

SAMUEL GRIFFITH SOCIETY 2025 NATIONAL CONFERENCE:

FIFTEENTH SIR HARRY GIBBS ORATION (AUGUST 2025)

THE LONG MARCH OF CH III OF THE CONSTITUTION

The Honourable Justice Simon Steward AC¹

1. May I commence by expressing my great admiration and deep respect for the wonderful work of that very fine jurist Sir Harry Gibbs. Sir Harry – known to his friends as Bill – was a true lawyer and a very true gentleman. He is one of my heroes. May I also acknowledge that distinguished former judge and former President of the Society: the Honourable Ian Callinan AC, KC. Australia owes you a great debt for the service you have given your country, and for the tremendous example you have set for others, not least myself.
2. May I also thank the Samuel Griffith Society and its President, Mr Allan Myers, AC, KC for inviting me to give this oration. It is a profound honour to present the oration in 2025 in the wonderful city of Perth. Finally, I would like to thank my brother Edelman J for his characteristic kindness and generosity in introducing me. He is a genuine and dear friend indeed.
3. The purpose of my oration concerns the history of some of the jurisprudence in the High Court of Australia concerning the reach of judicial power. Ch III, as most of you would know, is the part in the

1 Justice of the High Court of Australia.

Constitution which deals with judicial power and who may exercise it. Chapter I concerns legislative power and Chapter II concerns executive power. It is not my intention in this oration to seek to define what judicial power is, although I will touch upon that topic. As you will discover, the issue of what is and what is not an exclusively judicial power is a profoundly difficult issue. Indeed, in Allsop CJ's 2022 Sir Harry Gibbs Oration, his Honour stated that judicial power cannot be defined.² Rather, my intention is to trace some of the history of the jurisprudence concerning Chapter III as an educative illustration of how my Court develops, or perhaps changes, the law. The pace of that change has very rapidly increased in recent years. That is why this oration is entitled the "Long March of Ch III of the *Constitution*".

4. My aim is not to give critical commentary on what has occurred; that would not be appropriate. In that respect, I must confess to you that I am sometimes perceived to be a non-conformist on the Court. Whether that is accurate, I do not know. But as will become apparent, I have struggled to agree with much of what has happened recently in the Court's jurisprudence regarding the reach of judicial power. It is possible that Sir Harry might have shared in my struggles. In any event, in what follows, let me simply

² James Allsop, 'Being a judge: judicial technique, independence and labels', *Federal Court of Australia* (Sir Harry Gibbs Memorial Oration, 30 April 2022) <www.fedcourt.gov.au/digital-law-library/judges-speeches/speeches-former-judges/chief-justice-allsop/allsop-cj-20220430>.

give you some facts – some food for thought. I suspect many of these facts you may not have heard before.

5. The issue of what constitutes judicial power is important, because Australia embraces the doctrine of the separation of powers in its *Constitution*. The doctrine is assumed to be beneficial. But that is a big assumption. And it is not necessarily achieved by having a *Constitution*. In the 1970s, the British journalist Ludovic Kennedy interviewed on TV the then Lord High Chancellor of Great Britain, the Second Viscount Hailsham. His Lordship was asked if he had any conflict of interest given that he sat in Cabinet, sat in the House of Lords on the Woolsack, and also sat as a judge in the Appellate Committee of the House of Lords. In other words, his Lordship held offices in all three branches of government. His Lordship politely said "no". His Lordship said that it was his very function to keep each branch of government separate, and that for this purpose he needed to be a member of each. His Lordship said this was a better way of governing the three branches rather than leaving the task of separation to a written document, namely a constitution, such as that found in the United States of America.

American jurisprudence

6. The Supreme Court of the United States first recognised the immediacy of separation from the words of the *US Constitution* in

1792 in *Hayburn's Case*.³ It became entrenched. Thus, in 1880, Miller J, speaking for the US Supreme Court in *Kilbourn v Thompson* said:⁴

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

7. In 1931 in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* ("*Dignan*"),⁵ Dixon J well expressed Australia's adoption of this doctrine. His Honour said:⁶

"When they adopted the distribution of powers which they found in the Constitution of the United States, the framers of the Constitution of the Commonwealth of Australia were, of course, by no means unaware of the significance given to the distribution and of the consequences flowing from it. But an independent consideration of the provisions of the Commonwealth Constitution unaided by any such knowledge cannot but

³ 2 US (2 Dall) 409 (1792).

⁴ 103 US 168 at 190-191 (1881).

⁵ (1931) 46 CLR 73.

⁶ (1931) 46 CLR 73 at 96.

suggest that it was intended to confine to each of the three departments of government the exercise of the power with which it is invested by the Constitution, the doing of that which can be done in virtue only of the possession of such a power."

Early Australian jurisprudence

8. The foregoing explains foundational Australian authorities, such as *R v Kirby; Ex parte Boilermakers' Society of Australia* in 1956,⁷ which established that the judicial power of the Commonwealth could not be conferred on a body which also exercised non-judicial power. In that case, legislation conferring both judicial power and an arbitration power on the Commonwealth Court of Conciliation and Arbitration was held to be invalid.
9. Dividing governmental power into three branches may be conceptually easy; but it is another thing entirely to define what types of power are exercisable by each branch. In that respect, some types of power may be exercised by more than one branch. For example, both the legislative and judicial branches may prescribe the procedural rules of a court.⁸ Other types of power have been found to be exclusively reposed in one particular branch. As we shall

⁷ (1956) 94 CLR 254.

