2. Democracy and the Constitution: The People Deciding the Identity of 'the people'

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Introduction

The phrase 'the people' appears at the beginning of the preamble to the Australian Constitution, where the people of the colonies are recognised as 'the people' who 'agreed to unite in one indissoluble federal Commonwealth'. That agreement is a reference to the referenda held in each colony to accept the draft Constitution, which had been drafted by predominantly elected delegates to the constitutional conventions in the late 1890s.² Those conventions resulted in a *Constitution Bill* which was taken to the United Kingdom by the Australian delegation and, with one significant alteration,³ was passed by the Imperial Parliament.

There had been an earlier attempt, in 1891, to adopt a Constitution. However, due to a lack of political will in NSW and a depression, it did not progress through the colonial Parliaments as had been planned.⁴ The second attempt involved 'the people' both in the political movement for federation, as well as in the drafting and acceptance of the *Constitution Bill*. 'The people' played a big role in the final successful push for a Constitution.⁵

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2 For the history of the two conventions and the various referenda see John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005). Western Australia is not mentioned in the preamble, as its people did not vote in a referendum to accept the draft until after the draft was taken to the United Kingdom for passage through the Imperial Parliament. Covering clause 3 refers to the possibility of Western Australia being joined in the Commonwealth if the people of Western Australia agreed to the Bill. They did so through referendum on 31 July 1900 and the Constitution came into effect from 1 January 1901.

3 Section 74 was amended to retain some appeals to the Privy Council. See J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) ch 16. In addition, covering clause 2 was amended to remove the statement that 'This Act shall bind the Crown' and covering clause 6 was amended to remove the definition of 'colony'.

4 For details on this period, see John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005).

5 See Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, revised ed, 1999) ch 8 'The People'. It is particularly interesting to note, for the argument later developed, that not all women were fully part of 'the people' in terms of voting rights at the time of the

The phrase ‘the people’ appears in sections 7 and 24 of the Constitution. Section 7 requires that senators be directly chosen by the ‘people of the States’ and s 24 requires that members of the House of Representatives be directly chosen by ‘the people of the Commonwealth’. Those choices occur by election.⁶ Section 128 provides for the electors in the States and Territories to vote in referenda, which is the process by which the text of the Constitution can be changed.⁷ There are also a number of other references to ‘the people’ in the Constitution,⁸ or to other categories of persons.⁹

Read together, these sections reflect the fact that ‘the people’ were involved in the making of the Constitution, are involved in making amendments to the constitutional text, and are the ones who choose members of Federal Parliament. Who are these people? For the purpose of this chapter,¹⁰ I begin with the premise that what connects the different manifestations of ‘the people’ in the Constitution is an idea of the constitutional community. ‘The people’ is a reference to that community, which has both legal and symbolic implications. The constitutional community is a concept which reflects the fact that every Constitution governs a community of people, which exists separate from the document, but whose *constitutional* identity is affected by the Constitution itself. This draws on the work of scholars such as Michel Rosenfeld.¹¹

In the Australian context, an understanding of who is included or excluded from the constitutional community informs not only the categories of membership,

‘final successful push for a Constitution’. See Kim Rubenstein and Deborah Cass, ‘Representation/s of Women in the Australian Constitutional System’ (1995) 17 *Adelaide Law Review* 3 and Helen Irving (ed) *A Woman’s Constitution?: Gender and History in the Australian Commonwealth* (Hale & Iremonger, 1996).

6 See for example the textual indication of this in s 7 ‘voting’, ss 8 and 30 ‘qualification of electors’.

7 The process also necessarily involves the Parliament and the Governor-General.

8 For example, reference to ‘the people’ in s 53.

9 For example, reference to ‘subjects of the Queen’ in s 117.

10 For other work regarding the identity of the constitutional ‘people’, see Elisa Arcioni, ‘Identity at the Edge of Constitutional Membership’ in K Rubenstein, M Nolan and F Jenkins (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, forthcoming) addressing the status of the people of the Territories; Elisa Arcioni, ‘Excluding Indigenous Australians from “the people”: A Reconsideration of Sections 25 and 127 of the Constitution’ (2012) 40(3) *Federal Law Review* 287; as well as a preliminary overview in Elisa Arcioni, ‘That Vague but Powerful Abstraction: The Concept of “the people” in the Australian Constitution’ (Paper presented at Gilbert + Tobin Constitutional Law Conference, Sydney, 20 February 2009) http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/469_ElisaArcioni.pdf.

