

**DUAL CITIZENS IN THE FEDERAL PARLIAMENT:
RE CANAVAN, RE LUDLAM, RE WATERS, RE ROBERTS
[NO 2], RE JOYCE, RE NASH, RE XENOPHON
(2017) 349 ALR 534**

‘where ignorance is bliss,
‘Tis folly to be wise.’¹

I INTRODUCTION

In mid-2017, it emerged that several Federal parliamentarians may have been ineligible to be elected on account of their dual citizenship status by operation of s 44(i) of the *Constitution*. In *Re Canavan*,² the High Court, sitting as the Court of Disputed Returns, found five of them ineligible. This case note interrogates the Court’s interpretation of s 44(i), and analyses the judgment with reference to its political context and its constitutional significance. It is argued that the Court has left unclear the question of how it will treat foreign law in respect of s 44(i), and that the problems which this case has highlighted might only be resolved by constitutional reform.

II THE POLITICAL CONTEXT

A Background

In July 2017, two Greens senators, Scott Ludlam and Larissa Waters, resigned from the Senate, upon announcing that they were, respectively, New Zealand and Canadian citizens. Politicians soon traded blows. The Prime Minister accused the Greens of ‘careless[ness]’ with respect to their eligibility for nomination.³ But soon

* Student Editor, Adelaide Law Review, University of Adelaide.

¹ Thomas Gray, ‘Ode on a Distant Prospect of Eton College’ in D C Tovey (ed), *Gray’s English Poems* (Cambridge University Press, first published 1898, 2014 ed) 4, 7, lines 99–100.

² *Re Canavan, Re Ludlam, Re Waters, Re Roberts [No 2], Re Joyce, Re Nash, Re Xenophon* (2017) 349 ALR 534 (‘*Re Canavan*’).

³ David Penberthy and Will Goodings, Interview with Malcolm Turnbull, Prime Minister (Radio Interview, 19 July 2017) <<https://www.malcolmturnbull.com.au/media/interview-on-5aa-adelaide>>. References to the positions of parliamentarians are based on the state of affairs at the time the case was heard by the High Court.

enough, parliamentarians in other parties — including the ruling Liberal–National coalition — faced accusations that they too were ineligible.

These included the Deputy Prime Minister Barnaby Joyce and two Government Ministers, Senators Matthew Canavan and Fiona Nash. Crossbench senators Malcolm Roberts and Nick Xenophon were also in doubt. All five were referred to the Court of Disputed Returns,⁴ in addition to the two Greens who had already resigned.

B *The Facts*

Each parliamentarian had been put in their position of jeopardy because of some connection to a foreign state. The facts of these relations can be stated briefly.

Canavan was the grandson of Italian migrants.⁵ He discovered in July 2017 that ‘he may have been registered as an Italian citizen’ by his mother,⁶ despite never having taken any steps to acquire citizenship himself.⁷

Ludlam acquired New Zealand citizenship upon being born in that country, to New Zealander parents, before moving with his family to Australia three years later.⁸

Waters was born to Australian parents in Canada, and consequently became a Canadian citizen.⁹

Roberts was born in India to a British father and Australian mother, and was registered as a ‘citizen of the United Kingdom and Colonies’.¹⁰ He was naturalised as an Australian citizen years later.¹¹

Joyce was born in New South Wales to a New Zealander father, and acquired New Zealand citizenship by descent.¹²

Nash was born in Sydney to a Scottish father, who was a ‘citizen of the United Kingdom and Colonies otherwise than by descent’.¹³ At birth, Nash acquired ‘citizenship of the United Kingdom and Colonies’, which became ‘British citizenship’ in 1983.¹⁴

⁴ *Commonwealth Electoral Act 1918* (Cth) s 376.

⁵ *Re Canavan* (2017) 349 ALR 534, 551 [75].

⁶ *Ibid* 552 [78].

⁷ *Ibid* 552 [76].

⁸ *Ibid* 554 [90].

⁹ *Ibid* 555–6 [94], [96]–[97].

¹⁰ *Ibid* 556–7 [100]–[101].

¹¹ *Ibid* 556 [100].

