the whole of the Australian system of government'.[10] Further, she suggests that it is 'artificial' to discuss the constitution 'in isolation from the rest of the assumptions and practices on which the constitutional system is based', and it is 'more productive' to 'identify the values and aims' of this system 'as a whole'.[11]

Certainly, all these blandishments to join in constitutional conversations provoke a desire to comment, but where to start? A poststructuralist might begin by noting that the invitation to identify the values and aims of the system 'as a whole' rests on an untheorised notion of 'wholeness' — one, moreover, which implies an inclusive process. A feminist poststructuralist might go further, noting that within feminist theoretical debates which question what the founda-

3 Ibid.

4 Ibid 2 (emphasis added).

5 Ibid 3-4.

6 Ibid 4.

7 Cheryl Saunders, 'Making Best Use of the Constitutional Decade' (1992) 1 *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation Inc* 12.

8 Ibid 13.

9 'Constitutional Centenary Conference 1991: Concluding Statement — A Constitutional Review Process' (1992) 1 *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation Inc* 7, 7-8 ('Concluding Statement').

10 Saunders, above n 7, 14.

11 Ibid.

tional category 'Woman' authorises and who it excludes and deauthorises. North American philosopher Judith Butler has made some incisive and highly relevant suggestions. Butler argues that the invocation of a stable subject of feminism, understood as a seamless category of women or as a generally shared conception of 'women', encapsulates exclusionary processes.[12] As she explains, the aim of poststructuralist feminism is not to abolish foundational categories, as naïve critics frequently allege. Rather, it is to interrogate precisely what is authorised by 'the theoretical move' which seeks to establish foundations, and what precisely such a move 'excludes and forecloses'.[13] For example, a political or representational strategy which resorts to a universal 'we' must be 'exposed for its own highly ethnocentric biases'.[14] More broadly, Butler's point is 'that subjects are constituted through exclusion, that is, through the creation of a domain of deauthorized subjects, presubjects, figures of abjection, populations erased from view'.[15] It follows that one of the key aims of poststructuralist feminist theory is to interrogate exclusionary processes, thereby destabilising essentialist and universal pretensions within feminist as well as within masculinist thought.

Accordingly, this article examines the ways in which Australian constitutional democracy encapsulates exclusionary processes. More specifically, it examines some of the ways in which the Australian citizen has been constituted through exclusions — through the constitution of a domain of deauthorised subjects, presubjects, figures of abjection and populations erased from view. That is, my aim is to contribute to the constitutional debate by attempting a necessarily selective critical historical analysis of some of the constitutional law discourses which have inscribed the Australian citizen as the bearer of rights in 'our' representative democracy.

II AUSTRALIAN CITIZENSHIP — EXCLUSIONS/INCLUSIONS

There is much current institutional support for a focus on the question of democratic citizenship in this, our constitutional centenary 'decade'. For example, in 1994 the Joint Standing Committee on Migration opened an inquiry into 'enhancing the meaning of Australian citizenship' as part of the wider debate on Australia's identity.[16] Concurrently, the Senate Standing Committee on Legal and Constitutional Affairs is holding an inquiry into the 'desirable structure' for a system of national citizenship indicators. More specifically, the Committee will examine the elements which 'comprise

12 Judith Butler, 'Contingent Foundations: Feminism and the Question of "Postmodernism"' in Judith Butler and Joan Scott (eds), *Feminists Theorize the Political* (1992) 3, 15-6.

13 Ibid 7.

14 Ibid.

15 Ibid 13.

16 Joint Standing Committee on Migration, *Inquiry Into Enhancing the Meaning of Australian Citizenship: Issues Paper* (1994). The issues being canvassed are the meaning of citizenship, its rights and obligations, mechanisms for encouraging citizenship and legal arrangements for acquiring and losing citizenship.

"international best practice" in democratic citizenship' with a view to developing 'a system of statistical indicators to monitor the condition of democratic citizenship and social and economic well-being in Australia'.[17] Furthermore, according to Brian Galligan, the question of guarantees of basic rights — especially basic democratic rights — topped the list of the twelve key issues identified by the 1991 Constitutional Centenary Conference for review and possible constitutional reform.[18]

Joining the conversations about citizenship, Sir Ninian Stephen in his 1993 Deakin Lecture on 'Issues in Citizenship' outlined the 'complex process of evolution' of the legal status of citizens in Australia and called for an overhaul of the Citizenship Act 1948.[19] He declared:

> We hear calls today for our Constitution to be redrawn so that citizens may learn from it the real nature of our structure of government, where power lies and who exercises it, so that it will describe the true character of our democracy. But scarcely, if at all, less important must be the explicit definition of the very font of power and bearer of rights in our democracy: we, its citizens.[20]

Leaving aside any poststructuralist scruples one might have about a project which would seek to rewrite a text in order to discover the 'real nature' of power relations — the 'truth' of 'our democracy', no less — how might we respond to the call to provide an explicit definition of citizen? And how should we respond to the more recent laments of the Federal Government's 'Civics Experts Group' about widespread 'ignorance' of matters constitutional in the Australian community at a time when 'an active and informed citizenship should be the mortar that holds together the bricks of our contemporary multicultural society.'[21] The Civics Expert Group insists that the Australian system of government 'relies for its efficacy and legitimacy on an informed citizenry' and that '[w]ithout active, knowledgeable citizens, the forms of democratic representation remain empty.'[22] But the key questions are: who are these active, knowledgeable citizens who are the very font of power and bearer of rights in 'our' democracy, and where shall we look for them?

An obvious starting point is the Australian Citizenship Act 1948, which brought in the term and thus the status 'Australian citizen'. Taking into consideration the claim that before 1948 'there was no such thing as Australian

17 'National Citizenship Indicators' (1994) 3(1) *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation* 15.