11 See Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2010) as developed in Symposium, ‘Comments on Michel Rosenfeld’s The Identity of the Constitutional Subject’ (2012) 33(5) *Cardozo Law Review* 1839. I acknowledge that there is a debate regarding the identity and role of the constituent people before a Constitution is formed. It is sufficient for the purposes of this chapter to note that there is a theory that the constituent power, which has the authority to create the Constitution, becomes the constituted people upon enactment of the Constitution. This raises difficult questions regarding precisely who was the constituent authority and on what basis, to what extent membership of the constituent authority automatically translates into membership of the constituted people, and how to address changes in the composition of the constituted people over time. See, for example, Ulrich K Preuss, ‘Constitutional Powermaking of the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution’ in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical perspectives* (Duke University Press, 1994) 143.

but also the nature of the constitutional community. However, simply re-naming ‘the people’ as the community under the Australian Constitution does not get us very far in understanding who those people are. Thus I arrive at the focus of this chapter. Here I look at the method adopted by the Australian High Court in trying to grapple with the meaning of this phrase, ‘the people’.

The jurisprudence of the Court regarding the phrase ‘the people’ is addressed in this chapter through an examination of two groups of cases. The first is a series of cases concerned with representative government, and most recently focusing on the exercise of the federal franchise. The second is a series of cases about migration or deportation, centred on the constitutional concept of ‘alien’.

By looking to the text of the Constitution, it is obvious why the phrase ‘the people’ is of concern in cases relating to the system of representative government. Representative government is centred on what has been referred to as the bedrock of ‘choice by the people’,¹² in the sections to which I have already referred — ss 7 and 24 — whereby the people of the States and Commonwealth directly choose the members of Federal Parliament. In the representative government cases, especially the most recent ones, a majority of the High Court has given great weight to that phrase ‘chosen by the people’, to the extent of invalidating legislation because the legislation was inconsistent with that mandate.¹³ Not only is there a series of cases referring to ‘the people’, from which to extract patterns regarding how we can understand that category, but those cases also show how jurisprudentially significant that phrase can be.

The second series of cases, relating to migration or deportation, is not as obviously connected to the phrase ‘the people’. As Gleeson CJ stated in the case of *Singh v Commonwealth*: ‘Sometimes the problem of meaning lies, not in understanding the concept that a particular word or expression signifies, but in understanding the relationship between a number of concepts referred to in the Constitution.’¹⁴ That is true of the migration cases, in which a number of categories intersect to inform the meaning of ‘the people’.

The migration cases are relevant to understanding the meaning of ‘the people’ because they assist in determining boundaries of membership. The cases all turn on the status of ‘alien’, referred to in s 51(xix) of the Constitution, which grants the Federal Parliament power to make laws with respect to aliens.¹⁵ Aliens are individuals who fall outside the constitutional community. By understanding who is considered to be outside the constitutional community, we get some

12 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 12 [1] (French CJ), referring to *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198 [82] (Gummow, Kirby and Crennan JJ).

13 *ibid.*

14 *Singh v Commonwealth* (2004) 222 CLR 322, 334 [15].

15 It also grants power regarding naturalisation. This aspect becomes relevant in underpinning at least aspects of citizenship legislation which affect the reasoning in the second group of cases, addressed below.

guidance as to the outer limits of that community, an idea of what line forms the boundary. Such an understanding assists in determining who falls on the right side of the boundary, and therefore within the constitutional ‘people’.

These two groups of cases, regarding representative government and ‘aliens’, help us to understand who the constitutional ‘people’ are. The connection I make between those groups of cases is a reflection on the method of reasoning adopted by a majority of the Court. That connection is in the use of legislative indications of membership in determining the meaning of constitutional terms.

My argument in this chapter is that when the Court tries to work out these questions, concerning who is included as amongst ‘the people’, or who is excluded by being an ‘alien’, a majority of the Court defers to, or uses in some form, *legislative* indications of membership in order to determine the content of the *constitutional* concepts. While the Court starts and ends with a constitutional expression, the way it fills the constitutional expression with meaning is to see what the legislature has done in the areas of law affected by that phrase, in order to decide what the constitutional limits might be. This indicates broader issues regarding constitutional interpretation. In the next section, I outline how this method of reasoning operates in both groups of cases. I then indicate some of the implications of this pattern and how this approach can be understood as the Court’s deferring to the people’s indication of their own identity.