¹² *Ibid* 557 [105], 558 [109].

¹³ *Ibid* 558 [113], 559–60 [116]–[118].

¹⁴ *Ibid* 559–60 [117]–[118].

Xenophon was born in South Australia to a Cypriot father and a Greek mother, neither of whom had been naturalised as Australians at the time.¹⁵ He had renounced any rights to Greek or Cypriot citizenship in 2007.¹⁶ But Cyprus was a British possession when his father was born there; Xenophon therefore had claim to the status of ‘British overseas citizenship’ by descent.¹⁷

The fact of dual citizenship was disputed only in respect of Canavan, Roberts, and Xenophon. The disputed questions of fact concerning Roberts were determined in a separate hearing, concluding that there was a ‘real and substantial prospect’ that Roberts was a British citizen.¹⁸ The statuses of Canavan and Xenophon fell to an interpretation of foreign law, as will be shown.

III THE CONSTITUTIONAL BAR TO ELECTION

Section 44 of the *Constitution* prescribes five categories of persons who ‘shall be incapable of being chosen’ to sit in Parliament. Subsection (i) concerns persons who are

under any acknowledgment of *allegiance, obedience, or adherence* to a foreign power, or [are] ... *subject[s] or ... citizen[s] or entitled to the rights or privileges* of a subject or a citizen of a *foreign power*.¹⁹

In *Re Canavan*, the Court followed the approach of the majority in *Sykes v Cleary*, finding that the ‘incapab[ility] of being chosen’ under s 44(i) attaches to the process of election, ‘of which nomination is an essential part’²⁰ The question which fell to the Court was therefore the following: were the persons referred by the Parliament ineligible *at the time of nomination*?

¹⁵ Ibid 560 [121].

¹⁶ Ibid 560 [122].

¹⁷ Ibid 560–2 [123]–[129].

¹⁸ *Re Roberts* (2017) 347 ALR 600, 618 [103], 620 [116] (Keane J).

¹⁹ *Constitution* s 44(i) (emphasis added).

²⁰ *Re Canavan* (2017) 349 ALR 534, 537 [3], citing *Sykes v Cleary* (1992) 176 CLR 77, 100–1, 108, 130–2 (‘*Sykes*’). In *Sykes* at 120–1, Deane J disagreed on this construction. He preferred a ‘narrow construction’ which would adjudge eligibility at the time of the ‘final step in the procedure for choosing the particular member’, being the ‘declaration of the poll’.

IV COMPETING INTERPRETATIONS

A *A Mental Element?*

The Court accepted the approach of the *amicus curiae*,²¹ which treated s 44(i) as though it had two limbs, being two severable bases for ineligibility:²²

1. acknowledgement of allegiance to a foreign power; and
2. citizenship, or entitlement to the rights of citizenship, of a foreign power.

Three separate submissions invited what was termed a ‘substantial[.]’ departure from the text of the *Constitution*.²³ Their common principle was to imply a mental element into the second limb,²⁴ meaning that the *status* of having, or being entitled to, foreign citizenship would not *alone* constitute ineligibility.

The Attorney-General’s approach required that citizenship was voluntarily obtained or retained — requiring some level of knowledge.²⁵ The point was to distinguish between persons who were Australians *by birth*, and those who were *naturalised*.²⁶ ‘[N]atural-born’ Australians must take active steps to *obtain* foreign citizenship in order to be disqualified.²⁷ But ‘naturalised Australian[s] who had not taken all reasonable steps to *renounce* a foreign citizenship would be deemed to have voluntarily obtained [it]’.²⁸ This sought to disqualify naturalised citizens like Roberts and Ludlam, who mistakenly but ‘honestly believed that naturalisation had involved renouncing the[ir] foreign citizenship’.²⁹

²¹ An *amicus curiae* was appointed ‘to act as contradictor on issues of law in the references concerning Senators Canavan, Nash and Xenophon’: *Re Canavan* (2017) 349 ALR 534, 538 [7]. Submissions as *amicus* were made by Geoffrey Kennett SC and Brendan Lim, instructed by the Australian Government Solicitor. See *Amici Curiae*, ‘Annotated Submissions of the Amici Curiae’, Submissions in *Re Canavan, Re Nash, Re Xenophon*, Nos C11, C17, C18/2017.

