Case Note

Love v Commonwealth: The Section 51(xix) Aliens Power and a Constitutional Concept of Community Membership

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Abstract

Love v Commonwealth represents a significant shift in the High Court of Australia's jurisprudence on s 51(xix) of the *Australian Constitution*. Whereas previous cases have alluded to the existence of theoretical limits to the scope of the s 51(xix) aliens power, the result in *Love v Commonwealth* involves the declaration and enforcement of such a limit in practice, with the majority holding that Aboriginal Australians are beyond the scope of the power. Perhaps more significantly, the majority approach to the aliens power positions the Court to develop a substantive concept of constitutional membership. The minority analyses of s 51(xix) instead adopt a sovereignty framework approach: they proceed on the basis that legislation relying on s 51(xix) can validly apply to any person so long as the criterion attracting its application has a plausible connection to the ordinary understanding of alienage. The minority approach rejects the notion of a constitutional concept of community membership and would instead give the Commonwealth Parliament a broad discretion to determine matters of membership and alienage. It is in the majority's rejection of this approach that a concept of community membership emerges. While Parliament, on the majority view, retains a degree of control over the composition of the constitutional community, its power to exclude persons from that community is subject to significant limitations, including by reference to a concept of territoriality. This case note focuses exclusively on the emergence, in the majority reasons, of a constitutional concept of community membership.

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I Introduction

In *Love v Commonwealth*, the High Court of Australia was asked to determine whether the plaintiff Aboriginal men (Daniel Love and Brendan Thoms) were aliens for the purposes of s 51(xix) of the *Australian Constitution*.[1] Love and Thoms were born in Papua New Guinea and New Zealand respectively, each with an Australian citizen parent, but holding the citizenship of their respective country of birth and never having acquired Australian citizenship. Both had been permanent residents in Australia before cancellation of their visas under s 501(3A) of the *Migration Act 1958* (Cth) and would have been liable to deportation as 'unlawful non-citizens' under s 198 of that Act. The power to deport each plaintiff turned exclusively on the Commonwealth's s 51(xix) power to legislate with respect to '[n]aturalization and aliens'.

The novelty of the plaintiffs' position within the Court's s 51(xix) jurisprudence was their Aboriginality. The Court was asked to determine whether that status had any constitutional significance for the purposes of the aliens power. Four Justices (Bell, Nettle, Gordon and Edelman JJ)[2] held that Aboriginal Australians (as defined)[3] could not be considered aliens for the purposes of s 51(xix).[4] However, to limit the significance of *Love* to this narrower proposition would ignore important features of the majority's overall approach to the aliens power.

The disagreement between the majority and the minority reflects a difference in underlying conceptions of the relationship between individuals and the Commonwealth of Australia that constitutes 'membership' of the constitutional community. For the minority, this relationship is essentially formal, regulated by the exercise of a broad legislative discretion to control community membership as citizenship. For the majority, on the other hand, there is a substantive, pre-legislative concept of community membership that is defined by reference to a *particular* community's assertion of sovereignty over a *particular* territory. This concept of territoriality, featuring to varying degrees in each of the majority judgments, mediates the relationship between the individual and the Commonwealth and may play an important role in the future development of a concept of constitutional membership.

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1 *Love v Commonwealth* (2020) 270 CLR 152, 169–70 [1]–[4] ('*Love*').

2 Though each Justice in *Love* gave separate reasons, when addressing common features of the reasons of Bell, Nettle, Gordon and Edelman JJ, I will refer to them as reasons of the majority. Similarly, the separate reasons of Kiefel CJ, Gageler and Keane JJ will be collectively referred to as reasons of the minority.

3 While the relevant test of Aboriginality for the purposes of s 51(xix) is an important point of disagreement in *Love*, it is not within the scope of this case note. It has been addressed elsewhere more thoroughly than would be possible here, see Michelle Foster and Kirsty Gover, 'Determining Membership: Aboriginality and Alienage in the High Court' (2020) 31(2) *Public Law Review* 105. Practical considerations arising from the need to assess Aboriginality have since come before the Full Court of the Federal Court of Australia: *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602.

4 The constitutional 'orthodoxy' (at 110) of the majority's interpretive approach to this narrower question has been amply defended by Gerangelos: Peter Gerangelos, 'Reflections upon Constitutional Interpretation and the "Aliens Power": *Love v Commonwealth*' (2021) 95(2) *Australian Law Journal* 109.

This case note explores the concept of constitutional membership that emerges from *Love*. Part II outlines the Court's prior aliens power jurisprudence, setting out the broad limits within which the scope of the power remained to be determined. Part III summarises the Court's reasons in *Love*, including the minority position. Part IV addresses the concept of constitutional membership that emerges from the majority reasons, the relevance of territoriality to that concept, and underlying questions of constitutional legitimacy that may inform the concept's future development.

II Pre-*Love* Aliens Case Law

Previous High Court decisions concerning the aliens power had, without meaningful exception, affirmed Commonwealth power to exclude various 'outsiders' from the Australian community. In the first half of the 20th century, before the advent of statutory Australian citizenship, the primary power of exclusion was the immigration power in s 51(xxvii) of the *Constitution*.[5] When the aliens power was discussed, the Court emphasised its breadth, stating that it

> must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it.[6]

Reliance on the immigration power allowed the Commonwealth to exclude a range of (non-white) British subjects who, as a consequence of Australia's place within the British Empire at the time, would not have been considered aliens for the purposes of s 51(xix).[7] But even the power of exclusion conferred by s 51(xxvii) was not unlimited in scope. In *Potter v Minahan*, an Australian-born (and thereby British subject) child of an Australian mother and a Chinese father, taken back to China by his father at a young age, was held, when returning to Australia as an adult, not to be an immigrant, but rather 'a member of the [Australian] community'.[8] Thus where immigrant (rather than alien) status was relied on as the basis for exclusion, Commonwealth power was limited by reference to a concept of community membership.

