The High Court And The Shaping Of Australian Citizenship

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Introduction

In 1994, Michael Detmold, Professor of Law at Adelaide University wrote an opinion piece in The Weekend Australian newspaper called *The New Citizen*. In it he argued that the range of new rights cases[1] determined by the Australian High Court heralded a new approach to Constitutional law. He stated:

> An important part of our growing up as a community has been the High Court's transformation of constitutional law in the past decade. If anything characterises that transformation, it is the importance attributed to citizenship. The old constitutional law was mainly a constitutional law of sovereignties….the new one is one of citizenship".[2]

But what sort of citizenship was Professor Detmold referring to?

This presentation draws upon my research[3] into the High Court's use of the word citizenship since its inception. It is a window for reflecting on the legal notion of citizenship in Australia and is a result of some traditional black letter law research looking at High Court decisions where the word citizen appears. What is striking is the number of cases where the word citizen is used when, in fact, the Court isn't referring to the legal status of citizenship at all. Instead, the court is using the word citizen as person. While "it is hardly surprising that citizenship has many dimensions and bears many meanings"[4] stated by Peter Schuck this morning, my presentation argues that the High Court's varied use of the term reflects greatly on the different meanings of citizenship in Australia.

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*I would like to thank several current and former research assistants who have assisted me in identifying the High Court decisions that refer to citizen. They include Jennifer Patterson, Kylie Evans and Evelyn Ng.

[1] The cases referred to in the article included the Australian Capital Television v The Commonwealth (1992) 177 CLR 106, Mabo v Queensland (No 2) (1992) 174 CLR 1, Leeth v The Commonwealth of Australia (1992) 174 CLR 455 and Theophaneous v Herald Sun and Weekly Times Ltd (1994) 182 CLR 104

[2] "The New Citizen" The Weekend Australian, October 15-16 1994, p 25.

[3] I am grateful for the 1999 ARC small grant which has funded this research.

[4] Peter Schuck, "Citizenship in a Federal System" Conference paper, 22

No doubt, the mixed use of the term citizen can partly be explained by different meanings of citizenship in different contexts[5]. This presentation today, supported by my latest research, looks at the extent to which the legal notion of citizen sits so uncomfortably with the broader notion of citizenship as membership of the community.[6] Or, to use Peter Schuck's crisp divide, there is a tension between the formal notion of citizen and the substantive meaning of citizenship. The High Court, a body vested with the responsibility for giving words their exact amount, has overspent its brief. Rather, like policy makers, journalists, government spokespeople, politicians and ordinary people, it has used the word citizenship interchangeably with personhood, and, ultimately reaffirmed the mixed and often confused meaning of citizenship in Australia[7].

Theories of citizenship

While my research relies on traditional black letter law research involving case law, it is not devoid of broader theoretical frameworks or structures. In fact, the aim has been to see what theories or philosophies of citizenship underpin the Court's shaping of the notion. To continue the theme, let me set out some of the different theories or notions of citizenship that make up the greatly developing and growing literature on the subject.

Ronald Beiner, a Canadian Professor of Political Science writes:

> [I]n theorizing citizenship, one must take up questions of membership, national identity, civic allegiance and all the commonalities of sentiment and obligation that give effect to the legal and ethical bonds constitutive of a given community"[8].

Beiner is essentially looking at the different approaches to citizenship through political philosophy. He describes five different frameworks – the liberal conception of citizenship where citizenship is allegiance to the State which has the responsibility of enforcing the rule of law and protecting human rights. This figures largely in some of the High Court judgments. There is alternatively the pluralist conception of citizenship which sees the State as providing an open framework for the "flowering" of group identity or group purposes. We see less of this from the High Court. There is also a welfarist conception of citizenship – where citizenship represents allegiance to a State as a provider of benefits and social services – associated with the sociologist TH Marshall's social rights of citizenship.[9] There are hints of this concept of citizenship from the High Court. A

[5] I have written about this in Kim Rubenstein, "Citizenship in Australia: Unscrambling its meaning" (1995) 20 MULR 503.
[6] Which I argued in the article above n 5
[7] More recently, the two Councils operating under the Department of Immigration; the National Multicultural Advisory Council and the Australian Citizenship Council have acknowledged the difference between the different meanings of citizenship. See The Australian Citizenship Council, "Contemporary Australian Citizenship" (1999) at paragraphs 9 - 19 and The National Multicultural Advisory Council, "Australian Multiculturalism for a new century" Towards inclusiveness (1999) 40.
[8] Ronald Beiner, "Citizenship and Nationalism: Is Canada a "Real Country"? in K Slawner and M E Denhim, eds., *Citizenship After Liberalism* (New York, Peter Lang Publishing, Inc., 1998) p 185
[9] TH Marshall, Citizenship and Social Class (195) and Sociology at the Crossroads and Other Essays

nationalist conception of citizenship sees citizenship as the vehicle for the furtherance of national identity. Finally, there is an Arendtian conception of citizenship where citizenship is the giving effect to our noblest human capacities. These latter two concepts also figure in some of the statements from the Court. All of them see citizenship as linked to the State.[10] In some ways I have argued elsewhere that these views to an extent are becoming outdated.[11]

The legal notion of citizenship is often distinguished from these broader frameworks of citizenship. In fact, as Peter Schuck categorised his views of citizenship this morning the legal is distinguished from the political, psychological and sociological[12]. With a visitors knack of going to the hear of things, he captures the dichotomy gripping the High Court whenever it turns to the issue of citizenship.

This piece will show that the Court speaks of citizenship as two distinct concepts – the legal notion of citizenship, that is the status of Australian citizen - and, what I will call collectively, the broader notions of citizenship within which Beiner's different political philosophies operate. But as Karen Slawner, another Canadian academic and editor of the book in which Beiner's piece appears reminds us, much of the literature talks of "good citizenship" and legal citizenship as separate concepts. She states:

> Although it is evidently possible to discuss such legal matters as whether states operate according to jus soli or jus sanguinis, or to trace the history of the expansion of the franchise, or analyse changes in immigration law, *none of these can be viewed in isolation from normative considerations. Legal definitions of citizenship always incorporate what is considered to be desirable activity. (*My italics)[13]

In using the word citizenship in various ways, the Court has, in an unacknowledged manner, both developed our understanding of the questions of "membership, national identity, civic allegiance and the commonalities of sentiment and obligation that give effect to the legal and ethical bonds"[14] of the Australian community and also confused or conflated two distinct categories.

(1963)

[10] See also Eva Cox, Who Am I again? The Australian's Review of Books, June 1999,p 17 where the different conceptions of citizenship were discussed in a slightly different way. She looked at six different books which spoke to differing conceptions of citizenship. The books include Lindsay Tanner's *Open Australia*, two books called *The Good Citizen* and another called *The Right's Revolution*

[11] See Kim Rubenstein, "Citizenship in a Borderless World" in A Anghie and G Sturgess, Legal Visions of the 21 century: essays in honour of Justice Christopher Weeramantry (1998, Kleuwer Press). Peter Schuck and I have differing views on this issue. See Schuck, above n 4 at 3.

[12] Peter Schuck, above n 4 at 22

[13] Karen Slawner, "Uncivil society: Liberalism and Hermeneutics, and 'Good Citizenship' in K Slawner and M E Denhim, eds., *Citizenship After Liberalism* (New York, Peter Lang Publishing, Inc., 1998) 81 at 82-3.

[14] Beiner, above n 8

In looking to the High Court to understand Australian citizenship, we must remember that the Court is called upon to adjudicate legal claims and its focus has essentially been upon the legal framework of citizenship. In this sense, it means the Court's views of citizenship often do not take into account the "private" notions of citizenship, the idea of the citizen beyond the public sphere.[15]

The rest of this paper is divided into the three main contexts in which citizenship is discussed and adjudicated upon by the High Court; the Constitution, legislation and the common law. Of course, it is worth reminding those less familiar with the Court's place in the greater framework, that it does not set up its own agenda in these matters, it relies solely on the cases brought before it. To that extent, the Court hasn't shaped citizenship, but the litigants before it have.

The Constitution

An important constraint upon the High Court in its shaping of Australian citizenship is that citizenship is not a constitutional term at all. The word citizen was deliberately not used in the drafting of the Australian constitution. There are many reasons for this, which I have canvassed elsewhere.[16] The omission, though, has had a profound influence upon the meaning of Australian citizenship.

There is no foundational constitutional basis for securing the liberal view of citizenship which sets the state up as protector of human rights. Nor is there any comprehensive statement about the relationship between the state and its citizens in a Bill of Rights. Nor is there any aspirational constitutional statement about citizenship as membership of the community. Our Constitution does not guide us in understanding which notions of citizenship apply and when. It does not allude to the legal, political, psychological or sociological meaning of the term. Citizenship is purely a statutory term, open to change and differential consequences. We must look to a range of disparate pieces of legislation in order to understand the meaning of Australian citizenship. This means that it is open for Parliament to determine and change these different philosophical issues, which many would argue is consistent with democratic principles.

