

‘DAMMIT, LET ‘EM DO IT!’ THE HIGH COURT AND CONSTITUTIONAL LAW: THE 2005 TERM

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I INTRODUCTION

Judge Richard Posner is a provocateur par excellence. Having defended the decision in *Bush v Gore*¹ as a necessary political intervention to avert chaos² and having recently articulated an unabashedly elitist conception of democracy,³ he now claims that the Supreme Court of the United States, when it decides constitutional cases, is a political animal, with a discretion as large as a legislature's. The reason is that the Court makes discretionary calls in an open area where the constitutional text and history, and previous judgments, do not speak clearly. As he puts it:

Constitutional cases in the open area are aptly regarded as 'political' because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. They can be decided only on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms. Almost a quarter century as a federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly. When one uses terms like 'correct' and 'incorrect' in this context, all one can actually mean is that one likes (approves of, agrees with, or is comfortable with) the decision in question or dislikes (disapproves of, disagrees with, or is uncomfortable with) it. One may be able to give reasons for liking or disliking the decision...and people who agree with the reasons will be inclined to say that the decision is correct or incorrect. But that is just a form of words. One can, for that matter, notwithstanding the maxim *de gustibus non disputandum*, give reasons for preferring a Margarita to a Cosmopolitan.⁴

Posner contends that several alternative conceptions of the Court – as moral vanguard, for one, or as a cosmopolitan entity subscribing to international law – are flawed, being descriptively false or undesirable or both. He advocates that

* Commonwealth Solicitor-General. This paper was originally presented as part of the Gilbert + Tobin Centre of Public Law 2006 Constitutional Law Conference, Sydney, 24 February 2006. My thanks to Gim Del Villar for his assistance with researching this paper.

1 531 US 98 (2000). This US Supreme Court case, heard on 11 December 2000, directly influenced the outcome of the 2000 presidential election.

2 Richard A Posner, *Breaking the Deadlock: The 2000 Election, the Constitution and the Courts* (2001).

3 Richard A Posner, *Law, Pragmatism and Democracy* (2003).

4 Richard A Posner, 'Foreword: A Political Court (The Supreme Court 2004 Term)' (2005) 119(1) *Harvard Law Review* 31, 40–1.

judges should have a modest political role, only invalidating statutes which, in Justice Holmes' words, fail the 'puke test': they make the judge want to vomit! Alas, judicial modesty is not the order of the day in the Supreme Court.⁵

As I hinted, Posner's thesis has something to offend everyone. I am not qualified to pronounce on whether or not he is right about the Supreme Court of the United States,⁶ although I wonder whether the mere fact of disagreement about the law or moral issues necessarily means that there is no true answer.⁷ Nor am I convinced that legal arguments are merely window-dressing for gut-level intuitions.

However, I suspect that something like Posner's scepticism about legal argument and reasoning is commonplace: for years, commentators and the media have portrayed our High Court as a political institution,⁸ dwelling on the political ramifications of its decisions,⁹ and even labelling judges conservative or progressive.¹⁰ So I thought it might be profitable to see whether or not Posner's thesis could be applied to the constitutional cases decided by the High Court in 2005. Could you say that the Court essentially made political decisions, because the legal materials did not admit of any clear answer? If so, could you say that the Court had a suitably modest role or an overly large one? In other words, is it deferential or aggressive? I do not think that a small survey of one year's work by the Court can offer definite answers, but it can certainly be suggestive.

II THE 2005 TERM

By my reckoning, the High Court decided only four cases dealing fairly and squarely with constitutional matters; in another case, the issue was tangential.

The cases that squarely raised the constitutional issues were *Re Minister for Immigration and Multicultural Affairs; Ex parte Ame*,¹¹ *APLA Ltd v Legal*

5 Ibid 56.

6 Some commentators in the United States seem to have embraced Posner's thesis and complained that Judge Alito did not provide enough information on the way he would exercise his political discretion. See, eg, Jeffrey Toobin, 'Unanswered Questions', *New Yorker* (New York) 16 January 2006; Ruth Marcus, 'Underneath Their Robes', *Washington Post* (Washington) 17 January 2006, A17. For a defence of Judge Alito's reticence, see Stuart Taylor, 'Honest Nominees and Artless Dodgers', *National Journal* (Washington), 17 January 2006.

7 Robert P George, 'Book Review: Law, Democracy and Moral Disagreement' (1997) 110 *Harvard Law Review* 1388, 1389–90.

8 See, eg, Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987); Jeffrey Goldsworthy, 'Realism about the High Court' (1989) 18 *Federal Law Review* 27; Brian Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40; Jeffrey Goldsworthy, 'Reply to Galligan' (1989) 18 *Federal Law Review* 50.