As Australian citizenship replaced British subject status,[9] the Commonwealth relied increasingly on s 51(xix) rather than s 51(xxvii). A series of three High Court cases on the aliens power addressed the changing significance of British subject

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5 See *Potter v Minahan* (1908) 7 CLR 277; *Attorney-General (Cth) v Ah Sheung* (1906) 4 CLR 949.

6 *Robtelmes v Brenan* (1906) 4 CLR 395, 404 (Griffith CJ).

7 See Sangeetha Pillai, 'Non-Immigrants, Non-Aliens and the People of the Commonwealth: Australian Constitutional Citizenship Revisited' (2013) 39(2) *Monash University Law Review* 568, 579–83; John Gava, 'Losing Our Birthright: *Singh v Cth*' (2016) 37(2) *Adelaide Law Review* 369, 378. See also *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518, 556 (Isaacs J): 'the power as to "aliens" leaves a huge gap, sufficient in itself to paralyse the Commonwealth unless "immigration" covers it'.

8 *Potter v Minahan* (n 5) 289 (Griffith CJ). See also at 299 (Barton J): 'No one describes a man returning home to his own country as an immigrant. … Immigration has various but kindred meanings. They all imply that the country which the immigrant seeks to enter is not his home, by any criterion, natural or artificial.'

9 See especially the *Nationality and Citizenship Act 1948* (Cth), and changes made to it by the *Australian Citizenship Amendment Act 1986* (Cth).

status across Australia's gradual trajectory towards independent sovereignty.[10] All concerned plaintiffs who, having entered Australia as British subjects and not having thereafter acquired Australian citizenship, argued that by virtue of their British subject status at the moment each entered Australia (between 1966 and 1974) they could not be considered aliens. *Re Patterson; Ex parte Taylor* stands out, with the High Court holding the plaintiff to be outside the scope of the aliens power.[11] However, it was effectively overruled in *Shaw v Minister for Immigration and Multicultural Affairs*, in which a majority held that, from the commencement of the *Australian Citizenship Act 1948* (Cth), a British subject born outside Australia to non-citizen parents entered Australia as an alien and would remain so unless and until naturalised.[12]

More recent aliens cases, not concerned with British subject status, have without exception affirmed Commonwealth power to exclude non-citizen plaintiffs, while nonetheless acknowledging theoretical limits on that power. In *Pochi v MacPhee*, two relevant points were made concerning the aliens power. First, while the meaning of 'aliens' must be ascertained by reference to Australian rather than foreign law,

> [c]learly the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word.[13]

Second, unlike immigrant status, alien status is not subject to a principle of absorption: a person does not, merely by reason of long residence in Australia, cease to be an alien.[14] The only way for an alien to be relieved of that status is by naturalisation,[15] a process exclusively regulated by Commonwealth legislation.[16] More recent High Court rulings have confirmed this point.[17]

Following legislative abrogation of the common law *ius soli* principle,[18] a wide range of non-citizens have been found to fall within the scope of the aliens

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10 See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 ('*Nolan*'); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 ('*Re Patterson*'); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 ('*Shaw*').

11 *Re Patterson* (n 10).

12 *Shaw* (n 10) [32] (Gleeson CJ, Gummow and Hayne JJ). The majority reasoning in *Shaw* was recently endorsed and expanded upon by a majority of the High Court in *Chetcuti v Commonwealth* (2021) 95 ALJR 704 ('*Chetcuti*'). In *Chetcuti*, the majority held that a British subject, having arrived in Australia in 1948 (before the commencement of the *Australian Citizenship Act 1948* (Cth) on 26 January 1949) and not thereafter having acquired Australian citizenship was susceptible to treatment as an alien.

13 *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ) ('*Pochi*'). See also *Re Patterson* (n 10) 400 [7] (Gleeson CJ): 'Whilst fully accepting that Parliament cannot, by some artificial process of definition, ascribe the status of alienage to whomsoever it pleases …'.

14 See *Pochi* (n 13) 113 (Murphy J).

15 Registration of citizenship by descent may, for constitutional purposes, be considered a form of naturalisation.

16 While naturalisation in the *Australian Citizenship Act 2007* (Cth) is referred to as 'citizenship by conferral' (pt 2 div 2 sub-div B), I will, for convenience, continue to use the generic term 'naturalisation'.

17 See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 172 [26] (Gleeson CJ) ('*Ex parte Te*').

18 The *Australian Citizenship Amendment Act 1986* (Cth) (n 9) restricted automatic citizenship to children born in Australia to at least one citizen or permanent resident parent.

power, including children born in Australia (to non-citizen, non-resident parents) but holding a foreign citizenship,[19] and even children born in Australia holding no citizenship at all.[20] Despite regular reference to the existence of theoretical limits of the kind alluded to in *Pochi*, prior to *Love* the High Court had never enforced such limits in practice. As a result, the case law does not reveal any particular feature capable of taking a person beyond the scope of the power. Absorption into the Australian community, birth within Australia, or the absence of foreign allegiance had not sufficed.[21] In the particular circumstances of Papua New Guinea's independence from Australia, even a person born an Australian citizen, to Australian citizen parents, within the then territory of Australia, was not safe from the operation of the aliens power following independence.[22]

However, while no feature had emerged in the High Court jurisprudence as definitive of non-alienage, there was similarly no obvious candidate for a definitive criterion of alienage. The only feature common to all of the plaintiffs held to have been validly excluded under the aliens power was their lack of Australian citizenship, but if the *Pochi* limits are to have any substance, then non-citizenship alone cannot be determinative: citizenship has no constitutional status and is subject to legislative modification. Thus a challenge for the Court in *Love*, regardless of the position taken with respect to Aboriginality, was to articulate satisfactorily the *Pochi* limits in a way that previous decisions had failed to do.

