Article

Australian National University

Federal Law Review
2024, Vol. 52(2) 230–257

DOI: 10.1177/0067205X241255445
journals.sagepub.com/home/flr
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No Place Like Home? Alienage, Popular Sovereignty and an Implied Freedom of Entry into Australia Under the *Constitution*

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Abstract

Does the Constitution protect the ability of an Australian to enter the country? This article investigates that question. Whilst the Constitution provides no express guarantee of a citizen's right to enter Australia, a series of recent cases — particularly *Love v Commonwealth*[1] and *Alexander v Minister for Home Affairs*[2] — give occasion to consider whether a freedom of entry forms an implied part of Australia's constitutional framework. Early scholarly attempts to establish a freedom of entry have relied upon the definition of non-alienage to ground this implication. This article commences by reviewing the effect of the High Court's recent alienage jurisprudence on these arguments. After concluding that fatal difficulties attend this approach, I investigate an alternative foundation for an implied freedom of entry: an implication drawn from a constitutional principle of popular sovereignty. Focusing on a recent thread of High Court jurisprudence which has placed an increasing emphasis on the constitutional protection afforded to popular sovereignty, I conclude that this alternative basis provides a viable foundation upon which an implied freedom of entry could be recognised in the Constitution.

Accepted 14 September 2023

1. *Love v Commonwealth* (2020) 270 CLR 152 ('*Love*').
2. *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 ('*Alexander*').

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There is no greater sorrow on earth than the loss of one's native land

— Euripides

Medea[3]

I Introduction

The ability to enter one's country has long been considered a hallmark of belonging to a political community.[4] As early as 1215, the *Magna Carta* established that 'it shall be lawful for any [subject] to leave and return to our kingdom unharmed'.[5] Blackstone observed that the 'natural and regular consequence of [one's] personal liberty is that every man may claim a right to abode in his own country so long as he pleases'.[6] Closer to home, Griffith CJ declared in *Potter v Minahan* that:

> Every human being ... is a member of some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort when he thinks fit.[7]

Within Australia, however, the question of whether the *Constitution* guarantees a citizen's ability to enter the country remains unsettled. Unlike other countries,[8] Australia's *Constitution* provides no express right for citizens to enter the country. Nonetheless, scholarship has been divided as to whether such a guarantee forms an implied part of Australia's constitutional framework. Zines[9] and Kirk,[10] for example, have both suggested that the *Constitution* might recognise an implied freedom of entry for Australian citizens. Other commentators have rejected any such implication as 'undemocratic' and lacking in doctrinal foundation.[11] Despite such conjecture, this topic has been subject to little detailed analysis. As Jeffries, McAdam and Pillai observe, 'the case for a constitutional right of entry remains highly speculative' and underdeveloped.[12] This article seeks to address this gap in the literature, examining whether the *Constitution* recognises an implied freedom of entry.

This article contends that there is one — but only one — viable basis on which a freedom to enter Australia can be recognised within the *Constitution*: as an implication based upon the *Constitution's* guarantee of popular sovereignty.

To develop this contention, this article has two main objectives. The first is to reject the primary existing scholarly account for an implied freedom of entry, developed principally by Professor

3. Euripides, *Medea*, in Richard Rutherford (ed), *Alcestis and Other Plays,* tr John Davie (Penguin Books, 1996) lines 650–1.
4. Theodore Plucknett, 'Outlawry' (1933) 11 *Encyclopedia of the Social Sciences* 505; Shai Lavi, 'Citizenship Revocation as Punishment: On the Modern Duties of Citizens and their Criminal Breach' (2011) 61 *University of Toronto Law Journal* 783, 809.
5. Claire Breay (ed), *Magna Carta: Manuscripts and Myths* (British Library, 2002) [45].
6. William Blackstone, *Commentaries on the Laws of England* (1765) bk I, 120–41.
7. *Potter v Minahan* (1908) 7 CLR 277, 289 (Griffith CJ) ('*Potter*').
8. See *Canada Act 1982* (UK) sch B pt I s 6; *Basic Law for the Federal Republic of Germany* art 116(1).
9. Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 589.
10. Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27(3) *Federal Law Review* 323, 345.
11. Amanda Stoker and Jye Beardow, 'Mr McGowan, Tear Down this Wall!: Section 92 after Palmer v Western Australia' (Speech, Samuel Griffith Society Online Speaker Series, 2021) 8.
12. Regina Jeffries, Jane McAdam and Sangeetha Pillai, 'Can We Still Call Australia Home? The right to return and the legality of Australia's COVID-19 travel restrictions' (2022) 27(2) *Australian Journal of Human Rights* 211, 218–19.

https://doi.org/10.1177/0067205X241255445 Published online by Cambridge University Press

Helen Irving[13] — an argument which links a freedom of entry to the definition of non-alienage in section 51(xix) of the *Constitution*. Part I begins by outlining and contextualising this argument, directing particular attention towards the High Court's recent decision in *Love*.[14] Thereafter, Part II critiques this account. I contend that jurisprudential developments post-*Love*, and broader historical and conceptual difficulties, pose insurmountable obstacles to accepting Professor Irving's argument.

Given these difficulties, the second objective of this article is to propose an alternate basis for recognising an implied freedom of entry: one founded on the *Constitution's* guarantee of popular sovereignty. Part III develops this argument, building upon a line of recent High Court jurisprudence which has articulated the constitutional basis of a popular sovereignty principle.[15] Part IV considers and responds to possible objections.

In exploring this question, this article traverses an issue of contemporary importance. Most notably, the Federal Government's COVID-19 regulations[16] prevented approximately nine-thousand Australian citizens from entering Australia during the pandemic.[17] Indeed, an argument that these regulations offended an implied freedom of entry was pleaded, but ultimately not pressed, in a Federal Court challenge to those regulations.[18] Similarly, Parliament has recently enacted the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth), allowing Australian citizens to be denied entry into the country if, amongst other requirements, a Minister reasonably suspects that citizen of supporting a terrorist organisation.[19] The Commonwealth's increasing willingness to prevent citizens from entering Australia makes this an important and timely question to address.

Before continuing, I make three qualifications about this article. First, a point of terminology. In the literature and case law, various authors refer to a 'right' of return, entry and abode.[20] For reasons developed below, this article adopts a different expression: an implied *freedom* of entry. Consistent with other constitutional freedoms,[21] this freedom would operate as a limitation on legislative and executive power, not a personal right.[22]

Second, this article is concerned only with investigating the constitutional basis of an implied freedom of entry. I do not assess whether any particular statutory scheme would burden that guarantee. As with other constitutional freedoms, this implication would operate as a qualified limit on government power.[23] Even if legislation burdened entry, that law would remain valid if

13. Helen Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30(1) *Sydney Law Review* 131.
14. *Love* (n 1).
15. See *McCloy v New South Wales* (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, 548 (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions NSW (No 1)*').
16. *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* (Cth) s 6 ('*Biosecurity Determination*').
17. Sangeetha Pillai, 'Australia's decision to ban its citizens from returning from India – Is it legal? Is it moral? Is it just?', *ABC News* (online, 7 May 2021) <https://www.abc.net.au/religion/is-australias-india-travel-ban-legal-moral-just/13335360>.
18. Originating Application, *Newman v Minister for Health and Aged Care* (5 May 2021) 5 <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/gary-newman/NSD388of2021-Originating-Application.pdf>; see also *Newman v Minister for Health and Aged Care* [2021] FCA 517 [3]–[4] (Thawley J).
19. Section 10(2)(b).
20. *Love* (n 1) 198 [95] (Gageler J), 230 [213] (Keane J), 270 [325] (Gordon J); Irving (n 13).
21. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ) ('*Lange*'); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 175–6 [8]–[11] (Gleeson CJ), 186 [43] (Gummow, Crennan and Kirby JJ) ('*Roach*').
22. *Tajjour v New South Wales* (2014) 254 CLR 508, 569 (Crennan, Kiefel and Bell JJ); James Stellios, *Zines' the High Court and the Constitution* (Federation Press, 6th ed, 2015) 587.
23. *Lange* (n 21) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ).

https://doi.org/10.1177/0067205X241255445 Published online by Cambridge University Press

'reasonably appropriate' to achieving a constitutionally legitimate end.[24] As the experience with other constitutional freedom shows, these statutory questions might become the locus of considerable contestation.[25] However, before those issues are addressed, it is necessary to first establish a constitutional basis for recognising this freedom — it is the constitutional question, and not statutory analysis, which is the focus of this article.

Finally, a methodological point. The High Court has made clear that constitutional implications are drawn by reference to what 'the terms and structure of the *Constitution* prohibit, authorise or require'.[26] In examining an implied freedom of entry, the focus of this article is thus directed towards the *Constitution's* text and structure, as expounded by High Court jurisprudence.

II Understanding the First Account: *Love*, Non-alienage and Entry

This article commences by examining the primary argument which has been made in support of an implied freedom of entry: an account based on section 51(xix) of the *Constitution,* which empowers Parliament to make laws with respect to 'naturalization and aliens'. Broadly expressed, this argument relies upon one central proposition — that a defining or essential characteristic of a non-alien is their capacity to enter Australia.

Professor Helen Irving has most clearly developed this argument, contending that an ability to enter Australia 'lies at the core of the definition of [non-alienage], both conceptually and constitutionally'.[27] However, since Irving's 2008 article, jurisprudence concerning section 51(xix) has evolved significantly. To present the strongest argument in favour of this account, this section repositions Irving's argument in light of the High Court's contemporary non-alienage jurisprudence.[28] Ultimately, as I argue in Part II, I view this account as problematic. Before reaching that criticism, however, it is important to advance this account it in its best possible form.

The starting point for developing Irving's argument is *Love*,[29] where a High Court majority held that Aboriginal Australians were not aliens for the purposes of section 51(xix) of the *Constitution*. The reasoning of the *Love* majority, however, moves beyond considerations of Indigeneity. The case concerned 'underlying conceptions of the relationship between individuals and the Commonwealth'.[30] As I explain, this underlying conception of non-alienage in the *Love* majority's reasoning may provide support for Irving's argument. Those judgments, therefore, require unpacking.

To examine how *Love* may support Irving's argument, it is necessary to examine three components of the *Love* majority judgments: (A) the majority's characterisation of section 51(xix), (B) the connection between non-aliens and the physical territory of Australia which emerges through

24. Ibid.
25. Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47(4) *Federal Law Review* 551.
26. *Lange* (n 21) 566–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ).
27. Irving (n 13) 138. Rangiah has recently utilised 'Irving's logic' to advance a similar argument, arguing that all non-aliens have an implied freedom of entry: Priam Rangiah, 'COVID Travel Bans, Citizenship and the Constitution: Do Australian Citizens Have a Constitutional Right of Abode?' (2022) 50(4) *Federal Law Review* 558, 567. Whilst Irving's argument is the focus of this part, I consider both arguments in this section. As both arguments proceed from an identical logical foundation, my reasons for rejecting each account are the same, as identified in Part II of this article.
28. As I do with Rangiah (n 27).
29. *Love* (n 1).
30. 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, 600–1.

https://doi.org/10.1177/0067205X241255445 Published online by Cambridge University Press

that characterisation and (C) the possible consequential linking of non-alienage to an implied freedom of entry.