18 Brian Galligan, 'Parliamentary Responsible Government and the Protection of Rights' (1993) 4 *Public Law Review* 100, 101. In fact, the question of the head of state topped the list; guarantees of basic rights came in second: 'Concluding Statement', above n 9, 7.

19 Sir Ninian Stephen, 'Issues in Citizenship' (1993) 2(5) *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation* 1.

20 Ibid 2. The Foundation has been critical of the failure of the education system to teach young people to become 'active citizens' and therefore supports the scheme for school constitutional conventions: 'Education and Citizenship' (1994) 3(1) *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation* 8.

21 Mike Steketee, 'PM Vows Campaign on Civic Ignorance', *Australian* (Sydney), 8 September 1994.

22 Ibid.

citizenship, only British subjection',[23] it might be helpful to consider the rules which demarcate citizens from the state of non-citizenship inasmuch as these rules limit the entitlements of, for example, newly-arrived people. As a preliminary matter however, we might want to ask about the *meaning* of citizenship. Reflecting on the concept of citizenship, feminist legal scholar Margaret Thornton has recently observed that while in 'classic definitional terms' citizenship is 'the status determining membership of a legally cognisable political community', it involves 'more than a passive belonging'.[24] Citizenship includes legally recognised abstract rights which 'apply equally to all citizens, at least in a formal sense'.[25] However, the concept also includes 'a more subtle layer of meaning' which operates to qualify 'the degree of participation within the community of citizens'.[26] As Thornton notes, 'variables such as gender, race, ethnicity and class' function to determine the extent of 'active participation within a particular polity'.[27] Further, these 'power variables' challenge the 'insistent rhetoric of formal political equality as a substantive reality'. Thus, because the concept of power absents itself from the discourses of liberal legalism, mainstream legal analysts overlook 'the diverse ways in which citizen identity is constructed'.[28]

In this article, I am concerned with the exclusionary ways in which this citizen identity is established.[29] Pursuing this theme of exclusions, let us begin with those who have not been constituted as Australian citizens — that is, with the people described by Judith Butler as 'deauthorised subjects' or 'presubjects', 'figures of abjection' and populations erased from constitutional purvey and thus from citizenship in Australian history. The indigenous population of this country is a case in point. It is a commonplace now that the Aboriginal people have been excluded from participating in 'our' Australian constitutional democracy, but nowhere is this exclusion more poignantly, if unconsciously, expressed than in 'key issue' Number 10 of the 'Agenda for the Decade':

> There should be a process of reconciliation between the Aboriginal and Torres Strait Islander peoples of Australia *and* the wider Australian community.[30]

23 David Wishart, 'Allegiance and Citizenship as Concepts in Constitutional Law' (1986) 15 *MULR* 662. By repealing all references to the status of British subject, the Australian Citizenship Act 1984 (Cth) effectively removed the status of British subject from Australian law: ibid 683.

24 Margaret Thornton, 'Embodying the Citizen' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (forthcoming, 1995) 200.

25 Ibid.

26 Ibid.

27 Ibid 201.

28 Ibid 202.

29 Thornton's insights into the concept of citizenship expose the limitations of any project claiming to 'rethink' Australian democracy and to explore 'an alternative conception of public law as a representation of *political community*', but which pays little attention to power relations affected by race, gender and class. A project which aims to focus on '*individuals and groups* as participants in the political process in the legal context' is also clearly limited. These are some of the stated aims of the undergraduate law subject 'Rethinking Australian Democracy', *Faculty of Law: LLB Course and Subject Guide*, University of Melbourne (1995) 54.

30 'Concluding Statement', above n 9, 8 (emphasis added).

Here surely, is a population of excluded presubjects, finally coming into official view, which is to be 'reconciled', no less, with the Australian people and even, possibly, to be granted constitutional status.[31] Indeed, here is an historical exclusion so profound that Australia's democratic constitutional government has felt compelled to legislate about this excluded population's land rights, and to declare in the preamble that:

> The People of Australia intend ... to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which *history*, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.[32]

Thus as late as 1993, a legislative acknowledgment that these peoples have been excluded from the Australian nation is still projecting their full recognition into the future. What remains unacknowledged is that 'history' — the history of dispossession as well as the history of constitutional democracy in Australia — far from entitling Aboriginal people to recognition, has in fact actively disentitled them to aspire to 'full recognition and status within the Australian nation'.

Australian migration law has also encapsulated exclusionary processes. 'Our' history is littered with a plethora of laws designed to exclude non-white and non-British people from the Australian democratic community of white, propertied men of British descent. As James Jupp argues:

> White Australia cannot be understood simply as a restrictive immigration policy. It was central to building a white British Australia from which all others would be *excluded*.[33]

Consider for example the dictation test 'in a European language' that was imposed on immigrants. This test, which could be administered in any European language — even, in one notorious case, in Gaelic[34] — was incorporated into Commonwealth legislation in 1901 and implemented until its abolition by the Migration Act of 1958.[35] The test was one of many very effective exclusionary practices which lasted, in this case, for over fifty years.[36] These practices, which included the establishment of Australia's right to exclude anyone from permanent settlement, even British subjects, precluded the need to spell out the White Australia policy in legislation.[37] Indeed, according to Jupp, Australia was 'ahead' of other western nations in creating effective legal barriers to entry[38] and the White Australia policy was 'almost completely effective between

31 After referring to Aboriginal people as 'an area' in 'a state of flux', Sir Ninian suggests that 'it might be desirable for the Constitution to recognise the Aboriginal and Torres Strait Islander peoples as the indigenous peoples of Australia': Stephen, 'The Constitutional Decade', above n 2, 6.