III The High Court in *Love*

Each of the separate judgments in *Love* accepted the existence of limits on the aliens power of the kind alluded to in *Pochi*.[23] Moreover, all agreed that the aliens power is not subject to a doctrine of absorption of the kind developed in the context of the s 51(xxvii) immigration power,[24] and that alien status can only be lost by naturalisation.[25] These propositions from *Pochi* set the scene for the analysis of s 51(xix): on the one hand Parliament's power must be limited by reference to some substantive concept of alienage, yet at the same time the concept has a formal element at least to the extent that an alien may only be relieved of the status by the (formal) process of naturalisation, as provided for by Commonwealth legislation.

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19 *Singh v Commonwealth* (2004) 222 CLR 322 ('*Singh*').

20 *Koroitamana v Commonwealth* (2006) 227 CLR 31 ('*Koroitamana*').

21 Note that a plausible argument has been made that the Court in *Singh* (n 19) broke with established precedent in declaring that birth in Australia would not take a person beyond the scope of the aliens power: Gava (n 7); Anthony Gray, 'The Meaning of an "Alien" in the Constitutional Universe' (2013) 20(2) *Australian Journal of Administrative Law* 89. Despite the re-emergence of a concept of community membership in *Love*, there is no suggestion that *Singh* is likely to be reconsidered. However, as the plaintiffs in *Love* were born overseas, the question was not squarely raised.

22 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 ('*Ex parte Ame*'), but note that the reasoning in that case was substantially concerned with the interaction of the aliens power with the territories power in s 122 of the *Constitution* in its application to external territories.

23 *Love* (n 1) 171–2 [7] (Kiefel CJ), 183 [50]–[51] (Bell J), 194–5 [87] (Gageler J), 218 [168] (Keane J), 236–7 [236], 238–9 [242] (Nettle J), 266 [310] (Gordon J), 288 [394] (Edelman J).

24 See, eg, ibid 175 [19] (Kiefel CJ), 246 [257] (Nettle J), 264 [304] (Gordon J).

25 See ibid 174 [17] (Kiefel CJ), 247–8 [261] (Nettle J), 264 [304] (Gordon J). But note at 299–301 [416]–[421] Edelman J argues that absorption may be a 'relevant factor' (at 319 [464]) in the determination of non-alien status, suggesting a willingness to reconsider *Pochi* (n 13) on this point.

The disagreement in *Love* concerned not only the application of the *Pochi* limits to the plaintiffs, but also the far more significant question of the nature of those limits generally. On the latter question, the minority approach would attribute significant discretionary power to Parliament to determine the composition of the constitutional community, while the majority approach more significantly restricts that discretion. The difference between the two approaches is set out below.

A *Framing the* Pochi *Limits on Section 51(xix) Legislative Power*

For the majority in *Love*, the 'ordinary understanding'[26] of alienage limits the persons, or categories of persons, to whom legislation supported by s 51(xix) can validly apply. Thus, the question in applying the *Pochi* limits is whether a particular individual (to whom a law supported by s 51(xix) purportedly applies) is in fact an alien, or capable of answering the description of 'alien' in the ordinary understanding of the word.[27] That inquiry is primarily concerned with elements of an individual's status capable of taking him or her outside the ordinary understanding of alienage, and thus beyond the scope of the power.

For the minority in *Love*, on the other hand, the ordinary understanding of alienage only limits the criteria by reference to which Parliament may legislatively attribute the status. Thus, the question of validity instead turns on features of the law itself, rather than features of the persons to whom it applies. A law would validly *determine* a certain class of persons to be aliens if the criterion or criteria for the attribution of that status bore a sufficient connection to the ordinary understanding of alienage. Essentially, for the minority there is no pre-legislative fact of a person's alienage, merely valid and invalid criteria by reference to which Parliament may attribute that status. The power to regulate community membership is only limited by the requirement that the law identifying non-members must fasten on some feature bearing a sufficient connection to the ordinary understanding of alienage. Kiefel CJ framed the question as 'whether it is open to the Commonwealth Parliament to treat persons having the characteristics of the plaintiffs as non-citizens [aliens] for the purposes of the *Migration Act*'.[28] Accordingly, for the minority, 'the status of alien is not defined by pointing to what is said to take a person outside the reach of Parliament's prescription, rather it depends upon what it is that gives the person that status'[29] — the latter criteria being those set out by Parliament, in negative form, in the *Australian Citizenship Act 2007* (Cth).

On this minority view, once the validity of a chosen criterion of 'alienage' has been established, it is irrelevant that an individual so identified may in some other sense be considered a member of the community.[30] The *Pochi* limits would simply mean that 'there are "available characteristics for the Parliament to choose

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26 *Love* (n 1) 183 [50]–[51] (Bell J), 236–7 [237] (Nettle J), 300 [419] (Edelman J).

27 See, most succinctly, ibid 261 [293] (Gordon J).

28 Ibid 170 [4] (Kiefel CJ). Note that for the minority Justices, for whom valid Commonwealth legislation is determinative of alien status, citizenship and alienage are taken to be mutually exclusive antonyms: see, eg, ibid 170–1 [5] (Kiefel CJ), 219–20 [172] (Keane J).

