**Allegiance, Foreign Citizenship and the Constitutional Right to Stand for Parliament**

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**Abstract**

In 2017, in *Re Canavan*, the High Court of Australia found five sitting Members of the Commonwealth Parliament to be citizens of a 'foreign power' and thus ineligible, under s 44(i) of the *Constitution,* to hold their seats. In 2018, in *Re Gallagher*, the High Court found that a Senator who had attempted unsuccessfully to renounce her British citizenship prior to her Senate candidature was similarly ineligible. In this article we argue that the conclusion in *Re Canavan* was incorrect: that both the Court's reasoning about the purpose of s 44(i) – to avoid 'split allegiance' – and its methodology for determining foreign citizenship were inconsistent in their own right and also against its reasoning in *Re Gallagher*. We challenge the Court's conflation of citizenship and allegiance with *obedience* to a state. We examine the rules of international law for identifying a person's citizenship, as well as exceptions to these rules, including what came to be known as the 'constitutional imperative', which the Court held will exempt a foreign citizen from s 44(i) disqualification under certain circumstances. We conclude that the Court, in seeking to avoid 'uncertainty and instability' in its interpretation of s 44(i) did the opposite. Had it looked, instead, to the relevant foreign state for an authoritative determination of a person's citizenship, confusion and uncertainty surrounding s 44(i) could have been avoided, and a democratic understanding of Australian citizenship could have been prioritised.

## I Introduction

In October 2017, in *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* ('*Re Canavan*'), the High Court of Australia, acting as the Court of Disputed Returns,[1] found five sitting Members of the Commonwealth Parliament ineligible to hold their seats.[2] Each, the Court unanimously ruled, was a citizen of a 'foreign power' (in addition to being Australian) at the date for nomination as a parliamentary candidate. As a result, each of the five, it concluded, was in breach of section 44(i) of the *Commonwealth Constitution*. All were obliged to resign. In early 2018, in *Re Gallagher*, a Senator who had attempted to renounce her foreign citizenship prior to her nomination, but whose application had not been processed by the country in question until after her election, was also disqualified by the Court.[3] These formal legal referrals led to, and were accompanied by, additional resignations attributed to dual citizenship, totaling 15 members of the 2016 Parliament.[4] Several of the disqualified Members of

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[1] Section 47 of the *Constitution* empowers the Parliament to resolve disputes about eligibility, and also to provide for an alternative mechanism for determination of disputed elections. The mechanism by which the cases on s 44(i) were heard is now contained in the *Commonwealth Electoral Act 1918* (Cth) which provides for the referral to the High Court by the House of Parliament in which the question arises, of questions generated by the constitutional provisions for disqualification.
[2] (2017) 263 CLR 284 **(*'Re Canavan'*).**
[3] (2018) 263 CLR 460.
[4] Merran Hitchick and Andy Ball, 'Australia's citizenship scramble: the full list of MPs and senators affected', *The Guardian* (online at 9 May 2018) <https://www.theguardian.com/australia-news/ng-

Parliament ('MPs') renounced their foreign citizenship in order to re-contest their seats in subsequent by-elections. Beyond the 2016 Parliament, the new prominence of s 44(i) and accompanying case law, led to a significant number of withdrawals from candidature in the May 2019 election.[5]

Section 44(i) provides that any person who:

> [I]s under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power … shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.[6]

Over the years, the impact of this provision on eligibility to serve in Parliament has attracted significant attention in a number of official inquiries,[7] but, prior to 2017, little attention in case law. There had been only a handful of cases concerning the section, and none with closely analogous facts. Although the prior leading case on the substance of s 44(i),[8] *Sykes v Cleary* ('*Sykes*'), squarely concerned foreign citizenship and section 44(i),[9] its factual subject was the status of several candidates in a federal by-election, including two who had acquired Australian citizenship by naturalisation;[10] the primary question was whether these candidates had divested themselves of their foreign citizenship before nominating as candidates. In *Re Canavan*, the majority of the MPs whose eligibility had come before the High Court were Australian citizens by birth. The Court therefore faced the task, for the first time, of determining how the provision applied to 'birthright' citizens; it then determined whether, under the provision as interpreted, the individuals found to hold foreign citizenship were disqualified from Parliament. The High Court, under pressure to resolve these questions quickly;[11] saw its task as, among others, one of assuring 'certainty'

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interactive/2017/dec/07/australias-citizenship-scramble-which-mps-are-safe-whos-out-and-who-doesnt-know>; see also Damon Muller, 'Five leave the Parliament', *Flagpost: Blog of the Parliamentary Library* (Blog Post, 10 May 2018) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2018/May/Five_leave_the_Parliament>. For a detailed account of the period prior to *Re Gallagher* (n 3), see Tony Blackshield, 'Comment: The Unfortunate Section Forty-Four' (2018) 29(1) *Public Law Review* 3, 6–9.

[5] Five candidates preselected by major parties withdrew prior to the date for close of nominations for the 2019 election because of apprehended difficulties with s 44(i). See Jeremy Gans, 'Second-class surnames', *Inside Story* (online at 26 April 2019) <https://insidestory.org.au/second-class-surnames/>.

[6] *Australian Constitution* s 44(i). Section 45 of the *Constitution* is also relevant to the issues raised in the s 44(i) cases. Section 45 provides that if a Senator or Member of the House of Representatives '[b]ecomes subject to any of the disabilities mentioned in the last preceding section', including 44(i), 'his place shall thereupon become vacant'. See *Re Nash [No 2]* (2017) 263 CLR 443.

[7] See Appendices in the Report of the Commonwealth Joint Standing Committee on Electoral Matters, *Excluded: The Impact of Section 44 on Australian Democracy* (Report, May 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Inquiry_into_matters_relating_to_Section_44_of_the_Constitution/Report_1> ('*Excluded*'). See also Australian Constitutional Commission, *Final Report of the Constitutional Commission* (Report, June 1988) vol 1, ch 4.

[8] To adopt the distinction between substance and process used in Graeme Orr, 'Comment: Fertilising a Thicket: Section 44, MP Qualifications and the High Court' (2018) 29(1) *Public Law Review* 17.

[9] (1992) 176 CLR 77 ('*Sykes*'). Section 44(i) has also been discussed in *Nile v Wood* (1987) 167 CLR 133; *Sue v Hill* (1999) 199 CLR 462; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Singh v Commonwealth* (2004) 222 CLR 322.

[10] It also considered section 44(iv), disqualification for holding an office of profit under the Crown.

[11] James Massola and Amy Remeikis, 'Turnbull government pushes High Court to hear citizenship saga within four weeks', *Canberra Times* (online at 22 August 2017) <https://www.canberratimes.com.au/story/6029124/turnbull-government-pushes-high-court-to-hear-citizenship-saga-within-four-weeks/digital-subscription/>.

and 'stability'.[12] However, a period of deep confusion and uncertainty regarding the status of many other MPs and candidates followed, one that has not been resolved.[13]

Such an outcome was unnecessary and avoidable. The Court's reasoning in *Re Canavan* about the provision's purpose—to avoid 'split allegiance'—and its methodology for determining foreign citizenship were inconsistent (both in their own right, and as against the Court's own reasoning in *Sykes* and in *Re Gallagher*). The Court's interpretation of s 44(i), we argue, was also at cross-purposes with the central exception it developed, what came to be called the 'constitutional imperative'. The 'constitutional imperative' (discussed further below) was held to exempt a foreign citizen from disqualification in circumstances where the state's foreign nationality law would have the effect of irremediably preventing its citizens from being chosen to serve in the Australian Parliament. The High Court's decision in *Re Canavan* was also neglectful of the realities of modern Australian demographics;[14] unnecessarily so, we suggest, even in doctrinal terms, as the Court's own reasoning offered an alternative pathway to interpreting section 44(i),[15] one that would allow more space for modern realities, at the same time as strengthening the jurisprudential clarity and stability that it sought.

In summary, we argue that the Court's understanding of allegiance should be open to reconsideration, in particular in light of its recognition of the 'constitutional imperative', and secondly, that the Court's approach to determining foreign citizenship, as a question of fact, was flawed. The conclusion that a person is a foreign citizen for the purposes of s 44(i) cannot be conclusively reached without a determination by the foreign state in question.[16] Absent such a determination, the foreign state is in no position to impose duties of allegiance upon a person, and so 'split allegiance' (the mischief identified by the Court in the provision's purpose) cannot arise. This conclusion, we argue, is supported by the Court's own conclusion in *Re Gallagher* that the duties of allegiance owed by a person who holds foreign

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[12] *Re Canavan* (n 2) 299 [19], 307 [48].

[13] A 2018 Report of the Commonwealth Joint Standing Committee on Electoral Matters observed that '[p]roblems with the operation of s 44 have come to public attention over the past year as a result of the high number of citizenship issues dealt with by the High Court … In addition to the previously identified problems with s. 44, recent High Court decisions have also created new uncertainties and future opportunities to manipulate election results.': *Excluded* (n 7) x.

[14] As at 30 June 2015, 28.2% of Australia's estimated resident population was born overseas (ABS 2016), a very high percentage compared with most other countries within the Organisation for Economic Cooperation and Development: Janet Phillips and Joanne Simon-Davies, 'Migration to Australia: a quick guide to the statistics', (Research Paper, Parliamentary Library, Parliament of Australia, 18 January 2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/MigrationStatistics>. Overseas born does not equate with dual citizenship, and these statistics are for residents, not citizens, but in the absence of statistics on dual citizenship, it is one indicator of the potential extent of dual citizenship.

