Indigeneity and Membership in Australia after *Love*

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The place and status of First Nations peoples within Australia has long been contested. In the 2020 decision of *Love v Commonwealth*, the High Court of Australia declared that Aboriginal and Torres Strait Islander peoples who satisfied the tripartite definition from *Mabo v Queensland (No 2)* were not aliens, even if they were not Australian citizens. The decision recognised the unique connection First Nations peoples have with the lands and waters of Australia, but it left many unopen questions. The immediate political reaction also suggested many non-Indigenous Australians remain uncomfortable with accepting the unique position First Nations peoples hold in this country. In this chapter, we tease out the legal and political challenges to Indigeneity and membership raised by *Love*.

Introduction

Aboriginal and Torres Strait Islander peoples have occupied, possessed, and cared for the Australian continent for at least 60,000 years.[1] Despite their enduring spiritual connection to the lands and waters that comprise the territorial community of Australia, however, the place and status of First Nations peoples within the Australian political community has long been contested. For many years following invasion and colonisation, discriminatory law and practice sought to distance and exclude Aboriginal and Torres Strait Islander peoples from the broader non-Indigenous community. This approach continued into the early decades of the Australian Commonwealth. First Nations peoples did not participate and played no role in the drafting of the Australian Constitution. In 1902, they were expressly denied the right to vote for the Australian Parliament.

Over the course of the twentieth century exclusion and restrictions were progressively removed. This has been underpinned by significant shifts in constitutional and common law. In 1967, Australians voted overwhelmingly in a referendum to alter the Constitution and amend two discriminatory references to Aboriginal and Torres Strait Islander peoples.[2] In 1992, in the case of *Mabo v Queensland (No 2)*,[3] the High Court held that the idea that Australia was "terra nullius", or empty land, at the time of British occupation was a legal fiction, and that native title rights existed and were held by all Indigenous persons. Limited native title rights have since been incorporated into statute. Notwithstanding these significant changes, however, legal recognition of First Nations peoples' distinct rights possessed by virtue of their status as prior self-governing communities remains incomplete.

The Australian Constitution offers little guidance in considering the relationship between Indigeneity and membership of the Australian community. In fact, it offers little guidance on membership at all. The constitutional framework that governs membership of the Australian community is infamously focused on maximising parliamentary powers of exclusion. There is no express or clearly implied constitutional concept of citizenship or membership. In 1947 a statutory concept was first introduced, and has remained in place ever since, but it is thin and formal, doing little other than conferring the status of citizenship upon people deemed eligible. Substantive rights in Australia are primarily conferred through a range of other statutes, and for the most part do not hinge upon possession of citizenship. Non-citizens – even if they hold permanent residency and have lived in Australia for their entire lives – remain vulnerable to visa cancellation and removal from Australia in a wide range of circumstances.

Australia's citizenship frameworks, thus, do little to nothing to make space for the unique rights of First Nations peoples. Moreover, while the majority of First Nations peoples hold Australian statutory citizenship, some do not. This may happen, for instance, where a First Nations person is born outside Australia, and they or their parents have not gone through the administrative task of applying for citizenship by descent.

These factors collectively create a number of hanging questions about the place of First Nations peoples within the Australian constitutional community. For example, does the unique position First Nations people hold as the original custodians of Australian land exempt them from being excluded from Australia under migration legislation passed under the aliens power, irrespective of whether or not they hold statutory citizenship? Along similar lines, does it immunise them against having their citizenship revoked?

The first of these questions was explored by the High Court in 2020 in the case of *Love; Thoms v Commonwealth*[4] ('*Love*'). By the narrowest of majorities, the Court held that, for at least some First Nations people, exclusion from Australia under the banner of the aliens power was constitutionally impossible. The *Love* decision has been regarded as a controversial one, and, due to the lack of a clear thread in the majority's reasoning, has been seen as a vulnerable precedent. A mere two years later, the Commonwealth sought to overturn *Love* in the case of *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[5] ('*Montgomery*'), though this challenge was ultimately withdrawn following a change in government.

While *Love* remains good law, the lack of a clear majority voice throws open several questions about what exactly the decision means for the relationship

between Indigeneity and membership in Australia. In our chapter, we explore some of these questions. Our chapter is divided into four substantive sections. In the first section, we set out the legal frameworks that govern citizenship and community membership in Australia. As we explain, questions about the boundaries of membership in the Australian community are largely expressed through the language of alienage rather than citizen—terms that are not necessarily synonymous. In the second section, we trace how Australian law has moved from excluding to including First Nations peoples. We note, however, that this journey is incomplete. Many Australians continue to raise anxieties over recognising Indigenous difference and Indigenous-specific rights. In the third section, we turn to the *Love* case. Concerning the capacity of the Australian government to exclude First Nations peoples who do not possess statutory citizenship, *Love* is situated in the middle of disputes over Indigeneity and membership in the Australian community. In the final section we offer some reflections on the judgment and tease out ongoing complications that are yet to be resolved.