⁸ See, eg, Gerangelos "Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate" (2005) 8(1) *Constitutional Law and Policy Review* 1 at 9.

see, that has serious consequences. Again, Dixon J recognised these difficulties in the *Dignan* case. His Honour said:⁹

"But it is one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome the logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation. In the first place it was apparent that many things might be done in the course of, or as ancillary to, the execution of one power which might also be done in virtue of another."

10. An early definition of judicial power was set out in 1909 by Griffith CJ in *Huddart, Parker and Co Pty Ltd v Moorehead*, where his Honour said this:¹⁰

"[T]he words 'judicial power' as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

11. In defining judicial power thereafter in the High Court, the history of what judges did and what they did not do assumed great if not dispositive importance. One used to ask: is this what judges have traditionally done? Kitto J made this clear in *R v Davison* when

⁹ (1931) 46 CLR 73 at 91-92.

¹⁰ (1901) 8 CLR 330 at 357.

his Honour said that one should look to what judges did when the *Constitution* became law.¹¹ His Honour observed:¹²

"Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it."

12. That judicial power should be defined by asking what judges have traditionally done in the past could be no surer nor more obvious a method of delineating judicial power from the power of the executive and legislative branches.

13. By 1970, such history retained its importance. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*, Kitto J again observed:¹³

"[I]t has not been found possible to frame an exhaustive definition of judicial power. But this is not to say that the expression is meaningless. The uncertainties that are met with arise, generally if not always, from the fact that there is a 'borderland in which judicial and administrative functions overlap', so that for reasons depending upon general reasoning, analogy or history, some powers which may appropriately be treated as administrative when conferred on an administrative functionary may just

¹¹ (1954) 90 CLR 353.

¹² (1954) 90 CLR 353 at 382.

¹³ (1970) 123 CLR 361 at 373 (citation omitted).

as appropriately be seen in a judicial aspect and be validly conferred upon a federal court."

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs

14. History teaches that judges decide controversies. That is their central role. And that includes deciding the punishment of those who have been adjudged guilty of a crime. Neither the executive nor legislative branches can adjudge the guilt or innocence of any accused person or punish a convicted person. This was confirmed in 1992 in the famous case of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ("*Lim*").¹⁴ This is a pivotal decision. It concerned a group of Cambodian nationals who had entered Australia illegally by boat. They were placed into detention and denied refugee status by the responsible Minister. The Federal Court of Australia set aside the decisions refusing the plaintiffs' applications for refugee status and referred the case back for determination. Whilst their case remained pending (and prior to the Federal Court hearing separate applications for orders releasing the plaintiffs from custody), Parliament passed a new set of provisions to be inserted into the *Migration Act 1958* (Cth). These provided for the detention without warrant or arrest of aliens and also for their removal from Australia. The provisions also purported to prohibit any court from releasing an alien from custody. The Cambodians, in a case stated for the High Court, challenged the

¹⁴ (1992) 176 CLR 1.

validity of the new provisions.¹⁵ Their senior counsel – the brilliant late Mr Brian Shaw QC – amongst other things argued that the provisions infringed Ch III of the *Constitution*. The provisions constituted, he said, a bill of pains and penalties as they in substance were directed at his clients. He also submitted that because of Ch III, Parliament was limited in what penalties it could impose upon a person and the provisions in question, he argued, exceeded those limits.¹⁶

15. The validity of all the provisions was upheld, save for the section which purported to prevent a court from releasing an alien from custody, which was held to be invalid. In reaching this conclusion, the Court made a number of important observations about the nature of judicial power. McHugh J observed:¹⁷

"The line between judicial power and executive power in particular is very blurred. Prescriptively separating the three powers has proved impossible. The classification of the exercise of a power as legislative, executive or judicial frequently depends upon a value judgment as to whether the particular power, having regard to the circumstances which call for its exercise, falls into one category rather than another. The application of analytical tests and descriptions does not always determine the correct classification. *Historical practice plays an important, sometimes decisive, part in determining whether the exercise of a particular power is legislative, executive or judicial in character.*"

15 (1992) 176 CLR 1 at 14-19.

16 (1992) 176 CLR 1 at 4-6.

17 (1992) 176 CLR 1 at 67 (emphasis added).

16. History explains why the adjudgment and punishment of criminal guilt under the law is a power exclusively vested in the judicial branch of government. As Brennan, Deane and Dawson JJ said:¹⁸

"There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth ... That being so, Ch. III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s. 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive."

17. Their Honours went on to reason that, historically, the law recognised a number of qualifications to the general proposition that the power to confine a citizen in custody is an exclusively judicial power. These qualifications included: detention by the executive of an accused in custody pending trial; detention to prevent the spread of disease; and detention of an alien pending the processing of that person's visa application or in order to facilitate their removal.¹⁹ The last exception supported the validity of the new migration provisions dealing with detention and removal.²⁰

¹⁸ (1992) 176 CLR 1 at 27.