[15] Alternative approaches to interpreting s 44(i) that are also consistent with High Court jurisprudence have been suggested in: Noa Bloch and Kim Rubenstein, 'Reading Down Section 44(i) of the *Australian Constitution* as a Method of Affirming Australian Citizenship in the 21st Century' (2018) 30 (Special Issue) *Denning Law Journal* 79; Bruce Dyer, 'The dual citizen ban—what was Barton thinking?' *AUSPUBLAW* (Blog Post, 27 September 2019) <https://auspublaw.org/2019/09/the-dual-citizen-ban-what-was-barton-thinking?/>.

[16] Our concern in this paper is the establishment of foreign citizenship in the context of a s 44(i) challenge, specifically with reference to the 'subject or citizen' limb of the provision. Although the High Court in *Re Canavan* (n 2) merged this limb with the 'entitled to the rights or privileges of a subject of a citizen of a foreign power' limb, it did not consider the implications this might have with regard to an individual who, arguably, enjoys the rights and privileges of citizenship without, however, being a legal citizen of a foreign state. The latter question is discussed in Hussein Al Asedy and Lorraine Finlay, 'But Wait … There's More: The Ongoing Complexities of Section 44(i)' (2019) 45(1) *University of Western Australia Law Review* 196.

citizenship remain engaged until the foreign state in question has confirmed and registered that person's divestment of citizenship and thus of allegiance.

## II *Re Canavan* and *Sykes v Cleary*

The controversy addressed in *Re Canavan* began in July 2017 when the Clerk of the Senate was informed that Senator Scott Ludlam held New Zealand citizenship. Ludlam subsequently resigned from the Senate, his case becoming the trigger for an expanding circle of cases of potential parliamentary disqualification on grounds of dual citizenship, leading to the referral, by the relevant house of the Australian Parliament, of six Senators and one Member of the House of Representatives to the High Court, sitting as the Court of Disputed Returns.[17]

In *Re Canavan,* the Court was asked to rule on the citizenship status, as a question of fact of: Senators Matthew Canavan; Malcolm Roberts; Fiona Nash; and Nick Xenophon, and Member of the House of Representatives Barnaby Joyce. Two others, Senators Ludlam and Larissa Waters, had already, by their own inquiries, concluded that they were foreign citizens at the relevant time (of nomination for election). The Court's task with respect to their eligibility was to decide whether their conclusions were correct and, if so in light of the meaning of s 44(i), they were disqualified from candidature. The Court's decision on these referrals was delivered as a unanimous judgment in October 2017.

As noted, when the Court came to consider s 44(i) in *Re Canavan,* there was limited jurisprudence to draw upon.[18] *Sykes,* the then leading case on the interpretation of s 44(i), did much to structure the analysis and set the parameters.[19] John Delacretaz and Bill Kardamitsis, the second and third respondents in *Sykes,* had naturalised as Australians many years earlier. Both had made declarations renouncing allegiance to their other nationalities on taking the oath of Australian citizenship. The question was whether their oath amounted to an effective renunciation of their foreign citizenship. The High Court majority held that it did not; the oath was legally ineffective to divest them of foreign citizenship. Divestment could only be achieved, the Court concluded, under the law of the relevant foreign state, and neither candidate had taken the required legal steps to renounce. A majority of the Court held that both had retained their foreign citizenship at the time of their candidature and were thereby ineligible to be chosen to sit in the Australian Parliament.[20] As naturalised Australians, both candidates' knowledge of their previous citizenship was not in question. In *Re Canavan*, in contrast, five of the seven challenged parliamentarians had been ignorant of their foreign citizenship (or eligibility for foreign citizenship) at the relevant date.

The interpretations of s 44(i) advanced in argument in *Re Canavan* on behalf of the referred MPs all took the form that ineligibility under the provision required a person's prior knowledge of foreign citizenship. If, as the Court had held in *Sykes*, the purpose of section 44(i) was to avoid split allegiance, no danger therefore arose, it was argued, if a person did not know of his or her foreign citizenship. As was put (by counsel for Joyce and Nash): 'You cannot heed a call that you cannot hear and you will not hear the call of another citizenship if you do not know you are a citizen of [another] country.'[21]

The Court rejected these arguments and any test requiring knowledge—the so-called 'mental element'—in prominent part because proof of a candidate's knowledge of holding foreign citizenship would 'open up conceptual and practical uncertainties in the application of the provision', uncertainties that were 'apt

[17] *Re Canavan* (n 2).

[18] See above n 9.

[19] *Sykes* (n 9).

[20] The majority was composed of a lead plurality judgment by Mason CJ, Toohey and McHugh JJ, joined by Brennan and Dawson JJ as to the result. Deane and Gaudron JJ dissented, holding that the respondents' renunciation of foreign citizenship in the oath taken on naturalisation sufficed to avoid disqualification under s 44(i).

[21] Quoted by the Court in *Re Canavan* (n 2) 301 [26].

to undermine stable representative government'.[22] Stability, the Court reasoned, required an objective determination of legal citizenship; stability could not be assured if subjective states of mind counted. Further, the Court identified potential cases where a foreign state might make claims upon the allegiance of a person whom it identified as one of its citizens notwithstanding that the person had no prior knowledge of his or her citizenship or rejected the attribution. Such claims by the foreign state, the Court suggested, might be contrary to Australia's interests.

The Court, however, also identified classes of foreign citizenship law that it would not recognise, notwithstanding the municipal validity of the law in question. That is to say, it allowed for cases of split allegiance that would not lead to disqualification from candidature for, or service in, Parliament. Such laws—called 'exorbitant' in argument[23]—stand as exceptions to the 'general rule' under which citizenship is determined (discussed below). Such exceptions, applied to the Australian case, will allow Australian citizens who are also citizens of another country to serve in Parliament; this, effectively, qualifies the significance of holding foreign citizenship.

The last piece of the puzzle here is the Court's ruling in *Re Gallagher*. Six months after handing down its decision in *Re Canavan*, the Court held in *Re Gallagher* that *renunciation* of foreign citizenship could not be recognised in Australia for the purposes of s 44(i) until there was a dispositive declaration by the relevant foreign state.

## III Split Allegiance and the Purpose of Section 44(i)

### A *Split Allegiance*

The purpose of s 44(i) was central to the High Court's reasoning in *Re Canavan*. The Court, however, devoted only three paragraphs to it.[24] It simply restated the conclusion of the plurality judgment in *Sykes* that the purpose was to ensure 'that members of Parliament did not have split allegiance'.[25] This statement itself constituted an unelaborated endorsement of a 1981 parliamentary committee report on 'The Constitutional Qualifications of Members of Parliament' which stated (without evidence of historical research) that '[t]he intention behind this constitutional provision is fairly obvious'.[26] The Court In *Re Canavan* also quoted from the concurring judgment of Brennan J in *Sykes*: the provision's purpose 'is to ensure that no candidate, senator or member of the House of Representatives owes allegiance or

[22] Ibid 309 [54]. The Court went on to elaborate 'conceptual' and 'practical' problems with any knowledge requirement. The first went to the nature and extent of knowledge required: 309–10 [55]–[57], the second included 'difficulties of proving or disproving a person's state of mind': 310 [58].

[23] Transcript of Proceedings, *Re Canavan* [2017] HCATrans 199, 43 [1770], and on numerous other occasions over the three days of hearing (the word 'exorbitant' was referenced approximately 80 times, with varying inflexions of meaning and application).

[24] *Re Canavan* (n 2) 300–1 [24]–[26].

[25] Ibid 300 [24], quoting *Sykes* (n 9) 107 (Mason CJ, Toohey and McHugh JJ). The full passage in *Sykes* reads: 'that members of Parliament did not have split allegiance and were not, as far as possible, subject to any improper influence from foreign governments'. The Court in *Re Canavan* did not explain its omission of the second part of the quote, and did not consider whether the mischief was split allegiance *tout court* or split allegiance that specifically attracted 'improper influence'. The possibility that foreign allegiance might attract beneficial effects or 'influence' was not addressed.

[26] It was to ensure that members of Parliament did not have split allegiance and were not, as far as possible, subject to any improper influence from foreign governments. Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *The Constitutional Qualifications of Members of Parliament* (1981) 10 [2.14].

obedience to a foreign power or adheres to a foreign power'.[27] The Court's reasoning took a direction consistent with a preference for Brennan J's formula; that is, for merging allegiance and obedience (discussed below).

The Court's primary focus was on whether, consistently with the purpose of avoiding split allegiance, the text of the provision might import a narrower meaning than appeared on its face. In pursuing this question, the Court turned first to the record of the drafting of section 44(i),[28] consulting the texts of successive drafts of the provision as these evolved during the Federal Conventions of 1891 and 1897–98. It concluded that neither the purpose nor the drafting history nor the text provided any reason to read down the words.

We take no issue with the Court's conclusion about the historical purpose (although the methodology might merit examination in a different paper),[29] but we question the meaning of 'allegiance' assumed by the Court, one that was not compelled by either the history or the 'ordinary and natural' meaning of the text. We note here that the word 'allegiance' appears only in the first limb of s 44(i) and that the words of the second limb do not refer to 'allegiance', but simply to the status of 'subject or citizen' (or the rights or privileges thereof); nevertheless, the concept of allegiance was imported into the words 'subject or citizen', and this became critical to the conclusion of disqualification following a finding of foreign citizenship in the individual cases. Although none of the challenges to the MPs' eligibility in *Re Canavan* invoked the first limb, the Court considered its meaning, holding that it concerned subjective allegiance, whereas the second limb concerned objective allegiance, and 'operat[ed] to disqualify the candidate whether or not the candidate is, in fact, minded to act upon his or her duty of allegiance'.[30] The difference between the two limbs is significant. A foreign state, the Court held, may impose duties of allegiance upon one of its citizens, simply by virtue of his or her being a citizen, regardless of whether or not that citizen feels a sense of allegiance; the simple fact of holding foreign citizenship brings him or her under the second limb of s 44(i). The Court's understanding of allegiance as an objective correlate of citizenship is therefore central to the manner in which the second limb is considered to operate. Allegiance was read into the second limb by the Court; accordingly, split allegiance invariably arises in cases of dual citizenship, regardless of the citizen's sentiments. So the question of how a person's citizenship is determined becomes critical.