The Constitution does, however, include terms casting shadowed light on the meaning and shape of Australian citizenship. The phrases that are relevant include "people of the Commonwealth"[17], "subjects of the Queen"[18] and 'aliens'[19]. The very term 'alien'

[15] Feminist discussions of citizenship highlight the gendered nature of the term. Given its traditional links to the State and the *public* duties of citizens, citizenship has often excluded women citizens For an overview of the many issues associated with feminism and citizenship see, Helen Irving, "Citizenship" in Barbara Caine (ed) Australian Feminism: a companion (1998,Oxford) 25

[16] Kim Rubenstein, "Citizenship in the Constitutional Convention Debates: A Mere Legal Inference?" (1997) *Federal Law Review* 295-316. See also H Irving, To Constitute A Nation (CUP, 1997) 156 and John Chersterman and Brian Galligan, Defining Australian Citizenship: Selected Documents (1999, MUP) Introduction

[17] Section 24

[18] Sections 34 and 117

speaks of ‘otherness’ and, in the context of membership, exudes exclusion. It is one context in which the High Court has spoken about citizenship as membership.

Justice Gaudron has spoken about the significance of the term alien and the legal status of Australians in various judgments. In her dissenting judgment *in Nolan v Minister for Immigration and Ethnic Affairs*[20] she spoke to issues of membership of the community in saying:

> failure on the part of the non-alien to acquire citizenship does not involve any fundamental alteration of his/her relationship with that community. But it may be otherwise if citizenship were offered and refused in circumstances such that refusal could properly be seen as a revival of an earlier allegiance to some other nation or as an abandonment of allegiance to Australia[21]

The facts of *Nolan’s* case account for the use of non-alien rather than non-citizen, because, as a British subject, Nolan was seeking to argue that he could not be deported due to this status. In this statement, Gaudron J is reminding us that membership of the community is not only determined by one’s legal status and a sense of membership can come by other means. It is only when a person’s political allegiance is in doubt that she highlights a distinction. This appears to speak to both a liberal and nationalist view of citizenship in its reference to allegiance to the state.

In her judgment in *Chu Kheng Lim v Minister for Immigration*[22], the detail of which I will return to examine, she highlighted that the reference to alien in the Constitution can be linked to citizenship:

> It is no doubt correct to say that “alien has become synonymous with “non-citizen”….But that conceals a number of questions: when did it become synonymous? With what effect in relation to persons, if any, who were not aliens but did not become citizens? And must it remain so?

Justice Gaudron is highlighting here the changed status of Australians from subject to citizen, the former including British subjects who weren’t naturalised Australians. These questions are at the heart of the event that this conference is commemorating; did becoming Australian citizens in 1949 mean that those who were not Australian citizens were aliens? Who do we regard as members of the Australian community?

She continued in an obiter statement:

> It may be that the occasion to answer the questions that I have formulated will never arise. However, membership of the community constituting the Australian

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[19] Section 51(xix)
[20] (1988) 165 CLR 178
[21] Ibid at 193
[22] (1992) 176 CLR 1

> body politic, for which the criterion is now, but was not always citizenship, is a matter of such fundamental importance that, in my view, it is necessary that the questions be acknowledged even if they are not answered.[23]

In this she is reminding us of the differences between membership of the community and the formal status of legal citizenship. And her desire to highlight this is one of the clearest statements about the inconsistencies between formal citizenship and substantive citizenship. Most of these differences will be further highlighted in the section of this paper on the legislative consequences of citizenship. It is my argument that understanding these differences is central to our understanding of citizenship in Australia and who we are prepared to include in our nation.

Justice Gaudron came back to this question about the development of the meaning of citizenship in the very recent decision of the Court in *Sue v Hill*[24]; the case disqualifying Senator-elect Heather Hill from her Parliamentary position. This case involved Section 44 of the Constitution which has also provided another context to consider citizenship because the only reference to citizen in the Constitution is "citizen of a foreign power". This section disqualifies people who are citizens of a foreign power from membership of the Parliament. The High Court found that Hill was ineligible for election due to her being a British citizen at the time of her election, and that Britain was a foreign power for the purpose of section 44[25]. This has raised much discussion about the Republican implications of the decision, in that it confirms that Australia is an independent, sovereign nation. The changed status of Australian citizens plays a part in that development.

Justice Gaudron, in looking at whether Britain was a foreign power identified three developments in the transformation of the relationship between the United Kingdom and Australia. One was the change in the meaning and attribution of the status British subject[26]. As she highlighted, British subjects became citizens of the independent nation states into which the British Empire was transformed. This occurred in Australia 50 years ago. Furthermore, she referred to the removal of the British subject status by amendment to the legislation in 1984, taking effect in 1987. From that time on, we were solely Australian citizens. She stated "that process, both in this country and the UK, renders the constitutional references to "a subject of the Queen" of little or no significance in determining whether the UK is now a foreign power"[27] This High Court decision reminds us that the introduction of the legal status of citizenship has been seen by the Court as a fundamental step in our independence as a nation, bestowing upon citizenship an important republican dimension and again highlighting the "nationalist" view of citizenship in Australia.

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[23] At 53.
[24] [1999]HCA 30, 23 June 1999, unreported.
[25] Ibid
[26] The other two developments were the Statute of Westminster 1931 (Imp) and the Statute of Westminster Adoption Act 1942 (Cth) and the Australia Act 1986 (Cth) and (UK).
[27] Sue v Hill [1999] HCA 30 23 June 1999, unreported p 67-68.

The decision also reminds us that the Constitution does speak to membership of the Australian community in terms of democratic participation. Holding dual citizenship lessens one's full membership capacity as it denies a person the ability to exercise their full democratic potential. This says more about the views of the framers of the Constitution than it does of the High Court. The High Court in applying this section has been guided by international law when determining whether someone is a dual citizen. Following the principles set out in the earlier decision of *Sykes v Cleary (No 2)*[28], the question whether a person is a citizen of a foreign country is, as a general rule, answered by the law of that country. This was further supported in the case of Heather Hill by Gaudron J also pointing out that dual citizenship was recognised by the common law and by necessary implication in the Australian Citizenship Act 1948 (Cth) for naturalised Australians. The anomaly in our own legislation, (which is the subject of one of the smaller group discussions this afternoon) is that once you are an Australian citizen, you cannot take up a further citizenship without losing your Australian citizenship.[29] This case, therefore, also adds to an acceptance by the High Court of the distinction between domestic and international frameworks for shaping Australian citizenship.

These two examples of the use of the word "alien" and the reference to foreign citizenship have been two contexts in which the Court has been called upon to shape the meaning of citizenship. But as Justice Gaudron says in *Lim*:

> 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.[30]

It is this absence that has placed constraints upon the role of the High Court in shaping its meaning leaving us lacking a clear constitutional sense of who we regard as members of the Australian community.

Subject versus citizen

The status, however, the constitutional framers referred to for some notion of membership of the community appears with the term "subject of the Queen". Section 117 states that:

> 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.

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[28] (1992) 176 CLR 77

[29] Section 17(1) of the Australian Citizenship Act 1948 (Cth) provides for the loss of citizenship if an Australian citizenship acquires a foreign citizenship.

[30] At 54.

As Peter Schuck noted this morning, this section speaks to aspects of membership in a Federal system, and to the importance of non-discrimination, which is a hallmark of liberal notions of citizenship. The High Court has made various pronouncements about this section.

Barwick CJ commented specifically about the omission of the word citizenship in the case of *Henry Boehm*[31]:

> The Constitution does not speak of citizens. In the preamble in covering cl 5 and in s 24 it speaks of 'the people of the States'. Section 117 speaks of 'subject of the Queen resident in any State" and s 75(iv) speaks of residents of different States. [32]

Given the status of Australia at Federation, Barwick regarded this as understandable. But he did speak further about the meaning of membership.

> The concept of a resident of a state involves in my opinion some degree of permanence of residence and of identity by reason thereof with a State. Ordinarily, the place where a person has his home, without having acquired a domicile in that place by origin or by choice, will be the place where for the purposes of s 117 that person will be resident . There may be lesser degrees of permanence of residence or of identity through residence which will satisfy the concept of residence in s 117.[33]

This is a broader view of membership of the community for it envisages membership for those who are not full legal members – whatever that full legal membership is. Ironically, this broad view of membership was in contrast to the nature of the decision. It was not until *Street v Q'ld Bar Association*[34] that we saw a broadening of the interpretation of section 117.[35]

In this case we detect differing views of the meaning of "subject of the Queen, resident in any State". Chief Justice Mason saw the section as one designed to enhance "national unity and a real sense of national identity"[36], which fits with the nationalist view of citizenship described by Beiner and which many would argue is an essential object of a national citizenship. But Mason did not directly discuss the meaning of citizenship in the section. His colleague Justice Brennan saw it as unnecessary to determine whether the term was synonymous with Australian citizen, and referred to the Convention Debates

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[31] (1973) 128 CLR 482. I will come back to this comment when I look at Justice Gaudron's decision in Teoh v Minister for Immigration see below n 185
[32] Ibid at 487
[33] Ibid
[34] (1989) 168 CLR 461
[35] For discussions about s 117 see generally Genevieve Ebbeck, " The Future for Section 117 as a Constitutional Guarantee (1993) 4 PLR 89 and "Section 117: The Obscure Provision" (1991) 13 Adel.L.R.23
[36] (1989) 168 CLR 461, 485

where the term was consciously left open. It was Justice Deane who made the explicit use of the term "citizen", saying that section 117 was there to "protect the citizen resident in one State from being subjected in another State to "disability or discrimination". More fundamentally the section was directed to the "promotion of national economic and social cohesion and the establishment of a national citizenship"[37]. Thus, he is clearly attempting to place into the Constitution a means for the Court to better influence the shaping of Australian citizenship. His view of citizenship here looks to notions of economic and social cohesion and draws upon social and perhaps welfarist notions of citizenship together with the nationalist view. But it also draws upon liberal notions of citizenship when discussing equality of treatment. The equation of citizenship and equality is also a theme of Justice Dawson when he states that the purpose of s 117 is to ensure that persons from one State are treated in another as citizens of the one nation, not as foreigners[38]. Justice Deane's decision takes us back to the words of Professor Detmold for it imbues into the Constitution a broader democratic flavour devoid of subjects and preferring citizens.

