



FACULTY OF LAW
GEORGE WILLIAMS AO

DEAN
ANTHONY MASON PROFESSOR
SCIENTIA PROFESSOR

17 July 2019

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

Dear Secretary

Review of the Australian Citizenship renunciation by conduct and cessation provisions

Thank you for the opportunity to make a submission to this inquiry. We do so in a private capacity.

We have previously made submissions to this Committee's inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018. We have also conducted several years of research on citizenship deprivation as a national security tool in Australia, the United Kingdom and Canada. Our work on this subject can be found in the following publications, which we have attached to this submission:

- Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia' (2017) 41(2) *University of Melbourne Law Review* 845; and
- Sangeetha Pillai and George Williams, 'Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations' (2017) 66(3) *International & Comparative Law Quarterly* 521.

Our submission draws on this research, and reiterates arguments made in our earlier submissions to the Committee. We make the following recommendations:

1. The need to retain citizenship stripping laws should be reviewed, given their apparent lack of utility and the risks they produce. Specifically, we recommend that unless the benefit of ss 33AA, 35 and 35A can be clearly and precisely articulated, these provisions should be repealed.
2. Citizenship loss should not occur 'automatically', as is currently the case under ss 33AA and 35.
3. Citizenship loss should be only be possible where a person has been convicted of an offence that demonstrates clear disloyalty to Australia, and the conviction was recorded after the entry into force of the *Allegiance to Australia Act 2015*.

4. The Act, or regulations made under the Act, should set out a clear process that must be followed to determine that a person is a dual citizen before citizenship cessation takes place.

We set out these recommendations in further detail below. If we can assist the Committee further in any way, please do not hesitate to contact us.

1. The need to retain citizenship stripping laws should be reviewed, given their apparent lack of utility and the risks they produce

In our submission (with Shipra Chordia) to the Committee's inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, we accepted that Australian law needs to adapt to new national security threats, and that extending the grounds for citizenship revocation for dual nationals involved in terrorist activity might, in some circumstances, be appropriate. However, our subsequent research has shown that, since the *Allegiance to Australia Act 2015* was enacted, citizenship revocation does not appear to have emerged as a key part of Australia's national security toolkit. We have conducted a cross-country analysis, published in 2017, of the utility of citizenship revocation laws in Australia, Canada and the United Kingdom.¹ In this, we concluded that in all three jurisdictions, citizenship revocation laws appeared to be of minimal utility as a national security device due to a range of factors, including overlap with other national security powers and difficulty guaranteeing that revocation will have its desired effect. Indeed, in June 2017, prior to the publication of our analysis, Canada repealed its citizenship revocation legislation.

In Australia, national security is safeguarded through a package of some 75 pieces of Commonwealth legislation. Collectively, this legislation confers broad investigatory powers on security agencies, criminalises and attaches high maximum sentences to a broad range of conduct, including conduct at the earliest stages of planning or preparing for terrorist or hostile activity and conduct that involves no hostile or violent intent, and facilitates the imposition of executive control orders and preventative detention orders in circumstances where a threat to national security exists but no criminal conduct has yet been committed. As we note in our 2017 article, this broad suite of national security devices operates to 'circumvent the risk of terrorist attacks and to reduce the risk to national security posed by citizens and non-citizens who seek to harm Australia, irrespective of whether or not a conviction has been secured.' In this context 'it is difficult to see how Australia's...citizenship revocation laws [are] of more than marginal practical utility from a security perspective.'²

Notably, our research and analysis has been based on publicly available information about the use of Australia's citizenship stripping laws. We recognise that we, and other members of the public, do not have access to intelligence and other sensitive information.³ We also endorse the overarching comments made by the Department of Home Affairs in its recent submission to the Independent National Security Legislation Monitor's (INSLM) current inquiry into citizenship stripping laws:

What is without doubt is that Australian authorities need a range of measures that enable nuanced but definitive action to protect Australia. [...] Ultimately, it is the

¹ Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia' (2017) 41(2) *University of Melbourne Law Review* 845.

² Pillai and Williams, above n 1, 880-881; Sangeetha Pillai and George Williams, Submission to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*, 3-4. See also Clive Walker, Submission to International Security Legislation Monitor, *Review of Terrorism-related Citizenship loss provisions in the Australian Citizenship Act 2007*, 8-12.

³ See Pillai and Williams, above n 1, 848.

cohesion, resilience, and unity of the Australian community that is our best defence against violent extremism.⁴

However, we suggest that, in order to ensure that Australia's very large suite of national security laws are functioning to achieve this goal, the way in which each piece of national security legislation operates to further the goals of community protection and social cohesion must be clearly and precisely articulated. To date, justifications for including citizenship stripping legislation as part of this apparatus have been vague and generalised. For instance, in its submission to the INSLM, the Department's comment on the effectiveness of ss 33AA, 35 and 35A merely said that these provisions are 'one of the suite of [national security] measures', and that they 'have helped protect the community and limited membership in that community to individuals that embrace and uphold Australian values'.⁵

We suggest that this justification is too imprecise, and lacks nuance, especially given that a number of experts have suggested that citizenship stripping may actually weaken, rather than enhance social cohesion.⁶ Moreover, as we note in our research:

...citizenship stripping has the potential to have negative consequences for international relations, and for national security ventures on a broader scale. Efforts to permanently offload unwanted or high risk citizens onto foreign states is likely to produce tensions between governments, as well as undermine the cohesion needed to tackle cross-jurisdictional security issues. It is also significant that the effect of nations such as the UK, Canada and Australia revoking citizenship may be to cast responsibility for dangerous individuals onto nations with far fewer resources or capacity to deal with them. Indeed, the measure may even strengthen the hand of terrorist organisations. People who might return home to face prosecution may instead be left at large overseas, perhaps with nowhere to go but to remain with Islamic State or another terrorist group.⁷

In light of the significant dangers that may flow from citizenship stripping laws, and the lack of any clearly articulated benefit served by the laws, we recommend that, in the absence of a clear demonstration of the precise need that the provisions serve, ss 33AA, 35 and 35A be repealed.

In the event that citizenship stripping laws are retained, we make a number of further recommendations for how the existing regime could be improved. These are set out below.

2. Citizenship loss should not occur 'automatically', as is currently the case under ss 33AA and 35

Sections 33AA and 35 currently provide for dual citizens to lose their Australian citizenship automatically in particular circumstances. In our submission to the Committee's 2015 inquiry, we recommended that citizenship revocation should not occur automatically. This is still our recommendation. Our reasons are threefold. First, automatic revocation is impractical. It creates confusion and legal uncertainty, obscures judicial review options and creates practical

⁴ Department of Home Affairs, Submission to International Security Legislation Monitor, *Review of Terrorism-related Citizenship loss provisions in the Australian Citizenship Act 2007*, 9.

⁵ Ibid.

⁶ See Rachel Olding, 'Stripping dual citizenship 'completely counter-productive' to fighting terrorism: UK expert', *The Sydney Morning Herald*, 21 July 2015 <<http://www.smh.com.au/nsw/stripping-dual-citizenship-completely-counterproductive-to-fighting-terrorism-uk-expert-20150721-giha2k.html>>. See also George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136, 1172-5.

⁷ Pillai and Williams, above n 1, 887-888.

challenges for government agencies. Secondly, there are strong arguments that legislating for automatic citizenship loss is beyond the scope of the Commonwealth's constitutional powers. Finally, automatic citizenship revocation is an extreme measure that is out of step with citizenship deprivation regimes internationally.

(a) Impracticality

Providing for citizenship loss in a way that is purportedly self-executing creates legal uncertainty, both for individuals affected and for government agencies that have obligations to take actions with respect to persons who have lost citizenship.

Sections 33AA and 35 purportedly provide for citizenship loss without the need for any decision by an official. A person is deemed to have renounced citizenship immediately upon engaging in conduct specified by these provisions. The Minister has a general duty to provide (or attempt to provide) notice to the person that they have lost citizenship, at the point that he or she becomes aware that citizenship loss has occurred, and a discretionary power to exempt a person from the effect of s 33AA or s 35.

As we noted in our 2015 submission,⁸ various government agencies incur obligations to act as soon as citizenship loss has occurred. These obligations arise irrespective of whether the Minister is aware of the loss or whether they have provided notification to the person. The *Australian Citizenship Act* does not set out how these obligations reconcile with the Minister's power to exempt a person from the effect of s 33AA or s 35.

The practical challenges that automatic citizenship deprivation imposes on government agencies have been recognised by the Department of Home Affairs itself. In its submission to the INSLM, the Department notes that 'the automatic nature of the citizenship cessation, under the 'operation of law' model creates several challenges', including:

- impacting on other mechanisms in Australia's national security toolkit, such as criminal justice processes,
- creating a lack of clarity about the powers of intelligence agencies at any point in time, as the scope of these powers differs with respect to citizens and non-citizen, and
- impacting upon Australia's ability to 'manage its broader bilateral relationships and equities'.⁹

As Rayner Thwaites has clearly articulated, the idea that citizenship loss can occur without the need for a decision-maker is 'a legal fiction, as difficult questions of judgment are required to determine if the statutory preconditions for deprivation are met.'¹⁰ Moreover, while judicial review is not excluded under ss 33AA and 35, the lack of any decision prior to citizenship loss obscures the scope of such review.¹¹ Once again, this creates confusion for those vulnerable to citizenship loss, and in turn imposes barriers on their access to justice.

It has now become clear that the administration of ss 33AA and 35 is conducted by a body known as the Citizenship Loss Board, comprised of senior executives from various

⁸ See Shipra Chordia, Sangeetha Pillai and George Williams, Submission to Parliamentary Joint Committee on Intelligence and Security, *Review of Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 4-5.

⁹ Department of Home Affairs, above n 4, 9.

¹⁰ Rayner Thwaites, Submission to International Security Legislation Monitor, *Review of Terrorism-related Citizenship loss provisions in the Australian Citizenship Act 2007*, [11]. See also Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, 14; Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, 35.

¹¹ See also Thwaites, above n 10, [12]-[13].

Commonwealth departments and agencies. No reference to the Board, its function or the rules that it operates under is made in the *Australian Citizenship Act 2007* or regulations made under this Act. In its submission to the INSLM, the Department said that the Board is 'not a decision-making body', but that it advises the Minister and Department for Home Affairs on the administration of the automatic citizenship loss provisions.¹² Amongst other things, the Board 'reviews whether legislative thresholds have been met in citizenship loss cases' and assesses whether candidates for citizenship loss are dual citizens.¹³ This further obscures the process via which executive determinations about citizenship stripping are made.

The consequences of this lack of accountability in the process for determining that a person has automatically lost citizenship can be extreme. The Neil Prakash case, for instance, which we discuss further in section 4 of this submission, is an example where serious procedural deficiencies have resulted in an Australian citizen being rendered effectively stateless.

(b) Constitutional issues

Secondly, there are strong arguments that legislating for automatic citizenship loss is beyond the scope of the Commonwealth's constitutional powers. These arguments are particularly compelling with respect to s 33AA, but may also apply to s 35.

Section 33AA defines the conduct giving rise to automatic citizenship loss by reference to terrorism and foreign incursions and recruitment offences in the *Criminal Code Act 1995* (Cth), but does not require a conviction before citizenship loss can occur. It is arguable that this infringes the constitutional separation of judicial power.

The Act attempts to address this by imposing its own requirements for the intent a person must possess when engaging in conduct triggering automatic citizenship loss, so that the threshold is different from that which must be met to secure a criminal conviction.¹⁴ Section 33AA(3) provides that citizenship loss under s 33AA if the conduct in question was undertaken

- (a) with the intention of advancing a political, religious or ideological cause; and
- (b) with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (j) intimidating the public or a section of the public. These intent requirements operate in place of the fault elements in the Criminal Code offences.

Notably, s 33AA(4) deems this intention to exist when, at the time the conduct was engaged in, the person was a member of a declared terrorist organisation or acting on instruction of, or in cooperation with, a declared terrorist organisation. As Thwaites has noted, this 'effectively establish[es] a strict liability regime for those found to be members of declared terrorist organisations', and, moreover, attaches 'severe, potentially extreme, punitive consequences' to this strict liability.¹⁵

There are strong arguments that ss 33AA(3) and (4) do not cure any constitutional defects that s 33AA may suffer from. As we noted in our 2015 submission to the Committee, one line

¹²¹² Department of Home Affairs, above n 4, 6.

¹³ Ibid.

¹⁴ See Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, Revised Explanatory Memorandum.

¹⁵ Thwaites, above n 10, [10].

of argument here is that citizenship deprivation in the absence of criminal conviction imposes a punishment akin to exile as a result of the will of Parliament, rather than by way of a finding of a court, in a manner similar in effect to a Bill of Attainder, and that this intrudes upon an exclusively judicial power.¹⁶ This line of argument calls into question the constitutionality of s 35 as well as s 33AA.¹⁷

(c) Automatic citizenship revocation is out of step with approaches to citizenship deprivation internationally

As we have noted in our research, the automatic aspect of citizenship deprivation provided for in ss 33AA and 35 is more extreme than the citizenship stripping regime in any other common law country.¹⁸ In its submission to the INSLM, the Department of Home Affairs provided a list of six international comparators with citizenship deprivation laws in force. Of these comparators, only one country – the United States – provides for automatic citizenship deprivation. However, its laws to this effect are significantly narrower than ss 33AA and s 35, as they only provide for automatic citizenship loss in cases where the citizen in question commits an act of treason or conspiracy against the United States *and* does so with the intent of relinquishing US nationality.

3. Citizenship loss should be only be possible where a person has been convicted of an offence that demonstrates clear disloyalty to Australia, and the conviction was recorded after the entry into force of the *Allegiance to Australia Act 2015*

In our 2015 submission, we argued that citizenship revocation on national security grounds should only be considered where revocation occurs via the exercise of ministerial discretion, where no risk of statelessness arises, and where a person only becomes a candidate for revocation if they have been convicted by a court of an offence with disloyalty to Australia as a core element, and subjected to a sentence indicating that their conduct was very serious. This was broadly echoed by the Committee in its report, which said that revocation of the Australian citizenship of dual citizens ‘should only follow appropriately serious conduct that demonstrates a breach of allegiance to Australia’.¹⁹

The ‘relevant terrorism convictions’ that trigger the possibility of citizenship revocation under s 35A have a much closer nexus with allegiance than those included in the original draft of the *Allegiance to Australia Bill 2015*. Nonetheless, some of the included offences do not require a person to demonstrate any lack of allegiance to Australia in order to be convicted. For example, one of the things deemed by the Bill to be a ‘relevant terrorism conviction’ is conviction of the offence of ‘entering or remaining in a declared area’ in s 119.2 of the *Criminal Code Act 1995* (Cth). In order to be convicted of this offence, a person need do nothing more than enter an area declared by the government to be a no-go zone. It is not necessary that the person enter the area with any intent to cause harm, or that they cause any actual harm. A narrow set of defences apply, but these exclude a variety of innocent purposes, including visiting friends, undertaking a religious pilgrimage or conducting business dealings.

Other ‘relevant terrorism convictions’ that do not necessarily require any disloyalty to Australia or intent to cause harm include:

¹⁶ Chordia, Pillai and Williams, above n 8, 2.

¹⁷ See Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, 13.

¹⁸ Sangeetha Pillai and George Williams, ‘Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations’ (2017) 66(3) *International & Comparative Law Quarterly* 521, 545.

¹⁹ Parliamentary Joint Committee on Intelligence and Security, ‘Advisory report on the Australian Citizenship Amendment (*Allegiance to Australia*) Bill 2015’, 114.

- Conviction, under s 101.4(2) of the *Criminal Code Act*, of possessing a ‘thing’ that is used in a terrorist act, where the person in possession of the thing was reckless to the connection between that ‘thing’ and the terrorist act. Arguably, this could capture an individual who has not turned his or her mind to the activities of a family member, for example, where that family member subsequently uses a joint possession – such as a car or sim card – in the preparation or commission of a terrorist act.
- Conviction an offence under 102.6 of the *Criminal Code Act*. This could occur where a person donates money to an overseas organisation and is found to be reckless as to whether the organisation was a terrorist organisation.

As we have argued elsewhere, the constitutional validity of s 35A of the Act remains unclear.²⁰ Australian constitutional law on citizenship is evolving, and the constitutional limits on the Commonwealth Parliament’s power over Australian citizenship have not yet been clearly defined by the High Court. The most likely sources of constitutional support for s 35A are the aliens power in s 51(xix) and the defence power in s 51(vi). Where revocation is hinged upon conduct that involves no necessary disloyalty element, the connection with both of these powers is likely to be weakened.

For this reason, we suggest that, if s 35A is retained, the list of ‘relevant terrorism convictions’ should be carefully reviewed to ensure that disloyalty to Australia is a core element of every included conviction. We also strongly recommend against lowering or removing the minimum sentencing threshold that currently applies before a person can be stripped of their citizenship, as was proposed in the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018.

Currently, s 35A enables a person to be stripped of their Australian citizenship on the basis of a conviction recorded prior to the commencement of the *Allegiance to Australia Act 2015*. We do not believe that citizenship revocation should be possible in such circumstances. As we said in our 2015 submission, one of the most important aspects of the rule of law is that a person is entitled to act in accordance with the law at the time that they committed their actions. No penalty, including a loss of citizenship, should apply in respect of conduct that was not subject to a penalty at the time it was committed. This is a long recognised and important principle that lies at the heart of Australian democracy, and the relationship between the state and citizen. Acting retrospectively in this case would be wrong in principle and create a new precedent that might do long term damage to Australia’s system of government. We recommend that, if s 35A is retained, it be amended so that it only applies to convictions recorded after the commencement of the *Allegiance to Australia Act 2015*.

4. The Act, or regulations made under the Act, should set out a clear process that must be followed to determine that a person is a dual citizen before citizenship cessation takes place

A person can only lose their Australian citizenship under ss 33AA, 35 or 35A if they are a citizen of a foreign country. The Explanatory Memorandum for the *Allegiance to Australia Act*

²⁰ See eg Sangeetha Pillai, ‘Citizenship-stripping reforms open to challenge in spite of safeguards’, 19 *Law Society Journal* (February 2016), 74; Sangeetha Pillai, ‘The Allegiance to Australia Bill and the Constitution: Legislative Power and Membership of the Constitutional Community’ on AUPUBLAW (21 July 2015) <https://auspublaw.org/2015/07/the-allegiance-to-australia-and-the-constitution/>.

2015 states that the purpose of this is to ensure that no person is rendered stateless as a result of citizenship loss under these provisions.

The recent Neil Prakash case demonstrates that the Act in its existing form does not adequately safeguard against the consequence of effective statelessness, where a person is erroneously considered to be a citizen of a foreign country.²¹ Prakash, who was born in Australia, was deemed to have automatically lost his Australian citizenship, after the Department of Home Affairs formed a view that he was a citizen of Fiji. However, Fijian authorities, who were not consulted prior to the Department forming this view,²² have consistently denied that Prakash has ever been a Fijian citizen.²³ At present, Prakash, who is not regarded as a citizen by either Australian or Fijian authorities, is effectively stateless. While the Act's judicial review provisions enable Prakash to challenge his citizenship loss in court, on the grounds that he is not a dual citizen, this option is not practically feasible, given that Prakash is currently serving jail time in Turkey.²⁴

Currently, there is no established, documented process setting out how it will be determined that a person is in fact a dual citizen, and therefore a candidate for citizenship loss. We recommend that, if ss 33AA, 35 and 35A are retained, the *Australian Citizenship Act*, or its, should set out the process that the Department, or the Citizenship Loss Board, must follow before reaching a determination that a person is a dual citizen. Citizenship cessation should not take effect unless this process has been followed.

Yours sincerely

Dr Sangeetha Pillai

Senior Research Associate, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW Law

Professor George Williams AO

Dean, Anthony Mason Professor and Scientia Professor, UNSW Law

²¹ See eg Kim Rubenstein, 'Stripping away more than just a citizenship', *APPS Policy Forum* (31 January 2019) <https://www.policyforum.net/stripping-away-more-than-just-a-citizenship/>; Sangeetha Pillai, 'Breaking the law for national security's sake', *APPS Policy Forum* (19 February 2019) <https://www.policyforum.net/breaking-the-law-for-national-securitys-sake/>.

²² See eg Paul Karp, 'Peter Dutton revoked Neil Prakash's Australian citizenship without consulting Fiji', *The Guardian* (30 January 2019) <https://www.theguardian.com/australia-news/2019/jan/30/peter-dutton-revoked-neil-prakashs-australian-citizenship-without-consulting-fiji>

²³ See Helen Davidson and Amy Remeikis, 'Neil Prakash 'not a Fiji citizen': Dutton move to strip Australian citizenship in doubt', *The Guardian* (2 January 2019) <https://www.theguardian.com/australia-news/2019/jan/02/neil-prakash-not-a-fiji-citizen-dutton-move-to-strip-australian-citizenship-in-doubt>

²⁴ See Erik Tlozek, 'Australian Islamic State recruiter Neil Prakash sentenced to jail in Turkey', *ABC News* (16 March 2019) <https://www.abc.net.au/news/2019-03-16/neil-prakash-sentenced-to-jail-in-turkey/10907510>.

THE UTILITY OF CITIZENSHIP STRIPPING LAWS IN THE UK, CANADA AND AUSTRALIA

SANGEETHA PILLAI* AND
GEORGE WILLIAMS†

In three common law countries — the UK, Canada and Australia — recent legislation significantly expanded the grounds on which nationals can be stripped of their citizenship. In each country, two justifications were invoked to support the expanded grounds for citizenship deprivation: a symbolic justification, asserting that citizens who engage in particular behaviour do not deserve to retain their citizenship, and a security justification, which cast citizenship stripping as a necessary device to neutralise threats from within the citizenry. In this article, we examine the denationalisation laws introduced in each of the three countries and analyse the extent to which each law served these symbolic and security justifications.

CONTENTS

I	Introduction.....	846
II	Enactment, Justification and Efficacy of Revocation Laws in the UK, Canada and Australia.....	851
	A The UK.....	851
	1 Laws Enacted.....	851
	2 Justifications.....	855
	3 Use and Efficacy.....	857
	B Canada.....	864
	1 Laws Enacted.....	864
	2 Justifications.....	865
	3 Use, Efficacy and Repeal.....	866
	C Australia.....	871

* BA (Hons), LLB (Hons) (UNSW), LLM (Syd), PhD (UNSW); Senior Research Associate, Andrew and Renata Kaldor Centre for International Refugee Law, Faculty of Law, University of New South Wales.

† BEc, LLB (Hons) (Macq), LLM (UNSW), PhD (ANU); Dean, Anthony Mason Professor and Scientia Professor, Faculty of Law, University of New South Wales; Foundation Director, Gilbert + Tobin Centre of Public Law; Australian Research Council Laureate Fellow; Barrister, New South Wales Bar.

1	Laws Enacted.....	871
2	Justifications	875
3	Use and Efficacy.....	877
III	Themes and Observations.....	881
IV	Conclusion	888

I INTRODUCTION

In recent years, three common law countries, the UK, Canada and Australia, have enacted legislation to broaden the capacity for nationals to be stripped of their citizenship. This represents a reinvigoration of security-based denationalisation: a practice which has been largely unused for several decades. The laws have been introduced in response to heightened concerns about national security stemming from the foreshadowed return of radicalised ‘foreign fighters’,¹ terrorist attacks in Western nations,² and planned or attempted attacks on home soil.³

The case for introducing new citizenship revocation measures has been made on the basis that additional powers are needed to respond to these challenges. For instance, in a press statement in 2014 announcing that the UK threat level had been raised to ‘severe’, then-Prime Minister David Cameron

¹ See, eg, Lydia Khalil and Rodger Shanahan, ‘Foreign Fighters in Syria and Iraq: The Day after’ (Analysis, Lowy Institute for International Policy, September 2016) <http://web.archive.org/web/20160913001824/http://www.lowyinstitute.org/files/khalil_and_shanahan_foreign_fighters_in_syria_and_iraq_final_web_120916.pdf>.

² See, eg, Alice Foster, ‘Terror Attacks Timeline: From Paris and Brussels Terror to Most Recent Attacks in Europe’, *Express* (London, 18 August 2017) <www.express.co.uk/news/world/693421/Terror-attacks-timeline-France-Brussels-Europe-ISIS-killings-Germany-dates-terrorism>, archived at <<https://perma.cc/3JDX-MDGH>>.

³ See, eg, Natasha Bitá, ‘Sydney Siege Shows How the Screen Door of Citizenship Has Been Left Open to Criminal Elements’, *The Australian* (Sydney, 20 December 2014) <www.theaustralian.com.au/opinion/sydney-siege-shows-how-the-screen-door-of-citizenship-has-been-left-open-to-criminal-elements/news-story/929eb385f0325e4aa58b7a3b230d4160>, archived at <<https://perma.cc/8ZQN-ZRKQ>>; ‘Canada Revokes Citizenship of Toronto 18 Plotter’, *HuffPost Canada* (Online, 26 September 2015) <www.huffingtonpost.ca/2015/09/26/toronto-18-terror-plotter-s-citizenship-revoked-by-federal-government_n_8200768.html>, archived at <<https://perma.cc/B95E-MTXA>>; Victoria Parsons, ‘Man Stripped of UK Citizenship over Fears of Paris-Style Terror Attack in London’, *The Independent* (London, 26 May 2016) <www.independent.co.uk/news/uk/crime/man-stripped-of-uk-citizenship-over-fears-of-paris-style-terror-attack-in-london-a7048986.html>, archived at <<https://perma.cc/QUA3-UXFP>>.

noted that '[t]he ambition to create an extremist caliphate in the heart of Iraq and Syria is a threat to our own security here in the UK'.⁴ Cameron continued:

We will always take whatever action is necessary to keep the British people safe here at home ... We are stopping suspects from travelling by seizing passports. We're barring foreign nationals from re entering the UK. We're depriving people of citizenship and we are legislating so we can prosecute people for all terrorist activity, even where that activity takes place overseas.⁵

In a similar vein, former Canadian Citizenship and Immigration Minister Chris Alexander said:

Our Government knows that there is no higher purpose for any government than to ensure the safety and security of its citizens and we have never been afraid to call jihadi terrorism exactly what it is. That is why we are taking steps to confront the ever evolving threat of jihadi terrorism by revoking citizenship of dual nationals who have been convicted of heinous crimes against Canada such as terrorism, espionage for foreign governments or taking up arms against Canada and our brave men and women in the Canadian Armed Forces. Our Government's changes to the *Citizenship Act* will ensure that those who wish to do us harm will not be able to exploit their Canadian citizenship to endanger Canadians or our free and democratic way of life.⁶

In announcing plans to introduce expanded citizenship stripping laws, former Australian Prime Minister Tony Abbott said:

It's worth recalling the citizenship pledge that all of us have been encouraged to recite: I pledge my commitment to Australia and its people; whose democratic beliefs I share; whose rights and liberties I respect; and whose laws I will up-

⁴ David Cameron, 'Threat Level from International Terrorism Raised: PM Press Statement' (Speech, Prime Minister's Office, 29 August 2014) <www.gov.uk/government/speeches/threat-level-from-international-terrorism-raised-pm-press-conference>, archived at <<https://perma.cc/T66A-E6QG>>.

⁵ Ibid.

⁶ Citizenship and Immigration Canada, Government of Canada, 'Protecting Canadians: Government of Canada Now Able to Revoke Citizenship of Dual Citizens Convicted of Terrorism', *Cision* (Web Page, 29 May 2015) <www.newswire.ca/news-releases/protecting-canadians---government-of-canada-now-able-to-revoke-citizenship-of-dual-citizens-convicted-of-terrorism-517764271.html>, archived at <<https://perma.cc/7HBA-9KZM>>.

hold and obey. This has to mean something. Especially now that we face a home-grown threat from people who do reject our values.⁷

These statements suggest that the move to reinvigorate denationalisation laws in all three countries was underpinned by two justifications: a security rationale and a symbolic rationale. Both rationales take as their starting point the idea that recent events have produced an increased number of ‘undesirable citizens’, and that this requires a legislative response. The security rationale is based on the idea that these undesirable citizens may pose a threat to national security and that managing this risk of harm warrants removing them from the citizenry and, where possible, from the nation itself. By contrast, the symbolic rationale is less grounded in pragmatic considerations. It asserts that certain members of the citizenry do not deserve to hold citizenship, irrespective of whether or not the fact that they hold it presents an increased risk of harm.

