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SCHRÖDINGER'S CAT: A CONSTITUTIONAL ALIEN IN AUSTRALIA?

Benjamen Franklen Gussen[1*]

This Article provides a duty-based theory of constitutional alienage. Australian jurisprudence is used to illustrate how this theory would apply, with possible extensions to the other two great Anglo-American federations, the United States and Canada.* An alien is a person who has no permanent allegiance to the Australian sovereign. This allegiance requires two reciprocal bonds. The first is a duty of permanent loyalty to the sovereign. The duty can arise from only four rights: *jus soli*, *jus sanguinis*, *jus domicile*, and *jus asyli*. The second bond is a duty of permanent protection owed by the sovereign to said person. While the rights are constitutional, the duties are statutory. In other words, the duties can be regulated without the need to amend the *Constitution*. Superposed loyalties to different sovereigns constitute the outer limit on regulating the duty of loyalty, while statelessness is the outer limit on the duty of protection. The legal fiction of superposed loyalties echoes Schrödinger's cat, where a person's permanent loyalties are superposed until she breaches her duty of loyalty, which leaves only an allegiance to a foreign state. The theory argues that in the Australian context, some persons can be constitutional aliens and statutory citizens at the same time, which necessitates legal reform.

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1. * Dr. Engr. B. F. Gussen is a constitutional jurist at the Swinburne School of Law and a former President of the Australian Law and Economics Association (2019-2020). His main research program is comparative constitutional economics in the United States, Canada, and Australia.

* *See generally* BENJAMEN GUSSEN, AXIAL SHIFT: CITY SUBSIDIARITY AND THE WORLD SYSTEM IN THE 21ST CENTURY (2019) (arguing the emergence of a new world order based on city sovereignty); Benjamen Franklen Gussen & Sahar Araghi, *The* Engineers Case *Centenary: SCOTUS and the Origins of Australia's Scabrous Constitutional Signature*, 10 BRIT. J. AM. LEGAL STUD. 27 (2021) (suggesting a constitutional crisis in Australia due to the High Court of Australia (HCA)'s divergence from US constitutional jurisprudence); Benjamen Gussen, *On the Hardingian Renovation of Legal Transplants*, *in* LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA 84-108 (Vito Breda ed., 2019) (explaining the jurisprudential symbiosis between the three great Anglo-American Federations: the United States, Canada, and Australia); Benjamen Franklen Gussen, *Reflections on* La Fata Morgana*: Watsonian "Prestige" and Bagehotian "Efficiency*,*"* 12 J. COMP. L. 80 (2017) (identifying a neo-Bagehotian (evolutionary) shift in the constitutions of the United States, Canada, and Australia); Benjamen Franklen Gussen, *On the Territorial Evolution of The Australian Federation in the 21st Century*, 22 JAMES COOK UNIV. L. REV. 15 (2017) (drawing attention to the critical need for creating new states in Australia).

INTRODUCTION

While the legal issue of alienage of Australia's First Nations is new, the High Court of Australia (HCA) has been analyzing the meaning of the term "alien" for almost four decades.[2] On the 11 of February 2020, the HCA,[3] with a majority of four-to-three, found that "Aboriginal Australians"[4] cannot be classified as constitutional "aliens," that is

2. There is no definition of the term "alien" in the *Australian Constitution*. It is also not defined in the *Australian Citizenship Act 2007* (Cth) (Austl.), nor in the *Migration Act 1958* (Cth) (Austl.).

3. *See Love v Commonwealth* (2020) 270 CLR 152 (Austl.) [hereinafter "*Love* and *Thoms*"].

4. *Id*.

"aliens" for the purposes of section 51(xix) of the *Australian Constitution*.[5] The decision divided the community as much as it did the HCA.[6] Historically, when interpreting the meaning of "alien", the HCA oscillated between accepting or rejecting what came to be known as the *Pochi-Nolan* dichotomy.[7] On the one hand, the term "alien" was interpreted as synonymous with "non-citizen;" a person who is not a citizen of the Commonwealth of Australia ("the Commonwealth") is a constitutional alien. On the other, this dichotomy was rejected, first, in *Re Patterson (Ex parte Taylor)*, and later in *Ex parte Te*.[8] Members of the HCA who disagree with the dichotomy argued that the concept of citizenship is absent from the *Australian Constitution*, and therefore the concept cannot be used to define the term "aliens." It follows that the Commonwealth Parliament's power to redefine the meaning of this term is limited by a person's connection to the Australian community.[9] Put differently, there exists a non-alien-and-non-citizen category to which certain persons belong[10] because, "that class long existed[; its] members were long granted special status."[11] According to the view that rejects the dichotomy, British Subjects were not aliens within section 51(xix) until their special status was removed on March 3, 1986 by the *Australia Acts*[12] when Australia became a fully independent sovereign nation.[13] Later, in *Love* and *Thoms*,

5. Commonwealth of Australia Act, 1900 (Imp), 63 & 64 Victoria, c. 12, § 9 pt 5 (U.K.) (hereafter "*Australian Constitution*").

6. *See* Janet Albrechtsen, *Court in the Crossfire of Runaway Judicial Activism*, INQUIRER, THE WEEKEND AUSTL., SYDNEY, NSW, 16 (Feb. 15–16, 2020), 6 https://www.theaustralian.com.au/inquirer/high-court-in-the-crossfire-of-runaway-judicial-activism /news-story/631a06647c8216cbf7ec264e461181a9 (arguing that the decision is negatively altering the direction of Australia); *see also* Marcia Langton, *Ancient Cultural "Belonging" More Than Race, is the Issue*, INQUIRER, THE WEEKEND AUSTL., SYDNEY, NSW 16 (Feb. 15–16, 2020), https://search.ebscohost.com/login.aspx?direct=true&AuthType=shib&db=n5h&AN=9X9AUSNEW SMMGLSTRY000419101879&site=ehost-live&scope=site&cust (arguing that this HCA decision demonstrates that the rule of law is alive and well in Australia).

7. In *Pochi*, the HCA held that "alien" includes a "person who was born outside Australia, whose parents were not Australians, and who has not been naturali[z]ed as an Australian." *Shaw v Minister for Immigr. & Multicultural Aff.* (2003) 218 CLR 28 ¶ 70, at 53, (Austl.) [hereinafter "*Shaw*"]; *see Pochi v Macphee* (1982) 151 CLR 101, 109–10 (Austl.) [hereinafter "*Pochi*"]; *see also Nolan v Minister for Immigr. & Ethnic Aff.* (1988) 165 CLR 178 (Austl.) [hereinafter "*Nolan*"] (confirming the *Pochi* understanding that an "alien" is a non-citizen).

8. *Love* and *Thoms* ¶¶ 419-420, at 300; *Ex parte* Taylor (2001) 207 CLR 391 (Austl.) [hereinafter "*Ex parte Taylor*"]; *Ex parte* Te (2002) 212 CLR 162 (Austl.) [hereinafter "*Ex parte Te*"].

9. There is essentially no "exact concurrence in the expression of a constitutional principle to replace the discarded dichotomy." *Shaw* ¶ 78, at 56.

10. *See, e.g.*, *Ex parte Te* ¶¶ 177-202, at 210–18.

11. *Id.* ¶ 183 at 212.

12. *See generally Australia Act 1986* (Cth) (Austl.); Australia Act 1986 (UK) (the Acts were intended to confirm the status of Australia as an independent nation).

13. *Shaw* ¶ 30.

members of Australia's First Nations were said to belong to the same class, and hence, are outside the power in section 51(xix) of the Constitution.[14]

The purpose of this Article is twofold: to critique the HCA's reasoning for finding a person an "alien" under the *Australian Constitution* and to provide a framework for analyzing constitutional alienage. Previously, the underlying legal issue has been formulated around a dichotomy between alien and non-citizen. Those who disagree with the dichotomy argue so because citizenship in Australia is not a constitutional concept.[15] Those who agree with the dichotomy argue that there is an implied constitutional concept of Australian citizenship,[16] given that as a "corollary of 'popular and legal sovereignty' . . . [there is] a constitutional concept of who, precisely, are 'the people' in whom that sovereignty resides, and a constitutional concept of their rights and obligations."[17] The two positions reflect two schools of thought on whether nationality and citizenship are synonymous or not. Contrastingly, my reasoning goes beyond differences between high-level concepts such as nationality and citizenship. Allegiance itself must be analyzed as a double bond of loyalty and protection.[18] The proposed approach, therefore, looks at the lowest denominator for the analysis: the legal rights giving rise to the reciprocal duties of permanent loyalty and permanent protection.[19]

The double bond is a safer ground for analyzing alienage because higher-level concepts such as citizenship and nationality are not always synonyms.[20] For example, before its independence from the United Kingdom in 1776, the United States ("U.S.") used the terms "subject" and "denizen" to refer to the legal status that later became described by the

14. *Love* and *Thoms* ¶ 411, at 296 n.669 (citing John W. Salmond, *Citizenship and Allegiance*, 18 L. Q. REV. 49, 49 (1902) (explaining "one who is not a citizen may be termed an *alien subject*.")); *see* JOHN MERVYN JONES, BRITISH NATIONALITY LAW AND PRACTICE 40-41, 41 n.1 (1947).

15. *See, e.g.*, *Chu Kheng Lim v Minister for Immigr, Locl Gov't and Ethnic Affs* (1992) 176 CLR 1 ¶ 5, at 54 (Austl.) [hereinafter "*Chu Kheng Lim*"] ("Citizenship, so far as this country is concerned, is a concept which is entirely statutory, originating as recently as 1948 . . .").

16. *See generally* Genevieve Ebbeck, *A Constitutional Concept of Australian Citizenship*, 25 ADEL. L. REV. 137 (2004) (arguing that a constitutional standard of citizenship is inherent in the text and structure of the *Australian Constitution*).

17. *Id.* at 140.

18. Some suggest that the concepts of citizenship and nationality have some form of alliance, dating back to Ancient Greece. *See* Paul Martin, Re MIMIA; Ex Parte Ame – *The Case for a Constitutional Australian Citizenship*, 6 QUT L. & JUST. J. 1, 9 (2006) (citing DEREK HEATER, WHAT IS CITIZENSHIP? 51 (1999)).

19. As first codified by the *Nationality Act 1920* (Cth) (Austl.).

20. For example, in sociology, the orthodoxy treated citizenship as a civic identity, while it treated nationality as an ethnic identity. McCrone and Kiely suggest that nationality and citizenship are very different. The first is a "cultural concept" that signifies a relationship with the community, while the latter is a "political concept" that signifies a relationship with the State. *See* David McCrone & Richard Kiely, *Nationalism and Citizenship*, 34 SOC. 19, 23–25 (2000).

word "citizen."[21] While the word "subject" ceased to be used in the U.S. after 1789, when the United States Constitution came into force,[22] the concept of "allegiance" continued to form part of the statutory definition of U.S. nationality. For example, section 501(a) of the Nationality Act of 1940,[23] defines the term "national" as "a person owing permanent allegiance to a state." Section 501(b) explains that "[t]he term 'national of the United States' means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include an alien." The Nationality Act of 1940, therefore, distinguishes between U.S. nationality with citizenship and U.S. nationality without citizenship. In the United States, it was held that "[t]he term 'American national' means a person wheresoever domiciled owing permanent allegiance to the United States of America, and embraces not only citizens of the United States but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions."[24] Therefore, any person can become an American national if they can prove they owe permanent allegiance to the United States. Hence, the United States Oath of Allegiance requires "true faith and allegiance" by any permanent resident who wants to obtain U.S. nationality.[25] However, such residents are not necessarily United States citizens. The United States continues to maintain a distinction between nationality and citizenship where all citizens are nationals, but the reverse is not true.[26] For example, in *Ricketts v. Attorney General*,[27] Junior M. Ricketts argued in the U.S. Court of Appeals for the Third Circuit that he could not be removed from the United States because he was a United

21. Maximilian Koessler, "*Subject", "Citizen", "National", and "Permanent Allegiance"*, 56 YALE L. J. 58, 58 (1946).

22. *Id.* at 59.

23. Nationality Act of 1940, 8 U.S.C. § 501 (repealed 1952).

24. Koessler, *supra* note 22, at 66 n.46 (citing Administrative Decisions and Opinions to June 30, 1925 (U.S. v. Ger.), 7 R.I.A.A. 119, 193 (Mixed Claims Comm'n 1924)).

25. 8 C.F.R. § 337.1 (2022) ("Oath of Allegiance"); *see also* 8 U.S.C. § 1448 ("Oath of Renunciation and Allegiance"); 8 U.S.C. § 1452 ("Certificates of citizenship or U.S. non-citizen national status; procedure"); 8 U.S.C. § 1101(a)(22) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.").

26. Hence, 8 U.S.C. § 1408 identifies some persons as "nationals, but not citizens, of the United States at birth," including people born in "outlying possession of the United States," such as American Samoa. *See* 8 U.S.C. § 1101(a)(29).

27. Ricketts v. Attorney General, 897 F.3d 491, 493 (3d Cir. 2018); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 855–56 (2018) (Thomas, J., concurring) (asserting "[t]he term 'or' is 'almost always disjunctive, that is, the [phrase]s it connects are to be given separate meanings.'") (quoting Loughrin v. U.S., 134 S. Ct. 2384, 2390 (2014)); Chalmers v. Shalala, 23 F.3d 752, 755 (3d Cir. 1994).

States citizen. In the District Court, Ricketts failed to prove his citizenship.[28] Circuit Judge Jordan stated that "[w]hen an alien faces removal under the Immigration and Nationality Act, one potential defense is that the alien is not an alien at all but is actually a national of the United States."[29] He then explained that "citizenship and nationality are not synonymous. While all citizens are nationals, not all nationals are citizens."[30] Notwithstanding this distinction between nationality and citizenship, in the United States, from as early as 1833, some suggested that an alien is defined as "any person, who is not a citizen of the United States."[31] This mutual exclusivity between alienage and citizenship became known as the *Pochi-Nolan dichotomy* in the Commonwealth.[32]

Note also that allegiance to the United States is separate and independent from allegiance to the autochthonous nations in the United States[33] Hence, if a person owes allegiance to one of the First Nations, it does not follow that they owe allegiance to the United States.[34] These are different nationalities, requiring different standards of membership. In the Commonwealth of Australia, on the other hand, the membership standard attaches to individuals, not to nations. There is only one nationality, because there is only one sovereignty in Australia. As early as 1836,

28. *Ricketts*, 897 F.3d at 493 (citing Ricketts v. Attorney General, 2016 WL 3676419, *1 (E.D.N.Y. July 7, 2016). The District Court found that Ricketts was "a Jamaican national who appropriated the identity of a United States citizen." *Id.* (citing *Ricketts*, 2016 WL 3676419, at *7).

29. *Ricketts*, 897 F.3d at 492.

30. *Id*. at 493 n.3 (referring to 8 U.S.C. § 1101(a)(22) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.")).

31. *Ex parte* Taylor (2001) 207 CLR 391 ¶ 241, at 471 (Austl.) (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION §1694 (reprt. 1970) (1833)).

32. *See, e.g.*, Karen Schultz, *Future Citizens or Intergenerational Aliens? Limits of Australian Constitutional Citizenship*, 21 GRIFFITH L. REV. 36, 56 n.150 (2012).

33. *See, e.g.*, Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered*, 2005 UTAH L. REV. 443, 540 (2005):

… tribal Indians today are citizens of "independent" and "overlapping sovereigns" — the United States and their tribe … As citizens of more than one polity … [t]hey have shown that they [can traverse] the multiple civic loyalties that call upon them for allegiance, and of governing themselves simultaneously in the small sphere of their tribe without losing their capacity to engage in political activity at a higher governmental level.

34. *See, e.g.*, David E. Wilkins & Sheryl Lightfoot, *Oaths of Office in Tribal Constitutions: Swearing Allegiance, but to Whom?* 32 AM. INDIAN Q. 389, 392 (2008) (explaining the impact of oaths of office found in tribal constitutions adopted before the Indian Reorganization Act, 25 U.S.C. v. § 461 et seq. (1934) or adopted during the "Indian Self-Determination era of the 1970s and beyond." While may factors affect the former, the latter is seen as a form of swearing allegiance to the tribe and as a "purposeful distanc[ing] from the federal and especially the state governments.").

Australian courts denied the existence of any spheres of sovereignty other than British sovereignty. [35] The same denial of First Nations sovereignty survives today, even after landmark cases such as *Mabo [No 2]*,[36] where the HCA acknowledges that the common law recognizes native title to land but denied any sovereign right of Australia's First Nations to hold land or to manage their own internal affairs. Given that the Commonwealth is not recognized by the HCA as a plurinational state, the duties of loyalty and protection, and constitutional alienage, can be regulated only by the Commonwealth.[37]

The first duty, the duty of permanent loyalty, owed by someone to the Australian sovereign, may exist through the rights of *jus soli*, *jus sanguinis*, *jus domicile*, or *jus asyli*, depending on the factual matrix of each case.[38] The outer limit on this duty is imposed by *conflicting* duties of loyalty to foreign states.[39] Similarly, the sovereign, the Crown-in-Parliament,[40] owes a reciprocal duty of permanent protection towards

35. *See R v. Murrell* (1836) 1 Legge 72, 73 (Austl.) (Justice Burton stating that "although it might be granted that on the first taking possession of the Colony, the aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They had no sovereignty.").

36. Even after the decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (Austl.), the enlarged doctrine of *terra nullius* continues to be the basis for British sovereignty in New Holland (the name given to Australia by Dutch explorers before British colonization). *See, e.g.*, *Coe v. Commonwealth [No 2]* (1993) 118 ALR 193 (Austl.). *See also* Daniel Lavery, *No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in* Mabo *[No 2]*, 43 MELB. UNIV. L. REV. 233 (2019) (suggesting that *Mabo [No 2]* made Australia's First Nations worse off because this judgment ignored their sovereignty).

37. *See, e.g.*, *Coe,* 118 ALR at 195 (Austl.) (Chief Justice Mason rejecting the proposition that there are domestic dependent nations in Australia).

38. *See, e.g.*, Trischa Mann, Australian Law Dictionary (3rd ed. 2017) 612 (explains that '[o]riginal nationality (nationality acquired at birth) is based on descent from a national (jus sanguinis) or birth within the territory of a state (jus soli) or a combination of jus sanguinis or jus soli'). The other two concepts, jus domicile and jus asyli are more recent rights based on domicile in a given jurisdiction or the right to asylum in that jurisdiction. Today, this rationale can be seen in the *Australian Citizenship Act 2007* (Cth) ss 11A-15 (automatic acquisition of Australian citizenship) and 15A-19A (acquisition of Australian citizenship by application) (Austl.).

39. *See Singh v Commonwealth* (2004) 222 CLR 322 ¶ 200 at 398 (Austl.) [hereinafter "*Singh*"] (the plurality in *Singh*, Justices William Gummow, Kennenth Hayne and Dyson Heydon, with whom Chief Justice Gleeson agreed, at ¶ 200, arguing that the "central characteristic" for alienage is owing allegiance to a country other than Australia). *Cf. Love* and *Thoms* (2020) 270 CLR 152 ¶ 59, at 185 (Austl.) (Justice Bell stating that "none of the Justices in the majority in *Singh* are to be understood as holding that allegiance to a foreign power is the determinative characteristic of the status of alienage.").

40. *See* Noel Cox, *The Theory of Sovereignty and the Importance of the Crown in the Realms of the Queen*, 2 OXFORD UNIV. COMMONWEALTH L. J. 237, 244 (2002) (arguing that "sovereign authority is legally vested in the Crown-in-Parliament, and politically in the people."); *see also*, WENDY BRADY, SOVEREIGN SUBJECTS: INDIGENOUS SOVEREIGNTY MATTERS 140-51 (Aileen Moreton-Robinson ed., 2020). *But Cf.* PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE

persons owing permanent loyalty.[41] The outer limit on this duty is imposed by obligations under the *United Nations Convention relating to the Status of Stateless Persons*[42] and the *United Nations Convention on the Reduction of Statelessness*.[43] As I explain in Section I, the "naturalization and aliens" power under section 51(xix) relates to regulating the twin duties, rather than the constitutional rights underlying the duties. To be clear, even though the rights giving rise to the duties of loyalty and protection are preserved under the *Australian Constitution*, no allegiance to the Australian sovereign can materialize unless the legislative instruments regulating the reciprocal duties of loyalty and protection, including Australian nationality law, allow for said allegiance to form.

To further explain this reasoning, Section I delineates the duty-based theory of alienage from the historical context of the *Australian Constitution*. Section I will help expound on the meaning of alienage and its relationship to the duties of permanent loyalty and permanent protection. Next, the article applies the theory to HCA judgments, up to and including the *Love and Thoms* decision, to show how the theory explains the different outcomes in some of the cases (Section II). The Article ends with thoughts on the potential need for law reform to rectify anomalies that could arise from misalignment between the constitutional concept of alienage and the statutory concept of citizenship.

I. THE ANALYTICAL FRAMEWORK

This section develops the duty-based theory of alienage in the context of the *Australian Constitution*. The starting point is to ascertain the meaning of the term "alien" from its use in the medieval period.[44] Next, the drafting history of section 51(xix), the only place where the term "alien" appears in the *Constitution*, is explained. Third, the task is to ascertain the meaning of the term "alien" from its position in the

LAW IN NEW ZEALAND 284-85 (Janine Flew ed., 1993) (arguing that sovereignty resides in the people rather than Parliament);

41. *See, e.g.*, Sangeetha Pillai, *The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis*, 37 MELB. UNIV. L. REV. 736, 738, 749, 751, 781–783 (2014) (arguing that the essential characteristic of citizenship is the existence of reciprocal rights and duties, including protection rights and pledging loyalty to the Australia people).

42. United Nations Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.

43. United Nations Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

44. *See* KEECHANG KIM, ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP 9 (J. H. Baker ed., 2000) (arguing that the legal distinction between the status of free and unfree evolved on the hands of Sir John Fortescue and Thomas Littleton into a legal distinction based on allegiance to a polity).

Constitution—in particular, its relation to naturalization. The last step is to understand the relevance of the concept of indivisible allegiance to the meaning of alienage.

A. The Meaning of "Alien"

The history of the concept of allegiance informs the meaning of "alien." The word "alien" comes from Latin "*alienus,*" from Latin "*alius,*" meaning else or other;[45] interpreted to mean "belonging to another person or place."[46] The key phrase is "belonging to," which means "to bear a relation to as a member."[47] The word "belong" today suggests membership in a group, but it does not guide the standard for membership. When this group is defined as a "nation," membership is called a "nationality," i.e., "the quality of membership in a particular nation."[48] And while the concept of "nation" is hard to define,[49] membership in this group ". . . cent[ers] around the doctrine of allegiance."[50] This doctrine can be traced back to the medieval period.[51] Historically, the bond, or "liege," was to a feudal lord, and later the "liege" was between a monarch and his subjects.[52] In 1345, Edward III explained the meaning of allegiance as an exchange of duties, where the person comes "of their good grace into our obedience and to do to us their duty; and to assure them that we shall defend and maintain them properly."[53] There also has to be a seal, an oath of fealty,[54]

45. *Alien* and *Else*, *The Concise Oxford Dictionary of English Etymology* (online version 2003).

46. *Ex parte* Taylor (2001) 207 CLR 391 ¶ 114 at 428 (Austl.).

47. *Belong*, MACQUARIE DICTIONARY DEF. 4(a) (Susan Butler, ed., 7th ed.2017).

48. *Id*. at *Nationality* (def. 1).

49. *See, e.g.*, Gyorgy Frunda (Special Rapporteur for the Comm. on Legal Affs. and Hum. Rts.), *The Concept of "Nation,"* U.N. Doc. 10762, (Dec. 13, 2005).

50. *Ex parte Taylor* ¶ 114, at 429 (citing WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW VOLUME 9, at 72 (3d ed. 1944)).

51. *See* KEECHANG KIM, ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP 177 (2000), for his analysis of Calvin v. Smith (*Calvin's* case) (1608) 77 Eng. Rep. 377 (KB), and the analogy with faith, namely, where there is no ligeance, there is no legal protection, just like in the Middle Ages, where no faith meant no legal protection.

52. *See, e.g.*, *Ex parte* Anderson (1861) 3 El & El 525, 121 Eng. Rep. 525 (QB); China Navigation Co. v. A-G (1932) 48 Times L. Rep. 375 (KB); Attorney General v. Nissan (1969) 1 All Eng. Rep. 629 (HL) (appeal taken from Eng.); Oppenheimer v. Cattermole (1972) 3 All Eng. Rep. 1106 (EWCA (Civ)).

53. William H. Dunham Jr., *Doctrines of Allegiance in Late Medieval English Law*, 26 N.Y.U. L. REV. 41, 50 (1951).

54. *Id*. at 51. While historically the duty was known as a duty of fealty or fidelity, today, the duty is referred to as a duty of loyalty. Fealty refers to Latin "fidelitas," similar to the word fidelity. On the other hand, the word loyalty comes from Latin "legalis" which refers to the status of being legal. *See* MACQUARIE DICTIONARY *supra* n.48, at *Loyal*. Today, faithfulness to one's allegiance to

which in turn, gives rise to the duty of protection.[55] Under the feudal doctrine of *nemo potest exuere partiam*,[56] and until the passing of the *Naturalization Act 1870*,[57] allegiance, and its constituent duties, had to be perpetual.[58] This doctrine of perpetual allegiance was codified in section 3 of the *Act of Settlement 1701*.[59] After 1870, however, allegiance became permanent and undivided rather than perpetual, thus allowing for renunciation of British nationality but also rendering alien persons naturalized in foreign states.[60] Still, permanent allegiance was indivisible, and it remained so until the passing of the *British Nationality Act 1948* (UK) (see Section IC below).[61]

At the passing of the *Australian Constitution* in 1900, the applicable nationality law in Australia was the 1870 Act.[62] Accordingly, permanent allegiance is a constitutional principle in Australia.[63] This means that the duties of loyalty and protection constituting this "liege" were also envisaged to be permanent. The permanency of these loyalties distinguishes immigrants and visitors from those enjoying a permanent allegiance to the Australian sovereign. Immigrants only have a duty of

the sovereign is to be understood in terms of the legal system at any given jurisdiction, which suggests that the duty is a statutory construct, unlike the right, which is constitutional.

55. Allegiance is sealed today by swearing loyalty to Australia and its people (the political sovereign), a pledge of loyalty, accepted by the body politic—the Commonwealth. *See Australian Citizenship Act 2007* (Cth), sch 1 (Austl.).

56. "No one can cast off his country." *See* AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 195 (2009).

57. The Naturalization Act 1870, 33 & 34 Vict. c. 14 (UK).

58. *See* Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L. J. 1411, 1420, 1428 (1997).

59. Act of Settlement 1701, 12 & 13 Will. 3 c. 2 (Eng. & Wales). *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. 1, ch. 10, http://avalon.law.yale.edu /18th_century/blackstone_bk1ch10.asp[https://perma.cc/ELJ4-FBT2].

60. The Naturalization Act 1870, 33 & 34 Vict. c. 14, §§ 3-6 (UK)

61. British Nationality Act 1948, 11 & 12 Geo. 6 c. 56 pt. II §§ 19-22 (UK) (providing renunciation and deprivation of citizenship no longer because of dual citizenship).

62. Michael Klapdor, Moira Coombs & Catherine Bohm, *Australian Citizenship: A Chronology of Major Developments in Policy and Law*, PARLIAMENT OF AUSTRALIA, Social Policy and Law and Bills Digest Sections 1, 1 (Sept. 11, 2009) https://www.aph.gov.au/About _Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/AustCitizenship (confirming that when the *Australian Constitution* was passed in 1900 "Australians could only hold the status of British subjects," which at the time was regulated by the Naturalization Act 1870, 33 & 34 Vict. c. 14 (UK)).

63. This interpretation can still be seen in section 44(i) of the *Australian Constitution*. The section disqualifies Members of Parliament if they hold dual citizenship. See Benjamen Franklen Gussen, *A Pseudo Calabresian Sunset Down Under: The Anachronism of Disqualifying Australian Members of Parliament for Holding a Foreign Citizenship*, 32 N.Y. INT'L L. REV. 25 (2019) (arguing that s 44(i) should be deemed obsolete).

local loyalty.[64] Visitors are also distinguished in having a duty of temporary loyalty.[65] The duty of protection, therefore, has to be both local and temporal to reciprocate the loyalty present in each case.

B. The Existence of the Duty of Permanent Loyalty

Historically, only four rights can give rise to the duty of permanent loyalty. *Jus soli* was the common law test for determining whether a person was a national—a "subject," using feudal terminology—or an alien.[66] William Blackstone (1723–1780) explained the standard for British nationality under common law by reference to this birthright and the concept of allegiance: "Natural-born subjects are such as are born within the dominions of the crown of England; that is within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it."[67] Under common law, an "alien" was one "who is born out of the allegiance of our sovereign lord the king."[68] In *Calvin's case*,[69] the King's Bench held that persons born in territories lost by the King would retain their status as subjects of the King. However, after the independence of the United States, the King's Bench held that persons born in the United States after independence were aliens even if their parents were born there before independence.[70] Similarly, a person born in Hanover during the reign of William IV, who was the King of the United Kingdom and Hanover, became an alien of the United Kingdom, but not Hanover, when Queen Victoria ascended to the throne.[71] By the end of the fourteenth century, allegiance "had been extended by legislation to include the children of English parents born in foreign countries or any

64. *See, e.g.*, *Singh* 222 CLR 322 ¶ 65, at 353 (Austl.); *id*. ¶ 202; *Ex parte Te* (2002) 212 CLR 162 ¶¶ 28-2, at 192 (Austl.); *id*. ¶ 252 n.416 (citing *Shaw* (2003) 218 CLR 28 ¶ 29 (Austl.)); *Love* and *Thoms* (2020) 270 CLR 152 ¶ 248, at 242–43 (Austl.); *id*. ¶¶ 428, 430, at 303–05.

65. *See, e.g.*, *Singh* ¶ 58, at 351, ¶ 93, at 363; *id*. ¶ 164 at 387; *id*. ¶ 299, at 427; *Love* and *Thoms* ¶ 108, at 203.

66. *Ex parte Taylor* (2001) 207 CLR 391 ¶ 115 (Austl.) (citing WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW Volume 9, at 73 (3d ed. 1944); MICHAEL PRYLES, AUSTRALIAN CITIZENSHIP LAW 14 (1981)).

67. *Id*. ¶ 114 (citing *Pochi* at 107–08) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 366 (8th ed. 1778)).

68. *Id*. ¶ 273 (citing Co. Litt. 128b, 129a; Calvin v. Smith (Calvin's case) (1608) 77 Eng. Rep. 377 (KB); Collingwood and Pace (1664) 86 Eng. Rep. 262, 267-68; Doe d Thomas v. Acklam (1824) 107 Eng. Rep. 572).

69. *Id*. ¶ 116, n.90 (citing Calvin's Case 77 Eng. Rep. 377).

70. *Id.* ¶ 116 n.91 (citing Doe d Thomas 107 Eng. Rep. 572).

71. *Id*. ¶ 116 n.93 (citing *In re* Stepney Election Petition; Isaacson v. Durant (1886) 17 QBD54).

child born within the sovereign's territories."[72] The common law, therefore, has long recognized a dichotomy between "aliens" and British subjects.[73] By the nineteenth century, Albert Venn Dicey (1835–1922) treated the categories of alien and citizen as mutually exhaustive.[74] The status of British subjects then became synonymous not only with British nationality but also with British citizenship.[75]

The 1701 Act also recognized *jus sanguinis* as a standard for British nationality. The 1701 Act was passed at a time when "the jealousy of foreigners, fostered, as it had been, by the dislike of the partiality of William III to his foreign favourites, was rampant in the country . . . ."[76] Section 3 of the Act also excludes those who were born "out of the Kingdoms of England Scotland or Ireland or the Dominions thereunto belonging," referring to aliens, denizens, and naturalized subjects. Section 3 continues its discriminatory rationale with the exception afforded to those "born of English Parents."[77] This part of Section 3 extends the protection of the Crown to include a subject's children to one generation. This qualification was a modification of the position under common law, under which children born in foreign countries were aliens regardless of the nationality of their parents.[78] The inclusion of those "born of English Parents" is a restatement of the doctrine of *jus sanguinis*, first seen under Roman Law, and signifies the emergence of national identity in Great Britain.[79]

72. *Id*. ¶ 115.

73. *Id*. ¶ 272.

74. *Love* and *Thoms* (2020) 270 CLR 152 ¶ 435, at 307 (Austl.) (critiquing this classification, because categories like "denizen" do not fit either, which conflated the issue with whether the category of non-citizen-and-non-alien is empty or not; the concepts of "citizen" and "non-alien" can be antonyms, while still allowing certain classes to be non-citizens-and-non-aliens (citing A. V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 174 (1896))).

75. John W Salmond, *Citizenship and Allegiance*, 18 L. Q. REV. 49, 52 (1902). Salmond explains that under *jus sanguinis*, citizenship and nationality "ran together, and the one status was hereditary because the other was." *Id*. at 53. On the other hand, "Feudalism had in theory severed all connexion between membership of the state and membership of the nation," but Salmond is quick to add that "[n]evertheless[,] in practice the state and the nation tend to coincidence even under feudalism." *Id*. at 54, 55.

76. H.S.Q. Henriques, *The Political Rights of English Jews*, 19 JEWISH Q. REV. 298, 311 (1907).

77. Act of Settlement 1701, 12 & 13 Will. 3 c. 2, § 3 (Eng. & Wales).

78. HOME OFFICE, *Historical Background Information on Nationality* (2017) (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/650994/Background-information-on-nationality-v1.0EXT.pdf.

79. *See, e.g.*, DORA KOSTAKOPOULOU, THE FUTURE GOVERNANCE OF CITIZENSHIP (William Twining et al. eds., 2008).

The third right is *jus domicile*, which leads to a duty of permanent loyalty through a process of naturalization.[80] Today, this right allows for the conferral of Australian citizenship under the *Australian Citizenship Act*.[81] Schedule 1 of the Act allows for a person to enter into a permanent allegiance with the Commonwealth through a "pledge of commitment as a citizen of the Commonwealth of Australia." There are two forms of the pledge, one using the words "under God" and the other without these words. The pledge is as follows: "From this time forward, (under God), I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose law I will uphold and obey." Today this right is regulated by the status of permanent residence, defined in section 5 of the 2007 Act, and the general residence requirements in section 22: legal presence in Australia for four years before applying for citizenship and presence as a permanent resident for the last twelve months of those four years.

The fourth right is *jus asyli*, the concept of people's right to apply for asylum.[82] Article 14(1) of the *UN Universal Declaration of Human Rights* states that "everyone has the right to seek and to enjoy in other countries asylum from persecution."[83] *Jus asyli* puts a limit on the sovereign right of the Commonwealth to regulate its duty of permanent protection towards persons coming within the definition of article 1A(2) of the *Convention Relating to the Status of Refugees*, i.e., persons who, if deported, would be in danger of prosecution based on, inter alia, race, religion, and nationality.[84] Section 36(2) of the *Migration Act*[85] incorporates this non-refoulement principle, found in article 33 of the *Convention*.[86] The

80. *See generally* Harald Bauder, *Jus Domicile: In Pursuit of a Citizenship of Equality and Social Justice*, 8 J. INT'L POL. THEORY 184 (2012) (explaining the citizenship principle of jus domicile, and how it could improve the wellbeing of migrant workers); Carly Austin & Harald Bauder, *Jus Domicile: A Pathway to Citizenship for Temporary Foreign Workers?* (CERIS – The Ontario Metropolis Ctr., Working Paper No. 81, 2010) (conducting a critical evaluation of Canada's foreign worker scheme using contemporary theories of citizenship).

81. *Australian Citizenship Act 2007* (Cth) (Austl.).

82. *See generally* Christine A. Stevens, *Asylum Seeking in Australia*, 36 INT'L MIGRATION REV. 864 (2002) (examining the development of asylum processes in Australia).

83. Universal Declaration of Human Rights, G.A. Res. 217 (III) A (December 10, 1948).

84. Convention Relating to the Status of Refugees art 1, ¶ A(1), 189 U.N.T.S. 151 (July 28, 1951).

85. *Migration Act 1958* (Cth) (Austl.).

86. Convention Relating to the Status of Refugees, 189 U.N.T.S. 151 (July 28, 1951) (entered into force on Apr. 22, 1954). Australia became a State party to the Convention on 13 December 1973. *See* United Nations Treaty Collection https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en. *See generally* Seline Trevisanut, *International Law and Practice: The Principle of* Non-Refoulement *and the De-Territorialization of Border Control at Sea*, 27 LEIDEN J. INT'L L. 661 (2014) (arguing for non-refoulement wherever state authorities perform border control measures); Jean Allain, The *Jus Cogens* Nature of *Non-*

Commonwealth also has obligations to protect stateless persons as defined in article 1(1) of the *Convention Relating to the Status of Stateless Persons*: "the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law."[87]

The absence of a duty of permanent loyalty is both necessary and sufficient for alienage. While each one of the four rights can give rise to the reciprocal duty of permanent loyalty, this duty is not a sufficient condition for allegiance.[88] There also needs to be a duty of permanent protection arising from the reciprocal Commonwealth right to sovereignty under the Australian monarch. To see why, alienage needs to be understood as it appears in section 51(xix): "[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . naturalization and aliens,"[89] which also happens to be the only place where the term "alien" appears in the *Constitution*. The term always appears together with naturalization. The power is therefore to naturalize and to alienate. The fact that these words appear together suggests that they are exercised as one, rather than separate powers. When Parliament naturalizes someone, it impacts his status as an alien, and vice versa. However, to naturalize someone means that the person acquires permanent allegiance to the Australian sovereign through a pledge of loyalty. The existence of a duty of permanent loyalty is, therefore, a prerequisite for naturalization.[90] The pledge constitutes a double bond of permanent loyalty to, and permanent protection by, the Australian sovereign. The duty of permanent loyalty which binds a person to Australia also assures that person of the duty of protection owed by the body politic—the Commonwealth. However, the

Refoulement, 13 INT'L J. REFUGEE L. 533 (2001) (explaining the origins of the principle of non-refoulement and its jus cogens nature); Rene Bruin & Kees Wouters, *Terrorism and the Non-Derogability of* Non-Refoulement, 15 INT'L J. REFUGEE L. 5 (2013) (arguing that refugees who pose a danger to national security, even though they are not protected against refoulement under Article 33 (1) Refugee Convention, should nonetheless benefit from a restrictive application allowing for protection of such refugees).

87. Convention Relating to the Status of Stateless Persons, 360 U.N.T.S. 117 (Sept. 28, 1954); *see generally* Michelle Foster, Jane McAdam & Davina Wadley, *Part Two: The Prevention and Reduction of Statelessness in Australia - An Ongoing challenge*, 40 MELB. UNIV. L. REV. 456 (2016) (analyzing the extent to which Australian law complies with international obligations to reduce statelessness); *see* Michelle Foster, Jane McAdam & Davina Wadley, *Part One: The Protection of Stateless Persons in Australian Law – The Rationale for A Stateless Determination Procedure* 40 MELB. UNIV. L. REV. 401, 405 (2016) (explaining that "key treaty obligations [under the 1954 and 1961 Convention] have yet to be implemented in [Australian] domestic law.").

88. *See, e.g.*, Maximilian Koessler, *Subject, Citizen, National, and Permanent Allegiance*, 56 YALE L.J. 58 (1946).

89. *Australian Constitution* s 51(xix).

90. *Australian Citizenship Act 2007* (Cth), sch 1 (Austl.).

latter duty is not required for establishing alienage because, since medieval times, there can be no situation where there is a duty of permanent loyalty and no duty of permanent protection. Once the Commonwealth regulates the conditions under which the four rights can give rise to permanent loyalty as well as the actions and omissions that can lead to a breach of this duty, it also must grant permanent protection where the duty is deemed to exist. The duty of protection is purchased with the duty of loyalty. This price of permanent loyalty explains the essence of alienage. It is the presence of this duty in naturalization and its absence in aliens that distinguishes the two. The presence or absence of permanent loyalty is the criterion for designating someone as a constitutional alien. An alien is someone that does not owe this duty of permanent loyalty to the Australian sovereign. Only after a person has been naturalized does she cease to be a constitutional alien, through her pledge of commitment.[91] If the Commonwealth decides that this person cannot become an Australian citizen and she remains in Australia only under a permanent residency visa, that person continues to be an alien with only local protection—the Commonwealth has no duty towards her outside Australia.[92]

In sum, the term "alien" is defined by the absence of a duty of permanent loyalty to the Australian sovereign. The definition flows from the history of the doctrine of allegiance and the phrase "naturalization and aliens" in section 51(xix). The next subsection looks at the drafting history of section 51(xix) to further explain the historicity of the definition of alienage provided in this subsection.

C. The Drafting History of Section 51(xix)

The phrase "naturalization and aliens" in section 51(xix) of the *Australian Constitution* is a boilerplate found in other imperial Acts. The phrase was declared by the HCA to be identical to that found in the *British North American Act 1867*,[93] section 91(25): "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next herein-after enumerated; that is to say— . . . naturalization and aliens."[94] Since 1902, the Privy Council recognized that

91. *Australian Citizenship Act* 2007 (Cth) s 26 (Austl.).

92. See the analysis of *Te and Dang*, *infra* Section IIC2.

93. British North America Act 1867, 30 & 31 Vict. c. 3 (UK), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

94. *Love* and *Thoms* (2020) 270 CLR 152 ¶ 83, at 192 (Austl.); *see Ex parte Taylor* (2001) 207 CLR 391 ¶ 266, at 479 (Austl.) (explaining that s 51(xix) was borrowed from the Federal Council of Australasia Act 1885, 48 & 49 Vict. c. 60 (UK) and the British North America Act 1867, 30 & 31 Vict. c. 3 (UK)).

section 91(25) was dichotomous when it said that the section would "determine what shall constitute either the one or the other."[95] In other words, the Canadian counterpart follows a dichotomy where the set of non-naturalized-and-non-alien is empty, or, simply, that there can be no person who is both naturalized and an alien, or not naturalized and not an alien. In Canada, the meaning of the term "alien" can be gleaned from the *Aliens and Naturalization Act* 1881.[96] Section 1 of the Act states that: "Each and every person who, being by birth an Alien . . ."—the term was a signifier of birth outside the jurisdiction, more specifically, outside the British Empire. Given the analysis in Section 2.1 above, section 1 explains how *jus soli* gives rise to the duty of permanent loyalty. The HCA, however, interpreted section 51(xix) to go beyond its Canadian counterpart (section 91(25)), "in that the power permits as well specification of the legal consequences of that legal status."[97] Furthermore, as stated in *Love and Thoms*,[98] "[u]nlike, for example, the legislative powers of the Parliament of Canada,[99] the legislative powers of the Parliament of the Commonwealth have not to date been constrained by the insertion of a constitutional guarantee of 'aboriginal . . . rights.'"[100]

A similar phrase can be found in the *Federal Council of Australasia Act 1885*: ". . . the Council shall have legislative authority in respect to the several matters following: . . . Such of the following matters as may be referred to the Council by the legislatures of any two or more colonies, that is to say— . . . naturalization *of* aliens."[101] Fifteen years after this Act passed, the phrase in the *Australian Constitution* changed to "naturalization *and* aliens," bringing it in line with the Canadian phrase. What is the significance of replacing the proposition "of" with the conjunction "and?" That the word "naturalization," an abstract noun from the verb "to naturalize," expresses a legal status, while "aliens," also a noun, merely describes a class of people suggests that the earlier version

95. Cunningham v. Tomey Homma [1903] AC 151 (PC) 156 (appeal taken from B.C.); Morgan et al. v. P.E.I. (1975), 55 D.L.R. (3d) 527, 531–32 (Can.).

96. Naturalization Act 1881, 44 Vict. c 13, § 3 (UK).

97. *Love* and *Thoms* ¶ 84, at 193 (citing *Ex parte Te* ¶¶ 80, at 114); *see also Shaw* ¶¶ 2, at 190; *see generally Chu Kheng Lim* (where Justices Brennan, Deane, and Dawson accepted the Commonwealth policy of mandatory detention of aliens).

98. *Love* and *Thoms* ¶ 135, at 211.

99. *Cf.* Watt v. Liebelt (1998), [1999] 2 F.C. 455 (Can.).

100. *See* the Constitution Act 1982*, being* Schedule B to the Canada Act 1982 c. 11, § 35 (UK).

101. Federal Council of Australasia Act 1885, 48 & 49 Vict. c. 60, § 15(i) (UK) (emphasis added) (repealed by the *Commonwealth of Australia Constitution Act 1900* (Cth) 63 & 64 Vict. c. 12, cl. 7 (Austl.)); *see also Ex parte Taylor* (2001) 207 CLR 391 ¶ 266 n.307, at 479 (Austl.). For the continued relevance of the Act, see Stuart B. Kaye, *Forgotten Source: The Legislative Legacy of the Federal Council of Australasia*, 2 NEWCASTLE L. REV. 57 (1996).

is limited to naturalization as *a process done to* aliens; to naturalize aliens. The latter version is wider, in line with the transition from the confederal Federal Council to the federal Commonwealth.[102] It also envisages the reversal of naturalization, suggesting only coordination between the power to naturalize and the power to alienate; between the process of naturalization and the status of aliens.

The meaning of the term "aliens" in these instruments suggests a dichotomy with nationality, i.e., membership into a nation (refer to Section 2.1). As pointed out by Justice Keane in *Love and Thoms*, "[i]n the decades leading up to Federation, judicial statements in England, the United States, Canada and the Australian colonies confirmed that the essence of alienage was the want of permanent allegiance to the sovereign, albeit as a political institution rather than a natural person."[103] Similarly, Justice McHugh in *Re Patterson (Ex parte Taylor)*[104] noted that in 1901, an "alien" was defined as a person from another place who did not "bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law."[105] At that time, permanent allegiance was the standard for British nationality. It follows that in 1901 no British subjects were "aliens" for the purposes of section 51(xix) of the *Australian Constitution*. The status of British subject was synonymous with Australian nationality; only after the *Nationality Act 1920*[106] did Australia begin to separate from British nationality law.[107] The introduction of Australian citizenship in 1948 led to a series of changes to the status of persons born in the United Kingdom, making them become "alien" for constitutional purposes. Under section 5(1) of the *Nationality and Citizenship Act 1948*, later renamed the *Australian Citizenship Act*,[108] an alien was defined as "a person who is not a British subject, an Irish citizen or a protected person."[109] The *Migration*

102. Even though the Council is referred to as federal, the distribution of powers in the 1885 Act, especially when compared to the 1900 Act, suggests that the former was a looser federation—one that should be described as confederal rather than federal. *See, e.g.*, J. R. VILE, THE UNITED STATES CONSTITUTION 87–98 (2015).

103. *Love* and *Thoms* ¶ 248, at 242–43 (citations omitted).

104. *Ex parte Taylor* ¶ 113, at 428.

105. Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12, § 9 (UK) (setting forth the *Australian Constitution*, including a concluding schedule with an oath and affirmation of allegiance to Queen Victoria and her heirs and successors).

106. *Nationality Act 1920* (Cth) (Austl.).

107. This separation began by bestowing on First Nations the status of British subjects. *See generally* Ann-Mari Jordens, *Australian Citizenship: 50 Years of Change* 74 AUSTL. L. REFORM COMM'N REFORM J. 24 (1999) (explaining the evolution of the concept of Australian citizenship).

108. Commonwealth, Parliamentary Debates, House of Representatives, Apr. 11, 1973, at 1312 (Al Grassby, Minister for Immigration).

109. *Nationality and Citizenship Act 1948* (Cth) (Austl.).

Act 1958 had a similar definition.[110] However, in 1973 the *Citizenship Act* was amended to require swearing allegiance to "Her Majesty Elizabeth the Second, Queen of Australia."[111] In 1983, the definition of "alien" in the *Migration Act* was replaced by "non-citizen" who is defined as "a person who is not an Australian citizen."[112] And in 1984, the definition of "alien" was also omitted from the *Australian Citizenship Amendment Act*.[113] This is the reason why Chief Justice Kiefel in *Love and Thoms* (see Section IIE), and the majority in *Pochi* and *Nolan*, decided to use "non-citizen" and "alien" as synonyms.

To further unpack the relationship between the meaning of "aliens" and nationality, I will now proceed to explain the history of section 51(xix) from the point of view of the drafters of the *Australian Constitution*.

1. Australasian Convention debates

Also, the framers of the *Australian Constitution* understood the meaning of the term "alien" as someone who owes no duty of permanent loyalty to the Australian sovereign. As stated by Justice Edelman in *Love and Thoms*, "at the Constitutional Convention in 1898, the delegates rejected cl. 110, as it had been proposed to be amended by Dr. Quick, which concerned the right and privileges of citizenship."[114] One reason for this rejection was "uncertainty about the concept of Commonwealth citizenship."[115] Chief Justice Gleeson provides a similar analysis, explaining that the discussions in the constitutional debates on the issue of Commonwealth citizenship show apprehension from the difficulties relating to the adoption of a citizenship standard:

> The first thing to be noted is that there were two alternative, and inconsistent, proposals. In 1898, the chief proponent of the inclusion of a citizenship power, Dr Quick, said that he wanted to see either a definition of citizenship in the Bill or a power conferred on the Parliament to define citizenship. The debate that followed related to both alternatives. A number of speakers raised various objections. Some

110. *Migration Act 1958* (Cth) (Austl.); *see Ex parte Taylor* (2001) 207 CLR 391 ¶ 118 (Austl.), at 430–31.

111. *Australian Citizenship Act 1948* (Cth) s 15 and sch. 2 (Austl.).

112. *Migration Act 1958* (Cth) s 5 (Austl.).

113. *Australian Citizenship (Amendment) Act 1984* (Cth) s 4(2)(a) (Austl.).

114. *Love* and *Thoms* (2020) 270 CLR 152 ¶ 411, at 296–97 (Austl.) (citing Commonwealth, Official Record of the Debates of the Australasian Federal Convention: Melbourne, Mar. 3, 1898, at 1788, 1797 (Dr. Quick) (Austl.); Official Record of the Debates of the Australasian Federal Convention: Melbourne, Feb. 8, 1898, at 677 (Mr. Kingston) (Austl.); Official Record of the Debates of the Australasian Federal Convention: Melbourne, Mar. 2, 1898, at 1761 (Mr. O'Connor) (Austl.)).

115. *Id*.

> regarded a definition of citizenship as unnecessary. Some saw the proposal as cutting across the concept of state citizenship. Mr Isaacs thought that "all the attempts to define citizenship will land us in innumerable difficulties." He expressed concern that the proposed amendment might deprive Parliament of the power of excluding people of certain specified races "who happened to be British subjects." The subject of re was of great concern to the framers, and their views on that matter were quite different from those which now prevail. To put the point at its lowest, a purpose of limiting Parliament's power to legislate for exclusion is not apparent. It is impossible to discern in the record of the Convention Debates any specific reason for the rejection of Dr Quick's ambiguous proposal. The discussion throws no light on the purpose or object of s 51(xix), except to the extent that it suggests that a broad, rather than a narrow, power with respect to aliens was in contemplation.[116]

The main concern, as articulated by Isaac Isaacs (who later became the Chief Justice of the HCA and the Governor-General of Australia), is the ability of the Commonwealth Parliament to exclude "certain specific races" from owing a permanent duty to the Australian sovereign and therefore becoming naturalized in Australia.[117] The difficulty was that these races also happened to be British subjects, which is the same nationality applicable in Australia at Federation. While these races owed permanent loyalty to the Australian sovereign, the drafters of the *Constitution* were careful to ensure that Parliament was able to regulate the duty of permanent loyalty that could arise from the right. They were to be considered aliens even though they were, at least technically, Australian nationals.[118]

Justice McHugh also makes a similar reference to the Convention debates,[119] explaining the issue as an apprehension of having "Asiatics" become citizens in Australia:

> One of the problems confronting the makers of the *Constitution* was the issue of categori[z]ation, in particular, the effect of defining "citizen" as a "subject of the Queen." Under the common law, "subject of the Queen" included all "natural born subjects" born in any part of the British Empire. This included colonies such as Hong Kong. Some delegates were concerned not only that Chinese people from Hong Kong would be treated differently from those born in other parts of China, but also that

116. *Singh* 222 CLR 322 ¶ 31, at 341 (Austl.) (citations omitted).