32 Native Title Act 1993 (Cth) (emphasis added).

33 James Jupp, *Immigration* (1991) 46 (emphasis added).

34 *R v Wilson; ex parte Kisch* (1934) 52 CLR 234.

35 Jupp, above n 33, 48.

36 Ibid.

37 Ibid 48-9.

38 Ibid 49.

the 1890s and the 1960s as a form of immigrant *exclusion*'.[39] Furthermore, current immigration policy still places limits on eligibility by perpetuating 'constructions of "Australians" as white and English-speaking',[40] as well as young, able-bodied and male. A recent research report indicates that for all the gender-neutrality of current immigration law and selection practices, 'immigrant' remains a gendered category.[41] The 'skill' criteria discriminates against immigrant women,[42] thereby helping to perpetuate the historical image of the 'ideal immigrant', the counter-part to the 'ideal citizen', as white, English-speaking, able-bodied and male.[43]

There is, of course, no centenary to celebrate the exclusionary 'dictation' law which was passed in 1901, the same year as Australia's 'democratic', federal constitution was adopted — a point which returns us to Sir Ninian's directive to prospective contributors to the constitutional debate to examine the whole complex of laws and practices which make up 'our polity', and to 'air all significant issues fully and frankly'. Sir Ninian, recall, was not averse to inciting 'a certain amount of controversy' in this educational process. But how much, exactly, did he have in mind? For example, a sense of the importance of history is invoked by Sir Ninian in his celebration of the 'official' centenary, but would he invite an interrogation of his idea of 'history'? Would he welcome such questions as: whose history and what kind of history is in order?[44] And would the airing of a distinctly feminist perspective exceed the bounds of Sir Ninian's understanding of 'controversy'?

III Absent Feminist Conversationalists

It might be useful at this stage to place these comments on the exclusionary processes at work in Australian constitutional history in a broader discursive context. Thus for example, it is notable that, according to Canadian legal academic Patrick Macklem, constitutional law is a conversation — a conversation about the ways in which a society constitutes the relationship between the individual and the community. He argues that the constitutive element of law is

39 Ibid 51 (emphasis added).

40 Jan Pettman, *Living in the Margins: Racism, Sexism and Feminism in Australia* (1992) 82.

41 Ruth Fincher, Lois Foster and Rosemary Wilmot, *Gender Equity and Australian Immigration Policy* (1994) 23.

42 Ibid.

43 Ibid 24-7.

44 If Rob McQueen's critique of High Court judges' understanding of 'history' is any guide, one suspects Sir Ninian's understanding of history is uninformed by an appreciation of 'the very different nature of "historical" and "legal" truth; and the dangers of confusing the two'. One suspects, too, that he is unaware of the 'dangers of translating a conditional historical "truth" into an absolute legal "truth" with a definite performative function': Rob McQueen, 'Why High Court Judges Make Poor Historians' (1990) 19 *Federal Law Review* 245, 264. In short, one suspects Sir Ninian has in mind the sort of conventional constitutional history written by what Geoffrey Palmer has referred to as 'the dead hand of analytical positivism' — a history, we might add, which is written by the equally dead hand of liberal (read: masculinist) humanism: Geoffrey Palmer, *New Zealand's Constitution in Crisis* (1992) 24. This is not the sort of history which interests me, nor is it one which is likely to command attention, let alone draw attention to the exclusionary processes which have constituted Australian 'representative' democracy.

most apparent in constitutional law in that it 'self-consciously and explicitly deals with fundamental questions relating to the organization of social and political life'.[45] That is:

> Particular stances taken in this conversation reinforce and are reinforced by competing pictures of individuality and community. Vying for the mantle of truth and the honour of being translated into reality, these pictures of politics and the self represent the limits and possibilities of our current constitutional imagination.[46]

If this is so — if Macklem is right that constitutional law has a vital role to play in 'articulating and shaping conceptions of individuality and community' and in 'giving meaning to ourselves and our relations with others'[47] — why have feminists abstained from constitutional conversations in Australia? Why are they not intervening in a way which might help us 'free our constitutional imaginations from the ideological and argumentative constraints'[48] which result from a failure to see social and political life for what Macklem says it is: 'a joint and often conflictual process of constructing reality through language'?[49]

The absence of a specifically feminist contribution to the conversations of the constitutional decade is striking.[50] Certainly, there is currently a great deal of feminist work being written on citizenship and western liberal democracy, some of it in the specific Australian context. But these writers are not, for the most part, participating in the official debates celebrating the constitutional centenary. However, feminist commentators on the related republican debate provide some insights into this feminist silence. Reflecting on the fact that 'almost no specifically feminist discussion on republicanism has been heard', Helen Irving suggests that the problem is that the attempt to confine the republican options to a 'minimalist' position has had the discursive effect of constraining debate within 'a legal framework'.[51] In her view, the 'individuals' who are interested in the Constitution are male, and the evidence of male domination of constitutional law bears her out.[52] Historian Ann Curthoys agrees. While insisting that there is 'room for more feminist contribution' to debates about republicanism and national identity,[53] Curthoys laments that when we begin to talk about matters constitutional, we 'enter a male territory of powers, law and regula-

45 Patrick Macklem, 'Constitutional Ideologies' (1988) 20 *Ottawa Law Review* 117, 118.

46 Ibid.

47 Ibid.

48 Ibid 121-2.

49 Ibid 122.

50 The consideration of 'the woman question' in the Centenary Foundation's newsletter can be described as tokenistic at best, and none of it is written from a feminist theoretical perspective: See the 'Women's Suffrage Centenary Issue' (1994) 3(1) *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation.*