A The Love Characterisation of Section 51(xix): Constitutional Membership

For present purposes, the first significant aspect of *Love* lay in the majority's articulation of the 'essential character' of section 51(xix).[31] Whilst the four majority judgments in *Love* involved differences in analysis,[32] each member of the majority appeared to adopt a broadly common characterisation of the aliens power: that section 51(xix) is concerned with persons who are 'members' of the Australian body politic.[33]

In *Love*, Edelman J was clearest in this respect. To Edelman J, the crucial criterion of non-alienage is one's 'membership of the Australian political community'.[34] A non-alien, to his Honour, is the description applied to those who are 'essential *members* of the "community which constitutes the body politic of the nation state"'.[35] Similarly, Bell J,[36] Nettle J[37] and Gordon J[38] all adopted the nomenclature of 'membership' to characterise non-alienage.

Two points are immediately important about this characterisation of section 51(xix). First, in equating non-alienage to some form of constitutional membership, the *Love* majority faced an immediate tension. On the one hand, each majority judgment accepted that Parliament was the body which generally supplied the criterion which determines community membership.[39] Within contemporary Australia, it is citizenship which ordinarily 'shape[s] the membership of the political community'.[40] Yet, each of the *Love* majority also insisted that Parliament's ability to define membership was not a power at large[41] — the legislature could not 'expand the power conferred by section 51(xix)' however it pleased.[42] As Gerangelos observes,[43] this reasoning explicitly 'engages with the logic of the doctrine' expressed in *Australian Communist Party v Commonwealth*: that Parliament cannot recite itself into power by allowing citizenship (a statutory term) to govern alienage (a constitutional term).[44]

Second, it is reasonably clear that the majority in *Love* recognised this 'membership' as having some substantive content immune from legislative alteration — so much was apparent in the

31. For a discussion on the 'essential character' of a head of power, see James Stellios, 'Constitutional Characterisation: Embedding Value Judgements About the Relationship Between the Legislature and the Judiciary' (2021) 45(1) *Melbourne University Law Review* 277, 280–9.
32. Minister for Immigration, Citizenship, Migrant Services and Multicural Affairs, 'Submissions of Appellants and Attorney-General for the Commonwealth (Intervening)', Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, S192/2021, 28 January 2022, 6.
33. *Love* (n 1) 190 [74] (Bell J), 246 [257] (Nettle J), 276–7 [349] (Gordon J), 287–8 [393] (Edelman J).
34. Ibid 300 [420].
35. Ibid 290 [398] (citations omitted, emphasis added).
36. Ibid 170 [74].
37. Ibid 246 [257].
38. Ibid 276–7 [349].
39. Ibid 187 [64] (Bell J), 244 [252] (Nettle J), 263 [303] (Gordon J), 309 [440] (Edelman J); see also *Singh v Commonwealth* (2004) 222 CLR 322, 383 [153] (Gummow, Hayne and Heydon JJ), 418 [268] (Kirby J) ('*Singh*').
40. *Love* (n 1) 308 [439] (Edelman J).
41. Ibid 187 [64] (Bell J), 236–7 [236] (Nettle J), 271 [328] (Gordon J), 291–2 [401] (Edelman J).
42. Ibid 187 [64] (Bell J).
43. Peter Gerangelos, 'Reflections upon Constitutional Interpretation and the "Aliens Power": Love v Commonwealth' (2021) 95(2) *Australian Law Journal* 109, 111.
44. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 205–6 (McTiernan J), 263–4 (Fullagar J) ('*Communist Party Case*').

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holding that certain non-citizens are non-aliens. Thus, across the majority judgments in *Love*, each Justice searched for a 'central characteristic'[45] or the 'essential meaning'[46] of non-alienage which was beyond legislative alteration. As Stellios observes, this approach conceptualises section 51(xix) as a power over people.[47] It is the fixed and 'defining characteristics of those persons', on this view, which gives meaning to section 51(xix).[48]

What, then, were the core (or definitional)[49] features of non-alienage to the *Love* majority? The answer to that question requires some unpacking.

B The Core Features of Non-alienage

Whilst the precise description of the defining characteristics of non-alienage varied in *Love*, one idea appeared to lie at the heart of the majority view. Non-alienage, the *Love* majority held, may arise from a person or group's entrenched physical connection to the Australian body politic and its territory: a physical connection which, on this majority analysis, lies beyond legislative alteration.[50]

In *Love*, Edelman J again most explicitly linked non-alienage with a person's physical connection to the body politic. To Edelman J, the notion of 'belonging' is the core characteristic of non-alienage[51] — a concept that was said to encompass not just a legal status, but a person's broader tie to 'the *land* of Australia generally, and thus to the political community of Australia'.[52] Or, as his Honour later described in *Love*, to be a non-alien reflects a physical connection to the 'Australian political community by bonds of birth and parentage that the Commonwealth Parliament cannot legislate to sever'.[53]

Although not articulated in precisely this manner, both Gordon J and Bell J conceptualised section 51(xix) in similar terms.[54] Gordon J held in *Love*, for example, that one of the 'essential requirements of a polity' is that 'sovereignty ... is asserted over *territory*'.[55] One's description as a non-alien, to her Honour, thus 'cannot be divorced from that territory'.[56] Justice Bell, likewise, suggested that non-aliens are those who cannot 'be said to belong to another *place*'.[57] Once more, on this view, it is a *physical* connection to Australia which is associated with non-alienage.

Justice Nettle's conception of non-alienage was slightly different than the other *Love* majority judges. To his Honour, constitutional membership did not concern a person's broader tie to the political community.[58] Rather, Nettle J understood section 51(xix) as reflecting a relationship

45. *Love* (n 1) 185–6 [60] (Bell J), 240 [245] (Nettle J), 269 [322] (Gordon J); *Singh* (n 39) 383 [154] (Gummow, Hayne and Heydon JJ).
46. *Love* (n 1) 287 [392] (Edelman J); *Singh* (n 39) 351 [57] (McHugh J).
47. Stellios (n 31) 320.
48. Ibid (citations omitted, emphasis added).
49. Ibid 289.
50. *Love* (n 1) 190 [73] (Bell J), 257 [278] (Nettle J), 262 [298] (Gordon J), 308–9 [438]–[439] (Edelman J); Davenport (n 30) 600–1.
51. Ibid 288 [394].
52. Ibid 289 [396] (citations omitted, emphasis added).
53. Ibid 288–9 [395].
54. Ibid 190 [74] (Bell J), 263 [301]–[302] (Gordon J).
55. Ibid 276 [347] (citations omitted, emphasis added).
56. Ibid 276 [348]–[349].
57. Ibid 190 [74] (citations omitted, emphasis added).
58. Ibid 250 [252].

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between sovereign and subject,[59] a concept mediated through notions of 'permanent allegiance and protection'.[60] However, Nettle J still emphasised that non-alienage creates a specific connection to the territory of Australia. Specifically, to his Honour, the non-alien is owed a 'unique obligation of permanent protection' by the sovereign[61] — an obligation which manifests in the state's requirement to not subject non-aliens to 'exclusion from the *territory* of Australia'.[62] Again, therefore, it is a connection to the *physical* land of Australia which emerges as a component of non-alienage in Nettle J's judgment.

Ultimately, the takeaway from *Love* was significant: to varying degrees, a High Court majority identified a concept of constitutional membership which incorporated a person's physical connection to the territory of Australia.[63]

C Non-alienage and a Freedom of Entry

Against this backdrop, the *Love* majority's conception of section 51(xix) may provide support for Irving's attempt to connect a freedom of entry to non-alienage.[64] Simply put, if a feature of non-alienage is a person's connection to the physical territory of the country, then there must be a means of maintaining that connection — a guaranteed freedom of entry into Australia.

Hints of this view were discernible in cases before *Love*. In *Air Caledonie International v Commonwealth*, for example, the High Court unanimously spoke of a 'citizen's right to re-enter the country, without need of any Executive fiat or "clearance"'.[65] In *Singh v Commonwealth*, Gummow, Hayne and Heydon JJ described the relationship between non-alien and sovereign as 'mutual' and suggested that one consequence of this mutuality was 'perhaps' found in the 'right of the Australian citizen to enter the country'.[66] Justices Brennan, Deane and Dawson similarly observed in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* that the *Constitution* creates an 'important difference' between the alien and the non-alien: the 'vulnerability of the alien to exclusion'.[67] More recently, in a statement post-*Love* (to which I later return), Kiefel CJ, Keane and Gleeson JJ referred to non-alienage as an 'assurance' that a person 'is entitled to be at liberty in this country and to return to it as a safe haven in need'.[68]

Expressed in the abstract, however, these statements were left without clear doctrinal foundation. *Love* is significant in this context because it provides a concrete basis upon which to explicate these judicial suggestions of a freedom of entry — that a freedom of entry is needed to maintain the connection between the non-alien and the Australian body politic.

In *Love* itself, Bell, Nettle and Edelman JJ all alluded to this form of argument. Justice Bell, for example, explicitly stated that the 'exercise of the sovereign power of this nation does not extend to the exclusion of [non-aliens] from the Australian community'.[69] To allow the sovereign to remove

59. Ibid.
60. Ibid.
61. Ibid 258 [279].
62. Ibid 253–4 [272].
63. Davenport (n 30) 600.
64. Irving (n 13) 149.
65. (1988) 165 CLR 462, 470 ('*Air Caledonie*').
66. *Singh* (n 39) 387–8 [166] (citations omitted, emphasis added).
67. (1992) 176 CLR 1, 29 ('*Lim*').
68. *Alexander* (n 2) 578–9 [74].
69. *Love* (n 1) 190 [73].

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non-aliens from Australia, Nettle J similarly held, would impermissibly grant Parliament power to 'tear the organic whole of the society asunder'.[70]

Justice Edelman, likewise, has suggested (in oral argument) that 'the core of being a non-alien' is the 'inability to be deported or prevented from entering Australia'.[71] Hence, his Honour indicated in *Love* that non-aliens must have the means of maintaining access to the 'defined place or territory' of their belonging.[72] Or, as his Honour put more directly in *Love*:

> Membership of the community [is significant] because [it] involves an explicit statement of an '*absolute and unqualified right*' that a citizen cannot be either deported or denied re-entry.[73]

An account, in short, which indicates that a constitutional member is afforded a protection distinguishable from the constitutional alien: an immunity of the non-alien from exclusion.