²² *Re Canavan* (2017) 349 ALR 534, 540–1 [20]–[23].

²³ *Ibid* 539 [13].

²⁴ *Ibid* 539–40 [14]–[19].

²⁵ *Ibid* 539 [14]; Attorney-General (Cth), ‘Annotated Submissions of the Attorney-General of the Commonwealth’, Submission in *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon*, Nos C11, C12, C13, C14, C15, C17, C18/2017, 26 September 2018, 12 [32], 20–2 [52]–[59].

²⁶ *Re Canavan* (2017) 349 ALR 534, 539 [15].

²⁷ *Ibid*.

²⁸ *Ibid* (emphasis added).

²⁹ *Ibid*.

Submissions for Joyce and Nash,³⁰ and Ludlam and Waters,³¹ also argued for a mental element, along similar lines.

But the Court, in a single unanimous judgment, rejected any such implication. The Court preferred the argument of the amicus curiae, which it described as a ‘textual’³² reading of the section ‘close[] to [its] ordinary and natural meaning’.³³ The section contained no mental element, which would ‘open up conceptual and practical uncertainties’.³⁴

B *A Limited Exception: the Constitutional Imperative*

Nevertheless, the Court was prepared to accept one limited exception, being the ‘constitutional imperative ... that an Australian citizen not be prevented by foreign law from participation in representative government where ... the person has taken all steps that are reasonably required ... to renounce his or her foreign citizenship’.³⁵

The ‘constitutional imperative’ seeks to avoid a case in which a person is ‘irremediably disqualified’ under s 44(i).³⁶ This followed authority in *Sykes*, in which the plurality said it was important not to give ‘unqualified effect’ to foreign law so as to disqualify persons ‘on whom there was imposed involuntarily ... a continuing foreign nationality, notwithstanding that they had taken *reasonable steps* to renounce [it]’.³⁷ The exception anticipated ‘extreme examples of foreign ... citizenship being foisted upon persons against their will’.³⁸

C *The Reasonable Steps Test*

A majority in *Sykes* held that ineligibility under s 44(i) fell to whether the person had ‘taken all reasonable steps to divest himself or herself of any conflicting allegiance’.³⁹ This was an interrogation of reasonableness into both the ‘circumstances of the particular case’ and the ‘requirements of the foreign law’.⁴⁰

The Court in *Re Canavan* rejected submissions by the Attorney-General which argued that, if a person did not know that they were a foreign citizen, then ‘[t]aking

³⁰ Ibid 539 [16].

³¹ Ibid 539–40 [17].

³² Ibid 539 [13].

³³ Ibid 540 [19].

³⁴ Ibid 548 [54].

³⁵ Ibid 539 [13].

³⁶ Ibid 545 [43].

³⁷ *Sykes* (1992) 176 CLR 77, 107 (Mason CJ, Toohey and McHugh JJ) (emphasis added).

³⁸ Ibid 131 (Dawson J).

³⁹ Ibid 107 (Mason CJ, Toohey and McHugh JJ). See also Brennan J at 114, Deane J at 128, Dawson J at 131, Gaudron J at 139.

⁴⁰ Ibid 108 (Mason CJ, Toohey and McHugh JJ), 128–130 (Deane J), 131 (Dawson J).

no steps [would be] reasonable'.⁴¹ It was cautioned that '[s]ection 44(i) is cast in peremptory terms'.⁴² Put simply, ignorance is not bliss under s 44(i).

D *The Interpretation of Foreign Law*

The Court's strict reading suggested that foreign law alone would be determinative of eligibility under s 44(i). Questions of foreign law are conventionally treated in private international law as 'question[s] of fact of a peculiar kind'.⁴³ But the 'constitutional imperative' recognised that, in some 'extreme'⁴⁴ cases, foreign law would have to be disregarded.