117. *Id*.

118. Australian nationality did not arise until much later, when the *Nationality and Citizenship Act 1948* (Cth) (Austl.) came into force.

119. *Singh* ¶¶ 103-104, at 366–367.

> they would be able to claim citizenship of the Commonwealth. Dr John Cockburn, a South Australian delegate, emphasized: "We desire always to deal with Asiatics on broad lines, whether they are subjects of the Queen or not; and in South Australia, and, I believe, other colonies, those lines of distinction are obliterated."[120]

Note also that while Australia's First Nations were not considered in the debates, they were also constitutional aliens, not owing a duty of permanent loyalty to the British sovereign, which at the time of the Federation was also the Australian sovereign. Justice Gordon suggests that

> discussions of 'aliens' in the Convention Debates were generally directed at supposedly 'foreign' peoples, such as those originating from East Asia and India. Nothing in the Debates contemplated that Aboriginal Australians—peoples who came from the land and waters that now make up Australia—would be within [section 51(xix)] power.[121]

The reason why First Nations were not the subject of any of these debates is that they were autochthonous. The difference is that they were already in Australia. The debates were intended to ensure that other aliens would not be allowed into the continent. Dealing with First Nations as aliens is clear from the repealed section 127 of the *Australian Constitution*, which stated "[i]n reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."[122] Repealed only in 1967,[123] this section suggests that First Nations were not under British sovereignty. They owed no permanent loyalty and therefore were constitutional aliens.[124] The earliest possible date for making members of the First

120. *Singh* ¶ 104, at 367 (emphasis in the original) (citations omitted).

121. *Love* and *Thoms* (2020) 270 CLR 152 ¶ 344, at 275 (Austl.) (citing Official Report of the National Australasian Convention Debates: Sydney, Apr. 3, 1891, at 689, 702–03; Official Record of the Debates of the Australasian Federal Convention: Melbourne, Jan. 27, 1898, at 228–30, 234–35, 242; Official Record of the Debates of the Australasian Federal Convention: Melbourne, Jan. 28, 1898, at 248, 252; Official Record of the Debates of the Australasian Federal Convention: Melbourne, Mar. 2, 1898, at 1763; Official Record of the Debates of the Australasian Federal Convention: Melbourne, Mar. 3, 1898, at 1782, 1791–792).

122. Commonwealth of Australia Act, 1900 (Imp), 63 & 64 Victoria, c. 12 § 127 (UK).

123. *Constitution Alternation (Aboriginals) Act 1967* (Cth) s 3 (Austl.). Technically, the second part of the constitutional referendum, held on May 27, 1967, passed the Bill, and it came into force on Aug. 10, 1967 (date of Royal assent).

124. *Compare Love* and *Thoms* ¶ 105, at 202 (the position of the Solicitor-General was that "aboriginal natives of Australia, like other persons born in Australia" after 1949 had the statutory status of Australian citizens and, "by virtue of that citizenship," also had the statutory status of British subjects) *with* Ann-Mari Jordens, *Australian Citizenship: 50 Years of Change* 74 AUSTL. L. REFORM COMM'N REFORM J. 24, 26 (arguing that under the *Naturalization Act 1920* (Cth) all members of First Nations born after Jan. 1, 1921, were automatically British subjects, and that prior to this date, they

Nations British subjects was January 1, 1921, after the passage of the *Nationality Act 1920*.[125] Section 6(a) of the Act deems as natural-born British subjects any person born within the British monarch's "dominions and allegiance." Assuming de jure British sovereignty in Australia since 1788, or put differently, assuming that the enlarged doctrine of *terra nullius* provides a legal basis for British sovereignty, all members of First Nations born after January 1, 1921, were deemed to be British subjects. The better view, however, is that just like the "certain specified races" referred to by Isaac Isaacs (see above), First Nations continued to be aliens, even after becoming Australian citizens in 1949 and until section 127, which excluded them from being counted constitutionally, was repealed in 1967. Aboriginality, therefore, explains the anomaly of being a national or citizen and simultaneously being an alien.

In summary, the Constitutional Convention debates suggest that section 51(xix) was intended to prevent those not owing permanent loyalty to the Australian sovereign from becoming naturalized, especially Asiatics who had the status of British subjects, but also, by implication, First Nations, even after the *Nationality Act 1920*.

2. British nationality in 1900

Understanding the term "alien" requires analyzing the meaning of this term in 1900 when the *Australian Constitution* was passed. The term appears in the *Constitution* only once, in section 51(xix), in the phrase "naturalization and aliens." This suggests that understanding the term "alien" can be informed by the meaning of "naturalization" and vice versa. Note however that the term "naturalization" also appears only once in the *Constitution*, which is explained by the fact that the *Constitution* does not have a nationality (or citizenship) standard.[126] In 1900, Australians identified themselves as British (subjects). Both words, "naturalization" and "aliens," must therefore be understood through British nationality law. The applicable nationality standard at the time the *Constitution* was passed was the *Naturalization Act 1870*.[127] Therefore, to be able to interpret the phrase "naturalization and aliens" in section 51(xix) of the *Constitution*,

had to apply to become naturalized in the same way as aliens). Those who were naturalized did owe a duty of permanent loyalty and were in allegiance to the Australian sovereign. But those who did not undergo this process, were only deemed to owe the duty. However, under section 127 of the *Constitution*, they were not even counted as part of the Australian population, let alone owed a duty of protection by the Commonwealth.

125. *Nationality Act 1920* (Cth) (Austl.).

126. See the discussion of the Constitutional Conventions above.

127. Naturalization Act 1870 33 & 34 Vict. c. 14 (UK).

we need to look for the meaning of the words "naturalization" and "aliens" in the 1870 Act.

While the dictionary in section 17 of the *Naturalization Act 1870* does not define the term "alien," the meaning of the term can be learned from the text and structure of the Act. The long title of this Act states that its objective is to "amend the Law relating to the Legal Condition of Aliens and British Subjects."[128] The same objective is repeated in the Preamble. The word "naturalization" in the short title,[129] therefore, relates to not only the regulation of the legal status of aliens but also British subjects. The structure of the Act is also informative as to the relationship of the term "alien" to other terms, such as "statutory alien," "British subject," "naturally-born British subject," "British nationality," and "naturalization." The Act has the following sections: "Status of Aliens in the United Kingdom" (sections 2–5), "Expatriation" (section 6), "Naturalization, and resumption of British Nationality" (sections 7–9), "National status of married women and infant children" (section 10), "Supplemental Provisions" (sections 11–12), "Miscellaneous" (sections 13–17), and "Repeal of Acts mentioned in Schedule" (section 18). The Schedule has two parts, with Part I listing Acts "wholly repealed" other than Acts of the Irish Parliament; Part II listing wholly repealed Acts of the Irish Parliament; Part III lists Acts partially repealed.

The 1870 Act explains the meaning of the term "alien" by reference to the status of "a natural-born British subject" as well as to the wider term "British subject." For example, section 2 of the Act ("Capacity of an alien as to property") explains that the position of an "alien" is the same as that of a "natural-born British subject" when it comes to owning property. Section 5 makes a similar analogy between "alien" and "natural-born subject" in relation to trial by jury, and section 7 makes an analogy between an "alien" and "a natural-born British subject" in relation to "naturalization." It can be inferred that under the Act, the term "naturalization" refers to a process that provides aliens with the same "rights and privileges" as those enjoyed by a "natural-born British subject."[130] To naturalize a person, therefore, is to treat the person *as if* they were "natural-born" into the status of a British subject. A person can be naturally born into the status of a British subject in one of two ways: either through *jus soli* or *jus sanguinis*. The former is found in section 4 of the Act, which refers to "British-born," explaining that "[a]ny person who, by reason of his having been born within the dominions of Her Majesty, is

128. *Id*.
129. *Id*. § 1.
130. *Id*. § 2(2).

a natural-born subject." The latter can also be found in section 4, where "[a]ny person who is born out of Her Majesty's dominions of a father being a British subject may … cease to be a British subject."[131] Note however that other parts of the Act explain the term "alien" by reference to "British subject," rather than limiting the analogy to "natural-born British subjects." For example, section 2(2) states that the section "shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him."[132] Similarly, section 3 explains the status of "naturalized aliens" as those "who have been naturalized as British subjects" and provides for a process through which such aliens can revoke their status as British subjects by making "a declaration of alienage."[133] Also, section 4 explains how a "British-born subject may cease to be [British subjects]" through the same "declaration of alienage" process, while section 6 explains that when a "British subject" becomes voluntarily naturalized in any foreign state, that they become an "alien."[134] Note however that the *Naturalization Act 1870* discriminates between natural-born and naturalized nationals in terms of the requirements under which they forfeited their status as nationals. Under section 4 of the 1870 Act, alienage of a natural-born British subject is not automatic on becoming a subject of a foreign State.[135] When of full age and under no disability, the person has to make a declaration of alienage of their British citizenship. In contrast, under sections 7 and 9, an alien-born person can obtain British nationality upon relinquishing their foreign nationality; however, because of section 6, such persons would be deemed aliens automatically.[136] Section 6 of the 1870 Act mirrors sections like section 44(i) of the *Australian Constitution* that at the time were found in legislation that was applicable only in the colonies.[137] There are therefore two different "default" positions. The first is that of alienage when a person obtained foreign citizenship by naturalization. In this category, the person needs to make a declaration to remain a British subject. This position is influenced by the same rationale

131. *Id*. § 4.

132. *Id*. § 2(2).

133. *Id*. § 3.

134. *Id*. § 4 & 6.

135. *Id*. § 4 ("may, if of full age and not under any disability, make a declaration of alienage . . .").

136. At the time, there could be no divided allegiance—although perpetual allegiance was no longer the standard for British nationality after the passing of section 6 of the *Naturalization Act 1870*.

137. *See generally* Benjamen Franklen Gussen, *A Pseudo Calabresian Sunset Down Under: The Anachronism of Disqualifying Australian Members of Parliament for Holding a Foreign Citizenship*, 32 N.Y. INT'L LAW REV. 25 (2019) (analyzing the history of section 44(i)).

behind the undivided allegiance doctrine. The second position is that of no alienage, provided the person obtained their foreign citizenship by *jus sanguinis* or *jus soli*. Here the person needs to make a declaration of alienage to cease being a British subject. This second position is also based on undivided allegiance, which allows for alienage by declaration.

According to the 1870 Act, the term "alien" designates someone who does not hold "British nationality" and therefore someone who has no allegiance to the British sovereign. That allegiance can only arise if the person owes a duty of permanent loyalty to the British sovereign. The Act explains the term "British subject" by reference to the concept of "British nationality." For example, section 6 explains that a British subject who has become naturalized in a foreign State but wants to remain a British subject may be able to do so through "a declaration of British nationality" which includes an "oath of allegiance."[138] Therefore, the term "alien" designates someone who is not a British national. This can be seen explicitly in section 7 that delineates a process for an alien to acquire British nationality.[139] Similarly, section 8 explains how a "statutory alien," i.e., a "natural-born British subject" who became an alien under the 1870 Act (because of allegiance to a foreign State), can be readmitted into British nationality.[140] Also, section 10 provides for readmission to British nationality for certain classes of people who became statutory aliens. The distinction between a constitutional alien, i.e., someone not having a right to permanent loyalty, and a statutory alien, i.e., someone who became an alien because they breach their duty under British law, agrees with the understanding that the power under section 51(xix) of the *Constitution* allows the Commonwealth to regulate the duty of permanent loyalty that defines the term "alien."[141]

In summary, in 1900, the phrase "nationalization and aliens" in the *Australian Constitution* was interpreted as designating someone who was not a British national. The British nationality standard in 1900 was the status of a British subject, which can be obtained either by being naturally born into this status (through *jus soli* and *jus sanguinis*) or through a process of naturalization. It can therefore be inferred that the same phrase continued to be related to nationality, even after Australia decided to instate its own standard, under the *Nationality Act 1920*. The membership into a nation, as discussed in Section 2.1, signifies a duty of permanent loyalty, the lack of which defines constitutional alienage.

138. Naturalization Act 1870 § 9 (UK).

139. *Id*. § 7.

140. *Id*. § 8.

141. *Australian Constitution* s 51(xix).

The next subsection explains this definition through sections 34(ii) and 44(i) of the *Australian Constitution*.

D. Breach of the Duty

According to Salmond,

> The *Naturalization Act*, 1870, has been careful … to provide to some extent against the existence of double allegiance. The reception of a British subject into the allegiance of a foreign state extinguishes his British nationality *ipso jure*; no alien naturalized in England is to be deemed a British subject while in the country of his original allegiance, so long as by the law of that country he remains a subject of it; and a man who is a British subject by the *jus soli*, and a foreigner by the *jus sanguinis*, may make his election between these two conditions.[142]

The phrase "subject to this Constitution" in section 51(xix) suggests that the indivisible allegiance doctrine in section 44(i) is relevant to section 51(xix); the prohibition in the former provision goes beyond disqualification from nominating or sitting in the Commonwealth Parliament.[143] It suggests that indivisible allegiance is a constitutional principle that continues to apply to all Australians. The potential tension between this constitutional concept and the statutory concept of citizenship, especially the legality of dual citizenship, is unpacked in the next paragraph. For now, I aim to explain why indivisible allegiance is a constitutional doctrine that informs "naturalization and aliens" as much as the disqualification of members of the Commonwealth Parliament. I begin by noting that while the status of a British national was a necessary rather than a sufficient condition for qualification, the disqualification in section 44(i) was only to clarify the conditions under which that status is lost. Section 44(i) explains that "any person who [i]s under any acknowledgment of allegiance . . . to a foreign power . . . shall be incapable of being chosen or of sitting as [a member of the Commonwealth Parliament]."[144] The provision was designed to "ensure 'that members of Parliament did not have a split allegiance,"[145] and to ensure taking "all

142. John W. Salmond, *Citizenship and Allegiance*, 18 L. Q. REV. 49, 56–57 (1902) (emphasis in the original).

143. *See* Gussen, *supra* note 138.

144. In addition, section 44(i) refers to the standards of 'subject' and 'citizen', which also require permanent allegiance. The section also refers to 'obedience' and 'adherence to' a foreign power, as well as entitlement to 'rights or privileges of a subject or a citizen of a foreign power,' which I interpret as characteristics of temporary or local allegiance, similar to the status of denizens or permanent residents.

145. *Sykes v Cleary* (1992) 176 CLR 77, 107 (Austl.).

reasonable steps to divest . . . of any conflicting allegiance."[146] As explained in Section 2.1 above, the origin of section 44(i) can be traced back to section 3 of the *Act of Settlement 1701*.[147] The design seen in section 3 continued to apply in the British Empire even after British Dominions passed their own citizenship laws in the twentieth century. The design in section 3 is based on congruence between qualification and disqualification. However, the constitutions of the British colonies needed to depart from this complementarity to prevent the eventuality of persons with multiple allegiances becoming members of their respective parliaments. Under the perpetual allegiance doctrine that informed British nationality at the time and until 1870, these persons continued to be British subjects. The disqualification provisions were intended to rectify this inconsistency by ensuring that these persons renounced these other allegiances upon becoming members of the relevant parliament—a harbinger of the doctrine of undivided permanent allegiance that later replaced perpetual allegiance as the doctrine informing British national law. The historical context of the War of 1812 between the United States and the United Kingdom explains why this complementarity was lost.[148] The United States government did not recognize the doctrine of perpetual allegiance and allowed British deserters to become U.S. citizens. Britain found the deserters liable for impressment. Perpetual allegiance was eventually discarded and replaced by undivided allegiance. The latter doctrine appears in the *Australian Constitution* because it was part of the applicable nationality law in Australia at the time: The *Naturalization Act 1870*. Section 6 of the 1870 Act replaced perpetual allegiance with indivisible allegiance, where a British subject would be "deemed to have ceased to be a British subject and be regarded as an alien" if the British subject has permanent allegiance to a foreign State.[149] Therefore, while section 44(i) applies the doctrine to the disqualification of members of parliament, it also enshrines this doctrine as part of the phrase "subject to the Constitution." In conjunction with section 34(ii) that deals with the qualification of members of parliament, section 44(i) confirms the requirement that a member of Parliament must be a British subject by restating the naturalization concepts articulated in sections 4 and 6 of the

146. *Id.*

147. Act of Settlement 1701, 12 & 13 Will. 3 c. 2 (Eng. & Wales).

148. For a detailed account, see CARL BENN, THE WAR OF 1812 (2002).

149. Naturalization Act 1870, 33 & 34 Vict. c. 14, § 6 (UK).

1870 Act. The doctrine of undivided allegiance is therefore a constitutional principle in Australia.[150]

The scythe of the doctrine of indivisible allegiance continues to guide the outer limit of alienage even after its occultation first by statutory British law and later by Australian nationality law in 1948 and 2002 respectively.[151] Although, despite this doctrine, Australians could hold dual citizenship in certain circumstances.[152] Later, statutory intervention made it possible for all Australians to hold dual citizenship.[153] How can we then reconcile dual citizenship with this doctrine? I argue that the answer comes from a 1935 thought experiment by an Austrian-Irish physicist: Erwin Schrödinger.[154] Imagine that we put a cat in a box where there is poisoned food. Until we look inside the box, we do not know whether the cat is dead or alive, and when we do look, the cat is either dead or alive. The cat is in a superposition, both dead *and* alive. Only by actively looking inside the box do we force nature to collapse the two states of dead and alive into one, i.e., into either finding a dead or an alive cat. This superposition guides the state of permanent loyalty in Australia. Prior to the *Nationality Act 1920*,[155] there was only permanent loyalty to the British sovereign. After 1920, there were *constitutionally* superposed loyalties, to a British *and* Australian sovereign, forming one allegiance. Later statutory intervention collapsed this superposition to loyalty only to the Australian sovereign, but also created other possibilities for superposition through dual citizenship. This logic reconciles dual citizenship under Australian nationality law, and the doctrine of indivisible allegiance found in the *Constitution*. Loyalties are deemed to be superposed. Allegiance is divided only if there is a *conflict* in the duty of permanent loyalty owed to different sovereigns. Only after a person

150. Unless we argue that s 44(i) is obsolete. *See generally* Gussen, *supra* note 138 (explaining the anatomy of section 44(i) on the disqualification of members of the Commonwealth Parliament).

151. *See* British Nationality Act 1948, c. 56, §§ 10, 19 (UK); *Australian Citizenship Legislation Amendment Act 2002* (Cth) sch 1 s 1 (repealing s 17 in the *Australian Citizenship Act 1948*) (Austl.). These statutory instruments can inform nationality law in the United Kingdom and the Commonwealth respectively but cannot amend the *Australian Constitution*. The Commonwealth still has the right to use indivisible allegiance in deciding on the issue of alienage, even if current nationality law allows for divided allegiance. The license for dual citizenship is a statutory exception to the general rule. The general rule continues to inform membership in the Commonwealth Parliament as much as alienage.

152. *See Australian Citizenship Act 1948-1973* (Cth) s 18 (Austl.).

153. *See Australian Citizenship Legislation Amendment Act 2002* (Cth), sch 1 (Austl.) (which repealed s 17 of the *Australian Citizenship Act 1948* (Cth) (Austl.)).

154. *See generally* Erwin Schrödinger, *Die gegenw. . .rtige Situation in der Quantenmechanik*, 23 NATURWISSENSCHAFTEN, 807 (1935) (explaining the phenomenon of quantum superposition); Erwin Schrödinger, *The Present Situation in Quantum Mechanics: A Translation of Schrödinger's "Cat Paradox Paper*," 124 PROC. AM. PHIL. SOC'Y, 323–38 (John D. Trimmer trans., 1980).

155. *Nationality Act 1920* (Cth) (Austl.).

breaches her duty of loyalty to the Australian sovereign, under conditions regulated through statutory law, will her allegiances collapse into one state, namely only permanent allegiance to another sovereign.[156]

In summary, a constitutional alien is someone who does not owe a duty of permanent loyalty to the Australian sovereign, or someone who has breached said duty. In the case of naturalization, the duty must be sealed by an oath of allegiance for it to give rise to the reciprocal duty of protection owed by the Australian sovereign.[157] However, the latter duty affects allegiance, but not alienage. This means that a person could be an Australian (statutory) citizen and a constitutional alien at the same time (see Section IB above). In effect, there is an alien-and-citizen category. For example, where someone breaches their duty through heinous crimes,[158] or terrorist acts,[159] and the breach does not result in statutory intervention to relegate the duty of protection owed such a person from a permanent to a local or temporary one.

On the other hand, identifying a breach of the duty requires identifying the right from which the claimed permanent loyalty has emerged and given rise to a permanent allegiance between a person and the Australian sovereign. Under this framework, the category of non-alien-and-non-citizen applies to persons who owe a duty of permanent loyalty to the Australian sovereign but have not sealed their allegiance through statutory requirements, and hence, who owed no duty of protection by the Australian sovereign. Today, this category is only transitional as it includes only persons that are deemed to owe the duty because of one of the four rights (*jus soli, sanguinis, domicile, and asyli*). Historically, British subjects belonged to this category through the channel of the indivisible British Crown. In other words, the permanent allegiance to the British sovereign and the Australian sovereign formed one allegiance until the *Statute of Westminster 1931*[160] redefined the sovereign as the monarch of each Commonwealth realm, rather than as the British monarch; a process that was completed with the passing of the *Australia Act 1986*, which ended all power of the United Kingdom Parliament to legislate for

156. The superposition is possible because there is no conflict between the allegiances. In essence, breaching one of the duties of loyalty has the same effect as making an election similar to that envisaged by section 4 of the Naturalization Act 1870, 33 & 34 Vict. c. 14 (UK).

157. Today, before becoming a member of the Commonwealth Parliament, the elected member has to take the oath under section 42 of the *Australian Constitution*. Similarly, a pledge of commitment is required before someone can become naturalized. *See Australian Citizenship Act 2007* (Cth), s 27 sch 1 (Austl.).

158. *See Migration Act 1958* (Cth) ss 201, 203 (Austl.).

159. *See Australian Citizenship Act 2007* (Cth) ss 33AA, 35, 35AA, 35A (Austl.).

160. Statute of Westminster 1931, 22 Geo. 5 c. 4 (UK).

the Commonwealth, the States, and the Territories.[161] Similarly, if we accept de jure British sovereignty,[162] Australia's First Nations, through the enlarged *terra nullius* doctrine, were members of the non-alien-and-non-citizen category through the status of British subjects or, if we reject this doctrine, were never members of this category.[163] Regardless of its genesis, First Nations allegiance was later exclusively through Australian citizenship therefore removing them from the non-alien-and-non-citizen category.[164]

II. APPLYING THE FRAMEWORK TO HCA JUDGMENTS

This Section looks at HCA authorities on the meaning of the term "alien" in chronological order, starting from 1908 and up to and including 2020. *Love and Thoms* is not the first HCA decision to divide the Court on the meaning of the term "aliens," although it is the first to analyze whether alienage could turn on aboriginality.[165] The objective is to show how the framework can explain and inform the outcomes in these cases. Under the analytical framework, the legal issue in all these cases is the existence of a duty of permanent loyalty between a person and the Australian sovereign. While there is an alignment between the HCA rulings and the framework in most cases, there are cases where the framework explains why the HCA decision is wrong.

A. Early Authorities

While two of the early authorities were concerned with the meaning of the term "immigrant" rather than "alien," these authorities help illustrate cases where a person would be in breach of her duty of permanent loyalty. The framework is used to analyze the judgments and explain their historical context under British nationality law.

1. Potter v. Minahan

The first HCA case to consider the meaning of the term "alien" was *Potter v. Minahan*.[166] James Minahan was born in Victoria in 1876, the

161. *Australia Act 1986* (Cth) s 1 (Austl.).

162. For the counter argument, *see* Lavery, *supra* note 37.

163. The rejection of the enlarged *terra nullius* doctrine is endorsed by the reasoning in *Mabo [No 2]* (1992) 175 CLR 1 (Austl.).

164. *See* Jordens, *supra* note 108.

165. *See infra Section* IIE.

166. *Potter v Minahan* (1908) 7 CLR 277 (Austl.) [hereinafter *Potter*].

illegitimate son of a woman born in Victoria and a man born in China. At the age of five, he was taken by his father to live in China. His father died in 1896. Upon his return to Australia in 1907, he did not pass the dictation test required under the *Immigration Restriction Act*.[167] He brought proceedings arguing that the Act did not apply to him, because he was an Australian-born British subject.

With a majority of three-to-two, the HCA held for Minahan. The rationale according to Chief Justice Griffith, Justice Barton, and Justice O'Connor is that Minahan was a British national by birth.[168] This case is useful to illustrate how the fact of birth in Australia was taken by the majority as determinative of a person's status as a British subject, and hence as negating their status as "immigrants." Minahan's father had a permanent allegiance to the Australian sovereign, arising out of *jus domicile*. Minahan's mother also had a permanent allegiance to the Australian sovereign but arising out of *jus soli*. The Commonwealth duty of protection to each parent requires extending the protection to their son, Minahan, by deeming him to owe a duty of permanent loyalty and therefore to have permanent allegiance to the Australian sovereign. His relationship with the Commonwealth is conditional on the relationship between the Commonwealth and his parents. However, for Justice Isaacs,[169] dissenting, the test is instead "whether . . . [the person] is fairly to be considered as one of the people of the Commonwealth, and whether … he can justly . . . regard this country as a place of . . . general residence which he had never abandoned."[170] On the other hand, in his dissent,[171] Justice Higgins emphasized the ability of the Commonwealth to regulate the nature of its relationship with Minahan, notwithstanding his *jus soli*:

> Now, there is not one hint, from first to last, in this [*Immigration Restriction*] Act, that Parliament, in providing against undesirable immigration, meant to make any distinction between those born and those not born in Australia. The object of Parliament was simple and intelligible, and irrespective of considerations of birth.[172]

The framework suggests that Minahan was a constitutional alien. However, he was deemed to owe a duty of loyalty under the applicable nationality law at the time. Section 4 of the *Naturalization Act 1870* states

167. *Immigration Restriction Act 1901* (Cth) (Austl.).

168. *Potter* at 287; *id*. at 295 (citing *Moorhouse v. Lord* (1863) 10 H.L.C. 272, 291); *id*. at 301–02 (citing A. V. DICEY, CONFLICT OF LAWS 79–80 (1st ed. 1896)).

169. *Potter* at 309.

170. *Id*.

171. *Id*. at 321.

172. *Id*. at 322–24.

that a child with either *jus soli* or *jus sanguinis* can, when of full age, make a declaration of alienage, thus terminating his duty of permanent loyalty to the British sovereign. Minahan owed two conflicting duties under *jus sanguinis*, one to the British (Australian) sovereign, through his mother; and the other to China, through his father. While Minahan never made an explicit declaration of alienage, he was caught by section 6 of the *Naturalization Act 1870*:

> Any British subject . . . when in any foreign state and not under any disability voluntarily become naturalized in such state, shall from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject and be regarded as an alien . . .[173]

The bar on naturalization (through *jus domicile*) at a foreign State is to ensure that the duty of loyalty owed to the Australian sovereign, or as was in 1908, to the British sovereign, and the allegiance arising from it, is not divided. Any other channel leading to a divided allegiance will also deem a person to have breached his duty of permanent loyalty.[174] Minahan's continuous residence in China for 26 years suggests more than just naturalization for the purposes of section 6. He had allegiance, through *jus sanguinis*, to the Chinese Emperor. Given the doctrine of undivided allegiance that governed his relationship with the British (Australian) sovereign, he would be "regarded as an alien" (section 6). In other words, he breached his duty of permanent loyalty to Australia by owing a conflicting duty of permanent loyalty to China and broke his permanent allegiance to the Australian sovereign. Minahan's status as an alien brings him under the *Immigration Restriction Act*.

The framework agrees with the dissenting judgments by Justices Isaacs and Higgins, but for different reasons. The test is not whether Minahan belongs to the Australian community, nor whether he is a member of a class of people classified under "undesirable immigration." His alienage flows directly from analyzing the effect of his duty of permanent loyalty to the Chinese sovereign. The nationality law applicable at the time collapsed his permanent duty of loyalty to one owed to China. The 1870 Act made it clear that any duty of permanent loyalty to a foreign state conflicted with the duty of permanent loyalty to the British (Australian) sovereign. He thus became a constitutional alien in Australia.

173. This is the relevant Act given it allowed for a transition from perpetual allegiance to undivided allegiance. *See* Gussen, *supra* note 138.

174. The bar on divided allegiance can still be seen explicitly in section 44(i) of the *Australian Constitution* (disqualification of members of the Commonwealth Parliament).

2. Donohoe v. Wong Sau

In *Donohoe v. Wong Sau*,[175] Lucy Wong Sau, the daughter of On Hing, a naturalized British subject, was born in Australia in 1883. In 1889, she returned with her ill father to China, and remained there after his death in 1902 and the death of her mother in 1908. After her marriage in 1917 to Wong Sau, a Chinese gardener residing and domiciling in New South Wales, Lucy finally returned to Australia in 1924. On her return, she could not speak English and did not pass the dictation test required under the *Immigration Act*.[176] She was prosecuted as a prohibited immigrant under the Act. She argued that she was not an "immigrant" for the purposes of the Act. The Magistrate convicted and sentenced her to imprisonment for six months. She appealed to the Court of Quarter Sessions at Sydney, which upheld the appeal and quashed the conviction. From that decision, the informant, by special leave, appealed to the HCA.

The HCA held unanimously that Wong Sau was a constitutional alien. Chief Justice Knox held that she was an "immigrant" for the purposes of the *Immigration Act* because "the proper inference is that the respondent, in attempting to enter Australia, was not coming home and for that reason was an immigrant."[177] Justice Isaacs, also holding that Wong Sau was an "immigrant," reiterated the test he adopted in *Potter*.[178] He then applied the test to the facts in this case, stating that "the respondent was not at the time of her entry into the Commonwealth a member of this community. She was not Australian in point of language, bringing-up, education, sentiment, marriage, or of any of those indicia which go to establish Australian nationality."[179] Similarly, Justice Higgins held Wong Sau to be an "immigrant" because she "was not coming home"[180] while Justice Rich stated that "I have no doubt that the respondent was not returning home as part of the Australian community."[181] Justice Starke simply agreed that "the appeal should be allowed."[182]

The case turns on whether Wong Sau owed a duty of permanent loyalty to the Australian sovereign. The duty could arise through two channels: *jus soli* and *jus sanguinis*, both deriving from her father's permanent allegiance to the British sovereign. Without any statutory

175. *Donohoe v Wong Sau* (1925) 36 CLR 404 (Austl.).
176. *Immigration Act 1901* (Cth) (Austl.).
177. *Donohoe* at 407 (Knox, CJ).
178. *Id*. at 407 (citing *Potter* at 308).
179. *Id*. at 408.
180. *Id*.
181. *Id*. at 409.
182. *Id*.

intervention, either right creates a relationship of permanent allegiance between her and Australia, as explained in *Potter*. However, under the relevant legislation at the time, "[a] British subject who, when in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject."[183] Wong Sau's voluntary act of remaining in China for thirty-five years, from the age of six to the age of forty-one, coupled with her *jus sanguinis* duty of loyalty to China, brought her within the legislative prohibition. She was no longer a British subject. Her duty of permanent loyalty to Australia came to an end through the indivisible allegiance that governed her relationship with the British sovereign.

3. Meyer v. Poynton

In *Meyer v. Poynton*,[184] Frederick William Meyer, a German national, commenced proceedings against the Honorable Alexander Poynton, Minister for Home and Territories, and the Honorable George Foster Pearce, Minister of Defense, for an injunction restraining the revocation of a certificate of naturalization granted to Meyer, and restraining the second named defendant from exercising the powers conferred on him by the *Aliens Restriction Order*,[185] for the purpose of deportation. Meyer became naturalized in 1909 and therefore became a British subject by virtue of section 8 of the *Naturalization Act 1903*.[186] On June 4, 1920, after the commencement of proceedings, a formal order was made by the Minister of Defense pursuant to the *War Precautions Act*[187] to deport Meyer.

In dismissing the motion, Justice Starke stated that Meyer had failed to establish a prima facie right,[188] adding "[i]t seems to me that if the power given by the *Naturalization Act 1903* to admit to Australian citizenship is within the power to make laws with respect to naturalization, so must authority to withdraw that citizenship on specified conditions be also within that power."[189] The case is an illustration of the proposition that a person who is not a citizen of Australia[190] is an alien for the purposes of

183. British Nationality and Status of Aliens Act 1914, 4 & 5 Geo. 5 c. 17, § 13 (UK).
184. *Meyer v Poynton* (1920) 27 CLR 436 (Austl.).
185. *Aliens Restriction Order 1915* (Cth) (Austl.).
186. *Naturalization Act 1903* (Cth) (Austl.).
187. *War Precautions Act 1914* (Cth) (Austl.).
188. *See Meyer*(1920) 27 CLR at 438.
189. *Id.* at 441.
190. *Id*. (stating that "[t]he plaintiff is not an Australian citizen by force of Australian law.").

the defense power in section 51(vi) of the *Australian Constitution*, given that the *Aliens Restriction Order* was authorized under the *War Precautions Act*.[191]

The outcome is explained by noting that Meyer's duty of permanent loyalty to Australia is based on *jus domicile*. Under the *Naturalization Act*,[192] if "the Governor General, is satisfied that it is desirable for any reason that a certificate of naturalization should be revoked," the Commonwealth may revoke the certificate. The Commonwealth was satisfied that Meyer breached this duty of permanent loyalty, and by doing so, lost his permanent allegiance to the British sovereign, making him an alien that could be deported under the *War Precautions Act* and the *Aliens Restriction Order*. Note again that as in the previous two cases, the plaintiff severed his allegiance to the British sovereign by owing a conflicting duty of permanent loyalty to Germany.

In summary, the analytical framework agrees with the dissenting judgments in *Potter v. Minahan* and with the majorities in *Donohoe v. Wong Sau* and *Meyer v. Poynton*. The cases illustrate the emergence of a duty of permanent loyalty to the Australian sovereign through different legal rights— *jus soli*, *jus sanguinis,* and *jus domicile*—and how a person can breach this duty by actions that evince a duty of permanent loyalty to another sovereign. The next subsection will trace the emergence and application of what came to be known as the *Pochi-Nolan* dichotomy. We can see a shift of emphasis to the concept of citizenship as a proxy for the existence of a permanent allegiance to the Australian sovereign. The main problem with this approach is that it ignored other channels leading to permanent allegiance, but without leading to citizenship—what came to be known as the non-alien-and-non-citizen category.

B. The Emergence of the Pochi-Nolan Dichotomy

In this subsection, the analytical framework is applied to three HCA cases in the period from 1982 to 1992. The three cases demonstrate the proposition that the term "alien" is the antonym of the term "citizen." The cases suggest that a permanent allegiance to the Australian sovereign cannot arise unless through the legal status of citizenship, which could be only through *jus soli*, *jus sanguinis,* or *jus domicile*.

191. *War Precautions Act 1914* (Cth) (Austl.). *See Aliens Restrictions Order 1915* (Cth) Preamble (Austl.).

192. *Naturalization Act 1903* (Cth) s 7(b) (Austl.). Note that this case was decided on June 4, 1920, before the *Nationality Act 1920* (Cth) (Austl.) came into force on Jan. 1, 1921.

1. Pochi v. Macphee

The earliest case directly on the issue of "alien" is *Pochi v. Macphee*,[193] which related to Luigi Pochi, who was born in Italy in 1939. While he arrived in Australia in 1959, he never became an Australian citizen.[194] In 1977, Pochi was convicted of supplying Indian hemp, contrary to the *Poisons Act 1966*,[195] and was sentenced to imprisonment for two years. In 1978, the Minister for Immigration ordered that Pochi should be deported from Australia under section 12 of the *Migration Act*.[196] The Administrative Appeals Tribunal (AAT), on Pochi's application, recommended that the deportation order be revoked. And notwithstanding the fact that the Minister's appeal to the Federal Court was dismissed, the Minister decided not to revoke the deportation order. Pochi then brought proceedings to the HCA for an injunction and a declaration that the Minister be required to give effect to the AAT's recommendation. Unanimously, the HCA found that Pochi was an alien for the purpose of section 51(xix) of the *Constitution*.[197]

Section 12 of the *Migration Act* applied to "aliens," which were defined in section 5(1) of the Act to mean "a person who is not — (a) a British subject; (b) an Irish citizen; or (c) a protected person." This dictionary section was introduced in the Explanatory Memorandum of the Migration Bill 1958 without any explanation of the rationale for the definition of the term "alien."[198] The phrase "British subject" was defined in section 51(1) of the *Australian Citizenship Act 1948* as

> A reference in any other law of the Commonwealth to a British subject shall be read as including a reference to an Australian citizen and to any

193. *Pochi v Macphee* (1982) 151 CLR 101 (Austl.).

194. In *Pochi*, Chief Justice Gibbs and Justices Mason and Wilson found that Mr. Pochi was an alien because, "The Parliament can . . . treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian." *Pochi* at 109–10.

195. *Poisons Act 1966* (NSW) s 21 (Austl.).

196. *Migration Act 1958* (Cth) s 12 (Austl.) (emphasis added). Section 12 reads as follows:

Where (whether before or after the commencement of this Part) an alien has been convicted in Australia of a crime of violence against the person or of extorting any money or thing by force or threat, or of an attempt to commit such a crime, *or has been convicted in Australia of any other offence for which he has been sentenced to imprisonment for one year or longer*, the Minister may, upon the expiration of, or during, any term of imprisonment served or being served by that alien in respect of the crime, order the deportation of that alien.

197. *Pochi* at 116 (Justice Wilson agreeing with the reasons given by Chief Justice Gibbs).

198. *Migration Act 1958* (Cth) Explanatory Note (Austl.), https://www.aph.gov.au/binaries/library/pubs/explanmem/docs/1958migrationhr.pdf.

> other person who, under this Act, has the status of a British subject or has the status of a British subject without citizenship.[199]

An Australian citizen is defined as a British subject, and therefore, owes a duty of permanent loyalty to the British sovereign, notwithstanding Australia's adoption six years earlier of the *Statute of Westminster Act 1931*.[200] Section 4 of the 1931 Act declared the Dominions as sovereign in that the British Parliament cannot legislate for any Dominion unless requested to do so by that Dominion. Australia, however, continued to endorse the indivisibility of the Crown until the passing of the *Australia Acts*.[201]

Chief Justice Gibbs, after reminding us that "Parliament cannot, simply by giving its own definition of 'alien', expand the power under s. 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word,"[202] explained his reasoning in the following terms: "the Parliament can in my opinion treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian."[203] The first two classes referred to by Chief Justice Gibbs are understood by reference to the third class; there are other means through which a person can obtain Australian citizenship. This, therefore, was an understanding of exclusivity between the term "alien" and being an Australian citizen. Chief Justice Gibbs details three rights, *jus soli*, *jus sanguinis*, and *jus domicile,* that can give rise to the duty of permanent loyalty. His Honor, however, also suggests that they are exclusive, which does not seem to agree with the section 51(1) definition of an Australian citizen. The unity of the Crown meant that someone who owed a duty of permanent loyalty to the British sovereign also owed a duty of permanent loyalty to the Australian sovereign and vice versa. A person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian could still owe a duty of permanent loyalty to Australia given, at that time, the unity of the Crown in right of the United Kingdom and the Crown in the right of the Commonwealth of Australia. Chief Justice Gibbs, however, seems to suggest that while the duty to the British Crown in right of the United Kingdom is permanent, that duty to Australia is only local;

199. *Australian Citizenship Act 1948* (Cth) (Austl.) (repealed by the *Australian Citizenship (Transitional and Consequential) Act 2007* (Cth) (Austl.)).

200. Statute of Westminster Act 1931, 22 Geo. 5 c. 4, §§ 2-6 (UK). *See Statute of Westminster Adoption Act 1942* (Cth) (Austl.).

201. *Australia Act 1986* (Cth) (Austl.); Australia Act 1986, c. 2 (UK).

202. *Pochi* at 109.

203. *Id*. at 110.

it does not give rise to a permanent allegiance to the Australian sovereign. We will see the same rationale in *Nolan* (below).[204]

Similarly, Justice Murphy, states that "[t]he concept of alien was not fully explored in the presentation of this case, at least not to my satisfaction,"[205] given the argument that "all persons who were born inside the sovereign's dominions are British subjects, and all who were born outside are aliens."[206] Notwithstanding, he accepted the argument that a person "born in Italy, of Italian parents and has not been naturalized in Australia, is an alien."[207] He uses the same rationale of "non-citizen" that Chief Justice Gibbs formulated in his reasons.

An analysis under the framework looks instead at whether Pochi owes a duty of permanent loyalty to the Australian sovereign, and whether this duty led to permanent allegiance to Australia. The only potential legal channel for such a duty is *jus domicile*. Before his conviction, Pochi lived in Australia for eighteen years, which can establish only a duty of local loyalty. Had Pochi not been convicted and sentenced to two-year imprisonment, he would have been able to enter into a permanent allegiance to the Australian sovereign. His status, however, was that of an immigrant having only local allegiance. At the time Pochi was convicted of supplying Indian hemp, contrary to the *Poisons Act 1966*,[208] he was a constitutional alien given the absence of any duty of permanent loyalty. Pochi was therefore caught by section 12 of the *Migration Act 1958*.

2. Nolan[209]

By the time *Nolan* came before the HCA, section 5(1) of the *Migration Act 1958* was repealed[210] and, in its place, the term "non-citizen" was introduced.[211] The rationale for this change can be gleaned from the

204. *See, e.g.*, Commonwealth, *Parliamentary Debates*, Senate, 2 November 1983, 2048 (Stephen Martin, Senator) (Austl.) (Martin suggests that "[a]n alien was someone who came here from a non-Commonwealth country. The term 'immigrant' applied to someone from a Commonwealth country.").

205. *Pochi* at 112.

206. *Id.*

207. *Id*.

208. *Poisons Act 1966* (NSW) s 21 (Austl.).

209. *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178 (Austl.).

210. *Migration Amendment Act 1983* (Cth) s 4(a) (Austl.) (The definition of the term "immigrant" was also repealed, by section 4(b)). *Id*. at s 4(b).

211. *Id.* at s 4(c).

Parliamentary debates.[212] A useful explanation referred to the three categories found in section 5(1) definition of "alien":

> [T]here is no longer to be a distinction between Commonwealth citizens, who are not citizens of Australia, and persons of other nationality, who are otherwise called aliens, persons of Irish nationality, for whom some special category existed in the past, and protected persons, that is, persons from former colonies of Australia.[213]

In their joint judgment in *Nolan*, [214] Chief Justice Mason and Justices Wilson, Brennan, Deane, Dawson, and Toohey found Therrance William Nolan to be an alien, notwithstanding that he was a citizen of the United Kingdom who arrived in Australia in 1967 and that he lived in Australia for eighteen years.[215] Their Honors followed the United States Circuit Court for the District Court of Ohio in finding that the term "alien" means "nothing more than a citizen or subject of a foreign state."[216] This does not mean that a dual citizen is an alien, as is the case under indivisible allegiance, but that the term "alien" has two limbs: (1) the person has no permanent allegiance to the Australian sovereign, and (2) the person has a permanent allegiance to another country. Hence, a stateless person belongs to the category of non-citizen-and-non-alien, given that they do not have permanent allegiance to any sovereign. The full implications of this point were discussed above in Section I.

Their Honors also stated that "the word ["alien"] is not and never has been appropriate to describe within any part of the territory (whether colonial or otherwise) of a single sovereign State the status of a person who is one of the subjects of that particular State."[217] They added that the word "alien" is "appropriate to describe the status, vis-a-vis a former colony which has emerged as an independent nation with its own citizenship, of a non-citizen who is a British subject by reason of his citizenship of a different sovereign State."[218] This dictum does not add to the understanding that an "immigrant" owing a duty of local loyalty to Australia is still an "alien" for constitutional purposes. Hence, section 5(1)

212. *See e.g.*, Commonwealth, *Parliamentary Debates*, *supra* note 205, at 2048 (Comments of Senator Martin) (Martin suggests that the "distinction [between "immigrant" and "alien"] is removed by these amendments and people previously referred to as either aliens or immigrants will now be referred to as non-citizens.").

213. *Id.* at 2050 (Comments of Senator Teague).

214. *Nolan* at 181.

215. *Ex parte Taylor* ¶ 89, at 421.

216. *Nolan* at 183 (citing Milne v. Huber, 17 F. Cas. 403, 406 (C.C.D. Ohio 1843)).

217. *Id.* at 184.

218. *Id*.

of the *Australian Citizenship Act 1948* defined "alien" as "a person who does not have the status of a British subject and is not an Irish citizen or a protected person."[219] This is the same definition adopted later in section 5(1) of the *Migration Act 1958*. This definition of "alien" was later omitted in 1984.[220]

In her dissent, however, Justice Gaudron rejected the argument that "alien status corresponds with the status of non-citizen."[221] The crux of Justice Gaudron's argument is that "the statutory definition of 'alien' cannot control the constitutional meaning of 'alien' as a person not a member of the community constituting the body politic of Australia,"[222] adding that because

> the transformation from non-alien to alien requires some relevant change in the relationship between the individual and the community, it is not, in my view, open to the Parliament to effect that transformation by simply redefining the criterion for admission to membership of the community constituting the body politic of Australia.[223]

She expounded that "[t]here is no specific criterion identified for membership of the community constituting the Australian body politic,"[224] because there has been a transformation from the British Empire into the British Commonwealth of Nations.[225] She then suggests that "[n]either the *Citizenship Act* nor the *Migration Act*, in terms, makes Australian citizenship the exclusive criterion for admission to membership of the community constituting the body politic of Australia."[226] Justice Gaudron accepted Chief Justice Gibbs' statement in *Pochi* that "the Parliament can . . . treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian."[227] However, she questioned whether that statement "was intended to encompass persons who, although answering that description, had acquired non-alien status before Parliament so acted,"[228] adding that the statement "needs to be read in the context of his Honor's earlier

219. *Australian Citizenship Act 1948* (Cth) s 5(1) (Austl.).
220. *Australian Citizenship Amendment Act 1984* (Cth) s 4 (Austl.).
221. *Nolan* at 188.
222. *Id.* at 191.
223. *Id.* at 193.
224. *Id*. at 189.
225. *Id*.
226. *Id.* at 190.
227. *Id*. at 189 (citing *Pochi* at, 109–10).
228. *Id*. at 193.

acknowledgment that the extent of Parliament's power to define an alien had not been fully explored in argument."[229]

The first difficulty with the dissenting opinion in *Nolan* is that it denies that there is a "specific criterion" to explain the origins for an individual's membership in the Australian community.[230] Compare the comments by Chief Justice Gibbs in *Pochi*: "*The allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia*. Now, once the *British Nationality Act* 1981 (U.K.)[231] has come into force, the principle that every Commonwealth citizen is a British subject will have finally been abandoned . . ."[232] Therefore, Chief Justice Gibbs identifies permanent allegiance to the Australian sovereign as the specific criterion. Regardless of whether we refer to citizenship or the status of a British subject, the underlying permanent allegiance to a sovereign, and the bundle of rights enjoyed by an individual identified as a citizen or as a British subject, flow from the existence of the twin duties of loyalty and protection owed to said sovereign and individual. The issue turns on whether the permanent allegiance is owed to the same sovereign, and if not, whether the existence of the other permanent allegiance allows the Commonwealth to breach its duty of protection where the individual has breached his or her duty of permanent loyalty to Australia.

The second difficulty is that the dissenting opinion suggests that the Commonwealth Parliament transformed the criterion for membership in the Australian community, i.e., permanent allegiance. However, that criterion was never changed. What changed is the channel that gave rise to a duty of permanent loyalty, and this change was introduced by the British Parliament. The *British Nationality Act 1981* meant that a duty of permanent loyalty to the British sovereign no longer evinces a duty of permanent loyalty to the Australian sovereign, and therefore, the former cannot lead to a permanent allegiance to Australia. However, even if this change was introduced by the Commonwealth Parliament, it would still be within the sovereign right of the Commonwealth to regulate the duty of protection it owes to an individual because the individual has a permanent allegiance to another sovereign. A breach of the duty of loyalty entitles the Commonwealth to breach the duty of protection owed to this individual.

229. *Id*.

230. There are other difficulties, including conflating the effect of local and temporal allegiance with permanent allegiance, both seen as establishing membership in the Australian community; and suggesting that the Australian community is unitary. Hence, membership of any of Australia's First Nations would mean membership in the Australian community. I will focus first on the lack of a single criterion to describe the nature of the membership in the Australian community.

231. British Nationality Act 1981 (c. 61) (UK).

232. *Pochi* at 109 (emphasis added).

Not so, however, if the consequence of such breach would render the individual stateless, under international law.

3. Chu Kheng Lim

The third case that analyzed the term "alien" was *Chu Kheng Lim*.[233] Mr. Lim was one of thirty-six Cambodian nationals who arrived in Australian waters on separate boats, in 1989 and 1990, respectively.[234] The group did not have valid entry permits and their applications for refugee status were rejected in April 1992.[235] They were detained in custody from the time of their arrival.[236] The group commenced proceedings in the HCA against the Minister for Immigration, the Local Government and Ethnic Affairs, and the Commonwealth of Australia, seeking a declaration that certain sections of the *Migration Act*[237] that allowed the detention of an alien in custody were beyond the legislative power of the Commonwealth Parliament.[238] Chief Justice Mason stated a case for the consideration of the Full Court.[239] Unanimously, the HCA found the plaintiffs to be constitutional aliens.[240]

Six of the HCA justices continued to support the *Pochi-Nolan* dichotomy. Chief Justice Mason did not reanalyze the term "alien" but stated that he agreed with the reasons given by the plurality[241] and hence maintained his reasoning in *Nolan* in support of the *Pochi-Nolan* dichotomy.[242] In their joint judgment, Justices Brennan, Deane, and Dawson accept the *Pochi-Nolan* dichotomy because of the establishment of distinct Australian citizenship.[243] Justice Toohey agreed with the dichotomy, finding that a non-citizen within the *Migration Act* is a constitutional alien, i.e., an alien under section 51(xix).[244] Justice McHugh also agreed with the dichotomy,[245] for the same reasons stated in *Nolan*.

233. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (Austl.).

234. *Id.* at 3.

235. *Id.* at 39.

236. *Id.*

237. *Migration Act 1958* (Cth) (Austl.).

238. *Chu Kheng Lim* at 3.

239. *Judiciary Act 1903* (Cth) s 18 (Austl.).

240. *Chu Kheng Lim* at 2.

241. *Id.* at 10.

242. *Nolan* at 183.

243. *Chu Kheng Lim* at 25 (citing *Nolan* at 183–84).

244. *Id.* at 45 n.91, at 46 ("No-one may be designated or detained in custody pursuant to any of the provisions . . . unless he or she is a non-citizen, that is, an alien.").

245. *Id*. at 65 (citing *Nolan* at 183–84).