The reasoning in the representative government cases

Over a series of cases from the 1970s,¹⁶ the High Court confirmed that there is a system of representative government contained within the Constitution. After some changes in approach, the current view is that the constitutional elements of that system are those required by the text and structure of the Constitution,¹⁷ not freestanding principles of democracy or politics more generally.

What is a common element amongst these cases is the requirement of choice by ‘the people’ as the heart of the system of government, and that constitutional implications may arise from that phrase. The most significant implication is

¹⁶ There were earlier mentions of elements of representative government, for example *Judd v McKeon* (1926) 38 CLR 380 where the notion of ‘choice’ was at issue.

¹⁷ See especially the unanimous statement in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

the implied freedom of political communication.¹⁸ That implied freedom was deemed to be necessary in order for the people to make an informed choice as required by ss 7, 24 and 128 of the Constitution.

Two of the most recent cases addressing the system of representative government under the Constitution are the cases which are the focus here — *Roach v Electoral Commissioner*¹⁹ and *Rowe v Electoral Commissioner*.²⁰ *Roach* was a challenge to the blanket disenfranchisement of prisoners from the federal franchise, on the basis that it breached ss 7 and 24 of the Constitution. The majority struck down the legislation. The majority reasoned that the power of the Parliament to determine the franchise was restricted by the requirement of ss 7 and 24 that parliamentarians be ‘directly chosen by the people’. Limited disenfranchisement was allowed, but to disenfranchise *all* prisoners went beyond the justifiable limits on the federal franchise.

Rowe was a case which challenged the timing of the closing of the electoral rolls prior to the 2010 federal election. Parliament had passed legislation which reduced the amount of time within which eligible persons could enrol to vote following the calling of an election. The Court, again by majority, struck down the legislation as being inconsistent with the constitutional mandate of choice by ‘the people’. The detriment caused by the legislation outweighed any potential benefits of the early closing of the rolls.

In those two cases, a majority of the Court used the notion of choice by ‘the people’ to invalidate the laws in question. In examining the meaning of that phrase, and determining who ‘the people’ are, the majority started from the position that a universal adult franchise is now protected by the Constitution. That is, that all capable adult citizens should have the right to vote. This was the baseline against which the Court in *Roach* determined whether it was justifiable to disenfranchise all prisoners, and against which the Court in *Rowe* determined whether the legislature could shorten the timeframe between calling the election and closing the electoral roll.

Focusing on how the Court determined that such a broad franchise is protected reveals the significance of legislative indications of membership in defining the constitutional meaning of ‘the people’. Gleeson CJ is the most explicit in his use of legislation. He states that universal adult franchise is protected by ss 7 and

18 The settled doctrine relating to this freedom was established in a unanimous judgment in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, as refined in *Coleman v Power* (2004) 220 CLR 1 and accepted in recent cases such as *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 and *Monis v The Queen; Droudis v the Queen* [2013] HCA 4. *Lange* followed on from earlier cases including *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

19 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

20 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

24.²¹ This is because ‘long established universal adult suffrage’ is ‘an historical development of constitutional significance’.²² What this means is that, because of changed historical circumstances, ss 7 and 24 ‘have come to be a constitutional protection of the right to vote’.²³

Significantly, included in those historical circumstances is ‘legislative history’.²⁴ The relevant legislative history addressed in the case is that relating to the federal franchise. Today there is an almost universal adult franchise. Adult citizens have a right to vote unless they fall into a number of discrete and non-arbitrary categories, and only a small, closed category of adult non-citizens have a right to vote.²⁵ The remainder of Gleeson CJ’s judgment is about what exceptions are allowed from that general right to vote, and how they can be justified. The conclusion in *Roach* was that the blanket disenfranchisement went too far, but that disenfranchisement of prisoners with a minimum sentence of three years was valid.²⁶

The joint majority judgment of Gummow, Kirby and Crennan JJ displays the same method. They approach the question by looking at the central conception of representative government. The implied freedom of political communication, discussed above, is one aspect of that system. However, these judges say that voting is even more central; it is at the heart of the system of representative government. In identifying the centrality of voting to the constitutional system of government, they state that ‘[g]iven the particular Australian experience with the expansion of the franchise in the nineteenth century, well in advance of that in the United Kingdom, this hardly could be otherwise’.²⁷ This statement comes after their having outlined the details of the legislative changes from colonial times to today, with respect to the franchise.