Citizenship and community membership in Australia

The word “citizen” only features once in the Australian Constitution – in s 44(i), which provides that a citizen of a foreign power is ineligible to serve as a member of the federal Parliament. On Australian citizenship, the Constitution is completely silent. This silence eventuated because the Constitution’s framers could not agree on fundamental aspects of citizenship. Some saw it as a status that served as a gateway to particular rights or immunities,[6] while others saw it as something that derived from the possession of those rights and immunities.[7] Others still believed that citizenship was connected to particular rights and duties, but that it was not

necessary to reflect this legally, because the idea that a democratically elected parliament would infringe upon the fundamental rights of citizens was inconceivable.[8]

There was also disagreement about who ought to be entitled to citizenship. At Federation, the fullest form of formal community membership throughout the British Empire was British subject status.[9] While the framers wanted to grant full rights to settle in Australia to those born in England,[10] they also had a unanimous desire to exclude people who were British subjects, but were not regarded as being of "British type". This meant that a national citizenship that was coexistent with British subject status was undesirable. The idea of granting the Commonwealth Parliament the power to legislate with respect to citizenship was discussed, but was not proceeded with. There was some concern expressed that granting such a power to the Parliament might open up the possibility of citizenship deprivation via legislation.[11]

Instead, Parliament was granted broad powers over "naturalisation and aliens" and "immigration and emigration", which worked hand in hand to facilitate racially-based statutory exclusion on the broadest possible basis. At Federation, and for several decades thereafter, British subjects were regarded as outside of the scope of the aliens power, but within the scope of the immigration power. This enabled Parliament to legislate in a way that shaped the Australian community via whatever migration mix it chose. In the early years of Australian federation, it did so via the statutes that gave effect to the White Australia Policy, which remained in place for a number of decades. The naturalisation limb of the naturalisation and aliens power enables it to recognise desirable migrants as formal members of the Australian community via naturalisation, while the aliens limb, in conjunction with the immigration limb of the immigration and emigration power, allows it to partially or completely exclude migrants who are considered less desirable.

Despite the lack of an express legislative power with respect to citizenship, it is well-settled today that the Commonwealth Parliament has the constitutional power to define the concept of Australian citizenship through legislation. Since 1949 such legislation has existed. The legislative concept of Australian citizenship is relatively thin and formal. It prescribes the various ways in which a person can acquire citizenship (automatically at birth, by descent upon application, and by conferral, upon application following a period of permanent residency). It also prescribes the circumstances in which citizenship may be lost by voluntary renunciation or by Ministerial revocation on the basis of fraud or prescribed conduct.

The constitutional basis for Parliament's power to pass citizenship legislation has never been conclusively ruled on by the High Court. It is accepted that the naturalisation and aliens power provides support, at least to the extent that citizenship is being conferred on people who were previously aliens, via a process of naturalisation.[12] But this legislation also confers statutory citizenship on people who it is not clear were ever aliens. For example, when citizenship is conferred automatically at birth on a child born in Australia to Australian parents, it would be strange to describe this as the naturalisation of an alien; it is more a recognition that the citizen has, since birth, been a core member of the Australian community and a non-alien.

There is no practical need to comprehensively chart who is and is not a constitutional alien. When Parliament grants a person statutory citizenship, it is generally unimportant to determine the basis on which this is constitutionally possible. But when a person with a claim to constitutional non-alienage is *denied* citizenship, or the rights of citizenship, questions about the boundaries of

Parliament's power become more important, and constitutional ambiguities about what rights go hand in hand with citizenship have practical consequences.

Citizenship is not the main gateway to rights in Australia. The *Australian Citizenship Act 2007* (Cth) says nothing about the rights that attach to citizenship. A plethora of other statutes confer substantive rights on members of the Australian community, but overwhelmingly these do not hinge upon possession of citizenship. There are two significant legal benefits that are strongly associated with citizenship. The first is the right to vote held by adult citizens (a statutory right with a degree of constitutional protection). The second is simply the right to be in Australia, or an immunity against being removed.[13]

The overwhelming power to make exclusionary legislation under the umbrella of the aliens power has been employed by Parliament to its fullest, particularly in the last decade. The *Migration Act 1968* (Cth) provides that where a non-citizen fails a "character test", they are vulnerable to visa cancellation, detention, and deportation (ss 501, 189, 198). Visa cancellation is *mandatory* (though reversible by ministerial discretion on application) where a non-citizen is convicted of an offence and sentenced to at least 12 months imprisonment (ss 501(3A)(i)). These laws purport to apply to *all* non-citizens, regardless of how long they have spent in Australia or the strength of their ties to the country. But because the laws rely on the aliens power for constitutional support, there are deep questions about their validity or applicability in circumstances where a person is a non-citizen, but also has a viable claim of non-alienage.