¹⁹ (1992) 176 CLR 1 at 28-29.

²⁰ (1992) 176 CLR 1 at 30-32.

18. More recently, in 2023, the proposition that detention for the purpose of facilitating removal may validly be imposed by the executive was further explained in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ("NZYQ").²¹ There the Court made clear that detention of this kind is not valid where there is no real prospect of the purpose of removal becoming practicable in the reasonably foreseeable future.²² But importantly, the Court did not say that only judges may punish more generally – although it did make it clear that, subject to the known exceptions, Parliament could not validly pass a law permitting the executive arbitrarily to detain a citizen in custody for reasons divorced from the criminal justice system. That is because detention was characterised as a form of punishment which can only be imposed by a court upon the adjudgment of a person's conviction for a crime.²³ But the Court did not otherwise decide that judges have a monopoly over the exercise of any power which is punitive in nature.

19. That the principle was confined in this way had been earlier confirmed by Gleeson CJ in *Re Woolley; Ex parte Applicants M276/2003* ("Woolley"), when his Honour said:²⁴

²¹ (2023) 280 CLR 137.

²² (2023) 280 CLR 137 at 163-164 [60].

²³ (2023) 280 CLR 137 at 157 [39].

²⁴ (2004) 225 CLR 1 at 12 [17].

"The proposition that, ordinarily, the involuntary detention of a citizen by the State is penal or punitive in character was not based upon the idea that all hardship or distress inflicted upon a citizen by the State constitutes a form of punishment, although colloquially that is how it may sometimes be described. Taxes are sometimes said, in political rhetoric, to be punitive. That is a loose use of the term. Punishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function."

20. In 1996, in the landmark case of *Kable v Director of Public Prosecutions (NSW)*,²⁵ the Court developed another doctrine derived from the *Constitution*'s separation of powers: that it is not lawful for Parliament to pass a law which purports to confer non-judicial functions on a court which exercises federal jurisdiction, if to do so would substantially impair the institutional integrity of that court.²⁶ We can put that doctrine to one side; for present purposes, I wish to retain our attention on the concept of punitive laws and Ch III of the *Constitution*.

Alexander v Minister for Home Affairs

21. Then, in 2022, came the decision of the High Court in *Alexander v Minister for Home Affairs ("Alexander")*.²⁷ The case concerned a challenge to a suite of provisions in the *Australian Citizenship Act 2007* (Cth), which empowered the Minister to cancel a person's Australian citizenship in certain circumstances. These

²⁵ (1996) 189 CLR 51.

²⁶ (1996) 189 CLR 51.

²⁷ (2022) 276 CLR 336.

circumstances included where the Minister was satisfied that the person had engaged in conduct constituting foreign incursions and recruitment (which was a crime under the *Criminal Code* (Cth)) and was also both satisfied that this conduct demonstrated that the person had repudiated their allegiance to Australia and that it would be contrary to the public interest for the person to remain an Australian citizen. Cancellation was only permitted for individuals who were dual citizens.²⁸

22. The plaintiff, "Mr Alexander", was a dual citizen of Australia and Turkey. The Australian Security Intelligence Organisation assessed that he had travelled in 2013 to Syria with a Syria-based Australian member of the Islamic State ("ISIS") and that he then likely joined ISIS and engaged in foreign incursions and recruitment in that country. The Minister cancelled Mr Alexander's citizenship. At that time, and at the time of the hearing of his case, he remained in prison in Syria.²⁹

23. All of the judges of the Court, other than me, in effect decided that the judicial branch of government had the exclusive power to cancel citizenship. The laws which gave that power to the executive branch, which were used by the Minister to cancel Mr Alexander's citizenship, were thus invalid. Articulating the basis for that decision required the Court to equate the cancellation of citizenship with the

²⁸ (2022) 276 CLR 336 at 444-446 [296]-[300].

²⁹ (2022) 276 CLR 336 at 449 [308]-[309].

detention of a person in custody; both were forms of punishment. Importantly, history played no part in this decision; no judge had ever in the past cancelled a person's citizenship. In other words, whereas history drove the reasoning in *Lim* and was the justification for the doctrine that only judges can punish a person for committing a crime, that justification was here entirely absent.

24. Compounding matters was the characterisation by the majority of the Court of the purpose of the citizenship cancellation power as being a form of retribution for rejecting the shared values of the Australian community.³⁰ Moreover, it was reasoned, the Minister purported to "act as prosecutor and judge" to punish the breach of those *Criminal Code* provisions dealing with foreign incursion.³¹

25. So the principle from *Lim* was expanded from judges having the exclusive power to punish upon the adjudgment of criminal guilt – something judges have always done – to judges having the exclusive power to punish more generally, which is something they have never had in the past. This was expressly contrary to what Gleeson CJ had observed in *Woolley*,³² and indeed also, on one view, ostensibly inconsistent with a similar observation made by

30 (2022) 276 CLR 336 at 368 [75], 376-377 [98].

31 (2022) 276 CLR 336 at 402 [173], quoting *Re Tracey* (1989) 166 CLR 518 at 580.

32 (2004) 225 CLR 1 at 12 [17].