We signal here that the Court's privileging of 'allegiance' as the primary ground for determining eligibility was in conflict with its reasoning about the 'constitutional imperative'. Further, we argue that its insistence that allegiance must be singular and undivided (that is, a person, even a dual citizen, cannot hold *allegiance* to more than one state/sovereign) is outmoded: a remnant of the historical origins of citizenship in subject status that lingered in the era in which the *Constitution* was framed, when dual nationality was regarded as both a moral anathema and a major problem for international relations.[31]

To anticipate our argument at this point, the reasoning in *Re Canavan* raised two concerns. First, the Court's understanding of allegiance as obedience (on the part of the citizen), was, we argue, both

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[27] *Re Canavan* (n 2) 300 [24] quoting *Sykes* (n 9) 109 (Brennan J). The Court in *Re Canavan*, in the same paragraph, also quoted Deane J in *Sykes*: the 'whole purpose' of s 44(i) is to 'prevent persons with foreign loyalties or obligations from being members of the Australian Parliament:' (n 9) 127 (Deane J).

[28] Neither the parliamentary committee nor the High Court made reference to the Federal Convention Debates. Had the Court done so, it would have found little to enlighten. The only reference to the Debates in the judgment is indirect—noting that the 'predecessors' of ss 44(i) and 45(i) 'came to be adopted without substantial debate' in the draft Bill in 1891: *Re Canavan* (n 2) 301–302 [29].

[29] See Helen Irving, 'Constitutional Interpretation, the High Court and the Discipline of History' (2013) 41(1) *Federal Law Review* 95.

[30] *Re Canavan* (n 2) 301 [25].

[31] Alfred M Boll, 'Chapter 4—Views and Treatment of Multiple Nationality in Historical Perspective and the Influence of Human Rights' in *Multiple Nationality and International Law* (Martinus Nijhoff Publishers, 2007).

outmoded and in conflict with the concept of citizenship as democratic participation (conveyed in the Court's own commitment to the 'constitutional imperative'); secondly, the Court's methodology for determining whether a person was or was not, in fact, a citizen of a 'foreign power' was flawed. These two concerns are linked, we suggest, by the Court's understanding of the purpose of s 44(i) as the avoidance of split allegiance. In brief, if allegiance to a foreign power is the mischief, as the Court held, such allegiance, we argue, cannot be compelled unless and until the relevant foreign state has determined that a person is one of its own citizens.

Thus, notwithstanding its outmoded concept of allegiance, the Court, we suggest, may, consistently with its own jurisprudence, retain the concept of citizenship as allegiance and allegiance as obedience, but still reach the conclusion (contrary to its conclusion in *Re Canavan,* but consistently with *Re Gallagher*) that a person is not disqualified under s 44(i) until the state in question has confirmed his or her citizenship. This will require a methodology for identifying foreign citizenship that rests upon a conclusive determination by the state in question. Notably, in *Re Canavan*, the acceptance by the majority of challenged parliamentarians that they held a foreign citizenship did not, in itself, prove dispositive. The Court disregarded the individuals' views on their citizenship status and sought evidence in external objective opinion (discussed below). The specific question of whether or not Matthew Canavan was an Italian citizen was resolved (in the negative) consistently with his own beliefs and assertions, but without reference to these. The methodology will accordingly be consistent with the Court's rejection of a 'mental' test for allegiance: a person's state of mind, or belief that he or she is or is not a citizen, will remain irrelevant to the determination of whether allegiance is owed by that person to a foreign state.

A third tranche of our argument concerns exceptions to the 'general rule' that the determination of a person's citizenship is to be made by the relevant state. If the citizenship law of the foreign state is such as to breach the constitutional imperative—which imports a modern concept of citizenship (our normative preference)—the Court has indicated that it will not recognise such a law, even in the event that the foreign state has determined that a person is a citizen of that state. Allegiance to that state will not be engaged (or recognised). The very fact that, pursuant to the constitutional imperative, a dual Australian/foreign citizen may validly sit in Parliament, consistently with s 44(i), reveals that the disqualification of a foreign citizen is qualified by democratic principles. As with the second concern, relating to questions of proof, this leads to the conclusion that a person should not be automatically disqualified on the Court's own finding that he or she is a foreign citizen. We develop these arguments below.

### B *Citizenship as Allegiance; Allegiance as Obedience*

The Court did not define allegiance, but a particular concept of allegiance, imported from *Sykes*, was presupposed in the provision's purpose; it underlay the Court's approach to the other questions it faced and ultimately led to the conclusion that foreign citizenship *meant* obedience to a foreign power, necessarily disqualifying a dual citizen from service in Parliament (subject, however, to exceptions, as we shall see).

In unraveling the concept, we take particular notice of Brennan J's judgment in *Sykes* from which the Court in *Re Canavan* substantially drew. As noted, Brennan J stated that the purpose of section 44(i) was 'to ensure that no candidate, [or MP] owes allegiance or obedience to a foreign power or adheres to a foreign power'.[32] The words—'allegiance or obedience'—are consistently conjoined throughout his judgment. Brennan J did not state clearly whether 'or' indicates a synonym for allegiance—that is, whether 'obedience' is another way of talking about 'allegiance' and clarifying what allegiance means in essence—or whether it offers an alternative as such. But the best reading of his judgment is that 'allegiance or obedience to a foreign power' is a conjoint expression. Significantly, the Court's treatment of the purpose of s 44(i) in *Re Canavan* is consistent with the conjunction of allegiance and obedience.

[32] *Sykes* (n 9) 109 (Brennan J)

Allegiance, in this conceptualisation, *connotes* obedience—obligations, duties—which can be compelled by the state to which it is owed (the state of which one is a citizen). [33]

Furthermore, in the Court's reasoning in *Re Canavan*, allegiance as obedience is treated as singular and exclusive, with allegiance to the 'other' state presumptively taking precedence over allegiance to Australia. 'Obedience', in these terms, implies undivided (and compelled) allegiance to one state, against other states' interests. Notably, in Brennan J's discussion of situations (discussed below) where the foreign law in question 'is incapable in fact of creating a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power', the enforcement of a duty of allegiance or obedience under foreign law is spoken of as 'a threatened impediment to the giving of *unqualified* allegiance to Australia'.[34] In *Re Canavan* the Court also spoke of 'the constitutional guarantee of *single-minded* loyalty provided by s 44(i)'.[35] Allegiance here is conceptualised as singular: as needing to be 'unqualified' or indivisible in order to be true allegiance.[36]

The mischief of dual citizenship, in this conceptualisation, lies in the assumption that allegiance can take only one direction, to the detriment of any other, and the further assumption that a dual citizen's allegiance will be directed exclusively to the foreign state. The person with dual citizenship has, in effect, no choice about where his or her allegiance is directed. If a dual citizen's allegiance to his or her 'other' country of citizenship always takes precedence over allegiance to Australia then, for the purposes of s 44(i), the dual citizen is effectively treated as an alien (alienage, on prevailing High Court authority, being defined as owing allegiance to a foreign country or absence of allegiance to Australia).[37]

To define citizenship as allegiance, and allegiance as obedience, is to invoke the feudal notion of 'fealty', one which effectively entails a personal, inalienable, and immutable relationship between subject and sovereign.[38] It is, effectively, to understand the concept 'citizen' in terms consistent with its historical origins in the (British) term 'subject'. In *Sykes,* Brennan J acknowledged the historical character of subject status in parsing the language in s 44(i). 'Subject', he wrote (drawing from Quick and Garran),[39] is 'a term appropriate when the foreign power is a monarch of feudal origin; citizen when the foreign power is a republic'.[40] Further, '[a]t common law, the status of a subject was coincident with the owing of allegiance'.[41] Brennan J indicated that, for the purpose of s 44(i) the distinction between 'subject' and 'citizen' was not significant.[42] We suggest that (while 'subject' status did not arise in any of the individual s 44(i) cases before the Court) the distinction may be significant, once the 'constitutional imperative'—arising from Australia's constitutional provisions for representative government—is factored into an analysis of the concept of citizenship. That is, if 'subject' and 'citizen' are treated as coterminous, the idea that citizenship also imports obedience (to the sovereign/state) may become prioritised (as it was in *Re Canavan*) over the idea of citizenship as entailing democratic participation. Citizenship understood as (in the manner of subjecthood) entailing allegiance/obedience is fundamentally in conflict with citizenship understood as democratic participation. In *Re Canavan*, the former understanding, we suggest, became prioritised over the latter. It need not have been.

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[33] For a resonant historical analysis of how obedience to the state featured in government policy and practice on allegiance, in the period between World War I and the early 1950s, see David Dutton, *One of Us?: A Century of Australian Citizenship* (UNSW Press, 2002) chapter 6.

[34] *Sykes* (n 9) 113–14 (Brennan J) (emphasis added).

[35] *Re Canavan* (n 2) 309 [54] (emphasis added).