51 Helen Irving, 'Boy's Own Republic' (1993-94) 8 *Arena* 24, 24-5.

52 Ibid.

53 Ann Curthoys, 'Single, White, Male' (1993-94) 8 *Arena* 27, 27.

tion.'[54] Meanwhile, another feminist historian, Marilyn Lake, views the comments of Irving and Curthoys as part of 'the problem', as 'symptomatic of the malaise': they 'want to speak, but are not sure what to say'. There is a need for an imaginative engagement with republican and nationalist discourses on the part of women, but the 'narratives of nation so integral to republicanism in Australia construct a masculine homosocial identity'. Thus, if republicanism — or, by extension, constitutionalism — wants to incite the interest of women, it 'must speak to women's subjectivities and concerns'.[55]

There is, then, a perceived chasm between constitutional matters and women's subjectivities and concerns, a chasm which, according to some feminist observers, is attributable to the numbing dullness of male-centred constitutional law which does not 'speak' to us. No wonder then that women do not appreciate 'the closeness of the connection between the constitution and everyday life' that is so apparent to Colin Howard, a past master of masculinist discourse in which the citizen is always already constituted as 'he'.[56] Clearly, feminists need to find a way to break out of the constraints imposed by masculinist law scholars on current constitutional conversations, conversations that legitimate the status quo and, in the process, limit the possibilities of reimagining the relationship between 'the individual' and the polity.[57]

While feminists have not found a point of imaginative entry into current conversations about constitutional law, mainstream analysts, mindful that 1994 was the centenary year of white women's suffrage in Australia, have tended to associate 'the woman question' in constitutional law with the question of women's representation in parliament. For example, Cheryl Saunders selected this issue as the first of several aspects of the constitutional system having 'direct relevance for women' that should be commemorated by a women's suffrage centenary project. The stated goal of this project is to identify 'impediments to the entry of women into politics' with reference to the experience of women members of Parliament.[58] The evidence suggests that any such identification process taking place within the constitutional centenary discourses about women's rights will be a self-limiting one conducted within the confines of masculinist liberalism and restricted to questions about proportional representation for the House of Representatives and affirmative action quotas in party preselection. At least, if the perfunctory consideration of 'the woman

54 Ibid 28.

55 Marilyn Lake, 'A Republic for Women?' (1994) 9 *Arena* 32, 32.

56 Colin Howard, *Australia's Constitution* (2nd ed, 1985) 1.

57 It might be noted here that in her failure to consider gender, Kathe Boehringer's view that 'the task of revitalising citizenship participation must be associated with recognition and enhancement of the autonomous associational life of civil society' offers little assistance to feminist analysts. From any feminist perspective, Boehringer's republicanism remains a Clayton's (ie, illusory) one: Kathe Boehringer, 'Against Clayton's Republicanism' (1991) 16 *Legal Service Bulletin* 276.

58 Cheryl Saunders, 'Special Editorial: Women and Parliament' (1994) 3(1) *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation* 2, 3. It has been noted that Australian history is replete with struggles to 'extend or transform the rights of citizens and non-citizens' which provoke revisionist histories at commemorative moments: Julian Thomas, 'Citizenship and Historical Sensibility' (1993) 25 *Australian Historical Studies* 383, 383.

question' by the Constitutional Centenary Foundation is any guide, it is difficult to imagine that the project managers will be informed about feminist theorisations of liberal and representative democracy.[59]

This is not to deny that notions of representation bear some thought. While it is not possible to address all the issues raised by the growing body of feminist work on citizenship and democracy which has emerged over the past decade, it might be helpful to provide some idea of the sort of theoretical developments which would enhance the debate about Australian citizenship should feminists ever decide to join the current constitutional conversations.

IV Rude Intrusions — Feminists Theorise 'Democracy'

Feminist work on democracy over the past decade provides such a smorgasbord of imaginative possibilities for radically rethinking Australian constitutional democracy that it is difficult to know where to begin. But perhaps it is fitting to give line honours to British political theorist Anne Phillips. After all, Phillips was the token feminist writer listed in the University of Melbourne's Constitutional and Administative Law course materials in 1994 — the centenary year, recall, of white women's suffrage in Australia. Evidently, centenaries provoke tokenism in mainstream, masculinist law courses, but at least Phillips was a good choice. In a useful overview of a diverse range of feminist perspectives on liberal democracy, Phillips points to the 'prolonged exclusion of women' from the democratic process as a primary factor leading to feminist distrust of liberal democracy. She notes two 'moments' in feminist thinking about democracy — the first coincided with 'an explosion in participatory democracy' in the 1970s; the second moment is the current one in which feminist theorists have turned to 'the macro-level of women's membership in the political community' in order to explore 'questions of inclusion and exclusion' and to question 'the universalising pretensions of modern political thought'.[60] The crucial issue here is whether liberal democracy can deal adequately with sexual inequality. After canvassing feminist critiques of liberal democracy's capacity to deliver a 'real' equality to women, Phillips decides that it can. Notwithstanding feminist critiques of liberal democratic minimalism which build on critiques of the highly gendered private/public distinction and the failure of democracy to admit 'the pertinence of group differentiation', Phillips believes feminists should remain committed to liberal democracy, albeit to a more 'active' and 'more substantial' gender-sensitive democracy. In what might be read as a cautionary tale, she warns against feminist analyses which go too far in pushing liberal democracy to engage more fully with the question of sexual equality.[61]

[59] For a feminist discussion of these issues see Irving, above n 51 and Lake, above n 55.

[60] Anne Phillips, *Democracy and Difference* (1993) 103-5.

[61] Ibid 106-20.