In this article, we examine the efficacy of the recent moves to legislate for citizenship stripping in the UK, Canada and Australia in light of these stated goals. In Part II, we outline recent citizenship stripping legislation enacted in each of the three countries, and situate this in the context of other national security laws. We then seek to determine the extent to which expanding the grounds for citizenship stripping has served the security and symbolic justifications that the government in each country supplied in support of this move. In doing so, we recognise the limitations of our analysis. It is not possible to undertake a comprehensive assessment of the efficacy of these laws given our lack of access to intelligence and other sensitive information. It is also not possible to measure empirically the contribution that they have made to national security. Instead, we examine the extent to which the expanded citizenship stripping laws serve security justifications by looking at publicly available information about the use of such laws, as well as the extent to which they cover the same ground as other national security legislation.

A significant development that has occurred since this article was written is that the Canadian denationalisation legislation that we analyse has been repealed, just three years after its enactment.⁸ Interestingly, the decision to repeal this legislation, much like the decision to introduce it, appears to have been underpinned by a symbolic rationale: in this case one that emphasises

⁷ Tony Abbott, ‘National Security Statement’ (Speech, Australian Federal Police Headquarters, 23 February 2015) 7 (emphasis omitted).

⁸ See Bill C-6, *An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act*, 1st Sess, 42nd Parl, 2016 (‘Bill C-6’), amending *Citizenship Act*, RSC 1985, c C-29, s 10(2) (‘*Canadian Citizenship Act*’).

the security of citizenship as a status, irrespective of the ‘deservingness’ of each individual citizen. Our analysis has been updated to take account of and to reflect upon this.

In Part III, we identify and explore some key themes that arise out of the cross-jurisdictional analysis conducted in Part II. The resurrection of denationalisation powers in the UK, Canada and Australia forms part of a broader global trend towards invoking citizenship stripping as a response to national security concerns.⁹ While the recent repeal of these powers in Canada signifies a partial retreat from this trend, there is no evidence to date of this approach being mirrored in the UK, Australia or other countries. The increased tendency to invoke citizenship stripping as a national security tool raises the question of whether citizenship deprivation can ever be considered justified on security grounds. This question has been explored in a number of recent commentaries,¹⁰ and we do not address it in this article. Our focus is squarely on whether recent examples of such laws in the comparator countries have served as an effective means by which to pursue their stated goals.

This approach fills a meaningful gap in recent scholarship on citizenship stripping. Most existing work is directed towards one of two ends: exploring normative questions about how denationalisation affects the value of citizen-

⁹ In the last two years, several countries have enacted citizenship stripping laws as a response to security threats, including Austria, Azerbaijan, Belgium and The Netherlands: see, eg, Sangeetha Pillai and George Williams, ‘Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations’ (2017) 66 *International and Comparative Law Quarterly* 521, 522 n 8, citing: *Code de la Nationalité Belge 1984* [Belgian Nationality Code 1984] art 23(1)(ii); *Staatsbürgerschaftsgesetz 1985* [Nationality Act Austria] § 33(2); *Netherlands Nationality Act* (Netherlands) art 14(2)(b) [Olivier Vonk trans]; Azad Hasanli, ‘Azerbaijanis Engaged in Terrorist Activity to Lose Citizenship’, *Trend News Agency* (Baku, 4 December 2015) <<https://en.trend.az/azerbaijan/society/2465160.html>>, archived at <<https://perma.cc/D678-SBT5>>. In this period, other countries have also resumed utilisation of citizenship stripping laws. For example, in Denmark, s 8B of the *Consolidation Act No 422 of 7 June 2004 (Consolidated Act on Danish Nationality)* [Bertel Haarder and Oluf Engberg, Ministry of Refugee, Immigration and Integration Affairs trans, 7 June 2004] was employed for the first time to deprive Said Mansour of his Danish citizenship: ‘Denmark Strips Man of Citizenship over “Terror Links”’, *Al Jazeera* (Online, 11 June 2016) <www.aljazeera.com/news/2016/06/denmark-strips-man-citizenship-terror-links-160611080713219.html>, archived at <<https://perma.cc/CTJ8-JQAD>>. On 8 June 2016, the Supreme Court of Denmark upheld the decision to revoke Mansour’s citizenship: see *Prosecution Service v T* (Højesterets Dom [Supreme Court of Denmark], Case No 211/2015, 8 June 2016).

¹⁰ See, eg, Matthew J Gibney, ‘Should Citizenship Be Conditional? The Ethics of Denationalization’ (2013) 75 *Journal of Politics* 646; Christian Joppke, ‘Terror and the Loss of Citizenship’ (2016) 20 *Citizenship Studies* 728; Patti Tamara Lenard, ‘Democracies and the Power to Revoke Citizenship’ (2016) 30 *Ethics and International Affairs* 73.

ship as a status,¹¹ or analysing some aspect of citizenship deprivation within a single jurisdiction.¹² While our article touches on these themes, its primary contribution is to add to a smaller body of work that conducts cross-jurisdictional comparisons of approaches to citizenship stripping.

To date, there are a few published comparisons of this nature examining the UK and Canadian denationalisation laws,¹³ but there is minimal analysis factoring in the recent Australian legislation.¹⁴ Further comparison of the legislative experiences of these three countries, including Canada's move to repeal its laws, is worthwhile. The UK, Canada and Australia are the only common law countries to have recently reemployed citizenship stripping as a national security device. These countries are logical comparators because they share common foundations for their models of citizenship: Canada and Australia originated as UK colonies and imported the UK's conceptualisation of citizenship upon their inception.¹⁵ Moreover, as this article reveals, there are a number of similarities between the justifications invoked in the three countries for expanding the grounds for denationalisation, while the justifications for repealing these expansions in Canada serve as a useful counterpoint.

¹¹ See, eg, Lucia Zedner, 'Security, the State, and the Citizen: The Changing Architecture of Crime Control' (2010) 13 *New Criminal Law Review* 379; Shai Lavi, 'Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach' (2011) 61 *University of Toronto Law Journal* 783; Rainer Bauböck and Vesco Paskalev, 'Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation' (2015) 30 *Georgetown Immigration Law Journal* 47; Patrick Sykes, 'Denaturalisation and Conceptions of Citizenship in the "War on Terror"' (2016) 20 *Citizenship Studies* 749.

¹² See, eg, Hina Majid, 'Protecting the Right to Have Rights: The Case of Section 56 of the Immigration, Asylum and Nationality Act 2006' (2008) 22 *Journal of Immigration Asylum and Nationality Law* 27; Alice Ross, 'Deprivation of Citizenship: What Do We Know?' (2014) 28 *Immigration, Asylum and Nationality Law* 316; Matthew J Gibney, 'The Deprivation of Citizenship in the United Kingdom: A Brief History' (2014) 28 *Immigration, Asylum and Nationality Law* 326; Eric Fripp, Rowena Moffatt and Ellis Wilford (eds), *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Hart Publishing, 2015); Craig Forcese and Ani Mamikon, 'Neutrality Law, Anti-Terrorism, and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies' (2015) 48 *UBC Law Review* 305; Helen Irving and Rayner Thwaites, 'Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)' (2015) 26 *Public Law Review* 143; Lucia Zedner, 'Citizenship Deprivation, Security and Human Rights' (2016) 18 *European Journal of Migration and Law* 222; Kim Rubenstein and Jacqueline Field, *Australian Citizenship Law* (Lawbook, 2nd ed, 2017) 260–77.

¹³ See, eg, Craig Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists"' (2014) 39 *Queen's Law Journal* 551; Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' (2014) 40 *Queen's Law Journal* 1.

¹⁴ But see Pillai and Williams (n 9).

¹⁵ See *ibid* 523–5.

In light of the historical and contemporary parallels between the three countries, examining their recent experience with denationalisation laws enables the early anticipation of themes and patterns that may underpin security-based citizenship stripping in common law countries. That is the larger project of this article.

II ENACTMENT, JUSTIFICATION AND EFFICACY OF REVOCATION LAWS IN THE UK, CANADA AND AUSTRALIA

A *The UK*

1 *Laws Enacted*

Of the three countries in our study, the UK has had the longest history of relatively broad denationalisation laws. Such laws were first introduced in the aftermath of World War I and have since remained on UK statute books in some form.¹⁶ Prior to 2002, the Home Secretary was empowered to revoke the citizenship of a naturalised citizen where their citizenship had been acquired through fraud or misrepresentation, or on the basis of prescribed disloyalty grounds.¹⁷ However, this power could only be exercised where the Secretary was satisfied that retention of citizenship would not be ‘conducive to the public good’.¹⁸

In the post-World War II period, the power to revoke citizenship on disloyalty grounds was exercised very rarely, with the last instance of deprivation on disloyalty grounds in the 20th century occurring in 1973.¹⁹ In 1981, UK nationality law was redrafted in the form of the *British Nationality Act 1981* (UK). Following vigorous parliamentary debate,²⁰ this Act broadly retained the Secretary of State’s citizenship deprivation powers. However, this did not lead to any new uses of the power to revoke citizenship on disloyalty grounds, and UK denationalisation laws came to be regarded as ‘moribund’.²¹

¹⁶ See Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 329–30.

¹⁷ See *ibid.*

¹⁸ *British Nationality Act 1981* (UK) s 40(2). See also *ibid* 328.

¹⁹ The last citizen deprived of citizenship was Nicholas Prager, for spying for Czechoslovakia: United Kingdom, *Parliamentary Debates*, House of Lords, 9 October 2002, vol 639, col 281 (Lord Filkin); Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 329.

²⁰ See, eg, United Kingdom, *Parliamentary Debates*, House of Lords, 23 July 1981, vol 423, cols 366–411; United Kingdom, *Parliamentary Debates*, House of Lords, 13 October 1981, vol 424, cols 261–365. See also Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 330.

²¹ Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 330.

In the 21st century, the UK has expanded and invoked denationalisation powers, and ‘has emerged as a global leader in using citizenship deprivation as a counterterrorism measure.’²² During this period, it broadened ministerial powers to revoke citizenship in 2002, 2006 and 2014.²³ On each of these three occasions, the expansions to revocation laws were introduced in the aftermath of events that heightened national security concerns: the September 11 terrorist attacks on the World Trade Centre in 2001, the 2005 London bombings, and increased foreign fighter engagement in the conflicts in Syria and Iraq from 2011 onwards.²⁴

The UK’s 21st-century reinvigoration of the practice of disloyalty-based citizenship revocation commenced in the aftermath of the 11 September 2001 terrorist attacks. In 2002, a government White Paper was published, ‘recommending that denationalization laws be “update[d]” and used to illustrate the State’s “abhorrence” of certain crimes.’²⁵ Following this, Parliament passed legislation replacing the assortment of specific denaturalisation powers that the Home Secretary had held under the *British Nationality Act*²⁶ with a broad executive power to revoke a person’s citizenship, exercisable whenever the Secretary believed that it would be ‘seriously prejudicial to the vital interests of ... the United Kingdom’ for that person to continue to hold citizenship.²⁷ Additionally, citizenship revocation was no longer confined to naturalised citizens — the deprivation power was also exercisable against natural-born citizens.²⁸ However, in practice only UK citizens with dual citizenship were vulnerable to denationalisation as the legislation precluded citizenship deprivation where this would result in statelessness.²⁹ Matthew Gibney has noted that the introduction of a broad denationalisation power was tempered

²² Pillai and Williams (n 9) 532.

²³ *Nationality, Immigration and Asylum Act 2002* (UK) s 4; *Immigration, Asylum and Nationality Act 2006* (UK) s 56; *Immigration Act 2014* (UK) s 66; Pillai and Williams (n 9) 532.

²⁴ See generally Pillai and Williams (n 9) 532–6.

²⁵ *Ibid* 532, quoting Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (Cm 5387, 2002) 35 [2.23].

²⁶ The grounds that gave rise to denationalisation powers in the 1981 Act related to ‘loyalty, criminality and trading with the enemy’: Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 330; see generally at 329–30.

²⁷ *Nationality, Immigration and Asylum Act 2002* (UK) s 4(1), amending *British Nationality Act 1981* (UK) s 40(2).

²⁸ *Nationality, Immigration and Asylum Act 2002* (UK) s 4(1), amending *British Nationality Act 1981* (UK) s 40(1).

²⁹ *Nationality, Immigration and Asylum Act 2002* (UK) s 4(1), amending *British Nationality Act 1981* (UK) s 40(4).

by the high threshold of the ‘vital interests of the United Kingdom’ test, as well as a number of other safeguards, such as the protection against statelessness and provision for automatic legal appeals.³⁰

In 2006, following the London suicide bombings on 7 July 2005, the threshold for citizenship deprivation was further lowered by granting the Home Secretary the power to revoke citizenship whenever he or she believed that citizenship deprivation would be ‘conducive to the public good.’³¹ The legislative protections against statelessness remained intact so, in practice, the deprivation power could only be exercised against dual citizens.

The ‘conducive to the public good’ standard remains the general threshold for citizenship revocation today. However, in controversial changes introduced in 2014, the Home Secretary was granted the power to revoke in certain circumstances the citizenship of UK nationals with no other citizenship.³²

Section 40(4A) of the *British Nationality Act* now provides that the Home Secretary may deprive a naturalised British citizen of their citizenship where he or she believes this would be ‘conducive to the public good’, even if that person would become stateless as a result. However, this power can only be exercised if the Home Secretary is satisfied that depriving the person of citizenship is for ‘the public good’ because, while they held citizenship status, they conducted themselves ‘in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory.’³³ Additionally, the Home Secretary must have ‘reasonable grounds for believing that the person is able ... to become a national of [a foreign] country or territory’ under the law of that country or territory.³⁴

While the threshold for revocation is much higher when statelessness may ensue, the 2014 expansions to UK revocation law have been regarded as

³⁰ See Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 330–2. Gibney explains that the ‘combination of expansion and contraction’ of the UK’s citizenship stripping powers in the 2002 Act was influenced by a desire to comply with the *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000): Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 332.

³¹ *Immigration, Asylum and Nationality Act 2006* (UK) s 56(1), amending *British Nationality Act 1981* (UK) s 40(2).

³² *Immigration Act 2014* (UK) s 66(1), inserting *British Nationality Act 1981* (UK) s 40(4A).

³³ *British Nationality Act 1981* (UK) s 40(4A)(b).

³⁴ *Ibid* s 40(4A)(c). For an analysis of the UK citizenship stripping provisions and the circumstances in which they are used, see Terry McGuinness and Melanie Gower, ‘Deprivation of British Citizenship and Withdrawal of Passport Facilities’ (Briefing Paper No 06820, 9 June 2017) 5.

remarkable in their breadth. As a result of these expansions, it has been suggested that 'UK governments now have at their disposal laws to strip citizenship that are arguably broader than those possessed by any other Western democratic state'.³⁵ These powers have even been used outside of the counterterrorism context to revoke the citizenship of leaders of the Rochdale child sex grooming gang.³⁶ Despite this breadth, the UK is considering further expansions to its denationalisation laws, with the Home Office signalling in October 2015 an intention to consider how to 'more easily revoke citizenship from those who reject our values'.³⁷

The UK denationalisation legislation does not require consideration of international law principles, nor judicial involvement prior to a ministerial decision to revoke citizenship. Individuals who have their citizenship revoked have a right of appeal,³⁸ and are entitled to written notice outlining this right, as well as the reasons for the deprivation order.³⁹ However, the efficacy of this appeal right can be limited. For instance, the right to appeal does not prevent a person from being subject to the consequences of citizenship deprivation, such as deportation from the UK, with no right to re-enter. This can make the

³⁵ Gibney, 'The Deprivation of Citizenship in the United Kingdom' (n 12) 326. This comment preceded the enactment of Australia's citizenship stripping legislation, which is, in some respects, even broader than the UK legislation as it provides for citizenship deprivation in a way that bypasses the need for a ministerial decision. Despite this, it can still be argued that the denationalisation powers held by the UK government are the broadest in any Western democracy, given the capacity to use these powers to render individuals stateless and the flexibility inherent in the 'conducive to the public good' standard for citizenship stripping. Indeed, in his April 2016 report, *Citizenship Removal Resulting in Statelessness*, the UK Independent Reviewer of Terrorism Legislation, David Anderson, noted that the UK power to revoke the citizenship of persons with no other citizenship was 'unusually strong' in international terms and that it 'extends further than the laws of most comparable countries in Europe, North America or Australasia': David Anderson, *Citizenship Removal Resulting in Statelessness: First Report of the Independent Reviewer on the Operation of the Power to Remove Citizenship Obtained by Naturalisation from Persons Who Have No Other Citizenship* (Report, April 2016) 17 [4.1] <www.gov.uk/government/uploads/system/uploads/attachment_data/file/518390/David_Anderson_QC_-_CITIZENSHIP_REMOVAL__print_.pdf>, archived at <<https://perma.cc/6WFT-L9AY>>.

³⁶ See, eg, 'Shabir Ahmed: Sex Gang Leader Appeals over Deportation', *BBC News* (London, 16 February 2016) <www.bbc.com/news/uk-england-manchester-35590906>, archived at <<https://perma.cc/3RNH-M59A>>.

³⁷ Secretary of State for the Home Department, *Counter-Extremism Strategy* (Cm 9148, 2015) 33 [104].

³⁸ The right of appeal is either to a court (*British Nationality Act 1981* (UK) s 40A(1)) or to the Special Immigration Appeals Commission (*Special Immigration Appeals Commission Act 1997* (UK) s 2B), depending on whether the decision was made in reliance on closed material.

³⁹ *British Nationality Act 1981* (UK) s 40(6).

practical exercise of appeal rights very difficult.⁴⁰ The rights are also difficult to exercise where a person is stripped of their citizenship while they are outside UK territory.⁴¹ Even where appeal rights are exercised, as Lucia Zedner has noted, their utility is ‘weakened by the tendency of judges to defer to the executive in respect of decisions relating to national security’.⁴² Additionally, the wide breadth of the Home Secretary’s revocation powers significantly reduces the likelihood that any appeals brought will be successful.⁴³

2 *Justifications*

Two justifications were invoked to support the UK’s 21st-century citizenship stripping expansions. The first was symbolic, and was reflected in presentations of the expanded laws as affirming particular features of the state–citizen relationship. For instance, statements made in Parliament and by the government in relation to the revocation laws described citizenship as a ‘privilege’ rather than a right, and emphasised that citizens owe a duty of allegiance to the state.⁴⁴ Professor Clive Walker, Special Adviser to the Independent Reviewer of Terrorism Legislation, has said that the UK’s citizenship stripping

⁴⁰ See Zedner, ‘Citizenship Deprivation, Security and Human Rights’ (n 12) 237.

⁴¹ See Alice Ross and Patrick Galey, ‘Rise in Citizenship-Stripping as Government Cracks Down on UK Fighters in Syria’, *The Bureau of Investigative Journalism* (London, 23 December 2013) <www.thebureauinvestigates.com/2013/12/23/rise-in-citizenship-stripping-as-government-cracks-down-on-uk-fighters-in-syria/>, archived at <<https://perma.cc/5KZF-23WA>>, discussed in McGuinness and Gower (n 34) 11.

⁴² Zedner, ‘Citizenship Deprivation, Security and Human Rights’ (n 12) 230.

⁴³ A survey of the Special Immigration Appeals Commission’s published decisions reinforces this. Since 2007, there have been 10 appeals in which the Commission has examined the validity of a decision to deprive an individual of their citizenship. All but two of these appeals were predominantly concerned with the question of whether the deprivation decision rendered the appellant stateless: ‘Outcomes 2007 Onwards’, *Tribunals Judiciary* (Web Page) <<http://siac.decisions.tribunals.gov.uk/#top>>, archived at <<https://perma.cc/S48P-S9EZ>>. The introduction in 2014 of a power to deprive a person of citizenship even when statelessness may ensue minimises the potential for future challenges to be brought on this ground. The two appeals that did not concern questions of statelessness were, notably, both dismissed by the Commission: *M2 v Secretary of State for the Home Department* (Special Immigration Appeals Commission, Appeal No SC/124/2014, Mr Justice Irwin, Upper Tribunal Judge Southern and Dame Holt, 22 December 2015); *K2 v Secretary of State for the Home Department* (Special Immigration Appeals Commission, Appeal No SC/96/2010, Mr Justice Irwin, Upper Tribunal Judge Jordon and Mr Fell, 22 December 2015).

⁴⁴ See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 24 April 2002, vol 384, col 413 (Marsha Singh); United Kingdom, *Parliamentary Debates*, House of Commons, 6 January 2015, vol 590, cols 165–210; ‘The UK’s Unacceptable Obsession with Stripping British Citizens of Their UK Nationality’, *Andy Worthington* (Blog Post, 25 March 2014) <www.andyworthington.co.uk/2014/03/25/the-uks-unacceptable-obsession-with-stripping-british-citizens-of-their-uk-nationality/>, archived at <<https://perma.cc/E994-VNKW>>.

powers respond to a ‘growing importance attached to loyalty within core values (such as “Britishness”) as the citizen’s reciprocal duty towards the state which grants the prize of citizenship’.⁴⁵

The second justification presented the revocation expansions as necessary to meet the UK’s national security needs. This is reinforced by the fact that each expansion was introduced either in the wake of terrorist activity or following failed attempts to deal with particular individuals of concern under the prior law.

The justifications offered for each of the three expansions cast pre-existing denationalisation laws as insufficient to deal with pressing threats. For instance, prior to the passage of the 2002 amendments, the House of Lords Select Committee on the Constitution reported that the prior deprivation powers failed to reflect ‘the types of activity that might threaten [the UK’s] democratic institutions and [its] way of life’.⁴⁶ In parliamentary debate over the 2006 expansions, Immigration, Citizenship and Nationality Minister Tony McNulty stated that the government viewed it as ‘essential’ that, in light of the London terrorist attacks, powers to exclude non-citizens whose presence was ‘not to be conducive to the public good’ should be extended to enable the removal of British nationality,⁴⁷ and that, ‘it is appropriate to have [this] power ... in the locker — if nothing else — given the way circumstances are’.⁴⁸ Shortly after the introduction of the 2014 expansions, then-Prime Minister David Cameron made reference to a growing threat from Britons travelling to fight with Islamic State, and stated that ‘gaps in [the UK’s] armoury’ required strengthening.⁴⁹

Such statements cast pre-existing laws as inadequate from a security standpoint. However, they did not identify precise security needs that the proposed expansions were designed to meet, but rather asserted their necessity in general, often rhetorical, terms. Moreover, since 2002, the UK has enacted a wide range of other national security measures, a number of which serve similar objectives to citizenship stripping. The government’s security-based justifications for each of the three revocation expansions engaged only

⁴⁵ Anderson, *Citizenship Removal Resulting in Statelessness* (n 35) 11 [3.1], quoting Clive Walker (private communication to Anderson).

⁴⁶ House of Lords Select Committee on the Constitution, *Nationality, Immigration and Asylum Bill* (House of Lords Paper No 129, Session 2001–02) 6 app 2.

⁴⁷ United Kingdom, *Standing Committee Debates*, House of Commons, 27 October 2005, col 254.

⁴⁸ *Ibid* col 271.

⁴⁹ Cameron (n 4).

minimally with the question of what the revocation expansions would add to such laws.⁵⁰ The following section outlines the way in which the UK's citizenship revocation powers have been used in the 21st century, examines their overlap and interaction with other security-based legislation, and analyses their utility as a means of serving the justifications supplied for them.

3 *Use and Efficacy*

The three 21st-century expansions of UK denationalisation powers have been characterised by ever-broadening executive discretion and limited safeguards. As noted above, a key justification for this was that each set of expansions was a necessary update that would serve to make UK law better adapted to meet contemporary challenges.

Despite this, for several years the expanded laws did not see significant use, but rather were invoked only sparingly. Moreover, where revocation powers were invoked, they did not necessarily provide targeted and effective responses to security challenges.

This is demonstrated by the only attempt to invoke the power granted to the Home Secretary in 2002 to revoke a person's citizenship where the Secretary reasonably believed that they had conducted themselves in a manner seriously prejudicial to the vital interests of the UK. Three days after this revocation power entered into force, it was used to revoke the citizenship of Abu Hamza al-Masri,⁵¹ a radical cleric who had publicly praised the September 11 terrorist attacks and Osama bin Laden.⁵² At this time, Abu Hamza was a dual citizen of the UK and Egypt, and therefore susceptible to denationalisation. The legislation at the time, however, provided that deprivation did not come into effect until a person had exhausted all of their appeal avenues. Abu Hamza lodged an appeal, which was not concluded until 2010,

⁵⁰ A criticism of the 2002 law was that most conduct seriously prejudicial to the vital interests of the UK was already criminalised and penalised through treason offences. The government's response was that it wanted to retain the power to revoke citizenship even where a criminal conviction was not or could not be secured; for instance, due to a lack of sufficient admissible evidence: see, eg, United Kingdom, *Parliamentary Debates*, House of Lords, 9 October 2002, vol 639, cols 279–81 (Lord Filkin).

⁵¹ *Hamza v Secretary of State for the Home Department* (Special Immigration Appeals Commission, Appeal No SC/23/2003, Mr Justice Mitting (Chairman), Senior Immigration Judge Goldstein and Mr Smith, 5 November 2010) [2].

⁵² Lena Jakobsson, 'Jury Finds Radical Islamic Cleric Abu Hamza al-Masri Guilty in Terror Trial', *CNN* (Online, 20 May 2014) <<http://edition.cnn.com/2014/05/19/justice/new-york-terror-trial/index.html>>, archived at <<http://perma.cc/7ZBN-FFYD>>.

almost eight years after the original deprivation order was made.⁵³ During this time, Egypt had taken steps to divest him of his dual Egyptian citizenship.⁵⁴ As a result, the Special Immigration Appeals Commission found that the Secretary of State lacked the power to revoke Abu Hamza's UK citizenship as doing so would render him stateless.⁵⁵

It was not until the introduction of the 'conducive to the public good' threshold for revocation in 2006 that denationalisation saw a resurgence. Even this power was sparingly used in its early years: between 2006 and 2009, only four people were stripped of their citizenship.⁵⁶ In 2010, however, the election of the Cameron government signified a major shift in the exercise of citizenship deprivation powers. Within its first year, the government stripped five people of their citizenship.⁵⁷ Since 2010, there have been 33 denationalisations on security grounds.⁵⁸

It has been reported that the vast majority of denationalised persons were stripped of their UK citizenship while abroad.⁵⁹ In 2013, *The Bureau of Investigative Journalism* reported that this had occurred '[i]n all but two known cases'.⁶⁰ This creates considerable practical barriers for those who wish to appeal the revocation decision. Once an appeal is lodged, however, the process can be protracted and can be complicated by intervening events.

For example, in 2007 the UK moved to revoke the citizenship of Hilal al-Jedda, an asylum seeker from Iraq, who had been granted British citizenship in 2000.⁶¹ Under Iraqi law at the time, al-Jedda automatically lost his Iraqi citizenship upon attaining a foreign citizenship. On this basis, he appealed against the revocation order on the ground that depriving him of his UK

⁵³ *Hamza* (n 51) [2].

⁵⁴ See especially *ibid* [11]–[14].

⁵⁵ See *ibid* [22]. In 2004, amendments were introduced to allow deprivation to take effect as soon as a notice to deprive was issued. While this gave greater flexibility to the government with respect to the use of citizenship deprivation powers, it did not lead to new uses of these powers.

⁵⁶ Melanie Gower, *Deprivation of British Citizenship and Withdrawal of Passport Facilities* (Standard Note No SN/HA/6820, House of Commons Library, 30 January 2015) 5.