The joint judgment then moves to what was Gleeson CJ’s second step in his reasoning, stating: ‘The question with respect to legislative disqualification from what otherwise is adult suffrage ... thus becomes a not unfamiliar one. Is the disqualification for a substantial reason?’²⁸ Thus, Gummow, Kirby and Crennan JJ also accept the ‘bedrock’ of universal adult franchise, which has achieved that status due to changed legislation over time, and anything abrogating that rule must be justified.

21 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173–4 [6].

22 *ibid* 174 [7].

23 *ibid*.

24 *ibid*.

25 See current manifestation in the *Commonwealth Electoral Act 1918* (Cth).

26 This suggests something about the normative nature of ‘the people’, in privileging ‘good’ behaviour and penalising ‘bad’ behaviour — see the reference to ‘conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right’ in *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174–5 [8] (Gleeson CJ).

27 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198 [80]–[81].

28 *ibid* 199 [85], (emphasis added).

In the case of *Rowe*, which followed three years after *Roach*, the majority once again deferred to legislative indications of membership of ‘the people’. Chief Justice French was most explicit about this. Early in his judgment, French CJ stated: ‘The content of the constitutional concept of “chosen by the people” has evolved since 1901 and is now informed by the universal adult-citizen franchise which is prescribed by Commonwealth law.’ He continued, stating that the constitutional concept of choice by the people has acquired ‘a more democratic content than existed at Federation. That content, being constitutional in character, although it may be subject to adjustment from time to time, cannot now be diminished.’²⁹

French CJ was indicating that the meaning of choice by the people has changed. But he goes further and makes it clear that it is the changes in *legislation* over time that have determined the changed constitutional meaning. He refers to McTiernan and Jacobs JJ’s judgment in *Attorney-General of the Commonwealth; ex rel McKinlay v the Commonwealth*,³⁰ which Gleeson CJ had referred to in *Roach*. The joint judgment in *McKinlay* had, in turn, referred to the constitutional meaning being linked to the ‘common understanding of the time’.³¹ French CJ states that ‘common understanding’ is not ‘judicial understanding’.³² This seems to be a distinction between the views of the community generally (the ‘common understanding’), compared with the view of the judiciary. French CJ says that ‘durable legislative development of the franchise is a more reliable touchstone. It reflects a persistent view by the elected representatives of the people of what the term “chosen by the people” requires.’³³ Then, as in *Roach*, the remainder of his judgment is about whether the law in question breaches that command, which in this instance the majority decided was the case.

The joint judgment of Gummow and Bell JJ in *Rowe* adopts the reasoning and conclusion of Gleeson CJ in *Roach* with respect to the universal adult franchise being constitutionalised.³⁴ In her concurring judgment, Crennan J also refers to Gleeson CJ in *Roach*.³⁵ Crennan J reasons that representative government must be democratic. Democratic representation is given content by the ‘common understanding’, which is to come from legislative development. Crennan J then reaches her conclusion that ‘a fully inclusive franchise — that is a franchise free of arbitrary exclusions based on class, gender or race’, is now constitutionalised.³⁶

29 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 18 [18].

30 *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

31 *ibid* 35–37.

32 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 18 [19].

33 *ibid*.

34 *ibid* 48–9 [123].

35 *ibid* 107 [328].

36 *ibid* 117 [368].

Thus, the majority judges, in both of the most recent cases concerned with the system of representative government and the phrase ‘chosen by the people’, have all used legislative indications of membership to determine ‘the people’ who should be doing the choosing. It is the pattern of membership that the judges see in legislation which provides the meaning of the phrase ‘chosen by the people’, particularly, who are ‘the people’ who should be able to exercise a choice through a federal vote.

The reasoning in the ‘alien’ cases

I now turn to the second group of cases, the ‘alien’ cases, to demonstrate that in a separate area of constitutional jurisprudence, the Court is using legislative indications to determine membership of the constitutional community. Here the Court does so by considering who can be excluded from that community through characterisation as a constitutional ‘alien’.

