

## NEW PERSPECTIVES ON AUSTRALIAN CONSTITUTIONAL CITIZENSHIP AND CONSTITUTIONAL IDENTITY

### ABSTRACT

‘Citizenship’ can be used in a number of different senses. It can refer to the legal status of citizenship and the rights that attach to that status, or more generally to identification as a member of society. This article investigates recent developments relating to these dimensions of citizenship. First, it examines the implications of *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1 for the debate on whether a constitutional concept of citizenship exists despite the omission of Australian citizenship from the *Constitution*. Secondly, it draws on the scholarship of Gary Jacobsohn and Michel Rosenfeld on ‘constitutional identity’ to examine the dynamic and constructed nature of what it means to be a member of the Australian community.

### I INTRODUCTION

The Australian *Constitution* makes no reference to Australian citizenship. Whether a constitutional concept of citizenship exists as a limitation on power remains an open question.<sup>1</sup> The debate is partly motivated by a hope that constitutional citizenship will precipitate further rights and protections, and partly by a concern that it is anachronistic in current times (albeit explicable in 1900<sup>2</sup>) that Australia’s constituting document does not establish expressly the legal status and collective identity of the people constituting the body politic. The first matter is primarily a question of legal doctrine, whereas the second implicates broader concerns. Ultimately, they reflect different senses in which the word ‘citizenship’ is used. The first concerns citizenship as a legal status, whereas the second concerns citizenship as a form of identity.<sup>3</sup> This article considers constitutional citizenship, in both these dimensions, in the light of *Roach v*

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<sup>1</sup> The power to establish statutory citizenship is not considered in this article. See *Singh v Commonwealth* (2004) 222 CLR 322, 329 [4] (Gleeson CJ); *Hwang v Commonwealth* (2005) 80 ALJR 125.

<sup>2</sup> See Helen Irving, ‘Still Call Australia Home: The *Constitution* and the Citizen’s Right to Abode’ (2008) 30 *Sydney Law Review* 133, 133–4.

<sup>3</sup> See Linda Bosniak, ‘Citizenship Denationalized’ (2000) 7 *Indiana Journal of Global Legal Studies* 447; Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002) 4–5.

*Electoral Commissioner* ('Roach'),<sup>4</sup> *Rowe v Electoral Commissioner* ('Rowe')<sup>5</sup> and recent scholarship on 'constitutional identity'.

In *Roach*, a majority of the High Court of Australia held that the words 'directly chosen by the people' in ss 7 and 24 of the *Constitution* guarantee 'the people' a right to vote subject only to disqualifications imposed for a substantial reason, and that what constitutes a 'substantial reason' can change from time to time. Their Honours went on to find invalid a law purporting to disenfranchise all people who were imprisoned at the date of an election. A majority in *Rowe* then invalidated a law purporting to prevent new or transferred electoral enrolments from the date of the writ for an election. Part II of this article teases out the implications of these cases for citizenship as a constitutional status and as a basis for further rights.

This article then changes tack. It explores citizenship in its identity dimension through the scholarship of Michel Rosenfeld and Gary Jacobsohn. Rosenfeld and Jacobsohn have independently advanced the concept of 'constitutional identity' as an analytical tool for understanding identity in constitutional systems.<sup>6</sup> Their work is particularly valuable because they direct attention to why and how constitutional identities can change, rather than simply describe the particular identity of different systems. Part III examines their work in detail, focusing on *what* is constitutional identity and *how* it is constructed, and Part IV then applies their framework of constitutional identity to Australia. Part V then reflects on the links and common themes between Australian constitutional citizenship as a possible legal status and Australian constitutional identity.

Until the High Court deals decisively with constitutional citizenship, the concept will lie ready to be used by litigants at the first opportunity. There is thus practical utility in reviewing recent cases for indications that constitutional citizenship will find favour. But constitutional citizenship has significance beyond its potential use in litigation. At least on one view, a role of a constitution is to express and shape national identity,<sup>7</sup> and so whether a *constitutional* concept of citizenship exists speaks to Australia's national identity. But the *Constitution* is not an exhaustive determinant of national identity, just as a written constitution is not exhaustive of constitutionalism. At a minimum, judicial decisions expounding the written constitution must be considered. Rosenfeld and Jacobsohn's accounts of constitutional identity are particularly helpful then because they focus upon the role of judicial decisions in shaping identity. By investigating constitutional citizenship together with judicial decisions that more indirectly shape our understanding of community membership, it is hoped that a fuller appreciation of what it means to be a member of the Australian community will result.

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<sup>4</sup> (2007) 233 CLR 162.

<sup>5</sup> (2010) 243 CLR 1.

<sup>6</sup> See Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2010); Gary Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010).

<sup>7</sup> See Vicki C Jackson, 'Methodological Challenges in Comparative Constitutional Law' (2010) 28 *Penn State International Law Review* 319, 325.

## II AUSTRALIAN CONSTITUTIONAL CITIZENSHIP

A *Constitutional Citizenship before Roach and Rowe*

The story of Australian citizenship has been well told by several writers,<sup>8</sup> and it is sufficient to recount only the most significant parts of its history here. The starting point is that the *Constitution* does not mention Australian citizenship at all, either to confer or to limit power. Other formulations — ‘the people’,<sup>9</sup> ‘subjects of the Queen’,<sup>10</sup> ‘the electors’,<sup>11</sup> and aliens<sup>12</sup> (and by negative implication non-alien) — are used in constitutional provisions directed to other matters. The Convention Debates reveal that this omission was deliberate, for reasons that are now well-known.<sup>13</sup> As a matter of history and constitutional text, there is therefore no constitutional concept of Australian citizenship. Instead, citizenship was established via statute in 1948.<sup>14</sup>

The statutory basis of citizenship raises the question whether Parliament can tamper with the incidents of citizenship and if so the extent to which it can validly do so. That question has been litigated in several cases, and a number of principles have emerged. First, possession of Australian statutory citizenship is a necessary,<sup>15</sup> but not sufficient,<sup>16</sup> condition to avoid characterisation as an ‘alien’ under the *Constitution*. Secondly, statutory citizenship will be necessary *and* sufficient only where ‘real’ statutory citizenship is conferred, as evidenced by, for example, possessing the right to enter Australia.<sup>17</sup> Thirdly, although non-alien status is linked to the possession of *statutory* citizenship, Parliament cannot define as an ‘alien’ someone who does not properly meet that description.<sup>18</sup> Fourthly, mere birth in

<sup>8</sup> See, eg, Rubenstein, *Australian Citizenship Law*, above n 3; Kim Rubenstein (ed), *Individual Community Nation: Fifty Years of Australian Citizenship* (Australian Scholarly Publishing, 2000).

<sup>9</sup> See *Constitution* preamble, ss 3, 5, 7, 15, 24, 25, 53, 89, 105.

<sup>10</sup> See *ibid* ss 34(ii), 117.

<sup>11</sup> See *ibid* s 128.

<sup>12</sup> See *ibid* s 51(xix).

<sup>13</sup> See Rubenstein, *Australian Citizenship Law*, above n 3, 29–38, who identifies four themes from the Convention Debates: disagreements about the definition of citizenship, concerns about dual citizenship, disagreements about the rights and duties of citizenship, and concerns to exclude certain groups of people from citizenship. See also Helen Irving, ‘Citizenship before 1949’ in Kim Rubenstein (ed), *Individual Community Nation: Fifty Years of Australian Citizenship* (Australian Scholarly Publishing, 2000) 9, 13–16.

<sup>14</sup> See *Nationality and Citizenship Act 1948* (Cth), now the *Australian Citizenship Act 2007* (Cth).

<sup>15</sup> See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

<sup>16</sup> See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439.

<sup>17</sup> See *ibid*.

<sup>18</sup> See *Pochi v McPhee* (1982) 151 CLR 101, 109 (Gibbs CJ).

Australia does not render a person a non-alien.<sup>19</sup> Finally, an alien is someone who owes allegiance to no state or to a foreign state.<sup>20</sup>

In this series of cases, a number of High Court justices expressly affirmed constitutional citizenship.<sup>21</sup> In *Singh v Commonwealth* (*'Singh'*), McHugh J (with Callinan J adopting similar reasoning<sup>22</sup>) in dissent held that Ms Singh was born in Australia and was thus not an alien. The law attempting to impose further requirements for obtaining citizenship was seen as 'seek[ing] to deprive her of her membership of the Australian community and her constitutional citizenship. It is beyond the power of the Parliament to do so.'<sup>23</sup> McHugh J thus tied constitutional citizenship to the constitutional term 'alien' and its opposite, non-alien. He elaborated on these views in *Hwang v Commonwealth*.<sup>24</sup> McHugh J stated that references to 'the people of the Commonwealth' were intentionally synonymous with Australian citizenship. That phrase recognises 'that there is an Australian community of people'<sup>25</sup> who are 'critical to the operation of the *Constitution*.'<sup>26</sup> He added:

No doubt the Parliament does not have unlimited power to declare the conditions on which citizenship or membership of the Australian community depends. It could not declare that persons who were among 'the people of the Commonwealth' were not 'people of the Commonwealth' for any legal purpose. ... And, as long as it does not exclude from citizenship, those persons who are undoubtedly among 'the people of the Commonwealth', nothing in the *Constitution* prevents the Parliament from declaring who are the citizens of the Commonwealth, which is simply another name for the Constitutional expression, 'people of the Commonwealth'.<sup>27</sup>

<sup>19</sup> See *Singh v Commonwealth* (2004) 222 CLR 322 (*'Singh'*); *Koroitamana v Commonwealth* (2006) 227 CLR 31.

<sup>20</sup> See *Singh* (2004) 222 CLR 322; *Koroitamana v Commonwealth* (2006) 227 CLR 31.

