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ALLEGIANCE AND CITIZENSHIP AS CONCEPTS IN CONSTITUTIONAL LAW

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[In this article, the author explores the relationship between the individual and the state. He does this not from the traditional international law point of view, but in order to study the effect of the relationship in constitutional law.

The author explains the relationship in terms of membership. He examines different theories of membership and discusses how the fact of membership may rationalise the State's authority over the individual and the individuals inherent rights or lack of them.

The author goes on to examine the components of the concept of membership. He traces the history of Australia's laws of nationality and citizenship as Australia gradually achieved consitutional independence from the British Empire, discussing the effect of being accorded the 'status of British subject'. He examines the concept of allegiance for constitutional law, focussing on the different theories of allegiance and the courts aproach to the issue and the resultant correlative duties consequent upon being a member of a society.

He concludes that there is no single policy or concept defining membership as expressed in the concept of membership adopted in the legal system and ponders the value of seeking to define membership.]

People as individuals may be viewed as the fundamental unit in society, organised in a variety of ways into States; as an institution, the State has authority over the people. The relationship so constituted is one of the fields of study of political science, the questions of who owes and what, if anything, is political obligation being ancient[1] and continuing problems. This essay has the unabashedly theoretical aim of exploring the possible relationship between the State and the individual as defined by or described in law.[2] As an enquiry into the nature of our society it does not need any more justification than an enquiry into the physical nature of black holes, yet purely theoretical aims in legal research are so derided that I feel compelled to justify mine. There is no lack of wholesomely practical reasons for my discussion.

The Australian Citizenship Amendment Act 1984, when in full operation, will have repealed Part II of the Australian Citizenship Act 1948 and make the consequential amendments to remove the status of British subject from the law of Australia. That status has been accorded to Australian citizens since 1948 and, before then, there was no such thing as Australian citizenship, only British subjection. The Constitution of Australia makes references to 'British

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[1] *E.g.* Aristotle, *Politics*, iii: I.

[2] This is a distinct question from that of why people obey the law, which is directed at social fact. See Hart, H.L.A., *The Concept of Law* (1961) for an answer to this question based on the habit of obedience.

subject' and 'subject of the Queen' but none at all to Australian citizens.[3] What, then, is the effect of this change on the municipal law of Australia?

The question of the applicability of section 3 of the Act of Settlement of 1701 raised in the public mind not only the technical constitutional question of how to resolve the legal problem but also the meaning of the now condemned status of 'British subject' in the context of qualifications for serving the public of Victoria.[4] The very fact of the residual power held by the United Kingdom over the government of those countries which were once its Dominions raises a multitude of further questions as to the meaning of 'sovereignty'. The general preoccupation of constitutional lawyers in this regard has been the content or extent of the sovereignty of the United Kingdom and how to minimize or remove it[4A], leaving aside the question of what the relationship between the State of the United Kingdom and the people of those countries is.

It is difficult to ascertain exactly what is meant by the terms 'Australian citizen', 'nationality' or even 'British subject' for the purpose of ensuring that the law expresses the wishes which motivate it. For example, in Victoria recently there was some controversy over proposed amendments to the Local Government Act[5] whereby aliens were to become participants in local government. Argument raged.[6] On the one hand it was said to be undermining the very fabric of society that people who were not Australian citizens or subjects of the Crown should govern the people of Victoria in howsoever small a way. On the other hand the argument was advanced that as this country is comprised of people from many points of the globe with ties to a multitude of 'homes', we should not preclude any person in our society from participating in its government. 'Subject of the Queen', 'citizenship', 'allegiance', and so forth were thrown in with abandon, with lawyers powerless to explain the meaningful content of each term.[7]

Lest it be said that these concerns are ephemeral, it must be noted that at least one war has been fought over competing allegiances.[8] In 1946 allegiance

[3] *Infra*, 675-6.

[4] See *Age (Melbourne)*, 11 September 1980 to 16 September 1980 for the first articles on this issue. The debate has been taken up in Booker, K. and Winterton, G., 'The Act of Settlement and the Employment of Aliens' (1981) 12 F.L.R. 212 and Lindell, G.J., 'Applicability in Australia of Section 3 of the Act of Settlement of 1701' (1980) 54 *Australian Law Journal* 628.

[4A] Allegedly now accomplished through the Australia Act 1985.

[5] To ss 51-56, 73-77 of the Local Government Act 1958.

[6] See numerous articles and letters in the Victorian newspapers in March and April 1983. A similar point is made in Pryles, M., 'Nationality Qualifications for Members of Parliament' [1982] *Monash University Law Review* 163.

[7] Similar difficulties and controversies become apparent when discrimination on the grounds of national origin is claimed, *e.g.* under ss 9 and 10 of the Racial Discrimination Act (Cth) 1975. Whilst it is permissible to discriminate on the basis of nationality, there is no real distinction between the concepts. See *Ealing Borough Council* v. *Race Relations Board* [1972] A.C. 342 and Human Rights Commission, *The Australian Citizenship Act 1948* (1982) 4-5.

[8] Allegiance was the cause of the 1812-1814 Anglo-American war. Great Britain claimed that allegiance to the Crown was indelible: incapable of being removed by naturalization in a different State. The United States of America naturalized some British subjects who were sailors. As Great Britain was running short of sailors for its navy at that time, some naval commanders tried to

again became an issue of some notoriety when William Joyce, or 'Lord Haw Haw', was tried and hanged for the treason of making highly inflammatory radio broadcasts from Germany into the United Kingdom during the second World War. As treason is the breach of one's duty to obey and Joyce had made treasonable statements if he owed that duty, he claimed he owed no allegiance to the Crown of England. He was an alien[9] but had acquired a British passport in 1933, during a period of residence in Great Britain, by misrepresenting himself to be a British subject. The court held that as he was able to claim protection, although he never did, his duty to obey, or not to commit treason, carried over during the whole of the currency of the passport even after Joyce had left Great Britain.[10] Some of the broadcasts were made during this time and he was found guilty.[11] The fundamental issue raised by *Joyce's Case*[12] is whether the criteria for the duty to obey and consequently those for entry, residence or citizenship which result from the duty of protection should be more than a product of political or judicial convenience.

Perhaps the most complex legal problem raised by the concept of allegiance is fundamental to the nature of federations and the Commonwealth of Nations. It is how there can be allegiance separately owed to separate Crowns unified in one person, at the same time as owing single allegiance to separate Crowns as a citizen of a federation. The problem has been occasionally, in 1608[13] and 1886,[14] and incompletely addressed. In *Calvin's Case*[15] it was decided that subjects of the same person could not be alien to each other because allegiance was owed to the person and not the body politic. In the later case, *Isaacson* v. *Durant*,[16] it was decided that, because allegiance was owed to the body politic and even if subjects were not alien to each other when two Crowns were united on the one head, when the Crowns were separated the subjects of one King were alien to the subjects of the other King.

From these examples[17] it appears that there are three fundamental questions

'press' the new citizens of the United States into the navy on the basis that they were still British subjects and therefore bound to obey orders of the Crown's representative. Naturally, the United States claimed this was an infringement of its rights and, after a number of such incidents, war broke out. Great Britain abandoned indelibility in 1870 in the Naturalization Act 1870 ss 3-6.

[9] He was a citizen of the United States of America by birth who had lived in Ireland between the ages of 3 and 15, and from 1921 to 1939 he resided in England with short holidays abroad.

[10] *Joyce v. D.P.P.* [1946] A.C. 347. Whilst a person is within the boundaries of a State he is deemed to owe 'local' allegiance: *Sherley's Case* (1555) 2 Dyer 144 ba; 73 E.R. 315; *Calvin's Case* (1608) 7 Co. Rep. 1a; 77 E.R. 377; 2 St. Trials 559, 638.

[11] There was an immediate outcry over this decision: for opposite sides of the ensuing debate see Lauterpacht, H., 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens' (1945-7) *Cambridge Law Jounal* 330; Williams, G.S., 'The Correlation of Allegiance and Protection' (1948-50) 10 *Cambridge Law Jounal* 54.

[12] [1946] A.C. 347.

[13] *Calvin's Case* (1608) 7 Co. Rep., 1a; 77 E.R. 377; 2 How. St. Trials 559, hereafter cited only as 2 St. Trials 559.

[14] *In re Stepney Election Petition, Isaacson v. Durant* (1886) 17 Q.B.D. 54.

[15] 2 St. Trials 559.

[16] (1886) 17 Q.B.D. 54.

[17] Recent experience in Malaysia reinforces my conviction as to the importance of the topic. In that country questions of citizenship and race are intertwined in both the definition of citizenship and preferential treatment granted to those of particular racial or religious groups. Failure to resolve these questions could have drastic results.

concerning the legal definition of political obligation: whether there is one, what is it and who falls under it?[18] This essay is an attempt to find a means to or formula for understanding what the law is and how it is changing. A concept of 'membership' is developed as the abstract description of any relationship between the individual and the State which might exist. Various concepts of law are then examined to explore whether they might be the specific expression of the concept of membership adopted in the legal system.

MEMBERSHIP IN CONSTITUTIONAL LAW

The State expects people to obey it. Most States, including Australia, expect all people within their boundaries to comply with their laws, but distinctions are made on grounds, other than as to expectations of obedience, between residents, aliens, citizens and a host of other classifications. However, if a legal system defines the relationship of an individual to the State, there must be a set of people whom are in that relationship. These are defined for the purposes of this discussion as 'members'. The individual can be said to 'belong' to the State and is in a relationship of 'membership' with the State. Use of the term 'membership' implies that no specific form of relationship with the State is being indicated. This does not assume that States must define the relationship of the individual to the State. The point is that there may be such a relationship in the law. The lack of a definition is as significant as the type of relationship.

The State is not defined for the purposes of this analysis in the manner of international law or even by external criteria such as a body of people occupying a defined territory and organized under a sovereign government.[19] Rather it is here used in the manner of political science or even its ordinary sense of 'the body politic as organized for supreme civil rule and government; the political organization which is the basis of civil government'.[20] The community may or may not be viewed animistically: again, no specific theory of the relationship of individuals with the State or the State itself is being adopted.

The adoption of a concept of membership involves the assumption that society is comprised of discrete homogeneous units here called members and usually equated with individual humans. This does not deny groups are a part of society, but rather asserts that benefits and sanctions arising from the operation of law may be analysed to be to the ultimate benefit or detriment of individuals, no matter the legal formulae for their acquisition or imposition.

[18] These have always been the vital questions since they were posed by Aristotle (*Politics* iii: I).
[19] This is more a definition for international law: *The Shorter Oxford English Dictionary* (3rd ed. 1975).
[20] *Ibid.;* see also Brinkman, C., *Recent Theories of Citizenship in its Relation to Government* (1927) 5-9; Hinsley, F.H., *Nationalism and the International System* (1973) 26-51; Marshall, G., *Constitutional Theory* (1971) 14-20; Mabbott, J.D., *The State and the Citizen* (2nd ed. 1967).

A legal system could be developed so that individuals were not directly regulated. Their profits and liabilities would accrue solely as a part of a group. Yet within the group would be regulation of individuals responsible for actions of the group[21] and the whole system could still be described in terms of rights and liabilities of individuals. In the legal system in operation in Australia, corporations and other groups are recognized[22] or created[23] by law and therefore their existence depends on law. Individuals are created in a manner autonomous to the law. Whereas the relationship of law to corporations is constituted by the law, or at least is not relevant to membership and need not be further considered, the relationship of the individual to the law is here examined.

That membership is a viable concept is confirmed by anthropological research which analyses society as comprised of units regulating those who belong and being regulated by more comprehensive units.[24] This model of primitive societies is specifically designed to extract the universal aspects of society[25]. The concept of belonging is vital to the existence of the unit no matter the means of determining who is a member or what part of the social framework determines membership. For example, kinship is the usual means by which members are distinguished and in this respect provides the rules of membership.

Membership may be a fundamental aspect of legal systems but, as a concept, it requires no assumptions as to the relationship created or recognized by the legal system. In any particular system it may not even exist. By adopting a concept with no assumed content, recognition of what theories of the relationship between the State and the individual are adhered to by the legal system can be attempted. Without such a concept discussion flounders in circularity. Accepting membership as a viable tool of analysis allows the incorporation of profound theories of the nature of the State into the understanding of the laws later examined. In a preliminary work of this nature there is not enough space to examine them in detail; simplifications must suffice. Two categories of theories of the authority of the State are identifiable: individualist and corporate theories.

When the individual is assumed to be the source of authority of society to make demands of its constituent members, both the authority of law and law-making authority of the State are obtained through the citizen placing person and all powers under the supreme direction of the general will of his fellow citizens. Such theories presuppose the individual to have freedoms and

[21] Moore, S.F., *Law as Process* (1978) Ch. 3.
[22] *The Conservators of the River Tone v. Ash* (1829) 10 B. & C. 349; *Ex parte the Newport Marsh Trustees* (1848) 16 Sim. 346; *Jeffreys v. Gurr* (1821) 2 Br. Ad. 833.
[23] *E.g.* under the Companies Act 1981 (Cth), Associations Incorporations Act 1982 (Vic.).
[24] Each unit of whatever level is termed a 'semi-autonomous social field' by Moore, S.F. in *Law as Process* (1978), see esp. Ch. 2; 'corporation' by Smith, M.G. in *Corporations and Society* (1974), see esp. Ch. 4; 'holon' by Koestler, A. in *The Ghost in the Machine* (1967).
[25] Moore, S.F., *op. cit.* 57.

rights to relinquish. In return for surrendering his rights and freedoms and for accepting the obligation to obey the State, the citizen is incorporated in the State as an indivisible part and receives protection and security. The State receives the power to command the citizens, that is, to make laws for its citizens, through a social pact. This contract makes the people subject to the laws of the State but, because of that subjection, the people are the sovereign power within the State. The authority of law-making and of law derives from the individual, although each individual is an indivisible part of the whole.[26]

Since the citizens are those individuals joined in the social pact, the determination of who they are is a vital, if not contentious, constitutional issue. Although Rousseau may have had difficulty extending the social contract to succeeding generations of citizens,[27] subsequent theorists saw the opportunities for disassociation after birth as sufficient to entitle a person born into the State to citizenship.[28] There is no need for additional legal principles of membership to connect the member to the State as the social contract is itself sufficient explanation of membership. The law of citizenship, being the general will of the citizens according to the social contract, determines who the members are.