What was not resolved in this case is important for the question of the inclusive nature of citizenship. As Justice Toohey states, "Whether a person living in Australia, but not a natural born or naturalised Australian citizen, is entitled to protection accorded by s 117 is a matter to be considered when the case arises"[39]. That will truly test the boundaries of membership of the Australian community. As we saw above, Justice Barwick in *Boehm*[40] thought it possible to bring residents within the protection of s 117.

The issue may be answered if the recently introduced *Constitution Alteration (Establishment of Republic) Bill* of 1999 is passed in its present form by popular Referendum later this year. It provides the substitution of "A subject of the Queen" in s 117 with "An Australian Citizen".[41] That means that only Australian citizens will be protected by s117 and the states could enact discriminatory laws for non-citizens without constitutional concern. This is a major decision which has not received substantial scrutiny by the public.

This Bill also makes provision in a new s 127 for the definition of Australian citizen to mean "a person who is an Australian citizen according to the laws made by the Parliament".[42] This too is significant. Given the Constitution hasn't spoken about citizenship, the insertion is a major change and one which beckons ambiguities. One concern is the contrast of citizenship with the word "aliens" in section 51(xix). In *Nolan v Minister of State for Immigration and Ethnic Affairs*[43] the majority considered the definition of "alien" in the Australian Citizenship Act at that time (which excluded most

[37] Ibid, 522
[38] Ibid 541
[39] Ibid 554
[40] Above n 31
[41] Schedule 2 - Consequential amendments of the Constitution, 38,39.
[42] Schedule 2 - Consequential amendments of the Constitution, 41.
[43] (1988) 165 CLR 178

British subjects including Nolan) did not confine the meaning of the word in s 51(xix) of the Constitution. How will this contrast with the use of the word citizen? If "alien" is a Constitutional word, but "citizen" by virtue of its definition in the new s 127 is a legislative term, surely inconsistencies will result.

Moreover, s 127 provides for Parliament to define citizenship without a specific head of power under s 51 over citizenship. The ability of the Commonwealth to make laws about citizenship has never been challenged before the Court. Justice Gaudron in *Nolan's* case has confirmed the power of the Commonwealth to enact laws prescribing the acquisition of citizenship prescribed by the Act.[44] This is because section 51 does include power over "naturalisation". But what of broader issues associated with citizenship than naturalisation. The rights and responsibilities flowing from citizenship start from birth for some people. While it is likely that this may be brought within the implied nationhood power and properly within the scope of Commonwealth legislative power, it would also be more consistent to insert a clear head of power over citizenship under s 51, independent of naturalisation and aliens if the broader notion of citizenship is envisaged.

Most importantly, these changes are being made without fundamental public scrutiny or involvement in the change, largely because the attention has been on the Republican focus of the Bill[45]. There has been no public discussion about the changes in the Constitution relating to citizenship : whether there should be more constitutional protection over this term? Whether there should be rights associated with citizenship in our Constitution? Surely these questions need further public thought and discussion. It was not part of the government's Australian Citizenship Council's[46] deliberations to consider the placement of citizenship into our Constitution. If these changes are successful, no doubt the High Court will face constitutional ambiguity in future cases involving citizenship.

Constitutional rights of citizens/ non-citizens

The question of rights in our Constitution and the distinction between citizen and non-citizen has been considered by the High Court even though there has been no mention of citizenship in the Constitution. The judgment in *Lim's* case has been significant in highlighting the profound impact of the legal term of citizen upon rights of people within the Australian community. The case involved the detention of Cambodian asylum seekers, the subject of special legislation which created the category of "designated persons"[47]. In deciding that it was constitutional to administratively detain these people, and take away their fundamental right of freedom, the High Court made a distinction between citizens and non-citizens. That is, this legislation would not have been constitutional if the Act had

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[44] Nolan v The Minister for Immigration and Ethnic Affairs (1988) 165 CLR 178, 190
[45] The author did raise some of these concerns in her Oral submission to the Parliamentary Committee reviewing the Bills on Tuesday 6 July, 1999, Melbourne. (To be reported in Hansard)
[46] The Commonwealth Government established the Australian Citizenship Council on 7 August 1998 to report on a broad range of matters connected with Australian citizenship.
[47] Section 54K Migration Act 1958 (Cth)

provided for citizens to be detained in the same manner. In the Court's view, the philosophy underpinning this distinction also reinforces one of the consequences of citizenship due to our Constitution's separation of powers. The joint decision of Brennan, Deane and Dawson JJ explained:

> It would … be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is, putting to one side the exceptional cases ..below [which included custody following a warrant for criminal trial, mental illness or infectious diseases, Parliamentary contempt] 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. Every citizen is ruled by the law, and by the law alone..”[48]

Therefore, citizens are protected by the principle of separation of powers and the rule of law when it comes to administrative detention, yet non-citizens are not. It was explained by the Court as an incident of sovereignty over territory “to exclude or expel even a friendly alien”.[49] The Court reaffirmed its earlier decisions upholding Parliament's ability to restrain an alien in custody to the extent necessary to effect deportation, as an incident of executive power.

Challenges to this principle of sovereignty allowing for a distinction on the basis of citizenship for the diminution of basic rights of freedom, have increased in recent times. [50] Just how well does it fit with liberal notions of equality of persons before the law?[51] And with changing notions of sovereignty, will it continue to be an acceptable definition?

Another case where the Court has shaped the meaning of citizenship *is Cunliffe v The Commonwealth*[52]. Also a migration law case, the issue of free speech was raised in the challenge to the Migration Act 1958 which restricted migration lawyers providing advice to clients. In the discussion about implied rights of free speech, some of the judges addressed the question of whether an implied freedom, such as the one claimed, could be claimed by non-citizens. Chief Justice Mason was the only judge to embrace the idea that non-citizens in Australia were entitled to the protection afforded by the Constitution and the laws of Australia.[53] Relying on *Re Bolton; ex parte Deane*[54], he said that non-citizens

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[48]Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1,27

[49] Ibid , 29

[50] James Nafziger, "The general admission of aliens under international law" (1983) 77 American Journal of International Law p 804-47

[51] See also Joseph Carens, “Aliens and Citizens: The Case for Open Borders” in Beiner (ed) Theorising Citizenship (1995, SUNY Press) 229 and considerable literature by him on this topic.

[52] (1994) 182 CLR 272. I also discussed this distinction in Kim Rubenstein, “Citizenship in Australia: Unscrambling its meaning” (1995) 20 MULR 503 at 515-516.

[53] Cunliffe v Commonwealth (1984) 182 CLR 272, 299.

within Australia were entitled to invoke the implied freedom of communication, 'particularly when they are exercising that freedom for the purpose, or in the course, of establishing their status as entrants and refugees or asserting a claim against government or seeking the protection of the government'.[55] Justices Brennan and Deane, on the other hand, sought to distinguish a non-citizen's right to the protection of the law from the right to invoke the Constitutional protection of free speech. Justice Brennan grounded this distinction in representative democracy. Aliens 'have no constitutional right to participate or to be consulted on matters of government in the country' and the 'Constitution contains no implications that the freedom is available to aliens who are applying for or who have applied for visas…Nor is there any basis for implying that aliens have a constitutional right'.[56] While Justice Deane accepted part of Mason CJ's argument, and included aliens in the protection of some Constitutional protections, such as section 80 (trial by jury), 92 (freedom of trade) and 116 (religious freedom), he distinguished non-citizens rights implied from representative democracy. He said : "Any benefit to an alien must be indirect in the sense that it flows from the freedom or immunity of those who are citizens.'[57] This distinction is crucial in highlighting the notion of membership of the community being viewed fundamentally as political membership with the rights of citizenship flowing directly from this political perspective. Both *Lim* and *Cunliffe* confirm that the liberal notion of citizenship where the state is a protector and guardian of rights is an exclusive one.