<sup>21</sup> In particular, Justices McHugh, Kirby and Callinan. On Justice McHugh, see Elisa Arcioni, 'That Vague but Powerful Abstraction: The Concept of "the People" in the *Constitution*' (Paper presented at the 2009 Constitutional Law Conference, Sydney, 20 February 2009). On Justice Kirby, see Kim Rubenstein and Niamh Lenagh-Maguire, 'Citizenship Law' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Lawbook, 2009) 105. Justice Gaudron appears also to have envisaged limits on the extent to which the Parliament can alter the incidents of citizenship: see Kim Rubenstein, 'Meanings of Membership: Mary Gaudron's Contributions to Australian Citizenship' (2004) 15 *Public Law Review* 305.

<sup>22</sup> See *Singh* (2004) 222 CLR 322, 433 [317], 437 [322].

<sup>23</sup> *Ibid* 380.

<sup>24</sup> (2005) 80 ALJR 125. In *Roach*, Gleeson CJ cited *Hwang v Commonwealth* in support of the proposition that '[t]he concept of citizenship has itself evolved in Australian law', although his Honour did not elaborate this point further: see (2007) 233 CLR 162, 177 [12].

<sup>25</sup> *Hwang v Commonwealth* (2005) 80 ALJR 125, 128 [11] (McHugh J).

<sup>26</sup> *Ibid* 130 [17].

<sup>27</sup> *Ibid* 130 [18].

Justice Kirby articulated his views on constitutional citizenship (using the term ‘constitutional nationality’) most fully in *Koroitamana v Commonwealth*.<sup>28</sup> His Honour distinguished between statutory citizenship and ‘the constitutional status of nationality.’<sup>29</sup> The latter was said to be ‘reflected expressly’ in provisions referring to ‘the people’, ‘electors’, ‘subjects of the Queen’, and in s 44(i), which disqualifies from Parliament any ‘subject or citizen of a foreign power’.<sup>30</sup>

The commentators who favour constitutional citizenship as a limitation on power<sup>31</sup> have fixed on the textual references to ‘the people’ (and similar terms),<sup>32</sup> the proposition that the *Constitution* is binding because of its acceptance by the people,<sup>33</sup> and the observation that a constitution assumes a constitutional community.<sup>34</sup> In contrast, others have doubted whether the terms ‘the people’, ‘the electors’ and ‘subjects’ can ever mean ‘citizen’ primarily on the basis that ‘citizen’ connotes a rights-bearing status whereas the others do not.<sup>35</sup> They have also doubted whether citizenship can be implied given that it was deliberately left out during the Convention Debates. Gaudron J’s statement that citizenship is ‘entirely statutory, originating as recently as 1948’ and that ‘it is not a concept which is constitutionally necessary’<sup>36</sup> has been used to support this position, and

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<sup>28</sup> (2006) 227 CLR 31.

<sup>29</sup> *Ibid* 47 [56] (emphasis in original).

<sup>30</sup> *Ibid* 47–8 [56].

<sup>31</sup> Professor Helen Irving has recently argued that constitutional citizenship can be discerned not as a limitation on power but as the space left over once the proper scope of the immigration and aliens powers is observed. Only certain people can be deported as an immigrant or an alien, and all others are thus in a sense constitutional citizens with a right of abode in Australia. See Irving, ‘Still Call Australia Home’, above n 2.

<sup>32</sup> See, eg, Genevieve Ebbeck, ‘A Constitutional Concept of Australian Citizenship’ (2004) 25 *Adelaide Law Review* 137; Daniel Guttman, ‘Before the High Court: *Roach v Commonwealth*: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?’ (2007) 29 *Sydney Law Review* 297, 302–4; Jeremy Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323, 345. See also Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2010) 27.

<sup>33</sup> That the authority of the *Constitution* rests on its acceptance by the people, see, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); G J Lindell, ‘Why Is Australia’s *Constitution* Binding? — The Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29. That popular sovereignty might support a concept of constitutional citizenship, see, eg, Ebbeck, above n 32, 140; Arcioni, above n 21, 5. That popular sovereignty might support citizenship rights, see, eg, Leslie Zines, ‘The Sovereignty of the People’ in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91, 100–1.

<sup>34</sup> See Ebbeck, above n 32, 138, 140. See also Saunders, *The Constitution of Australia*, above n 32, 27.

<sup>35</sup> See Greg Taylor, ‘Citizenship Rights and the Australian Constitution’ (2001) 12 *Public Law Review* 205, 209–10.

<sup>36</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 54 (Gaudron J) (‘Chu Kheng Lim’). See, eg, *ibid* 211; Rubenstein,

it also draws considerable strength from the High Court's direction that terms can only be implied from the 'text and structure'<sup>37</sup> of the *Constitution*. The *Constitution* does not use the term Australian citizen, and its structure, as illuminated by the Convention Debates, focuses on the institutions of government rather than the members of the body politic.

Yet the arguments against constitutional citizenship are contestable. The argument that the term 'citizen' is more evocative of rights than 'subject' or 'people' assumes that only citizens can bear rights. Yet there is no reason why 'people' and 'subjects' cannot have rights and protections. The principle of legality, which requires that the legislature expressly face up to the abrogation of fundamental common law rights and protections,<sup>38</sup> tends to suggest that there is no necessary illogicality in saying that subjects have rights and protections.<sup>39</sup> All three terms (people, subject and citizen) are simply variations on a theme of membership or community. Moreover, reliance on the deliberate omission of citizenship by the framers incorrectly assumes that the rejection of citizenship entails a rejection of any concept of membership. This false assumption also animates reliance upon Gaudron J's statement in *Chu Kheng Lim*. The reason why citizenship in its statutory iteration is unnecessary may well be because Australian membership (which for convenience may be called constitutional citizenship) already existed within the *Constitution*. Indeed, the full passage from *Chu Kheng Lim* suggests as much. The conclusion that Gaudron J draws from citizenship's statutory basis is that 'it cannot control the meaning of "alien"'.<sup>40</sup> Finally, to the extent that the argument against constitutional citizenship depends on the 'text and structure' of the *Constitution*, that argument must be reassessed in the light of *Roach* and *Rowe*.

### B *Limitations on the Franchise: Roach and Rowe*

A majority in both *Roach* and *Rowe* concluded that the words 'chosen by the people' guaranteed a right to vote subject only to disqualifications made for a substantial reason, and that what constitutes a 'substantial reason' has changed

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*Australian Citizenship Law*, above n 8, 257. But see more recently Kim Rubenstein and Niamh Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, 2011) 143, 144–5.

<sup>37</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>38</sup> See *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ). See generally James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008).

<sup>39</sup> The analogy to the principle of legality cannot be pressed too far, given the uncertainty that surrounds the process by which rights become 'fundamental' for the purposes of that principle. Whereas rights associated with citizenship may be viewed as having their conceptual basis in membership of the community, the conceptual basis for characterising those rights held by subjects and protected by the principle of legality is unclear. See Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 456–9.

<sup>40</sup> *Chu Kheng Lim* (1992) 176 CLR 1, 54.

since Federation.<sup>41</sup> This conclusion recognised some change in the meaning of the *Constitution*, and can be contrasted with originalist approaches to interpretation that give primacy to the meaning of the text as it stood at Federation. The question is whether the majority's reasoning can be applied to overcome the primarily originalist arguments against a constitutional concept of citizenship. To answer that question, it is necessary to consider whether a general interpretative approach can be extracted from *Roach* and *Rowe*.

In *Roach*, the plurality asserted that 'the *Constitution* makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution.'<sup>42</sup> Professor Jeffrey Goldsworthy has complained that their Honours 'made no attempt to explain the nature of this evolutionary process, or why other constitutional expressions do not also have an "evolutionary" meaning.'<sup>43</sup> Their Honours simply cited a passage from Gummow J's judgment in *McGinty v Western Australia* ('*McGinty*')<sup>44</sup> and another case quoting the same.<sup>45</sup> These citations certainly do not explain why there are limits upon the legislature's capacity to restrict the franchise, which seems to be the point of Goldsworthy's criticism. Gummow J referred to the evolution of representative government *at the option* of the legislature; that is, his Honour was discussing legislative power rather than any restriction upon power. However, the best reading of the plurality is that they cited *McGinty* for exactly that proposition — that the legislature has the *power* to develop the franchise. Their Honours sourced *restrictions* upon that power elsewhere. They stated that '[v]oting in elections for the Parliament lies at the very heart of the system of government for which the *Constitution* provides'.<sup>46</sup> It is a 'central concept'.<sup>47</sup> They continued:

representative government as that notion is understood in the Australian constitutional context comprehends not only the bringing of concerns and grievances to the attention of legislators but also the presence of a voice in the selection of those legislators. Further, in the federal system established and maintained by the *Constitution*, the exercise of the franchise is the means by which those living under that system of government participate in the selection of both legislative chambers, as one of the people of the

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<sup>41</sup> This article uses the term 'right to vote' for convenience. Whether or not this 'right' is properly to be characterised as a personal right or as a limited freedom from legislative restriction is unimportant for present purposes.

<sup>42</sup> (2007) 233 CLR 162, 186–7 [45] (Gummow, Kirby and Crennan JJ).

<sup>43</sup> Jeffrey Goldsworthy, 'Original Meanings and Contemporary Understandings in Constitutional Interpretation' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 245, 268 (citations omitted).

<sup>44</sup> See *Roach* (2007) 233 CLR 162, 186–7 [45] (Gummow, Kirby and Crennan JJ), citing *McGinty* (1996) 186 CLR 140, 279–80 (Gummow J).

<sup>45</sup> (2004) 220 CLR 181, 213–14 [78] (McHugh J), quoting *McGinty* (1996) 186 CLR 140, 279–80 (Gummow J).

