REIMAGINING *LOVE & THOMS v COMMONWEALTH*: RECOGNITION AND CITIZENSHIP THROUGH PLURAL SOVEREIGNTY

"This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis… of sovereignty." – Uluru Statement from the Heart.

I Introduction

In *Love & Thoms v Commonwealth,*[1] the High Court held that Aboriginal Australians are not within the ambit of the 'aliens' power conferred by *s51(xix)* of the *Constitution*.[2] I argue that this decision is only justifiable if the Court recognises a plural sovereignty shared between the colonial state and Aboriginal Australians. I begin by outlining the ratio in *Love,* suggesting it was wrong as a matter of law. This is because neither the need to ensure consistency with common law nor connection with lands and waters are sufficient criteria for membership in the Australian political community as it is currently conceived. I then establish the lens of plural sovereignty central to my reimagining, using Tully's characterisation of a heterogeneous plurality of overlapping and interacting sovereignties subject to ongoing negotiation. This is contrasted with the singular hegemonic sovereign of modern constitutionalism.[3] I defend the lens of plural sovereignty as the most appropriate for understanding the constitution of the Australian body politic. I conclude by arguing that accepting this vision of plural sovereignty makes the finding in *Love* that Indigenous Australians cannot be considered aliens more legally and morally persuasive. Given that this essay reimagines the case in an 'ideal world,' compelling moral and legal justifications are equally important. The legal grounds are more convincing because plural sovereignty provides the necessary link between indigeneity and political non-alienage by creating space for indigenous citizenship. My proposed model is also more morally desirable because it enables the necessary belonging and consent implied by non-alienage. Ultimately, I illustrate

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[1] *Love v Commonwealth of Australia* [2020] HCA 3; *Thoms v Commonwealth of Australia* [2020] HCA 3 (*'Love'*).
[2] Ibid [81] (Bell J).
[3] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

that accepting plural sovereignty can provide a more legally and morally sustainable justification for why Aboriginal Australians are non-aliens than the justifications offered by the majority in *Love*. In doing so, I hope to expose one of many possibilities for mutually beneficial cooperation and coexistence the pluralist reimagination of the Australian constitutional order may facilitate.

II The law

1 The decision

In *Love,* the court considered whether Mr Love and Mr Thoms could be detained and deported under the *Migration Act (1958).* Both did not meet the character criteria for a visa and had not been naturalised as statutory Australian citizens.[4] The court held by a majority of 4:3 that those deemed Aboriginal Australians under Brennan J's tripartite test[5] could not be considered aliens under *s51(xix).*[6] Consequently, Mr. Thoms could not be deported. The difference concerning Mr Love was "proof, not principle"[7] since it was unclear whether he satisfied the mutual recognition element in the indigeneity test.[8]

Among the majority's divergent reasoning, there are several unifying threads across three justices (Gordon, Bell, and Edelman JJ) that form a somewhat coherent ratio. Firstly, they recognise the *Pochi* limit[9] - Parliament cannot treat as aliens "those who could not possibly answer the description of aliens."[10] They then agree that someone who 'belongs' to the Australian community cannot be an alien.[11] They reason that Aboriginal Australians 'belong' to the Australian community and therefore cannot be considered aliens because 1) they have a special connection with the lands and waters of Australia,[12] and 2) there is a need to ensure coherence with *Mabo,* which recognised this special connection and the presence of

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[4] '*Love'* (n 1) per Kiefel CJ [2].
[5] *Mabo v Queensland* [No 2] (1992) 175 CLR 1, 70 (*'Mabo'*).
[6] *Love* (n 1) [81] (Bell J).
[7] Ibid.
[8] Ibid [79] (Bell J).
[9] *Pochi v MacPhee* (1982) 151 CLR 101, per Gibbs CJ at 109 (Mason J agreeing at 112, Wilson J agreeing at 116).
[10] '*Love'* (n 1) [50] (Bell J), [311] (Gordon J) and [433] (Edelman J).
[11] Ibid [61], [74] (Bell J), [302] (Gordon J) and most clearly at [394] (Edelman J).
[12] *'Love'* (n 1) [67] (Bell J), [289], [363] (Gordon J) and [450] (Edelman J).