⁵⁷ *Ibid*.

⁵⁸ Victoria Parsons, 'Theresa May Deprived 33 Individuals of British Citizenship in 2015', *The Bureau of Investigative Journalism* (London, 21 June 2016) <www.thebureauinvestigates.com/2016/06/21/citizenship-stripping-new-figures-reveal-theresa-may-deprived-33-individuals-british-citizenship/>, archived at <<https://perma.cc/L44Y-AQLD>>.

⁵⁹ *Ibid*. See also Ross and Galey (n 41).

⁶⁰ Ross and Galey (n 41).

⁶¹ *Al-Jedda v Secretary of State for the Home Department* [2014] AC 253.

citizenship would leave him stateless. In 2013 the matter reached the Supreme Court, before which the Home Secretary noted that, due to a change in Iraqi law after al-Jedda attained UK citizenship, he had the opportunity to reacquire Iraqi citizenship.⁶² The Home Secretary argued that, consequently, the deprivation order did not make al-Jedda stateless, as he was entitled to obtain another citizenship.⁶³ The Court dismissed this submission, noting that it would 'mire the application of the [provision] in deeper complexity',⁶⁴ and unanimously found in al-Jedda's favour. The introduction in 2014 of a power to revoke citizenship in certain circumstances even if statelessness would ensue was a direct response to the government's lack of success in this case.

A number of inferences can be drawn from the way in which the UK's denationalisation laws have been employed and expanded. First, the continued expansion of citizenship revocation powers, coupled with sparing, inefficient use of these powers between 2002 and 2009, suggests that the impetus for the changes made during this period was more symbolic than security based. Each revision to the law served as a symbolic statement that particular types of citizens did not deserve to retain their citizenship and remain members of the community. This was underlined by statements in Parliament and by the government describing citizenship as a 'privilege' rather than a right, and affirming that citizens owe a duty of allegiance to the state.⁶⁵ At the same time, the modest use of the citizenship stripping powers, at least prior to 2009, suggests that in a practical sense, the powers were not critical to achieving the UK's national security objectives.⁶⁶

A question arises as to what factors precipitated the sharp increase in use of the revocation laws from 2010 onwards. In part, the higher number of revocations may be a response to the new security risk posed by increased numbers of foreign fighters. However, significant increases in foreign fighter

⁶² Ibid 266–7 [23], [25].

⁶³ See ibid 255.

⁶⁴ Ibid 269 [32].

⁶⁵ See n 44.

⁶⁶ A less obvious point is that the laws also mark a shift away from the idea that citizenship is tethered to allegiance. The current revocation threshold in UK law generally allows a person to be stripped of their citizenship whenever this would be 'conducive to the public good': *British Nationality Act 1981* (UK) s 40(2). This does not require any non-allegiant conduct on the citizen's part. Thus, attempts to justify the revocation laws as an affirmation of the fact that citizens owe a duty of allegiance to the state do not seem to provide an adequate explanation for their enactment.

activity only commenced in 2011.⁶⁷ This suggests that, at least initially, the increase in use of the powers was triggered by a difference in political perspectives and priorities between the Cameron government and the prior Blair and Brown governments.

The idea that broad use of citizenship stripping powers has not been critical to ensuring national security in the UK could, in part, be explained by the fact that, since 2002, the UK has enacted a wide range of other national security measures of greater utility.⁶⁸ Indeed, a number of other more targeted measures serve similar objectives to citizenship stripping, such as those for the detention and removal from the UK of persons deemed to pose a security risk, and the prevention of their re-entry.

Initially, such exclusionary mechanisms were directed towards non-citizens resident in the UK. However, they have increasingly included citizens within their scope. For instance, the Home Secretary enjoys under the royal prerogative an executive discretion to withdraw or refuse passports.⁶⁹ Historically, these powers are thought to have been used very sparingly.⁷⁰ However, in April 2013, the criteria for using the prerogative were updated.⁷¹ Between the update and November 2014, the Home Secretary invoked the passport refusal and cancellation powers 29 times to ‘disrupt the travel of people planning to engage in terrorist-related activity overseas’.⁷²

The UK’s prerogative passport cancellation powers, while broad in scope, may be less effective as a tool to prevent citizens who pose security risks from returning to the UK from abroad. This is because the *Immigration Act 1971* (UK) grants UK citizens a ‘right of abode’, allowing them to enter the UK ‘without let or hindrance’.⁷³ Thus, a citizen who travels to the UK using a

⁶⁷ See, eg, Institute for Economics and Peace, *Global Terrorism Index: Measuring and Understanding the Impact of Terrorism* (Report No 36, November 2015) 45.

⁶⁸ See generally Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) ch 5; Helen Fenwick and Gavin Phillipson, ‘UK Counter-Terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms’ in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 481.

⁶⁹ Theresa May, ‘The Issuing, Withdrawal or Refusal of Passports’ (Written Statement to Parliament, 25 April 2013); McGuinness and Gower (n 34) 12 [4].

⁷⁰ For instance, the power is ‘reported to have been used only 16 times between 1947 and 1976’: McGuinness and Gower (n 34) 14 [4.3].

⁷¹ May, ‘The Issuing, Withdrawal or Refusal of Passports’ (n 69).

⁷² Theresa May, ‘Home Secretary Theresa May on Counter-Terrorism’ (Speech, Royal United Services Institute, 24 November 2014) <www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism>, archived at <<https://perma.cc/Y9XE-SSBB>>.

⁷³ *Immigration Act 1971* (UK) s 1(1); see also at s 2(1)(a).

foreign passport or fraudulent travel document has a prima facie legal right to enter.⁷⁴

The right of abode can be limited by restrictions that are lawfully imposed.⁷⁵ In January 2015, the *Counter-Terrorism and Security Act 2015* (UK) ('CTSA') introduced a suite of new administrative powers designed to facilitate exclusion and the disruption of the mobility of persons deemed to pose a security risk. One of the key features of the CTSA is the Temporary Exclusion Order ('TEO') — an order which the Home Secretary may issue to prevent a citizen outside the UK from returning to the UK for a two-year period.⁷⁶ After, or during, this period additional TEOs may be imposed.⁷⁷ In order to issue a TEO, the Home Secretary must be satisfied of five criteria.⁷⁸ Most significantly, he or she must 'reasonably suspect[] that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom,'⁷⁹ and 'reasonably consider[] that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism.'⁸⁰

The TEO regime has the capacity to lock a citizen out of the UK indefinitely. There is no limit to the number of times that an additional TEO can be imposed on top of the initial two-year order. However, the primary purpose of the scheme is not exile but is to provide a mechanism via which excluded citizens can return to the UK in a managed way. A citizen subject to a TEO

⁷⁴ Notably, s 1(1) of the *Immigration Act* also confers a right to leave the UK without let or hindrance. Where a citizen's UK passport is their sole travel document, however, cancelling their passport effectively renders this right redundant.

⁷⁵ *Ibid.*

⁷⁶ *Counter-Terrorism and Security Act 2015* (UK) ss 2(1), 2(5), 4(3)(b) ('CTSA'). TEOs can also apply to non-citizens who have a right of abode in the UK: at s 2(6).

⁷⁷ *Ibid* s 4(8).

⁷⁸ *Ibid* ss 2(2), 2(3)–(7).

⁷⁹ *Ibid* s 2(3).

⁸⁰ *Ibid* s 2(4). Other conditions are that the Secretary of State reasonably considers that the individual is outside the UK, and that the individual has a right of abode in the UK: at ss 2(5)–(6). Finally, the Secretary of State must either obtain permission to impose a TEO, or 'reasonably consider[] that the urgency of the case requires a [TEO] to be imposed without obtaining [prior judicial] permission': at s 2(7). See also Jessie Blackbourn and Clive Walker, 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79 *Modern Law Review* 840, 849–56; Helen Fenwick, 'Responding to the ISIS Threat: Extending Coercive Non-Trial-Based Measures in the Counter-Terrorism and Security Act 2015' (2016) 30 *International Review of Law, Computers and Technology* 174, 176–8; Zedner, 'Citizenship Deprivation, Security and Human Rights' (n 12) 228.

can apply for a permit to re-enter the UK, which will typically be granted,⁸¹ but can be made subject to conditions with which the citizen must comply for the permit to remain valid.⁸² Such conditions can include obligations incumbent upon the citizen after their return to the UK, such as reporting to police and attending a deradicalisation program.⁸³ Where a citizen subject to a TEO is deported from a foreign country to the UK, the TEO scheme does not authorise their exclusion.⁸⁴ Moreover, where ‘the Secretary of State considers that [such an] individual is to be deported to the United Kingdom’, a permit to return must be issued.⁸⁵

It is not clear that the Home Secretary’s citizenship deprivation powers add significantly to the protection against security threats that is already achievable via these other broad exclusionary controls. This is especially so because the majority of citizenship revocations are issued while a citizen is overseas,⁸⁶ such that a TEO could be used to prevent or manage their return to the UK. Notably, citizenship revocation seems to be employed more frequently than the TEO scheme, which Prime Minister Theresa May and Home Secretary Amber Rudd recently admitted had only been used once since its enactment.⁸⁷ This may be because denationalisation provides a more straightforward means to permanently exile a high-risk citizen from the UK. However, it is not clear that exile serves the UK’s security needs better than the conditional managed return scheme implemented via the *CTSA*. For instance, as Jessie Blackbourn and Clive Walker have suggested, discouraging the voluntary return of citizens deemed to be security risks carries with it the danger of such individuals adopting terrorism as a way of life, which opens up further risks that they may contribute to the escalation of foreign conflicts

⁸¹ *CTSA* (n 76) s 6(1). The permit can, however, be denied if the Secretary of State requests that the citizen attend an interview with a constable or immigration officer and the citizen fails to attend: at s 6(2).

⁸² *Ibid* ss 5(2)–(3).

⁸³ *Ibid* s 9.

⁸⁴ *Ibid* s 2(1)(b).

⁸⁵ *Ibid* s 7(1).

⁸⁶ Ross and Galey (n 41).

⁸⁷ Peter Walker, ‘Rudd Admits Anti-Terror Exclusion Powers Used Only Once since 2015’, *The Guardian* (London, 29 May 2017) <www.theguardian.com/uk-news/2017/may/29/uk-used-anti-terror-exclusion-powers-once-since-2015-amber-rudd-admits>, archived at <<https://perma.cc/V3CR-FCS8>>; Fiona Hamilton and Lucy Fisher, ‘Jihadist Ban: Theresa May Says Use of Temporary Exclusion Orders Is “a Matter for Police”’, *The Times* (London, 30 May 2017) <www.thetimes.co.uk/article/may-defends-single-use-of-jihadist-ban-dnxnqr6p3>, archived at <<https://perma.cc/F48Z-CCC9>>.

or seek to instigate terrorist attacks in the UK from overseas.⁸⁸ Certainly, in the lead-up to each expansion of the UK's denationalisation powers, no considered justification for prioritising permanent removal as an anti-terror tool was articulated.

It might also be argued that citizenship stripping avoids the problem of having to admit an excluded citizen who is deported to the UK by a foreign country — a feature of the TEO scheme that some commentators have described as a limit to its effectiveness.⁸⁹ However, whether citizenship stripping actually avoids this prospect is not clear. Guy Goodwin-Gill, for instance, has argued that, under international law, '[a]ny State which admitted an individual on the basis of his or her British passport would be fully entitled to ignore any purported deprivation of citizenship and, as a matter of right, to return that person to the United Kingdom.'⁹⁰

Where a citizen is within the UK, citizenship stripping facilitates their permanent removal, an outcome which is not achievable via other mechanisms. However, the very small number of revocations in this context suggests that this is not generally seen as critical to maintaining national security. Moreover, there can be practical challenges to removing a denationalised person from the UK, as this depends upon finding a country willing to take them. This is likely to be particularly challenging where revocation results in statelessness. Even where this is not the case, deportation can prove practically difficult. For instance, in *Pham v Secretary of State for the Home Department*, the applicant was a naturalised British citizen who had not renounced his prior Vietnamese citizenship.⁹¹ The Home Secretary ordered that he be stripped of his British citizenship and deported to Vietnam. Deportation was frustrated when the Vietnamese government responded that it did not recognise the applicant as a Vietnamese citizen.⁹² Cases such as this demonstrate the problematic nature of citizenship revocation as an effective counter-terrorism tool and why such a power may be of limited utility compared to other measures.

⁸⁸ Blackbourn and Walker (n 80) 852.

⁸⁹ Ibid 851–2.

⁹⁰ Guy S Goodwin-Gill, 'Deprivation of Citizenship Resulting in Statelessness and Its Implications in International Law' (Opinion, 12 March 2014) 12 [24] (emphasis omitted) <<https://assets.documentcloud.org/documents/1086878/guy-s-goodwin-gill-legal-opinion-on-deprivation.pdf>>, archived at <<https://perma.cc/3T8Z-TYTD>>.

⁹¹ [2015] 1 WLR 1591.

⁹² Ibid 1595–6 [3].

The analysis above illustrates that, through each of its recent iterations, UK denationalisation law has made a powerful statement about what citizenship entails and which citizens should lose the privilege to hold it, but that it has been of questionable utility as a national security device. This raises the question of whether a strong symbolic rationale is sufficient justification for the laws in light of their expansive nature and the weakness of the security rationale that underpins them. This question is discussed further in Part III.

B Canada

1 *Laws Enacted*

In mid-2014, the Canadian federal Parliament followed in the UK's footsteps by passing the *Strengthening Canadian Citizenship Act*, SC 2014, c 22, which introduced a number of new disloyalty-based citizenship revocation grounds into the *Citizenship Act*, RSC 1985, c C-29 ('*Canadian Citizenship Act*').⁹³ Prior to this, Canadian citizenship was, by global standards, a very secure status: naturalised citizens could have their citizenship revoked by ministerial discretion on grounds of fraud or where there was a concealment of material circumstances, but Canadians could not otherwise lose their citizenship against their will.⁹⁴

The *Strengthening Canadian Citizenship Act* expanded the grounds for revocation considerably to include three new circumstances. First, it created a ministerial power to revoke a person's citizenship where an individual is convicted of any of a series of prescribed offences under Canadian law relating to national security.⁹⁵ Secondly, it made revocation possible where a citizen had been convicted in a foreign jurisdiction of an offence committed outside Canada that, had it been committed in Canada, would qualify as a 'terrorism offence' under s 2 of the *Criminal Code*, RSC 1985, c C-46.⁹⁶ Finally, the Minister was granted the power to revoke citizenship where he or she had reasonable grounds to believe that the person concerned, while holding Canadian citizenship, served in the armed forces of a country or 'as a member

⁹³ Pillai and Williams (n 9) 540.

⁹⁴ Ibid 529.

⁹⁵ *Strengthening Canadian Citizenship Act*, SC 2014, c 22, s 8, amending *Canadian Citizenship Act* (n 8), the latter as repealed by *An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act*, SC 2017, c 14, s 3(1) ('*Canadian Citizenship Amendment Act*').

⁹⁶ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2)(b), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1).

of an organized armed group' where 'that country or group was engaged in an armed conflict with Canada'.⁹⁷

Before exercising this final power, the Minister was required to obtain a judicial declaration that the person engaged in the activity in question.⁹⁸ A degree of protection against statelessness was also provided for: the three new grounds for citizenship revocation did not authorise revocation that 'conflict[ed] with any international human rights instrument regarding statelessness to which Canada is signatory'.⁹⁹ However, the person affected bore the burden of proving, on the balance of probabilities, that they were 'not a citizen of any country of which the Minister ha[d] reasonable grounds to believe the person [was] a citizen'.¹⁰⁰

In most cases, the *Strengthening Canadian Citizenship Act* left the decision of whether or not a person's citizenship was to be revoked with the Minister, rather than with a court. The judiciary only played a role in the process in the sense that revocation could not occur without a conviction (albeit not necessarily in a Canadian court) or by a judicial declaration that the citizen concerned had engaged in particular conduct. Unlike in the UK, the requirement of both an executive and a judicial decision served as a safeguard against abuses of power.

Ministerial revocation decisions were also subject to judicial review, where leave of the court was obtained.¹⁰¹ However, as in the UK, the ability to access such review may have been limited where the citizen seeking review was outside national borders.

2 *Justifications*

Justifications for the Canadian citizenship revocation provisions drew on a symbolic rationale much more heavily than on a security rationale. This is clear from the parliamentary discussion of the *Strengthening Canadian Citizenship Act* prior to its passage. The Act was presented as being directed towards 'strengthen[ing] and protect[ing] the value of Canadian citizen-

⁹⁷ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10.1(2), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 4(2).

⁹⁸ *Ibid.*

⁹⁹ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10.4(1), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 5.

¹⁰⁰ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10.4(2), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 5.

¹⁰¹ *Canadian Citizenship Act* (n 8) s 22.1(1).

ship'.¹⁰² In his second reading speech, then-Citizenship and Immigration Minister Chris Alexander said that the legislation would help 'maintain[] the integrity of citizenship ... [by] deterring disloyalty'.¹⁰³ At a press conference, Alexander said that '[c]itizenship is not a right; it is a privilege'.¹⁰⁴ When introducing the legislation into the upper house, Senator Nicole Eaton said:

Citizenship is based on allegiance. Those granted citizenship pledge allegiance to our monarch, the Queen of Canada, and to our system of government and its laws. Betrayal of this allegiance comes with a price.¹⁰⁵

By contrast, security justifications for the Act were canvassed only briefly and — as in the UK — were invoked in very general terms. A government backgrounder to the *Strengthening Canadian Citizenship Act* states that its provision for citizenship revocation 'underscore[s] the government's commitment to protecting the safety and security of Canadians and promoting Canadian interests and values' and 'reinforce[s] the value of Canadian citizenship'.¹⁰⁶ Additionally, in his second reading speech, Alexander said that the *Strengthening Canadian Citizenship Act* was 'about deterring disloyalty'.¹⁰⁷ He also noted that '130 Canadians are fighting with extremists somewhere in the world, with terrorist groups that have been listed by Canada or that face listing by Canada',¹⁰⁸ but did not suggest that the Act would help combat this problem, other than by reinforcing the value of Canadian citizenship.

3 Use, Efficacy and Repeal

The Canadian revocation provisions reflected the symbolic justifications invoked prior to their enactment, which emphasised that citizens who demonstrate disloyalty or a lack of allegiance do not deserve to retain their Canadian citizenship. Enabling revocation only where a person has served

¹⁰² Canada, *Parliamentary Debates*, House of Commons, 27 February 2014, 3310 (Chris Alexander).

¹⁰³ *Ibid* 3311.

¹⁰⁴ Susana Mas, 'New Citizenship Rules Target Fraud, Foreign Terrorism', *CBC News* (Online, 6 February 2014) <www.cbc.ca/news/politics/new-citizenship-rules-target-fraud-foreign-terrorism-1.2525404>, archived at <<https://perma.cc/YGJ7-5JHW>>.

¹⁰⁵ Canada, *Parliamentary Debates*, Senate, 17 June 2014, 1932.

¹⁰⁶ 'Strengthening Canadian Citizenship Act: Protecting and Promoting Canada's Interests and Values', *Government of Canada: News* (Web Page, 6 February 2014) <www.canada.ca/en/news/archive/2014/02/strengthening-canadian-citizenship-act-protecting-promoting-canada-interests-values.html>, archived at <<https://perma.cc/HF6A-25DT>>.

¹⁰⁷ Canada, *Parliamentary Debates*, House of Commons, 27 February 2014, 3311.

¹⁰⁸ *Ibid* 3313.

with a country or group engaged in conflict with Canada or been convicted of terrorism or national security offences ensures that revocation is predicated on a lack of allegiance.

On the other hand, parts of the Act remained unsupported by this allegiance-based justification. For instance, s 10(2)(b) rendered a person convicted of particular national security offences in a foreign country susceptible to citizenship revocation.¹⁰⁹ While such conduct may be reprehensible, it does not inherently indicate disloyalty to Canada. Additionally, disloyal conduct did not lead to the same consequences for all citizens, as only dual citizens were vulnerable to citizenship revocation.

By contrast, the revocation provisions did not seem particularly well-adapted to any security purpose. A major reason for this was the requirement of a criminal conviction before most grounds for citizenship revocation could take effect.¹¹⁰ While this was an important safeguard in the Canadian law, it arguably weakened any security justifications for citizenship stripping as any security threat posed could be neutralised by criminal sanction. Each of the conviction-based grounds for denationalisation had a minimum sentence threshold that had to be met before a person became a candidate for citizenship revocation. For most offences a sentence of life imprisonment was required, with the result that the additional consequence of citizenship stripping was likely to be of minimal practical utility.¹¹¹ However, for some offences, a minimum sentence of five years' imprisonment sufficed to trigger the possibility of denationalisation.¹¹²

Additionally, as is the case in the UK, Canada's citizenship stripping laws overlapped with other powers that can be used to exclude Canadian citizens from Canadian territory on national security grounds. The Canadian gov-

¹⁰⁹ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2)(b), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1).

¹¹⁰ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1). See also Forcese and Mamikon (n 12) 334–5.

¹¹¹ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) ss 10(2)(a), (c)–(e), (g)–(h), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1).

¹¹² This lower threshold applied to terrorism offences under s 2 of the *Criminal Code*, RSC 1985, c C-46 (or offences committed overseas that, if committed in Canada would qualify as such) (*Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2)(b), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1)) and to terrorism offences as defined in s 2(1) of the *National Defence Act*, RSC 1985, c N-5 (*Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2)(f), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1)).

ernment holds a prerogative power over passports.¹¹³ The *Canadian Passport Order*, SI/81-86 clarifies that this includes a ministerial power to revoke a passport where the Minister ‘has reasonable grounds to believe that [this] is necessary to prevent the commission of a terrorism offence ... or for the national security of Canada or a foreign country or state.’¹¹⁴ Though details of Canadian passport revocation decisions are not publicly available, the Canadian government stated in 2014 that the revocation power had been used to prevent the exit from Canada of citizens seeking to travel to conflict regions as well as the return of citizens who were already abroad in such regions.¹¹⁵

It is worth noting that, as in the UK, there are legal limits on the way in which the Canadian executive’s passport control powers can be exercised. These stem from s 6(1) of the *Canadian Charter of Rights and Freedoms*, which grants Canadian citizens the constitutional ‘right to enter, remain in and leave Canada.’¹¹⁶ This right is subject to such ‘reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’¹¹⁷ The Canadian courts have held that s 10.1 of the *Canadian Passport Order* is a valid law that is compatible with the *Charter*. However, executive decisions made under s 10.1 may be held invalid by the courts if they fail to comply with the *Charter*.¹¹⁸ An example is the case of *Abdelrazik v Minister of Foreign Affairs*, in which the Canadian government refused to issue a passport to a citizen overseas who, fearing detention, wished to return to Canada, despite having no evidence that his return to Canada would endanger the national security of Canada or another country.¹¹⁹ The Federal Court found that this decision was invalid.

It is unlikely that a government decision to revoke the passport of a Canadian who qualified as a candidate for citizenship revocation would have met such a fate. This is because satisfaction of the criteria for citizenship stripping — conviction of a terrorism or national security offence, or serving

¹¹³ See, eg, *Canadian Passport Order*, SI/81-86, s 4(3).

¹¹⁴ *Ibid* s 10.1.

¹¹⁵ Stewart Bell, ‘Canadian Government Begins Invalidating Passports of Citizens Who Have Left to Join Extremist Groups’, *National Post* (Toronto, 20 September 2014) <<http://news.nationalpost.com/news/canada/canadian-government-revoking-passports-of-citizens-trying-to-join-extremist-groups>>.

¹¹⁶ *Canada Act 1982* (UK) c 11, sch B pt I s 6(1) (‘*Canadian Charter of Rights and Freedoms*’).

¹¹⁷ *Ibid* s 1.

¹¹⁸ See, eg, *Veffer v Minister of Foreign Affairs* [2008] 1 FCR 641, 654 [23], quoting *Black v Prime Minister* (2001) 54 OR (3d) 215, [46]; *Abdelrazik v Minister of Foreign Affairs* [2010] 1 FCR 267, 323 [133], quoting *Attorney General of Canada v Kamel* [2009] 4 FCR 449, 455–6 [11].

¹¹⁹ *Abdelrazik* (n 118).

in the armed forces of a group engaged in armed conflict with Canada — would seem to have provided clear evidence of an elevated threat to national security. It is thus likely that the passport revocation powers in s 10.1 of the *Canadian Passport Order* can be employed to achieve the same effects as citizenship stripping, calling into question any security rationale for the revocation legislation.¹²⁰

The lack of any clear security benefit in Canada's denationalisation laws was underlined by the sole instance of revocation under the now-repealed legislation. In late September 2015, the Harper government revoked the citizenship of Zakaria Amara, the ringleader of the unsuccessful Toronto 18 bomb plot. Amara is currently serving a sentence of life imprisonment, so poses no foreseeable threat to Canadian security.¹²¹ The Harper government also issued notices to nine other citizens, signalling an intention to deprive them of their citizenship. Most were, like Amara, members of the Toronto 18 group.¹²² However, no further deprivation orders were ultimately issued due to a change in government and a policy shift with respect to citizenship.

In October 2015, a new government was elected in Canada, under the leadership of Justin Trudeau. In the lead-up to the election, Trudeau voiced his opposition to the *Strengthening Canadian Citizenship Act*, arguing that 'as soon as you make citizenship for some Canadians conditional on good behaviour, you devalue citizenship for everyone'.¹²³ Like the justifications for the Act, Trudeau's opposition was anchored around a symbolic point about the value of citizenship: one that reiterated the security and equality elements of common law citizenship that were minimised by proponents of the Act.

Shortly after its election, the Trudeau government took steps to undo key elements of the *Strengthening Canadian Citizenship Act*. In February 2016, Bill C-6 was introduced into Parliament. The Bill purported to repeal all the new national security grounds for citizenship revocation,¹²⁴ as well as to

¹²⁰ See Forcese and Mamikon (n 12) 336–8.

¹²¹ See, eg, 'Canada Revokes Citizenship of Toronto 18 Plotter' (n 3).

¹²² Stewart Bell, 'Canada Working to Revoke the Citizenship of Nine More Convicted Terrorists', *National Post* (Toronto, 30 September 2015) <<http://news.nationalpost.com/news/canada/government-working-to-revoke-citizenship-of-nine-more-canadians-convicted-of-terrorist-offences>>. However, there are some exceptions, including a citizen serving a sentence for a conviction in the US courts.

¹²³ Ryan Maloney, 'Bill C-24: Trudeau Says Terrorists Shouldn't Be Stripped of Citizenship in Leaked Audio', *HuffPost Canada* (Online, 28 September 2015) <www.huffingtonpost.ca/2015/09/28/bill-c-24-trudeau-audio-conservatives_n_8206798.html>, archived at <<https://perma.cc/3VZ9-9U9J>>.

¹²⁴ Bill C-6 (n 8) cls 3–5.

restore the citizenship of any person denationalised under those grounds.¹²⁵ Consequently, the nine further citizens flagged for denationalisation by the previous Harper government were not subject to deprivation orders.

As was the case with the *Strengthening Canadian Citizenship Act*, parliamentary debate over the Bill focused overwhelmingly on the value of citizenship. The contrast between these two pieces of legislation showcases deep philosophical differences in the way in which the Harper and Trudeau governments have conceived of citizenship. In stark contrast to the rhetoric about citizenship being a 'privilege' that accompanied the introduction of the *Strengthening Canadian Citizenship Act*, the Trudeau government defended Bill C-6 as a measure necessary to preserve the principles of secure citizenship and equality between all citizens, which stem from the common law. In his second reading speech for the Bill, former Minister of Immigration, Refugees and Citizenship John McCallum, said: '[w]hen we say a Canadian is a Canadian ... that includes good and bad Canadians.'¹²⁶ McCallum went on to say:

The place for a terrorist is in prison, not at the airport. It is our strong belief that if a person is sent to prison for terrorism, there should not be two classes of terrorists: those who go to prison and have their citizenship revoked and those who only go to prison.¹²⁷

Similarly, Independent Senator Raymonde Gagné argued that citizenship deprivation on national security grounds creates an unequal citizenship. Gagné also suggested that any security rationale that underpins such measures is unconvincing:

What would we accomplish? Some say that we would be sending a message, but what message? That we have two classes of citizens? I find that response counterproductive. The message I would like us to promote is the message in the bill that every Canadian who legitimately obtains Canadian citizenship is a Canadian for better or for worse. Think about it. Who do we want to send this message to, to terrorists?

