

## ALIEN OR AUSTRALIAN? THE INVOLUNTARY DEPRIVATION OF CITIZENSHIP FOR REPUDIATION OF ALLEGIANCE TO AUSTRALIA UNDER SECTION 51(XIX) OF THE *CONSTITUTION*

ASHWINI RAVINDRAN\*

*The High Court handed down a trio of cases in 2022–23 regarding ministerial powers to involuntarily deprive an Australian citizen of their citizenship. In the first of these decisions, Alexander v Minister for Home Affairs, the Court considered that the aliens power in section 51(xix) of the Constitution was capable of supporting laws providing for involuntary citizenship deprivation in response to a citizen's conduct. This article challenges that suggestion. I argue that an Australian citizen's allegiance to Australia cannot be unintentionally repudiated by their conduct. Thus, a citizen's conduct alone cannot render them an alien, at risk of losing their citizenship pursuant to a law supported by the aliens power. Ultimately, this view posits a more enduring concept of Australian citizenship.*

### I INTRODUCTION: DOES THE ALIENS POWER SUPPORT INVOLUNTARY CITIZENSHIP DEPRIVATION IN RESPONSE TO A CITIZEN'S CONDUCT?

Involuntary citizenship deprivation denotes the state's withdrawal of citizenship from its own citizen, against their will. It is a historic phenomenon, familiar even to the laws of ancient Rome, Babylon and Greece.<sup>1</sup> Chief Justice Warren of the United States ('US') Supreme Court described it as 'a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development'.<sup>2</sup> This article considers the constitutionality of its ongoing infliction in Australia under the aliens power in section 51(xix) of the *Constitution*. Contrary to the High Court's recent decision in *Alexander v Minister*

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1 Michael F Armstrong, 'Banishment: Cruel and Unusual Punishment' (1963) 111(6) *University of Pennsylvania Law Review* 758, 759 <<https://doi.org/10.2307/3310548>>; David W Maxey, 'Loss of Nationality: Individual Choice or Government Fiat?' (1962) 26(2) *Albany Law Review* 151, 163.

2 *Trop v Dulles*, 356 US 86, 101 (1958) ('*Trop*').

for Home Affairs ('Alexander'),<sup>3</sup> I argue that the aliens power does not support involuntary citizenship deprivation imposed in response to a person's conduct.

The High Court handed down a trio of cases regarding involuntary citizenship revocation in 2022–23: *Alexander, Benbrika v Minister for Home Affairs* ('Benbrika'),<sup>4</sup> and *Jones v Commonwealth* ('Jones').<sup>5</sup> Of the three, the conclusion in *Alexander* has the most significant implications for the aliens power. It supplies the focus of this article.

The majority of the High Court in *Alexander* declared invalid a Commonwealth law purporting to invest the Minister with the power to deprive a dual citizen of their Australian citizenship if satisfied that, inter alia, they had engaged in terrorist-related conduct that demonstrated that they had 'repudiated their allegiance to Australia'.<sup>6</sup> In so holding, their Honours reasoned that the law was contrary to Chapter III of the *Constitution* and the principle espoused in *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* – that the 'adjudgment and punishment of criminal guilt' is 'exclusively judicial in character'.<sup>7</sup> However, the implications of this finding for citizenship deprivation are likely 'narrow and essentially formal'.<sup>8</sup> The conclusion was based on the *form* of the impugned provision, which vested the exclusively judicial power to adjudge and punish criminal guilt by citizenship deprivation in the Minister rather than a Chapter III court.<sup>9</sup> Similar reasoning was applied in the subsequent decision in *Benbrika*, where although the Minister's power of citizenship deprivation was conditional on a conviction by a Chapter III court, the relevant provision still invalidly authorised the Minister to exercise the exclusively judicial function of punishing criminal guilt.<sup>10</sup> A law vesting equivalent citizenship deprivation powers in a court rather than the Minister would likely avoid this Chapter III problem, provided the powers were exercisable as judicial punishment for criminal guilt.<sup>11</sup> Notably, in the wake of *Benbrika*, the Commonwealth Government has introduced

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3 (2022) 276 CLR 336 ('Alexander').

4 (2023) 97 ALJR 899 ('Benbrika').

5 (2023) 97 ALJR 936 ('Jones').

6 *Alexander* (n 3) 376 [97] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]), 403 [175] (Gordon J), 429–30 [254] (Edelman J). See also *Australian Citizenship Act 2007* (Cth) s 36B, as at 18 September 2020 ('*Citizenship Act*').

7 (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ('*Lim*').

8 Helen Irving, 'Alexander v Minister for Home Affairs: Existential Citizenship and Metaphorical Allegiance', *AUSPUBLAW* (Blog Post, 15 July 2022) <<https://www.auspublaw.org/blog/2022/07/alexander-v-minister-for-home-affairs-existential-citizenship-and-metaphorical-allegiance>> ('Existential Citizenship and Metaphorical Allegiance').

9 *Ibid.* See also *Alexander* (n 3) 375–6 [96] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]), 402 [173] (Gordon J), 429 [252] (Edelman J).

10 *Benbrika* (n 4) 904 [2]–[3] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 912 [50] (Gordon J), 917–18 [76]–[77] (Edelman J).

11 See Emily Hammond and Rayner Thwaites, 'Citizenship Stripping and the Conception of Punishment as an Exclusively Judicial Function', *AUSPUBLAW* (Blog Post, 8 December 2023) <<https://www.auspublaw.org/blog/2023/12/citizenship-stripping-and-the-conception-of-punishment-as-an-exclusively-judicial-function>>.

a scheme for court-imposed citizenship deprivation, the validity of which remains to be tested in the High Court.<sup>12</sup>

More significantly for this article, the Court in *Alexander* considered more generally that a law authorising citizenship deprivation on the basis that a person has engaged in conduct that demonstrates a repudiation of their allegiance to Australia would be supported by section 51(xix) of the *Constitution*.<sup>13</sup> That section gives the Parliament the power to legislate ‘with respect to ... naturalization and aliens’.

This article interrogates, and ultimately, contests, this section 51(xix) analysis. I agree with the Court’s implicit conclusion that allegiance to Australia takes a person outside the reach of the aliens power. However, I argue that a person cannot, merely through their conduct, unintentionally repudiate that allegiance.<sup>14</sup> Therefore, conduct alone cannot render them an alien, able to be stripped of their citizenship against their will pursuant to the aliens power. This position is advanced even though a person can voluntarily and intentionally renounce their Australian citizenship.<sup>15</sup>

The article proceeds in three parts. Part II explains both the aliens power and *Alexander*, and argues that the aliens power does not encompass a general power of citizenship deprivation that the Commonwealth Parliament can exercise in any circumstance. This conclusion ensures the relevance of the article’s more confined inquiry: does the aliens power authorise citizenship deprivation in response to a citizen’s conduct? Part III explores the meaning of alienage and its connection to allegiance. It finds that the essential meaning of an alien is a person who lacks allegiance to Australia, and conversely, that an individual who owes allegiance to Australia is outside the reach of the aliens power. With that premise established, Part IV develops three reasons why an individual cannot unintentionally repudiate their allegiance to Australia and become an alien through conduct. First, repudiation of allegiance is inconsistent with the principles of allegiance, both generally and as they were understood at Federation. Second, an interpretation of the aliens power permitting repudiation of allegiance through conduct offends contemporary constitutional principles. Finally, repudiation of allegiance does not accord with the doctrine of treason. I therefore conclude that citizenship deprivation on the basis of conduct is unsupported by the aliens head of power in the *Constitution*.

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12 *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (Cth).

13 *Alexander* (n 3) 360 [42], 365–6 [63] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]), 395–6 [156] (Gordon J), 420–3 [227]–[234] (Edelman J), 441 [286] (Steward J).

14 This article uses the term ‘unintentionally’ to indicate that the loss of allegiance or citizenship is not intended. The conduct itself may be voluntary and intentional.

15 This position also broadly reflects the position in respect of US citizenship under the *United States Constitution*: *Afroyim v Rusk*, 387 US 253, 257, 268 (Black J for the Court) (1967) (‘*Afroyim*’); *Vance v Terrazas*, 444 US 252, 261 (White J for the Court) (1980). See also Ben Herzog, *Revoking Citizenship: Expatriation in America from the Colonial Era to the War on Terror* (New York University Press, 2015) 80–6; Lawrence Abramson, ‘United States Loss of Citizenship Law after *Terrazas*: Decisions of the Board of Appellate Review’ (1984) 16(4) *New York University Journal of International Law and Politics* 829, 878; T Alexander Aleinikoff, ‘Theories of Loss of Citizenship’ (1986) 84(7) *Michigan Law Review* 1471, 1471 <<https://doi.org/10.2307/1288994>>; Elwin Griffith, ‘Expatriation and the American Citizen’ (1988) 31(4) *Howard Law Journal* 453, 485.

The article does not consider whether citizenship deprivation could be supported by a head of Commonwealth legislative power other than the aliens power. Nor does it examine any other restriction on citizenship deprivation arising from either the *Constitution*<sup>16</sup> or international law.<sup>17</sup> This is not least because the Commonwealth in *Alexander* withdrew its foreshadowed reliance on other heads of legislative power,<sup>18</sup> suggesting that the scope of the aliens power plays the most significant role in defining the boundaries of citizenship deprivation. The article also confines itself to natural-born, as opposed to naturalised, citizens. The position in respect of naturalised citizens and the naturalisation power was considered in *Jones*, and encompasses slightly different considerations due to the possibility of conditional naturalisation.<sup>19</sup>

In focusing the inquiry as such, this article asks a specific question that goes to the heart of legal identity in Australia:<sup>20</sup> how can an Australian citizen become an alien to this country against their will? When can we, to adopt the words of Warren CJ, ‘[destroy] for the individual the political existence that was centuries in the development’?<sup>21</sup> Ultimately, the answer sheds light on a wider question that pervades not only this article, but section 51(xix) discourse generally: what does it mean to be an Australian citizen?

I conclude that even the most extreme and reprehensible conduct will not repudiate an Australian citizen’s allegiance to Australia. Their conduct cannot, therefore, make them an alien. Citizenship deprivation in response to a person’s conduct is thus unsupported by the aliens power, contrary to the finding in *Alexander*.

## II DEFINING THE OUTER LIMITS OF CITIZENSHIP DEPRIVATION

Before engaging the article’s central question – whether citizenship deprivation in response to conduct is supported by the aliens power – it is necessary to explain

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- 16 See, eg, *Alexander* (n 3) 388–9 [132] n 166 (Gordon J); Matilda Gillis, ‘A Doctrinal and Feminist Analysis of the Constitutionality of the Australian Citizenship Revocation Laws’ (2020) 41(2) *Adelaide Law Review* 449, 463–7.
- 17 See generally *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975); Christophe Paulussen, ‘Stripping Foreign Fighters of Their Citizenship: International Human Rights and Humanitarian Law Considerations’ (2021) 103(916–17) *International Review of the Red Cross* 605 <<https://doi.org/10.1017/S1816383121000278>>.
- 18 See below n 46 and accompanying text.
- 19 See *Jones* (n 5) 945–6 [37]–[38], [41] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 966 [144] (Edelman J), 975 [196] (Steward J). However, to the extent that a person’s naturalisation is unconditional or that the conduct said to repudiate allegiance is not a breach of a condition of naturalisation, I suggest that the analysis in this article also applies to naturalised citizens.
- 20 For a discussion of the normative significance of citizenship to identity, see generally Helen Irving, *Citizenship, Alienage, and the Modern Constitutional State: A Gendered History* (Cambridge University Press, 2016) 238–9, 274 <<https://doi.org/10.1017/CBO9781107588011>> (‘*A Gendered History*’); Kim Rubenstein, *Australian Citizenship Law* (Thomson Reuters, 2<sup>nd</sup> ed, 2017) 6–11; Linda Bosniak, ‘Citizenship Denationalized’ (2000) 7(2) *Indiana Journal of Global Legal Studies* 447, 479–88 <<https://doi.org/10.2139/ssrn.232082>>.
- 21 *Trop* (n 2) 101.

the context and relevance of the question. This Part undertakes that task by first, summarising the prevailing interpretation of the aliens power; second, explaining the High Court's decision in *Alexander*, with a focus on the Court's consideration of the aliens power; and third, arguing that the aliens power does not encompass a general power of citizenship revocation, to be exercised in any circumstances the Parliament sees fit. Instead, citizenship deprivation is supported by the aliens power in certain instances only. This enlivens the article's central question: is a citizen's conduct one such circumstance? To begin, let us turn to the provision that engages this question: section 51(xix) of the *Constitution*.