Indigenous Australians before settlement.[13] These factors meant that Indigenous Australians could not possibly answer the description of aliens. Nettle J uses a different line of reasoning focussed on the "protection owed by the sovereign"[14] to Aboriginal Australians. This protection is "so strong" that their "classification as aliens lies beyond the… ordinary understanding of the word."[15] His honour also applied a different test of indigeneity, noting that Aboriginal Australians must have maintained continued observance of traditional laws and customs to not be classified as aliens.[16] Since his judgment cannot easily be reconciled with the other majority justices, this analysis focuses on the resonant threads of the other three. In the following section, I argue that whilst the outcome of the decision was correct, this discernible ratio is not legally sustainable in the law as it currently is.

2 Why was it wrong as a matter of law?

A *Irrelevance of common law*

Firstly, the argument that the decision was required to ensure consistency with *Mabo* is unpersuasive because *Mabo* is an entirely different area of law. This is raised by dissenting Kiefel CJ, who notes that "the common law of native title" cannot be used "to answer questions of a constitutional kind."[17] While the common law can inform readings of the constitutional text, the Constitution should not 'yield' to common law principles.[18] Consequently, for *Mabo* to be persuasive, it would have needed to provide an underlying constitutional principle that could operate as a "philosophical basis"[19] for *Love.* Evidently, *Mabo* did no such thing. It is a property law case that explains the common law[20] without considering constitutional principles beyond implicitly reinforcing the Crown's indivisible sovereignty through recognising its capacity to extinguish native title.[21] Since the common law is to yield to the text of the *Constitution* when they are in conflict, and *Mabo* was a land

[13] Ibid [70]-[71] (Bell J), [298] (Gordon J) and [451] (Edelman J).
[14] Ibid [248], [252] (Nettle J).
[15] Ibid [252] (Nettle J).
[16] Ibid [281] (Nettle J)
[17] Ibid [31] (Kiefel CJ).
[18] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 126-127 (Mason CJ, Toohey and Gaudron JJ) cited in '*Love'* (n 1) [41] (Kiefel CJ).
[19] '*Love'* (n 1) [45] (Kiefel CJ).
[20] See, for example, '*Mabo'* (n 5) [83] (Brennan J).
[21] Ibid [75] (Brennan J).

rights case that is neither analogous to *Love*[22] nor enunciated a constitutional principle capable of supporting the majority's position, the argument that the decision in *Love* was required to ensure consistency with *Mabo* is not legally sustainable.

B *Irrelevance of connection with lands and waters*

Moreover, connection with lands and waters is not a sufficient condition for membership in the Australian body politic as it is currently conceived. Indigenous Australians clearly have a strong claim to belonging in the *territory* of Australia due to their connection with lands and waters. However, colonial law gives no credence to this connection as a sufficient criterion for *political* membership. In Western law, this membership "is created by the law of the sovereign nation" and is marked with "formalities that make manifest its attainment and loss."[23] Lands and waters in the corpus of Australian law are viewed as territories not sufficiently correlated to the body politic of which the applicants claimed to be members. Australian law has long distinguished between these two concepts. It is why foreign nationals may own property even if they are still considered 'aliens' due to their non-citizenship status.[24] It is also why Brennan J in *Mabo* distinguished between the Crown's sovereignty over a colony and its ownership of land in that colony.[25] In Western law, property in and of itself (in the context of native title or otherwise) lacks the political dimension necessary to link 'connection with lands and waters' to political membership.