According to the High Court, then, the constitutional protection of representative democracy applies to citizens. In the landmark free-speech case, *Australian Capital Television v The Commonwealth*,[58] Mason CJ talked of citizens when discussing freedom of communication as an indispensable element in representative government. He said:

> only by exercising that freedom can the *citizen* communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only be exercising that freedom can the *citizen* criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. (My italics)[59]

Indeed in that case the plaintiffs argued for the implied freedom by virtue of the "common citizenship of the Australian people".[60] But as we saw in *Cunliffe*, Mason was the only person to interpret citizen in the broader sense of resident, and it appears that this right does not reside with non-citizens. In this sense we see a clear demarcation: non-citizens, by virtue of not having political, voting rights are by law not part of our political community.

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[54] (1987) 162 CLR 514, 521-2
[55] Cunliffe (1994) 182 CLR 272, 299
[56] Ibid. 328
[57] Ibid 336.
[58] (1992) 177 CLR 106
[59] Ibid ,138
[60] Ibid , 109. Justice Dawson also referred to Australian citizens at 182.

It is exactly here that liberal notions of equality sit uneasily with citizenship. As Karen Slawner argues:

> When we talk about citizenship, we are already talking about good citizenship, because those excluded from the category are considered inferior or inadmissable in some way.[61]

In both cases discussed, the High Court has identified the issue of inadmissability as a necessary component of their inability to rely upon constitutional protection. The right of the State to determine who is in fact *physically* part of the community leads to a fundamental distinction for the purpose of constitutional protection. Using Slawner's terminology, the concept of nationality or statehood itself constructs a space of legitimate belonging and an excluded outside.[62]

Other constitutional contexts:

Section 75

There are other constitutional contexts in which notions of membership of the community have been discussed by the Court. That is, the court has indicated to us, that membership of the community is not necessarily limited only to formal citizens. One example is through the discussion of s 75 of the Constitution which sets out the Court's original jurisdiction. In particular, s 75(iv) refers to all matters "between States, or between residents of different States". In the 1922 case of *The Australian Temperance and General Mutual Life Assurance Society Ltd v Federal Commissioner of Taxation*,[63] the court discussed whether s 75 of the Constitution could apply to corporations. The case raises some interesting discussion about the nature of residence, which refers to a broader notion of membership or connection to a particular community, which in turn has consequences for the meaning of citizenship.

While the majority held that corporations could not be residents for the purpose of the section, Isaacs J in dissent stated that he was in agreement with the constitutional commentators Quick and Garran in saying that "Residence of a State for the purpose of this section,…should be interpreted as involving a suggestion of State membership, and of a character to identify the litigant to some extent with the corporate entity of the State".[64] Interestingly, he added that the identification by reason of residence of the litigant with one State connotes his exclusion from similar identification by reason of residence with any other State. "If I were to express it in one word it is "status". [65] This gives residence a strong link to citizenship as a legal status, having legal consequences. Justice Higgins in the majority, also linked residence to citizenship more explicity when he noted the word

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[61] Slawner, above n 13

[62] Slawner, above n 13 at 84.

[63] Australian Temperance and General Mutual Life Assurance Society Ltd v Federal Commissioner of Taxation (1933) 48 CLR 452

[64] Ibid at 307

[65] Ibid at 308

residence was used in the Constitution as a substitute for citizen due to the republican implication.

But in contrast to the notion of status as found by Isaacs J, Higgins stated the opposite, that residence is a mere question of fact, whereas 'citizenship has legal implications'. [66] This distinction in law, has not necessarily continued to be true in practice as residence has also had legal implications, in the social security arena, and taxation for example In other words, legislation has evolved which provides for residential benefits. But given citizenship in Australia is purely a statutory concept, its legal implications are largely drawn from legislation, as the legal status of resident also relies. This will not change substantially if the proposed changes to s 117 through *the Constitution Alteration (Establishment of Republic) 1999* Bill is passed, because it reinforces that the definition of Australian citizenship is to be left in the hands of Parliament. And there has been no suggestion of changing the reference to residents in s 75.

Federalism

Federalism is another constitutional context where the Court has used the concept of citizenship. There are often conflicts arising between Commonwealth and State jurisdictions that are discussed in terms of citizenship and Peter Schuck's paper canvassed Federalism this morning.[67]

In the 1949 seditious statements case *The King v Sharkey* [68], Justice Dixon stated : "even if the State is unable to cope with domestic violence, the Federal Government has no right to intervene for the protection of the State or its citizens, unless called up by the State Executive….but if domestic violence within a State interferes with the rights and privileges of federal citizenship, then the Federal Government may interfere to restore order, without a summons from the State"[69] In this case we get a clear sense of the two forms of citizenship that exist in Australia, the Federal and State. This again speaks to the political notion of citizenship; that legally and politically we identify with two different governments. Citizenship speaks to the relationship between an individual and his/her government, and to that extent, citizenship in Australia is naturally complicated by a federal system.

This leads to inconsistencies of citizenship in Australia. For instance, in *Attorney General for the State of Victoria v The Commonwealth of Australia*, [70] the lack of an equality or consistency of citizenship was highlighted in the context of the Federal nature of our system . The cases involved a challenge to the Commonwealth Marriage Act. In the course of affirming the Commonwealth's power to make the law, Windeyer J commented " I certainly think it unfortunate that an Australian citizen should be legitimate by the law of one State and illegitimate according to the law of another, and that so

[66] Ibid at 329
[67] Schuck, above n 4
[68] (1949) 79 CLR 121
[69] Ibid at 151
[70] Attorney General (Vic) v The Commonwealth (1962) 107 CLR 529

fundamental a status should be determined by the considerations of State domicile and the principles of private international law. But in fact the States have long had varying laws on this subject." [71] In this instance, the Court recognised that the Constitution, by virtue of s 51, enabled the Commonwealth to enter the field and by its overriding power produce uniformity where State laws were in disharmony. But without such a power, and in other instances where political will is absent, it is a feature of our Federal system that Australian citizenship does not necessarily mean an equality of status.

The power of the Commonwealth to interfere with State citizens has been affirmed through these concepts. It was specifically stated *in Victoria v The Commonwealth and Hayden*[72] where Stephen J, referring to comments made by Justice Latham in the *Pharmaceutical Benefits Case*[73], affirmed that a State Attorney General has a right to challenge the validity of federal legislation which deals with a purely State field of legislative power and therefore interferes with the rights of citizens of the State.[74] This is an instance where the court uses the word citizen informally. In essence they are talking about people subject to state laws, for there is no formal State citizenship. But the reference here is to our understanding of political membership and a governmental relationship between an individual and the State.[75]

In another case looking at the interpretation of the Judiciary Act (1903),[76] which concerns the procedures for exercising federal jurisdiction, we see some discussion by Barwick CJ involving the word citizen. The Chief Justice discussed the rights flowing from the Judiciary Act as rights of the "citizen". In this sense, he must mean person subject to the law in the country as the Act does not only apply to Australian citizens. For instance, he stated:

> What the section does is to equate the rights of the Commonwealth to those of the citizen. In so far as the rights of the citizen are created by a State law, it is an irrelevant consideration that the Crown is excluded from the operation of the State law. The section looks to the rights of the citizen against a fellow citizen: it does not look to the rights of the citizen as against the Crown.[77]

Mason J also used the terminology of the "private citizen" in a case affirming *Maguire*.[78] Most recently, in the controversial decision of *Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks v Prentice*[79], where the Court struck down the cross-vesting legislation agreed to by both Commonwealth and State legislatures, Justices McHugh and Kirby both referred to the broader notion of

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[71] Ibid at 582-3
[72] (1975) 134 CLR 338
[73] Attorney General (Vic) v The Commonwealth (1945) 71 CLR 237 at 247-8
[74] Victoria v The Commonwealth and Hayden (1975) 134 CLR 338 at 389
[75] This language was also used in Richardson v Forestry Commission ((1988) 164 CLR 261 at317
[76] Maguire v Simpson (1977) 139 CLR 362
[77] Ibid at 402
[78] The Commonwealth of Australia v John Fairfax and Sons (1980) 147 CLR 39 at 59.
[79] [1999] HCA 27 (17 June 1999)

citizenship in different places. McHugh, in reference to the jurisdiction of the different courts, stated:

> if a plaintiff has been injured in an accident as a result of independent acts of negligent driving by a Commonwealth employee and a private *citizen*, the High Court will have jurisdiction under s 75(iii) in respect of both claims even though the acts or omissions constituting negligence and the facts giving rise to them are very different.[80] (my italics)

Moreover, he stated:

> Where a litigant has unsuccessfully challenged a legislative provision on constitutional grounds and a later decision reverses the earlier holding, the Court has the discretion whether to extend time to allow the litigant once again to challenge the legislation. Ordinarily in those circumstances, the discretion should be exercised in favour of the *citizen*.[81] (My italics)

Justice Kirby and Justice Callinan also referred to citizens in their judgments,[82] and all of them are referring to private individuals, bound by the law. But as I have indicated, these are not citizens in the formal sense but citizens as right and duty-bearing individuals within the community; persons subject to the law, and often seeking the protection of the law.