### A The Aliens Power: A Brief Overview

The *Australian Constitution* makes scant reference to matters of nationality and citizenship.<sup>22</sup> In the context of this silence on Australian citizenship, section 51(xix) of the *Constitution*, which endows the Commonwealth Parliament with the power to make laws 'with respect to ... naturalization and aliens', has become a significant source of Commonwealth legislative power over nationality, citizenship, and exclusion from Australia.<sup>23</sup> The Commonwealth's increased reliance on the aliens power has also been motivated by jurisprudence that a person who is 'absorbed' into the Australian community is beyond the reach of the power to legislate with respect to 'immigration and emigration' in section 51(xxvii),<sup>24</sup> but remains within the reach of the aliens power.<sup>25</sup>

The term 'aliens' is not defined in the *Constitution*. As such, the aliens power has been found to grant the Commonwealth Parliament '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',<sup>26</sup> including by imposing on aliens 'burdens, obligations and disqualifications which the Parliament could not impose upon other persons'.<sup>27</sup> The naturalisation and aliens power has consequently been said to include the power 'to create and define the concept of Australian citizenship'<sup>28</sup> – a view recently accepted

22 See generally Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (1997) 25(2) *Federal Law Review* 295, 295–6 <<https://doi.org/10.22145/flr.25.2.5>>.

23 Sangeetha Pillai, 'The Exclusion of Aliens under Federal Law: Analysing the Impact of *NZYQ*, *Alexander* and *Benbrika*', *AUSPUBLAW* (Blog Post, 5 February 2024) <<https://www.auspublaw.org/blog/2024/2/the-exclusion-of-aliens-under-federal-law-analysing-the-impact-of-nzyq-alexander-and-benbrika>>.

24 *R v Director-General of Social Welfare; Ex parte Henry* (1975) 133 CLR 369, 372 (Barwick CJ), 374 (Gibbs J), 382 (Mason J, McTiernan J agreeing at 373). See also George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams: Australian Constitutional Law and Theory* (Federation Press, 6<sup>th</sup> ed, 2014) 938.

25 *Pochi v Macphee* (1982) 151 CLR 101, 111 (Gibbs CJ, Mason J agreeing at 112, Wilson J agreeing at 116), 113 (Murphy J) ('*Pochi*').

26 *Chetcuti v Commonwealth* (2021) 272 CLR 609, 622 [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ) ('*Chetcuti*').

27 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 35 [2] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at 87 [190]) ('*Shaw*').

28 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 173 [31] (Gleeson CJ) ('*Te*'), cited in *Koroitamana v Commonwealth* (2006) 227 CLR 31, 46 [48] (Gummow, Hayne and Crennan JJ) ('*Koroitamana*'). See also *Hwang v Commonwealth* (2005) 87 ALD 256, 259–60 [10]–[11] (McHugh J).

by a majority of the High Court in obiter in *Alexander*.<sup>29</sup> According to this view, the aliens power thus supports a law determining a class of citizens and providing that ‘persons who do not share that status are aliens’.<sup>30</sup> A statutory status of Australian citizenship has existed in Australia since 1949,<sup>31</sup> and is currently governed by the *Australian Citizenship Act 2007* (Cth) (‘*Citizenship Act*’).

However, the aliens power is not unfettered. As Gibbs CJ declared in *Pochi v Macphree* (‘*Pochi*’), ‘Parliament cannot, simply by giving its own definition of “alien”, expand the power under s[ection] 51(xix) to include persons who could not possibly answer the description of “aliens” in the ordinary understanding of the word’.<sup>32</sup> This statement, known as the ‘*Pochi* limit’, was expressly endorsed by the majority in *Alexander*.<sup>33</sup> Therefore, whilst the statutory status of Australian citizenship has sometimes been seen as ‘the obverse of the status of alienage’,<sup>34</sup> the two descriptors are not perfect antonyms: ‘Non-citizenship does not equate, in all cases, with alienage.’<sup>35</sup>

As with many terms appearing in the *Constitution*, there is a distinction between the connotation, or essential meaning, of the term ‘alien’, and its denotation or application: whilst its connotation remains constant from Federation, its denotation may change over time.<sup>36</sup> Although this is but one method of constitutional interpretation, it has received approval in the context of the aliens power.<sup>37</sup>

There are ongoing disagreements as to the breadth of the aliens power.<sup>38</sup> However, this article does not endeavour to resolve all such disputes. In contrast to most issues considered prior to *Alexander*,<sup>39</sup> the inquiry does not concern itself

29 *Alexander* (n 3) 358 [36] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]). Cf at 387–8 [136] (Gordon J).

30 *Ibid* 357 [34] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]).

31 See *Nationality and Citizenship Act 1948* (Cth).

32 *Pochi* (n 25) 109.

33 *Alexander* (n 3) 357 [35] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]), 386–7 [133] (Gordon J), 416–17 [215] (Edelman J).

34 *Shaw* (n 27) 35 [2] (Gleeson CJ, Gummow and Hayne JJ).

35 *Love v Commonwealth* (2020) 270 CLR 152, 264 [304] (Gordon J) (‘*Love*’).

36 *Chetcuti* (n 26) 637 [57] (Edelman J), citing *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers, Australia* (1959) 107 CLR 208, 267 (Windeyer J).

37 See Kim Rubenstein, ‘Citizenship and the Centenary: Inclusion and Exclusion in 20<sup>th</sup> Century Australia’ (2000) 24(3) *Melbourne University Law Review* 576, 601. See also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 183–4 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ) (‘*Nolan*’); *Shaw* (n 27) 43 [32] (Gleeson CJ, Gummow and Hayne JJ). Cf *Singh v Commonwealth* (2004) 222 CLR 322, 413 [249] (Kirby J) (‘*Singh*’).

38 See, eg, *Love* (n 35) 192–5 [83]–[88] (Gageler J), 270–2 [325]–[330] (Gordon J). See also Jamie Blaker, ‘The Constitutional Concept of an Alien’ (2023) 34(1) *Public Law Review* 48; Joe McIntyre, ‘Alienage and Identity in Australia’s Constitutional Legal History’ in Anna Olijnyk and Alexander Reilly (eds), *The Australian Constitution and National Identity* (ANU Press, 2023) 151 <<https://doi.org/10.22459/ACNI.2023.08>>.

39 See, eg, *Singh* (n 37); *Pochi* (n 25); *Nolan* (n 37); *Te* (n 28); *Shaw* (n 27); *Koroitama* (n 28); *Love* (n 35); *Chetcuti* (n 26); Mischa Davenport, ‘*Love v Commonwealth*: The Section 51(xix) Aliens Power and a Constitutional Concept of Community Membership’ (2021) 43(4) *Sydney Law Review* 589; John Gava, ‘Losing Our Birthright: *Singh v Commonwealth*’ (2016) 37(2) *Adelaide Law Review* 369; Sangeetha Pillai, ‘Non-immigrants, Non-aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited’ (2013) 39(2) *Monash University Law Review* 568, 588–98.

with the alienage status of *non*-citizens. Rather, it focuses specifically on those who *have* Australian citizenship, and asks the question: in what circumstances will the aliens power support a law revoking that citizenship? This was the relevant issue before the High Court in *Alexander*.

## **B Involuntary Citizenship Deprivation: The High Court in *Alexander***

The following discussion summarises *Alexander*, focusing on the High Court's reasoning in respect of the aliens power. I explain the impugned provision and its legislative background, discuss the provision's application to the plaintiff, summarise each judgment and finally, find a through line in this reasoning, which the remainder of the article contests.

### **1 Legislative Background**

In the midst of heightened concerns regarding the threat of terrorism, the *Citizenship Act* was amended in 2015 and 2020 to provide for the deprivation of the Australian citizenship of dual citizens who became, colloquially, 'foreign fighters'.<sup>40</sup>

The new section 36B of the *Citizenship Act* allowed the Minister to make a determination for the cessation of a person's Australian citizenship if satisfied that they engaged in specified conduct while outside Australia, that this conduct demonstrated that they 'repudiated their allegiance to Australia', and that it would be contrary to public interest for them to remain an Australian citizen.<sup>41</sup> The Minister could not make such a determination if satisfied that the person would become stateless,<sup>42</sup> which effectively confined the provision's application to dual (or more) citizens. The specified conduct in section 36B largely related to involvement in terrorist activity.<sup>43</sup>

### **2 Facts and Issues**

Delil Alexander was an Australian citizen from birth, and a Turkish citizen by descent. In 2013, he travelled to Turkey, and then Syria. The Australian Security Intelligence Organisation reported that his travel to Syria was facilitated by Islamic State, a designated terrorist organisation under the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'). He had likely joined this organisation and engaged in 'foreign incursions and recruitment' – specified conduct under section 36B(5)(h) – by

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40 See generally *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth); Revised Explanatory Memorandum, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 1; *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth); James Renwick, *Report to the Attorney-General: Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007* (Independent National Security Legislation Monitor Report No 7, 15 August 2019).

41 *Citizenship Act* (n 6) s 36B(1).

42 *Ibid* s 36B(2).

43 *Ibid* s 36B(5).

entering or remaining in the al-Raqqa province of Syria, which was at the relevant time a declared area under the *Criminal Code*.<sup>44</sup>

In July 2021, the Minister for Home Affairs determined, pursuant to section 36B(1) of the *Citizenship Act*, that Alexander ceased to be an Australian citizen. The Minister asserted satisfaction that Alexander had engaged in foreign incursions while outside Australia which demonstrated a repudiation of his allegiance to Australia, that it was contrary to public interest for Alexander to retain his citizenship, and that the determination would not render Alexander stateless.<sup>45</sup>

Alexander, by his litigation guardian, challenged the constitutional validity of section 36B in the High Court. Relevantly, Alexander argued that section 36B was unsupported by a head of Commonwealth legislative power. The only head of power ultimately relied upon by the Commonwealth in defending the validity of section 36B was the aliens power in section 51(xix) of the *Constitution*.<sup>46</sup>

### 3 Decision

By a 6:1 majority (Steward J dissenting),<sup>47</sup> the High Court upheld Alexander's challenge to section 36B of the *Citizenship Act*, finding that it was contrary to Chapter III of the *Constitution*.<sup>48</sup> However, Alexander's contention that the provision was unsupported by the aliens power was not accepted by any judge, although Gordon J did not decide the issue.<sup>49</sup> The following analysis summarises their Honours' respective reasoning on this point.

#### (a) Kiefel CJ, Keane and Gleeson JJ (Gageler J agreeing): The Broader Approach

The plurality concluded that the aliens power supported a law revoking the Australian citizenship of a citizen on the basis that they had engaged in conduct that demonstrated a repudiation of allegiance to Australia.

Although the *Pochi* limit constrained Parliament's power to define aliens, it did not stretch the ordinary understanding of the word 'alien' to designate as such an individual 'who has engaged in conduct exhibiting such extreme enmity to Australia as to warrant being excluded from membership of the Australian community'.<sup>50</sup> Moreover, the plurality considered that the Parliament was authorised by the aliens power to define the circumstances under which a citizen

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44 *Criminal Code Act 1995* (Cth) ss 119.2, 119.3 ('*Cth Criminal Code*'). See also Julie Bishop, Minister for Foreign Affairs, 'Declaration of Al-Raqqa Province in Syria' (Media Release, 4 December 2014) <<https://www.foreignminister.gov.au/minister/julie-bishop/media-release/declaration-al-raqqa-province-syria>>.

45 Alexander (n 3) 351 [15] (Kiefel CJ, Keane and Gleeson JJ).

46 Delil Alexander, 'Plaintiff's Submissions', Submission in *Alexander v Minister for Home Affairs*, S103/2021, 12 November 2021, [17]–[27], [34]–[40] ('Plaintiff's Submissions'); Minister for Home Affairs, 'Submissions of the First and Second Defendants', Submission in *Alexander v Minister for Home Affairs*, S103/2021, 10 December 2021, [47].