Post-*Love*, there thus seemed considerable force in Irving's argument for an implied freedom of entry founded on section 51(xix) of the *Constitution*. Namely, that a freedom of entry is necessary to give effect to the core conception of non-alienage.[74]

III Rejecting the First Account: Doctrinal and Conceptual Challenges

Having outlined the existing argument favouring an implied freedom of entry, this section turns to offer a novel critique of this account. I contend that an approach linking a freedom of entry to the definition of non-alienage is problematic for three reasons: (A) it is contrary jurisprudential developments post-*Love*, (B) it faces historical inconsistencies and (C) is attended by broader conceptual difficulties. On this basis, I conclude that any implied freedom of entry ought to operate independently from the concept of non-alienage, an account I develop in Part III.

A The Jurisprudential Challenge: The Post-love Shift

The first challenge to Irving's account is that, post-*Love*, the High Court has 'shifted'[75] its characterisation of section 51(xix) — a shift which is fatal to Irving's proposed implication.

The High Court's post-*Love* judgment in *Chetcuti v Commonwealth*[76] is critical in this respect. In this case, a new majority of Kiefel CJ, Gageler, Keane and Gleeson JJ[77] re-conceptualised section 51(xix) as conferring Parliament with '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'.[78]

To understand how this development challenges Irving's account, it is essential to unpack (1) what this *Chetcuti* characterisation of section 51(xix) entails, before (2) explaining how this characterisation forecloses a freedom of entry based on section 51(xix) of the *Constitution*.

70. Ibid 253–4 [272].
71. Transcript of Proceedings, *Delil Alexander v Minister for Home Affairs* [2022] HCATrans 8.
72. *Love* (n 1) 308 [438].
73. Ibid 309 [440] (citations omitted, emphasis added).
74. Irving (n 13) 139.
75. James Stellios, 'The High Court on Constitutional Law: The 2021 Term' (ANU College of Law Research Paper No 22.8, 1 February 2022) 37–8.
76. (2021) 272 CLR 609 ('*Chetcuti*').
77. Three of the four *Chetcuti* majority dissented in *Love*. Gleeson J was newly appointed to the Court.
78. *Chetcuti* (n 76) 622 [12] (citations omitted, emphasis added).

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1 The Competing View of Section 51(xix). The first significant feature of the *Chetcuti* joint judgment is that the majority adopted a different characterisation of section 51(xix) to the *Love* majority— that alienage and non-alienage is a 'status' determined exclusively by Parliament.[79] As I shortly explain, this view conceptualises alienage as having no immutable or established feature. Instead, the legislature alone decides 'who is and who is not' an alien.[80]

The clearest articulation of this view emerges from Gageler J's dissent in *Love*.[81] In that case, his Honour characterised the aliens power as a power to determine a 'legal status'.[82] Crucially, as a *legal* concept, Gageler J views the legislature as the sole body equipped with the 'power to determine [this] status',[83] a determination it has reached through the statutory concept of citizenship.[84] To Gageler J, the constitutional category of 'non-citizen non-alien' is thus a *non sequitur*:[85] one is either a citizen, or an alien.

As Stellios has observed, this approach characterises section 51(xix) as a 'topic of juristic classification'.[86] Broadly, topics of juristic classification refer to heads of power with no 'fixed' and 'concrete' meaning.[87] Such matters are instead artificial legal constructs which, owing to their artificiality, take their definition from legislative enactment.[88] For instance, the High Court has described the trade-marks power (section 51(xviii)) as a topic of juristic classification.[89] A trade-mark is not a 'physical object but an 'artificial' notion, capable of creation only through a legal instrument.[90] Hence, the meaning ascribed to the term depends upon legislative enactment — it is Parliament alone which gives content to this construct.[91]

In *Love*, Gageler J similarly conceptualises alienage. Thus, in contrast to the *Love* majority,[92] his Honour rejects the idea that section 51(xix) has any pre-determined substantive content. Instead, Gageler J describes the concept of alienage as necessarily without any 'established and immutable legal meaning'.[93] The status of alienage can be 'judicially ascertained'[94]; but such ascertainment occurs 'only through the application of positive law'.[95]

How, then, does Gageler J reconcile this approach with the interpretive constraints imposed by the *Communist Party* doctrine?[96] His Honour does so in two different ways. First, Gageler J suggests that Parliament's ability to affect community membership is not 'entirely unconstrained'.[97]

79. Ibid. See also Stellios (n 31) 314.
80. Ibid.
81. Chief Justice Gleeson had a similar conception of section 51(xix): *Re Minister for Immigration and Multicultural Affairs: Ex Parte Te* (2002) 212 CLR 162, 171 [24] ('*Ex Parte Te*'); *Singh* (n 39) (Gleeson CJ) 376 [128].
82. *Love* (n 1) 192–3 [83].
83. Ibid 192–4 [86].
84. Ibid 197 [93].
85. Ibid 210 [132] (Gageler J. See also 170–1 [5] (Kiefel CJ), 221 [177] (Keane J).
86. Stellios (n 31) 290; *Love* (n 1) 193 [84] (Gageler J), citing *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 578 (Windeyer J).
87. *Attorney-General (NSW) v Brewery Employés Union of NSW* (1908) 6 CLR 469, 611 (O'Connor J) ('*Union Label*').
88. Stellios (n 31) 290.
89. *The Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 493–7 [19]–[26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
90. *Union Label* (n 87) 611 (Higgins J).
91. Ibid.
92. See Part I.A-B.
93. *Love* (n 1) 193–4 [86] (citations omitted, emphasis added).
94. Ibid.
95. Ibid.
96. *Communist Party Case* (n 44).
97. *Love* (n 1) 622 [101] (Gageler J).

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His Honour indicates that other sections of the *Constitution* may restrain Parliament's power to affect constitutional membership[98] — restrictions which I discuss below.[99]

Secondly, as concerns section 51(xix) itself, Gageler J contends that *Communist Party* principles have little bearing on topics of juristic classification. Specifically, on Gageler J's understanding, there is no 'constitutional fact' (or meaning) to be ascertained under the aliens power: that meaning is determined by Parliament alone.[100] Hence, to his Honour, the *Communist Party* principle has a limited bearing on section 51(xix), merely requiring 'a *connection* between the power and a particular law' determining alienage status.[101] This standard of review is relaxed, perhaps resembling a 'rational connection' analysis in other fields of constitutional law[102] (ie, a law purporting to determine alienage status would be invalid only if it had no rational connection to alienage whatsoever).

This conceptualisation of section 51(xix) has been controversial. Justice Edelman, in particular, has variously labelled Gageler J's characterisation of section 51(xix) as 'distorted',[103] an 'absurdity',[104] 'radical',[105] 'problematic',[106] an 'incoherence',[107] 'remarkable',[108] a 'rot',[109] 'curious',[110] a 'grave danger'[111] and akin to treating the *Constitution* 'like alphabet soup'.[112] The *Communist Party* principle is central to this criticism — that the validity of a law cannot be 'determined by the opinion of the Commonwealth Parliament'.[113]

Notwithstanding these criticisms, in a series of post-*Love* cases, a High Court majority has accepted Gageler J's view of section 51(xix). Hence, the *Chetcuti* majority adopted Gageler J's description of alienage as a 'status' determined by citizenship.[114] Likewise, the same plurality in *Alexander* described section 51(xix) as enabling Parliament to 'attribute to any person who lacks ... citizenship "the status of alien"'.[115] Post-*Love*, therefore, it seems that Gageler J's conception of section 51(xix) as a topic of juristic classification has prevailed.

2 Non-alienage as Legal Status: Foreclosing a Freedom of Entry. The view that non-alienage is determined exclusively by Parliament poses a fatal difficulty for Irving's argument that section 51(xix) can ground an implied freedom of entry. Put simply, if non-alienage has no 'established and immutable' meaning,[116] then a freedom of entry cannot lie (as Irving claims) 'at the core of the

98. Ibid.
99. See Part III.B.2.
100. *Love* (n 1) 195 [88]. See Stellios (n 31) 314.
101. *Love* (n 1) 194–5 [87] (citations omitted, emphasis added).
102. *Clubb v Edwards* (2019) 267 CLR 171, 205 [85] (Kiefel CJ, Bell and Keane JJ).
103. *Alexander* (n 2) [186].
104. Ibid [196].
105. Ibid.
106. Ibid [202].
107. Ibid [220].
108. Ibid [224].
109. Ibid [212].
110. Ibid [218].
111. *Love* (n 1) 307 [436].
112. Ibid 290 [399].
113. Ibid 320–1 [467] (Edelman J), see also 270–1 [327]–[330] (Gordon J).
114. *Chetcuti* (n 76) [12] 710 (Kiefel CJ, Gageler, Keane and Gleeson JJ).
115. *Alexander* (n 2) [33] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J).
116. *Love* (n 1) 194 [86] (Gageler J).

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definition' of this concept.[117] For non-alienage, on this view of section 51(xix), has no fixed characteristics whatsoever.[118]

Instead, under the High Court's current conception, it is only citizenship which determines the characteristics of non-alienage. Citizenship, however, remains an unsuitable concept around which to tether any implied constitutional freedoms. For the High Court has long accepted that citizenship, a legislative concept, has no 'immutable core elements'.[119] Rather, it falls to Parliament to 'create and define the concept of Australian citizenship' and to determine which benefits (including entry) attach to that notion.[120]

In *Alexander*, a case concerning the Commonwealth's power to strip citizens of citizenship, a High Court majority affirmed the vulnerability of grounding any constitutional freedoms based upon section 51(xix) alone. Having described non-alienage as a 'legal status',[121] the joint judgment of Kiefel CJ, Keane and Gleeson JJ observed that 'once it is accepted, as it must be, that the statute conferring citizenship is the source of Mr Alexander's rights [as a non-alien] ... it must also be accepted that [this] statute may limit those rights, *including by providing for the circumstances in which they may be lost*'.[122] A view, in short, which emphasises that citizenship is 'a purely *statutory* concept',[123] inapt to establish any entrenched *Constitutional* freedoms.

Thus, the prospect of injecting a freedom of entry into the definition of non-alienage faces difficulties in the post-*Love* case law. It remains true, however, that the High Court's jurisprudence concerning section 51(xix) is far from settled. As such, the question remains whether the definition of non-alienage *should*, from a more theoretical standpoint, incorporate an implied freedom of entry. Below, I move away from a strictly doctrinal analysis, to consider two broader conceptual challenges in connecting a freedom of entry to the definition of non-alienage.

