

CITIZENSHIP AS A CONSTITUTIONAL CONCEPT; THE PAST AND THE FUTURE.

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“Citizenship”, as Gaudron J states in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (Lim)* (1992) 176 CLR 1 at 54, is not a constitutional term at all:

“Citizenship, so far as this country is concerned, is a concept which is entirely statutory, originating as recently as 1948 ... It is a concept which is and can be pressed into service for a number of constitutional purposes ... But it is not a concept which is constitutionally necessary, which is immutable or which has some immutable core element ensuring its lasting relevance for constitutional purposes.”¹

Indeed, the term was deliberately omitted from the Australian *Constitution*.² While John Quick was keen to include a reference to national citizenship, Isaac Isaacs successfully pressed for its omission.³ Kirby J explains in *DJL v Central Authority* (2000) 201 CLR 226 at 277-278 (references omitted):

“The Australian *Constitution* does not refer to the status of ‘citizen’ in relation to native born or naturalized people of the Commonwealth. The ‘people’ are referred to in several places. Elsewhere the people who are entitled to vote are described as ‘electors’. In harmony with the notions of the time, the *Constitution* refers to the national status of Australians as that of ‘a subject of the Queen’. This has been construed, in contemporary circumstances, to be equivalent to a reference to Australian citizenship.”

While some of these statements are arguable,⁴ there is no doubt in my view that the absence of any explicit use of the term “citizen” has been a constraining factor in the High Court’s approach to Australian citizenship.

This is not to deny the constitutional importance of a person’s “civil status”⁵. In fact, Gaudron J was at pains to point out (in overriding the decision of *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178) in *Re Patterson; Ex parte Taylor*

¹ This is the same in Canada. See *Solis v Canada (Minister for Citizenship and Immigration)* (2000) 186 DLR(4th) 512 where the Federal Court of Appeal determined that the concept of citizenship has no meaning apart from statute. The applicant had argued that notwithstanding he was not a citizen under the *Citizenship Act RSC 1985*, he had an independent charter-based right to be considered a citizen largely because of his family ties and roots in Canada. An application for leave to appeal to the Supreme Court of Canada was dismissed on 23 November 2000 without reasons (Court File No 27947).

² As discussed in greater detail in Kim Rubenstein, *Australian Citizenship Law in Context* (LawBook Co, 2002) Chapter 2.

³ *Ibid* at [2.3.2.2].

⁴ And indeed are addressed further below.

⁵ This is the term used by Gummow and Hayne JJ in their joint judgment in *Re Patterson; Ex parte Taylor* at [141], (2000) 75 ALJR 1439 at 1465.

[2001] HCA 51; (2001) 75 ALJR 1439 that “there could hardly be an issue of more fundamental importance than that of a person’s constitutional status”.⁶ However, the constitutional status being discussed was “alien” rather than “citizen”.

In my 20 minutes today, I will briefly take you to some important High Court decisions that shed light on citizenship and its constitutional implications.

Section 44 of the Constitution and citizenship

There have been various constitutional questions prompting the court to discuss citizenship. Section 44 of the *Constitution* provides the court with one context since the only reference to “citizen” is “citizen of a foreign power” and the disqualification of people who are citizens of a foreign power from membership of the Parliament. The meaning of “citizenship” was examined in *Sue v Hill* (1999) 199 CLR 462, with Senator-elect Heather Hill disqualified from her parliamentary position. The High Court found Hill ineligible for election as she was a British citizen at the time of her nomination and Britain was a foreign power for the purpose of s 44. The new status of Australian citizen had played a part in that development.

In *Sue v Hill*, Gaudron J identified the change in the meaning of the status of “British subject” in the transformation of the relationship between the United Kingdom and Australia.⁷ It was highlighted by Gaudron J that British subjects became citizens of the independent nation-states into which the British Empire was transformed. Furthermore, the removal of the British subject status by amendment to the legislation in 1984, taking effect in 1987, meant that from that time on Australians were solely Australian citizens. As Gaudron J stated (at 528):

“That process, both in this country and the United Kingdom, renders the constitutional references to ‘a subject of the Queen’ of little or no significance in determining whether the United Kingdom is now a foreign power”.

Thus, the introduction of citizenship as “legal status” is viewed by the court as a fundamental step in Australia’s independence as a nation, bestowing upon citizenship an important republican dimension.