<sup>46</sup> *Roach* (2007) 233 CLR 162, 198 [81] (Gummow, Kirby and Crennan JJ).

<sup>47</sup> *Ibid.*

relevant State and as one of the people of the Commonwealth. In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic.<sup>48</sup>

Therefore, the restriction upon the legislature's power to tamper with the franchise was said to inhere in the system of representative government itself. Their reference to a 'constitutional bedrock'<sup>49</sup> suggests that this restriction is akin to an assumption upon which the *Constitution* is based.<sup>50</sup> To then apply this constitutional restriction on power to the present facts, their Honours relied on the history of disenfranchisement at Federation. The core of this reasoning is thus not 'evolutionary', at least as that term is used in contradistinction to originalism. Instead, restrictions on Parliament's ability to disenfranchise voters were sourced in an assumption or bedrock of the constitutional system, and colonial history was used to give determinate meaning to that assumption.<sup>51</sup>

Gleeson CJ's reasoning is more evolutionary in orientation and so presents itself as a larger target for originalist criticism. First, he approved McTiernan and Jacobs JJ's statement in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* ('*McKinlay*') that 'the long established universal adult suffrage may now be recognised as a fact'.<sup>52</sup> According to Gleeson CJ, 'fact' refers to 'an historical development of constitutional significance of the same kind as the developments considered in *Sue v Hill*'.<sup>53</sup> Gleeson CJ then analogised from *Sue v Hill*, where it was said that the concept of 'foreign power' fell to be applied to different circumstances at different times, to the present case and the meaning of 'chosen by the people of the Commonwealth'. With respect, his Honour's reliance upon *Sue v Hill* is unsatisfactory. As Professor Leslie Zines has observed, *Sue v Hill* involved a change in external facts, whereas *Roach* simply involved 'a change in our perception and values as to what "the people" encompasses'.<sup>54</sup> And even accepting that what is and what is not a 'fact' is contestable, *Sue v Hill* is distinguishable in so far as there was much more evidence of a change in circumstances in that case than there was in *Roach*. In *Roach*, Gleeson CJ only referred specifically to the 'legislative history' of the statutory franchise in Australia.<sup>55</sup> Secondly, Gleeson CJ

<sup>48</sup> Ibid 198–9 [83].

<sup>49</sup> Ibid 198 [82].

<sup>50</sup> See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

<sup>51</sup> See also Adrienne Stone, 'Comparativism in Constitutional Interpretation' [2009] *New Zealand Law Review* 45, 67–8.

<sup>52</sup> (1975) 135 CLR 1, 36.

<sup>53</sup> *Roach* (2007) 233 CLR 162, 174 [7]. See *Sue v Hill* (1999) 199 CLR 462.

<sup>54</sup> Leslie Zines, 'Chief Justice Gleeson and the *Constitution*' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 269, 273. See also Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 562. Cf Patrick Emerton, 'Political Freedoms and Entitlements in the Australian Constitution — An Example of Referential Intentions Yielding Unintended Legal Consequences' (2010) 38 *Federal Law Review* 169, 189–90, 198–9.

<sup>55</sup> *Roach* (2007) 233 CLR 162, 174 [7].

cited Gummow J's statement in *McGinty* that whether a difference in voting power revealed 'gross disproportion' 'is to be determined by reference to the particular stage which then has been reached in the evolution of representative government.'<sup>56</sup> This citation does not progress matters far, because Gummow J was simply agreeing with McTiernan and Jacobs JJ in *McKinlay*, and elsewhere in his judgment Gummow J was clearly concerned with the power of the legislature to develop the franchise rather than any restriction upon that power.

Although Gleeson CJ's evolutionary justifications are problematic, his Honour also appeared to base his conclusion on the additional ground that the right to vote inheres in Australia's constitutional system:

Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.<sup>57</sup>

In *Rowe*, French CJ explicitly adopted an evolutionary approach. His Honour quoted the passages from Gleeson CJ's judgment discussed above, and added that implicit in ss 8, 30 and 51(xxxvi) 'was the possibility that the constitutional concept would acquire, as it did, a more democratic content than existed at Federation.'<sup>58</sup> However, those provisions envisage the legislative *power* to develop the franchise rather than any *restriction* upon power. Keeping this distinction in mind, French CJ's conclusion does not necessarily follow: 'That content, being constitutional in character, although it may be subject to adjustment from time to time, cannot now be diminished.'<sup>59</sup> If this were correct as a general proposition, it might be arguable that Parliament could not achieve a repeal of legislation intended to benefit indigenous people, as upheld in *Kartinyeri v Commonwealth* ('*Kartinyeri*').<sup>60</sup>

Gummow and Bell JJ noted that Quick and Garran's emphasis 'upon the progressive instincts and tendencies of modern political thought retains deep significance for an understanding of the text and structure of the *Constitution*.'<sup>61</sup> They reasoned that one such 'traditional conception' is the rule of law, which 'posits legality as an essential presupposition for political liberty and the involvement of electors in the enactment of law.'<sup>62</sup> The framers of the *Constitution* had expected that these progressive instincts 'would animate members of legislative

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<sup>56</sup> *McGinty* (1996) 186 CLR 140, 286–7.

<sup>57</sup> *Roach* (2007) 233 CLR 162, 174 [7] (citations omitted).

<sup>58</sup> *Rowe* (2010) 243 CLR 1, 18 [18].

<sup>59</sup> *Ibid* 18 [18].

<sup>60</sup> (1998) 195 CLR 337.

<sup>61</sup> *Rowe* (2010) 85 ALJR 213, 238 [119], quoting John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 418.

<sup>62</sup> *Rowe* (2010) 243 CLR 1, 47 [120].

chambers which were chosen by the people. By this means the body politic would embrace the popular will and bind it to the processes of legislative and executive decision making.<sup>63</sup> Their Honours also agreed with the reasons of Crennan J, and ultimately her conclusion that ‘the term “chosen by the people” had come to signify the share of individual citizens in political power by the means of a democratic franchise.’<sup>64</sup>

Crennan J quoted Isaacs J’s statement that ‘in interpreting the *Australian Constitution*, [one should have regard to] every fundamental constitutional doctrine existing and fully recognised at the time the *Constitution* was passed’.<sup>65</sup> Her examination of the British history of voting pre-Federation, the electoral history in the colonies before Federation, the Convention Debates and contemporary commentary revealed that in 1900, one such doctrine was the distinction between oligarchy and democracy and a firm preference for the latter. Sections 7 and 24 therefore have always ‘constrain[ed] the Parliament from instituting a franchise which will result in an oligarchic representative government and mandate[d] a franchise which will result in a democratic representative government’.<sup>66</sup> Moreover, ‘[w]hat is sufficient to constitute democratic representative government has changed over time, as conceptions of democracy have changed, to require a fully inclusive franchise’.<sup>67</sup> Her Honour concluded that ‘[t]o recognise that ss 7 and 24 mandate a democratic franchise ... is to recognise the embedding of the right to vote’ in the *Constitution*.<sup>68</sup>

Gummow and Bell JJ and Crennan J go to great lengths to explain how their specific formulation of the right to vote exists now when it did not do so at Federation. Their reasoning can be broken down into four steps. First, the *Constitution* must be interpreted in the light of fundamental constitutional doctrines existing at the time of Federation. Secondly, such doctrines include a democratic franchise and the rule of law (understood to mean the people voting for representatives who then enact legislation). Thirdly, the content of these fundamental doctrines falls to be determined at the date of the litigation. Fourthly, the content of those doctrines has always included a right to vote, but the restrictions that can be placed on that right are more limited today than at Federation.

This reasoning differs from a purely evolutionary approach because it attempts to give the right to vote an historical basis. Their Honours relied on fundamental constitutional doctrines at Federation in order to determine the meaning of the constitutional phrase ‘directly chosen by the people’. Having identified the concepts (democratic franchise and the rule of law), their Honours kept the concepts constant

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<sup>63</sup> Ibid.

<sup>64</sup> Ibid 48 [121].

<sup>65</sup> Ibid 105 [324], quoting *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 411–12.

<sup>66</sup> *Rowe* (2010) 243 CLR 1, 281 [367] (Crennan J).

<sup>67</sup> Ibid 117 [367].

<sup>68</sup> Ibid 117 [368].

while recognising that the conceptions meeting the description of those concepts could change over time. Whether or not this explanation is really any different from a purely evolutionary approach,<sup>69</sup> it resonates with a number of interpretative techniques that are thought to allow for legitimate evolution in the meaning of constitutional terms while still remaining faithful to the text and intentions of the framers. These techniques include the distinctions between connotation and denotation, concepts and conceptions, and the essence and inessential elements of a term.<sup>70</sup> Their Honours' approach also finds academic support,<sup>71</sup> most recently in the work of Patrick Emerton.<sup>72</sup> His thesis is that speakers assume that their words refer to a particular kind of thing, and that the nature of the kinds of things at the end of these referential chains might change as modern facts change. Similarly, the plurality in *Roach* explicitly refers to an historical investigation into 'the common assumptions about the subject to which the chosen words might refer over time'.<sup>73</sup>

One way to assess their Honours' approach is to consider whether it blazes a new trail or whether it simply builds upon principles from earlier cases. Their Honours' chain of reasoning is better read in the second, more benign, fashion. The first step was foreshadowed in *Roach*, where the plurality considered colonial history 'to explain the common assumptions about the subject to which the chosen words might refer over time',<sup>74</sup> and in *South Australia v Totani* where French CJ applied this same interpretational approach.<sup>75</sup> It may be of course that these cases collectively represent a new direction in terms of how the Court justifies the use of historical materials in interpreting the *Constitution*. However, such a new direction does not appear to result in a break from the Court's usual historically attentive approach to constitutional interpretation. Fundamental constitutional doctrines are in a sense one historical source amongst several that can be used to interpret the *Constitution*. Additionally, the first step might also be regarded as explaining Dixon J's statement that the *Constitution* is 'framed in accordance with many traditional conceptions'.<sup>76</sup>

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<sup>69</sup> See Graeme Hill, "'Originalist" vs "Progressive" Interpretations of the Constitution — Does It Matter?' (2000) 11 *Public Law Review* 159.