47 Alexander (n 3) 463–4 [345] (Steward J).

48 Ibid 376 [97] (Kiefel CJ, Keane and Gleeson JJ), 385 [127] (Gageler J), 403 [175] (Gordon J), 429–30 [254] (Edelman J). See also *Lim* (n 7) 27 (Brennan, Deane and Dawson JJ).

49 Alexander (n 3) 376 [97] (Kiefel CJ, Keane and Gleeson JJ), 385 [127] (Gageler J), 403 [175] (Gordon J), 429–30 [254] (Edelman J).

50 Ibid 357–8 [35] (Kiefel CJ, Keane and Gleeson JJ).



could lose their citizenship and thereby become an alien.<sup>51</sup> Their Honours argued that this power to revoke citizenship was concomitant with the power to confer it.<sup>52</sup> Furthermore, the statutory position in the United Kingdom ('UK') at Federation recognised renunciations of allegiance, including by voluntarily becoming naturalised in a foreign state, or, in the case of women, marrying a foreign subject. In their Honours' view, in light of this context, the aliens power must extend to identifying the circumstances in which a citizen can become an alien by virtue of a law responding to their repudiation of allegiance to Australia.<sup>53</sup>

With regard to the impugned legislation, the plurality found it reasonably open to the Parliament to treat certain voluntary conduct, such as that canvassed in section 36B, as being 'so reprehensible as to be incompatible with the common bonds of allegiance to the Australian community'.<sup>54</sup> This was so even if the person did not intend to renounce their citizenship,<sup>55</sup> or to defy Australian statutory law.<sup>56</sup>

Whilst noting past doubts regarding the concept of allegiance,<sup>57</sup> their Honours said allegiance was a 'useful gauge of the existence of the bonds of citizenship'.<sup>58</sup> Their Honours considered that the aliens power should not be interpreted as supporting laws specifying criteria for voluntary renunciation of citizenship, but not laws that treat conduct demonstrating a repudiation of allegiance to Australia as an implied renunciation of that citizenship.<sup>59</sup>

Justice Gageler agreed with the plurality, penning a concurring judgment only to express further views on the Chapter III argument.<sup>60</sup>

*(b) Justice Gordon: The Holdout*

In contrast to the plurality, Gordon J found it unnecessary to decide whether section 36B was supported by the aliens power, given the provision was invalid on the Chapter III ground.<sup>61</sup> Nonetheless, her Honour expressed the view that the aliens power could support legislation revoking the citizenship of a person who was otherwise – prior to their conduct – a non-alien, where the person expressly or impliedly renounced their allegiance to Australia by engaging in certain conduct.<sup>62</sup> To the extent that section 36B covered conduct that 'plainly' constituted a renunciation of allegiance, such as fighting for a state at war with Australia or service in the armed forces of a declared terrorist organisation, it was supported by

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51 Ibid.

52 Ibid 359 [38].

53 Ibid 360 [42].

54 Ibid 362–3 [51].

55 Ibid.

56 Ibid 365 [61].

57 Ibid 362 [49], citing *Love* (n 35) 303–5 [428]–[431] (Edelman J).

58 *Alexander* (n 3) 362 [49] (Kiefel CJ, Keane and Gleeson JJ).

59 Ibid 362 [50].

60 Ibid 376–7 [98]–[99].

61 Ibid 385–6 [132].

62 Ibid 388 [137], 389 [139].

the aliens power.<sup>63</sup> Its application to conduct beyond this might be unsupported by the power, but it was unnecessary to consider this question.<sup>64</sup>

(c) *Justice Edelman: The Metaphorical Membership Approach*

Unlike Gordon J and the plurality, Edelman J began by considering the Commonwealth's submission that all dual citizens are aliens, and thus that section 36B is supported by the aliens power because it only applies to dual citizens.<sup>65</sup> His Honour rejected this argument, noting that all dual citizens could not be aliens lest 'potentially half of the permanent population of Australia' be aliens, which must, '[a]lmost by definition', be wrong.<sup>66</sup>

However, Edelman J agreed that the aliens power supported laws revoking citizenship from people who had engaged in conduct demonstrating a repudiation of their allegiance to Australia.<sup>67</sup> Allegiance was here used as a 'metaphor' to describe a person's membership of the community.<sup>68</sup> Renunciation of allegiance arose irrespective of a person's subjective intentions, from actions inconsistent with such membership.<sup>69</sup> Such actions could include wrongdoing 'so extreme that it can be judged to be inconsistent with continuing membership of the political community'.<sup>70</sup> As such, his Honour agreed with Steward J's suggestions of conduct that would justify citizenship deprivation.<sup>71</sup>

(d) *Justice Steward: The Institution Protection Approach*

Steward J considered that the aliens power included a power to revoke a person's citizenship; however, because membership was 'inextricably bound up' with allegiance, this power must be limited to recognising and accepting a loss of citizenship 'arising from actions or steps that are indelibly inconsistent with that allegiance and with membership of that community'.<sup>72</sup> This did not require that a person subjectively intend to renounce their citizenship.<sup>73</sup> His Honour considered this conclusion consistent with the position in the UK and the US at Federation.<sup>74</sup>

Thus, Steward J found that a person's citizenship could be revoked if their conduct 'represented a fundamental and lasting rebuttal of allegiance to Australia',<sup>75</sup> or was 'so incompatible with the shared values of the Australian community that it constitutes a severance of the bond between citizens and a repudiation of

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63 Ibid 394–6 [154], [156].

64 Ibid 395–6 [155]–[156].

65 Ibid 406 [185].

66 Ibid 405 [182].

67 Ibid 406 [185].

68 Ibid 422 [232].

69 Ibid 422–3 [233].

70 Ibid.

71 Ibid. See below n 77 and accompanying text.

72 Ibid 441–2 [286].

73 Ibid 442 [288].

74 Ibid 434 [266].

75 Ibid 442–3 [289].

allegiance'.<sup>76</sup> Although it was unnecessary to exhaustively consider the boundaries of such conduct, his Honour said it would include waging war against Australia, 'actions which seek to destroy or gravely harm the fundamental and basal features of the nation guarded by its Constitution, such as representative democracy and the rule of law', 'actions directed at overthrowing state institutions where such conduct amounts to a clear rejection of allegiance to Australia', or terrorist attacks.<sup>77</sup> Section 36B covered such conduct and was therefore supported by the aliens power.<sup>78</sup>

#### 4 Reflections

Although the judgments in *Alexander* differed, all judges appeared to agree that the aliens power would support a law revoking the citizenship of a person who had engaged in conduct that demonstrated a repudiation of allegiance to Australia, regardless of whether that person subjectively intended to renounce their citizenship. This article interrogates this conclusion, which was arguably reached in obiter dicta, given the provision was invalid by virtue of Chapter III regardless. However, to ensure the relevance of this confined inquiry, I first consider the extent to which the aliens power generally supports laws providing for citizenship deprivation.

### C Citizenship Deprivation under the Aliens Power

#### 1 A General Power of Citizenship Deprivation?

There is some suggestion by the plurality in *Alexander* that the aliens power encompasses a general power to revoke any person's citizenship, it being for the Parliament to 'define the circumstances' under which it will be exercised.<sup>79</sup> That decision would be unconstrained by any requirement that a particular circumstance exists as a matter of constitutional fact.<sup>80</sup> If this is the true breadth of the aliens power, there is no need to consider whether the power supports a law revoking the citizenship of those whose conduct is said to demonstrate a repudiation of allegiance to Australia: Parliament's decision to declare this conduct sufficient to justify citizenship loss would be the end of the inquiry. Therefore, whilst not the central question of the article, the preliminary question of whether the aliens power supports a general power of citizenship deprivation must be examined for that central question to bear any significance. For reasons of constitutional principle, this preliminary question should be answered in the negative.

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76 Ibid 444 [295].

77 Ibid 442–3 [289]–[290].

78 Ibid 446–7 [301].

79 Ibid 357–8 [35] (Kiefel CJ, Keane and Gleeson JJ).

80 Given the plurality in *Alexander* (n 3) also discussed the significance of a repudiation of allegiance and conduct exhibiting 'extreme enmity to Australia', it is arguable that their Honours' judgment does not support such a broad conclusion: at 357–8 [35], 362 [49]–[50]. However, at least one commentator has interpreted the plurality's reasons in *Alexander* (n 3) as endorsing a general power of citizenship deprivation: see Stephen Donaghue, 'Citizens, Aliens and the People' (Lucinda Lecture, Monash University, 17 August 2023).

The *Pochi* limit, a widely-accepted constraint on Parliament's exercise of the aliens power, asserts the existence of a class of persons who 'could not possibly answer the description of "aliens" in the ordinary understanding of the word', and establishes that the aliens power could not be expanded to include such persons within its reach.<sup>81</sup> As Gordon J observed in *Alexander*, this limit is a 'necessary corollary' of the propositions that 'aliens' is a constitutional term, the content of which cannot be defined by Parliament, and that there exists a group of non-aliens who remain non-aliens regardless of their statutory description.<sup>82</sup> These propositions are, in turn, simply a consequence of orthodox principles of constitutional supremacy that 'a stream cannot rise higher than its source'<sup>83</sup> and that '[i]t is emphatically the province and duty of the Judicial Department to say what the law is'.<sup>84</sup> As discussed, the majority in *Chetcuti v Commonwealth* stated that the aliens power includes the 'power to determine who is and who is not to have the legal status of an alien'.<sup>85</sup> However, in light of the foregoing principles, it is difficult to escape Edelman J's conclusion that this assertion should not be interpreted as 'rejecting a century of hornbook constitutional law' such that Parliament can decide the scope of its own power.<sup>86</sup> Nor should the observation that at Federation, the application of alienage was changing, be interpreted as allowing the Parliament to define the scope of the aliens power: this is a fact that may make the interpretation of 'aliens' more complex, but by no means results in Parliament being the arbiter of its own power.<sup>87</sup>

Regardless, a law purporting to revoke the citizenship of a person who could not possibly otherwise answer the description of an alien in the ordinary understanding of the word would not, ordinarily, be a law with respect to aliens.<sup>88</sup> This is because the *Pochi* limit asserts this class of persons to be beyond the reach of the aliens power, regardless of their citizenship status. Put differently, the aliens power will not support *any* law purporting to apply to such persons, *including* a citizenship deprivation law. Furthermore, such a law would also not be captured by the incidental aspect of the aliens power, because it is not necessary for the effective fulfilment of the aliens power that Parliament have this broad deprivation power.<sup>89</sup> This entails the seemingly axiomatic conclusion that a citizenship deprivation law can only be supported by the aliens power insofar as it applies to those who are, according to the *Constitution*, aliens.

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81 *Pochi* (n 25) 109 (Gibbs CJ), cited in *Alexander* (n 3) 357–8 [35] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]), 386–7 [133] (Gordon J), 416–17 [215] (Edelman J).

82 *Alexander* (n 3) 386–7 [133].

83 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J), quoted in *Alexander* (n 3) 408 [189] (Edelman J).

84 *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (Marshall CJ) (1803), cited in *Alexander* (n 3) 393 [151] (Gordon J).

85 *Chetcuti* (n 26) 622 [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

86 *Alexander* (n 3) 410–11 [198] (Edelman J). See also *Jones* (n 5) 962 [125] (Edelman J).

87 Cf *Love* (n 35) 195 [88] (Gageler J), 217–18 [167] (Keane J).

88 See generally *Jones* (n 5) 963–5 [131]–[136] (Edelman J).

89 *D'Emden v Pedder* (1904) 1 CLR 91, 109 (Griffith CJ for the Court); *Burton v Honan* (1952) 86 CLR 169, 177 (Dixon CJ).