Gageler J (as his Honour then was) in 2019 in *Minogue v Victoria* (to which I will return).³³

26. Why did I dissent in *Alexander*? Essentially it is because judges, as already mentioned, in this country and in England, have never exercised any power to cancel citizenship. It has never been a judicial function. It simply is not something judges have ever done before. If one asked the question that Kitto J posed in *R v Davison* – in 1900 was the cancellation of citizenship by judges "so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system"?³⁴ – the answer would be emphatically: "no". For one thing, citizenship in this country did not then exist. Indeed, with very great respect, the conclusion reached by the majority contradicted history – having regard to the United Kingdom's *Naturalization Act 1870* (Imp), and following that our own *Naturalization Act 1903* (Cth). Under those Acts it was the executive branch that always had the power to denationalise a person. Judges had nothing to do with it.

27. Moreover, the authorities clearly supported the proposition that the federal executive can impose, in certain circumstances, detriments and penalties based upon the fact that some crime has been committed. For example, the power of the Minister to cancel

³³ (2019) 268 CLR 1 at 20-21 [31].

³⁴ (1954) 90 CLR 353 at 382.

an alien's visa upon them being found guilty of a crime was found to be valid in *Falzon v Minister for Immigration and Border Protection*.³⁵ In *Alexander*, I could not see any meaningful distinction between a power to cancel a visa and a power to cancel citizenship.

28. I was also not satisfied that the purpose of these laws was retribution. Parliament expressly stated its purpose in s 36A of the *Australian Citizenship Act*. That provision made no reference to retribution. Rather, it stated that the new provisions permitted the Minister to cancel citizenship when a person severs their bond with the Australian community and acts to renounce their allegiance. The majority's finding about retribution seemed to me to contradict the express words of the statute.³⁶

29. I also thought that the Court's conclusion contradicted prior authority.³⁷ In *Ex parte Walsh; Re Yates*, Isaacs J referred to a man who was "thought by the whole of the rest of Australia" to be of "so great a danger ... that nothing short of expulsion ... would be an adequate protection to the community".³⁸ Isaacs J observed that Parliament could validly pass a law for that person's deportation, and that the exercise of such a power was a matter reserved to the

³⁵ (2018) 262 CLR 333.

³⁶ (2022) 276 CLR 336 at 460 [337].

³⁷ (2022) 276 CLR 336 at 462-463 [342]-[343].

³⁸ (1925) 37 CLR 36 at 95.

executive branch of government, unless the deportation took place as punishment for a crime. His Honour said:³⁹

"There is nothing in the written Constitution to require the power of deportation always to be exercised through the medium of the Judiciary."

30. I was also not satisfied that Mr Alexander was really being punished by having his citizenship cancelled. Certainly, such an outcome was nothing, in my view, equivalent to being imprisoned. Why did I think that? Because determining the constitutional validity of the provisions required one to assume that the Minister had been validly satisfied that Mr Alexander had committed the crime of foreign incursion in Syria and that, by his conduct, Mr Alexander had repudiated his allegiance to this country. Why would it be punishment for the law simply to give legal effect to his act of repudiation? The cancellation of Mr Alexander's citizenship was the *de jure* acknowledgement of something which *de facto* has already occurred, namely that person's rejection of the Australian body politic.⁴⁰

39 (1925) 37 CLR 36 at 95-96.

40 (2022) 276 CLR 336 at 460 [337].

Benbrika v Minister for Home Affairs

31. A similar outcome then took place the following year in *Benbrika v Minister for Home Affairs* ("*Benbrika*").⁴¹ In 2008, Mr Benbrika was convicted of intentionally being a member of a terrorist organisation, knowing that it was a terrorist organisation (contrary to s 102.3(1) of the *Criminal Code*); of intentionally directing activities of a terrorist organisation, knowing it was a terrorist organisation (contrary to s 102.2(1) of the *Criminal Code*); and of possession of a thing, connected with preparation for a terrorist act, knowing of that connection (contrary to s 101.4(1) of the *Criminal Code*).⁴² His trial judge described him thus:⁴³

"The essence of Benbrika's criminality, with respect to the Count of directing the [activities] of a terrorist organisation lies in his exercising an enormous influence over the young men who followed him, and imbuing, or seeking to imbue in them, a fanatical hatred of non-Muslims and, even, those vast majority of Muslims who abhor violence as much as anyone else. ... There is no evidence before the Court that Benbrika has, in any way, renounced his commitment to violent jihad and hence to terrorism."

32. Mr Benbrika's sentence expired in 2020.⁴⁴ But he was thereafter detained in prison pursuant to the continuing detention

⁴¹ (2023) 280 CLR 1.

⁴² (2023) 280 CLR 1 at 6 [6].

⁴³ (2023) 280 CLR 1 at 44 [121], quoting *R v Benbrika* (2009) 222 FLR 433 at 446-447 [68], 448 [77].