9 On the media's tendency to concentrate on the political ramifications of decisions and the alleged politics of judges, see Jack Waterford, 'The Media and the Court' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 469, 469; John Henningham, 'The High Court and the Media' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 54, 61.

10 The furore over the appointment of Ian Callinan to the High Court is a particularly clear example.

11 (2005) 218 ALR 483 ('Ame').

Services Commissioner (NSW),¹² *Ruhani v Director of Police (No 1)*,¹³ and *XYZ v Commonwealth of Australia*.¹⁴

The last of these involved a challenge to provisions of the *Crimes Act 1914* (Cth), designed to counter child sex tourism. The appellants argued that the law was not a law with respect to external affairs, and sought to reopen the cases holding that a law that operated on matters and things geographically external to Australia was necessarily a law with respect to external affairs. The High Court made orders on 17 November 2005 dismissing the challenge, but has yet to hand down its reasons. I will therefore say no more about it.¹⁵

A *Re Minister for Immigration and Multicultural Affairs; Ex parte Ame*

Ame (pronounced 'ah-may') concerned a person who was born in the territory of Papua before it became part of the independent state of Papua New Guinea in September 1975. Under the *Australian Citizenship Act 1948* (Cth), in force before independence, Mr Ame was an Australian citizen by birth, as were most others born in Papua. However, under the *Migration Act 1958* (Cth) as in force at that period, Mr Ame required an entry permit to enter or reside in the Australian states or internal territories.

When Australia granted independence to Papua New Guinea in September 1975, it made regulations that stripped Australian citizenship from persons who acquired citizenship under the *Constitution of the Independent State of Papua New Guinea*. Section 65 of that constitution granted citizenship to persons born in Papua New Guinea before independence who had two grandparents born in the country. An exception was made, however, for those who had a grant of permanent residency in Australia.

Mr Ame, who first entered Australia in 1999, argued that he could not be detained or removed under the *Migration Act 1958* (Cth). He argued that he was not an 'alien' as he had never lost his Australian citizenship; as an Australian citizen by birth, he had a right of permanent residence in Australia, so the regulations never applied to him. He also argued that a fundamental right such as citizenship could not be withdrawn by regulation without very clear statutory authorisation, and the *Papua New Guinea Independence Act 1975* (Cth) did not provide it. Finally, he argued, in the alternative, that the Commonwealth could not withdraw citizenship without the consent of the person concerned.

The High Court unanimously rejected each of these arguments. Six judges in a joint judgment, and Kirby J writing separately, spelt out the embarrassing conclusion of accepting Mr Ame's first argument: most of the population of Papua would still be Australian citizens, not citizens of Papua New Guinea. Such a conclusion flew in the face of the historical background leading to the *Constitution of the Independent State of Papua New Guinea* and could hardly have been intended.¹⁶ There was, moreover, no constitutional obligation for

12 (2005) 219 ALR 403 ('APLA').

13 (2005) 219 ALR 199 ('*Ruhani (No 1)*').

14 [2006] HCA 25.

15 The High Court handed down its judgement for this case on 30 June 2006, after this paper was presented.

16 Ibid 490–1 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 504–6 (Kirby J).

residents of an external territory to be given the right to enter mainland Australia.¹⁷

The Court further held that the regulations withdrawing Mr Ame's citizenship, which followed British precedents,¹⁸ were supported by the regulation-making power in the *Papua New Guinea Independence Act 1975* (Cth) and were constitutionally valid. In this last respect, the joint judgment stated:

The power in s 122 pursuant to which parliament enacted legislation to deal with the acquisition of the external territory enabled it also to enact legislation to deal with the relinquishment of sovereign rights and rights of administration over that territory. The power pursuant to which parliament could enact legislation to treat the inhabitants of the territory as citizens enabled it also to treat the inhabitants of the new independent state as aliens.¹⁹

The joint judgment went on to reject any suggestion that the aliens power could not be used to strip persons unilaterally of their Australian citizenship. Their Honours noted that in *Singh v Commonwealth of Australia*²⁰ the Court had effectively rejected that view.²¹ It followed that Mr Ame could be detained and removed under the *Migration Act 1958* (Cth).