The emphasis of contract theories upon reciprocity often results in discrimination on the gounds of citizenship. The contract may also be used to justify expatriation or the withdrawal of citizenship. The contract with a particular individual may be dissolved or denied by the State as representing the rest of the citizens.[29] The State may, by operation of law, deny that the status of citizen is possessed by individuals. If so deprived, the individual may be in law a subject of the citizens, or even mere property.[30]

On the other hand, in corporate theories of the State, the source of law may be some institution which is assumed to have the authority to make laws through its very existence, so that the authority of law must also be assumed to exist. These assumptions are justified in many ways. The history of the State and its connection with the present and future may imply collective action and adaptation beyond the life of the single individual. Through this idea the State is sometimes said to exist as a separate entity.[31] The State may also

[26] Rousseau, J.J., *The Social Contract* (1968; first published in 1762) is the classical example of this type of theory.
[27] Rousseau, J.J., Bk II, Ch. 10.
[28] *E.g.* Goldsmith, M.M., *Allegiance* (1971) 21.
[29] Bickel, *The Morality of Consent* (1975) 54.
[30] In *Dred Scott v. Sandford* (1856) 19 Howard 393; 60 U.S. 393, it fell to the Supreme Court of the United States to decide whether Art. 4 sec.2 of the *Constitution of the United States of America* protected negroes. Art. 4 sec. 2 stated: 'The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states'. It was decided that it was not within the power of the states to make a negro a citizen of the United States and therefore to have the full rights of citizenship in every other state. Negroes were not included as part of the 'people of the United States' for the purposes of the Declaration of Independence and the U.S.A. *Constitution* because it was never intended at that time that negroes were to be citizens. This decision enabled the disagreements leading to the American civil war to arise. Whether or not this decision has been overruled is not the point. The decision was possible.
[31] Brinkman, *op. cit.* 43-44.

be deemed a 'great incorporation'[32] with its origins in the past so distant that the manner and reasons for its existence are unimportant.[33] The State may be deemed to acquire its powers by natural law demanding the association of men into States or by endowing the State with God-given rights over its subjects.[34]

If the State exists of its own authority, there is no need for the independent theoretical existence for the rights of man. Sometimes those rights are added to the existence of the State within the theory, yet they are not necessarily so added. The importance of the assumed authority to make laws and of law is that the individual is in a position of subjection of that power. The individual does not have rights inherent, but may have liberties granted to him. There is no necessary symmetry of obligations and rights, nor limitations upon the power of the State arising from the manner of its association. The continued existence of the State is sufficient end for the acts of individuals, and in this pursuit the powers of the State, if morality is excluded, can have no limitation.

The distinction between individualist and corporate theories is clearer if expressed in religious terms, although religion is not necessary to the classification. The community may be ordained with divine authority by God, sometimes through a figurehead such as the King or the Pope. In contrast, the individual may be deemed to be responsible only to God and thereby derive the dignity of being human and acquire natural rights. Another version of the distinction is the civil law problem of classification of nationality laws: whether they should be public or private laws.[35]

Corporate theories require an explanation as to why the individual is subject to a particular State and therefore will predict legal principles which vary with the justification for the existence of the State. These principles would either be or result in the laws of membership distinguishing between those who are and are not subject to the State.

When a law is assumed to be a command, and the legal system assumed to exist independently of the State or where the legal system is assumed to be 'sovereign', there is no need for a legal connection between the State and the individual. The law will determine those who it commands irrespective of the connection of those commanded with the State. The legal concept of the State may be an 'incorporation' or otherwise, but the relationship of that entity to the individual is irrelevant to the legal system. Law may regulate the rights and duties of the individual and the State, but it does so as it would between any two legal persons within its powers to command.[36] There may

[32] Hobbes, T., *Leviathan* (1973; first published 1651).
[33] Bickel, *op. cit.* 20.
[34] Thompson *op. cit.* 8; MacIver, R.M., *The Modern State* (1926) 119.
[35] Silving, H., 'Nationality in Comparative Law' (1956) 5 *American Journal of Comparative Law* 410, 421.
[36] There are many 'command' or 'positive', theories of law. Only one version, Kelsen H., *General Theory of Law and State* (1946) 234, deals with the relationship between the individual and the State under these theories.

well be laws specifying whom the legal system commands and whom it does not command, but that is a consequence of the existence of other legal systems and the consequent need to provide for resolution of problems created by the conflict of laws rather than a question of constitutional law.

Although the command theories do not require explanations of membership, they are otherwise similar to subjection theories. The individual is subject to the law which is assumed to exist prior to the State. The legal system has its own theoretical independent existence through history[37] or a vague presupposition of existence.[38] The individual has no inherent rights independent of the legal system. Therefore the theory is one of two sub-categories of corporate theories, one of the subjection of the individual to the State and the other of subjection to the legal system.

The theory of the source of authority of law and law-making power adopted by the legal system or inferable from the laws of the system determines and is determined by the rules of law which decide who is a member. The absence of criteria for membership or the absence of principles relating criteria to the constitution implies that the corporate theory of subjecton to the legal system is being applied by the legal system to the constitutional law of membership.

In legal systems adopting the differing explanations for the authority of law and law-making power given above, the major contrasts in their membership laws lie in the means by which they are formed. In systems adopting the individualist contractarian approach, membership laws are decided in the manner with which all matters of society are dealt. Where the State or society itself is assumed to exist and to have authority because of that existence, membership will be the result of criteria and the principles inherent in the interpretation adopted for the existence of the State. Where this is that the State is the legal system, the only principle of membership is that such laws must be validly made and the only use to which membership laws are put is to decide who may be commanded by the system.

The theories of the nature of the State help in an entirely pragmatic way the understanding of membership laws. They are structures which can be used to ascertain the function of the various sets of laws. Secondly, they provide hypotheses against which the laws can be tested. For example, allegiance could be viewed as having the function of being the legal principle linking citizens with the State of Australia. The hypothesis of a corporate State provides the following tests: Does the principle of allegiance result in laws deciding whom the State may govern? Can allegiance provide a theory including rationales for the authority of law-making, obedience to law and the existence of the State? The results should clarify the meaning and purposes of allegiance as a legal concept. A closer approach to the resolution of practical problems

[37] Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (10th ed. 1959) 184.
[38] Kelsen, H., *op. cit.* 115.

should be made and assumptions at the foundation of the legal structure should be laid bare.[39]

Prior to applying this analysis to the law, two popular and academic misconceptions should be eradicated.

The existence of membership law does not seem consistent with the plethora of categories in modern laws as to nationality. International law requires that most people be attributable to a State.[40] For this purpose, rules have been developed, the most important being that it is the responsibility of every State to decide which individuals are attributable to it. The criteria for being attributable to a State in international law often coincide with the contents of membership law in distinguishing between categories of people deemed to have or not have connections with the State. The rules may, therefore, be of a dual nature: to satisfy the requirements of international law and to determine who the members of the State are for the purpose of its constitutional law.[41]

The result of a single set of rules fulfilling both purposes is that their constitutional aspect has been neglected or distorted. Satisfaction of the international law nationality has been regarded as the sole purpose of the criteria of membership.[42] The relevance of constitutional law has been expressly denied. In a work which is generally accepted as the most complete exposition of nationality and citizenship laws of the Commonwealth of Nations, Professor Parry states: 'It is not essential to the legal nature of the State that there should exist any definition of its citizens'.[43] Although other authors do

[39] As Owen Dixon wrote in 1931: 'An enquiry into the source whence the law derives its authority in a community, if prosecuted too far, becomes merely metaphysical. But if a theoretical answer be adopted by a system of law as part of its principles, it will not remain a mere speculative explanation of juristic facts. It will possess the capacity of producing rules of law': 'The Statute of Westminster, 1931' (1931) 10 *Australian Law Journal Supplement* 96. There is one qualification to this procedure. If law is not systematic, being neither consistent nor coherent, no conclusion may be drawn as to one area of law from the propositions of another area. It is beyond the purposes of this essay to pursue this excursion into the theory of precedent, suffice it for now to assert that lack of system is a possibility that should be taken into account, just as the possibility of recourse to logic in precedent should also be noted.

[40] Jones, J.M., *British Nationality Law* (Revised ed. 1956) 4; Parry, C., *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (1857) 8; Brownlie, I., *Principles of Public International Law* (2nd ed. 1973) 367ff.; O'Connell, D.P., 2 *International Law* (2nd ed. 1970) 670ff. There are limitations on the general rule, some in the form of treaties. Some authors suggest alternatives or redefinitions.

[41] Koessler, M., ' "Subject", "Citizen", "National", and "Permanent Allegiance" ' (1946) 56 *Yale Law Journal* 58, 59; O'Connell, D.P. *op. cit.* (1970) 670; Jones, J.M. *op. cit.* (1956) 1. Some States have separate rules for either or both purposes: British Protected Persons, prior to 1949, were nationals of the United Kingdom but were not members thereof, s. 308 of the United States Nationality Act makes a similar distinction. The Law of Return 1950 of Israel may create the situation of membership without nationality. The 1922 League of Nations mandate to the United Kingdom for the government of Palestine created nationality without membership: See Gouldman, M.D., *Israeli Nationality Law* (1970). For most states the generalization is true, and even if there are differences, they are outlined by the one set of rules.

[42] It is totally ignored in 4 *Halsbury's Laws of England* (4th ed.) 401; McDougal, M.S., Lasswell, H.D., Lung-chu Chen, 'Nationality and Human Rights: The Protection of the Individual in External Arenas' (1973-4) 83 *Yale Law Journal* 900.

[43] Parry, *op. cit.* 3. See also Bickel, *op. cit.* 75; Brogan, D.W., *Citizenship Today* (1960).

not make as bald a statement on this point as Parry, nonetheless they impliedly deny the importance of the definition of membership to the constitution of a State. These authors banish membership to sociology,[44] or state it to be nationalism or a revolutionary sentiment[45] or created to control immigration and the economy.[46] Few writers have examined the critical question of whether or not it is essential to the legal nature of the State that there should exist a definition of its citizens.[47]

Even when the legal relationship between an individual and a State has been considered, the usual conclusion has been that it is fully described by the legal rights and duties of the individual. The legal system itself has been said to be its description. This idea is particularly evident where it has been argued that the detrimental consequences of involuntary expatriation are so great as to provide a moral justification for the abolition of the status of resident alien.[48] The argument may also state that the rules distinguishing members from aliens cause discrimination against aliens, that this discrimination is a wrongful denial of human rights and thus membership should be based on no more than residence.[49] Such arguments are justifications of desired conclusions. The legal system may be a description of the relationship between the individual and the State, but it is not an explanation as to why certain individuals are members and others are aliens. The arguments assume the law does not require more complex principles of membership for constitutional coherence. Some theories of membership make this assumption acceptable,[50] but whether or not a theory is appropriate for a particular legal system has not been discussed by any author.

Second, it is popularly thought, and sometimes seriously stated, that the ideas of membership in Western legal systems derive from modified Graeco-Roman principles.[51] This is incorrect if it implies that the Graeco-Roman principles were directly accepted into the Western legal systems.[52] The connection between the two is more tenuous.

The classical Greek definition of membership is that of Aristotle: 'As soon as a man becomes entitled to participate in authority, deliberative and judicial,

[44] Jones *op. cit.*; Koessler *op. cit.*, 56.
[45] Brogan, D.W. *op. cit.* 39-41.
[46] Page, W., 'Letters of Denization and Acts of Naturalization for Aliens in England, 1509-1603' 8 *The Publications of the Huguenot Society of London* (Kraus Reprint, 1969) i-v.
[47] Parry, C. and Jones, J.M. do not examine the proposition. These two authors are generally considered to have covered the field of study. *Cf.* Bickel, A.M. *op. cit.* (1975) where the past constitutional context of the law is examined. Unfortunately Bickel's examination of the present constitutional context is extensively coloured by assumptions as to the moral acceptability of certain interpretations of the law.
[48] McDougal, M.S., Lasswell, H.D., Lung-chu Chen, 83 *op. cit.* 900.
[49] Bickel *op. cit.* (1975)
[50] In addition, the allocation of rights and duties in accordance with the rules of membership is, under some theories of membership, entirely avoidable.
[51] *E.g.* Brogan, W.D., *op. cit.* 7; Thompson, D.F., *The Democratic Citizen* (1970) 2.
[52] This does not deny the immense influence the classical writers had on medieval political thought and hence the growth of the modern State. See *e.g.* Morral, John B., *Political Thought in Medieval Times* (1958) (1980 reprint).

we deem him to be a citizen'.[53] The Greek definition is remembered for the connection it makes between membership and the political process.[54] When the texts of Greek laws are studied, the real connection with the modern law of membership is revealed to be the concept of territorial jurisdiction.[55] The political connection has survived as theory rather than as an actual legal concept.[56]

Similarly, Roman ideas affect modern conceptions but, again, in only limited ways. A.N. Sherwin-White, in his almost definitive exposition of the Roman laws of membership, illustrates the use of Roman citizenship in a variety of forms as a political weapon.[57] The grant of Roman citizenship originally was a reward resulting in material benefits. Later, during the Empire, Roman citizenship was still considered a reward but merely conferred an increase in status. The element of reward had the effect of unifying the Empire through increased loyalty to Rome. The idea of membership of the State being a reflection of nationalism and therefore capable of being used to increase the cohesion of the political unit remains.

Although some ideas from the classical civilization have remained to permeate modern law as to membership, the differences between the ancient and modern concepts of the individual and the State are more striking. They show that the law of membership stands within the elaborate structure of law and philosophy central to any society. The ancient Greek did not think the foreigner from another Greek city an alien in the same sense as the foreigner would be considered today. On the other hand, those who were not Greek were 'barbarians', a term which contained overtones of censure.[58] The Greek legal systems did not use the concept of sovereignty in the modern juridical sense of territorial boundaries.[59] The Romans developed a theory of sovereignty, but it was restricted to the law of persons and family law.[60] This personal theory of sovereignty required the law to travel with the person, so that the alien in Rome had the laws of his home territory applied in cases concerning his rights[61]. To the Roman, the State was the collected citizens without the abstraction of government by law. Consequently, the law of Rome could not be applied merely because an area was under the government of Rome. In the later Empire, the concept of membership was not related to the State, but rather to the idea of a commonwealth of racial groups. This

[53] Aristotle, *Politics*, iii, 1.
[54] Thompson, *op. cit.* 2.
[55] Jones, J. Walter, *The Law and Legal Theory of the Greeks* (1956) 57.
[56] Horowitz, R.L., 'Phenomenology and Citizenship: A Contribution by Alfred Schutz' 27 *Philosophy and Phenomenological Research* (1977) 293, 294.
[57] Sherwin-White, A.N., *The Roman Citizenship* (1939).
[58] Jones, J. Walter, *op. cit.* 50.
[59] Shaw, W.A., 'Letters of Denization and Acts of Naturalization for Aliens in England and Ireland, 1603-1700' 18 *The Publications of the Huguenot Society of London* (Kraus Reprint 1969) i.
[60] Kaser, M., *The Roman Private Law* (2nd ed. 1968) 60; Kunkel, W., *An Introduction to Roman Legal and Constitutional History* (tr. J.M. Kelly, 1973) 6-7.
[61] Kunkel, *op. cit.* 76.

membership implied participation in the benefits of status or freedoms, but not participation in decision-making.[62]

MEMBERSHIP IN CONSTITUTIONAL LAW

If membership is accepted to be a viable description of a concept in constitutional law, the question arises as to what its contents are. Possibilities are citizenship, British subjection[63] and allegiance.[64] Each will be examined in turn.

CITIZENSHIP

If Australian citizenship is synonomous with membership, the answer to Aristotle's question, 'who is a member?', is easily found. The Australian Citizenship Act 1948-1984 provides for the acquisition of Australian citizenship by birth,[65] adoption,[66] descent[67] or grant.[68] The first is an acceptance of the principle of *jus soli* and the third of *jus sanguinis* to a limited degree.[69] The grant of citizenship is a discretionary matter for the Minister upon being satisfied that nine conditions are met:[70] The conditions are of residence and intention to reside, age, good character, basic knowledge of the English language, an understanding of the nature of the application for citizenship and adequate knowledge of the responsibilities and privileges of citizenship. Under section 15 an oath of allegiance must be taken or an affirmation of allegiance must be made. Citizenship may be lost if the Australian citizen does any act or thing the sole or dominant purpose and effect of which is to acquire the nationality or citizenship of another country, renounces his allegiance in specified circumstances or has acquired citizenship by a deception or by a false or misleading statement.[71] There are further provisions relating to the loss of citizenship of children or wives of persons who have lost their citizenship and for persons who acquire citizenship by false representation.[72]

[62] Sherwin-White, *op. cit.* 201-3.
[63] British subjection is included because of the controversy over its exclusion from the Australian Citizenship Act 1948-84.
[64] This is not contended to be a complete list of all possibilities. Some candidates for the position of principle of membership may be discoverable in other constitutional concepts. 'Absorption into the community' together with 'domicile' is next in order of probability, being the more restrictive test for the extent of the power over emigration and immigration in s. 51 (xxvii) of the Constitution. Lack of space prohibits further discussion except for the brief comment, *infra, 706.*
[65] Section 10.
[66] Section 10A. This makes adoption equivalent to birth in most respects.
[67] Section 11.
[68] Sections 12-15.
[69] For a comprehensive exegesis of the Act as at 1980, see Pryles, M., *Australian Citizenship Law* (1981) Ch. 3. The two principles virtually exhaust the modern alternatives for criteria for nationality other than grant.
[70] Section 13.
[71] Sections 17-20.
[72] Sections 21, 23.