This was the legal and practical question at the heart of the *Love* case. Could the *Migration Act* be used to deport a First Nations person who does not hold Australian statutory citizenship from Australia, or are First Nations peoples,

regardless of their citizenship status, constitutional non-aliens who are immune from removal? This question brings into play deeper questions about the relationship between First Nations people and Australian law. As we outline below, this issue is itself unsettled.

First Nations peoples and membership in Australia

A historical sweep examining how Australian law has engaged with First Nations peoples reveals a gradual shift from exclusion to inclusion. As we outline in this short background, however, what inclusion means remains contested. First Nations peoples understand inclusion to mean both legal recognition of equal rights as equal citizens *and* legal protection of their unique rights and interests as Indigenous peoples. In contrast, many within the Australian community struggle with the notion of providing legal recognition of Indigenous difference.

Exclusion began early. Colonisation in Australia proceeded on the basis that the Indigenous inhabitants had no law or rights worthy of protection. The British and later colonial governments did not attempt to negotiate their presence on the continent, nor did they seek to understand the intricate and complex normative systems that had secured the survival of First Nations peoples for thousands of generations. Despite the evidence before them, British politicians considered that Aboriginal people were "entirely destitute…of the rudest forms of civil polity",[14] while the Supreme Court of New South Wales declared that Aboriginal people had only "the wildest most indiscriminatory notions of revenge."[15] Colonial authorities became convinced that First Nations peoples "would be exterminated by the progress of civilisation."[16] This attitude "contributed significantly to the pervasive ideologies that formed the racist, protectionist policies framed by" colonial governments.[17]

It also helps us understand how the Australian Constitution does or does not engage with First Nations peoples. The Constitution was drafted at a series of constitutional conventions in the 1890s by leading colonial politicians. Reflecting the attitudes of the day, First Nations peoples were not invited and did not contribute to the drafting. The new Constitution ignored the hundreds of First Nations communities and the multiple intricate bodies of social ordering they had developed.[18] It also discriminated against First Nations people in at least three sections. Section 25 anticipated that a State Parliament could exclude people from voting in elections on the basis of their race, section 51(xxvi) empowered the Federal Parliament to make special laws for the people of any race, other than the Aboriginal race, and section 127 excluded First Nations people from being counted for constitutional purposes. While these provisions did not necessarily indicate ill-intent,[19] they symbolically excluded First Nations peoples from membership of the new polity. Exclusion was confirmed the following year with the passage of the *Commonwealth Franchise Act 1902*, which disqualified Indigenous Australians from voting. Even though there was no concept of Australian citizenship at this stage, First Nations peoples were clearly not considered part of the Australian community.[20]

Aboriginal and Torres Strait Islander peoples contested the place that had been set for them in the new nation. In the first half of the twentieth century, focus centred on dismantling racist law and policy and recognising their rights as equal members of the community.[21] In 1928, for instance, Noongar elder William Harris led a deputation to Philip Collier, the Premier of Western Australia, arguing for changes to the discriminatory *Aborigines Protection Act 1905* (WA). The following decade, Yorta Yorta man, William Cooper, collected almost 2000 signatures from Aboriginal people in a petition to send to the King. Denied the right to vote, Cooper and his

petitioners desired a voice in national affairs, calling for someone “who can speak for us in Parliament, influencing legislation on our behalf and safeguarding us from administrational officers.”[22] Cooper’s demand for dedicated representation in Parliament was dismissed by Cabinet, but First Nations peoples continued to call for political and legal reform.