I doubt that anyone can seriously claim that *Ame* was a hard case in the sense that the legal materials did not clearly point in one direction. It was implausible to suggest that the Commonwealth had the power to acquire a territory but not to provide for its independence; implausible to suggest that when the Commonwealth granted independence to Papua New Guinea it would ensure that most persons born and residing in Papua did not become citizens of the new state but remained Australian citizens; and equally implausible to suggest that people cannot be stripped of their citizenship unless they consent. The answers to such questions, based on the history, the case law and precedents from the United Kingdom and elsewhere, were crystal clear. Even Kirby J agreed. *Ame* thus does not support the argument that the High Court was acting in a political way.

The interesting associated issue was whether the aliens power incorporates a power to deprive a person or group of Australian citizenship by legislation. The short answer was that the issue did not arise because, even if the aliens power did not so extend, the relevant legislation was enacted under the territories power. It is clearly incidental to releasing a territory into independence that its citizens cease to be Australian citizens. To suggest that some limitation on the breadth of the aliens power affected what could be done under the territories power would be as silly as suggesting that some limitations on the breadth of the conciliation and arbitration power affect what can be done under the corporations power. Surely no-one would seriously make that suggestion.

17 Ibid 492 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

18 The regulation was modelled on legislation enacted by the United Kingdom in the 1960s and 1970s in relation to places such as the Bahamas, Botswana, Fiji and Malaysia: *Ame* (2005) 218 ALR 483, 493.

19 Ibid 496.

20 *Singh v Commonwealth of Australia* (2004) 209 ALR 355.

21 *Ame* (2005) 218 ALR 483, 495.

B *APLA Limited v Legal Services Commissioner (NSW)*

The second case I want to discuss, *APLA*, however, shows that discretion and choice is very much a part of constitutional law.

Part 14 of the *Legal Professional Regulation 2002* (NSW) made it an offence and professional misconduct for a barrister or solicitor to publish an advertisement that includes any reference to personal injury, to the circumstances in which personal injury might occur, or to personal injury legal services. The aim of the regulations was to discourage the vice colloquially known as 'ambulance chasing'.

The three plaintiffs wanted to advertise legal services concerning personal injuries. The advertisements were to be placed in newspapers, the *Sydney Yellow Pages*, trade union journals circulating in New South Wales, and a website uploaded from a computer server located in Melbourne. The plaintiffs contended that Part 14 was invalid for several reasons:

- it infringed the implied freedom of political communication;
- it infringed an implied freedom arising from Chapter III of the *Constitution*;
- it infringed the guarantee of freedom of interstate trade, commerce and intercourse in section 92 of the *Constitution*;
- it was beyond the legislative competence of the NSW Parliament because of its extra-territorial effect; and
- it was inconsistent with federal legislation conferring rights of action and jurisdiction.

A majority of the High Court (Gleeson CJ, Gummow, Hayne, Callinan, Heydon JJ; McHugh and Kirby JJ dissenting) dismissed the challenge.

I will not discuss the extra-territorial argument, since it was unanimously rejected by the judges who considered it and seemed a long-shot, to put it mildly. I do, however, want to sketch the reasons concerning the other arguments, as they reveal some of the choices that the majority and minority made.

1 *The Implied Freedom of Political Communication*

Six members of the court, Kirby J dissenting, held that there was no infringement of the implied freedom of political communication. They emphasised that the communications prohibited were basically commercial in character, not governmental or political: the regulations did not prohibit discussion about the merits of tort law reform or the policy implemented by Part 14. As the regulations did not burden communication about governmental or political matters, they did not attract the implied freedom in the first place.²²

The fact that one of the proposed advertisements began with the sentence '[d]espite the best efforts of Premier Bob Carr and Senator Helen Coonan to stop you, you may still have legal rights to compensation' was immaterial. Part 14

22 Ibid 413 (Gleeson CJ and Heydon J), 423 (McHugh J), 456–7 (Gummow J), 497 (Hayne J), 520, 521 (Callinan J).

could validly prohibit advertisements that contained some political comment.²³ This is analogous to the protest appearing in the subject article in the *Rabelais* case²⁴ where it was sought to defend an article giving advice and instruction on shoplifting on the basis of an opening paragraph expounding the political philosophy that shoplifting was desirable because it promoted economic equality.