[36] As stated by Brennan J in *Sykes* (n 9) 113–114; quoted in *Re Canavan* (n 2) 306 [45]; and in *Re Gallagher* (n 3) 474 [32].

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

[38] *Calvin v Smith* (1608) 77 Eng Rep 377.

[39] *Annotated Constitution of the Australian Commonwealth* (1901) 491–2 [144].

[40] *Sykes* (n 9) 109.

[41] Ibid.

[42] Ibid 110.

Citizenship, understood substantively, is not a simple term. It has been conceptualised in multiple ways in political and legal theory.[43] Two principal concepts are of direct relevance to the current discussion: first, historically, as noted, in terms of allegiance or obedience on the part of the individual to the sovereign; secondly in terms of democratic participation, with its associated constitutional (political and legal) rights. These concepts are not readily reconcilable. Obedience to the state/sovereign sits uncomfortably with the freedom of action and equality of status essential to democratic rights. Obedience, whether compelled or voluntary (the Court held that the distinction was not relevant to the purpose of s 44(i))[44] is conceptually incompatible with the democratic principle that entails, at its core, that citizens participate as equals in choosing the representatives who will make the laws under which they, the citizens, will live.

The High Court has, indeed, confirmed this principle in its implied freedom of political communication jurisprudence. In the words of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth*:

> The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives.[45]

This understanding of citizenship, as a modern democratic concept, is a matter of sharing political power, of self-government or democratic sovereignty, rather than 'obedience' to the state or the sovereign. Certainly, citizens are required to obey the laws made by their representatives, but obedience to oneself does not constitute 'obedience' as captured in the historical concept of allegiance. Indeed, to define citizenship as characterised by allegiance (rather than democratic participation), and allegiance as characterised by obedience, is, as discussed, to reactivate the feudal notion of 'fealty', one which effectively entails a (now outdated) personal relationship of subject to sovereign.

Importantly, the High Court considered this distinction in its identification of the constitutional imperative as a ground for exceptions to the application of s 44(i); in doing so, it effectively contemplated circumstances in which an individual's entitlement to be chosen to serve in Parliament was protected by the *Constitution's* provision for representative democracy, notwithstanding the person's putative allegiance to a foreign power.

## IV Determining Foreign Citizenship

### A *The General Rule*

For a candidate or Member of Parliament to be subject to disqualification under the second limb of s 44(i), he or she must first be found to be 'a subject or a citizen' of a foreign power (and the manner in which this is found will be relevant to the provision's reach). It has long been the position of the common law courts that the question of whether a person is or is not a national of a state is to be determined by the municipal law of that state. The allocation of responsibility to the municipal law is itself the product of public international law. Public international law provides, within quite widely drawn limits, that determining who is a national of a state is a matter for that state. The High Court repeatedly stated its recognition of this rule in the s 44(i) cases.

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[43] For an indication of this variety see Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017).

[44] *Re Canavan* (n 2) 310 [57].

[45] (1992) 177 CLR 106, 137.

In *Sykes*, for example, Mason CJ, Toohey and McHugh JJ stated that 'the question of whether a person is a citizen or national of a particular foreign State is determined according to the law of that foreign State'.[46] In *Re Canavan,* the Court affirmed:

> Whether a person has the status of a subject or a citizen of a foreign power necessarily depends upon the law of the foreign power. This is so because it is only the law of the foreign power that can be the source of the status of citizenship or of the rights and duties involved in that status.[47]

In *Sykes*, the Justices also referred to the 1930 Hague *Convention on Certain Questions Relating to the Conflict of Nationality Laws* ('Hague Convention')[48] for recognition of this rule in international law.[49] Articles 1 and 2 of the Hague Convention are generally taken to represent customary international law,[50] and indicate the terms of the general common law rule (the 'general rule'):

> Article 1: It is for each State to determine under its law who are its nationals …
>
> Article 2: Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State.

The general rule does not prescribe the role that is allotted to the executive government of a state in interpreting and determining its own law. It does not specify whether it is open to another state to reach a determination 'in accordance with the law of the [foreign] State' that is at odds with a determination arrived at by officials of that state.[51]

Our concern here is with the more limited issue of a person's foreign nationality *for the purpose of s 44(i),* where this purpose serves to determine and constrain the answer given to the question of how foreign citizenship is determined. As outlined above, the Court in *Re Canavan* held that the purpose of s 44(i) was to avoid 'split allegiance' where allegiance was understood as synonymous with 'obedience' to a foreign state.[52] This obedience was given content in terms of the obligations and demands that could be imposed on a person as a citizen of the foreign state. A precondition for such demands is that the foreign government in question—the body making the demands—will need to satisfy itself that that the person in question is one of its citizens. It is unlikely to accept a ruling by the High Court of Australia on this

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[46] *Sykes* (n 9) 105–6 citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 for the common law rule.
[47] *Re Canavan* (n 2) 304 [37].
[48] *Convention on Certain Questions Relating to the Conflict of Nationality* Laws, opened for signature 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937).
[49] *Sykes* (n 9) 106 (Mason CJ, Toohey and McHugh JJ).
[50] Article 1 was cited by the International Court of Justice in the *Nottebohm* case, with no indication that it was restricted to particular international law: see *Nottebohm* (*Liechtenstein v Guatemala*)(*Judgment*) [1955] ICJ Rep 4, 23. On chapter 1 of the Convention more generally, see GR de Groot and OW Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf Legal Publishers, 2016) 87.
[51] A prominent example of such a divergence was the British litigation that culminated in the decision of the United Kingdom Supreme Court in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591. The British courts ultimately held that the applicant was a Vietnamese national, as a matter of Vietnamese nationality law, when this was denied by the Vietnamese authorities. This divergence may be an elementary aspect of conflict of laws. It nonetheless means that legal consequences follow from a court's ascription of a foreign nationality, when that nationality is denied by the foreign state. This further complicates the idea of allegiance to a foreign power.
[52] *Re Canavan* (n 2) 300 [24], quoting *Sykes* (n 9) 107 (Mason CJ, Toohey and McHugh JJ). See further above n 25.

question. The inquiry relevant to s 44(i) is, thus, whether the government of the purported foreign state of nationality affirms that the individual is its national.[53]

Yet in *Re Canavan*, the High Court made findings as to foreign nationality under foreign citizenship law without reference to the government of the state in question. The Court, indeed, proceeded as if Article 2 of the Hague Convention read: 'Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State *as construed by any other State where such a question may arise*'.[54]

However, inconsistently with this, in *Re Gallagher* the Court did require the foreign government's affirmation that a person had successfully renounced his or her foreign citizenship (see below), as it had (albeit indirectly) in *Sykes*. Further, the foreign state's confirmation of that person's citizenship was required before renunciation could be confirmed.

### B *Fact Finding in* Re Canavan

As was observed by Edelman J in *Re Gallagher*, s 44(i) 'contains no express provision for how to determine whether a person should be recognised as a subject or a citizen of a foreign power'.[55] In *Re Canavan*, the Court adopted a methodology of deciding as best it could on the evidence of foreign nationality law before it. The Court, that is, drew upon sources independent of the government of the state in question.

In argument before the Court, the Commonwealth and other parties submitted that the determination of disqualification from service in Parliament for the purpose of s 44(i) was a separate question from the determination of nationality, as such. A person may be factually (according to foreign law) a foreign national, but that person's eligibility to sit in Parliament, it was argued, must rest upon a voluntary acknowledgment of the foreign nationality by the person, or on the person's exercise of a right or entitlement of foreign nationality. Rejecting this argument, the Court asserted that the approach would create confusion and uncertainty. Its preferred approach was to follow the 'ordinary and natural meaning' of the language in s 44(i) which, it held, meant that nationality, once established, automatically meant disqualification.

Its approach overlooked the real complexity in identifying and applying citizenship law. This complexity arises for multiple reasons, apart from the simple fact that experts may (and do) disagree about the relevant law and its application to individual cases.[56] These reasons include, among others: changes in citizenship law over time (including whether the effect of the change is or is not retrospective); difficulties in accessing legal records or the relevant foreign nationality laws and regulations; difficulties in identifying and engaging legally-reliable language experts and/or translating non-English legal texts; and difficulties accommodating the not infrequent recourse to (unpredictable) government discretion in foreign nationality law. The Court conceded that there may be cases where the law is inaccessible or where 'foreign states may be unwilling or unable to provide necessary information in relation to the ascertainment and means of renunciation of their citizenship'.[57] It did not take this observation any

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[53] Further, 'the available means of proof [of a person's nationality] … generally consists of some type of documentary evidence accepted as probative of acquisition of nationality in a particular way': Adam I Muchmore, 'Passports and Nationality in International Law' (2004) 10(2) *UC Davis Journal of International Law & Policy* 301, 315.

[54] To reiterate, the particular issues raised here by state law becoming unmoored from its state arise in relation to the purpose of s 44(i). On the more general theme of 'disembedded state law' see Karen Knop, 'State Law without Its State' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *Law Without Nations* (Stanford University Press, 2010) 66.

[55] *Re Gallagher* (n 3) 479 [51].

[56] Note the Court's acknowledgment in *Re Gallagher* of 'differences of opinion expressed by the experts on British immigration law whom the parties had called as witnesses': (n 3) 471 [19].

