

VOTING RIGHTS OF PERMANENT RESIDENTS

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I INTRODUCTION

In this article, we discuss the case for extending voting rights in federal elections to permanent residents. It is our contention that extending the entitlement to vote to permanent residents – while arguably not strictly required by democratic justice in the absence of obstacles to accessing citizenship – is not only consistent with, but also reinforces the values of Australian society. Australia, as is evidenced by the institution of compulsory voting, places great value on citizens' duty of participation. We argue that the extension of voting rights to permanent residents would play a productive role in instilling a culture of engagement and political responsibility among those living within Australian borders. In New Zealand, the extension of voting rights to permanent residents in 1975 has been credited with producing a 'uniquely inclusive political community'.¹

Moreover, granting voting rights to permanent residents is consistent with the changing face of citizenship. The increasing movement of citizens between states in the 20th century has complicated the role of citizenship in defining membership of the polity.² As the political community has become increasingly heterogeneous, membership is no longer simply assigned as a product of birth or ancestry. Citizenship necessarily focuses on the real connections between persons and states, and residence has necessarily grown in importance for the attribution

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1 Fiona Barker and Kate McMillan, 'Constituting the Democratic Public: New Zealand's Extension of National Voting Rights to Non-citizens' (2014) 12 *New Zealand Journal of Public and International Law* 61, 61.

2 See, eg, Aihwa Ong, '(Re)Articulations of Citizenship' (2005) 38 *Political Science and Politics* 697; Seyla Benhabib, 'Borders, Boundaries, and Citizenship' (2005) 38 *Political Science & Politics* 673.

of rights traditionally associated with full and formal political membership, or even thicker notions of national belonging.³

Permanent residency is already associated in all liberal democracies with the attribution of most civil, social and cultural rights including access to health, welfare and education, and many political rights, such as the right to vote in local elections. Citizens retain more rights than permanent residents in some areas, for example, in some jurisdictions, permanent residents are still subject to migration controls and do not enjoy the same security in their right to remain and re-enter their country of residency, they are vulnerable to deportation if involved in criminal activities, and have more limited options to pursue family reunification with relatives overseas. However, scholars note that the differences between citizens and permanent residents are in practice minimal and that permanent residents enjoy significant locational security.⁴

International law provides grounds for discrimination between citizens and non-citizens in a state. For example, article 25 of the *International Covenant on Civil and Political Rights* enshrines rights for citizens to participate in public affairs, to vote and to access the public service.⁵ The *Australian Citizenship Act 2007* (Cth) does not set out the rights and obligations of citizenship. Instead the distinctions that exist between citizens and non-citizens are found in other legislation. The most significant distinction between citizens and residents relates to their rights and obligations to engage in the political processes of the state.⁶ This article proposes that this distinction be further narrowed so that residents are eligible to vote, while a distinction between citizens and residents is retained in relation to the eligibility to run for office.

This article is structured as follows. Part I details electoral reform in Australia, underlying Australia's history of progressive electoral reform as well as the value placed on political participation and engagement as evidenced by the

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- 3 See generally Christian Joppke, *Citizenship and Immigration* (Polity Press, 2010) 5. See also Stephen H Legomsky, 'Why Citizenship?' (1994) 35 *Virginia Journal of International Law* 279; Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994); Yasemin Nuhoglu Soysal, 'Post-national Citizenship: Rights and Obligations of Individuality' in Edwin Amenta, Kate Nash and Alan Scott (eds), *The Wiley-Blackwell Companion to Political Sociology* (Blackwell Publishing, 2012) 383; Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996); Gerard Delanty, *Citizenship in a Global Age: Society, Culture, Politics* (Open University Press, 2000); Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Gower Publishing, 1990); William Rogers Brubaker 'Membership without Citizenship: The Economic and Social Rights of Noncitizens' in William Rogers Brubaker (ed), *Immigration and the Politics of Citizenship in Europe and North America* (University Press of America, 1989) 145; David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (John Hopkins University Press, 1996); Dora Kostakopoulou, 'Why Naturalisation?' (2003) 4 *Perspectives on European Politics and Society* 85.
- 4 Peter J Spiro, 'The (Dwindling) Rights and Obligations of Citizenship' (2013) 21 *William & Mary Bill of Rights Journal* 899, 900.
- 5 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 25.
- 6 See, eg, Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002) ch 5; Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37 *Melbourne University Law Review* 736, 777.

institution of compulsory voting. Part II considers whether there are any constitutional impediments to extending the franchise to non-citizens. It concludes that it is likely the Court will hold that permanent residents can be included within the ‘people of the Commonwealth’ for the purpose of voting, and that their inclusion in the franchise is consistent with the requirement that the Parliament be ‘directly chosen by the people’ in sections 7 and 24 of the *Constitution*. Part III considers the theoretical case for extending the franchise to permanent residents by analysing a number of approaches to determining who should be included as full participants in the political community. We argue that on the basis of all the principles considered, extending the franchise to permanent residents is permissible and that a number of reasons, some general and some specific to the Australian context, weigh in favour of a presumption of inclusion. In Part IV, we address a number of issues concerning the limits of our proposal, explaining why the extension of voting rights to permanent resident in national and state elections does not necessarily lead to a case for participation in other democratic processes, including among others, standing for election or voting in constitutional referenda.

II VOTING RIGHTS OF RESIDENT NON-CITIZENS IN OTHER JURISDICTIONS

Very few nations currently grant voting rights to resident non-citizens in national elections. By far the most permissive regime is that of New Zealand in which, since 1975, resident non-citizens have had the franchise after one year of continuous residence.⁷ A New Zealand government Longitudinal Immigration Survey in 2008 indicated that 88.4 per cent of eligible resident non-citizens had enrolled to vote under the system of compulsory enrolment. This compared with an enrolment rate of 95.3 per cent for all eligible voters in New Zealand.⁸ Furthermore, resident non-citizens had a voter turnout at national and local elections in 2008 of 55 per cent compared with a national turnout of 79.5 per cent.⁹

There has been little academic consideration of the New Zealand experience of enfranchising resident non-citizens. One reason for this has been that the introduction of voting rights for permanent residents has garnered little opposition.¹⁰ Kate McMillan concludes that the overall experience is a positive one if the goal is to maximise democratic participation in the polity. McMillan

7 Anne Henderson, ‘Immigration and Electoral Enrolment: Do the Numbers Add Up?’ (Working Paper No 13-01, Statistics New Zealand, January 2013) 6–7; Barker and McMillan, above n 1, 61.