In reaching their conclusions, the majority rejected the argument that the freedom of political communication protected communications not only with or about the executive and legislative arms of government but also with or about the courts. Justice McHugh, in particular, made it clear that communications protected by the implied freedom of political communication had to bear a close relationship to the provisions in Chapters I, II and VII of the *Constitution* dealing with representative and responsible government whence the freedom sprung.²⁵ For this reason, communications about the courts would not come within the scope of the implied freedom unless they reflected on the acts or omissions of the legislature or the executive government.²⁶ On this point Kirby J dissented. He argued that the courts were an arm of government and discussion about them necessarily came within the implied freedom.²⁷

I doubt very much that the legendary man on the Clapham omnibus, the person in the street, or for that matter anyone who was not a constitutional lawyer would entertain for one minute the idea that the proposed advertisements of the plaintiffs were political communications. Nonetheless, when it came to marking out the boundaries of the implied freedom, the Court had some room to move: there were dicta of four judges in *Cunliffe v Commonwealth*²⁸ suggesting that the implied freedom applied to immigration assistance. If the implied freedom applied to that, anything was possible. So under Posner's schema, the Court made a political choice to confine the scope of the implied freedom.

2 Chapter III of the Constitution

The same choice was also present in the Chapter III argument. The plaintiffs claimed, in effect, that Chapter III could only operate effectively if people were able to ascertain and assert their legal rights; this in turn required people to be free to communicate about and to receive such information and assistance as they might require to assert their legal rights; because the regulations unjustifiably burdened that freedom to receive information and assistance, they were invalid.

Five members of the Court, McHugh and Kirby JJ dissenting, rejected this argument. In their view, the effective operation of Chapter III did not require legal practitioners to have the freedom to market their services to prospective clients. After pointing out that State and Territory regulation of the legal

23 Ibid 413 (Gleeson CJ and Heydon J), 423 (McHugh J), 457 (Gummow J), 497–8 (Hayne J).

24 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225.

25 *APLA* (2005) 219 ALR 403, 420–22.

26 Ibid 421.

27 Ibid 488.

28 (1994) 182 CLR 272 ('*Cunliffe*'), 299 (Mason CJ), 340–41 (Deane J), 378–80 (Toohey J), 387 (Gaudron J).

profession had always formed part of the context in which federal jurisdiction was exercised, and that until recently advertising had been prohibited by the legal profession, Gleeson CJ and Heydon J said:

There is nothing in the text or structure of the Constitution, or in the nature of judicial power, which requires that lawyers must be able to advertise their services. It may or may not be thought desirable, but it is not necessary.

The regulations in question do not impede communications between lawyers and their clients. Nor do they restrain or inhibit the provision of legal services, or require lawyers to conceal their existence or their identities. Professional directories, and telephone books, inform the public of the availability of legal services.²⁹

In the same vein, Gummow J said:

It is neither of the essential nature of a court nor an essential incident of the judicial process that lawyers advertise. Part 14 operates well in advance of the invocation of jurisdiction. It does not prevent prospective litigants from retaining lawyers, nor prevent lawyers or others from publishing information relating to personal injury services and the rights and benefits conferred by federal law.³⁰

Other judgments in the majority were to similar effect.³¹

By contrast, the minority judges claimed that advertising was essential. McHugh J, for instance, stated:

[Part 14] prevents potential litigants from obtaining information about their rights in respect of certain federal causes of action and about the legal practitioners who might provide appropriate advice and representation (even on a pro bono basis) concerning those rights. It thus impairs the capacity of courts exercising federal jurisdiction to hear and determine 'matters' that Ch III authorises and for which the parliament has legislated in the expectation that those 'matters' will be determined in federal jurisdiction.³²

Justice Kirby added that Part 14 would impose a special burden on the poor, who would be unable to know where to start.³³ The question whether there are many injured people in the community who would neither have friends who could point them in the direction of a legal aid provider nor have the ability to find one in the telephone book is a matter of subjective political judgment upon which minds may differ.

Again, whether or not Part 14 impaired the capacity of Chapter III courts to function is something that is not amenable to clear-cut answers. A choice had to be made.

3 Freedom of Interstate Trade, Commerce and Intercourse

The argument from section 92 of the *Constitution* is an even starker example of a judicial choice.

Section 92 relevantly provides that trade, commerce and intercourse among the States shall be absolutely free. Part 14 prohibited advertising of legal services to be provided in NSW even if the advertisement originated in another State. The

29 *APLA* (2005) 219 ALR 403, 414.

30 *Ibid* 463–4.

31 *Ibid* 500–501 (Hayne J), 526 (Callinan J).

32 *Ibid* 428.

33 *Ibid* 493.

website that could be uploaded from a server in Melbourne was an example of this. Communications are a form of intercourse, so Part 14 interfered with intercourse across state borders. Hence, the plaintiffs argued, it was invalid.

The five members of the Court who addressed this argument (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) rejected it. They pointed out that since *Cole v Whitfield*,³⁴ it had been accepted that section 92 had two limbs, one protecting interstate trade and commerce, and the other protecting interstate intercourse.