Beyond the simple statement of who are citizens lies the complex question of whether citizenship is membership or a mere manifestation of international law. According to the analysis developed above, if criteria for distinguishing between individuals determine membership there may be principles justifying them. Whether or not these principles exist and, if so, what they are should be sought in the history of the relevant Act, in constitutional law and in the uses to which the criteria are put.

The roots of the concept of Australian citizenship lie in naturalization under British law and the capacity of colonies to convert aliens into British subjects.[73] The same distinction between subjects and aliens applied in the colonies as in the United Kingdom. The alien owed local allegiance, which placed upon him the obligation to obey the laws of the colony.[74] A person born within the King's dominions was a natural-born British subject, no matter whether born in the United Kingdom or in a colony, because he was born within the King's protection and therefore owed the King obedience.[75]

Naturalization created allegiance and, as a result, the extent of the allegiance depended on the powers of the naturalizing institution.[76] The Imperial Parliament[77] had the power of law-making for the whole Empire, therefore, if it so desired, it could make a law that those naturalized owed allegiance in law and would be protected throughout the Empire. A person who was naturalized according to the laws of a dominion, rather that the laws of the Empire, could only be granted the benefits of a British subject within the territory for which the naturalizing institution could make laws. As English laws were paramount in all respects, if a law was not in force in England, no other law-creating institution could enact it for England, whereas English laws could be made applicable to all the territory of the King.

The most logical analysis of the limited effect of dominion or 'local' naturalization was that the locally naturalized person was an alien in the United Kingdom.[78] Since the United Kingdom exercised the rights of a State to the exclusion of the international personality of the colonies, the international effect of colonial naturalization was doubtful. Upon leaving the territory of the colony, a locally naturalized person probably reverted to his prior nationality.[79] Local naturalization gave to aliens rights and duties of natural-born British subjects only whilst they remained within the colony. Thus local naturalization was a more limited form of naturalization than was

[73] See Pryles, *op. cit.* Ch. 2 for a history of the development of the legislation as such. The emphasis in the following analysis lies on its constitutional law roots.
[74] *Low v. Routledge* (1865) 1 Ch. 42.
[75] *Craw v. Ramsay* (1669) Carter 184, 124 E.R. 905, Vaughan 244, 124 E.R. 1072.
[76] *Ibid.*
[77] The Parliament of the United Kingdom and its Empire.
[78] *Ibid., R. v. Francis, ex parte Markwald* [1918] 1 K.B. 617; *Ex parte Lau You Fat* (1888) 9 N.S.W. R.269. Of course this was only true so long as the Parliament of the United Kingdom did not enact that the person was not an alien.
[79] Piggott, F., *Nationality including Naturalization and English Law on the High Seas and Beyond the Realm* (1907) 236-7.

granted by the Imperial Parliament, but it was still an implementation of the doctrine of allegiance by law.

These principles remained in force, despite some viscissitudes,[80] until the advent of the 'Common Code', and thus were adopted in the Constitution of the Commonwealth of Australia. The relevant provisions of the Constitution are powers to legislate and not exclusive powers: s. 51(xix) naturalization and aliens, s. 51(xxvii) immigration and emigration and s. 51(xxviii) the influx of criminals. Even without reference to the records of the convention debates all of the powers can be traced as products of the then British law. The power to naturalize had always been part of the powers of a local legislature[81] and was expressly retained for the colony by Imperial statue.[82] Immigration and emigration had also long been controllable by a local legislature, albeit through the negative statement of the common law that an alien could not bring an action to compel entry to a British colony.[83] The influx of criminals was merely an aspect of immigration control.

The expression of the Constitution is in terms of 'people of the Commonwealth',[84] and 'subject of the Queen, resident in any State'.[88] Apart from section 117 the only mention of 'British subject' is in the qualifications for a member of Parliament.[89] The variety of terminology is the result of the complexity of the principles of local naturalization. The term 'British subject' could not be used except as a political qualification because it may have excluded locally naturalized people.[90] Thus 'people' refers to the population at large, 'residents' refers to jurisdiction of courts and 'British subject' is used when a connection with the suffrage is to be implied.[91] The possibility of a direct definition of citizenship was rejected during the Constitutional Conventions despite the history of Article 4 section 2 of the Constitution of the United States of America.[92] It was decided that the import of 'subject

[80] *E.g.* the effect of ss VI, XII of the Aliens Act 1844 creating limited naturalization yet making colonial legislation repugnant to it. This was solved by the Aliens Act 1847. The obscurity of s. 7 of the Naturalization Act, 1870 placed doubt on the capacity of the Crown to protect naturalized persons. See *In re Bourgoise* (1887) 41 Ch.D. 31; Cockburn, *op. cit.* 39; Parry, *op. cit.* 80; Piggott, *op. cit.* 116.

[81] *Craw v. Ramsay* (1669) Carter 184, 124 E.R. 905, Vaughan 274, 124 E.R. 1072.

[82] Aliens Act 1847, Naturalization Act 1870, s. 16.

[83] *Musgrave v. Chun Teeong Toy* [1891] A.C. 272.

[84] Sections 24, 25, 127.

[85] Sections 7, 24(ii); and preamble.

[86] Section 75(iv).

[87] Section 41.

[88] Section 117.

[89] Sections 16, 34, 44(i), 45.

[90] Quick, J. and Garran, R.R., *The Annotated Constitution of the Australian Commonwealth* (1901) 957.

[91] Section 117 might seem to be an exception, but it was intended to be a guarantee of political rights: *Official Records of the Debates of the Australian Federal Convention* (Melbourne 1898) 664-691, 1750-1768, 1780-1801, 2387-2398. See also Quick and Garran, *op. cit.* 953-995. As to the fate of s. 117 as a guarantee, see *Davies and Jones v. W.A.* (1905) 2 C.L.R. 29; *Lee Fay v. Vincent* (1908) 7 C.L.R. 389; *Henry v. Boehm* (1973) 47 A.L.J.R. 429; and also Pannam C.L., 'Discrimination on the basis of State Residence in Australia and the United States' (1967-8) 6 M.U.L.R. 105.

[92] It was one of the catalysts for the American civil war: *supra* n. 30, p. 667.

of the Queen' was readily ascertainable, universal and acceptable.[93]

The first exercise of the naturalization power in 1903 was in the familiar form of local naturalization acts,[94] clearly recognizing the restrictions of the power of the Commonwealth to naturalize.[95] In as much as the principles of colonial constitutional law were expressly adopted in the Constitution, the structure of the Constitution as creating a subordinate self-governing colony also reaffirms the absence of citizenship as membership from the constitutional law of the Commonwealth of Australia in 1901.[96]

The lack of effect of colonial naturalization combined with the growing desire for autonomy in the colonies resulted in the Common Code of the British Nationality and Status of Aliens Act 1914 being developed. The specific policy forcing the conflict between the Imperial Parliament and the colonies was racial discrimination.[97] The United Kingdom was desirous of retaining its Empire. The means for so doing included a policy of unity of the status of British subject, that status being within the control of the United Kindom. Any local grant of the status was not recognised by the United Kingdom. No distinctions could be made between natural-born British subjects, because distinctions on a regional basis would diminish the power of the Empire government to govern the policy of the self-governing colonies. They would have been able to make distinctions themselves, and perhaps affect the international status of British subjects. Discrimination would also provoke resentment in the regions discriminated against. In contrast, the self-governing colonies wanted to control the composition of their respective populations. Fearing the great reservoirs of British subjects in the oriental 'factories', and non-Europeans in general, the self-governing colonies restricted alien immigration and the naturalization of non-Europeans.[98]

[93] This explains the inadequacy of s. 122: It does not provide for the relationship of the territory to the States and it does not provide any indication of how a person may be a member of the Commonwealth without being a member of a State. See *W.A. v. The Commonwealth* (1975) 4 A.L.R. 159; *Qld v. Commonwealth* (1978) 52 A.L.J.R. 100; *R v. Bernasconi* (1915) 19 C.L.R. 629; *Waters v. Commonwealth* (1951) 82 C.L.R. 188; *Lamshed v. Lake* (1958) 99 C.L.R. 132; *Capital T.V. and Applicances Pty. Ltd. v. Falconer* (1971) 45 A.L.J.R. 186.

[94] Naturalization Act 1903 (Cth), esp. s. 8.

[95] As do the debates on the bill: Commonwealth of Australia, *Parliamentary Debates* 14 (1903) 1607ff; 1703ff; 1917ff. Throughout, the term 'citizen of Australia' is used, with some confusion with the franchise.

[96] It was, after all, created by an act of the Parliament of the United Kingdom.

[97] See Great Britain, Parliament, 'Proceedings of a Conference between the Secretary of State for the Colonies and the Premiers of the Self-Governing Colonies at the Colonial Office, London, June and July, 1897', *Parliamentary Papers*, 1897 (Cmnd 8596) LIX 631 (hereafter cited as 'Colonial Conference 1897') 643.

[98] For example, the Aliens Act 1861 together with its amending act, the Aliens Act 1867, enacted by the Parliament of Queensland instituted two entirely separate systems of naturalization. One was for the natives of European or North American States, and granted the status of naturalized British subject as of right after an oath of allegiance had been taken. (Aliens Act 1861 (Qld) s. 2; Aliens Act 1867 (Qld) s. 5.) The other system was for Asiatic or African aliens. Naturalization was completely at the discretion of the Governor, required residence for at least three years, for the alien to be married and to reside with his wife. A memorial was to be presented stating the personal details of the applicant. Even so, the naturalized British subject of Asiatic or African origin was not capable of holding various offices. (Aliens Act 1861 (Qld) s. 4; Aliens Act 1867 (Qld) ss 6-12.)

After a false start in 1901,[99] rejected by the colonies in 1907 because it did not give them sufficient power to decide for themselves the composition of their populations,[1] the necessary compromise, in the form of five principles, was reached in 1911:

1. Imperial nationality should be world-wide and uniform, each dominion being left free to grant local nationality on such terms as its Legislature thinks fit.
2. The Mother Country finds it necessary to maintain the five years (residential condition). This is a safeguard to the Dominions as well as to us; but five years anywhere in the Empire should be as good as five years in the United Kingdom.
3. The grant of nationality is in every case discretionary, and this discretion should be exercised by those responsible in the area in which the applicant has spent the last 12 months.
4. The Imperial Act would not apply to the self-governing Dominions until adopted by them.
5. Nothing now proposed would affect the validity and effectiveness of local laws regulating immigration and the like, or differentiating between classes of British Subjects.[2]

Proposition five, first agreed to in 1907 as a result of the rejection of the 1902 scheme, was a concession by the United Kingdom because it permitted the self-governing dominions to prevent the immigration of British subjects. It represented the first crack in the principle of the universality of the status of British subjects. The dominions also gained a means to international recognition of their naturalizations. These gains were at the expense of the more stringent conditions imposed by the United Kingdom on naturalization.

After approval by all concerned dominions, the principles were enacted in the British Nationality and Status of Aliens Act 1914.[3] Part I of the Act defined natural-born subjects, Part II determined the method of naturalization of aliens and Part III provided for the national status of married women and infants, the loss of nationality and other procedural and evidentiary requirements.

[99] Great Britain, Parliament, 'Report of the Interdepartmental Committee', *Parliamentary Papers*, 1901 (Cmnd 723) LIX 351, (hereafter cited as 'Interdepartmental Committee 1899'). It recommended, firstly that the difference between being natural-born and being naturalized should be abolished and that dual nationality should be reduced, although the termination of the old nationality of a naturalized person should be at the discretion of the other country as pressured by 'international comity' (28). Secondly, it recommended that a Secretary of State or a Governor of a British possession should be empowered by legislation to naturalize persons who fulfil criteria set out in the legislation. The status so conferred would be universally recognised. The power of local naturalization by the colonies would be retained so that the control over the composition of the local population could not be said to lie solely in the hands of the British Government through the specification in the proposed statute of the criteria for Imperial naturalization (60).

[1] Great Britain, Parliament, 'Papers relating to Conference, 1902', *Parliamentary Papers* 1902 (Cmnd 1299) LXVI, 451, 491, 602-608. Great Britain Parliament, 'Published Proceedings and Precis of a Colonial Conference' *Parliamentary Papers*, 1907 (Cmnd 3404) LVI 1. and Great Britain Parliament, 'Minutes of the Proceedings of the Colonial Conference 1907'. *Parliamentary Papers*, 1907, (Cmnd 3523) LV, 61. The comments of General Botha are particularly strongly expressed at pp.533-41.

[2] Great Britain, Parliament 'Minutes of Proceedings of the Imperial Conference' *Parliamentary Papers*, 1911 (Cmnd 5745) LIV, 103, 259. There was much discussion about 'defeating' local legislatures by Imperial legislation (259-264); a person refused local naturalization might use the Imperial act to gain local effect in the refusing dominion. This problem was to be resolved by the discretionary provisions of the proposed act and communication between the authorities for naturalization in the place of residence of the alien (262).

[3] The 'Common Code' is the usual term for the Empire-wide scheme of naturalization introduced by the British Nationality and Status of Aliens Act 1914.

The Act profoundly altered the law. The most radical change was that it specified those persons who were deemed to be natural-born British subjects.[4] Until 1914 this had been a matter for the common law. The new criteria were that the person had to be born within His Majesty's dominions and allegiance, or on a British ship or of parents who are either naturalized or natural-born subjects. Section 1 also provided that allegiance for the purposes of the section included a place where by treaty, capitulation, grant, usage, sufferance or other lawful means jurisdiction was exercised by the Crown over British subjects. The naturalization procedures were conditional on complex residence conditions. The main variation from the Naturalization Act 1870 in this respect was that residence in any of the dominions was sufficient and only twelve months of the period need be in the dominion in which the alien was being naturalized.[5] The effect of the naturalization procedures was that the naturalized person would

> be entitled to all political and other rights powers and privileges, and be subject to all obligatons duties and liabilities to which a natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of natural-born British subject.[6]

Section 7 of the Act made provision for revocation of certificates of naturalization if they were obtained by false representation or fraud. Married women and children followed the status of the husband or father respectively, even to the extent of loss of nationality upon the loss of nationality of the husband.[7] Logically, this meant that if a female natural-born British subject married a naturalized British subject whose certificate of naturalization was revoked pursuant to s. 7, the woman lost her status of British subject although it was acquired by birth. In 1918, the requirements for revocation were broadened to include concealment of material circumstances, or that the subject had shown himself by act or speech to be disloyal to His Majesty.[8] In addition, if the subject was guilty of certain conduct[9] and the continuance of the certificate was found not to be conducive to the public good, the certificate might be revoked. However, the effect of the revocation was not to extend to the wife and children unless the Secretary of State so ordered.[10] The anomalous power of the Crown to issue letters patent of denization and the power of the colonies to issue local certificates of naturalization were preserved by sections 25 and 26 respectively. The final important provision was s. 9. Under this section Part II of the Act, which related to naturalization, could be adopted by the self-governing dominions and Parts I and III, were

[4] British Nationality and Status of Aliens Act 1914, s. 1.
[5] *Ibid.* s. 2.
[6] *Ibid.* s. 3.
[7] *Ibid.* s. 10.
[8] British Nationality and Status of Aliens Act 1918, s. 1.
[9] *Ibid.* The conduct was trading with the enemy; being sentenced to prison for twelve months or more; not being of good character at the date of grant of the certificate of naturalization or having no residence.
[10] *Ibid.*

to apply directly to all dominions, being Imperial legislation. Various other accommodations were made to enable the colonies to make the Act effective.[11]

Despite its origins, the Common Code was a product of colonial constitutional law of the Empire as a single constitutional unit. The terminology of the Australian Constitution when referring to individuals confirms this,[12] as does a statement of the High Court of Australia in 1907:[13]

> We are not disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality, so that, while the term 'immigration' as used in sec. 51 of the Constitution admittedly includes the power of exclusion of British subjects in general it would not extend to persons of Australian nationality, whatever that may mean.