[57] *Re Canavan* (n 2) 312 [67].

further, however, but it added that, in contrast to such possible cases, 'most members of the Commonwealth of Nations'[58] afforded assistance to their citizens in ascertaining citizenship status, implying thereby that the finding of citizenship in these cases was likely to be relatively simple.[59] Overall, it observed, in a tone of insouciance:

> [A] question of disqualification can arise only where the facts which establish the disqualification have been brought forward in Parliament. In the nature of things, those facts must always have been knowable. A candidate need show no greater diligence in relation to the timely discovery of those facts than the person who has successfully, albeit belatedly, brought them to the attention of the Parliament.[60]

As recorded in the judgment, with regard to Joyce's citizenship, the Court relied on the opinion (submitted in evidence) of Mr David Goddard QC and Mr Francis Cooke QC (both of the New Zealand Bar); with regard to Senator Nash, on the opinion of Mr Laurie Fransman QC (a UK Barrister, specialising in citizenship law) and advice received by Nash herself from an official of the British Home Office; with regard to Senator Roberts, on the opinion of Mr Fransman and Mr Adrian Berry (also a UK Barrister, specialising in citizenship law); with regard to Senator Xenophon, also on the opinion of Mr Fransman.

Regarding Senator Ludlam, the Court took note of advice Ludlam had received following his own inquiries, including from the New Zealand High Commission, and also Mr Goddard's report on New Zealand citizenship law. Senator Waters sought advice from the Clerk of the Senate and 'Canadian authorities'; the Court also took note of a report of Mr Lorne Waldman, 'a practising Canadian lawyer'.[61] On this basis, the Court reached its decision, in its own words, 'according to the law of [the] foreign state', albeit relying for the content of that law on the 'body of evidence' before it, presented by experts, in the absence of any contradictor on questions of fact,[62] and not subject to cross-examination.

Senators Roberts and Nash were found to be foreign citizens (both British); Senator Joyce was found to be a New Zealand citizen. The foreign citizenship and ineligibility of Senators Ludlam (New Zealand) and Waters (Canadian) were confirmed. Senators Canavan and Xenophon were found not to be foreign citizens (for reasons explained below).

The part that should be played by the state in determining citizenship had already arisen in *Sykes* and arose again in *Re Gallagher*. The Court in both cases followed a different method from the one adopted in *Re Canavan*; this inconsistency, however, was not explored. The problems generated by the Court's reliance on experts were well dramatised by its treatment of Senator Canavan's referral in *Re Canavan*. In considering whether Senator Canavan was or was not an Italian citizen, the Court did not seek a

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[58] Ibid. Note that Laurie Fransman's *British Nationality Law* (Bloomsbury, 3rd ed, 2011) is 1,853 pages long. Additionally, there may be cases where the state in question refuses to recognise, withholds or manipulates evidence of an individual's citizenship status. For a comparative discussion of examples of this nature (including the Australian case of *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex Parte Ame* (2005) 222 CLR 439, discussed in Kim Rubenstein and Jacqueline Field, 'What is a "Real" Australian Citizen? Insights from Papua New Guinea and Mr Amos Ame', in Benjamin N. Lawrence and Jacqueline Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017).

[59] Cf Gans (n 5) for a critical response to this assumption.

[60] *Re Canavan* (n 2) 310 [60]. This may be correct in the abstract—at least if it is assumed that 'diligence' is just a matter of application, and that the same quantum of diligence is available to all—but, in practice it has turned out to be far from the case. Among others interested in the issue, especially surrounding the case of *Re Canavan*, journalists with access to legal advice have conducted energetic campaigns of inquiry into the citizenship status of individual MPs or candidates. The Court's admonition—that 'nomination for election is manifestly an occasion for serious reflection on [the] question' of citizenship—is scarcely helpful in this regard: at 310 [60].

[61] Ibid 319 [97].

[62] Except concerning Senator Roberts: *Re Roberts* (2017) 91 ALJR 1018.

determination by the Italian government. It did, however, reason along lines that might have taken it to that point.

Canavan's maternal grandparents had held Italian citizenship prior to their Australian naturalisation. At the time of Canavan's birth in 1980, Italian citizenship by descent could only be acquired through the patrilineal line. On this basis, the initial inquiry was into his grandfather's position. His grandfather had been naturalised as an Australian citizen in September 1955, his mother born a month later. Under Italian law at the relevant time, upon his naturalisation, Canavan's grandfather ceased to be an Italian citizen, and so was no longer an Italian at the time of his mother's birth. This seemed to dispose of the question of Canavan's Italian citizenship by descent.

This was, however, only the start of the legal complexities. A co-authored report from two Italian public law academics stated that while it was true that at the time of Canavan's birth in 1980 Italian citizenship was only acquired patrilineally, this position had subsequently been altered, with retrospective effect, by a 1983 decision of the Italian Constitutional Court. Canavan's mother, it appeared, had acquired Italian citizenship at birth, by descent from her mother (who was not naturalised as Australian until 1959).

The Court heard that, following a request by Canavan's mother in 2006, the Italian consulate had issued a certificate confirming the Italian birth of the mother's ancestor but, according to the expert report, '[t]his [administrative step] should not per se be considered a recognition of Italian citizenship', as this process was distinct from the process that would generate an authoritative answer on the question of Canavan's Italian citizenship. That process required a 'request for the declaration of Italian citizenship'.[63] Senator Canavan had not applied for a declaration of Italian citizenship.

An application by Canavan for a citizenship declaration under Italian law would have settled the question, but the Court did not require it. In short, in the light of the experts' report, the Court excused Canavan's failure to seek a declaration of Italian citizenship on the grounds that this would not simply be declaratory of his position, but that it would also be in some sense constitutive of that status.[64] That is, the Court treated the administrative process that would resolve the question of whether Canavan possessed Italian citizenship as off-limits because it would in effect 'activate' a 'potential' citizenship.[65] In other words, the Court recognised the dispositive effect of an Italian executive ruling (in response to the individual's taking steps) but avoided it, substituting its own analysis of Italian law.

In the absence of an authoritative administrative declaration by the Italian government, the Court concluded simply that: 'On the evidence before the Court, one cannot be satisfied that Senator Canavan was a citizen of Italy' at the time of nomination.[66] In concluding, as it did, that documentary proof and activation of entitlement to hold citizenship were required before Italian citizenship could be confirmed, the Court's approach provides support for the proposition that a finding of citizenship status, for the purposes of s 44(i), requires the affirmation of the state of foreign nationality.[67] The Court's apparent

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[63] Following the steps set out in a 1991 circular from the Italian Department of Foreign Affairs: *Re Canavan* (n 2) 316 [84].

[64] Intriguingly, two months before *Re Canavan* was handed down, Senator Canavan, in the words of the Court, 'attended the Italian Embassy in Canberra and formally renounced any Italian citizenship. The renunciation took effect from 8 August 2017:' *Re Canavan* (n 2) 315 [79]. There was no discussion by the Court of the significance of this act.

[65] *Re Canavan* (n 2) 316-7 [85].

[66] Ibid 317 [86].

[67] When potential s 44(i) issues were raised with reference to the alleged Italian citizenship of the then Government Chief Whip Nola Marino, she responded: 'The court [in *Re Canavan*] found it [Italian citizenship] is about registration not relationship'. She declared: 'I am not registered': see Katharine Murphy and Melissa Davey, 'Citizenship crisis: John Alexander resigns and triggers byelection', The Guardian: Australia edition (online 11 November 2017) <https://www.theguardian.com/australia-news/2017/nov/11/citizenship-crisis-john-alexander-resigns-and-triggers-byelection>.

motivations for halting its inquiry at a point where it was simply 'not satisfied' of Canavan's Italian citizenship were also motivated by a sense that Italian nationality law as it related to citizenship by descent was 'exorbitant', and not entitled to recognition under Australian law. (This second point is developed below.)

Strikingly and paradoxically, in seeking to defend its methodology, the Court illustrated the very problem that that methodology was intended to avoid. Rejecting the argument that a person's knowledge of his or her foreign citizenship should be a criterion for disqualification under s 44(i), the Court illustrated what it called the 'conceptual difficulty' in this argument by the following questions:

> Does a candidate who has been given advice that he or she is 'probably' a foreign citizen know that he or she is a foreign citizen for the purposes of s 44(i)? Is the position different if the effect of the advice is that there is 'a real and substantial prospect' that the candidate is a foreign citizen? Does a candidate in possession of two conflicting advices on the question know that he or she is a foreign citizen for the purposes of s 44(i) only when the advice that he or she is indeed a foreign citizen is accepted as correct by a court?[68]

The answer, in each case, must indeed be *no*. It is the same answer that should be given regarding a court's own determination of citizenship. For the purposes of s 44(i), a dispositive answer to these questions lies in the hands of the state in question. A court's acceptance of advice cannot stand in for a ruling of the relevant state (to put it simply, a person arriving at the immigration portal to a foreign country is unlikely to be admitted as a citizen of that country merely by showing a copy of a High Court ruling that he or she is a citizen, nor is such a ruling likely to be sufficient for an application for a foreign country's passport). The very fact that there may be 'two conflicting advices' suggests that finality does not lie at the stage of 'advice' but can only be resolved by an authoritative executive decision.[69] This, indeed, is what the Court held in *Re Gallagher*, inconsistently with its ruling in *Re Canavan*, regarding a determination of divestment of a person's citizenship. In concluding, as it did on Senator Canavan's referral, that documentary proof and activation of entitlement to hold citizenship were required before Italian citizenship could be confirmed, the Court effectively also confirmed that a finding of foreign citizenship, for the purposes of s 44(i), requires the affirmation of the foreign state.