The Court accepted that Part 14 burdened interstate trade and commerce by prohibiting paid advertising of legal services. However, because it did not discriminate against such trade and commerce in a protectionist sense, it was valid.³⁵ Thus, Part 14 passed the first limb of *Cole v Whitfield*.

The Court also accepted that Part 14 burdened interstate intercourse because it prohibited communication across state borders that may not have been included within the concept of trade and commerce. However, the majority found that it was valid because it was not aimed at restricting interstate intercourse and the burden it imposed on such intercourse was no greater than reasonably necessary to achieve the object of Part 14.³⁶ Thus, the regulations also passed the second limb of *Cole v Whitfield*.

Two judges, Gummow and Hayne JJ, indicated that if a law could be characterised as burdening both interstate trade and commerce and interstate intercourse, its validity was to be judged according to the trade and commerce limb of section 92. In other words, in such situations, it would be sufficient to establish that the law did not discriminate in a protectionist sense.³⁷ Unfortunately, the other judges found it unnecessary to decide this issue.

If the only issue had been whether the regulations were discriminatory in a protectionist sense, the issue would have been clear. However, authority had not settled on the approach to determining whether a law infringed the guarantee of freedom of interstate intercourse. There were some strange dicta from *Cunliffe* suggesting that a law that incidentally imposed a burden on interstate intercourse would only be saved from invalidity if the burden was 'reasonably necessary for the purpose of preserving an ordered society' and was not disproportionate to that end³⁸ or was necessary for the 'government of the nation and its constituent parts'.³⁹ Nor had authority clarified the relationship between the intercourse limb of section 92 and the trade and commerce limb: if something could be characterised as both intercourse and trade and commerce, which test would apply? The choices left to the Court were plentiful.

34 (1988) 165 CLR 360.

35 *APLA* (2005) 219 ALR 403, 415 (Gleeson CJ and Heydon J), 447 (Gummow J), 507 (Hayne J), 523 (Callinan J).

36 *Ibid* 415 (Gleeson and Heydon J), 449 (Gummow J), 508 (Hayne J).

37 *Ibid* 446 (Gummow J), 504 (Hayne J).

38 *Cunliffe* (1994) 182 CLR 272, 308 (Mason CJ), 346 (Deane J), 392 (Gaudron J).

39 *Ibid* 395–6 (McHugh J).

4 *Inconsistency with Federal Laws*

The inconsistency argument was similar to the Chapter III argument. The plaintiffs submitted that the enjoyment of federal rights, such as those conferred under the *Trade Practices Act 1974* (Cth), and the exercise of federal jurisdiction under the *Judiciary Act 1903* (Cth) and other legislation required that persons have the right to seek legal assistance and representation. The prohibition on advertising allegedly had the practical effect of altering, impairing or detracting from the enjoyment of those rights and the exercise of that jurisdiction, so they were inconsistent with those laws under section 109 of the *Constitution*.

Justice Kirby was the only member of the Court to accept this argument. The majority found that the rights, powers and jurisdictions created under federal law would not be significantly negated or undermined by Part 14. Gleeson CJ and Heydon J, for instance, put it this way:

None of the federal legislation depends for its efficacy upon the unrestricted promotion of legal services. The rights, powers, and jurisdictions created have full legal effect and operation regardless of whether, at any given time, the states or territories permit or restrict advertising by lawyers.⁴⁰

Justice Callinan described the argument, in relation to rights of action, as 'far-fetched' and indicated that Part 14 was less likely to effect federal claims than filing fees or requirements that plaintiffs in remote areas must file in metropolitan registries.⁴¹

As with the Chapter III argument, the empirical basis for claims either way seems impossible to test; value judgments were inevitable.

My sketch of *APLA* makes it clear that the Court faced many choices. It should be no surprise, however, that I regard the choices made by a majority of the Court as the preferable ones. They took what seems to me a reasonable decision by legislatures – to try to reduce 'ambulance chasing' by curtailing advertising – and refused to block it by stretching the constitutional implication in *Lange v Australian Broadcasting Authority*⁴² to cover what ordinary people would regard as commercial messages. They refused to invent, or impose, a new implication based on Chapter III, an implication of vast scope that could only be reversed by the High Court or the Australian people at referendum. They refused to let the second limb of section 92, dealing with freedom of intercourse, swallow up the first limb; and they decided that a test based on the requirements of an 'ordered society' was too uncertain and manipulable. The minority, by contrast, dismissed the fact that lawyers have traditionally been prevented from advertising and would have given them constitutional backing to tout for work largely without restraint. Migration agents, accountants and others who have dealings with the law may not have been so lucky. The minority, or at least Kirby J, referred to the impact of Part 14 on the poor and vulnerable without mentioning that Chapter III says nothing about them and cannot credibly be interpreted as a guarantee that every person in the community shall have unhindered access to justice. In any

40 *APLA* (2005) 219 ALR 403, 416.