B The Historical Difficulty

The first conceptual challenge to Irving's account is one of history — that non-alienage, as an inherited common law concept, was never thought to guarantee a non-alien's ability to enter their country of nationality.

The *Constitution* does not define the term 'alien', and the record of its drafting does not identify the core characteristics of this term, nor how it should be interpreted.[124] As such, the High Court has developed its understanding of alienage and non-alienage based on analogical common law

117. Irving (n 13) 148.
118. This characterisation of section 51(xix), for identical reasons, also foreclose Rangiah's argument that a freedom of entry is a 'defining characteristic' of those people who are not aliens: Rangiah (n 27) 567.
119. *Lim* (n 67) 54 (Gaudron J); *Love* (n 1) 270 [325] (Gordon J); see also *Love* (n 1) 210 [132] (Gageler J).
120. *Singh* (n 39) 329 (Gleeson CJ); the majority judgments in *Alexander* (n 2) signalled that Chapter III of the *Constitution* imposes limits on Parliament's capacity to strip a person of citizenship. However, that observation is conceptually distinct from a freedom of entry connected to section 51(xix) and so can be put to one side. Below, in Part III, I discuss how *Alexander* may be relevant to an alternative grounding for this freedom.
121. *Alexander* (n 2) [33] (Kiefel CJ, Keane and Gleeson JJ).
122. Ibid (citations omitted, emphasis added).
123. *Love* (n 1) 264 [305] (Gordon J).
124. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1797 (Isaac Isaacs); Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (1997) 25(2) *Federal Law Review* 295, 307.

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reasoning,[125] turning to 'centuries of legal history and political theory' within Britain to inform its section 51(xix) jurisprudence.[126]

These historical factors present a weighty obstacle to linking a freedom of entry to non-alienage. Specifically, at common law, one's description as a non-alien has never guaranteed entry into one's country of nationality. To the contrary, British legal history is replete with examples of non-aliens being expelled from and prevented entry into Britain.[127] Foremost amongst these was exile, a form of punishment in which the sovereign forcibly expelled non-aliens from their homeland.[128]

The British Parliament's capacity to exclude non-aliens from their homeland is unsurprising. In the absence of a written constitution, it has long been accepted that the British Parliament can 'make or unmake any law whatever',[129] including legislation preventing non-aliens from entering their country of nationality. Against this historical backdrop, there is a considerable conceptual difficulty in arguing that a defining characteristic of the inherited common law notion of non-alienage is a freedom to enter the country.

Indeed, in Australian jurisprudence, the common law heritage of section 51(xix) proved problematic in early attempts to attach a freedom of entry to the definition of non-alienage. Over a series of post-Federation cases, the Griffith and Knox Courts upheld exclusions on British non-aliens from entering Australia.[130] In 1908, O'Connor J referred to British non-aliens as able to enter Australia, '*unless* some law of the Australian community has in that respect decreed the contrary'.[131] Likewise, in *R v Macfarlane*, Higgins J held that 'all the King's subjects, being bound by one tie of allegiance to the one sovereign, are free to move at will throughout the Empire *unless some law forbid them*'.[132]

Of course, the significance of these post-Federation cases should not be overstated. These cases pertained to British non-aliens:[133] the question of whether Parliament could equally restrict the movement of *Australians* into their own country has never been tested before the High Court.

Nonetheless, this foundational case law reflects a difficulty in Irving's account. So long as the High Court accepts the relevance of history as informing its section 51(xix) jurisprudence, the shadow of the British common law looms large over any argument that a freedom of entry is a defining feature of non-alienage.

C The Conceptual Challenge

A final objection is more theoretical in scope: that a freedom of entry is not conceptually necessary to give effect to the notion of non-alienage. This fact militates strongly against recognising an implication in this form.

125. Joe McIntyre and Sue Milne, 'The Alien and the Constitution: The Legal History of the 'Alien' Power of the Australian Constitution' (Research Paper, 29 July 2020) 8.
126. *Love* (n 1) 240 [245] (Nettle J); *Singh* (n 39) 349 [54] (McHugh J), 405 [225] (Kirby J), 423 [293] (Callinan J).
127. Javier Bleichmar, 'Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law' (1999) 14(1) *Georgetown Immigration Law Journal* 115.
128. *Hussey v Moor* (1616) 81 ER 232, 236; *Sir Robert Murray v Murray Bruchtoun* (1672) Mor 4799, 4810; *Sibbald v Lady Rosyth* (1685) Mor 13976, 13978; *Alexander Stuart v Patrick Haliburton* (1713) Mor 6829, 6829.
129. AV Dicey, *The Law of the Constitution* (Macmillan, 8th ed, 1915) 3–4.
130. *Potter* (n 7); *Attorney-General (Cth) v Ah Sheung* (1906) 4 CLR 949; *R v Macfarlane* (1923) 32 CLR 528 ('*R v Macfarlane*'); *Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 ('*Ex parte O'Flanagan*').
131. *Potter* (n 7) 305 (O'Connor J) (emphasis added), 289 (Griffith CJ).
132. *R v Macfarlane* (n 130) 576–7 (Higgins J) (emphasis added). See also 531 (Knox CJ), 552 (Isaacs J), 580 (Starke J).
133. *Potter* (n 7) 305 (O'Connor J), 289 (Griffith CJ); *R v Macfarlane* (n 130) 576 (Higgins J).

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In general, the High Court has been cautious in deriving novel constitutional implications. As Goldsworthy observes, any implication limiting government power gives rise to a 'danger of the *Constitution* being altered without the democratic endorsement of the electors'.[134] Hence, the High Court has established a demanding requirement for acknowledging implications.[135] Such constraints are recognised only where 'logically or practically necessary' to preserve the *Constitution's* text or structure.[136]

Against this backdrop, constitutional implications can be derived from section 51(xix) only to the extent that it is necessary to give effect to the definition of alienage or non-alienage. Irving, in this respect, argues that it is 'necessary' to differentiate aliens and non-aliens by reference to the contrasting substantive 'obligations' owed to these two groups of people.[137] To Irving, an implied freedom of entry is necessary to ensure that the distinction between aliens and non-aliens is not 'meaningless'.[138]

Upon closer inspection, however, this argument faces difficulties. For one, whilst aliens and non-aliens must be definitionally distinguished, it is not clear why that distinction must centre around substantive rights and freedoms. On the contrary, points of distinction are regularly made between classes of people without recourse to their substantive rights. To take an unrelated example, section 117 of the *Constitution* distinguishes between people from different States — not by reference to the different rights owed to those people but by reference to where those individuals reside.[139]

In the context of section 51(xix), aliens and non-aliens can similarly be distinguished without having regard to substantive freedoms.[140] In *Chetcuti*, the majority engaged in this distinction through analysing a factual question: whether a person had citizenship.[141] On the *Love* majority analysis, this distinction could be ascertained through a similar factual inquiry. Specifically, a Court would assess whether a person's prior connection to Australia meant they were a 'member of the Australian political community'[142] — a description which could still be satisfied, even if that person did not have a guaranteed ability to enter Australia at that specific point in time.

As a practical example, the Federal Government's COVID-19 travel restrictions illustrated that the distinction between aliens and non-aliens is not *necessarily* conditioned upon the capacity to enter Australia. During COVID-19, several Australian nationals were prevented re-entry into Australia.[143] However, throughout this period, it remained possible to distinguish between persons who were aliens, and those who were not. People who were citizens,[144] for example, remained non-aliens during this period, even if those non-aliens did not have a guaranteed ability to enter Australia.

The takeaway, for present purposes, is straightforward: that a freedom of entry is hardly necessary for the High Court to maintain a distinction between aliens and non-aliens. Ultimately,

134. Jeffrey Goldsworthy 'Constitutional Implications Revisited' (2011) 30(1) *Queensland University of Law Journal* 9, 19–20.
135. James Edelman, 'Implications' (Spiegelman Oration, 21 April 2022) 18–20; Jeremy Kirk, 'Constitutional Implications (I): Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 646.
136. *Lange* (n 21) 566–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ).
137. Irving (n 13) 148.
138. Ibid.
139. See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461.
140. Irving (n 13) 148.
141. *Chetcuti* (n 76) 710 [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
142. *Love* (n 1) 186 [61] (Bell J), 262 [296] (Gordon J); 288 [394] (Edelman J).
143. Pillai (n 17).
144. *Chetcuti* (n 76) 710 [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

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that fact alone points decisively against connecting an implied freedom of entry to the definition of non-alienage.

D Non-alienage and a Freedom of Entry: An Inopportune Framework

Section 51(xix) remains, at best, an unsettled foundation upon which to establish a freedom of entry. Both jurisprudentially and theoretically, significant difficulties arise in connecting the definition of non-alienage to such an implication. Any freedom of entry, therefore, ought to operate independently of non-alienage. The remaining sections of this article consider an alternative grounding for such a principle: an account, I contend, that is doctrinally and conceptually sound and is adapted for Australia's unique constitutional context.

IV The Second Account: Political Sovereignty and a Freedom of Entry

Having rejected the first account of an implied freedom of entry, this section turns to advance an alternative grounding for this guarantee: an implication drawn from the *Constitution's* protection of popular political sovereignty (the popular sovereignty principle).

The possibility of using popular sovereignty to ground a freedom of entry has been suggested by Zines[145] and Kirk.[146] However, both authors outline this argument only briefly, and so the prospect of recognising an implication on this basis remains largely unexamined. This section develops these initial arguments, in an attempt to provide a firm constitutional foundation upon which an implied freedom of entry could be accepted.

Broadly expressed, my account is premised on two constituent claims, each of which are necessary to ground this implication.

A. The High Court has held that the *Constitution* guarantees an equal opportunity to participate in the exercise of political sovereignty.[147]
B. A necessary aspect of having an equality of opportunity to participate in the exercise of political sovereignty is the ability to enter Australia.[148]

Defending these two constituent claims, I contend, provides a basis on which a constitutional freedom of entry could be recognised.

Before developing this account, I make three brief comments on the scope of this argument. First, my argument in claim (A) is descriptive: that the High Court has, factually speaking, recognised a popular sovereignty principle. This section does not evaluate whether the High Court has been correct to do so. Those arguments have been made elsewhere.[149] Rather, in this section, I take as a given that the High Court has recognised this principle and tease out the implications of that recognition.

145. Zines (n 9) 414–15.
146. Kirk (n 10) 345.
147. See Part III A.
148. See Part III B.
149. George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1; Leslie Zines, 'The Sovereignty of the People' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (The Federation Press, 1997) 91.

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Second, although popular sovereignty relates to the implied freedom of political communication, my proposed freedom of entry is not derived from the freedom of political communication: the High Court has rejected that form of reasoning.[150] Instead, my account contends that the constitutional guarantee of popular sovereignty itself renders an implied freedom of entry necessary.