<sup>70</sup> See Sir Anthony Mason, 'Justice Windeyer on the *Engineers Case*: Commentary on the Paper Delivered by Professor Jeffrey Goldsworthy, "Justice Windeyer on the *Engineers Case*", published in (2009) *Federal Law Review* 364' (2010) 12 *Constitutional Law and Policy Review* 41, 42.

<sup>71</sup> See Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323 ('evolutionary originalism'); Ronald Dworkin, *Freedom's Law* (Harvard University Press, 1996) (concept/conception); Michael Stokes, 'Contested Concepts, General Terms and Constitutional Evolution' (2007) 29 *Sydney Law Review* 683 (concept/conception). See also Mason, 'Justice Windeyer', above n 70.

<sup>72</sup> See Emerton, above n 54.

<sup>73</sup> (2007) 233 CLR 162, 188–9 [53] (Gummow, Kirby and Crennan JJ) (emphasis added).

<sup>74</sup> *Ibid.*

<sup>75</sup> (2010) 242 CLR 1, 49 [72].

<sup>76</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

Shades of both the first and the second step appear in Gummow J's judgment in *McGinty*. His Honour stated that '[t]he architects of the Australian federation shared an expectation that the federal Parliament would embrace what were then advanced ideas of political representation.'<sup>77</sup> He discussed John Stuart Mill, whose concept of representative government revolved around institutions that 'had as their essence the placing of ultimate controlling power with the people, to be exercised by representatives of the people elected periodically in free elections'.<sup>78</sup> Although the views of any one scholar did not carry the day at Federation, Gummow J noted that the Convention Debates and later legislative debates on electoral laws 'manifest a familiarity on the part of significant figures in the federal movement' with these scholarly works.<sup>79</sup>

The third step, which essentially assimilates the constitutional expression to an 'always speaking' statute,<sup>80</sup> has a precursor in *Cheatle v The Queen*, at least on one interpretation of that case. The High Court held that at federation, an 'essential feature or requirement' of a 'jury' was that it be 'representative of the wider community'.<sup>81</sup> Whether a particular jury is sufficiently 'representative' will 'vary with contemporary standards and perceptions'.<sup>82</sup> Likewise, a democratic franchise and the rule of law require involvement by the people, and the extent of the involvement that is required will vary from time to time.

Finally, the fourth step — what constitutes a 'substantial reason' for disenfranchisement — builds upon the case law concerning the legitimate limits on the implied freedom of political communication. In *Roach*, the plurality expressly observed that '[t]he affinity to what is called the second question in *Lange* will be apparent'.<sup>83</sup>

There are, however, some difficulties with this reasoning, such that one must not simply assume that it will be taken up in later cases. First, the approach comes perilously close to incorporating into the *Constitution* extra-constitutional theories that do not find explicit reflection in its text and structure.<sup>84</sup> This criticism is

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<sup>77</sup> *McGinty* (1996) 186 CLR 140, 271.

<sup>78</sup> *Ibid* 273.

<sup>79</sup> *Ibid*.

<sup>80</sup> See Sir Anthony Mason, 'Constitutional Advancement — Some Reflections' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 283, 289. On 'always speaking' statutes, see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 123–4.

<sup>81</sup> *Cheatle v The Queen* (1993) 177 CLR 541, 560 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>82</sup> *Ibid*.

<sup>83</sup> *Roach* (2007) 233 CLR 162, 199 [85] (Gummow, Kirby and Crennan JJ) (citations omitted).

<sup>84</sup> A point that Crennan J appears to disclaim: see *Rowe* (2010) 243 CLR 1, 112 [347].

diverted if one accepts that such incorporation is inevitable,<sup>85</sup> but the High Court has steadfastly distanced itself from such extra-constitutional theorising.<sup>86</sup> Secondly, and relatedly, the fundamental constitutional doctrines identified at step two may have been known to the framers, but it is equally plausible to conclude that the framers did not give effect to them if they are not otherwise evident in the *Constitution*.<sup>87</sup> It becomes a matter of judicial impression whether a doctrine is sufficiently evident as to be an assumption underpinning the *Constitution* (and thus relevant to constitutional interpretation) or whether it is merely an ‘unexpressed assumption[] upon which the framers of the instrument supposedly proceeded’<sup>88</sup> (and thus irrelevant to constitutional interpretation). Thirdly, it might prove to be difficult to distinguish ‘fundamental constitutional doctrines’ from non-fundamental constitutional doctrines or fundamental non-constitutional doctrines, if such distinctions even exist. The difficulty in drawing distinctions — between legitimate and illegitimate assumptions and between fundamental constitutional doctrines and other doctrines — is not itself a reason for rejecting the interpretational method completely. However, it prompts caution before extracting a more general interpretative approach from *Rowe* to be applied in future cases.

### C *Constitutional Citizenship after Roach and Rowe*

Although not without their analytical difficulties, which await future clarification, *Roach* and *Rowe* clearly establish three rationales for a right to vote where such a right did not exist at federation. First, according to Gleeson CJ and French CJ, the meaning of representative government has evolved to include a right to vote, as revealed by ‘[d]urable legislative development[s]’.<sup>89</sup> Secondly, according to the plurality in *Roach*, the right to vote is an assumption or constitutional bedrock beneath the very constitutional system itself. Thirdly, according to Gummow and Bell JJ and Crennan J in *Rowe*, the constitutional words embody a democratic representative government and the rule of law. On both the second and third approaches, applying the constitutional terms today, it can be said that there is a right to vote subject to certain limited restrictions. These rationales breathe new life into the argument for a constitutional concept of citizenship.

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<sup>85</sup> See Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668; Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28 *University of New South Wales Law Journal* 842.

<sup>86</sup> See, eg, *McGinty* (1996) 186 CLR 140, 231–2 (McHugh J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ).

<sup>87</sup> See *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 130 [419] (Kiefel J).

<sup>88</sup> *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J). See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

<sup>89</sup> *Rowe* (2010) 243 CLR 1, 18 [19] (French CJ); *Roach* (2007) 233 CLR 162, 174 [7] (Gleeson CJ).

First, the evolution of statutory citizenship and the proliferation of legislation that differentiates between citizens and non-citizens may represent ‘[d]urable legislative development’ of a constitutional concept of citizenship.<sup>90</sup> Laws providing for local naturalisation or endenisation existed as early as 1828.<sup>91</sup> After federation, the first statute to deal with nationality was the *Naturalization Act 1903* (Cth). Naturalisation under that Act conveyed a de facto Australian status notwithstanding that the Act was framed in terms of ‘British subjects’ — in the *Markwald* litigation it was held that a person naturalised in Australia was an alien in the United Kingdom.<sup>92</sup> Australian citizenship was finally established by the *Nationality and Citizenship Act 1948* (Cth) and continues to exist today pursuant to the *Australian Citizenship Act 2007* (Cth). A large body of other statutes have also picked up Australian citizenship in their operation.

This web of legislation demonstrates legislative development of citizenship in a general sense, but it is doubtful whether it is truly analogous to the legislative extension of the franchise relied upon by the Chief Justices in *Roach* and *Rowe*. Significantly, French CJ adopted durable legislative development as a touchstone because it was said to reflect ‘a persistent view by the elected representatives of the people of what the term “chosen by the people” requires.’<sup>93</sup> The citizenship legislation, and legislation using citizenship as a criterion of operation, cannot as easily be regarded as explaining what any particular constitutional term means or requires. Indeed, statutory citizenship would be a particularly inapt candidate for guiding the meaning of constitutional terms. Statutory citizenship is a very minimal construct. Although the Act’s preamble refers to Australian citizenship as ‘a common bond, involving reciprocal rights and obligations’, the legislation is not intended to, nor does it, assign rights or duties by its own operation. Its only purpose is to define who citizens are for the purposes of other legislation.<sup>94</sup>

The second and third rationales provide more stable ground for a constitutional concept of citizenship. The franchise, which is ‘constitutional bedrock’, itself assumes the existence of a community of people able to vote. Accordingly, the existence of a constitutional people or community is also an assumption underpinning the *Constitution*. Alternatively, both the democracy argument and the rule of law argument in *Rowe* clear the way for a constitutional concept of citizenship. A democratic franchise and the rule of law (understood to mean the people voting for representatives who then enact legislation) not only assume a right to vote but also, again, the existence of a community of people. This constitutional bedrock of membership can be referred to in any number of ways, be it a constitutional people, constitutional membership or constitutional citizenship.

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<sup>90</sup> See generally Rubenstein, *Australian Citizenship Law*, above n 8, ch 5.

<sup>91</sup> See Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (Stevens & Sons, 1957) 523–9.

<sup>92</sup> *R v Francis; Ex parte Markwald* [1918] 1 KB 617; *Markwald v A-G (UK)* [1920] 1 Ch 348. See generally *ibid* 530.

<sup>93</sup> *Rowe* (2010) 243 CLR 1, 18 [19] (emphasis added).

<sup>94</sup> Sir Ninian Stephen, ‘Australian Citizenship: Past, Present and Future’ (2000) 26 *Monash University Law Review* 333, 336.