41 *Ibid* 527.

42 (1997) 145 ALR 96.

case, they ignored the ability of a person, rich or poor, to find out about his or her legal rights simply by picking up a phone and ringing a lawyer in the phonebook. If one might forgive the language, the majority displayed appropriate modesty and showed a strong stomach; the minority was immodest and rather dyspeptic.

C *Ruhani v Director of Police (No 1)*

This is one of those cases in which an Act of the Commonwealth Parliament was challenged and the Commonwealth did not intervene to defend it. This had the unfortunate consequence that the Court did not consider an alternative basis for validity: namely, that the territories power permits the conferring of ‘after-care’ on an ex-territory. This would have neatly avoided most of the Chapter III argument.

The facts of the *Ruhani (No 1)* bear on the Pacific solution. Mr Ruhani was taken to Nauru by the Australian Navy. There, he sought the issue of writ of habeas corpus against the Director of Police, whom he claimed was holding him against his will. Chief Justice Connell of the Supreme Court of Nauru dismissed the application. Mr Ruhani then appealed to the High Court of Australia using the *Nauru (High Court Appeals) Act 1976 (Cth)* (*‘Nauru Appeals Act’*). The *Nauru Appeals Act* purported to give effect to an agreement between Australia and Nauru providing for such appeals. Section 5 of the Act relevantly provided:

Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.

The Director objected to the competency of the High Court to hear the appeal. He argued that the *Nauru Appeals Act* was invalid because section 73 of the *Constitution* exhaustively set out the High Court’s appellate jurisdiction and the *Nauru Appeals Act* had impermissibly purported to add to it. Section 73 of the *Constitution* says nothing about hearing appeals from courts of foreign nations. The Director also argued, in the alternative, that, if the *Nauru Appeals Act* conferred original jurisdiction, it was not original jurisdiction of a kind identified in sections 75 and 76 of the *Constitution*. The argument seemed to be that the matter rose under Nauruan, and not Commonwealth, law.

The High Court, with Callinan and Heydon JJ dissenting, rejected these arguments. Despite the agreement and the language of the *Nauru Appeals Act*, both suggesting that the Act was intended to confer appellate jurisdiction, four judges in the majority (Gleeson CJ, McHugh, Gummow and Hayne JJ) found that the Act in fact conferred only original jurisdiction. The Act did so under section 76(ii) of the *Constitution*, which speaks of laws conferring jurisdiction on the High Court in any matter arising under laws made by the Parliament. The jurisdiction was not appellate because it was not included in section 73 of the *Constitution* and the appeal was the first time that the judicial power of the Commonwealth had been engaged.⁴³

Justice Kirby, the other judge in the majority, found that the jurisdiction was clearly appellate but concluded that section 73 of the *Constitution* did not

43 *Ruhani (No 1)* (2005) 219 ALR 199, 202 (Gleeson CJ), 211–213 (McHugh J), 225–6 (Gummow and Hayne JJ).

exhaustively provide for the appellate jurisdiction of the High Court.⁴⁴ In this, however, he was alone.

The dissenting judges, Callinan and Heydon JJ, claimed that to regard the *Nauru Appeal Act* as conferring original jurisdiction would be to proceed in 'the teeth of the most clearly expressed language possible'⁴⁵ and would involve the High Court 'embarking on an elaborate fiction that an "appeal" was not an appeal'.⁴⁶ They also claimed that, given the Director's stance, Nauru had effectively indicated that it was not to be bound by a decision of the court. This meant that any decision would be unenforceable, so there was no 'matter'.⁴⁷

It would again be difficult to deny that the legal materials in *Ruhani (No 1)* were inconclusive. The language of the agreement between Australian and Nauru, and the *Nauru Appeals Act* reflected an assumption that the High Court would be acting as a genuine court of appeal. On the other hand, it was not clear that this mattered since the Act could be characterised as falling within section 76(ii) of the *Constitution*. The Court clearly found the choice of characterising the jurisdiction conferred by the Act a difficult one, since it split four to three on that issue.