The scheme was, however, doomed to failure because it proved to have a number of serious deficiencies.[14] In the first place, amendment was difficult. This was a direct result of one of its fundamental concepts: that British nationality should be based on the same rules throughout the Empire. Due to the political situation revealed by the Colonial Conferences of 1907 and 1911, the Code had to be implemented by each self-governing colony. Consequently, each change to the Code had to be made by all self-governing colonies. Another serious deficiency of the Common Code was that it developed at a time when there was a delicate balance between unity of Empire and national self awareness in the colonies. It was designed so that the concept of unity of nationality embodied by it would not upset that balance. However, national self awareness developed as a result of other factors and, within six years, the provisions relating to the method of adoption by the self-governing colonies were being blatantly ignored by Australia.[15] In 1936 Latham J. could state: 'Whatever may be the ultimate solution to this problem, it is at least clear, in my opinion, that it is within the province of Australian law to determine who are to be regarded in Australia as "Australian nationals".'[16]

The first sign of the demise of the Common Code[17] was the Canadian Nationals Act 1921. Canada found it necessary to define its nationals and to separate them from British subjects for the purpose of nominating judges to the Permanent Court of International Justice. The definition of the citizens of Canada included those locally naturalized; therefore a few citizens were not British subjects elsewhere. The Union Nationality and Flags Act 1927 followed a similar course, extending further the separation of the definition of local citizens from the recognized status of British subject. It set conditions

[11] British Nationality and Status of Aliens Act 1914, s. 8. The same power of naturalization as was granted to the Secretary of State was granted to the Governors of the British dominions.
[12] *Supra*, 675-6.
[13] *The Attorney General for the Commonwealth v. Ah Sheung* (1907) 4 C.L.R. 949.
[14] For a comprehensive discussion of the failure of the Common Code and the development of the Common States, see Joseph, C., *Nationality and Diplomatic Protection* (1969) 36-100.
[15] Australia re-enacted the whole of the British Nationality and Status of Aliens Act 1914-18 rather than merely adopting Part II as allowed for in s. 1.
[16] *The King v. Burgess, ex parte Henry* (1936) 55 C.L.R. 608, 650.
[17] Apart from some dominions re-enacting rather than adopting the legislation. This does not refer so much to the contents of the scheme as to a feeling of independence.

upon the acquisition by a British subject of the status of a national, thus excluding a wide range of British subjects. The obvious aim was discrimination against coloured races. The Irish, as always, provided a further problem. The Irish Constitution of 1922 and the subsequent attitude of the Irish, culminating in the Irish Citizenship legislation of 1935-37 was in effect a unilateral renunciation of British nationality.[18]

The issue which caused Australian legislation to diverge from that of the United Kindom was the nationality of married women. The 1930 Hague Convention was implemented in different ways by the United Kingdom and Australia. Whereas the former provided for automatic loss of previous nationality upon marriage, the Australian legislation provided for the retention of the previous nationality or, if a woman married an alien, the retention of all political and other rights, powers and all obligations, duties and liabilities of a natural-born British subject.[19]

These examples of divergence from the Common Code show how the national interest of the various dominions overcame the principle of unity of nationality. As early as 1920, the system could not honestly be called 'common'. A radical change had to be made, and was made in the 1948 legislation.[20]

The concept of the Empire as a group of autonomous communities was again expressed through the desire to discriminate on racial grounds. In 1923, pressure upon South Africa to stop discriminating against British subjects, even if they were Indians, moved General Smuts to say during the Imperial Conference:

> The newer conception of the British Empire as a smaller League of Nations, as a partnership of free and equal nations under a common hereditary sovereign, involves an even further departure from the simple conception of a unitary citizenship. British citizenship has been variable in the past: it is bound to be even more so in the future. Each constitutent part of the Empire will settle for itself the nature and incidents of its citizenship. The composition and character and right of its people will be the concern of each free and equal State in the Empire. It will not only regulate immigration from other parts of the Empire as well as the outside world, but will also settle the rights of its citizens as a matter of domestic concern. The common Kingship is the binding link between the parts of the Empire; it is not a source from which private citizens will derive their rights. They will derive their rights simply and solely from the authority of the state in which they live. Hence Indians going to Canada will not be entitled to claim equal political rights with the other citizens of Canada, no more than Canadians going to India or Australia could claim equal political rights there. The conception of the Empire as a League of Nations ought to do away with these claims which are so disturbing and unsettling in the Empire.[21]

This speech was prophetic. In 1926, the self-governing communities of the British Empire were defined:

[18] *Cf.* the English view of the same events: *Murray v. Parkes* [1942] 2 K.B. 123.
[19] Nationality Act 1936 (Cth) s. 6.
[20] Nationality and Citizenship Act 1948 (Cth); British Nationality Act 1948. This brought in the 'common status'.
[21] Great Britain, Parliament, *Parliamentary Papers* 'Imperial Conference 1923: Summary of Proceedings' (1923) Cmnd, 1987, XII, Pt I, 1 (hereafter cited as 'Report, 1923') 139.

> They are autonomous Communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[22]

This, the Balfour Declaration, embodied what General Smuts called 'the new conception of the British Empire as a smaller League of Nations'.[23] As he correctly pointed out, the conception involved certain necessary changes to the concept of a unified status of British subject. The issue was, however, taken no further at that time.

The conflict between the new status of members of the Commonwealth of Nations and the common status possessed by all subjects of the Crown was clearly perceived at the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation in 1929. The status of the dominions as distinct entities in international law and for legal and political purposes involved a separate membership by individuals of each community for the purposes of that community. The common status made no allowance for separate membership. However, it was recognised that a status of common allegiance was not inconsistent with recognition both within and without the Commonwealth of Nations of the distinct nationality of each separate community.[24] What 'common allegiance' meant was left undefined.

In the Imperial Conference of 1930 these ideas were refined, and the following resolutions passed:

2. That, if any changes are desired in the existing requirements for the common status, provisions should be made for the maintenance of the common status, and the changes should only be introduced (in accordance with present practice) after consultation and agreement among the several members of the Commonwealth.
3. That it is for each Member of the Commonwealth to define for itself its own nationals, but that, so far as possible, those nationals should be persons possessing the common status, though it is recognized that local conditions or other special circumstances may from time to time necessitate divergences from this original principle.
4. That the possession of the common status in virtue of the law for the time being in force in any part of the Commonwealth should carry with it the recognition of the status by the law of every other part of the Commonwealth.[25]

The conference tried to separate nationality and that which General Smuts had called 'citizenship' from the 'common allegiance' mentioned in the Balfour Declaration. However, 'common allegiance' was still not defined. The explanation of it most compatible with the various resolutions of the Conference was that 'allegiance' was the relationship with the Crown which enabled the Crown to take the position in the Government of each dominion in which the Crown found itself. The relationship was 'common' because the Crown was in the same position in each dominion at that time.

[22] Great Britain, Parliament, *Parliamentary Papers,* 'Imperial Conference 1926: Summary of Proceedings' (1926) Cmnd 2768, XI, 545 (hereafter cited as 'Report, 1926') 569.
[23] Report, 1923, 139.
[24] Great Britain, Parliament *Parliamentary Papers,* 'Report of a Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation', (1929) Cmnd 3479, XVI, 171 (hereafter cited as 'Report, 1929') 578.
[25] Great Britian, Parliament, *Parliamentary Papers,* 'Imperial Conference 1930: Summary of Proceedings' (1930-31) Cmnd 3717, XIV 569 (hereafter cited as 'Report, 1930') 622.

These principles were further discussed and put into a form suitable for legislation during the Imperial Conference of 1937. The common status was to remain, but it was noted that 'British subject' referred to the monarch and not to subjection to the United Kingdom. Within the common status, every member State was to distinguish between British subjects in general and British subjects whom the member State regarded as members of its own community.[26] A 'member of the community' was defined as

> denoting a person whom that Member of the Commonwealth has, either by legislative definition of its nationals or citizens or otherwise, decided to regard as 'belonging' to it, for the purposes of civil and political rights and duties, immigration, deportation, diplomatic representation, or the exercise of extra-territorial jurisdiciton[27].

It was left to each member of the Commonwealth to choose a connection between it and its members. The conference also recommended that uniformity of criteria was desirable to avoid dual nationality within the Commonwealth. In broad terms, the members of a community were to be natural born or naturalized persons and those belonging to annexed territory, and residing in the community; and persons who, having come as British subjects from other parts of the Commonwealth of Nations, had identified themselves with the community to which they had come.[28] The conference further decided that the criteria should be submitted to other members for comment so as to avoid overlapping rules of acquisition and loss and also because other members might feel it was in their interest. Consultation would ensure agreement so that there would be no later objections.

The development of these principles into legislation did not occur until 1946, when Canada again took the initiative.[29] The Canadian government had advised members of the Commonwealth in 1945 that it found desirable the introduction of legislation to lay down the conditions for the acquisition and loss of Canadian citizenship. The Canadian Citizenship Act 1946 enacted that all Canadian citizens were British subjects and that all persons who were British subjects by the law of another part of the Commonwealth should be recognized as British subjects in Canada.[30] The Act thus recognized the common status whilst departing from the Common Code. As a result, the government of the United Kingdom convened a Conference of Experts in London in 1947. The general scheme of the Canadian Act was agreed to be suitable, and the 'common clause' was declared to be an essential part of the

[26] The exception was Great Britain: 'it is the practice of the United Kingdom to make no distinction between classes of British subjects' (Report 1937, 24).
[27] Great Britain, Parliament *Parliamentary Papers,* 'Imperial Conference 1937: Summary Proceedings' (1936-7) Cmnd 5482, XIII (hereafter cited as 'Report, 1937') 25.
[28] *Ibid.* 26.
[29] In all fairness, it must be said that Australia considered the question in 1945, but advice was received that the Canadian government proposed a similar bill in the near future. It was decided, in the circumstances, to defer consideration of the question of Australian citizenship. Commonwealth, 200 *Parliamentary Debates* (1948) 1062.
[30] Great Britain, Parliament, 'British Nationality Bill 1948', *Parliamentary Papers* 1947-8 (Cmnd 7326) XXII, 673, 675.

scheme. Special provisions were made for Eire,[31] the remaining colonies of Great Britain,[32] and the anomalous group of persons who were protected by the United Kingdom in international law, but did not fit within the definition of community membership.[33]

The British Nationality Act 1948 and the Australian Nationality and Citizenship Act 1948 came into effect soon after the Conference of Experts. In Parliament, it was said that the Australian version of the common status was the consequence of the disintegration of the Empire and that the separation of peoples was a corollary of nationhood. The main opposition to the Act was grounded on the idea that the Empire should not have been destroyed, and that 'citizen' had no viable meaning in the common law.[34]

Three major alterations have been made to the Australian Nationality and Citizenship Act 1948 since 1949. In 1969 a 'more radical separateness'[35] was implemented by making citizenship of Australia paramount.[36] Thus a citizen of one of the countries to which section 7 of the Australian Citizenship Act 1948-1973 applied was a British subject 'by virtue of' his citizenship.[37] In the Australian Citizenship Act 1973 the Australian citizen was deemed to have 'the status of a British subject' and not 'to be a British subject'. This alteration implied that the status of British subject was merely an addition to the status of an individual as an Australian citizen.

The third major alteration to the Act was effected by the Australian Citizenship Act 1984 repealing all references to the status of British subject. Consequential amendments were to be made to other legislation where the status of British subject was employed.[38] The major justifications for the change are that the existence of the common status discriminated on the basis of national origin and that it was no longer adhered to by the other members of the Commonwealth of Nations.[39] Extensive consultations within Australia have taken place to ascertain attitudes to these changes. The opposition to them has focussed on the oath of allegiance[40] and on the severing of ties with Britain or else the fear of creeping republicanism.

The preceding historical discussion of Australian nationality and citizenship legislation reveals that the dominating policy behind at least the early

[31] In the United Kingdom Eire citizens were British subjects. In Eire Law, Eire citizens were not British subjects: *Murray v. Parkes* [1942] 2 K.B. 123.
[32] There was to be one community of the United Kingdom and Colonies for citizenship purposes: Great Britain Parliament, 'British Nationality Bill, 1948' *Parliamentary Papers*, 1947-8 (Cmnd 7326) XXII 673, 676.
[33] 'British Protected Persons': from the mandates and protectorates of the two World Wars and other treaty obligations, or even diplomatic errors by Great Britain, *ibid.*
[34] Commonwealth, 200 *Parliamentary Debates* (1948) 3228-3265.
[35] Lumb and Ryan, *op. cit.* 9.
[36] Citizenship Act 1969, s. 6.
[37] Australian Citizenship Act 1948-1973, s. 7(1).
[38] Department of Immigration and Ethnic Affairs, Australian Citizenship Amendment Bill, 1983-84, *Explanatory Memorandum,* 1948, p. 2.
[39] Commonwealth, *Parliamentary Debates,* House of Representatives, 1982, 2355-65, [Ministerial Statement]; 1983, 3366-9, Second reading speech; Human Rights Commission, The Australian Citizenship Act 1948 (1982).
[40] These proposed changes were rejected in the Senate.

development of separate Australian citizenship was the desire to discriminate on the grounds of race, colour and sex. However, it is best seen as an aspect of the desire for autonomy from the United Kingdom. The most recent amendments continue this trend. Australian citizenship will be free of its erstwhile dependency on British law. This can be attributed to the feeling that Australia is a separate State. Citizenship, then, is a product of the growth of the colonies towards nationhood, or into independent States.