⁴⁴ (2023) 280 CLR 1 at 44 [122].

regime contained in Div 105A of the *Criminal Code* precisely because a judge of the Supreme Court of Victoria was at that time of the view that if released he would be a danger to the community.⁴⁵ The validity of Div 105A had previously been confirmed by the High Court.⁴⁶

33. In the same year, the Minister cancelled Mr Benbrika's citizenship which he had acquired after moving to Australia. The Minister did so pursuant another power of cancellation contained in the *Australian Citizenship Act*. This power did not turn on the Minister's satisfaction that a crime had been committed but on the fact of actual conviction in a court. The Minister nonetheless still needed to be satisfied that the conduct to which the conviction related demonstrated a repudiation of allegiance to Australia and that cancellation was in the national interest.⁴⁷

34. Mr Benbrika challenged the validity of this law. All the justices of the Court, except I, held that this law was invalid as it offended Ch III of the *Constitution*. The essential point of the plurality was that cancelling Mr Benbrika's citizenship imposed further or additional punishment upon him for his past offending. Only judges could do this. And it did not matter whether there were any

⁴⁵ (2023) 280 CLR 1 at 44-45 [122]-[123].

⁴⁶ *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68.

⁴⁷ (2023) 280 CLR 1 at 46 [125].

historical analogues of judges themselves exercising such a power. As Kiefel CJ, Gageler, Gleeson and Jagot JJ observed:⁴⁸

"Once it is accepted that Ch III of the *Constitution* makes imposition of punishment consequent upon a finding of criminal guilt exclusively judicial and once it is further accepted, as it was by the Solicitor-General, that the termination of citizenship purportedly authorised by s 36D(1) is punitive in character, the absence of any precedent for a court being empowered to order this kind of punishment is not to the point. Chapter III requires a punishment to be imposed by a court if it is to be imposed at all."

35. As already mentioned, I dissented. I could not characterise the power in question as punitive. Instead, in my view, the power reflected a fundamental proposition, namely that the key to citizenship is allegiance to Australia. I thus observed:⁴⁹

"[W]e are not here considering the act of cancellation of citizenship in a vacuum. We are considering it in a particular context and for a particular purpose. That context is that the person in question has by their conduct demonstrated a repudiation of their allegiance to Australia and cancellation of that person's citizenship is in the public interest. In those circumstances, it would be wrong to conclude that the cancellation of citizenship has harsh consequences. The person in question has, by their conduct, objectively disavowed membership of the 'people of the Commonwealth'."

36. I then observed that the fundamental character of the power was not cancellation because of conviction for a crime; it was

⁴⁸ (2023) 280 CLR 1 at 18-19 [45]

⁴⁹ (2023) 280 CLR 1 at 53 [144].

cancellation when the conviction demonstrated a repudiation of allegiance to Australia, and that it was in the public interest to terminate the person's membership of the Australian polity. Repudiation, not criminal conviction, was the "touchstone" of the regime.⁵⁰ I wrote the following:⁵¹

"If an alien is someone who owes allegiance to a foreign power, it must follow that a citizen, or a member of the people of the Commonwealth, is someone who owes allegiance to Australia. The concept of allegiance – as a means of identifying who belongs and who does not belong to the Australian polity – is not limited to some form of overt patriotism. It can be more passive than that. It may be a quality which is merely innate. But at the very least it means fidelity to the people of Australia, its institutions, its democratic system of government and the rule of law."

37. I again concluded that cancellation of citizenship was not punishment but a simple recognition that by extreme conduct a person had inexorably separated themselves from the people as a community and from Australia itself. Accordingly, as I also said in *Alexander*, I stated that cancellation "is simply the *de jure* acknowledgment of something which has in fact already occurred: a person's rejection of membership of the Australian body politic".⁵²

⁵⁰ (2023) 280 CLR 1 at 53 [145].

⁵¹ (2023) 280 CLR 1 at 55 [152].

⁵² (2023) 280 CLR 1 at 57 [157].

YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs

38. The next step in the long march took place in 2024. It is the decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ("YBFZ").⁵³ YBFZ was one of the group of detainees who were released following the *NZYQ* decision. Following their release, Parliament passed the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth). This introduced a series of provisions into the *Migration Act* and the *Migration Regulations 1994* (Cth) which would permit the issue of a special visa to the detainees who had been released, but in certain cases subject to certain conditions. The detainees needed to have a visa because, under the *Migration Act*, an alien who has no visa in Australia must be detained and removed.⁵⁴

39. Two of the visa conditions were called the "monitoring condition" and the "curfew condition". The monitoring condition required an electronic monitoring device to be affixed to the visa holder, usually around the ankle. This permitted continuous electronic surveillance of the person's location. The curfew condition usually required the visa holder to stay within a specified location – often that person's home – overnight. The *Migration Regulations* obliged the Minister to impose these conditions unless he or she was

⁵³ (2024) 99 ALJR 1; 419 ALR 457.

⁵⁴ (2024) 99 ALJR 1 at 47-48 [190]-[193]; 419 ALR 457 at 515-516.

satisfied that it was not reasonably necessary for the protection of any part of the Australian community to impose a given condition.⁵⁵

40. To assist in the application of this regime the government established a "Community Protection Board". Its function was to give advice about the application of the visa conditions for each visa holder. It developed a set of guiding principles. Amongst other things these state the following:⁵⁶

"When considering what level of risk an individual may pose to the Australian community, and whether it is not reasonably necessary for the protection of any part of the Australian community to recommend imposition of a visa condition, the Board should use its collective skills, knowledge and experience and attempt to come to a collective view. The Board must have regard to all relevant factors, which may include the following:

- Immigration history;
- criminality;
- Behaviour in criminal custody and/or immigration detention;
- Behaviour and compliance with visa condition while in the community;
- Medical and health information (inclusive of psychological);
- Identity information;
- Security information; and
- Whether there are any other circumstances that are likely to increase the risk the individual may pose to the Australian community; and

⁵⁵ (2024) 99 ALJR 1 at 48 [194]-[195]; 419 ALR 457 at 516-517.