This contrast between formal citizenship and broader substantive notions was starkly evident in another Federalism case: *The University of Wollongong v Metwally*[83]. Justice Deane, in looking at the inconsistencies between the Commonwealth and State legislation used the word citizen in a contradictory sense:

> Mr Metwally… as a visitor to this country, he might resort to, and rely upon, what Governments and Parliaments have asserted to be the law. He will derive no personal solace from the fact that, in declaring invalid the law upon which he sought to rely, this Court has performed its allotted function under the Constitution of ensuring that … the citizen cannot be subjected to an obligation under State law which is contemporaneously inconsistent with an obligation under Commonwealth law to which he is also subjected. [84]

But Mr Metwally was not a citizen, he was a visitor to this country! Yet in looking at the law applying to him, Justice Deane said the "citizen...cannot be subjected

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[80] Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks v Prentice [1999] HCA 27 (17 June 1999) at para 75

[81] Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks v Prentice [1999] HCA 27 (17 June 1999) at para 80.

[82] Ibid, Kirby J at para 193 and Callinan J at para 246, footnote 316

[83] University of Wollongong v Metwally (1984) 158 CLR 447

[84] Ibid at 481

to". This mixed use of citizen indicates to us that even though Mr Metwally is not a citizen, the law treats him as a member of the community when he is subjected to the law. This incorporates a liberal view of citizenship. Each of these judgments which use citizen in the broader sense indicate a desire to treat individuals equally - regardless of whether they are formal citizens or not.

This less formal reference to citizenship often leads to other statements of inaccuracy. In another federalism, s 109 case, *Gerhardy v Brown*[85], dealing with Indigenous land issues before the *Mabo*[86] decision, Justice Brennan referred to "Aboriginal peoples…[being] incapable of enjoying and exercising "on an equal footing" the human rights and fundamental freedoms that are the birthright of all Australian citizens".[87] This appears to indicate that there are fundamental freedoms linked to citizenship which are not identifiable directly from the Constitution, and, to that extent, this use of the word citizen is not accurate.

Brennan J also uses the notion of citizenship in the *Mabo* decision, and justifies the departure from the common law precedent before *Mabo* because of a belief in 'the equality of all Australian citizens before the law".[88] But such a belief is severely tested in the case of *Kruger and Others v The Commonwealth of Australia*[89] involving a Constitutional challenge to the Aboriginals Ordinance 1918(NT) authorising the removal and detention of Aboriginal children. The Court held there was no constitutional requirement for all laws of the Commonwealth to accord equality before the law. The case highlights the significant difference for Indigenous Australians between formal citizenship and full and equal membership of the community. There is a disjuncture between the legal status and the broader political, sociological and psychological meanings of the term.

Justice Toohey referred in his judgment to:

> the creation of a federal union with one government and one legislature in respect of national affairs [which] assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation.[90]

He further states "there is nothing in the Constitution which excludes Aboriginals from citizenship. Their exclusion from citizenship rights, in particular voting rights, was the result of legislation."[91] What is more, our legislative and administrative history has shown that while Aboriginal people were formally citizens – they were never treated equally as citizens – and were specifically deprived of rights normally attributed to

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[85] (1984) 159 CLR 70
[86] Mabo v Queensland (No 2) (1992) 174 CLR 1
[87] Ibid at 136
[88] Mabo v Queensland (No 2) (1992) 175 CLR 1 at 58. Brennan J also referred to indigenous citizens at 52,53.
[89] (1997) 190 CLR 1
[90] Ibid, 90 quoting Barton J in R v Smithers: Ex parte Benson (1912) 16 CLR 99, 109-110
[91] Ibid, 96

citizens.[92] While *Mabo*[93] sought to alter this to some extent, the Court's power to change this fundamentally has been limited. Toohey is correct in saying that there is nothing in the Constitution which excludes Aboriginals from citizenship. Equally, there is nothing in the Constitution about the rights and responsibilities of citizenship. Thus Parliament as a law-making body has been able to discriminate in ways which treat some citizens fundamentally differently to others.

If indeed, Professor Detmold's vision of a new constitutional law based on citizenship exists, it is not clear. His inspiration came from judgments that used the terminology of citizenship often. The cases of *Mabo*[94], *Australian Capital Television*[95], and the later free speech cases[96] all saw the judges referring to citizens. But *Lim's*[97] case, and the other migration law examples, which I will discuss shortly, show us that such citizenship is confined to formal citizens. And the many other cases, in the constitutional context, where the court has used citizen meaning person, further complicates our understanding of membership of the community. With the Constitution lacking a clear reference to citizenship, or assigning a place to 'human rights and fundamental freedoms'[98] as Constitutional birthrights of Australian citizens, we are left with no clear sense of who makes up the community and what consequences follow from membership of the community . In addition, due to the constraints of our Constitution, the High Court has been unable to directly assist us.

The changes to our Constitution referred to earlier in the forthcoming referendum will only confirm this approach leaving us with another failed opportunity to properly review the place of citizenship in our Constitution.

Legislative interpretations of citizenship: statutory interpretation

Legislation has been the main mechanism for the development of the legal notion of citizenship in this country. As noted, the Court's role in shaping the actual legal consequences of citizenship has been limited and largely directed by the Parliament, and has occasionally arisen in its interpretation of various pieces of legislation when disputes arise.

Ironic as it may be, the Act commemorated by this conference has in many ways done least to develop our understanding of citizenship in Australia. This is because the Nationality and Citizenship Act now the Australian Citizenship Act says practically

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[92] See further Chesterman and Galligan, Citizens without Rights: Aborigines and Australian Citizenship (CUP, 1997)

[93] Mabo v Queensland (No 2) (1992) 174 CLR 1

[94] Ibid

[95] Australian Capital Television v The Commonwealth (1992) 177 CLR 106,

[96] Theophaneous v Herald Sun and Weekly Times Ltd (1994) 182 CLR 104. Justice Deane for instance, in this case referred to the "privileges and immunities" of the "citizen" as provided for in the Constitution at 168.

[97] (1992) 176 CLR 1

[98] Brennan J in Metwally (1984) 159 CLR 70 at 136

nothing about the content of Australian citizenship. True, it tells us who is entitled to membership of the formal legal status and who can be deprived of it, and, to that extent it tells us who we want as part of our community. Slawner's argument reminds us that:

> none of these [legal issues] can be viewed in isolation from normative considerations. Legal definitions of citizenship always incorporate what is considered to be desirable activity.[99]

The High Court, however, has not been called upon to definitively determine or interpret the Act as no dispute about its application has led to its courtroom. A reference to the new act, though, was mentioned in *Wong Man On v The C'th and Others*[100] where the Nationality and Citizenship Act was considered in determining whether the applicant was an alien within the meaning of the War Time Refugees Removal Act 1949. Fullagar J looked at the definition of Australian citizen and identified that persons who were British subjects immediately before the Nationality and Citizenship Act came into operation automatically qualified as Australian citizens.[101]

The main context in which citizenship has arisen for the Court has been in immigration and deportation matters due to the centrality of citizenship to the Commonwealth government's control in this area[102]. Another early case to consider the new status of citizen was *O'Keefe v Calwell* [103] where the issue of absorption and deportation was in contest. But we can turn to cases before the introduction of the Nationality and Citizenship Act 1948 (Cth) where matters of membership were central to the Court's analysis.

Migration

Most early cases dealing with nationality issues revolved around the Immigration Restriction Act 1901 (Cth) and, in particular, the deportation power. One of the most fundamental cases looking at notions of membership of the community was the case of *Potter v Minahan*[104]; the illegitimate son of a Chinese man and a Victorian woman, whose legal domicile was his mother's, was taken at the age of 5 to China, but returned at the age of 31. He claimed he was not an immigrant and was not prohibited from entry. Justices Isaacs and Higgins were not concerned about the legal issues of nationality and domicile in determining this person's immigration status, but rather looked to his residence, his actual home rather than his technical home.[105] However, in later cases such

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[99] Karen Slawner, "Uncivil society: Liberalism and Hermeneutics, and 'Good Citizenship' in K Slawner and M E Denhim, eds., *Citizenship After Liberalism* (New York, Peter Lang Publishing, Inc., 1998) 81 at 82-3.
[100] Wong Man On v The Commonwealth (1952) 86 CLR 125
[101] At p 128
[102] Sections 51 (xix) and (xxvii)
[103] (1949) 77 CLR 261
[104] (1908) 7 CLR 277.
[105] Ibid, Isaacs J at 308-9, Higgins J at 320

as *Pochi* [106] and *Nolan and Minister for Immigration*,[107] the Court was less concerned about whether the person had become absorbed into the community, or obtained an "Australian character"[108], and accepted the power of the Commonwealth to deport persons who were not formal citizens by virtue of the head of power in the Constitution which provided for laws regarding "naturalisation and aliens"[109]. The centrality of citizenship to the Commonwealth's power to determine who in fact became or remained resident in Australia recalls Slawner's statement that the legal framework of citizenship impacts upon notions of good citizenship. It is even more fundamental in that it determines the *actual* membership of the community.

