

LOSING OUR BIRTHRIGHT: *SINGH v COMMONWEALTH*

ABSTRACT

In this article I argue that in *Singh v Commonwealth* ('*Singh*') the High Court, without good reason, removed the accepted notion that birth in Australia takes a person outside the legislative power granted to the Commonwealth in the aliens and immigration powers. In the article I examine in detail the judgments in *Singh*, especially the claim made in the majority judgments that there were no relevant authorities concerning children of aliens born in Australia. I then examine all the major cases dealing with the aliens power decided before *Singh* and show that, contrary to the majority's claim, there was a longstanding series of authorities that directly and indirectly held that a person born in Australia could not be an alien. I conclude by showing that the High Court has consistently said that previous decisions should only be overturned after serious consideration and for good reasons. This fidelity to authority has been forcefully defended by many High Court judges, including several who decided *Singh*. It was not, however, given effect to in *Singh* and this led to a significant change in one of our most important human rights — the right to call somewhere home.

I INTRODUCTION

In this article I argue that in *Singh v Commonwealth*¹ the High Court of Australia, without good reason, removed the accepted notion that birth in Australia takes a person outside the scope of the Commonwealth's power to legislate for aliens and immigration.²

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¹ (2004) 222 CLR 322 ('*Singh*').

² Section 51 of the *Constitution* provides that:

The [Commonwealth] Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...

(xix) naturalization and aliens; ...

(xxvii) immigration and emigration ...

This article is arranged as follows. First, I note the practice of the High Court in dealing with precedent in constitutional law. I then examine in detail the judgments in *Singh*, especially the claim made in the majority judgments that there were no relevant authorities concerning children of aliens born in Australia. Next, I analyse all the major cases dealing with the aliens power decided before *Singh* and show that, contrary to the majority's claim and in line with the two dissenting judges, there was a longstanding series of authorities that directly and indirectly held that a person born in Australia could not be an alien. At the very least these authorities demanded a considered response rather than the almost flippant assertion made by the majority judges that there were no authorities relevant to the issue before the judges. I conclude by showing that the High Court has consistently said that previous decisions should only be overturned after serious consideration and for good reasons. This fidelity to authority has been forcefully defended by many High Court judges, including several who decided *Singh*. It was not, however, given effect to in *Singh*.

This article is not concerned with the literature surrounding the constitutional significance of citizenship³ nor with the lamentable practice of deporting to their 'home' countries people convicted of criminal offences who arrived here as children.⁴ My concern, rather, is with the legal reasoning adopted by the majority judges in *Singh* and, in particular, their claim that the decisions in this area of law did not provide an answer to the legal question before the Court. This issue has not been the focus of the literature looking specifically at that case.⁵

Contrary to the views of the majority judges in *Singh*, the case law provided a clear answer to the question whether a child born in Australia to parents who were aliens was an alien for the purposes of the aliens power. Suggestions that the issue had not come before the High Court and was thus an open question fundamentally misread the decisions in this area and display a misunderstanding of the way in which precedent has been applied and understood in the High Court.

³ See, eg, Genevieve Ebbeck, 'A Constitutional Concept of Australian Citizenship' (2004) 25 *Adelaide Law Review* 137; Sydney Tilmouth, 'Citizenship as a Constitutional Concept: *Singh v Commonwealth of Australia* and *Rasul v Bush*, *President of the United States*' (2005) 26 *Australian Bar Review* 193; Helen Irving, 'Still Call Australia Home: The *Constitution* and the Citizen's Right of Abode' (2008) 30 *Sydney Law Review* 131; Christopher Tran, 'New Perspectives on Australian Constitutional Citizenship and Constitutional Identity' (2012) 33 *Adelaide Law Review* 199; Sangeetha Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited' (2013) 39 *Monash University Law Review* 568.

⁴ See, eg, Michelle Foster, 'Membership in the Australian Community: *Singh v The Commonwealth* and Its Consequences for Australian Citizenship Law' (2006) 34 *Federal Law Review* 161; Michelle Foster, "'An 'Alien' by the Barest of Threads" — The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33 *Melbourne University Law Review* 483.

⁵ See, eg, Tilmouth, above n 3; Foster, 'Membership in the Australian Community', above n 4.

The majority judges in this case have overturned our understanding of one of the most important rights of Australians, one that was recognised in the very early years of federation, in order to reconfigure the judicial interpretation of the aliens and immigration powers contrary to nearly a century of accepted understanding of what those powers meant.

II PRECEDENT AND THE HIGH COURT

The overwhelming majority of judges from the earliest days of the High Court have shown deference to the notion of *stare decisis*. Of course, all judges have acknowledged that, ultimately, the *Constitution* will trump judicial pronouncements and that the Court is free to overrule previous decisions.⁶ But with very few exceptions,⁷ High Court judges have consistently stated that this power to overrule operates within a system of precedent.⁸ A consistent theme amongst these statements is that a case will only be overruled for good reasons, where important constitutional issues are at stake, and that overruling is not something that is to be done lightly. In *Cole v Whitfield*⁹ the Court (seven justices sitting) made it clear that in ‘the interests of certainty, even in matters of constitutional interpretation, *the Court does not readily discard or depart from settled principle*.’¹⁰ In *Lange v Australian Broadcasting Corporation*,¹¹ another judgment of all seven justices, the following observation was made:

This Court is not bound by its previous decisions. Nor has it laid down any particular rule or rules or set of factors for re-opening the correctness of its decisions. Nevertheless, *the Court should reconsider a previous decision only with great caution and for strong reasons*.¹²

⁶ See, eg, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company* (1914) 18 CLR 54 (‘*Tramways Case*’).

⁷ While there may be others the only examples that I could find were Isaacs J in the *Tramways Case* (1914) 18 CLR 54, 70 and Murphy J in *Queensland v Commonwealth* (1977) 139 CLR 585, 610 (‘*Second Territorial Senators Case*’).

⁸ For some prominent examples throughout the High Court’s history, see *Tramways Case* (1914) 18 CLR 54; *James v Commonwealth* (1935) 52 CLR 570; *Queensland v Commonwealth* (1977) 139 CLR 585; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266; *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311; *Cole v Whitfield* (1988) 165 CLR 360; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 (not a constitutional decision but one which was relied on in subsequent constitutional decisions); *Street v Queensland Bar Association* (1989) 168 CLR 461; *Ha v New South Wales* (1997) 189 CLR 465; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁹ (1988) 165 CLR 360.

¹⁰ *Ibid* 400 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) (emphasis added).

¹¹ (1997) 189 CLR 520.

¹² *Ibid* 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (emphasis added) (citations omitted).

In several cases individual judges and the Court as a whole have indicated that so strong is the pull of precedent that preferred interpretations of the *Constitution* can be overridden by established precedent.¹³ There are, of course, contrasting views on what constitutes precedent and how a relevant precedent is to be identified. Sir Owen Dixon's practice and belief in these areas provide an example that would be persuasive to many in the legal profession.¹⁴

Dixon clearly saw the judicial role as bounded and believed that the rules and principles of the law acted as a restraint on judges and limited their capacity to decide cases other than on what might be called legal grounds. He was not, however, a 'dreamer', to use Hart's term.¹⁵ He did not see judging as a form of divination with judges merely declaring an already existing law. Neither did he believe in any form of mechanical jurisprudence with a judge's role being equivalent to an umpire who merely applies rules and does not create them.¹⁶ Dixon accepted that there was a creative aspect to strict legalism but that it was a *bounded* creativity far removed from the actions of political actors. This creative role was driven by the ultimate impossibility of mastering the untidy, sometimes incoherent and often contradictory mass of cases and principles that made up the common law. Dixon also recognised the limited capacity of any one individual to master this unruly mass of cases and principles and of being able to identify the ensuing legal consequences of any particular ruling. Dixon preferred to rely on the arguments of counsel raised in the context of concrete disputes and avoided the temptation of deciding that which had not been the subject of argument or was not necessary for the resolution of the dispute before the court.¹⁷

¹³ See, eg, *James v Commonwealth* (1935) 52 CLR 570, 593 (Dixon J), 603 (Evatt and McTiernan JJ); *Queensland v Commonwealth* (1977) 139 CLR 585, 597–601 (Gibbs J), 603 (Stephen J); *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 38–9 (McHugh J). For the Court, see *Cole v Whitfield* (1988) 165 CLR 360, 400 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

¹⁴ But not for Justice Kirby who has argued for a more freewheeling approach to precedent and legal reasoning in general: see, eg, Justice Michael Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet and Maxwell, 2004) <http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Judicial_Activism.pdf>.

¹⁵ H L A Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream' (1977) 11 *Georgia Law Review* 969.

¹⁶ This was the analogy made by the soon to be Chief Justice of the United States Supreme Court, John Roberts, in his confirmation hearing before the United States Senate in 2005: Charles Babington and Jo Becker, "'Judges Are Not Politicians,' Roberts Says", *The Washington Post* (online), 13 September 2005 <<http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091200642.html>>.

¹⁷ See, eg, *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 480–1 (Dixon J); *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1935) 53 CLR 618, 637 (Rich, Dixon, Evatt and McTiernan JJ); *Ballas v Theophilus [No 2]* (1957) 98 CLR 193, 195 (Dixon CJ), cf 207, 209 (Williams J); *Cooper v Ungar* (1958) 100 CLR 510, 516 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ); *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co*

Dixon accepted that the answers to legal problems before the courts were not as certain as mathematical proofs. The common law method of interpreting and applying cases and the principles to be derived from them helped judges to find and develop the law, but this method and these principles could not always provide clear answers. The common law method was not an exact science and this meant that not every judge would or could come to the same answer. This in turn also meant that the answers given by any one judge could and should be analysed to see if they did comport best with the existing materials.¹⁸

Once common law legal reasoning is understood in this fashion it becomes apparent that it is inevitably provisional. There can be no absolutely right answer to contested legal issues because reasonable practitioners of that method can and do vary in applying their understanding of a vast and unruly body of legal rules and principles to an essentially infinite set of fact situations. Indeed, given the immensity of the legal materials it is unrealistic to expect judges to have a mastery of the law. There are just too many rules and doctrines with too many competing lines of authority (as well as inconsistencies) for the law to be reduced to the equivalent of an algorithm.¹⁹ Because of this, common law judging is best seen as a craft tradition rather than a rigorous intellectual discipline along the lines of, say, philosophy or mathematics. The sheer mass of unruly precedents and the relentless need to decide cases expeditiously mean that judges do not have the time and freedom accorded to university academics to try to solve problems perfectly, irrespective of the time and effort needed.