First Nations peoples’ activism may have encouraged a shift in government policy in the 1930s from protectionism (which favoured exclusion) towards assimilation. Assimilation recognised Aboriginal and Torres Strait Islander peoples were unjustly excluded from the Australian polity and sought to include them. However, inclusion would be on the terms of non-Indigenous Australians; Aboriginal people would be expected to “attain the same manner of living as other Australians and live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.”[23] In 1962, the Commonwealth belatedly extended the franchise to all First Nations peoples (*Commonwealth Franchise Act 1962* (Cth)). Paul Hasluck, the Minister for the Territories, praised the Act as “one step further towards the ideal of one people in one continent.”[24]

That ideal appeared another step closer in 1967. That year, Australians voted overwhelmingly in a referendum to alter the Constitution and amend two discriminatory references to Aboriginal and Torres Strait Islander peoples. The referendum amended s 51(xxvi) and excised s 127. As we have seen, section 127 did not legally exclude Aboriginal and Torres Strait Islanders from being counted as citizens, but it excluded them from “membership of the constitutional community.”[25] Similarly, while the states could make laws for Aboriginal and Torres Strait Islanders,

alteration of s 51(xxvi) empowered the Commonwealth to do so on the same basis as all other “races”. The referendum symbolically and practically expanded the idea of Australian identity by making room for First Nations peoples as equal members of a “single-status community.”[26] Indigenous and non-Indigenous Australians alike could enjoy political equality.

The referendum was a momentous change, but it fell short of meeting First Nations peoples’ aspirations, As Guugu Yimithirr lawyer and activist Noel Pearson later remarked, the absence of any explicit recognition of Aboriginal and Torres Strait Islander normative distinctiveness recorded their citizenship in neutral terms.[27] Indeed, following the referendum, Aboriginal and Torres Strait Islander peoples have increasingly articulated demands for recognition of their unique rights *as* First Nations peoples. These aspirations are embedded in and drawn from long histories as self-governing communities operating under their own source of laws prior to colonisation. When citizenship is understood as membership of a single-status community, these claims cannot be heard.

One of the more prominent early calls for the legal recognition of First Nations peoples’ distinct rights occurred in August 1966. That month, Vincent Lingiari led 200 Gurindji stockmen, house servants and their families off the Wave Hill Cattle Station in the Northern Territory following years of exploitation. While media and politicians initially saw the strike as a fight for fair wages and conditions, the Gurindji’s motivations were clear: they wanted their land back.[28] Their resolve – alongside the determination of the Yolngu and Larrakia peoples who were advocating at the same time – led directly to enactment of the first land rights legislation in the country (*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)). Similar legislation is now in place in all States.

The strength of the Gurindji and other First Nations communities has pushed Australia to recognise Indigenous peoples differentiated status. Legal recognition comes in several major forms, including the establishment of distinct entitlements to land through native title and land rights regimes, and the protection of cultural heritage. An Indigenous sector that delivers services and represents First Nations peoples is also increasingly significant. Yet, these advances are precarious. As many First Nations peoples have remarked, understandings of Australianness continue to marginalise Aboriginal and Torres Strait Islander peoples' unique rights. The "psychological terra nullius" continues to exclude First Nations peoples as First Nations peoples.[29]

Concerns along these lines featured prominently in political and legal debate following the High Court's decision in *Mabo v Queensland (No 2),* which held that the Australian common law could recognise Indigenous peoples' pre-colonial interests in land. A few weeks after the decision was handed down, President of the Western Australia Liberal Party, Bill Hassell, noted succinctly: "Mabo creates privilege – legal privilege based on race."[30] A Queensland legal scholar was particularly incensed, labelling the decision akin to "apartheid".[31]

Although expressed more subtly, the same anxiety is present in contemporary debate on constitutional recognition of Aboriginal and Torres Strait Islander peoples. In 2016, former Prime Minister Tony Abbott rejected growing calls for a treaty between First Nations peoples and the Australian state, noting that: "A treaty is something that two nations make with each other, and obviously Aboriginal people are the first Australians, but in the end we're all Australians together, so I don't support a treaty."[32] Likewise, the Institute for Public Affairs has persistently rejected the need for a First Nations Voice to be put in the Constitution, on the basis that

“Indigenous Australians already have a voice to Parliament”—they can vote in the federal Parliament like every other citizen.[33] At the core of these statements is an understanding of Australian citizenship that denies space for First Nations peoples distinct rights. For this line of thinking, constitutional reform unfairly positions Aboriginal and Torres Strait Islander people “as a favoured class of Australians entitled to pursue advantageous claims not available to others.”[34] Sitting at the intersection of non-Indigenous anxieties over identity, membership and belonging, was the *Love* case.

The *Love* Litigation

Daniel Love and Brendan Thoms are both Aboriginal men who were born outside Australia. Love was born in Papua New Guinea (PNG) in 1979 to an Australian citizen father and PNG citizen mother. At birth, he became a citizen of PNG. He identifies as and is recognised by at least one elder as a Kamilaroi man. Thoms was born in Aotearoa New Zealand in 1988 to an Australian citizen mother and an Aotearoa New Zealand citizen father, and automatically became a citizen of Aotearoa New Zealand at birth. He identifies and is recognised by other members as a member of the Gunggari people. The Federal Court has recognised Gunggari native title and Thoms himself is a native title holder.[35] Both Love and Thoms came to Australia as children and have lived in the country into adulthood. Both were eligible for Australian citizenship by descent, but never took out this citizenship.