As discussed, this article limits its scope to natural-born Australian citizens – people who automatically acquired citizenship from birth, rather than through naturalisation. I assume that natural-born citizens cannot possibly otherwise be described as aliens, having enjoyed a statutory status of ‘full and formal membership of the community’ since birth.<sup>90</sup> Thus, they fall within the *Pochi* limit and are generally beyond the reach of the aliens power. The Commonwealth accepted a similar proposition in *Singh v Commonwealth* (*‘Singh’*), in relation to people born in Australia to Australian citizen parents.<sup>91</sup>

It follows from this analysis that ordinarily, a citizenship deprivation law will not be supported by the aliens power in its application to natural-born Australian citizens, as such persons are (ordinarily) not aliens. In order for the law to be supported by the aliens power, there must be some *constitutionally-relevant* circumstance that renders the person an alien *while* they are a citizen.<sup>92</sup> Such circumstances cannot be defined by Parliament because the *Pochi* limit would be redundant if Parliament could, pursuant to the aliens power, turn a person who is beyond the reach of the aliens power into an alien.<sup>93</sup> As Edelman J confirmed in *Jones*, ‘[t]he text of section 51(xix) does not contemplate the alienation of those who are not aliens’.<sup>94</sup> Thus, a person can only be stripped of their citizenship pursuant to a law supported by the aliens power if they are an alien for a reason *separate* from any exercise by Parliament of the aliens power itself. For similar reasons, it is also not sufficient for the executive government to decide that such constitutionally-relevant circumstances exist; these are matters of constitutional fact. Under this analysis, it cannot be the citizenship deprivation itself that makes the person an alien: they must already have become one. It is therefore necessary to consider the constitutionally-permissible circumstances in which the aliens power will support citizenship deprivation.

## 2 Permissible Instances of Citizenship Deprivation

There are three relatively uncontroversial circumstances in which the aliens power supports citizenship deprivation. These are, in other words, three circumstances in which a citizen becomes an alien, and is thus at risk of losing their citizenship pursuant to a law supported by the aliens power. First, a person can intentionally and voluntarily renounce their allegiance and citizenship.<sup>95</sup> This was accepted in both the UK and the US at Federation as an individual’s right or an extension of their freedom.<sup>96</sup> Second, a person can become an alien as a

90 *Citizenship Act* (n 6) Preamble.

91 Transcript of Proceedings, *Singh v Commonwealth* [2004] HCATrans 5, 2578–81, 3086–8, 3103–5, 3308–11 (DMJ Bennett QC), cited in *Alexander* (n 3) 393 [151] (Gordon J).

92 In this sense, acceptance of the proposition that an involuntary citizenship deprivation law could be supported by the aliens power entails acceptance that there exists a class of ‘citizen aliens’, the converse of the ‘non-citizen non-aliens’ class recognised in *Love* (n 35): ‘Plaintiff’s Submissions’ (n 46) [29].

93 See *Nolan* (n 37) 192 (Gaudron J).

94 *Jones* (n 5) 963 [132].

95 See, eg, *Alexander* (n 3) 388–9 [137]–[139] (Gordon J), 421 [229] (Edelman J).

96 Maxey (n 1) 153–63; Letter from Thomas Jefferson to Albert Gallatin, 26 June 1806, archived at <<https://founders.archives.gov/documents/Jefferson/99-01-02-3910>>; Sir Alexander Cockburn, *Nationality: Or*

consequence of external events leading to some change in sovereign borders or allegiance.<sup>97</sup> For example, people who became citizens of Papua New Guinea upon its independence could validly lose their Australian citizenship.<sup>98</sup> The third circumstance of likely-permissible citizenship deprivation is where a naturalised citizen breaches a condition that was validly imposed on naturalisation, or if the naturalisation itself was fraudulently obtained.<sup>99</sup> Broad powers of denaturalisation have historically and recently been upheld as valid.<sup>100</sup>

### 3 Citizenship Deprivation for Repudiation of Allegiance in *Alexander*

It was against the foregoing background that the High Court in *Alexander* found that a fourth category of permissible citizenship deprivation exists, whereby a person can become an alien by virtue of conduct demonstrating a repudiation of allegiance to Australia, in circumstances where that person does not intend to renounce their citizenship. However, before this conclusion is examined, one clarification must be made. Although repudiation of allegiance was the language used in the impugned provision in *Alexander*,<sup>101</sup> acceptance that such conduct is capable of rendering someone an alien must involve recognition of a constitutionally-permissible instance of citizenship deprivation, given Parliament does not have the capacity to define the permissible circumstances. As such, the article is concerned with this conduct as a constitutional category only.

## D Conclusion

This Part provided an overview of both the aliens power and the High Court's decision in *Alexander*. It then established that the aliens power does not grant the Commonwealth Parliament a general power to deprive an Australian citizen of their citizenship, but rather, encompasses a limited power of citizenship deprivation that can be exercised in the event of certain constitutionally-relevant circumstances or conduct. This opens the central inquiry of this article: was the High Court in *Alexander* correct in finding that conduct that demonstrates a repudiation of allegiance to Australia is constitutionally relevant? That is, can conduct render a person an alien and thereby expose them to the risk of citizenship deprivation?

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*the Law Relating to Subjects and Aliens, Considered with a View to Future Legislation* (Ridgway, 1869) 214; *Naturalisation Act 1870* (Imp) 33 & 34 Vict, c 14, s 3 ('*Naturalisation Act 1870*'). See also Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12(1) *Melbourne Journal of International Law* 27, 40.

97 *Alexander* (n 3) 388–9 [137]–[139] (Gordon J), 421 [229] (Edelman J).

98 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 ('*Ame*').

99 *Alexander* (n 3) 389 [141], 402–3 [174] (Gordon J), 421 [229] (Edelman J); *Benbrika* (n 4) 911 [46] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

100 *Meyer v Poynton* (1920) 27 CLR 436, 441 (Starke J); *Jones* (n 5) 941 [4] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 973 [185] (Edelman J), 974 [188] (Steward J).

101 *Citizenship Act* (n 6) s 36B(1)(b).

### III ALIENAGE AND ALLEGIANCE

The first task in assessing whether a person can become an alien through their conduct is to determine the relationship that otherwise takes that person outside the reach of the aliens power. This Part argues that that relationship is allegiance.

I begin by contending that allegiance is definitionally relevant to alienage, given the concepts were connected both historically and at Federation. Second, I argue that alienage is defined by a lack of allegiance to Australia, rather than allegiance owed to a foreign power. Finally, I address concerns that allegiance is an inappropriate concept for modern Australia, by characterising allegiance as being owed to the body politic, rather than the monarch. Thus, I conclude that a relationship of allegiance to Australia takes a person outside the reach of the aliens power. This allows the subsequent Part to examine whether this allegiance can be unintentionally repudiated by conduct so as to bring a person within the reach of the power.

#### A The Relevance of Allegiance to Alienage

By accepting that a person could become an alien by repudiating their allegiance to Australia, the High Court in *Alexander* implicitly accepted the relevance of allegiance to alienage.<sup>102</sup> However, the connection between allegiance and alienage is controversial and has been questioned by the High Court previously.<sup>103</sup> The following discussion examines the connection, historically and at Federation. I then air and address doubts regarding the certainty of the position at Federation, and conclude that allegiance is definitionally relevant to alienage.

#### 1 The Historical Connection between Allegiance and Alienage

The notion of allegiance dates back to English feudal law, wherein a vassal owed a duty of ‘liege’ (meaning absolute or unqualified) fealty to a landowning lord, concomitant on the lord’s reciprocal obligation to protect the vassal.<sup>104</sup> Over time, this duty of ‘liege’ fealty, or allegiance, came to be owed between a subject and the King, who was ‘the only liege lord because he was the supreme lord of all’.<sup>105</sup> Again, this duty was correlative to a duty of protection on the part of the sovereign.<sup>106</sup> Traditionally, this allegiance was indelible and permanent, in that it bound the subject even when outside the country, and could not be removed.<sup>107</sup>

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102 See also *Alexander* (n 3) 362 [49] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]).

103 See, eg, *Love* (n 35) 292 [402] (Edelman J); *Chetcuti* (n 26) 625–6 [21], 629 [34], (Kiefel CJ, Gageler, Keane and Gleeson JJ).

104 John W Salmond, ‘Citizenship and Allegiance’ (1902) 18 (January) *Law Quarterly Review* 49, 51; Helen Irving, *Allegiance, Citizenship and the Law* (Edward Elgar, 2022) 1 <<https://doi.org/10.4337/9781839102547>>.

105 Salmond (n 104).

106 Glanville L Williams, ‘The Correlation of Allegiance and Protection’ (1948) 10(1) *Cambridge Law Journal* 54, 58 <<https://doi.org/10.1017/S0008197300083951>>; William Blackstone, *Commentaries on the Laws of England: Book I*, ed Wilfrid Prest (Oxford University Press, 1<sup>st</sup> ed, 2016) 235.

107 Blackstone (n 106) 237. See also Salmond (n 104) 50–1.

The concept of alienage has a deep-rooted history in the common law that is inextricably connected to allegiance. The seminal declaration is that of Sir Edward Coke in *Calvin's Case*, that 'they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, and no aliens',<sup>108</sup> 'ligeance' being the antecedent terminology for allegiance.<sup>109</sup> In that case, a child born in Scotland after the accession of King James VI of Scotland to the throne of England was held not to be an alien in England, by virtue of owing allegiance to the one monarch.<sup>110</sup> William Blackstone was to echo Coke's sentiment over a century later, in his *Commentaries on the Laws of England*: subject to confined exceptions such as those applicable to diplomats living abroad, 'an alien is one who is born out of the king's dominions, or allegiance'.<sup>111</sup> Historical studies also confirm this connection, with Professor William H Dunham observing that the test of subjecthood – and thus implicitly of alienage – in medieval English courts was 'neither residence, race, nor language; it was simply an affirmation, or a denial, that a litigant was "within the king's allegiance"'.<sup>112</sup> Admittedly, friendly aliens owed a temporary and local allegiance when resident in the dominion, in that they had to obey the law and were subject to the jurisdiction; however, this was not 'truly' allegiance in a strict feudal understanding, in comparison to the natural and perpetual allegiance owed by subjects.<sup>113</sup> Clearly, the references by Coke, Blackstone and Dunham to allegiance denote that permanent allegiance owed by subjects. Therefore, at least historically, the concepts of alienage and allegiance were closely intertwined. As the following discussion demonstrates, this connection remained strong at Federation.

## 2 Allegiance and Alienage at Federation

More significantly for the meaning of 'aliens' as that term is used in section 51(xix) of the *Constitution*, allegiance was still relevant to alienage at Federation.<sup>114</sup> At this point, I assume that the contemporaneous usage of a legal term at Federation supplies, or at least informs, the meaning of that term in current constitutional jurisprudence. The merit of this assumption has been discussed elsewhere,<sup>115</sup> and

108 *Calvin's Case* (1608) 7 Co Rep 1; 77 ER 377, 383. See also Irving, *Allegiance, Citizenship and the Law* (n 104) 5–6.

109 Salmond (n 104) 51.

110 *Calvin's Case* (n 108) 394.

111 Blackstone (n 106) 239.

112 William H Dunham Jr, 'Doctrines of Allegiance in Late Medieval English Law' (1951) 26(1) *New York University Law Review* 41, 43.

113 Salmond (n 104) 50, 52.

114 See generally *Singh* (n 37) 350–66 [56]–[100] (McHugh J); *Love* (n 35) 240–3 [246]–[249] (Nettle J).

115 See generally Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16(1) *Federal Law Review* 1 <<https://doi.org/10.1177/0067205X8601600101>>; BM Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14(4) *Public Law Review* 234; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1 <<https://doi.org/10.1177/0067205X9702500101>>; Greg Craven, 'Original Intent and the Australian Constitution: Coming Soon to a Court Near You?' (1990) 1(2) *Public Law Review* 166; James Allan, 'Constitutional Interpretation Wholly Unmoored from Constitutional Text: Can the HCA Fix Its Own Mess?' (2020) 48(1) *Federal Law Review* 30 <<https://doi.org/10.1177/0067205X19890432>>.



is outside the scope of this article to evaluate. It suffices to observe that the High Court has previously asserted that the *Constitution* must be read ‘naturally in the light of the circumstances in which it was made, with *knowledge of the combined fabric of the common law, and the statute law which preceded it*’.<sup>116</sup> The Court has also allowed recourse to the historical record in constitutional interpretation, not to determine the subjective intentions of the framers but rather to ascertain, *inter alia*, ‘the contemporary meaning of language used’.<sup>117</sup> Determining the meaning of the term ‘aliens’ at Federation has been described as ‘an essential step in the task of construction’, although not the end of the inquiry, even by judges who dispute whether the term had, at Federation, a fixed meaning.<sup>118</sup>

There are numerous statements in authoritative contemporaneous materials that indicate that at Federation, throughout the common law world, alienage was defined by reference to allegiance. AV Dicey, writing just prior to the turn of the 20<sup>th</sup> century, claimed that an alien was ‘any person who is not a British subject’, where a British subject was ‘any person who owes permanent allegiance to the Crown’.<sup>119</sup> John Quick and Robert Garran, in their commentary on the *Constitution*, cited Dicey’s discussion and stated that ‘[i]n English law an alien may be variously defined as a person who owes allegiance to a foreign State, who is born out of the jurisdiction of the Queen, or who is not a British subject’.<sup>120</sup> In 1902, John W Salmond also distinguished between ‘natural’ subjects and aliens by reference to whether they owed a natural and permanent allegiance, or only a temporary and local allegiance.<sup>121</sup> As McHugh J observed in *Singh*, the term alien can no longer refer to non-British subjects lest most Australian citizens be aliens.<sup>122</sup> However, there is a clear connection being drawn between alienage and allegiance throughout these statements. That connection is apparent not only in scholarly writing, but also in cases decided around Federation.<sup>123</sup> For example, in *Re Stepney Election Petition; Isaacson v Durant* (‘*Stepney Election*’), Lord Coleridge CJ found that Hanoverians living in England following the end of the personal union between the crowns of England and Hanover were aliens, because they owed allegiance to the Duke of Cumberland in Hanover, rather than Queen Victoria of England.<sup>124</sup>

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116 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ) (emphasis added).