8 Henderson, above n 7, 13–15.

9 Kate McMillan, ‘National Voting Rights for Permanent Residents: New Zealand’s Experience’ in Diego Acosta Arcarazo and Anja Wiesbrock (eds), *Global Migration: Old Assumptions, New Dynamics* (Praeger, 2015) vol 2, 101, 113. This title can be accessed via SSRN at the following URL: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2449068>.

10 Ibid 102.

points to the fact that political parties reach out to the immigrant vote, that there is a greater participation of resident non-citizen voting in local elections if they have the right to vote in national elections, and that participation of non-citizens in the electoral process increases as their length of residency increases, suggesting a trend towards greater engagement over time.¹¹

Besides New Zealand, there are several South American nations that grant voting rights to resident non-citizens, although the period of residency required is considerably longer than in New Zealand. Non-citizen residents gain the right to vote in national elections in Chile after five years' residence, in Malawi after seven years, and in Uruguay after 15 years.¹² It is important to note that the number of non-resident aliens who are in a position to take up these rights is likely to be very small in these countries as they have all experienced negative net overseas migration.¹³

To provide a fuller context to the discussion, it needs also to be recognised that non-citizens participate in other forms of election in national polities. In Australia, resident non-citizens have equivalent voting rights to citizens in local government elections in South Australia, Tasmania, and Victoria.¹⁴ At this level of government, the focus is on participation rather than status as the primary basis for eligibility to vote.¹⁵

11 Ibid 114–16.

12 Ibid 101 n 2; David C Earnest, 'Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm' (Paper presented at the Annual Convention of the American Political Science Association, Philadelphia, 29 August 2003) 5, 14; *Uruguayan Constitution* art 78. See also David C Earnest, 'Voting Rights for Resident Aliens: A Comparison of 25 Democracies' (Paper presented at the Annual Meeting of the Northeast Political Science Association and the International Studies Association-Northeast, 7 November 2003).

13 Despite experiencing growing immigration rates, all three countries remain primarily origin countries: see Cristián Doña-Reveco and Amanda Levinson, *Chile: A Growing Destination Country in Search of a Coherent Approach to Migration* (6 June 2012) Migration Policy Institute <<http://www.migrationpolicy.org/article/chile-growing-destination-country-search-coherent-approach-migration>>; David Ndegwa, 'Migration in Malawi: A Country Profile 2014' (Report, International Organization for Migration, 2015) 21–2; Martín Koolhaas and Mathias Nathan, 'Inmigrantes Internacionales y Retornados en Uruguay: Magnitud y Características, Informe de resultados del Censo de Población 2011' (Report, International Organization for Migration, February 2013) 9.

14 *Local Government (Elections) Act 1999* (SA) s 14 (1)(ab)(i); *Local Government Act 1993* (Tas) s 254(2); *Local Government Act 1989* (Vic) ss 11, 13.

15 For a discussion of inclusion of resident non-citizens at the local, rather than national level in the United States, see Jamin B Raskin, 'Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage' (1993) 141 *University of Pennsylvania Law Review* 1391. For a more general discussion of voting rights for non-citizen residents in various jurisdictions, see Rainer Bauböck, 'Expansive Citizenship – Voting Beyond Territory and Membership' (2005) 38 *Political Science & Politics* 683.

III ELECTORAL REFORM IN AUSTRALIA

The decision to grant non-citizens voting rights is a reflection of a nation's constitutional culture.¹⁶ Australia is an immigrant nation. It has permitted people from around the world to enter the nation as permanent residents, to live and to work. It makes little distinction between the civil and social rights of citizens and permanent residents. Permanent residents are subject to most legal liabilities and entitlements, and the expectation is that they will take up Australian citizenship after a period of residence – and most do. The rates of naturalisation in Australia are reported to be around 70–80 per cent.¹⁷

Australia has a strong culture of electoral participation in its system of representative government. The High Court has established a rich jurisprudence around the constitutional requirement that the Parliament be 'directly chosen by the people' in sections 7 and 24 of the *Constitution*. These sections are the basis for a number of limitations on Parliament's law making power around the electoral process. They have also been used to place limits on Parliament's power to restrict the voting rights of prisoners,¹⁸ and prevent Parliament restricting enrolment options in the lead up to a federal election.¹⁹ The concern of the Court is always to ensure that the franchise is as wide as possible. A number of judges in a number of cases have suggested, despite an absence of express words to this effect, that the *Constitution* gives rise to a minimum franchise that cannot be removed by Parliament.²⁰

The words in sections 7 and 24 are also the foundation of the constitutional freedom of political communication,²¹ which was found in 1992 to be an implication of the *Constitution's* establishment of a system of representative and responsible government in Australia.²² The High Court has been divided on whether the freedom of political communication is limited to citizens. In *Cunliffe v Commonwealth*, Mason CJ stated that:

Non-citizens who are actually present within this country, like citizens, are entitled to the protection afforded by the *Constitution* and the laws of Australia. It

16 Cristina M Rodríguez, 'Noncitizen Voting and Extraconstitutional Construction of the Polity' (2010) 8 *International Journal of Constitutional Law* 30, 31–2.

17 See Eddy S Ng and Isabel Metz, 'Multiculturalism as a Strategy for National Competitiveness: The Case for Canada and Australia' (2015) 128 *Journal of Business Ethics* 253, 257; Alan Hyde, 'Overcoming Citizenship: Six Practical Steps for Overcoming the Hierarchy of Nationality' (Research Paper No 125, Rutgers Law School, 10 May 2013) 7. This latter report places the naturalisation rate for Australia at 68 per cent.

18 See, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162.

19 See, eg, *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

20 See, eg, *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ) ('*McKinlay*'); *McGinty v Western Australia* (1996) 186 CLR 140, 201 (Toohey J), 221–2 (Gaudron J), 287 (Gummow J) ('*McGinty*'); *Langer v Commonwealth* (1996) 186 CLR 302, 342 (McHugh J); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173–5 [6]–[8] (Gleeson CJ).

21 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange v ABC*').