Nevertheless, Dixon believed that despite these inescapable hurdles the judges were expected, as far as is humanly possible, to be faithful to the common law tradition, and their reasoning and decision-making should not be understood as giving licence to freewheeling choice and innovation.²⁰

In other words, by anchoring a judge's reasoning to that of his or her predecessors one avoids the law becoming the personal plaything of individual judges. Reasoning *from* these authorities is central and can be contrasted to an opportunistic use of the authorities to support positions chosen on other grounds. This reasoning should not, of course, take the form of pettifogging or Jesuitical casuistry but should acknowledge the spirit and not just the letter of the law contained in previous decisions. It should not take the transparently cynical form attested to in the following anecdote, proffered by Chief Judge Cuthbert Pound of the New York Court of Appeals:

(1958) 100 CLR 644, 653 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ); *Hall v Busst* (1960) 104 CLR 206, 215–17 (Dixon CJ), cf 220–3 (Fullagar J), 231–5 (Menzies J); *South Australia v Commonwealth* (1962) 108 CLR 130, 146–7 (Dixon CJ), cf 148–9 (McTiernan J).

¹⁸ Sir Owen Dixon, 'Concerning Judicial Method' in Judge Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (Lawbook, 1965) 152, 157–8.

¹⁹ As Brian Tamanaha has shown, judges have accepted this and have been open about it for a very long time: see Brian Z Tamanaha, 'The Realism of Judges Past and Present' (2009) 57 *Cleveland State Law Review* 77.

²⁰ Dixon, above n 18, 158.

No two cases are exactly alike. A young attorney found two opinions in the New York Reports where the facts seemed identical although the law was in conflict, but an older and more experienced attorney pointed out to him that the names of the parties were different.²¹

It is the argument of this article that the claim by the majority judges that no earlier decisions of the High Court determined the particular question before the Court in *Singh* is far removed from Dixon's understanding of precedent and sails perilously close to that parodied by Chief Judge Pound.

III *SINGH* — THE FACTS AND DECISION

The plaintiff, Tania Singh, was born in Mildura, Victoria on 5 February 1998. Her parents, Indian citizens born in India, were neither Australian citizens nor permanent residents of Australia. They had come to Australia on a Business (Short Stay) visa (subclass 456) in April 1997 and when that visa expired in July 1997 the plaintiff's father had lodged an application for a protection visa claiming refugee status for himself and his family. The family had not departed from Australia since their arrival. The application for a protection visa was denied and proceedings challenging that decision had not been determined by the hearing of the plaintiff's case. That case was argued on the basis that Tania Singh had Indian citizenship through descent from her parents although Kirby J questioned whether this was true.²²

Section 10(2) of the *Australian Citizenship Act 1948* (Cth) (*'Australian Citizenship Act'*) provided that a person born in Australia after 20 August 1986 should be an Australian citizen by virtue of that birth only if a parent of the person was, at the time of that birth, an Australian citizen or permanent resident, or if the person had been ordinarily resident in Australia for 10 years commencing on the date of birth. By operation of this section the plaintiff was not an Australian citizen. The plaintiff commenced proceedings for a declaration that s 10(2) was beyond power to the extent that it required 10 years' residence from birth in Australia before citizenship would be recognised, a declaration that she was an Australian citizen by virtue of birth in Australia and an order restraining the relevant Minister from removing or causing to remove the plaintiff from Australia.

The Court by a majority of 5:2 (Gleeson CJ; Gummow, Hayne and Heydon JJ in a joint judgment; and Kirby J; McHugh and Callinan JJ dissenting) refused the claim for the declarations and an order restraining the Minister from removing the plaintiff from Australia. The majority decided in the following ways.

²¹ Chief Judge Cuthbert W Pound, 'American Law Institute Speech of Judge Pound' (1933) 5 *New York State Bar Association Bulletin* 265, 267, quoted in Robert A Leflar (ed), *Appellate Judicial Opinions* (West Publishing, 1974) 140–1.

²² *Singh* (2004) 222 CLR 322, 401.

Chief Justice Gleeson took it as axiomatic that a court, and especially the High Court, did not operate in a vacuum and was affected by the past.²³ But he added that '[c]hanging times, and new problems, may require the Court to explore the potential inherent in the meaning of the words, applying established techniques of legal interpretation.'²⁴ According to Gleeson CJ historical context was an inevitable, indeed, often necessary aid for the Court's task of finding the meaning of words in the *Constitution*.²⁵ For Gleeson CJ the meaning of 'aliens' in the *Constitution* as informed by the context surrounding the formation of that *Constitution* did not exclude from its meaning someone born in Australia in Tania Singh's position.²⁶

Chief Justice Gleeson's judgment is noteworthy for the fact that it did not deal in any substantive manner with the existing authorities on s 51(xix) of the *Constitution*. It appears that he assumed that previous decisions of the Court did not either govern the present litigation or that he found no useful legal reasoning there to guide him in his decision. It is clear that his interest was not in the authorities dealing with the meaning of 'aliens' but, rather, with a historical argument about what he thought the word meant in 1900, irrespective of what the High Court had decided about this since that date.

According to Gummow, Hayne and Heydon JJ 'aliens' did not have at the time of federation a fixed legal meaning ascertainable by reference to the common law but had a meaning that reflected changes in legal thought in Europe and England.²⁷ These changes meant that a 'central characteristic of the status of "alien" is, and always has been, owing obligations to a sovereign power other than the sovereign power in question.'²⁸ For Tania Singh this had the effect of rendering her an alien for the purposes of the *Constitution* with the result that the legislation in question was within power. Of the effect of previous decisions of the Court these judges said:

The previous decisions of the Court do not require the conclusion that those born within Australia who, having foreign nationality by descent, owe obligations to a sovereign power other than Australia are beyond the reach of the naturalisation and aliens power.²⁹

²³ Ibid 331.

²⁴ Ibid 335.

²⁵ Ibid 338.

²⁶ Ibid 341. Section 51(xix) of the *Constitution* provides that: 'The [Commonwealth] Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... naturalization and aliens'.

²⁷ *Singh* (2004) 222 CLR 322, 384.

²⁸ Ibid 383.

²⁹ Ibid 399.

Such a perfunctory ‘examination’ of the authorities makes it clear that for these judges as well, the historical argument about what they thought the word meant in 1900 loomed far larger in their minds than what the High Court had decided about the meaning of ‘alien’ more than 100 years since federation.

The remaining majority justice, Kirby J, took a different approach to the other majority judges, but came to the same conclusion that Tania Singh was an alien for the purposes of the *Constitution* and, therefore, the legislation in question was within the Commonwealth’s legislative power under s 51(xix).³⁰ For Kirby J the meaning of ‘alien’, ‘like every other word in the *Constitution*, is not frozen in whatever meaning it may have had in 1901.’³¹ While regard might be had to the framers’ intentions, theirs was not and should not be the final word on the meaning of the *Constitution*.³² Since Kirby J understood the legal position in 1900 as divided between those who favoured nationality by birth and that by descent, he believed it unwise to forever limit the federal Parliament to one of these understandings. This meant, in practice, that he favoured an interpretation that would allow the Commonwealth Parliament the greatest leeway possible in dealing with aliens.³³

Justice Kirby, too, did not think that previous cases on the aliens power constrained him:

In proof of the deeply entrenched notion of a ‘birthright’, deriving from birth on Australian soil, the plaintiff pointed to numerous judicial observations about the constitutional idea of alienage in terms excluding persons born in Australia. ... It was conceded that these references were not essential to the decisions then in question. In none of the cases was the person concerned born in Australia. The problem now presenting was therefore not specifically addressed.³⁴

Justice McHugh, in dissent, stated that the *Constitution* was framed within a legal context that meant that a person born in Australia (with three exceptions not relevant

³⁰ Ibid 419.

³¹ Ibid 412.

³² Ibid 412–13.

³³ Ibid 414–15.

³⁴ Ibid 408 (citations omitted). Needless to say, any such concession by Singh’s counsel could not, when the very questions before the Court were whether or not she was an alien and whether the aliens power supported the legislation pursuant to which she was to be deported, mean that the judges could ignore previous cases which, as this article will show, should have led to the finding that Singh was not an alien and that the Act in question, insofar as it treated her as if she were, could not be valid. After all, as the High Court has made clear in its discussion of precedent (see above n 6 and accompanying text), its ultimate allegiance is to the *Constitution*, and not to the concessions made by counsel about the meaning of a constitutional provision.

to Tania Singh)³⁵ could not be an alien for the purposes of the *Constitution*.³⁶ His analysis of the case law, going back to *Potter v Minahan*³⁷ in 1908 to the then present, showed that the authorities made it clear that someone born in Australia (with the same three exceptions mentioned above) could not be an alien for the purposes of the *Constitution*.³⁸

Justice Callinan agreed that Tania Singh was not an alien for the purposes of the *Constitution*:

The conclusion that I have reached accords with the view that prevailed at the Federal Convention in 1898. It gives rise to a clear and certain rule. That rule has existed for hundreds of years. ... It is not inconsistent with any majority holdings of this Court. It falls squarely within the language of Gibbs CJ in *Pochi v Macphee*, and McHugh J in *Re Patterson; Ex parte Taylor*.³⁹

Thus, for Callinan J both the context in 1900 and High Court authority affirmed that Tania Singh, a person born in Australia of non-Australian parents, was not an alien.

To sum up, the majority judges in *Singh* simply asserted that there were no binding authorities on the general question of whether a person born in Australia could be an alien, in contrast to the dissenting judges who discussed and followed the authorities on that very point. Were the majority correct in their understanding of the authorities dealing with the aliens power?

IV THE ALIENS POWER BEFORE *POCHI V MACPHEE*⁴⁰

In *Robtelmes v Brennan*⁴¹ the High Court upheld the Commonwealth's right to expel the appellant, a Kanaka brought to Australia, but did not define the term 'alien' as it was apparent that since the appellant was born outside Australia and had not been naturalised, he was an alien.⁴² So, from early on it was clear that someone

³⁵ The three exceptions are as follows: (1) any person whose father was an enemy alien and who was born within a part of the British dominions that at the time of the person's birth was in hostile occupation; (2) any person born within British dominions whose father was an alien and, at the time of the person's birth, was an ambassador or other diplomatic agent accredited to the Crown by the sovereign of a foreign state; and (3) a child of a foreign sovereign born within British dominions: *ibid* 365–6.