The status of ‘alien’ is provided for in 51(ixx) of the Constitution, which the Federal Parliament has used to support its migration legislation since the 1980s.³⁷ Cases arising under that legislation are usually about whether or not someone can be deported as an alien. In these cases, as with the cases regarding representative government addressed above, a majority of the Court uses legislative indications of membership or exclusion from membership, in the course of reaching a conclusion about whether someone is a constitutional alien.

The cases are consistent in identifying allegiance as the touchstone of alien status. If a person has no allegiance to any state, then that person is an alien. This includes stateless people, as seen in *Al-Kateb v Godwin*.³⁸ If a person has allegiance to a foreign nation, then he or she can also be classed as an alien, as seen in the example of British subjects since 1986 in the cases of *Shaw v Minister for Immigration and Multicultural Affairs*³⁹ and *Nolan v Minister for Immigration and Ethnic Affairs*.⁴⁰

Significant for my argument here is how the Court determines a person’s allegiance. Members of the majority in these alien cases look to legislation, particularly citizenship legislation. There are two ways in which this has

37 See the *Migration Amendment Act 1983* (Cth), which came into effect on 2 April 1984. Prior to that, the immigration power in s 51(xxvii) was the foundation for that legislation. The interaction between the two powers and the doctrine of absorption is beyond the scope of this chapter, but for noting that absorption into the Australian community (which makes someone a non-immigrant) does not necessarily make an alien a non-alien and therefore immune from deportation: Genevieve Ebbeck, ‘A Constitutional Concept of Australian Citizenship’ (2004) 25(2) *Adelaide Law Review* 137, 145–153.

38 *Al-Kateb v Godwin* (2004) 219 CLR 562.

39 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

40 *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

occurred. The first is by considering how alienage was understood at federation and concluding that it was a status which was inherently given meaning at that time through legislation. When the Court refers or defers to the meaning at federation in order to understand the current application of the constitutional term, it has adopted the meaning as affected by legislation of that era. The second approach is the Court ascribing constitutional significance to legislation in the post-federation era, by looking to Australian legislation since the enactment of the Constitution, in order to give the meaning of ‘alien’ current content. In this part, I address those two approaches, as well as noting a more specific use of an individual piece of legislation, to demonstrate the ability of the Parliament to determine, at least to some extent, the constitutional meaning of ‘alien’.

Before proceeding, I note the relationship between constitutional ‘alien’ at the heart of these cases and the concept of ‘the people’. ‘The people’ is a reference to the constitutional community. Aliens are those outside that community. By understanding what makes someone an alien, and therefore an outsider, we can understand who is *not* an alien and therefore an *insider* — one of ‘the people’.

Using pre-federation legislation

The first way in which the Court uses legislative indications of the constitutional meaning of ‘alien’ is when it looks to the meaning of that term at the time of the federation of the Australian colonies. It is well-accepted that historical materials can be used in interpreting the Australian Constitution.⁴¹ Despite the many disagreements and nuances regarding the use of such materials,⁴² some regard for historical meaning is common to most exercises of constitutional interpretation.⁴³

41 See for example the statement regarding use of convention debates in *Cole v Whitfield* (1988) 165 CLR 360. However, note that there are problems with using such materials, as well as other historical materials. See Helen Irving, ‘Constitutional Interpretation, the High Court, and the Discipline of History’ (2013) 41(1) *Federal Law Review*.

42 See for example the debate regarding originalism, both in Australia and in the US: Philip Bobbitt, *Constitutional Interpretation* (Blackwell, 1991); Greg Craven, ‘Original Intent and Australian Constitution: Coming Soon to a Court Near You?’ (1990) 1(2) *Public Law Review* 166; Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25(1) *Federal Law Review* 1; Simon Evans, ‘The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches’ (2006) 29(3) *University of New South Wales Law Journal* 207.

43 I avoid using the term originalism here, as there is a distinction made in the literature between using historical materials for the purpose of establishing an originalist understanding of the Constitution, and using materials from the time of enactment to determine the meaning in a textualist sense. See the recent debate between Antonin Scalia and Richard Posner, in Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) and Richard A Posner, ‘The Incoherence of Antonin Scalia’ (2012) *New Republic*, <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>. My interest in materials from the past is focused on the use of legislation, not the competing arguments regarding the different schools of interpretation.