22 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137–40 (Mason CJ), 149 (Brennan J), 168, 174 (Deane and Toohey JJ).

follows that non-citizens actually within this country are entitled to invoke the implied freedom of communication, particularly when they are exercising that freedom for the purpose, or in the course, of establishing their status as entrants and refugees or asserting a claim against government or seeking the protection of government.²³

However, the majority of the Court held that non-citizens are not protected by the implied freedom. As Deane J stated:

While an alien who is within this country enjoys the protection of the ordinary law, including the protection of some of the *Constitution's* guarantees, directives and prohibitions, he or she stands outside the people of the Commonwealth whose freedom of political communication and discussion is a necessary incident of the *Constitution's* doctrine of representative government. That being so, the implication does not operate to directly confer rights or immunities upon an alien. Any benefit to an alien from the implication must be indirect in the sense that it flows from the freedom or immunity of those who are citizens.²⁴

A clear implication of expanding voting rights to non-residents in Commonwealth elections will be an expansion of the implied freedom. The freedom focuses on communication around the electoral process. If non-citizens participate in representative government, their ability to engage in communication around the electoral process will necessarily garner the same protection under the implied freedom as is afforded citizens. It is evident from the High Court's construction of the freedom that it is the communication that matters, not the speaker, as it is the communication that has an impact on the electoral process.²⁵

Australia has been at the forefront of the development of voting rights since the introduction of representative assemblies in the colonies in the mid-19th century. South Australia led the world in requiring elections to be held on Saturdays.²⁶ Victoria was a pioneer in the payment of members of parliament, which meant that poor people could also afford to run for office.²⁷ The colonies introduced the secret ballot, which is still known in some places as the 'Australian ballot'.²⁸ South Australia and Western Australia were at the vanguard

23 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 299 (citations omitted).

24 *Ibid* 335–6 (citations omitted).

25 See, eg, *Lange v ABC* (1997) 189 CLR 520, 560 (The Court):

Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation.

See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 73 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 232 (McHugh J).

26 This occurred in 1896: *Electoral Code Act 1896* (SA) s 87. The Commonwealth introduced the requirement for elections to be held on Saturdays in 1911: *Commonwealth Electoral Act 1902* (Cth) s 88A, as inserted by *Commonwealth Electoral Act 1911* (Cth) s 12. This requirement is now in *Commonwealth Electoral Act 1918* (Cth) s 158.

27 *An Act To Provide for Reimbursing Members of the Legislative Council and of the Legislative Assembly Their Expenses in relation to Their Attendance in Parliament 1870* (Vic) s 1.

28 See Graham Maddox, *Australian Democracy in Theory and Practice* (Pearson Education, 4th ed, 2000) 114.

of extending the voting franchise to women.²⁹ The Commonwealth adopted all of these initiatives, and it introduced compulsory voting in Federal elections in 1924.³⁰ This latter reform underlines the value attached in the Australian polity to the citizen's duty of participation.

There has been a clear trend towards increasing the franchise in Australia through removing property qualifications,³¹ extending the vote to women,³² and to all Indigenous Australians in national elections,³³ and lowering the voting age from 21 to 18.³⁴ It is difficult to conceive of any of these extensions ever being reversed. Extending the franchise to permanent residents in federal and state elections is consistent with this long term trend and would further encourage engagement and participation in the democratic process in line with Australian values.

29 This occurred in South Australia in 1894 and in Western Australia in 1899: *Constitution Amendment Act 1894* (SA) s 1; *Electoral Act 1899* (WA) s 5 (definition of 'elector'). The only other polities to introduce the vote to women prior to the 20th century were New Zealand: *Electoral Act 1893* (NZ) s 6; and some American states: *ibid*.

30 *Commonwealth Electoral Act 1918* (Cth) s 128A(1), as inserted by *Commonwealth Electoral Act 1924* (Cth) s 2.

31 South Australia was the last state to remove a property qualification for voting in the Legislative Council in the *Constitution Act Amendment Act 1973* (SA) s 3, repealing *Constitution Act 1934* (SA) s 20.

32 *Commonwealth Franchise Act 1902* (Cth) s 3. As a result of s 3(c), which limits the extension of the franchise to those '[w]hose names are on the Electoral Roll for any Electoral Division', it is not apparent that s 3 grants all women the right to vote. It needs to be read with *Commonwealth Electoral Act 1902* (Cth) s 31, which provides that anyone who would be qualified to vote, but for enrolment, is entitled to enrol. This has the effect of 'undoing' the requirement in s 3(c) and enabling women to enrol and thus to vote in federal elections. Note also, that Indigenous women in SA who were able to vote in SA elections in 1902, were removed from the electoral roll under the *Commonwealth Franchise Act 1902* (Cth) s 4, as all Indigenous persons were expressly excluded from voting in national elections: see Patricia Grimshaw, 'Settler Anxieties, Indigenous Peoples, and Women's Suffrage in the Colonies of Australia, New Zealand, and Hawai'i, 1888 to 1902' (2000) 69 *Pacific Historical Review* 553, 564–5.

33 The vote was extended to Indigenous Australians in 1962 through the *Commonwealth Electoral Act 1962* (Cth) s 2, repealing *Commonwealth Electoral Act 1918* (Cth) s 39(6). Voting was made compulsory for Indigenous Australians in 1984: *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 28(j), repealing *Commonwealth Electoral Act 1918* (Cth) s 42(5).

34 This occurred in NSW and WA in 1970; in SA in 1971; for Commonwealth elections in 1973; and in the remaining states soon after this time: *Commonwealth Electoral Act 1973* (Cth) s 3, amending *Commonwealth Electoral Act 1918* (Cth) s 39; *Parliamentary Electorates and Elections (Amendment) Act 1970* (NSW) s 2, amending *Parliamentary Electorates and Elections Act 1912* (NSW) s 20(1); *Constitution Act Amendment Act (No 2) 1971* (SA), No 17 of 1971, ss 3–4, amending *Constitution Act 1934* (SA) ss 21, 33; *Electoral Act Amendment Act (No 2) 1970* (WA) s 3, amending *Electoral Act 1907* (WA) s 17(1). In October 2015, the Labor Opposition leader, Bill Shorten advocated further lowering the voting age to 16: see, eg, Judith Bessant, 'Lowering Voting Age to 16 Just One Step to Restore Public Trust in Politics', *The Age* (online), 3 November 2015 <<http://www.theage.com.au/comment/lowering-voting-age-to-16-just-one-step-to-restore-public-trust-in-politics-20151102-gkp9tg.html#ixzz3zYZ8Nu99>>.

IV THEORETICAL BASES FOR GRANTING VOTING RIGHTS TO PERMANENT RESIDENTS

What principles should govern access to the franchise? In recent decades, a rich literature has emerged which attempts to answer this question, focusing on what is known as the ‘democratic boundary problem’. Theorists have proposed a number of different principles for answering this question, each relying on different theories of democratic legitimacy.³⁵ In this section, we analyse the most important of these suggestions and argue that each one allows for the granting of voting rights to permanent residents in the Australian context.