³⁶ *Ibid* 350–66.

³⁷ (1908) 7 CLR 277 ('*Potter*').

³⁸ *Singh* (2004) 222 CLR 322, 368–75 (McHugh J).

³⁹ *Ibid* 437 (citations omitted). *Pochi v Macphee* was decided in 1982 and *Re Patterson; Ex parte Taylor* was decided in 2001.

⁴⁰ (1982) 151 CLR 101 ('*Pochi*').

⁴¹ (1906) 4 CLR 395.

⁴² *Ibid* 405 (Griffith CJ), 415 (Barton J), 418, 421–2 (O'Connor J).

born outside of Australia and not of Australian parentage was an alien. But what of someone born in Australia?

In *Potter*⁴³ the defendant Minahan was charged with being an immigrant who had failed a dictation test within one year of his arrival in Australia. Minahan was born in Australia in 1876 of an Australian mother and a Chinese father. He was taken by his father to China aged five but returned to Australia after federation. He did not speak any English.

Potter was a case involving, directly, the immigration power (s 51(xxvii)) but the analysis in the case so relies on birth in Australia and its consequences that to say that the case has no bearing on the aliens power (s 51(xix)) is misconceived and unpersuasive.⁴⁴ It is important to note the relationship between the immigration and aliens powers. It might seem redundant to have two powers that seem to overlap but an appreciation of the consequences of being a part of the British Empire helps to explain why this choice was made. Both powers were included in the *Constitution* because the founders wanted to give the Commonwealth Parliament the power to restrict entry into Australia of the many millions of non-European peoples who could not be classed as aliens because they were subjects of the British Crown. The immigration power was included in the *Constitution* because a power over aliens would not have allowed the Commonwealth Parliament to pass laws that were aimed, for clearly racist reasons, at excluding British subjects who were non-Europeans from entering or remaining in Australia. The interrelationship of the aliens and immigration powers means that to understand either, both have to be examined. Similarly, the decline of the Imperial nature of British subjecthood and the concomitant rise of Australian nationality had an effect on both powers with the result that the immigration power has now declined in importance and the aliens power is now used in a way that would have been possible if Australia had become a fully independent nation in 1901 and had not been part of the British Empire. In other words, the aliens power now operates in a way that it would have operated at the time of *Potter*, if at that time Australia had not been part of the British Empire.⁴⁵ Thus, the reasoning in *Potter* is as applicable to explain the aliens power as it is to the immigration power.

For Griffith CJ birth, not domicile or nationality, was central to the resolution of the case:

every person becomes at birth a member of the community into which he is born, and is entitled to remain in it until excluded by some competent authority. It follows also that every human being (unless outlawed) is a member of some community, and is entitled to regard the part of the earth occupied by that

⁴³ (1908) 7 CLR 277.

⁴⁴ This is the position of the majority in *Singh*, who stated that there were no binding precedents on the matter of birth in Australia and the status of alienage. See also Tilmouth, above n 3, 203, who argues that '*Singh* is also perhaps difficult to reconcile with the earlier case of *Potter v Minahan*'. See also Irving, above n 3, 139.

⁴⁵ For a more detailed discussion about this point, see Pillai, above n 3, 581–3.

community as a place to which he may resort when he thinks fit. ... At birth he is, in general, entitled to remain in the place where he is born. ... If his parents are then domiciled in some other place, he perhaps acquires a right to go to and remain in that place. But, until the right to remain in or return to his place of birth is lost, it must continue, and he is entitled to regard himself as a member of the community which occupies that place. These principles are self-evident, and do not need the support of authority.⁴⁶

The reasoning here is straightforward. Minahan was an Australian and therefore not an alien, which meant his return to Australia was not an act of migration, which in turn meant that the immigration power could not apply to him. Understood in this fashion Minahan's birth in Australia and the legal consequences attaching to that birth are central to Griffith CJ's reasoning and cannot be classified as obiter dicta. His decision *depends* on his analysis of the effect of Minahan's birth in Australia. It is difficult, or more accurately impossible, to see a person who is a member of the Australian community as an alien and Griffith CJ's reasoning reflects this very view.

For Barton J the immigration power clearly allowed the Commonwealth Parliament to prohibit the entry into Australia of an immigrant. However, this did not extend to Australian-born subjects of the King:

I very much doubt whether there is any right to impose [restrictions on entry and egress] on those who may be termed in one sense its own nationals, who at birth were part of its self-governing community, and whose liberty in the regard mentioned is a birthright.⁴⁷

Thus, for Barton J, too, the fact of birth in Australia meant that Minahan was not within the immigration power because he was a member of the Australian community (and hence, as explained above, not an alien). As with Griffith CJ the effect of birth in Australia was central to Barton J's reasoning and decision.

Similar sentiments were expressed by O'Connor J:

A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves ...⁴⁸

As with Griffith CJ and Barton J birth was central to O'Connor J's understanding of immigration. Minahan did not come within the operation of the *Immigration Restriction Act 1901* (Cth) because as a native-born Australian he was not immigrating to Australia when he returned after a sojourn overseas. After all, if Australians were not immigrating to Australia when they returned to the country, immigration must

⁴⁶ *Potter* (1908) 7 CLR 277, 289.

⁴⁷ *Ibid* 294 (Barton J).

⁴⁸ *Ibid* 305.

have been an action of non-Australians, which in 1908 meant aliens and non-alien, non-Australian British subjects. By the 1980s the definition of non-Australians had been simplified to mean just aliens because the previously existing distinction between aliens and non-Australian British subjects had disappeared and all non-Australians were aliens for constitutional purposes.

Neither of the dissenting judges, Isaacs J nor Higgins J, was prepared to accept that birth in Australia *by itself* had the effect of removing Minahan from the operation of the Act. In other words, the mere fact of birth in Australia did not mean that Minahan could not be an immigrant.⁴⁹

Potter is a 3:2 decision that decisively determines that birth in Australia removed Minahan from the operation of the immigration power in the *Constitution*. Given that the immigration power was introduced into the *Constitution* to remedy the fact that the aliens power would not, then, allow the Commonwealth to deny entry to millions of people not born in Australia, it is easy to see that the immigration power was *wider* in reach than the aliens power — at that time. If birth in Australia took a person outside of the immigration power it would similarly take him or her outside the aliens power.⁵⁰

It should be noted that the significance of birth for the majority judges, at least,⁵¹ in *Potter* occurred in a legal climate where there were competing views surrounding birth and descent as determinants of alienage in the common law and civil law traditions.⁵² The emphatic nature of the discussion in the majority judgments surrounding birth in *Potter* makes it clear that for those majority judges, they accepted that birth, not descent, was the test for alienage in the *Constitution*. For the majority judges in *Potter* the descent of Minahan was not important. That renders irrelevant any suggestion that a significant point of difference between *Potter* and *Singh* is that Minahan had at least one parent who was a British subject, which was not the case for *Singh*. The reliance on the common law test of birth rather than descent makes that difference immaterial. It would only be relevant if *Potter* were held to have been decided wrongly and it is the argument of this article that it was not and that it was an authority that the majority in *Singh* misread and failed to treat seriously.

In *R v Macfarlane; Ex parte O'Flanagan*⁵³ the plaintiffs, O'Flanagan and O'Kelly, defended a deportation order made after their arrest for seditious activity. Both were British subjects born in Ireland who had arrived in Australia in March 1923

⁴⁹ Ibid 308 (Isaacs J), 320–1 (Higgins J).

⁵⁰ Sangeetha Pillai does not think that birth was central to the decision in *Potter* but, in the face of such explicit comments that it is by the three majority judges, it is difficult to agree with her conclusion: see Pillai, above n 3, 582.

⁵¹ Justice McHugh in *Singh* stated that birth was central to all five judges' reasoning in *Potter*: *Singh* (2004) 222 CLR 322, 342.

⁵² Ibid 340–1 (Gleeson CJ), 350–1 (McHugh J), 391 (Gummow, Hayne and Heydon JJ), 413–14 (Kirby J), 437 (Callinan J).

⁵³ (1923) 32 CLR 518.

and were arrested within a month. Both argued that s 8A of the *Immigration Act 1920* (Cth) was beyond power. A majority of the High Court (Knox CJ, Isaacs, Rich and Starke JJ, Higgins J doubtful) found the section within power. All the majority judges, except Starke J, accepted that birth in Australia took a person outside the immigration power.⁵⁴ Justice Isaacs noted that the immigration power had to have an extensive reach given the ‘huge gap’ left by the aliens power, which did not cover British subjects from outside Britain.⁵⁵ As suggested above, until the growth in the notion of Australian citizenship and the recognition of British subjects as aliens later in the 20th century, it made no sense to read the immigration and aliens powers apart. To understand who was an alien reference had to be made to decisions of the High Court in both the immigration and aliens powers. Justice Starke differed from the majority and explicitly endorsed Isaacs J’s view in *Potter* that birth was not determinative of alien status for the purposes of the *Constitution*.⁵⁶ However, Starke J did not acknowledge that Isaacs J was in clear dissent in *Potter*.

In *Donohoe v Wong Sau*⁵⁷ the defendant was born in Australia of a naturalised, Chinese-born father and a Chinese mother. She went to China at age six and remained there until shortly after her marriage to a Chinese resident in Australia and returned to Australia in 1924. After her arrival in Australia she failed a dictation test and was convicted and imprisoned for six months. Her conviction was quashed on appeal and the informant, Donohoe, appealed to the High Court. In deciding whether Wong Sau was an immigrant for the purposes of the *Immigration Act 1920* (Cth), the Court held that she was⁵⁸ but then also raised questions about the effect of *Potter*. Without mentioning *Potter* Knox CJ stated that the ‘mere fact’ of being born in Australia did not prevent a person being an immigrant if after an absence she wishes to return here.⁵⁹ This is hardly convincing legal reasoning as *Potter* stood for the opposite principle. Justice Isaacs repeated his formulations in *Potter*, stating that ‘some doubt has been suggested as to the meaning of that case’.⁶⁰ What those doubts were and why this meant that *Potter* was not to be treated as binding authority was not explained. Justice Higgins agreed with Knox CJ and Isaacs J but tried to distinguish *Potter* on the grounds that Minahan’s father had taken the child’s birth certificate to China with the child and Minahan’s mother was European.⁶¹ The salience of these points was not explained. Justice Rich stated that Wong Sau was not a member of the Australian community when she returned to Australia⁶² but he did not explain why and neither did he discuss *Potter*. Finally, Starke J agreed that the appeal should be

⁵⁴ Ibid 531 (Knox CJ), 555 (Isaacs J), 575 (Higgins J), 578 (Rich J).