I'm not so sure that the prospect of losing one's citizenship might convince a radicalized person to refrain from committing a terrorist act. The message is

¹²⁵ Ibid cl 20. Fraud-based revocation, which predates the Harper government's changes, was retained.

¹²⁶ Canada, *Parliamentary Debates*, House of Commons, 9 March 2016, 1647.

¹²⁷ Ibid.

going out to our fellow citizens, to immigrants who are being told that no matter what, their status as citizens will always be different.¹²⁸

Notably, those who argued against Bill C-6 also focused on maintaining the ‘value’ of Canadian citizenship. For instance Conservative MP Garnett Genuis said:

What this bill would do, in my view, is reduce the value of citizenship by allowing someone to be involved in terrorism, which completely goes against Canadian values ... This potentially toxic combination would reduce the value of our citizenship.¹²⁹

Bill C-6 was passed on 13 June 2017,¹³⁰ and received Royal Assent on 19 June. As a result of its passage, s 20 of the *Canadian Citizenship Act* now provides that Zakaria Amara, the sole person to lose his citizenship pursuant to the *Strengthening Canadian Citizenship Act*, is deemed never to have lost his citizenship. Like the UK law, the Canadian law was underpinned by a clear symbolic rationale — one that was reversed with the passage of Bill C-6, but a weak security rationale. The implications of this are explored in Part III.

C Australia

1 *Laws Enacted*

In December 2015, the Australian federal Parliament passed the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (*‘Allegiance to Australia Act’*). This introduced new avenues for citizenship loss into the *Australian Citizenship Act 2007* (Cth), and made Australia the most recent common law country to enact legislation enabling citizenship stripping on national security grounds.

Prior to these changes, the grounds for citizenship loss in Australia were limited. A citizen by naturalisation could have their citizenship revoked if they committed certain offences in relation to their application for citizenship,¹³¹ or where their citizenship was obtained by fraud.¹³² Additionally, those who obtained their citizenship by application and ‘conferral’ could have it revoked

¹²⁸ Canada, *Parliamentary Debates*, Senate, 3 May 2017, 2940.

¹²⁹ Canada, *Parliamentary Debates*, House of Commons, 9 March 2016, 1653.

¹³⁰ Canada, *Parliamentary Debates*, House of Commons, 13 June 2017, 12600–1.

¹³¹ *Australian Citizenship Act 2007* (Cth) s 34(1)(b)(i).

¹³² *Ibid* s 34(2)(b)(iv).

if they were convicted of a 'serious offence' in the window between lodging an application for citizenship and having citizenship conferred, provided this would not render them stateless.¹³³ In all these cases, revocation took place via the exercise of ministerial discretion, which required the Minister to be satisfied that it would be 'contrary to the public interest for the person to remain an Australian citizen'.¹³⁴ In addition, an Australian citizen with dual citizenship automatically lost their Australian citizenship if they 'serve[d] in the armed forces of a country at war with Australia'.¹³⁵ This provision has been part of Australian citizenship legislation since its introduction in 1948 but has never operated to deprive a person of their citizenship.¹³⁶

The *Allegiance to Australia Act* created three new avenues for citizenship deprivation that apply to Australians with dual citizenship. Two of these avenues provide for citizenship loss to take place automatically upon fulfilment of particular criteria. First, a dual citizen can lose citizenship by committing prescribed conduct with the intention of: 'advancing a political, religious or ideological cause';¹³⁷ 'coercing, or influencing by intimidation, ... [a] government';¹³⁸ or 'intimidating the public'.¹³⁹ The conduct that triggers citizenship loss is defined by reference to terrorism and foreign incursions and recruitment offences.¹⁴⁰

Secondly, the longstanding provision providing for automatic citizenship loss for dual citizens who 'serve[] in the armed forces of a country at war with Australia'¹⁴¹ is updated to include 'fight[ing] for, or ... in the service of, a declared terrorist organisation'.¹⁴² However, the law specifies that being in the service of such an organisation does not include the provision of 'neutral and independent humanitarian assistance',¹⁴³ unintentional actions,¹⁴⁴ or actions

¹³³ Ibid ss 34(2)(b)(ii), (3)(b).

¹³⁴ Ibid ss 34(1)(c), (2)(c).

¹³⁵ Ibid s 35(1).

¹³⁶ See, eg, Kim Rubenstein, Submission No 35 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (20 July 2015) 3.

¹³⁷ *Australian Citizenship Act 2007* (Cth) s 33AA(3)(a).

¹³⁸ Ibid s 33AA(3)(b)(i).

¹³⁹ Ibid s 33AA(3)(b)(ii).

¹⁴⁰ Ibid s 33AA(6).

¹⁴¹ Ibid s 35(1)(b)(i).

¹⁴² Ibid s 35(1)(b)(ii).

¹⁴³ Ibid s 35(4)(c).

¹⁴⁴ Ibid s 35(4)(a).

committed under duress or force.¹⁴⁵ These two grounds are triggered automatically when a citizen engages in particular activity and do not require a conviction or the exercise of a ministerial discretion. However, the Minister does have an obligation to take reasonable steps to inform a person who has lost their citizenship of this, the reasons for citizenship loss and their rights of review.¹⁴⁶ Both automatic-deprivation provisions apply only to dual citizens over the age of 14.¹⁴⁷

The idea that these provisions are ‘self-executing’ has been described as a ‘legal fiction.’¹⁴⁸ As Helen Irving has noted, ‘[t]he law cannot apply itself. Someone or some authority must make a determination.’¹⁴⁹ In practice, it appears that such determinations will be made by the Citizenship Loss Board, an executive body created in early 2016, which Immigration and Border Protection Minister Peter Dutton has said will

consider individual cases that have been worked up through ASIO, ASIS, the Department of Defence, [the] Department of Immigration and Border Protection, Justice, [and] obviously the Attorney-General, Prime Minister and Cabinet.¹⁵⁰

¹⁴⁵ Ibid s 35(4)(b).

¹⁴⁶ Ibid ss 33AA(10)–(11), 35(5)–(6), 35A(5)–(6), 35B(1)–(2). Notice is not required where the Minister has determined that providing it could ‘prejudice the security, defence or international relations of Australia, or Australian law enforcement operations’: at ss 33AA(12), 35(7), 35A(7).

¹⁴⁷ Ibid ss 33AA(1), 35(1).

¹⁴⁸ Paul Farrell, ‘Government Officials of Secretive Citizenship Loss Board Named’, *The Guardian* (Sydney, 22 July 2016) <www.theguardian.com/australia-news/2016/jul/22/government-members-of-secretive-citizenship-loss-board-named>, archived at <<https://perma.cc/BB9R-DV7P>>, quoting George Williams.

¹⁴⁹ Helen Irving, ‘Bill Relies on Legal Fiction of Self-Executing Law to Revoke Citizenship’, *The Conversation* (Online, 17 August 2015) <<https://theconversation.com/bill-relies-on-legal-fiction-of-self-executing-law-to-revoke-citizenship-46017>>, archived at <<https://perma.cc/4863-PZKV>>.

¹⁵⁰ Santilla Chingaipe, ‘What Is the Citizenship Loss Board and How Will It Work?’, *SBS News* (Sydney, 13 April 2016) <www.sbs.com.au/news/article/2016/04/14/what-citizenship-loss-board-and-how-will-it-work>, archived at <<https://perma.cc/L9G6-MB2Q>>, quoting Peter Dutton, ‘Press Conference, Melbourne’ (Speech, Melbourne, 8 April 2016) <www.minister.border.gov.au/peterdutton/2016/Pages/press-conference-8-april.aspx>, archived at <<https://perma.cc/U3A9-8WED>>. See also George Williams, ‘Stripping of Citizenship a Loss in More Ways than One’, *The Sydney Morning Herald* (Sydney, 17 April 2016) <www.smh.com.au/comment/stripping-of-citizenship-a-loss-in-more-ways-than-one-20160417-go87as.html>, archived at <<https://perma.cc/72M9-ABBL>>.

Despite it wielding this considerable power, no mention is made of the Citizenship Loss Board in Australian legislation. This shrouds its operation in secrecy, makes its legal mandate unclear, and suggests that it operates according to its own rules, free from typical administrative law constraints such as the requirement to make decisions reasonably and without bias.¹⁵¹ The Board is composed of senior departmental secretaries from various government departments — information that was only revealed as the result of a *Guardian Australia* freedom of information request.¹⁵²

The final avenue for denationalisation introduced via the *Allegiance to Australia Act* creates a ministerial discretion to revoke citizenship where a dual citizen is convicted of a prescribed offence.¹⁵³ In order to exercise this power, the Minister must be satisfied that citizenship revocation would be in the public interest and that the conviction demonstrates a repudiation of allegiance to Australia.¹⁵⁴ The prescribed offences relate to terrorism, treason, treachery, sabotage, espionage, and foreign incursions and recruitment.¹⁵⁵ The possibility of citizenship revocation on the basis of conviction only arises for citizens who have been sentenced to at least six years' imprisonment.¹⁵⁶

The Minister is empowered to revoke a person's citizenship on the basis of a conviction recorded prior to the commencement of the legislation.¹⁵⁷ However, this retrospective aspect of the law is subject to additional safeguards: it only applies in regard to convictions that have occurred no more than 10 years before the legislation's entry into force, and a higher sentencing threshold of 10 years applies.¹⁵⁸

The offences that trigger a ministerial discretion to revoke citizenship upon conviction include the forms of conduct, such as acts of terrorism, that also give rise to automatic citizenship loss on the first ground.¹⁵⁹ In this sense, there is an overlap between the 'conduct-based' and 'offence-based' grounds for citizenship loss. The legislation deals with this by altering the fault element

¹⁵¹ Williams, 'Stripping of Citizenship a Loss in More Ways than One' (n 150).

¹⁵² Farrell (n 148).

¹⁵³ *Australian Citizenship Act 2007* (Cth) s 35A.

¹⁵⁴ *Ibid* ss 35A(1)(d)–(e).

¹⁵⁵ *Ibid* s 35A(1)(a).

¹⁵⁶ *Ibid* s 35A(1)(b).

¹⁵⁷ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) sch 1 s 8(4) ('*Allegiance to Australia Act*').

¹⁵⁸ *Ibid* sch 1 s 8(4)(b).

¹⁵⁹ *Australian Citizenship Act 2007* (Cth) s 35A(1)(a).

for ‘conduct-based’ citizenship loss¹⁶⁰ and specifying that it only applies in limited circumstances: where a person has committed the relevant conduct outside Australia or where they have left Australia before they can be brought to trial.¹⁶¹ In all other cases, only the offence-based grounds for citizenship loss apply.

2 *Justifications*

In the time since the September 11 bombings, Australia has passed a larger number of national security statutes than any other democratic nation, some 66 to date at the federal level alone.¹⁶² This has led to Australia’s response to terrorism being characterised as one of ‘hyper-legislation’.¹⁶³

The denationalisation provisions introduced via the *Allegiance to Australia Act* were justified as a necessary addition to these laws on the grounds that they would symbolically affirm important features of the state–citizen relationship. In particular, it was emphasised that citizenship involves duties of allegiance, and that violation of these duties warrants exclusion from the citizenry. For instance, a purpose provision included in the *Allegiance to Australia Act* states:

This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.¹⁶⁴

Similarly, in an interview, Immigration and Border Protection Minister Peter Dutton said that

[Australian citizenship] confers a great advantage on people and if people are going to swear an allegiance to our country and then go beyond that to — and

¹⁶⁰ See *ibid* ss 33AA(3), (6).

¹⁶¹ *Ibid* s 33AA(7).

¹⁶² By mid-2013, Parliament had enacted 61 pieces of anti-terrorism legislation: George Williams, ‘The Legal Legacy of the “War on Terror”’ (2013) 12 *Macquarie Law Journal* 3, 7. A further 5 anti-terrorism statutes have been enacted since then.

¹⁶³ Roach (n 68) 310.

¹⁶⁴ *Allegiance to Australia Act* (n 157) s 4.

in opposition to the words that they've just spoken at their citizenship ceremony ... attempt to attack Australians, there's a consequence to pay for that.¹⁶⁵

In addition to this symbolic justification, the *Allegiance to Australia Act* was portrayed as an important security measure. The Act was introduced in the wake of increased numbers of Australian foreign fighters partaking in overseas conflicts, and was presented as a direct response to the threats that stem from this. When first announcing government plans to expand revocation laws, then-Prime Minister Tony Abbott noted that 'at least 110 Australians [had] travelled overseas to join the death cult in Iraq and Syria', that within Australia there were 'over 400 high-priority counter-terrorism investigations' on foot,¹⁶⁶ and that 'all too often the threat comes from someone who has enjoyed the hospitality and generosity of the Australian people'.¹⁶⁷

Mirroring the UK and Canadian experience, the security justification for the *Allegiance to Australia Act* was framed in fairly general terms. For instance, in his second reading speech for the legislation, Dutton said:

Regrettably, some of the most pressing threats to the security of the nation and the safety of the Australian community come from citizens engaged in terrorism. It is now appropriate to modernise provisions concerning loss of citizenship to respond to current terrorist threats. The world has changed, so our laws should change accordingly.¹⁶⁸

No attempt was made, however, to justify how the legislation would assist in mitigating terrorist threats or securing community safety, or how it would fill a gap in the existing law. Notably, even when purporting to speak directly to the necessity of the legislation as a security measure in parliamentary debates, proponents tended to invoke symbolic and rhetorical justifications, rather than providing any reasoned case for how the changes would improve public safety. For instance, in the context of explaining why the legislation was 'prudent and pragmatic' in 'targeting [the threat of] resurgent terrorism',¹⁶⁹ Andrew Nikolic, a member of the Joint Parliamentary Committee on Intelli-

¹⁶⁵ Interview with Peter Dutton, Minister for Immigration and Border Protection (Leigh Sales, 23 June 2015) <www.abc.net.au/7.30/content/2015/s4260728.htm>, archived at <<https://perma.cc/399Y-2NJH>>.

¹⁶⁶ Abbott (n 7).

¹⁶⁷ Ibid.

¹⁶⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7369.

¹⁶⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13034 (Andrew Nikolic).

gence and Security, drew on the symbolic rationale that non-allegiant citizens deserve to be denationalised:

Around 110 Australians are currently fighting or are engaged with terrorist groups in Syria and Iraq. And almost 200 people in Australia are enabling terrorism in the Syria-Iraq conflict through financing and recruitment or are seeking to travel there. Supporting and engaging in terrorist activities against Australia's interests is a clear breach of a person's commitment and allegiance to our country — a bond that should unite all citizens. So the new powers in this bill are a necessary, measured and appropriate response.¹⁷⁰

In the Senate debate, Attorney-General George Brandis also appealed to rhetoric as a means of justifying the national security value of the laws. In response to comments by Senator Nick McKim that the proposed legislation, in particular its retrospective provisions, could actually function to undermine, rather than promote, national and global security,¹⁷¹ Brandis said:

It will keep Australians safe. Senator McKim, if you were to apply the famous pub test to this and you asked your average Australian whether they would feel safer or less safe if people who have been convicted and sentenced for more than 10 years imprisonment for committing a terrorist crime were to be booted out of Australia and whether Australians would approve of it, I dare say they would say yes.¹⁷²

3 *Use and Efficacy*

The Australian law was enacted in a climate of urgency, with the government suggesting that it, among other measures, was required to deal with immediate threats to the Australian community.¹⁷³ Once enacted, the citizenship revocation measure came into force on 12 December 2015.¹⁷⁴ In February 2016 the Citizenship Loss Board held its inaugural meeting.¹⁷⁵ In February

¹⁷⁰ Ibid.

¹⁷¹ Commonwealth, *Parliamentary Debates*, Senate, 3 December 2015, 9937–8 (Nick McKim).

¹⁷² Ibid 9938.

¹⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7369 (Peter Dutton, Minister for Immigration and Border Protection).

¹⁷⁴ *Allegiance to Australia Act* (n 157) s 2.

¹⁷⁵ The minutes of this meeting have been obtained via *The Guardian Australia's* freedom of information request (Farrell (n 148)): Citizenship Loss Board IDC, 'Draft Minutes of Meeting Held on Tuesday, 23 February 2016 at DIBP, 2 Constitution Avenue Canberra' (Minutes, 23 February 2016) <http://gimc.org.au/wp-content/uploads/2016/07/20160520_FA160401379_Documents_Released.pdf>, archived at <<https://perma.cc/P4BL-RJRE>>.

2017 it was confirmed that the laws had been used for the first time to strip the citizenship of Islamic State militant Khaled Sharrouf.¹⁷⁶ As with Canada's decision to revoke the citizenship of Zakaria Amara, Australia's decision to denationalise Sharrouf carries greater symbolic weight than practical utility in securing Australian national security. Sharrouf left Australia for Syria in 2013 and has made no attempts to return to Australia. In 2015, unconfirmed media reports claimed that he had died.¹⁷⁷ This was later reported to perhaps be incorrect,¹⁷⁸ however fresh reports that Sharrouf had died in an airstrike surfaced in January 2017.¹⁷⁹

The fact that Sharrouf's case is the only known example of the *Allegiance to Australia Act* being used reflects the fact that it is not clear that this new measure is actually useful in protecting the community from national security threats. In part, this is because other measures already provide such protection.

Australia's new denationalisation law operates alongside a wide range of other national security legislation, which already achieves many of the security objectives towards which the *Allegiance to Australia Act* is directed. As in the UK and Canada, broad passport suspension and cancellation powers provide the government with a considerable practical capacity to prevent Australians abroad from returning home when they are considered to pose a security risk.¹⁸⁰

¹⁷⁶ Paul Maley, 'Khaled Sharrouf Stripped of Citizenship under Anti-Terror Laws', *The Australian* (Sydney, 11 February 2017) <www.theaustralian.com.au/national-affairs/immigration/khaled-sharrouf-stripped-of-citizenship-under-antiterror-laws/news-story/c82f008e768ae74f7798af983c4d2051>.

¹⁷⁷ See, eg, Dylan Welch, 'Khaled Sharrouf and Mohamed Elomar Killed Fighting with Islamic State in Mosul, Reports Say', *ABC News* (Online, 23 June 2015) <www.abc.net.au/news/2015-06-22/khaled-sharrouf-and-mohammed-elomar-killed-in-iraq-reports-say/6565162>, archived at <<https://perma.cc/E7XT-ZU7P>>.

¹⁷⁸ See, eg, Paul Bibby, 'Australian Terrorist Khaled Sharrouf May Be Alive, His Family's Barrister Says', *The Sydney Morning Herald* (Sydney, 15 February 2016) <www.smh.com.au/nsw/australian-islamic-state-fighter-may-be-alive-his-familys-barrister-says-20160213-gmtkii.html>, archived at <<https://perma.cc/TU46-LMVC>>.

¹⁷⁹ See, eg, Paul Toohey, 'Australian ISIL Brigade and Notorious Executioner, Khaled Sharrouf, Killed in Mosul Air Strike', *Herald Sun* (Melbourne, 13 January 2017) <www.heraldsun.com.au/news/world/australian-isil-brigade-and-notorious-executioner-khaled-sharrouf-killed-in-mosul-air-strike/news-story/c2a2f945e29a81cd2e269f3d66897953>. This article notes that at the time, Australian government departments said that they were unable to 'verify the [fresh] report[s]' of Sharrouf's death, as they had 'limited capacity to confirm deaths in the war zone'.

¹⁸⁰ *Australian Passports Act 2005* (Cth) ss 22, 22A.

There is an open question as to whether a citizen who presents at the Australian border has a right of entry into Australia, irrespective of whether they have a valid passport.¹⁸¹ There is evidence to suggest that this was a point of concern for the Australian government when the *Allegiance to Australia Act* was drafted. For instance, Dan Tehan, chair of the Parliamentary Joint Committee on Intelligence and Security inquiry into the legislation, remarked during proceedings that citizenship revocation, in contrast to passport revocation, would leave ‘no doubt whatsoever’ as to the government’s power to exclude a person from Australian territory.¹⁸² As a number of constitutional lawyers have noted, however, there are doubts about the scope of the Commonwealth’s constitutional power to revoke citizenship.¹⁸³

Within Australia, terror-related offences carry high criminal penalties.¹⁸⁴ Moreover, in addition to the offence of engaging in a terrorist act, of which a person can only be convicted after an act of terrorism has been carried out, there are a wide range of offences that are designed to mitigate the risk of terrorism eventuating. For instance, there are offences that criminalise conduct preparatory to a terrorist act, including: ‘[p]roviding or receiving training connected with terrorist acts’;¹⁸⁵ ‘[p]ossessing things connected with terrorist acts’;¹⁸⁶ ‘[c]ollecting or making documents likely to facilitate terrorist acts’;¹⁸⁷ and doing any ‘[o]ther acts ... in preparation for, or planning, terrorist acts’.¹⁸⁸ These offences carry lengthy maximum penalties, ranging from 10

¹⁸¹ For an academic argument advancing this position, see Helen Irving, ‘Still Call Australia Home: The Constitution and the Citizen’s Right of Abode’ (2008) 30 *Sydney Law Review* 133. Cf Sangeetha Pillai, ‘Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited’ (2013) 39 *Monash University Law Review* 568, 597; Sangeetha Pillai, ‘The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis’ (2014) 37 *Melbourne University Law Review* 736, 759–61. To date, there has not been a case in which a court has been required to directly confront this question.

¹⁸² Commonwealth, *Parliamentary Debates*, Parliamentary Joint Committee on Intelligence and Security, 4 August 2015, 23.

¹⁸³ See, eg, Sangeetha Pillai, ‘The Allegiance to Australia Bill and the Constitution: Legislative Power and Membership of the Constitutional Community’, *AUSPUBLAW* (Blog Post, 21 July 2015) <<https://auspublaw.org/2015/07/the-allegiance-to-australia-bill-and-the-constitution/>>, archived at <<https://perma.cc/8TSY-2XCU>>; Irving and Thwaites (n 12); Sangeetha Pillai, ‘Citizenship-Stripping Reforms Open to Challenge in Spite of Safeguards’ (2016) 3(19) *LSJ: Law Society of NSW Journal* 74, 75.

¹⁸⁴ See, eg, *Criminal Code Act 1995* (Cth) divs 101–3, 119.

¹⁸⁵ *Ibid* s 101.2.

¹⁸⁶ *Ibid* s 101.4.

¹⁸⁷ *Ibid* s 101.5.

¹⁸⁸ *Ibid* s 101.6. See generally George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35 *Melbourne University Law Review* 1136.

years' imprisonment to life imprisonment. In addition, it is a crime, punishable by life imprisonment, to 'engage[] in a hostile activity in a foreign country',¹⁸⁹ to make preparations for such activity,¹⁹⁰ or to 'enter[] a foreign country with the intention of engaging in [such] activity'.¹⁹¹ It is also an offence, with a maximum penalty of 10 years' imprisonment, for a person to enter or remain in particular areas that are designated by the executive as no-go zones, on the basis that they are hotbeds for terrorist training and activity.¹⁹² Such offences are designed to decrease the likelihood that terrorist activity will eventuate.¹⁹³ As Whealy J noted in *R v Elomar*,

[t]he broad purpose of the creation of offences of the kind involved in the present sentencing exercises is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act. ... The legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community.¹⁹⁴

It has been noted that where an Australian citizen commits an offence in foreign territory, gathering enough admissible evidence to secure a conviction can be very challenging.¹⁹⁵ To the extent that this weakens the national security value of the criminal law, it is mitigated by div 104 of the *Criminal Code Act 1995* (Cth). Division 104 creates a 'control order' regime, in which individuals not suspected of any criminal offence may be subject to a wide range of restrictions (potentially amounting to house arrest) if those restrictions are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of ... protecting the public from a terrorist act'.¹⁹⁶

Collectively, these factors operate to circumvent the risk of terrorist attacks and to reduce the risk to national security posed by citizens and non-citizens who seek to harm Australia, irrespective of whether or not a conviction has been secured. In this context, as in the UK and Canada, it is difficult to see how Australia's new citizenship revocation laws will be of more than marginal

¹⁸⁹ *Criminal Code Act 1995* (Cth) s 119.1(2)(a).

¹⁹⁰ *Ibid* s 119.4.

¹⁹¹ *Ibid* s 119.1(1)(a).

¹⁹² *Ibid* s 119.2(1).

¹⁹³ See Keiran Hardy and George Williams, 'Australian Legal Responses to Foreign Fighters' (2016) 40 *Criminal Law Journal* 196, 197, 201.

¹⁹⁴ (2010) 264 ALR 759, 779 [79].

¹⁹⁵ See, eg, Bret Walker, *Annual Report* (Report, Independent National Security Legislation Monitor, Australian Government, 28 March 2014) 31–6.

¹⁹⁶ *Criminal Code Act 1995* (Cth) s 104.4(1)(d).

practical utility from a security perspective. This is reinforced by the fact that, during the debate over the legislation, no clear case was made that it was needed to fill a particular gap in Australian law.

The Australian denationalisation laws may have greater utility as a symbolic statement that disloyalty or lack of allegiance will be met with exclusion from the Australian citizenry. This casts Australian citizenship as a conditional status, contingent upon good behaviour. As with the UK and Canadian laws, however, aspects of the Australian denationalisation legislation dilute the clarity of this symbolic statement. First, the fact that denationalisation only applies to Australian citizens with dual citizenship means that disloyal conduct attracts different consequences for different citizens. This casts doubt over the manner in which allegiance is central to the state–citizen relationship. Secondly, while many of the grounds for citizenship loss hinge upon conduct that suggests a lack of allegiance to Australia, this is not true of all grounds. For instance, the ground that enables citizenship revocation on the basis of a conviction for entering an area declared a no-go zone does not require any repudiation of allegiance.

As in the other two jurisdictions examined in this article, Australia's broad denationalisation laws make a clear symbolic statement about the nature of Australian citizenship, but are not tailored to serve any clear national security purpose. Part III below reflects on the implication of this combination of factors in all three countries.

III THEMES AND OBSERVATIONS

While there are significant differences in the ways in which the UK, Canada and Australia considered in this article provided for denationalisation, the recent citizenship stripping expansions in the three countries are marked by a number of points of symmetry. All three countries made recent and dramatic expansions to the grounds for involuntary citizenship loss, resulting in very broad citizenship stripping regimes. The UK and Australian regimes, which remain in force, are amongst the broadest in the world. Moreover, the UK, Canada and Australia each justified their respective denationalisation expansions via a similar double-barrelled rationale.