Justice Gaudron seemed to have now accepted the *Pochi-Nolan* dichotomy: "It is no doubt correct to say that 'alien' has become synonymous with 'non-citizen' and that that was accepted by this Court in *Nolan* . . . ."[246] Her Honor stated that in her view the impugned provisions "are valid only insofar as 'non-citizen' is and remains synonymous with the constitutional meaning of 'alien'. They can and should be read down to this effect."[247] More importantly, her Honor was now explicit in finding that the dichotomy applied in two separate phases: the first was a transient phase until Australia had its own citizenship. The second phase was a permanent one, extending after that citizenship was received. She, therefore, asks, "when did [the term "alien" and non-citizen] become synonymous? with what effect in relation to persons, if any, who were not aliens but did not become citizens? and must it remain so?"[248] Notwithstanding, Justice Gaudron maintained her position that citizenship "is not a concept which is constitutionally necessary, which is immutable or which has some immutable core element ensuring its lasting relevance for constitutional purposes,"[249] and hence citizenship "cannot control the meaning of 'alien' in s. 51(xix) of the *Constitution*."[250] The issue for Justice Gaudron was that citizenship is "a concept which is entirely statutory, originating as recently as 1948 with the enactment of what was then styled the *Nationality and Citizenship Act 1948* (Cth)."[251] It follows that section 51(xix) "does not authorize the transformation of a non-alien into an alien by statutory redefinition of citizenship or by repeal or amendment of legislative provisions dealing with citizenship."[252]

The alienage, in this case, is straightforward because there was never a duty of permanent loyalty to the Australian sovereign. There is no legal right that can give rise to a duty of permanent loyalty owed by the plaintiffs to Australia—except *jus asyli*. However, the plaintiffs failed to establish their status as refugees and therefore had no legal basis for deeming them to owe the requisite duty of permanent loyalty.

C. Rejection of the Dichotomy

The following two cases from 2001 and 2002 illustrate how the HCA has come to reject the *Pochi-Nolan* dichotomy. The analytical framework

246. *Id*. at 53.
247. *Id.* at 54 (citations omitted).
248. *Id.* at 53.
249. *Id.* at 54.
250. *Id*. (citations omitted).
251. *Id*.
252. *Id*.

suggests that both cases were decided wrongly. *Ex parte Taylor* because it found Graham Taylor was not a constitutional alien, even though, in 2001, the United Kingdom had already become a foreign state; and in the second case, *Te* and *Dang*, because Meng Te and Dung Dang could not clear the threshold for the alienage test.

1. Ex parte Taylor

The fourth case analyzing the meaning of the term "alien" for the purposes of section 51(xix) of the *Australian Constitution*, *Re Patterson* (*Ex parte Taylor*),[253] completed the shift from understanding alienage as the antonym of citizenship to understanding it as the antonym of allegiance—more in line with the analysis under the analytical framework.[254] In this case, Graham Ernest Taylor, who has never held a passport,[255] arrived in Australia in 1966 on his British father's passport at the age of six.[256] He made Australia his home for the next thirty years, even enrolling in federal and state elections.[257] However, he never obtained Australian citizenship.[258] His absorbed persons visa and transitional (permanent) visa were canceled in 1996 after he pleaded guilty to sexual assaults upon children.[259] And although he was able to successfully challenge the cancellation, his visas were canceled again under section 501(3) of the *Migration Act 1958* in 2000.[260] Taylor was

253. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (Austl.) [hereinafter "*Ex parte Taylor*"].

254. *Ex parte Taylor* ¶ 114, at 428 ("A subject of the Crown owed allegiance to the sovereign; an alien did not . . ."); ¶ 121, at 431 (". . . at least until the passing of the *Royal Style and Titles Act 1973* (Cth), a person, living in Australia, who owed allegiance to the Queen of the United Kingdom was not and is not an alien within the meaning of the Constitution."); ¶ 225, at 466 (". . . an individual who was not an alien becomes one and, in consequence, does not thereafter owe allegiance to that sovereign power."); ¶ 276, at 483 ("a 'subject of the Queen', wherever born and however owing that allegiance, was not and could not be an 'alien' for Australian legal purposes."); ¶ 306, at 493 (". . . the legal status of alienage . . . is bound up in notions of allegiance and duties of loyalty."); and ¶ 372, at 517 ("the status of alien corresponds with the absence of that allegiance.") (citing Gaudron, J in *Nolan* at 186).

255. *Ex parte Taylor* ¶ 22, at 404.

256. *Id.* at 392.

257. *Id.*

258. *Id.*

259. *Id.*

260. The "character test" referred to in section 501(3) of the Act is elaborated in subsection (6) of that section in these terms: "For the purposes of this section, a person does not pass the character test if: (a) the person has a substantial criminal record . . . ." "Substantial criminal record" is defined in section 501(7) to include the situation where "the person has been sentenced to a term of imprisonment of 12 months or more." Nothing in the Act elaborates the notion of "national interest" referred to in section 501(3).

again successful in challenging the cancellation of his visas.[261] With a six-to-one majority, the HCA made an order absolute for a writ of certiorari to quash the cancellation decision,[262] because of an error in the exercise of jurisdiction under section 501(3) of the *Migration Act*.[263] On the issue of alienage, however, only four out of seven justices (Gaudron, McHugh, Kirby, and Callinan) found that Taylor was not an alien.[264]

Chief Justice Gleeson followed the earlier decision in *Nolan*.[265] He referred to the definition of "alien" in the United States, the same definition referred to by the majority in *Nolan*,[266] but chose to focus on another statement, defining an alien as "one born out of the United States, who has not since been naturalized under the constitution and laws."[267] He was of the view that this definition would also apply to Australia, notwithstanding its transition from the British Empire to the Commonwealth.[268] Chief Justice Gleeson found Taylor to be an alien.[269] Similarly, Justices Gummow and Hayne followed the majority reasoning in *Nolan*,[270] arguing that Taylor was an alien at the time of the enactment of section 501(3) because he was a citizen of a foreign power at that time.[271] Justices Gummow and Hayne summarized the definition of "alien" from *Nolan*, as having two limbs: (1) not a citizen of Australia, and (2) a citizen or subject of a foreign state.[272] This illustrates the outer limit on section 51(xix) under international law; no person can be an alien if they are stateless.

Four of the justices found Taylor not an alien. Justice Gaudron overruled *Nolan*.[273] She reaffirmed her views that an alien is "'a person who is not a member of the community which constitutes the body politic of the nation state from whose perspective the question of alien status is to

261. *Ex parte Taylor* ¶ 22, at 392.

262. *Id.* ¶ 20, at 404.

263. *Id.* at 392 (due to jurisdictional error in purporting to cancel the visa, due to erroneous belief the holder of the visa would have an opportunity to make representations seeking revocation of the decision, due to failure to take into account the nature of the visa holder's criminal convictions when applying the national interest test to cancel his visa, and due to failure to reach a reasonable and rational conclusion based on the available evidence that the cancellation of the visa was in the national interest).

264. *Id.*

265. *Id.* at 6.

266. Milne v. Huber, 17 F. Cas. 403 (C.C.D. Ohio 1843).

267. *Ex parte Taylor* ¶ 6, at 400 (citing Milne, 17 F. Cas. at 406).

268. *Id.* ¶ 7, at 400–01.

269. *Id.* ¶ 38, at 408–09.

270. *Id.* ¶ 241, at 470.

271. *Id.*

272. *Id.*

273. *Id.* ¶¶ 39-40, at 409.

be determined.'"[274] Justice Gaudron was therefore of the opinion that Taylor was not an alien,[275] given that Parliament had not decided to define "alien" to "include persons who, although not aliens prior to 1987, had since taken action to acknowledge their allegiance to the United Kingdom or to assert their rights and privileges as one of its citizens."[276] And since section 501(3) applied only to non-citizens who are also aliens, given that Parliament would not have the power to legislate otherwise, it would not apply to Taylor.[277] For Justice McHugh, Taylor was also not an alien.[278] He too overruled *Nolan*,[279] because it overlooked the fact that "the emergence of Australia as an independent nation" did not furnish a "constitutional reason for distinguishing [the position of subjects of the Queen of Australia] from that of British born subjects of the Queen of the United Kingdom living in Australia."[280] In particular, in Justice McHugh's opinion, *Nolan* did not give effect to the implications of section 117 of the *Australian Constitution* on the definition of "alien" for the purposes of section 51(xix).[281] Section 117 refers to "subject of the Queen," which in 1901 meant subject of the Queen of the United Kingdom of Great Britain and Ireland,[282] and according to Justice McHugh, it cannot be accepted that "the constitutional rights of some subjects of the Queen granted by s 117 of the Constitution simply disappeared at some unidentified and unidentifiable time by reason of the change in the relationship between the executive governments of the United Kingdom and Australia."[283]

In summary, "[p]rior to the completion of the evolutionary process that made the United Kingdom a foreign power, the Parliament could not have asserted that British subjects, living in Australia, were aliens."[284] Justice McHugh found that the denotation of the term "aliens," "had evolved with the gradual development of the Australian sovereign state,"[285] and that until the passing of the *Royal Style and Titles Act 1973*,[286] which changed the Royal Style and Title of Elizabeth the Second

274. *Nolan v Minister for Immigr & Ethnic Affs* (1988) 165 CLR 178, 189 (Austl.).

275. *Ex parte Taylor* ¶ 44, at 410.

276. *Id.* ¶ 51, at 412.

277. *Id.* ¶ 52.

278. *Id.* ¶ 120, at 431.

279. *Id.* ¶¶ 90-91, at 421.

280. *Id.* ¶ 90, at 421.

281. *Id.*

282. Commonwealth of Australia Constitution Act, 1900 (Imp), 63 & 64 Vict. c. 12, Preamble & cl. 2 (UK).

283. *Ex parte Taylor* ¶ 130, at 435.

284. *Id.* ¶ 133, at 436.

285. *Id.* ¶ 111, at 427–28.

286. *Royal Style and Titles Act* 1973 (Cth) s 4(2) (Austl.).

to "Queen of Australia," Taylor, who owed allegiance to the Queen of the United Kingdom, was not and is not an alien within the meaning of section 51(xix) of the *Australian Constitution*.[287] In other words, his Honor accepted that the phrase "subject of the Queen" in section 117, evolved to mean the "subject of the Queen of Australia,"[288] and hence, "once a person is accepted as a subject of the Queen for the purposes of the Constitution, that person cannot be an alien for the purposes of the Constitution."[289] Similarly, Justice Kirby overruled *Nolan*,[290] because the majority assumed that the terms "non-citizen" and "alien" were synonymous,[291] which is not accurate. After all, according to his Honor, conflating the two terms erases the historical, constitutional, and legal facts that accompanied the emergence of Australia as an independent nation.[292] Justice Kirby, therefore, was of the view that Taylor was not an alien: "If when [a] person arrived, he or she was a British subject when that status was accorded constitutional and statutory equivalence to Australian nationality, that person was likewise beyond the operation of the naturalization and aliens power."[293] Justice Callinan agreed with Justice Kirby, overruling *Nolan*[294] and finding that Taylor was not an alien.[295]

In *Ex parte Taylor*, the split of the HCA on the *Pochi-Nolan* dichotomy stemmed from disagreement on the constitutional meaning of the term "alien" for the purposes of the "naturalization and aliens" power, section 51(xix). Because there is no citizenship standard in the *Australian Constitution*, the four-member majority were of the view that the term "alien" was not synonymous with "non-citizen" but with "non-allegiance," and hence, a British subject like Taylor could not be an alien.

The analysis of this case, however, should begin by ascertaining whether Taylor owed a duty of permanent loyalty to the Australian sovereign. Because Taylor arrived in Australia as a child, said duty must derive from a duty owed to the Australian sovereign by at least one of his parents. The next question, therefore, relates to whether his father's duty of permanent loyalty to the United Kingdom and his duty of permanent loyalty to Australia, *at the time Taylor arrived in Australia*, were

287. *Ex parte Taylor* ¶ 135, at 436.

288. *Id.* ¶ 131, at 435.

289. *Shaw v Minister for Immigr & Multicultural Affs* (2003) 218 CLR 28 ¶ 173, at 84, (Austl.); *see also Ex parte Taylor* ¶132, at 435.

290. *Ex parte Taylor* ¶ 300, at 491.

291. *Id.*

292. *Id.*

293. *Id.* ¶ 304, at 492.

294. *Id.* ¶¶ 376-77, at 518.

295. *Id.*

superposed.[296] The father's duty emerged from the unity of the Crown that existed in 1966 when Taylor arrived in Australia. Given that his father was a British citizen, and hence had permanent allegiance to the British sovereign, this allegiance also meant that the father had a permanent allegiance to the Australian sovereign (in 1966). The two underlying loyalties to the United Kingdom and Australia were superposed. The latter loyalty made it possible to deem six-year-old Taylor to owe a duty of permanent loyalty to Australia, and hence to have a permanent allegiance to the Australian sovereign. Moreover, as stated in *Sue v. Hill*,[297] because of section 1 of the *Australia Acts 1986*,[298] which removed any power held by the British Parliament to legislate for the Commonwealth, the United Kingdom became a distinct sovereign power. Nevertheless, Taylor's permanent loyalties continued to be superposed, because the 1986 Acts had no retrospective effect; they collapsed the loyalties only after 1986. However, when Taylor breached his deemed duty of permanent loyalty to Australia in 1996 by committing sexual assaults upon children, the breach collapsed his loyalties into one owed to the United Kingdom under section 501 of the *Migration Act* 1958. Taylor now has only one allegiance: to the British sovereign. The breach severed his permanent allegiance to Australia, allowing his deportation back to the United Kingdom. The analytical framework in Section I suggests that the minority's opinion in *Ex Parte Taylor* on alienage was correct.

2. Te and Dang

One year later, in *Ex parte Meng Kok Te*,[299] the HCA had an opportunity to reconsider the *Pochi-Nolan* dichotomy. Meng Kok Te was born in Cambodia in 1967.[300] He entered Australia as a refugee in 1983.[301] In 1998, after being convicted and sentenced for several criminal offenses,

296. In other words, if allegiance may be in one of many configurations, then the most general state of this allegiance is a combination of all these possibilities. Therefore, the father's allegiance in 1966 was a combination of both allegiance to the British sovereign as well as to the Australian sovereign. For any observer, the two allegiances existed as one.

297. *Sue v Hill* (1999) 199 CLR 462 ¶ 65, at 492 (Gleeson, CJ, Gummow and Hayne, JJ) (Austl.) (finding that "[a]t least since 1986 with respect to the exercise of legislative power, the United Kingdom is to be classified as a foreign power."); *see also* Anne Twomey, *Sue v. Hill – The Evolution of Australian Independence*, *in* THE HIGH COURT AT THE CROSSROADS: ESSAYS IN CONSTITUTIONAL LAW 77 (Adrienne Stone & George Williams eds., 2000).

298. Australia Act 1986 (Cth) (Austl.); Australia Act 1986, c. 2 (UK).

299. *Re Minister for Immigr and Multicultural Affs; Ex parte Meng Kok Te* (2002) 212 CLR 162 (Austl.) [hereinafter "*Ex parte Te*"].

300. *Ex parte Meng Kok Te*, 212 CLR at 163.

301. *Id.*

a delegate of the Minister ordered his deportation.[302] He applied for a review of that decision in the Administrative Appeals Tribunal (AAT).[303] In 2000, the Tribunal affirmed the deportation order.[304] In 2001, Te instituted proceedings in the original jurisdiction of the HCA for writs of *certiorari* and prohibition against the AAT and the Minister.[305] Justice Hayne directed that the application to be heard by the Full Court.[306] Similarly, Dung Chi Dang, who was born in the Republic of Vietnam in 1968, entered Australia on a permanent visa in 1981.[307] He was never granted Australian citizenship, although his wife and child became citizens.[308] In 2000, after spending over five years in prison or immigration detention, a delegate of the Minister canceled his visa pursuant to the *Migration Act*.[309] Dang instituted proceedings in the HCA for writs of certiorari and prohibition against the Minister.[310] In 2002, Justice Hayne ordered the case to be heard by the Full Court.[311]

The HCA found unanimously that the prosecutors were aliens, but the seven justices came to their decision for different reasons. Three justices continued their support of the *Pochi-Nolan* dichotomy. In what seems like a direct reply to the definition of "alien" proposed by Justice Gaudron in her dissent in *Nolan*, Chief Justice Gleeson stated that belonging to the Australian community is decided only through Australian citizenship.[312] Furthermore, on the issue of absorption, he cited with approval Justice Mason's statement in *Cunliffe* that "'an alien who has been absorbed into the Australian community ceases to be an immigrant, though remaining an alien.'"[313] The distinction between an immigrant and a non-alien is that an immigrant's allegiance is only local, whereas a non-alien's allegiance is permanent. More specifically, to the issue of allegiance, Chief Justice Gleeson expressly stated that "local allegiance is not incompatible with the status of alienage. Allegiance and alienage are not mutually exclusive."[314] He adds: "[n]or is a right to vote . . . necessarily

302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. Migration Act 1958 (Cth) s 501(2) (Austl.).
310. *Ex parte* Te (2002) 212 CLR 162, 163 (Austl.).
311. *Id.*
312. *Id.* at 172 (citing Australian Citizenship Amendment Act 1993 s 3 (Cth)).
313. *Id.* ¶ 25 (citing *Cunliffe v Commonwealth* (1994) 182 CLR 272, 295 (Mason J)).
314. *Id.* ¶ 29, at 173.

incompatible with the status of alienage."[315] Chief Justice Gleeson cited *Robtelmes v. Bernan*,[316] with supporting authority from international jurists,[317] England,[318] and the United States,[319] for the proposition that "it is an attribute of sovereignty that every State is entitled to decide what aliens shall or shall not become members of its community."[320] He then expressed his position by reiterating that "[t]he power conferred by section 51(xix) includes a power to determine legal status."[321] Under the analytical framework, this power is understood "subject to this Constitution," and hence subject to the indivisibility of allegiance that survives under section 44(i), imposing an outer limit under international law.[322] Justice Gummow also continued his reasoning in support of the *Pochi-Nolan* understanding of the term "alien" as a synonym with non-citizen.[323] His Honor referred to United States jurisprudence in support of this understanding of the

315. *Id.* ¶ 30, at 173.

316. *See generally Robtelmes v Brenan* (1906) 4 CLR 395 (Austl.) [hereinafter "*Robtelmes*"].

317. *Id.* at 409 (citing Philippe-Antoine Merlin de Douai: "This authority is supported by a quotation from another international writer, Merlin, in his *Repertoire de Jurisprudence* [*Répertoire Universel Et Raisonné De Jurisprudence. . .* (Nabu Press, 2012)], and a long passage of that author is stated in English on page 473 in these words: 'That is to say, that though the tacit, acquiescence of the Government, in the continued residence of a foreigner within the French dominions, would not deprive the Government, of its inherent prerogative to order him to quit the country, at a moment's notice; yet, nevertheless, that the stranger might, by such unauthorized residence, acquire a domicile for all judicial purposes, taking it as a proposition too clear even for discussion, that a stranger domiciled in France, without express authority of the Government, might be ordered out of the country whenever the Government though fit to interfere.'").

318. *See, e.g.*, *id.* at 407 (citing In re Adam 1 Moo P.C.C., 460); *see also id*. at 413 (citing The Attorney-General for Canada v. Cain and Gilhula [1906] AC 542 (UKPC) (appeal taken from Can.): "It can scarcely be doubted from the authority of *In Re Adam*, on the general law and the specific authority of the case of *The Attorney-General for Canada v. Cain and Gilhula*, that once a Statute authorizing deportation is passed by a self-governing authority within the Empire, and receives the Crown's assent, then, premising that the law is within the powers given by the Constitution, the right of the Executive power of the self-governing authority—in this case the Commonwealth—to deport upon such statutory provision is complete.").

319. *See, e.g.*, Robtelmes at 402 (citing Nishimura Ekiu v. U.S., 142 U.S. 651 (1892), where SCOTUS expressed the doctrine: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

320. *Ex parte Te* ¶ 21, at 170.

321. *Id.* ¶ 24 at 171 (citing *Ex parte Taylor* ¶ 7, at 400–01; Meyer v Poynton (1920) 27 CLR 436, 440–41 (Austl.)).

322. United Nations Convention Relating to the Status of Stateless Persons, Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975), signed by Australia on Dec. 13, 1973. The Commonwealth can terminate any allegiance, provided that by doing so the affected person does not become stateless.

323. *Ex Parte Te* ¶ 110, at 192, ¶ 114 at 194 (citing *Nolan* at 185).

term.[324] In particular, he cited *United States v. Wong Kim Ark*[325] and *Perkins v. Elg*[326] to reiterate the right of the Commonwealth as an independent nation to regulate its citizenship, including the definition of the term "alien." In addition, his Honor referred to *Carlisle v. United States*[327] to explain the modern concept of allegiance as meaning "the obligation of fidelity and obedience, which the individual owes to the government . . . It may be an absolute and permanent obligation, or it may be a qualified and temporary one . . . The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence."[328] He added that "allegiance had been due to the sovereign in a political, not a personal, capacity,"[329] and endorsed Justice Deane and Justice Dawson's dicta that the expression "subject of the Queen in right of Australia" is synonymous with the term "Australian citizen."[330] Justice Hayne was also of the view that Te and Dang were constitutional aliens,[331] agreeing with the reasons given by Justice Gummow.[332]

Four justices continued to reject the *Pochi-Nolan* dichotomy. Justice Gaudron was still not convinced of the mutual exclusivity between citizenship and alienage, or more precisely, she argued that the set non-citizen-and-not-alien is not empty. Her reasoning continued to stem from the same proposition, namely: "'Citizenship is a statutory, not a constitutional concept . . . [T]he fact that the [applicant] is not an Australian citizen is irrelevant if he is not an alien'"[333] Notwithstanding, Justice Gaudron found both applicants to be aliens, [334] by distinguishing her earlier reasons in *Ex parte Taylor* on the fact of the status of British subject. Justice McHugh, who found Meng Te and Dung Dang to be aliens,[335] also rejected the *Pochi-Nolan* understanding of an alien as a non-

324. *Id.* at 193 (citing art. I, §8, cl 4 of the *United States Constitution*) (regarding the power to establish a uniform rule of naturalization).

325. *See generally* U.S. v. Wong Kim Ark, 169 U.S. 649 (1898) (confirming the U.S. citizenship of Wong Kim Ark, who was born in San Francisco, but whose parents were subjects of the emperor of China).

326. Perkins v. Elg, 307 U.S. 325, 329 (1939).

327. Carlisle v. U. S., 83 U.S. 147 (1872).

328. *Id.* at 154.

329. *Ex parte Te* ¶ 122, at 196 (citing Gardner v. Ward, 2 Mass 228(n) (1805)).

330. *Id.* (citing *Street v Queensland Bar Ass'n* (1989) 168 CLR 461, 525, 541 (Austl.)).

331. *Id.* ¶ 206, at 219.

332. *Id.* ¶ 211, at 220.

333. *Id.* ¶ 53, at 179.

334. *Id.* ¶ 59, at 181; ¶ 69, at 183.

335. *Id.* ¶ 74, at 183.

citizen.[336] He explained the term "aliens" as connoting "'belonging to another person or place'"[337] and summarized his position that "[s]ome British subjects who entered Australia as nonaliens prior to a certain date are exceptions to the 'general proposition' that it is open to Parliament to treat any person who is not an Australian citizen as an alien."[338] Justice Kirby furthered his reasoning in *Ex parte Taylor*, stating that "the simple notion of a dichotomy between an Australian citizen and a constitutional 'alien' could no longer be maintained,"[339] because a person can belong to a category of non-citizen-and-non-alien, for example, "a person who had been born in the United Kingdom and entered Australia before the coming into effect, in 1987, of the *Australian Citizenship Amendment Act 1984* (Cth) . . . and had been absorbed into the Australian community but had not taken out Australian citizenship."[340] Nevertheless, Justice Kirby found both Te and Dang to be aliens for the purposes of section 51(xix) because they did not belong to the special category of non-citizen-and-non-alien.[341] Justice Kirby, in analyzing the possibility of other members in the category of non-citizen-and-non-alien,[342] provided a delineation of the difference between local allegiance and other types of allegiance, such as "natural" and "acquired" allegiance.[343] The former "is nothing more than the duty of anyone in Australia to comply with the Constitution and laws of this country,"[344] and hence, "owing this form of allegiance does not change the status of persons who are 'aliens' within s[ection] 51(xix) of the Constitution."[345] Justice Callinan also rejected the dichotomy between "alien" and "citizen," arguing that allegiance in *Ex parte Taylor*, was natural, given Taylor's status as a British subject.[346] He also seemed to suggest that "absorption" into the Australian community was another process through which "acquired" allegiance can negate alienage,[347]

336. *Id.* ¶ 85, at 186.

337. *Id.* ¶ 81, at 185 (citing *Nolan v Minister for Immig & Ethnic Affs* (1988) 165 CLR 189, 183 (Austl.)).

338. *Id.* ¶ 85, at 186–87 (citing *Ex parte Taylor* ¶ 121, at 431*Ex parte* Taylor (2001) 207 CLR 391, 431 (Austl.)).

339. *Id.* ¶ 174, at 209; *see also id.* ¶ 182, at 212 ("It would be a serious legal error to mistake that holding and to pretend that the dichotomy of 'alien' and 'citizen' is still in place.").

340. *Id.* at ¶ 174, at 209 (citing Gaudron J in *Ex parte Te* ¶ 53, at 178).

341. *Id.* ¶ 184, at 212.

342. *Id.* ¶¶ 186–202, at 213–18.

343. *Id.* ¶ 192, at 215 (citing HALSBURY'S LAWS OF ENGLAND vol 8(2), ¶ 29 (4th ed. 2006)).

344. *Id.*

345. *Id.*

346. *Id.* ¶ 226, at 228.

347. *Id.*

although "criminal activities are incompatible with absorption within the community."[348]

A better analysis proceeds from the fact that Te and Dang did not owe permanent allegiance to any foreign sovereign at the time of determining their status as aliens. The outer limit of section 51(xix) power decides the legal issue based on whether Te and Dang, by their alienage, would become stateless. If so, even if they are considered aliens, they cannot be deported. Te was a refugee from the Khmer Rouge-dominated government, arriving in Australia in 1983, at the age of 16. At the time of his deportation, he knew of no surviving relatives in Cambodia.[349] Similarly, Dang arrived as a refugee in 1981 at the age of 12, after escaping with his family from the Socialist Republic of Vietnam.[350] Notwithstanding their *jus soli* in Cambodia and Vietnam, respectively, the fact that they fled these countries as adolescents, and the fact that they were granted permanent residence in Australia, suggests that they have breached their respective duties of permanent loyalty to Cambodia and Vietnam. Therefore, they were not in permanent allegiance to a foreign sovereign. This point is relevant because it enlivens the outer limit on the Commonwealth sovereign right to regulate its duty of protection towards stateless people. In other words, while they have breached their duty of permanent loyalty based on the *Migration Act 1958*, and are therefore constitutional aliens, the Commonwealth is prevented from breaching its duty of protection towards them.[351] There could be legislative intervention to prevent persons in the position of Te and Dang from becoming Australian citizens, but they need to continue to be protected, potentially, in a position similar to that of a permanent resident. In summary, Te and Dang are constitutional aliens, but cannot be deported. Otherwise, the Commonwealth would be in breach of its international obligations on the treatment of stateless persons. Their permanent residence visas, which establish only a local allegiance to the Commonwealth, should not have been canceled.

348. *Id.* ¶ 227, at 228.

349. *Id.* at 163; *Man to be Deported Despite Residency*, THE AGE (Feb. 16, 2004, 11:00 PM), https://www.theage.com.au/national/man-to-be-deported-despite-residency-20040216-gdxbee.html.

350. *Id.* at 163.

351. This argument is based on interpreting the United Nations 1954 and 1961 Conventions on statelessness as *jus cogens*. *See* Tania A. Galarza Roman, *International Asylum Law: Violating Jus Cogens*, 59 REV. DER. P.R. 415 (2020) (canvassing the history of the principle of non-refoulement as a *jus cogens* norm); I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT'L L. 513 (1989) (arguing that the principle of *pacta sunt Servanda* imposes a legal duty on subjects of international law to fulfill their treaty obligations in good faith). Australia has never incorporated the 1954 and 1961 Conventions into its domestic law.

D. Reinstituting the Dichotomy?

This subsection analyzes four cases from 2003 to 2006. The analytical framework leads to the same outcome in all four cases. There are however differences in the analytical structure, which informs the outcome in other situations.

1. Shaw

Just one year after *Te and Dang*, the decision in *Ex parte Taylor* was rejected in *Shaw*,[352] where Chief Justice Gleeson, as well as Justices Gummow, Hayne, and Heydon (McHugh, Kirby and Callinan dissenting) found that a British subject was a constitutional alien to whom deportation under the *Migration Act* could apply.[353] Jason Shaw was born in the United Kingdom and, in 1974, at the age of two, he came to Australia with his British parents on a permanent entry permit.[354] He never left Australia, and yet he never applied for citizenship. In 1998, Shaw was convicted of property, motor vehicle, and drug-related offenses and sentenced to seven and a half years imprisonment.[355] This sentence led to Shaw failing to pass the character test in 2001 under the *Migration Act*,[356] and therefore, the Minister for Immigration and Multicultural Affairs canceled his visa pursuant to the Act.[357]

The *Shaw* majority overruled *Ex parte Taylor*. Chief Justice Gleeson, Justices Gummow, Hayne, and Heydon argued that all persons who entered Australia after the commencement of the *Australian Citizenship Act 1948* on 26 January 1949 and who were born out of Australia of parents who were not Australian citizens and who had not been naturalized, were "aliens" for the purposes of section 51(xix).[358] In their joint judgment, Chief Justice Gleeson, Justices Gummow and Hayne stated that the fact that Shaw was a British subject did not prevent the term "alien" from applying to him.[359] They elaborated that

> [o]nce it be decided that the text of the Constitution contemplates changes in the political and constitutional relationship between the United Kingdom and Australia, it is impossible to read the legislative

352. *Shaw v Minister for Immigr and Multicultural Affs* (2003) 218 CLR 28 (Austl.).
353. *Migration Act 1958* (Cth) s 501(2) (Austl.).
354. Under the *Migration Act 1958* (Cth) s 6 (Austl.).
355. *Shaw* at 28.
356. *Id.*at 29; *see Migration Act 1958* (Cth) s 501(6) (Austl.).
357. *Id.* The visa was cancelled under *Migration Act 1958* (Cth) s 501(2) (Austl.).
358. *Id.*
359. *Id.* ¶ 10, at 36.

> power with respect to ‘‘aliens’’ as subject to some implicit restriction protective from its reach those who are not Australian citizens but who entered Australia as citizens of the United Kingdom and colonies under the [*British Nationality Act 1948*].[360]

The *Shaw* plurality concluded that "the aliens power has reached all those persons who entered this country after the commencement of the Citizenship Act on 26 January 1949 and who were born out of Australia of parents who were not Australian citizens and who had not been naturalized."[361] They went on to reject the reasoning in *Ex parte Taylor* because, *inter alia*, it did not "rest upon a principle carefully worked out in a significant succession of decisions."[362] Similarly, in his very short opinion, Justice Heydon rejected "the axiomatic correctness of the proposition that in 1901 British subjects were not aliens,"[363] and agreed to the orders proposed by Chief Justice Gleeson, Justices Gummow and Hayne.[364]

On the other hand, Justices McHugh, Kirby and Callinan disagreed. For them, the date on which British subjects became aliens was 3 March 1986, when the *Australian Acts* came into effect.[365] For Justice McHugh, deportation under the *Migration Act* did not apply to British citizens who arrived in Australia before 3 March 1986.[366] Notwithstanding that *Ex parte Taylor* does not have a *ratio decidendi*,[367] Justice McHugh suggested that it should not be overruled,[368] although *Shaw* is reasonably distinguishable from *Ex parte Taylor* on the facts, given that Taylor arrived in Australia in 1966, while Shaw did not arrive until 1974,[369] hence, after Parliament enacted the *Royal Style and Titles Act 1973*,[370] which distinguished between the British and Australian monarchs.[371] Similarly, Justice Kirby, who opined that *Ex parte Taylor* should be respected "as a matter of legal precedent,"[372] found that Shaw was not an "alien."[373] In other words, Justice Kirby continued his rejection of the *Pochi-Nolan* dichotomy,

360. *Id.* ¶ 27, at 42.
361. *Id.* ¶ 32, at 45.
362. *Id.* ¶ 39, at 45.
363. *Id.* ¶ 190, at 87.
364. *Id.*
365. *Id.* at 29.
366. *Id.* ¶ 46, at 46.
367. *Ex parte Te* ¶ 86, at 187.
368. *Shaw* ¶¶ 50–51, at 47.
369. *Id.* ¶ 50, at 48.
370. *Royal Styles and Titles Act 1973* (Cth) (Austl.).
371. *Shaw* ¶ 49, at 47.
372. *Id.* ¶ 80, at 57.
373. *Id.* ¶ 86, at 59.

finding that Shaw was a non-citizen-and-non-alien person, with "a special nationality position in Australia."[374] Justice Callinan also rejected the *Pochi-Nolan* dichotomy and continued his reasoning in *Ex parte Taylor*.[375] He stated that

> [t]he difficulty that arises from [*Ex parte Taylor*] is the lack of the statement of a definitive final milestone in the evolutionary process of complete independence, not the absence of an explicit statement by a majority of the Court that Nolan should be overruled. The decision in *Nolan* [overlooked significant matters].[376]

The analysis should again start with the threshold question of the existence of permanent allegiance to a foreign sovereign at the time alienage is to be ascertained. Therefore, Shaw's permanent allegiance is to be determined in 1998, when he committed the offenses that later led to failing the character test. There is no contention that, following the 1999 decision in *Sue v. Hill*, the United Kingdom was a foreign state.[377] Shaw had the requisite allegiance to overcome the threshold question. However, what channel would have led to a permanent allegiance to the Australian sovereign? Shaw's father arrived in 1974 on a permanent entry permit, and that cannot give rise to permanent allegiance. The only way his father could have a permanent allegiance to the Australian sovereign is through the unity of the Crown. In other words, if there is a superposition between the duty of permanent loyalty to the United Kingdom and the duty of permanent loyalty to Australia, at the time the father entered the Commonwealth in 1974, then the father would have a permanent allegiance to Australia. The collapse of this superposition started in 1939 with section 4 of the *Westminster Act 1931* and section 3 the *Statute of Westminster Adoption Act 1942*.[378] Under section 4, the British Parliament

374. *Id.*; *see Ex parte Taylor* ¶ 314, at 496.

375. *Shaw* ¶ 166, at 81.

376. *Id.* (citing *Ex parte Taylor* ¶ 90, at 421).

377. *Sue v Hill* (1999) 199 CLR 462 ¶ 65, at 492 (in their joint judgment, Chief Justice Gleeson, Justices Gummow and Hayne found that "at least since 1986 [after the passing of the Australia Act 1986 (Cth)] with respect to the exercise of legislative power, the United Kingdom is to be classified as a foreign power."); ¶ 173, at 528 (Justice Gaudron agreeing with the plurality that "the United Kingdom is now a foreign power for the purposes of s 44(i) of the Constitution."); ¶ 248, at 557 (Justice McHugh not deciding on this point); ¶ 283, at 570 (Justice Kirby not deciding on this point because the High Court has no jurisdiction to hear the petition); and ¶ 298, at 573 (Justice Callinan finding it inappropriate to decide on this point).

378. Section 3 of the 1942 Act adopted sections 2–6 of the 1931 Act and made the adoption retrospective from September 3, 1939 (the beginning of World War II). *See* Statute of Westminster Parliamentary Adoption Act 1942, PARLIAMENT OF AUSTRALIA PARLIAMENTARY LIBRARY, https://web.archive.org/web/20080520090259/http://www.aph.gov.au/library/handbook/constitution/westminster-act.htm.

cannot legislate for any Dominion, unless by request from that Dominion. However, the process was not completed until the passing of section 12 of the *Australia Act 1986*, which repealed, *inter alia*, section 4 of the 1931 Act.[379] It is relevant that the Commonwealth Parliament requested the United Kingdom Parliament to legislate for the Commonwealth on three occasions after the adoption of the 1931 Act in Australia.[380] This means that at the time Shaw's father arrived in Australia, he had a permanent loyalty to the Australian sovereign, from which flowed a permanent allegiance between Shaw and the Australian sovereign. Note, however, that at the time the status of alienage was to be decided, i.e., in 1998, the superposition between the permanent loyalties had collapsed. Therefore, when Shaw failed his character test, he had only permanent loyalty to the British sovereign. Shaw was a constitutional alien. There was no bar on the Commonwealth to regulate its duty of protection towards him as stipulated under the *Migration Act 1958*.

2. Singh

In *Singh v. Commonwealth*,[381] the plaintiff, Tania Singh, was a six-year-old girl born in Australia to Indian parents, and hence acquired Indian citizenship, but not Australian citizenship.[382] Her parents entered Australia in 1997 on a three-month business visa. After that visa expired, they unsuccessfully applied for protection visas. Tania Singh, by her friend Malkit Singh, commenced proceedings in the HCA against the Minister for Immigration and Multicultural and Indigenous Affairs, seeking relief. In 2003, Justice Kirby stated a case and reserved questions for the consideration of the Full Court, which were later amended by him in 2004.

Chief Justice Gleeson, Justices Gummow, Kirby, Hayne, and Heydon found that Singh was a constitutional alien.[383] Chief Justice Gleeson was clear that the term "alien" for the purposes of section 51(xix) "can only be

379. *Australia Act 1986* (Cth) s 12 (the section has the heading "12 Amendment of Statute of Westminster" and states that "Sections 4, 9(2) and (3) and 10(2) of the Statute of Westminster 1931, in so far as they are part of the law of the Commonwealth, of a State or of a Territory, are hereby repealed.").

380. The three occasions are: the *Cocos (Keeling) Islands (Request and Consent) Act 1954* (Cth) (Austl.) and the Cocos Islands Act 1955 (UK); the *Christmas Island (Request and Consent) Act 1957* (Cth) (Austl.) and the Christmas Island Act 1958 (UK); and the *Australia (Request and Consent) Act 1985* (Cth) (Austl.) and the Australia Act 1986 c. 2 (UK).

381. *Singh v Commonwealth* (2004) 222 CLR 322 (Austl.).

382. After the 1986 amendments to the *Australian Citizenship Act 1948* (Cth) (Austl.), the critical factor is not being born in Australia, but also the citizenship or permanent residence of at least one parent. See *Australian Citizenship Amendment Act 1986* (Cth) s 4 (Austl.).

383. *Singh* at 322.

identified by reference to legal usage and understanding."[384] His Honor also emphasized that understanding the term "alien" requires "understanding the relationship between a number of concepts referred to in the *Constitution*."[385] Chief Justice Gleeson then went on to give examples of "the Court's reliance upon the historical context in which the *Constitution* was written as an aid to its interpretation,"[386] and the importance of the "general nature and purpose" of the *Constitution* for its interpretation,[387] including under the *Acts Interpretation Act 1901*.[388] He also referred to section 15AB of the same Act, permitting the consideration of extrinsic material in the interpretation of the *Constitution*, including the Convention debates.[389] His Honor then explained the different approaches adopted by legal systems in the West to the concepts of "alienage," "citizenship," and "allegiance;"[390] and how in the United Kingdom, "[t]he questions of nationality, allegiance and alienage were matters on which there were changing and developing policies, and which were seen as appropriate for parliamentary resolution."[391] Chief Justice Gleeson reiterated the proposition from *Chu Kheng Lim* that the term "alien" became synonymous with non-citizen since Australia became an independent nation, with the qualification that Parliament cannot expand the definition of the term to include persons "who could not possibly answer to the description of 'aliens' in the *Constitution*.[392] The joint reasons of Justices Gummow, Hayne and Heydon rejected the argument that an essential characteristic of the term "alien" is that the person was born outside Australia, which conforms with the article's proposed analytical framework.[393] Instead, they found that the "central characteristic" is "owing obligation to a sovereign power other than Australia."[394] For their Honors there was one constant feature of the term

384. *Id.* ¶ 10, at 331–32 (citing *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 (Austl.)).

385. *Singh* ¶ 15, at 334 (emphasis added).

386. *Id.* ¶ 14, at 333.

387. *Id.* ¶ 16, at 334.

388. *Acts Interpretation Act 1901* (Cth) s 15AA (Austl.); *see Singh* ¶ 20, at 336.

389. *Singh* ¶ 20, at 336–37.

390. *Id.* ¶ 30, at 340.

391. *Id.* ¶ 30, at 341.

392. *Singh* ¶ 4, at 329 (citing Brennan, Deane & Dawson, JJ in *Chu Kheng Lim* at 25) (referring to *Nolan* at 183–84).

393. *Singh* ¶ 198, at 398.

394. *Id.* ¶ 200, at 398. Although, as clarified by Justice Edelman in *Love* and *Thoms*, "their Honors could not have meant that every person who owes allegiance to another sovereign power is, without more, an alien within s 51(xix)." *See Love* and *Thoms* ¶ 430, at 304–05. The "more" comes from Justices Gummow and Hayne definition of "alien:" you also need the absence of allegiance to the Commonwealth. *See Singh* ¶ 150, at 382.

"alien:" it was that the alien "belonged to another."[395] This idea of "belonging," also discussed in *Love and Thoms*[396] comes from the etymology of the word "alien," from the Latin "*alienus*,"[397] which is the definition of nationality today: "a legal relationship between an individual person and a state."[398] Their Honors concluded that "[t]he central characteristic of that status is, and always has been, owing obligations (allegiance) to a sovereign power other than the sovereign power in question (here Australia).[399] Justice Kirby, who also found Singh to be an alien,[400] stated that

> [b]ecause the Constitution must operate in the environment of international law, and because the general notion of alienage adapts to that environment, it would be astonishing if, without clearer language, Australia's constitutional power to enact federal legislation with respect to "aliens," as broadly defined, were closed off and confined, in this respect, to specific nineteenth century notions that have been altered in several countries where they previously prevailed.[401]

He also suggested that nationality is synonymous with citizenship.[402] Justice Kirby goes on to look at the meaning of the term "alien" under international law, reiterating that "questions of nationality fall within the domestic jurisdiction of each nation state."[403]

Justice McHugh, dissenting, agreed with the constitutional interpretation approach delineated by Chief Justice Gleeson, but came to "the inevitable conclusion" that "the term 'aliens' means persons who do not owe permanent allegiance to the Queen of Australia."[404] Because Singh was born in Australia, she owes such permanent allegiance, which seems to conflate *jus soli* with *jus sanguinis*,[405] i.e. as an automatic channel for finding the reciprocal duties of fealty and protection ushering

395. *Id.* ¶ 190, at 395.

396. *Love* and *Thoms* ¶¶ 32–33, at 178–79 ("In the constitutional context 'belonging' refers to the formal legal relationship between a person and the community or body politic in question.").

397. *Id.* ¶ 424, at 301–02; *see also Nolan* at 183.

398. OLIVIER VONK, DUAL NATIONALITY IN THE EUROPEAN UNION: A STUDY ON CHANGING NORMS IN PUBLIC AND PRIVATE INTERNATIONAL LAW AND IN THE MUNICIPAL LAWS OF FOUR EU MEMBER STATES 19-20 (2012).

399. *Singh* ¶ 200, at 398.

400. *Id.* ¶ 273, at 419.

401. *Id.* ¶ 258, at 416.

402. *Id.* ¶ 257, at 415.

403. *Id.* (citing IAN BROWNLIE, PRINCIPLES OF PUB. INT.'L L. 373 (6th ed. 2003)); *see also U.S. v. Wong Kim Ark,* 169 U.S. 649, 667–68 (1898); Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. 6 (ser. B) No. 4, at 24 (Feb. 7).

404. *Singh* ¶ 58, at 351.

405. *Id.* ¶ 40, at 344.

permanent allegiance. Moreover, according to Justice McHugh, Singh was not an alien, because the "concepts of nationality and citizenship" are "irrelevant to determining the meaning of 'aliens.'"[406] Justice McHugh cited Blackstone for the proposition that "[t]he children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such,"[407] and citing *Potter v. Minahan*,[408] for an application of the same proposition in Australia. He reasoned that

> [i]n the Australian colonies in 1900, the essential meaning – the connotation – of the term 'alien' was a person who did not owe permanent allegiance to the Crown. And, subject to three exceptions, in 1900 *and now*, birth in Australia, irrespective of parentage, gave and still gives rise to an obligation of permanent allegiance to the sovereign of Australia.[409]

Justice McHugh then goes through an extensive historical account of the development of the concepts of "aliens" and "alienage" in common law.[410] Similarly, Justice Callinan, also dissenting, was clear that "'[c]itizen' is a term of no particular constitutional significance."[411] According to Justice Callinan, "[b]y using the language of 'allegiance, obedience, or adherence' the founders can again be seen to have had in mind the old common law concepts of [indivisible] allegiance owed, in the case of republics, by citizens, and, in the case of monarchies, by subjects,"[412] and that "[t]he concept of an Australian citizenship is therefore a statutory and not a constitutional one, as Justice Gaudron said in *Chu Kheng Lim v. Minister for Immigration*."[413]

The analysis should have started with the fact that Singh has permanent allegiance to the Indian sovereign.[414] The issue then becomes whether the Commonwealth can sever any permanent allegiance Singh might have to the Australian sovereign. Under the applicable nationality law at the time, the Commonwealth regulated the duty of permanent loyalty arising from *jus soli* by stipulating for a period of ten years before Singh could be deemed to owe a duty of permanent loyalty to Australia:

406. *Id.* ¶ 39, at 344.

407. *Id.* ¶ 35, at 342 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765), bk 1, c. 10, 361–62).

408. *Id.* (citing *Potter* at 287, 289; 294; 304–05; 308; 320; and *id*. ¶ 108, at 368).

409. *Id.* ¶ 38, at 343 (emphasis in the original).

410. *Id.* ¶¶ 59–100, at 351–66.

411. I*d.* ¶ 307, at 430.

412. *Id.* ¶ 308–09, at 430–31 (citing *Shaw* ¶ 94, at 61).

413. *Id.*

414. *Id.* at 322; *see* INDIAN CONST. pmbl. ("We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic.").

"the person has, throughout the period of ten years commencing on the day on which the person was born, been ordinarily resident in Australia."[415] Therefore, notwithstanding her *jus soli*, Singh cannot be said to owe the requisite duty. Another channel that could have helped Singh is *jus sanguinis*, but only if she were deemed to owe the requisite loyalty through at least one of her parents. The answer, therefore, is straightforward. Singh was a constitutional alien. The "central characteristic," i.e., having a concurrent permanent allegiance to a foreign state,[416] agrees with the proposed analytical framework as a threshold question, but only to ascertain whether a breach of duty of permanent loyalty to Australia would result in statelessness. The breach would collapse the two loyalties to one owed to a foreign state.

3. Ex parte Ame

The "central characteristic" from *Singh* was approved in the joint reasoning of Chief Justice Gleeson, Justices McHugh, Gummow, Hayne, Callinan, and Heydon in *Ame*.[417] Amos Bode Ame was born in 1967 in the Australian territory of Papua when it was administered by Australia as a Possession of the Crown and as part of an administrative union known as the Territory of Papua and New Guinea. Under the *Australian Citizenship Act 1948*, Ame acquired the status of Australian citizen by birth. Nevertheless, under the *Migration Act 1958,* he required an entry permit to be entitled to enter or reside in any of the States or internal Territories.[418] The entry permit requirement confirms that *jus soli* at that time was conditional and not absolute, as is the case with *jus sanguinis*. Ame, therefore, brought proceedings against the Minister for Immigration and Multicultural and Indigenous Affairs seeking writs of prohibition and *mandamus* and a declaration.

However, the HCA found the plaintiff an "alien," given his owed allegiance to Papua New Guinea when it became an independent nation in 1975.[419] In their joint judgment, Chief Justice Gleeson, Justices McHugh,

415. *Australian Citizenship Act 1948* (Cth) s 10(2)(b) (Austl.).

416. *Singh* ¶ 200, at 398. Although as clarified by Edelman, J in *Love* and *Thoms*, "Their Honours could not have meant that every person who owes allegiance to another sovereign power is, without more, an alien within s 51(xix)." *Love* and *Thoms* ¶ 430, at 304–05. The "more" comes from Justices Gummow and Hayne's definition of "alien:" you also need the absence of allegiance to the Commonwealth. *See Singh* ¶ 150, at 382.

417. *See Minister for Immigr and Multicultural and Indigenous Affs*; *Ex parte Ame* (2005) 222 CLR 439 ¶ 35, at 458 (Austl.) [hereinafter "*Ex parte Ame*"].

418. *Ex parte Ame* ¶ 1, at 445 (citing *Minister for Immigr and Multicultural and Indigenous Affs v Walsh* (2002) 125 FCR 31 ¶¶ 15–21, at 35–36 (Austl.)).

419. *Id.* ¶ 41, at 460.

Gummow, Hayne, Callinan, and Heydon found Ame to have ceased to be an Australian citizen under the *Australian Citizenship Act 1948* when Papua New Guinea gained its independence.[420] They believed that changes in the national and international context may have a bearing on the practical operation of the "aliens" power.[421] They elaborated that

> [t]he reason why persons who were Australian citizens by virtue only of their birth in Papua (persons such as the applicant and almost all other indigenous Papuans as at Independence Day) were regarded as holding no "real" foreign citizenship appears from what has been noted above. Although technically Australian citizens, under the *Migration Act* that citizenship did not of its own force give them the right to enter, or remain in, mainland Australia. To have a right of residence in Australia, they needed to apply for, and be granted, such a right. Hence the reference to a grant of a right of residence.[422]

The reasoning above elaborates on the distinction between nationality and citizenship. Ame's connection to Papua by virtue of his birth can only establish belonging to a nation that had no sovereignty within the Commonwealth.

Ame owed his permanent allegiance to his nation. Only a process of naturalization would give him the legal status of a citizen.[423] The plurality then elaborated on the heterogeneity of the relationships between the Commonwealth and various nations within.[424] The plurality was careful to emphasize the monopoly by the Commonwealth on sovereign rights in Australia, including the legal status of citizenship, and the rights of entry and re-entry of these inhabitants and all others into Australia.[425] The same understanding also informs Australia's multi-national identity; the framers of the *Australian Constitution* were explicit in identifying the separate identities of the First Nations of Australia. Take for example the repealed section 127 of the *Australian Constitution*. It specifically excludes the First Nations from being counted in "reckoning the number of the people of the Commonwealth."[426] The First Nations had their *sui generis* relationship

420. *Id.*

421. *Id.* ¶ 35, at 458–59.

422. *Id.* ¶ 12, at 449. Under the framework, someone who owes permanent loyalty to the Australian sovereign must enter into permanent allegiance with said sovereign. By requiring a permit to enter into and to remain in mainland Australia, the Commonwealth created multiple standards of permanent allegiance. There is no bar on this approach under the indivisibility of allegiance inherent in the design of the *Australian Constitution*.

423. *Id.*

424. *Id.* ¶ 30, at 457.

425. *Id.* ¶ 31, at 457.

426. COMMONWEALTH CONST. s 127 (repealed by the Constitution Alteration (Aboriginals) Act 1967 (Cth) s 3 (Austl.)).

with the Commonwealth, distinct from the other type of relationship that existed between the Commonwealth and the people constituting the nations referred to in the covering clauses, including New Zealand (in cl. 6). The latter, however, became a sovereign nation, with its own standard for citizenship.