If the Court had considerable freedom to choose how to characterise the *Nauru Appeals Act*, the question is how it was exercised. I think that the majority did so with restraint. It did not take the opportunity to strike down an Act underpinned by a treaty which the government of Nauru, by taking the objection, seems to have breached, an Act which the Australian Law Reform Commission had recommended should be considered for repeal because it was practically unused and involved the High Court reviewing the decisions of courts of another sovereign nation.⁴⁸ Thus, the majority of the Court demonstrated once again its deference and modesty.

As an aside, I note that the appeal against Chief Justice Connell's decision was dismissed by a majority of the High Court in subsequent proceedings. Justice Kirby found himself in dissent again.

D *Ruddock v Taylor*⁴⁹

That brings me to the final case, *Ruddock v Taylor*, which focuses less on the *Constitution* than on statutory construction.

44 Ibid 240–6.

45 Ibid 264.

46 Ibid 264.

47 Ibid 267–8.

48 Australian Law Reform Commission, *Report 92: The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, 2001, [19.24]–[19.29]. Justice Kirby, in *Ruhani (No 1)*, adverted to the desirability of Australia strengthening the institutions of governance in the Pacific through judicial links: ibid 246. By contrast, the dissenters refused to accept that the Supreme Court of Nauru should be 'treated as a foreign equivalent to an administrative body and strictly non-judicial emanation of the federal parliament': ibid 264. They did, however, leave open the possibility that the Commonwealth Parliament could legislate to establish an appellate tribunal for the Pacific with the support of other nations: ibid 268.

49 (2005) 221 ALR 32.

Mr Taylor came to Australia from the United Kingdom in 1956, when he was aged nine. In 1996, he was convicted of sexual offences involving children and imprisoned. After Mr Taylor had completed his term of imprisonment, the then Minister for Immigration purported to cancel his implied visa on character grounds. Relying on the case of *Nolan v Minister for Immigration and Ethnic Affairs*,⁵⁰ officers of the Department of Immigration detained Mr Taylor as an unlawful non-citizen under section 189 of the *Migration Act 1958* (Cth) pending his anticipated removal from Australia. The section relevantly provided:

If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

The decision to cancel his visa was, however, set aside by the High Court by consent on administrative law grounds. The parliamentary secretary to the Minister for Immigration later purported to cancel the visa, and Mr Taylor was again detained. Once more, the High Court set aside the decision to cancel the visa because it found jurisdictional error, a bare majority adding that Mr Taylor was not an alien. In doing so, the Court appeared to overturn its earlier decision in *Nolan*. However, this aspect of the Court's decision in *Re Patterson; Ex parte Taylor*⁵¹ was reversed by a differently constituted majority in *Shaw v Minister for Immigration and Multicultural Affairs*.⁵² The correctness of *Nolan* had been reaffirmed.

Mr Taylor sued the Minister for false imprisonment arising from the cancellation of his visa on each occasion. He succeeded before the District Court of NSW and the Court of Appeal. The Minister appealed to the High Court. The High Court, by a majority of five to two, with McHugh and Kirby JJ dissenting, upheld the appeal.

The joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ, and Callinan J in a separate judgment, found that the NSW Court of Appeal had conflated the issue of whether the Ministers had acted without legal authority in cancelling Mr Taylor's visas and whether Mr Taylor has been unlawfully detained. The two issues, they indicated, should have been kept distinct.⁵³ Whether Mr Taylor had been unlawfully detained turned on the effect of section 189 of the *Migration Act 1958* (Cth). In the majority's view, this obliged an officer to detain someone whom the officer knew or reasonably suspected, or even believed, to be an unlawful non-citizen. They rejected the respondent's argument, which was accepted by the minority, that section 189 did not apply where the officer's state of mind had passed from suspicion to belief but the belief turned out to be legally mistaken.⁵⁴ In other words, if an officer was convinced that someone was an unlawful non-citizen and that conviction was reasonable in light of what was or could be known at the time, then section 189 required a person's detention.

50 (1988) 165 CLR 178 ('*Nolan*').

51 (2001) 207 CLR 391.

52 (2003) 218 CLR 28.

53 (2005) 221 ALR 32, 37, 38 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

54 *Ibid* 37 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

The majority also held that section 189 applied to suspicions based on mistakes of law as well as mistakes of fact, thereby rejecting the respondent's argument to the contrary. The joint judgment pointed out that there was no textual basis for finding otherwise; that the distinction between mistakes of law and fact could not be easily drawn in many cases; that drawing the distinction would create great uncertainty in a provision intended to be exercised in the administration of the Act; and that there was no constitutional reason asserted for it.⁵⁵ Justice Callinan was even blunter, saying: '[t]he notion, that conduct based upon a mistake of law cannot be regarded as reasonable is patently absurd'.⁵⁶

The significance of the case, in constitutional terms, is this: it seems implicit from the joint judgment, and explicit in the judgment of Callinan J,⁵⁷ that the power to detain persons reasonably suspected of being aliens is incidental to the aliens power in paragraph 51(xix) of the *Constitution*. It follows that the aliens power would enable officers to detain, at least for a short period, Australian citizens who are found wandering in the outback without any Australian documentation and who claim that they are foreigners.