The High Court has also affirmed the notion that citizenship provides a person with a right of entry to Australia in the tax case of *Air Caledonie International and the Commonwealth*[110]. The case dealt with a charge to be imposed on international airline passengers entering Australia which was struck down as unconstitutional [111]. Of relevance to the Court's shaping of citizenship is its statement that "the right of an Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or "clearance" from the Executive."[112] As I noted elsewhere[113] this principle would have assisted the hapless Australian journalist Wilfred Burchett who in the 1950s was continually denied re-entry into Australia despite being an Australian citizen, due to the government denying him a passport to deter his practical re-entry. The *Air Caledonie* case is a reminder that the High Court, in referring to this right of re-entry by Australian citizens, is not referring to a specific constitutional right, and there is no reference in the case to where this right comes from. But for present purposes, we can state by virtue of the *Air Caledonie*, and the case of *Lim* referred to earlier[114] that the High Court has affirmed the government's approach to the centrality of citizenship for the very practical notion of membership of the community; in determining who gets here and who stays.

Civil service - Army

The distinction between civilians and soldiers has been another context in which we have seen several references by the Court to citizens. The 1925 decision of *Pirrie v McFarlane* [115] was an important case on intergovernmental immunities, but it also raises the notion of citizenship as distinct from military service. First of all, both Knox CJ and Higgins J use the word "citizen" when essentially talking about persons generally. Indeed, Reg 488 of the Air Force Regulations 1922, Statutory Rules 1922, No 160 as

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[106] (1982) 151 CLR 101
[107] (1988) 165 CLR 178
[108] Term used by Isaacs J in Ah Yin v Christie (1907) 4 CLR 1428 at 1435-1436
[109] s 51 (xix)
[110] (1988) 165 CLR 462
[111] By virtue of s 55 which provides for 'laws imposing taxation shall deal only with the imposition of taxation and any provision therein dealing with any other matter shall be of no effect".
[112] (1988) 165 CLR 462, 469
[113] Rubenstein, above n 5
[114] Lim (1992) 176 CLR 1
[115] Pirrie v McFarlane (1925) 36 CLR 170

amended, said : "It is to be borne in mind that a soldier is not only a soldier but a citizen also, and as such is subject to the civil as well as to the military law…" English case law had set out that because men (sic) are soldiers they do not cease to be citizens, but have all the rights and duties of citizens. In this context, civilian law is distinguished from military law. Civil law here equates to citizenship when, in fact, it covers all persons, not just legal citizens. This is particularly highlighted by the fact that in 1922 there were no Australian citizens.[116]

Moreover, in the 1943 decision of *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*[117], we see citizenship discussed in the context of military service and duty. This case was one of the important decisions looking at s 116 of the Constitution and the free exercise of religion. Latham CJ cited and approved a United States case which set out what is often referred to as a fundamental consequence of citizenship. It was said:

> Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to its capacity, to support and defend government against all enemies[118]

In the same case, Williams J confirmed the "right of the Commonwealth Parliament to require Australian citizens to serve in the armed forces or engage in some form of work connected with the prosecution of the war"[119] and, for the same reasons, the right to intern other citizens.[120] Moreover, Williams stated:

> For the purposes of defence the Commonwealth can in times of war pass legislation affecting the rights of the States and of their citizens and corporations under State laws to a greater extent than it can in times of peace.[121]

This distinction between civil and military status was also referred to in *Groves v The Commonwealth*[122], in a case involving the law of negligence and its application against the Commonwealth by a serving member of the armed forces for damages caused by the negligence of a fellow member of the armed forces while on duty in peace time.

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[116] The notion of Federalism was also discussed here because "ordinary citizenship" was something within State hands, rather than federal. So that, according to Isaacs J, "military commands lawful by Commonwealth law, are not susceptible of denial or abridgement by State law as to citizenship". Ibid at 206 See earlier part of this paper on Federalism and Citizenship above n 67 ff

[117] (1943) 67 CLR 116

[118] Citing *Hamilton v University of California* (1934) 293 US 245 at 262,263 by Latham CJ at 133.

[119] (1943) 67 CLR 116 at 162

[120] Ibid.

[121] Ibid at 163

[122] (1982) 150 CLR 113 at 117 and 126

But what is more profound, is this right of the Commonwealth in times of war is not only linked to citizens. As I wrote in an earlier piece[123], non-citizens can also be conscripted and required to serve our nation as the case of *Polites v The Commonwealth*[124] illustrates. The High Court accepted the power of the Commonwealth to include aliens in conscription for military service. As such, service as a soldier need not be, and has not been, the exclusive duty of Australian citizens. This speaks once again to who we are prepared to include in our community and when we are prepared to accept broader notions of membership of the community.[125] We are prepared to treat non-citizens on an equal basis with citizens in situations which will advantage the nation, but not when the government considers there may be some disadvantage to the common good.

Extradition

Some may think that one of the consequences of citizenship may be one's immunity from foreign prosecution, or specific rights relating to extradition of Australians. However, citizenship has not been found to do that. The important High Court decision on this matter is *Barton v The Commonwealth*[126] where Barwick CJ was at pains to point out that the lawfulness of extradition had nothing to do with citizenship. "The plaintiff's citizenship, is in my opinion irrelevant to the application in this case of the relevant principles"[127]. The issue is rather whether the person has been charged with a crime of a particular kind. In this case, the Court held it was within the prerogative power of the executive (not within the power of the Act) to request a foreign state to surrender a person who is alleged to have committed an offence against the law of Australia.

Tax

We have also seen the Court make statements about citizenship and the relationship of individuals to the state, in the context of taxation. In fact, the payment of taxes is often referred to as a social and political representation of a person's obligation to the community, connoting some form of membership. In this sense, the payment of taxation fits into Beiner's welfarist notion of citizenship, or what Peter Schuck referred to as the sociological dimension of citizenship.

One of the High Court justices who most used the word citizen in the context of taxation was Barwick CJ. In *Kolotex Hosiery v Federal Commissioner of Taxation*[128], he discussed the rights of the taxpayer under various sections of the Income Tax Assessment Act 1936-67:

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[123] K Rubenstein, Citizenship in Australia: Unscrambling its meaning" (1995) 20 MULR 503
[124] (1945) 70 CLR 60
[125] See my discussion in K Rubenstein, Citizenship in Australia: Unscrambling its meaning" (1995) 20 MULR 503 at 520-22.
[126] (1974) 131 CLR 477
[127] Ibid , 482
[128] (1975) 132 CLR 535

> The Commissioner's satisfaction or lack of it in relation to a situation of mixed fact and law is made a critical element in the process of assessment in connexion with the group of sections. Thus the *citizen's* rights are made to depend upon subjective attitudes of the Commissioner.[129]

And in *Brambles Holdings v Federal Commissioner of Taxation*[130] Barwick CJ set out in this Payroll Tax case his clear philosophy on tax:

> In the administration of taxation laws it is, in my opinion, fundamental that the citizen is entitled to take advantage of the provisions of the statute, even if the result is not something contemplated by the draftsman.[131]

Then, in *Federal Commissioner of Taxation v Westraders Pty Ltd*[132], Barwick CJ stated that it is for the Parliament to decided "the circumstances which will attract an obligation on the part of the citizen to pay tax"[133]. He continued to say that it is the right of citizens to essentially "mould" their transactions around the tax act and that it is "basic to the maintenance of a free society"[134]

In each of these statements, Barwick CJ, by using the word citizen, is telling us that he sees taxpayers as members of the community to whom they pay tax. This may be so, even if they are not formal legal citizens. Thus, in the legal sense, Barwick's use of the term is inaccurate.

Finally, in another tax avoidance case of 1946, the Court, in *Peate v Federal Commissioner of Taxation*[135], also used the word citizen. The case raised issues about the philosophy underpinning taxation and, in particular for this case, the freedom of persons to choose under whom they would be employed. Windeyer J referred to a statement of Lord Atkin's "that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf".[136] The reference by Windeyer to the "personal status of a citizen" raises a sense of clear rights and responsibilities flowing from citizenship. This particular right or freedom of employees would perhaps be better characterized today as a person's right or a human right, rather than a citizen's per se. While we do find that non-citizens working rights can be limited by the Migration Act[137] they still have the same choice as others regarding who employs

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[129] Ibid at 541 (My italics)
[130] (1977)138 CLR 467
[131] Ibid at 470
[132] (1980) 144 CLR 55
[133] Ibid at 59
[134] (1980) 144 CLR 55 at 61
[135] (1964) 111 CLR 443
[136] Citing Nokes v Doncaster Amalgamated Collieries Ltd [1940] 1014 at 1026, in (1964) 111 CLR 443 at 479.
[137] Most temporary visas restrict a person's working rights. See Migration Regulations 1994.

them formally. And, of course, they are still subject to taxation if they do in fact earn money in Australia.[138]

Voting

We have already considered the High Court's approach to political membership of the community of non-citizens in light of the free speech cases associated with representative democracy. This stems from citizenship as the necessary qualification for voting. The transition from British subject to Australian citizen also resulted in those British subjects who were enrolled immediately before 26 January 1984 being entitled to be on the electoral roll[139]. To this extent, political membership is greater than citizenship.