⁵⁵ Ibid 556.

⁵⁶ Ibid 580.

⁵⁷ (1925) 36 CLR 404 (*‘Donohoe’*).

⁵⁸ Ibid 407 (Knox CJ), 407–8 (Isaacs J), 409 (Higgins J), 409 (Rich J), 409 (Starke J).

⁵⁹ Ibid 407.

⁶⁰ Ibid 407–8.

⁶¹ Ibid 409.

⁶² Ibid.

allowed but did not give reasons.⁶³ *Donohoe* rests very uneasily with *Potter* and in the absence of any clear and convincing reasons provides an unsatisfactory challenge to the authority of the earlier case.

In *Ex parte Walsh; Re Yates*⁶⁴ the High Court had to consider a deportation order made against two unionists who had been born outside of Australia — Walsh had been born in Ireland but had come to Victoria before federation while Johnson came to live in Australia in 1910. Both had made their homes in Australia. The Court held for varying reasons that the two could not be deported from Australia. Since neither was born in Australia the case is not directly relevant to the problem raised in *Singh* but the judgment of Higgins J is noteworthy. He described the effect of *Potter* as follows:

All the five members of the Bench agreed on the major premiss — that persons who are already members of the Australian community are not subject to immigration laws. The only difference was that the majority thought that Minahan was necessarily a member of the Australian community by reason of birth in Australia; whereas the minority thought that he had ceased to be a member [by moving to China to live].⁶⁵

This recognition of the basis of the decision and of the authoritative status of *Potter* by one of the judges in the *minority* in that very case should not be ignored.

The state of the authorities on the eve of World War II was that in *Potter* there was a clear, if narrow, majority for the proposition that someone born in Australia did not come within the reach of the immigration power. As I have explained above, because of Australia's position in the British Empire, the immigration power had to do the heavy lifting as reliance on the aliens power would not have allowed the Commonwealth government to implement and carry out immigration policies designed to keep out non-European British subjects. So if, as in *Potter*, the person in question was outside the immigration power because of his or her birth in Australia, he or she would also have been outside the aliens power. Subsequent cases had, in the main, supported this decision and those few that had not were poorly reasoned.

The first major case involving the aliens power after World War II was *O'Keefe v Calwell*⁶⁶ in 1949. O'Keefe was born in the then Dutch East Indies and was a Dutch national. She was evacuated to Australia after the Japanese invasion and married an Australian citizen and became a British subject. The government wished to deport her as a prohibited immigrant pursuant to s 4 of the *Immigration Act 1940* (Cth) and O'Keefe sought an injunction against the responsible Minister. The High Court (Rich, McTiernan, Williams and Webb JJ; Latham CJ and Dixon J dissenting) found that O'Keefe did not come within the terms of the Act. On the constitutional issue of

⁶³ Ibid.

⁶⁴ (1925) 37 CLR 36 ('*Ex parte Walsh*').

⁶⁵ Ibid 111 (Higgins J).

⁶⁶ (1949) 77 CLR 261.

whether the Commonwealth could have validly passed the law all the judges except Rich and Webb JJ (who did not consider the issue) accepted that the Commonwealth had power to deport persons who had immigrated and not become members of the Australian community.⁶⁷ On the latter point Latham CJ observed that '[a] person who is a member of the Australian community cannot be a prohibited immigrant because he, when returning to Australia, is not an immigrant: see *Potter v Minahan* ... and *Ex parte Walsh and Johnson*; *In re Yates* ...'⁶⁸

In *Ex parte Walsh* the applicants were not born in Australia but were considered to have been absorbed in Australia. But in *Potter Minahan* was born in Australia and the majority decided that this made him Australian and outside the scope of the immigration power (and, for the reasons explained above, the aliens power).

*Koon Wing Lau v Calwell*⁶⁹ involved habeas corpus writs by five persons who were being held before deportation. The plaintiffs were Chinese persons who had come to Australia as wartime refugees and now wanted to remain in Australia. Several had left Australia and returned before the deportation orders were made. On a claim that the legislation authorising the deportation was invalid the Court (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ) found against the plaintiffs and in favour of validity. Three of these judges, Rich, Dixon and Williams JJ, decided the actions by relying on the undoubted power of the Commonwealth to legislate for immigrants who had not become absorbed into the Australian community⁷⁰ — thus not raising the issue raised by *Singh*.

The other three judges ranged more widely and considered the aliens power as well. On *Potter* Latham CJ (with whom McTiernan and Webb JJ concurred)⁷¹ had the following to say:

It is argued that *Potter v Minahan* decided that any person who established a permanent home in Australia could never thereafter lawfully be treated as an immigrant into Australia. But in fact the decision in *Potter v Minahan* related only to a person born in Australia who was *returning to his home* in Australia. He did not enter Australia originally as an immigrant — he was born here. Such a person upon birth becomes a member of the community and, if he has not abandoned such membership, and after a temporary absence comes back to the community to which he already belongs, he is not an immigrant into that community.⁷²

What is important to note here is that the three judges who felt it necessary to consider *Potter* made it quite clear that birth in Australia removed a person from the reach of

⁶⁷ Ibid 277 (Latham CJ), 287–8 (Dixon J), 290 (McTiernan J), 294 (Williams J).

⁶⁸ Ibid 280 (citations omitted). See also Dixon J's observation to the same effect: at 287. (1949) 80 CLR 533.

⁶⁹ Ibid 569–70 (Rich J), 577 (Dixon J), 587–8 (Williams J).

⁷¹ Ibid 583 (McTiernan J), 593 (Webb J).

⁷² Ibid 563 (emphasis in original) (citations omitted).

the immigration and aliens powers unless that person had abandoned membership of the Australian community — the reference to being a member of the Australian community is difficult to understand unless it means that someone born in Australia is not an alien. It cannot be said that Tania Singh had done anything to abandon the Australian community before her case came to the High Court.

*Wong Man On v Commonwealth*⁷³ involved a claim by the plaintiff that, as a person born in New Guinea in 1916, which was then German territory occupied by British forces, he was a British subject and not an alien subject to deportation. Justice Fullagar, before whom the action was heard, held that a person born of alien parents in enemy territory conquered and occupied during the course of war was not a British subject and therefore an alien.⁷⁴ What is significant about this decision is Fullagar J's detailed analysis of the difference between annexation or cession or subjugation on the one hand and military conquest and occupation on the other hand for the purposes of determining if a person born on the land was an alien. This discussion is important because it is based on the assumption that place of birth rather than the allegiance of the parents, all other things being equal, was what determined alienage. This, of course, is entirely consistent with the majority judgments in *Potter*.

To sum up, of cases after World War II before *Pochi*, where the aliens power was at issue or where it formed part of the reasoning of the judges, almost all the judges accepted that birth in Australia meant that a person was *outside* the legislative power of the Commonwealth to deal with aliens. No case challenged *Potter* on this issue. This was to continue until *Singh*.

V *POCHI* AND THE ALIENS POWER BEFORE *SINGH*

Pochi was the first of a series of cases that examined the scope of the aliens power in the context of the growth of the notion of Australian citizenship and the reduced significance of the status of British subject to Australian citizens. This changing relationship was to cause the High Court some difficulties as it tried to craft a suitable date to mark when British subjects were no longer automatically considered part of the Australian community. In *Pochi* the plaintiff, Luigi Pochi, had been born in Italy in 1939, had come to Australia in 1959, married here and had become absorbed into the Australian community. In September 1974 he had applied for a grant of Australian citizenship, which was approved by the relevant authorities. However, he was not notified of this and, as a consequence, had not taken an oath or affirmation as required by the *Australian Citizenship Act* and had not been granted a certificate of citizenship. In 1977 Pochi was convicted of supplying Indian hemp contrary to New South Wales law and in 1978 the Minister for Immigration ordered his deportation. The plaintiff's 'highly technical argument'⁷⁵ was that the *Australian Citizenship Act* had the effect that at the time of the deportation order some persons who were in fact

⁷³ (1952) 86 CLR 125.

⁷⁴ *Ibid* 130–1.

⁷⁵ *Pochi* (1982) 151 CLR 101, 107 (Gibbs CJ).

British subjects did not have this status under that Act and were therefore aliens for the purposes of the *Migration Act 1958* (Cth) (*'Migration Act'*). Pochi did not come within the range of persons so affected but the *Migration Act* extended to persons who were and because, according to the plaintiff, the relevant provisions could not be severed it was argued that they were invalid because such British subjects could not be aliens. This would have made the deportation order invalid.

As Gibbs CJ acknowledged, an answer to this argument required an understanding of the status of a British subject in Australian law and the scope of the aliens power at a time when the relationship between British subjects and the constitutional notion of aliens was being reconfigured. Of the former Gibbs CJ said:

At the time of federation, the status of British subjects was governed mainly by the common law, which applied in both England and the Australian colonies ... The rule of the common law was stated by Blackstone ... as follows: 'Natural-born subjects are such as are born within the dominions of the crown of England ...'⁷⁶

As seen above, the majority in *Singh* neither agreed with this analysis nor saw it as expressing binding authority. On the scope of the aliens power and how this affected the plaintiff's argument Gibbs CJ had the following to say:

This argument proceeds on the assumption that any person who is a British subject under the law of the United Kingdom cannot be an alien within s 51(xix). That assumption is incorrect. ... If English law governed the question who are aliens within s 51(xix), almost all Australian citizens, born in Australia, would in future be aliens within that provision. The absurdity of such a result would be manifest. The meaning of 'aliens' in the *Constitution* cannot depend on the law of England. It must depend on the law of Australia. It is true that s 51(xix) presents some difficulties. Clearly the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word. This question was not fully explored in the present case, and it is unnecessary to deal with it. *However, the Parliament can in my opinion treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has been naturalized as an Australian.* The plaintiff's argument is based on a false assumption and must fail.⁷⁷

As Gibbs CJ makes clear in this extract and in the rest of his judgment, the definition of 'alien' was *central* to his analysis of the plaintiff's submission. It is a definition that is entirely consistent with the majority's understanding in *Potter* of the effect of birth in Australia on a person's membership of the Australian community.