In *Re Canavan*, the Court warned that 'to accept that proof of knowledge of the foreign citizenship is a condition of the disqualifying effect of s 44(i) would be inimical to the stability of representative government'.[70] Accepting that a person's 'knowledge' of his or her citizenship was not the equivalent of an authoritative confirmation of that knowledge, the Court approached the question of ascertainment of citizenship by its own research, drawing on non-official expert opinion. This, however, was not the only alternative to subjective knowledge available to it. Nor was reliance on non-official expert advice destined to ensure stability. Indeed, as discussed, expert advice may be inconclusive or inconsistent (and was not uniform even in *Re Canavan*), and the complexities of accessing advice and/or relevant information are multiple. The Court's statement should be reformulated: 'The proof of foreign citizenship *by the relevant foreign state* as a pre-condition of the disqualifying effect of s 44(i) *would be beneficial to the stability of representative government*.'

### C *Renunciation of Foreign Citizenship:* Re Gallagher

[68] *Re Canavan* (n 2) 309–10 [56].

[69] As to what might constitute an authoritative decision, our suggestion is the possession of documentation which, if produced at the point of entry to the relevant state, would be regarded by that state as establishing a right to enter (and remain) by virtue of being a citizen or national. An opinion offered by a member of the relevant consulate or embassy as to a person's nationality status does not constitute an authoritative decision.

[70] *Re Canavan* (n 2) 307 [48].

Under the s 44(i) jurisprudence, if a person had once held foreign nationality, he or she needs to show that that foreign nationality had been divested by the close of nominations, to be eligible to be chosen to sit in Parliament. Prominent among the relevant mechanisms of loss in foreign nationality law is renunciation. Renunciation was considered at length in *Sykes*. *Sykes* raised questions of the form and manner in which renunciation of citizenship might be expressed with legal effect; *Re Gallagher* added questions specifically about the role to be played by the foreign state in completing the process of renunciation.

*Re Gallagher* concerned the eligibility of Senator Katy Gallagher to sit in Parliament.[71] Gallagher, it was not in dispute, had previously held British citizenship (by descent, through her father) in addition to Australian citizenship. Intending to renounce her British citizenship as a candidate for the Senate, she had submitted the relevant application form and documents to the British Home Office, and had paid the required fee, prior to her nomination. Gallagher argued that the British Secretary of State was under a duty to register her declaration of renunciation as soon as the declaration and accompanying information were received. The significance of this argument for Gallagher's case was that if renunciation was legally inevitable on application, then application was sufficient to demonstrate renunciation. This position was disputed by the Commonwealth Attorney-General, who held that the British Secretary of State had first to satisfy herself of Gallagher's British citizenship and was entitled to refuse to register the declaration until so satisfied.

The Home Office did not confirm Gallagher's renunciation until after the date of her nomination as a candidate for the Senate. The question of her eligibility turned on whether it was sufficient that she had, at the relevant time, done everything within her control to secure renunciation of her British citizenship; or whether eligibility to sit in Parliament required all administrative processes on the part of the relevant foreign country to be completed and the renunciation finalised, with the relevant State's confirmation that the person was no longer one of its citizens. The Court unanimously held that the second was required.[72] Senator Gallagher, it concluded, had remained a British citizen for some months after the nomination date, and so remained until Britain confirmed that she was no longer a citizen.

In both *Sykes* and *Re Gallagher*, it was argued that renunciation could be effected through the application of Australian law or steps taken by the individual (such as, in *Sykes*, swearing on oath to renounce all foreign allegiances). The Court rejected that argument, holding in both cases that, for renunciation to be legally effective, a conclusive determination by the foreign state in question was required. In the words of Justice Gageler, 'the fact is that [Senator Gallagher] remained a British citizen under the law of the United Kingdom until registration of her renunciation in accordance with that law'.[73]

If renunciation requires the 'sign-off' of the relevant state, and this requires the state to have before it at least a minimum of evidence concerning the particulars of the individual, it follows that a similar process is required for the conclusive determination of citizenship. *Re Gallagher*, that is to say, stands for the proposition that, for the purpose of s 44(i), the state in question, and that state alone, determines who is one of its nationals (and, following the Court's logic, who owes it allegiance). If, as the Court suggested, Gallagher remained subject to the imposition of duties of allegiance/obedience to Britain until the moment when Britain confirmed that she was no longer a citizen, then Britain's role in confirming her citizenship must also have been essential, had the challenge to her eligibility involved simply the prior question (as in *Re Canavan*) of whether or not she held foreign citizenship.

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[71] *Re Gallagher* (n 3).

[72] Ibid. This unanimity took the form of a judgment of the plurality with two concurring judgments (by Gageler and Edelman JJ).

[73] Ibid 477 [45]–[46]. There is an irony here, too, arising from the Court's insistence that s 44(i) protects against foreign influence in the Australian Parliament: in ceding control over renunciation to the foreign state in question, the Court allows for that state to influence the pool of Australian candidates or MPs.

We have argued, to this point, that determination of a person's foreign citizenship must lie in the hands of the relevant foreign state, and that split allegiance will not arise in the absence of such a determination. Adherence to the general rule in the context of a s 44(i) ruling requires such a determination. To be true to its own reasoning, the Court, thus, must depend upon the affirmation of the foreign state in the exercise of fact finding, before it concludes that an individual is ineligible to serve in Parliament.

We come now to the exceptions to the general rule, such that a citizenship determination by the state in question need not, in particular circumstances, be recognised by another state. The question here is whether the Court might be excused from applying the general rule (as applied with regard to s 44(i)), by principles that allow for non-recognition of a state's citizenship law. The Court acknowledged such exceptions and, indeed, added to them. The inclusion of the exceptions in the analysis becomes significant in understanding how the Court might remain faithful to the general rule, at the same time as making it compatible with the principle that all Australian citizens have a meaningful entitlement to participate in the constitutional system of representative democracy, unencumbered by any 'exorbitant' rules of a particular foreign citizenship law.

## V Exceptions to the General Rule

Exceptions to the general rule are recognised in international and common law, including in the second part of Article 1 of the Hague Convention. These exceptions involve cases where it is legitimate for a country to refuse to apply foreign citizenship law or recognise a determination under the domestic law of another state of nationality that a person is, or is not, a citizen of that state. In such cases, a municipal court may deliberately arrive at a determination on the relevant foreign citizenship at odds with that of the relevant foreign state. These exceptions can be summarized as (i) the 'international law non-recognition' exception, and (ii) the 'domestic purposes public policy' exception. A third category of exception was carved out by the High Court: (iii) exceptions arising from the 'constitutional imperative'.

These exceptions to the general rule were internalised to the s 44(i) jurisprudence in the manner outlined by Brennan J in *Sykes*:

> If recognition of [citizenship] status, rights or privileges under foreign law would extend the operation of s.44(i) of the *Constitution* to cases which it was not intended to cover, that section should be construed as requiring recognition of foreign law only in those situations where recognition fulfils the purpose of s 44(i).[74]

This statement raises the question of what s 44(i) was intended to cover. In a circular manner, the answer is to be found by looking at the scope and nature of the exceptions. Consideration of the exceptions does much to map the scope and nature of s 44(i)'s intended coverage.

### A *The International Law Non-Recognition Exception*

The proposition that the general rule—that it is for each state to determine under its law who are its nationals—is subject to qualifications or exceptions was accepted by the Court in *Sykes* and *Re Canavan*. The first such exception arises where the relevant foreign law would be denied recognition under international law. This qualification with reference to public international law is found in earlier common law authority.[75] The second part of Article 1 of the Hague Convention provides for this exception: '[A State's citizenship] law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.'[76]

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[74] *Sykes* (n 9) 113.

[75] *Oppenheimer v Cattermole* [1976] AC 249, 277–8, 282–3.

[76] Hague Convention (n 48).

A prominent application of the exception concerns cases of citizenship law that breach international human rights. The Court noted in *Sykes* that courts may refuse to 'apply a foreign citizenship law which does not conform with established international norms or which involves gross violation of human rights'.[77] Another example offered in *Sykes* was where foreign law purports to affect the 'nationality of persons who have no connection or very slender connection with the foreign power', and thus 'exceeds the jurisdiction recognized by international law'.[78] None of the laws considered in the s 44(i) cases had the character of breaching human rights. However, the Court applied the non-conformity with 'established international norms exception' (albeit not expressly) in its analysis of Senator Nick Xenophon's referral in *Re Canavan*. Its analysis provides a prominent example of how public international law mediates the inquiry mandated by s 44(i) into the foreign law of nationality.

Senator Xenophon (who acquired Australian citizenship by birth in Australia) was found by the Court (following advice from Mr Fransman) also to be a British Overseas Citizen ('BOC') under British law, by reason of his father's birth in Cyprus when still a British Colony, and via the transmission of his father's status to Xenophon.[79] The Court held that the label 'citizen' under foreign law was not enough in itself to furnish a definitive conclusion on the question of a person's eligibility to stand for or serve in Parliament under s 44(i). It identified a constitutive feature of the relevant status—the status presumed to engage allegiance or obedience to a foreign power—namely the existence of a right of abode. BOC status, it noted, did not carry a right of abode: 'one of the main characteristics of a national under international law'.[80] The absence of this constituent feature ruled against a finding that a person was a 'citizen' of a foreign power, properly so called. The Court allowed that the status of BOC constituted a 'juridical relationship' between Xenophon and the United Kingdom but concluded that it was not a relationship that constituted him as a citizen of a foreign power. The Court thus found Xenophon not to be a foreign citizen for the purposes of s 44(i).

The significance of this conclusion is that the Court was prepared to look beyond the labels attached to a status under foreign law in applying s 44(i); and, more particularly, it was prepared to recognise that the label of 'citizen' did not, in all cases, import obligations of allegiance or obedience; at least not obligations that Australia was willing to recognise. The Court's reasoning on Xenophon's referral shows that the Court will not disqualify a foreign 'citizen' under s 44(i) where the status does not accord with what the Court will recognise as a status that can create allegiance.