29 Ibid 174 [15] (Kiefel CJ).

30 Ibid 220 [172] (Keane J): 'the fact that a person who is not a citizen of Australia also has some other characteristic (such as having been born to an Australian parent, or having deep personal ties or a strong emotional attachment to Australia) cannot alter that status created by law'.

and some unavailable characteristics"'.[31] It would, thus, be open to Parliament to pass a law attributing alien status to any class of individuals so long as the characteristic by which that class was identified was related to the ordinary concept of alienage. Presumably, this would enable Parliament to treat as aliens persons possessing any one or a combination of characteristics plausibly connected to the concept of alienage, including at the very least birth outside the Australian territory, birth to one or more non-citizen parents, or foreign allegiance.

Gageler J, defending this approach, describes alienage as a 'recognized topic of juristic classification',[32] meaning that the power to legislate with respect to aliens necessarily includes 'a source of legislative authority to modify or replace the pre-existing law on that topic'.[33] The basis for this characterisation is the proposition that the concept of alienage has never had an 'established and immutable legal meaning',[34] but rather has always been determined by the application of positive law on the subject from time to time.

This analysis, with respect, appears to beg the question of whether past determinations of alien status have, in fact, depended on positive law or, instead, on an underlying substantive concept of alienage or community membership. Where positive law overlaps with an underlying constitutional concept, the difference will be difficult to discern. Much is made by the minority in *Love* of statements in past aliens cases to the effect that s 51(xix) includes a power to 'determine' who is an alien: Kiefel CJ describes this as a 'power to choose the criteria for alienage';[35] Keane J describes s 51(xix) as empowering the Commonwealth 'to "create and define the concept of Australian citizenship", to select or adopt the criteria for citizenship or alienage, and to attribute to any person who lacks the qualifications for citizenship "the status of alien"';[36] Gageler J describes s 51(xix) as encompassing a power 'to determine who is and who is not to have the legal status of alienage'.[37]

The difficulty with these propositions is that they do not specify exactly how Parliament may determine who will be treated as an alien or a community member. Authorities relied upon by the minority may mean nothing more than that the Parliament has absolute control over the process (naturalisation) by which aliens become members of the community. Gleeson CJ and Heydon J in *Koroitamana v Commonwealth* stated that '[t]he power conferred by s 51(xix) is a wide power, under which the Parliament has the capacity to decide who will be *admitted* to formal membership of the Australian community, which now means citizenship.'[38] Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* stated that 'the power to make laws with respect to aliens has been understood as a

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31 Ibid 186 [60] (Bell J), summarising the Commonwealth's submission on this point.

32 Ibid 194 [86] (Gageler J), quoting *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 578 and *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 455 [14].

33 *Love* (n 1) 194 [86] (Gageler J).

34 Ibid, quoting *Koroitamana* (n 20) 37 [9].

35 *Love* (n 1) 170 [5] (Kiefel CJ), citing *Koroitamana* (n 20) 38 [11].

36 *Love* (n 1) 217 [166] (Keane J), citing *Koroitamana* (n 20) 37 [9], 46 [48], 46 [50], 49 [62] and *Shaw* (n 10) 35 [2].

37 *Love* (n 1) 193 [84] (Gageler J), citing *Ex parte Te* (n 17) 170–2 [21]–[26] (Gleeson CJ), 219–20 [209]–[210] (Hayne J) and *Shaw* (n 10) 35 [2], 87 [190].

38 *Koroitamana* (n 20) 38 [11] (emphasis added).

wide power, equipping the Parliament with the capacity to decide, on behalf of the Australian community, who will be *admitted* to formal membership of that community'.[39] The more limited proposition, that Parliament has power to regulate community membership via its control over the process of naturalisation, does not deny the existence of an underlying concept of community membership independent of positive law on the subject.

For the minority in *Love*, however, the broader power to regulate community membership is seen as a key element of State sovereignty. For Gageler J, '[m]embership of or exclusion from the political community of the Commonwealth of Australia is a topic of vital national importance'.[40] For Kiefel CJ, it is 'a serious matter' to deny to Parliament a broader power to regulate community membership that 'is fundamental to the structure of the *Constitution* and the governance of Australia'.[41] The language used is reminiscent of an implied nationhood power.[42] However, there are counter-examples to the proposition that a broad legislative discretion to determine community membership is an essential element of national sovereignty.[43]

Within this 'sovereignty framework', the power of exclusion would only be constrained by the minimal requirement that the exclusion of a given class of persons be linked to a characteristic plausibly connected to alienage. Previous aliens cases would thus establish the validity of relevant characteristics as criteria for the legislative denial of membership. On the alternative (*Love* majority) view, Commonwealth power to control the composition of the constitutional community is implicitly limited to its regulation of the process of naturalisation. The power of exclusion is constrained by a constitutional concept of community membership, with members of that constitutional category not capable of answering the description of aliens. Previous aliens cases could only affirm that each particular plaintiff, validly subject to the aliens power, was not, in fact, a member of the community in the constitutional sense. In the next section, I consider how these different conceptions of the limits on the s 51(xix) aliens power were applied to the plaintiffs in *Love*.

B *Applying the* Pochi *Limits to the Plaintiffs in* Love

The majority's analysis in *Love* focuses on ways in which the plaintiffs belong to the Australian community, these factors being capable of taking them outside the ordinary understanding of aliens.[44] The minority, while raising the plaintiffs' lack of Australian citizenship, can be most coherently interpreted as focusing on ways in

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39 *Ex parte Te* (n 17) 171 [24] (emphasis added).

40 *Love* (n 1) 209 [130].

41 Ibid 173 [14]. See also at 217–18 [167] (Keane J): 'What was clear at Federation was that it was an attribute of the sovereignty of an independent State to decide who were aliens and whether they should or should not become members of the community.'