Justice Kirby, on the other hand, seemed to use the words "nationality" and "citizenship" interchangeably.[427] He accepted Ame's argument that the HCA "assimilated constitutional notions of nationality (including the references to 'British subject' and 'subject of the Queen') by differentiating 'citizens' from 'aliens'."[428] Notwithstanding, his Honor was cognizant of the constitutional origins of nationality,[429] and the statutory origins of citizenship.[430] He states: "I do not doubt that there are fundamental notions of nationality, sufficiently expressed[431] or necessarily implied, in the *Australian Constitution*."[432] His Honor goes on to warn that "[h]istory, and not only ancient history, provides many examples of legislation depriving individuals and minority groups of their nationality status,"[433] citing "the Nuremburg Laws of September 1935 by which Germans of defined Jewish ethnicity living in Germany were stripped of German nationality."[434] After providing a useful analysis of the different types of territories under the *Australian Constitution*,[435] he reiterated the majority holding in *Ex parte Taylor* that "British subjects resident in Australia . . . enjoy[] a status as Australian 'nationals', that is Australian subjects of the Queen who could not be deprived of that status by, or under, legislation enacted by the Parliament."[436] Under this view, the

427. *Ex parte Ame* ¶¶ 42–44, at 460–61 (Justice Kirby's reference to "[de]privation of nationality" in ¶ 42 and "Australian citizen" in ¶ 44).

428. *Id.* ¶ 94, at 475–76 (footnotes omitted).

429. *Id.* ¶ 94, at 476, ¶ 120 at 484.

430. *Id.* ¶ 93, at 475.

431. *Id.* ¶ 120, at 484 n.137 (citing "subject of the Queen" and member of the "people of the Commonwealth[]" and stating that "[l]imits on the power of the United States Congress to deprive persons of citizenship were recogni[z]ed in *Vance v. Terrazas,* 444 U.S. 252 (1980)."); *see also* Perez v. Brownell, 356 U.S. 44, 64–65 (1958); Trop v. Dulles*,* 356 U.S. 86 (1958). *Cf.* Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1473 (1986) (looks at "whether the [U.S.] Constitution ought to be read to prohibit denationalization of U.S. citizens." He finds the possibility of loss of citizenship where a U.S. citizen cannot fulfill "the obligations of U.S. Citizenship" (*Id*. at 1503)).

432. *Ex parte Ame* ¶ 120, at 484.

433. *Id.* ¶ 49, at 462.

434. *Id.* ¶ 49, at 462 n.37 (citing David Fraser, *Law Before Auschwitz: Aryan and Jew in the Nazi Rechtsstaat*, *in* THINKING THROUGH THE BODY OF THE LAW 66 (Cheah, Fraser and Grbich eds., 1996) (explaining that "[t]here are many other examples [of legislation depriving minorities of their nationality status]: *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 ¶ 163 at 416 (Austl.)").

435. *Id.* ¶¶ 101–02, at 478.

436. *Ex parte Ame* ¶ 108, at 480.

Commonwealth could not deprive Ame of his Australian nationality by imposing a requirement for entry and residence in Australia.[437] Nevertheless, given that this view was overruled in *Shaw*,[438] he concluded that under the *Citizenship Act 1948*, "although called 'citizens', [Papuans] were required to secure an 'entry permit', without which they were treated as a 'prohibited immigrant' and liable to deportation."[439]

In terms of customary international law, his Honor cited with approval the proposition that changes in sovereignty where there is a succession of states, that the affected population become nationals of the new sovereign.[440] He looks at article 15 of the *Universal Declaration of Human Rights* for the proposition that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[441] A key point by his Honor was made regarding article 24(a) and article 25(2) of the *Draft Articles on Nationality and Natural Persons in Relation to the Succession of States*, which have been adopted by the International Law Commission ("ILC").[442] Article 24(a) says that a successor State is required to "attribute its nationality to persons . . . having their *habitual residence* in its Territory."[443] Justice Kirby then elaborates on the stipulation in article 25(2) that the predecessor State shall not

> withdraw its nationality from persons . . . who . . . [have] their habitual residence in its territory . . . [or] have an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State . . . [or have] their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.[444]

His Honor goes on to illustrate the application of these articles in the case of the Philippines, which used to be an unincorporated Territory of

437. *Id.* ¶ 109, at 480.

438. *Id.* ¶ 110, at 480 (citing *Shaw*); *see supra* Section IID1.

439. *Id.* ¶ 73, at 470 (referring to the Migration Act 1958 (Cth) s 18 (Austl.) (citing *Minister for Immigr and Multicultural and Indigenous Affs v Walsh* (2002) 125 FCR 31 ¶¶ 15–21 at 35–36 (Austl.)).

440. *Id.* ¶ 122, at 484 (citing IAN BROWNLIE, PRINCIPLES OF PUB. INTERN'L L. 628 (6th ed. 2003)).

441. *Id.* ¶ 123, at 485 (citing G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)).

442. *Id.* ¶ 125, at 485 (citing Int'l Law Comm'n., Rep. on the Work of its Fifty-First Session, *Nationality in Relation to the Succession of States*, U.N. Doc. A/54/10, at 19 (1999)).

443. *Id.* (emphasis added).

444. Int'l Law Comm'n., Rep. on the Work of its Fifty-First Session, *Nationality in Relation to the Succession of States*, U.N. Doc. A/54/10, article 25(2) 19 (1999); *see Ex parte Ame* ¶ 125, at 485.

the United States.[445] No Fourteenth Amendment protection was afforded to that Territory, and hence "[p]ersons born in the Territory of the Philippines were not treated as born in 'the United States', and United States citizenship was not conferred on them by statute."[446] Note, however, that the U.S. Bill of Rights would still apply to such unincorporated territories.[447] Here, again, we see how the earlier discussion of nationality under international law has now been translated into a discussion of citizenship in the case of the Philippines.

Under the proposed analytical framework, the starting point is to ask whether at the time Ame's alienage is to be ascertained, i.e., in 2005, he had a permanent allegiance to a foreign sovereign. Papua New Guinea became an independent sovereign state on September 16, 1975. Ame became a citizen of Papua New Guinea on Independence Day.[448] The next issue is whether he had a permanent loyalty to the Australian sovereign. The relevant time is again the time of establishing his status as an alien. We need to ascertain the mechanism that could have given rise to such loyalty. In Ame's case, his duty of loyalty to Australia originated from *jus soli* because he was born in an Australian territory. But this right is not absolute. It is conditional on him obtaining an entry permit. The condition is valid, because it does not attempt to modify the right giving rise to permanent loyalty but enables the Commonwealth to exercise its sovereign right in regulating its allegiances. This brings into the analysis the doctrine of indivisible allegiance under the *Papua New Guinea Constitution 1975*,[449] and under statutory regulation by the Commonwealth. Section 4 of the *Papua New Guinea Independence Act 1975*[450] provided that on the expiration of the day preceding Independence Day, Australia became a foreign state. Ame could not be a citizen in Papua New Guinea and in Australia. Hence, the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975*[451] provided

> [a] person who–(a) immediately before Independence Day, was an Australian citizen within the meaning of the Act; and (b) on

445. *Id.* ¶ 128, at 486.

446. *Id.* ¶ 128, at 486 n.146 (citing Organic Act of Porto Rico 1917, ch. 45, 39 Stat. 951 (codified in 48 U.S.C. § 731); referred to in Balzac v. Porto Rico, 258 U.S. 298, 306–08 (1922) (U.S.)).

447. *Id.* ¶ 128, at 486 n.113 (citing Dorr v. U. S., 195 U.S. 138, 148–49 (1904); Downes v. Bidwell, 182 U.S. 244, 289 (1901); and Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922)).

448. *Id.* at 440.

449. The doctrine can still be found in the CONST. OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA (1975) s 64(1) (PNG).

450. Papua New Guinea Independence Act 1975 (Cth) (Austl.).

451. Papua New Guinea Independence (Australian Citizenship) Regulations 1975 (Cth) reg. 4 (Austl.).

> Independence Day becomes a citizen of the Independent State of Papua New Guinea by virtue of the provisions of the Constitution of the Independent State of Papua New Guinea, ceases on that day to be an Australian citizen.

Section 65(5) of the *1975 Commonwealth Act* allowed citizens of Papua New Guinea to apply within two months after Independence Day to renounce their right to permanent residence in Australia or their status as Australian citizens. Ame is deemed to have renounced his Australian citizenship by becoming a citizen in Papua New Guinea, even though he did not formally renounce his Australian citizenship.[452] Coupled with the fact that he has permanent loyalty to Papua New Guinea, Ame's permanent loyalty to the Australian sovereign was terminated. The entry permit was a way of signaling that the duty of permanent protection owed by the Commonwealth to Ame was therefore also coming to an end.[453]

4. Koroitamana

One year after *Ex parte Ame*, the issue of the meaning of the term "alien" was considered again in *Koroitamana v. Commonwealth*.[454] The HCA followed the binding force of its 2004 *Singh* decision and unanimously found that the children were aliens within the meaning of section 51(xix).[455] The prosecutors in this case were two children aged six and eight born in Australia to Fijian parents.[456] While Fiji was "formerly a dominion of the Crown . . . it severed that allegiance long before the applicants were born."[457] The parents were not Australian citizens nor permanent residents.[458] Unlike in *Singh*, the children were not citizens of a foreign country and did not owe permanent allegiance to any foreign power.[459] However, they had the right to obtain Fijian citizenship by registration.[460] They commenced proceedings in the Federal Court, by their next friends, claiming that they were not aliens under the plenary power in section 51(xix).[461] The applicants argued that "since 1901, there has been . . . [no] departure from the starting point that birth within

452. *Ex parte Ame* at 442 (K. Rubenstein for the applicant).
453. Had Ame been granted an entry permit, his reciprocal loyalties would have been only local.
454. *Koroitamana v Commonwealth* (2006) 227 CLR 31 (Austl.) [hereinafter "*Koroitamana*"].
455. *Id.* at 31–32.
456. *Id.* ¶ 1, at 35.
457. *Id.* ¶ 59, at 50–51.
458. *Id.* ¶ 6, at 36.
459. *Id.*
460. *Id.* ¶ 15, at 40.
461. *Id.* at 31–32.

Australia places the person within the allegiance of the *Crown in right of Australia*,"[462] and since there has been no "positive characteristic of alienage,"[463] the children cannot be characterized as aliens under section 51(xix). The Commonwealth argued that the term "alien" does not exclude a person born in Australia.[464] They referred to the majority in *Singh* for the proposition that a person that does not have a nationality falls within the meaning of "alien" under section 51(xix).[465]

In their joint judgment, Chief Justice Gleeson and Justice Heydon found the children were not stateless, given their right to obtain Fijian citizenship by registration.[466] Their Honors refer back to *Singh* for the proposition that "birth in Australia does not of itself mean that a person is beyond the reach of the power conferred on the Parliament by section 51(xix),"[467] and that *Singh* rejected the proposition that "at the time of federation, the concept of alienage had an established and immutable legal meaning that deprived Parliament of any substantial room for legislative choice in the matter."[468] They confirmed that "questions of nationality, allegiance and alienage were matters on which there were changing and developing policies, and which were seen as appropriate for parliamentary resolution."[469] Notwithstanding that the children were born in Australia, and that neither owed loyalty to a foreign sovereign power, the children were constitutional aliens because their parents were citizens of a foreign country.[470]

462. *Id.* at 33 (R. C. Kenzie QC, with him S. E. J. Prince for the applicants) (Austl.) (emphasis added).

463. *Id.* at 33 (R. C. Kenzie QC, with him S. E. J. Prince) (Austl.).

464. *Id.* at 35 (D. M. J. Bennett QC, Solicitor-General for the Commonwealth, with him M. A. Perry QC and K. C. Morgan) (Austl.).

465. *Id.* at 34 n.12 (D. M. J. Bennett QC, Solicitor-General for the Commonwealth, with him, M. A. Perry QC and K. C. Morgan) (citing *Singh* ¶ 190, at 395 ("[W]hat did remain unaltered was that 'aliens' included those who owed allegiance to another sovereign power, or who, having no nationality, owed no allegiance to any sovereign power."]) (citing Al-Kateb v. Godwin (2004) 219 CLR 562, ¶ 1, at 571–72 ("For present purposes, unlawful non-citizens are aliens who have entered Australia without permission, or whose permission to remain in Australia has come to an end. In this context, alien includes a stateless person, such as the appellant")) (citing ¶ 301, at 662) ("Whether statelessness calls for a different treatment, as it may well do for practical and humanitarian reasons, is a matter for the legislature and not for the courts.").

466. *Koroitamana* ¶ 15, at 39.

467. *Id.* ¶ 9, at 37 n.16 (citing *Singh* ¶¶ 3–11, at 329–32; ¶ 146, at 381; ¶¶ 204–05, 207, at 400; and ¶ 272, at 419).

468. *Id.* ¶ 9, at 37 n.17 (citing *Singh* ¶ 30, at 340; ¶ 190, at 395; and ¶ 252, at 414).

469. *Id.* ¶ 9, at 37 n.18 (citing *Singh* ¶ 30, at 340–41).

470. According to the analytical framework, the children were not stateless because, under *jus sanguinis*, they are presumed to inherit the duty of permanent loyalty owed by their parents to Fiji; and under *jus soli*, they are presumed to owe a duty of permanent loyalty to the Australian sovereign. The Commonwealth, nonetheless, can regulate the conditions that said duty can give rise to allegiance.

Justices Gummow, Hayne and Crennan followed similar reasoning,[471] emphasizing that "the possession of a foreign nationality or allegiance"[472] is a "relevant characteristic"[473] for establishing the status of a constitutional alien. This characteristic led their Honors to find the applicants "aliens."[474] However, their Honors also proposed that "stateless" is a "relevant characteristic" rendering a person an "object[] of the exercise of the aliens' power."[475]

In contrast, Justice Kirby reiterated that "Australian constitutional notions of alienage and nationality are to be understood in the context of any universal principles of fundamental human rights applicable to and accepted by, the community of civilized nations."[476] He referred to the international law context on nationality, as found in the *Universal Declaration of Human Rights*,[477] the *International Convention on Civil and Political Rights*,[478] and the *Convention on the Rights of the Child*.[479] His Honor also provided a clear statement on the difference between "nationality" and "citizenship" in finding that "[i]n Australia, nationality is not expressed in the *Constitution* in terms of citizenship,"[480] and restated "the rejection of the constitutional idea of nationality as a birthright."[481]

While Justice Callinan was also clear that the applicants can become Fijian citizens by registration,[482] he found them to be "effectively stateless persons, absent registration or success in these proceedings."[483] Nevertheless, he also concluded that the case of the applicants was "relevantly indistinguishable from *Singh*."[484]

The two children are also constitutional aliens under the proposed framework. The children never owed the *requisite* duty of permanent

471. *Koroitamana* ¶ 28, at 41–42.

472. *Id.* ¶ 30, at 42.

473. *Id.*

474. *Id.* ¶ 49, at 46.

475. *Id.* ¶ 31, at 42.

476. *Id.* ¶ 66, at 50 (citing Al-Kateb v. Godwin (2004) 219 CLR 562 ¶¶ 174–75, at 624 (referring to Newcrest Mining (WA) Ld. v. Commonwealth (1997) 190 CLR 513, 658 (Austl.)).

477. *Id.* ¶ 66, at 51 (citing G.A. Res. 217 (III) A, Universal Declaration of Human Rights arts. 15(1) and (2), Dec. 10, 1948).

478. *Id.* ¶ 67, at 51 (citing International Convention on Civil and Political Rights art. 24.3 ("Every child has the right to acquire a nationality."), Dec. 16, 1966, 999 U.N.T.S. 171).

479. *Id.* ¶ 68, at 51 (citing Convention on the Rights of the Child arts. 7 and 8, Nov. 20, 1989, 1577 U.N.T.S. 3).

480. *Id.* ¶ 54, at 47.

481. *Id.* ¶ 62, at 49.

482. *Id.* ¶ 85, at 55 (citing CONSTITUTION OF THE REPUBLIC OF THE FIJI ISLANDS 1997 § 12(1) (Fiji)).

483. *Id.* ¶ 85, at 55.

484. *Id.* ¶ 86, at 56.

loyalty to the Australian sovereign, their *jus soli* being regulated the same way as in *Singh*, under the *Australian Citizenship Act 1948* (Cth) (and amendments). The two children were born in 1998 and 2000. This means that they came under section 10(2) of the 1948 Act, which states that after the passing of the *Australian Citizenship Amendment Act 1986* (Cth), the requisite duty of permanent loyalty arising from *jus soli* was conditional on either one of the parents being an Australian citizen or permanent resident, or on ordinary residence in Australia for ten years after birth. In 2006, the time when alienage was to be decided, neither of these conditions was met. The *jus soli* channel was, therefore, not effective in giving rise to the requisite permanent loyalty to the Australian sovereign.

Moreover, statelessness does not affect their alienage, but the Commonwealth's duty of protection towards them. A stateless person is "a person who is not considered as a national by any State under the operation of its law."[485] The two children in this case were not stateless because they had an effective *jus sanguinis* channel under the operation of Fijian nationality law: they could obtain the nationality of their parents through registration. This, then, does not engage the outer limit on the ability of the Commonwealth to deport the children.

E. Love *and* Thoms[486]

The relevant facts in the case are as follows. Daniel Alexander Love was a citizen of Papua New Guinea ("P.N.G."), born there in 1979.[487] His father was, similar to Ame, a citizen of Australia by birth since he was born in Port Moresby, the capital of P.N.G., which at the time was an Australian territory.[488] His mother was a citizen of P.N.G.[489] Love identified himself "as a member of the Kamilaroi group and [was] recognized as such by one elder of that group."[490] Although Love was granted a permanent residency visa for Australia in 1985 and resided in Australia continuously since then,[491] he had never sought or acquired Australian citizenship.[492] On May 25, 2018, Love was convicted of assault

485. Convention Relating to the Status of Stateless Persons art. 1(1), Sept. 28, 1954, 360 U.N.T.S. 117.

486. Love v Commonwealth, (2020) 270 CLR 152 (Austl.).

487. *Love* and *Thoms,* ¶ 150, at 214.

488. *Id.*

489. *Id.*

490. *Id.* ¶ 155, at 215.

491. *Id.* ¶ 152, at 214.

492. *Id.*

occasioning bodily harm[493] and was sentenced to 12 months' imprisonment. Subsequently, his visa was canceled.[494] Brendan Craig Thoms also identified "as a member of the Gunggari People and is accepted as such by other members of the Gunggari People."[495] He was a citizen of New Zealand, born there in 1988.[496] At the time, his father was a New Zealand citizen, and his mother an Australian citizen, although Thoms never acquired Australian citizenship.[497] Thoms obtained a Special Category Visa in 1994 from Australia and did not travel out of Australia after 2003.[498] In 2018, he was convicted of a domestic violence offence,[499] and sentenced to 18 months' imprisonment. His visa was subsequently canceled.[500]

Three of the seven HCA justices accepted the *Pochi-Nolan* dichotomy, and therefore found Love and Thoms to be constitutional aliens. Chief Justice Kiefel rejected the plaintiffs' argument that aboriginality necessitated permanent protection from the Crown.[501] She argued that since Australia became an "independent sovereign country," the word "alien" became synonymous with "non-citizen."[502] She then looked at cases concerning alienage, where she pointed to the power of the Commonwealth Parliament to treat "an alien as a stateless person,"[503] and to the etymological meaning of "alien" as "one belonging to another place,"[504] more specifically, as one who "belongs to the sovereign State of which they are a citizen."[505] Justice Kiefel continued to explain that the category of non-alien-and-non-citizen, argued in *Ex parte Taylor*,[506] had already been rejected in *Shaw*.[507] Similarly, Justice Gageler found that Aboriginal Australians were within the standard common law or statutory

493. Under the Criminal Code (Qld) s 339 (Austl.).

494. Under the Migration Act 1958 s 501(3A) (Cth) (Austl.); see *Love* and *Thoms,* ¶ 153, at 214.

495. *Love* and *Thoms,* ¶ 158, at 215.

496. *Id.* ¶ 156, at 215.

497. *Id.*

498. *Id.* ¶ 157, at 215.

499. Criminal Code 1995 (Qld) s 339(1) (Austl.); *see Love* and *Thoms,* ¶ 159, at 215.

500. Under the Migration Act 1958 s 501(3A) (Cth) (Austl.); *see Love* and *Thoms,* ¶ 159, at 215.

501. *Love* and *Thoms,* ¶¶ 36–38, at 179–180.

502. *Id.* ¶ 9, at 172 (the proposition that "non-citizen" and "alien" are synonymous was explicitly rejected by Justice Kirby in his critique of the *Nolan* decision in *Ex parte Taylor*); *see Ex parte Taylor,* ¶ 300, at 501; *see also Shaw,* ¶¶ 68–80, at 55–60 (referring to *Pochi,* at 109–10; *Nolan* at 185–86, 190).

503. *Id.* ¶ 16, at 174 (citing *Koroitamana).*

504. *Id.* ¶ 18, at 175 (citing *Nolan* at 183).

505. *Id.* ¶ 32, at 178.

506. *Id.* ¶ 39, at 180 n.111 (citing *Ex parte Taylor,* ¶ 52, at 417; *id*. ¶ 136, at 444; *id.* ¶ 308, at 504–05; *id*. ¶ 377, at 530).

507. *Love* and *Thoms,* ¶ 39, at 180 (referring to *Shaw* ¶ 31).

rules governing the *Pochi-Nolan* dichotomy.[508] There was, therefore, no "constitutional category of 'non-citizen non-aliens.'"[509] Moreover, for Justice Gageler, owing allegiance to a foreign sovereign was not an "essential characteristic" of the term "alien,"[510] because it was in tension with the plenary nature of the aliens power, as well as making the issue turn on the content of foreign law.[511] Justice Keane also agreed with the *Pochi-Nolan* dichotomy,[512] although he also stated that section 51(xix) power has limits in that "the Commonwealth Parliament cannot, simply by inventing its own peculiar definition of 'alien,' expand the power under section 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word."[513] He emphasized that the statutory description "reflects the ordinary meaning of 'alien' as a person who is not a citizen of Australia but is a citizen of a foreign State."[514]

On the other hand, four out of the seven HCA justices rejected the *Pochi-Nolan* dichotomy, arguing that citizenship is an uncertain statutory concept, and that the dichotomy would have unjust consequences for Aboriginal Australians. Justice Bell found that the category of non-citizen-and-non-alien exists, and that Aboriginal Australians belonged to this category.[515] She also found that the "possession of foreign citizenship [does not] necessarily bring[] a person within the scope of the aliens power."[516] Her Honor went on to explain that she was "authorised by the other members of the majority to say that although we express our reasoning differently, we agree that Aboriginal Australians (understood according to the tripartite test in *Mabo [No 2]*) are not within the reach of the 'aliens' power conferred by s 51(xix) of the *Constitution*."[517] Justice Bell approached the legal issue by looking at the ordinary understanding of the word "alien,"[518] stressing that "at Federation, Aboriginal Australians were not aliens."[519] Justice Nettle was also of the view that Love and

508. *Id.* ¶ 103, at 201.

509. *Id.* ¶ 132, at 210.

510. *Id.* ¶ 89, at 195.

511. *Id.* ¶ 89, at 195 n.184 (citing *Singh,* ¶ 154, at 383; ¶ 190, at 395; ¶ 200, at 398; *Ex parte Ame,* ¶ 35, at 460–61).

512. *Id.* ¶ 172, at 219–20 (citing *Ex parte Te,* ¶ 26, at 172; *Koroitamana,* ¶ 48, at 47).

513. *Id.* ¶ 168, at 218 (citing *Pochi,* at 109).

514. *Id.* ¶ 172, at 219–220.

515. *Id.* ¶¶ 81–82, at 192.

516. *Id.* ¶ 66, at 188.

517. *Id.* ¶ 81, at 192.

518. *Id.* ¶ 50, at 183 (citing *Pochi,* at 109 (Gibbs, CJ, Mason, J agreeing at 112; Wilson, J agreeing at 116)).

519. *Id.* ¶ 52, at 183.

Thoms were not aliens because "they have so strong a claim to the permanent protection of—and thus so plainly owe permanent allegiance to—the Crown in right of Australia that their classification as aliens lies beyond the ambit of the ordinary understanding of the word."[520] In addition, Justice Gordon, in finding Love and Thoms non-aliens,[521] rejected the dichotomy,[522] because there is no complete alignment between "non-citizen" and "alien,"[523] citing *Pochi* as an authority for this proposition.[524] She explained that "[t]he word 'alien' . . . describes a person's '*lack* of relationship with a country' (emphasis added)."[525] Her Honor then stated that "[i]t is connection with land and waters that is unique to Aboriginal Australians . . . It is a connection which existed and persisted before and beyond [British] settlement, before and beyond the assertion of [British] sovereignty and before and beyond Federation."[526] The fourth member of the bench to reject the *Pochi-Nolan* dichotomy was Justice Edelman. He also emphasized the irrelevance of statutory citizenship to the definition of the constitutional term 'alien.'[527] For Justice Edelman, the "antonym of an alien to the community of the body politic cannot be a 'citizen.' It is a 'belonger'[528] to the political community."[529] Love and Thoms were therefore not constitutional aliens given their belonging to certain Aboriginal groups.

The proposed analytical framework suggests that Love never owed a duty of permanent loyalty to the Australian sovereign. The issue is whether the prosecutors had permanent loyalty to the Australian sovereign at the time they were convicted and sentenced, i.e., in 2018. We need to ascertain the channel that has given rise to the requisite duty of loyalty alleged to be owed by Love and Thoms to Australia. The channel is claimed to be based on their membership in Aboriginal groups, which in turn requires understanding the channel that has given rise to permanent loyalty between the First Nations and the Australian sovereign. The channel is sometimes stated to be the enlarged doctrine of *terra nullius*, which made

520. *Id.* ¶ 252, at 244–45.

521. *Id.* ¶ 293, at 261; ¶¶ 375–86, at 284–86.

522. *Id.* ¶ 304, at 264.

523. *Id.* ¶ 309, at 265–66.

524. *Id.* ¶ 309, at 265 n.510 (citing *Pochi,* at 109–10).

525. *Id.* ¶ 302, at 263 (citations omitted).

526. *Id.* ¶ 363, at 280–81.

527. *Id.* ¶ 394, at 288.

528. *Id.* ¶ 394, at 288 n.622 (citing R (Bancoult) v. Sec'y of State for Foreign & Commonwealth Affs., [2001] QB 1067 ¶ 43, at 1099; Stephanie Jones, *Colonial to Postcolonial Ethics: Indian Ocean 'Belongers', 1668–2008*, 11 INTERVENTIONS: INT'L. J. OF POSTCOLONIAL STUD. 212, 220–21 (2009) (referring to Magna Carta, Ch. 29)).

529. *Love* and *Thoms,* ¶ 394, at 288.

all First Nations British subjects.[530] Members of First Nations were, therefore, naturally born into allegiance (through *jus soli* or *jus sanguinis*) since January 1, 1921.[531] However, this enlarged *terra nullius* doctrine has already been discredited under international law:[532] It would not furnish a sound legal basis for the proposed loyalty. In other words, there is doubt as to the validity of *de jure* British sovereignty in Australia. A more secure view is that Australia's First Nations became stateless after the 1788 *de facto* British sovereignty over New Holland (what the continent was known as before British settlement). Then, after the 1954 and 1961 United Nations Conventions on statelessness, First Nations were deemed to owe a duty of permanent loyalty to the Australian sovereign, and the Commonwealth was deemed to owe a duty of protection to First Nations.[533] The same result would have been obtained under article 24(a) and article 25(2) of the *Draft Articles on Nationality and Natural Persons in Relation to the Succession of States*, which have been adopted by the

530. Nationality Act 1920 s 6 (Cth) (Austl.); *see supra* Section I.

531. The 1920 Act received the royal assent on Dec. 2, 1920. *See* Commonwealth Gazette, No. 108 (Dec. 9, 1920), 2255. Under the Acts Interpretation Act 1901 (Cth) s 3A (Austl.), given the absence of a specific provision in the 1920 Act, "An Act (other than an Act to alter the Constitution) commences on the 28th day after the day on which that Act receives the Royal Assent." The 1920 Act established a nationality standard for Australia, under which First Nations would be deemed nationals. Another view suggests that First Nations became Australian nationals at the time Australia gained independence. Justice Murphy has suggested that this occurred at Federation, given that section 128 of the *Australian Constitution* gives the Commonwealth Parliament the legislative power to amend the *Constitution*. *See* China Ocean Shipping Co v S Australia, (1979) 145 CLR 172, 236–37 (Murphy, J) (Austl.); Kirmani v Captain Cook Cruises Pty Ltd (No 1), (1985) 159 CLR 351, 383 (Murphy, J) (Austl.); Bistricic v Rokov, (1976) 135 CLR 552, 567 (Murphy, J) (Austl.). *But cf.* Geoffrey Lindell, *Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence*, 16 FED. L. REV. 29 (1986) (arguing that Australia's independence was an evolutionary process that started with the Statute of Westminster 1931 (UK) and ended with the Australia Act(s) 1986 (Cth) (UK)); George Winterton, *The Acquisition of Independence*, *in* REFLECTIONS OF THE AUSTRALIAN CONSTITUTION 31 (Robert French, Geoffrey Lindell & Cheryl Saunders eds., 2003) (arguing that Australia's full independence was achieved in 1930 due to a change in the constitutional convention as to who would give effective advice to the Crown. This change divided the Crown among existing Dominions; there was now a Crown in right of Britain and a Crown in right of Australia).

532. *See* Daniel Lavery, *supra* note 37.

533. *See* United Nations Convention Relating to the Status of Stateless Persons art. 2 ("Every stateless person has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."), Sept. 28, 1954, 360 U.N.T.S. 117; United Nations Convention on the Reduction of Statelessness art. 1(1) ("A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.") and art. 4(1) ("A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State."), Aug. 30, 1961, 989 U.N.T.S. 175. The 1954 and 1961 Conventions create the requisite reciprocal duties of permanent loyalty and permanent protection for allegiance to a Contracting State. However, Australia has never ratified either of these Conventions.

International Law Commission (ILC).[534] The outer limit on the protection of First Nations people was finally given effect by repealing section 127 of the *Australian Constitution* in 1967, which suggests that the channel through which First Nations had their permanent allegiance to the Australian sovereign was through *jus domicile*. They were naturalized into permanent allegiance. This means that for Love and Thoms to have permanent loyalty to the Australian sovereign, *irrespective of their aboriginality*, they have to be naturalized. And since neither Love nor Thoms had been naturalized at the time alienage was to be tested, they would be constitutional aliens. Their aboriginality cannot secure membership into the non-alien-and-non-citizen category.[535]

On the other hand, *jus sanguinis* suggests that Thoms was not a constitutional alien—until 2018. I will also discuss this right regarding Love for completeness. Under this channel, the requisite duty of loyalty to Australia arises from the duty of loyalty owed by one or both parents. Love's paternal great-grandfather, Frank Wetherall, was born in Queensland and was descended from the First Nations, as was his paternal great-grandmother, Maggie Alford.[536] Both Wetherall and Alford would have been stateless between 1788 and 1921. While *jus sanguinis* could transfer their allegiances to Love, their nations were not part of the Commonwealth until section 127 of the *Constitution* was repealed in 1967. Similarly, Love's father was an Australian citizen by birth, born in Port Moresby, but was an Australian citizen by reason that at the time of his birth Papua was an Australian Territory. Love's father was in the same position as Amos Bode Ame was in 2005, a constitutional alien. Love's father cannot help Love argue a duty of loyalty owed to the Australian sovereign based on his father's status as an Australian citizen by birth in the Territory of Papua (see above). As to Thoms, his mother was an Australian citizen by birth, "which entitled Mr Thoms to acquire Australian citizenship . . . [but] he has never sought to acquire that status."[537] The analysis proceeds similar to the situation of the two Fijian children in *Koroitamana*. In that case, Justice Callinan dissenting, the two children were not stateless because they had *the right* to be Fijian citizens

534. *Ex parte Ame,* ¶ 125, at 485 (citing Int'l L Comm'n., Rep. on the Work of Its Fifty-First Session, *Nationality of Natural Persons in Relation to the Succession of States*, U.N. Doc. A/54/10, at 19 (1999)).

535. Had Love and Thoms been stateless, not having a permanent allegiance to a foreign sovereign at the time their alienage was decided, there would have been a duty of protection on the Commonwealth towards them. This was not the case given that Love and Thoms had P.N.G. and New Zealand citizenship respectively.

536. *Love* and *Thoms,* ¶¶ 79–80, at 191–82.

537. *Id.* ¶ 156, at 215.

upon application. In this case, *jus sanguinis* deems Thoms to owe the requisite duty of loyalty to Australia. Thoms was an example of a member of the non-alien-and-non-citizen category. Notwithstanding, the superposition of his requisite duty of loyalty collapsed in 2018, upon being convicted of a domestic violence offence, leaving him with a permanent loyalty, and hence permanent allegiance, only to New Zealand. It follows that Thoms was an alien under section 51(xix) of the *Constitution*. This channel, therefore, did not survive deportation under the *Migration Act 1958*.

CONCLUSION

Historically, there have been two HCA schools of interpretation on the meaning of "aliens" under section 51(xix) of the *Australian Constitution*. One school came to be known as the *Pochi-Nolan* school, named after two HCA cases, where the majority adopted a dichotomy between alienage and Australian citizenship.[538] The other school, adopted by the HCA majority in *Re Patterson; Ex parte Taylor*,[539] suggests that the dichotomy is imprecise: There is a non-alien-and-non-citizen category, to which historically belonged persons with the status of a British subject. In the 2020 *Love* and *Thoms* decision, a four-to-three majority in the HCA resurrected this category to include persons belonging to Australia's First Nations.

In this Article, I have argued that both approaches misinterpret constitutional alienage. The legal status of a person in Australia depends on her relationship with the sovereign, namely, the Crown-in-Parliament. An alien is a person who owes no duty of permanent loyalty to the Australian sovereign. The duty arises (disjunctively) from four rights: *jus soli*, *jus sanguinis*, *jus domicile*, and *jus asyli*; and is a requisite for permanent allegiance to the Australian sovereign. This allegiance represents a double bond. The first bond is the duty of permanent loyalty owed by a person to the Australian sovereign. The second is a duty of permanent protection owed by the Australian sovereign to said person. The latter duty arises from the Commonwealth right to sovereignty under the Australian monarch. These rights are not absolute. While the four loyalty (personal) rights and the protection (sovereignty) right are constitutional and cannot be altered except through referenda under section 128 of the *Australian Constitution*, the duties are statutory, with superposed loyalties

538. Pochi v McPhee, (1982) 151 CLR 101 (Austl.); Nolan v Minister for Immigr & Ethnic Affs, (1988) 165 CLR 178 (Austl.).

539. *Re* Patterson; *ex parte* Taylor, (2001) 207 CLR 391 (Austl.).

being the outer limit on regulating the requisite duty of loyalty, and statelessness, being the outer limit in the case of protection.

Before 1930, permanent loyalty to the United Kingdom also informed permanent allegiance to the Australian Sovereign. The two loyalties were superposed—coinciding perfectly, due to the unity of the Crown in the United Kingdom and Australia. This legal fiction is analogous to the quantum principle of superposition in the mental experiment known as Schrödinger's cat, where a cat in a box is *both* dead and alive until we look inside the box. Similarly, a person's permanent loyalties are superposed, until she breaches her duty of loyalty to Australia, which leaves only an allegiance to a foreign state. The legal principle of superposition reconciles statutory dual citizenship in Australia with the constitutional doctrine of indivisible allegiance that survives through section 44(i) of the *Constitution*. This doctrine continues to inform section 51(xix) beyond the requirement of disqualification of members of the Commonwealth parliament. This is so, given that the history of section 44(i), going back to the *Settlement Act 1701*,[540] suggests that indivisible allegiance informs the citizenship status of all Australians. Later statutory intervention allowing for dual citizenship, since 2002, must conform to the same indivisible allegiance doctrine. This is where superposition provides consistency. The superposed duties allow for dual citizenship as long as these duties are not conflicting. Heinous crimes and terrorist acts, *inter alia*, will collapse the loyalties, leaving the Commonwealth free to sever a person's permanent allegiance. The limit on this sovereign right is statelessness under international law.

Based on this theory, at Federation, the Commonwealth owed no duty of protection to Australia's First Nations because they were not British subjects. In 1900, that relationship was defined by British nationality law; and since 1920, by Australian nationality law. Both nationality standards were derived from a person's membership in a particular nation (the United Kingdom and Australia respectively). A critical point, therefore, relates to the change in the status of First Nations when they became British subjects on January 1, 1921, after the *Nationality Act 1920* came into force.[541] Prior to this date, they had to apply to become naturalized in the same way as aliens. Therefore, the current relationship between the Commonwealth and these autochthonous nations could limit the sovereign right of the former only as envisaged by the *Australian Constitution*. However, it is not clear whether these Nations ever had allegiance to the British, and later, to the Australian sovereign. The enlarged *terra nullius*

540. Act of Settlement 1700, 12 & 13 Will. 3 c. 2 (Eng. & Wales).

541. Nationality Act 1920, (Cth) (Austl.).

doctrine is no safe ground for finding British sovereignty over New Holland, now known as Australia. Today, a person's allegiance to a First Nation does not create the requisite duty of loyalty to the Australian sovereign, given that there has never been an exchange of sovereignties between the First Nations and the Australian sovereign, similar, for example, to that in New Zealand under the *Treaty of Waitangi* (signed on February 6, 1840, between the Maori of Aotearoa New Zealand and the British Crown). It could well be that the Commonwealth is a plurinational state, made of many nations that do not owe allegiances to the Australian sovereign. In essence, there could be spheres of sovereignty that leave members of First Nations as constitutional aliens even today. Only a process of treaty-making could lead to an exchange of sovereignty that can bring Australia's First Nations into a permanent duty of loyalty to the Australian sovereign.

However, the non-alien-and-non-citizen category is not of historical relevance only, it includes persons owing a duty of permanent loyalty to the Australian sovereign but who have not become citizens under Commonwealth legislation. Crucially, the theory of alienage expounded in this Article suggests that certain persons can be constitutional aliens and Australian (statutory) citizens, simultaneously. For example, where an Australian citizen breached her requisite duty of permanent loyalty by not conforming to Australia's laws, or by not maintaining public order. A person who commits heinous crimes such as sexual assault on children is still an Australian citizen, even though the person has breached her permanent duty of loyalty. The Commonwealth legislative intervention, under the *Migration Act 1958*,[542] does not reach this person, even if she has allegiance to a foreign sovereign. Legislative intervention is needed to rectify such outcomes, notwithstanding the limit of statelessness, to ensure that such persons are not able to enjoy the status of Australian citizenship, for example, by aligning their alienage with a permanent residency visa instead. The rationale for this proposition flows directly from the theory expounded in this Article. The cardinal principle of nationality law is owing a permanent duty of loyalty to a sovereign. Breach of this duty destroys the (permanent) bond under which someone can claim citizenship. In essence, the theory is relational, where citizenship is a statutory privilege, not a constitutional right.[543]

542. Migration Act 1958, (Cth) (Austl.).

543. The theory is based on the same relational worldview that underpins organization at the quantum scale. See generally CARLO ROVELLI, HELGOLAND, MAKING SENSE OF THE QUANT (2021) (arguing that the universe is not made of objects but of relations; constructs such as citizenship and nationality have no intrinsic properties and can have meaning only when they interact with (hidden) behaviour).

So, was Schrödinger's cat a constitutional alien in Australia? Based on the duty-based theory of constitutional alienage developed in this Article, the answer depends on whether the cat had a duty of permanent loyalty to the Australian sovereign. Ascertaining whether a person is an alien requires an analysis of the legal right claimed to have given rise to this duty of loyalty, and the reciprocal duty of protection owed by the Commonwealth to her. Only four rights, *jus soli, jus sanguinis, jus domicile, and jus asyli*, can give rise to the prerequisite duty. Allegiance to the Australian sovereign is based on a double bond: a duty of permanent loyalty owed by the person to Australia, and a duty of permanent protection owed by the Commonwealth to that person. Allegiance based on local duties (applying only as long as the person is within Australia) or temporary duties (applying only within Australia and only for a specific duration), as in the case of immigrants and visitors to the Commonwealth, respectively, do not constitute the required allegiance—leaving such persons as constitutional aliens. Moreover, the rights are not absolute. The Commonwealth can exercise its sovereign right to regulate the requisite duties of permanent loyalty and permanent protection. Only statelessness under international law limits this right. Hence, a stateless person can be an alien and still impose on the Commonwealth a duty of protection, for example, through permanent residency.

INSTIGATOR AND PROXY LIABILITY IN THE CONTEXT OF INFORMATION OPERATIONS

Carolyn Sharp

ABSTRACT

As the success and sophistication of information operations continues to increase, States may soon bypass conventional warfare by manipulating information streams and exploiting those effects to net the results of a successful war campaign using proxies. This will be possible as States effectively utilize catalogues of human data, combined with psychological tactics, to target and influence specific individuals to act for the benefit of the State. In other words, peacetime information operations could incite targeted individuals to carry out an attack while the instigating State observes and coaches its proxies from the sidelines. This article argues that this dynamic would create a situation in which an instigating State is both attacking and not attacking another State. Nevertheless, both the instigating State and proxy would bear responsibility for the attack because each would have a distinct role as instigator and attacker, i.e., they would both be a proximate cause. However, if targeted individuals can show that preventive measures were taken to withstand the effects of malicious information operations, their responsibility for the act would be judged using a reasonableness standard.

I. INTRODUCTION

In the second collection of Aesop's Fables, we learn about a cunning monkey who persuades his friend, Cat, to reach her paw into the fire and retrieve their master's roasting chestnuts so they can eat them before he returns. Each time Cat puts her paw into the fire and rakes another chestnut out over the coals it becomes more severely burned, yet she continues steadfastly in collecting the chestnuts. When the master of the house suddenly enters the room and interrupts Cat from her determined pursuit, she turns around only to discover that Monkey has eaten all the chestnuts.[1]

This centuries-old tale has long highlighted the notion of one party being used for the benefit of another. Indeed, a variety of dictionaries define the term "cat's paw" as "one used by another as a tool," "a person used to serve the purposes of another," or "a person who is used by another to carry out an unpleasant or dangerous task."[2] Notably, each of these definitions imply that the person acting on behalf of the other would not be undertaking such action without the initial interference or oversight of the other. They also imply that there is no complete and shared understanding among the parties as to the ultimate purpose of the agreed upon undertaking. In other words, one party has a complete understanding of the purpose(s) of the endeavor while the other party's understanding is, unbeknownst to them, limited.

A cat's paw dynamic can apply in situations as simple as attaining a warm meal of roasted chestnuts, to highly complex situations involving myriad resources and painstaking preparation. Indeed, it is plausible that a cat's paw dynamic could apply in situations where an entity, such as a State, used its resources to covertly influence key individuals from another State to act for its benefit. Similar to the roles of Cat and Monkey, the instigating State would plausibly incur no harm from the endeavor, while the targeted individuals from the other State would bear the burden of their actions.

For example, if State *X* wanted to weaken State *Y*, instead of kinetically attacking or openly drawing resources out of State *Y*—which would certainly implicate State *X*—it could indirectly attack State *Y* via cyber backchannels to effectively influence certain classes of individuals

1. Aesop, *The Monkey & the Cat*, *in* THE AESOP FOR CHILDREN: WITH PICTURES BY MILO WINTER (Rand, McNally & Co., 1919), https://read.gov/aesop/076.html.

2. *Cat's-paw*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cat%27s-paw (last visited March 16, 2022); *see also Cat's Paw*, DICTIONARY.COM, https://www.dictionary.com/browse/catspaw (last visited March 16, 2022); *Cat's-paw*, OXFORD, https://www.lexico.com/definition/cat's_paw (last visited March 16, 2022).

within State *Y* to mount their own insurrection. This internal conflict would produce the intended outcome of weakening State *Y* with no relative cost to State *X*. It would also not facially implicate State *X* with regard to state responsibility because the individuals would have changed their behavior via State *X*'s interference but would have appeared as (and believed themselves to be) independent actors. Specifically, the individuals would have had no knowledge of their role as State *X*'s proxy and no understanding of State *X*'s role in the matter. Because of this information asymmetry, where State *X* is not evidently linked to its proxies' attack, the proxies would incur all costs associated with attacking State *Y*.

Article 4 of the Articles on State Responsibility, which bases responsibility on the conduct of the State or organs of the State, would not be implicated in this situation because the proxy acting for the benefit of the instigating State would not be doing so as an organ of the State, and would almost certainly not be accorded status as an organ of the State.[3] While the proxy's decisions would be based on changed behavior that was shaped by the instigating State, accountability for such behavior and subsequent actions would ultimately (and purposefully) remain with the individual. Therefore, unless the instigating State accorded the proxies a status as an organ of the State there would be no apparent basis for equating the proxy's conduct to conduct of an organ of the instigating State.

Likewise, Article 8 holds that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[4] This language imparts responsibility to a State based on the conduct of a person or group of persons who "*in fact*" act "on the instructions of, or under the direction or control of, the State."[5] Because of this fact-based mandate, State *X* would not be implicated in the proxy attack due to the intentionally covert information operations that by their very nature inhibit sufficient factual findings linking an instigating State's involvement to its proxy's actions.[6]

3. G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, at 4 (Dec. 12, 2001).

4. *Id*. at 8.

5. *Id*. (emphasis added).

6. *Id*.

This means that not only could States theoretically bypass war by instigating an attack on another State via proxies, but States could also seemingly bypass accountability for these actions due to the proxy's role as the immediate cause of the attack and the absence of available facts linking the interference of the instigator to its proxies. State *X* could effectively be attacking State *Y* via its proxies while at the same time not obviously attacking State *Y* due to the inconspicuous nature of information-operations proxy warfare.

While the proxies in such a situation must bear responsibility for their actions, the responsibility for the attack must also lie with the instigating State. However, based on the current application of the law, an instigating State's covert role in info-ops proxy warfare is not explicitly accounted for. Specifically, when holding a party responsible for an attack, the *prima facie* attacker bears full responsibility for the attack. This loophole provides instigating States a "have your cake and eat it too" outcome with regard to info-ops proxy warfare because the instigating State is not directly carrying out the attack—its proxy is—and the facts linking the instigator to the proxy are largely unavailable.

Because each party serves as one half of the whole source of an attack, it is necessary to consider the whole equation of factors when determining responsibility for an info-ops proxy attack. Under this analysis, an instigating State's act against another State via its proxies would result in responsibility, based on the Cat's Paw doctrine, because of its purposeful interference with the proxy's behavior.[7] Both the instigating State and the proxy would be the proximate cause of the attack as each play a specific and complicit role as instigator and attacker.

While proxy/cat's paw responsibility would not be negated due to the instigating State's role in the attack, accountability should be constrained when an individual takes preventive measures to explicitly rebuff the effects of info-ops proxy warfare. These proactive measures would not only serve as a barrier in protecting the individual from deceptive tactics, but they would also demonstrate an intent to play no role in furthering the cause of an instigating State's interests.

In sum, this article argues that an info-ops proxy war could allow an instigating State to influence individuals within a targeted State to act for its benefit. In this manner, the instigating State could covertly interfere with the habits and decisions of its proxies, leading them to initiate an attack against a targeted State (insurrection, for example), all while the

7. *See* Staub v. Proctor Hosp., 562 U.S. 411, 412 n.1, 424 (2011).

interference of the instigating State would remain unassociated with the action of its proxies. In such a dynamic, where the instigating State is both attacking and not attacking due to the purposeful and effective interference—yet dearth of non-circumstantial facts linking the instigator to its proxy—evaluation of the attack should not be limited to the outcome, or effects, of the action and the immediate cause of such effects. Rather, an analysis of an attack linked to info-ops proxy war should be expanded to include the whole equation of necessary components. Under a whole equation test, both the instigator and the proxy would be liable as a proximate cause of the attack based on the Cat's Paw doctrine. Furthermore, proxy accountability should be limited in situations where the individual took steps to mitigate erroneous behavior due to a known potential for harmful influential operations.

Part II will examine the tactics of targeted information operations and what sets them apart from peacetime activities. Part III will then evaluate instigator's responsibility in the context of info-ops proxy warfare. Part IV will evaluate proxy responsibility. Part V will conclude.

II. INFORMATION OPERATIONS

Targeted information-operations are a unique form of warfare due to the information asymmetry between an instigating State and its targets i.e., the targeted individual/proxy and the affected State. This information asymmetry is advantageous because it decreases the potential for liability due to its invisible operations and increases the ability to manipulate an individual since the individual is ignorant of the actions being taken against them.[8] Although targeted individuals may not understand their role in furthering the cause of the instigating State's interest, States that seek to influence behavior for specific purposes will always be dependent upon favorable responses of the individuals. Thus, instigating States would not likely engage in info-ops proxy warfare unless it was possible to have some degree of control over the outcome.

One way to understand how an instigating State can influence proxies with a measure of confidence is to look to the private sector's approach in the parallel field of targeted marketing. Corporations spend billions of dollars annually in marketing by tracking customers preferences, moods, and behaviors (i.e., data collection) and then targeting them with specific

8. Øyvind H. Kaldestad, *Out of Control: How Consumers are Exploited by the Online Advertising Industry*, FORBRUKER RADET, 174 (Jan 14, 2020), https://fil.forbrukerradet.no/wp-content/uploads/2020/01/2020-01-14-out-of-control-final-version.pdf.

advertisements when they are optimally primed to receive them and act favorably.[9] This targeting is usually based off of data that tracks personal habits.[10] Indeed, the field of habit formation research has seen such an uptick in demand, the former chief scientist at Amazon once noted: "It's like an arms race to hire statisticians nowadays."[11]

Habits are studied by neurologists and psychologists, in part, because of their association with decision-making.[12] A study from Duke University observed that "habits, rather than conscious decision-making, shape 45 percent of the choices [humans] make every day."[13] In 2012, it was reported that the Obama campaign had hired a habit specialist to "figure out how to trigger new voting patterns among different constituencies."[14]

The obvious benefit of a habit is that as something becomes automatic the need to think decreases.[15] Reducing the need to think is not necessarily problematic because it allows the brain to conserve effort; however, allowing brains to "power down" may pose a problem when a situation demands critical thinking.[16] Habits can be "ignored, changed, or replaced," but once they are established "the brain stops fully participating in decision-making" and the process becomes automatic.[17] More specifically, as habits are formed, the behavior "shifts to the sensory motor loop that supports representations of cue response associations, and no longer retains information on the goal or outcome."[18] This means that decisions driven by habits are based on cues, not conscious effort, so a large portion of an individual's decision-making patterns are capable of being changed

9. CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 29, 68 (Crown 2016).

10. *What Is Behavioral Targeting?*, LOTAME (March 4, 2021), https://www.lotame.com/what-is-behavioral-targeting/.

11. Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.

12. LOTAME, *supra* note 10.

13. Duhigg, *supra* note 11.

14. *Id*. *See also* Tim Murphy, *Meet Obama's Digital Gurus*, MOTHER JONES (Oct. 2012), https://www.motherjones.com/politics/2012/10/obama-campaign-tech-staff/.

15. *How We Form Habits, Change Existing Ones*, SCIENCE DAILY (Aug. 8, 2014), https://www.sciencedaily.com/releases/2014/08/140808111931.htm; *see also* D.L. Ronis et al, *Attitudes, Decisions, and Habits as Determinants of Repeated Behavior*, *in* ATTITUDE STRUCTURE AND FUNCTION, 213, 219 (1989) (noting that habits are the result of automatic cognitive processes, developed by extensive repetition, and so well-learned that they do not require conscious effort).

16. Duhigg, *supra* note 11; *see also Changing Habits*, THE LEARNING CTR. UNIV. OF N.C. AT CHAPEL HILL, https://learningcenter.unc.edu/tips-and-tools/changing-habits/ (last visited March 16, 2022); *Habit Formation*, PSYCHOLOGY TODAY, https://www.psychologytoday.com/us/basics/habit-formation (last visited March 16, 2022).