Citizenship was to be used to provide the criteria for civil and political rights and duties, immigration, deportation, diplomatic representation and the exercise of extra-territorial jurisdiction.[41] It was intended to provide the criteria for nationality and does so now, but whether or not these intentions included membership as defined in this essay is a different question. It cannot be denied that the conditions for acquisition of citizenship could prescribe the people who are and may become members. Requirements of residence, comprehension and knowledge of civic duty[42] are well suited to the task. In as much as citizenship also performs the duty of allocation of people to Australia for the purposes of international law and conflicts of law it would seem to be the determinant of membership. Yet if citizenship has this function in constitutional law it performs it with an extraordinary lack of substance. Its potential existence is not acknowledged in the Constitution, the words of which are entirely inappropriate to anything but the pre-existing colonial law. Very little has been written that is not in relation to international law[43], or an exegesis[44] of the Act or that does not implicitly accept the idea that citizenship is merely an international matter.[45] Cases also follow this approach.[46] More obviously, there are few rights and obligations conditional on Australian citizenship, although it must be admitted this is in the process of being changed. The suffrage, the ultimate political right, has until now been granted to British subjects on a residence condition.[47] Most statutes which mention citizenship are more the result of international allocation of persons than of

[41] Report, 1937, 25.
[42] See Pryles, *op. cit.* 80-83, for an examination of relevant Canadian cases on the extent of knowledge required.
[43] Parry, C., *Nationality and Citizenship Law* (1957); Ryan, K., 'Immigration, Aliens and Naturalization in Australian Law', in O'Connell, D.P. (ed.) *International Law in Australia* (1965) 465; Joseph, C., *Nationality and Diplomatic Protection* (1969) 77.
[44] Campbell, E. and Whitmore, H., *Freedom in Australia* (1973) 197; Lumb, R.D. and Ryan, K.W., *The Constitution of the Commonwealth of Australia Annotated* (2nd ed. 1977) 9; Pryles (1981) *op. cit.* Ch. 3.
[45] *E.g.*, Booker, K. and Winterton, G., 'The Act of Settlement and the Employment of Aliens' (1981) 12 F.L.R. 212; Lindell, G.J., 'Applicability in Australia of Section 3 of the Act of Settlement of 1701', (1980) 54 *Australian Law Journal* 628; Pryles, M., 'Nationality Qualifications for Members of Parliament', [1982] *Monash University Law Review* 163.
[46] *McManus v. Clouter* [1980] 1 N.S.W.L.R. 27 refers to jurisdiction or conflicts of laws. *Infra,* 702-5.
[47] Commonwealth Electoral Act s. 39(1); Constitution Act (Vic) s. 48(1); Parliamentary Electorates & Elections Act 1912 (N.S.W.) s. 20(1); The Elections Act of 1915 (Qld), s. 9; Constitution Act, 1934-75 (S.A.) s. 33(1); Electoral Act 1907-1980 (W.A.), s. 17(1); Constitution Act 1954 (Tas), ss 28, 29. British subjects presently enrolled have not been disenfranchized.

political obligation.[48] It is only now that membership of Parliament is being confined to Australian citizens and even this change is despite the Constitution, which refers to British subjects.[49]

The irrelevance of citizenship contrasts markedly with the popular conception of the importance of citizenship to the structure of the State of Australia. It is the policy of the government to encourage the acceptance of citizenship as an integral part of the Constitution.[50] The debates on citizenship bills reveal that separate citizenship is thought to be a corollary to nationhood.[51] At a time when few rights were conditional on Australian citizenship, rather more than one fifth of all persons granted Australian citizenship were British subjects prior to naturalization.[52]

Not only does citizenship have few of the consequences that would be expected from a concept of membership, but even if it is the determinant of membership there has been no theoretical explanation of why this is so expressed to date. A possibility is the corporate theory assuming that Parliament has the power to make people into citizens. The absence of a concept of political obligation binding on the law-making institutions is a significant finding in the quest for a concept of membership. Another rationale for the power of Parliament is that it has the ability to declare or recognize those who owe allegiance, rather than that of creating allegiance. Although implicitly rejected by McClelland J of the Supreme Court of New South Wales in *McManus v. Clouter*[53] who asserted that allegiance was the result of citizenship[54], this theory would allow allegiance to be the explanation of political obligation. An argument on these lines fits some popular conceptions of the role of the monarch and, further, the structure of the State. It reflects the common law position, to be explored later, that the grant of citizenship is in effect a naturalization, which itself refers back to allegiance and subjection.

BRITISH SUBJECTION

The status of British subject has been removed from statute, if not the Constitution. Yet it determined the grant or imposition of more civil and political rights or obligations than Australian citizenship. Most importantly

[48] Section 7. *cf.* the List of Commonwealth Statutes referring to Australian Citizens, Pryles (1973) *op. cit.* Appendix A. The list looks dauntingly long at first, until it is realized that the proportion of Acts which are concerned with jurisdiction or with trade are the majority.
[49] Sections 16, 34, 44(i), 45. See also Pryles (1982) *op. cit.*
[50] Commonwealth of Australia Department of Immigration, 'Australian Citizenship Ceremony Handbook: A Guide for Civil Authorities' (1973).
[51] Commonwealth of Australia *Parliamentary Debates* (1948) 3228-3265; (1982) 2355-65; (1983) 3366-9.
[52] Commonwealth of Australia, Department of Immigration, 'Australian Citizenship Act 1948-73, Return' 1975, 1976 and 1977.
[53] [1980] 1 N.S.W.L.R. 27, 40-45.
[54] *Ibid.* 44.

the suffrage is still given to British subjects who have resided for six months in the Commonwealth of Australia and whose names appeared on the electoral role prior to January 1984. The disabilities of aliens were incurred by reason of the absence of the status of British subject, Irish citizen or protected person.[55] What, then, is the significance of the status and what is the effect of its repeal?

Prior to the Nationality Act 1920, it could be said that British subjection was a result of owing allegiance. The Common Code overturned this causal relationship so that allegiance became a result of being a subject. The Nationality and Citizenship Act 1948 created new relationships between British subjection, allegiance and the local naturalization by grant of Australian citizenship. Under section 7 an Australian citizen or a citizen of various countries of the old British Empire[56] 'is a British subject'. Thus subjection was a consequence of being a citizen of one of the named countries and the status was common to all such citizens. What the difference is between the old status of actually being a British subject and the later status of 'having the status of a British subject' has not been made clear, except perhaps that it emphasized the causal relationship.

The 'common status' of British subject as adopted by the members of the British Commonwealth of Nations in the latter half of the decade 1941-1950 seems to be the statement in law of the principle of 'common allegiance' upon which so much emphasis was placed during the Imperial Conferences of 1926 and 1930.[57] Despite the resolutions of the Conferences, the implications of the principle are vague. The autonomy required by the Balfour declaration was precisely defined and has been consistently refined since it was made, but the corollary to autonomy, the extent of the remaining connections with the United Kingdom, was left undefined. As the allegiance of the British subjects of the member States was accepted to be the most fundamental aspect of the unity of the Commonwealth, the meaning of 'allegiance' depends on the concept of autonomy. The participants in the conferences probably intended that the meaning of allegiance and therefore of British subjection was to vary with time and as the outcome of events dictated.

The 'status of British subject' is capable of having meanings varying between the extremes of common allegiance in the sense adopted in *Calvin's Case*[58] and mere international classification. The former would indicate the continuance of colonial status whereby each subject was not alien to another and all subjects enjoyed the same rights and duties. The latter asserts that the existence of the status is the product of historical accident, perhaps referring to the Crown as head of the Commonwealth of Nations. Whilst it

[55] s. 5(1) Australian Citizenship Act 1948-1973.
[56] The relevant countries were specified in s. 7 and the Regulations.
[57] *Supra*, 679-682.
[58] (1608) 2 St. Trials 559.

implies complete autochthony, it does not derogate from the 'common' position which the Crown of the United Kingdom might occupy in the constitutions of the various dominions.

It is more realistic in these days of republican members of the Commonwealth of Nations to accept that although the term has international effects they are defined by the municipal laws of the other countries and should not be regarded as part of Australian constitutional theory. The 'common status' could be defined differently in the internal law of each member nation. Thus the range between the above extremes could include the assertion of a common monarchical State of the members of the Commonwealth of Nations disregarding whether the other States do or do not fit the model. For Australian purposes their constitutions would be deemed to fit, which raises the further possibility, also implying autochthony, derived from the severance of the connection of the people of the Commonwealth of Australia with the Crown of the United Kingdom. Under this interpretation the Crown is divisible[59] and the Queen is Queen of Australia in substance as well as in title.[60]

Nowhere on the scale does the 'status of British subject' have independent meaning. It is either a product of allegiance or of citizenship. The statutory application of the status of British subject to Australian citizens has proved unnecessary. It has been removed without making significant changes to the definition of political obligation or to constitutional law. There are no constitutional problems because the Constitution makes sparing reference to British subjection; the only reference is in section 34 which is subject to the contrary decision of Parliament. The other reference to subjection refers to the Queen[61] who remains Queen of Australia. A Member of Parliament is subject to disqualification if he/she is 'under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power'.[62] This provision does not specify what they must belong to, only what they must not do. 'Foreign' may be reinterpreted to include British, whereas until now such an implication would not be possible. It is fortunate that the Constitution was drafted in the 1890s and not one hundred years earlier because the term 'British subject' was deliberately avoided. It was liable to confusion due to problems with the status of locally naturalized persons.[63]

[59] *Contra, Calvin's Case* (1608) 2 St. Trials 559; *Cf., Isaacson v. Durant* (1886) 17 Q.B.D. 54.
[60] *McManus v. Clouter* (1980) 1 N.S.W.L.R. 27, 40-55.
[61] Section 117.
[62] Section 44(i).
[63] *Supra,* 674-676. This itself was the result of the desire for autonomy. The Constitution in this respect has been admirably flexible.

ALLEGIANCE

It is a commonplace of constitutional law that allegiance, described as the reciprocal duties of protection and obedience,[64] is the principle relating the Crown to the individual. The protection afforded by the Crown as its part of the obligations of allegiance is narrow and to a large extent discretionary. The Coronation Oath specifies that the monarch should govern the people according to their laws and customs, to cause law and justice in mercy to be executed in all judgments to the Sovereign's power and to maintain religion. Thus the subject is entitled to be physically protected by the Crown against armed attack, but only within the dominions of the Crown.[65] This effectively translates into the proposition that the subject need not pay for such protection (although taxes are still obligatory). Diplomatic protection may be afforded to a subject, although there is no obligation on the Crown to do so.[66] The Crown may act as *parens patriae*, making infants wards of the court.[67] Finally, act of State is not a defence in most circumstances available to the Crown against its subjects.[68] The oath of allegiance[69] and, as a corollary,[70] allegiance in general requires the subject to obey the Crown.[71] Apart from the obligation to obey the law, the practical effect of owing allegiance is liability for the offence of treason.[72]

The usual statements of allegiance go no further than the above. There is no need to do so because their authors are concerned with the rules affecting people. For the purposes of this essay further examination is needed. Allegiance could be the principle of membership from which the criteria for

[64] *Cf.* the terminology of de Smith, Street, H. and Bazier, R., *Constitutional and Administrative Law* (4th ed. 1981) 431-433 where allegiance entitles protection. There is no mention of obedience, only 'violation of allegiance' (431), but *cf.* 131 where duties of the Crown are mentioned.
[65] *China Navigation Co.* v. *Att. Gen.* [1932] 2 K.B. 197; *Mutasa v. Att. Gen.* [1980] Q.B. 114.
[66] *Joyce v. D.P.P.* [1946] A.C. 347.
[67] *Re P(GE) (an infant)* [1965] 1 Ch. 568; *Chignola v. Chignola* (1974) 9 S.A.S.R. 479; *A v. B.* [1979] 1 N.S.W.L.R. 57; *Holden v. Holden* [1968] V.R. 334; *Glasson v. Scott* [1973] 1 N.S.W.L.R. 689; *McManus v. Clouter* [1980] 1 N.S.W.L.R. 27.
[68] *Johnstone v. Pedlar* [1921] 2 A.C. 262; *Nissan v. Att. Gen.* [1970] A.C. 179.
[69] Schedule 2, Australian Citizenship Act 1948-73.
[70] The oath has not created the allegiance of the subject since *Calvin's Case* (1608) 2 St. Trials 559. See also *Oppenheimer v. Cattermole* [1975] 2 W.L.R. 347 and Marshall G., *Constitutional Theory* (1971) 16.
[71] Under the Australian Citizenship Bill 1983-4 the oath of allegiance was to be altered to a 'pledge of Australian citizenship'. It would have required that the individual 'faithfully uphold the Constitution, obey the laws of Australia and fulfil my duties as an Australian citizen'. The oath or affirmation of allegiance required of members of Parliament by s. 42 of the Constitution was not to be changed (to do so requires a referendum). This promises that the member 'be faithful and bear true allegiance to her Majesty Queen Elizabeth II, her heirs and successors according to law'. For the reason specified in n. 70 *supra*, whether or not allegiance is included in citizenship ceremonies is irrelevant to whether or not a person owes allegiance. The change to a pledge and its terms might, however, have changed what allegiance is.
[72] Treason encompasses, in summary, warring or aiding war against the Sovereign, trying to or even talking about killing the Sovereign, his heirs and successors, killing or 'violating' a King's wife, or the wife of the next in line, endeavouring to prevent the succession or killing certain of the Sovereign's officers. See *Halsbury's Laws of England* (4th ed.) Vol. IV, 570.

membership derive. More specifically, it could justify the criteria specified in the Australian Citizenship Act 1948-84.

The duties comprising allegiance derive from the feudal system of personal relationships, called homage, made by mutual oath.[73] They were of obedience and service by one party and protection by the other. The duties were accepted into modern law in *Calvin's Case*[74] of 1608 which has stood as the leading case ever since then.[75] It was heard at a time when the feudal law imposed on the Anglo-Saxons had only just been replaced with central government.[76]

Calvin's Case was a test case set up to resolve political difficulties concerning the accession of King James of Scotland to the throne of England.[77] The problem was that Scots were aliens in England and therefore suffered the disabilities of aliens including the incapacity to hold property. Whilst it was acknowledged that those born before King James' accession to the English throne (the *ante-nati*) would have to be naturalized by Act of Parliament, it was considered to be most advantageous to King James if those born after that date (the *post-nati*) were not aliens in England. Not surprisingly, Robert Calvin, a *post-natus* and a Scot, was held not to be an alien and therefore to be capable of holding property in England.

Allegiance was defined as follows:

> Liegance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them.[78]

The obligations of both King and his subjects were due by the 'law of nature', which was defined as:

> that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature.[79]

It was decided that the government and subjection to the government existed before any municipal or judicial laws. The law of nature, being of the time of creation, was also before municipal and judicial laws. Therefore allegiance existed because of the law of nature. Secondly, and more logically, the binding force between the individual and the law was allegiance and the law of nature was the only means by which this binding force might be created. As a product

[73] Generally: Bracton, *On the Laws and Customs of England* (Tr. S.E. Thorne, 1977); Glanville, *The Treatise on the Laws and Customs of the Realm of England* (Tr. G.D.G. Hall, 1963); Holdsworth, W., 2, 127 ff; Maitland, F., W. and Pollock, F., 1 *History of the Law Before the time of Edward I* (2nd ed. 1959).

[74] (1608) 2 St. Trials 559.

[75] It is always cited when allegiance is at issue: *e.g.*, *McManus v. Clouter* (1980) 29 A.L.R. 101; *China Navigation Co. v. Att. Gen.* [1932] 2 K.B. 197.

[76] Professor Parry and other modern writers argue that the primitive, feudal and even later law is not relevant to studies of the present law. This results from too great and emphasis on International Law ideas of attributing individuals to States. The argument also ignores the common law as a continuum, developing its principles from prior law. Examples of the argument are Parry (1957) *op. cit.* 28; Bickel, *op. cit.* (1975); Brogan, *op. cit.* (1960).

[77] For a complete description of the whole process of negotiation between Scotland and England, see *Calvin's Case* (1608) 2 St. Trials 559, ff.

[78] *Ibid.* 614.

[79] *Ibid.* 629.

of the law of nature, allegiance was irremoveable and immutable by judicial and municipal law.[80]

The relationship between King and subject was created by birth within the protection of the King.[81] Due to the protection at the time of birth, obedience and service were owed to the King.[82] However, to state that the subject owed allegiance to the King was deemed an over-simplification because the King had two capacities: the natural body and the body politic.[83] The body politic was defined by those powers granted to the King by law, the chief of which was that the King gave and took in the capacity of the body politic.[84] As the body politic was independent of the personal body of the King, it was immortal and always had legal capacity. It was analogous to the modern company.[85] As it was a product of the law, and as Scotland and England had separate legal systems, there was a body politic of the King for each of the two countries. The natural body was the person of the King. It was the capacity which, by natural law, inherited the royal blood. Thus the powers of the King were determined by the law of the land, but the natural law decided which person was the King.