As noted above, the majority judges in *Singh* understood *Pochi* as only deciding that a person born outside of Australia, except for some exceptions not relevant to the

⁷⁶ Ibid 107–8.

⁷⁷ Ibid 109–10 (emphasis added).

plaintiff Pochi, was an alien and that because the status of a person born in Australia did not arise in that case, *Pochi's* ratio decidendi did not include the proposition that birth in Australia removed a person from the reach of the aliens power.⁷⁸ However, this view is a misreading of *Pochi*. As Gibbs CJ made clear, Pochi's argument did not deal directly with whether or not he was an alien although Gibbs CJ seemingly accepted that Pochi was an alien.⁷⁹ Rather, Pochi's argument was that the *Migration Act* in its general provisions treated as aliens British subjects who were not and could not be aliens under the *Constitution* and that because these provisions could not be severed the Act was invalid — having the effect that it would not then apply to Pochi. In other words, the attack on the Act was not directly relevant to Pochi and it was the indirect effect of the decision (and the judges' reasoning to come to that decision) that affected Pochi. *Pochi* was not a decision on whether or not Pochi was an alien; rather, it dealt with the fundamental issue of whether or not British subjects could be aliens for the purposes of s 51(xix) and the answer to that question involved a *general* discussion about what constituted an alien in the *Constitution*. That discussion had to be general because the position of British subjects in Australia went to the very heart of what it meant to be Australian, politically, socially and, most crucially, constitutionally. Chief Justice Gibbs' definition of what constituted an alien was not aimed at deciding whether or not Pochi was an alien but, instead, had the purpose of describing what constituted alienage in order to answer the precise question about the validity of the *Migration Act* before the Court.

At the same time, while his definition was general, it could not be comprehensive. Chief Justice Gibbs recognised that one aspect of his definition was incomplete — what was the position of overseas-born British subjects in Australia and, in particular, if they could be aliens at what date did this occur? It is clear that Gibbs CJ would not be willing to accept the reach of the aliens power as merely reflecting the definition given in Commonwealth legislation. In *Pochi* the legislation in question dealt with the very question that he did not want to answer, ie, when did British-born subjects become aliens under the *Constitution*? His definition of what constituted an alien was limited to this extent but was otherwise general and comprehensive. Both his reference to the common law position on descent and his lack of discussion of *Potter* and subsequent cases indicates that he was happy with the then accepted notion that birth in Australia took one outside the aliens power. Because of this his judgment was not as narrowly defined as suggested by the majority judges in *Singh*. Therefore, *a claim that Gibbs CJ's judgment was obiter dictum insofar as it dealt with a person born in Australia seriously misreads the legal issue in Pochi and the precise legal question that the judges had to decide in that case.*

Justices Mason and Wilson agreed with Gibbs CJ's judgment.⁸⁰ Justice Murphy's judgment took a different tack with his attempt, quixotic at the time, to read an

⁷⁸ *Singh* (2004) 222 CLR 322, 400 (Gummow, Hayne and Heydon JJ), 408 (Kirby J). Chief Justice Gleeson did not discuss this aspect of *Pochi* in his judgment.

⁷⁹ *Pochi* (1982) 151 CLR 101, 109–10.

⁸⁰ *Ibid* 112 (Mason J), 116 (Wilson J). Justice Aickin died before judgment was delivered in this case.

American-style Bill of Rights into the *Constitution*. He was willing to accept that Pochi, who ‘was born in Italy, of Italian parents and has not been naturalized in Australia’, was an alien.⁸¹ It should be noted that this reflects, in obverse, Gibbs CJ’s definition of what constitutes an alien. In addition, Murphy J made it quite clear that children born in Australia of alien parents would be Australian citizens.⁸²

In sum, *Pochi* did nothing to challenge the then prevailing view that birth in Australia took one outside the aliens power.⁸³

While *Kioa v West*⁸⁴ did not directly deal with the reach of the aliens power, it did lead to legislative changes to the *Migration Act*, which in turn has led to some confusion about the scope of the aliens power. In *Kioa* two Tongan citizens, Mr and Mrs Kioa, sought judicial review of deportation orders against them. They had overstayed their student visa. Review was denied in the Federal Court and in the Full Court of the Federal Court and the two applicants appealed to the High Court. During this period their child, Elvina, was born. Through the operation of s 10 of the *Migration Act* it was accepted that Elvina was an Australian citizen.

The High Court (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ) held that no administrative law remedies were available to Mr and Mrs Kioa. All the judges noted that no deportation order could be made against Elvina, although as a practical matter all accepted that she would accompany her parents back to Tonga if they were deported.⁸⁵

Kioa is a case that deals with administrative law but the judges clearly accepted that Elvina was an Australian-born citizen. More importantly, perhaps, so did the Commonwealth, which did not seek to question her status as an Australian-born citizen even though it was clearly unhappy with that aspect of the decision. As Kim Rubenstein has explained, *Kioa* was the catalyst for a change to the *Migration Act* so that children in Elvina Kioa’s and Tania Singh’s situation would have to have been ordinarily resident in Australia for 10 years before they became Australian citizens if they were born after 20 August 1986.⁸⁶ Previously, birth in Australia was sufficient for them to become Australian citizens.

It is trite law that the change in the *Migration Act* motivated by *Kioa* would not of itself be of any constitutional significance and it is the argument of this article that both before and after *Kioa* the case law on the aliens power made it clear that birth in Australia, with minor and irrelevant exceptions that did not affect Tania Singh,

⁸¹ Ibid 112 (Murphy J).

⁸² Ibid 115.

⁸³ This view about birth and alienage was supported by the leading text on citizenship law in Australia at the time: see Michael Pryles, *Australian Citizenship Law* (Lawbook, 1981) 10.

⁸⁴ (1985) 159 CLR 550 (*‘Kioa’*).

⁸⁵ Ibid 570 (Gibbs CJ), 574, 588 (Mason J), 604 (Wilson J), 626, 629–30 (Brennan J), 634 (Deane J).

⁸⁶ Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002) 91–3.

took one outside the aliens power. But *Kioa* also seems to have been seen by some as indicating why the majority judges in *Singh* were able to claim that previous cases did not deal specifically with the issue raised in that case, ie, whether a child born in Australia of non-Australian parents was an alien. Given that before 1986 such children would have been considered Australian citizens, it could be argued that it took until 2004 before the precise question raised by Tania Singh came before the High Court because it was only after 1986 that it became a practical problem.

Such an argument simply misreads the decisions of the Court both before and after *Kioa* and it is the argument of this article that the High Court, both explicitly and implicitly, had made it clear that a person born in Australia in Tania Singh's position was not within the scope of the aliens power. Indeed, far from raising a novel legal issue, *Singh* dealt with a question of law that had been settled for many years by the High Court.

The next significant discussion of the aliens power arose in *Nolan v Minister for Immigration and Ethnic Affairs*.⁸⁷ Nolan was a citizen of the United Kingdom and a subject of the Queen born in the United Kingdom, who came to Australia in 1967 and had lived here continuously since then but had not been naturalised. On 22 September 1985 the Minister made an order for his deportation under s 12 of the *Migration Act*. By this time Nolan had lived in Australia for over 18 years, nine of which he had spent in prison. Nolan challenged the validity of the deportation order on the ground that in its application to him s 12 was beyond the legislative power of the Commonwealth.

The High Court (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; Gaudron J dissenting) held that Nolan came within the Act and that even though he was a British subject this did not prevent him being an alien for the purposes of the *Migration Act*.⁸⁸ Both the plaintiff and the defendants relied on their understanding of the scope of the aliens power to make their arguments and the majority relied on their understanding of the aliens power to come to their decision. The majority reasoned as follows, beginning first with a definition of 'alien':

[Alien] means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state': *Milne v Huber* [(1843) 17 Fed Cas 403, 406]. Thus, an 'alien' has been said to be, for the purposes of United States law, 'one born out of the United States, who has not since been naturalized under the constitution and laws' [*Milne v Huber*, (1843) 17 Fed Cas 403, 406]. That definition should be expanded to include a person who has ceased to be a citizen by an act or process of denaturalization and restricted to exclude a person who, while born abroad, is a citizen by reason of parentage. *Otherwise, it constitutes an acceptable general definition of the word 'alien' when that word is used with respect to an independent country with its own distinct citizenship.*⁸⁹

⁸⁷ (1988) 165 CLR 178 ('*Nolan*').

⁸⁸ *Ibid* 184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

⁸⁹ *Ibid* 183 (emphasis added).

It should be noted that this comprehensive definition is given in a joint judgment by six out of seven judges and that, as we shall see, the remaining judge, Gaudron J, did not disagree with it except for the matter of timing for British subjects. *By directly alluding to the United States Supreme Court's definition of what constitutes an alien in their discussion of Gibbs CJ's definition of 'alien' in Pochi it is clear that the judges were endorsing a definition based on birth. By directly alluding to 'an independent country with its own distinct citizenship' the judges were making it clear that the definition applied to contemporary Australia.*

On this understanding of the aliens power Tania Singh could not be an alien.

The majority judges added that this definition would not have applied in 1900:

The word ['alien'] could not, however, properly have been used in 1900 to identify the status of a British subject vis-à-vis one of the Australian or other colonies of the British Empire for the reason that those colonies were not, at that time, independent nations with a distinct citizenship of their own. At that time, no subject of the British Crown was an alien within any part of the British Empire.⁹⁰

As explained above, it was for this reason that a separate immigration power was included in s 51 of the *Constitution* — to enable regulation of movement into and out of Australia of all persons and not just the then narrower range of persons who were then aliens. But, of course, time has not stood still and since 1900 the Empire has been transformed into the Commonwealth and the emergence of independent nations within the Commonwealth rendered obsolete notions of an indivisible Crown. In Australia a separate Australian citizenship was established by the *Nationality and Citizenship Act 1948* (Cth).⁹¹

The majority judges emphasised that this understanding of the aliens power and the reasoning underpinning it had been recognised in *Pochi*. According to the majority, the 'leading judgment' was that of Gibbs CJ, with whom two of the other three judges concurred, and in doing so reproduced that part of Gibbs CJ's judgment that said that the aliens power, s 51(xix), gave the federal Parliament the power to 'treat as an alien *any person* who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian'.⁹² For the majority *Pochi* defined the reach of the aliens power and they rejected the plaintiff's attempt to reopen that decision, indicating instead their total agreement with the decision and the reasoning of the majority in that case.⁹³

So, for the majority judges, the discussion in *Pochi* was central to a definition of the aliens power, which was in turn central to the determination of the dispute before the Court. In other words, the endorsement of *Pochi* and the definition of 'alien'

⁹⁰ Ibid.