42 See, eg, *Ruddock v Vadarlis* (2001) 110 FCR 491.

43 See, eg, the United States, where a constitutionally enshrined concept of citizenship (in the *United States Constitution* amend XIV) strictly limits Congress' power: *Afroyim v Rusk*, 387 US 253 (1967); Patrick Weil, 'Can a Citizen Be Sovereign?' (2017) 8(1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1.

44 See, eg, *Love* (n 1) 263 [302] (Gordon J): 'The word "alien" ... describes a person's "*lack* of relationship with a country"' (emphasis in original), citing *Nolan* (n 10) 183, quoted in *Singh* (n 19) 400 [205].

which the plaintiffs are linked to foreign places to bring them within the ordinary understanding of alienage.[45]

The minority judgments are more uniform and so may be treated together. Their starting point in the search for valid criteria of alienage is the meaning of the term 'alien' at Federation. According to Gageler J,

> it must now be taken as settled that the Parliament is entitled at least to choose between the principal options recognised as having vied for acceptance as indicia of nationality in the second half of the 19th century, being place of birth (*jus soli*) or the nationality of one or more parents (*jus sanguinis*), or to choose some combination of the two.[46]

The result is that at least birth outside the territory (the obverse of *ius soli*) and birth to a non-citizen parent (the obverse of *ius sanguinis*) must be valid criteria of alienage. By conferring automatic citizenship based on the conjunction of *ius sanguinis* and *ius soli* rules, Parliament has left both criteria as determinants of alienage, so that birth outside of the territory or to a non-citizen parent would be a valid basis for the Commonwealth to treat each plaintiff as an alien.

The minority also places significant weight on the question of foreign allegiance, relying on the statement in *Singh v Commonwealth* that 'a central characteristic of the status of "alien" is, and always has been, owing obligations to a sovereign power other than the sovereign power in question'.[47] Care is taken, however, to emphasise that it is not a necessary condition of alienage (in recognition of the Court's earlier decision in *Koroitamana*),[48] nor a sufficient condition (as it is within Parliament's power to provide, as it has done, for dual citizenship).[49] Nonetheless, the minority suggests that foreign allegiance would be a valid criterion for the legislative attribution of alienage, even though it is not independently determinative.[50] Importantly, the allegiance in question is merely formal, describing the relation of a person to the State of which he or she is a citizen or subject.[51]

While accepting that the content of a concept of allegiance is unclear,[52] the minority at times appears to rely on the *absence* of formal allegiance (citizenship) as a determinative criterion of alienage.[53] However, this should be interpreted in light of the *Pochi* limits, which would be non-existent if the legislative capacity with respect to citizenship were not correspondingly limited. Thus, while the absence of formal allegiance may, presuming the validity of citizenship laws, conclusively indicate alien status, it is not readily characterised as a valid criterion for the legislative attribution of that status.

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45 *Love* (n 1) 175 [18] (Kiefel CJ): 'as a matter of etymology, "alien" means belonging to another place'. See also at 197 [93] (Gageler J).
46 Ibid 200 [100] (Gageler J). See also at 171–2 [6]–[7] (Kiefel CJ), 217–18 [167] (Keane J).
47 Ibid 218 [169] (Keane J), quoting *Singh* (n 19) 383 [154] (Gummow, Hayne and Heydon JJ).
48 *Love* (n 1) 195–6 [89] (Gageler J), 219 [170] (Keane J).
49 Ibid 219 [171] (Keane J).
50 Ibid 174 [16] (Kiefel CJ); 195–6 [89] (Gageler J); 219 [170] (Keane J).
51 Ibid 220 [174] (Keane J).
52 See, eg, ibid 173 [13] (Kiefel CJ), 203–4 [109] (Gageler J)
53 See, eg, ibid 178–9 [32]–[33] (Kiefel CJ).

The minority's understanding of s 51(xix) and its limits places the plaintiffs squarely within the scope of the power. Australian citizenship law reflects a valid legislative choice to allow birth outside the territory (among other criteria) to be a determinant of alien status, and that alone is sufficient to bring the plaintiffs within the scope of the power. Foreign allegiance represents a further criterion that Parliament might validly have seized upon to justify its attribution of alien status to the plaintiffs.

The majority judgments in *Love* are more varied in their application of s 51(xix) and its limits to the plaintiffs. All at least implicitly reject the valid-criteria-of-alienage approach to the extent that they do not treat previous aliens cases as establishing criteria capable of bringing a person *within* the scope of the power. Instead, each of the majority reasons approaches the *Pochi* limits by asking whether there is a relevant *connection* to Australia — that is, a relevant indicator of community membership — by reason of which the plaintiffs could not possibly answer the description of aliens.

Bell J starts by observing that, at Federation, Aboriginal Australians were not aliens, though it is an open question whether their non-alienage was by reason of their birth within the territory (and consequent British subject status) or by reason of the more fundamental circumstance of 'the unique connection that Aboriginal Australians have to the land and waters of Australia'.[54] Bell J notes, however, that the meaning of 'alien', regardless of its meaning at Federation, may change over time in response to 'changes in the national and international context'— noting, in particular, that the apparent power of the Commonwealth to redefine alien status, as emerging from *Shaw* and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*, must be understood in this light.[55]

In this connection, Bell J draws attention to *Mabo v Queensland (No 2)*[56] as involving recognition by the common law of important circumstances — the 'antecedent rights and interest in the land and waters of Australia possessed by the indigenous inhabitants sourced in traditional law and customs'[57] — that bear significantly on the ordinary understanding of alienage and community membership. It is this underlying recognition of a spiritual connection to country that makes it impossible for Bell J, relying most directly on the *Pochi* formulation, to find 'that an Aboriginal Australian can be described as an alien within the ordinary meaning of that word'.[58]