### B *The Public Policy Exception*

The second exception is where recognition of a foreign nationality would, in the circumstances, be contrary to domestic public policy. This exception may overlap with the 'international law non-recognition exception' (in that domestic public policy may oppose the recognition of a foreign law that breaches international law), but it should be considered a distinct exception in assessing the reach of the general rule under s 44(i). As an exception to the general rule, the public policy exception does not speak to whether a person validly holds citizenship under the foreign nationality law in question. Instead it asks whether, notwithstanding that under the terms of the nationality law of the state in question this person is, or may be, validly held to be a citizen, there is a reason of *domestic* public policy why the holding of that status (or the terms of its loss) should be denied recognition under domestic law, in this case *Australian* law.

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[77] *Sykes* (n 9) 135–6.

[78] Ibid 113 (Brennan J) citing *Oppenheimer* (n 70) 277 (Lord Cross).

[79] It is of relevance to our argument that non-official advice on a person's citizenship status does not provide certainty, to note that one of the authors of this article whose ancestry is relevantly analogous to Xenophon's was advised by the British Home Office that a British Overseas Citizen cannot transmit BOC status to his or her children.

[80] *Re Canavan* (n 2) 328 [131].

The public policy exception is most famously associated with judgments of the House of Lords in *Oppenheimer v Cattermole*.[81] The case concerned Mr Meier Oppenheimer's liability to pay British income tax on his pension from the German government, a matter that rested upon the determination of his citizenship status, since a post-war taxation treaty between the United Kingdom and Germany exempted dual British-German citizens from the tax. Oppenheimer, by birth a German Jew, had left Germany in 1939 and was naturalised a British citizen in 1948. In a matrix of varied and conflicting laws, one question that emerged in the course of the litigation was whether British law should recognise a Nazi law of 1941 whereby German Jews who lived abroad were stripped of their German citizenship. A majority of the House of Lords concluded that it was justified on grounds of public policy in refusing to apply the 1941 law.[82] A court could depart from the general rule in cases where the law was, for example, 'repugnant'.

In *Sykes*, in considering the public policy exception, Brennan J cited *Oppenheimer* specifically as authority for a public policy exception refusing to recognise changes to enemy alien status in wartime. But, Brennan J continued, 'there is no reason why the doctrine of public policy should be confined to that situation'.[83] Non-recognition should be employed to ensure that s 44(i) does not extend 'to cases which it was not intended to cover'.[84] A hypothetical, but arresting, example was where a foreign power 'mischievously' conferred its citizenship upon all the members of Australia's Parliament, 'so as to disqualify them all'.[85] It would be 'absurd', Brennan commented, to recognise such a law.[86] Section 44 (i), he continued, 'is not concerned with the operation of foreign law that is incapable in fact of creating any sense of duty, or of enforcing any duty, of allegiance or obedience to a foreign power'.[87]

There are indications in the Court's judgment in *Re Canavan* that its analysis, specifically, of Senator Canavan's referral may best be understood as an application of the public policy exception. The Court concluded that, on the evidence before it, it could not 'be satisfied that Senator Canavan was a citizen of Italy [at the time of nomination]'.[88] Significantly, however, it added:

> Given the potential for Italian citizenship by descent to extend indefinitely—generation after generation—into the public life of an adopted home, one can readily accept that the reasonable view of Italian law is that it requires the taking of … positive steps … as conditions precedent to citizenship.[89]

The Court's readiness to attribute the need for positive steps to Italian nationality law, in order to resolve the interpretive uncertainties before it, was expressly informed by its discomfort with what it found on investigating the Italian nationality law, namely the indefinite transmission of citizenship by descent.[90] The Court was not satisfied that Canavan was an Italian citizen, but it reasoned that, if he were, his

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[81] *Oppenheimer* (n 75).

[82] The majority on this point comprised Lords Cross (the leading judgment), Hodson and Salmon. Lord Pearson in dissent on this point. Lord Hailsham stated that he would 'prefer to express no concluded opinion' on this point: Ibid 263. See also J. G. Merrills, '*Oppenheimer v. Cattermole*—The Curtain Falls' (1975) 24 *International and Comparative Law Quarterly* 618, 622–7.

[83] *Sykes* (n 9) 112–13.

[84] Ibid 113.

[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] *Re Canavan* (n 2) 317 [86].

[89] Ibid.

[90] Keane J comments in the transcript on the exorbitant nature of citizenships extended to the seventh generation: Transcript of Proceedings, *Re Canavan* (High Court of Australia,199, 10 October 2017) 2827–37. See also: 'Now, if one allows citizenship to pass by indefinite succession, one is going to have people engaging in genealogical witch-hunts which will occupy this Court every time there is an election:' Transcript of Proceedings, *Re Canavan* (High Court of Australia), 200, 11 October 2017) 4093–5 (Bennett QC).

citizenship should not disqualify him from serving in Parliament; Italian citizenship law was, effectively, 'exorbitant'.

It might therefore be thought that the High Court could, consistently with the approach it adopted in *Re Canavan,* bypass the determination of the foreign state, treating its own determination as a matter for purely Australian domestic (constitutional) purposes, with no further or external application. This might resemble what was at stake in *Oppenheimer*, where Britain's sole purpose in investigating Oppenheimer's nationality was to determine whether or not to impose British income tax on his German pension: a domestic matter. However, the Court's understanding of the purpose of section 44(i) precluded this approach; in locating the mischief of split allegiance in the prospect of foreign states' imposition of duties of allegiance on the citizens they identify as their own, the Court situated the matter outside the Australian domestic arena.[91] It conceptualised the question as one of determining not only what foreign citizenship law looked like, but the demands the foreign state might make on (dual) Australian citizens (such as military service[92]), by reason of their foreign citizenship.

### C *The Constitutional Imperative Exception*

In developing the idea that non-recognition should be employed to ensure that s 44(i) does not extend 'to cases which it was not intended to cover', Brennan J held, in *Sykes*, as we saw, that s 44(i) was not intended to apply to the operation of foreign law that is 'incapable … of creating any sense of duty, or of enforcing any duty, of allegiance or obedience to a foreign power'. He then introduced the *sui generis* exception that has become central to the jurisprudence and litigation on s 44(i): the 'reasonable steps' exception. Under this exception, where a person has taken all reasonable steps under the relevant foreign law 'to renounce the status … carrying the duty of allegiance or obedience … and to obtain a release from that duty', recognising the persistence of a person's foreign nationality, and so maintaining their ineligibility to sit in Parliament, is not required by the purpose of s 44(i).

The 'reasonable steps' exception in *Sykes* was further developed in *Re Canavan*, evolving into the 'constitutional imperative'. The constitutional imperative offers a further, autochthonous ground for non-recognition, although it only specifies the type of law that might merit non-recognition with reference to its effects; that is, it justifies the non-recognition of any foreign law that would have the effect of *irremediably* preventing an Australian citizen from enjoying his or her entitlement to take part in Australia's system of representative democracy. In the words of the Court in *Re Canavan*:

> [A]n Australian citizen who is also a citizen of a foreign power will not be prevented from participating in the representative form of government ordained by the *Constitution* by reason of a foreign law which would render an Australian citizen irremediably incapable of being elected to either house.[93]

What might such a law look like? Hypothetical examples were given, including laws that did not permit renunciation of citizenship or required it to be performed in circumstances involving 'risks to person or property'[94] or conditioned upon completion of military service in a country engaged in 'active combat

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[91] On the irony of this, given that the court's interpretation of s 44(i) hinged on concerns about foreign influence, see above n 73.

[92] Other countries with comparable representative democratic systems, including Canada, the United Kingdom, USA, and (except with respect to MPs who acquire a foreign nationality while sitting) New Zealand, do not disqualify dual citizens from candidature or service in their legislatures. We are unaware of any cases, in relevantly recent times, where individual members of the legislature were subject to compulsory military service imposed upon them by the foreign country of which they held citizenship.

[93] *Re Canavan* (n 2) 306 [44].

[94] Ibid 313 [69]. Other examples given of 'exorbitant' laws, such as the 'mischievous' conferral of foreign citizenship upon the whole parliament, are not necessarily examples of 'irremediable' obstacles to participation, since such a law need not necessarily preclude renunciation.

with another state'.[95] These examples concerned only examples of laws that might evade recognition because they conflicted with (implied) Australian constitutional entitlements. They did not concern, for example, citizenship laws that were repugnant in themselves, or that violated human rights.

The reason such a foreign law need not be recognised is because the constitutional imperative, in the words of Gageler J, 'serves the function of ensuring that the [s 44(i)] disqualification does not operate so rigidly as to undermine the constitutionally prescribed system of representative and responsible government which the disqualification is designed to protect'.[96] As the Court stated in *Re Canavan,* this means:

> that an Australian citizen not be prevented by foreign law from participation in representative government where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her foreign citizenship.[97]

The Court's adherence to the constitutional imperative becomes critical in an examination of s44(i). Conceptualised as an implication arising from the *Constitution's* provisions for representative democracy, the constitutional imperative, we argue, exists in tension with the conceptualisation of allegiance as a relationship of obedience on the part of the citizen to the state. It also draws attention back to the 'mischief' in s 44(i), which, we suggest, the Court lost sight of in its focus on the appropriate method for determining whether or not a person held foreign citizenship.