⁹¹ Ibid 183–4.

⁹² Ibid 185 (emphasis in original) (citations omitted).

⁹³ Ibid 186.

given by Gibbs CJ in that case lie at the heart of the reasoning and decision of the majority judges. What of the dissenting justice, Gaudron J?

Put simply, Gaudron J's difference with the majority was not about Gibbs CJ's definition of an alien in *Pochi*, or at least not with its general application. Rather, Gaudron J's point of departure was that the *Pochi* definition could be read to include persons who before 1973 were not aliens because they were British subjects. The year of 1973 was isolated by Gaudron J because in that year the Oath of Allegiance changed from general allegiance to the Crown to allegiance to the Crown in right of Australia.⁹⁴ As we have seen, for the majority this change took place in 1948.⁹⁵

It is important to highlight the nature of the dispute before the Court, the decisions handed down and the precise difference between the majority judges and Gaudron J on the scope of the aliens power. First, the dispute was a dispute about the reach of the aliens power and whether the plaintiff came within that power. Secondly, the majority judges made it clear that their decision was one that was based on their understanding of the reach of the aliens power. In doing so, they endorsed in strong terms the decision in *Pochi* and, in particular, the reasoning of Gibbs CJ in that case, reasoning that had been adopted by the majority in that case. Thirdly, Gaudron J did not question the correctness of *Pochi* but rather its application to British subjects who came to Australia before 1973. The narrowest interpretation of *Nolan* is that it is a decision of six judges directly applying, endorsing and explaining *Pochi*. The widest interpretation is that all seven judges endorsed *Pochi* but that six judges believed that birth outside Australia did not make a British subject an alien for constitutional purposes if that person arrived in Australia before 1948 but did if the person arrived after that year, whereas for Gaudron J British subjects not born in Australia could not be treated as aliens if they came to Australia before 1973.

On any understanding of *Nolan* the decision cannot support the notion that Tania Singh was an alien under s 51(xix). The decision is a direct endorsement and explanation of Gibbs CJ's definition of 'alien' in *Pochi* as meaning that, with some irrelevant exceptions, birth in Australia would take a person outside the aliens power.

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁹⁶ the High Court (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) heard a claim that certain sections of the *Migration Act* were invalid as contravening ch III of the *Constitution*. In a joint judgment Brennan, Deane and Dawson JJ quoted at length from the judgment of the majority in *Nolan* where aliens were described as those not born in Australia or not born of Australian parents.⁹⁷ Neither *Pochi* nor birth in Australia was mentioned by Mason CJ, Toohey and

⁹⁴ Ibid 191.

⁹⁵ See above n 91 and accompanying text. As we shall see, the exact date at which these British-born subjects were to be treated as aliens was to be a continuing source of controversy.

⁹⁶ (1992) 176 CLR 1.

⁹⁷ Ibid 25.

McHugh JJ. Justice Gaudron, however, stated that the children (born in Australia) of aliens entering Australia illegally can be treated as aliens. Her Honour gave no authorities to support this contention and failed to consider the long line of authority supportive of the majority judgments in *Potter*, *Pochi* and *Nolan* or, indeed, her own judgment in *Nolan*. Instead she referred to s 10(2) of the *Australian Citizenship Act*, which provided that a child born in Australia was a citizen only if one of the parents was Australian or the child had been ordinarily resident in Australia for 10 years from the time of birth. Although Gaudron J did not explain this reasoning as accepting the notion that the Commonwealth could by legislation widen or narrow the reach of the aliens power, it is difficult to see that her reasoning is doing anything else.

*Re Patterson; Ex parte Taylor*⁹⁸ raised once again the troublesome question of when British subjects became aliens under the aliens power. Taylor was born in England in 1960 and came to Australia in 1966 aged six. He did not become an Australian citizen but was put on the electoral rolls for federal and state elections after he turned 18. He held a transitional (permanent) visa. He was arrested and was sentenced to a minimum of three and a half years' imprisonment for sexual offences. Patterson, the Parliamentary Secretary to the Minister for Immigration, purported to cancel Taylor's visa pursuant to the *Migration Act*. Taylor commenced proceedings for writs of prohibition and certiorari in the High Court. The High Court (Gaudron, McHugh, Kirby and Callinan JJ; Gleeson CJ, Gummow and Hayne JJ dissenting) held that Taylor was not an alien and that the legislation giving the Minister (or designate in this case) power to cancel the visa did not apply to him.⁹⁹

For Gaudron J the central issue concerning the aliens power revolved around when British subjects born outside Australia became aliens under the aliens power. Her Honour repeated her concerns, raised in *Nolan*, that careful attention was needed to accurately define when British subjects became aliens under the *Constitution*. It was that aspect of *Nolan* that she still found unacceptable. Of *Pochi* she said this:

What was said in *Pochi* was that 'the Parliament can ... treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalised as an Australian'. However, that case was not concerned to analyse the position of persons who entered this country as British subjects at a time when they fell outside the definition of 'alien' in the *Citizenship Act*. Nor was it concerned with the question whether, if they were not aliens, Parliament could legislate to make them so for the purpose of s 51(xix) of the *Constitution*.¹⁰⁰

In *Nolan* Gaudron J had indicated that British subjects who had come to Australia before 1973 were not aliens because up to that date, at least, 'the criterion for admission to membership of the community constituting the body politic of

⁹⁸ (2001) 207 CLR 391 ('*Patterson*').

⁹⁹ Taylor also challenged the validity of the cancellation of the visa on administrative law grounds and on constitutional arguments about who could cancel such a visa, grounds that will not be considered in this article.

¹⁰⁰ *Patterson* (2001) 207 CLR 391, 409 (Gaudron J) (citations omitted).

Australia changed from allegiance to the Crown to citizenship involving allegiance to the Crown in right of Australia'.¹⁰¹ In *Patterson* she identified 1987 as the date at which this had changed.¹⁰² This meant that a person such as Taylor who had arrived in Australia before that date could not be an alien under the aliens power.¹⁰³ Her Honour's analysis of the aliens power and *Pochi* and *Nolan* show that she was not disputing the central thrust of Gibbs CJ's definition of 'alien' in *Pochi* and the centrality of birth in Australia for that definition. Instead, Gaudron J's concern was to show that the constitutional link between Australia and the English Crown, as it had been transformed in the 20th century, had to be carefully analysed and that British subjects only became aliens under the *Constitution* relatively late in that century. Nothing in her judgment challenges *Pochi's* and *Nolan's* base assumption about the relevance of birth in Australia for determining whether a person was an alien or not.

For McHugh J, as for Gaudron J, the central issue in this case was when British subjects not born in Australia could be considered aliens. Alienage, according to his Honour, was to be determined by allegiance to the Crown and the 'core concept of allegiance was based on jus soli — birth within the territory of the realm'.¹⁰⁴ Justice McHugh accepted that the evolving nature of the relationship between Australia and the United Kingdom in the 20th century and the development of Australian independence had an effect on the definition of 'alien' in the *Constitution*. But he rejected *Nolan* and held that it should be overruled because the judges in the majority had misunderstood the changes in the relationship between Australia and the United Kingdom caused by the developing Australian independence.¹⁰⁵ As with Gaudron J's judgment, it is clear that what McHugh J was concerned with was the way in which *Nolan* had included as aliens British subjects resident in Australia who had arrived here before a certain date: 1973 for McHugh J and 1987 for Gaudron J. Neither judge showed any dissatisfaction with the general proposition enunciated in *Pochi* and confirmed in *Nolan* that a person born in Australia (subject to narrow exceptions not relevant to Tania Singh) could not be an alien under the *Constitution*.

The same concern with the position of British subjects resident in Australia animated Kirby J's reasoning and decision:

Had the word 'alien' possessed in 1900 the meaning asserted for it in these proceedings by the respondent there would, logically, have been no need for a power over 'immigration'. The aliens power, as applicable to every non-Australian subject or citizen, *native born or naturalised*, would have sufficed to sustain all conceivable laws on migration or migrants. Migrants, *not born in Australia*, unless naturalised, would forever be 'aliens' and subject to federal regulation, including expulsion, on that ground alone.¹⁰⁶

¹⁰¹ *Nolan* (1988) 165 CLR 178, 191–2.

¹⁰² *Patterson* (2001) 207 CLR 391, 410 (Gaudron J).

¹⁰³ *Ibid* 410–12.

¹⁰⁴ *Ibid* 429 (McHugh J).

¹⁰⁵ *Ibid* 421.

¹⁰⁶ *Ibid* 483–4 (emphasis added) (citations omitted).

For Kirby J the problem posed by *Pochi* and *Nolan* was that they were both over-inclusive because they added British subjects born in the United Kingdom to an otherwise appropriate test. Such subjects were, according to Kirby J, ‘treated by Australian law as members of a special class of Australians’ whose status by 1987 might have been even considered ‘anomalous’.¹⁰⁷ But as Kirby J was willing to acknowledge, the constitutional relationship between Australia and the United Kingdom had changed and this meant that Kirby J accepted that ‘citizens of the United Kingdom, coming to Australia after May 1987, might be regarded as “aliens” for constitutional purposes’.¹⁰⁸ Justice Kirby chose May 1987 as the appropriate cut-off point because, to him, the coming into effect of the changes to the *Australian Citizenship Act 1973* (Cth), which deleted all references to the status of British subject, was the culmination of legislative changes that gave effect to the changing constitutional relationship between Australia and the United Kingdom.¹⁰⁹ Nothing in Kirby J’s judgment shows any dissatisfaction with Gibbs CJ’s definition of the constitutional term ‘alien’ *other than that it could not include British-born subjects of the Crown who had come to live in Australia before May 1987*. This, of course, is not relevant for determining whether Tania Singh was an alien.

Justice Callinan agreed, in general terms, with the reasoning of McHugh and Kirby JJ¹¹⁰ and made it clear that he supported Gibbs CJ’s definition of what constituted an alien in *Pochi*, noting that when *Pochi* was decided the *Migration Act* contained a definition that excluded a British subject from its operation.¹¹¹

Patterson considered serious issues surrounding who were and who were not aliens under the *Constitution*. But these issues did not surround the base assumption dating back to *Potter* and reaffirmed in *Pochi* and *Nolan* that birth in Australia meant that you could not be an alien.