17. Duhigg, *supra* note 11; *see also* PSYCHOLOGY TODAY, *supra* note 16.

18. SCIENCE DAILY, *supra* note 15.

by manipulating cues. As habit processes become increasingly understood they can become easier to control, which, in turn more easily controls decision-making.

Neurological studies have mapped the habit-formation process as a three-step loop of cue, routine, and reward.[19] This three-step loop has provided researchers a blueprint for habit experiments.[20] Research has shown that marketing campaigns realize an enormous amount of success when piggybacking on habit loops that are already in place rather than convincing consumers to establish a new habit (i.e., inviting them to purchase a novel product).[21]

However, researchers have discovered that the greatest success in molding a shopper's behavior is realized when customers are going through a major life event and their habits become disrupted.[22] At those unique moments, individuals are "vulnerable to intervention by marketers."[23] According to psychologist Wendy Wood, the first step towards effectively changing habitual behavior is to

> derail existing habits and create a window of opportunity to act on new intentions. Someone who moves to a new city or changes jobs has the perfect scenario to disrupt old cues and create new habits. When the cues for existing habits are removed, it's easier to form a new behavior.[24]

Thus, by leveraging the discontinuity of major life events, habits can be exploited, and decision-making patterns can be changed.[25] This means that, with the right resources, an instigating state could use targeted

19. CHARLES DUHIGG, THE POWER OF HABIT: WHY WE DO WHAT WE DO IN LIFE AND BUSINESS 48–52 (New York: Random House, 2012), s*ee also* THE LEARNING CENTER, *supra* note 16; Duhigg, *supra* note 11.

20. Duhigg, *supra* note 1111.

21. Crawford Hollingworth & Liz Barker, *Habits the Holy Grail of Marketing: How to Make, Break and Measure Them*, THE MARKETING SOCIETY, https://www.marketingsociety.com/sites /default/files/thelibrary/Habits%20-%20The%20Behavioural%20Architects 2.pdf (last visited March 16, 2022).

22. Duhigg, *supra* note 11.

23. *Id.*; *see also* Katherine White, Rishad Habib, & David J. Hardisty, *How to SHIFT Consumer Behaviors to be More Sustainable: A Literature Review and Guiding Framework*, 83(3) AM. MKTG ASS'N 22, 26–35 (2019), noting that "a disruption in the stable context in which automatic behaviors arise can create ideal conditions for habit change. Life changes (e.g., a recent move) make people more likely to alter their [] behaviors. . . . [O]ne means of influencing habitual change is by leveraging discontinuity, or the notion that major life change events can allow for other forms of habit change to occur. It is also possible that a certain mindset (beyond rare major life changes) can lead to habit change . . . . [A] "fresh start" mindset . . . . can be both measured and manipulated."

24. *How We Form Habits, Change Existing Ones*, *supra* note 15.

25. White, *supra* note 23.

information operations to effect changed behavior in certain classes of individuals by acting on (or creating) major life events and using this window of opportunity to alter their habits.

In sum, because an ingrained habit is hard to change, it is easier to take advantage of an already existing habit to alter decision-making patterns. However, the most effective approach is to exploit the brief period of a major life event "when old routines fall apart and . . . habits are suddenly in flux" to establish new decision-making patterns.[26] These psychologically- and neurologically-based strategies are made possible through the use of vast amounts of data and research, and scientists who know how to organize and use such data.[27] Thus, it is not a stretch to presume that a State could likewise be capable of gathering data and hiring its own team of experts to strategically alter behaviors of key individuals.

One major drawback to understanding how States (and companies) use data in relation to targeted individuals and changed behavior is an increasing reluctance to reveal data practices.[28] For States, this may come as no surprise due to national security concerns; however, companies are just as guarded.[29] Timothy Morey, Theodore "Theo" Forbath, and Allison Schoop note that "most [companies] prefer to keep consumers in the dark, choose control over sharing, and ask for forgiveness rather than permission."[30] Part of the reason for not being open about data practices is the potential alarm raised when the capabilities of such practices are exposed. For example, the New York Times reported how the retail chain Target could identify pregnant customers and tailor specific ads to them before they had revealed their pregnancy, and that consumers were taken aback and "creeped out" by this level of invasiveness.[31] The heavy backlash caused Target to modify its marketing approach to make advertisements appear more random and less invasive.[32]

26. Duhigg, *supra* note 11; *see also* Chris Palmer, *Harnessing the Power of Habits*, 51 AM. PSYCH. ASS'N 78 (2020); Adolfo Di Crosta, et. al., *Psychological Factors and Consumer Behavior During the COVID-19 Pandemic*, 16 PLOS ONE (2021).

27. *See* Maria Cohut, *What Happens In the Brain When Habits Form?*, MED. NEWS TODAY (Feb. 11, 2018), https://www.medicalnewstoday.com/articles/320874#Brain-patterns-that-indicate-habits.

28. Timothy Morey, Theodore "Theo" Forbath, & Allison Schoop, *Customer Data: Designing for Transparency and Trust*, HARV. BUS. REV., May 2015, at 1.

29. *Id.*

30. *Id.* at 4.

31. Duhigg, *supra* note 11, *see also* Larry Downes, *Customer Intelligence, Privacy, and the "Creepy Factor,"* HARV. BUS. REV., Aug. 15, 2012.

32. Duhigg, *supra* note 11.

Another reason companies choose to be protective of data capabilities is the fact that this field remains largely unregulated both within States and between States, which does little to incentivize disclosure.[33] Despite this guarded atmosphere, however, a few conclusions can be made about current and potentially future data practices.

First, technological capabilities have allowed marketers to shift from mass media marketing to using personal data in order to target consumers on an individual basis.[34] This shift, and the resulting success from it, "presupposes that the advertisers have a thorough understanding of our habits, interests, tastes and network of contacts, in order to have the greatest impact."[35] In other words, individuals are being psychologically targeted to great effect based on criteria unique to them.[36] S.C. Matz, M. Kosinski, G. Nave, and D.J. Stillwell note that "the application of psychological targeting makes it possible to influence the behavior of large groups of people by tailoring persuasive appeals to the psychological needs of the target audiences."[37]

Second, the very nature of the guarded data practices discussed above creates an information asymmetry between the State or company and the targeted individual. This allows a State or company to "be armed with thousands of data points about an individual and a large arsenal of insights derived from behavioural psychology, while the individual has no idea about the company [or malicious actor] even existing."[38] This second conclusion leads to the third conclusion on data practices: when a State or company maintains information asymmetry the ability to manipulate an individual increases.[39] This is because "it is extremely difficult for consumers to opt out [of] or otherwise protect themselves from being profiled and categorized" when they are unaware of the practices taking

33. *How Connecting 7 Billion to the Web Will Transform the World*, PBS (May 2, 2013, 4:16 PM), https://www.pbs.org/newshour/science/in-new-digital-age-google-leaders-see-more-possibilities-to-connect-the-worlds-7-billion; *see also* Kaldestad, *supra* note 8; *Meeting the Challenges of Big Data: A Call for Transparency, User Control, Data Protection by Design and Accountability,* EUROPEAN DATA PROTECTION SUPERVISOR (July 2015).

34. Leslie K. John et al, *Ads That Don't Overstep*, HARV. BUS. REV., Jan.–Feb. 2018.

35. *The Great Data Race*, DATATILSYNET (Nov. 3, 2015), https://www.datatilsynet.no/en/regulations-and-tools/reports-on-specific-subjects/the-great-data-race/.

36. S.C. Matz, M. Kosinski, G. Nave & D.J. Stillwell, *Psychological Targeting as an Effective Approach to Digital Mass Persuasion*, 114 PNAS 12714, 12714 (2017) ("people's psychological profiles can be accurately predicted from the digital footprints they leave with every step they take online").

37. *Id.*

38. Kaldestad, *supra* note 8 at 45.

39. *Id.*

place.[40] Stated further, when individuals lack the information as to how, why, or when they are being targeted—let alone who or what is targeting them—the effectiveness of persuasion techniques used against them increases.[41]

This last point is supported by research showing that success of ad personalization is based on "consumers who [a]re largely unaware that their data dictated which ads they saw."[42] Conversely, when consumers are aware of this interference, they are more resistant to it.[43] For example, a study tracking the results of a law passed in the Netherlands observed that when websites were required "to inform visitors of covert tracking . . . advertisement click-through rates dropped."[44] Interestingly, when consumers were given a certain amount of control over their information or "were merely reminded that they could" manage their information, ad performance increased.[45] This last finding may be enticing for cunning States or companies who may opt to "manipulate consumers by giving them meaningless opportunities to feel in control that create a false sense of empowerment."[46]

In sum, States and/or companies can direct specific information at targeted individuals based on that individual's personal profile. Furthermore, States and companies know that there are optimal times (and methods) for targeting individuals when the individuals are most susceptible to influence. Because these targeted data practices are largely unregulated, targeted individuals could, and likely do, remain ignorant as to who is targeting them and when, and for what purposes. Moreover, because targeted data practices yield the most effective results when individuals are unaware of—or falsely believe they are in control of—the process, targeted individuals are likely to have only a limited understanding of the level of influence over them. This invisible operation, in turn, makes it difficult for an external factfinder to connect the targeted data practices to the net results of such efforts.

40. *Id.*

41. *Id.*

42. John, *supra* note 34; *see also Behavioural Study on Advertising and Marketing Practices in Online Social Media*, 95–96 EUROPEAN COMM'N CONSUMERS, HEALTH, AGRIC. & FOOD EXEC. AGENCY (June 2018).

43. John, *supra* note 34; *see also* VENKY ANANT ET AL., *The Consumer-Data Opportunity and the Privacy Imperative* (Apr. 27, 2020), https://www.mckinsey.com/business-functions/risk-and-resilience/our-insights/the-consumer-data-opportunity-and-the-privacy-imperative.

44. John, *supra* note 34.

45. *Id.*

46. *Id.*

While manipulation, secrecy, and deceit are misguided tactics for companies to use, they are certainly a viable option for States that seek to target other States—particularly if the State's objective is to avoid detection. Nevertheless, if a State targets and influences individuals to induce the individual to attack, the State will be held liable for its proxy's actions based on its role as instigator.

III. INSTIGATOR'S RESPONSIBILITY

When a State uses highly effective info-ops via lawful channels or methods to induce certain individuals to attack a targeted State, it is critical to consider who is ultimately responsible for that attack. The answer to this question could result in a variety of outcomes. The instigating State could be liable for prohibited intervention based on its interference with the behaviors of individuals within the affected State for the purpose of weakening that State, or it could also be liable for a prohibited use of force under Article 2(4) of the U.N. Charter based on its proxy's actions.[47] If the targeted individuals (i.e., proxies) within the affected State are deemed responsible, their attack could result in criminal penalties or, in extreme cases, a non-international armed conflict. In short, if info-ops prove successful in changing the decision-making patterns of individuals so that they unknowingly take action for the benefit of the instigating State, then the affected State must be privy to this type of warfare and be able to make decisions based on a comprehensive understanding of the circumstances. Determining liability in a well-informed environment will provide the affected State the opportunity to choose the most effective and lawful response.

While it is possible for an instigating State to be held liable for the effects of its cyber actions, info-ops proxy warfare presents a unique situation.[48] Where individuals are targeted to take on the mission of the instigator, an analysis of the effects of an attack—linking the effects to the direct cause of the attack—would not immediately result in the instigating

47. U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

48. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L., 885, 916–17 (1998–1999); *see also* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., 2017).

State's responsibility because the targeted proxies would be the obvious cause of the attack, not the instigator.

This hall-of-mirrors dynamic is similar to a situation in which a belligerent strategically places civilians in harm's way in order to both accuse an adversary of attacking civilians and hold them responsible for the civilians harm.[49] Geoffrey S. Corn notes that condemnation grounded on the results of such an attack "is based on the understandable yet legally flawed assumption that the party that directly caused the harm bears legal responsibility for that harm."[50] In the case of an info-ops proxy war, the legally flawed assumption would be the conclusion that the party directly causing the harm bears *sole* legal responsibility for that harm. While the circumstances of targeted information operations are slightly different, Corn posits that "intentionally *baiting* an attacking force into directly causing civilian casualties should be condemned . . . as an *indirect attack* on civilians."[51] This notion of exploiting the effects of combat in order to achieve a strategic goal can also apply to sophisticated info-ops proxy warfare, where an instigating State baits targeted individuals to act.

Under the Cat's Paw doctrine, a concept introduced earlier in this article, the "[a]nimus and responsibility for the adverse action can both be attributed to the earlier agent . . . if the adverse action is the intended consequence of that agent's . . . conduct . . . . and if that act is a proximate cause of the ultimate . . . action . . . ."[52] In other words, the proxy's decision to attack would not automatically render the link to the instigating State "remote" or "purely contingent."[53] The instigating State's intervention would also be a proximate cause of the proxy's ultimate attack. As long as the instigating State intended for the adverse action to occur, it can be held liable for the unlawful act even if the act itself was performed by another party (i.e., the cat's paw). Based on this legal doctrine, both the instigator and the proxy would bear responsibility for their unlawful actions.[54]

In sum, when a party is effectively baited into acting for the benefit of an instigator, it is inadequate to merely link the effects of the baited party's actions to the baited party. Otherwise, the instigating State

49. *See* Geoffrey S. Corn, *Beyond Human Shielding: Civilian Risk Exploitation and Indirect Civilian Targeting*, 96 INT'L L. STUD. 117 (2020).

50. *Id.* at 125.

51. *Id.* at 127.

52. *Staub v. Proctor Hospital*, 562 S. Ct. 1186, 1192, 1194 (2011).

53. *Id.* at 1192.

54. *Id.* (In the employment law case at hand, *Staub v. Proctor Hospital*, both the instigator and cat's paw fell under the jurisdiction of their employer, who ultimately bore responsibility for their unlawful action.).

circumvents legal responsibility for its role in effecting unlawful acts. Laurie Blank notes that responsibility determinations that are based on a myopic view of the circumstances ultimately "minimizes deliberate strategies to violate the [law of armed conflict] . . . because the focus on effects trains all attention on the attack itself and not the conduct of the [other] party."[55] Thus, in considering responsibility for an attack, the affected State would need to consider the actions of the individuals carrying out the attack as well as the tactics and motives of the instigating State that *caused* the targeted individual(s) ultimate actions.

When determining this dual responsibility for info-op proxy attacks, two obvious components must be present. First, the instigating State needs to have purposefully interfered with individuals' decision-making patterns. Without this component, the targeted individual's behavior would not fit into the scheme of the instigating State's plan, as to timing and purpose. Indeed, like the effects of marketing, a consumer may ultimately decide to purchase a new item without the intervention of the company trying to sell the product, but hinging this decision on the whims of consumers will almost certainly result in a failed product, and eventually a failed company.[56] In other words, the likelihood of a third-party choosing to take a specific course of action that is particularly favorable to an entity wholly unconnected to them, without any oversight from that entity, is unlikely. As with targeted marketing, the success of targeted info-ops cannot be left to chance. When a State purposefully interferes with the behavioral decision-making processes of targeted individuals to effect unlawful outcomes, the first component of instigator responsibility is present.

While component one is dependent upon the instigating State's interference, component two depends upon the targeted individual's ultimate action, regardless of whether the instigating State's interference is known to them or not. Once the individual acts unlawfully, proxy liability is present. Details regarding component one would have to be based on the totality of the circumstances. As awareness of info-ops proxy warfare grows and measures are taken to monitor this type of interference, indicators will become more apparent.

55. Laurie Blank, *Assessing LOAC Compliance and Discourse as New Technologies Emerge: From Effects-Driven Analysis to "What Effects?"*, in THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT 36–37 (Eric Talbot Jensen & Ronald T.P. Alcala eds., 2019).

56. Tyler Sharp, *Successful Marketing Is About People, Not Products*, FORBES (Aug. 15, 2019, 8:00 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2019/08/15/successful-marketing-is-about-people-not-products/?sh=5e3103747b74 (businesses "cannot exist within their own bubble").

In a landmark study on the effectiveness of psychological mass persuasion, S. C. Matz, M. Kosinski, G. Nave, and D.J. Stillwell note that psychological persuasion could "be used to exploit 'weaknesses' in a person's character" either through "direct access to an individual's digital footprint" or inferentially, and "without their awareness."[57] However, they also note that potential instances of psychological persuasion have been flagged:

> recent media reports suggest that one of the 2016 US presidential campaigns used psychological profiles of millions of US citizens to suppress their votes and keep them away from the ballots on election day. The veracity of this news story is uncertain. However, it illustrates clearly how psychological mass persuasion could be abused to manipulate people to behave in ways that are neither in their best interest nor in the best interest of society.[58]

While it is difficult to ascertain information to prove/disprove this interference without the assistance of meaningful regulations, a whistleblower, or an instigator's (unlikely) self-disclosure, such operations may be deducible based on the totality of circumstances. Awareness of info-ops proxy warfare is the first step in adducing salient factors.

Thus, when circumstances affirmatively indicate an instigating State's purposeful actions of interference and when the targeted individuals have acted, both components are present for not only a potentially successful info-ops proxy attack but also dual responsibility for that attack. An analysis of both components provides a complete understanding as to who must bear responsibility. By holding a State responsible for its role as instigator, affected States can ensure that legal responsibility is not circumvented, and that warfare continues to be lawfully regulated.

In short, otherwise lawful info-ops directed at targeted individuals (via the State's interference with the targeted individuals' decision-making habits)—who consequently decide to act for the benefit of the instigating State (knowingly or not)—would result in the individual's change of status from target to proxy of the instigating State. This, in turn, creates liability for the instigating State because the targeted individuals would now be acting as its proxy. Furthermore, the proxy would also bear liability for his/her actions because targeted info-ops can only effectively alter habits

57. Matz, *supra* note 36 at 12717.

58. *Id*. (footnotes omitted).

and decision-making trajectories, they cannot suspend the individual's agency. The targeted individual's ability to decide his/her own course of action, however misguided, would remain with that individual.

Just as Cat was duped by Monkey and got burned after clawing the chestnuts from the embers of the fire, a decision-maker who acts at the behest of another party's influence can also end up getting burned.[59] However, proxy liability can and should be mitigated if measures were taken to avoid the manipulative effects of targeted info-ops.

IV. PROXY RESPONSIBILITY

If individuals, particularly key decision-makers within an affected State, are going to be subject to targeted info-ops, then it is imperative that they develop not only an awareness of such operations, but also the capacity to anticipate and defend against them.[60] Furthermore, if individuals want to mitigate responsibility in the context of info-ops proxy warfare, then it is imperative that they have a thoughtful decision-making process to rely on and refer to, if necessary.

The OODA (observe, orient, decide, act) loop is an analytical tool developed by Col. John R. Boyd that is meant to provide insight into a decision calculus and to adjust strategies in constant coevolution with one's strategic environment.[61] In the context of targeted info-ops, where success generally depends upon the individual's ignorance of interference within their sphere of influence, the OODA loop can be repurposed to help avoid both harmful deception and unlawful decision making.[62] If individuals can observe, orient, decide, and act to defend against

59. *See* AESOP, *supra* note 1.

60. BRIAN DAVID JOHNSON, ET AL. INFORMATION WARFARE AND THE FUTURE OF CONFLICT 11 (2019), noting that:

[t]he state of war or peace depends upon the observer, the circumstances, and context under which observations are made. In the future, the definition of battlefields, combatants, and adversaries will need to be remapped in ways that contradict and challenge existing procedures and doctrine. In the era of great power competition, commanders on future battlefields will need to converge all capabilities, both traditional and emerging information-related capabilities in novel ways across the competition, conflict, and return to competition phases of multi-domain operations.

61. JOHN R. BOYD, A DISCOURSE ON WINNING AND LOSING 385 Air University Press (Grant T. Hammond ed., 2018).

62. *Disinformation and Propaganda—Impact On the Functioning of the Rule of Law In the EU and Its Member States*, at 65, EUROPEAN PARLIAMENT POL'Y DEP'T FOR CITIZENS' RTS & CONST. AFF'S (Feb. 2019).

increasingly unconventional info-op proxy warfare, then the effectiveness of such operations can be diminished.[63]

Decision makers must be capable of (1) observing their position as a targetable and influenceable actor and monitoring their mental state throughout the decision-making process, (2) orienting their perspective to an external, neutral truth—foundational documents of the international/national legal system, for example—in order to engage a decision making process from a position of truth-based neutrality, (3) deciding on a plan of action based on an analysis of both available information and information sources, and (4) acting only after the decision-maker has exercised due diligence with respect to steps 1–3.

If malicious information operations continue to increase in intensity and effectiveness, then law of war requirements, such as the requirement to take feasible precautions in attack, will likewise demand an increased attention to facts to mitigate against erroneous decisions. Without an ability to fortify against sophisticated offensive measures that move beyond traditional forms of propaganda, manipulative attacks, phishing, etc., a targeted individual's ability to make lawful decisions will almost certainly be handicapped.

While malicious info-ops would ideally be prevented by alert and prepared governments (and a cooperative private sector), it is likely that such attacks will generally advance undetected due to a lack of relevant laws and an unwillingness and/or inability to prevent such attacks.[64] This will ultimately require individuals, including military personnel, to take additional steps to ensure that the decisions they make fall within the scope of reasonable doubt. In other words, when exercising due diligence, the reasonableness standard that is applied to erroneous decisions would only be appropriate for an affirmative defense if the proxy had considered available information *as well as* the factors at play meant to adversely influence that decision.

If preventative measures were available to help an individual avoid undesirable outcomes of info-ops proxy warfare, and the individual did not implement them, then a reasonableness standard would not likely apply. These preventative measures can be understood through a modified OODA loop paradigm:

63. Charles Ward et al., *America's Lesson From Gaza: Prepare For Disinformation War*, BREAKING DEFENSE (Nov. 12, 2021, 11:31 AM), https://breakingdefense.com/2021/11/americas-lesson-from-gaza-prepare-for-disinformation-war/.

64. Carolyn Sharp, *When Corporations Take Offensive Measures Against States*, ARTICLES OF WAR (Jul. 22, 2021), https://lieber.westpoint.edu/corporations-take-offensive-measures-against-states/.

A. Observe

One of the biggest hurdles to overcoming deception is recognizing that it is happening.[65] As a starting point, individuals will need to acknowledge that the unconscious decisions they might be making could be influenced by the interference of an instigating State. By "naming the game" these individuals will have a starting point to manage their role as information and decision-making arbiter. Labeling is powerful because it brings attacks of influence out of obscurity and into the decision maker's focus, which then allows them to take their bearings on the situation and adjust their perspective accordingly.[66]

Due to the influential nature of info-ops proxy warfare, it will likely be necessary for individuals to periodically distance themselves from info-op entry points and subsequent exposure. By protecting their own mental state, individuals can maintain clarity and remain focused on their mission and/or lawful interests.[67] Once individuals have taken their bearings on the situation, they can proceed to the next step of preparing to discern and act on reliable information.

B. Orient

Instigating States will find the most success when they can induce their targets to align with distorted truths and/or lose sight of their own goals and values.[68] Deception is not new to warfare, but the level of sophistication in modern day information-based operations can ultimately amount to a rewrite of history, motives, and even personal identity if the target is primed for it.[69] Without an external, neutral, truth-based (ENT) starting point, deceptive data practices can disorient and overcome an individual and hamper the decision-making process.

Examples of ENT's include the U.S. Constitution, the Universal Declaration of Human Rights, or other foundational documents recognized by the international (or national) community. Orienting to a

65. *See* Johnson, *supra* note 60 at 51–55.

66. Jorge Arango, *The Power of Labeling*, MEDIUM (Jul. 23, 2018), https://jarango.medium.com/the-power-of-labeling-2366b57a5c2c.

67. Matthew Richtel, *The Latest in Military Strategy: Mindfulness*, N. Y. TIMES (April 5, 2019), https://www.nytimes.com/2019/04/05/health/military-mindfulness-training.html.

68. *Id.*

69. *See* IVO JUURVEE ET AL., FALSIFICATION OF HISTORY AS A TOOL OF INFLUENCE (Lingvobalt et al. eds., 2020); TIM HWANG, MANEUVER AND MANIPULATION: ON THE MILITARY STRATEGY OF ONLINE INFORMATION WARFARE 9 (2019); FORTINO RODRIGUEZ SANCHEZ, THE EFFECTS OF BULLYING ON IDENTITY (2019).

foundational document is not meant to serve as a fact-checking process; rather, it is a means of establishing a neutral frame of mind in preparation for the decision-making process. This is contextually different than operating from a place of suspicion or distrust.

Studies have shown that individuals "are less accurate in judging whether someone is deceiving or telling the truth under conditions of contextual distrust than under conditions of contextual trust."[70] Similarly, those who tend to distrust "are less likely to expose themselves to situations in which they can be deceived [therefore] they simply are less likely to learn how to recognize deceit."[71] To the point, while being suspicious increases lie detection accuracy, it often "decreases truth detection accuracy."[72]

By starting the decision-making process from a place of truth-based neutrality, individuals will have a trust- and truth-based context to lead out on and refer to as they navigate their way through analyzing their genuine intent in the decision-making process. This will equip them with a means of maintaining control over their mental acumen—a critical element to the decision-making process. Once an individual is oriented, they will then be prepared to assess available information and attempt to act on it in relation to externalities and other independent sources of information.

C. Decide

Decision-making is most effective when decisions are based on a thorough understanding of situational context and intent.[73] In the case of targeted info-ops, this process also includes evaluating decisions and the context in which they are developed. This is a critical step in determining whether an individual's behavior comports with the individual's intent. By establishing intent and operating within that framework, individual's will have a bias for action within the confines of their genuine intent, which will help them to operate as an independent decision-maker.[74]

70. Mariëlle Stel et al., *The Limits of Conscious Deception Detection: When Reliance on False Deception Cues Contributes to Inaccurate Judgements*, 11 FRONTIERS IN PSYCH. 1, 5 (2020).

71. *Id.* at 2.

72. *Id.* at 8.

73. Peter F. Drucker, *The Effective Decision*, HARV. BUS. REV. (Jan. 1967); *see also DEPT. OF THE ARMY,* ADP 6-0 MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES (2019).

74. *See* Donald E. Vandergriff, *How the Germans Defined Auftragstaktik: What Mission Command is and is Not*, SMALL WARS J. (June 21, 2018, 12:17 PM) https://smallwarsjournal.com/jrnl/art/how-germans-defined-auftragstaktik-what-mission-command-and-not (explaining the comprehensive approach to warfighting known as Auftragstaktik, which

Without scrutinizing the purpose and reasoning of their decisions, individuals could be basing their decisions on psychologically persuasive criterion, such as cue-based behavioral modifications. By analyzing their own intent and periodically disrupting their own unconscious habitual processes, individuals can attempt to ensure focused decision-making.[75] This produces a more rigorous and governed process and guards against the inclination to rely on routine- and pattern-based decision-making.[76]

Once the individual has evaluated, challenged, and disrupted the decision-making processes, they can then attempt to deduce credible information and act on it. It should be noted here that this process is not a perfect solution for guarding against the effectiveness of info-ops proxy warfare. However, it is an important step towards independent decision-making, which allows an unwitting proxy to remain within the protection of the reasonable doubt standard.

D. Act

As discussed earlier, targeted info-ops can cause individuals to unknowingly take on the mission of the instigating State.[77] By targeting individuals and influencing them to choose a course of action favorable to the instigating State, if and when these operations are discovered, the instigating State will undoubtedly deny involvement or contend that the target made their decision independently.

However, if the individual intentionally took steps to mitigate against the influence of info-ops proxy warfare, but was nonetheless deceived, and they can show that they would not have made the decision but for the adversary's deception, and point to factors indicating such interference,

fosters individual initiative by "emphasiz[ing] [the] commander's intent, [and] provid[ing] subordinates a framework for making their own decisions in harmony with the overall plan.").

75. David Michels et al., *Tested by Fire: Three Keys to Making Better Decisions through Disruption*, BAIN & CO. (Nov. 17, 2020), https://www.bain.com/insights/tested-by-fire-three-keys-to-making-better-decisions-through-disruption/ (Periods of disruption allow decision makers to improvise and circumvent conventional "processes and routines in favor of a more pragmatic and agile approach. In this way, leaders tighten control over high-stakes decisions and quickly cut through organizational hierarchy to draw together the people and information needed to make the right calls.").

76. *Id.*

77. *See Johnson*, *supra* note 60 at 18, noting:

[i]n context of [information warfare], reflexive control is a tactic which includes a sustained effort at shifting the behavior of specific targets by ingestion of specific data, where the ultimate goal is to get that target to achieve an action that is to their advantage - ideally without the target becoming aware of their manipulation. This method of attack plays fundamentally on the underlying cultural understanding, psychology, or dogma of the intended target - exploiting existing biases or creating new ones in order to manipulate behavior and actions.

then the instigating State would be held accountable for the action of its proxy, but the individual would not be held liable as the proxy due to the unilateral nature of the principle/agent relationship and the individual's steps to mitigate against such a relationship. Likewise, if individuals can show that they exercised due diligence, but ultimately erred in their decision, then the action taken would be judged on a reasonableness standard.[78] Ultimately, actions that can be traced and tethered to a thoughtful and methodical decision-making process will be a useful guide in determining the appropriate standard of judgment if a targeted individual's, i.e., proxy's, decisions are later discovered to be unlawful.

E. Conclusion

While info-ops can be effective, they do not *prima facie* deprive decision-makers of their agency. Individuals will be susceptible to a Cat's Paw dynamic, however, if they are not careful to observe the presence of these attacks, orient their minds to a neutral, truth-based perspective, and then use the neutral power from that position to help protect and correct decision-making practices before they act. This is a demanding process, but it can help to safeguard both the decision-maker's judgement and the objects affected by the results of his/her decisions.

If proxy info-ops are left unchecked and unaddressed, then otherwise rational actors will increasingly adopt and advocate for positions that may have once been contrary to their personal and professional mission and purpose. But if individuals are prepared and ready to withstand such attacks, they can be capable of defending themselves.

V. CONCLUSION

Individuals across the globe are vulnerable to personalized adversarial attacks that covertly influence their habits and guide their decisions. If these individuals cannot untangle their behavior from this interference, they may find themselves acting for the benefit of an adversarial party, up to and including carrying out an attack. The affected State must then face the prospect of holding both the instigator and proxies liable, unless the proxies can show that they earnestly attempted but nonetheless failed to guard against the instigating State's efforts to target and influence them.

78. *See* Michael N. Schmitt, *Foreign Cyber Interference in Elections*, 97 INT'L L. STUD., 739, 759 (2021).

While unusual, this proxy dynamic has been addressed via the Cat's Paw doctrine, which holds that the party with adverse intentions *and* the party used by the other to recast the intentions into actions will both be held responsible for the resultant unlawful actions when certain criteria are met. This doctrine effectively issues responsibility in situations where clandestine motives seek to achieve no-cost benefits.

When two parties serve as unique and necessary components of an action, both will be held liable because each are critical to the operational success of the mission. So not only can a proxy attack be dealt with through the laws of the affected State, but the affected State can also respond in self-defense to the instigating State's info-ops proxy warfare based on the nature of the operations—which induce proxies to act for the benefit of the instigator.

Holding the party that directly caused the attack as the *only* responsible party in the context of targeted information operations merely furthers the instigating State's interest in circumventing legal responsibility. As a State adapts its tactics to technological innovations, the laws must, and inevitably will, adapt as well.

INFORMATION LEAKING AND THE UNITED STATES SUPREME COURT

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I. INTRODUCTION

The issue of abortion stands front and center before the United States Supreme Court in 2022.[1] The case of *Dobbs v. Jackson Women's Health Organization*, currently pending before the Court, addresses the question of the constitutionality of the State of Mississippi's ban on most abortions occurring after fifteen weeks of pregnancy.[2] It has been widely reported that this case has the potential to overturn *Roe v. Wade*.[3]

On Monday, May 2, 2022, *Politico* released a report that it had obtained a copy of a draft opinion in the *Dobbs* case.[4] The draft opinion, authored by Justice Samuel Alito, contended that the *Roe* decision was "egregiously wrong from the start."[5] The news was stunning, especially considering the traditions of secrecy and confidentiality within the inner workings of the Supreme Court.[6] Both pro-choice and pro-life politicians responded to the news of the potential overturning of *Roe v. Wade*.[7] Vice President Kamala Harris remarked in an address, "How dare they tell a woman what she can and cannot do with her body?" in response to the draft opinion leak.[8] Former Vice President Mike Pence responded to the Harris remarks with, "Since 1973, generations of mothers enduring heartbreak and loss that can last a lifetime. Madame Vice President, how

1. *See* Julie Rovner, *With the Supreme Court Poised to Act, Americans Remain Bitterly Divided on Abortion*, NPR (Jan. 21, 2022, 4:33 PM), https://www.npr.org/sections/health-shots/2022/01/21/1074605184/abortion-roe-v-wade-supreme-court.

2. *See* Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. 2022).

3. *See, e.g.*, Matt Hadro, *What Makes* Dobb*s the Best, and Possibly Last, Chance to Overturn* Roe*?*, CATHOLIC NEWS AGENCY (Nov. 28, 2021), https://www.catholicnewsagency.com/news/249704/what-makes-dobbs-the-best-and-possibly-last-chance-to-overturn-roe.

4. *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

5. *Id.*

6. *See* Joan Biskupic, *Behind the Scenes at the Secretive Supreme Court*, CNN (May 5, 2022, 7:54 AM), https://www.cnn.com/2022/05/05/politics/behind-the-scenes-supreme-court/index.html.

7. *See* Mychael Schnell, *Democrats Denounce Leaked Supreme Court Draft Ruling Nixing* Roe v. Wade, HILL (May 2, 2022, 11:35 PM), https://thehill.com/regulation/court-battles/3474836-democrats-denounce-leaked-supreme-court-draft-ruling-nixing-roe-v-wade/; Karen Wall, *Smith Calls Possible Overturn of* Roe v. Wade *"A Powerful Step,"* PATCH (May 3, 2022, 3:48 PM), https://patch.com/new-jersey/brick/smith-calls-possible-overturn-roe-v-wade-powerful-step.

8. Eugene Daniels & Myah Ward, *Harris on GOP's Anti-Abortion Push: "How Dare They*," POLITICO (May 3, 2022, 9:01 PM), https://www.politico.com/news/2022/05/03/kamala-harris-supreme-court-abortion-00029813.

dare you?"[9] Even President Joe Biden responded to the leak of the opinion by noting the draft opinion would be "quite a radical decision."[10]

The unprecedented leak of a draft Supreme Court opinion has dealt a major hit to the traditions, confidence, and reputation of the Supreme Court. Chief Justice John Roberts acknowledged the authenticity of the leaked draft opinion and called the release of the document an "egregious breach" of trust.[11] In the wake of this leak, the functioning and traditions of the Supreme Court may never be the same, and the leak seriously undermines the already shaken public confidence in the Supreme Court.[12]

This Article provides a comprehensive legal analysis of the leaked draft opinion in *Dobbs* and potential civil as well as criminal sanctions arising out of the leak. This Article first proposes that the Supreme Court require any clerks to have been a licensed attorney for at least three years. Second, the Article proposes that additional actions be taken to protect the confidentiality of the deliberations of the Court as well as Court materials and provide specific criminal penalties in the event of intentional, unauthorized disclosure. While these measures cannot retroactively remedy the harm the leak has caused, they can serve to help restore public confidence in the Court and its vital role in adjudicating disputes fairly, impartially, and in accordance with upholding equal justice under the law.

9. Lexi Lonas, *Pence Hits Harris over Abortion Remarks: "How Dare You?"*, HILL (May 6, 2022, 10:40 AM), https://thehill.com/blogs/blog-briefing-room/3479518-pence-hits-harris-over-abortion-remarks-how-dare-you/.

10. Arnie Seipel, *Biden Says Abortion Decision Would Be "Radical" and Threaten Other Rights*, NPR (May 3, 2022, 1:11 PM), https://www.npr.org/2022/05/03/1096135394/supreme-court-abortion-leak-biden-reaction.

11. Kevin Breuninger, *Supreme Court Says Leaked Abortion Draft Is Authentic; Roberts Orders Investigation into Leak*, CNBC (May 3, 2022, 2:40 PM), https://www.cnbc.com/2022/05/03/supreme-court-says-leaked-abortion-draft-is-authentic-roberts-orders-investigation-into-leak.html.

12. *See* Mark Moore, *Americans' Confidence in Supreme Court Plummets, Poll Finds*, N.Y. POST (May 10, 2022, 4:21 PM), https://nypost.com/2022/05/10/americans-confidence-in-supreme-court-plummets-poll-finds/.

II. OPINION AND INFORMATION LEAKS AT THE UNITED STATES SUPREME COURT

A. Overview of the Dobbs v. Jackson Women's Health Organization *Case*

Dobbs v. Jackson Women's Health Organization involves a Mississippi statute that bans most abortions after fifteen weeks of pregnancy.[13] Alito's draft opinion does not incrementally "chip away" at abortion rights as many predicted it would.[14] Rather, it emphatically states, "We hold that *Roe* and *Casey* must be overruled."[15] Diverting from the past precedent, Alito then establishes rational basis review as the applicable standard for adjudicating state abortion restrictions and upholds the Mississippi legislation.[16]

In support of this holding, Alito provides a variety of arguments. He emphasizes how "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . ."[17] And while the Due Process Clause of the Fourteenth Amendment has been held to guarantee rights that are not mentioned in the Constitution, this is only permitted when such rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[18] Neither of these standards are met regarding the right to an abortion. States were permitted to legislate the practice of abortion as they saw fit for the first 185 years after the adoption of the Constitution.[19] Three-quarters of the states criminalized abortion at all stages of pregnancy at the time the Fourteenth Amendment was adopted.[20] The very notion of a constitutional right to abortion was nonexistent until a few years before *Roe*.[21]

In explicitly overturning *Roe*, Alito's draft opinion addresses the standard for overturning Supreme Court precedent. Alito states that the

13. Leaked Draft Opinion, Dobbs v. Jackson Women's Health Organization (Feb. 10, 2022), at 4, https://s3.documentcloud.org/documents/21835435/scotus-initial-draft.pdf.

14. Nathaniel Weixel, *Advocates Sound the Alarm on Abortion Rights Ahead of Midterms*, HILL (April 4, 2022, 6:00 AM), https://thehill.com/policy/healthcare/3256893-advocates-sound-the-alarm-on-abortion-rights-ahead-of-midterms/.

15. Leaked Draft Opinion, *supra* note 13, at 5.

16. *Id.* at 65.

17. *Id.* at 5.

18. *Id.*

19. *Id.* at 1.

20. *Id.* at 5.

21. *Id.* at 15 (noting that even law review articles—known for creative applications of new rights—never mentioned a constitutional right to abortion until 1968).

doctrine of *stare decisis* is "not an inexorable command."[22] And Alito goes through the five factors to be considered for overturning a prior case, which all favor the overturning of *Roe*. The factors are "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[23]

In justifying the overturning of *Roe*, Alito criticizes the opinion in *Roe* as largely irrelevant to what should have been the primary consideration—whether there exists a constitutional right to an abortion.[24] Alito also alleges that *Roe* was "egregiously wrong from the start" and has had "damaging consequences."[25] Finally, Alito enumerates twenty-five past Supreme Court precedents that have been overturned,[26] likely in an effort to demonstrate that the overturning of bad precedent is common and necessary.

Naturally, these arguments from Alito have been criticized.[27] Since this Article focuses on the leaked opinion and there have yet to be any published dissents, the arguments against Alito's draft opinion are not analyzed here.

Much of the criticism of the draft opinion in *Dobbs* does not relate to abortion but rather how such a precedent could affect other rights. Many have argued that the rationale for overturning *Roe* could also be applied to overturning other precedents, such as those concerning the right to contraception, interracial marriage, same-sex sodomy, voting rights, forced sterilizations, and same-sex marriage.[28] It is clear that Alito anticipated such criticism and attempted to address these concerns using language such as the following: "*Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged . . . ."[29]

22. *Id.* at 35 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

23. *Id.* at 39.

24. *Id.* at 2.

25. *Id.* at 6.

26. *Id.* at 37 n.47.

27. *See, e.g.*, Lisa Rubin, *The Leaked Draft Has a Fatal Flaw. And It's Even Worse Than You Think.*, MSNBC (May 11, 2022, 6:55 PM), https://www.msnbc.com/rachel-maddow-show/maddowblog/the-leaked-draft-has-a-fatal-flaw-and-its-even-worse-than-you-think-rcna27416.

28. Sean Illing, *After* Roe*: 9 Legal Experts on What Rights the Supreme Court Might Target Next*, VOX (May 5, 2022, 10:00 AM), https://www.vox.com/23055107/supreme-court-abortion-roe-wade-constitution.

29. Leaked Draft Opinion, *supra* note 13, at 5.

Alito also quotes language from *Roe* and *Casey* to make the case that abortion is unique and, therefore, that *Dobbs* will not jeopardize any other rights. For example, he quotes from *Roe* how abortion is "inherently different" and quotes from *Casey* how abortion is "a unique act."[30] Alito goes further and explicitly states, "[W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in the opinion should be understood to cast doubt on precedents that do not concern abortion."[31] While some have viewed these assurances as dispositive,[32] others have voiced concern, pointing out that Alito vigorously dissented in *Obergefell v. Hodges*,[33] arguing that "the Constitution leaves that question to be decided by the people of each State."[34]

Commentators have noted that the tone of Alito's draft opinion is somewhat coarse.[35] One example of Alito's rhetoric that perhaps violates unwritten rules of Supreme Court collegiality is "Until the latter part of the 20th century, there was no support in American law for a constructional right to obtain an abortion. Zero. None."[36]

1. The tradition of secrecy at the United States Supreme Court

Some have referred to the leaked draft opinion in *Dobbs* as "unprecedented,"[37] while others have noted that there have been numerous leaks in the history of the Supreme Court.[38] These seemingly contradictory

30. Roe v. Wade, 410 U.S. 113, 159 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992). The decision in *Roe* further differentiates itself from other issues by stating that abortion is "inherently different from marital intimacy," "marriage," or "procreation." Leaked Draft Opinion, *supra* note 13, at 62 (quoting *Roe*, 410 U.S. at 159).

31. Leaked Draft Opinion, *supra* note 13, at 62.

32. *See, e.g.*, David French, *Why Justice Alito's Draft Opinion in* Dobbs *Doesn't Threaten Gay Marriage*, THE ATLANTIC (May 6, 2022), https://newsletters.theatlantic.com/the-third-rail/627535eb95033600218457a5/roe-v-wade-obergefell-gay-marriage/.

33. Obergefell v. Hodges, 576 U.S. 666, 736 (2015).

34. Ruth Marcus, *The Leaked Draft* Roe *Opinion Is a Disaster for the Supreme Court*, WASH. POST (May 3, 2022, 10:52 AM), https://www.washingtonpost.com/opinions/2022/05/03/alito-roe-leaked-draft-disaster-for-supreme-court/.

35. *See, e.g.*, Dahlia Lithwick, *The Most Shocking Aspects of Alito's Leaked Draft Opinion*, SLATE (May 7, 2022, 6:00 AM), https://slate.com/news-and-politics/2022/05/samuel-alitos-leaked-draft-opinion-is-shocking-in-tone-and-tenor.html.

36. Leaked Draft Opinion, *supra* note 13, at 15.

37. *See, e.g.*, Tiana Lowe, Dobbs *Decision Leak an Unprecedented Breach of Supreme Court Norms*, WASH. EXAM'R (May 2, 2022, 9:44 PM), https://www.washingtonexaminer.com/opinion/dobbs-decision-leak-an-unprecedented-breach-of-supreme-court-norms.

38. Jonathan Peters, *The Supreme Court Leaks*, SLATE (July 6, 2012, 2:25 PM), https://slate.com/news-and-politics/2012/07/the-supreme-court-leaking-john-roberts-decision-to-change-his-mind-on-health-care-should-not-come-as-such-a-surprise.html.

claims are the result of viewing the term "leak" with different levels of specificity. There have been numerous instances of information leaked from the Supreme Court, such as the ultimate outcome of a case and details of the deliberation process.[39] But in the over-230-year history of the Court, there has never been a leaked opinion.[40]

In 1852, the *New York Tribune* reported the outcome of the Supreme Court case of *Pennsylvania v. Wheeling and Belmont Bridge Company*.[41] The *New York Tribune* also published an insider's account of the deliberations in the *Dred Scott* case.[42] Historians have speculated that these two leaks came not from a clerk but from Justice John McLean.[43] In 1919 a clerk leaked the results of business-related Supreme Court decisions, likely to profit from insider trading.[44]

From 1968 to 1979, the frequency of Supreme Court leaks increased. In 1968 a law clerk leaked Justice Abe Fortas's discussions with President Johnson on Vietnam.[45] In 1972 an internal memo on *Roe v. Wade* was leaked, along with accounts of the Court's deliberations on the case.[46] Then, the outcome and 7–2 margin was made public in a separate leak.[47] In 1977 the 5–3 decision not to review convictions in the Watergate cover-up cases was leaked.[48] And in 1979 there was a leak that disseminated the outcomes of two decisions.[49]

Occasional leaks have occurred even recently. A group of Supreme Court clerks from the 2000 term leaked information about the deliberations in *Bush v. Gore* four years later.[50] There was a 2012 Supreme Court leak regarding the deliberation process in *National Federation of*

39. *Id.*

40. Josh Gerstein, *How Rare Is a Supreme Court Breach?*, POLITICO (May 2, 2022, 8:36 PM), https://www.politico.com/news/2022/05/02/supreme-court-draft-opinion-00029475. This distinction is made even more confusing by fact-checking efforts that allege there have been previously leaked Supreme Court decisions by using the term "decision" to refer to just releasing the end result, not an entire opinion. Emery Winter, Casey Decker & Mauricio Chamberlin, *No,* Roe v. Wade *Leaked Draft Opinion Was Not the First Leaked Supreme Court Decision*, KHOU11 (May 4, 2022, 6:07 PM), https://www.khou.com/article/news/verify/scotus-verify/alito-early-draft-opinion-poltico-leak-roe-wade-not-first-ever-leaked-supreme-court-decision/536-65f00c91-523e-4dbc-bd66-dcea75af4bfe.

41. Peters, *supra* note 38 (citing Pa. v. Wheeling & Belmont Bridge Co., 590 U.S. 460 (1855)).

42. *Id.* (citing Scott v. Sanford, 60 U.S. (19 How.) 393 (1857)).

43. *Id.*

44. Gerstein, *supra* note 40. Due to a lack of insider trading laws in 1919, the leaker was charged with defrauding the United States. *Id.* The case never went to trial. *Id.*

45. Peters, *supra* note 38.

46. *Id.*

47. *Id.*

48. *Id.*

49. Gerstein, *supra* note 40.

50. *Id.* (citing Bush v. Gore, 531 U.S. 98 (2000)).

Independent Business v. Sebelius.[51] To illustrate the unprecedented severity of leaking an entire draft opinion in *Dobbs*, the leak in *Sebelius*, which only mentioned aspects of the deliberation process was viewed as "incredible," "shocking," and a "once-in-a-lifetime scoop."[52]

2. Possible culprits of the leak

Speculation in the news and on social media as to who the leaker is has included every possible outcome, including a liberal clerk or Justice, a conservative clerk or Justice, other Supreme Court staff, and a foreign government hack. The most likely candidate for who leaked the draft opinion appear to be either a Supreme Court Justice or clerk.[53]

Some have attempted to argue that there would be no motivation for a liberal clerk to leak the draft opinion because doing so would "lock[] in the five members of the majority."[54] But such an objection assumes that the only possible goal of a leak is to change the votes of the Justices and further assumes that the leaker was acting completely rationally, both of which are not necessarily correct. Perhaps the leaker was attempting to get Congress to act before the opinion came down, whether through legislation or a court-packing scheme.

The assumption that a leaker would not have believed that leaking the draft opinion could lead to one of the five Justices in the majority changing his or her vote is unfounded. Justice Kennedy famously changed his vote in *Planned Parenthood of Southeast Pennsylvania v. Casey*.[55] And Chief Justice Roberts changed his vote in *National Federation of Independent Business v. Sebelius*.[56] Supreme Court Justices have even revised their opinions after issuing the preliminary slip opinion.[57] Finally, because this

51. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

52. Peters, *supra* note 38.

53. Josh Blackman, *Making Sense of the Apparent Leaked Opinion in* Dobbs, REASON: VOLOKH CONSPIRACY (May 2, 2022, 9:22 PM), https://reason.com/volokh/2022/05/02/making-sense-of-the-apparent-leaked-opinion-in-dobbs/.

54. Josh Blackman, *What if the SCOTUS Leak Came from a Foreign Hack?*, REASON: VOLOKH CONSPIRACY (May 6, 2022, 3:55 PM), https://reason.com/volokh/2022/05/06/what-if-the-scotus-leak-came-from-a-foreign-hack/.

55. Evans Rowl & Robert Novak, *Justice Kennedy's Flip*, WASH. POST (Sept. 4, 1992), https://www.washingtonpost.com/archive/opinions/1992/09/04/justice-kennedys-flip/17eb4e0b-72f6-4678-b5bb-7a3e8f79b395/.

56. Avik Roy, *The Inside Story on How Roberts Changed His Supreme Court Vote on Obamacare*, FORBES (June 1, 2012, 1:01 PM), https://www.forbes.com/sites/theapothecary/2012/07/01/the-supreme-courts-john-roberts-changed-his-obamacare-vote-in-may/?sh=653320aad701.

57. Jon Jackson, *Could* Roe v. Wade *Leaker Change Supreme Court's Historic Abortion Ruling?*, NEWSWEEK (May 3, 2022, 12:21 PM), https://www.newsweek.com/roe-v-wade-supreme-court-opinion-change-final-ruling-1703005.

is the only leaked draft opinion in the history of the Court, there is no reason to assume that the leaker was acting in a reasonable manner that would result in his or her motivations being easily deduced through logical syllogisms. Perhaps the leaker simply wanted to disrupt the system, which is something activists have promoted in recent years.[58] Ian Millhiser, senior correspondent at Vox, where he covers the Supreme Court, praised the leaker for saying what Millhiser interprets as, "[F]uck it! Let's burn this place down."[59] Political commentator Keith Olbermann agreed, saying that the leaker is a "hero" and reiterating in all caps, "FUCK IT, LET'S BURN THIS PLACE DOWN."[60]

Another theory put forth is that a conservative leaked the draft opinion, intending to mitigate negative reactions to the final decision.[61] While there is nothing to preclude this as the motivation behind the leak, it is highly improbable that a Supreme Court Justice and/or law clerk would believe such a strategy to be effective. Common sense dictates that waiting until everything is finalized—and when protesting and threats of violence would not be effective at changing the decision—would be a far superior strategy to mitigate public outrage. And the final opinion in *Dobbs* may be less drastic than the leaked draft opinion—either by toning down the rhetoric[62] or by rewriting it to uphold the Mississippi fifteen-week ban without overturning *Roe*. In such an instance, a conservative clerk or Justice releasing the more incendiary draft opinion would only serve to unnecessarily amplify public outrage, not mitigate it. Furthermore, this unlikely theory ignores the fact that, by leaking the draft opinion early, pro-choice advocates have a chance to change the effects of the ultimate Supreme Court decision through federal legislation or a court-packing scheme. The availability of these potential solutions for pro-choice advocates, which would not be available as an immediate solution after the final opinion is released, appears to be highly motivating to pro-choice advocates. This, of course, is the opposite of what a conservative clerk or Justice would want to effectuate.

58. *See, e.g.*, Meghan Roos, *BLM Leader: We'll "Burn" the System Down if U.S. Won't Give Us What We Want*, NEWSWEEK (June 25, 202, 11:17 AM), https://www.newsweek.com/blm-leader-well-burn-system-down-if-us-wont-give-us-what-we-want-1513422.