Phillips then, does not dispute the view of Australian political theorist Carole Pateman that the 'belated inclusion' of women in liberal democracies 'operates very differently from the original inclusion of men' or that sexual differentiation was 'built into the foundations' of democratic thought.[62] Phillips is sympathetic, too, to feminist critiques of abstractions such as 'the individual' or 'the citizen' that implicitly assume a male norm. Cognisant of feminist theorisations of bodily differences and bodily specificity, she does not wish to advocate sexual equality in terms of sexual neutrality. She takes feminist philosopher Moira Gatens' point that the liberal paradigm offers equal treatment only 'to those activities that *simulate* the neutral subject', thereby ignoring the differential impact that sexual violence has on women's bodies.[63] But she does not want to jettison democracy's abstract universals for the sake of sexual difference. She is opposed to a feminism which would 'overplay its hand, presenting the orthodoxy as more straightforwardly abstract and universal than is in fact the case.'[64] That is, feminists should not over-emphasise female sexual identity. We should strive, rather, to take a middle route[65] — to work, that is, within the democratic system.[66]

Phillips can thus be placed fairly in the camp of those who would seek to move beyond a critique of the patriarchal or fraternal nature of liberal democracy in order to make a positive feminist contribution to the project of recasting or 'reconstituting liberalism as a theory of radical democracy'.[67] Impliedly, she would draw a halt at feminist interventions which would seek to analyse further the ways in which law — including constitutional law — is, as Italian political theorist Adriana Cavarero argues, 'completely modelled on the male subject and can take in women only by homologising them with the male subject which operates as a basic paradigm.'[68] In this view, women are either excluded or admitted and 'homologised to the male paradigm' in a way which represses female sexual difference.[69] They either fight exclusion or demand homologising admission.[70] Phillips provides no answers to this dilemma. Nor does she address the question of the pervasiveness of the threat of sexual violence. Yet surely this threat, as British political theorist Susan James argues, is an obstacle

62 Anne Phillips, 'Universal Pretensions in Political Thought' in Michèle Barrett and Anne Phillips (eds), *Destabilizing Theory: Contemporary Feminist Debates* (1992) 10, 11; Carole Pateman, *The Sexual Contract* (1988); Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (1989).

63 Phillips, above n 60, 64.

64 Ibid 70.

65 Ibid 119.

66 Phillips expands on her ideas about increasing women's political representation in Anne Phillips, *Engendering Democracy* (1991).

67 Pauline Johnson, 'Feminism and Liberalism' (1991) 14 *Australian Feminist Studies* 57, 62.

68 Adriana Cavarero, 'Equality and Sexual Difference: Amnesia in Political Thought' in Gisela Bock and Susan James (eds), *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (1992) 37.

69 Ibid 41.

70 A similar point is made in Carole Pateman, 'Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship' in Gisela Bock and Susan James (eds), *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (1992) 17, 39.

to political participation and to the 'minimal kind of physical independence that liberalism guarantees the citizen'. The female voter might be a 'good-enough citizen' by the standards of liberal democracy, but is she 'good enough' by the standards set by feminist commentators who insist that we take account of the impact of men's pervasive violence against women on women's participatory rates in democratic processes?[71]

Susan James, then, is less sanguine than Phillips about the emancipatory possibilities of liberal democracy — and, by extension, of constitutional law. So too is the Australian political theorist Jan Pettman. While Phillips pleads for feminists not to give up on liberal democracy, thereby implying that it can be transformed into a more inclusive theory, Pettman emphasises the political salience of exclusion — the exclusion of marginalised groups — in Australian history. Commenting on the Bicentenary 'celebrations' of white settlement in Australia, Jan Pettman has argued that:

> The Australian national political project historically has been an exclusive one — masculinist, racist and Anglo-supremacist .... Aborigines were excluded from the beginning of settlement by the formulation of the colony of New South Wales as *terra nullius* — unoccupied country .... Violence, restricted citizenship and institutionalisation were the strategies to build the nation and the state as white .... Immigration and citizenship restrictions also operated to keep foreign 'others' out.[72]

Here Pettman returns us to our main theme: the exclusionary processes which have inscribed and which continue to inscribe Australian constitutional democracy. To take the most obvious example, the achievement of female suffrage in South Australia was marked by a centenary in 1994, and a concomitant constitutional centenary discourse about women's rights.[73] However, it is well to to be reminded that such achievements in the name of citizenship rights are also marked by exclusionary discourses. Twenty years ago, feminist historian Anne Summers noted that feminists in 19th century New South Wales and Victoria had 'objected to Chinese and "Blackfellers" being able to vote when they could not.'[74] In this way, white middle-class women made claims for citizenship rights against those of other excluded groups — Asian men whose access to citizenship was restricted by the White Australia policy, and Aboriginal men who, like Aboriginal women, were formally excluded from that 'defining right of political citizenship, the full right to vote', until 1967.[75]

[71] Susan James, 'The Good-Enough Citizen: Citizenship and Independence' in Gisela Bock and Susan James (eds), *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (1992) 53. On the limiting effects of sexual violence see also Margaret Thornton, 'Portia Lost in the Groves of Academe Wondering What to do about Legal Education' (1991) 9(2) *Law in Context* 9, 12-3.

[72] Pettman, above n 40, 5.

[73] See the articles in (1994) 3(1) *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation.*

[74] Anne Summers, *Damned Whores and God's Police* (1975) 360.