Finally, as noted above,[151] an implied freedom of entry would operate only as a qualified limitation on government power. Parliament could still enact legislation prohibiting entry, if that law was appropriate and adapted to achieving a constitutionally legitimate end.

A Political Sovereignty Within the Constitution

The first contingent claim is that the High Court has recognised the *Constitution* as guaranteeing an 'equality of opportunity to participate in the exercise of political sovereignty'.[152] However, as Winterton has observed, notions of popular sovereignty are 'notoriously ambiguous'[153] — particularly so in recent High Court jurisprudence. The High Court's recognition of a popular sovereignty principle therefore requires some analysis.

To examine the High Court's conception of popular sovereignty, this subsection (1) outlines the emergence and acceptance of a constitutional popular sovereignty principle, before (2) developing a precise account of what the High Court means by its use of this term.

1 Two Views of Popular Sovereignty. The term popular sovereignty broadly refers to a political system in which 'the ultimate source of all authority ... originates in the people'.[154] Within the High Court, Justices have identified with two competing schools about the existence of a constitutional popular sovereignty principle.

The first school of thought is that notions of popular sovereignty have no 'logical or legal basis' within Australian constitutional theory whatsoever.[155] Under this view, the ultimate source of constitutional authority lay not with the Australian people, but the Imperial Parliament.[156] That body, after all, was the institution which enacted and legitimised the Australian *Constitution* at Federation.[157] Sir Owen Dixon endorsed this conception of constitutional sovereignty, arguing that the *Constitution* did not 'obtain its force from the direct expression of a people's inherent authority' but instead gained legitimacy as part of the 'exercise of [British] legal sovereignty' over Australia.[158] Dawson J, similarly, contended that the only 'foundation of the Australian *Constitution*' was 'an exercise of sovereign power by the Imperial Parliament'.[159]

A contrasting understanding of Australia's constitutional arrangements is that sovereignty remains 'embedded in the Australian people'.[160] This view — which gained prominence following

150. *Gerner v Victoria* (2020) 270 CLR 412, 427 [25] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) ('*Gerner*').
151. See Introduction.
152. *McCloy* (n 15) 207 [45] (French CJ, Kiefel, Bell and Keane JJ); *Unions NSW (No 1)* (n 15) 548 (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
153. Winterton (n 149) 4.
154. George Duke, 'Popular Sovereignty and the Nationhood Power' (2017) 45(3) *Federal Law Review* 415, 415.
155. Zines (n 9) 557; see also Geoffrey 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, 32–3.
156. See Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Harston, Partridge and Co, 1901) 14; William Harrison Moore, *The Constitution of the Commonwealth of Australia* (Robert Maclehose and Co, 1910) 66.
157. See James Stellios, *Zines and Stellios' The High Court and the Constitution* (Federation Press, 7th ed, 2022) 673–4.
158. Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.
159. *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 181 (Dawson J) ('*ACTV*').
160. *McGinty v Western Australia* (1996) 186 CLR 140, 237 (McHugh J) ('*McGinty*').

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Australia's independence from the United Kingdom[161] — broadly embraces Madison's theory of constitutional authority: that 'the people, not the government, possess the absolute sovereignty'.[162] Support for this view emerged over a series of implied freedom of political communication cases in the Mason Court, where various Justices ascribed some form of 'ultimate sovereignty' to the Australian people.[163] Mason CJ was clearest in this respect, arguing that the *Constitution*:

> [B]rought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people.[164]

The development of a popular sovereignty principle, his Honour continued, culminated in the passage of the *Australia Act 1986* (UK) — a moment which 'marked the end of the legal sovereignty of the Imperial Parliament' and correspondingly recognised that 'ultimate sovereignty resided in the Australian people'.[165]

Ultimately, and notwithstanding a period of uncertainty,[166] the latter view of popular sovereignty has prevailed within contemporary High Court case jurisprudence. Both the French and Kiefel Courts repeatedly endorsed the view that the *Constitution* creates and guarantees the exercise of popular political sovereignty.[167] In *Unions NSW (No 1)*, for example, a majority of French CJ, Hayne, Crennan, Kiefel and Bell JJ described the *Constitution* as establishing:

> [G]overnment by the people through their representatives: in constitutional terms, a sovereign power residing in the people, exercised by the representatives.[168]

In *McCloy*, a High Court majority similarly spoke of the 'equality of opportunity to participate in the exercise of political sovereignty' as an aspect of Australia's democratic system 'guaranteed by our *Constitution*'.[169] That same view was echoed more recently in *Unions NSW v New South Wales (No 2)*, where Kiefel CJ, Bell and Keane JJ recognised a constitutional protection afforded to 'equal participation in the exercise of political sovereignty'.[170]

Two immediate points can be made about the contemporary expression of this principle. First, it is clear that the High Court has not only accepted a doctrine of popular sovereignty, but views that principle as a substantive constraint on government power. So much was apparent in *Gerner v Victoria*, where a unanimous High Court held that any laws which 'impede the exercise of political sovereignty by the people of the Commonwealth' will face constitutional scrutiny.[171] Likewise, the High Court has now accepted that the foundation of the implied freedom of political communication is the *Constitution's* guarantee of popular sovereignty. In *Clubb v Edwards*, for example, a plurality

161. See Zines (n 149) 192; Lindell (n 155) 34.
162. James Madison, 'Report on the Virginia Resolutions' (1836) 4(2) *Elliot's Debates on the Federal Constitution* 569, cited in *Theophanous v Herald v Weekly Times Ltd* (1994) 182 CLR 104, 180 (Deane J).
163. *Theophanous* (n 162) 180 (Deane J); *Nationwide News v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ) ('*Nationwide News*'); *McGinty* (n 161) 230 (McHugh J).
164. *ACTV* (n 159) 180 (Mason CJ).
165. Ibid.
166. The principle 'played [no] noticeable part' in the Brennan or Gleeson Court's jurisprudence: Zines (n 9) 559.
167. Duke (n 154) 424.
168. (2013) 252 CLR 530, 548 [17].
169. *McCloy* (n 15) 207 [45] (French CJ, Kiefel, Bell and Keane JJ).
170. *Unions NSW v New South Wales* (2019) 264 CLR 595, 614 [40] ('*Unions NSW (No 2)*').
171. *Gerner* (n 151) [18] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ); see also *Unions NSW (No 2)* (n 170) at 614 [40] (Kiefel CJ, Bell and Keane JJ).

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of Kiefel CJ, Bell and Keane JJ spoke of the constitutional need for laws to be 'consistent with the political sovereignty of the people and the implied freedom which supports it'.[172]

Second, despite its numerous references to the term, the High Court has still not precisely articulated what it understands by its references to popular sovereignty.[173] As various scholars have observed, judicial references to the term remain somewhat 'cryptic'[174] and 'vague',[175] without self-evident meaning.[176] Likewise, it provides scant assistance to turn to political theory to assess how the High Court understands popular sovereignty. As Duke observes, the breadth of the term allows for dramatically 'different conceptions' of popular sovereignty to emerge in philosophical discourse.[177]

The question remains, therefore, as to how legislation might 'impede the exercise of political sovereignty by the people'.[178] It is to that question which this next subsection turns, paying close regard to the High Court's own jurisprudence.

2 What Is Meant by the High Court's Use of the Term 'Popular Sovereignty'?. High Court jurisprudence suggests two possible conceptions of popular sovereignty. The first, broader understanding links popular sovereignty to a requirement that the Government must govern on behalf, and for the benefit, of the people. If 'governmental authority is derived from the people', Kirk surmises, then it might be argued that 'no law can be valid which unjustifiably harms them'.[179] This understanding of popular sovereignty exposes a broad range of legislative activity to constitutional scrutiny. Anything contrary to the popular interest, on this account, would be *prima facie* invalid.[180] A handful of High Court judgments may have have alluded to this view of popular sovereignty. Nettle J in *McCloy*, for example, posited in *McCloy* that 'political sovereignty further necessitates that those who govern take account of the interests of the interests of all those whom they govern'.[181]

However, with respect, it is difficult to discern a clear textual basis for this broad conception of popular sovereignty. On face value, such a constraint is inconsistent with the drafting of the *Constitution*, which sought to minimise 'checks on legislative action'.[182] Likewise, it is doubtful that the judiciary is institutionally equipped to assess whether legislation is in 'the public interest'. As Kirk observes, determining whether laws are publicly beneficial 'is the essence of political judgment', not judicial decision-making.[183]

172. *Clubb v Edwards* (2019) 267 CLR 171, 205 [85] (Kiefel CJ, Bell and Keane JJ).
173. Duke (n 154) 423.
174. George Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25(1) *Adelaide Law Review* 21, 34.
175. James Stellios, 'Using Federalism to Protect Political Communication' (2004) 31(1) *Melbourne University Law Review* 239, 243.
176. Duke (n 154) 423.
177. Ibid 424.
178. *Gerner* (n 151) 424 [18] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).
179. Kirk (n 10) 345. Justice Stephen Breyer, former Justice of the United States Supreme Court, has similarly suggested that a popular sovereignty principle is relevant with respect to the United States *Constitution* (albeit as an interpretive principle, rather than a substantive constraint on government power). Justice Breyer contends that Courts 'should take greater account' of the 'people's right to "an active and constant participation in collective power"' when interpreting the *Constitution*: Stephen Breyer, 'Active Liberty: Interpreting Our Democratic Constitution' (The Tanner Lectures on Human Values, 17–19 November 2004) 4–5.
180. Ibid.
181. *McCloy* (n 15) 257 [216] (Nettle J); see also Michael Kirby, 'Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution' (1997) 4 *Deakin Law Review* 129, 138.
182. Owen Dixon 'Two Constitutions Compared' (1942) 28(11) *American Bar Association Journal* 733, 734.
183. Kirk (n 10) 345–6.