Allegiance was owed to the natural body of the King. Upon this the whole case turned. Three reasons were given.[86] Firstly, only the natural person could take oaths. Since oaths were enforced by natural law, the sanction could hardly operate on a creation of law, as it had no soul. Allegiance was presumed to be created, albeit impliedly, by the oath of both parties. Even if allegiance was not created by oath, it was a system of obligations instituted by the natural law, the divine sanctions of which could only bind persons with souls. Secondly, treason was the breach of allegiance obligations. One type of treason was compassing the death of the King and as only the natural body could die and other types of treason were applicable to the natural body alone, allegiance itself must have been to the natural body. Finally, the only act of law which could create a King was the Coronation. However, it was well established that the Coronation was 'but a royal ornament and solemnization of the royal descent, but no part of the title'.[87] Allegiance was owed to a new King from the moment of death of the previous King, without any legal act intervening, but if allegiance were owed to the body politic, rather than the natural body, the law would have required an act of choice from the possible candidates to the kingship.

Since allegiance was owed to the natural body of the King, and since there could only be one natural body however many kingdoms there were, there

[80] *Ibid.* 630.
[81] *Ibid.* 614.
[82] *Ibid.* 640.
[83] The distinction was accepted in the *Case of the Dutchy of Lancaster* (1561) 4 Eliz. 212, 213.
[84] *Calvin's Case* (1608) 2 St. Trials 559, 640.
[85] *Ibid.* 628.
[86] *Ibid.* 624-629.
[87] *Ibid.* 625.

could only be one type of allegiance. That allegiance was a creation of the law of nature. The subjects of each kingdom who were born after the ascension of the King to both thrones, were born in the same 'liegance', and therefore could not be aliens to one another.[88]

The explanation as to why the *post-nati* were not aliens did not supply the reasons why the *ante-nati* were aliens. It is necessary to return to the concept of allegiance to understand the reasoning of the court on this point. Allegiance was not a continuing legal relationship in which the subject remained during his life. When a person was born and if the birth fulfilled the necessary conditions,[89] the individual was said to be born under the protection of the King. The obligations of obedience and service flowed from being so born. The act of accepting protection and of assuming obligations created the allegiance of the subject. The obligations of both the King and the subject remained the same throughout the life of both, because they were products of natural law. Thus Lord Coke wrote: 'The time of his birth is chiefly to be considered; for he cannot be a subject born of one Kingdom that was born under the liegance of a King of another Kingdom, albeit afterwards one Kingdom descends to the King of another'.[90] A new King assumed the obligations of the old, but the obligations of the King remained as they were at the time of birth of the subject. The later King might also be King of other dominions, as King James was of Scotland. The obligations of King James of Scotland could not be the same as those of King James of Scotland and England because the natural law took account of the Kingdom over which a King was sovereign. The natural law created his kingship in the natural body. Thus the *ante-nati* and the *post-nati* could not have the same allegiance and were aliens each to the other.

Calvin's Case dealt with allegiance by birth, but immigration had created for some considerable period of time prior to 1608 the necessity of a method of receiving an individual into society. When there were no restrictions on holding land, or other disabilities upon aliens, the performing of homage to an appropriate lord made the newcomer a member. Homage could be done for services to be performed by the vassal, in return for which the lord would grant protection.[91] Such protection was sufficient to overcome the disadvantage of non-membership in feudal society. When the disabilities were applied in a manner which encompassed even those who had given homage to a lord, or the homage became meaningless, another form of reception to membership was needed. The new form followed the idea of homage: an oath of allegiance to the King. Whether or not membership was

[88] *Ibid.* 632-633, unless either fell within the exceptions to the territorial extent of the King's ligeance. *Ibid.* 639.
[89] That the parents be under the actual obedience of the King, and that the place of birth be within the King's dominions.
[90] *Ibid.* 639.
[91] Glanvill, Bk IX, 106. This was a corruption of the later feudal era.

to be granted to an individual was thus a discretionary matter for the King. The process was called endenization. It was a product of the established system, but later became corrupted by formalism whereby the letters patent granted to the newcomer were seen to act, rather than the oath of allegiance.[92]

A competing system was used for the same purpose. This was naturalization by Parliament. Parliament declared that an individual, or group of individuals, was no longer subject to the disabilities of an alien: 'Shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as other inheritors in time to come'.[93] The power to make these declarations was assumed to have been given to Parliament by the common law, or to have been a natural consequence of the ability to impose disabilities upon aliens. Yet these sources of power did not justify Parliament forging relationships which had been personal to each individual. Naturalization by Parliament was, therefore, apart from the system of allegiance then in operation. Allegiance was a joint relationship of protection by the King and obedience by the subject.[94] Parliament could impose its will upon the system: it could tell the King, the courts and the people that the naturalized person was not to suffer any disability being an alien, and it could order the King to protect the naturalized person as if he were a subject. Parliament's power could not make an alien a subject of the King in the same manner as natural law of allegiance made the individual a subject. Endenization was the product of the laws of allegiance, but naturalization was the product of the power of Parliament over the common law. Parliament seldom declared an individual was a subject, it merely 'deemed' him to be one, or to have the same advantages as one.

The first instance of making aliens Englishmen did not distinguish between denization and naturalization. In 1295, a grant of the King's grace was made to Elias Daubeny and declared that the King held him as an Englishmen and wished everyone else would also do so.[95] In 1406, letters patent were issued to make David Holbache, a Welshman, capable like other liege subjects in England, and of being of the King's Council and of purchasing lands in England within or outside towns and of doing all other things which liege subjects could do. The grant was confirmed by an Act of Parliament because the grant of the letters patent was contrary to statute.[96] Thus the causes of separation can be seen: the King as the source of allegiance and that to which the individual goes in order to render obedience, but Parliament objecting to the consequent grant as an excess of power.

By the time of *Calvin's Case*, naturalization was equated to being born within the King's allegiance,[97] but no reason was given. It was a barely

[92] Shaw, *op. cit.* iv.
[93] De Natus Ultra Mare, 25 Edw III stat. 2 (1350); most naturalization statutes followed this pattern.
[94] Bracton, f78b.
[95] Shaw, *op. cit.* iii.
[96] *Ibid.* iv; Parry, *op. cit.* 36.
[97] *Calvin's Case* (1608) 2 St. Trials 559, 582.

acknowledged afterthought and did not fit within the system of personal relationships constituted by natural law allegiance. It was the product of a different type of authority: the power of Parliament over the common law. Parliament, however, was an aspect of the body politic and acts of Parliament were acts of the Crown. They were to be obeyed because the natural-born subject owed obedience to the King in his personal capacity. Thus the relationship between the two capacities of the Crown was important, yet received little attention in cases. The most precise statement is in the *Case of the Duchy of Lancaster*[98] which decided that a lease by King Edward VI in his nonage was binding on Queen Mary. In its decision, the bench assumed the distinction to be:

> For although he has or takes the land in his natural body, yet to this natural body is conjoined his body politic, which contains his royal estate and dignity, and the body politic includes the body natural, but the body natural is the lesser, and with the body politic is consolidated. So that he has a body natural, adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person, and make one body and not diverse, that is the body corporate in the body natural, et e contra the body natural in the body corporate. So that the body natural, by the conjunction of the body politic to it, (which body politic contains the office, government, and majesty royal) is magnified, and by the said consolidated hath in it the body politic, for which reason the acts which the King does touching the things that he possesses or inherits in the body natural, require the same circumstance and order as the things which he possesses or inherits in the body politic do; for the thing possessed is not of such consideration as to change the nature of the King's person, but the person who possesses it changes the natural course of the thing possessed.[99]

'Conjoined', 'magnified' and 'consolidated' are not words that clarify the meaning of the distinction[1] and add little to the definition of allegiance.

Coke L.J. made a clear distinction between the laws of nature and the laws of man.[2] Laws as to naturalization were of the latter category. Thus, when an alien was naturalized, he did not acquire natural law allegiance, because man could not create it, he was merely a subject of laws which ordered all people to treat him as if he were a natural-born subject. In other words, he was not to be subject to the disabilities of aliens.

As a product of the immediately post-feudal era, denization was the act of creating a personal relationship between the King and the new subject. The relationship took the same forms as the natural law allegiance of the natural-born subject because it was personal to the parties and a product of their mutual promises and oaths. The natural born person of the King was bound to the obligations created at the time of endenization. The power of the King in this respect was the same as that which created alien enemies from alien friends and *vice-versa*, and the protection given by the King was that given to the newly born. Lord Coke mentions the restrictions upon the efficacy

[98] (1561) 4 Eliz. 212.
[99] *Ibid.* 213.
[1] The lack of clarity in this distinction was, according to at least one author, one of the primary causes of the Civil War: Kenyon, J.P., *Stuart England* (1978).
[2] *Calvin's Case* (1608) 2 St. Trials 559, 619.

of endenization as a rule of law.[3] It has been found that such restrictions were not always put in letters patent.[4] However, whether or not the restrictions were necessary is not important. Any consequence of endenization was a rule of common law and not natural law because the rights of subjects were at the discretion of the law-making authorities.

The creation of the naturalized subject had nothing to do with the King's person, his allegiance to the King was a result of law-making by Parliament. The continuing duties of the natural-born or endenized subject were composed of obligations arising from natural law. Naturalization, being an act of Parliament, did not have this natural law foundation. The allegiance of the naturalized subject must, therefore, have been a doctrine of law analogous to, but not part of the natural law.

If common law allegiance existed, then the doctrine of the local allegiance of aliens present in the Crown's territories becomes explicable. *Sherley's Case*[5] of 1555 is the classic example. A Frenchman, named John Sherley, and one of the rebels with Stafford, was captured and arraigned for high treason. John Sherley pleaded that he was an alien, that he could not commit an act against the duty of his allegiance when he was not a subject of the King. The answer of the court was as follows:

> But this is of no significance; at this time of peace between England and France, to levy war with other English rebels was sufficient treason; and if it were in time of war, he should not be arraigned, but ransomed.[6]

The alien, if he did not enter as an alien enemy, owed allegiance for the duration of his presence within the territory of the King. The temporary allegiance could be breached by treason in the same manner as the more normal permanent allegiance. The duty of obedience arose from the protection of the alien within the kingdom by the King. It could not have been a result of the same processes as natural law allegiance, because it was an act of will for the alien to enter the kingdom, and therefore no act of God nor any oath of obedience placed him under protection of the King. There was no obligation on the King to protect the alien. He was able to be ejected or declared to be an enemy at any time. Thus the relationship of temporary, or local[7] allegiance was 'wrought by law'.[8]

In 1608 members of the State were the subjects of the King. The source of authority of the law was natural law allegiance, the validity of which could not be questioned. From allegiance sprang the laws of membership: the definition of who were British subjects and that the status was indelible. By analogy, the common law had developed legal allegiance and the disabilities

[3] *Ibid.*
[4] Shaw, *op. cit.*; Parry, *op. cit.* 35.
[5] 2 Dyer 144b, 73 E.R. 315.
[6] *Ibid.* 316.
[7] 'Local' here means 'limited territorially'.
[8] *Calvin's Case* (1608) 2 St. Trials 559, 615. It seems to be one of the few illogicalities of the system that protection by the Crown deriving from legal allegiance was sufficient for the child of an alien to be a natural born subject.

of aliens. The parliamentary means of becoming a British subject, naturalization, depended on legal allegiance. The alternative, but more restricted approach of denization could still be fitted into the natural law allegiance scheme.

Allegiance was, therefore, the principle of membership. It explained why individuals owed political obligation. The conception of State it projected was a corporate model assumed to exist by the legal system. How the State should be further defined was left unclear[9] but this is a problem perhaps inherent to the model. In any event the nature of the State in political theory was still unclear.

Although *Calvin's Case* is the leading case for the present concept of allegiance, whether or not the existing law is consistent with it must be examined if the present status of allegiance as a concept of constitutional law is to be clarified. The following propositions state the present position in Australia of the doctrines established by *Calvin's Case*:

1. The Australian Citizenship Act 1948-1984 specifies who are 'citizens by birth, adoption or descent'[10] and how a person may be naturalized.[11] Naturalization is a reasonably cheap process. Denization is still possible, but little used.
2. An Australian citizen may lose that status by act, renunciation or as a result of false acquisition.[12]
3. Certain British subjects who are not Australian citizens, have, in effect, the rights and duties of Australian citizens.
4. The common law disabilities on aliens no longer exist, but there are a variety of discriminations in individual statutes.[13]
5. The right to exclude aliens remains, but the right to deport immigrants is subject to some constitutional limitations.[14]

The major change is that the common law no longer decides who the members are. The whole area of law is governed by statute[15] and, as a result, the connection of allegiance to membership is far from certain. Citizenship may stand alone as membership, but, if it does not, its relation to membership is also unclear. The earlier discussion of citizenship laws did not examine this relationship. In what way, therefore, has allegiance altered and how has it accommodated its change in function?

[9] Coke C.J. in at least *Calvin's Case* left Parliament out of his scheme for justifying the obedience of the subject to the law. 'The Crown' might have included Parliament or else Parliament might have been simply the method by which the Crown made laws.
[10] Sections 10, 10A, 10B.
[11] Section 13.
[12] Sections 17-20.
[13] *Ibid.*
[14] See Lumb and Ryan, *op. cit.* 171-176; Lane, P.H., 'Immigration Power' (1966) 39 *Australian Law Journal* 302; Finlay, H.A., 'The Immigration Power Applied' (1966) 40 *Australian Law Journal* 120 and the most recent cases of a long line: *Ex parte Henry* (1975) 133 C.L.R. 369; *Ex parte Kwok Kwon Lee* (1971) 124 C.L.R. 168. The test is of 'absorption into the community'.
[15] There are some exceptions of which *Joyce v. D.P.P.* [1946] A.C. 347 is one. *Infra* n. 47, p. 700.

Sir Matthew Hale, writing on the problems of dual allegiance in 1730,[16] repeated the theories of allegiance as stated in *Calvin's Case*:

> And hence it is, that the natural-born subject of any prince cannot by swearing allegiance to another prince put off or discharge him from that natural allegiance; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested without the concurrent act of the prince to whom it was first due: indeed the subject of a prince to whom he owes allegiance, may entangle himself by his absolute subjecting himself to another prince: which may bring him to great straits, but he cannot by such a subjection divest the right of subjection and allegiance that he first owed to his lawful prince![17]

Allegiance was divided into two types: 'original virtual and implied' and 'expressed and declared by oaths and promises'. These expressions are the direct produce of *Calvin's Case*. Little change was made in the expression of a provision for divestiture of allegiance.[18] Similarly, Blackstone states that allegiance is 'founded in reason and the nature of government'.[19] There is an 'implied, original and virtual allegiance owing from every subject to his sovereign'.[20] The King is said to be fully invested with all rights and bound by all duties of sovereignty before his coronation. The bond of allegiance is indelible, except by legislation.[21] The exception is new, but the explanation of indelibility is almost the same as that of Hale.

The expositions of these two authors reveal that the rules and doctrines of *Calvin's Case* were adhered to in the eighteenth century. At the same time there was less explanation of why these doctrines existed and a reluctance to discuss their foundations in natural law. Natural law was not entirely rejected; in a few cases as to colonial law the immediate abrogation of 'infidel' laws upon conquest was still accpected, even if for the justification that such laws were 'against reason'.[22] Whilst allegiance still provided the rationale for the obedience of the subject to the sovereign, and hence of the authority of law, its own justification was fading.