[75] Peter Beilharz, Mark Considine and Rob Watts, *Arguing About the Welfare State* (1992) 45. Pettman argues that a wide range of status have 'contained' Aboriginal people within definitions 'constructed for the purpose of controlling, managing and "protecting" them': Pettman, above n 40,

Accordingly, white women who wish to celebrate the centenary of 'our' first white female franchise should reflect on the racialised discourses which have constructed franchise rights in Australia. As feminist historian Patricia Grimshaw, amongst others, has argued, this first white Australian women's attempt to 'redefine their place in the body politic' intersected with some very 'illiberal' (that is, racist) redefinitions of 'nation' — redefinitions which 'must caution us against complacency as we conduct our re-evaluation of the nation we wish to be'.[76] Furthermore, as Pettman argues, citizenship has been 'ambiguous for women', even white women, who are 'frequently constructed as dependants, as passive citizens, objects, clients and consumers of policies, rather than as individual citizens'.[77] She gives 'their treatment as "wife" rather than "subject"'[78] as one example of this fragile civil status — a point which finds much evidentiary support in provisions relating to married women in Australian citizenship law.[79] Drawing on Carol Pateman's critique of social contract theory, Pettman argues, convincingly, that women were not simply excluded from the 'contract of fraternal citizenship'; rather, representative democracy in Australia was 'constructed on their exclusion and control'. She notes also that citizenship has been 'militarised': that the Australian armed forces were exempted from the Sex Discrimination Act can be seen as yet another exclusion of women from full citizenship.[80] And within the category of white women, immigrant women have also been excluded from citizenship, such that research needs to identify the ways in which immigrant women have been 'incorporated into "Australia"'.[81]

In relation to this notion of 'incorporating' people who historically have been 'outside' or excluded from entry into citizenship, it is notable that High Court judges, commenting on the extent of the immigration power in s 51 (xxvii) of the Constitution, have claimed that 'the concept of immigration extends beyond the actual act of entry into Australia to the process of *absorption into the*

81. There is some uncertainty about the history of Aboriginal voting rights. Thornton claims that it 'would seem' that Aboriginal women were technically eligible to vote in state elections in New South Wales, South Australia, Victoria and Tasmania following the state enfranchisement of women, but that neither Aboriginal men nor Aboriginal women could vote in Queensland or West Australia until 1962: Thornton, 'Embodying the Citizen', above n 24, 203.

76 Patricia Grimshaw, 'Colonialism, Gender and Representations of Race: Issues in Writing Women's History in Australia and the Pacific', Inaugural Lecture (Max Crawford Chair of History), University of Melbourne (1994) 12. In this connection, we might consider the political limitations of a feminist strategy which stresses women's differences from men as the basis of their demands for citizenship rights. As Marie de Lepervanche has noted, prior to the First World War 'the only Commonwealth provision to recognise women independently as citizens with sex-specific claims was the universalist maternity allowance of 1912 from which Aboriginal and Asian women were excluded'. Marie de Lepervanche, 'Women, Nation and the State in Australia' in Nira Yuval-Davis and Floya Anthias (eds), *Woman-Nation-State* (1989) 45.

77 Pettman, above n 40, 80.

78 Ibid 80-1.

79 Michael Pryles, *Australian Citizenship Law* (1981). See Index: 'Married Women'.

80 Pettman, above n 40, 81.

81 Ibid 36. See generally 36-53.

Australian community'.[82] Impliedly then, the High Court sees immigrants as outside 'Australia' until they are 'absorbed' into it, thereby supporting Pettman's assertion that '[i]t is unclear when a migrant ceases to be a migrant and accepted in their claims to rights'[83] within Australia. More broadly, the High Court's claim also provides evidentiary support for Pettman's argument that citizenship is 'a set of inclusion/exclusion practices'.[84] Mainstream legal commentators, however, seem to be either oblivous to these practices or naive about their discriminatory effects.

To take a highly relevant example: in the course of examining citizenship as a concept in constitutional law, legal academic David Wishart has ascertained that a historical review of Australian nationality and citizenship legislation reveals that 'the dominating policy behind at least the early development of separate Australian citizenship' was a 'desire to discriminate on the grounds of race, colour and sex'. Yet he then proceeded to argue that the policy is 'best seen as an aspect of the desire for autonomy from the United Kingdom.'[85] Such a disclaimer has the effect of erasing the historical record of discriminatory exclusions within Australian citizenship practices.[86] As a counter-point, we might note in passing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[87] a 1992 case involving the detention of Cambodian nationals. *Lim* serves as a reminder, for those who require one, of the exclusionary effects on non-European peoples of the demarcations made by 'our' constitutional government and our judiciary between citizens and non-citizens. Briefly, the High Court decided in *Lim* that illegal immigrants may be treated differently from citizens. In particular, as non-citizens, they do not enjoy the citizen's constitutional immunity from being imprisoned by a non-judicial power.[88] The *Lim* case thus invokes a historical memory of exclusions which is elided in conventional legal analyses.

V Invoking History: The Citizen as a Bearer of Constitutionally Guaranteed Rights

Having noted some of the exclusionary processes at work in Australian constitutional history, let us move to a consideration of judicial interpretations of the Constitution in relation to the notion of the citizen as a bearer of the rights usually associated with democracy — the rights of equality, participation, or, at least, of representation and freedom of speech. According to Peter Hanks, it is

82 *R v Director-General of Social Welfare (Vict); ex parte Henry* (1975) 133 CLR 369, 376 (Stephen J) (emphasis added).

83 Pettman, above n 40, 82.

84 Ibid.

85 Wishart, above n 23, 683-4.

86 However, it is relevant to point out that Pryles, noting that the conditions for naturalisation set out in the Nationality Act 1920 (Cth) did not include the racial restrictions of earlier legislation, suggested that the legislators understood that racially restricted policies would be pursued 'in the context of immigration restrictions rather than as qualifications for naturalisation': Pryles, above n 79, 37.