In an interesting contrast, however, the court found that the constitutional references to “a subject of the Queen” were still significant in determining whether British subjects resident in Australia at the time of the legislative removal of the status were “aliens” for the purposes of s 51(xix) of the *Constitution*, in determining Parliament’s power to deport aliens under the *Migration Act 1958*. In *Re Patterson; Ex parte Taylor* [2001] HCA 51, the court confirmed the constitutional capacity for dual citizenship by stating that “[a] person is not necessarily excluded from membership of the Australian community by reason of his or her being a citizen of a foreign power”.⁸ However, while one can be a dual citizen, dual citizens can not nominate to stand as a member of Parliament. British

⁶ Ibid at [40], (2000) 75 ALJR 1439 at 1448.

⁷ (1999) 199 CLR 462 at 527, fn 228. See also discussion of this in Chapter 3 at [3.2].

⁸ Ibid, Gaudron J at [34].

subjects resident in Australia in 1987 have a special constitutional class as they are citizens of a foreign power, can vote in Federal and State elections if on the electoral roll and are not aliens of Australia and can not be deported.

Section 117 of the Constitution and citizenship⁹

The Court's closest attempt at discussing membership of the Australian community in a constitutional context has been in considering s 117, which demands:

“A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be applicable to him if he were a subject of the Queen resident in each other State.”

I use the term membership of the community in contrast to citizenship to highlight that there is often a difference between the legal notion of membership and broader community understandings of membership. In *Street v Queensland Bar Association* (1989) 168 CLR 461, the court broadened its interpretation of s 117 by dropping clues as to its view of citizenship as membership.

Mason CJ saw s 117 as designed to enhance “national unity and a real sense of national identity” (at 485) while not directly discussing the meaning of “citizenship”. Brennan J deemed it unnecessary to determine whether the term is synonymous with “Australian citizen”, and referred to the Convention Debates where the term was consciously left open (at 505). However, Deane J made explicit use of the term “citizen”, stating (at 522) that the operation of s 117 is to “protect the citizen resident in one State from being subjected in another State to ‘disability or discrimination’”. More fundamentally, the section is, in his view, directed to the “promotion of national economic and social cohesion and the establishment of a national citizenship” (at 522). Thus, Deane J sought to use s 117 to influence the shape of Australian citizenship. The equation of citizenship and equality was also a theme of Dawson J, who (at 541) viewed s 117 as ensuring that persons from one State are treated in another “as citizens of the one nation, not as foreigners”.

What was not resolved in this case is very important in determining the breadth of citizenship. “Whether a person living in Australia, but not a natural born or naturalized Australian citizen, is entitled to the protection accorded by s 117 is a matter to be considered when the occasion arises”, Toohey J stated (at 554). This was considered by McHugh J in *Re Patterson; Ex parte Taylor* [2001] HCA 51,¹⁰ a case which revisited the meaning of “alien” in s 51(xix) of the *Constitution*.¹¹ McHugh J was of the view that “subject of the Queen” in s 117 has evolved to mean “subject of the Queen of Australia” (at [131]). And once one accepted that a particular person was a “subject of the Queen of Australia”, they were deserving of s 117 protection. McHugh J stated (at [132]) that:

⁹ For broader discussions about s 117, see Lee and Paterson, “Australian Nationhood in the Constitutional Interpretation of Section 117” (2000) 8 *Asia Pacific Law Review* 169; Mathieson, “Section 117 of the Constitution: The Unfinished Rehabilitation” (1999) 27 *Federal Law Review* 393 and Ebbeck, “The Future for Section 117 as a Constitutional Guarantee” (1993) 4 *Public Law Review* 89 and “Section 117: The Obscure Provision” (1991) 13 *Adelaide Law Review* 23.

¹⁰ Decision 6 September 2001.

¹¹ See immediately below.

“It is not a question of Australian citizenship — a term that the *Constitution* does not use — but of the distinction that the *Constitution* draws between a subject of the Queen and one who is not, that is to say, an alien.”