Before proceeding with the discussion of these normative principles of inclusion we must define the relevant group within which individuals ought to be included. For the present discussion, it is important to draw the distinction between the ‘body of citizens’ and the ‘demos’. By body of citizens we simply mean the members of the polity, or as Rainer Bauböck puts it, ‘all individuals who are recognized as members by the governing institutions of a democratic polity or who mutually recognize each other as belonging to such a polity’.³⁶

On the other hand, the demos is constituted more narrowly by all citizens who enjoy full political rights. The principles that govern inclusion in the citizenry and the demos are different. For example, children who are citizens may be excluded from the demos, and some adults, such as prisoners who have been sentenced to a term of imprisonment of 3 years or more,³⁷ may be excluded from the demos, but remain citizens. Additionally, principles for inclusion, both in the demos and the citizenry, vary depending on the type of polity, for example, whether it is constituted at the local, national or supranational level.³⁸ In this discussion we are interested in the normative principles regulating membership of the demos at the national level.

Most theorists who have engaged in the debate around the democratic boundary problem have defended one of two principles. First, a principle that prescribes including in the demos all those whose interests are affected by political decisions taken by the demos (the ‘affected interests’ principle) or, second, a principle which prescribes the inclusion of all those who are subject to political coercion (the ‘coercion’ principle).

The affected interests principle is considered by many theorists of democracy as the best and most plausible principle for determining membership of the demos. As Robert Goodin states: ‘[it brings] the “who” and the “how” of democratic politics into alignment’. It ‘dictates who should constitute the decision-making group’ and also ‘how that group should be governed (“making

35 Rainer Bauböck, ‘Morphing the Demos into the Right Shape: Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens’ (2015) 22 *Democratization* 820, 824–5.

36 *Ibid* 821.

37 See, eg, *Commonwealth Electoral Act 1918* (Cth) s 93(8AA).

38 Bauböck, ‘Morphing the Demos into the Right Shape’, above n 35, 824–5.

decisions democratically”, which well-established results tell us is the best way to protect and promote people’s interests’).³⁹

A central issue in the affected interests approach is the problem of boundary definition. The affected interests principle has the potential to lead to a radical expansion of the scope of the demos even to a global scale. This is because the democratic decisions of any one state, and especially of the most powerful states, affect the interests of many, if not all, people beyond the boundaries of the state’s territory. They would therefore obviously also affect the interests of resident non-citizens whose life is centred on their state of residence.

There are ways to restrict the scope of the principle. For example, affected interests can be limited to those individuals whose *basic* interests would *probably* be affected by government decisions. Sarah Song points out that restricting the boundaries of the principle in this way would not exclude resident non-citizens from the application of the principle.⁴⁰ This is because the basic interests of all individuals living in the state’s territory are very likely to be affected by the state’s government decisions. Resident non-citizens, therefore, would be included even under such a restricted principle.

The supporters of the coercion principle consider it central to democracy that ‘those who are subject to the law ought to have a say in its formulation’,⁴¹ or as Seyla Benhabib puts it, ‘all those who are subject to the law should also be its authors’.⁴² The coercion principle grounds the definition of the demos not on a generalised protection of individual interests, but rather on the protection of individual autonomy. For example, Arash Abizadeh states:

That one’s interests in general are affected by others does not itself negate self-rule or autonomy and equal standing, but being unilaterally subject to a coercive and symbolic political power, without any say over the terms of its exercise, does. Inclusion in the demos is therefore grounded intrinsically not in individuals’ interests as a whole, but in their standing as autonomous and equal.⁴³

Resident non-citizens are clearly subject to the coercion of the states within whose boundaries their lives are centered. There is no distinction between the legal regulation of permanent residents and citizens in Australia in relation to their work, study, property ownership or relationships.⁴⁴ In fact, in some ways resident non-citizens are subject to a greater degree of coercion, such as their vulnerability as aliens to immigration detention and removal if they fail the ‘good character test’ under section 501 of the *Migration Act 1958* (Cth).⁴⁵

39 Robert E Goodin, ‘Enfranchising All Affected Interests, and Its Alternatives’ (2007) 35 *Philosophy & Public Affairs* 40, 50.

40 Sarah Song, ‘Democracy and Noncitizen Voting Rights’ (2009) 13 *Citizenship Studies* 607, 609.

41 Rodríguez, above n 16, 30.

42 Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004) 204.

43 Arash Abizadeh, ‘On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem’ (2012) 106 *American Political Science Review* 867, 878.

44 Pillai, above n 6, 751; Rubenstein, above n 6, 254.

45 See, eg, Australian Human Rights Commission, *Human Rights Issues Raised by Visa Refusal or Cancellation under Section 501 of the Migration Act* (Background Paper, June 2013).

Long term non-resident citizens are affected more by the law of their place of residence than by the law of their place of citizenship. They may have a continuing stake in the law back home because of continuing connections through investments or personal relationships, but their subjection to the law is less immediate than non-citizen residents. This is reflected in the fact that the voting rights of non-resident citizens decrease over time. Citizens living overseas can apply to continue to vote in federal elections for up to six years if they intend to return to Australia within that time.⁴⁶ It would be odd, therefore, under the coercion principle, if resident non-citizens were not to be included in the demos. Under both the affected interests and the coercion principles there is a compelling case for the inclusion of resident non-citizens in the demos.

Both principles have received significant critical attention. Bauböck has argued that both principles, despite their diversity, have a common feature; that is to say, they are output-based principles. In order to resolve the democratic boundary problem, they look at the output of the democratic decision-making and its impacts on individuals. However, Bauböck notes that this way of proceeding creates a circularity problem that makes it impossible to answer the question of inclusion:⁴⁷ as the scope of decision-making expands so does the range of people it affects, thus expanding the size of the polity and the potential scope of future decision-making.

This expansion is not a concern for theorists who support the destabilising of boundaries and expansion of the demos. Goodin, for example, argues that the democratic ideal ought to be to enfranchise ‘all affected interests’ and thereby to give ‘virtually everyone everywhere a vote on virtually everything decided anywhere’.⁴⁸

Bauböck resolves the problem of the boundary of the demos by considering not the output of democratic decision-making but the principle of democratic authorisation. Bauböck asks: ‘Who has the right to authorize a government and its decision making powers?’ He describes this question as one of input legitimacy. It has the advantage of breaking the circularity engendered by output principles of legitimacy.⁴⁹

Whichever of the two principles of democratic participation is favoured, we are still left with the question of *how* resident non-citizens ought to be enfranchised. Sarah Song points out that there are two main strategies that democracy and citizenship theorists have supported; the *expansion* and the *disaggregation* of citizenship.⁵⁰ The first strategy aims at expanding the scope of citizenship to include all those entitled to participate in the demos. The second strategy aims at disaggregating participation in the demos from citizenship status by granting voting rights directly to those that are entitled to participation regardless of their official status as citizens.