Indeed, under the court's conception of the Australian state's singular sovereign supremacy since settlement,[26] suggesting that Aboriginal Australians' spiritual connection with land qualifies them for membership of the settler's political community inaccurately characterises the nature of their connection. The community the court refers to is the Commonwealth of Australia,[27] not the communities of Aboriginal Australians who have lived for over 50,000

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[22] *'Love'* (n 1) [127] - [128] (Gageler J).
[23] Ibid [194] (Keane J).
[24] Australian Tax Office, 'Owning Real Property in Australia,' *ATO* (Web Page, 9 August 2023) https://www.ato.gov.au/Business/International-tax-for-business/Foreign-residents-doing-business-in-Australia/Owning-real-property-in-Australia/#:~:text=If%20you're%20a%20foreign%20person%20(including%20a%20temporary%20resident,registering%20your%20investment.
[25] *'Mabo'* (n 5) [45] (Brennan J).
[26] See, for example, *Love* (n 1) [347]-[365] (Gordon J).
[27] Argued in *Love* (n 1) [195] (Keane J).

years[28] on the land over which this imperial constitutional order now proclaims to exclusively reside. At the formation of this modern 'political community,' indigenous peoples were not even included in the population census. It is a community they have continually been ostracised from or assimilated into.[29] Indeed, their connection to land has long been seen as inimical to this political community. This is illustrated by the native title cases preceding *Mabo*[30] and the political discourse that ensued from the judgment in 1992 and continues even today.[31] Aboriginal Australians' connection to the land is far older than this constituted order of the Australian body politic; it lives outside and independently of the colonial state.[32] Many Aboriginal Australians see their connection to land as grounds for the illegitimacy of this political community,[33] not membership in it. Consequently, connection to lands cannot be seen as sufficient criteria for membership in that state, just as the Palestinian's spiritual connection to the land annexed by Israel does not justify their membership of the hegemonic Israeli political community but instead justifies an alternate claim to authority. Thus, viewing indigenous connection to land as justifying membership in the current conception of the Australian political community fails to recognise the ancient spiritual aspects of this connection that transcend and challenge the modern Australian constitutional order.

This insufficient linking of 'connection with lands and waters' with belonging in the political community is due to the constraining language of modern constitutionalism. This is the "language of the master: masculine, European, and imperial."[34] It is assimilatory and exclusionary. [35] "Recognition involves acknowledging it in its own terms,"[36] and the court was unwilling to engage with indigenous perspectives on what their connection with the land entails. Consequently, the court could not convincingly move outside the modern constitutional legal paradigm in which it is widely accepted that membership "is created by

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[28] Ibid.
[29] See generally Charles Rowley, *The Destruction of Aboriginal Society* (Australian National University Press, 1970).
[30] See, for example, *Attorney General v Brown* (1847) 1 Legge 312, 316.
[31] See the discussion in Misha Ketchell, 'No, the Voice to Parliament would not force people to give up their private land,' *The Conversation* (Web Page, September 18 2023), https://theconversation.com/no-the-voice-to-parliament-would-not-force-people-to-give-up-their-private-land-212784.
[32] Ben Silverstein, 'Submerged Sovereignty: Native Title within a History of Incorporation' in Julie Evans, Anne Genovese, Alexander Reilly and Patrick Wolfe, *Sovereignty: Frontiers of Possibility* (University of Hawaii Press, 2012) 60.
[33] See, for example, Irene Watson, 'Buried Alive,' (2002) 13 *Law and Critique* 253, 256.
[34] Tully (n 3) 34.
[35] Tully (n 3) 45.
[36] Ibid 23.

the law of the sovereign nation."[37] Within this frame, where the debate between the majority and the dissent occurs, the dissent reads more persuasively. In the following sections, I argue that this could be resolved by embracing a vision of plural sovereignty that allows the infusion of indigenous legal perspectives into Australian law, thereby bridging the gap between the court's admirable claim and its insufficient justification for this claim.

III Reconceiving the Sovereign

1 Plural sovereignty

Plural sovereignty is best understood in contrast with its antithesis - the hegemonic, 'billiard ball' model of modern constitutionalism.[38] Modern constitutionalism is the remnant of Hobbesian and Lockean theories which viewed "conflicting jurisdictions and authorities" as the source of conflict.[39] Thus, it was believed that complete authority must be vested in the body of a singular sovereign, typically the King.[40] Consequently, individuals in the mythical state of nature[41] established a political community bound by a common good and shared set of institutions to maintain 'peace.'[42] This contract was agreed on at some fictionalised time and is not subject to ongoing revision and negotiation.[43] In the 21st century, this singular sovereign has become the democratic 'people'[44] who form internally consistent "independent nations."[45] The myth is that "every culture worthy of recognition is an independent nation-state."[46] Consequently, the sovereign is still understood as an internally homogenous entity[47] acting with 'one voice' in the 'General Will.'[48]