As adults, both Love and Thoms were convicted of separate offences and sentenced to a period of imprisonment of 12 months or more. As a result, both men had their visas cancelled by a delegate of the Minister for Home Affairs in accordance with s 501(3A) of the *Migration Act*. This provision relies on the aliens

power for constitutional support, and imposes mandatory (but reversible) visa cancellation on any non-citizen who is convicted of an offence and sentenced to more than 12 months imprisonment.

Love and Thoms challenged the cancellation of their visas on the grounds that, due to their Indigeneity, they were not constitutional aliens, and therefore could not be deported under a statutory provision that relied on the aliens power for support. By contrast, the Commonwealth's argument was that Love and Thoms were aliens because they did not possess statutory citizenship, and in fact had not endeavoured to acquire it despite being eligible for citizenship by descent.

At the heart of the case was a question about the scope of the constitutional aliens power. The Constitution merely states that Parliament has a power to legislate with respect to "naturalization and aliens". It does not define or qualify what an "alien" is. Alien is originally a common law term, used to denote people who were not British subjects. At common law, at least from 1608 when *Calvin's Case*[36] was decided, British subjects were regarded as those born in Crown territory. They owed "permanent allegiance" to the Crown (who owed them a corresponding duty of protection), while aliens did not. By the time Australia federated in 1901, these concepts had shifted, as a result of legislative developments in the United Kingdom. A changing set of statutory criteria defined who was entitled to British subject status, and British subjects could, in certain circumstances, renounce their subjecthood and divest themselves of their allegiance. In short, the law on alienage at Federation was fluid, and actively shaped by legislative developments.[37]

A number of High Court judges over the years have concluded that this means that the Commonwealth Parliament has the power to affect who qualifies as a constitutional alien via its legislative development of Australian citizenship. Some

have gone so far as to say that the terms “alien” and “non-citizen” are synonymous.[38] It is accepted that there are boundaries to this equivalence. Alien is a term inserted into the Constitution to place limits on Parliament’s legislative capacity. If Parliament were able to define an alien to be anything it wanted, this limit would be illusory, and the *Constitution’s* purpose would be frustrated.[39]

It is therefore more accurate to say that Parliament can, through citizenship legislation define who is a citizen and who is an alien, but only within the bounds that the *Constitution* allows. A person who is capable of being regarded as a constitutional alien will be a non-alien if Parliament elects to grant them citizenship, and an alien if Parliament elects not to do so. But a person who is not capable of being regarded as a constitutional alien will always be a non-alien, whether or not Parliament grants them citizenship. Prior to 2020, non-citizens in a number of categories had argued that they were constitutional non-aliens. These included children born in Australia to non-citizen parents,[40] permanent residents who have lived in Australia since they were babies,[41] people who were British subjects – and therefore non-aliens prior to Australia acquiring legal independence from the United Kingdom,[42] and people born in PNG who had held Australian citizenship prior to PNG’s independence.[43] The High Court held that people in all of these categories were capable of being regarded as aliens.

Love and Thoms were the first people to argue that First Nations people are constitutional belongers, incapable of being regarded as aliens. With precedent in other aliens power cases heavily underlining the breadth of Parliament’s discretion, their claim required careful argument. While First Nations peoples are distinct from other classes of people who might assert non-alienage, by virtue of their deep and enduring connection to country and their legal systems predating Australian

Federation, this is not reflected in the Australian Constitution. The constitutional text devotes significant attention to ensuring Parliament has flexibility over who can be excluded from Australia, while being silent on the question of who is definitively included. It does not state, in terms, that Aboriginal and Torres Strait Islander peoples are belongers, or expressly exclude them from the scope of the aliens power. Rather, since the changes made in the 1967 referendum, it does not mention them at all. At the time of Federation, Australia was regarded – erroneously – as terra nullius. It took until *Mabo (No 2)* in 1992 for this error to be legally recognised, and that case was a common law, rather than a constitutional decision. As we noted above, although the legal position of First Nations peoples has changed radically since Federation, this has largely fallen short of amounting to secure, substantive recognition of their differentiated status.

All seven members of the High Court acknowledged that Aboriginal and Torres Strait Islander peoples have a unique and significant connection to country. The point of difference between the majority and minority judges was whether that connection had constitutional force.