117 *Cole v Whitfield* (1988) 165 CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

118 *Singh* (n 37) 385 [159] (Gummow, Hayne and Heydon JJ).

119 AV Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens & Sons, 1896) 173 (citations omitted).

120 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 599.

121 Salmond (n 104) 50, 52.

122 *Singh* (n 37) 351 [57].

123 See, eg, *United States v Wong Kim Ark*, 169 US 649, 657–8, 662–3, 721–3 (Gray J for the Court) (1898); *Re Criminal Code Sections Relating to Bigamy* (1897) 27 SCR 461, 474 (Strong CJ).

124 *Re Stepney Election Petition; Isaacson v Durant* (1886) 17 QBD 54, 60 (Lord Coleridge CJ for the Court) (‘*Stepney Election*’).

These materials all suggest that allegiance continued to define alienage in the years leading up to and including Federation.<sup>125</sup>

### 3 *Doubts regarding the Certainty of the Position at Federation*

Despite the weight of this authority, it has been asserted that by Federation, there was no fixed meaning of alienage by reference to allegiance because statutory modifications were being made to the traditional common law rules on nationality.<sup>126</sup> Indeed, by Federation, British subjecthood had been extended to some people by descent, despite the traditional position that one generally had to be born within the Crown's dominions to owe allegiance.<sup>127</sup> Further, the *Naturalisation Act 1870* (Imp) allowed a subject to voluntarily renounce their allegiance, where previously that allegiance had been thought indelible or permanent.<sup>128</sup>

However, such statutory modifications merely indicate that the rules regarding allegiance, and the persons who owed it, had developed since the times of Coke and Blackstone. They do not, in light of the numerous contemporaneous statements to the contrary, suggest that allegiance was no longer relevant to alienage. As such, although the plurality in *Singh* found that 'aliens' did not have a fixed legal meaning at Federation, in that the exact boundaries of the group to whom the descriptor applied was changing, their Honours agreed that the respective categories of British subject or alien 'were defined by reference to the nature of the allegiance they owed'.<sup>129</sup> Notably, this article focuses on whether allegiance can be repudiated through conduct, which necessarily assumes the case of a person who owes allegiance. Thus, the rules supplying the outer boundaries of who owes allegiance and *how* such allegiance arises are outside its scope. The relevant point is merely that alienage was, at Federation, defined by reference to allegiance.

It follows that at Federation, allegiance was definitionally relevant to alienage. Assuming that the meaning of a constitutional term at Federation informs the contemporary meaning of that term, I argue that allegiance remains relevant to alienage, and could, for example, be said to constitute its central characteristic or essential meaning.<sup>130</sup> It is, however, necessary to be more specific about the relationship between allegiance and alienage.

## B A Negative or Positive Relationship?

Even once the relationship between allegiance and alienage is accepted, there is a disagreement throughout the case law regarding whether it is a lack of allegiance to Australia that suggests a person is an alien (a negative relationship between allegiance and alienage), or whether it is allegiance being owed to a

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125 For a discussion on how these principles were applied (and misapplied) to Indigenous Australians at Federation, see Peter Herman Prince, 'Aliens in Their Own Land: "Alien" and the Rule of Law in Colonial and Post-Federation Australia' (PhD Thesis, Australian National University, 2015).

126 *Love* (n 35) 194 [86] (Gageler J), 292 [402] (Edelman J); *Chetcuti* (n 26) 639 [61] (Edelman J).

127 *Singh* (n 37) 389 [173] (Gummow, Hayne and Heydon JJ). See also Dicey (n 119) 177.

128 *Naturalisation Act 1870* (n 96) s 4. Cf Blackstone (n 106) 237.

129 *Singh* (n 37) 395 [190] (Gummow, Hayne and Heydon JJ).

130 See *Love* (n 35) 269 [322] (Gordon J).

foreign power that has this consequence (a positive relationship). The Court's conclusion in *Alexander* that a person can become an alien by repudiating their allegiance to Australia implicitly endorses the negative relationship,<sup>131</sup> but the positive relationship has also received support.<sup>132</sup>

For the following three reasons, a negative relationship is more appropriate. First, as Gordon J observed in *Love v Commonwealth* ('*Love*'), if owing allegiance to a foreign power is a sufficient condition of alienage, then all dual citizens are aliens.<sup>133</sup> Although this was the Commonwealth's submission in *Alexander*, Edelman J – the only judge to expressly consider the submission – appropriately rejected it: it would be nonsensical if such a large proportion of the permanent population of Australia<sup>134</sup> were aliens.<sup>135</sup> Indeed, due to some foreign countries' laws, it is possible for people who were born in Australia to Australian citizens, and who have always lived in Australia, to have unknowingly obtained foreign citizenship by descent.<sup>136</sup> To describe such persons as aliens must certainly '[stretch] the application of alien beyond breaking point'.<sup>137</sup>

Second, and conversely, if owing allegiance to a foreign power is a *necessary* condition of the definition of alienage, then stateless persons, who owe no obligations to any sovereign power, would not be aliens, despite potentially having no connection to Australia.<sup>138</sup> Aside from being wholly illogical, this would run counter to the Court's conclusion in *Koroitamana v Commonwealth* that the stateless plaintiffs, neither of whom had any citizenship despite being entitled to obtain a foreign one, were aliens.<sup>139</sup>

Finally, it would be highly undesirable as a matter of constitutional principle, and a threat to sovereignty, for the legislative capacity of the Commonwealth Parliament to depend on foreign law.<sup>140</sup> This would be the state of affairs if owing obligations to a foreign power was suggestive of alienage, because '[w]hether a person has the status of a subject or a citizen of a foreign power necessarily depends upon the law of the foreign power'.<sup>141</sup> Gordon J, who made this argument in *Love*, acknowledged that the constitutional prohibition on foreign citizens serving as

131 See also *ibid* 240 [246] (Nettle J); *Singh* (n 37) 351 [58] (McHugh J).

132 See, eg, *Singh* (n 37) 398 [200] (Gummow, Hayne and Heydon JJ); *Ame* (n 98) 458 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Nolan* (n 37) 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohy JJ), quoting *Milne v Huber* (1843) 17 Fed Cas 403, 406. Cf *Love* (n 35) 188 [66] (Bell J).

133 *Love* (n 35) 268 [317] (Gordon J).

134 Although the Census does not collect data on the number of dual citizens in Australia, the 2021 Census data reveals that 27.6% of the population were born overseas: 'Cultural Diversity: Census', *Australian Bureau of Statistics* (Web Page, 28 June 2022) <<https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/2021>>. This suggests that Australia likely has a sizeable population of dual citizens.

135 *Alexander* (n 3) 405 [182]. See also *Love* (n 35) 268 [318] (Gordon J).

136 See, eg, *Re Canavan* (2017) 263 CLR 284.

137 *Alexander* (n 3) 406 [184] (Edelman J).

138 *Love* (n 35) 268 [316] (Gordon J).

139 *Koroitamana* (n 28) 39 [14]–[15] (Gleeson CJ and Heydon J), 46 [49] (Gummow, Hayne and Crennan JJ), 55 [83] (Kirby J).

140 See *Love* (n 35) 268 [320] (Gordon J). See also *Pochi* (n 25) 109 (Gibbs CJ).

141 *Re Canavan* (n 136) 304 [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

parliamentarians, in section 44(i) of the *Constitution*, does depend on foreign law.<sup>142</sup> However, her Honour noted that section 44(i), unlike the aliens power, ‘is not a head of legislative power’.<sup>143</sup> As such, considerations of parliamentary sovereignty are inapplicable. In fact, as her Honour also observed, ‘had the framers of the Constitution intended to make “aliens” in s[ection] 51(xix) a test of foreign allegiance, they could have used the language employed in s[ection] 44(i)’.<sup>144</sup> Thus, rather than detracting from it, section 44(i) provides further weight to the argument that the test for alienage is not foreign allegiance. Therefore, a lack of allegiance to Australia suggests alienage, and conversely, owing allegiance to Australia suggests non-alienage. This begs the question: what is meant here by ‘Australia’? The following analysis answers that question in a way that ensures the continuing appropriateness of allegiance as a concept in modern constitutional law.

### C Is Allegiance Still a Relevant Concept in Contemporary Australia?

An argument sometimes advanced against defining alienage by reference to allegiance is that allegiance is an inappropriate concept to capture the citizen–state relationship in contemporary Australia. A notable proponent of this view is Professor Helen Irving, who contends that allegiance ‘connotes ... obedience to the sovereign’, which is ‘a disposition of submission or subordination ... incompatible with democratic self-government’.<sup>145</sup> This echoes the concerns of Maximilian Koessler, who described the term allegiance as ‘archaic’ and declared it inappropriate for usage in the modern, no-longer feudal, world,<sup>146</sup> and those of Associate Professor Shai Lavi, who claimed that allegiance ‘presuppose[s] the hierarchical subordination of subjects to the sovereign, an idea alien to democratic principles’.<sup>147</sup>

This article takes the doctrinal view that, given a lack of allegiance to Australia was the essential meaning of alienage at Federation, notions of allegiance cannot be dispensed with for the purposes of interpreting section 51(xix). However, within these limits on interpretation, I adopt a conception of allegiance that should assuage the concerns of Irving and others regarding the ongoing relevance of allegiance. Specifically, I posit that in contemporary Australia, allegiance is owed by an individual to the body politic or the people of Australia, rather than to the monarch.<sup>148</sup>

Allegiance denotes a bilateral relationship, whereby an individual is said to owe allegiance to a sovereign entity.<sup>149</sup> Traditionally, this was the monarch of England.<sup>150</sup> Although at the time of *Calvin’s Case* this allegiance was ‘due to the

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142 *Love* (n 35) 268–9 [320].

143 *Ibid.*

144 *Ibid* 268 [319].

145 Irving, *Allegiance, Citizenship and the Law* (n 104) 9.

146 Maximilian Koessler, “‘Subject’, ‘Citizen’, ‘National’, and ‘Permanent Allegiance’” (1946) 56(1) *Yale Law Journal* 58, 68–9 <<https://doi.org/10.2307/793250>>.

147 Shai Lavi, ‘Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach’ (2011) 61(4) *University of Toronto Law Journal* 783, 795 <<https://doi.org/10.1353/tlj.2011.0040>>.

148 Cf *Chetcuti* (n 26) 655 [105] (Steward J).

149 *Stepney Election* (n 124) 62 (Lord Coleridge CJ for the Court).