59. Asra Q. Nomani (@AsraNomani), TWITTER (May 3, 2022, 10:09 AM), https://twitter.com/AsraNomani/status/1521492106912710657.

60. Keith Olbermann (@KeithOlbermann), TWITTER (May 3, 2022, 11:48 AM), https://twitter.com/KeithOlbermann/status/1521516963096322049.

61. Matt Stieb, *A Running List of Theories About the Supreme Court Leaker*, INTELLIGENCER (May 8, 2022), https://nymag.com/intelligencer/2022/05/who-leaked-the-supreme-court-draft-overturning-roe-v-wade.html.

62. *See* Lithwick, *supra* note 35 and accompanying text.

While it is certainly possible that the leak was the result of a conservative clerk or Justice attempting to lock in the conservative majority or mitigate public outrage from the final opinion, the background of the case and the predictable results of the leak point to the more likely outcome that the leak came from a liberal clerk or Justice.[63] If one agreed with a draft majority opinion, the best course of action would be to do nothing, as the Justices rarely change their votes months after oral arguments.[64] And, as Chief Justice Roberts warned, the leak was likely intended to damage confidence in the Court, something that someone in favor of the outcome of the leaked *Dobbs* draft opinion would not want to do, since he or she agrees with the Supreme Court's holding.[65] The unprecedented nature of the leak and the risk of professional and even criminal repercussions both point to the act being an act of desperation. It makes more sense that such a desperate tactic would be implemented by the losing side, not the winning side.

The conflicting manner in which right- and left-leaning media outlets, politicians, and pundits have discussed the leak is further evidence that the leaker is more likely to be a liberal than a conservative. Conservative pundits are referring to the leak as an "actual insurrection," calling for an FBI investigation, and claiming that this could be "the end of the Court."[66] Conservative pundits are referring to the leak as the "original sin for judicial ethics"[67] and "an insurrection against the Supreme Court."[68] Some conservatives are even calling for the preemptive firing of all Supreme court law clerks.[69] And some conservatives are calling for criminal

63. Mark Movesian, *Why the* Dobbs *Leak is Dangerous*, FIRST THINGS (May 5, 2022), https://www.firstthings.com/web-exclusives/2022/05/why-the-dobbs-leak-is-dangerous ("Possibly, the leaker is a conservative clerk trying to keep Alito's majority intact, on the theory that it would be too embarrassing for a justice to change his or her mind in these circumstances. More likely, though, the leaker is a progressive who hopes an angry public reaction will make a member of Alito's majority reconsider.").

64. Jeremy Stahl, *Who Leaked Samuel Alito's Draft Opinion Striking Down* Roe v. Wade*—and Why?*, SLATE (May 3, 2022), https://slate.com/news-and-politics/2022/05/supreme-court-alito-abortion-opinion-leaker-identity-theory.html (describing this explanation as the "Occam's razor answer").

65. Stieb, *supra* note 61.

66. Stahl, *supra* note 64.

67. Jonathan Turley (@JonathanTurley), TWITTER (May 2, 2022, 9:07 PM), https://twitter.com/JonathanTurley/status/1521295243462774784.

68. Brian Stelter, *Left and Right React to Unprecedented Supreme Court Scoop in Different Ways*, CNN BUS. (May 3, 2022, 1:04 AM), https://www.cnn.com/2022/05/03/media/supreme-court-leak-reliable-sources/index.html.

69. *Starnes: Chief Justice Should Fire All Clerks Until Leaker Is Exposed*, TODD STARNES (May 3, 2022), https://www.toddstarnes.com/politics/starnes-chief-justice-should-fire-all-clerks-until-leaker-is-exposed/.

prosecution in the event the leaker is found.[70] Liberal pundits, however, are generally less likely to criticize the leak. Some are even praising the actions of the leaker, giving him or her "shoutout[s]," referring to him or her as a "hero"[71] and "brave,"[72] and asking for "more of this please."[73] This overall response from conservatives demonstrating outrage over the leak and liberals demonstrating gratitude is further evidence that the leak is more likely to be consistent with a liberal clerk's incentives than a conservative clerk's incentives.

The timing of the leak also suggests it was leaked by someone in a desperate attempt to change the outcome (a liberal), not preserve it (a conservative). The leaked draft opinion is from February 10th.[74] If the intent of the leak was to lock in the majority that existed at that time, why wait three months to leak? It seems more likely that the leaker waited to see if anything would change from February to early May and, after realizing nobody was changing votes, leaked the draft opinion in a last-ditch effort to effectuate change. Additionally, the leaker released the February "1st Draft" opinion, which contains notably coarse rhetoric.[75] Assuming that a later, more refined, and more collegial draft exists, the releasing of the first draft opinion and not a more recent revision points to a desire to cause public outrage, which was accomplished.

Some have suggested that the leak could have come from someone outside of the Supreme Court, such as a foreign government who gained access to the opinion through a computer hack.[76] While there is no evidence to support such a claim, it is not hard to imagine that, with all the Supreme Court personnel who have digital access to the draft opinion, one of their accounts could have been hacked. Recent hacks by foreign governments are often done with the intention of breeding animosity among Americans, and this leak has likely contributed toward that goal.[77]

Based on an understanding of the incentives involved, the predictable response to the leaked draft opinion, the diverse responses to the leak from

70. Priscilla Aguirre & Steven Santana, *Ted Cruz Wants the Person Who Leaked* Roe v. Wade *Draft to Be "Prosecuted*," MY SAN ANTONIO (May 3, 2022, 6:24 PM), https://www.mysanantonio.com/news/local/article/Texas-supreme-court-leak-roe-17143312.php.

71. Olbermann, *supra* note 60.

72. Brian Fallon (@brianefallon), TWITTER (May 2, 2022, 8:55 PM), https://twitter.com/brianefallon/status/1521292404397162497.

73. Jay Willis (@jaywillis), TWITTER (May 2, 2022, 8:49 PM), https://twitter.com/jaywillis/status/1521290832665448448.

74. Leaked Draft Opinion, *supra* note 13, at 1.

75. *See* Lithwick, *supra* note 35 and accompanying text.

76. Blackman, *supra* note 54.

77. *Id.*

conservatives and liberals, and the timing of the leak, the most likely conclusion appears to be a leak from a liberal person. However, the possibility that it was leaked by a conservative or a foreign government cannot be ruled out.

3. Supreme Court investigation – reaction of Chief Justice Roberts

A day following the leak of the draft opinion, the Supreme Court issued a press release in response to the leak.[78] Chief Justice Roberts strongly condemned the leak in a statement.[79] Roberts stated, "Court employees have an exemplary and important tradition of respecting the confidentiality of the judicial process and upholding the trust of the Court. This was a singular and egregious breach of that trust that is an affront to the Court and the community of public servants who work here."[80]

Roberts also noted that the Marshal of the Court would proceed with an investigation of the leak.[81] The Marshal of the Court, Gail Curley, a former Army colonel, is currently leading the Court's investigation of the leak.[82] However, it is generally understood that leak investigations can be challenging.[83] Despite the difficulties of a leak investigation, it has been reported that Supreme Court law clerks have been asked to turn over their cell phone records to investigators.[84]

4. Negative ramifications of the leak

The release of the leaked opinion sadly will probably cause some distrust within the Supreme Court and possibly affect collegiality in a negative way. Collegiality is a paramount part of the culture of the

78. *See* Press Release, Sup. Ct. of the U.S. (May 3, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22 [hereinafter Sup. Ct. Press Release].

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* Jessica Gresko, *Search for Supreme Court Leaker Falls to Former Army Colonel*, ASSOCIATED PRESS (May 24, 2022), https://apnews.com/article/supreme-court-leak-investigation-gail-curley-48623ac2a3bafe36f39bbf5f68257dbf.

83. *See* Pete Williams, *How the Supreme Court Could Proceed with the* Roe *Leak Probe*, NBC NEWS (May 5, 2022, 3:42 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-proceed-roe-leak-probe-rcna27508.

84. *See* Zach Schonfeld, *Clerks Asked for Phone Records in Supreme Court Probe: Report*, HILL (May 31, 2022, 3:21 PM), https://thehill.com/regulation/court-battles/3507011-clerks-asked-for-phone-records-in-supreme-court-probe-report/.

Supreme Court.[85] One of the testaments to the collegiality on the Court was the unlikely friendship of the late Justices Antonin Scalia and Ruth Bader Ginsburg.[86] Though ideologically opposite, their families ate meals together, and they attended the opera together.[87]

Despite the importance of collegiality, even prior to the leak there were reports of tension between Justice Neil Gorsuch and Chief Justice Roberts as early as 2017.[88] And reportedly there was tension concerning the issue of masking and proceedings at the Court relating to COVID-19.[89] In remarks in May 2022, Justice Clarence Thomas noted in essence that trust has seriously eroded with the leak.[90]

Unfortunately, it is quite conceivable that the disclosure of the draft opinion may permanently alter the operations of the Supreme Court in the future. Justices typically will circulate drafts among each other as part of the deliberative process on cases.[91] That practice may very well cease to occur in more sensitive and controversial cases, and perhaps even in cases that are less controversial.[92] In the end, if a culture of distrust becomes entrenched within the Court, this may end up slowing the operations of the Court, meaning access to justice could be less timely.[93]

85. *See, e.g.*, David A. Yalof, Joseph Mello & Patrick Schmidt, *Collegiality Among U.S. Supreme Court Justices?*, 95 JUDICATURE 12 (2011).

86. *See* Richard Wolf, *Opera, Travel, Food, Law: The Unlikely Friendship of Ruth Bader Ginsburg and Antonin Scalia*, USA TODAY (Sept. 20, 2020, 4:04 PM), https://www.usatoday.com/story/news/politics/2020/09/20/supreme-friends-ruth-bader-ginsburg-and-antonin-scalia/5844533002/.

87. *Id.*

88. *See* Joan Biskupic, *Gorsuch v. Roberts: The Rookie Takes on the Chief*, CNN (Oct. 8, 2017, 9:22 PM), https://www.cnn.com/2017/10/08/politics/neil-gorsuch-john-roberts-rivalry/index.html.

89. *See* Nina Totenberg, *Gorsuch Didn't Mask Despite Sotomayor's COVID Worries, Leading Her to Telework*, NPR (Jan. 21, 2022, 2:11 PM), https://www.npr.org/2022/01/18/1073428376/supreme-court-justices-arent-scorpions-but-not-happy-campers-either.

90. *See* Josh Gerstein, *Thomas Blasts Disclosure of Draft Supreme Court Opinion as "Tremendously Bad,"* POLITICO (May 13, 2022, 10:59 PM), https://www.politico.com/news/2022/05/13/thomas-blasts-disclosure-of-draft-supreme-court-opinion-as-tremendously-bad-00032531.

91. *See* Dareh Gregorian, *Former Supreme Court Law Clerks Worry* Roe *Leak Could Sow Distrust Among Justices and Staff Members*, NBC NEWS (May 4, 2022, 9:18 PM), https://www.nbcnews.com/politics/supreme-court/former-supreme-court-law-clerks-worry-roe-leak-sow-distrust-justices-s-rcna27380.

92. *Id.*

93. *Id.*

5. Protests and security for Supreme Court Justices

The release of the draft opinion has also caused protests throughout the United States.[94] Some protesters have even gone so far as to protest outside the homes of some of the Justices.[95] Security has been increased around the Court in the weeks after the leak.[96]

Within days following the leak, the United States Senate passed the Supreme Court Police Parity Act.[97] The legislation will provide members of the Supreme Court and their families the same level of security provided to members of the legislative and executive branches.[98] It is currently pending in the United States House of Representatives.[99]

III. POTENTIAL CIVIL AND CRIMINAL CONSEQUENCES FOR LEAKING SUPREME COURT OPINIONS

As noted earlier, there is much speculation as to the identity(ies) of the individual or individuals responsible for the leak of the draft opinion. Given the highly sensitive nature of the draft opinion disclosed, there exists the possibility of civil and/or criminal sanctions as a result of the disclosure. The possible sanctions vary and depend upon the status of the individual(s) responsible for the leak.

A. If the Leak Came from a Supreme Court Justice

It is unlikely that the source of the leak was a Supreme Court Justice. Such an action would be shocking on the part of a Justice, given the impartial character of judges and the negative ramification in that an action by one Justice to undermine the others would seriously damage the trust judges have in one another. If the leak of the draft opinion came from a Justice, it is possible there would be calls by some policymakers to pursue a drastic remedy: impeachment.

94. *See* Phil Helsel, *Protesters Flock to Supreme Court on Report of Draft Ruling That Would Overturn* Roe, NBC NEWS (May 3, 2022, 2:31 AM), https://www.nbcnews.com/politics/politics-news/protesters-drawn-supreme-court-monday-night-report-draft-ruling-overtu-rcna27046.

95. Myah Ward, *GOP Governors Call on DOJ to "Enforce the Law" as Protesters Gather Outside Justices' Homes*, POLITICO (May 11, 2022, 11:15 PM), https://www.politico.com/news/2022/05/11/gop-governors-doj-protesters-outside-justices-homes-00031909.

96. *See* Alexander Bolton, *Supreme Court Installs Security Fencing After Protests*, HILL (May 5, 2022, 11:35 AM), https://thehill.com/regulation/3478353-supreme-court-installs-security-fencing-after-protests/.

97. *See* S. 4160, 117th Cong. (2022).

98. *Id.*

99. *Id.*

1. The impeachment remedy

The United States Constitution provides in Article II, Section 4 that "The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[100] This provision extends to members of the federal judiciary.[101] A federal judge may be impeached by a majority vote of the United States House of Representatives.[102] A two-thirds vote of the United States Senate is required to remove the federal judge from office.[103]

2. Historical cases of judicial impeachment

Only fifteen federal judges have ever been impeached by the United States House of Representatives.[104] Of these fifteen judges, eight were found guilty of the impeachment charges by the Senate and removed from office, four were acquitted, and three resigned from office prior to the completion of the proceedings.[105] Of the eight federal judges removed from office, one was removed for intoxication on the bench,[106] one for refusal to hold court (he had joined the Confederacy during the Civil War),[107] one for having improper business relationships with parties before

100. U.S. CONST. art. II, § 4.

101. *See* Bruce Moyer, *When Federal Judges Are Impeached*, 67 FED. LAW. 4 (2020).

102. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment").

103. *See* U.S. CONST., art. I, § 3, cl. 6, 7. That provision states:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States.

104. *See List of Individuals Impeached by the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Impeachment/Impeachment-List/ (last visited June 3, 2022).

105. *Id.*

106. *See Federal Judge John Pickering Remembered For His Impeachment*, CONST. L. REP. (Apr. 4, 2017), https://constitutionallawreporter.com/2017/04/04/john-pickering-federal-judge-impeachment/.

107. *See District Judge West Humphreys Impeached After Joining Confederacy*, CONST. L. REP. (Apr. 19, 2017), https://constitutionallawreporter.com/2017/04/19/federal-judge-west-humphreys-impeached-confederacy/.

the court,[108] one for a general charge of misbehavior,[109] one for tax evasion,[110] one for perjury and conspiring to solicit a bribe,[111] another for perjury,[112] and the final one for accepting bribes and making false statements.[113]

A potential impeachment of a Supreme Court Justice would likely be informed by a historical precedent: the impeachment of Justice Samuel Chase.[114] In the wake of political differences between the Federalists and the Anti-Federalists, President Thomas Jefferson took issue with Justice Chase.[115] An impeachment effort began in 1803, focusing on Chase's "good behavior" as a Justice.[116] In March 1804, Chase was impeached on eight articles of impeachment by the House of Representatives.[117] Approximately one year later, Chase was acquitted of all counts of impeachment.[118] Notably, six Jeffersonian Republicans voted to dismiss at least one impeachment charge, breaking from President Jefferson.[119] As one commentator has written, "Chase's impeachment shifted the balance of power between Congress and the Supreme Court and forever ensured that judicial independence would shield the Court from the use of impeachment as a political solution to a party's discontent with the judiciary."[120]

108. *See Impeachment of Judge Robert Archbald*, CONST. L. REP. (May 10, 2017), https://constitutionallawreporter.com/2017/05/10/judge-robert-w-archbald/.

109. *See Impeachment of Judge Halsted L. Ritter*, CONST. L. REP. (May 31, 2017), https://constitutionallawreporter.com/2017/05/31/impeachment-of-halsted-l-ritter/.

110. *See Judge Harry Claiborne Impeached for Tax Evasion*, CONST. L. REP. (June 7, 2017), https://constitutionallawreporter.com/2017/06/07/harry-claiborne-impeachment/.

111. *Judge Alcee Hastings Impeached for Bribery*, CONST. L. REP. (June 13, 2017), https://constitutionallawreporter.com/2017/06/13/alcee-hastings-impeachment/.

112. *Judge Walter L. Nixon Impeached After Perjury Conviction*, CONST. L. REP. (June 21, 2017), https://constitutionallawreporter.com/2017/06/21/judge-walter-nixon-impeached-perjury-conviction/ (last visited Sept. 14, 2022).

113. *See Judge G. Thomas Porteous Is Last Judge to Be Impeached*, CONST. L. REP. (July 7, 2017), https://constitutionallawreporter.com/2017/07/07/thomas-porteous-impeached/.

114. *See Impeachment Trial of Justice Samuel Chase, 1804-05*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-chase.htm (last visited June 3, 2022).

115. *See* Al Dickenson, *Weaponizing Impeachment: Justice Samuel Chase and President Thomas Jefferson's Battle Over the Process*, J. AM. REVOLUTION (May 24, 2022), https://allthingsliberty.com/2022/05/weaponizing-impeachment-justice-samuel-chase-and-president-thomas-jeffersons-battle-over-the-process/.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725, 788 (2010).

3. Analysis of potential impeachment proceeding

Even assuming, arguendo, that the source of the leaked draft opinion was a Supreme Court Justice, any impeachment proceeding would likely be unsuccessful in removing the Justice from judicial office for three main reasons.

First, it is a stretch to make a strong argument that a leak of a draft opinion by a Justice would constitute a "high crime or misdemeanor." Certainly, the meaning of "high crime or misdemeanor" is a legal term of art subject to different interpretations.[121] However, there appears to be a general consensus among many legal scholars that "high crime or misdemeanor" would generally encompass conduct that only constitutes the most serious of offenses.[122] Leaking a draft opinion arguably does not rise to the level of activity such as intoxication on the bench, perjury, or making false statements, all things that resulted in impeachment of federal judges in the past.[123] It is very difficult to argue that the leak of a draft would constitute a "high crime or misdemeanor" when the Supreme Court itself does not have a code of ethics the Justices must abide by.[124]

Second, an impeachment proceeding against a Supreme Court Justice for the leaking of an opinion will likely be viewed as political in nature. Comparisons will likely be made to the case of Samuel Chase, the only other situation in which a Supreme Court Justice has faced impeachment. Furthermore, such a move would arguably politicize the Supreme Court, eroding separation of powers further and rendering the judicial branch subject to the political whims of the legislative branch.[125]

Practically, an impeachment proceeding would likely be unsuccessful given the current breakdown of Republicans and Democrats in Congress. In the House of Representatives, an impeachment could proceed if an overwhelming majority of members of one party's caucus voted for impeachment. Currently, the Democrats have a narrow majority in the

121. *See, e.g.*, Neil Kinkopf, *The Scope of "High Crimes and Misdemeanors" After the Impeachment of President Clinton*, 63 L. & CONTEMP. PROBS. 201 (2000).

122. *See* Mark R. Slusar, Comment, *The Confusion Defined: Questions and Problems of Process in the Aftermath of the Clinton Impeachment,* 49 CASE W. RES. L. REV. 869, 872 (1999) ("The narrow reading of "high crimes and misdemeanors" appears to be the most common among legal scholars . . .").

123. *See List of Individuals Impeached by the House of Representatives*, *supra* note 104.

124. *See* Rich Gardella, *Why Don't Supreme Court Justices Have an Ethics Code?*, U.S. NEWS (Apr. 11, 2017, 12:26 PM), https://www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236.

125. *See* Patrick J. Wright, Roe *Leak Will Do Lasting Damage to Court Independence*, MACKINAC CTR. FOR PUB. POL'Y (May 3, 2022), https://www.mackinac.org/blog/2022/roe-leak-will-do-lasting-damage-to-court-independence.

House of Representatives.[126] However, the Senate is divided 50–50 between Republicans and Democrats.[127] If an impeachment proceeding largely breaks along party lines, then the impeachment would fall well short of the sixty-seven votes required in the Senate to remove a Justice from office.

B. If the Leak Came from a Law Clerk

It is more probable that the source of the leaked draft opinion was a law clerk to one of the Justices. If the leaker is a law clerk, this action may spell the end of that clerk's legal career. It has been reported that the late Justice Antonin Scalia told law clerks that if they ever betrayed the confidences of the Court, then he would do everything in his power to destroy that person's legal career.[128] Although the code of conduct that applies to law clerks is not a document in the public domain, it has been reported that the duty of confidentiality is a key tenet of the document.[129] Thus, the leaker would almost certainly be in violation of the confidentiality agreement he or she entered into with the Court. If the law clerk is a licensed attorney, then he or she likely will face professional discipline with the bar of any jurisdictions in which he or she is a member.

1. Possibility of attorney discipline for Supreme Court clerk

Professional discipline is likely in the event the source of the leak happens to be a licensed attorney. At least three rules in the American Bar Association (ABA) Model Rules of Professional Conduct may be violated by leaking the draft opinion. First, ABA Model Rule 8.4(c) prohibits an attorney from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."[130] It can be argued that leaking the draft opinion constitutes conduct that involves dishonesty and deceit, especially considering the fact that law clerks sign a confidentiality agreement with

126. *See* Ally Mutnick & Sarah Ferris, *Democrats' Chance to Save the House Majority Runs Through These Districts*, POLITICO (May 9, 2022, 9:32 AM), https://www.politico.com/news/2022/05/09/democrats-last-best-chance-house-00030935.

127. *See* Burgess Everett & Marianne Levine, *Schumer's Senate Shocker: Bills Are Passing (Seriously)*, POLITICO (Mar. 15, 2022, 4:31 AM), https://www.politico.com/news/2022/03/15/schumer-steers-senate-toward-center-00017168.

128. *See* Roy Strom, *Who Leaked the U.S. Supreme Court Draft? Suspicion Falls on the Clerks*, NAT'L POST (May 4, 2022), https://nationalpost.com/news/world/who-leaked-the-u-s-supreme-court-draft-suspicion-falls-on-the-clerks-as-probe-begins.

129. *See* Mark C. Miller, *Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 LAW & SOC. INQUIRY 741, 744 (2014).

130. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2022).

the Court and such conduct is an intentional violation of this agreement.[131] The leak also constitutes a serious breach of trust, as expressed by Chief Justice Roberts in the press release released the day following the news reporting of the leak.[132]

Second, the leak is also prohibited by ABA Model Rule 8.4(d), which prohibits an attorney from "engag[ing] in conduct that is prejudicial to the administration of justice."[133] An intentional leak of a draft opinion is likely intended to affect the deliberations of the Court or the decision of the Court in some way. Such conduct is arguably prejudicial to the administration of the functions of the Court.

Finally, ABA Model Rule 8.4(e) prohibits an attorney from "stat[ing] or imply[ing] an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law."[134] This rule is arguably violated by the leaking of a draft opinion if the leak was intended to alter the outcome of the decision. By violating ABA Model Rule 8.4(c) or ABA Model Rule 8.4(d), a violation of ABA Model Rule 8.4(e) could occur.

2. Conduct detrimental to the administration of justice and disbarment

An attorney who knowingly and intentionally leaked the draft opinion may face a serious consequence: disbarment for conduct prejudicial to the administration of justice. Conduct prejudicial to the administration of justice has resulted in disbarments in a number of fact patterns, including an attorney who was convicted of conspiracy to distribute cocaine and marijuana,[135] an attorney who converted estate funds,[136] an attorney who assisted a son to escape criminal prosecution,[137] an attorney who participated in a fraudulent real estate investment scheme,[138] and where an attorney with a history of filing frivolous actions occurred.[139]

There does not appear to be a case from a state involving disbarment in which a law clerk disclosed confidential court materials from that court. However, there is a case in which an attorney was disbarred for allegedly

131. *See* Miller, *supra* note 129.
132. *See* Sup. Ct. Press Release, *supra* note 78.
133. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 2022).
134. *Id.*
135. *See* Matter of Ramsey, 301 S.E.2d 470 (S.C. 1983).
136. *See* Matter of Hill, 655 N.E.2d 343 (Ind. 1995).
137. *See* Att'y Grievance Comm'n of Md. v. Sheinbein, 812 A.2d 224 (Md. 2002).
138. *See In re* Mason, 736 A.2d 1019 (D.C. 1999).
139. *See* Ligon v. Stilley, 371 S.W.3d 615 (Ark. 2010).

engaging in witness tampering. In *Attorney Grievance Commission v. Kent*, the Maryland Court of Appeals found disbarment of an attorney appropriate after the attorney allegedly tampered with a witness in a criminal case.[140] The Maryland Court of Appeals noted:

> Respondent claims that he did not engage in conduct prejudicial to the administration of justice because his intent was to bring about the acquittal of individuals he believed to be innocent. Regardless of respondent's personal beliefs about the guilt or innocence of the defendants, he is bound to uphold the Rules of this Court.[141]

The current case of the draft opinion leak can be analogized with the *Kent* decision because in leaking the draft opinion the law clerk could be engaging in attempted tampering with the Court if the leak was intended to change the outcome of the decision. A disbarment could potentially occur even if the attorney sincerely believed he or she was working to uphold his or her perceived notion of the correct interpretation of the law.

In addition, the leaker's failure to cooperate in the Supreme Court's investigation regarding the leak could potentially constitute misconduct in connection with a potential attorney disciplinary proceeding. For example, in *Office of Disciplinary Counsel v. Marshall*, the Ohio Supreme Court recommended permanent disbarment of an attorney who failed to cooperate with an investigation of attorney misconduct.[142]

C. Criminal Consequences of the Leak

1. Applicability of 18 U.S.C. § 641

The great turmoil caused by the leak does not necessarily mean that it was a criminal action. Assuming that the leaker had lawful access to the draft opinion and did not engage in any hacking or other criminal activity to obtain it, it is unclear that such a person would be guilty of any crime. A fact making criminal prosecution more difficult is that draft Supreme Court opinions are not classified documents.[143] The leaker would instead likely face severe professional consequences, such as being fired from the Supreme Court and disbarred from the practice of law.

140. Att'y Grievance Comm'n v. Kent, 653 A.2d 909 (Md. 1995).

141. *Id.* at 918.

142. Disciplinary Counsel v. Marshall, 660 N.E.2d 1161 (Ohio 1996).

143. Shan Wu, *The Pitfalls in Calling for a Criminal Investigation into the Supreme Court's Leak*, THINK (May 6, 2022, 2:18 AM), https://www.nbcnews.com/think/opinion/pitfalls-criminal-investigation-supreme-court-abortion-leak-rcna27575.

The most likely criminal cause of action appears to be under 18 U.S.C. § 641. Unfortunately, this statute is notoriously ambiguous,[144] there exists significant circuit splits in its interpretation,[145] legislative history provides little insight to reveal any congressional intent,[146] and the Supreme Court has consistently declined to hear cases regarding whether § 641 applies to intangible information.[147] The statute makes it illegal for anyone to

> convert[] to his use or the use of another, or without authority, sell[], convey[] or dispose[] of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof . . . .[148]

The use of the words "converts," "sells," "conveys," and "disposes" seems to imply that § 641 only pertains to physical documents that would deprive the government of the original. Also, the statute determines whether the violation is a felony or a misdemeanor based on the value of the property taken.[149] This implies that only tangible items—and not copies of information—were intended to be covered. Other statutes about disseminating government documents explicitly specify that the act of making "copies" is forbidden,[150] but no such language appears in § 641. Likewise, other statutes explicitly include anyone who "publishes, divulges, discloses, or makes known in any manner or to any extent . . ."[151]

However, there are also grounds for the position that § 641 does cover disseminated copies of government documents such as that in *Dobbs*. In *Morissette v. United States*, the Supreme Court held that § 641 applies not only to acts of larceny and embezzlement but "also [to] acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions."[152] And while the legislative history is largely inconclusive regarding congressional intent,[153] the existence of the statute in some form or another since 1875, and no legislative history to suggest that Congress intended for it to apply to theft of information, may suggest

144. Jessica Lutkenhaus, *Notes: Prosecuting Leakers the Easy Way: 18 U.S.C. § 641*, 114 COLUM. L. REV. 1167, 1172 (2014).

145. *Id.* at 1185.

146. *Id.* at 1174–75.

147. *Id.* at 1185 n.92.

148. 18 U.S.C. § 641.

149. *Id.*

150. 18 U.S.C. § 793(b).

151. 18 U.S.C. § 1905.

152. Morissette v. United States, 342 U.S. 246, 266 n.28 (1952).

153. Lutkenhaus, *supra* note 144, at 1174–75.

that § 641 should not only apply to acts of larceny and embezzlement.[154] Courts have noted that "the language chosen by Congress [in § 641] could not have been broader,"[155] which implies that the statute should be interpreted more broadly, potentially including the copying and disseminating of government documents.

While not dispositive as to the potentiality of a criminal conviction under § 641, modern administrations have generally maintained that § 641 does not apply to leaks to the press.[156] And while a recent Department of Justice manual states that § 641 prohibits both corporeal and incorporeal theft of government information, it explicitly promotes a policy of nonprosecution when intangible information was taken primarily to disseminate to the public and if no trespassing or wiretapping was involved.[157] The Department of Justice Criminal Resource Manual states:

> it is inappropriate to bring a prosecution under 18 U.S.C. § 641 when: (1) the subject of the theft is intangible property, i.e., government information owned by, or under the care, custody, or control of the United States; (2) the defendant obtained or used the property primarily for the purpose of disseminating it to the public; and (3) the property was not obtained as a result of wiretapping, (18 U.S.C. § 2511) interception of correspondence (18 U.S.C. §§ 1702, 1708), criminal entry, or criminal or civil trespass.[158]

The manual further clarifies the intent of this policy: "Thus, under this policy, a government employee who, for the primary purpose of public exposure of the material, reveals a government document to which he or she gained access lawfully or by non-trespassory means would not be subject to criminal prosecution for the theft."[159] One could argue that the *Dobbs* leak is not the type of occurrence envisioned by the exceptions stated in the manual. The policy is explicitly designed to protect "whistle-blowers" and those in the media who receive such information.[160] Leaking the Supreme Court's deliberations and draft opinion in *Dobbs* would not be covered.

154. Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1463 (1984).

155. United States v. Collins, 56 F.3d 1416, 1419 (D.C. 1995).

156. Lutkenhaus, *supra* note 144, at 1178 n.55.

157. *Id.* at 1178–79.

158. U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL, § 1664, https://www.justice.gov/archives/jm/criminal-resource-manual-1664-protection-government-property-theft-government-information.

159. *Id.*

160. *Id. See infra* notes 170–171and accompanying text for a discussion of why whistleblower protections would not apply to the *Dobbs* leak.

The stipulation that § 641 covers the transfer of a "thing of value" can be used to argue both for and against the statute's applicability in the *Dobbs* leak. The ambiguity of a "thing of value" is also illustrated in the circuit split.[161] One could argue that the term implies applicability only to tangible items, as disseminating a copy of a document cannot be said to directly deprive the government of any monetary value. Conversely, it could be argued that the government also maintains value in certain pieces of information remaining private. For example, if the government knew that the *Dobbs* leak could have been avoided with a $5,000 security upgrade, it is highly likely that it would have made such an investment. In this way, it could be said that the government values keeping such information private at $5,000 or more. Based on this logic, it is irrelevant that the leaker did not directly cost the government any money. What matters is that the information contained in the draft opinion in *Dobbs* was a "thing of value" to the government.

While there is currently a circuit split on the issue, a majority of the Courts of Appeals that have considered the question concluded that § 641 does apply to intangible information.[162] The Ninth Circuit has held that § 641 may never be used to prohibit information disclosure, while the Second, Fourth, and Sixth Circuits, as well as a magistrate judge in the First Circuit, have declared prosecutions for information disclosure permissible under § 641 at least under certain circumstances.[163] The Fourth Circuit interpreted § 641 to be applicable to intangible information by maintaining that "information is a species of property and a thing of value."[164] Likely most relevant to a potential defendant in the *Dobbs* leak is that the D.C. District Court appears to agree with the majority of circuits that § 641 is applicable to intangible information. In *United States v. Hubbard*, the court upheld an indictment against members of the Church of Scientology for unauthorized copying of government documents because government resources were used in the process.[165]

The leaker of the *Dobbs* draft opinion may have a further defense based on First Amendment protections. The leak may be considered an expressive act.[166] Even laws against the dissemination of classified information are sometimes considered to be in conflict with the First

161. Lutkenhaus, *supra* note 144, at 1185.
162. *Id.* at 1186.
163. Lutkenhaus, *supra* note 144, at 1170.
164. United States v. Fowler, 932 F.2d 306, 310 (4th Cir. 1991).
165. United States v. Hubbard, 474 F. Supp. 64, 79–80 (D.D.C. 1979).
166. Lutkenhaus, *supra* note 144, at 1184.

Amendment.[167] And the information from the *Dobbs* leak is not even classified.[168] The level of protection afforded to expressive acts depends on the type of speech at issue.[169] In the *Dobbs* leak, it is unclear whether this classification would hinder or help a defendant arguing First Amendment protections. On one side, the topic of abortion is clearly one of public debate and democratic significance. But it could also be argued that a private draft opinion regarding abortion is not a matter of public debate.

While some have referred to the leaker as a "whistleblower,"[170] his or her actions would likely not receive protection under any whistleblower protection legislation. The purpose of such protections is explicitly applicable to issues of "waste, fraud, and abuse in the federal government."[171] While pro-choice advocates may argue that, in a sense, the leaked *Dobbs* draft opinion involves Supreme Court Justices "abusing" their power, this is clearly not the intention of whistleblower protections.

A potential prosecution for the *Dobbs* leak would elicit interesting hypotheticals regarding the interpretation of § 641. For example, what about someone with a photographic memory who is able to memorize a one-page Supreme Court memo and verbally communicates it to others verbatim? And since § 641 applies to "any record," would someone who makes and disseminates to the public a copy of a Supreme Court Christmas party flyer be criminally liable?

The uncertainties surrounding a potential criminal prosecution for the *Dobbs* leak is made even more fascinating when one considers the potential path such a prosecution could take. Given the dramatic circuit split involving § 641,[172] it would not be surprising if a criminal prosecution against the person responsible for the most significant Supreme Court leak in history was ultimately adjudicated by the Supreme Court. Such a case could evoke questions about the Supreme Court and issues of recusal, impartiality, and public pressure.

167. *Id.*

168. *See* Wu, *supra* note 143.

169. Lutkenhaus, *supra* note 144, at 1205.

170. *See, e.g.*, Molly Callahan, *Who Leaked the Supreme Court Draft Opinion Overturning* Roe v. Wade*? Four Theories*, NEWS @ NORTHEASTERN (May 3, 2022), https://news.northeastern.edu/2022/05/03/supreme-court-draft-opinion-overturning-roe/.

171. S. REP. NO. 112-155, at 1 (2012).

172. Lutkenhaus, *supra* note 144, at 1185.

2. Alternative criminal sanctions

Criminal liability under 18 U.S.C. § 641, while far from certain, is the most likely cause of action to result in a conviction. But there are other options that could be pursued. The leaker could be prosecuted under 18 U.S.C. § 1030, the Computer Fraud and Abuse Act of 1986 (CFAA). The CFAA makes it a crime "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." The 2021 Supreme Court case of *Van Buren v. United States*[173] makes prosecuting the leaker in Dobbs even more difficult. In *Van Buren*, the Supreme Court held that a police officer who ran license-plate searches in exchange for money did not violate the CFAA because the "provision covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them."[174] *Van Buren* is similar to the *Dobbs* leak in that both the actions violated the policy of their respective institutions—the police department's and the Supreme Court's, respectively. With the newly established Supreme Court precedent from *Van Buren*, it would be nearly impossible to obtain a conviction under the CFAA, assuming that the *Dobbs* leaker was a clerk or Justice who initially had valid access to the draft opinion.

Another potential but unlikely criminal cause of action would be honest services fraud under 18 U.S.C. § 1346. In 2020 Congress amended the CFAA to explicitly include "conduct that deprives a person or group of the right to have another act in accordance with some externally imposed duty or obligation, regardless of whether the victim so deprived has suffered or would suffer a pecuniary harm."[175] Supreme Court law clerks do pledge an oath to keep secret the confidential information that they are exposed to.[176] However, in the 2010 Supreme Court case of *Skilling v. United States*, the Court held that § 1346 is limited to "offenders who, in violation of a fiduciary duty, participate[] in bribery or kickback schemes."[177] Assuming that the leaker in *Dobbs* did not receive any direct

173. Van Buren v. United States, 141 S. Ct. 1648, 1649 (2021).

174. *Id.* at 1652.

175. MICHAEL A. FOSTER, CONG. RSCH. SERV., R45479, BRIBERY, KICKBACKS, AND SELF-DEALING: AN OVERVIEW OF HONEST SERVICES FRAUD AND ISSUES FOR CONGRESS (May 18, 2020), https://sgp.fas.org/crs/misc/R45479.pdf.

176. *See* Miller, *supra* note 129.

177. Skilling v. United States, 561 U.S. 2896, 2905 (2010).

compensation by *Politico*, a conviction under § 1346 would be highly unlikely.

There is a method by which Chief Justice John Roberts could potentially create criminal liability for the leaker. 18 U.S.C. § 1001 criminalizes knowingly and willfully false statements "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States . . . ."[178] Therefore, Chief Justice Roberts could require all law clerks to sign a statement under oath that they played no role in the *Dobbs* leak. Then, if the leaker is identified, he or she would likely be held to have violated § 1001. This strategy of creating a criminal violation under § 1001 is not without its problems, however. If multiple law clerks refused to sign the document in protest, this could potentially spark division on the Court and cause the Court to decrease in legitimacy in the public eye. Additionally, this strategy would only be effective if the leaker was a clerk. If the leak was the result of an outside hack or one of the Justices, the sworn statements from law clerks would be irrelevant for § 1001 prosecution.

There are various other federal statutes that pertain to the dissemination of government information, but none seem to be applicable to the *Dobbs* leak. 18 U.S.C. § 793 and § 794 are limited to national security information. 18 U.S.C. § 1905 is limited to "trade secrets, processes, operations, style of work, or apparatus . . . identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures."[179] And 50 U.S.C. § 783 deals only with classified information, which does not apply to draft Supreme Court opinions.[180]

IV. POSSIBLE REMEDIES TO PREVENT FUTURE OPINION LEAKS

In the wake of the leaked draft opinion, it is now incumbent to examine potential preventative measures to prevent future leaks. These measures include a three-year practice requirement for clerks, classifying internal Supreme Court documents, passing legislation explicitly criminalizing the copying and dissemination of internal Supreme Court documents, altering the reporter's privilege, and enhancing security protocol.

One proposed measure is requiring all clerks to be licensed for a minimum of three years. Obtaining a Supreme Court clerkship is one of the most prestigious honors a law school graduate can achieve. Clerks at

178. 18 U.S.C. § 1001.
179. 18 U.S.C. § 1905.
180. Wu, *supra* note 143.

the Supreme Court will typically serve as a clerk at a lower appellate court prior to receiving a Supreme Court clerkship.[181] However, there is no requirement that a clerk be a licensed attorney.[182] The United States Supreme Court requires an attorney be licensed for three years in a state, territory, commonwealth, possession, or the District of Columbia prior to being eligible for admission to practice before the Court.[183] Applying this same standard to law clerks would ensure there would be jurisdiction to pursue a state disciplinary proceeding if they commit misconduct. This requirement has the additional benefit of ensuring that clerks have some practical experience in practicing law.

Congress could pass legislation allowing internal Supreme Court communications to be labeled as classified.[184] This would result in a security clearance system to be enacted that may function to remind clerks and Justices of the significance of confidentiality. This would also increase the risk of criminal prosecution for leaking documents.

Congress could simply update 18 U.S.C. § 641 to be clearer in its applicability to leaked Supreme Court documents. Doing so might have some deterrence effect on future leakers who may be counting on no criminal liability for their actions. A far more drastic measure available is to attempt to reduce protections involving reporter privilege in an effort to disincentivize both the leaking and the publishing of leaked Supreme Court documents.

The *Dobbs* leak happens to coincide with newly proposed legislation, the Supreme Court Ethics, Recusal, and Transparency Act of 2022.[185] The bill currently focuses primarily on issues of disclosure and recusal when conflicts of interest are present.[186] However, the legislation could provide a timely opportunity for instituting additional measures regarding leaks.

There are also some minor changes that the Supreme Court could implement to help reduce the risk of another leak. For example, the Supreme Court could require unique watermarks on sensitive documents, microchemical identifiers in paper, limit cell-phone use, require searches

181. *See* Miller, *supra* note 129, at 742.

182. *See SCOTUS Clerkships*, CHAMBERS ASSOC., https://www.chambers-associate.com/where-to-start/getting-hired/scotus-clerkships (last visited June 3, 2022).

183. *See* Sahr A.M. Brima, *Admission to U.S. Supreme Court Bar*, AM. BAR ASS'N (Feb. 26, 2020), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2020/admission-to-us-supreme-court-bar/.

184. Zack Smith & John Malcolm, *Could Supreme Court Leaker Be Criminally Prosecuted? Maybe*, HERITAGE FOUND. (May 4, 2022), https://www.heritage.org/courts/commentary/could-supreme-court-leaker-be-criminally-prosecuted-maybe.

185. H.R. 7647, 117th Cong. (2022).

186. *Id.*

to be performed when each person leaves the building, and disable laptop USB ports. The advantages to these security measures are that they are implemented internally and therefore circumvent the need to pass legislation on the matter. However, one downside of such strategies is that Chief Justice John Roberts would need to acquire support from the other Justices to implement.

When evaluating each proposed measure, it is important to also consider the likelihood of such a future leak absent any additional preventative measures. The leaking of an entire draft opinion has only occurred once in over 230 years. This could be interpreted as evidence that the existing security measures are reasonably adequate and that the downsides to implementing future protections outweigh the benefits. The downsides of such additional measures extend beyond just the financial and time costs. They would also likely reduce trust and comradery on the Court, which is of paramount importance.[187] And the benefits of enhanced security measures are only probabilistic because no measure would completely eliminate the risk of future leaks.

V. CONCLUSION

The negative effects of the leaked draft opinion on the Supreme Court will likely extend well into the future.[188] The leak likely resulted in a reduction of trust at the Supreme Court.[189] This could have the harmful effect of Justices feeling they cannot communicate freely with colleagues. This breakdown in open conversation could lead to divisiveness and a breakdown of coalition building.[190] Furthermore, the leak and these negative consequences could result in a diminished perception of the Supreme Court and the legal system in the eyes of Americans, which itself is harmful.

187. Frank B. Cross & Emerson H. Tiller, *Understanding Collegiality on the Court*, 10 J. CONST. L. 257 (2008); *Justice Clarence Thomas Says Abortion Leak Has Changed the Supreme Court*, ASSOCIATED PRESS (May 14, 2022, 9:12 AM), https://www.nbcnews.com/news/us-news/justice-clarence-thomas-says-abortion-leak-changed-supreme-court-rcna28864 ("When you lose that trust, especially in the institution that I'm in, it changes the institution fundamentally.").

188. SCOTUSblog (@SCOTUSblog), TWITTER (May 2, 2022, 9:07 PM), https://twitter.com/SCOTUSblog/status/1521295411545260035.

189. Emily Crane & Priscilla DeGregory, *Supreme Court's Abortion Leak Isn't the First—Especially with* Roe v. Wade, N.Y. POST (May 3, 2022, 6:56 PM), https://nypost.com/2022/05/03/supreme-courts-abortion-leak-isnt-the-first-especially-with-roe/ ("The most immediate fallout will be a loss of trust among the Justices and an awareness that things said during deliberations are never truly private.").

190. Gerstein, *supra* note 40 (explaining that confidentiality is essential to the Court's collegiality).

The leaked draft elicits numerous legal and practical implications. This Article provides an analysis of the potential civil and criminal penalties applicable against the *Dobbs* leaker. It also considers possible methods for preventing future leaks and the inherent tradeoffs involved. In doing so, this Article provides an initial analysis of a little-explored area of Supreme Court procedure and invites future research on the subject.

SITLA AND HOW TO MAKE IT PAY: TWO PROPOSALS FOR INCREASING THE PROFITABILITY OF UTAH'S SCHOOL AND INSTITUTIONAL TRUST LANDS

I. INTRODUCTION

A. Utah's History of Tension with the Federal Government Over Land

During their 2012 General Legislative Session, the Utah State Legislature passed H.B. 148.[1] The main thrust of the bill was a demand that the United States federal government turn all public lands, with a few exceptions, over to the state of Utah. So far, the federal government has not complied. Utah is not the only state to make such a demand—Wyoming passed a similar bill as recently as 2021[2]—but, as one PBS article notes, "Utah's tenacious efforts to take back federal land stand out" from among the rest.[3] Not only has Utah's Legislature passed a bill that the federal government appears to have largely ignored, but a Utah congressman has also faced pushback after trying to sell thousands of square miles of federal lands to private parties,[4] and many Utah leaders supported President Trump's 2017 executive order to shrink the Bears Ears Monument.[5]

There is certainly a sordid past between Utah and the federal government that may contribute to these tenacious efforts. Many Utahns' ancestors were driven from their homes in the eastern United States for their membership in the Church of Jesus Christ of Latter-day Saints, and few, if any, were protected by the federal government. Utah's grudge against the federal government was further solidified after the conflict between Utah and the federal government in what became known as the

1. H.R. 148, 2012 Leg., 2012 Gen. Sess. (Utah 2012).

2. H.R. HB0141, 2021 Leg., Reg. Sess. (Wyo. 2021).

3. Nicholas Riccardi, *Utah's tenacious efforts to take back federal land stand out*, PBS NEWS HOUR (Dec. 3, 2017, 4:42 PM), https://www.pbs.org/newshour/politics/utahs-tenacious-efforts-to-take-back-federal-land-stand-out.

4. *Id.*

5. Richard Gonzales et al., *Trump Orders Largest National Monument Reduction In U.S. History*, NPR (Dec. 4, 2017, 5:14 AM), https://www.npr.org/sections/thetwo-way/2017/12/04/567803476/trump-dramatically-shrinks-2-utah-national-monuments.

Utah War.[6] Additionally, 54% of Utahns are Republicans or lean Republican,[7] and the Republican party tends to support federalism and states' rights.

Even without the past tension over religion and the current tension created by ideology, Utah may have good reason for its tenacious efforts to take back its lands. Only the 13th largest state by land area,[8] Utah has the 4th highest total acres of federal lands in its borders[9,10] and has the 2nd highest percentage of its land owned by the federal government.[11] (See Figures 1 and 2). This means that if the federal government were to turn federal lands over to state ownership, Utah's usable land would about double in size. Millions of acres of land would become available for housing, grazing, farming, mining, technology development, and more. And, whatever negative environmental and cultural impacts such activities would have, the millions and probably billions of tax dollars that would result over ensuing years must be tempting to a state with only a $25.97 billion budget in 2022[12]—an especially low number compared with the over $250 billion budget for California. (See Figure 3).

6. Richard D. Poll, *The Utah War*, UTAH HISTORY ENCYCLOPEDIA, https://www.uen.org/utah_history_encyclopedia/u/UTAH_WAR.shtml (last visited Oct. 24, 2022).

7. Pew Research Center, *Party affiliation among adults in Utah*, RELIGIOUS LANDSCAPE STUDY, https://www.pewresearch.org/religion/religious-landscape-study/state/utah/party-affiliation/ (last visited Apr. 21, 2022).

8. *United States by Area*, WORLD POPULATION REVIEW, https://worldpopulationreview.com /state-rankings/states-by-area (last visited Apr. 21, 2022).

9. *Federal land ownership by state*, BALLOTPEDIA, https://ballotpedia.org /Federal_land_ownership_by_state (last visited Apr. 21, 2022).

10. The Federal government owns a total of 615,311,596 in the United States. 33,267,621 of these acres are in Utah, 45,493,133 are in California, 56,262,610 are in Nevada, and 222,666,580 are in Alaska.

11. 63.10% of Utah is owned by the Federal government. Only Nevada, with 80.10%, has more of its land owned by the Federal government. *See* Figure 2.

12. Utah State Legislature, *Compendium of Budget Information for the 2022 General Session*, COBI FY22-23, https://cobi.utah.gov/2022/1/overview (last visited Apr. 21, 2022).

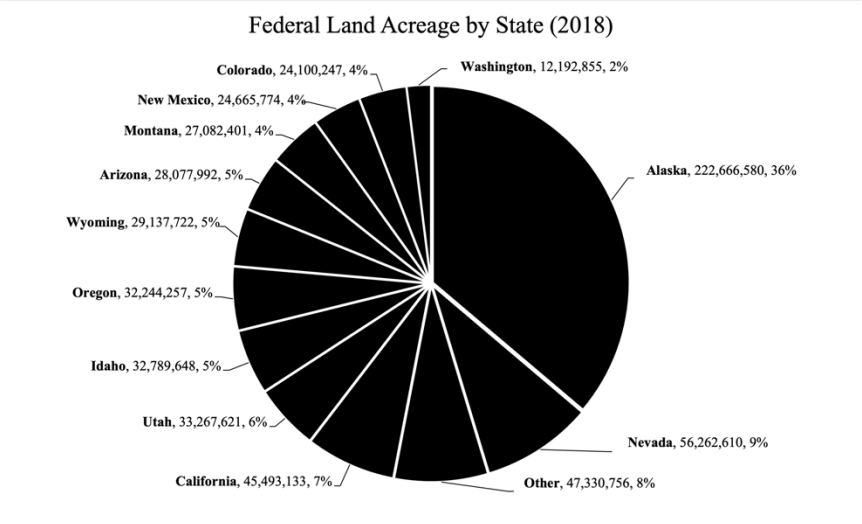

Figure 1[13]

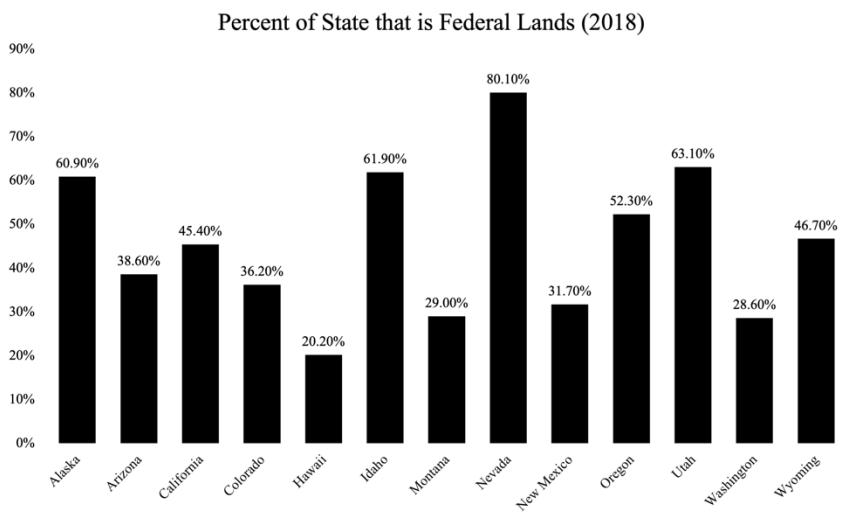

Figure 2[14]

13. Data from *Federal land ownership by state*, BALLOTPEDIA, https://ballotpedia.org /Federal_land_ownership_by_state (last visited Apr. 21, 2022).