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A second and more textually secure account connects popular sovereignty to equal participation in Australia's electoral system.[184] Popular sovereignty, on this view, does not constrain *all* government action. Rather, it guarantees a freedom for the Australian people to participate in Australia's electoral system — that being the process by which the people exercise political power to choose the representatives who govern on their behalf.[185]

Support for this notion has emerged in the High Court's more recent case law. In *Gerner*, for example, a unanimous High Court referred to the:

> express provisions of ss 7, 24 and 128 and related provisions of the *Constitution* [as] establish[ing] the political sovereignty of the people of the Commonwealth.[186]

Importantly, this textual identification connects popular sovereignty to Australia's electoral system. Sections 7 and 24 vest the people with the capacity to choose their representatives.[187] Section 128, likewise, confers 'the electors' with power to approve constitutional amendments. In this respect, the modern conception of popular sovereignty echoes Deane and Toohey JJ's statement in *Nationwide News v Wills*: that the '*Constitution* reserves to the people of the Commonwealth the ultimate power of governmental control' through its 'electoral processes'.[188]

On this view, popular sovereignty is closely connected to the ability for the people to choose their elected representatives.[189] Importantly, however, the High Court has suggested that the electoral control protected by popular sovereignty extends beyond voting in elections. Rather, the principle encompasses more general participation in the political process — such participation being necessary to preserve the people's 'ultimate power' of control over electoral outcomes.[190]

The *Unions NSW (No 2)* plurality, for example, discussed political sovereignty in terms of 'equal *participation* in the electoral process'.[191] The *McCloy* High Court similarly referred to laws which were 'inimical to equal *participation* by all the people in the political process' as being 'fatal to [their] validity'.[192] More explicitly, in that same case, Nettle J indicated that:

> 'Political sovereignty' means the freedom of electors, through [engagement] between themselves and with their political representatives, to implement legislative and political changes.[193]

Notice here that the focus of popular sovereignty is not just on the ability to vote. Rather, to the High Court, political sovereignty refers to the way in which the electors *themselves* can seek to 'implement legislative and political changes' through democratic participation.[194]

Expressed in this manner, protecting popular sovereignty encompasses various substantive incidents beyond voting. Foremost amongst these incidents is the freedom of political

184. Duke (n 154) 423.
185. Robert French, 'Law Making in a Representative Democracy' (Catherine Branson Lecture Series, 14 October 2016) 8.
186. *Gerner* (n 151) [24].
187. *Roach* (n 21).
188. *Nationwide News* (n 163) 71 (Deane and Toohey JJ).
189. *Roach* (n 21).
190. *Nationwide News* (n 163) 71 (Deane and Toohey JJ); *McCloy* (n 15) 257 [216] (Nettle J).
191. *Unions (No 2)* (n 171) 504 [5] (Kiefel CJ, Bell and Keane JJ) (citations omitted, emphasis added).
192. *McCloy* (n 15) 207 [45] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added); see also *Roach* (n 21) 186 175–6 [8]–[11] (Gleeson CJ), [43] (Gummow, Crennan and Kirby JJ).
193. Ibid 257 [216], citing *ACTV* (n 161) (Mason CJ) 137–8.
194. Ibid.

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communication, an implication which 'ensures that the people of the Commonwealth enjoy equal *participation* in the exercise of political sovereignty'.[195] A free flow of political communication, on this view, is necessary to protect the 'freedom of electors and their political representatives to disseminate or receive information' which may influence political outcomes.[196]

Likewise, persuasive suggestions have been made that equal participation in Australia's electoral processes encompasses other freedoms. Various authors have argued, for example, that a freedom to access the seat of government,[197] form and engage with political parties,[198] observe political events[199] and run for elected office[200] are all part of political sovereignty required by the *Constitution* — those activities being necessary to preserve the 'freedom of electors ... to implement legislative and political changes'.[201] Indeed, in *Re Gallagher*, the High Court spoke of the ability to run for Parliamentary office as guaranteed by the 'constitutional imperative' of preserving 'the ability of Australian citizens to *participate* in representative government' (subject, in that case, only to the express qualifications in section 44 of the *Constitution*).[202] That language of political *participation*, on face value, is consonant with a principle that connects popular sovereignty to equal participation in Australia's electoral system.

Further cases will be needed to chart the precise contours of constitutional popular sovereignty. The takeaway, for present purposes, is straightforward: although popular sovereignty relates to choosing one's representatives, the principle as expounded by the High Court entails more than just voting. Instead, the concept encompasses all that is necessary to ensure popular control over Australia's political systems — such control being framed in terms of equal 'participation by all the people in the political process'.[203]

B Freedom of Entry as a Necessary Pre-condition to Exercising Popular Sovereignty

Building upon this understanding of popular sovereignty, this section turns to the second continent claim: that a freedom of entry is a necessary pre-condition to ensuring an equal opportunity to exercise political sovereignty. As noted above, this argument is novel. Nonetheless, I contend that it is an implication which is (1) necessary in principle and (2) has attracted preliminary doctrinal support.

1 Freedom of Entry in Principle. The starting point for this claim emerges from a factual proposition: that an equal opportunity to exercise the incidents of popular sovereignty is restricted where Parliament deprives people of entry into Australia. The essence of this argument is surmised by

195. *Unions NSW (No 2)* (n 171) 614 [40] (Kiefel CJ, Bell and Keane JJ) (emphasis added); see also *Unions NSW (No 1)* (n 15) 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
196. *McCloy* (n 15) 257 [216] (Nettle J), citing *ACTV* (n 161) (Mason CJ) 137–138.
197. Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23(1) *Federal Law Review* 37, 57; *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108–9 (Griffith CJ), 109–110 (Barton J) ('*R v Smithers*').
198. Cheryl Saunders, 'Democracy: Representation and Participation' in Paul Finn (eds), *Essays on Law and Government* (Volume 1, Law Book Company, 1995) 51, 52.
199. Daniel Reynolds, 'An Implied Freedom of Political Observation in the Australian Constitution' (2018) 42(1) *Melbourne University Law Review* 199.
200. Rayner Thwaites and Helen Irving, 'Allegiance, Foreign Citizenship, and the Constitutional Right to Stand for Parliament' (2020) 48(3) *Federal Law Review* 299; Kirk (n 197) 58.
201. *McCloy* (n 15) 257 [216] (Nettle J).
202. *Re Gallagher* (2018) 263 CLR 460, 471 [23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (emphasis added). See also *Re Canavan* (2017) 263 CLR 284, 313 [72] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
203. *McCloy* (n 15) 207 [45] (French CJ, Kiefel, Bell and Keane JJ).

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Zines: that 'to be forced to leave, or be prevented from returning to, Australia ... impair[s] the exercise of a person's constitutional functions'.[204] Or, phrased differently, the *Constitution* could not guarantee an equal opportunity for 'the people' to exercise their political sovereignty if Parliament arbitrarily deprived some of those persons entry into the country. Legislation restricting entry, on this view, involves not just a denial of access to the physical territory of Australia; it is an exclusion from the Australian 'political community' as well.[205]

In this respect, it is important to note that many of the constitutionally protected incidents of political sovereignty mooted above are exercisable only when physically present within Australia. Most obviously, legislation restricting entry interferes with the constitutional freedom afforded to political communication. Laws inhibiting entry, for example, render any protection afforded to in-country political communication, including political demonstration and protest, inutile.[206] Similarly, the constitutional safeguard afforded to political campaigning,[207] and inquiring into political matters,[208] is frustrated where legislation limits entry into Australia.

Beyond political communication, other components of political sovereignty are curtailed where legislation restricts entry into Australia. Any protection afforded to the ability to access government and its representatives,[209] observe political matters[210] and effectively campaign for office[211] (to the extent that those activities are protected under a popular sovereignty principle) is undercut when laws limit entry into Australia. Or, borrowing Nettle J's language, the 'freedom of electors ... to implement legislative and political changes', through engagement 'between themselves and with their political representatives', is burdened where legislation denies some of those electors the ability to enter the country.[212]

In Australia, hints of this view have been discernible in recent cases. Most notably, the plurality in *Alexander* spoke of return to Australia as matters of 'public rights ... of "fundamental importance"'.[213] One reason for that 'fundamental importance', it has been suggested, is that a denial of entry is tantamount to an 'exclu[sion] from [the] *political* community'.[214]

Outside Australia, judicial support for the notion that entry is necessary to exercise political sovereignty emerges in the United States. Like its Australian counterpart, the *United States Constitution* contains no express guarantee of a citizen's right to enter the country. However, the Supreme Court has held that a citizen's ability to enter the United State is impliedly guaranteed by the *United States Constitution's* Fifth Amendment[215] (that no person can be deprived of their 'life, liberty or property' without due process of law).[216] In reaching that conclusion, the United States Supreme Court has emphasised that the ability of a citizen to enter the country serves as an essential

204. Zines (n 9) 589.
205. *Love* (n 1) 206 [118] (Gageler J), 287 [392] (Edelman J). See also John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 369–70.
206. *Levy v Victoria* (1997) 189 CLR 579; *Brown v Tasmania* (2017) 261 CLR 328.
207. *Unions NSW (No 1)* (n 15).
208. *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655.
209. Kirk (n 197) 57; *R v Smithers* (n 198) 108–9 (Griffith CJ), 109–10 (Barton J).
210. Reynolds (n 199).
211. Thwaites and Irving (n 200); Kirk (n 197) 58.
212. *McCloy* (n 15) 257 [216] (Nettle J).
213. *Alexander* (n 2) 578–9 [74] (Kiefel CJ, Keane and Gleeson JJ).
214. Ibid [208] (Edelman J) (emphasis added); see also [45] (Kiefel CJ, Keane and Gleeson JJ).
215. *Kent v Dulles,* 357 US 116, (1958); *Zemel v Rusk* 381 US 1, (1965).
216. *United States Constitution* amend V.

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pre-condition for exercising other constitutional guarantees.[217] In *Aptheker v Secretary of State*, for example, Douglas J described entering the country as the freedom which:

> makes all other rights meaningful ... Once the right to travel [into the country] is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.[218]

Care must be taken with this United States jurisprudence. For one, the Australian *Constitution* contains neither a due process clause,[219] nor an 'independent constitutional principle of individual liberty'.[220] Additionally, Douglas J spoke of entry as necessary to effectuate 'other *rights*'.[221] Such reasoning is not directly apposite in Australia, given that sections 7 and 24 of the *Constitution* 'do not confer personal rights on individuals', but rather constrains legislative and executive power.[222] Nonetheless, in the context of a popular sovereignty principle which protects various aspects of political participation from government interference, Douglas J's reasoning still has pertinence in an Australian context.[223] Namely, that once *legislation* prohibits entry, the exercise of popular political sovereignty (and the concomitant incidents of political activity guaranteed through that principle) suffers.