⁵⁶ (2024) 99 ALJR 1 at 49-50 [200]; 419 ALR 457 at 518-519.

- Other information relevant to the person's circumstances or conduct that is available to the Department."

41. Consistently with the tailored nature of these new provisions and regulations, of the 153 members of the NZYQ group, the Board recommended that: 59 be issued visas without either the monitoring or curfew conditions; 10 be issued visas subject only to the curfew condition; and 23 be issued visas subject only to the monitoring condition.⁵⁷

42. In the case of the plaintiff, YBFZ, the Board recommended that the grant of his visa be subject to both the monitoring and curfew conditions given his "extensive and continued" criminal history. Certain other financial prescriptive conditions were not imposed, and the Board advised that his case be reviewed within three months. But about 15 or so other conditions were otherwise imposed upon him which constricted his liberty and could be characterised as harmful, but about which he made no complaint. They included things like: the plaintiff must obtain the Minister's approval before taking up employment in a number of occupations, such as, those that involve the use of, or access to, chemicals of security concern; the plaintiff must obtain the Minister's approval before undertaking a number of activities, such as flight training; and the plaintiff must

⁵⁷ (2024) 99 ALJR 1 at 47 [192], 50 [201]; 419 ALR 457 at 515-516, 519.

obtain the Minister's approval before acquiring chemicals of security concern.⁵⁸

43. YBFZ challenged the validity of the regulations which provided for the imposition of the monitoring and curfew conditions on the ground that each infringed Ch III of the *Constitution*. Each imposed, it was argued, a form of punishment reserved exclusively to the judicial branch of government. Save for myself⁵⁹ and Beech-Jones J,⁶⁰ all the judges of the Court agreed with YBFZ,⁶¹ although Edelman J's reasons differed from that of the plurality.⁶² The regulations were thus held invalid.

44. The lead judgment was given by Gageler CJ, Gordon, Gleeson and Jagot JJ. In it, the meaning of judicial power was finally divorced from any necessary connection with history and traditional judicial practice in favour of what appeared to me to be very abstract concepts. And it was made clear that only judges can apply and enforce laws characterised as punitive. But what was punitive

⁵⁸ (2024) 99 ALJR 1 at 50 [202]-[204]; 419 ALR 457 at 519-520.

⁵⁹ (2024) 99 ALJR 1 at 44-54 [172]-[226]; 419 ALR 457 at 511-524.

⁶⁰ (2024) 99 ALJR 1 at 54-73 [227]-[327]; 419 ALR 457 at 524-550.

⁶¹ (2024) 99 ALJR 1 at 9-24 [1]-[88]; 419 ALR 457 at 463-484.

⁶² (2024) 99 ALJR 1 at 24-44 [89]-[171]; 419 ALR 457 at 484-510.

was expanded. This was said to be an "evolution" of the law.⁶³

What was punitive was now to be founded in a new theoretical principle that there exists:⁶⁴

"... a broader stream of common law and constitutional principle based on the pre-eminent value the law of this country gives to the protection of human life (from arbitrary capital punishment), limb, now called bodily integrity (from arbitrary corporal punishment), and liberty (from arbitrary detention). This reflects the common law's acceptance of the inherent and irreducible status of each human being in the compact between the individual and the state, a compact which this country inherited and within which the *Constitution* was enacted."

45. A source of authority for this "compact" was said to be the 17th edition of Blackstone's *Commentaries on the Laws of England*.⁶⁵ I was not aware of this constitutional "compact" before.

46. Moreover, their Honours made it clear that the characteristics of judicial power are not "frozen in time", but instead judicial power exhibits characteristics which are:⁶⁶

⁶³ (2024) 99 ALJR 1 at 11 [14]; 419 ALR 457 at 467.

⁶⁴ (2024) 99 ALJR 1 at 11 [12]; 419 ALR 457 at 466.

⁶⁵ (2024) 99 ALJR 1 at 11 [12]; 419 ALR 457 at 466, citing Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 1, ch 1, pp 126-131, 135-137.

⁶⁶ (2024) 99 ALJR 1 at 11 [14]; 419 ALR 457 at 467, quoting *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 276 [141].

"... deeply rooted in a tradition within which judicial protection of individual liberty against legislative or executive incursion has been a core value".

47. For this proposition, the majority referenced a single High Court judgment; it is a *dissenting* opinion of Gageler J (as his Honour then was) in *Vella v Commissioner v Police (NSW)*.⁶⁷ Uncoupling the meaning of judicial power from history permitted the Court to assert for the first time that, as a matter of federal power, only judges may impose a curfew and only judges may require the wearing of monitoring devices. But relevantly, judges had never before exercised a power of curfew, nor had the exclusive power to impose a monitoring device.