The argument I make here is that the Court uses pre-federation legislation in order to understand the current meaning of ‘alien’. The legislation in question is related to the law of nationality and citizenship. The history of that law as it now applies in Australia extends back to common law doctrines in Britain. The doctrine relating to subject and alien status in the United Kingdom developed over time into a statutory creature, with legislative incursions into the common law principles in Britain, in the Australian colonies prior to federation and then in Commonwealth law post-federation.⁴⁴

The joint judgment of Gummow, Hayne and Heydon JJ in *Singh v Commonwealth*⁴⁵ provides an example of the use of pre-federation legislation. That judgment focused on the development of nationality laws in the UK prior to federation, in order to conclude that the meaning of ‘alien’ was not fixed by the common law. In that case, Tania Singh, a girl born in Australia of non-citizen parents, was resisting characterisation as an alien. The joint judgment in that case said that history shows that legislative changes had affected the meaning of ‘alien’ as understood at federation. That led to the majority in that case coming to the conclusion that Tanya Singh could be considered an alien, despite her birth in Australia.⁴⁶

The relevance of pre-federation legislation is seen in the majority’s view that the law of British subject status was in flux, with significant legislative incursions into the common law principles. They therefore rejected the idea that birth within the realm necessarily made someone a subject,⁴⁷ who could not be an alien, because legislation had interfered with that principle.

Using post-federation legislation

It is not only pre-federation legislation which has an impact on the Court’s understanding of constitutional alienage. Australian legislation post-federation was a factor in determining the status of British subjects who were not Australian citizens, with the conclusion that they are now aliens. This is seen most clearly in the judgment in *Nolan*,⁴⁸ which concerned Therrence Nolan’s challenge to the federal government’s attempt to deport him. Nolan was a British subject but not an Australian citizen. The government argued he was an alien for the purpose of

44 For an overview, see Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook Co, 2002).

45 (2004) 222 CLR 322.

46 McHugh J, in dissent, concluded that the rule he saw in the British history and later developments was that birth in the realm meant a person could *not* be an alien. The distinction between McHugh J’s reasoning and that of the majority highlights the possibility of different interpretations of the same legal materials. See McHugh J’s summary in *Singh v Commonwealth* (2004) 222 CLR 322, 342-3.

47 See the discussion of this principle in David A Wishart, ‘Allegiance and Citizenship as Concepts in Constitutional Law’ (1986) 15 *Melbourne University Law Review* 662.

48 *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

the Constitution, and was therefore subject to deportation. Nolan resisted that characterisation by claiming that he owed a relevant allegiance and therefore could not be deported.

In determining whether he was a constitutional alien, the majority in *Nolan* focused on the legislative introduction of Australian citizenship from 1948.⁴⁹ From that time, Australians retained their earlier status as British subjects, which had applied as common law since the British imposed their law on this continent. However, a new status under legislation began to exist alongside that — the status of Australian citizenship. Over four decades, legislation reduced the significance of British subject status, until it disappeared as a reference to legal status in the mid-1980s.⁵⁰ The majority in the case of *Nolan*, relying on that legislative change and development, therefore concluded that the concept of ‘alien’ could, from 1986 at the latest, apply to British subjects who were non-citizens.⁵¹

Another specific example of legislation affecting constitutional status

The cases of *Singh* and *Nolan* show that legislative incursions into the law of nationality have affected the constitutional meaning of ‘alien’. The majority of the Court in each case used legislation to interpret the current meaning of ‘alien’. The status of ‘alien’ marks the boundary of the constitutional people, whereby aliens can be deported while ‘the people’ are the members of the constitutional community and are protected from removal.⁵² In using legislative indications to understand constitutional aliens, the Court is also providing guidance as to the meaning of ‘the people’.

The cases above reveal the use of legislation in the sense of indicating a pattern of development in status. There is one further example, which indicates the ability of one legislative enactment to affect constitutional membership, again by reference to the concept of ‘alien’. The example is the case of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*.⁵³ Amos

49 See *Nationality and Citizenship Act 1948* (Cth), which came into effect on 26 January 1949.

50 The only significant reference now is in provisions of Commonwealth electoral legislation allowing some British subjects who are not Australian citizens to retain their federal vote. See *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b)(ii).

51 Note that in an earlier case, the Court had concluded that the United Kingdom is now a ‘foreign power’ for the purpose of s 44(i), even though it could not have been so considered at federation: *Sue v Hill* (1999) 199 CLR 462.