First, all three countries invoked a symbolic justification for the expanded laws. This justification cast citizenship as a 'privilege', the possession of which is conditional upon adherence to a particular code of behaviour. Citizens who do not adhere to this code — particularly in ways that threaten the state, or that indicate a lack of allegiance or loyalty on the citizen's part — are regarded as unfit to retain citizenship. For instance, David Cameron described return-

ing jihadists as ‘enemies of the state’.¹⁹⁷ Tony Abbott was even more blunt. In addition to calling on all migrants to embrace ‘Team Australia’,¹⁹⁸ he said:

There’s been the benefit of the doubt at our borders, the benefit of the doubt for residency, the benefit of the doubt for citizenship and the benefit of the doubt at Centrelink. ... We are a free and fair nation. But that doesn’t mean we should let bad people play us for mugs, and all too often they have.¹⁹⁹

In the three countries, the expansion of citizenship stripping, coupled with this symbolic rationale, had the effect of shifting citizenship from a relatively secure status to one that is conditional. As Audrey Macklin has argued, ‘[c]itizenship emerges as an enhanced form of conditional permanent residence, revocable through the exercise of executive discretion’.²⁰⁰

Secondly, all three countries asserted that the expanded denationalisation powers and the shift towards a more conditional citizenship were necessary ‘modernisations’ of citizenship law. In the UK and Australia, proponents of these changes have strongly asserted that they are essential to mitigate increased threats to national security posed by contemporary challenges such as the foreign fighters phenomenon.²⁰¹ This security argument was also invoked in the Canadian context but with somewhat less emphasis. Nonetheless, the Canadian citizenship stripping expansions were also presented as essential to modernise the law: when introducing the legislation into Parlia-

¹⁹⁷ Ben Farmer and Peter Dominiczak, ‘David Cameron: Returning Jihadists are “Enemies of the State”’, *The Telegraph* (London, 17 November 2014) <www.telegraph.co.uk/news/politics/david-cameron/11237012/David-Cameron-Returning-jihadists-are-enemies-of-the-state.html>.

¹⁹⁸ Jared Owens, ‘“Don’t Migrate unless You Want to Join Our Team”: Abbott Meets Islamic Community’, *The Weekend Australian* (Sydney, 18 August 2014) <www.theaustralian.com.au/national-affairs/dont-migrate-unless-you-want-to-join-our-team-abbott-meets-islamic-community/news-story/d4046a301a9b65267801ae160331b404>.

¹⁹⁹ Liam Mannix, ‘“Bad People” Treating Us as Mugs: Abbott’s National Security Warning’, *The Sydney Morning Herald* (Sydney, 15 February 2015) <www.smh.com.au/federal-politics/political-news/bad-people-treating-us-as-mugs-abbotts-national-security-warning-20150215-13f3bd.html>, archived at <<https://perma.cc/U3UQ-KDTR>>. For extracts of similar statements expressed by Defence Minister Jason Kenney in the Canadian context, see, eg, Stewart Bell, ‘Canada Revokes Citizenship of Toronto 18 Ringleader Using New Anti-Terror Law’, *National Post* (Toronto, 26 September 2015) <<http://news.nationalpost.com/news/canada/canada-revokes-citizenship-of-toronto-18-ringleader>>.

²⁰⁰ Macklin (n 13) 29.

²⁰¹ See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 2 December 2014, vol 589, col 207 (Theresa May, Secretary of State for the Home Department); Commonwealth, *Parliamentary Debates*, Senate, 3 December 2015, 9930 (George Brandis, Attorney-General).

ment, the government stressed the fact that citizenship legislation had not been updated since 1977.²⁰²

The discussion in Part II assessed the utility of the revocation laws in each country in light of these justifications. This analysis shows that the security arguments supplied as justifications for the expanded laws are unsatisfactory and weak. Such justifications have tended only to invoke national security in general terms, rather than providing a persuasive and specific explanation of why citizenship stripping is a necessary or desirable means via which to pursue national security objectives. Each country had extensive pre-existing laws directed towards the same set of problems. While governments in all three countries asserted that citizenship stripping laws were needed to supplement and fill gaps in these existing laws, no reasoned argument was made for why this was the case, or what specific value the new laws would add to the national security toolkits of the three nations.

Moreover, the use of the laws in each country shows that they have not, in practice, served as a useful national security device. This conclusion flows in part from the fact that the laws themselves have been so little used, despite the fact their breadth means they could be very broadly applied. In Australia, the laws have only been used once, against an individual whose whereabouts are unknown and who has been reported dead. In Canada, the laws' sole use while in force was against an individual who posed no foreseeable security threat because he was serving a sentence of life imprisonment. In the UK, denationalisation laws saw very infrequent use for several years but since 2010 have come to be much more regularly employed. Despite this, documented examples showcase a number of instances in which invocation of the Home Secretary's revocation powers has had insignificant or negative effect. Several of the citizenship stripping cases in the UK showcase protracted and expensive legal battles that can take years to resolve.²⁰³ These cases demonstrate that citizenship stripping efforts can be frustrated when foreign governments take steps to divest a person of their second citizenship or deny the existence of this citizenship.²⁰⁴ Moreover, the UK denationalisation laws have predomi-

²⁰² Canada, *Parliamentary Debates*, House of Commons, 27 February 2014, 3310 (Chris Alexander).

²⁰³ See, eg, *Hamza* (n 51); *Al-Jedda* (n 61).

²⁰⁴ See, eg, *Hamza* (n 51); *Pham* (n 91). While the introduction of a power to revoke UK citizenship even where a person does not have a foreign citizenship mitigates this, it does not resolve the question of where a denationalised person goes, in practice, if no foreign government is willing to accept them: Goodwin-Gill, 'Deprivation of Citizenship Resulting in Statelessness and Its Implications in International Law' (n 90) 7, quoting United Kingdom, *Parliamentary Debates*, House of Commons, 30 January 2014, vol 574, col 1081 (Pete Wishart).

nantly been used against persons outside the UK, whose return to the UK could have been prevented or at least managed via other measures, such as TEOs and passport cancellation orders.

Collectively, the experiences in the three countries suggest that the new citizenship revocation powers have done little to meaningfully enhance national security. Indeed, several commentators, including those who adopt the view that new, targeted laws are necessary in order to manage the risks posed by foreign fighters,²⁰⁵ have argued that citizenship stripping is a particularly unhelpful national security tool.²⁰⁶ In the Canadian context, this is arguably underlined by the ultimate repeal of the expanded citizenship stripping laws.

Despite doing little to meaningfully improve national security, the denationalisation laws enacted in the UK, Canada and Australia convey a powerful message that citizens who may seek to harm their countries are undeserving of the privilege of citizenship. This raises the question of whether the symbolic value of making such a statement is itself a sufficient justification for such laws. Indeed, it has been suggested that, in certain instances and when employed in moderation, measures that appear to be targeting threats that attract high levels of anxiety can play a helpful role in engendering a feeling of security, even if their risk-minimisation effect is low.²⁰⁷ Echoes of such an agenda can be found in some of the justifications invoked in defence of the recent denationalisation laws — such as Australian Attorney-General George Brandis's suggestion that applying 'the famous pub test' would reveal that the

²⁰⁵ See, eg, Forcese and Mamikon (n 12).

²⁰⁶ See, eg, Gordon Clubb, 'Removing Citizenship Will Only Encourage UK Jihadists', *The Conversation* (Online, 29 August 2014) <<https://theconversation.com/removing-citizenship-will-only-encourage-uk-jihadists-30754>>, archived at <<https://perma.cc/8L4W-GPSP>>; Ben Saul, 'Plan to Strip Citizenship Is Simplistic and Dangerous', *The Drum*, ABC News (Online, 27 May 2015) <www.abc.net.au/news/2015-05-27/saul-plan-to-strip-citizenship-is-simplistic-and-dangerous/6499710>, archived at <<https://perma.cc/T2KT-GUXY>>; George Williams, 'Why Malcolm Turnbull Must Dump the Citizenship Bill', *The Sydney Morning Herald* (Sydney, 4 October 2015) <www.smh.com.au/comment/why-malcolm-turnbull-must-dump-the-citizenship-bill-20151004-gk0rgx.html>, archived at <<https://perma.cc/HHG4-D9G9>>.

²⁰⁷ Bruce Schneier, 'In Praise of Security Theater', *Wired* (San Francisco, 25 January 2007) <www.wired.com/2007/01/in-praise-of-security-theater/>, archived at <<https://perma.cc/3EQM-S8T9>>. See also Bruce Schneier, 'Beyond Security Theatre', *New Internationalist* (Oxford, November 2009) 10. Note, however, that Schneier makes this argument with several qualifications, and argues that an excess of 'security theatre' can increase the anxiety of a population: at 12.

‘average Australian’ would feel safer if people convicted of serious terrorism offences could be ‘booted out.’²⁰⁸

We suggest that, for a number of reasons, the symbolic rationale underpinning the recent denationalisation laws in the UK, Canada and Australia does not, in and of itself provide sufficient justification for their enactment. First and foremost, the laws enacted in all three countries were extremely broad, especially in regard to the conferral of power upon the executive. The laws enabled the revocation of one of the most fundamental rights in any democratic society in a broad and ill-defined range of circumstances. This is highlighted by the use of vague criteria such as ‘conducive to the public good’ in the UK. Such criteria can often be applied without the person affected having the opportunity to put their case in court or otherwise having a right to natural justice. In Australia, citizenship can be revoked in a way that even bypasses the need for a ministerial decision. These features erode fundamental tenets of the rule of law²⁰⁹ in a manner that is not proportionate to the achievement of national security or any other practical objective. This is not an outcome that should be accepted to achieve purely symbolic ends.

Secondly, not all citizens are equally vulnerable to citizenship loss. In the denationalisation laws in each of the three countries surveyed, disloyal behaviour has rendered dual citizens (and, in the UK, naturalised sole citizens) vulnerable to the prospect of denationalisation, while other citizens are subject to lesser penalties for identical conduct. This creates an unequal, two-tiered citizenship. Moreover, it dilutes any symbolic statement that citizenship is a privilege conditional upon allegiant behaviour, because this conditionality only applies to select citizens. In his April 2016 report on the UK’s denationalisation laws, the Independent Reviewer of Terrorism Legislation, David Anderson, noted that citizenship deprivation powers ‘are said to make law-abiding immigrants feel unwelcome because they encourage the notion that naturalised citizens who have retained their citizenship of origin do not enjoy the same security as those who have always been citizens.’²¹⁰

In a similar vein, it has been argued that singling out dual citizens for citizenship revocation is ‘counter-productive’ to domestic national security

²⁰⁸ Commonwealth, *Parliamentary Debates*, Senate, 3 December 2015, 9938.

²⁰⁹ Martin Krygier, ‘On the Rule of Law: What It Is, Why It Matters, and What Threatens It,’ *The Monthly* (Blog Post, 20 August 2015) <www.themonthly.com.au/blog/martin-krygier/2015/20/2015/1440049152/rule-law>, archived at <<https://perma.cc/2AZ3-TLUS>>.

²¹⁰ Anderson, *Citizenship Removal Resulting in Statelessness* (n 35) 12 [3.5] (emphasis omitted).

objectives because it ‘reinforces the identity issues that drive radicalisation.’²¹¹ This undermines key counter-radicalisation measures aimed at building community cohesion and social harmony, which have been implemented in all three of the countries surveyed as a critical component of counter-radicalisation policy.²¹² It has been well documented in other contexts that the effectiveness of such measures can suffer when the measures are perceived as creating division and discrimination within a population, rather than as genuinely consultative and community-driven.²¹³

²¹¹ Rachel Olding, ‘Stripping Dual Citizenship “Completely Counter-Productive” to Fighting Terrorism: UK Expert’, *The Sydney Morning Herald* (Sydney, 21 July 2015) <www.smh.com.au/nsw/stripping-dual-citizenship-completely-counterproductive-to-fighting-terrorism-uk-expert-20150721-giha2k.html>, archived at <<https://perma.cc/S6A6-NLZY>>. See also Williams, ‘A Decade of Australian Anti-Terror Laws’ (n 188) 1172–5.

²¹² In the UK, this is dealt with via the *Prevent* counter-radicalisation strategy: Secretary of State for the Home Department, *Prevent Strategy* (Cm 8092, 2011). This was supplemented in 2015 by a *Counter-Extremism Strategy*: Secretary of State for the Home Department, *Counter-Extremism Strategy* (n 37). In Canada, this is dealt with via the *Prevent* limb of the government’s counterterrorism strategy: Government of Canada, *Building Resilience against Terrorism: Canada’s Counter-Terrorism Strategy* (Strategy, 2nd ed, 2013) 15–17 <www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsln-c-gnst-trrrsm/rsln-c-gnst-trrrsm-eng.pdf>, archived at <<https://perma.cc/ZGU5-TQLB>>. In Australia, funding for community-based programs to counter violent extremism was first introduced in 2010 by the Rudd government. This was initially discontinued by the Abbott government, but was reintroduced in the 2014 budget: see Cat Barker, ‘Australian Government Measures to Counter Violent Extremism: A Quick Guide’, *Parliament of Australia* (Web Page, 10 February 2015) <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/Quick_Guides/Extremism>, archived at <<https://perma.cc/JF83-QJX5>>. The Attorney-General’s department notes that ‘[s]tate and territory-led intervention programmes [(with Commonwealth financial support)] have been established or are under development across Australia to identify radicalised and at-risk individuals, and provide tailored services to address the root causes of their radicalisation’: ‘CVE Intervention Programmes’, *Australian Government: Attorney-General’s Department* (Web Page) <www.ag.gov.au/NationalSecurity/Counteringviolentextremism/Pages/Intervention-programmes.aspx>, archived at <<https://perma.cc/A3MJ-6DYV>>.

²¹³ This has been a significant problem with the UK’s *Prevent* strategy for counter-radicalisation. The coupling of community development measures focused predominantly on Muslim communities, with a counterterrorism agenda and surveillance practices, has produced a community perception that *Prevent*’s community development goal is a ‘pretext for [government] “spying” on potential terrorists’: Keiran Hardy, ‘Resilience in UK Counter-Terrorism’ (2015) 19 *Theoretical Criminology* 77, 87 (citations omitted). See also Arun Kundnani, *Spooked! How Not to Prevent Violent Extremism* (Report, Institute of Race Relations, October 2009). In February 2016, the Independent Reviewer of Terrorism Legislation ‘sent a supplementary submission to the Home Affairs Select Committee in respect of its inquiry into countering extremism’, in which he argued that *Prevent* could benefit from independent review because it was ‘clearly suffering from a widespread problem of perception, particularly in relation to the statutory duty on schools and in relation to non-violent extremism’: Joint Committee on Human Rights, *Counter-Extremism* (House of Lords Paper No 39, House of

Thirdly, the practice of citizenship stripping on disloyalty or security grounds produces further negative effects. An individual who is stripped of citizenship may suffer severe consequences, including isolation from their home and family, the loss of democratic rights, detention and deportation. Additionally, the practice of citizenship stripping has the potential to undermine accountability for actions taken against individuals by states. At least two former British citizens, Mohamed Sakr and Bilal al-Berjawi, have been killed by US drone strikes shortly after being stripped of their UK citizenship.²¹⁴ While this may be mere coincidence, revoking a person's citizenship absolves a country from any responsibility for their fate.

Where citizenship revocation has the potential to render a person stateless, as in the UK, this danger is exacerbated, as affected individuals may be in a situation where they are not afforded protection by any country. Ben Emmerson, the UN Special Rapporteur on Counter-Terrorism and Human Rights, noted this in evidence to the UK Joint Committee on Human Rights. He said that stateless individuals are placed at 'a very substantial disadvantage' as they have no recourse to 'diplomatic protection' and 'no right[s] of entry or abode'.²¹⁵ Emmerson stressed that this inherent vulnerability is made worse when the reason an individual is rendered stateless is that they are suspected of involvement in terrorism.²¹⁶ In a world where national security measures are typified by wide executive discretion with sometimes inadequate oversight, the absolution from accountability for an individual facilitated by citizenship stripping is a cause for concern.

Finally, the trend towards citizenship stripping has the potential to have negative consequences for international relations and for national security ventures on a broader scale. Efforts to permanently offload unwanted or high-risk citizens onto foreign states is likely to produce tensions between governments, as well as undermine the cohesion needed to tackle cross-jurisdictional security issues. It is also significant that the effect of nations such as the UK, Canada and Australia revoking citizenship may be to cast

Commons Paper No 105, Session 2016–17) 13 [36], quoting David Anderson, Supplementary Written Evidence to the Home Affairs Select Committee, *Inquiry into Countering Extremism* (29 January 2016) 2 [7].

²¹⁴ See, eg, Chris Woods and Alice Ross, 'Former British Citizens Killed by Drone Strikes after Passports Revoked', *The Bureau of Investigative Journalism* (London, 27 February 2013) <www.thebureauinvestigates.com/2013/02/27/former-british-citizens-killed-by-drone-strikes-after-passports-revoked/>, archived at <<https://perma.cc/8822-HMCJ>>.

²¹⁵ Joint Committee on Human Rights, *Uncorrected Transcript of Oral Evidence: Counter-Terrorism and Human Rights* (House of Commons Paper No 1202, Session 2013–14) 22.

²¹⁶ *Ibid.*

responsibility for dangerous individuals onto nations with far fewer resources or capacity to deal with them. Indeed, the measure may even strengthen the hand of terrorist organisations. People who might return home to face prosecution may instead be left at large overseas, perhaps with nowhere to go but to remain with Islamic State or another terrorist group.²¹⁷

These factors illustrate that the laws enacted in the three jurisdictions surveyed, and that remain in place in the UK and Australia, threaten the rule of law and human rights and, in some ways, undermine the security objectives they are said to pursue. In light of this, the symbolic rationale drawn upon to support the laws is woefully inadequate.

IV CONCLUSION

Citizenship is often regarded as the most fundamental of human rights. In addition to signifying formal membership of a national community, it is often a gateway to a host of basic entitlements, including political rights, mobility rights and rights to consular assistance. It is a concept with a strong rhetorical dimension in forging understandings of what it is to belong to a community and in shaping a country's sense of its own identity. It is for such reasons that nations have often exercised caution in respect of laws that enable people to have their citizenship revoked.

Much has changed since the terrorist attacks of 11 September 2001. Within short succession, the UK, Canada and Australia introduced significant new citizenship stripping laws, creating a modern framework for banishing individuals seen to be a risk to public safety and the common good. The laws introduced in the three countries were striking in a number of respects. Courts were afforded little or no role in determining whether a person should be deprived of their citizenship. Instead, extraordinary powers have been conferred upon the executive to determine the status of the person in a way that will impact upon the person's fundamental human rights, including their right to vote, their entitlement to the protection of the state, and their capacity to enter and exit the nation.

The extreme breadth of the recent denationalisation laws threatens fundamental human rights and the rule of law. In light of these effects, the laws should be supported by strong and cogent justifications. Unfortunately, our analysis shows that any justifications invoked to support these laws ring hollow in light of the laws' experience post-enactment.

²¹⁷ See, eg, *Clubb* (n 206); *Saul* (n 206).

The UK, Canada and Australia all justified their expanded denationalisation laws via both a symbolic rationale, which cast citizenship as conditional upon allegiant behaviour, and a security rationale, which asserted that citizenship deprivation is a necessary part of a national security toolkit. Our analysis suggests that the security rationale has not been well served by the laws in any of the three countries surveyed. At the time of their introduction and thereafter, these laws have, at best, added little to other national security laws and, at worst, actually functioned to undermine security, particularly on a global scale.

The symbolic rationale for the laws has been better served: the laws enacted in each country achieved the symbolic effect of recasting citizenship as a privilege that citizens deserve to be stripped of if they demonstrate disloyalty or pose a risk to their country. However, we suggest that, even if it is accepted that reconfiguring citizenship as a conditional status may serve a meaningful purpose in certain circumstances, it does not singlehandedly provide an adequate rationale for the citizenship stripping laws examined in this article, which are characterised by extremely broad executive power and minimal safeguards, and which exist in the context of pre-existing legislation directed towards the same ends. This is especially true given the capacity for the laws to actually undermine, on a global scale, the security objective they are said to pursue.

Given this, the recent repeal of the 2014 denationalisation laws in Canada marked a welcome retreat from the emerging trend of utilising citizenship stripping as a symbolic and security device. There is, however, no indication that any such retreat will be mirrored in the UK and Australia. Indeed, the convening of the Citizenship Loss Board and use of the new citizenship deprivation powers in Australia, and the recent significant increase in the employment of citizenship stripping powers in the UK, along with the government's suggestion that these powers could be further broadened in the future, suggest quite the opposite.

TWENTY-FIRST CENTURY BANISHMENT: CITIZENSHIP STRIPPING IN COMMON LAW NATIONS

SANGEETHA PILLAI* AND GEORGE WILLIAMS**

Abstract Three common law countries—the UK, Canada and Australia—have significantly expanded citizenship revocation laws as a counterterrorism response. This article provides a detailed examination of these laws, their development and their use. It also explores and critiques the extent to which the laws shift citizenship away from fundamental common law principles, and the means by which such a shift has been justified.

Keywords: citizenship, common law, comparative law, counterterrorism, human rights, public law.

I. INTRODUCTION

Since 2011, 25,000 to 30,000 foreign fighters from as many as 100 countries have travelled to take part in conflicts in Syria and Iraq.¹ Half originate from nearby Middle-Eastern and North African countries, with a further 21 per cent from Europe.² This phenomenon has given rise to heightened concerns about the threat of terrorism in many Western nations.

The fear is that these fighters will return home with a radical outlook and the training needed to carry out terrorist attacks.³ In September 2014, the UN Security Council expressed concern that foreign fighters ‘may pose a serious threat to their States of origin, the States they transit and the States to which they travel, as well as States neighbouring zones of armed conflict’.⁴ The Council called upon States to cooperate to restrict the movement of foreign fighters.

* Senior Research Associate, Andrew and Renata Kaldor Centre for International Refugee Law, Faculty of Law, University of New South Wales, sangeetha.pillai@unsw.edu.au.

** Dean, Anthony Mason Professor and Scientia Professor, Faculty of Law, University of New South Wales; Foundation Director, Gilbert + Tobin Centre of Public Law; Australian Research Council Laureate Fellow; Barrister, New South Wales Bar, george.williams@unsw.edu.au.

¹ A large proportion of these, some 7000 people, arrived as new recruits over the first half of 2015: see Institute for Economics and Peace, ‘Global Terrorism Index’ (November 2015) 3.

² *ibid* 4. See also Z Laub and J Masters, ‘Council on Foreign Relations Backgrounders: The Islamic State’ (16 November 2015) at <<http://www.cfr.org/iraq/islamic-state/p14811>>.

³ See L Vidino, A Snetkov and L Pigoni, ‘Foreign Fighters: An Overview of Responses in Eleven Countries’ (Zurich Centre for Security Studies, March 2014) 4.

⁴ United Nations, Security Council Resolution 2178 (2014), S/RES/2178 (24 September 2014).

Many Western nations have a broad range of laws that can be applied to meet this threat.⁵ These include offences, often introduced in the years following the 11 September 2001 attacks, of preparing for or carrying out a terrorist act. Intelligence and law-enforcement agencies have been conferred with expanded powers of questioning and surveillance. More recently, counter-terrorism strategies have focused on restricting access to State territory. While initially such restrictions applied only to non-citizens, via immigration law,⁶ they have been extended to apply to citizens. One mechanism for doing this is to limit the right to a passport.⁷ Another, with more extreme effect, is to restrict the right to citizenship itself, by ‘denationalizing’ citizens who the State deems threatening.

Denationalization has gained popularity as a response to radicalization within the populace.⁸ Such laws necessarily affect a broad range of entitlements and rights that depend upon citizenship, including rights of protection, entry and exit and political participation. Not surprisingly, citizenship stripping as a response to security threats is hotly debated. Some commentators regard it as an illegitimate expansion of power ‘at the expense of all citizens and of citizenship itself’.⁹ Others suggest that denationalization is, in principle, a suitable mechanism for dealing with citizens who seek to commit acts of terrorism against their own State.¹⁰

In this article, we examine security-based citizenship revocation in the context of common law countries.¹¹ We look in detail at the UK, Canada and Australia, as these are the only common law countries to have recently employed citizenship stripping in response to contemporary national security

⁵ See generally V Ramraj *et al.* (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press 2012); K Roach (ed), *Comparative Counter-Terrorism Law* (Cambridge University Press 2015).

⁶ See B Hudson, ‘Punishing Monsters, Judging Aliens: Justice at the Borders of Community’ (2006) 39(2) *Australian & New Zealand Journal of Criminology* 232–47.

⁷ See L Zedner, ‘Enemies of the State: Curtailing Citizenship Rights as Counterterrorism’, Max Weber Lecture, European University Institute (18 March 2015).

⁸ Countries that in the last two years have enacted citizenship stripping laws as a response to security threats include Austria, Azerbaijan, Belgium and The Netherlands: See Nationality Act (Austria), art 33(2) (entered into force 2015); A Hasanli, ‘Azerbaijanis engaged in terrorist activity to lose citizenship’, *Trend News Agency*, 4 December 2015; Code of Belgian Nationality, art 23/2 (entered into force 2015); Citizenship Act (Netherlands), art 14(2)(b) (entered into force 2016). Other countries have renewed their use of such laws during this period. For instance, in 2015 section 8B of the Danish Nationality Act 2003 was applied for the first time to revoke the citizenship of Said Mansour: see *Director of Public Prosecutions v Mansour* [2015] IECA 213. This decision was upheld on appeal by the Danish Supreme Court in June 2016: see Supreme Court Verdict (8 June 2016), Case No 211/2015.

⁹ See eg A Macklin, ‘Kick-off Contribution’ in A Macklin and R Bauböck (eds), ‘The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?’ (2015) Robert Schuman Centre for Advanced Studies Working Paper 2015/14 <http://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1> 6.

¹⁰ See eg C Joppke, ‘Terror and the Loss of Citizenship’ (2016) *Citizenship Studies* 16.

¹¹ As we are primarily concerned with the evolution of citizenship stripping as a national security device, other grounds for citizenship revocation, such as fraud and misrepresentation, are considered only in passing.

challenges.¹² In each of these nations, security-based citizenship revocation is not unprecedented, having been employed during and after World Wars I and II. However, the recent revival of the practice is nonetheless remarkable, as it follows decades of disuse in each country.

Our analysis proceeds in four parts. We begin by setting out the key features that characterize the State–citizen relationship at common law. Secondly, we outline the historical evolution of citizenship legislation in each of the three countries, and consider the extent to which common law principles have continued to be reflected in such legislation. We then provide a detailed account of the development of the recent revocation laws as a response to security concerns, and the justifications provided for such laws. In doing so, we analyse the extent to which these recent laws represent a retreat from common law conceptualizations of citizenship. We conclude by discussing the impact that this recent shift towards citizenship stripping may have on future understandings of citizenship.

II. THE COMMON LAW FRAMEWORK

The models of citizenship in the UK, Canada and Australia share roots in the common law's conceptualization of the relationship between individuals and the State. Typically, the common law uses the language of 'subjecthood' rather than 'citizenship' to describe this relationship, although the terms 'subject' and 'citizen' are sometimes used interchangeably by scholars.¹³

The relationship between subjects and the State at common law experienced its most significant evolution between the fourteenth and nineteenth centuries, when 'British subject status' emerged as the gateway to formal community membership. Over this period, a pronounced common law distinction between 'British subjects' and 'aliens' emerged. This was first reflected in the conferral of various legal privileges, particularly relating to inheritance, on many UK-born residents, at the expense of foreign-born residents.¹⁴ In 1315, the statute *De Natis Ultra Mare* was passed to increase legal protection for children born to persons engaged in foreign service. This statute reformed inheritance law by extending inheritance rights for foreign-born persons

¹² Citizenship revocation has been enacted in other common law nations, but not as a response to recent national security concerns. For example, in New Zealand section 16 of the Citizenship Act 1977 enables revocation for dual citizens who have 'voluntarily exercised any of the privileges or performed any of the duties' of their foreign citizenship 'in a manner that is contrary to the interests of New Zealand'. This power extends to persons who have voluntarily and formally acquired the nationality or citizenship of a foreign country other than by marriage, and have subsequently acted in *any* manner contrary to the interests of New Zealand. This power was not introduced in response to contemporary events, nor has New Zealand moved to expand its citizenship revocation powers in recent times.

¹³ See eg JW Salmond, *Jurisprudence or the Theory of the Law* (Stevens & Haynes 1902) 192.