In *Sykes*, Brennan J suggested that 'if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all, it would be absurd to recognize the foreign law conferring foreign nationality'.⁴⁵ A law of this kind would be 'extreme' because it would exceed what international law recognises as the limits on a state's jurisdiction to legislate on the subject of nationality.⁴⁶

As for cases that are not extreme, a majority in *Sykes* held that unilateral declarations of renunciation were insufficient where foreign law availed a citizen of a way of renunciation that was reasonable.⁴⁷ The foreign legal process of renunciation would have to be followed. But Deane and Gaudron JJ, both in dissent, took the view that an oath of allegiance to Australia upon naturalisation was enough.⁴⁸

The dissenting view in *Sykes* did not meet the support of the Court in *Re Canavan*: 'The approach taken by Deane J draws no support from the text and structure of s 44(i)'.⁴⁹ The Court was adamant that — provided the foreign laws were reasonable — renunciation would be determined by reference to the foreign law.⁵⁰ But it was reflected

⁴¹ Attorney-General (Cth), 'Annotated Submissions of the Attorney-General of the Commonwealth', Submission in *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon*, Nos C11, C12, C13, C14, C15, C17, C18/2017, 26 September 2018, 1–2 [6] (emphasis added); *Re Canavan* (2017) 349 ALR 534, 549 [61].

⁴² *Re Canavan* (2017) 349 ALR 534, 549 [61].

⁴³ *Parkasho v Singh* [1968] P 233, 250 (Cairns J). See also Sir Lawrence Collins (ed), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 14th ed, 2006) vol 1, 259 [9-010].

⁴⁴ *Sykes* (1992) 176 CLR 77, 113 (Brennan J), 126 (Deane J).

⁴⁵ *Ibid* 113. The same example was put by Deane J at 126–7.

⁴⁶ See *Oppenheimer v Cattermole* [1975] 1 All ER 538, 566 (Lord Cross); *Sykes* (1992) 176 CLR 77, 112.

⁴⁷ *Sykes* (1992) 176 CLR 77, 108 (Mason CJ, Toohey and McHugh JJ), 114 (Brennan J), 132 (Dawson J).

⁴⁸ *Ibid* 128–30 (Deane J), 136–40 (Gaudron J).

⁴⁹ *Re Canavan* (2017) 349 ALR 534, 547 [52].

⁵⁰ *Ibid* 547 [51]–[53].

that reasonable circumstances ‘may be contrasted, for example, with a requirement of a foreign law that the citizens of the foreign country may renounce their citizenship only ... in the territory of the foreign power’.⁵¹ Such a law would not operate to disqualify an Australian citizen under s 44(i) ‘if his or her presence within that territory could involve risks to person or property’.⁵²

In *Re Canavan*, as in *Sykes*, the Court showed that foreign law was not to go unexamined in all cases. Both the ‘reasonable steps’ test and the ‘constitutional imperative’ required the Court to consider the reasonableness of the requirements of foreign citizenship law.

E *The Judgment*

Nevertheless, the eligibility of most respondents did not involve more than the simple application of foreign law.

Being citizens of New Zealand⁵³ and Canada,⁵⁴ respectively, Ludlam and Waters were ineligible to be elected. They had rightly resigned.

Roberts was ineligible too. He ‘knew that there was at least a real and substantial prospect that ... he remained ... a citizen of the United Kingdom’.⁵⁵ His only attempt at renunciation was to send a unilateral declaration by email, to an inappropriate authority, three days after his nomination.⁵⁶ This was ineffective under British law.⁵⁷

Similarly, the declarations of renunciation by Joyce and Nash of their respective New Zealand⁵⁸ and British⁵⁹ citizenships came too late.⁶⁰ They were both ineligible at the time of nomination.⁶¹

The cases of *Canavan* and *Xenophon*, however, demanded greater scrutiny of foreign law.

⁵¹ Ibid 551 [69].

⁵² Ibid.

⁵³ Ibid 554 [90].

⁵⁴ Ibid 555–6 [96]–[98].

⁵⁵ *Re Canavan* (2017) 349 ALR 534, 557 [102]; *Re Roberts* (2017) 347 ALR 600, 613–4 [73]–[74].

⁵⁶ *Re Roberts* (2017) 347 ALR 600, 621 [119].