Those British subjects, born in the United Kingdom, who were living in Australia at the commencement of the *Royal Style and Titles Act 1973* (Cth) became, in McHugh’s view, subjects of the Queen of Australia as well as subjects of the Queen of the United Kingdom, and were therefore protected by s 117.¹² Thus, Australian citizens and British subjects who are also subjects of the Queen of Australia are protected by s 117, creating a larger group of people deemed to be within the boundaries of membership of the Australian community. An even greater group of persons could still try to come within the protection of s 117: those who are permanent residents of Australia. If this question is brought before the court in the future, it will have to consider the difference between the legal status of citizen, permanent resident and temporary resident, which will involve considerations similar to the discussions in *Potter v Minahan (1908) 7 CLR 277*,¹³ and the broader notion of who is regarded as a member of the Australian community.¹⁴

Section 51(xix) and citizenship

The court has dealt with the consequences of citizenship most directly in immigration and deportation cases.¹⁵ Aliens are subject to Commonwealth control by virtue of s 51(xix) of the *Constitution*, which refers to “naturalization and aliens”. This head of power has been used by the government, and has been interpreted by the High Court, to give the Commonwealth almost complete control¹⁶ over laws relating to aliens. The power is plenary.¹⁷ The regulation of immigration through this power¹⁸ is the clearest expression of membership of the community since it practically determines who in fact is present within the country¹⁹ and maintains control over those people who do not take up Australian citizenship.²⁰

One of the most dramatic cases to display the government’s power over non-citizens and the different legal rights of citizens and non-citizens is *Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1*. The court upheld the power of the executive under the *Migration Act 1958* (Cth)²¹ to detain an alien held in custody for the purposes of expulsion or deportation. Such authority constituted an incident of executive power.²² This was not entirely surprising, as it had long been upheld by the

¹² Indeed, they were not aliens for the purpose of the *Constitution*, as discussed below.

¹³ See discussion in Rubenstein, *ibid.* Chapter 3 at [3.3].

¹⁴ Barwick CJ’s discussion of s 117 in *Henry v Boehm (1973) 128 CLR 482* at 487 identifies permanent residence as a factor in determining who is covered by s 117. See also Pannam, “Discrimination on the Basis of State Residence in Australia and the United States” (1967) 6 *Melbourne University Law Review* 105.

¹⁵ As discussed in more detail in Rubenstein, Chapter 3 at [3.3]. Since the *Migration Act 1958* (Cth) was amended, restricting judicial review rights of non-citizens, there are more cases reviewing decisions under the *Migration Act 1958* (Cth) where the High Court is exercising its original jurisdiction. This has increased the appearance of the word “citizen” in High Court judgments.

¹⁶ While this is a plenary power, the Commonwealth Government is still restricted by other notions protected by the *Constitution*, such as separation of powers and responsible government.

¹⁷ See McHugh J in *Re Patterson; Ex parte Taylor [2001] HCA 51* at [99], (2001) 75 ALJR 1439 at 1457.

¹⁸ As opposed to s 51(xxvii) “immigration and emigration”.

¹⁹ The executive’s power to control entry into the country was clearly established by the High Court in *Robtelmes v Brennan (1906) 4 CLR 395*. As Catherine Dauvergne argues, migration law is more important than citizenship law for the question of who can become an Australian citizen: Dauvergne, “Confronting Chaos: Migration Law Responds to Images of Disorder” (1999) 5 *Res Publica* 23 and “Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics” (2000) 24 *Melbourne University Law Review* 280.

²⁰ Note, however, the discussion below about the special status accorded to non-citizen British subjects.

²¹ Sections 54L and 54N as they then were.

²² *Lim (1992) 176 CLR 1* at 10 (Mason CJ); at 32 (Brennan, Deane and Dawson JJ); at 47 (Toohey J); at 58 (Gaudron J) and at 64 (McHugh J).

Australian courts as a necessary consequence of the power to deport. An earlier decision referred to in *Lim* was *Koo Wing Lau v Calwell* (1949) 80 CLR 533, which was a *Wartime Refugees Removal Act 1949* (Cth) case dealing with the deportation of prescribed persons.²³ However, the court clearly acknowledged that administrative detention of citizens would be unconstitutional:

“It would ... be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody ... the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.”²⁴

This highlights a fundamental difference in the rights of citizens and non-citizens.²⁵

The definition of “aliens” in s 51(xix) of the *Constitution* has been considered by the High Court because of the changed relationship between Australia and England and the common heritage of being “British subjects”. In several cases, non-citizens who were about to be deported under the *Migration Act 1958* (Cth), sought to prevent their deportation by arguing over the constitutional definition of “aliens” because of their British subject status.²⁶