14. *Id.*

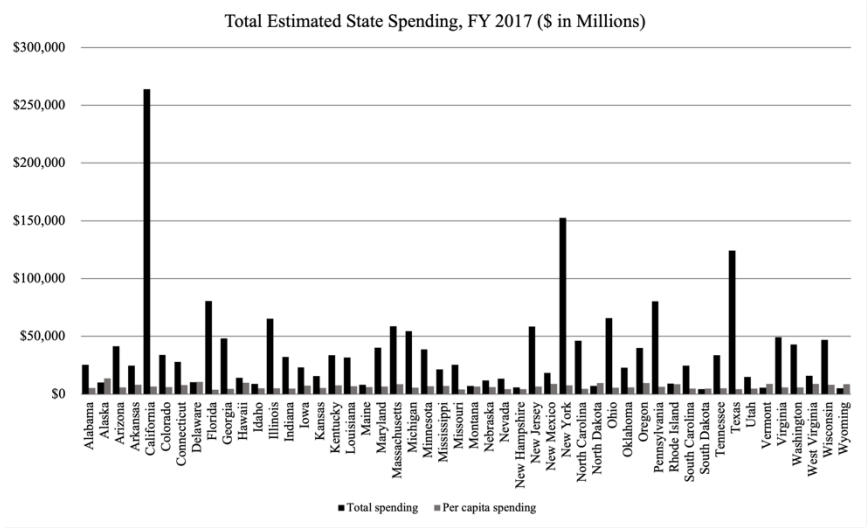

Figure 3[15]

B. Utah's School and Trust Lands Could Benefit from a Federal Land Transfer or Land Exchange with the Federal Government

Utah's education system is one area that would likely see a budget increase if Utah owned more of its public lands. Until recently, Utah had the lowest per-pupil spending in the nation, a position it held for almost two decades.[16] Now, Utah has won the cold comfort of passing the title to Idaho and has inched up to the second lowest per-pupil spending.[17] While Utah education would certainly get a boost from any increase in state income taxes or local property taxes—education's main sources of funding from the state and local level[18]—it could also see a boost from a currently insignificant source, Utah school and trust lands, if the federal government were to capitulate to Utah's 2012 demand. Utah uses its

15. Data from *Total state government expenditures*, BALLOTPEDIA, https://ballotpedia.org/Total_state_government_expenditures (last visited Apr. 21, 2022).

16. Connor Sanders, *Utah is not last in the nation for per-pupil spending, for the first time in decades*, THE SALT LAKE TRIBUNE (May 18, 2021, 12:59 PM, Updated 5:53 PM), https://www.sltrib.com/news/education/2021/05/18/utah-is-not-last-nation/#:~:text=For%20the%20first%20time%20in%20more%20than%20two%20decades%2C%20Utah,by%20the%20U.S.%20Census%20Bureau.

17. *Id*.

18. Office of Legislative Research and General Counsel, *How Utah Public Schools are Funded*, OLRGC BRIEFINGS (February 5, 2013), https://le.utah.gov/lrgc/briefings/howutahpublicschoolsarefunded.pdf.

school and trust lands to generate revenue for public education in the state, and there are significant problems with the locations of the school and trust lands that restrict Utah's ability to use the land effectively. Even if the federal government never completes a full land transfer with the states, there are still smaller-scale land transfers ("land exchanges") that the federal government may be more willing to engage in. These land exchanges will help increase the school and trust land revenue and ease the tax burden on the citizens of Utah.

C. An Overview of This Article's Purpose and Argument

This article will first discuss the history of education trust lands in the states, as well as the history of school trust lands in Utah. It will then examine the hurdles that Utah faces in generating revenue from its trust lands. The article will propose two solutions to these hurdles. The first solution is a near-complete transfer of public lands from the federal government to Utah. The second is a more modest, but more feasible, one-time or systemized series of land exchanges between parcels of Utah's school trust lands and federal lands. This article will explore the benefits and drawbacks to each proposal and end by recommending that Utah explore the possibility of completing a single land exchange or creating a systemized series of land exchanges with the federal government. The second proposal will reduce the need for drawn-out negotiations over land exchanges in the future and will allow Utah school trust lands the most reasonable chance to increase their revenue in the quickest amount of time.

II. STATE EDUCATION TRUST LANDS HISTORY AND FIDUCIARY DUTIES

Few people in America know much, if anything, about state education trust lands. As one survey of state education trust lands put it, "[State trust lands] are one of the most frequently ignored and least understood categories of land ownership in the American West."[19] Even so, state trust lands are a part of American history, particularly with western expansion, and still are a part—albeit a small part—of American political dialogue. Education trust lands are tangentially brought up in discussions regarding education, federal land ownership in states, and the role of state

19. PETER W. CULP ET. AL., TRUST LANDS IN THE AMERICAN WEST: A LEGAL OVERVIEW AND POLICY ASSESSMENT 2 (2005).

governments and the federal governments in land use and preservation. However, education trust lands deserve consideration from policymakers and the public on the trust lands' own merits. After all, these state trust lands are supposed to be used to benefit American students. If any state's education trust land system can be improved, that state's policymakers have a fiduciary duty to the education systems in their state to make those improvements.

A. The History of State Education Trust Lands in the United States

Congress has been granting trust lands to states for educational purposes since before the ratification of the United States Constitution. With the General Land Ordinance of 1785 and the Northwest Ordinance of 1787, Congress instituted a system that divided states into townships with 36 one-mile by one-mile parcels.[20] Specific parcels were set aside for the use of education within the state. The number of parcels set aside and the use of the land over time varies from state to state, but each state that was given these education lands was to hold them in trust for the benefit of public education and state educational institutions.[21]

The plan for the townships initially seemed like a good idea, especially after the Louisiana Purchase. Suddenly, millions of acres of flat farmland became available for settlement, new states began to spring up, and anyone could see that the educational needs of these fledgling states would quickly outpace their resources. The trust lands gave states a way to fund public education and have ready-made plots for school buildings in every town. If the states didn't want to manage the trust lands, they could sell the land, and many of the early states did just that. But as the westward expansion pressed ever closer to the Pacific Ocean, the straightforward simplicity of the state trust lands became complicated by a shift in federal land use policy. The federal government began retaining more land in the western states, rather than opening the land for settlement.

There are several reasons why the federal government land use policy shifted towards retention. One reason was an increased interest in land preservation and conservation.[22] In 1872, Congress created Yellowstone

20. *SITLA and Trust Lands Explained*, TRUST LANDS ADMINISTRATION, https://trustlands.utah.gov/our-agency/sitla-and-trust-lands-explained/ (last visited Apr. 21, 2022).

21. CULP ET AL., *supra* note 19.

22. Quoctrung Bui & Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES (Jan. 5, 2016), https://www.nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html.

National Park, the first national park in the United States.[23] Over the next 150 years, Congress created 62 more national parks, along with several national historical sites, national monuments, national preserves, national reserves, and numerous other designations, totaling over 400 separate protected sites.[24] Another reason was that the nature of the land changed.[25] The land went from rolling fields as far as the eye could see to rough desert land that was dominated by the Rocky Mountain range. Settlement was still possible, but the pioneers settling the Intermountain West tended to concentrate around the most workable parts of the land, rather than spreading out across the whole state. It didn't make sense for the federal government to incentivize settlers to work the dry land of Nevada's deserts or the salt flats of the Great Salt Lake. So, the federal government retained its ownership for much of the land in western states. (See Figures 4 through 6).

23. THE OFFICE OF COMMUNICATIONS & THE OFFICE OF LEGISLATIVE AND CONGRESSIONAL AFFAIRS, THE NATIONAL PARKS: INDEX 2012-2016, at 8 (2016).

24. *National Park System*, NATIONAL PARK SERVICE (Updated Mar. 18, 2022), https://www.nps.gov/aboutus/national-park-system.htm.

25. Bui & Sanger-Katz, *supra* note 22.

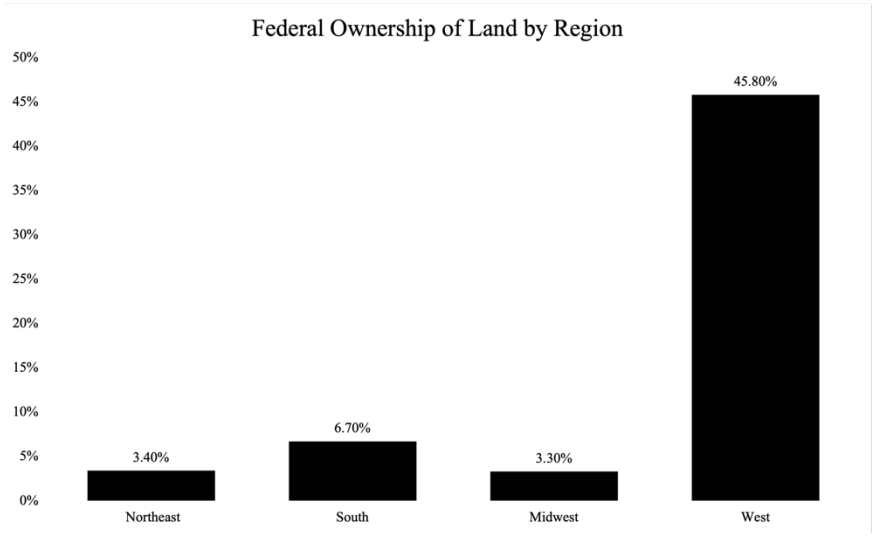

Figure 4[26,27]

26. Data from *Federal land ownership by state*, BALLOTPEDIA, https://ballotpedia.org/Federal_land_ownership_by_state.

27. Northeastern states: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, Vermont, and New Jersey.
Southern states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and Texas.
Midwestern states: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin, and Oklahoma.
Western states: California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, Wyoming, Arizona, New Mexico, Alaska, Hawaii.

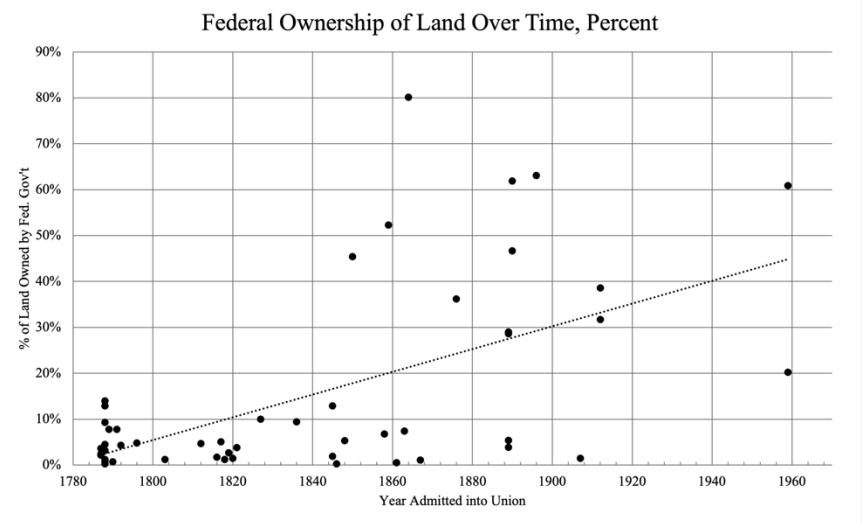

Figure 5[28]

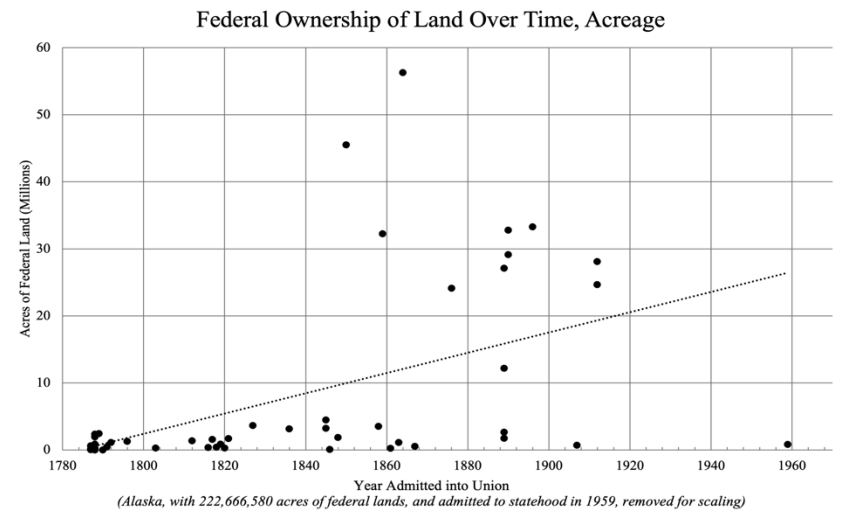

Figure 6[29]

28. *Id.*
29. *Id.*

Following the federal government's example, the western states retained their trust lands rather than selling them off.[30] For many states, retention of education trust lands combined with the township parcel distribution did not result in a guarantee that future townships would have dedicated space for schools. Rather, retention resulted in a checkerboard effect with federal land (usually land managed by the Bureau of Land Management (BLM)) being interspersed with one-mile by one-mile education trust land parcels. (See Figures 7, 8, and 9). This is problematic because it has led to parcel sterilization.[31] According to an analysis of federal lands commissioned by the Utah State Legislature in 2014, "[s]terilization of trust lands occurs when [a state] does not have full access to its [trust] lands, or when BLM refuses to allow development on its lands that surround trust lands."[32] In essence, the state is unable to generate revenue on the checkerboard parcels because BLM is reluctant to allow any operations to spill over from the trust lands onto BLM lands. With the parcels' small size, very little revenue generating operations—like development, mining, grazing, or farming—can be run on the parcels for a profit. Of course, not all the parcels are, or even were, so isolated. There are larger areas of contiguous education trust land parcels that states use to generate income for the school. Still, millions of acres of education trust lands across the nation have been sterilized.

After a few states ran into the sterilization problem—for example North Dakota, South Dakota, Montana, Washington, and Utah—Congress provided a solution, allowing other states to select *in lieu* lands. Essentially, if a parcel of land that would have been dedicated as education trust land were already in use by the railroad, private parties, or a federal department, the state could select another parcel in lieu of the original.[33] States like New Mexico and Arizona profited from the in lieu approach and had, respectively, the first and second highest gross revenues from their education trust lands in 2004.[34] New Mexico and Arizona were also granted more education trust lands than any other states.[35] Congress gave New Mexico 12.4 million surface and subsurface acres and Arizona 10.5 million surface and subsurface acres. The next highest grant of land was Utah, at 7.4 million surface and subsurface acres. Still, Utah's education

30. CULP ET AL., *supra* note 19.

31. JAN ELISE STRAMBRO ET. AL., AN ANALYSIS OF A TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH 85 (2014).

32. *Id.*

33. CULP ET AL., *supra* note 19 at 9–11.

34. *Id.* at 55.

35. *Id.* at 10.

trust land's 2004 gross revenue was less than one-fifth of what New Mexico's education trust lands made and less than one-fourth of what Arizona's made.[36] With the difference of in lieu options and parcel sterilization, the disparity is not surprising. The difference between parcel disbursement in Utah, Arizona, and New Mexico can be seen in Figures 7, 8, and 9.

With differences in culture, state ideology, and trust land history, each state has its own approach to managing its education trust lands. For instance, Utah is more revenue driven, while Colorado is more focused on stewardship, and Arizona takes an approach somewhere in between the two.[37] Additionally, each state has its own challenges in managing the lands and making them profitable, as will be shown throughout this article with Utah.

36. *Id.* at 55.

37. PETER W. CULP ET. AL., STATE TRUST LANDS IN THE WEST: FIDUCIARY DUTY IN A CHANGING LANDSCAPE 48–51 (2015).

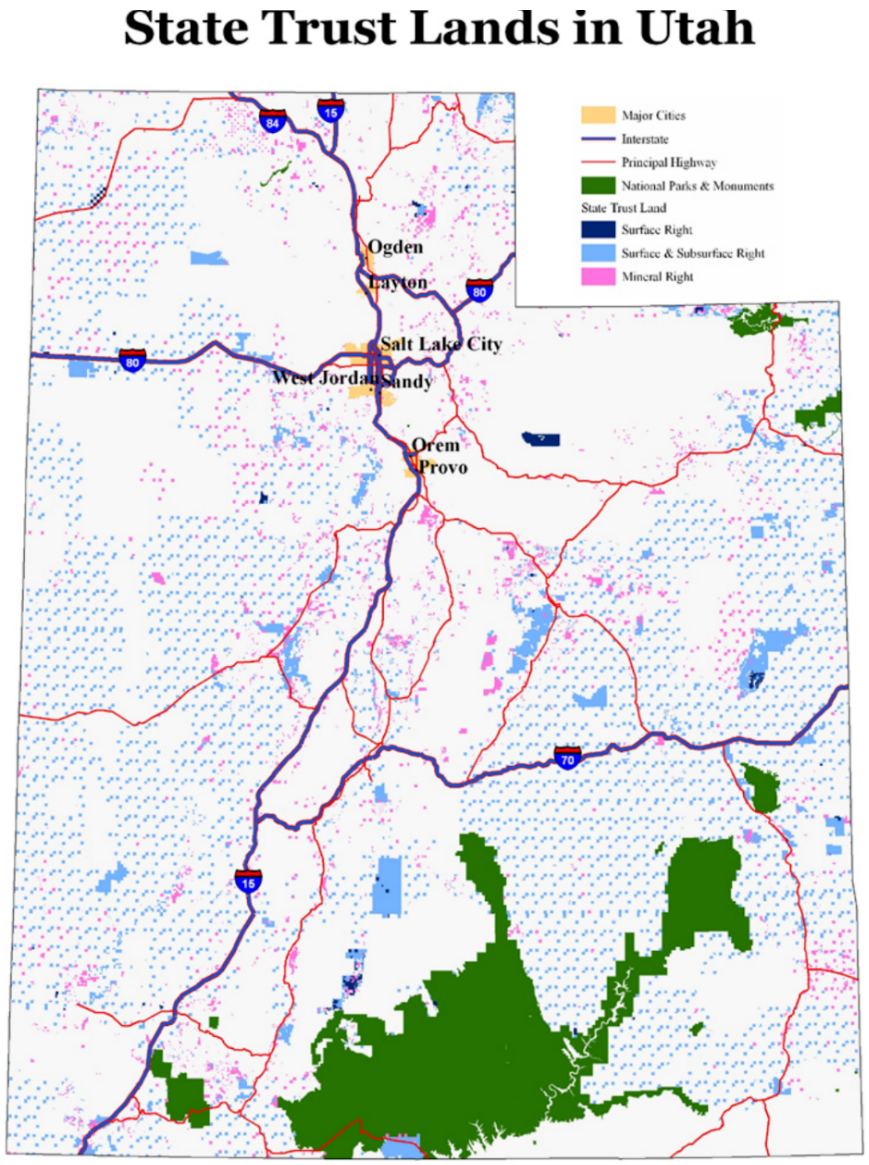

Figure 7[38]

38. CULP ET AL., *supra* note 19 at 133.

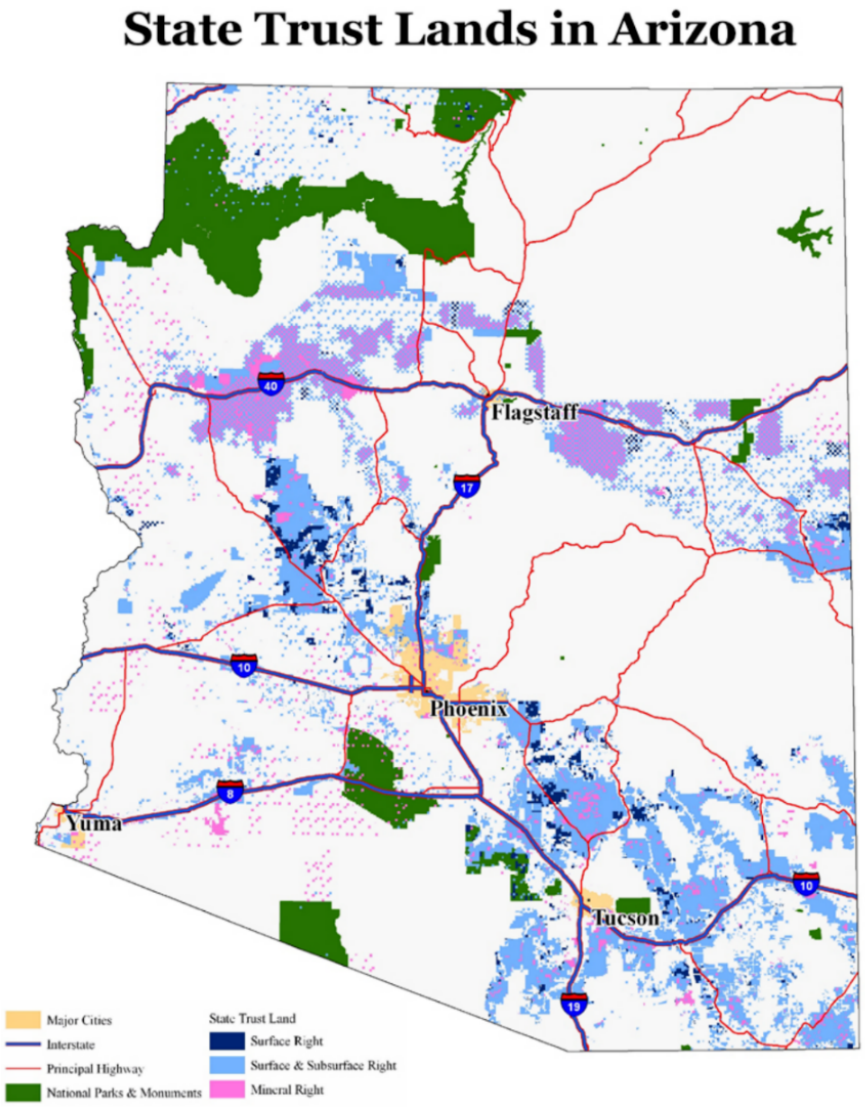

Figure 8[39]

39. *Id.* at 61.

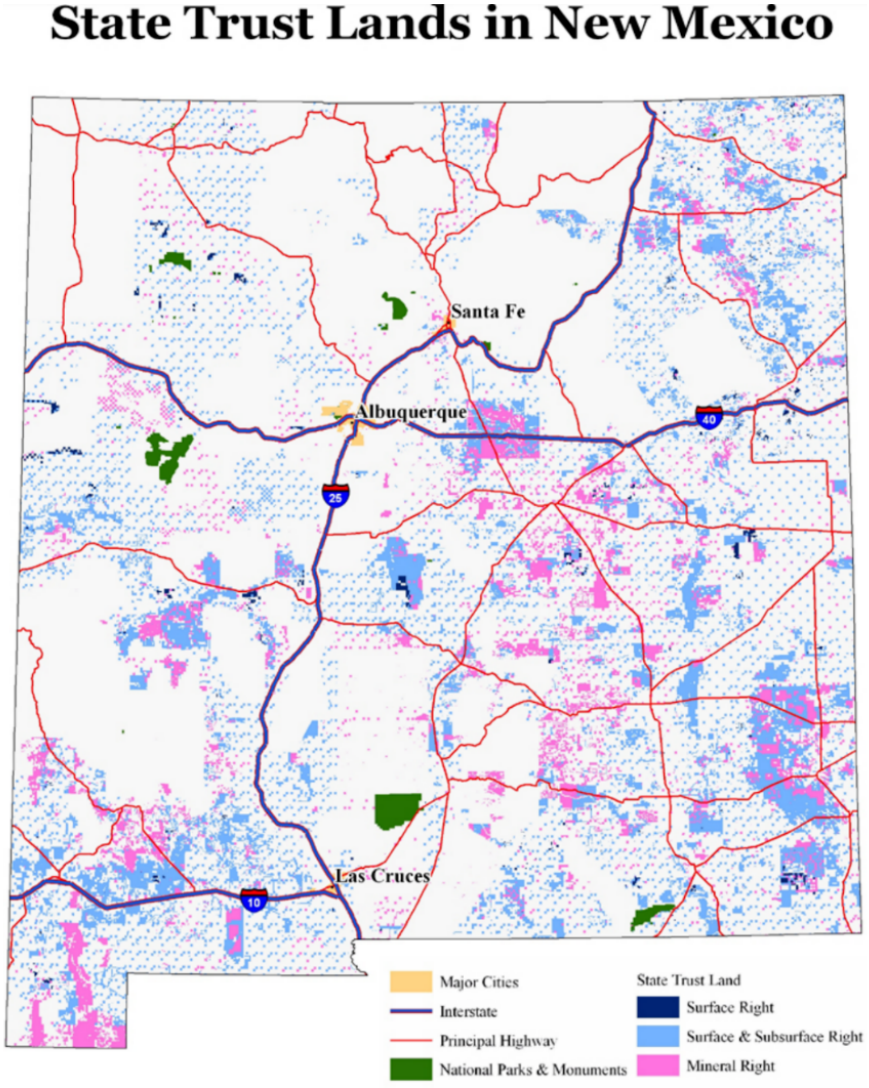

Figure 9[40]

40. *Id.* at 109.

B. States' Fiduciary Duties with Trust Lands

In brief, there are generally four fiduciary duties that trustees owe to the beneficiaries of a trust. These are the duty to follow the settlor's instructions, the duty of good faith, the duty of prudence, and the duty to preserve the trust.[41] The most important duties for the purpose of this paper are the duty of good faith, the duty of prudence, and the duty to preserve the trust. These three duties essentially require that a trustee do all in the trustee's power to preserve and manage the trust to maximize the benefits to the beneficiary without regard to the trustee's own interest.[42] With state education trust lands, the federal government is the settlor, the state is the trustee, and the state's public education system and other named educational institutions are the beneficiaries of the trust. To fulfill its fiduciary duties, a state must manage and administer its educational trust lands solely for the benefit of the state's educational institutions. Other considerations, like land conservation and preservation, are secondary to the interests of the beneficiaries. If a state considers changes to how it manages its trust lands, it must also consider how the changes will impact the state's ability to fulfill the fiduciary duties it owes to the state's public education.

III. UTAH STATE SCHOOL AND TRUST LANDS BACKGROUND, FINANCES, OPERATIONS, AND PROFITABILITY

A. Utah State School and Trust Lands Background

Utah School and Institutional Trust Lands Administration (SITLA) is the administrative body created by the Utah State Legislature in 1994 to manage the Utah school trust lands.[43] The approximately 3.4 million surface acres and 4 million subsurface acres of trust lands were granted to Utah by Congress at statehood in 1896. Along with the land came the condition that the revenue generated by the land—or use of the land itself—would be solely for the benefit of the trust lands' beneficiaries. In Utah, the beneficiaries are public education, Utah Schools for the Deaf and Blind, Utah State Hospital, Juvenile Justice Services, Miners Hospital,

41. *Id.* at 17–19.

42. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 125, 227(a) (AM. L. INST. 2012); 76 AM. JUR. 2D, *Trusts* § 404 (2022).

43. *SITLA and Trust Lands Explained*, TRUST LANDS ADMINISTRATION, https://trustlands.utah.gov/our-agency/sitla-and-trust-lands-explained/ (last visited Apr. 21, 2022).

University of Utah, Utah State University, Colleges of Education, and College of Mines and Earth Sciences/UofU.[44]

B. Utah State School and Trust Lands Finances

As mandated by the Utah Constitution, "[t]he permanent State School Fund shall be prudently invested by the state and shall be held by the state in perpetuity."[45] Despite this requirement and the requirement that funds only be distributed to the institutions specified above, the fund was ransacked by the state legislature in the 1980's when the state's higher education system faced a budget crisis. By 1990, the fund had less than $100 million. Utah instituted reforms to ensure that the permanent fund would remain permanent,[46] including the transfer of school trust land management from the Utah Division of State Lands and Forestry to SITLA.[47] SITLA has spent the last three decades growing the permanent fund to over $3 billion by 2021.[48] Distributions to beneficiaries have also grown from under $10 million in FY 1995 to almost $100 million in FY 2021.[49] SITLA is a self-funded organization,[50] meaning that its operations are funded from the revenue it generates rather than pulling from Utah's general fund.

C. Utah State School Trust Lands Operations and Profitability

Utah uses various surface and subsurface operations to generate revenue. These include oil and gas leasing, mining for minerals (such as coal, oil shale, sand, and gravel), grazing and easement permits, forestry, farming, land development, and occasionally selling land to private parties.[51] Oil, gas, and minerals (particularly coal) bring in the most revenue for the trust lands, accounting for about 83% of revenue between 2008 and 2012.[52] SITLA has a large grazing program and issues grazing permits for most of the trust lands. The grazing and easement permits,

44. *Id.*

45. UTAH CONST. art. X, § 5(2)(a).

46. CULP ET AL., *supra* note 19 at 141–142.

47. *Id*. at 135.

48. SCHOOL & INSTITUTIONAL TRUST FUNDS OFFICE, SCHOOL AND INSTITUTIONAL TRUST FUNDS FINANCIAL STATEMENTS 16 (2021).

49. *Id*. at 6.

50. STRAMBRO ET AL., *supra* note 31 at 75.

51. *Id.* at 76.

52. *Id.*

along with special use leases, often net several million dollars in profits.[53] Land development also brings in significant revenue but takes several years from the start of the operation to begin showing a profit.[54] On the somewhat rare occasions land is sold, Utah law dictates that SITLA may only sell the land when it is in the interest of the beneficiaries and only then at fair market value or higher.[55] Each operation is limited by the non-contiguous nature of the parcels, though other factors may also limit revenue. For example, forestry operations are limited both by non-contiguous parcels and the lack of sawmills in the state of Utah,[56] and forestry has often been run without a profit.[57]

IV. UTAH STATE SCHOOL AND TRUST LANDS' CURRENT REVENUE HURDLES

SITLA distributed a total of $2 billion to schools and educational institutions in Utah from 1994 to 2020,[58] which is a drop in the bucket compared to the $9.8 billion budget for public and higher education in 2022 alone.[59] The low revenue is due, in part, to the parcel sterilization discussed in the previous section. Much of Utah's school trust land is rendered useless and unprofitable because less revenue can be generated on one-mile by one-mile parcels, and because BLM imposes significant barriers to revenue projects that involve BLM. As the 2014 study commissioned by Utah's H.B. 148 notes:

> [I]n the event an applicant for a project on SITLA lands has to engage the BLM for any reason (rights-of-entry, access, etc), the agency can invoke a 'connected action' which grants it the right to fully examine not just use on BLM lands, but the entire project, regardless of how much of that project actually involves federal lands. In that situation, all lands (including trust lands) are treated for examination purposes as though they were federal lands. This process discourages development on trust lands as the cost of complying with BLM's regulatory requirements tends to be high and the potential outcome uncertain.[60]

53. *Id.* at 80.
54. *Id.* at 81.
55. *Id*. at 82.
56. *Id.* at 81.
57. *Id.* at 80.
58. Deena Loyola, *$2 Billion in Revenue, FY2020 Annual Report* (Dec. 16, 2020), https://trustlands.utah.gov/sitla/.
59. Utah State Legislature, *supra* note 12.
60. STRAMBRO ET. AL., *supra* note 31 at 86.

If the main hurdles to generating revenue on school trust lands are non-contiguous parcels and bureaucratic red tape, then any effective solution to parcel sterilization would have to include at least: (1) a plan to condense trust lands into contiguous parcels, and (2) reduction or elimination of interference from BLM and other federal agencies. Additionally, any solutions would need to allow Utah to adhere to its fiduciary duties of following the settlor's instructions, good faith, prudence, and preserving the trust. This article proposes two solutions to help increase the revenue for Utah's school trust lands.

The first proposal is the drastic, though improbable, solution that the 2012 Utah State Legislature demanded. That is, that the federal government turn all public lands over in the state of Utah for the state to own and manage as it sees fit. This proposal would eliminate BLM, the lumbering middleman, from needing to be involved in any approvals for condensing the trust lands or using the trust lands.

The second proposal is that Congress, in the spirit of the "*in lieu* lands" selection that Arizona and New Mexico had, work with Utah to do one large land exchange to condense school trust lands into contiguous areas. This second proposal is more feasible, but it would involve a high level of cooperation and probable frustration between the state and federal government while the land exchange is underway. The timing and political issues associated with a single land exchange may necessitate several systematized land exchanges in quick succession instead to avoid these issues. Once the land exchange is over, however, Utah should start seeing increased revenue on its trust lands within a reasonable timeframe, and there will be less need to involve BLM in future revenue projects.

Neither idea is perfect. But, when considering the increased revenues for the school trust lands, either would be better than the status quo. Each proposal would also help Utah to adhere to its fiduciary duties, because in both proposals, the trust lands would generate more revenue over time, the operation costs would decrease as trust lands became concentrated, and there would be fewer opportunities for trust lands to be political casualties in arguments between the state and federal governments.

A. Federal Land Transfer Proposal

How could state ownership of federal lands, then, help trust lands be more profitable? First, the non-contiguous trust land parcels could be condensed to make the parcels profitable. If Utah owned what are now federal lands, it could more easily transfer ownership of lands from the state of Utah to SITLA. Second, the amount of trust lands could be

increased. Congress could stipulate that a portion of the federal lands that are transferred become education trust lands in the same piece of legislation that transfers federal lands to the states. While this first proposal has the opportunity for greater gains for trust lands than the article's second proposal, this first proposal also has greater drawbacks that make the gains less likely.

1. Benefits of a complete transfer of federal lands

Many of the benefits of a complete transfer of federal lands would not be to trust lands specifically. In fact, most if not all advocates of a federal land transfer don't seem to consider trust lands one way or another. Even the study commissioned by the Utah State Legislature dedicates only about forty-five pages of the over 700-page long study to addressing Utah state trust lands.[61] Nevertheless, there are several potentially large benefits that Utah's trust lands could see because of a federal land transfer.

The first benefit is that it would be significantly easier for the state of Utah to unilaterally redesignate areas as trust lands than it would be for Utah and the federal government to jointly redesignate the same areas. If the federal government is involved, several federal departments are involved as well. BLM is the main federal agency with land surrounding Utah's trust lands (see Figure 11), but there are also other federal agencies whose lands surround trust lands. For instance, Bears Ears Monument, a national monument managed by the Forest Service of the U.S. Department of Agriculture,[62] has several parcels of trust lands.[63] The more agencies involved, the more complicated any sort of land exchange becomes. Each agency has their own set of regulations and standards that would have to be met. By contrast, Utah could even cut state agencies out of the picture by prioritizing the reallocation of trust lands before it assigns areas of the newly acquired land to state agencies.

The second benefit is that a land transfer would give Congress an opportunity to grant new trust lands to the state of Utah. Currently, Congress has no incentive to give up any of its lands to create new trust lands. Utah's trust lands have already been set by the Utah Enabling Act, and any increase in trust lands would require new legislation to take land

61. *Id.*

62. Forest Service, *Bears Ears National Monument*, U.S. DEP'T OF AGRIC., https://www.fs.usda.gov/visit/bears-ears-national-monument (Last visited Oct. 10, 2022).

63. Brian Maffly, *SITLA wants out of Bears Ears, trade for other federal lands*, SALT LAKE TRIB. (Jan. 5, 2022, 7:00 AM), https://www.sltrib.com/news/environment/2022/01/04/sitla-wants-out-bears/.

from the federal government—most likely from BLM—and grant them as trust lands to the state. The legislation would be a hassle to pass, and there does not seem to be support in Congress for such legislation, nor are there groups prominently advocating for it. However, if Congress were already transferring federal lands to the states, then it would be a comparatively easy matter for the legislation's sponsor to include a provision that a portion of the federal lands be designated as school trust lands. The most likely federal land transfer scenario would be Congress transferring BLM lands to Utah, rather than all federally owned lands. As of 2020, the federal government owns 33.2 million acres in Utah, 22.8 million of which are BLM lands.[64] Another 3.4 million surface acres could easily be added to Utah's trust lands while still leaving almost 20 million acres of BLM land for the state's use. More trust lands mean more opportunities for development, mining, and other operations, which in turn means more revenue for Utah's schools.

A third benefit is a possible increase in educational institutions that are eligible for trust land revenue. Utah's educational landscape has changed since it first became a state, and there are likely other state educational institutions that currently are not eligible for trust land funds that could benefit from the funds. Congress could either add these educational institutions to the list of enumerated beneficiaries or change the beneficiary list from specific educational institutions to all state-run educational institutions. Even if Congress did not change who the beneficiaries of the trust are, the increased revenue from a land transfer would still benefit many schools in Utah, especially schools providing public K-12 education.

Another benefit that is more incidental to trust lands is that, following a federal land transfer, the state of Utah would manage the lands surrounding trust lands rather than federal agencies. Arguably, the state of Utah is better placed than the federal government to manage the lands within the state. Utah leaders are closer to the people of Utah and will pay more attention to the priorities of the people who are directly affected by the land use policies of the transferred lands. Additionally, Utah is consistently ranked as one of the best run states in the nation in terms of management and fiscal responsibility.[65] As such, Utah's day to day

64. CAROL HARDY VINCENT, CONG. RSCH. SRV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, 8 tbl.1, 10 tbl.2 (2020), https://sgp.fas.org/crs/misc/R42346.pdf.

65. *See* Samuel Stebbins, et. al, *Best and Worst Run States in America: A Survey of All 50* (Dec. 8, 2020, 11:30 AM), https://247wallst.com/special-report/2020/12/08/best-and-worst-run-stateamerica-a-survey-of-all-s-in-50-3/2/; Samuel Stebbins & Evan Comen, *Best- and worst-run states in America: Which one is top rated?* (Dec. 7, 2017, 11:54 AM), https://www.usatoday.com

management of lands is likely to be superior to the federal government's management. Better management of public lands will benefit not only Utah's farmers, ranchers, developers, businesses, and citizens, but also its trust lands. If Utah is managing the areas surrounding the trust lands better, then there will likely be less red tape to hold up the operations SITLA runs on the trust lands. If there is a problem that makes the interactions between SITLA and state agencies inefficient, then the Utah government can come to a solution unilaterally. Utah's policymakers are more likely to listen to SITLA's concerns and come to a solution that is beneficial to SITLA's interests than is the federal government.

2. Drawbacks of a complete transfer of federal lands

There are two main drawbacks to a federal land transfer that may prove insurmountable. The first is that Congress shows no interest in transferring federal lands to the states now or any time in the foreseeable future. The second is that the cost of managing and administering the transferred lands might outweigh any financial benefit to the states, and so states may be just as unlikely as Congress to advocate for a complete federal land transfer. There is also a constitutional concern with how Utah has approached a federal land transfer in the past. While there is a chance that Congress may change its mind about transferring federal lands in the future and that states might find that the benefits outweigh the administrative costs of managing extra land, the possibility is currently remote.

a. Congress is unlikely to engage in a transfer of federal lands to the states. Since the Utah State Legislature's 2012 demand, Congress has shown no interest in transferring even one acre of federal land to the state without a good reason. In fact, Congress has shown no interest in giving up federal lands to anyone, whether a state or a private party. For example, a Utah congressmember tried to pass legislation in 2017 to sell almost 3 million acres of federal lands to private entities but had to retract the legislation after backlash.[66] With a Democrat controlled Senate and a Democrat President, there is even less chance that Congress will change its mind.

/story/money/2017/12/07/best-and-worst-run-states-america-which-one-top-rated/926586001/; Michael B. Sauter, et. al., *The best and worst run states in America* (Nov. 29, 2012, 3:20 PM), https://www.nbcnews.com/business/business-news/best-worst-run-states-america-flna1c7332327.

66. Riccardi, *supra* note 3.

What would it take for Congress to be willing to engage in a transfer of federal lands? First, both houses of Congress and the Presidency would need to be controlled by Republicans. In general, Republicans are more sympathetic to issues of states' rights and are less in favor of federal power than are Democrats. But not every Republican would necessarily support a land transfer. There would have to be enough Republicans—and perhaps Democrats—in both houses of Congress to support the movement. This might require that some conditions are placed on the states' use of the transferred land, like requirements to preserve certain areas or keep other areas public lands. A requirement to increase state educational trust lands might be appealing to both Republicans and Democrats, but it will likely take more than just education funding considerations to convince Congress to make the transfer; other circumstances would have to fall into place. Second, the movement would need to gain enough support from states to advocate for the transfer in large enough numbers to be noticed by Congress. As the article will discuss below, that might be difficult. So, while there is a chance that Congress would consider a federal land transfer in the future, it would take time and luck.

b. Administrative costs may make states reluctant to accept a federal land transfer. States might be a little less eager to accept a federal land transfer when they realize that with great areas of land come great administrative costs. Of the thirteen states with the highest percentage of land owned by the federal government, nine of them would see more than a 50% increase in lands owned by state and private entities following a federal land transfer.[67] Nevada, in particular, would see a large leap in land it would have to manage, adding an increase of over 400% to the land already owned by the state and private entities.[68] Utah's lands would increase by more than 170% (See Figure 10). While many groups may be elated by the massive amounts of land that would become open for development and other uses, the states that "benefit" the most may balk at having to administer two, three, or even four times the amount of land that they are used to administering. As the New York Times notes, "If they owned the land, the states would have to collect rents and administer permits themselves. An economic study from Utah in 2012 found that taking over land management would cost the state government a substantial sum: $275 million a year."[69]

67. BALLOTPEDIA, *supra* note 9.

68. *Id*.

69. Bui & Sanger-Katz, *supra* note 22.

The administrative costs may be offset by an increase in revenue from property taxes, income tax as businesses and private properties increase, and from selling excess land to private parties. Property tax, in particular, might see a large increase. States cannot tax the federal government for the land the federal government owns within the state.[70] That means that states are missing out on potentially millions of dollars in revenue from property tax. Of course, just because the federal government no longer owns the land doesn't necessarily mean that states will start collecting millions in property tax immediately. States would have to sell the land to private owners first and then tax the private owners. Not all federally owned land is attractive to private owners. Some land might be perfect for residential areas or mineral extraction, but the states might be saddled with land that can't be used for either. Even for the land that is sellable, states would still need to put money and effort into zoning or permitting the land, finding buyers, and creating or expanding departments to oversee the regulation and taxation of the land. The ratio of desirable to undesirable land will vary within a state, so some states might bear a larger burden than others. State policymakers would be wise to carefully weigh the costs and benefits to their individual states before deciding to advocate for a federal land transfer.

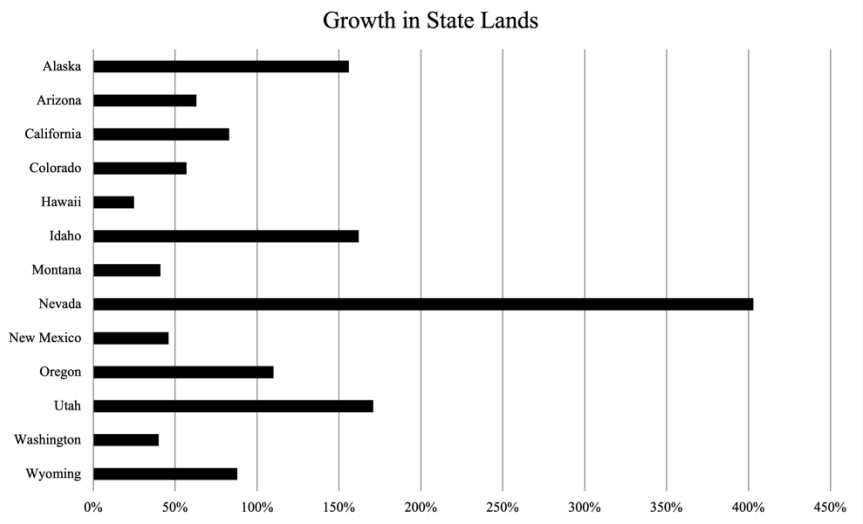

Figure 10[71]

70. U.S. CONST. Ann. art. IV, clause 2 (Justia); *see also* McCulloch v. Maryland, 17 U.S. 316 (1819).

71. BALLOTPEDIA, *supra* note 9.

A potential solution to decrease the administrative costs to states might be for the federal government to provide initial funds to help states get administrative infrastructure in place. After all, the federal government's burden of managing the lands would dwindle to a fraction of its current cost if it shifted the burden on to the states, freeing up funds that could be granted to the states. As with this entire proposal, there is a question of whether Congress would agree to such an arrangement. There is a myriad of other budget priorities that Congress could put the funds towards, but Congress may be more willing to give the money if it were a one-time grant.

As far as administrative costs for Utah's trust lands go, however, any increase in cost for operating trust lands would likely be outweighed by the increase in profits. Unlike some areas of land use, Utah already has the infrastructure in place for managing its trust lands. There is an administration, regulations and standards in the Utah Code, personnel that manage day-to-day operations, and existing operations on the trust lands. Rather than creating entirely new departments or fundamentally altering an existing department, Utah would—at most—only need to expand some of SITLA's personnel and access to resources. Expanding an existing department is likely significantly cheaper than creating and implementing a department from scratch. The return on investment for expanding the trust lands would likely be greater than the cost for expanding SITLA's scope, because the trust lands would have more profit per acre than they had prior to being condensed and expanded. However, just because the administrative costs for trust lands would be covered by the increase in trust land revenue, it still might not be beneficial for Utah as a whole to be saddled with millions of additional acres of land to manage. That is a concern that Utah policymakers, as the trustees with fiduciary duties to the beneficiaries of trust lands, would need to weigh.

c. The Utah constitution and current federal law may bar Utah from approaching the federal government about a land transfer. Perhaps the most ironic part of the Utah State Legislature's 2012 demand of federal land is that it might be against the Utah Constitution.[72] H.B. 148 is likely against federal law as well, but Utah policymakers are not above passing or keeping laws that conflict with federal law. The Utah Enabling Act and Utah Constitution both contain a provision that says: "[t]he people

72. Andy Kerr, *Statehood and Federal Public Lands: A Deal is a Deal*, PUBLIC LANDS BLOG (Sept. 9, 2016), http://www.andykerr.net/kerr-public-lands-blog/2016/9/8/statehood-and-federal-public-lands-a-deal-is-a-deal.

inhabiting this State do affirm and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries hereof . . . and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States."[73]

Utah can't assert any claims over federally owned land unless the United States government says otherwise. It may be against the Utah Constitution for Utah to approach the federal government and propose a land transfer, since that action would not conform with "disclaim[ing] all right and title to the unappropriated public lands lying within the boundaries hereof."[74] It's debatable whether simply approaching the federal government about a land transfer would be against the Utah Constitution, and it very well may not be. However, it seems to be against the spirit of the Utah Constitution and the Utah Enabling Act for Utah to continue pestering the federal government to give up the lands that Utah promised to disclaim.

The solution to the constitutional question, of course, is simple: the federal government needs to initiate the land transfer. Though Utah has been the one that has tried to initiate a land transfer in the past, it would no doubt welcome any advances from the federal government to transfer federal land.

V. FEDERAL LAND EXCHANGE PROPOSAL

Luckily, Utah's trust lands don't need a complete transfer of all unprotected federal lands to get the same benefits of condensed land, less interference from the federal government, and fulfillment of fiduciary duties from a change in land ownership. Rather than giving up ownership of federal lands, the federal government could make a new deal with the state of Utah to exchange the ownership of trust lands and federal lands. In essence, the federal government could designate new parcels of land to be state trust lands and then designate an equal number of non-contiguous trust land parcels as federal land. With these land exchanges, the total acreage owned by each department would remain roughly the same. At the very least, the value of each department's land would remain the same. The only difference would be the location of the lands owned by the respective departments and the increased capability for SITLA and federal

73. UT CONST. art. III; Utah Enabling Act, 28 Stat. 107 (1894).

74. *Id*.

departments to effectively manage their lands and effectuate their respective goals.

Land exchanges are an area that is already being explored by Utah and federal policymakers.[75] In 2014, Utah traded 25,034 acres of trust lands with the federal government, getting 35,516 acres in return.[76] The trade, representing just over 1% of SITLA's total land, took years to complete due to the slow pace of the federal government and changes in land valuation. In 2016, Utah was able to trade 84,000 acres of trust lands to BLM in exchange for 96,000 acres.[77] Most recently during their 2022 General Session, the Utah State Legislature considered exchanging SITLA lands in the Bears Ears Monument for other federal lands. Despite the benefits to SITLA, legislators failed to pass the measure due to worries that the deal would interfere with the state's pending litigation against the federal government to undo President Joe Biden's executive order to restore the Monument.[78] At this rate, SITLA may be able to fix the parcel sterilization problem in time for the Second Coming. If they're lucky. It's an agonizing rate that means, in the meantime, that schools are missing out on much needed funds.

If the federal government continues to refuse to turn all federally owned public lands over to the states, then it should consider a more comprehensive land exchange plan to revitalize SITLA lands. This article's proposal, with the details tweaked based on feasibility, is that the federal government should work with the state of Utah to conduct a study lasting between five and ten years. The study would be conducted by both state and federal land experts and would determine the worth of current non-contiguous SITLA parcels, the best federal land locations for new SITLA parcels, the worth of those areas of federal land, and the optimal equivalent trade between SITLA and federally owned lands.

A land exchange with the federal government has many of the same benefits of increased revenue that a complete land transfer would have and few of the drawbacks. There is still a significant cost associated with the land exchange in terms of time and money, but the quick future returns

75. Brian Maffly, *Touted as 'gold mine' for school trust, land swap in Bears Ears could fail as lawmakers eye monument lawsuit*, SALT LAKE TRIB. (Mar. 2, 2022, 8:36 AM), https://www.sltrib.com/news/environment/2022/03/02/touted-gold-mine-school/.

76. Brian Maffly, *Utah recreational land swap finally wraps up*, SALT LAKE TRIB. (Feb. 7, 2014, 12:53 PM), https://archive.sltrib.com/article.php?id=57058476&itype=cmsid.

77. Brian Maffly, *National Defense Authorization Act includes land swap for Utah weapons testing range*, SALT LAKE TRIB. (Dec. 2, 2016, 8:41 AM), https://archive.sltrib.com /article.php?id=4663384&itype=CMSID.

78. Maffly, *supra* note 63.

would make up for the costs. If complications arise that make the single land exchange unfeasible, Utah and Congress can make modifications that will still allow for a quicker, more systemized approach than is currently employed. Exchanging land with the federal government is also more feasible and less time consuming than a land exchange with private parties—similar to Montana's land exchanges—would be. Even with the majority of land exchanges happening between Utah and the federal government, there would still be a place in this proposal for a few land exchanges with private parties.

A. Benefits of a Land Exchange Between the Federal Government and SITLA

The first benefit of a land exchange is that it is advantageous to both Utah and the federal government. Many of the areas with non-contiguous trust land parcels wouldn't make sense for the trust lands' location, even if the trust lands were condensed. For instance, the Bears Ears Monument has trust lands that should be protected rather than used for mining or grazing operations. There are trust lands in other areas that should also be preserved, like Cedar Mesa and Arch Canyon, that SITLA is already eyeing as candidates for land exchanges.[79] By engaging in a land exchange involving these and similar areas, the federal government can more effectively protect land that it has designated for national monuments, national parks, and other important national sites. Likewise, SITLA can more effectively complete its goals of generating revenue for Utah educational institutions, and it doesn't have to waste resources maintaining land that doesn't generate revenue. For the non-contiguous land that the federal government has a lower interest in protecting, the federal government can still benefit from receiving those parcels in exchange for federal land that is contiguous to Utah trust lands. This is because federal agencies, usually BLM, use resources to monitor any SITLA operations that involve federal land for rights of entry and other interactions.[80] If Utah's trust land parcels were contiguous, there would be less need for SITLA to get rights of entry onto federal land, and there would be less need for BLM or other federal agencies to expend time and resources in monitoring SITLA operations. So, whether it's because more lands will be protected or because it will save resources, the federal government will

79. *Id.*

80. STRAMBRO ET. AL., *supra* note 34 at 86.

benefit from a land exchange as much as Utah's trust lands will benefit from being more condensed and having less federal red tape.