There have been other cases looking at representative democracy that impact upon the extent of the individual's protection under the Constitution and the relationship to the Electoral Act, in particular the equality of voting power. In the more recent decision of *McGinty & Others v Western Australia*[140] Brennan J confirmed:

> [I]n view of the fact that the franchise has historically expanded in scope, it is at least arguable that the qualifications of age, sex, race and property which limited the franchise in earlier times could not now be reimposed so as to deprive a citizen of the right to vote. [141]

This is the closest we get to a citizen's Constitutional right to vote. And there other contexts within which the Court has come to look at citizenship and representative democracy and these, too, have used the word citizen in considering representation rights[142]. This is, in essence, the most consistent with traditional political notions of citizenship as membership of the community. However, in New Zealand, for instance, permanent residents and citizens who have resided continuously in New Zealand for a year are entitled to be registered as electors; this speaks to political membership in terms of residence over a person's formal legal status.[143] Therefore, while the Court upholds the Parliament's qualifications for voting linked to citizenship, there is nothing stopping a future Parliament from extending the franchise to permanent residents.

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[138] Note, however, that there are some bilateral agreements in taxation between countries regarding the payment of taxes in more than one country.
[139] Part VII Electoral Act 1918 (Cth)
[140] (1996)140 CLR 140
[141] Ibid, 166-7
[142] For instance, Queensland v The Commonwealth (1977) 139 CLR at 604 per Stephen J. Stephen J also used the term citizen in discussing s 41 and political representation in King v Jones (1972) 128 CLR 221 at 271
[143] The Electoral Act 1993 (NZ) s 74

Jury Service

The Court has also discussed jury service thereby extending our understanding of the meaning and consequence of citizenship. Justice Brennan, in *R v Glennon* [144] quoted CJ Street in saying that "Every Australian worthy of citizenship can be relied upon to discharge properly and responsibly his (sic) duty as a juror"[145]. The statement is full of innuendo and significance. It clearly speaks to the concept of the "good citizen" and ties in with the Arendtian conception of citizenship giving effect to our noblest human capacities, in the civil sphere. It resonates with the belief in the corresponding responsibilities of citizenship that the individual owes to the state and fellow members of the community.

This is also seen as a reciprocal right, as the Court affirmed in *Cheatle v The Queen*[146]. The Full Court quoted the passage from Latham CJ in Newell v The King[147] where he referred to "the right to a jury is one of the fundamental rights of citizenship and not a mere matter of procedure."[148] This takes us into the realm of a common law right, discussed in the next part of the presentation. This reciprocal right is not just limited to citizens. The law has not distinguished between permanent residents and citizens in providing juries in criminal matters.

In all of these cases, the High Court has been powerless to do much more than affirm the Government's control over the meaning of citizenship. It often speaks to broader notions of membership of the community by referring to citizens when, in fact, the judges are referring to persons. For example in *Bradken v BHP*[149] the Court spoke of Commonwealth legislation applying to "ordinary citizens". *In Pioneer Concrete v Brisbane City Council*[150], Justice Wilson spoke about alerting "citizens" to exercise their right to participate as objectors in a planning dispute. These are examples where the legal notion of citizenship was not being used by the Court, but a broader notion of a person entitled to legal protection or protection of legislation generally. But these statements have no legal effect, and all they do is to confirm that our legal view of citizenship and broader notions of membership of the community are not parallel terms. This status quo will be maintained by the provisions in the forthcoming *Constitution Alteration (Establishment of Republic) 1999* Bill which leaves these matters aside in not dealing with citizenship in a more substantive way in our Constitution.[151]

[144] (1992) 173 CLR 592
[145] Ibid, 614
[146] (1993) 177 CLR 541
[147] (1936) 55 CLR 707
[148] at 711-712 in Newell, cited at 559 in Cheatle.
[149] (1979) 145 CLR 107 at 123
[150] (1980) 145 CLR 485
[151] See above discussion at n 41ff

The Common law of Citizenship

This final section picks up some of the threads already discussed in the context of the Constitution and legislation. The Court has often referred in its judgments to a common law of citizenship. For instance, in the case of *Wade v NSW Rutile Mining Company*[152], a case dealing with mining rights, Barwick CJ referred to the "fundamental principle that if Parliament intends to derogate from the common law right of the citizen it should make its law in that respect plain".[153] Indeed, it has been argued that this was one of the reasons for the absence of a Bill of Rights in our Constitution, the belief by the framers in the common law rights of citizenship. *In Australian Capital Television Pty Ltd v The Commonwealth*, Mason CJ, in discussing the disinclination of the framers of the Constitution to incorporate a comprehensive guarantee of individual rights, stated that the framers accepted, in accordance with the prevailing English thinking, that "the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy".[154]

The common law has been the source of rights cases, and these are not only reserved for Australian citizens. A case that illustrates this clearly involved an American citizen in Australia. The case of *Re Bolton; ex parte Beane*[155] reminds us of the broader reality of membership within the legal system. As Justice Brennan began his judgment:

> Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence may be overlooked until a case arises which evokes their contemporary and undiminished force. [156]

Bolton was an American citizen who had deserted the US army and was being sought by the US army for return. He had been detained by the Australian army and sought leave to the High Court for writs of Habeas Corpus for his release. Justice Brennan continued that :

> ..the laws of this country secure the freedom of every lawful resident, whether citizen or alien, from arrest and surrender into the custody of foreign authorities on a mere executive warrant[157]

Of course, one of the key words here is that of lawful residents. As Brennan J goes on to explain further, such freedoms are qualified by the power to deport and detain prohibited immigrants. This sits uneasily with the notion of equality of treatment of

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[152] (1970) 121 CLR 177
[153] ibid at 181.
[154] Ibid at 136.
[155] (1987) 162 CLR 514
[156] Ibid , 520-21
[157] Ibid, 521

persons, regardless of their nationality. It speaks to the same point I argued in the discussion regarding *Lim*.[158]

Justice Deane was explicit in explaining the breadth of judicial power of the Commonwealth when he was assessing the constitutionality of the War Crimes Act 1988 (Cth) in the case of *Polyukhovich v The Commonwealth of Australia*. He said: "The trial and punishment within Australia of an Australian citizen or resident accused of such an indictable offence..is part of the ordinary judicial power of the Commonwealth".[159]

The point made by *Bolton* and *Polyukhovich* is that, in general, the laws of the country apply to citizens and non-citizens. As Gibbs CJ stated in *Actors Equity Association v Fontana Films*[160]:

> It is unlikely, for example, that it was intended that the Parliament might provide that the rights and duties of aliens should be determined by a special law, different from that which applies to Australian citizens, in relation to such matters as contracts, torts, succession and criminal responsibility.[161]

So in many torts cases, for instance, the Court has referred to citizens when in fact they have included non-citizens. In the negligence case *of Shaddock & Associates v Parramatta City Council*[162], Mason J was talking about negligent advice provided by life insurance companies compared to advice by government departments or statutory authorities. In this discussion he referred to the receiver of advice as the "citizen". For instance:

> there is no persuasive reason for saying that the citizen who sustains damage as a result of information negligently given by a government department or authority has no remedy, although the citizen who sustains similar damage as a result of information negligently given by an investment adviser has a remedy[163]

It is likely that Mason J used the word citizen because the case dealt with public law, and the relationship between government and the individual. But it could easily be a non-citizen who relies on a public authority's advice, and they would be liable in the same way.

Similarly, in a trespass case, the word citizen was used in the context of exceptions to the general rule that a person is a trespasser unless that person enters premises with the consent of the occupier. Thus, according to Justices Gaudron and McHugh, "a constable or citizen can enter premises for the purpose of making an arrest".[164]

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[158] Above n 47 ff
[159] (1991) 172 CLR 501 at 629.
[160] (1982) 150 CLR 169
[161] Ibid at 181-182
[162] (No 1)(1981) 150 CLR 225
[163] Ibid, 252
[164] (1991) 171 CLR 635 at 647

Therefore, most laws applies to citizens and non-citizens alike.[165] Although, in sentencing and matters of parole, the High Court in *The Queen v Shrestha*,[166] was prepared to take into account the fact that the person was not a citizen:

> In determining whether an eligibility for parole order should be made in the case of a non-resident non-citizen who has been involved in planning a serious crime and who comes to this country to commit it intending then to leave…a court may frequently be unable to discover either a reason for extending greater mercy to the offender than that reflected in the head sentence…That is not to say that the court discriminates against non-citizens, but the fact that an offender is not and is not likely to become a resident is material in considering whether there is any public benefit by way of rehabilitation to be gained by an early release to conditional freedom.[167]

This confirms that residence is often the most important factor in determining rights and responsibilities that flow from law, rather than citizenship.