In *Pochi v Macphee* (1982) 151 CLR 101, the High Court confirmed that the power to define the meaning of “aliens” is in Australian hands and denied that English law governed the question. As Gibbs CJ pointed out (at 109):

“If English law governed the question who are aliens within s 51(xix) almost all Australians born in Australia would in future be aliens within that provision. The absurdity of such a result would be manifest.”²⁷

In an obiter statement, Gibbs CJ also stated (at 109-110) that aliens were “person[s] born outside Australia whose parents were not Australian and who [have] not been naturalized as an Australian”. The majority in *Nolan v Minister for Immigration and Ethnic Affairs* (*Nolan*) (1988) 165 CLR 178 confirmed Gibbs CJ’s definition of an “alien” and added persons who have “ceased to be a citizen by an act or process of denaturalization and restricted to exclude a person who, while born abroad, is a citizen by reason of parentage”.²⁸ Gaudron J, who dissented, defined an “alien” as (at 189):

“... [A] person who is not a member of the community which constitutes the body

²³ See discussion of Brennan, Deane and Dawson JJ in *Lim* (1992) 176 CLR 1 at 31. For a critique of this approach, see Crock, “Climbing Jacob’s Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia” (1993) 15 *Sydney Law Review* 338 at 349.

²⁴ *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). Note there are some qualifications to this general proposition, such as the power to detain citizens for the purpose of arrest and warrant and in cases of mental illness or infectious disease: *Lim* at 28-29 (Brennan, Deane and Dawson JJ).

²⁵ The extent of the executive’s power over non-citizens has also been raised in a Federal Court matter. In *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297 (11 September 2001), North J held that asylum seekers aboard the *MV Tampa* were unlawfully detained by the executive. In *Ruddock v Vadarlis* [2001] FCA 1329 (18 September 2001), the Full Court by a 2-1 majority overturned North J’s decision and held that the Commonwealth was acting within its executive power under s 61 of the *Constitution* in the steps it took to prevent the landing of the asylum seekers. An application for special leave to appeal this decision is pending in the High Court of Australia: *Vadarlis v Minister for Immigration and Multicultural Affairs* (M93 of 2001).

²⁶ These cases involved a range of arguments linked to British subject status. This material is also covered in Chapter 4 in the discussion on “British subject” at [4.1.1.2] and [4.3].

²⁷ This was affirmed in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178. See especially at 189 (Gaudron J).

²⁸ *Ibid* at 183.

politic of the nation state ... For most purposes it is convenient to identify an alien by reference to the want or absence of the criterion which determines membership of that community. Thus, where membership of a community depends on citizenship, alien status corresponds with non-citizenship; in the case of a community whose membership is conditional upon allegiance to a monarch, the status of an alien corresponds with the absence of that allegiance.”

Gaudron J’s dissent became part of the majority in overturning the decision of *Nolan* regarding the definition of “aliens” in *Re Patterson; Ex parte Taylor (Patterson)* [2001] HCA 51, (2001) 75 ALJR 1439.²⁹ The majority of the court in *Patterson* confirmed the view expressed in *Nolan* that the definition of “alien” in the *Australian Citizenship Act 1958* (Cth) did not “confine the meaning or denotation of the word in s 51(xix) of the *Constitution*”³⁰ and it held that a British subject, in essentially the same position as *Nolan*,³¹ was not an alien for the purpose of the *Constitution* and so could not be deported. This landmark decision formalises a new status of persons in Australia — British subjects who are not constitutional aliens for the purpose of s 51(xix). They are “non-citizen British subjects”.³² The consequence is that those people cannot be detained or deported.³³ The effect of this decision is substantial for those British subjects who were residing in Australia at the time of the changes to the *Australian Citizenship Act 1948* (Cth), which removed the status of British subject.³⁴

Thus, the relationship between England and Australia, and Australia’s steps towards independence as a sovereign nation, have complicated the meaning of the term “alien”. As Zines notes, the court’s interpretation of terms in the *Constitution* is not wedded to their meaning at the time of Federation. While the abstract meaning remains constant, the denotation changes. Thus, in *Nolan*, while a British subject would not have been an alien in 1900, the court took into account the “development of the independence of Australia, the evolution of the Crown from an Imperial to a national office and the creation of a national citizenship”.³⁵ Yet the majority in *Patterson*, while accepting the changes in the relationship, found that people in Taylor’s situation were in a special category. This was based on a range of reasons.