46 *Commonwealth Electoral Act 1918* (Cth) s 94(13)(e).

47 Bauböck, ‘Morphing the Demos into the Right Shape’, above n 35, 824–5.

48 Goodin, above n 39, 68.

49 Bauböck, ‘Morphing the Demos into the Right Shape’, above n 35, 822.

50 Song, above n 40, 608.

Michael Walzer was one of the first to argue for a direct relationship between citizenship and participation in the demos.⁵¹ Permanent alienage, he argues, is unjustifiable for two main reasons. First, for the protection of migrants, who, if barred from citizenship, and therefore from obtaining political rights, become vulnerable to exploitation and abuse. Second, out of concern for the health of liberal-democratic institutions because the presence of residents who cannot naturalise turns the political community into a tyranny. Permanent residents, he argues, are in every relevant respect similar to citizens: they are deeply enmeshed within the host society and are bound by its laws; thus, they ought to be able to access full membership and not be deprived of political self-determination.⁵²

Similar to Walzer, Bauböck advances a principle to define membership of the demos which requires a direct connection between citizenship and participation in the demos. Bauböck's stakeholder principle of citizenship is based on two assumptions: First, that individuals have an interest in membership for their own personal reasons, to ensure protection of their interests and because membership contributes to their self-respect and the respect they enjoy from others. Second, that members of a polity have an interest in preserving the autonomy of the polity and contributing to its flourishing:

The stakeholder principle links these two assumptions by proposing that those and only those individuals have a claim to membership whose individual autonomy and wellbeing is linked to the collective self-government and flourishing of a particular polity.⁵³

While recognising that '[b]eing ruled by a government on a long-term basis' provides grounds for the inclusion of resident non-citizens in the franchise, Bauböck insists that such inclusion has to happen through naturalisation.⁵⁴ '[N]aturalization is an act that marks the inclusion of immigrants into the polity through double consent: the immigrant needs to express her desire to become a citizen and the state formally accepts her on behalf of the current citizens'.⁵⁵ Thus, Bauböck requires the expansion of citizenship for the franchise to expand, and explicitly rejects enfranchising resident non-citizens who do not naturalise.

In contrast to Bauböck and Walzer, Sarah Song favours the disaggregation of the legal status of citizenship from many of the rights associated with citizenship.⁵⁶ This disaggregation, we have noted, has already started in many polities in relation to most civil, social, cultural and political rights. Enfranchising resident non-citizens would extend this list of rights to voting at the national level.

51 Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) 56.

52 This idea of the normative importance of the social ties formed by living in a community has been used by theorists to claim that even unauthorised migrants have, after a period of time, the right to stay, and thus, eventually naturalise. The ties they form outweigh the irregularity of their entry: see, eg, Joseph H Carens, 'The Case for Amnesty', *Boston Review* (online), 1 May 2009 <<https://bostonreview.net/forum/case-amnesty-joseph-carens>>.

53 Bauböck, 'Morphing the Demos into the Right Shape', above n 35, 825.

54 Ibid.

55 Ibid 830.

56 Song, above n 40, 608.

Which solution, Bauböck's or Song's, is most in line with the requirements of democratic justice? David Owen observes that there is no principle of democratic justice that requires either enfranchising or disenfranchising resident non-citizens:

The final implication is that in state migration contexts where resident citizens enjoy a wide range of civil, social and indeed political rights (such as rights to vote in municipal elections), that is, where they enjoy equal protection under the law as well as fair opportunities to contest the law to which they are subject, in addition to a fair opportunity to become a citizen, it is not a serious injustice to restrict voting rights to citizens but, importantly, nor is it a requirement of justice that voting rights be restricted to citizens. In other words, under just civic conditions and other things being equal, the enfranchisement of those resident non-citizens who choose not to become citizens is neither required nor forbidden by democratic justice.⁵⁷

Free from considerations in the democratic justice framework for determining the question, Owen suggests there are other reasons to favour a presumption of inclusion. First, excluding resident non-citizens from voting is paternalistic, in that it makes permanent residents dependent on the state for promoting their interests.⁵⁸ Second, permanent residents have an equal stake in the political community while they live and participate in it. Permanent residency may be taken to 'establish links between the autonomy and wellbeing of residents and of the polity' because of the social ties that they normally develop,⁵⁹ even in the absence of naturalisation.⁶⁰

We agree with Owen's analysis here. There is no principle of democratic justice standing in the way of enfranchising resident non-citizens. Furthermore, we believe there are other general considerations, and some specific to the Australian context, in favour of a presumption of inclusion.

First, even assuming a situation where resident non-citizens substantively enjoy opportunities for voice and contestation, there remains a question of how easily they can become citizens. Some of the reasons for low naturalisation rates are poorly understood, for example, how demographic factors about migrant communities impact on their propensity to naturalise. There are also psychological and identity factors that may represent obstacles to naturalisation in need of further research.⁶¹ If reasons for failing to naturalise are poorly understood, we may be underestimating the difficulty in accessing citizenship.

Second, there are factors outside the control of permanent residents which may impact on their ability to naturalise. Many countries do not recognise dual citizenship, meaning permanent residents from these countries will lose their original citizenship if they take up Australian citizenship. It is unreasonable to

57 David Owen, 'Resident Non-citizens and Franchise Rights: The Difference the EU Makes' (Paper presented at A New Horizon for Democracy? Right to Vote in National Elections for Foreign Citizens, Luxembourg, 21 March 2015) 7. This paper is available at: <<https://soton.academia.edu/DavidOwen>>.

58 Ibid 8.

59 Ibid.

60 For Bauböck, naturalisation is necessary to develop these social ties effectively. Bauböck, 'Morphing the Demos into the Right Shape', above n 35, 830.

61 Hyde, above n 17, 12.

make participation in the demos contingent on renouncing citizenship in a permanent resident's home country with which they may still have significant ties. It has also been shown that even relatively minor differences in bureaucratic procedures have a significant impact on naturalisation rates, again suggesting caution in assessing accessibility to citizenship.⁶² Of particular concern here is the imposition of application fees that may be particularly burdensome for already disadvantaged, disaffected or marginalised groups.⁶³

Finally, there are good reasons specific to the Australian context to support a presumption in favour of the inclusion of resident non-citizens in the franchise. Bauböck argues that the different membership regimes of polities may require different rules for inclusion.⁶⁴ If enfranchising resident non-citizens is permissible from the viewpoint of democratic justice, it is reasonable to expect that rules of inclusion in the franchise may vary according to political culture. In this respect, including resident non-citizens is not only consistent with, but reinforces, the values of Australian society.