Plural sovereignty recognises multiple centres of sovereignty in the non-absolute sense, where this sovereignty refers to "the authority of culturally diverse peoples to govern

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[37] '*Love'* (n 1) [194] (Keane J).
[38] Tully (n 3) 62.
[39] Ibid 67.
[40] Thomas Hobbes, *Leviathon or the Matter, Forme and Power of a Commonwealth, Ecclessiastical and Civil* (1651) [17].
[41] Tully (n 3) 63.
[42] Ibid 67-68.
[43] Ibid 69.
[44] Partlett, William, 'Remembering Australian Constituent Power' (2023) 46(3) *Melbourne Law Review* (advance).
[45] Tully (n 3) 18.
[46] Ibid.
[47] Tully (n 3) 63.
[48] Jean-Jacques Rousseau, *On the Social Contract* (1762) [1.6].

themselves."[49] These sovereigns overlap, interact, and are subject to "an intercultural dialogue" where associations are negotiated "over time in accord with the conventions of mutual recognition, consent, and continuity."[50] According to Tully, viewing sovereignty thus is to truly accommodate cultural diversity.[51] It is a way to accept the invitation to "walk" together,[52] to travel along the same river in different canoes, neither party attempting to steer the other's vessel unnecessarily.[53]

2 Plural sovereignty in Australia

Despite ongoing attempts of cultural assimilation and annihilation, plural sovereignty exists in Australia as a matter of fact and law; "the hidden constitution of contemporary society."[54] As numerous commentators have pointed out, the foundational myth of Australia's 'settlement' is no more than a convenient legal fiction retrospectively constructed to justify British singular sovereign supremacy over Australian territory. [55] Settlement in international law justifies authority over land previously 'terra nullius.'[56] Before *Mabo,* Australia was presumed to be settled because it was believed that the Indigenous people of Australia were 'so backward' that the land was essentially terra nullius and, therefore, acquired through settlement.[57] *Mabo* invalidated this myth by recognising the factual reality that Aboriginal Australians had a complex system of social existence that was in no way 'backward.'[58] To suggest so would be to "remain in a bygone era of racial discrimination."[59] However, whilst the court overturned terra nullius, they stopped short of overturning its implication that Australia was 'settled.' This creates a paradox within the body of Australian law – Australia was not terra nullius, but it was also settled. These two positions are fundamentally incompatible, and the settlement myth is thus seemingly legally unsustainable. If the myth of settlement cannot be maintained as a matter of law, then

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[49] Tully (n 3) 195.
[50] Ibid 184.
[51] Ibid 1.
[52] *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2016) (*'The Uluru Statement').*
[53] Tully (n 3) 126.
[54] Ibid 99.
[55] See, for example, Henry Reynolds, *Truth Telling* (NewSouth Books, 2021).
[56] Mark Lindley, *The Acquisition and Government of Backward Territory in International Law* (Longmans, Green and Co, 1926).
[57] See discussion in *Mabo* (n 5) [26]-[28] (Brennan J).
[58] Ibid [38].
[59] Ibid [41].

neither can the necessary implication that Britain gained complete sovereign political power over Australia from the time of settlement.[60]

However, whilst this unsustainable paradox might strengthen indigenous sovereign claims through the lens of modern constitutionalism, pluralism recognises that indigenous sovereignties do not hinge on the invalidity of settlement. Pluralism allows recognition of multiple, co-existing sovereignties, and Indigenous sovereignty lives on as a matter of fact and law. As Irene Watson writes, indigenous law "breathes slightly beneath the colonising layers, not asleep nor dying."[61] It continues to hold force over Aboriginal Australians and their lands today. The authority of this law is the land itself, Indigenous Australians' connection with it, and the mutual obligations and rights that this connection entails.[62] Consequently, it cannot be extinguished by any Western constitutional myth. These myths are external impositions that do not go to the foundations of the indigenous sovereignty itself. Hence, the source and force of indigenous sovereignty remains alive in law despite the settler's claim to complete and undiminishable authority. This indigenous sovereignty is expressed in ongoing instances of self-constitution, self-governance, custodianship over Australian lands and waters, and negotiations with the colonial state, from the Yirrkula Bark petitions to the Uluru Statement.[63] Despite attempts of assimilation and cultural destruction, as a matter of fact and law, indigenous sovereignty "co-exists with the sovereignty of the Crown."[64] Shifting lenses from modern constitutionalism to plural sovereignty exposes this truth and provides a means for its recognition.