⁵⁷ Ibid 617 [98], 618 [103].

⁵⁸ *Re Canavan* (2017) 349 ALR 534, 558 [109]–[110].

⁵⁹ Ibid 560 [118]–[119].

⁶⁰ Ibid 558 [108], 560 [119].

⁶¹ Ibid 557 [106].

As concerned Canavan, the Court accepted evidence that a ‘reasonable interpretation of Italian law’ meant he was *not* a citizen of Italy.⁶² Canavan’s mother registered him in Italy as an ‘Italian[] Resident Abroad’.⁶³ But the Court decided that this could ‘not per se be considered a recognition of Italian citizenship’.⁶⁴ To do so would allow ‘Italian citizenship by descent to extend indefinitely’ if successive generations could register their children as citizens without them having done a thing.⁶⁵ Canavan retained his place in the Senate.

In respect of Xenophon, the Court accepted that he was a ‘British overseas citizen’ at nomination.⁶⁶ The problem was that this carried few rights or obligations; the evidence termed it a ‘residuary’ of colonial British citizenship.⁶⁷ The Court held that ‘British overseas citizenship’ did ‘not confer the rights or privileges of a citizen as that term is generally understood’.⁶⁸ It declined to treat Xenophon as a foreign citizen. He was not ineligible.

The parliamentary places of the five respondents rendered ineligible — Nash, Roberts, Ludlam, Waters, and Joyce — were vacant by operation of s 45(i) of the *Constitution*.⁶⁹ It was ordered that the Senate places be filled by a ‘special count’ of the ballots cast, and a by-election was to be held in Joyce’s vacated seat, New England,⁷⁰ which Joyce himself won.⁷¹

⁶² Ibid 553–4 [85]–[86].

⁶³ Ibid 552 [78].

⁶⁴ Ibid 553 [84].

⁶⁵ Ibid 554 [86].

⁶⁶ Ibid 558 [131].

⁶⁷ Ibid 562 [131].

⁶⁸ Ibid 563 [134].

⁶⁹ Ibid 563–4 [136]–[139].

⁷⁰ Ibid 563–4 [136]–[139]. See also ‘Dual Citizen Senators’ Seats Have Been Recounted — Here are the Replacements’, *ABC News* (online), 10 November 2017 <<http://www.abc.net.au/news/2017-11-10/senate-recounts-decide-on-replacements-for-dual-citizens/9123338>>.

⁷¹ Rick Morton, ‘Barnaby Joyce Wins New England By-Election in a Landslide’, *The Australian* (online), 3 December 2017 <<https://www.theaustralian.com.au/national-affairs/barnaby-joyce-poised-for-new-england-byelection-win/news-story/ed4301396778442a8b6093520bd117ea>>.

V COMMENT

Section 44(i) gave us what has been called ‘the world’s most ridiculous constitutional crisis’.⁷² The provision is to some ‘an ass’,⁷³ to others ‘racist’,⁷⁴ and to a more reserved commentator, a mere ‘foll[y]’.⁷⁵ Whatever it is, it had from July 2017 until the time of writing thrown 17 members out of the Parliament.⁷⁶ A second decision, *Re Gallagher*,⁷⁷ followed *Re Canavan* in finding another ineligibility, which spurred further resignations.

The High Court sought to resolve a ‘dramatic’ political crisis.⁷⁸ Instead, its judgment created a constitutional one.

A Subconscious Disloyalty?

It is normal in statutory interpretation to look to the purpose of a law in order to clarify its meaning.⁷⁹ Section 44(i) is directed to the ‘split allegiance’ of members of Parliament.⁸⁰ It seeks to ensure that elected representatives have a ‘single-mindedness for the welfare of the community’.⁸¹ This purpose provided the basis for submissions which urged an interpretation guided by some criterion of voluntariness or knowledge.⁸²

⁷² David Fickling, ‘The World’s Most Ridiculous Constitutional Crisis’, *Bloomberg* (online), 17 August 2017 <<https://www.bloomberg.com/view/articles/2017-08-16/australia-faces-the-world-s-most-ridiculous-constitutional-crisis>>.