52 See Helen Irving, ‘Still Call Australia Home: The Constitution and the Citizen’s Right of Abode’ (2008) 30 *Sydney Law Review* 133, note here I am equating ‘the people’ as understood in this chapter with constitutional citizenship discussed in that article.

53 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439.

Ame was born in Papua while it was an Australian territory.⁵⁴ In 1975, Papua and New Guinea were unified and became an independent country, Papua New Guinea (PNG). In the process of becoming independent, PNG had to determine its citizenship laws and decided against allowing dual nationality. This became a political difficulty because Ame, and others, were Australian citizens under Australian law, although they did not have an automatic right to enter the Australian mainland. After independence, Ame entered the Australian mainland with a visa and sought to stay. The Australian government sought to deport him as an alien once his visa had expired.

In that case, the Commonwealth successfully argued that Ame was an alien, because the federal executive had passed a regulation stating that all persons who were Australian citizens but who became citizens of the independent state of PNG on Independence Day, ceased to be Australian citizens on that day.⁵⁵ The Court upheld the validity of that regulation and found that, in applying the idea of allegiance, Ame was an alien because he owed no allegiance to Australia; he was no longer a citizen, rather he owed allegiance to a foreign power because Australian legislation said he was a foreign citizen. Once again, the majority of the Court determined that legislation⁵⁶ led to his status as an alien — a constitutional status.

Despite several statements by the Court to the effect that the legislature cannot treat someone who is not truly an alien as an alien, that is, that the legislature cannot determine conclusively who is a constitutional alien, the majority of the Court has adopted what the legislature has said about citizenship as the basis for determining the meaning of constitutional ‘alien’.⁵⁷

I have outlined how the Court is going about its work in this area: it is relying, at least in part, on legislative indications of the meaning of constitutional expressions regarding membership of the constitutional people — either as electors in a system of representative government referred to in ss 7 and 24 — or as those excluded by being constitutional aliens. In the following section, I

54 For the history of Papua, as compared to New Guinea, see Alan Kerr, *A Federation in These Seas: An Account of the Acquisition by Australia of its External territories, With Selected Documents* (Attorney General's Department, 2009).

55 See *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth) reg 4.

56 The focus of the reasoning was the validity of the Australian law at issue, but factually and politically it interacted with PNG legislation and policy. See the *Constitution of the Independent State of Papua New Guinea 1975* s 64 regarding dual citizenship.

57 On this occasion, the Court emphasised the relevance of s 122 of the Constitution, the ‘territories’ power, which is understood as a broad power of the federal Parliament. Just as the Parliament can accept new territories under that power, so it can also divest itself of former ones. The consequence of doing so is that the Parliament can therefore affect the status of the people of those territories. The Court sought to limit its conclusions in this case to only some territories. See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 457 [28], [30] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan, Heydon JJ).

address the implications of this form of reasoning by considering the objections to this method. I then turn to a more positive reading of the way in which the Court is interpreting membership of the constitutional community.

The implications: Objections and a positive reading

The reasoning discussed above indicates the process by which the High Court is using legislative indications of membership or exclusion in determining the constitutional meaning of 'the people'. The objections to this form of reasoning are obvious. First, by using legislative indications of constitutional membership, it appears that the Court is allowing the Parliament to define a constitutional term for itself, which appears to breach the separation of the roles of the legislature and the judiciary. The Parliament makes the laws; the judiciary should determine the validity of those laws.⁵⁸

One response to this objection is that it is not any one legislative enactment which determines constitutional meaning. Parliament cannot identify the constitutional content of a term within one piece of legislation and then enact law upon that basis. Instead, it is a series of enactments which, over time, are interpreted by the Court as indicating a development in constitutional meaning, according to an identifiable pattern.⁵⁹

However, this leads to questioning of how the development is identified by the Court, to what extent exceptions and anomalous aspects of the legislation affect the identification of a pattern, and at what point something becomes a well-established pattern or principle through legislation. The legislative development of the franchise at the federal level, as well as at the State and earlier colonial levels, is complex and filled with discrepancies, temporary inclusions and exclusions.⁶⁰ The development of nationality and citizenship laws is likewise

58 This was outlined most clearly in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

59 The *Ame* case does not necessarily constitute an exception to this. That case can be understood as the High Court applying the meaning of alien which is equivalent to non-citizen, derived from the earlier cases which focused on the legislative incursions on the common law status of subject. In this instance, the Court is upholding the executive's power to withdraw the status of citizen, and therefore the consequent constitutional implication that the person becomes an alien and therefore subject to deportation. That power of removal of legislated status which affects constitutional status requires closer interrogation, but that was not done in the *Ame* case, nor is it addressed in this chapter.