The three minority judges (Kiefel CJ and Gageler and Keane JJ) said that it did not. In their view, the breadth of the discretion afforded to Parliament under the aliens power and the lack of reference in the constitutional text to First Nations peoples being included amongst the body politic or excluded from the reach of the aliens power made it impossible to conclude, using accepted methods of constitutional interpretation, that Parliament could not treat Love and Thoms as aliens.[44] Both Gageler J and Keane J acknowledged that Love and Thoms' argument had moral force,[45] but found that, in the absence of constitutional recognition of First Nations people – which would require a referendum – it did not have legal force.[46]

Both referred to the fact that the conversation about whether to amend the *Constitution* to include such recognition was currently underway.[47]

By contrast, the four majority judges (Bell, Nettle, Gordon, and Edelman JJ) found that Aboriginal Australians, understood according to the three-part test in *Mabo (No 2*), are not within the reach of the aliens power.[48] They said that due to Aboriginal and Torres Strait Islander peoples' long-standing and deep connection to country, they cannot be said to be aliens, or outsiders to the Australian community, even if they do not hold statutory citizenship.[49]

There were some variances in how the majority judges reached this conclusion. Justices Gordon and Edelman drew attention to the inseparability of ties between First Nations peoples and the land that makes up Australia. Justice Edelman described First Nations peoples as "belongers to the Australian political community",[50] and noted that their "metaphysical bonds" to country were "far stronger than those forged by the happenstance of birth on Australian land or the nationality of parentage."[51] Justice Gordon said:

> The constitutional term 'aliens' conveys otherness, being an 'outsider', foreignness. The constitutional term 'aliens' does not apply to Aboriginal Australians, the original inhabitants of the country. An Aboriginal Australian is not an 'outsider' to Australia… Failure to recognise that Aboriginal Australians retain their connection with land and waters would distort the concept of alienage by ignoring the content, nature and depth of that connection. It would fail to recognise the first peoples of this country. It would fly in the face of decisions of this Court that recognise that connection and give it legal consequences befitting its significance.[52]

Justices Bell and Nettle found that it would be incongruous to recognise – as the High Court had in *Mabo (No 2)* – that First Nations peoples have a unique, spiritual

connection with country, while also finding that they are capable of being described as constitutional aliens.[53] Justice Nettle went on to say that the common law recognition of Aboriginal societies "as the source and sanctuary of traditional laws and customs" means that the Crown owes an obligation to protect those societies, and that they in turn owe a permanent allegiance to the Crown in right of Australia.[54]

The majority judges in *Love* did not necessarily conceive of the constitutional protection afforded to First Nations peoples in the same way. For example, Nettle J observed that since the protection of First Nations societies is a product of the common law, it is "conceivable that it could be abrogated by statute", and that this would bring First Nations peoples who were non-citizens within the reach of the aliens power.[55] By contrast, Gordon and Edelman JJ's draw on, but place less weight on, the common law position, and it seems implicit in their judgments that the constitutional position that First Nations peoples occupy cannot be dismantled through legislation.

Reflections on *Love* and First Nations peoples' membership in Australia

At one level, the decision in *Love* is limited. The judgment prevented the government's intended deportation of Daniel Love and Brendan Thoms. It also precludes the government from deporting other Aboriginal non-citizens under the *Migration Act*. This is not many people. The Department of Home Affairs informed the Parliament that at least 23 people in immigration detention may be Aboriginal non-citizens.[56] At a broader level, however, *Love* speaks to the contested nature of the place and status of First Nations peoples within the Australian community. In this final section we conclude with several reflections on *Love*.

The first point to note is that *Love* offers little concrete on the legal relationship of First Nations peoples to Australia. Justice Edelman describes Aboriginal peoples as "belongers" to the Australian political community. But for First Nations peoples who do not hold citizenship, all that *Love* really guarantees is immunity against expulsion under laws made pursuant to the aliens power. It is not clear that this status carries with it any of the other rights hinged upon statutory citizenship (e.g., voting rights), and it certainly does not amount to the kind of substantive belonging that First Nations peoples have been asking for, as described in section 3 of this chapter. Can this really be described as belonging, in any meaningful sense?