i) *Non-justiciability*

Considerations of Aboriginal sovereignty have been circumnavigated because the establishment of the colonial state's sovereignty is non-justiciable in domestic courts.[65] It is argued that since colonial sovereignty was established by an act of state within international law, it cannot be challenged in any domestic court whose authority derives from that act.[66]

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[60] Paul Patton, 'Sovereignty, Law and Difference in Australia: After the Mabo Case' (1996) 21(1) *Alternatives: Global, Local, Political* 149, 168.
[61] Watson (n 33) 266.
[62] Christine Black, *The Land is the Source of the Law* (Routledge, 2011).
[63] For a detailed summary and analysis of these expressions of sovereignty, see Laura Rademaker and Tim Rouse, *Indigenous Self-Determination in Australia: Histories and Historiography* (ANU Press, 2020).
[64] '*The Uluru Statement'* (n 52).
[65] *NSW v The Commonwealth* (1975) 135 CLR 337, 388 (Gibbs CJ), cited in *Mabo* (n 5) [31] (Brennan J).
[66] Patton (n 63) summarising *Mabo* (n 5).

Within the language of modern constitutionalism, "the assertion of sovereignty by the British Crown necessarily entailed that there could thereafter be no parallel law-making system… To hold otherwise would be to deny the acquisition of sovereignty."[67] However, the lens of plural sovereignty may overcome this issue. This is because accepting plural sovereignty does not necessarily require questioning the foundations of the settler state. It might simply involve recognising the indigenous sovereignties that "continue parallel" to this state.[68] Once the sovereignties are understood as "negotiable, overlapping and interacting,"[69] recognising indigenous sovereignty does not necessarily entail denying the settler state's acquisition of sovereignty. Indigenous sovereignty is a "spiritual notion,"[70] the type of which the colonial state does not claim within the framework of modern constitutionalism. Therefore, there is space for recognition without displacement. Since accepting co-existing, plural sovereignty means the foundational act of acquisition or its implications need not be questioned, this lens offers a way around the non-justiciability of sovereignty as framed in *Mabo*. This acceptance of plural sovereignty also provides persuasive legal and moral grounds for the court's conclusion in *Love* that Aboriginal Australians cannot be considered aliens. I shall elaborate on this claim in the final section of this essay.

IV Application to *Love*

A Legal grounds

1 *Defining alien*

To understand whether Indigenous Australians can be considered aliens, we must first define what an 'alien' is. In *Love,* the majority held that 'alien' has an ordinary constitutional meaning of someone who does not 'belong' to the Australian community.[71] From this basis of 'belonging,' they argued Indigenous Australians could not possibly be considered aliens. However, in the more recent decision of *Chetcuti v Commonwealth,*[72] a new majority (containing the three dissenting justices in *Love)* returned to the pre-*Love* definition – 'alien'

[67] *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [44] (Gleeson CJ, Gummow and Hayne JJ).
[68] Silverstein (n 33) 78.
[69] Tully (n 3) 201.
[70] '*The Uluru Statement'* (n 55).
[71] *'Love'* (n 1) Ibid [61], [74] (Bell J), [302] (Gordon J) and most clearly at [394] (Edelman J).
[72] [2021] HCA 25 ('*Chetcuti'*).

is to be understood by its antonym, 'citizen.'[73] Whilst the court emphasised that the position of Indigenous Australians did not require reconsideration,[74] the reinstatement of the pre-existing rule has left *Love* "without a principled foundation."[75] The court's redefinition coheres with the criticisms outlined in section I of this response – alienage refers to non-membership of the *political* community, unable to be justified purely by reference to seemingly non-political concepts such as connection with lands and waters. The majority in *Chetcuti* understood there must be something more connecting the individual to the body politic, noting that citizenship is the best manifestation of this link.