The second benefit of a single land exchange rather than several smaller exchanges is that a single land exchange would cut down on costs. A single large land exchange would naturally cost more than the individual smaller exchanges have cost in the past, and there would be more political roadblocks to overcome. However, once the initial cost was paid to study the issue and complete the land exchange, Utah and Congress wouldn't have to revisit the issue. Instead of getting a new team to survey and evaluate land, negotiating terms of a deal, and passing new legislation every few years, Utah and Congress could commission one team to study the issue, negotiate the terms of one deal, and pass one piece of legislation. Both parties could save future time and resources for other matters, and SITLA could start making more revenue on the trust lands immediately rather than little by little.

The third, and perhaps most important benefit, is that a land exchange is much more feasible than a complete land transfer, and therefore is more likely to happen. As mentioned above, a land exchange provides benefits to the federal government that a land transfer wouldn't provide. Where a land transfer requires Congress to relinquish lands it has never indicated it wants to relinquish, a land exchange allows Congress to retain its lands and accomplish its goals. Additionally, land exchanges have precedence that a land transfer doesn't have. Congress has already engaged in smaller land exchanges and is considering several more.[81] The biggest difference between previous land exchanges and this land exchange would be that more acres of land would be exchanged. Congress, and indeed the state of Utah, may be more reluctant to engage in a land exchange of the size this article is proposing, but history shows they would both be more likely to consider a land exchange proposal over a land transfer proposal.

B. Drawbacks of a Land Exchange Between the Federal Government and SITLA

As with all new ideas, there are different costs and drawbacks than there are with the status quo or with other ideas. In brief, this proposal will involve more complications with land valuation and take more time to negotiate the political nuances than does the current practice of smaller land exchanges. Despite these drawbacks, the benefits of this federal land

81. Maffly, *supra* note 76.

exchange proposal are still worth the work the proposal would require to be successful.

1. A single federal land exchange may be impeded by changing land values

The previous land exchanges between Utah and the federal government have taken years to complete because of the time it takes to survey and value the land. The process is further complicated because land valuation can change within those years.[82] If it takes years for a small portion of Utah's trust lands to be exchanged, the natural conclusion is that it would take even longer for a larger portion of lands to be exchanged. In those years, the valuation may fluctuate between the plots of land to the point that no exchange is possible. State law requires that trust lands not be sold for less than fair market price,[83] and federal law dictates the same for federal land.[84]

To combat the problem of land value fluctuation, there are at least two options that Utah and Congress could explore. One is for the land exchange study to be conducted as this article proposed, but if there is a difference in land valuation when the time comes to actually exchange the land, both parties should be prepared to pay the difference in value between the lands. Obviously, if Utah were getting lands that were worth more than what it was giving, then only Utah would have to pay the difference in value, and vice versa with Congress. There is precedent for cash payments instead of land exchanges when there is a difference in valuation.[85] If both parties enter the agreement knowing that they might have to pay, there shouldn't be a legal problem with a cash payment along with the land exchange.

The second option is that the land exchange could be a hybrid between the current piecemeal approach and this article's single land exchange proposal. Essentially, this would be a series of land exchanges each using a systematic approach to identify parcels of trust and federal lands for a smaller exchange, maybe around 5,000 acres at a time, and quickly consummate the exchange before the land value can change. Like this article's single land exchange proposal, the several exchanges would be authorized by a single piece of legislation. The same team composed of

82. Maffly, *supra* note 76.
83. UTAH CODE § 53C-4-102(1) (1953) (last updated in 2018, and accurate in 2022).
84. Maffly, *supra* note 63.
85. *Id.*

SITLA and federal department members would work on each small land exchange, allowing the process to become systemized rather than requiring that the wheel be reinvented every time. In this way, Utah's trust lands and the federal government are still seeing the benefits of this article's original land exchange proposal while avoiding one of the potential complications.

2. A single federal land exchange may become politically complicated

Most past land exchanges have had their own political nuances to navigate. For instance, the 2016 land exchange originally involved a controversial provision that would have given disputed rights-of-way to Utah.[86] The 2014 land exchange raised concerns that SITLA operations on one particular parcel would be seen from the nearby Dinosaur National Monument.[87] The proposed land exchange in 2022 failed in part because Utah lawmakers were concerned about the impact the exchange would have on a pending lawsuit against the federal government over the expansion of the Bears Ears monument.[88] It once again stands to reason that if there are political complications with small land exchanges, there will be even more political complications with a large land exchange.

It's impossible to anticipate what political complications will arise, and so it is difficult to propose solutions to the complications beforehand. That being said, this drawback may also be helped by splitting the land exchange into a series of smaller systemized land exchanges. When the team in charge of facilitating the land exchanges runs into a political complication that will take time to solve, they can temporarily pass on exchanging the disputed parcels to allow state and federal policymakers to come to a compromise. Meanwhile, the team can continue finding other, less controversial parcels of land to exchange. The result might be that not every non-contiguous parcel is exchanged in a timely manner, or the result might be that some non-continuous parcels are never exchanged. However, a majority of non-contiguous parcels will likely be exchanged, which is still better than the slow process we currently have.

86. Maffly, *supra* note 77.
87. Maffly, *supra* note 76.
88. Maffly, *supra* note 75.

VI. THE BENEFITS AND DRAWBACKS OF LAND EXCHANGES BETWEEN UTAH TRUST LANDS AND PRIVATE PARTIES

Though this article's proposal focuses on an exchange with the federal government, Utah could also consider adopting Montana's approach of "land banking,"[89] where trust lands are sold to the highest bidder, whomever they may be. Montana is then able to buy parcels that are contiguous with other trust land parcels. Like Utah, Montana did not have the benefit of the "*in lieu* lands" option that New Mexico and Arizona had.[90] So, Montana suffers from similar non-contiguous problems that Utah suffers from. However, where 63.10% of Utah lands are owned by the federal government, only 29.00% of Montana's lands are federally owned (See Figure 2). More of Utah's trust lands are surrounded by federal lands, and so it makes less sense for Utah to sell its trust lands to anyone but the federal government. The issue can be seen more clearly in Figure 11. Figure 11 shows the placement of trust lands in Utah, just as Figure 7 does, but Figure 11 also shows who owns the rest of the lands in Utah. As Figure 11 shows, only a few non-contiguous trust land parcels are surrounded by private land. The vast majority are surrounded by federally owned land. For the parcels that are surrounded by private lands, Utah may want to consider using an approach similar to Montana's. However, given the higher percentage of federal ownership in the state, it makes more sense for Utah to primarily focus on land exchanges with the federal government.

89. CULP ET. AL., *supra* note 19, at 101.

90. *Id.* at 9.

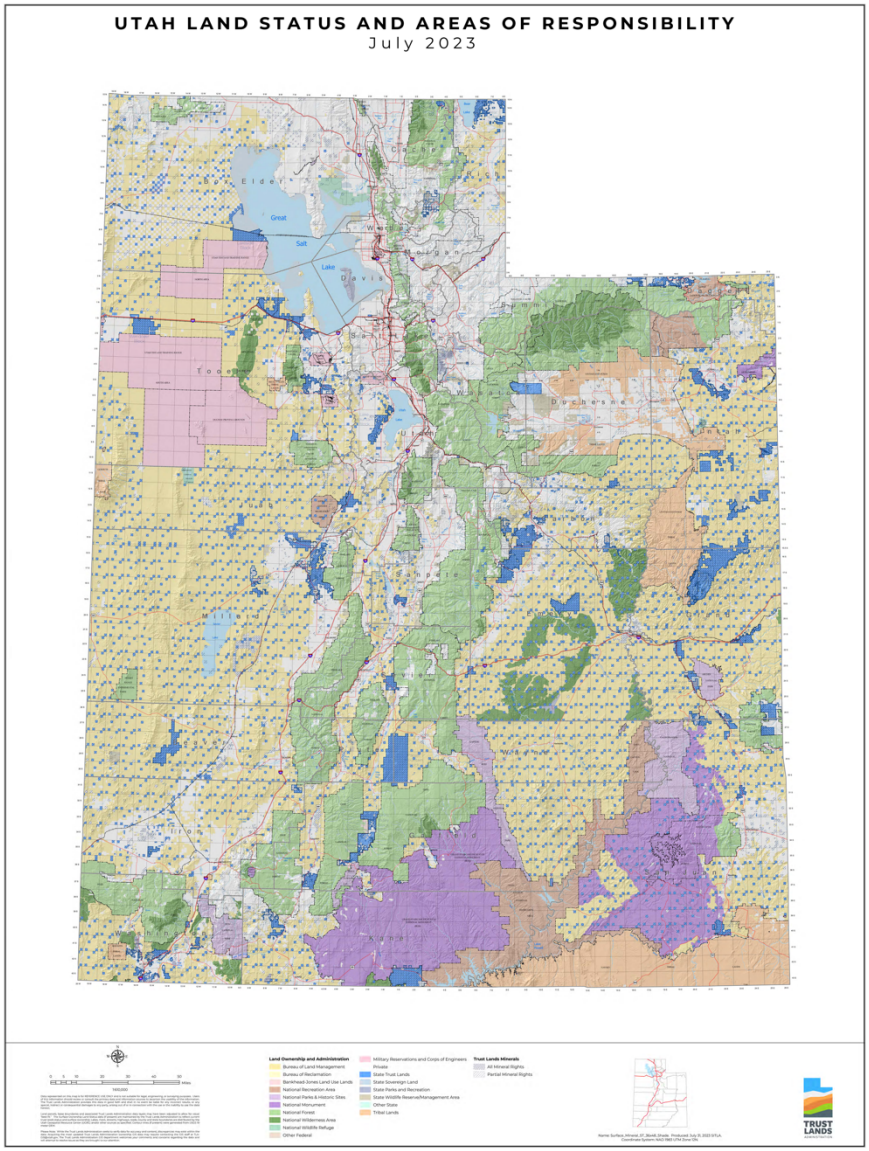

Figure 11[91]

91. *Surface and Mineral Ownership Map*, UTAH TRUST LANDS ADMINISTRATION, https://trustlands.utah.gov/tools/maps/pdf-maps/ (last visited Aug. 10, 2023).

VII. CONCLUSION

As daring and attractive as a complete transfer of federal lands may seem, Utah policymakers are likely wasting their breath making demands to Congress's deaf ears. Meanwhile, Utah trust lands live below their revenue potential as parcel sterilization continues to reduce the profitability of the trust lands, and Utah's public education misses out on much needed funding. Utah and Congressional policymakers could lessen the burdens on the trust lands from non-contiguous parcels and federal agency interference by working to exchange federal lands and trust lands as quickly as possible. If it is feasible, Utah and Congress should attempt to make a single land exchange so that Utah trust lands can generate the maximum possible revenue in the shortest amount of time. If a single land exchange is not feasible, then Utah and Congress should explore the possibility of a systemized series of smaller exchanges that will hopefully put an end to parcel sterilization within Utah trust lands. Whatever course of action Utah takes going forward, Utah should bear in mind the fiduciary duties that it owes to Utah's educational institutions and seek out all possible ways to benefit public education in the state of Utah.

Katrina Cole

RECAPTURING THE ORPHAN DRUG ACT: AN ANALYSIS OF PROPOSALS

I. INTRODUCTION AND BACKGROUND

On January 4, 1983, President Ronald Reagan signed into law the Orphan Drug Act ("ODA").[1] The ODA would later become a model for similar acts around the world, as various countries tackled the problem of orphan diseases.[2] "Orphan" diseases are rare diseases whose low prevalence has caused drug companies to "orphan" them because the effort and financial resources required to research, develop, and treat them are simply not profitable.[3] The Orphan Drug Act sought to remedy this problem by providing financial incentives to pharmaceutical companies that developed treatments for orphan diseases, thereby developing the eponymous "orphan drugs." The ODA provided two major incentives: seven-year market exclusivity that was stronger than standard intellectual property protections such as patents and a tax credit for 50% of the clinical trial costs.[4] Thus, pharmaceutical companies would have a monopoly over any treatments they developed for orphan diseases, as well as lower market entry costs. Because of the first-mover advantage for diseases that would not likely yield profit without the tax credit, this monopoly had a high chance of persisting beyond the statutory window. The initial and potential persistent monopolies did come with the standard monopoly concerns of price gouging, lack of competitive innovation to provide better solutions, etc. However, the monopoly also made for a very potent incentive. Furthermore, the tax *credit*, rather than a tax *deduction*, was calculated based off an extremely expensive step in bringing a drug to market, thus providing significant reductions in tax burden for these pharmaceutical companies. This paper will not focus on the history of the ODA but will provide a brief overview so as to give context to the incentive analysis that follows.

1. Barbara Andraka-Christou, *Policy Process Lessons from the Orphan Drug Act: Applications for Health Policy Advocates*, 4 J. ENTREPRENEURSHIP & PUB. POL'Y 278, 278–97 (2015).

2. *Id*.

3. *Id*.

4. *Id*.

Before the Bill

The ODA did not easily reach the President's desk to be signed into law. Patient-activist organizations such as the National Organization for Rare Disorders ("NORD") came to realize that while academics were doing research into cures for rare diseases, those diseases were not of any interest to the pharmaceutical companies. Working together, they decided to focus on the goal of pressuring Congress to make pharmaceutical companies bring drugs for rare diseases to market. They began, without the support of the pharmaceutical companies, lobbying Congress and engaging in public relations campaigns. Pharmaceutical companies pushed back, and initially proposed legislation stalled. Then, by moving to an incentive-driven approach, the activist organizations were able to bring pharmaceutical companies on board. By bringing national attention to the issue via television and newspaper, the organizations helped create the necessary political climate for Representative Henry Waxman of California to propose the legislation that would become the Orphan Drug Act. Republicans in the Senate pared down the benefits, but the bill was passed.[5]

Legal scholars have examined the Orphan Drug Act from the perspective of various policymaking frameworks. Klingon's Multiple Streams theory is the oldest such lens through which we can analyze the ODA.[6] According to the theory, there are three "streams" that flow through a policy system: problems, policies, and politics. A "policy entrepreneur" can, during a "policy window," bring these three streams together to implement a policy. When looking at the ODA in this way, legal scholars have shown that identifying the problem as a market failure for orphan drugs rather than that pharmaceutical companies were "heartless" was much more likely to succeed. The policy most likely to be successful was thus a market-based and incentive-generating proposal built by specialists at advocacy groups like NORD and pharmaceutical company lobbyists. Lastly, the politics around the situation were influenced by the media attention and politicians' desire to help their constituents and be reelected. This meant that the three streams could come together with NORD as the policy entrepreneur taking advantage of media attention in television dramas, etc. to ensure the policy was implemented.[7]

5. *Id*.
6. *Id*.
7. *Id*.

The Advocacy Coalition Framework is another framework through which legal scholars can seek to understand how policies come to pass. This framework suggests that policymaking occurs when specialists in different subsystems come together to make coalitions that tackle complex problems.[8] These specialists are necessary because of the intricacies of modern policymaking, and they will negotiate and struggle with one another due to deep core beliefs that vary across subsystems. In the case of the ODA, the relationship between the government, advocacy groups like NORD, and the pharmaceutical companies formed the coalition. By negotiating and focusing on the shared core beliefs, the three parties were able to generate a policy.

Social Constructionism Theory suggests that policymakers distribute benefits and burdens in accordance with how they've sorted people and entities into various groups.[9] The theory posits that the main groups are: (1) "advantaged" groups with significant power who are deserving of benefits because of what they provide to society; (2) "contender" groups with significant power and influence who are undeserving of benefits due to not needing them or not providing significant social value as a result of those benefits; (3) "dependent" groups who have little power or influence and yet are deserving due to misfortune, sympathy, etc.; and (4) "deviant" groups who are low-powered and undeserving such as criminals or other groups considered a permanent underclass by society. In the case of the ODA, the people with rare diseases are "dependent," but it took shifting the pharmaceutical companies from "contender" to "advantaged" to make the policy successful.

After the Signing

At its signing, the Orphan Drug Act included guidelines to the FDA for what qualified as an "orphan" disease. Originally, there was only one criterion for designation as orphan: "disease or condition which occurs so infrequently in the United States that there is no reasonable expectation that the cost of developing and making available in the United States a drug for such disease or condition will be recovered from sales in the United States of such drug."[10] In 1984, very soon after the passing of the ODA, Congress passed an amendment, adding a second criterion: diseases

8. *Id*.

9. *Id*.

10. Matthew Herder, *What is the Purpose of the Orphan Drug Act?*, 14 PLOS MED. (Jan. 3, 2017), https://doi.org/10.1371/journal.pmed.1002191.

with a prevalence of under 200,000 individuals within the United States.[11] Since this amendment, virtually all drugs developed for orphan diseases qualified under this criterion.[12]

Due to concerns that the prevalence-based criterion was being abused in order for "Trojan" orphan drugs (orphan drugs that do not necessarily deserve their status), the FDA moved in 1991 to increase the rigor of qualifications.[13] The 1991 proposed regulations were meant to address "salami slicing," a practice wherein the pharmaceutical company would very strictly define the limits of a disease, or subdivide the disease into multiple different classifications, in order to ensure that the prevalence was under the 200,000 brightline, thus granting the drug in development orphan drug classification.[14] The proposed regulations stated that a subset of a common disease or condition "would qualify for designation only if the subset is medically plausible" and that "'arbitrary' subsets would be unacceptable."[15] In 1992, however, the regulations offered little clarity or definition on "medically plausible" and completely dropped the "arbitrary" restriction.[16] Due to this lack of clarification, this regulation did not appreciably change the situation, which the FDA later acknowledged.[17]

The next attempt to regulate overuse of the ODA was in 2013.[18] This next round of regulation began by acknowledging the failures of the "medically plausible" guidelines and removed the term from the guidelines.[19] Instead, the FDA's Final Rule sought to define the orphan subset in such a way that nonrare diseases or conditions could not be "artificially subdivided" into smaller groups for designation.[20] There was some initial academic concern, though analyses suggested that the new, more rigorous definition provided reason to be optimistic.[21] Unfortunately,

11. *Id*.
12. *Id*.
13. Shannon Gibson & Barbara von Tigerstrom, *Orphan Drug Incentives in the Pharmacogenomic Context: Policy Responses in the US and Canada*, 2 J. LAW BIOSCI. 263, 263–91 (2015).
14. Herder, *supra* note 10.
15. Gibson & von Tigerstrom, *supra* note 13, at 269.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*.

later empirical analysis has suggested that the new regulation was not as helpful as the FDA had hoped, and artificial "salami slicing" persisted.[22]

Congress notably sought to remedy abuse of the Orphan Drug Act at two points after the 2013 updated regulations. The 2017 Tax Cuts and Jobs Act ("TCJA") cut the tax credit from 50% to 25% of clinical trial costs.[23] This measure was opposed, unsurprisingly, by pharmaceutical companies and interest groups lobbying on behalf of individuals with rare diseases.[24] A few years later, the House passed a version of the Build Back Better Bill, which included an amendment to the Orphan Drug Act.[25] It restricted the application of the tax credit only to the first orphan use of the drug.[26] However, the Senate version has not passed, and while orphan drug credit reform was considered for the Inflation Reduction Act, there was nothing passed beyond an exception to drug negotiation provisions for orphan drugs.[27] Consequently, the current status quo is a post-TCJA number with the existing 2013 regulation from the FDA and an increased incentive to classify nonorphan drugs as orphan drugs to avoid the negotiation provisions.

The ODA Today

Drug companies and advocacy groups for rare diseases consider the ODA a success.[28] Since its passing, over 400 orphan drugs have been brought to market.[29] In recent years, the numbers have increased, with the FDA estimating that nearly 200 drugs enter development for orphan drugs each year, and one third of FDA approvals are for orphan diseases.[30] Some academics have also cited the Orphan Drug Act as spurring innovation in treatment and therapies.[31]

22. Herder, *supra* note 10.

23. Christopher Gerry, *Risky Business: The Far-Reaching Consequences of Slashing the Orphan Drug Tax Credit*, SCI. NEWS. (Jan. 8, 2018), https://sitn.hms.harvard.edu/flash/2018/risky-business-far-reaching-consequences-slashing-orphan-drug-tax-credit/.

24. *See id.*

25. Rohan Narayanan, *NORD Response to New Draft of the Build Back Better Act*, NAT'L ORG. FOR RARE DISORDERS (Oct. 29, 2021), https://rarediseases.org/nord-response-to-new-draft-of-the-build-back-better-act/.

26. *Id*.

27. 42 U.S.C. § 1320f-1(e)(1)(A).

28. Gibson & von Tigerstrom, *supra* note 13.

29. *Id*.

30. *Id*.

31. *Id*. at 264.

Some, especially those in academic circles, though, are more skeptical. Critics of the ODA in its current state contend that the ODA does not actually provide the incentives it purports to. Because of this contention, they argue the drugs would have been developed even without what the ODA provides.[32] Many of the drugs developed under the umbrella of this ODA have been incredibly profitable, such as Provigil, Crestor, or Humira. Furthermore, empirical research has shown that the ODA is unable to reach a variety of genuinely rare diseases.[33] Together, this raises concerns of price gouging on the part of the pharmaceutical companies due to having a small captive market while simultaneously benefiting from government funding meant to help those people, not exploit them and their condition. Henry Waxman, the original author of the ODA, has since expressed regret and remorse that the ODA has been used to enrich pharmaceutical companies while many rare diseases languish and remain underserved.[34]

Additional criticism has been raised with respect to how the ODA interacts with the market. The market discourages certain types of research, such as that performed to benefit pregnant women, minority, and underserved groups; diseases that are unlikely to impact an American market; etc. Critics have pointed out that the ODA neglects the potential social welfare gains of funding for these situations.[35] The ODA also does not engage with the severity, morbidity, or transmissibility of diseases when establishing orphan status; these are also points of criticism.[36]

II. ANALYSIS

Equity

The ODA has a number of equity concerns, both in broad concerns about burdens and benefits, as well as traditional forms of equity analysis along vertical and horizontal axes. The fundamental question is whether it is appropriate for the government, and for society as a whole, to pay to save people with rare diseases. This paper argues that yes, the general

32. Herder, *supra* note 10.

33. Aaron S. Kesselheim, *Biomarker-Defined Subsets of Common Diseases: Policy and Economic Implications of Orphan Drug Act Coverage*, 14 PLOS MED. (Jan. 3, 2017), https://doi.org/10.1371/journal.pmed.1002190.

34. Michael J. Berens & Ken Armstrong, *Pharma's Windfall: The Mining of Rare Diseases*, SEATTLE TIMES (Nov. 9, 2013), https://apps.seattletimes.com/reports/pharma-windfall/2013/nov/9/mining-rare-diseases/.

35. Herder, *supra* note 10.

36. *Id*.

social benefits such an investment provides makes the general principle behind the ODA worthwhile. Caring for those with rare diseases is a form of the government's obligation to care for the less fortunate and disadvantaged. Additionally, research into rare diseases can have beneficial externalities. Pharmaceuticals can often be cross applied to different diseases as we learn more and as diseases develop. This means that the initial steps to bring an orphan drug to market can actually help many people beyond just that specific subset. As diseases change and new threats evolve, an arsenal of knowledge and options about a variety of treatments is generally helpful. This base of knowledge can also aid if the orphan disease is substantively related to a prevalent new disease, thus providing a more concrete foundation for treatment. Lastly, our Constitution does include an interest in promoting science; research into otherwise unprofitable drugs certainly advances this goal.[37]

In a burden/benefit analysis, the initial questions are: (1) who bears the burden in this situation, and (2) is that burden equitably distributed? In this case, pharmaceutical companies make substantial or even, to some, excessive amounts of profit; operate thanks to the human capital and infrastructure of this country; and rely on the public goodwill to at least some degree. Thus, they have at least some capacity to bear the burden of the cost of development for these rare drugs for the good of the society supporting them. Currently, the burden is borne by the public in aggregate. The Treasury, in 2021, estimated that the tax expenditure for the tax credit in the year 2022 was $1.72 billion, and $55.26 billion over ten years.[38] Despite being a comparatively small tax expenditure in the grand scheme of the budget, it is still money that is not going to the government that represents the public but rather going to private entities who have substantial wealth.

As for benefits, the ODA as written certainly benefits specifically the people with rare diseases, as they are much more likely to have therapies developed to treat them. As previously discussed, the ODA as written does not provide enough incentive to help *all* people with rare diseases, but it does also have some spillover benefits to society at large. Furthermore, individuals do not exist in a void. They have work connections, family connections, and social connections. Improving their quality of life provides financial, emotional, and spiritual benefits to this greater societal web. It benefits the pharmaceutical companies in that their costs of

37. U.S. CONST., art. 1, § 8, cl. 8.

38. U.S. TREASURY, *Tax Expenditures*, https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures (last visited Nov. 18, 2022).

production are offset, as well as rehabilitating their public image from that of a "contender" to "advantaged" under social constructionism theory.[39] They receive the goodwill from bringing the drug to market. The government and the politicians that make up the government benefit because they fulfill their burden to take care of disadvantaged groups, satisfy interest groups, and promote economic growth by introducing a stimulus. Furthermore, they can "outsource" some of the administrative burden of caring for people with rare diseases to the pharmaceutical companies, since they do not have to institute a state-run development. Thus, the ODA can be considered a win-win-win from a benefit perspective. Taken together, this means there are fairly widespread benefits that can be argued to outweigh the burdens shouldered by the public.

Further equity analysis requires an examination of horizontal and vertical equity. Horizontal equity in this situation can be between various pharmaceutical companies and various members of the public. Between pharmaceutical companies, there can be concerns around horizontal equity *between* companies. This measure certainly rewards drug companies who are well equipped or interested in rare diseases rather than drug companies who are not. Because it is a percentage-based tax credit, the amount of money recompensated to each company will also vary. However, this mitigates concerns about vertical equity between different orphan drugs that are harder or easier to develop; the abilities of bigger companies to handle difficulties cheaply, which smaller companies cannot; etc. It can be argued these equity concerns generally outweigh the horizontal equity concerns; if companies wish to also take advantage of this credit, nothing is stopping them from stepping in to aid patients in need.

The concerns of patients in need are also a matter of horizontal and vertical equity. There is a question about horizontal equity between patients: do patients in the same situation receive the same results? The ODA's tax credit itself does not push an equitable result between two patients with different rare diseases that have relative parity in said disease's nature. However, the ODA as a whole does because if a drug is developed for Patient A with Disease A, there is exclusivity for that treatment and companies are thus more likely to look to Patient B with Disease B. Since Diseases A and B have rough parity, the profit analysis that leads to a drug being developed for A suggests such a drug would also be developed for B. This theoretically achieves horizontal equity.

39. Andraka-Christou, *supra* note 1.

The ODA certainly promotes vertical equity from many perspectives. It promotes vertical equity between rare and nonrare diseases. Because rare diseases are less likely to be profitable and have less influence due to less prevalence, they are comparatively disadvantaged. Thus, aiding them is a positive move for vertical equity. The proportional nature of the tax credit also incentivizes vertical equity in that comparatively expensive to develop drugs are attractive as they will theoretically have the highest reduction on the company's tax burden. It also provides a positive effect on vertical equity in society as a whole; we are caring for the disadvantaged. The ODA also somewhat promotes vertical equity between the needs of patients because of the exclusivity doctrine: if the easiest diseases are covered by exclusivity, the harder diseases will be much more attractive.

The ODA is not perfect when it comes to vertical equity, however. It does not provide any *additional* credit beyond the proportional credit to extremely disadvantaged rare diseases. Thus, those diseases are highly likely to be left behind when they are the ones in most need. By providing a captive market and a lack of competition for the people in need, it leaves them vulnerable to additional burdens like price gouging or a lack of competition and innovation to make competing drugs. Also, it is not necessarily vertically equitable on a societal level: there is no consideration as to the socioeconomic standing of the population that tends to have rare diseases that drug companies focus on. There is no guidance to suggest that diseases frequent among wealthy people, men, white people, certain geographic areas, and other similarly privileged groups are not going to be preferred by drug companies. Lastly, as shown by the benefit and burden analysis, there can be vertical equity difficulties because the advantaged, wealthy, profit-motivated pharmaceutical companies are receiving a benefit on the backs of the less-advantaged public.

Overall, the potential and already demonstrated good that comes from the ODA and the commitment to care for those in the most need tip the scale for me in this equity analysis. The government seems to have agreed in implementing the measure, though that does not preclude efforts to increase equity of the ODA.

Efficiency

The primary aim of the ODA is to ensure that effective drugs are developed for orphan diseases. Because pharmaceutical companies are private entities beholden primarily to a profit motive, they are unlikely to

produce drugs that are unprofitable. Orphan drugs cost significantly more (approximately five times) than nonorphan drugs to develop.[40] Prior to the establishment of the ODA, drug companies claimed routine development of "public service" drugs for orphan diseases as an altruistic action.[41] NORD, though, was able to show that this was not the case, and the pharmaceutical industry was an adversary to research into orphan diseases.[42] Economic game theory analyses of the ODA have also demonstrated that absent government intervention, patients will suffer, and drug development will not occur.[43] Hence, for the ODA or any amended measure to succeed in its purpose, it should "tip the needle" to ensure effective drugs to help orphan diseases are brought to market.

The incentive system setup should ideally minimize exploitation while maximizing development for rare diseases. The intent of Congress and the public is to care for individuals with orphan diseases, not simply enrich pharmaceutical companies.[44] This has implications because the ODA only compensates successfully developed drugs. By doing so, the public disincentivizes abuse of the ODA and unnecessary expenditures on unproductive research. On the other hand, there is an efficiency cost in that risky or difficult research may be avoided for fear of failure and a lack of compensation. By compensating clinical trials specifically, the ODA does lower the incentive for a company to be efficient in this particular step of development. However, the incentive is powerful, as demonstrated by its historical success and by its theoretical nature. It is reliable, predictable, and thus attractive. Together, this suggests that the incentive is at least somewhat efficient at achieving the goals of Congress.

Game theory analysis has also been applied to the ODA.[45] This analysis suggests that orphan drugs will not be developed without any government incentive, and that government incentive will be effective at doing so, thus providing results to the public and profits to the companies.[46] That means that the core idea behind the ODA is theoretically sound. The game theory analysis did determine that endogenous pricing of drugs resulted in less yields to the public, but

40. *Id*.

41. *Id*.

42. *Id*.

43. *See* Wendy Olsder, Tugce Martagan & Christopher S. Tang, Improving Access to Rare Disease Treatments: Subsidy, Pricing, and Payment Schemes (June 9, 2022) (unpublished manuscript), https://ssrn.com/abstract=3481150.

44. Andraka-Christou, *supra* note 1.

45. Olsder, Martagan & Tang, *supra* note 43.

46. *Id*.

exogenous pricing required a heavier subsidy from the government despite reaching a more optimal balance between profit and yields to the patients.[47] The exact value of this subsidy and comparative efficiency between additional costs versus better yields to patients is a matter for expert negotiation and political determinations.

This notion of deciding appropriate prices of subsidies is a matter of efficiency from the perspective of the taxpayer. Is the ODA generally an efficient use of money? Traditional tort principles, while harsh to a layperson, do provide methods of estimating the value of a person's life to the public. Typical Value of a Statistical Life ("VSL") numbers estimate approximately $10 million.[48] Given the estimated cost of the ODA per year at $1.72 billion, the ODA would only need to save 172 people per year to break even and be efficient.[49] The National Conference of State Legislatures estimates that there are 25 million people with orphan diseases in the United States.[50] Together, this suggests that the numerical efficiency of the ODA is in reality incredibly high, and thus it is thus an excellent use of taxpayer money. This is important to keep in mind when evaluating problems with the ODA and potential solutions. Clearly the FDA and Congress are interested in amending and fine-tuning the ODA, but it is not overall desperately necessary. There is a large margin of error, and the actual yield of the ODA even without peak efficiency is relatively high.

That said, there are inefficiencies within the ODA. The most glaring is the previously mentioned salami slicing. This is a form of abuse of the statute, where due to the existence of a bright line, companies are able to obtain orphan drug status for drugs that probably were not meant to qualify. As a matter of legislative regulation, this is fixable by Congress and/or the relative agencies. There are also inefficiencies in line with the monetary analysis previously performed and the equity analysis. The drug companies, when selecting which drugs to develop, do not necessarily seek the drugs that would have the largest public good or monetary gain to the government; they instead seek private profit. Aligning the two more closely would theoretically yield better results. There are also potential inefficiencies in terms of confounding factors that lower the representation

47. *Id*.

48. Gina Cioffi et al., Evaluation of the Societal Burden of Rare Diseases in the United States (Oct. 11, 2021) (unpublished manuscript), https://doi.org/10.21203/rs.3.rs-936611/v1

49. U.S. Treasury, *supra* note 38.

50. Nat'l Conf. of State Legis., *Rare and Orphan Diseases*, https://www.ncsl.org/research/health/rare-and-orphan-diseases.aspx (last visited Nov. 18, 2022).

of further market-disadvantaged drugs even if the goal of the ODA is to achieve treatments for them because the ODA does not include additional incentives targeted to those market-disadvantaged drugs. Together, these failures mean that to some degree we are missing out on "real" orphan drugs in favor of orphan drugs that are relatively profitable to drug companies but not to the public and purpose of the ODA. We also do not know if as a result of the ODA's brightline prevalence distinction, we are missing out on drugs that could be close to the brightline but are now overshadowed. A disease with a prevalence of 250,000, for example, could now be in a "no man's land" where it cannot compete with the drugs that fall under ODA designation for attention, but neither can it compete with the significantly more prevalent diseases. This is also a potential inefficiency.

As previously discussed, the sheer yield of the ODA means the inefficiencies are more easily overlooked, as even most possible solutions will still end up incredibly efficient. This does not excuse attempts at or consideration of progress, however. In Section III, a number of proposals will be evaluated.

Administrability

Just as for equity and efficiency, there are multiple positive and negative concerns around administrability. The ODA in its current form is comparatively easy to administer: the prevalence criterion is straightforward and predictable for both the government and for the drug companies. Furthermore, its thirty-plus year tenure means that when it comes to this particular provision, there is established precedent and established expertise on the part of the companies and the government. Changes to this would inherently increase the administrability burden at least temporarily, even if there were a theoretical improvement down the line. However, that does not mean that prevalence is an open-and-shut criterion to administer, simply that it is *comparatively* easier. There are several loopholes, definitional contentions, and attempts by pharmaceutical companies to gain the most for the least. Thus, keeping abreast with developments in the field, methods of ensuring abuses are not occurring, etc. do add an administrative burden that requires expertise to manage. These do weigh down the administrability of the ODA.

Political Considerations

There are also a few attendant political considerations. Firstly, pharmaceutical companies are incredibly potent interest groups, so any efforts to curtail their benefits will be politically difficult, while increasing vulnerabilities in the ODA will be politically incentivized. At the same time, though, there can be public political pressure resulting from the needs of the sick, advocacy groups, and frustration at inefficiency or inequity insofar as the drug companies are characterized as unfairly taking funds they are not entitled to. Because the history of the ODA had pharmaceutical companies working in conjunction with NORD, while opposition met failure, drumming up this public support will not be easy even if theoretically viable.

III. PROPOSALS

Various proposals will be listed below, before concluding with the proposal that is arguably the "best" option for the government to take. The previous analysis factors of equity, efficiency, and administrability will be broadly considered, as well as the political process, policymaking framework considerations, and the economic game theory information where applicable. Because the current ODA is in fact quite equitable and quite efficient, the goal of these proposals is improvement rather than stripping back something successful.

Status Quo/Build Back Better Amendment

The current status option is perhaps the easiest and simplest solution. By "staying the course" and maintaining the status quo, the government and academics can collect additional data and determine with greater certainty what changes need to be made. The ODA's equity, efficiency, and administrability considerations have been previously discussed, and those would remain the same. The FDA could, under this proposal, attempt to tighten its requirements as needed in the vein of the 1998 and 2013 revisions.[51] This would increase the administrability burden but ideally offset that by improving the equity and efficiency of the ODA. Politically, there are a number of advantages to this proposal. It would require the least effort on the part of lawmakers, as well as avoid negative lobbying from pharmaceutical companies and rare disease advocacy groups. However,

51. Gibson & von Tigerstrom, *supra* note 13.

there is a political concern in that as lawmakers look for funding to finance their other agendas, raising revenue by eliminating this tax expenditure becomes politically attractive.

This option would imply not passing the Build Back Better Bill's amendment. This would almost universally be a win across most metrics. The Build Back Better Bill only applies the credit to the first time a drug is given orphan status.[52] Because drugs are widely cross-applicable, this would be deeply inequitable. It would take away necessary lifesaving treatment from people who need it, perhaps because their disease gained attention later, because it was more difficult to treat or research, etc. It would also be inequitable to rising pharmaceutical companies that would be unable to apply the credit to their own research simply because an established company had already used the drug in some other situation. It would be inefficient because a large number of potential drugs that the ODA sought to have developed simply would never reach market as per game theory analysis. While administrability may seem easier due to not needing to oversee as many drugs receiving the credit, the various permutations and combinations of drugs would still pose some administrability burdens. It would also be politically easier because the drug companies and the interest groups would not spend effort opposing the tightening restrictions.

The Build Back Better amendment does have some advantages. The overuse of the ODA via methods such as salami slicing would certainly be curtailed. There would be more room for competition if fewer drugs had exclusivity. The government would have additional revenue, which it could use in other areas. However, as history and the game theory analysis have shown us, the actual development of the needed treatments simply would not occur in those cases where the ODA's incentive was not provided. This severe cutback would undermine the ODA to the point where it would frustrate the fundamental purpose of the provision. This means the status quo option is the better of the two.

Remove the Prevalence Criterion

The next, most intuitive proposal is to remove the second criterion passed in 1984.[53] This would mean that *only* drugs for which there was no reasonable expectation of profitability within the United States could receive the credit. This proposal has academic support and is appealing for

52. Narayanan, *supra* note 25.
53. Herder, *supra* note 10.

many reasons.[54] It would ensure that some equitability concerns are met because the people whose diseases are genuinely disadvantaged by the market would be the primary focus. It could substantially increase efficiency as there would be a lot less room for abuse via salami slicing based on arbitrary prevalence brightlines. With fewer applicants, the administrative burden may also lessen. On the other hand, it may decrease efficiency because fewer drugs are in development or produced. To ensure that the genuinely unprofitable drugs *were* produced, the incentive would likely have to be increased, which could be seen as spending on pharmaceutical companies. Also, there may be continued room for abuse if a subset can be defined in such a way that the subset is unprofitable while other subsets are not, analogous to salami slicing. Abuse can also exist if the drug companies use the even smaller prevalence of these orphan diseases to engage in price gouging. The credit would also not *necessarily* ensure that all drugs disadvantaged in the American market now gain attention, leading to the continued influence of the previously mentioned structural difficulties such as a lack of interest in research for pregnant women. Furthermore, the administrative burden to determine what is in fact "unprofitable" at the outset is far more difficult than a mere prevalence-based approach. Politically, it could also be more difficult as it would likely be opposed by drug companies and interest groups for people with rare diseases who *do* have potentially profitable drugs being developed for their treatment. Also, the likely necessary increased spending as a percentage of the development costs could be politically difficult even if the actual monetary amount flowing out of the government goes down.

Public Production

Public production of drugs theoretically eliminates any equity concerns around not serving the right people and around advantaging otherwise wealthy drug companies at the expense of the public. It is also theoretically far more efficient, as there is no concern about overcoming a profit motive, no concern about overuse of the tax credit, etc. It could be advantageous for politicians who could take direct credit for the lifesaving treatments. On the other hand, direct government control is extremely difficult administratively. The burden would be quite significant, and the government lacks the expertise in the process of developing the drugs as opposed to mere oversight. Furthermore, it would be expensive because

54. *See* Herder, *supra* note 10, at 4.

the government would need to go through start-up costs, would lack some of the necessary expertise, and would be covering the entirety of the cost rather than simply a portion. This exacerbates equity considerations with regards to how much the public can afford to spend on the lives of minorities. It also would not be able to facilitate competition to spur innovation, which is an efficiency downside, as well as typical concerns about the efficiency of government spending. The traditional political climate in America is also not favorable to such state-run solutions, so implementing it would likely be significantly more difficult than a private sector subsidy. This means that while some academics have found that it is ideal, it is unlikely to be a credibly feasible proposal.[55]

Direct Grants

Similar to the public production proposal, the government directly funding specific drug development is a promising option. The government would theoretically be able to target the proper populations to prevent abuse, provide a variable and appropriate amount of funding depending on the circumstances of each specific case, etc. There would of course be concerns about abuse in the application process, but there would not be a brightline loophole as the status quo provides. This is a theoretically vast improvement in efficiency due to the targeted nature of the relief; structural difficulties could be avoided through judicious and ethical grant acceptances.

However, this theoretical improvement comes with significant costs and difficulties. Just as in the case of removing prevalence as a criterion, there is a significant cost associated with moving the truly disadvantaged diseases to a state where the pharmaceutical company will agree to develop. The expertise required to truly determine which diseases are in need of the aid is also quite difficult to obtain and not necessarily something the government immediately has. Without perfect knowledge and perfect systems of approach, there is also likely to be a reduction in efficiency as the government may simply be incorrect about the amount of grant money required or the proper diseases to allocate the grant to. The administrative burden to acquire this would be significant. There is still potential for abuse if regulatory capture or the complexities of politics influence the grant process. Drug companies also would not be able to easily rely on the presence of a guaranteed tax cut and would have to spend effort to produce grant proposals, which would lower efficiency and add

55. *See* Andraka-Christou, *supra* note 1.

potential dead weight loss. Granting money in this way is also less likely to be politically feasible due to being more overt spending and could be a point for further political struggles in the future. Advocacy groups are also unlikely to be happy because they must leave the decision for if their drug gets financed up to the government rather than a transparent metric. Thus, this option is not necessarily optimal.

Orphan Drug Cap-and-Trade

This proposal originated from considering disincentives as opposed to positive incentives that can be abused. The essence of the proposal is imposing a harsh tax on pharmaceutical companies for nonorphan drugs that can be offset by a generous credit for orphan drugs. This is analogous to, though not exactly, a cap-and-trade system, such as those proposed for carbon and fossil fuels.[56] This would theoretically increase efficiency because even if the profit margins for less profitable orphan drugs are slimmer, the comparative profit margin would be substantially increased, increasing the likelihood that the drug companies would seek to develop orphan drugs. There is also an equity advantage in that pharmaceutical companies have the capacity to pay so they would be bearing an increased, volitional burden for not producing the orphan drugs. This system, though, has multiple flaws. Firstly, there would be an even stronger incentive to abuse the orphan drug categorization, and determining which drugs are standard rather than genuinely orphan can be extremely difficult prospectively rather than retroactively. There could also be an equity concern across drug companies as not all companies are capable of or have the expertise to develop orphan drugs. The bookkeeping for tracing profits would also add an administrative burden. Politically it would also likely be an uphill battle as pharmaceutical companies would want to avoid a blanket tax and would lobby against it. Also, as is often the concern with *levying* a tax, the government needs to be concerned about how much of the tax is passed on to consumers. If much of it is passed on to consumers, then people who need treatment for nonorphan diseases may be inequitably burdened, while the efficiency does not substantially change. While price controls can, as the game theory analysis demonstrated, help ease this difficulty, on its own this would be the major variable that decides the utility of this proposal. This variable is difficult to determine, therefore the proposal in part H is preferable as it offers more certainty.

56. *See e.g.*, Lawrence H. Goulder & Andrew R. Schein, *Carbon Taxes Versus Cap and Trade: A Critical Review*, 4 CLIMATE CHANGE ECON. 1350010 (November 18, 2013).

Price Controls if Using ODA

Just as price controls could aid the prior proposal, and in fact many of the other proposals, they are a viable independent solution. The core equity argument behind them is that if you take public money meant to care for people with orphan diseases, you are not entitled to make an excessive profit off the very people the public deemed disadvantaged and in need of aid. It becomes a matter of fundamental fairness, as well as an efficiency matter in truly fulfilling the purpose of the ODA. Thus, price controls would be implemented for any drugs developed when taking advantage of the ODA. The game theory analysis of the ODA also concluded that exogenous pricing rather than pricing determined by the drug companies would be far more likely to produce good results for the patients.[57] And yet, there are still fundamental concerns that make this option difficult on its own. There is a reverse equity argument that it is not the government's place to place a cap on the market's determination of price, especially in cases where the drug companies are allegedly producing drugs that help people in great need. There's an efficiency argument, as demonstrated by the game theory paper, that the attendant subsidies provided to the drug companies would need to be even higher to "tip the needle" and may, in some cases, lead to some drugs not being produced at all. It also would not necessarily eliminate the incentive to abuse the ODA, nor would it change the flawed criteria by which drug companies currently abuse the ODA. Furthermore, the administrative burden of determining an appropriate price point to cap each drug is difficult and costly. Politically, this would not be popular with drug companies, and American politicians generally do not particularly like price control. However, the equity considerations are so significant that price control *should* be seriously considered, especially in conjunction with other proposals to address issues that price controls do not address.

Loss Recompensation

The third original proposal is one that intuitively leads to the final and ideal proposal. In this proposal, rather than an upfront tax credit, orphan drugs that *end up* unprofitable after the seven-year exclusivity period will get compensated by the tax credit. The fundamental goal is to recenter the ODA on the unprofitable drugs it was meant to facilitate and assure drug companies that they can afford to take the risk into that market. Because

57. *See* Olsder, Maragan & Tang, *supra* note 43.

this is retrospective rather than prospective, there would theoretically be much more accurate information, thus ensuring equitability, streamlining efficiency, lowering administrative costs, and being monetarily cheaper.

The main problem with this proposal is that because of the first-mover advantage, it is entirely possible that the drug's price will simply skyrocket *after* the exclusivity period, resulting in deferred prices that may be even higher to compensate for lost profit in the previous years. Drug companies could abuse this along with abusing the designation loopholes. "Kicking the can down the road" is not a viable strategy for long-term health of the plan, though this is a case where longer-term price controls could mitigate the downside. Also, the incentive would be weaker due to the time value of money, and the administrative burden of analyzing the exact profitability of the drug could be quite heavy. Because of the weakness of the incentive and the burden on the government, this policy is inferior to the recapture policy in section H.

Recapture

This policy is an original policy that has the most potential to be successful across all axes. Based on prior analysis, it would be even more successful if combined with price controls. However, price controls may not be strictly necessary in order to make the proposal function. This flexibility itself is an asset as it makes space for legislative and policymaking compromise. The essence of this policy is recapture, much in the vein of other forms of tax recapture such as depreciation recapture. Depreciation reduces tax burden, but when a realization event occurs that reflects a difference between the depreciation and the actual value, the overly depreciated tax burden must be made whole. In much the same way, a "recapture" can be applied to the ODA. The incentive can be broadly granted at the time the drug is brought to market. This incentive could be the current incentive, a much higher percentage than 50% to draw in more drugs. In the event that the drug is excessively successful and thus a genuinely profitable drug that should not have had the advantages of the ODA, the company must repay the tax credit at a variable rate dependent on the scale of the profits made, perhaps over the seven years of exclusivity. The exact rate of repayment, thresholds for profit, etc. would be determined by experts and ideally would be flexible from case to case and year to year as the landscape of drug development and disease understanding evolves. The idea of "repaying" a tax credit is not unheard

of. The advance child tax credit is similar and NOL tax credits are an inverse where a tax credit can be amended due to a separate loss.[58]

This proposal has many significant advantages, though it does not fix some issues itself. It also is highly flexible and can be implemented in conjunction with a subset of the prior proposals to result in a better overall policy. The first advantage, of course, is an equity advantage like that of the price controls. It ensures that the drug companies do not make excessive amounts of profit financed by public funds, though they would still be entitled to a reasonable profit to ensure the drugs were developed. The second advantage is that it lowers (though it does not eliminate) the incentive to abuse the ODA, because the only remaining benefits would be the first-mover advantage that comes with market exclusivity and the time value of money associated with the upfront credit. This time value of money is another advantage in that it maintains an incentive for drug companies to participate in orphan drug development even if the theoretical profit has been decreased. Thus, the drugs do get developed, and people do get treatment. It also has more flexibility in efficiency because the amount recaptured can vary rather than stay fixed. A company who developed a moderately excessively profitable drug would not have to recompensate the government as much as a company who developed an extremely excessively profitable drug. This variability and lack of a bright line also makes it harder for companies to strategize around ways to abuse it. Politically, it is more feasible because it would lower government spending, not be as unpalatable to the pharmaceutical companies, and allow politicians to demonstrate to the people that they are not simply giving money to companies without oversight.

There are, of course, downsides to this approach. There would need to be additional administrative overhead for the government and for companies to track this recapture and deal with greater complexity in the tax code. It also does not completely eliminate the incentive to abuse the ODA. The concerns about later price gouging that existed due to the limited time window in the loss recompensation proposal would exist here as well, though theoretically with less severity.

The proposal, though, appeals to me in part because of its flexibility. It can complement prior proposals to create an optimal framework. For example, if the prevalence criterion was removed to remove the salami

58. *See, e.g.*, I. R. S. 2021 Child Tax Credit and Advance Child Tax Credit Payments — Topic A: General Information, https://www.irs.gov/credits-deductions/2021-child-tax-credit-and-advance-child-tax-credit-payments-topic-a-general-information; I. R. S. Publication 536 (2021), Net Operating Losses (NOLs) for Individuals, Estates, and Trusts, https://www.irs.gov/publications/p536.

slicing style abuse, this proposal would be able to complement it by ensuring that any increased incentive to offset the increased unprofitability is not exploited. The recapture proposal could also synthesize with price controls to avoid gouging after the window, relying instead on the time value of money of the heavy tax credit and first-mover advantage to incentivize production of the drugs. This substantially increases equity because the people who need the drug are not going to be charged too high an amount, while the public via the government can rest easy knowing that they are not being fleeced for too much money.

From a policymaking framework perspective, the abuses of the pharmaceutical industry threaten them with returning to the contender status. By curtailing excessive profits, they return closer to an advantaged status, which makes any other abuses more palatable. As far as the three streams framework can be applied, this proposal is a policy that seeks to find a nexus between the problem of pharmaceutical abuse of the ODA and a political climate that wants a more efficient ODA without expending unnecessary political capital due to extreme opposition from either rare disease advocates or pharmaceutical companies.

Overall, this proposal is arguably optimal despite its imperfections. While it certainly is not a panacea to the struggles around companies seeking to gain the most while doing the least for people in need, it does provide a certain elegant backstop to an excessive amount of abuse. The other proposals run into difficulties in part due to overreaching. This proposal maintains a healthy incentive for companies to produce orphan drugs and puts a limit only if they truly egregiously abuse the drug. The drugs are thus still developed and go toward the ultimate goal of helping people in need.

III. CONCLUSION

The Orphan Drug Act has successfully provided many people with rare diseases in the United States with lifesaving treatment. It brought a solution to a problem posed by the unprofitability of those diseases and helped bring drug companies into a better place ethically and from a policymaking framework perspective. The measure is generally equitable, has high efficiency, and does not suffer from an excessive administrative burden. However, it is not perfect, and issues such as salami slicing create an impetus for the ODA to be better and deliver more to the people who need it. The recapture method was the best suggestion, as determined after an analysis of many proposals. The recapture method will allow the government to ensure that excessive profits are not being made off the

back of public funds while maintaining a potent incentive, thereby increasing the efficiency and equitability of the ODA. The recapture method is also flexible and can be integrated into other approaches, resulting in remedies for flaws that other proposals may face.

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