One of the judges in the minority is alive to this problem. Justice Gageler draws attention to these challenges, noting that the majority's decision admits the existence of a category of non-citizen non-aliens who are "consigned to inhabit a constitutional netherworld".[57] His Honour also noted that at the *Love* hearing, a "notable absence" from the viewpoints expressed was "the viewpoint of any Aboriginal or Torres Strait Islander body representing any of the more than 700,000 citizens of Australia who identify as Aboriginal or Torres Strait Islander."[58] While at least one Aboriginal person participated in the case, they did so intervening on behalf of the State of Victoria, rather than as a representative of First Nations peoples. Justice Gageler goes on to say:

> On the basis of the case as presented, I cannot presume that the political and societal ramifications of translating a communal, spiritual connection with the land and waters within the territorial limits of the Commonwealth of Australia into a legislatively ineradicable individual connection with the polity of the Commonwealth of Australia are able to be judicially appreciated.[59]

There are also complications in the way members of the majority reach their conclusion. Perhaps most curious is Nettle J's imputation that the common law recognition of First Nations peoples' connection with country amounts to a duty of protection on the Crown's part that carries with it an obligation that Aboriginal societies "owe permanent allegiance" to the Crown.[60] While his Honour recognises there might be instances of renunciation, this reasoning does not seem particularly in line with the kind of recognition that First Nations peoples have been advocating for as described in Section 3. As Keane J recognised, it also smacks of paternalism:

> To accept the argument would be to accept limitations on the freedom of persons of Aboriginal descent to pursue their destiny as individuals. The autonomy of such persons would be constrained in a way that does not affect people who are not of Aboriginal descent.[61]

The political reaction to *Love* suggests further challenges going forward. Reflecting the decision's challenge to the government's policy of deporting non-citizens convicted of serious offences, members of the government were furious with the result. Many also focused on the notion that the decision violated the principle of equality by privileging Indigenous people over non-Indigenous people. Almost immediately, calls were made to reopen the decision. In 2021, in the *Montgomery* case, the government asked the High Court to overturn its decision. Following a change of government at the 2022 federal election, however, the case was withdrawn.

Conservative legal commentators have derided *Love* as "fundamentally challenging the idea that all Australians are equal", and nothing more than "ethno-nationalism frocked up as progress". Others, including prominent federal politicians, have claimed the decision enshrined "racism" in Australian law, by dividing "those

who reside in Australia along racial lines."[62] At root in this criticism is the view that Aboriginal and Torres Strait Islander peoples' status as prior self-governing communities should have no legal significance in modern Australia. First Nations peoples' membership in the Australian community should be on the same terms as all Australians.

Australians will soon be asked whether they agree with this position. In the 2017 Uluru Statement from the Heart, Aboriginal and Torres Strait Islander peoples called for structural reform to "empower our people and take a rightful place in our own country."[63] The Statement called for a First Nations Voice to be put in the *Constitution*, and a Makarrata Commission to supervise agreement-making and truth-telling. In late 2023, Australians are expected to vote in a referendum on the Voice. An Indigenous representative body, the First Nations Voice would empower Aboriginal and Torres Strait Islander peoples with the capacity to have their voices heard and interests considered in the processes of government. While debate is ongoing at this time, it is likely that the Voice will be authorised to make representations to Parliament and the Executive Government on law and policy that affect Indigenous Australians.

Referendums are difficult to win in Australia. Only eight referendums have succeeded from 44 attempts since 1901. The political reaction to *Love* suggests inserting a Voice in the *Constitution* will be challenging. Indeed, conservative politicians and legal commentators have argued that the *Love* case weakens the prospect of a successful Yes vote. Senator James Paterson has warned that the judgment "perfectly illustrates the warnings constitutional conservatives" have "about the legal risks" of constitutional recognition.[64] Similarly, Morgan Begg has argued

that “[t]o approve constitutional recognition would be an endorsement of the High Court’s dangerous decision and empower future courts to make similar decisions.”[65]

The legal consequences of *Love* are uncertain, and at this stage, limited. Nevertheless, the political reaction suggests that something as fundamental as the place of First Nations peoples within Australia remains unsettled. The Uluru Statement from the Heart seeks to resolve these tensions. As the Statement explains, constitutional reform will allow Aboriginal and Torres Strait Islander peoples “ancient sovereignty to shine through as a fuller expression of Australia’s nationhood.”[66]

Notes

[1] Peter Veth and Sue O’Connor, “The Past 50,000 Years: An Archaeological View” in *The Cambridge History of Australia: Volume 1: Indigenous and Colonial Australia*, eds. Alison Bashford and Stuart Macintyre (Cambridge: Cambridge University Press 2013), 19.

[2] Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Canberra: Aboriginal Studies Press, 2007).

[3] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[4] *Love; Thoms v Commonwealth* (2020) 270 CLR 152.

[5] *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, High Court of Australia, Case No S192/2021

[6] See John Williams, “Andrew Inglis Clark: Our Constitution and His Influence,” *Papers on Parliament* 61 (2014): 89-91.

[7] *Official Record of the Debates of the Australasian Federal Convention* Melbourne 1898, vol. 5, 1782, Josiah Symon.