¹⁴ See eg F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I* (Liberty Fund 2010 [1895]) vol 1, 269.

whose parents were ‘of the faith and [allegiance] of the King’.¹⁵ However it also had a significant influence on the subsequent development of nationality under common law, which was increasingly regarded by fifteenth and sixteenth century jurists as defined by reference to ‘allegiance’.¹⁶

The anchorage of common law nationality on allegiance was affirmed in 1608 in *Calvin’s Case*,¹⁷ which concerned the legal status of Scottish-born persons, following the unification of England and Scotland under James I. In his leading judgment, Lord Coke affirmed that all persons born in Scotland after unification owed ‘allegiance’ to the King in his personal capacity.¹⁸ Consequently such persons qualified as ‘subjects’ rather than ‘aliens’.¹⁹ While a person’s ‘allegiance’ was acquired at birth, and therefore typically defined by their place of birth, Coke recognized exceptions to this rule that made it clear that subject status stemmed from *allegiance* rather than birthplace. For instance, persons born within the UK but without allegiance—such as the children of enemy aliens—were not regarded as subjects,²⁰ while people who did not owe allegiance at birth could acquire it via letters patent, statutory provision or territorial acquisition.²¹

In addition to tethering subjecthood to allegiance, Coke conceived of the State–subject relationship as *reciprocal*. In exchange for a subject’s duty of allegiance, the State owed a duty of protection. Coke described this relationship as a ‘mutual bond and obligation between the King and his subjects’.²² Due to a paucity of case law on the rights and duties of subjecthood or citizenship, the substance of these reciprocal rights and duties has never been well defined. The parameters of the State’s duty of protection, which has typically been treated as legally unenforceable,²³ are particularly unclear.²⁴ However, the idea that the State–citizen relationship is reciprocal in nature has endured, and has been repeatedly affirmed.²⁵

The final core feature of the common law State–subject relationship that Lord Coke identified in *Calvin’s Case* is that the bond between State and subject is *permanent*. This permanence distinguished the position of subjects from that of aliens, who also owed a temporary duty of ‘local allegiance’ to the State while

¹⁵ See eg F Plowden, *A Disquisition Concerning the Law of Alienage and Naturalization* (A Belin 1818) 40.

¹⁶ See eg K Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge University Press 2000) 141–2, 151–70.

¹⁷ *Calvin v Smith* (1608) 77 Eng Rep 377.

¹⁸ *ibid* 388–9, 391.

¹⁹ *ibid*. See also JM Jones, *British Nationality Law* (Clarendon Press 1956) 54.

²⁰ Jones (n 19) 56.

²¹ *ibid* 61. See also C Parry, *Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland* (Stevens & Sons 1957) 43.

²² *Calvin v Smith* (1608) 77 Eng Rep 377, 382.

²³ See eg Salmond (n 13) 243.

²⁴ See eg PJ Price, ‘Natural Law and Birthright Citizenship in *Calvin’s Case* (1608)’ (1997) 9 *Yale JL&Human* 73, 120.

²⁵ See eg *Ex parte Anderson* (1861) 121 ER 525; *China Navigation Co v Attorney-General* (1932) 48 TLR 375; *Attorney-General v Nissan* [1969] 1 All ER 629; *Oppenheimer v Cattermole* [1972] 3 All ER 1106.

within its borders, and were entitled to State protection during this time in return. In the case of an alien, both the duty of allegiance and the corresponding State duty of protection cease when the alien leaves State territory. In the case of a subject, however, both duties endure, wherever the subject happens to be.²⁶

There has been little judicial consideration of the withdrawal of either allegiance or State protection. However, the jurisprudence that does exist emphasizes the continuity of the State–subject relationship. A number of cases and commentaries suggest that a State failure to provide protection does not terminate a subject’s duty of allegiance.²⁷ Similarly, obiter dicta from the case of *Johnstone v Pedlar*²⁸ suggests that an individual’s failure to act ‘in the spirit’ of their duty of allegiance does not permit the withdrawal of State protection. In that case, Viscount Finlay stated that a British subject who commits treason ‘remains for all purposes a British subject and must be treated as such in every respect’, irrespective of whether subjecthood was acquired by birth or naturalization.²⁹

Three key principles arise from these common law authorities. First, the State and its citizens owe each other reciprocal duties of protection and allegiance. Secondly, the State–citizen relationship is a secure one, which endures when one of these duties is breached. Finally, these principles apply equally to all citizens, regardless of how they obtained citizenship.

III. EVOLUTION OF CITIZENSHIP REVOCATION LEGISLATION IN THE UK, CANADA AND AUSTRALIA

In 1844, legislation was passed in the UK to allow aliens to take an oath of allegiance and become naturalized as subjects.³⁰ Since then, statute has overtaken the common law as the predominant source of nationality law in the UK and former colonies such as Canada and Australia.

The UK nationality legislation enacted in the second half of the nineteenth century did not seek to overhaul common law understandings of subjecthood, but was designed to update nationality law to fit the political concerns of the day.³¹ The first major piece of UK nationality legislation was the Naturalization Act 1870, which allowed British subjects to elect to renounce their subjecthood by declaring themselves to be aliens.³² This eroded the common law idea that the bond between a subject and the State was permanent, but maintained the security of subjecthood as a status that a person could not lose against their will.

²⁶ See *Calvin v Smith* (1608) 77 Eng Rep 377, 384–386.

²⁷ See eg *De Jager v Attorney-General of Natal* [1907] AC 326. *China Navigation Company v Attorney-General* [1932] 2 KB 197, 211–213; G Williams, ‘The Correlation of Allegiance and Protection’ (1948) 10 CLJ 54, 57.

²⁸ [1921] 2 AC 262. ²⁹ *ibid* 274. ³⁰ See Parry (n 21) 69. ³¹ *ibid* 72. ³² *ibid* 79–80.

Later statutory innovations in the UK threatened the security of citizenship by allowing the State to revoke a person's citizenship in particular circumstances. Such revocation powers were first mooted in 1870, when legislation to enable the Home Secretary to revoke the citizenship of a naturalized citizen who 'acted in a manner inconsistent with his allegiance' was proposed. This proposal was ultimately rejected, with parliamentarians criticizing the power on the grounds that it was 'transcendental', 'arbitrary', lacked safeguards, and created inequalities between natural born and naturalized British citizens.³³ A limited power to revoke citizenship was finally introduced in 1914, when the Secretary of State was granted a power to revoke the citizenship of a naturalized person where it had been acquired by fraud, false representation or concealment of material circumstances.³⁴

In 1918, the grounds for citizenship revocation were extended to include disloyalty or a lack of allegiance, following public and political pressure to deal with enemies in the country's midst throughout World War I.³⁵ Under these extended grounds, the Home Secretary was required to deprive a naturalized person of their British citizenship where they had shown themselves 'by act or speech to be disaffected or disloyal to [the Sovereign]'.³⁶ Without limiting this, revocation was expressly required where the Secretary was satisfied of particular circumstances, and regarded retention of citizenship as being 'not conducive to the public good'. These circumstances were where a person was of 'bad character' at the time of naturalization, where they had resided in a foreign country for seven years or more without maintaining a 'substantial connection' with the UK or its dominions, where they had engaged in particular criminal behaviour, where they had traded or communicated with an enemy country or a citizen of such a country, or where they were a citizen of a country at war with the UK.³⁷

At the onset of World War I, neither Canada nor Australia had developed an independent citizenship status. In both countries, British subject status, which could be obtained by birth or naturalization, was the highest formal membership status that a person could hold.³⁸ In each country the grounds for revoking subjecthood for naturalized persons broadly mirrored those in place in the

³³ See eg HL Debate, vol 199, cc 1604–1618 (10 March 1970).

³⁴ See British Nationality and Status of Aliens Act 1914, section 7(1).

³⁵ See eg P Panayi, *The Enemy in Our Midst: Germans in Britain during the First World War* (Berg 1991) 62–9.

³⁶ British Nationality and Status of Aliens Act 1914, section 7(1), as amended by British Nationality and Status of Aliens Act 1918, section 1.

³⁷ *ibid* section 7(2), as amended by British Nationality and Status of Aliens Act 1918, section 1.

³⁸ For Canada, see A Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' (2014) 40(1) *Queens Law Journal* 1, 21. For Australia, see K Rubenstein, "'From This Time Forward ... I Pledge My Loyalty to Australia": Loyalty, Citizenship and Constitutional Law in Australia' in V Mason and R Nile (eds), *Loyalties: Symposia Series* (API Network Press 2005) 23, 24.

UK: prior to World War I the only basis for revocation was fraud,³⁹ but after the war both countries extended statutory powers to allow for disloyalty-based revocation.

In Canada, disloyalty-based revocation was introduced in 1919 and 1920, and directly mirrored the denaturalization legislation in the UK at the time.⁴⁰ These laws were only passed through Parliament after substantial debate. Critics expressed several concerns: that the grounds of ‘disaffection’ and ‘disloyalty’ were too vague,⁴¹ that the ministerial discretion to revoke citizenship was too broad, and created ‘fair weather citizens’, whose status could be revoked at will,⁴² that persons considered too dangerous to live freely in Canada should be tried and incarcerated rather than deported,⁴³ and that revocation decisions should lie with the judiciary rather than the executive.⁴⁴ In response, the government asserted that the expanded revocation grounds were necessary in order to maintain compliance with UK naturalization law.⁴⁵

In Australia, the idea of broadening revocation grounds was met with greater legislative enthusiasm, and was implemented earlier than in the UK and Canada. In 1917, legislative amendments allowed a naturalized person to have their subjecthood revoked on unrestricted grounds.⁴⁶ However, new legislation in 1920 narrowed this power to conform with the revocation grounds in place in the UK and Canada.⁴⁷

In all three countries, the expanded revocation grounds were used actively in the aftermath of World War I. The UK and Australia denaturalized around 50⁴⁸ and 150⁴⁹ people respectively during this time, with much more infrequent use of the power during the 1920s.⁵⁰ In Canada, the power was used much more extensively, particularly once World War I had ended. Ninette Kelly and Michael Trebilcock have noted that between 1930 and 1936, 461 people had their naturalization certificates revoked. More than half of these revocations occurred in 1932 following a ‘crackdown on the Communist Party’.⁵¹

³⁹ For a comprehensive overview of early Canadian legislation, see C Anderson, ‘A Long-Standing Canadian Tradition: Citizenship Revocation and Second-Class Citizenship under the Liberals, 1993–2006’, Paper presented at the Canadian Political Science Association, York University (June 2006) <<https://www.cpsa-acsp.ca/papers-2006/Anderson.pdf>> 6. In Australia, see Naturalization Act 1903 (Cth) section 11. ⁴⁰ See Anderson (n 39) 6.

⁴¹ See eg Canada, House of Commons Debates, 26 June 1919, 4119 (Ernest Lapointe).

⁴² *ibid*, 26 June 1919, 4126 (Samuel Jacobs). ⁴³ *ibid*, 21 June 1919, 3818 (Jacques Bureau).

⁴⁴ *ibid*. ⁴⁵ See Anderson (n 39) 7.

⁴⁶ See Naturalization Act 1917 (Cth) section 7, amending Naturalization Act 1903 (Cth) section 11.

⁴⁷ See eg Nationality Act 1920 (Cth) section 12.

⁴⁸ See M Gibney, ‘The Deprivation of Citizenship in the United Kingdom: A Brief History’ (2014) 28(4) *Immigration, Nationality and Asylum Law* 326, 328.

⁴⁹ D Dutton, ‘A Guide to Commonwealth Government Records in Australia’, National Archives of Australia Research Guide (2000) <<http://guides.naa.gov.au/citizenship/chapter2/revocation-naturalisation.aspx>> ch 2.

⁵⁰ See eg Gibney (n 48) 328; Dutton (n 49) ch 2.

⁵¹ N Kelley and M Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (University of Toronto Press 1998) 227.

The revocation legislation introduced during and soon after World War I was employed again for World War II in each country.⁵² Once again, Canada made the most extensive use of the revocation powers: in the aftermath of World War II, denaturalization legislation and the emergency War Measures Act 1914 were used to support a government policy to 'repatriate' Canadians of Japanese descent, including those born in Canada, some of whom had never been to Japan. This scheme was critiqued in Parliament, with opponents suggesting that deporting Canadians was 'the very antithesis of the principles of democracy'.⁵³

Following World War II, citizenship revocation on disloyalty grounds reduced considerably. This was coupled with a narrowing of revocation grounds in all three countries, though in this instance a different legislative approach was adopted in each.

In the UK, the British Nationality Act 1948 retained the Secretary of State's capacity to revoke the citizenship of naturalized citizens on grounds of fraud and misrepresentation,⁵⁴ as well as on narrowed disloyalty grounds. Under this Act it was no longer possible for the Secretary to revoke a person's citizenship on the basis of 'bad character' or citizenship of a State at war with the UK. The other disloyalty based grounds for revocation in the 1918 Act were retained,⁵⁵ however deprivation was only permitted where the Secretary was satisfied that retention of citizenship would be 'not conducive to the public good'.⁵⁶ In 1964, these grounds were narrowed further: the capacity to revoke citizenship on the basis of residence in a foreign country was removed, and it became unlawful to revoke a person's citizenship on criminal grounds if this would render them stateless. This was done in order to make British law consistent with the 1961 UN Convention on the Reduction of Statelessness.⁵⁷

Following World War II, the use of citizenship deprivation powers against disloyal citizens decreased considerably, to the point where the powers came to be considered 'moribund'.⁵⁸ Although the power to revoke citizenship on disloyalty grounds remained available under UK legislation, the last instance of this power being invoked in the twentieth century took place in 1973.⁵⁹

In 1981, UK nationality law was redrafted as the British Nationality Act 1981. Following vigorous parliamentary debate,⁶⁰ a deprivation power, expressed in the same terms as under previous legislation, but without the protection against statelessness, was included in the new legislation. However, this power was never used.

⁵² For the UK, see Gibney (n 48) 328. For Canada, see Anderson (n 39) 7. For Australia, see Dutton (n 49) ch 2.

⁵³ See Macklin, 'The Privilege to Have Rights' (n 38) 21–2 (quoting John Diefenbaker).

⁵⁴ See British Nationality Act 1948, section 20(2). ⁵⁵ *ibid* sections 20(3), 20(4).

⁵⁶ *ibid* section 20(5). ⁵⁷ Gibney (n 48) 329. ⁵⁸ *ibid* 330.

⁵⁹ The last citizen deprived of citizenship was Nicholas Prager, for spying for Czechoslovakia: See HL Deb vol 639 col 281 (9 October 2002); Gibney (n 48) 329.

⁶⁰ See eg HL Debate vol 423, cc 366–411 (23 July 1981); vol 424, cc 261–365 (13 October 1981).

Canada and Australia legislated to create independent citizenship statuses by way of the Canadian Citizenship Act 1946 and Nationality and Citizenship Act 1948, respectively. Both acts initially provided wide grounds for citizenship revocation. In Canada, these mirrored the grounds in the UK legislation in force at the time,⁶¹ whereas in Australia, the revocation grounds under pre-existing Australian naturalization legislation were retained.⁶² However, in contrast to the UK's decision to retain relatively broad statutory revocation powers, even once they had fallen into disuse, both Canada and Australia eventually moved to significantly restrict the grounds for citizenship stripping.

In Australia, amendments introduced in 1958 considerably limited the grounds for citizenship loss,⁶³ and narrow grounds remained in place until the most recent changes to citizenship law. A person could have their citizenship revoked if they committed a serious offence in relation to their application for citizenship,⁶⁴ or where their citizenship was obtained by fraud.⁶⁵ Additionally, those who obtained their citizenship by application and 'conferral' could have it revoked if they were convicted of a 'serious offence' in the period between lodging an application for citizenship and having citizenship conferred, provided this would not render them stateless.⁶⁶ In all these cases, revocation took place via the exercise of ministerial discretion, which required the Minister to be satisfied that it would be 'contrary to the public interest' for the person to remain an Australian citizen.⁶⁷ In addition, an Australian citizen with dual citizenship automatically lost their Australian citizenship if they 'serve[d] in the armed forces of a country at war with Australia'.⁶⁸ This provision has been part of Australian citizenship legislation since the 1948 Act was passed, but has never operated to deprive a person of their citizenship.⁶⁹

In Canada, the 1946 Act was subsequently replaced with the Canadian Citizenship Act 1977. Secretary of State James Faulkner emphasized that this was intended to diminish government discretionary power, and promote equality and the rule of law.⁷⁰ The Act retained ministerial powers to revoke citizenship on the basis of fraud⁷¹ or concealing material circumstances,⁷² but removed all other grounds for involuntary citizenship loss, including all disloyalty based grounds. As in Australia, this remained the approach to

⁶¹ See Canadian Citizenship Act 1946, pt III.

⁶² See Nationality and Citizenship Act 1948, div 4.

⁶³ See Nationality and Citizenship Act 1958, sections 6, 7, amending Nationality and Citizenship Act 1948 sections 20–22.

⁶⁴ See Australian Citizenship Act 2007, section 34(1)(b). ⁶⁵ *ibid* section 34(2)(b)

⁶⁶ *ibid* section 34(2)(b) (ii). ⁶⁷ *ibid* sections 34(1)(c), (2)(c). ⁶⁸ *ibid* section 35.

⁶⁹ See eg K Rubenstein, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Submissions> 4.

⁷⁰ See Anderson (n 39) 9. ⁷¹ Citizenship Act 1977, section 10. ⁷² *ibid* section 18.

citizenship revocation until the very recent enactment of new citizenship stripping laws.

The introduction of nationality legislation in the UK did not signify a radical break from common law principle, but rather a progressive development that built upon common law understandings of the subject–State relationship. Thus, common law subjecthood forms the foundation for citizenship in the UK, as well as the derivative concepts of citizenship that evolved in Canada and Australia. However, statutory citizenship in these three countries has at times developed inconsistently with common law principles.

The idea that the State–citizen bond is permanent experienced an early erosion. Citizens in all three countries have had a long-standing capacity to voluntarily renounce their citizenship. Moreover, in each country legislation has allowed for people to lose their citizenship involuntarily. In the context of World Wars I and II, such laws conferred broad executive revocation powers, which were often used. This undermined the common law idea of citizenship as a secure status, guaranteed to those who hold it: citizenship was instead made conditional on the conduct of the holder. This legislation also undermined the idea that all citizens hold an equal status, as only naturalized citizens were vulnerable to revocation. The 1917 Australian law conferring an unrestricted executive power to revoke the citizenship of a naturalized person, although wound back quickly, was an extreme example of this.

The idea that the State protection that stems from citizenship is owed in reciprocity to a citizen's duty of allegiance was better preserved, but ultimately still weakened by the wartime revocation laws. While a broad disloyalty based revocation ground existed, certain conduct that triggered revocation, such as residing in a foreign country without maintaining a connection with the State, and trading or communicating with a citizen of a country at war with the State, was not predicated on non-allegiance.

Notably, however, in the latter half of the twentieth century all three countries significantly narrowed citizenship stripping laws, and the use of such laws, in a way that substantially restored the connection with common law principles. Citizenship shifted from the 'conditional' status it had during times of emergency to a status that was generally very secure. This was most pronounced in Canada, where the narrowed laws only allowed people who obtained citizenship through fraud or material concealment of circumstances to lose it involuntarily. In the UK and Australia legislative grounds for disloyalty based citizenship loss remained, but were so narrow that they were never used in Australia, and were broader, but again not used, in the UK.

Similarly, the idea of citizenship as a compact involving reciprocal duties of allegiance and protection was restored. In each of the three countries, the continued centrality of a 'duty of allegiance' to citizenship has been affirmed, at least symbolically. Those who obtain citizenship by naturalization must take

an oath affirming their allegiance or loyalty to the State.⁷³ The idea that this allegiance is coupled with a reciprocal State duty of protection is also reflected, albeit more subtly. In the UK, while courts have stopped short of identifying a legally enforceable State duty to protect citizens, they have held that citizens may have a legitimate expectation that the State will consider extending protection to them.⁷⁴ In Canada, State duties of protection are more tangibly codified in the Charter of Rights and Freedoms, which constitutionally guarantees freedom of movement to, from and within Canadian territory to all citizens.⁷⁵ In Australia, the Preamble to the Australian Citizenship Act 2007 describes Australian citizenship as ‘a bond, involving reciprocal rights and obligations’.

The idea that citizenship was an equal status was also revived. The principle of equal citizenship is most strongly reflected in Canada, where section 15 of the Charter of Rights and Freedoms guarantees equality under the law to all individuals.⁷⁶ The Preamble to the Australian Citizenship Act 2007 describes citizenship as a ‘common bond ... uniting all Australians’, invoking, at least rhetorically, the idea of an equal citizenship.

Citizenship did not, however, become entirely equal. Only naturalized citizens could lose citizenship on account of fraud or failure to disclose material circumstances during the application process. In Australia, only dual citizens stood to lose their citizenship for serving in the armed forces of a country at war with Australia. UK legislation contained greater inequalities: broad security-based revocation powers only applied to those who obtained citizenship by naturalization or registration. However, despite these inequalities, the fact that the security-based denationalization grounds in Australia and the UK fell into disuse illustrates that, in practice if not in theory, citizenship was a status that applied equally, however it was obtained.⁷⁷

⁷³ See British Nationality Act 1981, section 42; Citizenship Act 1977, section 24; Australian Citizenship Act 2007, sched 1.

⁷⁴ See eg *R (Abbasi) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598.

⁷⁵ Canadian Charter of Rights and Freedoms, art 6.
⁷⁶ This is not a provision that applies specifically to citizenship. However, it has been held to require non-discrimination in terms of access to citizenship in certain cases: See eg *Benner v Canada (Secretary of State)* [1997] 1 SCR 358, 401. It has also been argued that section 15 protects against the establishment of ‘second class citizenship’: see eg Macklin, ‘The Privilege to have Rights’ (n 38) 48.

⁷⁷ The fraud based grounds for citizenship revocation applied only to naturalized citizens, and were used with some regularity in all countries. However, it could be argued that as the basis for this revocation ground was that affected persons were never properly entitled to obtain citizenship in the first place, the argument that citizenship, once properly obtained, was an equal status can be maintained.

IV. CITIZENSHIP STRIPPING REFORMS IN THE UK, CANADA AND AUSTRALIA

A. UK

1. Overview

The UK's citizenship stripping powers fell into disuse in the late twentieth century. In the twenty-first century, however, the UK has emerged as a global leader in using citizenship deprivation as a counterterrorism measure. In 2002, 2006 and 2014 it significantly broadened ministerial powers to revoke citizenship. As a result, it has been suggested that 'UK governments now have at their disposal laws to strip citizenship that are arguably broader than those possessed by any other Western democratic State'.⁷⁸ Despite this, in October 2015, the British government announced a proposal to further expand the grounds for citizenship deprivation.⁷⁹

The UK took its first step towards significantly expanding the statutory grounds for citizenship deprivation in 2002, in response to the September 11 terrorist attacks. Following the publication of a government White Paper recommending that denationalization laws be 'updated' and used to illustrate the State's 'abhorrence' of certain crimes,⁸⁰ the Nationality, Immigration and Asylum Act 2002 made key expansions to the British Nationality Act. The power to denationalize a citizen was uncoupled from the precisely stated disloyalty grounds that had featured in earlier legislation. In place of such grounds, a single standard, characterized by increased executive discretion, was introduced, enabling citizenship deprivation whenever the Secretary of State believed that it would be 'seriously prejudicial to the vital interests of the United Kingdom' for a person to continue to hold citizenship.⁸¹ For the first time in UK legislation, this citizenship deprivation power was exercisable not only against naturalized British citizens, but also against natural born citizens—a change that was justified as a measure to avoid discrimination between the different classes of citizenship.⁸² However, in practice the power could only be applied to UK citizens (natural born or naturalized) with dual citizenship, as the legislation precluded denationalization where this would leave a person stateless.⁸³

The substantial expansion of the grounds for citizenship revocation in the 2002 amendments marked a renewed shift away from the common law

⁷⁸ See Gibney (n 48) 326.

⁷⁹ See Great Britain, Home Office, 'Counter-Extremism Strategy' (October 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470088/51859_Cm9148_Accessible.pdf>.

⁸⁰ See Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (The Stationery Office 2002).

⁸¹ See Nationality, Immigration and Asylum Act 2002, section 4, amending British Nationality Act 1981, section 40.

⁸² See eg HL Debate, vol 679, col 281 (9 October 2002).

⁸³ See Nationality, Immigration and Asylum Act 2002, section 4, amending British Nationality Act 1981, section 40(4).

conceptualization of citizenship as a secure status. The Act also had implications for the equality between citizens. While it avoided earlier distinctions between natural born and naturalized citizens with respect to revocation, inequality between sole and dual citizens was created, with only the later class susceptible to citizenship revocation. On the other hand, the idea that the State–citizen relationship involves reciprocal duties of protection and allegiance was better preserved: to be a candidate for revocation, a person needed to act in a manner ‘seriously prejudicial to the vital interests of the UK’, action which would likely demonstrate a lack of allegiance.

Three days after the 2002 amendments entered into force, the Blair government sought to revoke the citizenship of Abu Hamza Al-Masri, a radical cleric who had publicly praised the September 11 terrorist attacks and Osama bin Laden. This marked the first attempt to invoke the government’s citizenship deprivation powers in over 30 years. Ultimately, this effort was unsuccessful.⁸⁴ Under the legislation at the time, deprivation did not come into effect until a person had exhausted all their appeal avenues. Abu Hamza lodged an appeal, which was not concluded until 2010. Within this time, Egypt had taken steps to divest him of his dual Egyptian citizenship. As a result, the Special Immigration Appeals Commission found that the Secretary of State lacked the power to revoke Abu Hamza’s UK citizenship, as doing so would render him stateless.⁸⁵

In 2006, following the 2005 London bombings, significant changes were introduced to lower the threshold for the exercise of citizenship deprivation powers, to any circumstance in which the Home Secretary believed that citizenship deprivation would be ‘conducive to the public good’.⁸⁶ Under this lowered threshold, citizenship revocation was no longer dependent on acting in a non-allegiant manner, signifying a further shift away from common law principle.

The 2006 amendments led to an immediate increase in deprivations, marking the first effective use of citizenship deprivation powers since 1973.⁸⁷ However, citizenship stripping still remained relatively rare: between 2006 and 2009 only four people were denationalized.⁸⁸ While citizenship revocation laws had departed in many respects from common law principles, this minimal use suggested that, at least in practice, UK citizenship initially remained a relatively secure status.

⁸⁴ See C Woods and A Ross, ‘“Medieval Exile”: The 42 Britons stripped of their citizenship’ *The Bureau of Investigative Journalism* (26 February 2013).

⁸⁵ See *Abu Hamza v Secretary of State for the Home Department*, SC/23/2003, Special Immigration Appeals Commission, 5 November 2010 [22]. In 2004, in response to the Abu Hamza case, amendments were introduced to allow citizenship deprivation to take effect as soon as a notice to deprive was issued: see Gibney (n 48) 332.

⁸⁶ See Immigration, Asylum and Nationality Act 2006, section 56, amending British Nationality Act 1981, section 40(2).

⁸⁷ See M Gower, ‘Deprivation of British citizenship and withdrawal of passport facilities’, House of Commons Library Standard Note SN/HA/6820, 30 January 2015, 5. ⁸⁸ *ibid.*

This security has waned since 2010, when the election of the Cameron government triggered a major shift in the exercise of citizenship deprivation powers. Within its first year, the government stripped six people of their citizenship. Since 2010, there have been 33 denationalizations on security grounds.⁸⁹

In 2014, the UK Parliament enacted new changes allowing sole British citizens to be stripped of their citizenship. This occurred in the wake of a failed attempt to revoke the citizenship of Hilal al-Jedda, an asylum seeker from Iraq, who was granted British citizenship in 2000. Under Iraqi law at the time, al-Jedda automatically lost his Iraqi citizenship upon attaining a foreign citizenship. In December 2007, al-Jedda was notified that the Home Secretary considered that depriving him of his British citizenship would be 'conducive to the public good'. He appealed on the ground that such deprivation would leave him stateless. The matter reached the Supreme Court, before which the Home Secretary noted that, due to a change in Iraqi law after al-Jedda attained UK citizenship, he had the opportunity to reacquire Iraqi citizenship.⁹⁰ The Home Secretary argued that consequently, the deprivation order did not make al-Jedda stateless, as he was entitled to obtain another citizenship. The Court dismissed this submission, noting that it would 'mire the application of the [provision] in deeper complexity'.⁹¹ It unanimously found in al-Jedda's favour.