Although the Australian nation was founded on exclusionary migration practices, distinguishing between people on the basis of race and ethnic origin, and although Aboriginal and Torres Strait Islander Australians have suffered discrimination in all aspects of their lives including their entitlement to vote,⁶⁵ Australia also has a history of progressive democratic practice. Australia places great value on the citizen's duty of participation, as is evidenced by the institution of compulsory voting. Granting voting rights to permanent residents would extend the culture of political engagement beyond the citizenry. In the Canadian context, Daniel Munro has argued that non-citizen voting rights in municipal elections have the potential to 'encourage the development of the deliberative capacities and democratic commitments of those potential citizens'.⁶⁶

In response to this last point, Bauböck argues that if resident non-citizens are encouraged to become citizens through naturalisation, 'then rejecting this offer amounts to much the same thing as not exercising their right to vote'.⁶⁷ However, through compulsory voting, Australia attempts to discourage its citizens from making the choice not to exercise their right to vote. It is, therefore, consistent with Australian political culture and aims to include resident non-citizens in the

62 Irene Bloemraad, *Becoming a Citizen: Incorporating Immigrants and Refugees in the United States and Canada* (University of California Press, 2006) 114.

63 The fee to apply for Australian Citizenship is \$285: *Australian Citizenship Regulations 2007* (Cth) sch 3 item 14A.

64 Bauböck, 'Morphing the Demos into the Right Shape', above n 35, 821.

65 See, eg, Rubenstein, above n 6, 26; John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).

66 Daniel Munro, 'Integration Through Participation: Non-citizen Resident Voting Rights in an Era of Globalization' (2008) 9 *Journal of International Migration and Integration* 63, 63.

67 Rainer Bauböck, 'Stakeholder Citizenship: An Idea Whose Time Has Come?' (Research Paper, Transatlantic Council on Migration, Migration Policy Institute, April 2008) 11.

franchise to similarly discourage their choice not to exercise a right to vote by eschewing naturalisation.⁶⁸

V CONSTITUTIONAL ISSUES WITH GRANTING THE FRANCHISE TO PERMENENT RESIDENTS

The Commonwealth Parliament derives its power to make laws in relation to elections from sections 31 and 51(xxxvi) of the *Constitution*. Under section 31, state electoral laws applied until the Commonwealth Parliament provided otherwise. When the first substantive national electoral laws were introduced in 1902,⁶⁹ there was no legal status of Australian citizenship.⁷⁰ Eligibility to vote was based on connection to the British Empire and residence in Australia. Section 3 of the *Commonwealth Franchise Act 1902* (Cth) granted the right to vote to persons who had obtained the age of 21, who had lived in Australia for six months continuously and who were ‘natural-born or naturalized subjects of the King’. Many of the people satisfying these criteria would now be permanent residents rather than citizens under Australian citizenship law.⁷¹ The required connection to Australia of six months suggests that voting was not limited to those with a deep and intrinsic connection to Australia. Their broader connection to the King was sufficient.

Sections 7 and 24 of the *Constitution* require that representatives to the Commonwealth Parliament be ‘directly chosen by the people’ of the states and of the Commonwealth. There is then a question of whether permanent residents meet the description of ‘the people’. It has been suggested, for example, that ‘the people’ is synonymous with Australian citizens or non-alien,⁷² and if this is the case, the term would not include permanent residents.

‘People’ is not defined in the *Constitution*. Judicial consideration of the concept has been in relation to determinations of alien status, and whether there are some people who could not be denied the description of a ‘person of the Commonwealth’ by parliamentary enactment. In *Hwang*, McHugh J concluded that ‘the people’ in the Commonwealth indicated that there is a distinct Australian community of people, and that the term is ‘synonymous with the concept of being a citizen of Australia’.⁷³ The main import of this finding was that for McHugh J, Parliament could not ‘exclude from citizenship those persons

68 For a discussion of the role of compulsory voting in improving political participation see, eg, Lisa Hill, ‘Compulsory Voting in Australia: A Basis for a “Best Practice” Regime’ (2004) 32 *Federal Law Review* 479.

69 *Commonwealth Electoral Act 1902* (Cth); *Commonwealth Franchise Act 1902* (Cth).

70 Rubenstein, above n 6, 9–11.

71 See the criteria for citizenship in the *Australian Citizenship Act 2007* (Cth) s 19G.

72 See *Hwang v Commonwealth* (2005) 222 ALR 83, 87 [11] (McHugh J) (‘*Hwang*’); Bryan Mercurio and George Williams, ‘The Australian Diaspora and the Right to Vote’ (2004) 32 *University of Western Australia Law Review* 1, 14.

73 (2005) 222 ALR 83, 87 [11].

who are undoubtedly among “the people of the Commonwealth”.⁷⁴ Sangeetha Pillai suggests that Justice McHugh’s analysis of ‘the people of the Commonwealth’ creates a constitutional category of person different from, and possibly narrower in scope than, ‘non-aliens’ under section 51(xix).⁷⁵

Nonetheless, McHugh J also recognises that the Parliament has a central role in determining who are the ‘people of the Commonwealth’ for particular purposes. This includes, for example, the power under section 30 of the *Constitution* to determine the qualification of electors. Relying on the power under section 30, the *Commonwealth Electoral Act 1918* (Cth) (‘CEA’) excludes non-aliens who would otherwise be considered ‘people of the Commonwealth’ such as persons under the age of 18,⁷⁶ prisoners serving a term of imprisonment of three years or longer,⁷⁷ and Australian citizens who live overseas for more than six years.⁷⁸ Bryan Mercurio and George Williams have suggested that this last exclusion might be open to challenge for excluding Australians who are necessarily part of ‘the people’ under sections 7 and 24.⁷⁹

Regardless of whether there is a limit on the power of Parliament to exclude certain categories of citizen from the ‘people of the Commonwealth’ for the purpose of the franchise, there seems no impediment to Parliament *including* categories of person within the ‘people of the Commonwealth’ when determining the extent of the franchise even if these people might not fit this description for other purposes. In fact, crucially, the voting rights of British permanent residents who were not citizens were preserved under the *Australian Citizenship Act 1948* (Cth). From 1984, the CEA was amended so that only British permanent residents who already had voting rights prior to this date retained the right to vote.⁸⁰ This amendment is consistent with High Court authority which has clarified that although British subjects held a special constitutional position in Australia until

74 Ibid 89 [18].

75 Pillai, above n 6, 742–3.

76 *Commonwealth Electoral Act 1918* (Cth) s 93(1)(a).