[8] *Official Record of the Debates of the Australasian Federal Convention* Melbourne 1898, vol. 4, 688, John Cockburn.

[9] *Singh v Commonwealth* (2004) 222 CLR 322, 367.

[10] *Official Record of the Debates of the Australasian Federal Convention* Melbourne 1898, vol. 4, 1760.

[11] *Official Record of the Debates of the Australasian Federal Convention* Melbourne 1898, vol. 5, 1764, Josiah Symon.

[12] *Hwang v Commonwealth* (2005) 87 ALD 256, 259–60 [10].

[13] See further Sangeetha Pillai, "The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis." *Melbourne University Law Review* 37, 3 (2014): 736-785.

[14] Great Britain House of Commons, 1837, 125-6.

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[23] Paul Hasluck, *Shades of Darkness: Aboriginal Affairs 1925–1965* (Melbourne: Melbourne University Press, 1988), 93.

[24] Commonwealth Parliament of Australia [Hansard], *House of Representatives Parliamentary Debates*, House of Representatives, 1 May 1962, 1771.

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[26] Geneviève Nootens, *Popular Sovereignty in the West: Polities, Contention, and Ideas* (Abingdon: Routledge, 2013), 58.

[27] Noel Pearson, "Aboriginal Referendum a Test of Nation's Maturity." *The Australian*, 26 January 2011, https://capeyorkpartnership.org.au/news/aboriginal-referendum-a-test-of-national-maturity/.

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[29] Larissa Behrendt, "White Picket Fences: Recognising Aboriginal Property Rights in Australia's Psychological *Terra Nullius*," *Constitutional Forum* 10, 2 (1999): 50.

[30] Bill Hassell, "Mabo and Federalism: The Prospect of an Indigenous Peoples' Treaty," *Upholding the Australian Constitution: Proceedings of the Second Conference of The Samuel Griffith Society* 2 (1993): 36.

[31] L. J. M. Cooray, "The High Court in Mabo: Legalist or L'égotiste," in *Make a Better Offer: The Politics of Mabo*, eds. Murray Goot and Tim Rowse (Sydney: Pluto Press, 1994), 95.

[32] George Williams and Harry Hobbs, *Treaty*, 2nd ed. (Sydney: Federation Press, 2020), 138.

[33] Institute of Public Affairs, *Four Reasons to Reject the Referendum Council Recommendation*s, Parliamentary Research Brief, 28 July 2017.

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[36] *Calvin's Case* (1608) 77 Eng Rep 377.

[37] *Chetcuti v Commonwealth* [2021] HCA 25 [41] (Gordon J), [69] (Edelman J). See also Sangeetha Pillai, *The legal parameters of Australian citizenship*. Doctoral dissertation, UNSW, 2015. UNSWorks: https://unsworks.unsw.edu.au/entities/publication/b0862db3-a924-42e2-9ac1-865dcae8480d, ch. 4.

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[39] See for example *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ).

[40] *Singh v Commonwealth* (2004) 222 CLR 322; *Koroitamana v Commonwealth* (2006) 227 CLR 31.

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[42] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

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

[44] *Love* 2020, Kiefel CJ [8] and [31], Gageler J [126]-[131], Keane J [177]-[181].

[45] *Ibid*., Gageler J [128], Keane J [178].

[46] *Ibid*., Gageler J [135], Keane J [178].

[47] *Ibid*., Gageler J [134], Keane J [178].

[48] *Ibid*., Bell J [81].

[49] *Ibid*., Bell J [74], Gordon J [296], Nettle J [276]-[278], Edelman J [398].

[50] *Ibid*., Edelman J [396].

[51] *Ibid*., Edelman J [396], Nettle J [276]-[278].

[52] *Ibid*., Gordon J [296]-[297].

[53] *Ibid*., Bell J [71], Nettle J [268]-[272].

[54] *Ibid*., Nettle J [272], [279].

[55] *Ibid*., Nettle J [283].

[56] Evidence to Senate Legal and Constitutional Affairs Committee, 2020, 109.

[57] *Love* 2020, Gageler J [131].

[58] *Ibid*., Gageler J [134].

[59] *Ibid*.

[60] *Ibid.,* Nettle J [279].

[61] *Ibid*., Keane J [217].

[62] See Harry Hobbs, “The New Right and Aboriginal Rights in the High Court of Australia,” *Federal Law Review* 51, 1 (2023): forthcoming.

[63] Uluru Statement, 2017.

[64] James Paterson, “The High Court *Love* Decision,” Samuel Griffith Society, Online Speaker Series, 2020, 4.

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