It is thoroughly unsurprising that a constitution should envisage a community to which it applies. The immediate and more practical question raised is whether any rights attach to this constitutional citizenship. One way to answer that question is to examine whether any ‘fundamental constitutional doctrine existing and fully recognised’ at Federation provides for such rights. One candidate might be the common law principle that the Crown owes its subjects a ‘duty of protection’ in return for their allegiance, but the content of that duty was at Federation, and remains today, nebulous.<sup>95</sup> The catalogue of rights protected by the principle of legality, most of which can be traced to historical legal sources,<sup>96</sup> might help to identify such fundamental doctrines, but this also is unlikely. Constitutionalising that catalogue would sit uneasily with the very premise of the principle of legality as it is presently understood in Australia, which is that the legislature *can* abrogate those rights so long as it does so expressly. More generally, reasoning from ‘fundamental constitutional doctrine[s]’ in this context appears to be the same as asking whether rights are so deeply rooted in the constitutional system and common law that they cannot be abrogated by the legislature, a question that remains unresolved to date.<sup>97</sup>

A more orthodox way to answer this question would be to examine the text and structure of the *Constitution* to infuse constitutional citizenship with meaning and significance. On this approach, constitutional citizenship might anchor the implied freedom of political communication and the right to vote. However, it is difficult to identify any other rights that could spring forth, because the *Constitution* has so little to do with personal rights and protections.<sup>98</sup> Identifying a constitutional concept of citizenship might thus prove to be an anti-climax for those aspiring to a comprehensive catalogue of rights. The role of constitutional citizenship may primarily be to shore up and rationalise the foundations of other legal doctrines.

If a constitutional concept of citizenship is only minimally effective in advancing our understanding of citizenship as a basis for rights, a question remains whether the concept might shed light on what it means to be an Australian constitutional citizen. *Roach* and *Rowe* illuminate this identity dimension of citizenship in the course of considering whether there was a ‘substantial reason’ for the impact of the impugned legislation on the franchise. The majority in *Roach* linked ‘the people’ who are entitled to vote to those who manifest a sense of civic responsibility.<sup>99</sup> The class of persons designated by ‘the people’ ordinarily includes those of any

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<sup>95</sup> See Christopher Tran, ‘Revisiting Allegiance and Diplomatic Protection’ [2012] *Public Law* 197.

<sup>96</sup> See Meagher, above n 39, 456–8.

<sup>97</sup> See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; *South Australia v Totani* (2010) 242 CLR 1, 29 [31] (French CJ); *Momcilovic v The Queen* (2011) 85 AJLR 957, 1089 [562] (Crennan and Kiefel JJ). See also George Winterton, ‘Justice Kirby’s Coda in Durham’ (2002) 13 *Public Law Review* 165.

<sup>98</sup> For the same conclusion, see Taylor, above n 35, 210; Kirk, above n 32, 345.

<sup>99</sup> See especially *Roach* (2007) 233 CLR 162, 175 [8], 176–7 [12] (Gleeson CJ), 199 [84]–[85], 202 [95] (Gummow, Kirby and Crennan JJ). See also Emerton, above n 54, 199.

religious belief,<sup>100</sup> those who leave their legal obligations to the last moment,<sup>101</sup> and those of any race,<sup>102</sup> and it does not necessarily exclude those who are imprisoned.<sup>103</sup> These insights shed only limited light on what it means to be a member of the Australian constitutional community because the Court was constrained to decide only the specific issues raised in the cases before it. Rosenfeld and Jacobsohn's respective accounts of constitutional identity, considered next, offer a fuller framework to consider the identity dimension of citizenship.

### III ROSENFELD AND JACOBSON'S ACCOUNTS OF CONSTITUTIONAL IDENTITY

Concrete events and issues such as Australia's treatment of asylum seekers, the national human rights consultation, and proposals for an Australian republic and the recognition of indigenous people in the *Constitution* can focus attention on what it means to be a member of the Australian constitutional community. They also raise a broader question about the nature of Australia's constitutional system. This issue has attracted sporadic academic attention, and the terminology used varies between authors and contexts.<sup>104</sup>

'Constitutional identity', as developed by Jacobsohn and Rosenfeld, can shed light on these issues. Jacobsohn treats 'constitutional identity' as the features and attributes characteristic of a particular constitutional system, whereas Rosenfeld's focus is narrower, taking the identity of the individuals bound by the system as his core concern. Their work does not directly engage with what it means to be a citizen in terms of the standard questions of who is a citizen and what rights and obligations do they have. Instead, their views of constitutional identity go beyond these concerns, although the identity of the individuals within the system is a central concern of Rosenfeld's account. Their work is particularly useful for present purposes because they address more obscure questions about *why* identities change and *how* identity is constructed. The following sections are devoted to explaining their separate accounts of constitutional identity in detail. Jacobsohn's work is a useful starting point before launching into Rosenfeld's more particular version that focuses on the individuals within constitutional systems.

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<sup>100</sup> See *Roach* (2007) 233 CLR 162, 174 [8] (Gleeson CJ).

<sup>101</sup> See *Rowe* (2010) 243 CLR 1.

<sup>102</sup> See *Kartinyeri* (1998) 195 CLR 337, 366 [40] (Gaudron J).

<sup>103</sup> See *Roach* (2007) 233 CLR 162.

<sup>104</sup> See, eg, Jeremy Webber, 'Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260 (symbolic/functional); Stone, 'Comparativism in Constitutional Interpretation', above n 51 (localism); Cheryl Saunders, 'Legacies of Luck: Australia's Constitution and National Identity in the 1990s' (1999) 15 *South African Journal on Human Rights* 328 (national identity).

### A Jacobsohn's Constitutional Identity

According to Jacobsohn, constitutional identity is the 'blend of characteristics revealing what is particular to the constitutional culture'.<sup>105</sup> Just as we know that an object is a table when that object has certain attributes that identify it as a table, we know a constitution, and a constitutional identity, when we see its defining characteristics.<sup>106</sup> Those characteristics can be sourced from constitutional and extra-constitutional principles,<sup>107</sup> but the difficulty is to identify which principles are to take priority in the event of disagreement. As Jeremy Waldron and others remind us,<sup>108</sup> there is pervasive disagreement within society. Jacobsohn sits within this tradition. He argues that all constitutional orders (and also constitutional identity) are riven with disharmony and dissonance.<sup>109</sup> Consequently, constitutional identity is dynamic rather than static.<sup>110</sup> Dynamism can manifest at three 'thematic focal points' in particular.<sup>111</sup> First, the 'aspirational content' of a constitutional system<sup>112</sup> may be contested. Secondly, constitutional identity will develop through interactions between actors within the legal system and between the legal system and extra-legal domains.<sup>113</sup> Thirdly, general goals will have to be balanced with the 'particularistic commitments of local traditions and practices'.<sup>114</sup>

Jacobsohn draws upon Edmund Burke and Alasdair MacIntyre to understand the limits upon this dynamism. Burke stated that a nation is 'an idea of continuity',<sup>115</sup> and MacIntyre observed that '[w]e enter upon a stage which we did not design and we find ourselves part of an action that was not of our making'.<sup>116</sup> Thus, for Jacobsohn, the change brought about by disharmony is bounded by historical identities and cannot completely be cut adrift from them.<sup>117</sup> 'the past cannot be excised from the developmental path of constitutional identity, but it need not establish its precise direction'.<sup>118</sup>

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<sup>105</sup> Jacobsohn, above n 6, 22.

<sup>106</sup> See *ibid* 5–7.

<sup>107</sup> See *ibid* 13.

<sup>108</sup> See Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999).

<sup>109</sup> See Jacobsohn, above n 6, 15, 86–7.

<sup>110</sup> See *ibid* 88.

<sup>111</sup> *Ibid* 103.

<sup>112</sup> See *ibid* 104–17.

<sup>113</sup> *Ibid* 107–12.

<sup>114</sup> *Ibid* 113. See further at 112–17.

<sup>115</sup> Edmund Burke, 'Speech on a Motion Made in the House of Commons, the 7th of May 1782, for a Committee to Inquire into the State of the Representation of the Commons in Parliament' in David Bromwich (ed), *On Empire, Liberty, and Reform* (Yale University Press, 2000) 274, quoted in Jacobsohn, above n 6, 96.

<sup>116</sup> Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame University Press, 1981) 199, quoted in Jacobsohn, above n 6, 93.

<sup>117</sup> See, eg, Jacobsohn, above n 6, 81, 97, 103–4, 111.

<sup>118</sup> *Ibid* 103–4.

Within these limits, Jacobsohn identifies two tools used to construct identity: formal constitutional amendments, and the use of foreign precedents in constitutional interpretation. As to the former, Jacobsohn concludes that an amendment cannot radically alter constitutional identity lest it fracture the link to the past that he considers to be a necessary element of constitutional identity.<sup>119</sup> It is not, however, possible to say definitively what is so important as to be immune from amendment.<sup>120</sup> As to the latter, Jacobsohn argues that comparativism is not objectionable in principle. Rather, the use of foreign cases should be assessed on a case-by-case basis, paying close attention to the broad constitutional identity of both the target and the comparator jurisdiction to ensure sufficient commonality between them to justify the use to be made of those foreign cases. This argument is not new, but Jacobsohn usefully highlights the depth and breadth of understanding needed before using foreign cases to assist in constitutional interpretation.

Jacobsohn's work emphasises that all constitutional disputes (in the courts and elsewhere in society) are connected to a broader vision of the constitutional system. This observation may reflect what many already thought to be the case. Jacobsohn's tools for modifying identity — amendments and the use of foreign precedents — are also familiar. His original contribution is tracking how constitutional identity has been used in a number of less-discussed jurisdictions to answer particular doctrinal issues, for example the possibility of unconstitutional constitutional amendments and the use of comparative constitutional law. By doing so, he demonstrates that constitutional identity has relevance to most if not all constitutional systems. What his account lacks, and what Rosenfeld provides, is a sophisticated account of *how* identity is constructed.