Nettle J approaches the *Pochi* question via the more traditional concepts of allegiance and protection: the essential meaning of alienage concerns an *absence* of permanent allegiance to the sovereign.[59] Allegiance in this context, however, is more than merely formal. While the precise content of permanent allegiance defies satisfactory definition,[60] any person incapable of being classified as an alien must be

54 Ibid 183 [52] (Bell J).
55 Ibid 189 [69] (Bell J).
56 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo (No 2)*').
57 *Love* (n 1) 189 [70] (Bell J).
58 Ibid 189 [71] (Bell J).
59 Ibid 240–3 [246]–[248] (Nettle J).
60 Ibid 244 [251], 246–7 [257]–[259] (Nettle J).

in possession 'of characteristics which so connect him or her to the sovereign as necessarily to give rise to reciprocal obligations of protection and allegiance'.[61] The meaning of 'permanent protection', while similarly problematic, must be informed by an understanding of the liability of those not entitled to such protection to removal from Australia as aliens.[62] Common law recognition of rights and interests founded on the existence of Aboriginal societies, with their own traditional laws and customs, imparts an obligation on the sovereign not to 'tear the organic whole of the society asunder'[63] by subjecting its members to a liability to deportation — an obligation amounting to a form of 'permanent protection' owed by the sovereign.[64] Permanent allegiance, by reason of which Aboriginal Australians cannot be said to be aliens, is simply a statement of the counterpart of this permanent protection.[65]

Gordon J's approach to the *Pochi* question more explicitly considers the relationship between sovereignty and territory. An alien, in the most basic sense, is a person who is not a member of 'the people of Australia'.[66] The meaning of that phrase must be understood by reference to the political community from which the Commonwealth derives its popular sovereignty.[67] That sovereignty is asserted over a particular territory,[68] to which the common law recognises Aboriginal Australians as having a unique connection as its 'first peoples'.[69] The people of Australia, in whose name that sovereignty is asserted, cannot be thought to exclude the first peoples whose connection to the territory has not been severed.[70] The ordinary understanding of alienage, for Gordon J, is thus directly concerned with questions of territoriality, sovereignty and legitimacy.

Edelman J takes a similar approach to Gordon J, highlighting the significance of territoriality to the concepts of sovereignty and political community that inform the ordinary understanding of alienage.[71] While Edelman J makes most frequent reference to spiritual or 'metaphysical ties'[72] to territory (as identifying 'belongers'[73] to the political community), his Honour also attempts to ground these notions by identifying a basic norm recognised by both statute and the common law. His Honour argues that it is in recognition of this metaphysical attachment to country that the combination of *ius soli* and *ius sanguinis* has never been doubted as giving rise to membership of a political community.[74]

While each member of the majority in *Love* develops the concept differently, all at least implicitly articulate the *Pochi* limits by reference to a concept of

61 Ibid 247 [260] (Nettle J).
62 Ibid 254 [273] (Nettle J).
63 Ibid 254 [272] (Nettle J).
64 Ibid 254 [273] (Nettle J).
65 Ibid 258 [279] (Nettle J).
66 Ibid 277 [351] (Gordon J).
67 Ibid 277–8 [351]–[352] (Gordon J).
68 Ibid 276–7 [347]–[350] (Gordon J).
69 Ibid 260 [289], 274 [340] (Gordon J).
70 Ibid 276–7 [349] (Gordon J).
71 Ibid 308 [438] (Edelman J).
72 Ibid 289 [396], 308–9 [438]–[439], 320 [466] (Edelman J).
73 Ibid 288 [394], 308 [437]–[438] (Edelman J).
74 Ibid 308–9 [439], 311–12 [443]–[445] (Edelman J).

community membership: a form of connection to Australia by reason of which a person cannot be considered an alien. The significance of the emergence of a constitutional concept of community membership, and the role of territoriality within that concept, will be discussed in the following section.

IV A New Constitutional Concept of Community Membership

The existence of a constitutional concept of community membership — sometimes described as 'constitutional citizenship' — has long been discussed in the Australian context.[75] Prior to *Love*, the scope of such a concept had been considered almost entirely at large,[76] in no small part due to 'the High Court's reticence to give the aliens power an autonomous meaning'.[77] Previous discussions have focused on the aliens and immigration powers as well as constitutional references to 'the People of the Commonwealth'.[78] With respect to the latter, much has been made of sparse judicial pronouncements to the effect that the Parliament's discretion to regulate community membership (as citizenship) is subject to the requirement that 'it does not exclude from citizenship *those persons who are undoubtedly among "the people of the Commonwealth"*'.[79]

The reasoning in *Love* provides a starting point for answering two key questions about a constitutional concept of community membership: (A) who is included within the category and on what basis?, and (B) what consequences flow from inclusion within the category?

A *Who is Included?*

The clear ratio decidendi of *Love* is that at least those persons satisfying the tripartite test of Aboriginality (developed in *Commonwealth v Tasmania*[80] and applied by the Court in *Mabo (No 2)*[81]) are constitutional community members and thus non-

75 See, eg, David A Wishart, 'Allegiance and Citizenship as Concepts in Constitutional Law' (1986) 15(4) *Melbourne University Law Review* 662; Genevieve Ebbeck, 'A Constitutional Concept of Australian Citizenship' (2004) 25(2) *Adelaide Law Review* 137; Michelle Foster, 'Membership in the Australian Community: *Singh v The Commonwealth* and Its Consequences for Australian Citizenship Law' (2006) 34(1) *Federal Law Review* 161; Christopher Tran, 'New Perspectives on Australian Constitutional Citizenship and Constitutional Identity' (2012) 33 *Adelaide Law Review* 199; Pillai (n 7); Elisa Arcioni, '"The People" in the *Australian Constitution*: More than a Vague and Emotionally Powerful Abstraction' (PhD Thesis, University of Sydney, 2015) especially 344–9; Elisa Arcioni, 'The Core of the Australian Constitutional People — "The People" as "The Electors"' (2016) 39(1) *University of New South Wales (UNSW) Law Journal* 421. For a comparative, international perspective, see Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press, 2020).