87 (1992) 176 CLR 1 ('*Lim*').

88 Ibid 26-7 (Brennan , Deane and Dawson JJ).

'conventional wisdom' that the Commonwealth Constitution does not guarantee the right to vote — that while the references to choice 'by the people' in Sections 7 and 24 may appear to require a universal franchise, there is 'no constitutionally required minimum content to the Commonwealth franchise'.[89] What might an unconventional — that is, feminist — commentator make of this? Consider, for example, *Attorney-General (Cth); ex rel McKinlay v Commonwealth*,[90] a case dealing with the question of whether s 24 demanded that electoral boundaries be fixed in accordance with the principle of one vote-one value. A majority of the High Court decided that s 24 did not demand equality in the size of electorates — that is, equality in the value of electors' votes. From a feminist perspective, it is notable that while Barwick CJ specifically ruled out the Convention Debates as an interpretative aid,[91] the majority was able to determine that the framers did not intend that s 24 of the Constitution should guarantee a universal suffrage. Crucially, the majority pointed to the *exclusion* of women from most of the colonial franchises: as adult suffrage was mostly 'unknown' in Australia in 1900, the framers could not have intended that it be read into the Constitution.[92] Stephen J found that the principles of 'representative democracy' and 'direct popular election' were contained in the opening words of s 24,[93] but he and the other majority judges could find 'nothing in our history',[94] let alone in the Constitution, which could imply a constitutionally entrenched universal adult suffrage.[95]

By contrast, Murphy J found that the words 'chosen by the people' in s 24 carried a 'mandate of equal representation', a mandate reinforced by s 30 which he interpreted as expressing the principle of 'one person, one vote'.[96] Significantly, one of the factors which led Murphy J to a view of s 24 which was diametrically opposed to the majority was his understanding of the historical relevance of female suffrage: in his view, s 24 demanded that House of Representative elections be democratic — for example, by preventing Parliament from 'depriving women of a vote'.[97] Thus, paradoxically, Murphy J, unlike the majority in *McKinlay*, read the meaning of the historical exclusion of women from the franchise as a factor implying a constitutional guarantee of equal value for equal votes.

The relationship between women's suffrage and the Constitution was also raised in *R v Pearson; ex parte Sipka*,[98] in which the majority decided that s 41 did not provide a constitutional guarantee of the right to vote. Dissenting,

89 Peter Hanks, *Constitutional Law in Australia* (1991) 53.
90 (1975) 135 CLR 1.
91 Ibid 17.
92 Ibid 19 (Barwick CJ).
93 Ibid 56.
94 Ibid 36 (McTiernan and Jacobs JJ).
95 Ibid 62 (Mason J).
96 Ibid 70-3.
97 Ibid 70.
98 (1983) 152 CLR 254 ('*Sipka*').

Murphy J reapplied his method of reading Australian constitutional history as a history of exclusions. He argued that to understand the meaning of s 41, one had to understand the history of the exclusion of women and of Aboriginal people from the franchise. Far from providing for a universal franchise, the Commonwealth Franchise Act 1902, by disqualifying Aboriginal people who were not entitled to vote in state elections, 'deliberately abstained' from introducing a uniform federal franchise. Murphy J noted further that the disqualification of Aboriginal people was not removed until 1962, and that until then, 'the only right of Australian Aboriginals to vote in federal elections was derived from the guarantee in s 41'. Murphy J thus deployed the 'history of discrimination against Aboriginal voting rights' against the narrow view of the meaning of s 41 favoured by the majority.[99] In this way, he once again demonstrated an understanding of the exclusionary character of Australian constitutional history. But, paradoxically, he utilised this understanding of exclusion to find a constitutional guarantee of the right to vote.

Significantly, the majority decision in *Sipka* that s 41 did not guarantee a right to vote was based in part on the 'historical fact' that the framers' intention in s 41 was to prevent South Australian women from being deprived of the franchise.[100] That this intention could be discerned in the Convention debates is suggestive of a liberalising trend in the High Court's understanding of historical interpretation, a trend which has become apparent in more recent decisions. The decisions in *Nationwide News Pty Ltd v Wills*[101] and more especially in *Australian Capital Television Pty Ltd v The Commonwealth*[102] have been said to represent the 'high-water mark' in relation to the implication of constitutional rights in Australia.[103] Indeed, Sir Anthony Mason asserts that these two decisions 'recognised that sovereignty resides in or derives from the people'.[104] For the High Court to find an implied constitutional guarantee of freedom of communication, 'at least in relation to public and political discussion',[105] it had to undergo a shift in its understanding of the intentions of the framers of the Constitution. Importantly, the majority found a 'major reason for their disinclination to incorporate in the Constitution comprehensive guarantees of individual rights' in their commitment to the principles of responsible government.[106]

99 Ibid 269-71.

100 Ibid 261-2 (Gibbs CJ, Mason and Wilson JJ), 277 (Brennan, Deane and Dawson JJ). Anne Mullins reads s 41 in the same way in 'Women and the Text of the Australian Constitution' (1994) 3(1) *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation* 18.

101 (1992) 177 CLR 1 ('*Australian Capital Television*').

102 (1992) 177 CLR 106.

103 Murray Wilcox, *An Australian Charter of Rights?* (1993) 206.

104 Sir Anthony Mason, 'The Role of the Courts at the Turn of the Century' (1994) 3 *Journal of Judicial Administration* 156, 166. For a different view, one which asserts that *Leeth v The Commonwealth* (1992) 174 CLR 455 is the most important of the new cases in which the High Court has 'created a new constitutional law of individual (citizens') rights that is profound and far-reaching', see Michael Detmold, 'The New Constitututional Law' (1994) 16 *Sydney Law Review* 228, 230.