Deep tensions infuse the Court's reasoning in the s 44(i) cases: between substantive and formal ideas of citizenship; between the content or meaning of citizenship defined substantively; between alternative methods of determining foreign citizenship, and in the application of exceptions to the general rule. These tensions contributed to a lack of coherence in the reasoning; they also contributed to the confusion and instability that the Court sought expressly to avoid in *Re Canavan*.

Is there a way, then, through the 'thicket',[98] which might allow for the reconciliation of these alternatives, allowing the Court to privilege the modern democratic concept of citizenship at the same time as maintaining the formal identification of citizenship status via the general rule, avoiding subjective or 'mental' tests for determining citizenship, and adhering to the purpose of s 44(i)?

## VI Conclusion

We start this concluding analysis by reiterating that the Court's primary concern (in the avoidance of split allegiance) was the prospect that duties of allegiance could be imposed, coercively, by the foreign state in question upon one of its citizens (sitting in the Australian Parliament), and that such duties would likely be hostile to Australia's interests.

The Court's concern, as discussed, conveyed the pre-modern notion of allegiance as singular and indivisible. A dual citizen, it appeared, might be compelled to give allegiance to the country of foreign citizenship, and therefore not to Australia. The other allegiance, it was assumed, trumped, or at least fatally compromised, the person's Australian allegiance, disqualifying him or her from sitting in the Parliament. The Court, effectively, disregarded the Australian citizenship of dual citizens, and treated the dual Australian-foreign citizen as exclusively an alien.[99]

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[95] *Re Gallagher* (n 3) 484 [65] (Edelman J).
[96] Ibid 476 [43].
[97] *Re Canavan* (n 2) 297 [13].
[98] Orr (n 8).
[99] On the definition of 'alien', see Michelle Foster, 'Membership in the Australian Community: *Singh v Commonwealth* and its Consequences for Australian Citizenship Law' (2006) 34 *Federal Law Review* 161.

Cutting against the grain of its reasoning to this point, in its identification of the constitutional imperative as a ground for an exception to the recognition of foreign citizenship law, the Court did two related things: it identified an alternative, modern conception of constitutional citizenship as competing with the concept of citizenship as allegiance/obedience; and it allowed for cases where a dual citizen might, in fact, without breaching s 44(i), sit in Parliament, notwithstanding the duties of citizenship that the relevant foreign government might purport to impose upon that person as one of its citizens.

A person who is merely eligible for foreign citizenship is not, without more, subject to the imposition of duties of foreign allegiance. The mischief of split allegiance does not arise until the foreign state has determined that a person is one of its citizens. Under the second limb of s 44(i), determination *by* the foreign state that the person is a citizen, is a precondition for any demands of obedience from and to that state. The Court recognised this fact, in reverse, by its ruling in *Re Gallagher*, that a person is not released from duties of allegiance, and that the mischief remains until the foreign state in question has confirmed renunciation and thus release.

In some countries, the law may appear to mandate an automatic 'determination' of citizenship leaving no room for the exercise of the state's discretion (and thus not incompatible with another state's unilateral conclusions about the effect of that law). In some others, citizenship may be conferred automatically upon eligible persons, even contrary to their wishes.[100] But again, in such cases, the determination of status rests upon satisfying the relevant state authorities of eligibility, a step bypassed by the Court in *Re Canavan*.

The Court, in seeking to avoid 'uncertainty and instability' did the opposite. This is graphically illustrated by the new Australian Electoral Commission's ('AEC') candidate's 'checklist' relating to 'eligibility under section 44 of the *Australian Constitution*' which requires answers to multiple questions asking for, among other information, particulars about: the prospective candidate's date and place of birth, current, previous and/or renounced citizenship; parents (biological or adoptive); grandparents; current spouse; former spouse(s); current or former de facto spouse(s); and 'similar' partner(s); as well as explanations as to why, if the candidate has not provided particulars or supporting documents, he or she has not done so.[101] These multiple particulars can be predicted to generate a multitude of issues under foreign nationality laws.

The post-*Canavan* requirements for nomination must surely be chilling on those who are from nationally diverse family backgrounds (a substantial demographic in Australia today[102]), in particular potential candidates of minor parties or independents who do not have access to, or funds for, legal and administrative advice. All indications are that the requirements will, indeed, compromise the representative character of the Parliament;[103] that they may (to adapt the Court's words regarding the possible effect of foreign law) 'impede [the] effective choice by an Australian citizen to seek election to the Commonwealth Parliament'.[104] This is not a purely normative or abstract objection, built on an idealised notion of 'representation'. It arises from what the Court itself has identified as the constitutionally protected system of Australian representative democracy.

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[100] This occurred historically with the automatic naturalisation, in most countries during a period spanning the early nineteenth century and the mid-twentieth, of foreign women who married citizens. See Helen Irving, *Citizenship, Alienage and the Modern Constitutional State: A Gendered History* (Cambridge University Press 2016).

[101] See *Commonwealth Electoral Act 1918* (Cth) sch 1 Form DB, inserted by the *Electoral Legislation Amendment (Modernisation and Other Measures) Act 2019* (Cth) cl 83.

[102] See Phillips and Simon-Davies (n 14).

[103] See for example Paul Karp, 'Questions raised over Liberal candidate Mina Zaki and Labor's Sharyn Morrow', *The Guardian: Australia Edition* (online 4 May 2019) <https://www.theguardian.com/australia-news/2019/may/04/liberal-candidate-mina-zakis-eligibility-to-sit-in-parliament-questioned>.

[104] *Re Canavan* (n 2) 313 [69].

The Court in *Re Canavan* sought to balance the purpose of avoiding split allegiance against the 'constitutional imperative' that an Australian citizen 'not be irremediably prevented by foreign law from participation in representative government'.[105] The principle of remediability may appear to allow for a reconciliation of purpose and imperative. That is to say, split allegiance may be remedied by renunciation of foreign citizenship, and thus, a person's access to democratic participation may not be impeded (but merely delayed) by a finding—or suspicion—that the person holds foreign citizenship. However, this 'remedy' has not borne the weight assigned to it. That is, in no small part, because of the complexities attending the prior question of whether one has a foreign nationality, complexities underestimated by the Court. If, as we suggest, one requires an affirmation of citizenship by the state in question, the 'thicket' as dramatised by the AEC checklist, reduces to the questions—do you or do you not have documentation from a foreign country either establishing citizenship, or, having previously done so, have documentation establishing renunciation or divestment of that citizenship? Without such an affirmation, there is no need for a remedy, and no need to exclude a person from his or her constitutional entitlement to seek to participate in Australia's democratic government. If we take seriously the Court's understanding of citizenship as allegiance as obedience, there is no reason to think that a person *eligible* for foreign citizenship is likely to be susceptible to compromising duties of foreign allegiance absent a confirmation, by the foreign state in question, of their citizenship. Further, in reality, renunciation may be difficult and expensive, thus potentially making the remedy effectively out of reach for many.[106] The Court has not yet considered concrete, as opposed to hypothetical, instances where the requirements for renunciation are argued to be too onerous.[107] The higher the Court sets the bar for 'irremediable', the more marginal becomes the role allotted to democratic conceptions of Australian citizenship opposed to citizenship understood in terms of allegiance/obedience. The most straightforward way of limiting the effects of s 44(i) within the current doctrinal structure would be to lower the bar for 'irremediable'.

The prospect that a dual Australian-foreign citizen, protected by the 'constitutional imperative', may nevertheless sit in Parliament, is difficult to reconcile with the Court's treatment of citizenship as allegiance/obedience. There is no reason to think that duties of allegiance would be less dangerous or less binding if imposed on an MP whose foreign citizenship was ineradicable than on an MP who had retained a foreign citizenship that was relatively easy to renounce. Under another aspect, the fact that, under the constitutional imperative, a dual citizen can sit in the Australian Parliament transforms and moralises disqualification under s 44(i). Dual citizens are presumed to have a split allegiance, and be disqualified, unless they can perform the role of 'good citizen' through their efforts to renounce their foreign citizenship.

The matter of how citizenship is determined raises profound questions about the nature of citizenship, questions that the High Court struggled with in its section 44(i) cases. The Court identified both allegiance/obedience and democratic participation in the matrix of Australia's constitutional rules and norms. It sought to protect against the influence of foreign allegiance at the same time as protecting the citizen's constitutional entitlement to political participation. It did so through an approach that rested upon its own determination of a person's foreign citizenship which, paradoxically, resulted in the

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[105] Ibid 313 [72]. In light of the reasoning in *Re Canavan*, one might add: 'that an Australian citizen [should] not be irremediably prevented by *Australian* law from participation in representative government'.

[106] To renounce American citizenship, for example, requires payment of a fee of $2,350 US (as at the time of writing), in addition to presenting in person for an interview at a US consulate or embassy (with associated travel costs); these rules are expressly intended to dissuade. While not technically irremediable, US renunciation would be out of the reach for many; it is, effectively irremediable in such circumstances. See general guidelines: US Department of State, *Renunciation of U.S. Nationality Abroad* (Web Page) <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Renunciation-US-Nationality-Abroad.html>. The fee at: US Embassy and Consulates in Australia, *American Citizen Services (ACS) Fees* (Web Page) <https://au.usembassy.gov/u-s-citizen-services/acs-fees/>.

[107] By which we mean that the Court has yet to pronounce a law of any country too onerous to meet the 'constitutional imperative'.

disqualification of elected representatives that may have been avoided, had the Court looked instead (as it did with renunciation) for evidence of confirmation of citizenship by authoritative decision of the relevant state. The Court was confronted with highly complex questions about the nature of citizenship, having both historical and modern currency, not only in Australia, but globally. These have not been settled by the section 44(i) jurisprudence.