Of course, the impact of remaining overseas should not be overstated: a person can still enjoy some form of political participation whilst out of Australia. Australia allows overseas voting,[224] whilst it also remains possible to engage in some political speech when overseas. Modern technology, in particular, allows 'widespread, democratised, access to media', which readily enables some form of communication on political matters from abroad.[225]

However, the crucial aspect of popular sovereignty is not just that it protects *some* engagement in the political system. Instead, the concept is predicated upon an *equal* opportunity to participate in the electoral system.[226] A political system, after all, cannot guarantee true popular sovereignty if only some of the populace can fully engage in the electoral process.[227] Hence, in an oft-cited observation, Professor Harrison Moore described the 'great underlying principle' of the *Constitution* as being 'to each a share, and an *equal* share, in political power'.[228] Similarly, the *McCloy* majority spoke of the *Constitution* as guaranteeing an '*equality* of opportunity to participate in the exercise of political sovereignty'.[229]

In this context, it is doubtful whether legislation excluding entry into Australia allows a truly equal opportunity to participate in the political process. Consider, for example, the Federal Government's power to deny re-entry to a citizen suspected of supporting a terrorist group under the

217. Jeffrey Kahn, 'International Travel and the Constitution' (2008) 56(2) *UCLA Law Review* 271, 335.
218. *Aptheker v Secretary of State* 378 US 500, 520 (1964) (Douglas J).
219. *McGinty* (n 160) 231–2 (McHugh J).
220. *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 164 [216] (Edelman J) ('*Benbrika (No 1)*').
221. *Aptheker* (n 218) 520 (Douglas J) (citations omitted, emphasis added).
222. *Lange* (n 21) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Stellios (n 157) 635–41.
223. *Alexander* (n 2) [78] (Kiefel CJ, Keane and Gleeson JJ), citing *Kennedy v Mendoza-Mertinez* 372 US 144, 168 (1963).
224. Bryan Mercurio and George Williams, 'The Australian Diaspora and the Right to Vote' (2004) 32(1) *University of Western Australia Law Review* 1.
225. *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 [165] (Steward J) (citations omitted).
226. Justice Patrick Keane, 'The People and the *Constitution*' (2016) 42(3) *Monash University Law Review* 529, 540.
227. See Part IV.B for certain exceptions to this principle.
228. Harrison Moore (n 156) 219 cited in *ACTV* (n 160) 139–40 (Gleeson CJ), *McCloy* (n 15) 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110] (Gageler J), 258 [219] (Nettle J).
229. *McCloy* (n 15) 207 [45] (French CJ, Kiefel, Bell and Keane JJ).

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Counter-Terrorism (Temporary Exclusion Orders) Act 2019 (Cth).[230] On its face, this legislation creates an inherently unequal opportunity to exercise political sovereignty. Some citizens can fully engage in the electoral system; others, who are overseas, do not enjoy that same opportunity to engage in in-country political communication,[231] accessing of government[232] and political observation[233] which are the incidents of a popular sovereignty guarantee.[234] In other words, the equal 'freedom of electors' to seek 'to implement legislative and political changes'[235] is burdened through laws excluding persons from Australia. That fact, under the High Court's current jurisprudence, means that legislation restricting entry demands constitutional justification. Or, phrased negatively, any unjustified restriction on an elector's ability to enter the country is incompatible with the constitutional protection of popular political sovereignty.

Thus, there seems considerable force in Kirk's observation: that to prevent an Australian from entering their own country is to 'deprive (some) citizens of their ultimate [constitutional] power'.[236] To maintain a truly equal opportunity to participate in the exercise of political sovereignty requires a means of ensuring equal access to Australia's political community itself — that is, an implied freedom of entry.

2 Freedom of Entry in Authority. The High Court has never considered a constitutionally implied freedom of entry.[237] Nonetheless, the argument that a popular sovereignty principle can ground an implied freedom of entry may have attracted support from at least two current High Court Justices.

The first is Edelman J, whose sole judgment in *Hocking v Director-General of the National Archives of Australia* offers support for an implication in this form.[238] Having observed that 'the body politic of the Commonwealth' refers to both a 'political community of people' and its 'established territory', his Honour contends that the *Constitution* contains:

> [L]imits upon the extent to which legislatures can fracture the membership of the political community of the body politic such as by exclusion of … [the] people ... [and] by imposition of unjustified restraints upon the participation by the people in the operation of the body politic.[239]

In support of the reference to 'exclusion', Edelman J cites *Love*: a case in which, it will be recalled, his Honour articulated a view that membership of the Australian body politic operates as a guarantee of entry into Australia.

Whilst Edelman J does not explain the foundation for this comment, two aspects of his Honour's statement are notable. First, Edelman J explicitly refers to an implication constraining Government power — Parliament's ability to 'exclu[de]' the 'people' from the body politic faces 'limits'.[240]

230. *Temporary Exclusion Orders* (n 19) s 10(2)(a)(iv), s 10(6)(d).
231. *Brown* (n 206); *Levy* (n 206).
232. Kirk (n 197) 57.
233. Reynolds (n 199).
234. This, of course, says nothing of whether the law is appropriate and adapted which, as outlined above, would render the law valid, even if burdening the freedom.
235. *McCloy* (n 15) 257 [216] (Nettle J), 207 [45] (French CJ, Kiefel, Bell and Keane JJ).
236. Kirk (n 10) 345.
237. Any argument was inapplicable in *Alexander*, where citizenship-stripping would have denied the plaintiff's status as one of 'the people': *Alexander* (n 2) [44] (Kiefel CJ, Keane and Gleeson JJ); see also Postscript for further developments in recent High Court jurisprudence on this topic.
238. (2020) 271 CLR 1.
239. Ibid 86 [212] (citations omitted, emphasis added).
240. Ibid.

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Second, Edelman J refers to the basis of this implication as the need to protect 'participation by the people' in the operation of the body politic, with his Honour citing various cases about representative democracy.[241] Although not identified as such, this language of 'participation' in the body politic echoes the High Court's popular sovereignty jurisprudence just outlined.

In addition, Gageler J may have alluded to a similar basis for a freedom of entry in *Love* itself.[242] As outlined above, Gageler J views Parliament's power to determine constitutional membership under section 51(xix) as having few limits.[243] Yet, his Honour acknowledges that 'Parliament's choice' in this area 'is [not] entirely unconstrained'.[244] Rather, Gageler J considers that limits on Parliament's power to shape community membership are found elsewhere in the *Constitution*.[245] Specifically, and 'having regard to the role of Australian citizenship as determining membership of the body politic', Gageler J observes that any 'exclusion' of an otherwise qualified person from citizenship, and thus the body politic, 'would need to be supported by "substantial reasons"'.[246] In support of that statement, Gageler J references the same representative democracy cases cited by Edelman J.[247]

Gageler J does not elaborate upon the precise basis for this comment, and so a question arises: how might representative government relate to a restriction on any 'exclusion' from the body politic? One possible answer is through notions of popular sovereignty. After all, as conceptualised by the High Court, popular sovereignty is 'an aspect of the representative democracy guaranteed by our *Constitution*'.[248] Preserving popular control over political outcomes, Gageler J may be suggesting, necessarily guards against any unjustified physical exclusion from Australia's political community.[249]

Thus, the jurisprudence from at least two Justices may be drawn upon to support an argument that the *Constitution's* guarantee of equal political participation cannot be maintained without a freedom of entry into Australia.

C Consequences

If the above two premises are accepted, then an implied freedom of entry may be necessary to preserve the *Constitution's* guarantee of popular sovereignty. Before continuing, I make three comments about the consequences of that implication. First, as noted, whether this freedom is burdened, and whether that burden could be justified, would turn on statutory particulars.[250]

Second, a burden on this freedom would only arise where a restriction on entry was more than 'inconsequential'.[251] Laws imposing no true burden on a person's entry into Australia — such as airport screening — would not face constitutional scrutiny. Only an actual burden, such as

241. Ibid, citing *Lange* (n 22), *Roach* (n 22); *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
242. *Love* (n 1).
243. Part II.A.1.
244. *Love* (n 1) 200 [101].
245. *Love* (n 1) 200 [101].
246. Ibid (citations omitted, emphasis added).
247. Ibid, citing *McGinty* (n 161), *Roach* (n 21); *Rowe* (n 241). See also Stellios (n 31) 316–17.
248. *McCloy* (n 15) 207 [45] (French CJ, Kiefel, Bell and Keane JJ).
249. See *Love* (n 1) 200 [101] (Gageler J).
250. See introduction.
251. *Unions NSW (No 1)* (n 15) 554 [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

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criminalising entry into Australia,[252] or taxing citizens upon return to the country,[253] would demand constitutional justification.

Third, this freedom would extend to 'the people' identified in sections 7 and 24 of the *Constitution* — those persons being the repositories of political sovereignty. Admittedly, there is some uncertainty about who, precisely, constitute 'the people'.[254] It suffices for present purposes to observe that, following statements in *Alexander*, the implication would at least extend to Australian citizens.[255]

V Potential Objections and Replies

Having developed an argument for an implied freedom of entry, this article anticipates and rebuts three potential objections to my account. In so doing, I clarify the contours of my proposed implication.

A Methodological Objection

A first objection might critique the methodology used to arrive at this implied freedom. Recall that my proposed account develops an implied freedom of entry as a necessary *pre-condition* for maintaining popular sovereignty. I have argued that only through guaranteed physical presence in the body politic can an equal opportunity to participate in the political process be maintained.[256] Importantly, this account does not view entry into the country itself as a substantive component of popular sovereignty — plainly, a person's mere presence in Australia does not amount to political participation.

The first objection might query this manner of deriving constitutional implications. Should we not, a critic might argue, only be concerned with protecting the substantive components of popular sovereignty? That is, by assessing whether legislation has restricted the ability to vote, the freedom to engage in political communication or the other incidents of popular sovereignty.[257] On this view, a Court should examine the constitutionality of legislation prohibiting entry — not by assessing whether it limits entry per se but instead by evaluating the *effect* of that restriction on the substantive components of political sovereignty.[258]

One response can be made to this objection: that popular sovereignty is concerned both with the substantive exercise of power, *and* the conditions of its exercise. In *McCloy*, for example, the High Court referred to the *Constitution* as protecting the 'equality of *opportunity* to participate in the exercise of political sovereignty'.[259] This language of 'opportunity' is significant. Literally defined, an opportunity refers to a 'set of circumstances permitting or favourable to a particular action' — a term, in the constitutional setting, which directs attention towards the *conditions* surrounding the exercise of a power.[260]

252. See, eg, *Biosecurity Determination* (n 16).
253. *Air Caledonie* (n 65).
254. Rangiah (n 27) 12–19; Elisa Arcioni, 'The Core of the Australian Constitutional People' (2016) 39(1) *UNSW Law Journal* 421, 422–7.
255. *Alexander* (n 2) [44] (Kiefel CJ, Keane and Gleeson JJ), citing *Love* (n 1) 197–8 [94] (Gageler J).
256. See Part III.B.1.
257. See Part III.A.2 for possible other incidents.
258. Ibid.
259. *McCloy* (n 15) 207 [45] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted, emphasis added).
260. *Oxford English Dictionary* (3rd ed, 2022) 'opportunity' (def 1).