150 *Salmond* (n 104) 50.

natural person of the King',<sup>151</sup> at least by the late 19<sup>th</sup> century it was recognised that 'to the King in his politic, and not in his personal capacity, is the allegiance of his subjects due'.<sup>152</sup> Furthermore, the emergence of Australia as an independent nation with a distinct citizenship bifurcated the Crown, such that the Australian head of state is now the monarch *in right of Australia*.<sup>153</sup> Thus, in *McM v C [No 2]*, McLelland J found that 'allegiance to the Crown of the United Kingdom has been superseded by allegiance to the Queen in her capacity as Queen of Australia'.<sup>154</sup> Therefore, if the sovereign entity to whom allegiance is owed is the monarch, that monarch would now be the King in right of Australia, in his politic rather than his natural person.<sup>155</sup>

However, there is a strong argument that, at least following the passage of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK), sovereignty resides in the body politic, or the people.<sup>156</sup> Popular sovereignty has never been universally accepted,<sup>157</sup> but most academic discussion has focused on the binding power of the *Constitution*.<sup>158</sup> The issue relevant to this article is narrower: who is the sovereign body to whom allegiance is owed? Admittedly, the monarch is the head of state, and the *Constitution* uses the phrase 'subject of the Queen'.<sup>159</sup> However, there are also references to 'the people'.<sup>160</sup> Further, allegiance owed to the people accords with the notion that the *Constitution* establishes a system of 'representative government ... in which the elected representatives exercise sovereign power on behalf of the Australian people'.<sup>161</sup> The High Court has previously endorsed the proposition that the people are sovereign: for example, Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* said that 'the *Australia Act 1986* (UK) ... recognized that ultimate sovereignty resided in the Australian people'.<sup>162</sup> This view also resolves

151 *Calvin's Case* (n 108) 389 (Sir Edward Coke).

152 *Stepney Election* (n 124) 65–6 (Lord Coleridge CJ for the Court).

153 *Nolan* (n 37) 185–6 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ). See also *Chetcuti* (n 26) 629 [34] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 635 [52] (Edelman J); *Royal Style and Titles Act 1973* (Cth).

154 (1980) 1 NSWLR 27, 44 [46].

155 The *Constitution* extends the provisions that mention the Queen – in reference to Queen Victoria – to 'Her Majesty's heirs and successors', currently King Charles III: at cl 2.

156 Liam Boyle, 'The Significant Role of the *Australia Acts* in Australian Public Law' (2019) 47(3) *Federal Law Review* 358, 366 <<https://doi.org/10.1177/0067205X19856501>>; GJ Lindell, 'Why Is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29, 37 <<https://doi.org/10.1177/0067205X8601600102>>.

157 See, eg, Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 (October) *Law Quarterly Review* 590, 597; George Duke, 'Popular Sovereignty and the Nationhood Power' (2017) 45(3) *Federal Law Review* 415, 420–1, 427, 443 <<https://doi.org/10.22145/flr.45.3.3>>. Cf Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "the People" and the *Australian Constitution*: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36, 56–7 <[doi.org/10.2139/ssrn.3455096](https://doi.org/10.2139/ssrn.3455096)>.

158 See, eg, Duke (n 157) 422; Lindell (n 156).

159 *Constitution* ss 34(ii), 117.

160 *Ibid* Preamble para 1, ss 7, 24.

161 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ) ('*ACTV*'). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72, 74 (Deane and Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 180 (Deane J).

162 *ACTV* (n 161) 138. See also *Clubb v Edwards* (2019) 267 CLR 171, 191 [29], 196 [51] (Kiefel CJ, Bell and Keane JJ) ('*Clubb*'); *McGinty v Western Australia* (1996) 186 CLR 140, 199 (Toohey J), 230, 237

the constitutional ‘conundrum’ raised by David A Wishart in relation to allegiance being owed to the monarch: namely, how can allegiance be owed to a single sovereign in a federal system where the monarch exists as a distinct polity for the Commonwealth and the states?<sup>163</sup>

Importantly, a conception of allegiance that casts the people as the sovereign body to whom allegiance is owed, rather than the monarch, does not involve the element of subordination or obedience that Irving observes is incongruous with modern democratic principles. Such a conception would remove, as the point of reference, the hierarchical relationship between an individual and the monarch, and replace it with one that endorses a view of the state wherein government powers derive from the sovereign people. This view is not only compatible with democratic self-government but is its central premise.<sup>164</sup>

Notably, however, this conception of allegiance does not adopt the view of Edelman J in *Alexander* that equates allegiance with membership of the community.<sup>165</sup> These are distinct concepts, allegiance being an old common law doctrine that imports specific principles. Thus, whilst this article’s conception of allegiance addresses important concerns, it also preserves the essential meaning of alienage as a lack of allegiance to Australia.

To conclude, this Part argued that a person who owes allegiance to the body politic or the people of Australia is not capable of answering the description of an alien in the ordinary understanding of the word and is outside the reach of the aliens power. Conversely, a person who does not owe such allegiance is within the reach of the power. Since I have assumed that a natural-born citizen is outside the reach of the power, I therefore also assume that such persons owe allegiance.

This Part’s conclusion has a significant implication for this article. If allegiance to Australia takes a person outside the reach of the aliens power, the *only* type of conduct that can bring that person within the reach of the power is conduct that somehow severs that relationship. The following Part examines whether conduct can have this effect without the person so intending.

#### IV REPUDIATION OF ALLEGIANCE

This Part argues that an individual cannot, by engaging in certain conduct, unintentionally repudiate their allegiance to Australia and thereby become an alien. Specifically, it argues that unintentional repudiation of allegiance is inconsistent with, first, the principles of allegiance, second, contemporary constitutional doctrine, and third, the law of treason.

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(McHugh J); *Commissioner of Taxation v Stone* (2005) 222 CLR 289, 312 [79] (Kirby J).

163 David A Wishart, ‘Allegiance and Citizenship as Concepts in Constitutional Law’ (1986) 15(4) *Melbourne University Law Review* 662, 702–4; Patrick Keane, ‘The People and the Constitution’ (2016) 42(3) *Monash University Law Review* 529, 532.

164 See generally Duke (n 157) 415–16, 436; *ACTV* (n 161) 137 (Mason CJ); *McCloy v New South Wales* (2015) 257 CLR 178, 226 [110]–[111] (Gageler J).

165 *Alexander* (n 3) 422 [232].

## A Inconsistency with the Principles of Allegiance

### 1 *Inconsistency with the Principles of Allegiance Generally*

Although there are differing accounts of the content of allegiance,<sup>166</sup> it is generally agreed that allegiance denotes some obligation.<sup>167</sup> Conduct that repudiates that allegiance must, logically, be conduct that *breaches* that obligation. However, as with any obligation, breaching conduct merely results in the obligation being breached, which can have its own consequences.<sup>168</sup> It does not result in the obligation no longer being owed. For example, if a person levies war against Australia, they may breach their allegiance, but this does not remove their obligation to refrain from this conduct. An individual could repeatedly engage in conduct that violates allegiance, and still owe allegiance, just as an individual could repeatedly engage in criminal behaviour or commit the tort of negligence, without repudiating the obligation to obey the criminal law or to fulfil their duty of care, respectively.

Against this reasoning, it could be said that allegiance differs from ordinary obligations, in that a person can voluntarily renounce it, most obviously in Australia by renouncing their citizenship.<sup>169</sup> As the plurality suggested in *Alexander*, if voluntary renunciation is permitted, allegiance could also be repudiated through conduct, though unintentionally.<sup>170</sup> However, this argument fails to appreciate a fundamental distinction. On the one hand, a person can voluntarily renounce an obligation and thereby excuse themselves from future liability for conduct that breaches that obligation (at least in respect of liability for breach of that obligation). On the other, a person can simply engage in conduct that breaches the obligation, while bound by that obligation. The latter does not dispel the obligation. Thus, conduct can breach, but not repudiate, allegiance.

The notable exception is found in contract law. Under the principles of contract, a party can terminate a contract in response to another party's breach of an essential term, sufficiently serious breach of an intermediate term, or repudiation of the contract, which is 'conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations'.<sup>171</sup> If contractual principles applied to the relationship of allegiance and reciprocal protection, a person could repudiate their allegiance through conduct that evinces an intention not to be bound, and the state could deem this to end the relationship entirely. This is consistent with Wishart's

166 See, eg, Ashwini Vasanthakumar, 'Treason, Expatriation and the So-Called Americans: Recovering the Role of Allegiance in Citizenship' (2014) 12(1) *Georgetown Journal of Law and Public Policy* 187, 197–200; Irving, *Allegiance, Citizenship and the Law* (n 104) 21; Wishart (n 163) 705.

167 Irving, *Allegiance, Citizenship and the Law* (n 104) 15; Salmond (n 104) 51–2; *Calvin's Case* (n 108) 382 (Sir Edward Coke).

168 See below Part IV(C).

169 *Citizenship Act* (n 6) s 33(1).

170 See *Alexander* (n 3) 362 [50] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]).

171 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, 135 [44], 136–40 [47]–[56] (Gleeson CJ, Gummow, Heydon and Crennan JJ). See also *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237, 259 [58] (Gleeson CJ, Kirby, Heydon, Crennan and Kiefel JJ); *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 629 [173] (Nettle, Gordon and Edelman JJ).

observation that contract theories justify citizenship deprivation.<sup>172</sup> The plurality expressly disavowed an analogy between contractual principles and the impugned provision in *Alexander*.<sup>173</sup> Nevertheless, by referring to conduct that Parliament could reasonably treat as being ‘so reprehensible as to be incompatible with the common bonds of allegiance to the Australian community’, their Honours adopted an approach that implicitly analogises allegiance and contract principles.<sup>174</sup>

However, although the citizen–state relationship has been described as contractual by some theorists,<sup>175</sup> as has the allegiance and reciprocal protection that characterises that relationship,<sup>176</sup> Professor Glanville L Williams must be correct in observing that ‘the analogy of the private-law doctrine of discharge by breach of contract ... is not ... regarded as relevant’ to the doctrine of allegiance.<sup>177</sup> Unlike a contract, allegiance, whether arising from birth in the territory, descent, or some combination of the two, is not an agreement voluntarily entered into,<sup>178</sup> involves an aspect of permanence,<sup>179</sup> and carries state-imposed criminal consequences for its breach through the law of treason.<sup>180</sup> Admittedly, Williams suggested that an actual violation of allegiance may justify the Crown withdrawing its correlative protection, which could give rise to a contract analogy.<sup>181</sup> However, he also noted that even when the state does not provide actual protection, the individual still owes allegiance.<sup>182</sup> That position strongly refutes the suggestion that the relationship is contractual.

## 2 *Inconsistency with the Principles of Allegiance at Federation*

The above argument is also supported by the legal principles regarding allegiance that applied at Federation. The allegiance owed by non-alien subjects was traditionally considered permanent, both in that it bound a subject even outside the jurisdiction, and in that it could not be removed by an action of the individual who owed it.<sup>183</sup> Over time, the latter qualification was removed in respect of voluntary renunciations authorised by statute,<sup>184</sup> but this was a specific exception to permanent allegiance created in recognition of an individual’s right or freedom

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172 Wishart (n 163) 667.

173 *Alexander* (n 3) 365 [61] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]).

174 *Ibid* 362–3 [51] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]).

175 See generally Ian Turner, ‘Conceptualising a Protection of Liberal Constitutionalism Post 9/11: An Emphasis upon Rights in the Social Contract Philosophy of Thomas Hobbes’ (2020) 24(10) *International Journal of Human Rights* 1475 <<https://doi.org/10.1080/13642987.2020.1725745>>; Joseph H Kary, ‘Contract Law and the Social Contract: What Legal History Can Teach Us about the Political Theory of Hobbes and Locke’ (1999) 31(1) *Ottawa Law Review* 73.

176 See, eg, Wishart (n 163) 699.

177 Williams (n 106) 57.

178 The exception is naturalised persons, who are outside the scope of this article.

179 See, eg, Salmond (n 104) 50, 57.

180 See below Part IV(C).

181 Williams (n 106) 57.

182 *Ibid* 56–7. See also *Joyce v DPP (UK)* [1946] AC 347, 372 (Lord Jowitt LC, Lord Simonds agreeing at 373, Lord Macmillan agreeing at 373, Lord Wright agreeing at 374) (*‘Joyce’*); Irving, *Allegiance, Citizenship and the Law* (n 104) 103.