During the late seventeenth and early eighteenth centuries, allegiance to the Crown began to be regarded as more of a reciprocal relationship of protection and obedience. The treaties of cession with the United States of America helped this development. If a treaty between States could decide the allegiance of subjects and those subjects could collectively force a change of allegiance, the doctrine must rest on something other than the divine ordination of place and time of birth. Although previous treaties[23] could be justified as the result of battle and therefore as a result ordained by God,

[16] Hale, M. *Historica Placitorum Coronea* (1736) 68.
[17] *Ibid.*
[18] The idea of removing allegiance by mutual act of subject and prince is not mentioned in *Calvin's Case*, and there is no record of it having ever been done in practice. It seems to be a recitation of the ability of the ties of homage to be broken in the feudal era, (Bracton f78b). It does not fit in the natural law allegiance system, perhaps it was the first sign of the trends explained below.
[19] Blackstone, W., *Commentaries on the Law of England* (5th ed. 1773) 365.
[20] *Ibid.* 369.
[21] *Ibid.* 370.
[22] *E.g. Blankard v. Galdy* (1763) 2 Salkeld 411, 91 E.R. 356; *Dutton v. Howell* (1763) Shower 24, 1 E.R. 17.
[23] *E.g.* Northhampton, 1328, Chateau-Cambriensis and Breda, 1667; see generally Forsyth, *op. cit.* 273.

the American treaty was the result of rebellion. Rebellion was against the authority of the King rather than a dispute between Kings. Nevertheless, the behaviour of the individual after the treaty decided whether he was a British subject or an American citizen.[24] The individual made a choice and so determined to which State he owed allegiance. The old *Calvin's Case*[25] doctrines would have required that the original allegiance at birth had to be altered, whereas the newer 'contract' theory of subjection enabled the problem to be justly solved.

The trend to a contract analysis of membership culminated in *Isaacson v. Durant*,[26] which was heard in the Court of Appeal in 1886. It did not have the same attention or importance attached to it as did *Calvin's Case*. The question the court faced was whether Hanoverians born before the accession of Queen Victoria and resident in England, not naturalized, but being in all other respects qualified, were entitled to vote at the election for members of Parliament. King William IV had worn the Crowns of both Hanover and England. Upon his death the Crown of Hanover went to his brother, and the Crown of England to his niece, who became Queen Victoria. The question resolved itself into whether or not the putative electors were British subjects. This was almost the exact converse of the question decided in *Calvin's Case* of the two Crowns being inherited by one man. *Isaacson v. Durant* was concerned with the situation when those two kingdoms fell to two people after being governed by one. There was a comment in *Calvin's Case* as to the results of the separation of the Crowns: it deserves to be quoted in full as it shows the implication of the natural law doctrine, and that the time of birth was as critical as the place of birth. The comment was made by way of reply to one of four difficulties raised by those antagonistic to the *post-nati* being subjects:

> 4. And as to the fourth, it is less than a dream of a shadow, or a shadow of a dream: (2 Ventrix 6) for it has been often said, natural legitimation respecteth actual obedience to the sovereign at the time of the birth; for as the Antenati remain aliens as to the crown of England because they were born when there were several kings of several kingdoms, by descent subsequent, cannot make him a subject to that crown to which he was alien at the time of his birth; albeit the kingdoms (which almighty God of his infinite goodness and mercy divert) should by descent be divided, and governed by several kings; yet it was resolved, that all those, that were born under one natural obedience, while the realms were united under one sovereign, should remain natural born subjects and no aliens; for that naturalization due and vested by birth-right, cannot by any separation of the Crowns afterwards be taken away; nor he, that was by judgment of law a natural subject at the time of his birth, become an alien by such matter *ex post facto*.[27]

[24] *Auchmuty v. Mulcaster* (1826) 5 B. & C. 770, 108 E.R. 287; *Fitch v. Weber* (1847) 6 Hare 51, 67 E.R. 1077.

[25] (1608) 2 St. Trials 559.

[26] (1886) 17 Q.B.D. 54. Also to be seen in the line of cases analysing naturalization, endenization and local allegiance as almost a contract: *The Ann* (1813) 1 Dods 221, 165 E.R. 1290; *M'Connel v. Hector* (1802) 3 Bos. & Pul. 113, 126 E.R. 1443; *Boulton v. Dobree* (1808) 2 Camp. 163, 170 E.R. 1116; *Alciator v. Smith* (1812) 3 Camp. 245, 170 E.R. 1370. This theory perhaps motivated *Isaacson v. Durant* to a greater extent than the treaties as to cession because they provided a simple approach to the problem.,

[27] *Calvin's Case* (1608) 2 St. Trials 559, 656. 'Naturalization' was here used in meaning becoming a subject by any means. It did not mean only the parliamentary means of making a subject.

In the passage, the ideas of allegiance being created by birth and of indelibility were emphasized. The obligations to the King at the time of birth could not be altered. In *Isaacson v. Durant* the passage was discussed, and was held to be only *dicta,* and too uncertainly expressed to be authoritative. Moreover, it was said, the judges in *Calvin's Case* never thought the situation would arise, 'it is less than a dream of a shadow, or a shadow of a dream',[28] and the statement was made at the time of the feudal system, and was a direct result of that system.[29] If the analysis adopted here is correct, this opinion is wrong. The quotation shows that the result of a separation of the Crowns was perfectly certain, it merely made administration difficult. The judges of 1608 did think the situation might arise. It was seriously mooted as a reason for not adopting the system suggested as supporting Calvin's claim to be a British subject. The system certainly was, in many respects, a product of the feudal system, but that was no reason for rejecting it.

A better rationale for the decision in *Isaacson v. Durant* is that the concept of allegiance was found to be inadequate. This became apparent when the argument that persons ought to have a choice of allegiance was raised. Distinguishing *Thomas v. Acklam*[30] and *Auchmuty v. Mulcaster*[31] on the grounds that they dealt specifically with the American treaty of peace the court decided that choice of allegiance was incompatible with natural law. It was impossible for the Court of Appeal to overrule *Calvin's Case*[32] and so it could not exploit the illogicality of natural law indelibility in the nineteenth century. The court, however, wished to decide that the Hanoverians born during the union did now owe allegiance to the Crown.[33] The solution was to confine *Calvin's Case* to its facts, the union of the Crowns, and to ignore the rest of the system. It was further decided that allegiance was owed to the body politic and various statutes were cited in support of this claim. Since the bodies politic were always separate, the Hanoverians could not be subjects of the Crown of the United Kingdom.

This decision meant that allegiance was not owed to a creation of divine law and not created at the birth of the subject. Allegiance was owed to a creation of the law and was itself a doctrine of law. Allegiance became the description of all of the obligations owed at any particular time by the subject to the King and the King to the subject. The body politic was a creation of law, therefore allegiance could be changed by the law-making authority.

The removal of indelibility by the Naturalization Act 1870 could only have taken place if the conceptual changes declared in *Isaacson v. Durant* had

[28] (1608) 2 St. Trials 559, 656.
[29] (1886) 17 Q.B.D. 54, 64-65.
[30] (1824) 2 B. & C. 779, 107 E.R. 572.
[31] (1826) 5 B. & C. 770, 108 E.R. 287.
[32] (1608) 2 St. Trials 559.
[33] For obvious political reasons. On the other hand, an act of Parliament would have been a better solution. Nevertheless, the case prevented many trying administrative problems. In addition, the language of the court hints at an attitude that the problem facing the court was only illusory, and should be solved by common sense, rather than by any theoretical discussion.

already occurred. Amongst the reasons the influential 1868 Royal Commission[34] had given for their recommendation that the old theory of indelibility be replaced by statutes was its inconvenience to the United Kingdom.[35] This conclusion was possible because the natural law theory had disappeared, and because allegiance was considered mutable by Parliament. Most importantly, it was made possible because allegiance was seen as a contract which, although usually made at birth, could be started and finished at any time.

The natural law basis of the allegiance doctrine had evaporated prior to the late nineteenth century with the disappearance of God from government. However, the rules as to who were British subjects at birth were still determined by the old allegiance doctrine as if it had never been altered. *Isaacson v. Durant* [36] did not overrule allegiance as the determinant of membership rules: the Court of Appeal had no power to do so. Thus, just prior to the British Nationality and Status of Aliens Act 1914, a judge of the Court of Appeal could still say without error, 'Nationality as we recognize it is based on the tie of allegiance, a personal duty owed to a Sovereign'.[37] *Cavin Gibson and Co. Limited v. Gibson,*[38] the case from which this is quoted, decided that a person born in Victoria was a British subject, which was sufficient reason for English law to have jurisdiction over him. *Roberts v. Attorney-General, in re Johnson,*[39] which decided that a person born in Malta is a British subject, produces a similar confirmation of the applicability of the rules derived from *Calvin's Case*:

> Whether born in England, Scotland, Canada, Cape Colony, or the Channel Islands or elsewhere within the Empire, he is a natural-born subject of the Crown, and, as *Calvin's Case* shews, the Crown is one and indivisible, and cannot be severed into as many distinct kingships as there are kingdoms.[40]

Allegiance had become a doctrine of law, without foundation other than as a description of the mutual bond, or contract between sovereign, whatsoever that might be, and subject. As such, it could not explain why persons born within the kingdom were subjects. It needed the natural law foundation for this purpose. By the end of the nineteenth century, allegiance was, therefore, a mere shell from which the rules of membership were said to derive, but from which they could not logically derive. If natural law allegiance did not describe the authority of law, a new reason for the obedience of subjects was required.

[34] *The Royal Commission of Inquiry into the Laws of Naturalization and Allegiance.*
[35] Great Britain, *Parliamentary Papers*; 'Report of the Royal Commission for Enquiry into the Laws of Naturalization and Allegiance', 1868-9, XXV, 608.
[36] (1886) 17 Q.B.D. 54.
[37] *Gavin Gibson and Co. Limited v. Gibson* [1913] 3 K.B. 379, 388, per Atkin J.
[38] *Ibid.*
[39] [1903] 1 Ch. 821.
[40] *Ibid.* 832-833. This does not contradict *Isaacson v. Durant* (1886) 17 Q.B.D. 54. Bodies politic united in one person are united. *Isaacson v. Durant* refers to situations where kingships are separate, but there is one King.

Theorists, of whom Austin[41] is an example, said that the law needed no ultimate authority to gain the obedience of its subjects. *Isaacson v. Durant*[42] stated that allegiance was owed to the body politic of the Crown, therefore the body politic had the authority of law-makig and should be obeyed. Dicey[43] said Parliament was supreme except for the rule of law, which created the constitution. The shell of *Calvin's Case,*[44] as expressed in *Roberts v. Attorney-General, in re Johnson*[45] and *Gavin Gibson and Co, Limited v. Gibson,*[46] still maintained the Crown was the source of law. In truth there was confusion. As long as the rules of membership existed, it seemed the judges did not care what was the source of authority of law.

The British Nationality and Status of Aliens 1914 solved some parts of the conundrum of rules of membership without reason for obedience to law. The rules thereafter could be said to be authorised by Parliament, whatever that might mean. It removed the entire natural law of allegiance from English law. Natural law was accepted to state that if a person was born within the protection of the Crown, he was a subject of the Crown. The 1914 Act stated that a person must be born within the territories of the Crown and within the allegiance of the Crown. Thus, after 1914, Parliament specified who were subjects. The obligation to provide laws as to who were British subjects was taken from the common law.[47] Parliament had made a statement that the reason for the individuals who fulfilled the various conditions being subjects of the Crown was because Parliament had the power to make them so. This step was long overdue as allegiance no longer determined the source of authority of laws.[48]

Allegiance was mentioned in the 1914 act as a condition for the creation of a natural-born subject.[49] The word 'allegiance' was not defined, other than as including certain degrees of jurisdiction by the Crown over certain territory. 'Allegiance', in the context of s.1, could not have imported the natural law into the statute. Natural law allegiance dictated all the reasons for a person being a natural-born subject. Thus the insertion of 'dominion' would be superfluous if the old doctrines were incorporated in the new Act. The proviso

[41] Austin, J., *The Province of Jurisprudence Determined* (1954).
[42] (1886) 17 Q.B.D. 54.
[43] Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (10th ed. 1959).
[44] (1608) 2 St. Trials 559.
[45] [1903] 1 Ch. 821.
[46] [1913] 3 K.B. 379.
[47] The exigencies of the World Wars created what some have called a revival of allegiance and indelibility. It was decided that British subjects and enemy aliens could not divest themselves of their status during war, even if it was a result of compulsory action of law: for British subjects, *Ex parte Freyberger* (1917) 116 L.T.R. 237; *Gischwind v. Huntington* [1918] 2 K.B. 420; for aliens, *R. v. Home Secretary; Ex parte L.* [1945] 1 K.B. 7; *Lowenthal v. A.G.* [1948] 1 All E.R. 295; *Ex parte Weber* [1916] 1 A.C. 421; see also *Oppenheimer v. Cattermole* [1975] 2 W.L.R. 347. It is difficult to see this doctrine as other than imaginative judicial legislation. It does not conflict with the theory of protection and obedience, but neither does it support it.
[48] *Cf.* Parry, (1957) *op. cit.* 86.
[49] British Nationality and Status of Aliens Act 1914, s. 1.

to s.1 gives some idea of the meaning envisaged by Parliament for 'allegiance'. It is probable that the reason for its insertion was to provide guidance in a situation where either British territory had been invaded or Britain had control over territory acquired by force.[50] If a child was born to an enemy invader it could not be a British subject. Without 'allegiance' in the section, the bare words imply that it would be a British subject.

Allegiance is a description of the obligations of being a British subject. With the enactment of the British Nationality and Status of Aliens Act 1914 (U.K.) and its empire-wide equivalents, including the Australian Nationality Act 1920, allegiance ceased to be a prescriptive definition of political obligation.