In Gaudron J’s view (at [47]), the only change that had occurred for Mr Taylor was an “evolutionary change in constitutional and governmental thinking with the emergence of the notion of the divisibility of the Crown”. This was not enough to change the relationship between people in the position of Taylor and “the body politic constituting

²⁹ Decision 6 September 2001.

³⁰ (1988) 165 CLR 178 at 186 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

³¹ Taylor arrived in Australia as a child in 1966 and has resided in Australia ever since. He has been on the electoral roll since turning 18; however, he never applied for Australian citizenship.

³² *Patterson* [2001] HCA 51 (6 September 2001) per Kirby J at [261], (2001) 75 ALJR 1439 at 1487-88. See further discussion in Chapter 4 at [4.3].

³³ Note, however, that Gaudron J explains that those people are still within the scope of the *Migration Act 1958* (Cth) through the s 51(xxvii) “immigration and emigration” of the *Constitution* and, as such, can have their visas cancelled. Whereas, the other judges in the majority, McHugh, Kirby, and Callinan JJ, in overturning *Nolan* upheld the view expressed in *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 that those persons are also beyond the scope of the immigration and emigration power by virtue of being absorbed into the community, and therefore they can not have their visas cancelled either. This distinction in the reasoning means that there is no majority view for saying that those British subjects are beyond the scope of the *Migration Act 1958* (Cth), except in the case of deportation and detention. See also the discussion in Kim Rubenstein, above, n2.

³⁴ See further discussion in Chapter 4 at [4.1.1.2] and [4.3].

³⁵ Zines, *The High Court and the Constitution* (4th ed, 1997), p 21. Four members of the High Court also confirmed this approach in its interpretation of a “foreign power” in s 44(i) of the *Constitution* in *Sue v Hill* (1999) 199 CLR 462 at 492 (Gleeson CJ, Gummow and Hayne JJ); at 528 (Gaudron J). The exact point at which British subjects lost their non-alien status was not clarified by the High Court and the later case of *Re Patterson; Ex parte Taylor* [2001] HCA 51, (2001) 75 ALJR 1439 found that they have not lost their non-alien status.

the Australian community” (at [48]).³⁶ In McHugh’s view (at [121]), until the passing of the *Royal Style and Titles Act 1973* (Cth), “a person, living in Australia, who owed allegiance to the Queen of the United Kingdom was not and is not an alien within the meaning of the *Constitution*”.³⁷ In Kirby J’s view, with whom Callinan J agreed (at [302]):

The introduction by statute, and then only in 1948, of the non-constitutional notion of citizenship scarcely justified the retrospective imposition, on a very large class of non-citizen British subjects in Australia, of the constitutional status of alien. Such imposition is especially untenable where members of that class have long since been absorbed amongst the people of the Commonwealth and accorded by them the full civil and political rights and duties of Australian nationality.³⁸

Thus, while according to Kirby J the “concept of citizenship in Australia has evolved in harmony with the emergence of Australia to full nationhood and independence”,³⁹ there has been a special status accorded to non-citizen British subjects by virtue of the court’s definition of “alien” in the *Constitution*, enlarging the Australian body politic.

Section 51 (xxvii) “Immigration and emigration”

Section 51(xxvii) is also relevant to the determination of citizenship. Regulating who enters the country impacts upon who can apply for citizenship.⁴⁰ Gummow J, when a member of the Federal Court, emphasised that:

“[T]he placing in the hands of the Parliament of the Commonwealth of a power with respect to immigration and emigration ... was done with the avowed purpose of conferring a power of exclusion of British subjects not born or naturalized in Australia”.⁴¹

This point is relevant to Gaudron J’s reasoning in *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439. While in the majority in overturning *Nolan* and finding that Taylor could not be deported or detained by virtue of not being an alien, Gaudron J states (at [54]) rather obtusely in one paragraph of her judgment:

“Although the power to legislate with respect to immigration does not extend to laws for the detention and removal of persons who have been integrated into the Australian community, there is no reason, in my view, why that power does not

³⁶ Note, however, that Gaudron J found that Parliament could in future legislate to define “alien” to include persons who, although not aliens prior to 1987, have since taken action to acknowledge their allegiance to the United Kingdom or to assert their rights and privileges as one of its citizens” (at [51]).