77 *Commonwealth Electoral Act 1918* (Cth) s 93(8AA).

78 *Commonwealth Electoral Act 1918* (Cth) s 94(13)(e).

79 Bryan Mercurio and George Williams, ‘The Australian Diaspora and the Right to Vote’ (2004) 32 *University of Western Australia Law Review* 1, 14.

80 *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b)(ii), as amended by *Statute Law (Miscellaneous Provisions) Act 1981* (Cth) s 32.

the *Australian Citizenship Act 1948* (Cth) became law on 26 January 1949,⁸¹ this special status no longer exists.⁸² However, British citizens who had the vote were able to retain it, despite the clarification that they held no special non-alien status. It would seem to follow that if the Parliament can first extend, and then restrict the franchise to British subjects then there is a strong case to be made that Parliament has the power to extend the franchise to other permanent residents.

The ‘Territory Senators’ cases⁸³ offer a further indication of the High Court’s likely attitude to an extension of the franchise to permanent residents. The Court held that the words in section 7 of the *Constitution* that the Commonwealth Senate must be ‘directly chosen by the people of the State’ did not prevent the Parliament passing a law to provide Senate representation for the Northern Territory and the Australian Capital Territory relying on the power in section 122 of the *Constitution* to make laws for the territories.⁸⁴ In essence, the principle of representative democracy was held to prevail over the principle of federalism.

The High Court has shown considerable deference to the Commonwealth Parliament in construction of other electoral laws despite constraints in sections 7 and 24. In *McKenzie v Commonwealth*, the High Court upheld a law providing public funding of political parties and introducing a simplified method of voting in senate elections (voting above the line).⁸⁵ Chief Justice Gibbs held that although voting above the line meant that the voters were electing representatives indirectly through preferencing political parties, the *Constitution* allows the Parliament to implement voting innovations which ‘[recognise] political realities’.⁸⁶

With this jurisprudence in mind, it is highly unlikely that the Court would hold that a law extending the franchise to permanent residents would be inconsistent with sections 7 and 24 of the *Constitution*.

81 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ) (‘*Nolan*’); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 470 [240] (Gummow and Hayne JJ) (‘*Re Patterson*’); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 40 [22] (Gleeson CJ, Gummow and Hayne JJ), 87 [190] (Heydon J) (‘*Shaw*’). For Gaudron J in *Nolan*, British subjects held a special position equivalent to citizens until May 1987 when their exclusion from the definition of an ‘alien’ came to an end: (1988) 165 CLR 178, 190. A majority of the Court in *Re Patterson* (2001) 207 CLR 391, held that British subjects held a special constitutional position, but the majority judges differed on when this period ended. Justice Gaudron maintained her position in *Nolan*: at 410 [44]. Justice McHugh held the significant year to be 1973, upon the passing of the *Royal Styles Act 1973* (Cth): at 431 [121]. Justice Kirby adopted the position of Gaudron J in *Nolan*: at 495 [312]. Justice Callinan agreed with Kirby J: at 518 [377]. In *Shaw* (2003) 218 CLR 28, this time in dissent, McHugh J: at 48 [51]; Kirby J: at 66–7 [109]; and Callinan J: at 84–5 [177]; all held that the relevant date was 3 March 1986, upon the passing into law of the *Australia Act 1986* (Cth).

82 *Shaw* (2003) 218 CLR 28, 43 [30] (Gleeson CJ, Gummow and Hayne JJ); 87 [190] (Heydon J).

83 *Western Australia v Commonwealth* (1975) 134 CLR 201 (‘*First Territory Senators Case*’); *Queensland v Commonwealth* (1977) 139 CLR 585 (‘*Second Territory Senators Case*’).

84 See eg, *First Territory Senators Case* (1975) 134 CLR 201, 234 (McTiernan J), 270–1 (Mason J), 272–3 (Jacobs J), 283–7 (Murphy J); *Second Territory Senators Case* (1977) 139 CLR 585, 606–7 (Mason J), 608–10 (Jacobs J), 610 (Murphy J).

85 (1984) 57 ALR 747, 750 (Gibbs CJ).

86 *Ibid* 749 (Gibbs CJ).

There is a further practical issue that needs to be addressed. The *CEA* strives to achieve an equality of voting franchise in the House of Representatives by undertaking regular redistributions of electoral boundaries.⁸⁷ Although the High Court has rejected an implication of voter equality from section 24 of the *Constitution*,⁸⁸ it remains a fundamental principle in Australian electoral law. Section 66 of the *CEA* establishes a Redistribution Committee to undertake required distributions so that the number of electors enrolled in each electoral division is, ‘as far as practicable’, equal. The Committee is to ‘endeavour to ensure’ that the numbers of electors in any electoral division are ‘not ... less than 96.5 [per cent] or more than 103.5 [per cent] of the average divisional enrolment’.⁸⁹

Increasing the franchise to include permanent residents will undoubtedly make the task of the Committee more difficult. However, Australia has excellent statistical information on the numbers of permanent arrivals to Australia as well as information on their place of destination. In fact the information available on the movement of permanent residents when they first enter the country is far more comprehensive than information on the movement of Australian citizens across electoral or state boundaries. From 2014 to 2018, for example, the Department of Immigration and Border Protection forecasted that just over 85 000 permanent residents would arrive in Australia each year.⁹⁰ Thus, the problem is clearly manageable.

VI OTHER ISSUES WITH GRANTING VOTING RIGHTS TO PERMANENT RESIDENTS

A Does Granting Voting Rights Undermine the Significance of Australian Citizenship?

There is no question that granting voting rights to permanent residents narrows the distinction between citizenship as the full expression of membership, and lesser membership statuses. However, important distinctions remain. The primary distinction between citizens and permanent residents is that permanent residents remain aliens, and subject to removal from the state if they breach their visa conditions. The importance of formal citizenship is underlined in a series of cases involving mostly unsuccessful challenges to the removal of long term

87 *Commonwealth Electoral Act 1918* (Cth) ss 59, 63A.

88 See *McKinlay* (1975) 135 CLR 1, 33 (Barwick CJ), 39 (McTiernan and Jacobs JJ), 45 (Gibbs J), 58 (Stephens J); *McGinty* (1996) 186 CLR 140, 176–7 (Brennan CJ), 195 (Toohey J), 219 (Gaudron J), 229–30 (McHugh J), 268 (Gummow J).