Following the al-Jedda case, the government sought to extend the UK's citizenship deprivation laws to enable certain terror suspects to be deprived of their UK citizenship, even if they would otherwise be left stateless. The proposal was a late addition to a package of broader amendments, and was introduced without prior consultation.⁹²

This proposal met with considerable resistance in the House of Lords. In the course of a lengthy debate, crossbencher Lord Pannick, who led the opposition to the proposal, stated that '[t]here are regrettably all too many dictators around the world willing to use the creation of statelessness as a weapon against opponents and we should do nothing to suggest that such conduct is acceptable'.⁹³ The proposal also attracted criticism beyond Parliament. For instance, Ben Emmerson, the UN Special Rapporteur on Counter-Terrorism and Human Rights, said in evidence to the Parliamentary Joint Committee on Human Rights ('JCHR') that rendering individuals stateless is 'a subject of very serious concern'.⁹⁴ The utility of the proposal as a national security measure was

⁸⁹ V Parsons, 'Citizenship stripping: new figures reveal Theresa May has deprived 33 individuals of British citizenship', *The Bureau of Investigative Journalism* (21 June 2016).

⁹⁰ See Woods and Ross (n 84).

⁹¹ *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62, [32].

⁹² Joint Committee on Human Rights, Twelfth Report, *Legislative Scrutiny: Immigration Bill (Second Report)* (26 February 2014) 6 <<http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/14205.htm>>.

⁹³ HL Deb vol 753 col 1169 (7 April 2014).

⁹⁴ Joint Committee on Human Rights, Oral evidence from David Anderson QC, Independent Review of Terrorism Legislation; and Ben Emmerson QC, UN Special Rapporteur on Counter-

also called into question. For instance, in the House of Lords debate, Baroness Kennedy observed that ‘it is by no means clear what deprivation can achieve that the criminal law cannot’.⁹⁵

The House of Lords rejected the first iteration of the 2014 proposal. However, after a number of concessions by the government, the law was passed by both houses. As a result, section 40(4A) of the British Nationality Act provides that the Secretary of State may deprive a naturalized British citizen of their citizenship where he or she believes this would be ‘conducive to the public good’, even if that person would become stateless as a result. However, this power can only be exercised if the Home Secretary is satisfied that depriving the person of citizenship is ‘for the public good’ because, while they held citizenship status, they conducted themselves ‘in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the islands, or any British overseas territory’. Additionally, the Home Secretary must have reasonable grounds for believing that the person is able to become a national of a foreign country or territory under the law of that country or territory.⁹⁶ As of April 2016, this power had not yet been used.⁹⁷ Nonetheless, it further erodes equality between citizens, as only naturalized citizens are vulnerable to revocation with the more extreme consequence of statelessness.

The citizenship stripping legislation in force in the UK contains broad executive powers and limited safeguards. In a report on the 2014 Bill, the JCHR asked why the Bill did not provide for judicial involvement prior to a ministerial decision to revoke citizenship. The government responded that placing the court in the position of primary decision-maker would be ‘out of step with all other immigration and nationality decisions’.⁹⁸ The JCHR recommended that, to mitigate arbitrariness, the Bill should be amended to require that, in cases involving statelessness, citizenship revocation be a ‘necessary and proportionate response’ to the prejudicial conduct engaged in by the citizen. This recommendation was not adopted.⁹⁹

Individuals who have their citizenship revoked in the UK have a right of appeal,¹⁰⁰ and are entitled to written notice outlining this right and the

Terrorism and Human Rights, 26 March 2014, <http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_HC_1202_TRANSCRIPT_Anderson_Emmerson_260314.pdf> 22.

⁹⁵ HL Deb vol 753 col 46 (17 March 2014).

⁹⁶ For an analysis of the UK citizenship stripping provisions and the circumstances in which they are used, see Gower (n 87).

⁹⁷ See D Anderson QC, ‘Citizenship Removal Resulting in Statelessness’, First report of the Independent Reviewer on the operation of the power to remove citizenship obtained by naturalisation from people who have no other citizenship (April 2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518120/David_Anderson_QC_-_CITIZENSHIP_REMOVAL_web_pdf> 4.

⁹⁸ JCHR (n 92) [61].

⁹⁹ *ibid* [62].

¹⁰⁰ The right of appeal is to either a court (Immigration Act 2014 section 40A(1)) or the Special Immigration Appeals Commission (Special Immigration Appeals Commission Act 1997, section 2B), depending on whether the decision was made in reliance on closed material.

reasons for the deprivation order.¹⁰¹ However, the efficacy of this appeal right can be limited. For instance, the right to appeal does not prevent a person from being subject to the consequences of citizenship deprivation, such as deportation from the UK, with no right to re-enter. This can make the practical exercise of appeal rights very difficult. Appeal rights are similarly difficult to exercise where a person is denationalized while they are outside UK territory. The Bureau of Investigative Journalism reported in 2013 that, in all but two cases, citizenship stripping powers had been exercised against individuals who were out of the UK.¹⁰²

2. *Justifications*

Ministerial powers to revoke citizenship on disloyalty grounds have an almost century-long history in the UK. However, except during World Wars I and II, and since the Cameron government's time in office from 2009, these disloyalty based deprivation powers had been used sparingly, or not at all. On a number of occasions, the UK Parliament considered whether the powers to revoke citizenship on disloyalty grounds should be retained. It consistently opted to do so, despite the often restrained use of these powers.¹⁰³ This was the case even in 1981, when citizenship stripping on disloyalty grounds had not occurred in close to a decade.

Many of the changes to the UK statutory citizenship stripping model demonstrate a desire to keep citizenship provisions 'up to date', perhaps to ensure that they remain tailored to the concerns of the day. The changes in 2002—which enabled denationalization for 'natural born' UK citizens, and replaced the previously precise grounds for deprivation with a general revocation power exercisable where the Secretary of State was satisfied that a person had acted 'in a manner seriously prejudicial to the vital interests of the UK'—took place in the wake of the 11 September 2001 terrorist attacks in the US. The changes were justified on the basis that the configuration of the previous deprivation powers failed to reflect 'the types of activity that might threaten [the UK's] democratic institutions and [its] way of life'.¹⁰⁴

A criticism of the 2002 law was that most conduct seriously prejudicial to the vital interests of the UK was already criminalized and penalized through treason offences. The government's response was that it wanted to retain the power to revoke citizenship even where a criminal conviction was not or could not be secured, for instance, due to a lack of sufficient admissible evidence.¹⁰⁵

¹⁰¹ Immigration Act 2014, section 40(5).

¹⁰² A Ross and P Galey, 'Rise in citizenship-stripping as government cracks down on UK fighters in Syria', *The Bureau of Investigative Journalism* (23 December 2013). See also Gower (n 87) 5–7.

¹⁰³ For justifications for retention in Parliament, see eg HL Deb vol 423 col 448 (23 July 1981) (Lord Mackay); HL Deb vol 639 col 279 (9 October 2002) (Lord Filkin).

¹⁰⁴ House of Lords Select Committee on the Constitution, Nationality, Immigration and Asylum Bill, 6th Report, HL 129 (2002), 6.

¹⁰⁵ See eg S Mantu, 'Deprivation of citizenship in the United Kingdom', ENACT Project Deliverable WP4 (July 2009) 17. See also HL Deb vol 639 cc 280–281 (9 October 2002).

Similarly, the lowering of the threshold in 2006 to allow deprivation wherever the Secretary of State believed it would be ‘conducive to the public good’ was designed to enable revocation for citizens who had not engaged in any criminal activity. This reflected the changes being immediately preceded by the 2005 London bombings, in which many of the perpetrators were previously unknown to police.¹⁰⁶ The 2014 changes, enabling citizenship revocation even where statelessness may follow as a consequence, were produced by the government’s ultimate loss in the protracted al-Jedda case.¹⁰⁷

The UK citizenship revocation laws overlap with a wide range of other national security measures. Some of these measures produce the same outcomes as denationalization, such as the detention and removal of individuals deemed to pose a threat, often with greater practical effect. For instance, the Home Secretary enjoys under the Royal Prerogative an executive discretion to withdraw or refuse passports. Historically, these powers are thought to have been used very sparingly.¹⁰⁸ However, in April 2013, the criteria for using the Prerogative were updated.¹⁰⁹ Between the update and November 2014, Home Secretary Theresa May invoked the passport refusal and cancellation powers 29 times.¹¹⁰

In January 2015, the Counterterrorism and Security Act 2015 (CTSA) introduced a suite of new administrative powers designed to facilitate exclusion and to disrupt the mobility of persons deemed to pose a security risk. One of the key features of the CTSA is the Temporary Exclusion Order (TEO)—an order which the Home Secretary may issue to prevent a citizen outside the UK from returning to the UK for a two-year period.¹¹¹ After, or during, this period additional TEOs may be imposed.¹¹² In order to issue a TEO, the Home Secretary must be satisfied of five criteria.¹¹³ Most significantly, he or she must ‘reasonably suspect that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom’,¹¹⁴ and ‘reasonably consider that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism’.¹¹⁵

¹⁰⁶ See eg ‘Report of the Official Account of the Bombings in London on 7th July 2005’, HC 1087 (2006). In the House of Lords, Baroness Ashton of Upholland defended the need for the lower threshold: ‘Our experience, on looking back over cases from the past two or three years, is that the test is too high and the hurdles too great’: HL Deb vol 679, col 1190.

¹⁰⁷ See eg JCHR, n 92 [23]–[24].

¹⁰⁸ For instance, the power is reported to have been used only 16 times between 1947 and 1976: see eg Gower, (n 87) 9.

¹⁰⁹ ¹⁰⁹ *ibid* 7.
¹¹⁰ The Rt Hon Theresa May MP, Speech on counter-terrorism, Royal United Services Institute, Whitehall (24 November 2014) at <<https://www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism>>.

¹¹¹ TEOs can also apply to non-citizens who have a right of abode in the UK: see Counter-Terrorism and Security Act 2015, section 2(6).
¹¹² *ibid* section 4(8).

¹¹³ See *ibid*, sections 2(3)–2(7).

¹¹⁴ *ibid* section 2(3).

¹¹⁵ *ibid* section 2(4). Other conditions are that the Secretary of State reasonably considers that the individual is outside the UK: section 2(5), that the individual has a right of abode in the UK: section 2(6).

Given that the majority of citizenship revocations are issued while a citizen is overseas,¹¹⁶ a TEO or passport cancellation order could also be used to prevent their return to the UK. For citizens within the UK, the revocation laws do open up the additional possibility of permanent removal. However, this is often not a practical goal. For instance, removing a person from the UK once they have had their citizenship revoked depends upon finding a country willing to take them. This is likely to be particularly challenging where revocation results in statelessness. However, even where this is not the case, deportation can prove practically difficult. For instance, in *Pham v Secretary of State for the Home Department*,¹¹⁷ the applicant was a naturalized British citizen who had never renounced his prior Vietnamese citizenship. The Home Secretary ordered that he be stripped of his British citizenship and deported to Vietnam. However, deportation was frustrated when the Vietnamese government responded that it did not recognize the applicant as a Vietnamese citizen.¹¹⁸ Cases such as this demonstrate the problematic nature of citizenship revocation as an effective counterterrorism tool, and why such a power may be of limited utility compared to other measures.

However, the UK's twenty-first century citizenship-stripping expansions were not strictly utilitarian in object. Proponents also advanced a rhetorical justification, asserting that the laws reinforced key features of the State–citizen relationship. For instance, when defending the laws, government members described citizenship as a ‘privilege’ rather than a right, and emphasized that citizens owe a duty of allegiance to the State.¹¹⁹

Notably, these rhetorical defences of the new revocation laws have sought to invoke elements of the common law conceptualization of citizenship: particularly the idea that citizenship is based on allegiance. At the same time, the recasting of citizenship as a ‘privilege’ rather than a secure status actively undermines the other key features of common law citizenship—its reciprocity, its security and continuity as a status, and the idea that it is characterized by equality.

This distorted invocation of the common law, magnifying select principles while minimizing others, has the potential to radically alter the way in which UK citizenship is understood. This is bolstered by the fact that, as noted

Finally, the Secretary of State must either obtain permission to impose a TEO, or reasonably consider that the urgency of the case requires a TEO to be imposed without prior judicial permission: section 2 (7). Other features of the CTSA include police powers to seize and retain for up to 14 days the travel documents of a person ‘suspected of intending to leave Great Britain ... in connection with terrorism-related activity’: section 1(1), and the resurrection of a previously abolished power by enabling people to be forcibly relocated under Temporary Prevention and Investigation Measures (TPIMs): Pt 2.

¹¹⁶ Ross and Galey (n 102).

¹¹⁷ [2015] UKSC 19.

¹¹⁸ *ibid* [3].

¹¹⁹ See eg HC Deb vol 384, col 413 (24 April 2002) (Marsha Singh); HC Deb vol 590 cc 170–210 (6 January 2015); A Worthington, ‘The UK’s Unacceptable Obsession with Stripping British Citizens of Their UK Nationality’ (25 March 2014) <<http://www.andyworthington.co.uk/2014/03/25/the-uks-unacceptable-obsession-with-stripping-british-citizens-of-their-uk-nationality/#sthash.IGLLqPHr.dpuf>>.

above, the revocation laws enacted by the UK in the twenty-first century reflect a progressive shift away from common law understandings of citizenship.

The idea that the UK's recent revocation expansions undermine the security and equality of citizenship is readily apparent. Perhaps less obviously these laws also mark a shift away from the idea that citizenship is tethered to allegiance. The current revocation threshold in UK law generally allows a person to be stripped of their citizenship whenever this would be 'conducive to the public good'. This does not require any non-allegiant conduct on the citizen's part. Thus, attempts to justify the revocation laws as an affirmation of the fact that citizens owe a duty of allegiance to the State do not seem to provide an adequate explanation for their enactment. Moreover, the fact that some citizens may be vulnerable to denationalization even where they have maintained their allegiance undermines the idea that the allegiance of citizens is offered in exchange for protection from the State.

In October 2015, the UK government released a new Counter Extremism Strategy, which signalled plans to 'consider ... how we can more easily revoke citizenship from those who reject our values'.¹²⁰ The Strategy non-exhaustively defines 'values' as including 'the rule of law, democracy, individual liberty and the mutual respect, tolerance and understanding of different faiths and beliefs'.¹²¹ It seems clear that if this plan to expand denationalization grounds is ultimately implemented, UK citizenship will become less secure and more conditional. Beyond this, it is unclear what principles could inform where a revocation threshold might be drawn, but likely that a compelling justification for the laws would need to look beyond the common law rhetoric of citizenship being based on allegiance.

B. Canada

1. Overview

The first recent proposal to expand citizenship stripping legislation in Canada came in 2012, when a private members bill (Bill C-425) proposed an amendment providing that a Canadian with dual citizenship would be deemed to have renounced their Canadian citizenship upon engagement in an act of war against the Canadian Armed Forces.¹²² In February, Bill C-425 passed through the House of Commons. However, the Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney, proposed that this be expanded to provide for dual citizens to be deprived of Canadian

¹²⁰ See Great Britain, Home Office, 'Counter-Extremism Strategy' (n 79) 33.

¹²¹ *ibid* 9.

¹²² Bill C-425, An Act to Amend the Citizenship Act (Honouring the Canadian Armed Forces), 2012, cl 2.

citizenship where they engage in acts of terrorism.¹²³ This led to the replacement of Bill C-425 with the Strengthening Canadian Citizenship Act 2015. In an interview in February 2013, Kenney said that the legislation was intended to be largely ‘symbolic’, and that it would rarely be used.¹²⁴

In mid-2014, the Strengthening Canadian Citizenship Act was passed. The Act expanded the grounds for revocation considerably to include three new circumstances. First, the Minister is empowered to revoke a person’s citizenship where an individual is convicted of any of a series of prescribed offences under Canadian law relating to national security.¹²⁵ Secondly, revocation is possible where a citizen is convicted in a foreign jurisdiction of an offence committed outside Canada that, had it been committed in Canada, would qualify as a ‘terrorism offence’ under section 2 of the Criminal Code.¹²⁶ Finally, the Minister may revoke citizenship where he or she has reasonable grounds to believe that the person concerned, while holding Canadian citizenship, served in the armed forces of a country, or as a member of an organized armed group, while that country or group was engaged in armed conflict with Canada.¹²⁷

Before exercising this final power, the Minister must obtain a judicial declaration that the person engaged in the activity in question.¹²⁸ A degree of protection against statelessness is also provided for: the three new grounds for citizenship revocation do not authorize revocation that conflicts with any international human rights instrument regarding statelessness to which Canada is signatory.¹²⁹ However, the person affected bears the burden of proving, on the balance of probabilities, that they are ‘not a citizen of any country of which the Minister has reasonable grounds to believe the person is a citizen’.¹³⁰

In most cases, the Strengthening Canadian Citizenship Act leaves the decision of whether or not a person’s citizenship shall be revoked with the Minister, rather than with a court. However, the judiciary plays a role in the process in the sense that revocation must be preceded by either a conviction (albeit not necessarily in a Canadian court), or a judicial declaration that the citizen concerned has engaged in particular conduct. This requirement of both an executive and a judicial decision provides some safeguard against abuses of power.

Ministerial revocation decisions are also subject to judicial review.¹³¹ However, as in the UK, the ability to access such review may be limited where the citizen seeking review is outside national borders.

¹²³ Evidence to House of Commons Standing Committee on Citizenship and Immigration, Parliament of Canada, Ottawa, 21 March 2013, (Jason Kenney) <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=41&Ses=1&DocId=6054299>>.

¹²⁴ See M Shephard, ‘Q&A: Jason Kenney says bill to strip Canadian citizenship largely ‘symbolic’’, *The Star* (25 February 2013).

¹²⁵ See Citizenship Act (Canada), section 10(2).

¹²⁶ *ibid.*

¹²⁷ *ibid* section 10.1(2). ¹²⁸ *ibid.* ¹²⁹ *ibid* section 10.4(1). ¹³⁰ *ibid* section 10.4(2).

¹³¹ See *ibid*, section 22.1(1).

Other potential safeguards may stem from Canada's constitutional framework, which includes a constitutionally entrenched Charter of Rights and Freedoms.¹³² While the Charter does not contain an express guarantee of citizenship, it enshrines a number of 'citizenship rights', including the right to vote in elections¹³³ and the right to remain in, leave and return to Canada.¹³⁴ It also contains a number of broader rights that apply to all persons. Significantly, section 15 of the Charter provides broad-ranging protection against discrimination in the context of every individual being 'equal before and under the law'. This arguably encompasses the common law idea that citizenship is an equal status for all holders.¹³⁵

In September 2015, the Harper government revoked the citizenship of Zakaria Amara, the ringleader of the unsuccessful Toronto 18 bomb plot, who is currently serving a sentence of life imprisonment.¹³⁶ Amara is the only person to have lost citizenship under the Strengthening Canadian Citizenship Act; however the Harper government also issued notices signalling an intention to denationalize nine other citizens, most of whom were also members of the Toronto 18 group.¹³⁷ A number of constitutional challenges to the Act were initiated in response, including an argument that by limiting its application to dual citizens, the Act contravened the equality principles enshrined in section 15 of the Charter.¹³⁸ However, following a change in government in 2015, discussed below, further revocations are unlikely to take place and these challenges have lapsed.¹³⁹

2. Justifications

As in the UK, justifications for the Strengthening Canadian Citizenship Act took the form of rhetorical statements about the 'value' of Canadian citizenship. In his second reading speech, Immigration Minister Chris Alexander asserted that the Act was directed towards 'strengthen[ing] and protect[ing] the value of Canadian citizenship',¹⁴⁰ and that it would help maintain the integrity of citizenship.¹⁴¹ At a press conference, Alexander said that '[c]itizenship is not

¹³² See Macklin, 'The Privilege to Have Rights' (n 38) 31–51.

¹³³ Canadian Charter of Rights and Freedoms, section 3.

¹³⁴ *ibid* section 6.

¹³⁵ See eg Macklin, 'The Privilege to Have Rights' (n 38) 48.
¹³⁶ See eg The Canadian Press, 'Canada Revokes Citizenship Of Toronto 18 Plotter' *The Huffington Post Canada* (26 September 2015).

¹³⁷ See S Bell, 'Canada working to revoke the citizenship of nine more convicted terrorists' *National Post* (30 September 2015).

¹³⁸ See D Greer, "'Two-Tiered' Canadian Citizenship Challenged', Courthouse News Service (1 September 2015); J Bronskill, 'Ottawa man challenges federal move to revoke citizenship over terrorism' *National Newswatch* (1 October 2015); The Canadian Press, 'Terrorist says stripping citizenship violates his right to vote' *Maclean's* (15 October 2015).

¹³⁹ See eg M Friscolanti, 'As Trudeau takes power, judge adjourns citizenship court battle' *Maclean's* (4 November 2015).

¹⁴⁰ Canada, House of Commons Debates, 27 February 2014, 1525 (Chris Alexander).

¹⁴¹ *ibid* 1530 (Chris Alexander).

a right; it is a privilege'.¹⁴² When introducing the legislation into the upper house, Senator Nicole Eaton said:

Citizenship is based on allegiance. Those granted citizenship pledge allegiance to our monarch, the Queen of Canada, and to our system of government and its laws. Betrayal of this allegiance comes with a price.¹⁴³

As in the UK, these statements draw heavily on the common law conceptualization of citizenship, by reinforcing the idea that citizenship is based on allegiance. However, they simultaneously subvert the common law, by downplaying the reciprocity and security of the State–citizen relationship, and shifting citizenship towards a conditional status that renders some citizens more vulnerable than others.

The Strengthening Canadian Citizenship Act aligns more closely with the rhetorical justifications provided than the UK revocation legislation. Enabling revocation only where a person has served with a country or group engaged in conflict with Canada or has been convicted of a terrorism or national security offence ensures that revocation generally is predicated on a lack of allegiance. However, parts of the Act remain unsupported by the allegiance justification. For instance, section 10(2) renders a person convicted of particular national security offences in a foreign country susceptible to revocation. While such conduct may be reprehensible, it does not inherently require any disloyalty to Canada. As in the UK, this undermines the idea that it is the State's duty to extend protection to citizens in exchange for their allegiance. Moreover, the idea that the citizenship of dual citizens is conditional upon particular behaviour, while that of sole citizens is not, undermines the idea that citizenship is an equal status.

In October 2015, a new government was elected in Canada, under the leadership of Justin Trudeau. In the lead-up to the election, Trudeau voiced his opposition to the Strengthening Canadian Citizenship Act, arguing that 'as soon as you make citizenship for some Canadians conditional on good behaviour, you devalue citizenship for everyone'.¹⁴⁴ Like the justifications for the Act, Trudeau's opposition was anchored around a rhetorical point about the value of citizenship: one that reiterated the security and equality elements of common law citizenship that were minimized by proponents of the Act.

Since its election, the Trudeau government has taken steps to undo key elements of the Strengthening Canadian Citizenship Act. In February 2016, Bill C-6, was introduced into Parliament. The Bill purports to repeal all the new national security grounds for citizenship revocation,¹⁴⁵ and to restore the

¹⁴² S Mas, 'New citizenship rules target fraud, foreign terrorism', CBC News (6 February 2014).

¹⁴³ Canada, Senate Debates, 17 June 2014, 1540 (Nicole Eaton).

¹⁴⁴ See eg R Maloney, 'Bill C-24: Trudeau Says Terrorists Shouldn't Be Stripped Of Citizenship In Leaked Audio' *The Huffington Post Canada* (28 September 2015).

¹⁴⁵ Bill C-6, An Act to amend the Citizenship Act and to make consequential amendments to another Act, 2016, cll 3–5.

citizenship of any person denationalized under those grounds.¹⁴⁶ Accordingly, if the Bill becomes law Zakaria Amara will regain his Canadian citizenship.

Bill C-6 was passed by the House of Commons on 17 June 2016, and is currently before the Senate. As was the case with the Strengthening Canadian Citizenship Act, parliamentary debate over the Bill so far has focused overwhelmingly on the value of citizenship. The contrast between these two pieces of legislation showcases deep philosophical differences in the way in which the Harper and Trudeau governments have conceived of citizenship. In stark contrast to the rhetoric about citizenship being a ‘privilege’ that accompanied the introduction of the Strengthening Canadian Citizenship Act, the current government has defended Bill C-6 as a measure necessary to preserve the principles of secure citizenship and equality between all citizens, which stem from the common law. In his second reading speech for the Bill, Minister for Immigration, Refugees and Citizenship, John McCallum, said: ‘[w]hen we say a Canadian is a Canadian is a Canadian, that includes good and bad Canadians’.¹⁴⁷ McCallum went on to say:

The place for a terrorist is in prison, not at the airport. It is our strong belief that if a person is sent to prison for terrorism, there should not be two classes of terrorists: those who go to prison and have their citizenship revoked and those who only go to prison.¹⁴⁸

Though they did not invoke the common law citizenship rubric, those who argued against Bill C-6 also focused on maintaining the ‘value’ of Canadian citizenship. For instance Conservative MP Garnett Genuis said:

What this bill would do, in my view, is reduce the value of citizenship by allowing someone to be involved in terrorism, which completely goes against Canadian values ... This potentially toxic combination would reduce the value of our citizenship.¹⁴⁹

Whether or not Bill C-6 passes is likely to have a significant effect on the way in which Canadian citizenship is conceptualized in the future. If the Bill ultimately becomes law, it will mark the restoration of a concept of citizenship that reflects common law principles. If, on the other hand, the changes implemented via the Strengthening Canadian Citizenship Act remain in place, Canadian citizenship will remain removed from its common law roots, and over time this distance may expand as the new revocation powers are employed or updated. The many references to ‘citizenship values’ in parliamentary debates also suggest that we may see a renegotiation of the values, beyond ‘allegiance’, that define what it means to be Canadian.

¹⁴⁶ *ibid* cl 20. Fraud-based revocation, which predates the Harper government’s changes, is retained.

¹⁴⁷ Canada, House of Commons Debates, 9 March 2016, 1604 (John McCallum).

¹⁴⁸ *ibid* 1605. ¹⁴⁹ *ibid* 1655 (Garnett Genuis).

*C. Australia**1. Overview*

Australia is the most recent common law country to enact legislation enabling citizenship stripping on national security grounds. This move was motivated by the risks associated with Australian foreign fighter participation in the Syrian and Iraqi conflicts, by a reported increase in security risks within Australia, and by the use of citizenship stripping as a national security device in the UK and Canada.

In early 2015, the Australian government signalled its intention to expand the grounds for citizenship loss. In a national security address, then-Prime Minister Tony Abbott said that ‘at least 110 Australians [had] travelled overseas to join the death cult in Iraq and Syria’, and that within Australia there were ‘over 400 high-priority counter terrorism investigations on foot’.¹⁵⁰ Noting that ‘all too often the threat comes from someone who has enjoyed the hospitality and generosity of the Australian people’,¹⁵¹ Abbott announced plans to amend the law to allow citizenship revocation for dual citizens on terrorism-related grounds.