2 ***Application to Indigenous Australians***

Even within this limited definition that an alien is a non-citizen, the lens of plural sovereignty may provide a way to recognise the sui generis position of Indigenous Australians. Since granting citizenship is viewed by modern constitutionalism as an exclusive power of the sovereign,[76] accepting plural sovereignty allows multiple forms of citizenship. In this way, citizenship due to indigeneity may become one of many possible expressions of indigenous sovereignty negotiable over time. One might think the court may be reluctant to determine the parameters of indigenous sovereignty, instead preferring to leave this to more classical models of negotiations with the Executive. However, they seemed comfortable to implicitly do so in *Love.* Indeed, the dissent argues in *Love* that this conferral of sovereignty was a direct consequence of the court's original decision to grant elders the power to determine who is indigenous and thus 'belongs' in the Australian political community.[77] Accepting the concept of indigenous citizenship as imagined here has the same implications as in *Love.* However, in my reimagination, this power to determine citizenship is not an unintentional cause of sovereignty but an effect of that sovereignty now recognised under the model of pluralism, thus giving it a more legitimate foundation. I am not suggesting that the court should determine the complete bounds in which this sovereignty can be exercised. Under this essay's understanding of plural sovereignty, these terms may develop over time through 'negotiation' and 'interaction' and would likely best be realised through ongoing treaty

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[73] Ibid [33].
[74] Ibid [34].
[75] Mischa Davenport, 'The Section 51(xix) Aliens Power and a Constitutional Concept of Community Membership' (2021) 43(4) *Sydney Law Review* 589, 602.
[76] Dominic O'Sullivan, *Sharing the Sovereign: Indigenous Peoples, Recognition, Treaties, and the State* (Palgrave Macmillan, 2020) 56.
[77] *'Love'* (n 1) [25] (Kiefel CJ), [125] (Gageler J) and [197] (Keane J).

discussions. All I am arguing is that 'indigenous citizenship' is an example of the exercise of indigenous sovereignty that the court would likely be legally justified in recognising, especially since they already did so in substance if not principle in *Love.*

Importantly, this complementary model of citizenship still justifies membership in the same Australian political community as that created by the typical statutory processes. However, this is a political community not composed of a singular, homogenous people but a diversity of those naturalised by the *Citizenship Act* and Aboriginal Australians whose belonging to the political community is vindicated by alternate criteria. This coheres with Young's vision of differentiated citizenship in pluralist societies.[78] Differentiated citizenship is not divisive but uniting as it engenders universal feelings of belonging.[79] This is impossible within the homogeneity of modern constitutionalism, where those who do not cohere with the hegemonic narrative are assimilated or excluded.[80] Hence, differentiated citizenship does not diminish the cohesiveness of the Australian body politic by creating race-based classes of rights.[81] Rather, it strengthens cohesiveness by recognising and celebrating difference. In this way, accepting plural sovereignty and the associated power to grant citizenship may complement rather than qualify the statutory categories of the colonial state, thereby legally justifying indigenous membership of the political community.

I shall not attempt to definitively outline the relevant legal criteria for this indigenous citizenship here. Doing so would perpetuate the limiting Western understandings of indigenous identity I have condemned throughout this essay. However, one possible ground for such citizenship may be the connection of an Aboriginal Australian with the lands and waters of this country. This argument is more convincing than in the original judgment when viewed through the pluralist lens because, in Aboriginal Australian culture, the land is the source of the law.[82] Consequently, belonging to the land involves a set of mutual rights to use and responsibilities to care for that land,[83] just as being a statutory Australian citizen consists of rights from and duties to the sovereign. Since plural sovereignty creates space for

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[78] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).
[79] Iris Marion Young, 'Polity and group difference: a critique of the ideal of universal citizenship,' in Ronald Beiner, *Theorising Citizenship* (University of New York Press, 1995) 250, 251.
[80] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights,* (Oxford University Press, 1995) 180.
[81] As argued in '*Love'* (n 1) [31] (Kiefel CJ), [126] (Gageler J) and [177] (Keane J).
[82] Black (n 65).
[83] Ibid xii.