The exception to this proposition is *Joyce* v. *DPP*,[51] mentioned at the outset of this essay. The House of Lords then had to decide whether Joyce's local allegiance as an alien was still owed whilst he was in Germany. By a majority of four to one the court decided it was owed. The first issue was whether local allegiance could be owed outside the territories of the Crown. The whole court agreed that allegiance was a question of duties, not territories. If there was protection[52] there was a duty of fidelity:

> The principle which runs through feudal law and what I may perhaps call constitutional law requires on the one hand protection, on the other fidelity: a duty of the sovereign lord to protect, a duty of the liege or subject to be faithful. Treason, 'trahison', is the betrayal of trust: to be faithful to the trust is the counterpart of the duty to protect.[53]

The court went on to decide whether Joyce was protected. It was agreed that the possession of a passport was a form of protection. A passport extended the protection of the Sovereign and therefore the duty to be faithful beyond the usual limits, that is, beyond the realm. The whole court agreed that whether or not allegiance was in existence depended on the circumstances of the individual case and was a matter for the jury to decide.[54] On the question as to whether the jury was correctly addressed on this point the court divided, Lord Porter being of the dissenting opinion that although as a matter of law protection is continued by the request for an extension of a passport, whether the existence of the passport continues the protection depends on the circumstances of the case. The passport might have been repudiated or lost; it requires a jury to decide these facts, and the jury had not been so directed.[55]

The House of Lords treated the local allegiance of an alien and the allegiance of the natural born as conceptually identical. The only differences acknowledged were the time from which allegiance is owed and the possibility

[50] Jones, J.M., *British Nationality Law and Practice* (1947) 126-130; McNair and Watts, A.D., *The Legal Effects of War* (4th ed. 1966).
[51] [1946] A.C. 347.
[52] The protection referred to here is not the 'vicarious' (*ibid.* 368) protection of *R. v. Casement* [1917] 1 K.B. 98 or *R. v. Neymann* [1949] 3 S.A.L.R. 1238.
[53] *Joyce v. D.P.P.* [1946] A.C. 347, 368.
[54] *Ibid. per* Lord Jowitt, L.C. 372, *per* Lord Porter 376.
[55] *Ibid.* 376, 382.

at common law of termination of local allegiance.[56] This is not consistent with the alleged precedent, *Calvin's Case*.[57] Underpinning *Joyce* v. *DPP*[58] is the notion of the reciprocal nature of allegiance. Lord Jowitt L.C. asked:

> whether there was not such protection still afforded by the sovereign as to *require* of him the continuance of his allegiance.[59]

If the court could find that Joyce was still protected, then he owed a duty to be faithful. Furthermore, this was asked in order to determine whether Joyce had thrown off his allegiance rather than as a result of the proposition that allegiance was created by protection. Termination was always an incident of local allegiance, and to this extent the case is not an extension of the law. It does extend the definition of what terminates local allegiance by the unequivocal denial that mere absence from territory is universally effective. Termination seems to require an act of the alien which can be interpreted as disavowing any protection offered. Thus the sovereign offers protection to most who enter the realm and if that protection is accepted, the duty to obey arises. When the alien no longer wants to be under the obligation to obey, something must be done which removes him from the ambit of the unilateral offer by the sovereign. A 'contract' theory of allegiance can be easily applied to the case. Unfortunately, the temptation to provide a theory was firmly resisted.[60]

In recent years the concept of allegiance has most often been explored when within.[61] The jurisdiction of the court depends on whether allegiance is owed so as to bring the infant within the protection of the Crown. The answer has generally been that if the infant is a citizen within the relevant citizenship legislation then allegiance is owed. There has been a reluctance to investigate the theory of allegiance in favour of the argument that whether or not others should be protected, if this infant falls within the definition of Australian citizen, then the problem is solved because at least all citizens owe allegiance. At this point there is some divergence of view. Whereas the Australian Citizenship Act 1948-84 is Commonwealth legislation, the prerogative jurisdiction of the various courts (other than Federal courts) over infants derives from the jurisdiction of English courts and the reception of English law into the states. As allegiance consists of a duty of obedience to and the receipt of protection from a single Sovereign, how it is to be divided so as to compel obedience to the Crown in respect of both State and Commonwealth

[56] *Ibid.* 366 *per* Lord Jowitt L.C.
[57] (1608) 2 St. Trials 559.
[58] [1946] A.C. 347.
[59] *Ibid.* 368. My italics.
[60] *Ibid.* 366.
[61] *Re P (GE) (an infant)* [1965] 1 Ch. 568; *Chignola v. Chignola* (1974) 9 S.A.S.R. 479; *A* v. *B* [1979] 1 N.S.W.L.R. 57; *Holden v. Holden* [1968] V.R. 334; *Glasson v. Scott* [1973] 1 N.S.W.L.R. 689; *McManus v. Clouter* (No. 1) [1980] 1 N.S.W.L.R. 1, (Powell J.); *McManus* v. *Clouter* (No. 2) [1980] 1 N.S.W.L.R. 27 (McLelland J.).

is an unresolved conundrum. Powell J in *McManus* v. *Clouter*[62] and in *A.* v. *B.*[63] retreated in confusion from attempting to answer it by asserting that at its narrowest allegiance must be owed by Australian citizens. McLelland J. in *McManus* v. *Clouter* was braver, cutting the Gordian knot by asserting that the newly attained status of Australia as an independent sovereign State means that 'for the purposes of Australian law, allegiance to the Crown of the United Kingdom has been superseded by allegiance to the Queen in her capacity as Queen of Australia, at least to the extent that allegiance connotes the correlative duty of protection by the Crown'.[64] The status of British subject is solely 'an acknowledgement of the symbolic title of the Queen as "Head of the Commonwealth" (i.e. the British Commonwealth)'.[65] McLelland J. found no difficulty with the Federal society by adopting[66] the statement of Waddell J. in *Kelly* v. *Panayioutou*:[67]

> In whichever State in the Commonwealth a person lives, the various aspects of his life are governed partly by Commonwealth influences and partly by State influences. How can it be said, in these circumstances, that a person is a subject of the Queen only in the right of a particular State, or only in the right of the Commonwealth? His allegiance, it seems to me, is purely and simply to the Queen.

This was and is a shallow analysis. It took no account of the then residual power of the Parliament of Great Britian, part of which is the Crown of Great Britain, to make Laws for the Commonwealth of Australia and to a differing extent for the states of Australia. Until recently there were a number of constitutional links with the United Kingdom which precluded the independence so blithely assumed. They were in existance at the time McLelland J. gave his opinion. No obedience to the laws consequent to these links would have been owed were allegiance owed solely to a Queen of Australia.

Even now, after the Australian Act 1986 has come into operation, it is arguable that the posited simple relation between the Queen and the people of Australia misrepresents the present position. Since *Isaacson v. Durant*[68], allegiance has been owed to the body politic, otherwise the system could not cope with divestiture of allegiance and the possibility of the state splitting. McLelland J's opinion is that allegiance is not owed to the Queen in the right of a particular state or of the Commonwealth, that is, to the body politic. He then states it is 'purely and simply to the Queen'.[69] This is a reversion to the mediaeval doctrine of personal allegiance to the King or Queen. It implies the federation is of the bodies politic of the states and the Commonwealth

[62] [1980] 1 N.S.W.L.R. 1, 11-12.
[63] [1979] 1 N.S.W.L.R. 57, 62.
[64] [1980] 1 N.S.W.L.R. 27, 44.
[65] *Ibid.*
[66] *Ibid.* 45.
[67] [1980] 1 N.S.W.L.R. 15(n), 16.
[68] (1886) 17 Q.B.D. 54.
[69] *McManus v. Clouter (No. 2)* [1980] 1 N.S.W. L.R. 27, 45, quoting Waddell J in *Kelly v. Panayioutou* [1980] 1 N.S.W.L.R. 15(n), 16.

under the one person to whom the subject owes the duties of a citizen. Yet the judgment does not proceed to explain how the old conflict is resolved.

It is to be regretted that the opportunity to find a more convincing rationale for citizenship was not taken. It would have been possible, for example, for the constitutional conundrum to be attacked through the naturalization *placitum*[70] in the Constitution: Since the power to naturalize has been given to the Commonwealth, and as the implication of naturalization is the power to create or declare allegiance, then the Australian Citizenship Act 1948-84 is an exercise of that power. There is only one allegiance as created or recognized under that legislation but applicable to all the residents of the states. Although this might leave the object of the allegiance unresolved, it would at least be consistent with the Constitution.

An alternative rationale now acceptable might be that which popularly justifies the Australian Acts of 1985. They are described as bringing the arrangements affecting the Commonwealth and the states into conformity with the status of Australia as a sovereign, independent and federal nation.[71] It could be said that the Crown of the sovereign, independent and federal nation of Australia is the body politic to which allegience is owed. As a gross simplification of an unknown principle this might suffice, but it should at the same time acknowledge that it leaves much unsaid. The Crown holds a different constitutional position in each state and the Commonwealth. There is also a history of dependency on the Imperial legislature for the binding force of the various constitutions and for much of other legislation and common law.[72] These factors should not be omitted if a true description of the states of Australia as a state and therefore the object of allegiance is to be given.

The complex constitutional position might be said to have been accepted by McLelland J. in the implicit assertion of a single overriding idea of State to which the states and The Commonwealth subscribe. Unfortunately this leaves the doctrine of allegiance in impossible confusion. Whilst the complete picture remains clouded, the object of allegiance includes the Crown. It is difficult to include the Queen in the necessarily abstract description of that which would comprise the State of Australia. Alternatively, the Commonwealth could be seen to be an overriding body politic, an argument colourfully put by Dixon J. (as he then was) in dissent in *Uther's Case*[73] and later confirmed in *The Commonwealth v. Cigamatic Pty Ltd (in liq):*[74] 'Like the Goddess of Wisdom the Commonwealth *uno ictu* sprang from the brain of its begetters armed and of full stature' so gaining a special relationship

[70] Section 51(x).
[71] *Australian Current Law* (March 1986).
[72] *E.g.*, s.7. of the Australia Act (Cth) 1986 does not fully describe the relation of the Crown to the states. Much is left unsaid. The source of that portion of constitutional law (for example, the succession) is not to be found entirely in Australian law.
[73] (1947) 74 C.L.R. 508, 530.
[74] (1962) 108 C.L.R. 372.

between itself and its people. Meagher and Gummow's tardy but acid rejoinder is entirely appropriate:

> The Commonwealth was not born by parthenogenesis, nor in the manner of Athen; it was called into existence by an Imperial Statute, it is not to be seen in isolation from the constitutional matrix of imperial legislation over a long period which contains the Commonwealth together with the Imperial and State Crowns.[75]

The recent cases have established that there are three aspects to allegiance: obedience, protection and the reciprocal nature of the obligations. Obedience to the law is admitted to be required of members, and the Crown does protect members, both in international and domestic matters: In reality, the legal system as a whole is the protection afforded the member by the Crown.[76] However, it is by no means clear that a member is protected because he owes a duty of obedience, or he owes obedience because he is protected. In the first situation in international matters, even though there is no obligation upon the State to protect the individual, it was held in *Joyce v D.P.P.*[77] that allegiance was owed: 'By his own act [possession of a passport] he has maintained the bond which while he was within the realm bound him to his sovereign.'[78] Jowitt L.C. went on to assert that the passport does constitute protection by the Crown. Porter L.J. dissented on the grounds that it was up to the jury to decide whether allegiance was still owed and the jury had been inadequately directed on this point. It therefore appears that both Jowitt L.C. and Porter L.J. agreed that the holding of the passport was evidence of continued duties of obedience and protection. They did not assert that Joyce owed a duty of obedience because he was protected. He owed allegiance because on the evidence and in view of his right to repudiate his allegiance, he had not done anything to sever his relationship with Great Britain but had maintained his local allegiance. It therefore seems that allegiance, consisting of duties of obedience and protection, will be owed in respect of a person if that person falls within criteria specified by the legal system, even if the criteria are, in the absence of legislation, supplied by the common law.

McManus v. *Clouter*[79] and the numerous other cases,[80] where the jurisdiction of a court depended on whether allegiance is owed in respect of a person, are amenable to the same analysis. The issue in these cases is not whether obedience is a duty of a person the presence of which was to be discovered be reference to the meaning and content of the concept of allegiance. Rather it is whether a person falls within the criteria established by law for allegiance and therefore owes allegiance. The duty of the Crown

[75] Meagher, R.P. and Gummow, W.M.C., 'Sir Own Dixon's Heresy' (1980) 54 *Australian Law Journal* 25, 29.
[76] This was rejected in *Joyce's Case* as the whole explanation of protection: [1946] A.C. 347, 370.
[77] [1946] A.C. 347.
[78] *Ibid.* 370.
[79] [1980] 1 N.S.W.L.R. 27.
[80] *E.g. Re P(GE) (an infant)* [1964] 1 Ch 568; [1965] 3 All E.R. 977; *Chignola v. Chignola* (1974) 9 S.A.S.R. 479; *A. v. B.* [1979] 1 N.S.W.L.R. 57; *Holden v. Holden* [1968] V.R. 334; *Glasson v. Scott* [1973] 1 N.S.W.L.R. 689.

to protect and the consequent jurisdiction of the court exists if allegiance is owed.

Allegiance merely describes, rather than defines, political obligation by indicating that the duties which exist, are correlative and consequent upon being a member. It does not answer the questions of when is a person a member and why does that person owe political obligations. The change, rejected in the Senate, of the oath of allegiance to a 'pledge of Australian citizenship' would have been a recognition of the lack of meaning of the word 'allegiance'. That it was considered possible is indicative of the modern conception.

CONCLUSIONS

It is unlikely that a contractarian system is accepted by the legal system to be the source of legal obligation. It would flounder in the complexity of finding the contracting parties. On the one hand the definition of the State is fraught with confusion in a federation, especially if residual powers in a 'mother' State are retained. On the other hand the duality of 'British subject' and 'Australian citizen' and the lack of constitutional effect of either tend to suggest that there is no effective definition of the individual member of the contractarian State. Further, allegiance is a description of the mutual duties of obedience and protection which are reciprocal only in so far as they are simultaneously owed. The criteria courts have used to decide questions as to whether one or other duty is owed apply equally to the other duty through the medium of whether allegiance as such is owed. Allegiance is, therefore, not appropriate for the contractarian State, the theory of which demands reciprocity of obligations.

If subjection were the answer, no convincing rationale for the status of the subject exists. Allegiance is now a mere consequence of membership, rather than its precondition as subjection would require. The problem of sovereignty in a federation implies that the Crown to which allegiance is owed is so diffuse as to make the concept untenable.

Allegiance is not the sole candidate for the explanation of subjection. Other, extra-legal concepts of political obligation are feasible. For example, the modern State is in some senses defined by territory; if a territorial principle were accepted in municipal law, the criteria for membership could lie in residence or 'absorption into the community'.[81] Although it would sit uneasily with the monarchical State, the idea would provide a satisfying rationale for the otherwise ephemeral notion of State's rights.

[81] As adopted by the High Court to decide who were deportable immigrants. See, *R v. MacKarlane Ex parte; O'Flanagan and O'Kelly* (1923) 32 C.L.R. 518, per Knox J.; *O'Keefe v. Calwell* (1948) 77 C.L.R. 261; *R. v. Carter; Ex parte Kisch* (1934) 52 C.L.R. 221; *R v. Forbes; Ex parte Molinari* [1962] V.R. 156; *Ex parte Lee Yum Bo, re Mornoney and Crawford* [1965] N.S.W.R. 956; *Ex parte Kwok Kwan Lee* (1971) 124 C.L.R. 168.

The theory that the source of law is the pre-existing legal system is adequate to fully explain membership principles in the law of Australia. The theory states that there are no membership principles, their place being assumed by rules as to conflicts of laws and a multitude of specific criteria for the functions membership serves. Membership laws are justifiable merely by their existence as laws, without reference to other concepts. Thus Australian citizenship, residence or other criteria are used as and when appropriate. Historical accident would be sufficient justification for the status of resident British subjects.

Whilst alternatives in legal theory to subjection to the legal system are less tenable than the limited acceptance by the judiciary of positivism into its interpretation of citizenship and allegiance, to assert positivism seems to contradict the mythology of citizenship in the popular mind, the theoretical constitutional law in other fields and the rhetoric of a bill of rights.

More generally, if a concept of membership were to develop, a greater sense of unity in the State would develop. The problems discussed at the outset of this essay could easily be resolved by reference to a single policy or concept defining membership. As it is at present, Parliament makes decisions as to the categorization of people affected by any particular legislation as appropriate in each given circumstance. The current government is using Australian citizenship with increasing frequency.

Whether it is a Good or a Bad Thing to define membership depends on one's view of the political process. Certainly there are dangers, as *Dred Scott v. Sandford*[82] proves. A statement that someone belongs has the corollary that many do not belong and this breeds argument and war. The rationale for the separate citizenship legislation of the various Dominions reveals the poverty of the justification for its existence and, by analogy, membership generally. On the other hand, the rule of law implied by the lack of coherence in membership principles has the similar dangers of a mere majority being capable of excluding a minority from all protection. The legislation emphasising citizenship as the distinction between those who belong to Australia as a State and those who do not, that is, creating a concept of membership of Australia, should be evaluated with these principles in mind.

[82] 19 Howard 393, 60 U.S. 393 (1856).