⁷³ Bill Hoffman, ‘The Law Can be an Ass Over Citizenship’, *Sunshine Coast Daily* (online), 19 May 2018 <<https://www.sunshinecoastdaily.com.au/news/the-law-can-be-an-ass-over-citizenship/3418221/>>.

⁷⁴ Kate Galloway, ‘Reform *Constitution* to Give Voice to all’, *Eureka Street*, 19 November 2017, 44.

⁷⁵ Martin McKenzie-Murray, ‘The Dual Citizenship Debacle’, *The Saturday Paper* (online), 18 November 2017 <<https://www.thesaturdaypaper.com.au/news/politics/2017/11/18/the-dual-citizenship-debacle/15109236005519>>.

⁷⁶ Merran Hitchick and Andy Ball, ‘Australia’s Citizenship Scramble: the Full List of MPs and Senators Affected’, *Guardian Australia* (online), 9 May 2018 <<https://www.theguardian.com/australia-news/ng-interactive/2017/dec/07/australias-citizenship-scramble-which-mps-are-safe-whos-out-and-who-doesnt-know>>.

⁷⁷ *Re Gallagher* (2018) 355 ALR 1.

⁷⁸ McKenzie-Murray, above n 75.

⁷⁹ See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA.

⁸⁰ *Sykes* (1992) 176 CLR 77, 107.

⁸¹ *Re Day (No 2)* (2017) 343 ALR 181, 193–4 [49] (Kiefel CJ, Bell and Edelman JJ), citing *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ).

⁸² Senator Canavan, ‘Annotated Submissions of Senator Canavan’, Submissions in *Re Canavan*, No C11/2017, 12–14, [49]–[58]; Attorney-General (Cth), ‘Annotated Submissions of the Attorney-General of the Commonwealth’, Submission in *Re Canavan*, *Re Ludlam*, *Re Waters*, *Re Roberts (No 2)*, *Re Joyce*, *Re Nash*, *Re Xenophon*, Nos C11, C12, C13, C14, C15, C17, C18/2017, 26 September 2018, 7–8 [20]–[23].

But it was cautioned by the amicus curiae that the section's purpose must be determined from *within* the text, not on the basis of 'some *a priori* assumption'.⁸³ They argued that a 'second' purpose was to 'avoid[] the *risk* or *appearance* of divided allegiances'.⁸⁴

The Court accepted this interpretation.⁸⁵ It adopted what the Attorney-General called an 'almost brutal literalism'.⁸⁶ That it is not possible to have a *subconscious* allegiance to a foreign state was irrelevant. Section 44(i) was concerned not with '*actual* allegiance as a state of mind', but with the '*status* of citizenship',⁸⁷ like a status offence in criminal law.⁸⁸

The determination of this status, however, raises further questions about the Court's interpretations of foreign law.

B Foreign Law

Both the 'reasonable steps' test and the 'constitutional imperative' show that there are some foreign laws that the Court will refuse to apply on account of their unreasonableness. But even when it was willing to apply and interpret foreign law, the Court did not strictly defer to the word of the law as it did with s 44(i).

In respect of Italian law, the Court made what Anne Twomey called a 'particular interpretative choice'.⁸⁹ It noted the 'potential for Italian citizenship by descent to extend indefinitely'.⁹⁰ It then decided that some more 'positive step[]' was required

⁸³ Amici Curiae, 'Annotated Submissions of the Amici Curiae', Submissions in *Re Canavan, Re Nash, Re Xenophon*, Nos C11, C17, C18/2017, 3 [13] (emphasis in original) citing *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 390 [26] (French CJ and Hayne J).

⁸⁴ *Ibid* 3 [14] (emphasis added).

⁸⁵ *Re Canavan* (2017) 349 ALR 534, 540 [19].

⁸⁶ Paul Karp, "'Brutal Literalism': Brandis Critiques High Court and Contradicts PM on Reform", *Guardian Australia* (online), 29 October 2017 <<https://www.theguardian.com/australia-news/2017/oct/29/brutal-literalism-brandis-critiques-high-court-and-contradicts-pm-on-reform>>.