indigenous legal perspectives in which connection to the land means connection to the sovereign, connection to lands and waters might become the sufficient link to the polity that ensures indigenous non-alienage that it was not in the majority's reasoning in *Love.*

B Moral grounds

Given that this reimagination is one of an 'ideal world,' these legal arguments must also be morally justified. Notably, my analysis necessarily dismantles the assumption that "the state's view of justice takes moral priority simply because it is the state's view."[84] I argue that my proposed model is more morally desirable than the court's original conception because it promotes two important values of community membership - belonging and consent. All else equal, a community that realises these values is more just than one that does not. A critical reading of *Love* might see the decision as a subtle attempt at assimilation into the colonial order by enforcing unconsented subjecthood on Indigenous Australians who may not feel to 'belong' in the colonial state. As Watson writes, "I never came into the [settler's] constituted order, never invited nor ever consented."[85] Yet under *Love*, there is no space for this resistance as Indigenous peoples become "marginal and reluctant conscripts"[86] into the Australian political community. Consent to live within this order is not asked, merely assumed. Additionally, in *Love,* indigenous peoples are supposed to 'belong' in the Australian political community – indeed, this is the foundation of the judgement. However, if belonging is realised when people "have a say in the formation and governing of the association, and second, see their cultural ways publicly acknowledged and affirmed,"[87] it is unclear that Aboriginal Australians 'belong' in the settler's political order the majority in *Love* conscripts them into. This is a community that has continually attempted to assimilate Aboriginal Australians' cultural ways and refused to listen to their voices, exposed only recently in the resounding failure of the Voice referendum. In this context, the decision in *Love* rings hollow because it fails to realise the core values of belonging and consent that are important in ensuring community membership is a just form of association.

[84] O'Sullivan (n 81) 55.
[85] Watson (n 33) 265.
[86] Tully (n 3) 5.
[87] Tully (n 3) 197.

Contrastingly, belonging and consent are more likely to be cultivated under the imagined vision of plural sovereignty. Firstly, belonging may be facilitated through the public acknowledgement of Indigenous cultural ways implicit in accepting Indigenous Australians' co-existing sovereignty. This acknowledgement continues through an ongoing affirmation of this sovereignty in practice and law. Further fostering belonging is that plural sovereignty allows negotiation about the form of association across time to overcome potential injustice and misrecognition. This contrasts with modern constitutionalism, where Indigenous Australians are forced to submit to whatever the colonial court or government deems appropriate. In turn, this improves the capacity for consent since "consent should always be tailored to the form of mutual recognition of the people involved."[88] Accepting the co-existing validity of multiple constitutional perspectives and languages facilitates mutuality, thereby creating the meeting ground for valid consent to be offered and accepted. Thus, plural sovereignty might provide a more morally as well as legally persuasive rationale for automatic indigenous membership in the Australian political community.

V Conclusion

This essay has argued that plural sovereignty is a lens that might provide stronger legal and moral justifications for the conclusion that Aboriginal Australians cannot be considered 'aliens' than the justifications offered by the majority in *Love.* I first criticised the court's judgment as failing due to the constraints of modern constitutional language and logic. I then contended that it is both legally possible and persuasive to recognise indigenous sovereignties that complement and co-exist with settler sovereignty. I suggested that this plural sovereignty might justify a concept of indigenous citizenship that could provide strong legal grounds for automatic indigenous membership within the Australian political community. This approach also promotes belonging and consent better than the original *Love* judgement. Ultimately, whilst the scope of this essay has been limited to the concept of alienage, its purpose has been to expose the broader possibilities pluralism provides for more just relations between the settler state and Aboriginal Australians. Recognising plural sovereignty may help us achieve 'Makarrata' – the coming together after a struggle.[89] It is in Makarrata that we may walk together towards a better future.[90]

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[88] Tully (n 3) 123.
[89] '*The Uluru Statement'* (n 55).
[90] Ibid.

Word count: 4017 words