48. Their Honours nonetheless went on to explain that there was no freestanding constitutional right to protection from all interferences with bodily integrity or liberty. This was a change in the concept of traditional judge-imposed punishment for the committing of a crime to a free-ranging concept of that which is punitive. Their Honours said:⁶⁸

"There are many interferences with bodily integrity and liberty authorised by the legislature, both significant and insignificant, which are non-punitive and therefore do not infringe on exclusively judicial power."

⁶⁷ (2019) 269 CLR 219 at 276 [141].

⁶⁸ (2024) 99 ALJR 1 at 12 [15]; 419 ALR 457 at 467.

49. However, on one view, the majority did not explain precisely how and when we are to characterise a law which interferes with bodily integrity and liberty as being non-punitive. Yet note how many laws may be characterised as an interference with your liberty. Instead, we now have a brand new two-stage test. Stage one involves asking whether a federal law is *prima facie* punitive. This is determined in the following way:⁶⁹

"In the constitutional context the *prima facie* character of a power may be punitive by default (for example, a power to impose involuntary detention in custody). If not punitive by default, the task of characterisation of the power begins by determining the meaning and scope of the law; the law's practical and legal operation; and the end or object the law is designed to achieve (ascertained objectively from its whole text and context at a level of generality or specificity calibrated to the importance of the 'constitutional value ... at stake'). The object of the required analysis is ultimately 'a single question of characterisation: whether the power to impose the detriment conferred by the law is properly characterised as punitive and therefore as exclusively judicial'."

50. Perhaps compounding matters is that earlier this year, in *Cherry v Queensland*, the Court unanimously endorsed the following proposition taken from Gageler J's earlier judgment in *Minogue v Victoria*:⁷⁰

"Deprivation of liberty consequent upon a determination of criminal guilt is, without more, an exercise of judicial

⁶⁹ (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468, quoting *Jones v Commonwealth* (2023) 280 CLR 62 at 82 [43].

⁷⁰ *Cherry v Queensland* (2025) 99 ALJR 782 at 790 [41], quoting *Minogue v Victoria* (2019) 268 CLR 1 at 20-21 [31].

power. 'Punishment', in the generic sense of State infliction of involuntary hardship or detriment, is not."

51. So that is the first stage of the test. Then the majority in *YBFZ* added something new to the meaning of judicial power, in the form of the second stage of the test. It is the doctrine of judicial justification, which you apply if, at the first stage, you decide that the law is *prima facie* punitive. Their Honours reasoned as follows:⁷¹

"Justification involves asking if the power having a *prima facie* punitive character (by default or otherwise) is reasonably capable of being seen to be necessary (in the relevant sense of 'reasonably appropriate and adapted' rather than essential or indispensable) for a legitimate and non-punitive purpose in which event the power's constitutional character is non-punitive."

52. No precedent was cited that supports the much broader introduction of this concept.

53. Edelman J's separate reasons in *YBFZ* are noteworthy.⁷² His Honour did not dissent, but adopted a very different form of analysis. His Honour commenced with an orthodox and very helpful description of what is classically considered to be punishment, adopted from Professor Herbert Lionel Adolphus Hart's work called

⁷¹ (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

⁷² (2024) 99 ALJR 1 at 24-44 [89]-[171]; 419 ALR 457 at 484-510.

Punishment and Responsibility: Essays in the Philosophy of Law.

Edelman J said:⁷³

"In a description to which this Court has referred on numerous occasions, HLA Hart famously described the 'standard or central case' of punishment as involving the following elements: (i) pain or unpleasant consequences; (ii) for an offence against legal rules; (iii) of an actual or supposed offender for their offence; (iv) intentionally administered by humans other than the offender; and (v) imposed and administered by an authority constituted by a legal system against which the offence is committed. As Hart recognised, his description was only of the standard or central case of punishment. He said that his description was not exhaustive or definitional."

54. Edelman J decided that the applicable *Migration Act* provisions and regulations were invalid, but not because of the doctrine of the separation of powers. Rather, they were invalid because they were beyond the reach of the aliens power in s 51(xix) of the *Constitution*. A law which, for example, authorised the detention of an alien beyond what is reasonably capable of being seen as necessary for the purposes of deportation would not fall within the ambit of the aliens power. Such a law would be invalid whether exercised by the judicial branch or by the executive branch of government.

⁷³ (2024) 99 ALJR 1 at 32 [124]; 419 ALR 457 at 495-496 (footnotes omitted), citing Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 1968 at 4-5.

55. Edelman J essentially concluded that the monitoring and curfew conditions were extreme and disproportionate impositions or constraints which were beyond reach of the aliens power.⁷⁴

56. As already mentioned, I dissented.⁷⁵ I said:⁷⁶

"... more recently the *Lim* principle has been extended. The extension is manifest in the reasons of the majority, which, amongst other things, seek support from dissenting reasons in recent decisions of this Court. From preserving to a court, and only to a court, a function which is clearly and exclusively judicial, the principle has, with respect, been used to strike down laws passed validly by Parliament concerning matters which have not ever, historically or otherwise, been the exclusive preserve of the courts. *Alexander v Minister for Home Affairs* and *Benbrika v Minister for Home Affairs* are good examples of this new development. In each of *Alexander* and *Benbrika*, legislation for the cancellation of a person's citizenship by the executive branch of government was declared by a majority of this Court to be invalid because of the *Lim* principle. Yet no Australian court had ever before exercised such a power. There was, with respect, no judicial function that needed preserving and protecting. Upon reflection, it is now clear that the *Lim* principle has slipped away, indeed has become entirely uncoupled, from established and basal principle as implied from the structure of the *Constitution*."