⁸⁷ *Re Canavan* (2017) 349 ALR 534, 541 [26], citing *Sykes* (1992) 176 CLR 77, 109–10 (Brennan J) (emphasis added).

⁸⁸ Jeremy Gans, 'The Mikado in the *Constitution: Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45' on *Opinions on High* (30 October 2017) <<https://blogs.unimelb.edu.au/opinionsonhigh/2017/10/30/the-mikado-in-the-constitution-re-canavan-re-ludlam-re-waters-re-roberts-no-2-re-joyce-re-nash-re-xenophon-2017-hca-45/>>.

⁸⁹ Anne Twomey, 'Section 44 of the *Constitution* — What Have We Learnt and What Problems Do We Still Face?' (2017) 32 *Australasian Parliamentary Review* 5, 15.

⁹⁰ *Re Canavan* (2017) 349 ALR 534, 554 [86].

for Canavan to become an Italian citizen,⁹¹ beyond his mother having registered him on a municipal list.

The Court seems to have accepted the submission which described the Italian law of citizenship by descent as ‘exorbitant’.⁹² But the right to citizenship by descent — *jus sanguinis* — is also the law of other many countries.⁹³ It could not be reasonably suggested that laws which confer citizenship *jure sanguinis* exceed the national-ity jurisdiction of a state. Indeed, it is one of the bases of citizenship law in most European states.⁹⁴ This does not seem to have dismayed the Court in *Re Canavan*.

The Court was also willing to look beyond the word of British law when it interpreted Xenophon’s ‘British overseas citizenship’ as though it were no citizenship at all.⁹⁵ This was a choice to put substance above form in dealing with foreign law, though the Court had done the exact opposite in respect of s 44(i) itself.

In both examples, the Court’s interpretive choices avoided results which it considered undesirable. The problem with the Court’s reasons in respect of Canavan and Xenophon is that neither of the Italian or British laws can fairly be said to be of the ‘extreme’ or ‘absurd’ type envisaged by Brennan J in *Sykes*.⁹⁶

It is one thing to take a view that a foreign law is ‘exorbitant’; it is another to say, as the Court did, that it should not be given effect in Australia. The Court has left entirely unclear the basis on which it will defy the word of foreign law. If its aim was

⁹¹ Ibid.

⁹² Twomey, above n 89, 16; Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* [2017] HCATrans 201 (12 October 2017) 181; cf Attorney-General (Cth), ‘Annotated Submissions of the Attorney-General of the Commonwealth’, Submission in *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon*, Nos C11, C12, C13, C14, C15, C17, C18/2017, 26 September 2018, , 1–2 [5]–[6].

⁹³ The Italian law of descent is based on the ancient principle of *jus sanguinis*, which is a common basis of the citizenship law of many countries. It is also the law of at least two other countries with significant diaspora communities in Australia: Greece and Ireland. See, eg, Spyridon Vrellis, *Private International Law in Greece* (Kluwer Law International, 2011) 174; Siobhán Mullally, ‘Citizenship and Family Life in Ireland: Asking the Question “Who Belongs”?’ (2005) 25 *Legal Studies* 578.

⁹⁴ Maarten P Vink and Gerard-René de Groot, ‘Birthright Citizenship: Trends and Regulations in Europe’ (Comparative Report, European Democracy Observatory Citizenship Observatory, November 2010) 5–7. See also David Scott FitzGerald, ‘The History of Racialized Citizenship’ in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 129, 135.

⁹⁵ *Re Canavan* (2017) 349 ALR 534, 563 [134].

⁹⁶ *Sykes* (1992) 176 CLR 77, 113 (Brennan J).

to provide ‘certainty’,⁹⁷ the Court’s interpretations of foreign law only raised more questions.

C *Constitutional Problems*

One such question was whether Minister Josh Frydenberg was ineligible for being a Hungarian citizen by descent. Frydenberg’s Jewish mother was born stateless in the Budapest ghetto. It was a country that, the Prime Minister protested, ‘would have pushed them into the gas chambers had ... the war [not] ended’.⁹⁸ To find Frydenberg ineligible would add legal insult to historical injury. Frydenberg’s status was not referred to the High Court. Still, his case shows the potential conflict between the values of s 44(i), as expressed by the Court’s interpretation in *Re Canavan*, and those of Australian society.