I will not dwell on the competing statutory constructions in *Ruddock v Taylor* beyond observing that the minority's reading of section 189 has always struck me as perverse. To say that section 189 requires an officer to detain a person whom an officer merely *suspects* of being an unlawful non-citizen but not to detain someone whom the officer *believes* to be an unlawful non-citizen is, frankly, absurd. There is a continuum from suspicion to knowledge and the greater includes the lesser. If one thinks (rightly or wrongly) that one knows something to be true, surely one also believes it and suspects it.

To say that section 189 does not cover mistakes of law simply ignores the points made by the majority about the lack of any textual foundation for this conclusion, the difficulty of distinguishing between errors of law and errors of fact, and the administrative chaos that would ensue from reading the legislation in that way. Nor, with great respect to his Honour, does Kirby J adequately explain how it is that the Ministers could be liable for unlawful imprisonment if the detention by the officers was authorised by section 189.

III CONCLUSION

Posner's thesis about the Supreme Court of the United States is an example of extreme realism.⁵⁸ On this view, judgments are legally neither right nor wrong, but merely reflect political choices that in turn cannot usually be criticised or defended (except at the margins). It is a thesis that seems guaranteed to leave

55 Ibid 41–2 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

56 Ibid 41–2 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

57 Ibid 83.

58 Posner, above n 3.

modern Australian defenders of a 'strict and complete legalism'⁵⁹ as well as judicial realism⁶⁰ agape with shock.

So how well does it apply to the High Court? After considering the constitutional cases decided in 2005, I have concluded that it needs to be significantly qualified. It seems to me that the Court demonstrated that it is significantly more constrained, far less political, than its American counterpart. Without denying that there is considerable scope for value judgments, I believe that the cases show that open area is narrower and the scope for legal norms to determine matters greater than in Posner's account of the Supreme Court. This is clearest in *Ame*, a case that involved the contentious area of citizenship and membership of the Australian body politic.

Posner's thesis does, however, illuminate how restrained the High Court is by comparison with its American counterpart. The cases show that the Court does not seek to be aggressive in exercising its discretion; it seeks not to invalidate legislation.⁶¹ The roots of this attitude lie deep. In 1908, Higgins J declared:

Nothing would tend to detract from the influence and the usefulness of this Court more than the appearance of an eagerness to sit in judgment on Acts of Parliament, and to stamp the Constitution with the impress which we wish it to bear.⁶²

The Court is therefore doing nothing new. I will end by quoting from one of Posner's judicial heroes, Justice Oliver Wendell Holmes. Summing up his judicial philosophy, Holmes, who I think was then aged ninety, said:

59 John Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 1; John Gava, 'Another Blast from the Past or why the Left should Embrace Strict Legalism: a Reply to Frank Carrigan' 27 *Melbourne University Law Review* 186.

60 Sir Anthony Mason, 'Legislative and Judicial Law-making: Can We Locate an Identifiable Boundary?' (2004) 24 *Adelaide Law Review* 15; Michael Kirby, 'Beyond the Judicial Fairy Tales' 48 *Quadrant*, January 2004.

61 Critics of the Rehnquist Court's 'activism' have focussed on the congressional legislation that it struck down: see Cass Sunstein, 'A Hand in the Matter' (March–April 2003) *Legal Affairs*; Paul Gewirtz and Chad Golder, 'So Who are the Activists?', *New York Times* (New York), 6 July 2005. For a critique of the argument, see Orin Kerr, 'Judicial Activism, One More Time' (2005) <<http://volokh.com/posts/1120667271.shtml>> at 28 May 2006.

62 *Attorney-General (NSW) v Brewery Employees' Union of NSW* (1908) 6 CLR 469, 590.

About seventy five years ago, I learned that I was not God. And so, when the people want to do something, and I can't find anything in the Constitution expressly forbidding them to do it, I say, whether I like it or not: "Goddammit it, let 'em do it!"⁶³

I am not sure that the High Court has gone this far yet, but the 2005 term shows that this philosophy is coming along nicely.

63 Quoted in H Abraham and B Perry, *Freedom and the Court* (7th ed, 1998), 26.