76 Pillai (n 7) 609; Ebbeck (n 75) 164; Foster (n 75) 182–3.

77 Michelle Foster, '"An 'Alien' by the Barest of Threads" — The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33(2) *Melbourne University Law Review* 483, 540.

78 For the most comprehensive overview of potential constitutional sources of a membership concept, see Pillai (n 7).

79 *Hwang v Commonwealth* (2005) 80 ALJR 125, 130 [18] (McHugh J) (emphasis added).

80 *Commonwealth v Tasmania* (1983) 158 CLR 1, 272–3 (Deane J).

81 *Mabo (No 2)* (n 56).

aliens.[82] Whether this constitutional status may extend to other persons or groups on the same or analogous bases remains unclear.

Bell and Gordon JJ each allude to the '*sui generis*' nature of Aboriginality,[83] but this alone may not be conclusive. It may be significant for the future development of constitutional community membership that the concept of allegiance — the supposed historical basis of community membership — is recognised as devoid of meaningful content.[84] Even Nettle J, using the term to refer to something more than the merely formal relationship of citizenship, makes clear that it only describes an entitlement to permanent protection[85], lending support to the proposition that '[a]llegiance merely describes, rather than defines political obligation [of community membership] ... It does not answer the questions of when is a person a member'.[86]

In the absence of any meaningful concept of allegiance, a territorial principle emerges as a potential basis of constitutional community membership. Bell J's ordinary-understanding approach provides little assistance in characterising the kind of connection to territory that might suffice. Nettle J's approach highlights a form of connection entitling persons to the permanent protection of the Australian Crown — only a slim starting point for future arguments seeking to expand constitutional membership. Gordon and Edelman JJ's approaches, framed in terms of legitimacy conditions for the exercise of sovereignty over a particular territory, provide an alternative, but similarly vague, basis on which constitutional membership may be extended.

A starting point might be to locate the territorial principles arising from Nettle, Gordon and Edelman JJ's judgments within a rights framework. For Nettle J, this is relatively straightforward: there are rights, arising from certain connections to territory, that entitle persons or groups to a form of permanent protection by the State (immunity from removal or exclusion from the territory) in a way that limits legislative power.[87] For Gordon and Edelman JJ, locating their reasons within a rights framework requires some unpacking of the relationship between sovereign legitimacy and territory, starting with the observation that the assertion of sovereignty over a territory involves a claim to exclusivity (a right to exclusive jurisdiction within that territory, and a right to exclude outsiders from it).[88]

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82 The minority is critical of this test for non-alienage: *Love* (n 1) 176–7 [23]–[26] (Kiefel CJ), 211–12 [137]–[138] (Gageler J), 225–6 [196]–[198] (Keane J). The majority is divided as to the necessity of the test: compare 253–4 [272] (Nettle J), 282 [367] (Gordon J), with 192 [80] (Bell J), 317 [458] (Edelman J). The question is more thoroughly addressed by Foster and Gover (n 3).

83 *Love* (n 1) 190 [74] (Bell J), 272 [333] (Gordon J).

84 This is more emphatically confirmed in *Chetcuti* (n 12), in which a majority of the Court supported the proposition that, upon the introduction of Australian citizenship, the concept of allegiance 'was altogether swept away': 712 [21] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 721 [64] (Edelman J), both judgments quoting Clive Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (Steven & Sons, 1957) 92.

85 See *Love* (n 1) 247 [260] (Nettle J).

86 Wishart (n 75) 706.

87 *Love* (n 1) 244 [251]–[252 (Nettle J).

88 Ibid 276–9 [347]–[357] (Gordon J), 308–12 [438]–[446] (Edelman J).

Addressing the legitimacy of such exclusivity, constitutional theorists have argued that 'constitutional legitimacy is not self-standing'[89] — that is, the popular (democratic) sovereignty of an internally self-defining political community may be limited by rights-based considerations. One proposed condition for the legitimation of exclusion is that it not violate essential rights of non-members. Some have argued that this may be satisfied by the existence of international regimes for the avoidance of statelessness and the provision of assistance to refugees so that every person has access to a territory 'where, at the very least, his or her rights are not violated in a serious way'.[90] However, this minimalist approach has increasingly been superseded by international human rights regimes recognising particular rights, the enjoyment of which requires access to a particular territory, as imposing limits on State powers of exclusion.[91]

These developments reflect a recognition that legitimate State sovereignty depends on both internal legitimacy, derived from popular constituent power, and external legitimacy based on non-violation of essential rights.[92] While a domestic court is not in a position to challenge sovereign legitimacy,[93] it may nonetheless interpret the *Constitution* by reference to considerations of legitimacy. Gordon and Edelman JJ's references to popular sovereignty and the conditions of its exercise may be read in this light: the kind of connection to territory on which constitutional community membership is founded includes any connection the denial of which would involve such a fundamental violation of rights that it would undermine the sovereignty asserted in the *Constitution*. While this bar may be rather high, it is not impossible that the category thus defined might extend beyond Aboriginal Australians.

However, the more recent decision in *Chetcuti v Commonwealth* casts significant doubt on the future of the concept of constitutional community membership developed in the separate majority reasons in *Love*. In *Chetcuti*, the minority Justices in *Love* were joined by the newest member of the Court, Gleeson J, to form a new majority in support of the proposition that 'the aliens power encompasses both power to determine who is and who is not to have the legal status of an alien and power to attach consequences to that status'.[94] While briefly acknowledging the existence of 'an exception in respect of a person who is an Aboriginal Australian according to the tripartite test in *Mabo v Queensland (No 2)*',[95]

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89 Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20(2) *Indiana Journal of Global Legal Studies* 605, 612.