³⁷ *Patterson* at [121], (2001) 75 ALJR 1439 at 1461.

³⁸ Note that Kirby J also stated in *Patterson* at [271], (2001) 75 ALJR 1439 at 1490 that attempts “by legislation or regulation, retrospectively, to convert him from a non-alien to an alien could therefore not succeed. Certainly, they could not succeed without the clearest possible legislation effecting such a change and provision to him of access to a court and due process of law to determine the lawfulness of the alteration in his particular case”.

³⁹ *Ibid* at [262], citing Brazil, “Australian Nationality and Immigration”, in Ryan (ed), *International Law in Australia* (2nd ed, 1984), Chapter 8.

⁴⁰ Catherine Dauvergne argues that migration law is more important than citizenship law in deciding who can become an Australian citizen: Dauvergne, “Confronting Chaos: Migration Law Responds to Images of Disorder” (1999) 5 *Res Publica* 23 and “Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics” (2000) 24 *Melbourne University Law Review* 280.

⁴¹ *Kenny v Minister for Immigration and Ethnic Affairs* (1993) 42 FCR 330 at 338 where Gummow J cites *R v McFarlane; Ex parte O’Flanagan and O’Kelly* (1923) 32 CLR 518 at 557-565 per Isaacs J. See also discussion in Chapter 2.

enable the Parliament to legislate so as to provide for the conferral of visas on persons who have migrated to Australia. Nor in my view, is there any reason why, having legislated to confer visas on such persons, the Parliament cannot legislate to provide for their cancellation.”

This statement appears to seek to overturn the otherwise accepted view that persons who have become absorbed into the Australian community are beyond the reach of the immigration and emigration power. In overturning *Nolan*, the other judges in the majority, McHugh, Kirby and Callinan JJ, upheld the view expressed in *Ex parte Walsh; Re Yates (1925) 37 CLR 36*⁴² that those British subjects are also beyond the scope of the immigration and emigration power by virtue of being absorbed into the community and, therefore, they can not have their visas cancelled. This distinction in the reasoning means there is no majority view in *Patterson* for saying those British subjects are beyond the scope of the *Migration Act 1958* (Cth), except in the case of deportation and detention. Thus, Gaudron J joins with the otherwise minority judges⁴³ in finding that the *Migration Act 1958* (Cth) still applies to British subjects who were residing in Australia in 1987 and who have not taken up Australian citizenship, except in the cases of detention or deportation. According to Gaudron J’s view, it would mean those British subjects voluntarily leave the country can be regulated on their return through a visa or have their visa cancelled, thus disallowing re-entry. This means they are free to continue to live in Australia but, in practice, not free to leave.

Conclusion

Controversially, Kirby J argued in *DJL v Central Authority (at 278)* that “it ... seems likely that further constitutional implications will be derived for the idea of citizenship to which the political institutions established by the Constitution give effect”.⁴⁴ However, so far, the court has had no constitutional foundation for securing the concept of citizenship held out by liberalism, which treats political membership as the source of protection for rights.⁴⁵ For instance, in the High Court human rights case, *Kruger v Commonwealth (the Stolen Generations case) (1997) 190 CLR 1*, the plaintiffs’ claims lacked any constitutional foundation in a concept of citizenship. Bereft of any aspirational statement about citizenship, and without a bill of rights, the *Constitution* gives no guidance as to which notions of citizenship apply, and when.

⁴² See also discussion in Chapter 3 at [3.3].

⁴³ That is, Gleeson CJ, Gummow and Hayne JJ, who found that Taylor was an alien and upheld *Nolan*, thereby enabling the *Migration Act 1958* (Cth) to apply to Taylor.

⁴⁴ See also Taylor, “Citizenship Rights and the Australian Constitution” (2001) 12 *Public Law Review* 205. Leslie Zines also discusses the constitutional implications of the sovereignty of the people on citizenship in Zines, “The sovereignty of the people” in Michael Coper and George Williams (eds) *Power, Parliament and the People* (1997) 91 at 100.

⁴⁵ See discussions in Chapters 1 and 5 about the normative notion of citizenship.