The Court certainly had its mind turned to the values of the *Constitution*. It defended its strict reading against the uncertainties of a mental element, which would be ‘apt to undermine stable representative government’.⁹⁹ In this case, the Court followed an approach taken in two other s 44 cases¹⁰⁰ that ‘expanded, rather than narrowed, the potential circumstances in which s 44 applies’.¹⁰¹ The Court decorated its judgment in the language of democracy,¹⁰² purporting to be its defender against the unscrupulousness of politicians.

But does dual citizenship actually undermine the integrity of a democratic representative? This is, of course, a question of whether s 44(i) is a good law, not a question of how it should be interpreted. Reform, therefore, has attracted considerable support.¹⁰³ It has since been concluded by a Parliamentary Committee that there

⁹⁷ *Re Canavan* (2017) 349 ALR 534, 546 [48]. See also the Court’s description of the alternative submissions as inviting ‘uncertainty and instability’ at [19].

⁹⁸ Amy Remeikis, ‘Turnbull Hits Out at Claim Josh Frydenberg is Hungarian Dual Citizen’, *Guardian Australia* (online), 3 November 2017 <<https://www.theguardian.com/australia-news/2017/nov/03/turnbull-hits-out-at-claim-josh-frydenberg-is-hungarian-dual-citizen>>.

⁹⁹ *Re Canavan* (2017) 349 ALR 534, 548 [54].

¹⁰⁰ *Re Day (No 2)* (2017) 343 ALR 181; *Re Culleton (No 2)* (2017) 341 ALR 1.

¹⁰¹ Twomey, above n 89, 13.

¹⁰² The Court’s judgment makes many appeals to the ‘system of representative and responsible government established under the *Constitution*’: *Re Canavan* (2017) 349 ALR 534, 545 [39], [43]–[44], 546 [48], 548 [54], 550 [67].

¹⁰³ For academic support expressed in submissions to the Parliamentary Committee overseeing the response to the crisis, see Joint Standing Committee on Electoral Matters, Parliament of Australia, *Excluded: The Impact of Section 44 on Australian Democracy* (2018) 85–90 [4.112–4.131]. See also Matthew Stubbs and Adam Webster, ‘Eligibility of Dual Citizens: The Coming-of-Age of Section 44’ (2018) 40(1) *Bulletin (Law Society of South Australia)* 6; Twomey, above n 89.

is ‘no viable alternative other than amending the *Constitution*’¹⁰⁴ to repeal ss 44–5 ‘in their entirety’.¹⁰⁵

Australia today is very different to what it was at Federation. Forty nine per cent of Australians were either born abroad — in a diverse list of countries — or have at least one foreign-born parent.¹⁰⁶ The repeal of s 44(i) would acknowledge that a sense of supranational belonging, which may take legal form as a second citizenship, does not undermine the integrity of someone’s Australianness.

VI CONCLUSION

The broad question for the High Court in *Re Canavan* was essentially ‘what role does foreign law play in determining who is eligible to participate in Australian democracy?’ In my analysis, I have tried to show that the Court has left that unclear because of its treatment of foreign law. To a flawed question, the Court gave a flawed answer. What is clear, however, is that *Re Canavan* is one of several recent judgments in which the Court has looked poorly upon attempts to loosen the *Constitution*’s prohibitions on certain classes of electoral nominee. The most one can hope is that the authority of *Re Canavan* will have its life cut short by the repeal of s 44(i). But, given the difficulty of constitutional reform, that might be a false hope.

¹⁰⁴ Joint Standing Committee on Electoral Matters, above n 103, 98 [5.23].

¹⁰⁵ *Ibid* 96 [5.6].

¹⁰⁶ Australian Bureau of Statistics, *Cultural Diversity in Australia* (28 June 2017) Census of Population and Housing: Reflecting Australia — Stories from the Census, 2016 <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Cultural%20Diversity%20Article~60>>.