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In this context, it is appropriate to consider both the substantive incidents of popular sovereignty and the circumstances needed to ensure that this principle is protected. An implied freedom of entry is a necessary safeguard of the latter. Where legislation prevents entry, those laws always restrict the *opportunity* to exercise political sovereignty and thus require constitutional justification.[261]

B Overbreadth Objection

A second objection critiques the scope of this implied freedom: an account based on popular sovereignty, it could be counterargued, leads to extreme consequences.

As presented above, an implication predicated on popular sovereignty suggests that any restriction on engagement in the political system is *prima facie* invalid.[262] Upon closer inspection, this principle may subject more than just restrictions on entering the country to constitutional scrutiny. For example, any term of imprisonment limits a person's full participation in the political process.[263] Might *any* criminal incarceration, therefore, burden popular sovereignty and demand constitutional justification? If so, the argument I have advanced above is overbroad. For it is inconceivable that the *Constitution* 'puts at risk (subject to considerations of proportionality) a significant range of routine Commonwealth and State laws'.[264]

The response to this argument turns on the High Court's understanding of popular sovereignty. Importantly, whilst the High Court has emphasised that the *Constitution* generally guarantees an equal opportunity to exercise political sovereignty, this principle is subject to exceptions. One such exception,[265] relevantly, is imprisonment following the adjudgment of criminal guilt.[266] Hence, in *Roach*, Gleeson CJ observed that 'civic responsibility and respect for the rule of law are *prerequisites* to democratic participation'.[267]

Importantly for present purposes, engaging in criminal conduct is readily distinguishable from leaving Australia. Of itself,[268] departing the country does not necessarily involve any 'form of civil irresponsibility' which forfeits one's ability to return to Australia and participate in the political system.[269] So much was recognised by Quick and Garran in 1901, when observing that a person does not 'lose their national character by ... sojourning in foreign countries'.[270]

Viewed in this light, an implication based on popular sovereignty is not overbroad. On the contrary, the implication has a specific application — pertaining chiefly to laws which infringe one's ability to enter the country.

261. *McCloy* (n 15) 207 [45] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted, emphasis added).
262. Part III.B.
263. *Roach* (n 21) 176 [11] (Gleeson CJ); 200 [89] (Gummow, Kirby and Crennan JJ).
264. *Gerner* (n 151) 423 [15] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) (citations omitted).
265. Children seem to be another exceptional category: *Roach* (n 21) 176 [11] (Gleeson CJ).
266. See also *Lim* (n 67) 27 (Brennan, Deane and Dawson JJ) for further detention exceptions.
267. *Roach* (n 21) 177 [14] (Gleeson CJ) (emphasis added), citing *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 585 [119] (Gothier J); see also *Ex Parte Te* (n 81) 229 [227] (Callinan J).
268. Though an argument may be relevant concerning terrorism-related activity: *Temporary Exclusion Orders* (n 20); see, eg, *Benbrika (No 1)* (n 220) at [36] (Kiefel CJ, Bell, Keane and Steward JJ).
269. *Roach* (n 21) 176 [12] (Gleeson CJ).
270. Quick and Garran (n 205) 599.

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C Originalism Objection

A final objection is one of interpretive principle: that recognising an implied freedom of entry involves impermissible judicial activism. This form of argument is made by Stoker and Beardow, who have criticised any recognition of an implied freedom of entry as unauthorised 'constitutional alteration'.[271] If the Drafters wished to protect a freedom of entry, these authors suggest, they could have included that guarantee in the constitutional text at Federation.[272]

This critique forms part of a larger debate around originalist and evolutionist theories of constitutional interpretation — questions which are beyond the scope of this article to resolve.[273] For present purposes, two points can be noted.

First, even if one adopts a strictly originalist viewpoint, it is not immediately obvious that a freedom of entry is inconsistent with the intentions of the Drafters. To the contrary, at least some Drafters suggested that the *Constitution* contains limits on Parliament's capacity to exclude Australians from entering the country.[274] For example, in *Potter v Minahan*, Barton J (a Drafter of the *Constitution*) held it 'open to doubt' whether Parliament could 'prohibit the entry of those who are subjects of the Crown born within our bounds, and who ... may be called Australian-born subjects of the King'.[275] Thus, an appeal to originalism need not automatically defeat a case against this implication.

Second, even if an implied freedom of entry is inconsistent with the Drafters' intentions, the High Court has rejected that original understandings of the *Constitution* are determinative of constitutional implications. Hence, in *Roach*, the High Court recognised the right to vote as an implied component in the 'evolution of representative government' guaranteed by the *Constitution*,[276] even though laws restricting the adult franchise were commonplace at Federation.[277] Comparably, even if not envisioned at Federation, the High Court has recognised that popular sovereignty is now an embedded constitutional principle. Once that proposition is accepted, then certain implications are necessary to protect that principle — including, I contend, a freedom of entry.

VI Conclusion

In 2019, Justice Keane observed that 'Australian judges have found the concept of "the people" to be a fertile source of constitutional doctrine'.[278] This article has posited one further point of fertility arising from the *Constitution's* references to the people — an implied freedom of entry into Australia.

However, if an opportunity to develop this implication arises, care must be taken in establishing the basis for this freedom. As outlined in Part I of this article, early commentary surrounding this implication has relied upon the definition of non-alienage to ground a freedom of entry. Such attempts, I have contended in Part II, are misguided. The combination of unfavourable jurisprudence, as well as historical and conceptual difficulties, presents too weighty a challenge to accept this account.

271. Stoker and Beardow (n 11) 8–9.
272. *Kruger v Commonwealth* (1997) 190 CLR 1, 68 (Dawson J), 155 (McHugh J).
273. See Kirk (n 200); Goldsworthy (n 133).
274. Irving (n 13) 146.
275. *Potter* (n 7) 294 (Barton J).
276. *Roach* (n 21) 174 [7] (Gleeson CJ), citing *McGinty* (n 164) 286–7 (Gummow J).
277. Ibid 225–6 (Heydon J).
278. Justice Patrick Keane, 'Silencing the Sovereign People' (Spigelman Public Law Oration, 30 October 2019) 2.

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Given these difficulties, Parts III and IV of this article have sketched out an alternative foundation for establishing this freedom: an implication derived from popular sovereignty. Although overlooked in recent scholarship, I have contended that establishing a freedom of entry on this basis is supported both in principle and authority.

One final query might simply be to ask whether the High Court will ever hear a case concerning this implication.[279] As Jeffries, McAdam and Pillai observe, excluding nationals from entering Australia is an extreme act, undertaken in rare circumstances.[280] Might the High Court simply never hear fully developed argument regarding an implied freedom of entry? On that question, we will simply have to wait and see. Before such a case arises, however, it is important to identify the constitutional foundation upon which a freedom of entry might be recognised. This article, it is hoped, fills that need.

VII Postscript

After this article was drafted, the High Court delivered two significant constitutional judgments: *Benbrika v Minister for Home Affairs (No 2)*,[281] another case concerning the validity of citizenship-stripping laws,[282] and *Jones v Commonwealth*,[283] regarding Parliament's power to revoke a conferral of citizenship where, amongst other things, a person has committed certain criminal offences.[284]

It is worth briefly noting the judgments of Edelman J across these two cases, both of which are highly relevant for the topic of this article. In two separate opinions, Edelman J reiterated his support for the existence of the implied freedom. However, more significantly, his Honour explicitly connected this implied freedom to sections 7 and 24 of the *Constitution*. His Honour's judgments, which mirror the argument made in this article, are thus the first time a High Court judge has directly grounded a freedom of entry on this basis.

In *Benbrika (No 2)*, for example, his Honour commented that:

> The power to revoke statutory citizenship does not imply a power to deprive a person of constitutional rights or freedoms. The ability to remain in Australia as a member of the Australian political community, and perhaps also *'[t]he ability to move freely in and out of the country', may be more fundamental than the constitutional ability to vote, recognised in ss 7 and 24 of the Constitution,* which cannot be removed without substantial justification or reason.[285]

Similarly in *Jones*, citing Zines, Edelman J posits that:

> [The Commonwealth's submission concerning the aliens power] is inconsistent with the requirement for substantial justification before particular core constitutional entitlements of the people of the Commonwealth could be removed. These core constitutional entitlements ... have been held to include the entitlement of the people of the Commonwealth not to be deprived of the ability to vote without

279. See, eg, Reynolds (n 199) 230.
280. Jeffries, McAdam and Pillai (n 12) 211–14.
281. [2023] HCA 33 ('*Benbrika (No 2)*').
282. Ibid [1] and [15] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
283. [2023] HCA 34 ('*Jones*').
284. Ibid [14] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
285. *Benbrika (No 2)* (n 281) [82] (emphasis added), citing *Roach* (n 21).

https://doi.org/10.1177/0067205X241255445 Published online by Cambridge University Press

> substantial justification. Similarly, ... it *has been said that there is a 'strong case for the invalidity of expulsion' of a person 'included in the body of the sovereign people' because to be 'forced to leave, or be prevented from returning to, Australia would of course also impair the exercise of people's constitutional functions'*.[286]

The substance of Edelman J's comments parallel the arguments made in this article in two respects. First, his Honour identifies that certain 'core constitutional entitlements' are reposed in the 'people of the Commonwealth',[287] those persons being 'member[s] of the Australian political community'.[288] That statement of principle aligns with the High Court's recognition of a popular sovereignty guarantee as identified in Part III.A of this article.

Second, Edelman J suggests that the freedom to enter Australia may be 'more fundamental' than other constitutionally guaranteed aspects of that political membership already recognised by the High Court,[289] including the right to vote.[290] For Edelman J, that fundamentality arises because of the importance of a person's physical presence in Australia to the effective exercise of their 'constitutional functions' — a notion which mirrors the argument made in Part III.B of this article, which argued that a freedom of entry into Australia was necessary to guarantee all citizens an equal opportunity to exercise the various incidents of political sovereignty.[291]

Of course, it remains to be seen whether other High Court Justices share this view. No other judge in *Benbrika* or *Jones* directly commented on this issue. Nonetheless, his Honour's comments — the first time a judge has connected freedom of entry to sections 7 and 24 of the *Constitution* — are of immediate relevance.

Acknowledgements

This is a version of the author's Honours thesis which was awarded the Blackburn Medal for Research in Law. I sincerely thank Ryan Goss, James Stellios, Thomas Dunbabin, Henry Palmerlee, Eloise Doherty and numerous other reviewers for their assistance on earlier drafts of this article. All views are my own.

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286. *Jones* (n 283) [133] citing Zines (n 149) 91 (emphasis added) (citations omitted, emphasis added).
287. Ibid; *Jones* (n 283) [133].
288. *Benbrika (No 2)* (n 281) [82].
289. *Benbrika (No 2)* (n 281) [82].
290. See *Roach* (n 21).
291. See above Part III.

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