105 *Australian Capital Television* (1992) 177 CLR 133 (Mason CJ).

106 Ibid 135-6 (Mason CJ).

Thus, in the final paradoxical analysis, the High Court has come to locate the failure of the framers to include a guarantee of equal protection in the Constitution in their commitment to representative democracy.

Finally, the *Cleary*[107] case raises still more questions for liberal or representative democracy — the question, in particular, of citizenships disqualified from political office. Criticising the decision, Helen Irving suggests that the High Court's narrow literalist approach has resulted in a misreading of the framers' intention behind s 44. She asks:

> Given its recent willingness to look beyond a purely literalist interpretation in other cases and to enter into the realm of implications and intentions, might the High Court have exercised a more expansive judgement in *Sykes v Cleary*?[108]

In Irving's view, *Cleary* has created 'doubts about the equal legal status of all citizens'.[109] But a critical reading of Australia's constitutional history of exclusions indicates that *Cleary* did not create these doubts: from any feminist perspective, 'our' flimsy constitutionally guaranteed citizenship rights, especially the right of all citizens to equal legal status, have been shrouded in doubts from the start.

Aside from *Cleary*, the High Court's more recent glosses on the Constitution indicate some understanding of the limitations of liberal democracy and, especially in Murphy J's powerful dissents, an understanding of the exclusionary nature of constitutional democracy in Australia. But the High Court's analysis falls far short of a poststructuralist feminist understanding of the highly complex nature of the exclusive/inclusive processes of liberal democracy. Nor does the High Court come close to understanding that the representation of law as a system of rules, norms, principles and standards of human behaviour is, as feminist legal academic Judith Grbich points out, 'a political practice which privileges the perspective of those social groups from whom the rule makers and official interpreters are systematically recruited.'[110]

By excluding a feminist perspective and by treating a male standpoint as if it were gender-neutral, constitutional conversations such as those taking place in the High Court implied rights cases misrepresent the consensus of the privileged groups as the consensus of the whole society.[111] At the same time, they greatly impoverish 'our' understanding of Australian constitutional democracy at this 'historic' time.

107 *Sykes v Cleary* (1992) 176 CLR 77 ('*Cleary*').

108 Helen Irving, 'Citizens and Not-quite Citizens' (1993) 2(4) *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation* 8. See also Cheryl Saunders, 'The Cleary Case' (1992) 1(3) *Constitutional Centenary: The Newsletter of the Constitutional Centenary Foundation* 1-2.

109 Ibid 11.

110 Judith Grbich 'Feminist Jurisprudence as Women's Studies in Law: Australian Dialogues' in A Arnaud and Elizabeth Kingdom (eds), *Women's Rights and the Rights of Man*(1990) 78.

111 Ibid. For a feminist critique of the implied rights cases — one which is not informed by poststructuralist theory and which fails to distinguish between conflicting feminist methodologies and perspectives — see Deborah Cass, 'Through the Looking Glass: The High Court and the Right to Speech' (1993) 4 *Public Law Review* 229.

CONCLUSION

Will the constitutional centenary 'celebrations' write this violent, exclusionary history out of its debates? It is all very well for poststructuralist feminist theorists to be constantly on guard against the exclusionary effects of universalising masculinist discursive practices as well as against any self-authorising moves within feminism which assumes a right to speak for all women. But who will challenge the universalising and exclusionary discourses of the Constitutional Centenary Foundation? Robert Dahl, masculinist doyen of empirical democratic theory, might seem to have authorised a trend to highlight exclusionary processes when he noted that under his prized ancient Greek democracy, 'citizenship was highly *exclusive*' (his emphasis). But perhaps the fact that he saw Greek citizenship as exclusive in contrast to the '*inclusive*' (his emphasis) citizenship of 'modern democracy'[112] derailed any hope that his followers would pick up on the exclusionary aspects of modern democracies. Of course, Dahl's failure to consider the problems that gender and race pose for his political analysis hardly qualified him as a critical role model.[113] But it does qualify him as a perfect choice for mainstream constitutional law courses aimed at maintaining a constitutional status quo in which women remain little more than 'auxiliaries to the commonwealth'[114] and feminists are absent conversationalists.

Finally, it should be said that the prospect of a strong feminist legal intervention in current constitutional debates seems bleak. To date, feminist scholars have been even more absent from the constitutional centenary debates than they have from the republicanism debate. More critically, liberal feminism, the favoured mode of analysis in feminist legal circles, seem to be inherently incapable of interrogating exclusionary processes — such is its commitment to the project of incorporating or 'adding in' women to masculinist institutions.[115] But on a happier note, feminist historians like Jan Pettman are already making an important and transgressive contribution to the project of rethinking Australian constitutional democracy. Significantly, they are writing histories about the ways in which social groups have been excluded from the political process in the legal as well as the extra-legal context. Will such critical histories prompt other feminists to join constitutional conversations in the decade of the Constitutional Centenary? At this 'historical' time, there is little ground for optimism.

[112] Robert Dahl, *Democracy and its Critics* (1989) 21.

[113] Philip Green, 'A Review Essay of Robert A Dahl *Democracy and its Critics*' (1990) 16(2) *Social Theory and Practice* 217, 227-8.

[114] Kant's phrase receives a feminist gloss in T Brennan and Carole Pateman, '"Mere Auxiliaries to the Commonwealth": Women and the Origins of Liberalism' (1979) 27 *Political Studies* 183, 196.

[115] See the critique of liberal feminist international law scholarship in Adrian Howe, 'White Western Feminism Meets International Law: Challenges/Complicity, Erasures/Encounters' (1995) 4 *Australian Feminist Law Journal* 63.