60 See for example Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125 and for an indication of the complexity, see Murray Goot, 'The Aboriginal Franchise and its Consequences' (2006) 52(4) *Australian Journal of Politics and History* 517.

not a simple coherent trajectory regarding membership.⁶¹ How the legislative developments in either area are understood and characterised in terms of an identifiable pattern is open to debate.

Further, the focus on a pattern of legislative development as indicating constitutional meaning may have the problem of ‘ratcheting’.⁶² This allows a cumulative erosion of the sovereignty of Parliament, which operates as follows: the Court has constitutionalised the universal adult franchise and stated that reintroduction of disqualifications on the basis of religion, race, gender and property, amongst others, would likely be invalid because of their inconsistency with the mandate of ‘choice by the people’.⁶³ What that does is limit the ability of the Parliament to determine the franchise from time to time, by not allowing a return to a more restrictive franchise. This means the franchise must forever expand, it cannot contract — this is the ‘ratcheting’ problem. By establishing this rule of a universal adult franchise on the basis of a consideration of a legislative pattern discerned by the Court, Parliaments in the past have, therefore, through a cumulative effect of a number of pieces of legislation, bound Parliaments into the future — this is the parliamentary sovereignty problem.

However, there is an interpretation of this method of reasoning which is more positive and indicates that the Court is allowing ‘the people’ to determine their own constitutional identity. First, a reminder that the primary textual indications of ‘the people’ in the Constitution connect to the system of representative government — ss 7 and 24. ‘The people’ choose the Parliament, the Parliament therefore represents ‘the people’ and its legislation is deemed to be the will of ‘the people’ through that representative system. Choice by the people has been referred to as the constitutional ‘bedrock’ of representative government.

Considered in this way, the legislation of Federal Parliament is the voice of the people. Thus, the Court, by adopting, deferring to, or reflecting legislative choices regarding membership of the constitutional people, is picking up on the people’s own view of themselves. The Court is adopting the people’s view of who they want to be included in the constitutional community and who they want excluded. The method of reasoning of the Court therefore has a measure of democratic legitimacy, by reflecting the constitutive power of the people to establish their own identity, through their representative institution, the Federal Parliament.

61 See further discussion of this in Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook Co, 2002).

62 ‘Ratcheting’ applies to the reasoning in the representative government cases. Different problems arise from the reasoning in the ‘aliens’ cases, which are beyond the scope of this chapter.

63 See in *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

The Court is seeking the meaning of constitutional terms, and acknowledges that the meaning of those terms may change, and that their application may change over time, due to national and international social, political and legal developments. What could the Court look to in order to determine the changed meaning over time? A majority is using legislation. While not completely satisfactory, at least legislation is identifiable, and can be seen as a reflection of the Australian polity's view of themselves.

Conclusions

This chapter has discussed the High Court's method of reasoning in addressing the meaning of the constitutional 'people'. I have identified that a majority of the Court, in two areas of constitutional jurisprudence, is using legislative indications of membership in order to define 'the people' who exercise the federal vote, and constitutional 'aliens' who are excluded from membership of 'the people'. This method of reasoning is surprising in that it seems to give the legislature the power, through cumulative indications, of defining the meaning of constitutional expressions. However, this method can also be understood as the Court giving 'the people' some indirect power of self-definition.

Whether we prefer deferral to Parliamentary choices over time or the judicial application of standards seen in some other external source, depends not on an absolute rule regarding constitutional interpretation but rather on classic differences of viewpoint regarding the role of judicial review. In the context of determining the meaning of the constitutional people, it comes down to figuring out to what extent we, the people, want to be playing a part in that determination.

The outstanding questions are then: what are the limits beyond which the Court will not allow the Parliament to go, and what alternatives exist for the Court in making these kinds of judgments regarding membership of the constitutional community? These are questions that go beyond the scope of this chapter, but that indicate that deferral to 'the people', while democratically legitimate, does not resolve the difficult questions regarding the division of power between the Legislature and the Court. The ongoing dialogue between those institutions will determine the meaning of 'the people' from time to time.

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