89 *Commonwealth Electoral Act 1918* (Cth) s 66(3)(a).

90 Department of Immigration and Border Protection (Cth), *The Outlook for Net Overseas Migration* (Report, September 2014) 8.

permanent residents on the basis that they failed the character test under section 501 of the *Migration Act 1958* (Cth).⁹¹

Also, under section 44 of the *Constitution*, only citizens are able to run for political office. This maintains a distinction between those who are so intrinsically connected to the state that they have the power to make its laws, and those who are affected by the laws of the state and have a stake in choosing those who make the law.⁹² Section 44(i) goes as far as to exclude dual citizens from running for office. The focus of the section is allegiance. Those running for office are required to have no potential conflicting loyalties. Since permanent residents are likely to retain strong loyalties outside Australia, most obviously to their country of citizenship, there is a rational basis for preventing them from running for office.

The same degree of loyalty is not required for participation in voting for a number of reasons. First, the impact of individual voters is considerably less than those standing for office. Those standing for office have the power to alter the law. Once elected, there is nothing to prevent them changing their policy platform and voting for laws that undermine the state. Second, voters are limited to voting for people who have a single allegiance to Australia under section 44(i) which considerably lessens the possibility that, through voting, they can have a negative effect on the continuance of the state.

B Is Extending the Voting Rights to Permanent Residents Akin to Automatic Naturalisation?

Although voting rights may play a role of promoting civic values, the case for granting voting rights for permanent residents is distinct from a claim for automatic naturalisation. There may be good reasons why people do not wish to become citizens despite their high level of engagement in the Australian state as permanent residents associated with the conditions of citizenship in their country of origin. As discussed above, if their country of origin does not recognise dual citizenship, people may be reluctant to abandon their association with this country.

Conversely, it might be objected that granting voting rights removes an incentive from permanent residents to become citizens, since with eligibility to vote they are able to engage fully in the political community, and there is no need to become citizens. The response to this objection is essentially the same. Citizenship comes with additional benefits, such as the entitlement to run for office, that may become important to permanent residents if they are more engaged in the political process through voting. It is worth noting here that in New Zealand the voting rights of permanent residents did not affect the rate of take up of citizenship positively or negatively.⁹³

91 See, eg, *Nolan* (1988) 165 CLR 178; *Re Patterson* (2001) 207 CLR 391; *Shaw* (2003) 218 CLR 28; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.

92 Bauböck, 'Morphing the Demos into the Right Shape', above n 35, 825.

93 McMillan, above n 9, 116–17.

C What Are the Implications of Granting Voting Rights to Permanent Residents in Commonwealth Elections for Other Democratic Processes of the State?

1 Voting in State Elections

The case for extending voting rights to permanent residents in state elections is the same as the case we have made for voting rights in federal elections. In the Australian federation, the responsibilities of both federal and state governments cannot be sensibly distinguished. The High Court acknowledged this in developing the implied freedom of political communication in the *Constitution*.⁹⁴ Permanent residents have a direct stake in policy areas that are the primary responsibility of the states such as health and education. Furthermore, many aspects of electoral law are centrally regulated. The Australian Electoral Commission monitors all state and federal elections,⁹⁵ the law relating to voting and elections is a combination of federal and state laws,⁹⁶ and the freedom of political communication is a principle in state constitutions as well as the *Constitution*, and affects communication around state electoral processes.⁹⁷

2 Voting in Local Government Elections

Permanent residents are already eligible to vote in local government elections in three states if they reside in the relevant council district.⁹⁸ This reinforces the role of residence as a primary criterion for eligibility to vote.

3 Voting in Constitutional Referenda

In our view, permanent residents should not be entitled to vote in constitutional referenda. Referenda result in changes to the *Constitution* that are fundamental, long term changes to the very constitution of the polity. Only those who have made a full and permanent commitment to the state, the core citizenry, ought to participate in such elections.⁹⁹ Parliamentary elections, by contrast, occur in short term cycles, and the laws that are made by elected representatives are subject to constant change both within and across electoral cycles. If a permanent resident participates in one election, but then leaves the state, their vote has had the appropriate short term influence in the democratic process.

94 See, eg, *Lange v ABC* (1997) 189 CLR 520, 564 (The Court).

95 *Commonwealth Electoral Act 1918* (Cth) s 7.

96 See generally *Commonwealth Electoral Act 1918* (Cth); *Parliamentary Electorates and Elections Act 1912* (NSW); *Electoral Act 2002* (Vic); *Electoral Act 1992* (Qld); *Electoral Act 1907* (WA); *Electoral Act 1985* (SA); *Electoral Act 2004* (Tas); *Australian Capital Territory Electoral Act 1992* (ACT); *Electoral Act 2004* (NT).

97 *McGinty* (1996) 186 CLR 140, 176–8 (Brennan CJ), 189 (Dawson J), 210–12 (Toohey J), 222 (Gaudron J).

98 *Local Government (Elections) Act 1999* (SA) s 14(1)(ab)(i); *Local Government Act 1993* (Tas) s 254(2); *Local Government Act 1989* (Vic) ss 11, 13.

99 See also Owen, above n 57.

4 *Standing for Office*

As discussed above, permanent residents ought not to be eligible to stand for office. It is reasonable to require a person to have sworn allegiance to the Australian state before they are eligible to serve in the national government. This is currently reflected in the law. Section 163 of the *CEA* limits eligibility for election to the House of Representatives or the Senate to Australian citizens. The *Constitution* goes further. Section 44 of the *Constitution* restricts dual citizens from standing for election since they are ‘entitled to the rights or privileges of a subject or citizen of a foreign power’ under section 44(i).¹⁰⁰

VII CONCLUSION

The case for extending voting rights to permanent residents in Commonwealth and state elections has been made on two grounds. First, the article has outlined principled reasons in democratic theory to support an extension of voting rights to permanent residents. Second, the article has demonstrated how these reasons are reinforced by the context of Australia’s democratic system, which has, through law and policy, emphasised the importance of wide and equal democratic participation through the requirements of compulsory voting and the equal value of the franchise. In a world in which the movement of people is ever increasing and people’s allegiances are not restricted to their country of citizenship, the case for broadening the franchise to permanent residents is a compelling one.

100 *Sykes v Cleary [No 2]* (1992) 176 CLR 77, 107 (Mason CJ, Toohey and McHugh JJ); *Sue v Hill* (1999) 199 CLR 462, 503 [97] (Gleeson CJ, Gummow and Hayne JJ).