### B Rosenfeld's Identity of the Constitutional Subject

Rosenfeld's starting point is Benedict Anderson's well-known thesis that nations are 'imagined communities' of strangers most of whom will never meet each other.<sup>121</sup> A constitutional order is a 'collectivity of strangers' that 'must also construct an "imagined community"'. That latter community produces a constitutional identity that though related to, must remain distinct from, its corresponding national identity.<sup>122</sup> Constitutional identity is particularly important for Rosenfeld because of his pluralist outlook.<sup>123</sup> In his view, '[c]onstitutions and constitutionalism only make sense under conditions of pluralism.'<sup>124</sup> On the one hand, an entirely homogenous society would not require constitutional order because there would

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<sup>119</sup> See *ibid* 77.

<sup>120</sup> *Ibid* 332.

<sup>121</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).

<sup>122</sup> Rosenfeld, above n 6, 18.

<sup>123</sup> See also Neil Walker, 'Rosenfeld's Plural Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 677.

<sup>124</sup> Rosenfeld, above n 6, 21.

be no disagreement.<sup>125</sup> On the other hand, modern societies are characterised not only by communal pluralism (ethnic, religious and linguistic divides) but by individualistic pluralism (reasonable disagreement between individuals).<sup>126</sup> Federal systems create additional space for disagreement between national and sub-national perspectives. Construction of a constitutional identity, built on ‘projections of sameness and images of selfhood’,<sup>127</sup> is a necessary glue to bind together these different individuals to establish an imagined constitutional community. The constitutional subject (and its identity) is thus a discourse constructed by fragments of constitutional norms, rather than any particular personification.<sup>128</sup> That is, it is not possible, or at least not profitable, to equate the constitutional subject with any particular group of people, be they the constitution makers, interpreters, or those bound by the constitutional order.<sup>129</sup>

Like Jacobsohn, Rosenfeld conceives of constitutional identity as dynamic.<sup>130</sup> It is dynamic because communal and individual identities, and past, present and future identities, will always be in conflict. Those identities must be balanced to produce a constitutional subject with an identity that can bind together the community of strangers. This dynamism manifests at particular moments. A constitutional identity is constructed when a constitution is made. It is then deconstructed by judicial decisions,<sup>131</sup> and reconstructed to assimilate those decisions.<sup>132</sup> Like Jacobsohn, Rosenfeld also identifies a number of limits upon this dynamism. First, constitutional identity must remain different from other identities (including national identity). Otherwise, it would not be possible for the strangers in the constitutional order to come together to form that same order. Secondly, and on the other hand, the constitutional identity must draw on these extra-constitutional identities. Constitutional identity cannot ‘veer so far off from [those other identities] as to become non-viable and hence incapable of genuine implementation.’<sup>133</sup>

Within these boundaries, Rosenfeld identifies three particular tools for constructing constitutional identity, drawing on philosophical (Hegel) and psychoanalytical

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<sup>125</sup> Although a constitution may still be useful, rather than required, in such a society, in order to achieve other purposes, for example the creation of an authoritative rule notwithstanding the absence of disagreement upon the matter.

<sup>126</sup> See Rosenfeld, above n 6, 21.

<sup>127</sup> Ibid 27.

<sup>128</sup> See *ibid* 41.

<sup>129</sup> *Ibid*. See also Martin Loughlin and Neil Walker, ‘Introduction’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 1, 3.

<sup>130</sup> See Rosenfeld, above n 6, 33. See also Hans Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 9, 20–1, discussing the ‘questionability’ of collective selfhood.

<sup>131</sup> Rosenfeld, above n 6, 44.

<sup>132</sup> *Ibid* 41–5.

<sup>133</sup> *Ibid* 11. For the same conclusion from a different theoretical perspective, see Loughlin and Walker, above n 129, 2.

(Freud and Lacan) theories of subjecthood. These are negation, metaphor (condensation) and metonymy (displacement). Negation involves the rejection of other identities in order to create space for a constitutional identity.<sup>134</sup> Metaphor (in Freudian psychoanalysis, ‘condensation’) emphasises the similarities between the strangers within a constitutional order while ignoring their differences in order ‘to forge links of identity.’<sup>135</sup> An example of metaphor is the proposition that ‘the [United States] Constitution is colorblind’. This emphasises the shared humanity of different races while simultaneously disregarding any racial differences that might exist.<sup>136</sup> Metonymy has a strong and a weak form. At the weak end, it involves contextualisation to highlight differences.<sup>137</sup> Such contextualisation is necessary to give effect to Rosenfeld’s pluralist assumption that imbedded within any constitutional order is a state of disagreement and multiple selves. An example of contextualisation is the application of the right to equality, which in some jurisdictions might recognise that equality in fact requires differential treatment for some sectors of society.<sup>138</sup> At the strong end, metonymy becomes what Freud called ‘displacement’.<sup>139</sup> Freud gives the example of a person’s unconscious hatred of an uncle who uses a cane. Where it is taboo to hate the uncle, that hatred will be displaced to a hatred of canes. In terms of constitutional identity, certain aspects of the current identity may be too important to be confronted, and so contextualisation gives way to a complete focus upon a contiguous aspect as a substitute for the first aspect.<sup>140</sup> Rosenfeld gives the example of the United States Supreme Court’s decision in *Lynch v Donnelly*,<sup>141</sup> which held that a nativity scene display did not contravene the Establishment Clause of the *United States Constitution*. The Court likened the display to other commercial traditions that have come to be associated with Christmas but which are inherently secular.<sup>142</sup>

Of the three, negation is the central tool because it clears a space for constitutional identity to exist. However, the repudiation of other identities leaves a vacuum that must then be filled via the operation of metaphor and metonymy together in order to create a positive constitutional identity.<sup>143</sup> The latter tools must draw on the available materials to do so, thus reincorporating aspects of those very identities that were rejected through negation.<sup>144</sup> Whether particular elements become incorporated into constitutional identity depends to a large extent on Freud’s concept of ‘overdetermination’.<sup>145</sup> That is, an element is more likely to be incorporated where it can be supported through both metaphor and metonymy.

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<sup>134</sup> See Rosenfeld, above n 6, 46.

<sup>135</sup> Ibid 51.

<sup>136</sup> Ibid 53.

<sup>137</sup> See ibid 55.

<sup>138</sup> See ibid.

<sup>139</sup> See ibid 53–4.

<sup>140</sup> See ibid 56.

<sup>141</sup> 465 US 668 (1984).

<sup>142</sup> See Rosenfeld, above n 6, 57–8.

<sup>143</sup> See ibid 60.

<sup>144</sup> See ibid 63.

<sup>145</sup> See ibid 64–5.

### C *Summary of Constitutional Identity*

The different conceptions of constitutional identity advanced by Jacobsohn and Rosenfeld are compatible and mutually reinforcing. There are five main points to take away for present purposes.

First, a shared constitutional identity is both a commonplace and a necessary condition of any constitutional legal system, without which it would not be possible to bind together a population marked by differences and disharmony.

Secondly, that identity is not preordained but dynamic. This is important, because it downplays any tendency to venerate ‘constitutional identity’.

Thirdly, constitutional identity is bounded by certain limits. It must remain different from other identities within society, but it cannot be separated perfectly from them. Those identities include all past, present and future constitutional and extra-constitutional identities.

Fourthly, constitutional identity is created when the constitution is made, but it is liable to change with each constitutional amendment, extra-constitutional development, and judicial decision.

Fifthly, there are five primary tools for constructing, deconstructing and reconstructing constitutional identity. The bluntest and most obvious tool is a formal constitutional amendment. This tool might also enable constitutional identity to approach other identities, because, in many jurisdictions, constitutional amendments require the agreement of several different groups within society.<sup>146</sup> The second tool is a methodological one: the use of foreign case law in constitutional interpretation. This alters constitutional identity because identity is unique to a system. Therefore, using a comparator’s case law implicates the target’s own identity in much the same way that copying a friend’s mannerisms, no matter how similar they are to one’s own, affects one’s own identity. The last three tools — negation, metaphor and metonymy — are more subtle and must be discerned in the cases, because they will rarely be explicitly mentioned.

The concept of constitutional identity, particularly as explained by Rosenfeld, contributes to our understanding of constitutional systems because it focuses attention on *how* identity is created. It shifts our attention from the question ‘what are we’ to ‘who are we’.<sup>147</sup> The former can be answered by reference to objective criteria, whereas the latter is constructed, and can only be answered by reference to the tools used in the construction. The Australian scholarship has generally focused on the content of Australian constitutional identity. Such observations can be important for various purposes (for example, to decide whether it is appropriate

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<sup>146</sup> Equally, the involvement of many groups might result in a race to the bottom to achieve agreement and so not approximate any particular identity at all.

<sup>147</sup> See Lindahl, above n 130, 14–16.

to rely on the case law of another jurisdiction because its constitutional identity is similar to Australia's). However, a deeper understanding of citizenship as identity requires an investigation into how that identity came to be developed. Rosenfeld and Jacobsohn's work assists in that endeavour.

#### IV THE IDENTITY OF THE AUSTRALIAN CONSTITUTIONAL SUBJECT

This Part examines a small selection of High Court cases and constitutional issues to illustrate the insights of Rosenfeld and Jacobsohn's work for our understanding of citizenship and identity. The first pair of cases relates to the people of the territories. These cases provide straightforward examples of negation and metonymy in action. The third case concerns the race power and demonstrates a more complex interaction between negation, metaphor, metonymy and constitutional amendments. The analysis of these three cases highlights how the courts construct the identity of the constitutional subject. The final illustration focuses on the insights from constitutional identity for a broader legal issue — constitutional amendments — rather than examining the reasoning in a particular case. This survey is not comprehensive and in many ways it oversimplifies constitutional identity. Its purpose is only to provide concrete illustrations of that concept.