Deciding upon a model for the expanded citizenship stripping legislation was not a straightforward task. Initial statements by Abbott and Immigration and Border Protection Minister Peter Dutton suggested that the government hoped to introduce UK-style legislation, with a broad ministerial discretion to revoke citizenship,¹⁵² and that this power might be exercisable even against Australian citizens who held no other citizenship. However, legal experts pointed out that a sweeping executive power of this nature was unlikely to be constitutionally permissible in Australia.¹⁵³ Additionally, as outlined in detailed leaks from Cabinet, the suggestion that the Minister might have the power to strip sole Australian citizens of their citizenship met with substantial opposition from senior members of the government, who argued that the move would violate the rule of law and international law principles.¹⁵⁴

In June 2015, the Abbott government introduced the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) into Parliament. The Bill

¹⁵⁰ The Hon Tony Abbott, ‘National Security Statement’, Speech delivered at Australian Federal Police Headquarters, Canberra (23 February 2015) <<http://www.scribd.com/doc/256590320/National-Security-Statement-Canberra>>.
¹⁵¹ *ibid.*

¹⁵² See P Dutton, Transcript of Interview on Sky News (27 May 2015), <<http://www.minister.border.gov.au/peterdutton/2015/Pages/citizenship-khaled-sharoufs-family.aspx>>.

¹⁵³ See eg H Irving and R Thwaites, ‘The Citizenship Amendment Bill: Out of the Frying Pan into the Fire’, AUPUBLAW (20 July 2015) <<http://auspublaw.org/2015/07/the-citizenship-amendment-bill/>>; S Pillai, ‘The Allegiance to Australia Bill and the Constitution: Legislative Power and Membership of the Constitutional Community’, AUPUBLAW (21 July 2015) <<http://auspublaw.org/2015/07/the-allegiance-to-australia-bill-and-the-constitution/>>.

¹⁵⁴ See eg P Hartcher and J Massola, ‘Cabinet revolt over Tony Abbott and Peter Dutton plan to strip Australians of citizenship’ *The Sydney Morning Herald* (26 May 2015).

sought to provide for a dual citizen to lose their Australian citizenship where they had repudiated their allegiance to Australia.¹⁵⁵ The Bill did not vest the Minister for Immigration with the expansive powers seen in UK legislation. Despite this, it set out the most wide-ranging citizenship stripping provisions so far proposed in any common law nation.

Rather than create either a ministerial or a judicial power to revoke citizenship, the Bill purported to create three ‘self-executing’ procedures by which automatic citizenship loss would be triggered. The first provided for a person to lose their citizenship automatically upon engagement in certain terrorism-related conduct, such as committing a terrorist act, financing terrorism or directing a terrorist organization.¹⁵⁶ The conduct was defined by reference to specified criminal offences, though in doing so the Bill did not incorporate the specific defences to those crimes, nor other qualifying factors such as the age of criminal responsibility.¹⁵⁷

Automatic loss of citizenship occurred when a person had engaged in the relevant conduct. This did not require a conviction in the courts (indeed, a person would even lose their citizenship where they had been acquitted of such a crime) or an executive determination that the citizen in question had engaged in the conduct. Nor did the Bill set out any hearing, appeal or other means by which an affected person might put their case. In fact, the Bill did not outline any fact-finding mechanism via which to determine that a person had committed relevant conduct, although it did provide a ministerial power to exempt a person from citizenship loss. The Minister was not required to consider whether to exercise this power of exemption, nor given prescribed criteria to take into account.¹⁵⁸

A second ‘self-executing’ procedure, again based merely upon a person’s conduct, would have expanded the existing ground of citizenship deprivation for serving in the armed forces of a country at war with Australia.¹⁵⁹ This was to be extended to fighting for or being in the service of an organization declared to be a terrorist organization under Australian law. As the explanatory memorandum to the Bill made clear, being in the ‘service’ of such an organization would include the provision of medical support or other like assistance.¹⁶⁰

The third new ground of automatic citizenship revocation was triggered by conviction, irrespective of the penalty imposed, of any one of a list of prescribed offences.¹⁶¹ The qualifying offences included a long list of crimes directly or indirectly connected with terrorism. However, it also included

¹⁵⁵ See Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2015, 7369 (Peter Dutton).

¹⁵⁶ See Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, cl 3.

¹⁵⁷ *ibid.* ¹⁵⁸ *ibid.* ¹⁵⁹ *ibid* cl 4.

¹⁶⁰ Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, [56].

¹⁶¹ Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, cl 5.

many offences that had no necessary connection to allegiance or national security. For instance, one of the offences giving rise to citizenship loss was the crime of ‘damaging Commonwealth property’.¹⁶² As the Bill did not require that a minimum sentence be imposed for a person to lose their citizenship, this made it possible for petty criminals who posed no security risk—such as a person who graffitied a Commonwealth building, or punctured the tyres of a Commonwealth vehicle, to automatically lose their citizenship.

The ambit of these provisions was further extended by their potential application to the children of any person whose citizenship had been automatically revoked on any of these grounds. Irrespective of whether such children themselves had demonstrated any culpability or lack of allegiance, the Bill provided a mechanism by which the Minister could revoke their citizenship, once this had already been removed from their parent.¹⁶³

While the title of the original Bill, and the Minister’s comments in his second reading speech, suggest that it was designed to deprive people of their citizenship where they had breached their common law duty of allegiance, the provisions themselves provided for citizenship loss in a far wider range of circumstances. By setting up automatic citizenship stripping, rather than a revocation power, the Bill bypassed the need to undertake any holistic assessment of whether a person had repudiated their allegiance, before denationalizing them. This was exacerbated by the fact that the Bill clearly provided for automatic citizenship loss in circumstances involving no necessary repudiation of allegiance, such as where a person had damaged Commonwealth property.

The Bill was referred to an inquiry conducted by the Parliamentary Joint Committee on Intelligence and Security (PJCIS). Submissions to the inquiry resoundingly criticized the legislation. Legal experts noted that it was overly broad, poorly drafted, unclear in its application and constitutionally problematic.¹⁶⁴ The Bill was also criticized for its lack of appropriate

¹⁶² *ibid.*

¹⁶³ This was made clear in notes to the amendments proposed in cl 3, 4 and 5 of the Bill, and facilitated by section 36 of the Australian Citizenship Act 2007 (Cth)—a pre-existing provision that allows the Minister to revoke a child’s citizenship in certain circumstances following a parent’s loss of citizenship.

¹⁶⁴ See eg S Chordia, S Pillai and G Williams, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 2–5; A Twomey, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 generally; H Irving, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 1–4; Australian Bar Association, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 generally; all accessible at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Submissions>.

safeguards.¹⁶⁵ It applied to children of all ages, excluded natural justice, did not require a person to be informed when they had lost their citizenship, and empowered the Minister to act on information from security agencies without a full security assessment being conducted.

In September 2015, the PJCS recommended 27 major changes to the Bill, aimed at ‘making the Bill’s scope more limited and procedures more transparent’.¹⁶⁶ Subject to these changes, the PJCS recommended that the legislation be passed. In November 2015, the government reintroduced an amended Bill into Parliament, adopting all of the PJCS recommendations. This Bill was passed by both Houses of Parliament in December 2015.

The changes to Australian citizenship law imposed through the Allegiance to Australia Act retain the three avenues of citizenship deprivation outlined in the original Bill. However, the enacted model is tighter in scope. First, a dual citizen can lose citizenship by committing prescribed conduct, with the intention of advancing a political, religious or ideological cause; coercing or influencing a government by intimidation; or intimidating the public.¹⁶⁷ The conduct that triggers citizenship loss is defined by reference to terrorism and foreign incursions and recruitment offences.¹⁶⁸

Secondly, the long-standing provision providing for automatic citizenship loss for dual citizens who serve in the armed forces of a country at war with Australia is updated to include fighting for, or in the service of, a declared terrorist organization.¹⁶⁹ However, the law specifies that being in the service of such an organization does not include the provision of ‘neutral and independent humanitarian assistance’, unintentional actions, or actions committed under duress or force.¹⁷⁰ These two grounds are triggered automatically when a citizen engages in particular activity, and do not require a conviction.

Thirdly, a dual citizen can lose their citizenship if they are convicted of a prescribed offence.¹⁷¹ Unlike in the original Bill, this does not occur automatically—rather, the Minister has a discretion to revoke citizenship where he or she is satisfied that this would be in the public interest and that

¹⁶⁵ See eg B Saul, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 5–8; Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 16–26; R Thwaites, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 5–7; all accessible at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Submissions> .

¹⁶⁶ See Commonwealth of Australia, Parliamentary Joint Committee on Intelligence and Security, ‘Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (4 September 2015) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Report> .

¹⁶⁷ Australian Citizenship Act 2007 (Cth), section 33AA(3).

¹⁶⁸ *ibid* section 33AA(6). ¹⁶⁹ *ibid* section 35. ¹⁷⁰ *ibid* section 35(4). ¹⁷¹ *ibid* section 35A.

the conviction demonstrates a repudiation of allegiance to Australia.¹⁷² The list of offences that open up the possibility of citizenship loss has been refashioned. The prescribed offences now have a closer nexus with allegiance, and relate to terrorism, treason, treachery, sabotage, espionage and foreign incursions and recruitment. The possibility of citizenship revocation also only arises for citizens who have been sentenced to at least six years' imprisonment.¹⁷³

The offences that trigger a ministerial discretion to revoke citizenship upon conviction include the forms of conduct, such as acts of terrorism, that also give rise to automatic citizenship loss on the first ground. In this sense, there is an overlap between the 'conduct based' and 'offence based' grounds for citizenship loss. The legislation deals with this by altering the fault element for 'conduct based' citizenship loss,¹⁷⁴ and specifying that it only applies in limited circumstances: where a person has committed the relevant conduct outside Australia, or where they have left Australia before they can be brought to trial.¹⁷⁵ In all other cases, only the offence based grounds for citizenship loss apply.

The conviction-based ground for citizenship revocation goes further than the original proposal in one fundamental respect. It allows for a person to be stripped of their citizenship on the basis of a conviction recorded prior to the commencement of the legislation. However, this retrospective application of the law only applies in regard to convictions that have occurred no more than ten years before the legislation's entry into force, and a higher sentencing threshold of ten years applies.¹⁷⁶

The Allegiance to Australia Act incorporates a number of safeguards that were absent in the original proposal. While the original Bill could not totally exclude the possibility of judicial review, which is guaranteed by section 75(v) of the Australian Constitution, any such potential was undermined by the fact that the Bill did not require a person to be informed when they had been deemed to have lost their citizenship. This is now remedied with a requirement that the Minister take reasonable steps to inform a person who has lost their citizenship of this fact, a basic description of the reasons for citizenship loss and their rights of review.¹⁷⁷

Additionally, the law now requires information received from security agencies to meet the criteria for a full security assessment, before it can be relied on to revoke citizenship.¹⁷⁸ It also restricts citizenship loss via the

¹⁷² *ibid* section 35A(1). ¹⁷³ *ibid* section 35A(1)(b). ¹⁷⁴ See *ibid*, sections 33AA(3), 33AA(6).

¹⁷⁵ *ibid* section 33AA(7).

¹⁷⁶ *ibid* Application provisions, 4 ('Application of section 35A').

¹⁷⁷ *ibid* section 33AA(10), (11); section 35(5), (6); section 35A(5), (6); section 35B(1), (2). Notice is not required where the Minister has determined that providing it could 'prejudice the security, defence or international relations of Australia, or Australian law enforcement operations': sections 33AA(12), 35(7), 35A(7).

¹⁷⁸ See Australian Security Intelligence Organisation Act 1979 (Cth), section 39. This provision was expressly excluded in the original Bill.

automatic mechanisms to persons over the age of 14,¹⁷⁹ and no provision is made for the children of a person affected by the law to also have their citizenship revoked.

While these and other changes significantly narrow the scope of the law and increase safeguards, the Australian legislation remains one of the broadest ranging regimes of citizenship deprivation in the world. The automatic citizenship stripping provisions, in particular, go further than even the UK legislation, by imposing citizenship deprivation upon *all* dual citizens that meet the designated criteria, irrespective of the level of threat they pose. The Minister has the power to consider whether to exempt a citizen from such loss.¹⁸⁰ However, there is no duty to exercise or consider exercising this power.¹⁸¹ The rules of natural justice do apply to a ministerial decision to make or deny an exemption determination. However, this may be of no utility, as natural justice does not apply to the threshold decision the Minister must make about whether to consider making such a determination in the first place.¹⁸²

The inclusion of foreign incursion and recruitment offences in the conviction based grounds for citizenship loss is another exceptional element of the revised law. As a result, citizenship stripping will apply to people who have been convicted of nothing more than entering an area declared by the government to be a no-go zone. The person need not have harmed anyone, and indeed may have entered the area against the wishes of the government merely to visit friends or to conduct business.¹⁸³

2. *Justifications*

Australia possesses a wide range of other national security legislation, having passed 66 federal anti-terror statutes since the September 11 bombings.¹⁸⁴ As in the UK and Canada, a key justification for why the Allegiance to Australia Act was needed in addition to this broad package of security laws was that the Act would affirm important features of the State–citizen relationship.

Once again, it was emphasized that citizenship involves duties of allegiance, and that violation of these duties warrants exclusion from the citizenry. For instance, a purpose provision included in the Allegiance to Australia Act states:

¹⁷⁹ Australian Citizenship Act 2007 (Cth), sections 33AA(1), 35(1).

¹⁸⁰ *ibid* sections 33AA(14), 35(9).

¹⁸¹ *ibid* section 33AA(15), (16); section 35(10), (11). Where this power is exercised, prescribed criteria must be considered: *ibid*, sections 33AA(17), 35(12).

¹⁸² *ibid* sections 33(22), 35(17). ¹⁸³ See Criminal Code Act 1995 (Cth), section 119.2.

¹⁸⁴ By mid-2014 Parliament had enacted 61 pieces of anti-terrorism legislation: G Williams, 'The Legal Legacy of the War on Terror' (2013) 12 *Macquarie Law Journal* 3, 7. A further five anti-terrorism statutes have been enacted since then. This is the largest number of anti-terror statutes passed by any democratic nation in the twenty-first century, and Australia's response to terrorism has been characterized as one of 'hyper-legislation': K Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 309.

This Act is enacted because the Parliament recognizes that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.¹⁸⁵

As in the UK and Canada, justifications for the Allegiance to Australia Act have also sought to paint citizenship as a conditional status, rather than a secure one. For instance, in an interview, Immigration Minister Peter Dutton said that:

[Australian citizenship] confers a great advantage on people and if people are going to swear an allegiance to our country and then go beyond that to – and in opposition to the words that they’ve just spoken at their citizenship ceremony attempt to attack Australians, there’s a consequence to pay for that.¹⁸⁶

The strong rhetorical affirmation that citizenship is predicated on allegiance seeks to draw on common law principle to lend legitimacy to the Allegiance to Australia Act. However, the Act itself subverts all three dimensions of common law citizenship. It creates two tiers of citizenship, as the new denationalization provisions only apply to dual citizens. For those citizens that the Act does apply to, citizenship is transformed from a status that is as secure and enduring irrespective of a citizen’s behaviour to one that is contingent upon particular behaviour.

As in the UK and to a lesser extent Canada, it cannot even be said that the Act makes retaining citizenship contingent upon ongoing allegiance, as not all of the grounds for citizenship loss seem to require a clear lack of allegiance to Australia. This was a much larger issue in the initial Bill, which imposed citizenship loss in a fairly wide range of circumstances, including on all people convicted of damaging Commonwealth property. The Act as ultimately passed ties citizenship loss much more closely to allegiance-related conduct. Nonetheless, certain revocation grounds—such as conviction for entering an area declared a no-go zone—do not require any repudiation of allegiance. This erodes the common law idea that the State owes protection in exchange for allegiance.

V. THEMES AND OBSERVATIONS

Citizenship as a common law concept has a number of fundamental characteristics. It is a compact between an individual and the State, under which the citizen pledges allegiance, and the State offers protection. It is also a status that places all its bearers in an equal position, irrespective of how

¹⁸⁵ Australian Citizenship Amendment (Allegiance to Australia) Act (Cth), section 4.

¹⁸⁶ Australian Broadcasting Corporation, ‘Australian citizenship “very serious obligation” says Peter Dutton referring to national security laws’ (7.30, 23 June 2015) <<http://www.abc.net.au/7.30/content/2015/s4260728.htm>>.

they acquired citizenship. Finally, it is a secure relationship, originally regarded as permanent in nature.

The recent revocation laws enacted in the UK, Canada and Australia represent a very significant retreat from these common law principles. These laws shift citizenship from a secure status to one which is conditional upon the citizen's behaviour. They also undermine the idea of equality between citizens: dual citizens (and, in the UK, naturalized citizens) remain more vulnerable to revocation than others. The effect is to fundamentally alter the nature of the compact between the State and its citizens.

This retreat from common law principle is not an entirely new phenomenon. As the discussion above illustrates, such principles were eroded in similar ways by citizenship revocation legislation that was actively used in the context of World Wars I and II. While each of the three countries revised its citizenship laws in the second half of the twentieth century, to substantially align with common law principles once again, the UK and Australia maintained the possibility of citizenship loss on disloyalty grounds throughout this period, even when deprivations were not being made in practice. The recent expansion and renewed use of disloyalty based deprivation might, therefore, be viewed as the most recent example of a broader tendency to tighten membership laws in times of emergency, in ways that do not always reflect common law principle.

Nonetheless, the recent resurgence of citizenship stripping laws is remarkable. In the UK, such laws had become 'moribund' following decades of disuse. In Australia, disloyalty based revocation laws had not operated since the introduction of citizenship legislation in 1949, and in Canada, such laws were removed from the statute books in 1977. In this context the reinvigoration of citizenship stripping was, in itself, noteworthy, and has been described by some commentators as a return of the mediaeval legal concepts of 'banishment' or 'exile'.¹⁸⁷

In addition, the extreme breadth of the laws that have been passed, especially in regard to the conferral of power upon the executive, is striking. The laws permit the revocation of one of the most fundamental of rights in any democratic society in a broad and ill-defined range of circumstances. This is highlighted by the use of vague criteria such as 'conducive to the public good' in the UK. Such criteria can be often be applied without the person affected having the opportunity to put their case in court or otherwise having a right or to natural justice. Both the UK law, which confers broad executive revocation power even when statelessness would ensue, and the Australian

¹⁸⁷ See eg Macklin, 'The Privilege to Have Rights' (n 38) generally; H Irving and R Thwaites, 'Banishment, Australian style', European University Institute Citizenship Blog <<http://eudo-citizenship.eu/commentaries/citizenship-blog/1476-banishment-australian-style>>; Canadian Bar Association, 'The CBA urges the government to amend Bill C-24 to ensure fairer and more efficient legislation' (30 April 2015) <<http://www.cba.org/News-Media/Press-Releases/2014/The-CBA-urges-the-government-to-amend-Bill-C-24-to>>.

law, which allows for citizenship loss in a way that bypasses the need for a ministerial decision push denationalization law into new territory.

The manner in which denationalization laws were expanded varied between the three countries. In the UK, revocation powers expanded progressively, and typically in reaction to national security incidents and heightened threat to the community, but did not see regular use until the election of the Cameron government. In Canada and Australia, the broadening of citizenship stripping laws took place far more suddenly, and the laws enacted were presented as updates required to enable citizenship law to deal with contemporary challenges, especially the threat posed by foreign fighters. All three countries, however, adopt similar models for citizenship stripping, characterized by wide executive discretion and limited judicial involvement. Despite the existing breadth of the laws, the UK is considering further expansions.¹⁸⁸

Given that the revocation laws in the UK, Canada and Australia signify a substantial retreat from common law citizenship principles, it is interesting that in all three countries, justifications for these laws have drawn heavily on the common law, by asserting that citizenship is predicated upon allegiance, and that this connection needs to be maintained. The reliance on this justification suggests that the common law still exerts an enduring influence over the way in which citizenship is shaped in these countries.

However, in all three countries, such justifications have distorted the common law, selectively invoking the duty of allegiance alongside rhetoric that actively attacks the other principles that characterize citizenship at common law: reciprocity, security and equality. In all three countries, governments have expressed the idea that citizenship is not a ‘right’, but a ‘privilege’ that individuals who deviate from community norms do not deserve to hold. For instance, David Cameron described returning jihadists as ‘enemies of the state’.¹⁸⁹ Tony Abbott was even more blunt. In addition to calling on all migrants to embrace ‘Team Australia’,¹⁹⁰ he said:

There’s been the benefit of the doubt at our borders, the benefit of the doubt for residency, the benefit of the doubt for citizenship and the benefit of the doubt at Centrelink ... We are a free and fair nation. But that doesn’t mean we should let bad people play us for mugs, and all too often they have.¹⁹¹

Such rhetoric is starkly at odds with the common law’s conception of citizenship as enduring even where a citizen engaged in treasonous

¹⁸⁸ See Great Britain, Home Office (n 79) 33.

¹⁸⁹ See B Farmer and P Dominiczak, ‘David Cameron: Returning jihadists are “enemies of the state”’ *The Telegraph* (17 November 2014).

¹⁹⁰ See J Owens, ““Don’t migrate unless you want to join our team”: Abbott meets Islamic community’ *The Australian* (18 August 2014).

¹⁹¹ See L Mannix, ““Bad people” treating us as mugs: Abbott’s national security warning’ *The Sydney Morning Herald* (15 February 2015). For extracts of similar statements expressed by Minister Jason Kenney in the Canadian context see eg S Bell, ‘Canada revokes citizenship of Toronto 18 ringleader using new anti-terror law’ *National Post* (26 September 2015).

conduct.¹⁹² It fundamentally reshapes the way in which we conceive of citizenship, shifting it from a secure status to one which is increasingly conditional. As Audrey Macklin has argued, '[c]itizenship emerges as an enhanced form of conditional permanent residence, revocable through the exercise of executive discretion'.¹⁹³ The fact that this reconfiguration of citizenship only applies with respect to particular citizens—dual citizens and, in the UK, naturalized citizens—undermines the idea that citizenship is an equal status. The allowance, in each country, for denationalization in particular circumstances that do not require non-allegiance erodes the image of citizenship as a compact in which citizens' allegiance is met with State protection.

It may be that a case can be made for employing rhetoric to reshape the concept of citizenship in times of emergency.¹⁹⁴ Certainly, similar practices were adopted in the context of World Wars I and II. However, the twenty-first century brand of revocation laws gives rise to two unique uncertainties.

First, although the context in which the current laws have been enacted has some parallels to World Wars I and II in that it is a time of heightened security concern, there are also a number of critical distinctions. The UK, Canada and Australia are not presently facing the imminent risks of war, but rather are seeking to minimize future risks of terrorist attack from within the populace. This is a much more indeterminate security concern than world war, and is not a threat that is marked by a formal start and end date. Indeed, the so-called 'war on terror' that was initiated after the 11 September 2001 attacks has now lasted longer than World Wars I and II combined. Despite the Trudeau government's steps to wind back the Strengthening Canadian Citizenship Act, such factors make it far more likely that the recent shift away from common law citizenship principles will be enduring rather than temporal.¹⁹⁵

Secondly, the recent laws depart from the common law citizenship principles that previously governed entitlement to citizenship without substituting other principles in their place. This creates great uncertainty as to the factors that should inform whether citizens should retain or lose their citizenship. While the rhetorical justifications supplied for the laws suggest that a citizen is entitled to retain their citizenship so long as they maintain their allegiance to the State, laws in all three countries allow citizenship deprivation in circumstances where no breach of allegiance obligations is required. The breadth of discretion afforded to the executive in each country with respect to

¹⁹² See eg Viscount Finlay's comments in *Johnstone v Pedlar* [1921] 2 AC 262, 274.

¹⁹³ Macklin, 'The Privilege to Have Rights' (n 38) 29.

¹⁹⁴ For an argument along these lines, see Joppke (n 10).

¹⁹⁵ More broadly, commentators have observed that, in a number of jurisdictions, anti-terror laws originally introduced as an emergency response to national security threats have ended up becoming enduring fixtures: see eg G Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 MULR 1136, 1137; Ramraj *et al.* (n 5); Roach, *The 9/11 Effect* (n 184).

revocation decisions exacerbates uncertainties about when citizenship should remain secure. Denationalization grounds may, in the future, be expanded by statutory amendment, as the UK has already contemplated. Without a clear understanding of the principles that underpin citizenship, it is hard to foresee where the limits to any such expansion may lie. John McCallum touched on this in his second reading speech for Bill C-6:

...the rules might be clear today about for what crime we have citizenship revoked and for what crime do we not, but those laws can change over time. I remember the former prime minister in the election campaign speculating about additional crimes that might be added. Who knows? It might be terrorism one year, and something else—whatever catches the attention of the government of the day—could be added the next year. It is a slippery slope, and one does not know where on that slope one will end up.¹⁹⁶

VI. CONCLUSION

Citizenship is often regarded as the most fundamental of human rights. In determining a person's membership of a community, it affects a host of basic entitlements, including political rights. As a result, the concept has a strong rhetorical dimension in forging understandings of what it is to belong to a community, and in shaping a country's sense of its own identity.

At common law, citizenship is characterized by three fundamental principles. First, citizens and the State owe each other reciprocal duties of allegiance and protection. Secondly, the State–citizen relationship is secure and enduring. Finally, all citizens are regarded as equal in status. While citizenship in the UK, Canada and Australia is now a statutory concept, its legislative development has continued to be informed by these common law principles. The influence of the common law on citizenship legislation has not been constant. During and after World Wars I and II, all three countries enacted denaturalization laws that eroded the common law's three fundamental citizenship principles. However, in the latter half of the twentieth century, the alignment between statutory citizenship and common law principle was substantially restored.

The recent denationalization laws enacted in all three countries mark a new retreat from the common law. These laws significantly extend government power and alter the relationship between citizens and the State by rendering citizenship less secure and less equal. The citizens that these laws apply to are no longer able to expect that their membership of the community will be retained irrespective of their actions. Instead, legislative developments have increasingly cast their citizenship as a conditional privilege, rather than as an inalienable status.

¹⁹⁶ Canada, House of Commons Debates, 9 March 2016, 1605 (John McCallum).

Curiously, the common law notion that citizenship is tethered to allegiance has been invoked, in isolation from other common law principles, as justification for these developments. This suggests that the common law has enduring rhetorical power, which lends legitimacy to legislative action.

Despite this rhetorical recourse to common law allegiance obligations, the redefinition of citizenship in the recent laws is not underpinned by any clear principle. The laws do not clearly reflect the idea that citizenship is based on allegiance, and actively subvert other common law citizenship principles. This raises significant questions about how the State–citizen relationship in the UK, Canada and Australia will be conceptualized in the future. The justifications offered for the current laws do not suggest any clear answer to these questions.

The fact that the recent reinvigoration of revocation has emerged in response to the indeterminate threat of terrorism makes it likely that the current uncoupling of contemporary citizenship from common law principles will be more enduring than it was in the context of World Wars I and II. Indeed, it is unlikely that we have seen the end of legislative innovations to expand citizenship revocation on security grounds. While the Trudeau government has moved to wind back disloyalty based citizenship revocation in Canada, this appears to be an anomaly. In addition to the UK's plans to expand its revocation laws, several countries, in the common law world and beyond have recently announced proposals to introduce or broaden denationalization legislation.¹⁹⁷ In the absence of any lessening of the national security threat, it is likely that this trend will continue. If it does, the result may be an ongoing alteration of what it means to be a citizen in many nations.

¹⁹⁷ These countries include: Bangladesh, Belgium, Israel, the Netherlands and Russia. See eg CR Abrar, 'Citizenship Law 2016: Need for thorough scrutiny, drastic revision' *New Age* (10 June 2016); European Union Democracy Observatory on Citizenship, 'New citizenship deprivation rules in the wake of the Paris attacks' <<http://eudo-citizenship.eu/news/citizenship-news/1527-new-citizenship-deprivation-rules-in-the-wake-of-paris-attacks>> H Keinon, 'Netanyahu: Israelis joining ISIS will lose citizenship', *The Jerusalem Post* (23 November 2015); Bill 34356 (R2064), Amendment of the Dutch Nationality Law in connection with the withdrawal of Dutch citizenship in the interest of national security'; Russian Legal Information Agency, 'Russian lawmakers propose stripping citizenship for terrorism' (4 December 2015) <http://www.rapsinews.com/legislation_news/20151204/275025186.html>.