*Re Minister for Immigration and Multicultural Affairs; Ex parte Te*¹¹² involved claims by persons born in Cambodia and Vietnam who had arrived in Australia from their countries of birth aged 16 and 13 respectively. Both were granted permanent resident status but neither took up Australian citizenship. Both were subsequently imprisoned for lengthy periods and both were subject to deportation from Australia pursuant to decisions made by the Minister. Both claimed that because they had become absorbed into the Australian community neither was an immigrant nor an alien for which laws could be passed justifying their deportation from Australia. In essence both relied on *Patterson* as having overruled *Nolan* with the effect that alien status was to be defined by allegiance, which was evidenced by the granting of permanent protection visas and their consequent absorption into the Australian

¹⁰⁷ Ibid 488.

¹⁰⁸ Ibid 495.

¹⁰⁹ Ibid 485–7.

¹¹⁰ Ibid 518–19.

¹¹¹ Ibid 516.

¹¹² (2002) 212 CLR 162 (*Te*).

community. The High Court disagreed, holding that the impugned laws were valid in their application to the applicants because they were supported by the aliens power. On the reach of that power and the effect of *Patterson* the judges made it clear that that case was concerned with the special position of British-born subjects of the Crown and had not altered the definition of ‘alien’ given by Gibbs CJ in *Pochi*.

Chief Justice Gleeson acknowledged that it ‘was the historical relationship between Australia and the British Empire, and the status of British subjects, which gave rise to the issue in *Patterson*’.¹¹³ Once understood in this fashion the effect of that case on *Pochi* and *Nolan* was confined to a special and diminishing class of persons. The Chief Justice was clear as to the effect of these two cases:

In *Pochi*, Gibbs CJ said that, for the purposes of s 51(xix), Parliament can treat as an alien ‘any person who was born outside Australia, whose parents were not Australians, and who has not been naturalised as an Australian’. ... In *Nolan*, six Justices of this Court approved that statement, and treated as an acceptable definition of the term ‘alien’, as adapted to Australia, a statement by a United States court that ... an alien is ‘one born out of the United States, who has not since been naturalised under the constitution and laws’.¹¹⁴

Patterson, according to Gaudron J, was a case that dealt specifically with the special position of British subjects from the United Kingdom and, in particular, when they could be regarded as aliens.¹¹⁵ For Gaudron J ‘the notion of “alien” is and always has been linked with a person’s place of birth.’¹¹⁶ Further, according to her Honour an alien-born person cannot ‘acquire the status and entitlements that attach to a person who acquires membership of the Australian body politic *by birth* except in accordance with statute’.¹¹⁷ The applicants here were born out of Australia and were therefore aliens.¹¹⁸

According to McHugh J an alien was a person ‘born out of Australia of parents who were not Australian citizens and who has not been naturalised under Australian law’.¹¹⁹ He described the effect of *Patterson* as limited: ‘The majority Justices in *Re Patterson* overruled *Nolan* to the extent that it purported to state an exclusive test of alienage. It overruled that case *to the extent that its general proposition applied to certain non-citizen British subjects*’.¹²⁰

¹¹³ Ibid 172.

¹¹⁴ Ibid 169 (citations omitted).

¹¹⁵ Ibid 178.

¹¹⁶ Ibid 179.

¹¹⁷ Ibid 180 (emphasis added).

¹¹⁸ Ibid 179.

¹¹⁹ Ibid 185.

¹²⁰ Ibid 188 (emphasis added).

Justice Gummow defined an ‘alien’ as ‘a person born outside Australia, whose parents were not Australians, and who has not been naturalised as an Australian. This was decided in *Nolan v Minister for Immigration and Ethnic Affairs*.’¹²¹ He also noted that *Patterson* was of doubtful authority and was happy to apply *Pochi* and *Nolan*.¹²²

Justice Kirby’s judgment contains a careful examination of the High Court’s treatment of the aliens power. He reproduced Gibbs CJ’s definition of ‘alien’ in *Pochi* and then explained that given *Pochi*’s birth in Italy it was not necessary in *Pochi* to consider in depth the position of British subjects.¹²³ Justice Kirby’s analysis of *Nolan* and *Patterson* led him to the following result:

The principle established by [*Patterson*] does not avail either of the present applicants. Neither was a ‘natural born subject’ of the Crown. Still less was either within the category of persons admitted to Australia as migrants who were British subjects (or citizens of the United Kingdom) before 1 May 1987. ...

However, the important question presented by the present proceedings is whether, one clear exception having been established to the dichotomy ... favoured by this Court’s earlier reasoning in *Pochi* (as well as the majority in *Nolan* and the minority on this point in [*Patterson*]) a further category of exception to the ‘aliens’ power exists in respect of other non-citizens, which is broad enough to encompass the applicants.¹²⁴

The answer to this question was no. The ‘special association with the Australian body politic’ to which the applicant in *Patterson* could appeal to was a result of fundamental aspects of ‘Australia’s history, constitutional arrangements and earlier legislation.’¹²⁵

For Hayne J the alien status of the applicants was clear. In responding to one applicant in language that applied to the other he said: ‘The prosecutor was born outside Australia to parents neither of whom was then an Australian. He has never been naturalised as an Australian. He is, therefore, an “alien” as that expression is to be understood in s 51(xix) of the *Constitution*.’¹²⁶

The authority provided to support this definition is *Nolan*, where the joint judgment cites, quotes and explains the definition given by Gibbs CJ in *Pochi*.¹²⁷

¹²¹ Ibid 194 (citations omitted).

¹²² Ibid 200.

¹²³ Ibid 206 (Kirby J).

¹²⁴ Ibid 212.

¹²⁵ Ibid 216.

¹²⁶ Ibid 219 (Hayne J) (citations omitted).

¹²⁷ *Nolan* (1988) 165 CLR 178, 185 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

Justice Callinan noted that the applicants were not British non-citizens who had entered Australia before 1987 and reaffirmed Blackstone's description of the natural allegiance due because of birth in the King's dominions.¹²⁸

Te involved an attempt to extend the reasoning in *Patterson* to the plight of two people who, unfortunately for them, were not British-born subjects of the Crown living in Australia. The judges all agreed that this could not be done. All the discussion in *Te* revolved around what amounted to the exception to the general definition of 'alien' given by Gibbs CJ in *Pochi*. None of the judges in *Te* challenged Gibbs CJ's definition of what constituted an alien and all supported it — as long as the special position of British-born subjects of the Crown living in Australia was recognised. What this special position was, of course, was in dispute. But what is clear is that *Te* only confirms the longstanding High Court acceptance of birth in Australia taking a person outside the range of the aliens power.

The last major case concerning the aliens power before *Singh* was *Shaw v Minister for Immigration and Multicultural Affairs*.¹²⁹ Shaw was born in the United Kingdom in 1972 and came to Australia with his parents in 1974 aged 18 months. His parents were citizens of the United Kingdom and British subjects who entered Australia on a permanent visa. Shaw did not apply for and did not obtain Australian citizenship or a passport. He was not eligible to vote and had not left Australia since arriving as an infant. In 1998 he was convicted of several offences and sentenced to seven and a half years' imprisonment. In 2001 the Minister purported to cancel Shaw's visa pursuant to s 501(2) of the *Migration Act*. In the High Court Shaw questioned whether that section was within the legislative powers of the Commonwealth to the extent that it authorised the Minister's cancellation of Shaw's visa. The High Court (Gleeson CJ, Gummow and Hayne JJ in a joint judgment, Heydon J agreeing; McHugh, Kirby and Callinan JJ dissenting) held that Shaw had entered Australia as an alien and remained an alien when the Minister cancelled his visa and, therefore, s 501(2) could validly apply to him.

For Gleeson CJ, Gummow and Hayne JJ the starting point of their analysis was as follows:

In *Cunliffe* ... Toohey J, referring to *Nolan* ... said that:

an alien can generally be defined as a person born out of Australia of parents who were not Australian citizens and who has not been naturalised under Australian law or a person who has ceased to be a citizen by an act or process of denaturalisation.¹³⁰

Shaw's argument was that this test could not apply straightforwardly to him as he was a British subject. The judges explained that once it was accepted that the

¹²⁸ *Te* (2002) 212 CLR 162, 226–7.

¹²⁹ (2003) 218 CLR 28 ('*Shaw*').

¹³⁰ *Ibid* 36 (citations omitted).

Constitution contemplated changes in the constitutional relationship between the United Kingdom and Australia it became ‘impossible to read the legislative power with respect to “aliens” as subject to some implicit restriction protective from its reach those who are not Australian citizens but who entered Australia’ as British subjects or citizens.¹³¹ They held that the present case

should be taken as determining that the aliens power has reached all those persons who entered this country after the commencement of the [*Australian Citizenship Act*] on 26 January 1949 and who were born out of Australia by parents who were not Australian citizens and who had not been naturalised.¹³²

It is clear that the judgment relies on *Pochi* and *Nolan* for a general definition of what constitutes an alien and then proceeds to deal with the vexed question of how British-born subjects resident in Australia come (or do not come) within that definition.

This vexed issue was also at the heart of McHugh J’s judgment. After an analysis of the cases dealing with the evolution of the constitutional relationship between Australia and the United Kingdom, McHugh J explained that his best reading of that evolution was that it was not until March 1986 with the coming into force of the Australia Acts¹³³ that the evolutionary process by which the term ‘subject of the Queen’ in s 117 of the *Constitution* changed to ‘subject of the Queen of Australia’. This meant that ‘[u]ntil that date, therefore, Australians, *born or naturalised*, and British citizens permanently residing in Australia owed their allegiance to the “Crown of the United Kingdom of Great Britain and Ireland”’ with the consequence that those people were not aliens under the *Constitution*.¹³⁴ This meant, of course, that Shaw was not an alien and that the law could not apply to him.

Nothing in this argument suggests any change from his views in *Patterson* and *Te*, which had emphasised the centrality of birth in defining who was an alien and had supported the *Pochi* definition given by Gibbs CJ.

The same concern with the vexed question of British-born subjects of the Crown was at the heart of Kirby J’s judgment. He was at pains to show that an over-general application of Gibbs CJ’s definition of ‘alien’ in *Pochi* had led to a too simple dichotomy between birth in and outside of Australia as the test for alienage. It was too simple because this included those British-born subjects of the Crown resident in Australia who, until the evolutionary process had changed the nature of the constitutional relationship between Australia and the United Kingdom, were not aliens under the *Constitution*. It was the *timing* of this change that had caused angst in *Nolan*, *Patterson* and, indirectly, *Te* and which was now before the Court again.¹³⁵

¹³¹ Ibid 42.