183 Salmond (n 104) 50–1; Blackstone (n 106) 237.

184 See above n 128 and accompanying text.



to expatriate themselves.<sup>185</sup> Overall, the allegiance owed by non-alien was and remains a relatively permanent one,<sup>186</sup> in comparison to the temporary and local allegiance owed by friendly resident aliens, which can be dispelled by the person simply choosing to leave the country.<sup>187</sup> Indeed, some element of permanency *must* be recognised for there to remain any meaningful distinction between the two types of allegiance, and thus for the allegiance that is definitionally relevant to alienage to have any content. Thus, for example, Salmond said of the allegiance owed by non-alien that ‘no man will be rejected from his allegiance without his own consent’,<sup>188</sup> and it was argued by the successful defendant in *Thomas v Acklam* (‘*Thomas*’) that allegiance ‘cannot be dissolved by either party without the concurrence of the other’.<sup>189</sup> This emphasis on consent and concurrence in ending the relationship confirms that element of relative permanence, and suggests that an individual’s conduct cannot repudiate allegiance without the individual intending that result. The fact that voluntary renunciation was permitted as an exception to permanence only because it was seen as an individual’s right reaffirms this idea, rather than detracting from the permanence of the relationship. Legislation authorising this exception is the state’s consent to the individual’s exercise of their right.<sup>190</sup>

Arguably, these statements by Salmond and in *Thomas* were made while discussing US independence, where the position was that a British subject could become an alien by remaining in the US after it became independent,<sup>191</sup> but could retain their allegiance if they had left the US at this time.<sup>192</sup> This might suggest that pre-Federation, a person’s conduct could sever allegiance. However, the position in respect of US independence is a consequence of the termination of allegiance following a change in sovereign borders, which is a different category of permissible citizenship deprivation.<sup>193</sup> It was not an approval of repudiation through conduct. Thus, in *Stepney Election*, the Court of Queen’s Bench found that these cases did not hold that a subject could ‘elect’ between allegiances through conduct.<sup>194</sup> Rather, they recognised that a person remaining in the US after independence would gain citizenship of that country and lose allegiance to the British Crown as a result of the *Treaty of Paris* (1783) (which formally recognised independence), whereas a person who left would never lose that allegiance.<sup>195</sup> It was therefore not conduct that severed the allegiance, that relationship being considered relatively permanent before and at Federation.

185 See above n 96 and accompanying text.

186 See *Love* (n 35) 244 [250]–[252] (Nettle J). Cf *Alexander* (n 3) 359–60 [40] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]).

187 Salmond (n 104) 50–1.

188 Ibid 57.

189 (1824) 2 B & C 779; 107 ER 572, 577 (Parke) (during argument) (‘*Thomas*’).

190 See *Afroyim* (n 15) 258 (Black J for the Court).

191 *Thomas* (n 189) 578 (Abbott CJ for the Court).

192 *Auchmuty v Mulcaster* (1826) 5 B & C 770; 108 ER 287, 289 (Abbott CJ), 289 (Bayley J).

193 See above nn 97–8 and accompanying text.

194 *Stepney Election* (n 124) 60–1 (Lord Coleridge CJ for the Court). Cf Salmond (n 104) 57.

195 *Stepney Election* (n 124) 60–1 (Lord Coleridge CJ for the Court).

### 3 Conclusion

Unintentional repudiation of allegiance through conduct is inconsistent with the principles of allegiance, both generally and at Federation. A concern may be that at Federation there were select examples in the UK – explored in the following discussion – of conduct demonstrating an allegiance to a foreign state being treated as sufficient to repudiate allegiance. According to the preceding discussion, such examples create an inconsistency. However, the following analysis will explain why, regardless, constitutional doctrine in modern Australia should not recognise these or other instances of potentially repudiating conduct.

#### B Inconsistency with Contemporary Constitutional Principles

This section argues that extending the aliens power to those whose conduct is said to demonstrate a repudiation of allegiance to Australia is inconsistent with contemporary constitutional principles. Necessarily, the type of conduct that is said to repudiate allegiance depends upon the breadth of the obligation that allegiance entails. This article does not adopt a stance as to this breadth. Rather, three types of conduct, each either expressly or implicitly suggested by various members of the Court in *Alexander* to be capable of repudiating allegiance, are explored: wrongdoing, conduct that demonstrates allegiance to a foreign state, and the expression of seditious political views. In my view, none of this conduct should attract the status of alienage, and thus, none can repudiate allegiance. Given these are broad categories that cover most conduct that could be deemed repudiatory, I conclude that conduct cannot repudiate allegiance.

#### 1 Repudiation by Wrongdoing

Edelman J suggested in *Alexander* that a person could repudiate their allegiance to Australia by ‘wrongdoing [that] is so extreme that it can be judged to be inconsistent with continuing membership of the political community’.<sup>196</sup> However, conduct that repudiates allegiance and renders a person an alien must be something other than ‘wrongdoing’, if what is meant by wrongdoing is illegal or unlawful behaviour. That is because the obligation to obey the law, at least when within the jurisdiction, applies to both resident aliens and non-aliens due to temporary allegiance.<sup>197</sup> Thus, the obligation encapsulated by permanent allegiance must entail something more than obedience to the law,<sup>198</sup> and conduct that is said to repudiate such allegiance and render a person subject only to temporary allegiance must have some other feature than simply being illegal. Evidently, the conduct may *also* be illegal, but it cannot repudiate allegiance merely on that basis.

The extremity of the wrongdoing is also irrelevant: one can conceive of very serious criminal conduct, such as murder, serious sexual offences, or organised crime, that cannot sensibly be seen as bearing on a person’s constitutional relationship with the nation, despite its reprehensibility and incompatibility with

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<sup>196</sup> *Alexander* (n 3) 422–3 [233].

<sup>197</sup> Irving, *Allegiance, Citizenship and the Law* (n 104) 4 n 8, 9.

<sup>198</sup> See *Love* (n 35) 244 [250] (Nettle J).

community norms. This is particularly so because the criminal law envisions such conduct, and the constitutional structure creates systems to punish it. So much was recognised by the High Court in *Roach v Electoral Commissioner*, who declared that '[p]risoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration.'<sup>199</sup> Therefore, it is inconsistent with the contemporary constitutional view of the citizen–state relationship to deem a person an alien merely because they have engaged in extreme wrongdoing.

## 2 Repudiation by the Demonstration of Allegiance to a Foreign Power

In contrast to Edelman J, the plurality in *Alexander* found that conduct capable of repudiating allegiance need not be illegal.<sup>200</sup> Their Honours argued that the *Constitution's* framers were aware of the statutory position in the UK at Federation, which provided for the involuntary citizenship deprivation of people who were naturalised in a foreign state, and of women who married aliens.<sup>201</sup> Implicitly, such examples reflect the view that a person repudiates their allegiance by affirming an allegiance to a foreign power. The plurality's use of these examples suggests that their Honours considered them to remain within the legislative power of the Commonwealth Parliament.

There are many problems with interpreting the aliens power as extending to people who engage in this conduct. Both naturalisation in a foreign state and marrying an alien are examples of innocuous conduct in which, at least cumulatively, a sizeable group of people in contemporary Australia participate. An interpretation of the aliens power that encompasses such a significant group of persons with otherwise strong ties to Australia must be rejected as creating an incoherent distinction between aliens and non-aliens.<sup>202</sup> Additionally, deeming women who marry aliens to have repudiated their allegiance to Australia would also be discriminatory and depend upon an outdated view of female subordination which assumes that a woman owes allegiance to her husband and therefore to her husband's state.<sup>203</sup> That view contradicts the notion that women form part of the people who exercise sovereign power in Australia.<sup>204</sup>

Admittedly, these examples were permitted at Federation as exceptions to the general principles of permanence. This article earlier considered the position at Federation important to constitutional interpretation.<sup>205</sup> However, although the position at Federation can inform the connotation of alienage, the changing factual circumstances arising from the normalisation of this conduct, and changing social views, suggest a corresponding change in the denotation of the aliens power. It would now be nonsensical, and a denial of women's sovereignty, to interpret the

199 (2007) 233 CLR 162, 199 [84] (Gummow, Kirby and Crennan JJ).

200 *Alexander* (n 3) 365 [60] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]).

201 See above n 53 and accompanying text.

202 See above nn 133–7 and accompanying text.

203 See Irving, *A Gendered History* (n 20) 71.

204 See *Clubb* (n 162) 196 [51] (Kiefel CJ, Bell and Keane JJ).

205 See above nn 115–18 and accompanying text.

aliens power as extending to those who engage in this innocuous conduct. Modern constitutional doctrine should not allow this.

### 3 *Repudiation by the Expression of Seditious Political Views*

Conduct considered to repudiate allegiance could also include expressing or advancing seditious political views. Ashwini Vasanthakumar claims that a ‘thicker’ conception of allegiance requires an individual to ‘adopt a particular attitude’ of affection or attachment towards the state and to ‘cultivate civic virtue’.<sup>206</sup> This was reflected in the plurality’s reference to conduct that is ‘so incompatible with the values of the Australian people’,<sup>207</sup> and Steward J’s and Edelman J’s examples of ‘actions which seek to destroy or gravely harm the fundamental and basal features of the nation guarded by its *Constitution*, such as representative democracy and the rule of law’ and ‘actions directed at overthrowing state institutions where such conduct amounts to a clear rejection of allegiance to Australia’.<sup>208</sup> Crucially, many political positions explicitly reject attitudes of affection or attachment to the state, are contrary to the values generally held by the Australian people, or seek to change state institutions. Irving argues that, under *Alexander*, membership of the Communist Party could be ‘disallegiant’ conduct ‘on the footing that communism promoted a scheme for destroying representative democracy’, one of the values of the Australian people.<sup>209</sup> Other examples of potentially repudiatory conduct, at least on Steward J’s and Edelman J’s definition, could be actions taken in support of the Western Australian secessionist movement, because it pursues the partial dissolution of the federal compact under the *Constitution*, or the Australian republican movement, as it seeks to remove the British monarchy, a state institution, from the Australian constitutional structure. Anti-monarchist sentiment has previously been considered disallegiant.<sup>210</sup>

To extend the aliens power to individuals who hold or advocate seditious political viewpoints would be antithetical to the principles of representative government that underpin the *Constitution*. As Irving has observed, such principles must value dissenting opinions.<sup>211</sup> Although Irving uses these examples to argue for the rejection of allegiance as a conceptual framework for the citizen–state relationship, the concerns can be allayed by finding that allegiance cannot be repudiated through this conduct, given this article has already found allegiance to be doctrinally relevant to alienage.<sup>212</sup> Further, it is not to the point that a law stripping citizenship in response to the expression of a political viewpoint might be invalid on the basis of the implied freedom of political communication. It is contrary to the very principles of representative democracy, on which that implied

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206 Vasanthakumar (n 166) 198–9.

207 *Alexander* (n 3) 365 [62] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]).

208 *Ibid* 443 [290] (Steward J, Edelman J agreeing at 422–3 [233]).

209 Irving, ‘Existential Citizenship and Metaphorical Allegiance’ (n 8).

210 See Irving, *Allegiance, Citizenship and the Law* (n 104) 130.

211 Irving, ‘Existential Citizenship and Metaphorical Allegiance’ (n 8).

212 See above Part III(A).

freedom is based, to find that a person can become an alien to Australia merely by holding or advancing seditious political views.

#### 4 Conclusion

However repudiatory conduct is defined, it encompasses behaviour that cannot result in alienage under modern constitutional principles. Notably though, the High Court's description of conduct repudiating allegiance in *Alexander* also includes treasonous conduct. The implications of the doctrine of treason are addressed in the following discussion, which argues that repudiation of allegiance cannot stand alongside a substantive crime of treason.

### C Inconsistency with the Doctrine of Treason

#### 1 Treason as a Violation of Allegiance

The crime of treason has endured in English law for many centuries.<sup>213</sup> Used in this article to denote 'high' treason,<sup>214</sup> treason remains on statute books in many jurisdictions around Australia and the common law world.<sup>215</sup> Definitions differ,<sup>216</sup> but treason generally includes either plotting or causing the death of the monarch or heir, levying war against the monarch or state, and adhering or providing 'aid and comfort' – that is, assistance – to enemies of the monarch or state.<sup>217</sup>

Treasonous conduct is perhaps the 'paradigm' example of conduct that violates allegiance.<sup>218</sup> As Williams said, '[t]he meaning of the duty of allegiance is clear: it signifies that one must not commit treason'.<sup>219</sup> The High Court's descriptions in *Alexander* of conduct that could repudiate allegiance may extend beyond treasonous conduct,<sup>220</sup> but there can be little doubt that their Honours' references to 'conduct exhibiting such extreme enmity to Australia',<sup>221</sup> fighting for enemy states at war with Australia,<sup>222</sup> and actions that seek to overthrow state institutions,<sup>223</sup> would, at the very least, include treason. Despite this, no judgment in *Alexander* considers the implications of treason for the conclusion reached in the case.