And there have been many cases where the Court speaks of residents as citizens. In *Spratt v Hermes and Another*,[168] a case concerning the validity of appointment of a Magistrate within the Constitutional requirements of s 72, Barwick CJ discusses the power of the Court on questions such as wrongful detention of the person. In it, he uses the word citizen, when in fact he could have been using the word person.[169] Similarly, Barwick uses the terminology of citizenship when looking at a lessee's rights under a city ordinance, when the lessee could well have been a non-citizen.[170] Barwick also uses the notion of citizenship in discussing the role of precedent upon individuals. In *Geelong Harbour Trust Commissioners v Gibbs, Bright and Co*,[171] he states:

> The Court, in my opinion within limits…should be ready to depart from the reasoning of an earlier case where it is convinced that that reasoning is clearly wrong and that the rights of the citizens should not for the future be tied to conclusions founded upon it.[172]

The terminology of citizenship is often used in criminal law cases looking at common law principles. Barwick uses citizenship in discussing a person's right to refuse to answer incriminating questions[173] and citizenship is the terminology used by Justices

[165] This is another area in which I am undertaking research with an ARC small grant. I am looking at a whole range of legislation to see where discrimination does occur on the grounds of citizenship.
[166] (1991) 173 CLR 48
[167] Ibid at 63-64 per Brennan and McHugh
[168] (1965) 114 CLR 226
[169] Ibid at p 243
[170] Esmond Motors v The Commonwealth (1970) 120 CLR 463 at 468
[171] (1970) 122 CLR 504
[172] Ibid at 516.
[173] Mortimer v Brown (1970) 122 CLR 493 at 495. Passage cited with approval in Hamilton vOades

Stephen and Aickin in *Bunning v Cross*[174], a case concerning illegally obtained evidence, when discussing the "right to immunity from arbitrary and unlawful intrusion into the daily affairs" of a person.[175] Justices McHugh and Gummow use citizenship also *in Ousley v The Queen*[176], a listening device case, in discussing the liberty and privacy of individuals.[177] In contrast, Justice Kirby used the term "individual"[178], referring to the same people. Citizen is also used in a case looking at the right of the State to call a Royal Commission,[179] and in a native title application case regarding the questions of a Commissioner who the Court held "had the common law right of every citizen to ask questions"[180], and in another case when discussing a person's right to a hearing, when in fact the right accords to persons.[181] Justice McHugh discusses the common law protection of legal professional privilege as a "fundamental right of the citizen"[182] which he states could only be made by the Parliament and not the judiciary as a matter of democratic principle.

In *A v Hayden* [183], the Court uses the word citizen for person when discussing the responsibility of persons to disclose a felony of which the person has knowledge. Justice Mason looks at the philosophy underlying the issue and states:

> the effective enforcement of the criminal law and the administration of justice, which are central elements in a well ordered democratic society, depend for their efficacy on the unrestricted freedom of each and every citizen to assist and co-operate with the authorities in the investigation and prosecution of criminal offences.[184]

Once again, we see the Court using the term citizen to represent a person broader than the legal citizen, it is the "good citizen", the participating, Arendtian, civic-minded member of the community. But it is also the person, deserving the protection of the State and an equality of treatment. This resounds with liberal notions of citizenship and extends it to non-citizen residents.

(1989) 166 CLR 486 at 514.

[174] (1978) 141 CLR 54.

[175] Ibid at 75. See also reference to this passage by Dawson J in Cleland v The Queen (1982) 151 CLR 1 at32.

[176] (1997) 192 CLR 69

[177] Ibid, McHugh J at 105 and Gummow J at 120.

[178] (1997) 192 CLR 69 at 142

[179] (1982) 152 CLR 25 at 89

[180] North Ganalanja Aboriginal Corporation and Another v The State of Queensland (1996) 185 CLR 595 at 635 citing Clough v Leahy (1904) 2 CLR 13 at 156-157

[181] See The Queen v Marks, ex parte Australian Building Construction Employees BLF (1981) 147 CLR 471 at 484.

[182] Carter v Managing Partner, Northmore Hale Davey & Leake & Others (1995) 183 CLR 121

[183] (1984) 156 CLR 532

[184] Ibid, 555

In discussing common law notions of citizenship, it is important to also look at Justice Gaudron's judgment in *Minister for Immigration & Ethnic Affairs v Teoh*[185] which Professor Detmold may well have included in his discussions on citizenship if it had been decided. Another migration law case involving questions of procedural fairness, Justice Gaudron, in looking at the rights of the individual who the government sought to deport, concentrates on the citizenship status of the deportee's children. And she links this back to concepts of 'subjectivity' in outlining the relationship between the individual and the state:

> Citizenship involves more than obligations on the part of the individual to the community constituting the body politic of which he or she is a member. It involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability. And there are particular obligations to the child citizen in need of protection. So much was recognised as the duty of kings, which gave rise to the parens patriae jurisdiction of the courts. No less is required of the government and the courts of a civilized democratic society.[186]

In Gaudron's view, "citizenship carries withit a common law right on the part of the children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments … directly affecting the child's individual welfare."[187] Gaudron is alone in this view, and the status of common law rights of citizenship are such that they can always be changed by Parliament, representing the democratic will of the people unless there is some Constitutional link the Court can identify. Gaudron's opinion is confined to the legal notion of citizenship, something that arose due to the Australian citizenship status of the children, and would not have been relevant if the children were not citizens. It is unique in that it identifies citizenship as a fundamental source of rights that are not otherwise articulated. In this sense, it fits within the liberal legal notion of citizenship, where the State is seen as the provider of protection and the rule of law.

It is unlikely that Justices Dawson, McHugh and Gummow in their joint judgment in the 1996 case of *Bellino v Australian Broadcasting Corporation*[188] were thinking of strictly formal citizens, when they state:

> At common law, any citizen has a right to comment upon a subject of public interest. The right is not one that is a peculiar privilege of the press. A citizen does not have to wait until the public discussion of a subject of public interest commences before he or she can make a lawful comment on the conduct of a person or institution whose activities are a subject of public interest.[189]

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[185] (1995) 183 CLR 273
[186] Ibid, 304.
[187] Ibid
[188] (1996) 185 CLR 183
[189] Ibid , 224

This case looks at defamation law principles, and the law applies equally to citizens and non-citizens present in Australia, so this protection should also apply accordingly. In another defamation case, *Mann v O'Neill*,[190] Justice Kirby states: "whilst judicial officers should ordinarily be expected to exhibit a high degree of tolerance of criticism and adverse comment, they are citizens too. They should not be subjected, completely without redress, to false and malicious allegations which damage their reputation.[191] This use of citizenship represents a notion of equality of treatment of persons and the belief in the rule of law.

It is unclear whether these common law citizenship rights will ever be seen by the High Court as constitutional rights that Parliament could not override. We have seen this to some extent in the Courts interpretation of s 80 of the Constitution, but whether other common law concepts could be entrenched is yet to be developed. What is clear, though, throughout is that the Court, in dealing with legal issues associated with citizenship, has not confined the rights and responsibilities of common law citizenship to legal citizens. We see a belief in the liberal state which enforces the rule of law and acts as a protectorof human rights, and it incorporates political, psychological and sociological aspects of citizenship. The legal status of citizen is often irrelevant to the Court in its usage of the term.

Conclusion

Justice McHugh, in the 1993 case *of Environment Protection Authority v Caltex Refining Co Ltd*[192], refers to the then Chief Justice Gleeson of the NSW Court of Appeal, who discusses the privilege against self-incrimination as one worthy of extension to corporations. Gleeson discusses the privilege as one holding the 'proper balance between the powers of the State and the rights and interests of citizens". McHugh doesn't like the use of corporate citizen and states:

> The current widespread use of the expression 'corporate citizen' seems to owe more to the objects of the public relations industry than to the analysis of the legal concept of citizenship.[193]

His concern was over artificial entities being regarded as citizens. It is my argument that, indeed, there hasn't been enough analysis of the legal concept of citizenship, nor enough attention upon who is regarded as a citizen, and for what purposes. McHugh would be happy for this reference regarding self-incrimination as one of citizenship for all persons, regardless of their legal status of citizen or permanent resident or visitor. The Court has displayed a willingness to use citizenship in the broader sense of personhood, particularly when discussing the common law, but has been

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[190] (1997) 145 ALR 682
[191] Ibid at 733
[192] (1993) 178 CLR 477
[193] Ibid, 549

restrictive in giving full membership rights to non-citizens when it comes to the Constitution or legislative interpretation.

In John Chesterman and Brian Galligan's book *Defining Australian Citizenship*: *Selected Documents*, launched at this conference, they argue in their introductory chapter that the absence of citizenship in the Constitution is more a reflection on Australian political culture and traditions which is not necessarily a failure on the part of the framers nor the Constitution itself. Moreover, they argue that there were other social citizenship advances during the century which reflect positive broader understandings of citizenship in Australia.[194] My argument, though, is that the gap between the formal legal meaning of citizenship and the greater broader notions of citizenship has influenced and contributes to the confused understanding of citizenship in the country. A stronger constitutional statement could be better utilised by courts, policy makers and the public to more readily and easily understand and articulate our sense of community in Australia.

[194] John Chesterman and Brian Galligan, Defining Australian Citizenship: Selected Documents (MUP, 1999) p11-12.