90 Ibid 619.

91 See, eg, the European Court of Human Rights' jurisprudence on the right to private and family life, as discussed by Daniel Thym, 'Respect for Private and Family Life under Article 8 *ECHR* in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57(1) *International and Comparative Law Quarterly* 87; Georgios Milios, 'The Immigrants' and Refugees' Right to "Family Life": How Relevant Are the Principles Applied by the European Court of Human Rights?' (2018) 25(3) *International Journal on Minority and Group Rights* 401.

92 See, eg, Peter J Spiro, 'A New International Law of Citizenship' (2011) 105(4) *American Journal of International Law* 694.

93 *Mabo (No 2)* (n 56) 51, 58.

94 *Chetcuti* (n 12) 710 [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

95 Ibid 710 [13] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

the apparent rejection of key elements of the *Love* majority's reasoning may leave that exception without a principled foundation.

B *What Does Constitutional Membership Entail?*

The clearest consequence of community membership (or non-alienage) arising from *Love* is freedom from liability to removal or exclusion. It may not be much of a stretch to suggest that persons falling outside the scope of the aliens power for the reasons discussed in *Love* would likely also fall outside the scope of the immigration power, on the basis that Australia is their home,[96] although community membership in the context of the immigration power is not identical to that under discussion here. Beyond this, however, Gageler J has described the consequences of the majority's reasoning as relegating persons like the plaintiffs to a 'constitutional netherworld', where they are members of the community but lack the status of citizens.[97]

Potentially the most pressing issue concerns the distribution of political rights, currently attributed on the basis of statutory citizenship. Gordon and Edelman JJ's reasoning, concerning popular sovereignty, most clearly suggests that political rights would follow constitutional membership. References to 'the people of Australia' invite consideration of constitutional principles of popular representation, preventing exclusion from the franchise otherwise than on the basis of 'substantial reasons' bearing a 'rational connection with the identification of community membership or with the capacity to exercise free choice'.[98] Bell and Nettle JJ's approaches do not so obviously link constitutional community membership to questions of popular representation, but nor do they rule it out. As for the minority in *Love*, it remains to be seen how the commitment to a citizen/alien binary will be applied in light of the majority's conclusion that there exist constitutional community members.

The relationship between constitutional membership and statutory citizenship also remains unresolved: are there people who are statutory citizens, but not constitutional community members (because they lack the relevant connection to territory) or is the effect of formal naturalisation to bring such persons within the constitutional category? If some citizens are not constitutional community members, are they liable to redefinition as aliens by Commonwealth legislation? The result in *Ex parte Ame* seems to suggest this possibility, but in that case Kirby J at least went to significant lengths to explain how the legislative transformation of citizens to aliens, and the consequent loss of constitutional protections, were only possible in the context of external territories.[99] The result in that case may be more satisfactorily confined to its own particular facts following *Love*, on the basis that the territory to which affected persons had the relevant connection had ceased to be part of the Commonwealth of Australia.

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96 See *Potter v Minahan* (n 5).

97 *Love* (n 1) 210 [131] (Gageler J).

98 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174–5 [7]–[8] (Gleeson CJ). See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

99 *Ex parte Ame* (n 22) 477–8 [99]–[101] (Kirby J). The rest of the court took a somewhat more ambiguous position: at 458–9 [33]–[35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

Recent comments by the Full Court of the Federal Court of Australia have highlighted the significance, albeit in a different context, of the acquisition of citizenship 'in terms of unrestricted membership of the Australian community as a whole',[100] where the community in question 'may be understood to be the people referred to in the *Constitution*'.[101] Most recently, Edelman J in *Chetcuti* has suggested that while a constitutional non-alien may subsequently become an alien by 'the application of the *Constitution* to new political and social facts and circumstances',[102] and while the grant of statutory citizenship is not a 'constitutional ratchet' capable of preventing such changes,[103] norms of citizenship have nonetheless taken on a significant influence on the scope of the aliens power.[104] This leaves open the possibility that, applying a contemporary concept of community membership, all citizens may nonetheless be found to fall beyond the scope of the aliens power.

V Conclusion

The High Court's decision in *Love* gives substance to previously elusive limits on the aliens power under s 51(xix) of the *Constitution*, while leaving significant questions to be answered by future litigation. The minority's valid-criterion-of-alienage approach, which would have given the Commonwealth Parliament an extremely broad power to exclude persons from the Australian community, was rejected in favour of a concept of constitutional community membership. How broad this concept will prove to be, and what consequences and rights will flow from it, remain to be seen. Indeed, there are already suggestions from the joint judgment in *Chetcuti* that key elements of the majority's reasoning in *Love* may be ignored following recent changes to the composition of the High Court. Nonetheless, the various approaches taken by the majority in *Love* provide some reason to believe that any future developments in this space will likely involve a territorial principle of membership, rather than the more problematic concept of allegiance.

100 *Minister for Home Affairs v Lee* [2021] FCAFC 89, [81] (Logan, Kerr and Banks-Smith JJ).
101 Ibid [83], citing *Love* (n 1) [10] (Kiefel CJ).
102 *Chetcuti* (n 12) 719 [56].
103 Ibid 722 [69]. See also at 727 [90]: 'There is no person whose constitutional status with respect to alienage is immune from any change in facts and circumstances and is therefore indelible.'
104 Ibid 721–3 [65], [70]–[72] (Edelman J).