213 See, eg, *Treason Act 1351*, 25 Edw 3, c 2 ('*Treason Act 1351*'). See also Daniel J Hill and Daniel Whistler, 'Thought Crime and the *Treason Act 1351*' (2022) 43(3) *Liverpool Law Review* 517, 519 <<https://doi.org/10.1007/s10991-022-09296-5>>.

214 See generally Irving, *Allegiance, Citizenship and the Law* (n 104) 91 n 1.

215 See, eg, *Cth Criminal Code* (n 44) ss 80.1, 80.1AA; *Crimes Act 1900* (NSW) ss 11–12, 16; *Criminal Law Consolidation Act 1935* (SA) ss 6–7, 10; *Criminal Code Act 1924* (Tas) ss 56, 59; *Crimes Act 1958* (Vic) s 9A; 18 USC § 2381 (1948); *Treason Act 1351* (n 213); *Treason Felony Act 1848*, 11 & 12 Vict, c 12.

216 See, eg, Hill and Whistler (n 213) 524.

217 See above n 215. See also Michael Lobban, 'The Travels of Treason' (2024) 87(1) *Modern Law Review* 24, 24, 26 <<https://doi.org/10.1111/1468-2230.12826>>.

218 Lavi (n 147) 799. See also Irving, *Allegiance, Citizenship and the Law* (n 104) 91.

219 Williams (n 106) 58.

220 See above Part IV(B).

221 *Alexander* (n 3) 357–8 [35] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 376–7 [98]).

222 *Ibid* 395–6 [156] (Gordon J).

223 *Ibid* 443 [290] (Steward J, Edelman J agreeing at 422–3 [233]).

The remainder of this section explores these implications, arguing that the principles of treason suggest that allegiance cannot be repudiated by conduct. The argument relies on general principles, so is not limited to treason in any statute or jurisdiction. Nor does the argument adopt a position regarding the compatibility of treason and democracy.<sup>224</sup>

## 2 Implications of Treason for Allegiance

The crime of treason requires that an obligation of allegiance is owed.<sup>225</sup> Vasanthakumar has explained that ‘[i]n the Anglo-American legal tradition, only those who owe allegiance to the state can commit treason against it’.<sup>226</sup> This is because, as Professor Michael Lobban has observed, ‘[a]t the heart of the offence is the betrayal of one’s allegiance to one’s king’.<sup>227</sup>

This requirement means that repudiation and treason are contradictory principles. The theory of repudiation asserts that by committing a treasonous act, which is a clear violation of allegiance, a person is revealing or effecting their lack of permanent allegiance. However, under the principles of treason, if a person lacks allegiance, they could not have betrayed their allegiance and be guilty of treason. Such a conclusion robs treason of applicability. Irving makes a similar observation: ‘If the conduct that would otherwise count as disallegiance is so extreme that it amounts to an intentional act of self-expatriation, then, in a circular or tautological fashion, the disallegiant person cannot breach his duty of allegiance.’<sup>228</sup> This analysis must at least hold in respect of treason committed outside the jurisdiction: while some type of allegiance is owed by both resident aliens and non-aliens within the jurisdiction,<sup>229</sup> generally – specific exceptions aside<sup>230</sup> – only permanent allegiance is owed outside the jurisdiction.<sup>231</sup>

Irving contends that this contradiction reflects the incoherence of allegiance.<sup>232</sup> However, in my view, the contradiction instead suggests that conduct cannot repudiate allegiance. Treason and allegiance have co-existed for many centuries and are related concepts. It is thus extremely unlikely that the principles of allegiance include a mechanism of repudiation that would leave treason without content. It is more likely that treasonous conduct breaches, but does not repudiate, allegiance. This view preserves both allegiance and treason, and thus is preferable to Irving’s view given allegiance is central to constitutional alienage.

224 See generally Lavi (n 147) 799; George P Fletcher, ‘Ambivalence about Treason’ (2004) 82(5) *North Carolina Law Review* 1611.

225 *Joyce* (n 182) 365 (Lord Jowitt LC, Lord Simonds agreeing at 373, Lord Macmillan agreeing at 373, Lord Wright agreeing at 374).

226 Vasanthakumar (n 166) 203 (citations omitted).

227 Lobban (n 217) 24.

228 Irving, *Allegiance, Citizenship and the Law* (n 104) 107.

229 See generally Wishart (n 163) 694.

230 *Joyce* (n 182) 368 (Lord Jowitt LC, Lord Simonds agreeing at 373, Lord Macmillan agreeing at 373, Lord Wright agreeing at 374).

231 See above n 187 and accompanying text.

232 Irving, *Allegiance, Citizenship and the Law* (n 104) 108.

The argument is exemplified in the dissenting opinion in *Kawakita v United States* ('*Kawakita*').<sup>233</sup> Kawakita was a dual citizen of the US and Japan who had assisted Japan during World War II through his work in a Japanese prisoner of war camp. He was later convicted of treason against the US. Importantly, Kawakita had argued that he did not commit treason because he had impliedly renounced his US citizenship, and therefore did not owe the very allegiance that underpins a treason conviction. The majority of the Supreme Court rejected this defence, finding that Kawakita had not *intended* to renounce his US citizenship. He thus owed allegiance to the US at the time of the treasonous acts. This view rejects the possibility of *unintentional* repudiation of allegiance. In contrast, the minority accepted Kawakita's defence. Their Honours found that because Kawakita's 'whole course of conduct was inconsistent with the retention of United States citizenship', he had unintentionally renounced his allegiance.<sup>234</sup> Therefore, he could not be guilty of treason. As Vasanthakumar wrote, the dissenting opinion considered that Kawakita's 'overt acts [of treason] did not reveal betrayal, but instead, revealed an absence of the very allegiance upon which such betrayal is predicated'.<sup>235</sup> This dissenting view is similar to the High Court's theory in *Alexander* that allegiance can be unintentionally repudiated through conduct inconsistent with allegiance. However, if this view were adopted, it would seem that all treasonous conduct would unintentionally repudiate allegiance. This position would preclude any liability for treason, as it would have for Kawakita. That surely cannot be a sound interpretation of allegiance.

### 3 Does a Temporal Explanation Allow Treason and Repudiation of Allegiance to Co-exist?

Arguably, treason could retain its content if a person who commits a treasonous act commits the offence of treason at that time, and by doing so, *prospectively* repudiates their allegiance.<sup>236</sup> However, there are two problems with this argument. First, it assumes that treason is committed by one distinct act, whereas treason can be, and often is, committed by multiple acts or a continuous course of conduct.<sup>237</sup> If a person prospectively repudiates their allegiance upon their first treasonous act, then treason convictions in cases of multiple or continuous acts cannot encompass the remainder, and potentially the preponderance, of the treasonous conduct. That does not accord with the view taken in treason cases where convictions for multiple overt acts of assistance to enemy states were upheld,<sup>238</sup> or in cases where continuous courses of conduct in working for enemy states were considered treason.<sup>239</sup> It also does not accurately capture the purposes of treason in punishing such conduct.

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233 343 US 717 (1952) ('*Kawakita*').

234 Ibid 746 (Vinson CJ, Black and Burton JJ joining).

235 Vasanthakumar (n 166) 208.

236 See generally Dunham (n 112) 69, 71.

237 See, eg, *Joyce* (n 182); *Kawakita* (n 233); *Cramer v United States*, 325 US 1 (1945) ('*Cramer*'); *Haupt v United States*, 330 US 631 (1947) ('*Haupt*').

238 See, eg, *Cramer* (n 237); *Haupt* (n 237).

239 See, eg, *Kawakita* (n 233); *Joyce* (n 182).

Second, to punish someone for an act on the basis that it betrays an allegiance by which the state asserts that person to be bound, but then to claim that by this act the person has extricated themselves from that obligation and the state can deem the relationship severed, places both the concept of betrayal and allegiance on a nebulous principled footing,<sup>240</sup> and may even be a form of double punishment. Given the significance of allegiance to the constitutional concept of alienage, we should reject an interpretation of allegiance that allows for such contradictory distortion on the basis of a legal technicality.

Therefore, the law of treason reveals that the principles of allegiance do not consider even the most egregious breaches of allegiance to unintentionally repudiate allegiance. It follows that no other conduct can have this effect.

#### D Conclusion

This Part demonstrated that a person's conduct cannot repudiate their allegiance to Australia. First, repudiation of allegiance does not accord with the principles of allegiance. Second, it would offend contemporary constitutional principles to extend the aliens power to those who engage in potentially repudiatory conduct. Third, the law of treason indicates that even the most extreme violations of allegiance cannot repudiate allegiance.

As the conclusion emphasises, this means that a person cannot become an alien merely by engaging in certain conduct. Therefore, conduct alone does not provide a basis for citizenship deprivation pursuant to the aliens power.

### V CONCLUSION: THE ALIENS POWER DOES NOT SUPPORT INVOLUNTARY CITIZENSHIP DEPRIVATION IN RESPONSE TO A CITIZEN'S CONDUCT

Contrary to the High Court's reasons in *Alexander*, this article argues that the aliens power in section 51(xix) of the *Constitution* does not support a law purporting to involuntarily deprive a natural-born Australian citizen of their citizenship in response to their conduct. That is because a person's conduct cannot repudiate the allegiance that exists between a non-alien and Australia, so as to render that person an alien, unless the person so intends.

This article's claim fails at its first hurdle if the power in section 51(xix) encompasses a general power to legislate for citizenship deprivation that can be exercised for any reason the Parliament deems fit, as the plurality suggested in *Alexander*. Hence, after explaining the aliens power and *Alexander*, Part II confronted this possibility and established that the aliens power does not extend this far. Specifically, an involuntary citizenship deprivation law that applies to a natural-born citizen, who is otherwise outside the reach of the aliens power, will not ordinarily be a law with respect to aliens. Rather, some constitutionally-relevant circumstance must exist to bring that citizen within the reach of the aliens

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240 See generally Vasanthakumar (n 166) 206.



power. These circumstances cannot be defined by Parliament lest the *Pochi* limit be nullified. This conclusion engaged the article's central inquiry: can a citizen's conduct be a constitutionally-relevant circumstance that renders them an alien?

In answering that question, Part III examined the meaning of alienage and its relationship to allegiance. It found that allegiance was definitionally relevant to alienage both historically and at Federation. Adopting an assumption of constitutional interpretation that the meaning of a constitutional term at Federation supplies or informs its meaning in contemporary Australia, that finding indicated that allegiance is the essential meaning or central characteristic of alienage. Specifically, I concluded that a lack of allegiance to Australia brings a person within the reach of the aliens power, and allegiance to Australia takes a person outside the reach of the power. I addressed concerns that allegiance is an undemocratic concept by characterising this allegiance as being owed to the people rather than the monarch.

Since Part III established that allegiance to Australia takes a person outside the reach of the aliens power, it followed that the only type of conduct that could bring a person within the reach of the power would be conduct that repudiates this allegiance. Part IV examined whether conduct can have this effect without the citizen so intending and concluded that it cannot. First, unintentional repudiation of allegiance is inconsistent with the principles of allegiance, generally and at Federation. Second, unintentional repudiation offends contemporary constitutional principles relating to the citizen–state relationship, the sovereignty of the people, and representative government. Third, the doctrine of treason reveals that even flagrant violations of allegiance cannot repudiate allegiance. Therefore, conduct cannot unintentionally repudiate allegiance and bring a person within the reach of the aliens power. Citizenship deprivation in response to a citizen's conduct is unsupported by section 51(xix) of the *Constitution*.

This conclusion is, in some ways, limited. Citizenship deprivation could be supported by a different head of legislative power. Yet, in a constitutional system that envisages a federal Parliament with powers granted and circumscribed by a written constitution, it is critical that legislation enacted by that Parliament be supported by an identifiable authority to do so. That is particularly so when the consequence of such legislation is, to quote Warren CJ once again, 'the total destruction of the individual's status in organized society'.<sup>241</sup>

In closing, at its heart, this article postulates the following relationship between Australian citizens and Australia: a natural-born Australian citizen may engage in conduct that is fundamentally at odds with the shared values of the community. That conduct may be contrary to Australia's national security interests. It may run counter to any obligation thought to be owed by an individual to the state. It may even be reprehensible. But that person's relationship to the nation is not severed by virtue of this conduct alone. They are not, in any sense of the word, an alien.

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241 *Trop* (n 2) 101.