##### A *The People of the Territories*

In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* ('Ame'),<sup>148</sup> the High Court upheld legislation that stripped Papua New Guineans of their Australian citizenship upon the independence of Papua New Guinea.<sup>149</sup> The applicant was born in Papua at a time when it was administered by Australia, and he thus acquired statutory citizenship by birth. Under the *Migration Act 1958* (Cth), he was nevertheless required to obtain an entry permit to enter or reside in Australia. Threatened with deportation for overstaying his visa, the applicant claimed that he was not an 'alien' because he was an Australian statutory citizen, and that the Commonwealth lacked the power to unilaterally withdraw his statutory citizenship. The Court disagreed, unanimously concluding that the applicant (and others in his position) did not hold 'real' citizenship and that s 122 of the *Constitution* empowered the Commonwealth legislature to remove his Australian citizenship.<sup>150</sup>

One of the applicant's arguments was metaphoric in nature. He attempted to establish a commonality with the people of the internal territories by arguing that if

<sup>148</sup> (2005) 222 CLR 439.

<sup>149</sup> On Australian citizenship and Papua New Guinea, see generally Peter M McDermott, 'Australian Citizenship and the Independence of Papua New Guinea' (2009) 32 *University of New South Wales Law Journal* 50.

<sup>150</sup> In support of the Court's decision, see David Bennett, "'Dammit, Let 'Em Do It!'" The High Court and Constitutional Law: The 2005 Term' (2006) 29 *University of New South Wales Law Journal* 167, 169–70.

he could be stripped of citizenship then they too could lose their citizenship.<sup>151</sup> The Court rejected this argument. The Court emphasised that the external territories stand outside the constitutional community established by the *Constitution* (negation)<sup>152</sup> and that the external territories are different from the internal territories (metonymy).<sup>153</sup>

The rights of the people of the external territories arose again in *Bennett v Commonwealth* ('*Bennett*'),<sup>154</sup> where the High Court upheld the validity of legislation that would require those standing for election to the Legislative Assembly of Norfolk Island and those enrolling to vote to be Australian citizens. The plaintiffs conceded that the Commonwealth had no duty to provide for self-government for Norfolk Island, but they submitted that if the Commonwealth chose to do so (as it had in 1979), it could not pass a law that 'divide[d] the community by a criterion that has nothing to do with membership of that community'.<sup>155</sup> In their submission, Australian citizenship was such a criterion because many in the Norfolk Island community were not of Australian descent.

The plurality rejected the plaintiffs' submission. First, they rejected the existence of any Island community separate from the Australian constitutional community. Their Honours stated that '[h]owever distinct and separate the people, or some of the people, of the island may have wanted to be, for more than a century ... they have been linked, first to New South Wales, then to the Commonwealth'.<sup>156</sup> The first negation, then, is of any separate Norfolk Island identity. The plurality then rejected the plaintiffs' submission that the system of representative government established by the *Constitution* requires the Legislative Assembly to be chosen by the Territory's people. Their Honours cited *Ame* for the proposition that the *Constitution* 'do[es] not bind Australia to any particular form of relationship with all inhabitants of all external territories acquired by the Commonwealth'.<sup>157</sup> Therefore, the people of the external territories are not part of the constitutional community (and constitutional identity) delineated by the terms 'the people of the State[s]' and 'the people of the Commonwealth', except for the purposes of negating their identity as part of the permanent population of Norfolk Island. This reasoning — the people of Norfolk Island are not the constitutional 'people' — partially acknowledges their separate identity as Norfolk Islanders that was earlier negated, illustrating Rosenfeld's point that a positive identity can only be established by reintegrating elements of previously discarded identities.

The metonymic aspect of these cases — that the people of the external (as opposed to the internal) territories are not part of the 'people of the States' or the 'people of

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<sup>151</sup> See *Ame* (2005) 222 CLR 439 461–2 [47] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 478 [100] (Kirby J).

<sup>152</sup> *Ibid* 457 [30] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

<sup>153</sup> *Ibid* 478–9 [101]–[103] (Kirby J).

<sup>154</sup> (2007) 231 CLR 91.

<sup>155</sup> *Ibid* 107 [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>156</sup> *Ibid* 108 [34].

<sup>157</sup> *Ibid* 110 [40].

the Commonwealth’ — is important in terms of the possibility of a constitutional concept of citizenship. Metonymy in this instance involves diverting attention from the category under consideration (the people of the external territories) to a contiguous category (the people of the States and Commonwealth) and emphasising the differences between them. In doing so, this reasoning implies that the contiguous category has some constitutional significance.<sup>158</sup> That is, the term ‘the people’ has a constitutional essence such that it is possible to say ‘the people’ of the external territories are not relevantly the constitutional ‘people’. Similarly, in *Roach*, the right to vote was said to reflect representative government and membership of the community and for that reason there were constitutional limits upon disenfranchisement.<sup>159</sup> This reasoning only works, of course, if membership of the community itself has some sort of constitutional value separate from the right to vote, lest the reasoning break down into circularity.

The metonymy in *Ame* and *Bennett* is also important in terms of constitutional identity. The Court’s conclusion that the people of the external territories (who are undoubtedly ‘persons’) are not part of the constitutional ‘people’ echoes a distinction drawn by the United States Supreme Court between ‘persons’ (for example, unauthorised immigrants) and the constitutional ‘people’.<sup>160</sup> It illustrates how constitutional text (including constitutional status terms as seemingly fundamental as ‘the people’) exists in a state of ‘interpretive controversy’,<sup>161</sup> and so identities tied to such text are not only dynamic (with its positive overtones) but unstable and precarious.

### C Race Power

In *Kartinyeri*,<sup>162</sup> a majority of the Court upheld the validity of the *Hindmarsh Island Bridge Act 1997* (Cth) (*Bridge Act*), which purported to prevent the Minister from making a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in respect of the Hindmarsh Island Bridge area. Such a declaration would have preserved the specified area from desecration. The plaintiffs submitted that the *Bridge Act* was invalid because, amongst other reasons, it had a detrimental impact upon the people of the Aboriginal race whereas s 51(xxvi) only supported laws beneficial to the Aboriginal race. Brennan CJ and McHugh J did not address this issue, and instead upheld the *Bridge Act* on the basis that the Commonwealth can repeal what it has enacted. The other judgments did not adopt this approach and were thus forced to confront the interpretation of s 51(xxvi) directly.

<sup>158</sup> *Contra* Irving, ‘Still Call Australia Home’, above n 2, 151–2.

<sup>159</sup> See especially *Roach* (2007) 233 CLR 162, 174 [7] (Gleeson CJ), 198–9 [83] (Gummow, Kirby and Crennan JJ).

<sup>160</sup> See Linda Bosniak, ‘Persons and Citizens in Constitutional Thought’ (2010) 8 *International Journal of Constitutional Law* 9, 21–4, discussing *United States v Verdugo-Urquidez*, 494 US 259 (1990).

<sup>161</sup> See Adrienne Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretive Disagreement’ (2005) 27 *Sydney Law Review* 29.

<sup>162</sup> (1998) 195 CLR 337.

Section 51(xxvi) was amended by referendum in 1967, and so *Kartinyeri* is particularly interesting for present purposes because Rosenfeld and Jacobsohn both discuss constitutional amendments as a tool for amending identity. The plaintiffs argued that the 1967 referendum was motivated by beneficial intentions with the consequence that s 51(xxvi) was limited to the enactment of beneficial laws (whether for the Aboriginal race or any other race), it being accepted that at Federation, s 51(xxvi) was explicitly intended to support detrimental and discriminatory laws. Three of the four justices to consider the question disagreed. They held that the relevant extrinsic material associated with the 1967 referendum did not establish that s 51(xxvi) should now be limited to beneficial laws. Gaudron J observed that the referendum effected a ‘minimalist amendment’,<sup>163</sup> which simply placed the Aboriginal race on a par with other races. Their Honours were thus unwilling to treat the amendment as substantially altering Australia’s constitutional identity.<sup>164</sup> In doing so, their Honours also employed negation to discard Aboriginal identity and instead emphasised metaphorically the similarities between Aboriginal and other races in Australia. The resulting identity is one that is race-neutral, but imperfectly so because s 51(xxvi) still enables race-specific laws.

Gaudron J’s reasons merit closer attention for the interplay between negation, metaphor and metonymy within her judgment. Her Honour held that the constitutional amendment did not by itself limit s 51(xxvi) to beneficial laws. However, she held that in practice only laws beneficial to the Aboriginal race would be able to be ‘deemed necessary’ as required by the terms of s 51(xxvi). Her reasons for this conclusion can be explained in terms of negation, metaphor and metonymy. Gaudron J assimilated the Aboriginal race into the broader Australian community by concluding that the 1967 referendum did not restrict s 51(xxvi) to beneficial laws, thus negating Aboriginal identity. Moreover, she emphasised that the amendment ‘operated to place them in precisely the same constitutional position as the people of other races’,<sup>165</sup> which runs along metaphoric lines. Finally, Gaudron J stated that in practice, only beneficial laws could be made for the Aboriginal race under s 51(xxvi) given their current circumstances in society. This contextualisation (metonymy) illustrates Rosenfeld and Jacobsohn’s point that identities (here, Aboriginal identity) must be negated to clear the way for a dominant shared constitutional identity, but that these identities are often reincorporated into the constitutional identity that is ultimately constructed.

Stepping back from the detail of the judgments in *Kartinyeri*, the evolution of the race power is instructive. The decision in *Kartinyeri* left a gap between Australia’s purportedly race-neutral *national* identity and its *constitutional* identity that continued to permit racial laws pursuant to s 51(xxvi). Steps are now on foot to buttress this race-neutrality (or indeed, to reverse it in favour of indigenous people) through constitutional amendment to amend or remove s 51(xxvi).<sup>166</sup> This evolution

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<sup>163</sup> Ibid 361 [29] (Gaudron J), 382–3 (Gummow and Hayne JJ).