¹³² Ibid 43.

¹³³ *Australia Act 1986* (Cth) and *Australia Act 1986* (UK).

¹³⁴ *Shaw* (2003) 218 CLR 28, 48 (McHugh J) (emphasis added).

¹³⁵ Ibid 53–7 (Kirby J).

For Kirby J the applicable date was March 1986.¹³⁶ On the general question of what defined an alien he was happy to paraphrase Gibbs CJ's test in *Pochi* with its reference to birth in Australia or birth outside of Australia to Australian parents or by naturalisation. For Kirby J an alien

refers to someone who is outside the Australian community and its fundamental loyalties, that is, outside Australian nationality. Applied today and for future application, I would accept that such community and such loyalties are marked off by citizenship of birth and descent, and citizenship by naturalisation. Indeed, so much is accepted by all members of the Court.¹³⁷

The British-born subject problem was the issue for Callinan J as well. What needed determination was when such subjects who had not obtained formal Australian citizenship were to be regarded as aliens.¹³⁸ His analysis led him to the same result as McHugh and Kirby JJ: March 1986 with the coming into force of the Australia Acts.¹³⁹ Justice Callinan's criticism of the majority judgment in *Nolan* did not concern the general definition of what was an alien given by the majority but, rather, its over-inclusiveness, which resulted in defining British-born subjects as automatically aliens.¹⁴⁰ There is nothing in his judgment that shows him resiling from his support in *Patterson* of Gibbs CJ's definition in *Pochi*.

For Heydon J the course of argument in *Shaw* 'postulated the axiomatic correctness of the proposition that in 1901 British subjects were not aliens, and concentrated on the question of when and how the change occurred.'¹⁴¹ He was not happy with this assumption:

It is not in fact self-evident that from 1 January 1901 all British subjects were not aliens, and inquiry into a subsequent date on which, or process by which, they became aliens tends to proceed on a false footing so far as it excludes the possibility that on 1 January 1901 some of them were aliens.¹⁴²

While not of direct relevance in determining whether Tania Singh was an alien, this statement does show that Heydon J was willing, maybe even eager, to go back to square one and see what the term 'alien' meant in 1901.

Shaw represented no challenge to the prevailing orthodoxy that, apart from the special position of certain British-born subjects, birth in Australia took a person outside the aliens power.

¹³⁶ Ibid 61–7.

¹³⁷ Ibid 61.

¹³⁸ Ibid 80 (Callinan J).

¹³⁹ Ibid 80–5.

¹⁴⁰ Ibid 80–1.

¹⁴¹ Ibid 87.

¹⁴² Ibid.

VI CONCLUSION

As shown above, it is clear that since its early days the High Court has consistently and clearly stated that birth in Australia would take a person outside of the operation of the aliens power, with exceptions that were not relevant in *Singh*. In 1908 *Potter* established that birth in Australia made one a member of the Australian community and, thus, outside the aliens power, and this was confirmed in subsequent cases. In 1982 the High Court confirmed in *Pochi* the views of the majority in *Potter* that birth in Australia rendered a person a member of the Australian community. It is true that *Potter* involved the immigration power but, as was explained above, given the position of Australia within the British Empire, laws to control entry into Australia would not cover a large percentage of the world's population because so much of this population was within the Empire and these people were not aliens under the common law. Reliance on the aliens power would not have supported laws intended to control entry into Australia of all persons outside the Australian community. But as has also been made clear above, the decision in *Potter* only makes sense if the decision was based on the notion that Minahan was not an alien but, rather, a member of the Australian community.

The position when *Pochi* was decided was clear. Birth in Australia took a person outside the aliens power. *Pochi* was decided at a time when the Empire no longer existed and Australia's control of entry into Australia was no longer confined by understandings of alienage derived from and affected by notions of empire. The majority decision in *Pochi* simply affirmed, directly, what *Potter* had held and subsequent cases had decided indirectly — that a person born in Australia was a member of the Australian community and therefore not an alien. The Court in *Nolan* clearly and emphatically explained that birth, with exceptions not relevant for Tania Singh, removed a person from the scope of the aliens power.

However, if, contrary to the analysis of *Potter* made in this article, the meaning of 'alien' in the *Constitution* was not settled by the time *Pochi* was heard, the decision in *Pochi* and the cases that followed that accepted its reasoning did establish a strong line of precedent that should have bound the Court in *Singh*. The majority in *Pochi* was made up of distinguished judges and the reasoning concerning who was an alien was necessary and central to the decision. *Pochi* is a clear authority for the proposition that a person born in Australia cannot be an alien. After *Pochi* the High Court affirmed several times that Gibbs CJ's definition of what constituted an alien for the purposes of the *Constitution* was correct. *Nolan* made it quite clear that birth in Australia took one outside the aliens power and in doing so *reaffirmed the High Court's appropriation of the United States Supreme Court doctrine that birth in the United States meant that one could not be an alien in that country*. What disputes did take place over the meaning of the aliens power after *Pochi* concerned the position of British-born subjects of the Crown living in Australia and identification of the date when this status ceased to take those persons outside the range of people who were aliens in Australia. *Pochi* and the cases that supported the definition of 'alien' given there in turn supported what the High Court had been saying since 1908 about birth and alienage in Australia.

The legal issue before the judges in *Singh* was therefore a familiar one. From the first days of federation the High Court was faced with a choice between two legal positions, and this dichotomy was one that was common to all major legal systems. Was birth or descent to be the test for membership in the Australian community? These were, indeed, dichotomous choices and to choose one meant, in practice and probably logic as well, to deny the other. As judges made clear over the 20th century, the choice consistently made by the High Court was in favour of birth. This was a rejection of descent of lineage. It was not one choice made from a range of possibilities. If it had been then the argument that the legal issue before the Court in *Singh* was a novel question would have more purchase. But when the choice is between two well-known legal propositions and the Court has consistently chosen one over the other it is difficult to see how such a choice involves a question that is novel.

To argue, as did the majority judges, that the previous cases did not deal with the precise issue raised in *Singh* was not an exercise in analysing and applying precedent. It was, instead, an unfortunately cynical manipulation of the facts and issues raised in that case to make it appear that the issue had not been considered in the High Court. The majority judges seemed determined to correct what they saw as a century of legal error and were not prepared to allow a century of precedent to stand in their way.

As I have argued above, it is manifest that the issue had been dealt with at length over nearly a century of High Court decisions. It must not be forgotten that two of the judges who decided *Singh*, McHugh and Callinan JJ, were of this belief. Common courtesy, if nothing else, demanded of the majority judges serious analysis of the line of authority relied on by their fellow judges.

Given the legal skills and knowledge of the majority judges we must accept that in *Singh* the majority judges *did not care about the authorities dealing with the constitutional meaning of 'alien' in Australia*. It is difficult to understand their perfunctory 'analysis' of the earlier cases in any other light.

Rather, the majority judges seemed determined to decide the constitutional question before them as if they were the first judges to consider the matter. The majority judgments are based on the idea that the role of the High Court is to determine the meaning of the *Constitution* without any input from earlier judges. In other words, this was the reasoning of legalist activist judges who placed their views above that of judges before them. The majority judges do not, of course, say this but the fig leaf presented by claiming that there were no authorities on the question before them shows that this is what they were doing. It should go without saying that the majority judges were not unaware of the centrality of precedent and authority in Australian law. Indeed, several of them had made a point previously in extrajudicial writing about the importance of precedent and its role in legal reasoning and development.¹⁴³

¹⁴³ See Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4; Justice Kenneth Hayne, 'Letting Justice Be Done Without the Heavens Falling' (2001) 27 *Monash University Law Review* 12; Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10 *Otago Law Review* 493.

It might be argued that the majority's decision could be defended by remembering that the High Court is not bound by its own decisions and that it was proper in *Singh* to look again at what 'alien' meant in Australian law. If we apply the standards that have governed the High Court since its creation and which have been elaborated above we can see that the High Court has consistently said that a previous case will only be overruled with good reason, where important constitutional issues are at stake, that overruling is not something that is to be done lightly and that the Court would be likely to do so when there was confusion and contradiction in the authorities in the area in question.¹⁴⁴

It is difficult to see what would be an important reason, constitutional or otherwise, that would have justified overturning nearly a century of precedent.¹⁴⁵ No evidence was provided that Australia was being swamped by aliens giving birth here, as so-called 'anchor babies' — the available evidence was to the contrary, as shown by Kirby J.¹⁴⁶ As a purely historical exercise it might have been worthwhile showing that common perceptions about the understanding of who was an alien in 1900 were wrong. But could this historical reassessment be of constitutional importance or necessary? Surely not, as the *Constitution* will work (and has worked) perfectly well with the then prevailing assumption about birth determining alienage. Was there confusion and contradiction in the authorities on the aliens power? No. As shown by my analysis of the cases involving the aliens power, it is clear that there was no confusion or contradiction in the authorities *other than on the limited question of when British-born subjects of the Crown became aliens for the purposes of the Constitution*. On the central question of who was an alien, *Potter*, *Pochi* and *Nolan* stood unchallenged until *Singh*. So, even if the judges had thought that the issue of who constituted an alien might be revisited, it is clear that the High Court's own practice dealing with overruling would not have sanctioned overruling *Potter*, *Pochi* and *Nolan*.

Does all this matter? Well, it matters for Tania Singh, a young girl whose right to live in Australia was taken away because of the desire of the majority judges in *Singh* to rewrite our understanding of the aliens and immigration powers. It also matters when governments start advocating the stripping of citizenship from some Australians. One hundred years of accepted law that birth in Australia made one an Australian is too important a right to be set aside so cavalierly. *Singh* was incorrectly decided and something should be done about that.

¹⁴⁴ See above nn 6–21 and accompanying text.

¹⁴⁵ Jeffrey Goldsworthy's recent discussion of the appropriateness of covert judicial law has some salience to my analysis of the reasoning of the majority judges in this case. Even on his analysis, however, which permits such subterfuge in 'extreme' cases, the reasoning and decision of the majority judges in *Singh* would not pass his standard as the facts do not raise an 'extreme' case: see Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305, 321.

¹⁴⁶ *Singh* (2004) 222 CLR 322, 410 n 392.