<sup>164</sup> Cf *ibid* 413 [157] (Kirby J).

<sup>165</sup> Ibid 361.

<sup>166</sup> See Expert Panel on Constitutional Recognition of Indigenous People, *You Me Unity: Equality and Recognition* (2011) <<http://www.youmeunity.org.au/>>.

has been a gradual process. It began with the framers at Federation, through to the people at the 1967 referendum, to the High Court in 1998 and back to the people in a referendum at some point in the future. This process illustrates that constitutional identity is dynamic but it is not necessarily a fast-moving dynamism. Moreover, this evolution of the race power demonstrates that constitutional identity is the product of a collective effort. It does not simply fall to the courts to construct, although the courts necessarily have a powerful position in this regard due to their role in determining what the law is. The power of the people to determine and amend Australia's constitutional identity depends in large part on the extent to which they can amend the *Constitution*, considered next.

### C Constitutional Amendments

Rosenfeld briefly mentions that '[a]mending the constitution involves changing it without threatening its overall unity or identity' because it is constitution-making that involves the creation of a new identity.<sup>167</sup> Jacobsohn similarly concludes that amendments, *as* amendments, cannot achieve revolutionary change due to constitutional identity's essential link with the past. He observes that in some countries 'the amendment process itself encourages, if not guarantees, moderation' due to the difficulty in pushing through a successful referendum.<sup>168</sup> These perspectives are consistent with the majority conclusion in *Kartinyeri* that the 1967 referendum was only a minimalist amendment. Yet to claim that constitutional amendments can only ever achieve moderate alterations of constitutional identity appears at least superficially incongruous with the importance of the constitutional amendment process to Australian constitutional identity. Judicial and academic statements about the significance of s 128 are commonplace,<sup>169</sup> and at a rhetorical level at least, the power of the people to amend the *Constitution*, seemingly without limits beyond the practical ones imposed by s 128 itself,<sup>170</sup> is a central feature of Australian constitutional identity. Rosenfeld and Jacobsohn suggest that in fact this power of amendment is more limited and does not in practice enable radical change to be achieved.

The argument can be pushed further by looking at how the courts have interpreted amended provisions. Rosalind Dixon has observed, with direct reference to *Kartinyeri*, that the courts will only interpret an amendment in a manner that

<sup>167</sup> Rosenfeld, above n 6, 30.

<sup>168</sup> Jacobsohn, above n 6, 82.

<sup>169</sup> See, eg, *McGinty* (1996) 186 CLR 140, 235–6 (McHugh J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 592 [68] (McHugh J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 300–1 [735] (Callinan J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 107, 216 (Gaudron J); Jeffrey Goldsworthy, 'Interpreting the *Constitution* in Its Second Century' (2000) 24 *Melbourne University Law Review* 677, 683–6.

<sup>170</sup> See Stephen Gageler, 'Amending the *Commonwealth Constitution* through Section 128 — A Journey Through Its Scope and Limitations' in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic: Essays in Honour of Professor George Winterton* (Federation Press, 2010) 6.

achieves a substantial change to constitutional identity where there is clear evidence of such an intention. However, to produce such clear evidence in the materials accompanying the referendum is to jeopardise the success of that very referendum.<sup>171</sup> The government's unsuccessful attempt to amend the *Constitution* to enable it to ban the Communist party is a good example. Dixon's analysis of *Kartinyeri* shows that the practical treatment of constitutional amendments sits in tension with the rhetorical power of such amendments to effect change.

This argument can be pushed further still by considering what evidence the courts take into account to interpret the amended provision. Usually, the available interpretative materials will be documentary evidence that was available both to the electors and to the legislature. However, in *Wong v Commonwealth*,<sup>172</sup> quite exceptionally, there was a piece of evidence (written advice from the Solicitor-General) that was known to certain members of the legislature but not to the public, and the Court took advice into account in construing the amended provision. By doing so, the Court implicitly gave primacy to the intention of the legislature over the intention of the people. This further limits the power of the people to alter the *Constitution* and constitutional identity via s 128.<sup>173</sup>

It is difficult to know what to make of the apparent inconsistency between ideal and practice.<sup>174</sup> The best reading of this tension may be to recognise that Australian constitutional identity includes both the rhetorical significance of s 128 and also the limits upon the people's ability to effect and dictate change via s 128 after the moment of a referendum. Such dynamism and conflict is, as Rosenfeld and Jacobsohn stress, a feature of constitutional identity, and whether this conflict continues depends on actors tempering their understanding of s 128.

## V AUSTRALIAN MEMBERSHIP: INSIGHTS FROM CONSTITUTIONAL CITIZENSHIP AND CONSTITUTIONAL IDENTITY

So far, this article has approached constitutional citizenship and constitutional identity separately, but the two issues are clearly connected at least insofar as the absence of an express conferral of citizenship in the *Constitution* is both an element of and also a limitation upon Australian constitutional identity. Indeed, some of the themes of constitutional identity appear in *Roach* and *Rowe*, which is unsurprising given that the Court treated voting as central to constitutional membership itself.

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<sup>171</sup> See Rosalind Dixon, 'Amending Constitutional Identity' (2012) 33 *Cardozo Law Review* 1847.

<sup>172</sup> (2009) 236 CLR 573.

<sup>173</sup> See Christopher Tran, 'Wong v Commonwealth: Missed Opportunities, Contemporary Meaning and the People' (2011) 13 *Constitutional Law and Policy Review* 76.

<sup>174</sup> Also noting a tension between the intentions of the people at a referendum and the High Court's jurisprudence on the interpretation of constitutional provisions the subject of a referendum, see John M Williams, 'The Constitutional Amendment Process: Poetry for the Ages' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 1, 2.

For example, the majority approaches reflect competing interests in dynamism and continuity. The Chief Justices' reliance on 'durable legislative developments' emphasises the dynamism of constitutional identity, whereas the fundamental constitutional doctrines approach emphasises the pre-constitutional identities that were only partially negated by Federation and that remain available for re-incorporation into the current identity. Another example is the difference between the majority and the minority reasons, which reflect competing preferences for metaphoric and metonymic reasoning. The majority adopted metaphoric reasoning by extracting a concept of representative government at a sufficiently high level of abstraction that they could identify, at any given stage in the development of the Australian community, sufficient similarities to that underlying concept that they could conclude that the system still fit the description of representative government. The majority thus downplayed the differences of opinion about not only what representative government required at the time of Federation, sweeping those differences together into a 'fundamental constitutional doctrine', but also what representative government requires at any given point in time. In contrast, the minority in *Roach* and *Rowe* adopt a predominantly metonymic approach. They emphasised that representative government was particularised only to the extent of the constitutional terms.<sup>175</sup> Additionally, they were unwilling to downplay the differences of opinion at Federation about the meaning of representative government.<sup>176</sup> In their view, no single doctrine of representative government carried the day in 1900, and it was not appropriate to rely on any apparent similarities between the views to crystallise an abstract concept of representative government. The minority thus emphasised differences over similarities, and took the view that the constitutional text negated any previous extra-constitutional identities except to the extent of that text.

When taken together, the discussion of constitutional citizenship and constitutional identity also illuminates a number of more general points about membership of the Australian community.

First, it is well-known that the Australian constitutional system focuses more on institutions of government than individual rights. Attempting to fill this omission through implication of a constitutional concept of citizenship is unlikely to be effective. The accepted means of constitutional interpretation do not support the implication of a broad catalogue of implied citizenship rights, even if it were possible to imply a constitutional concept of citizenship. Moreover, a constitutional status of citizenship on its own sheds little light on any consequential rights or indeed on what it means to be a member of this community. The cases on the people of the territories, the race power and s 128 all demonstrate that there is nothing immutable about constitutional status terms (whether framed in terms of citizens, subjects, people or otherwise). For example, existing constitutional references to 'the people' have not prevented that status from being used to distinguish and exclude a class of persons said to be separate from 'the people', nor has it prevented the courts from placing limits on the power of 'the people' to alter

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<sup>175</sup> See, eg, *Rowe* (2010) 243 CLR 1, 64 [182], 67 [193] (Hayne J).

<sup>176</sup> See, eg, *ibid* 71–2 [204] (Hayne J), 130 [419] (Kiefel J).

the *Constitution*. Adding ‘constitutional citizenship’ to the mix promises to insert additional terminology into an already crowded space without guaranteeing any more stable basis for what that status really means or achieves.

Secondly, any constitutional amendment to give meaning to Australian membership (whether by expressly providing for constitutional citizenship or otherwise) must specify in detail the rights and obligations attaching to that status to effect a substantial change to Australia’s constitutional identity. If a core feature of Australia’s current constitutional identity is the system’s focus upon institutions and not people, a substantial and substantive amendment will be needed to amend this identity. Simply referring to constitutional citizens in the preamble, for example, is unlikely to have much practical consequence in the absence of a legal tradition that gives substance to that status. As the history of statutory citizenship and the treatment of ‘the people’ and indigenous people in the *Constitution* shows, legal statuses on their own cannot do the heavy lifting when it comes to establishing rights or identities. Instead, they become focal points for distinctions to be drawn between people.

Thirdly, and more generally, it is doubtful whether constitutional status terms can explain much at all about membership of a community. Since they are the obvious starting point for litigants claiming something in the nature of a ‘typical citizenship right’, these terms are often the subject of litigation and thus the object of negation, metaphor and metonymy by the courts. This is by no means a criticism of the courts: this malleability simply reflects the broader dynamism of constitutional identity, of which a constitutional status term is a central element. It does reveal, however, that these terms have no special magic and that they are unstable anchors for identity. Establishing ‘constitutional citizenship’, or any other status, simply invites further distinctions to be drawn between people through the use of negation, metaphor and metonymy.