57. I referenced an opinion of Frankfurter J, a famous justice of the US Supreme Court, and a dear friend of Sir Owen Dixon, as to

74 (2024) 99 ALJR 1 at 42-43 [162]-[169]; 419 ALR 457 at 508-509.

75 (2024) 99 ALJR 1 at 44-54 [172]-[226]; 419 ALR 457 at 511-524.

76 (2024) 99 ALJR 1 at 44-45 [176]; 419 ALR 457 at 511-512 (footnotes omitted).

what types of punishment are exclusively reposed in the judicial branch of government.⁷⁷ In *United States v Lovett*, his Honour said:⁷⁸

"Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment."

58. I expressly warned that there is a real danger in reasoning from "highly generalised, undefined and abstract concepts, or perhaps aspirations, which will inevitably mean very different things to very different people and judges".⁷⁹

59. I also reasoned as follows:⁸⁰

"A difficulty with this new expression of the *Lim* principle, if it may still be called the *Lim* principle, is its potential, as observed by the Solicitor-General of the Commonwealth, to introduce incrementally into our Constitution a judge-made form of a Bill of Rights whenever a law of the Commonwealth in some way relevantly harms, or infringes upon, the liberty of a person. With each such increment the executive branch will be denied more and more power. That is because such a law, if it is to be valid and pass muster, must, on this view, satisfy the opinion of the judiciary that it pursues a 'legitimate and non-punitive purpose', a

⁷⁷ (2024) 99 ALJR 1 at 45 [179], 47 [188]-[189]; 419 ALR 457 at 512, 515.

⁷⁸ 328 US 303 at 324 (1946).

⁷⁹ (2024) 99 ALJR 1 at 46 [184]; 419 ALR 457 at 513-514.

⁸⁰ (2024) 99 ALJR 1 at 46 [183]; 419 ALR 457 at 513 (footnotes omitted).

concept which has yet to be clearly defined. This expression of principle does not, as it should, properly inquire into what, having regard to history, may correctly be seen as exclusively judicial functions. Instead, there is now a seemingly free-ranging investigation into whether a law is punitive or harmful, and, if so, whether it can otherwise be justified in some way as 'legitimate' without a delineation of the principles or values by which this judicial conclusion is to be reached."

60. I also referenced Frankfurter J's well-known warning, which appears in *Colegrove v Green*: "Courts ought not to enter this political thicket."⁸¹

61. I went on to decide that the contention that, as a matter of federal law, only judges can impose curfews and ankle-bracelet monitoring devices was entirely unsupported by history and precedent. I said:⁸²

"Parliament may pass laws for the protection of the Australian community from unlawful non-citizens or aliens who may pose a threat of harm. Such laws do not in any way confer on the executive any part of the exclusive judicial power exercisable in this country by judges alone. In that respect, no authority was cited for the proposition that, as a matter of implication arising from the structure of the *Constitution*, judges, and only judges, may order curfews or the wearing of electronic monitoring devices as conditions for the issue of a visa. Instead, the power to issue visas with conditions is one that is validly exercised by the executive branch of government, and that has always been so. And it is for that branch to determine what conditions, as specified by Parliament, it may impose for the grant of a visa."

81 (2024) 99 ALJR 1 at 47 [188]; 419 ALR 457 at 515, quoting *Colegrove v Green*, 328 US 549 at 556 (1946).

82 (2024) 99 ALJR 1 at 50-51 [206]; 419 ALR 457 at 520.

62. Strikingly, this very dramatic change in constitutional law was the subject of limited, if any, commentary in the media. It emerged without a sound.

Ravbar v Commonwealth

63. More recently, in *Ravbar v Commonwealth*,⁸³ my brother Edelman J again expressed concerns about the new Ch III doctrine. *Ravbar* is a case in which certain members of the Construction, Forestry and Maritime Employees Union ("CFMEU") sought to challenge the validity of the law which appointed Mr Mark Irving KC as administrator of the CFMEU for up to five years. The challenge relied upon, amongst other things, both the doctrine of the implied freedom of political communication, and a submission that the law infringed Ch III of the *Constitution*.⁸⁴ Only judges, it was said, can appoint an administrator to a union under a federal law. Edelman J said the following, in *obiter*, about the current two stage Ch III test:⁸⁵

"As a matter of precedent, unless there were compelling reasons to depart from it, I should endeavour to make the best sense of, and to apply, the test supported by a majority of this Court in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* for whether legislative means are punishment. But with great respect, the state of the present jurisprudence concerning the

83 (2025) 99 ALJR 1000.

84 (2025) 99 ALJR 1000 at 1043 [170].

85 (2025) 99 ALJR 1000 at 1061 [252].

concept of punishment in Ch III of the *Constitution* is extremely difficult to understand or apply and involves a legal fiction. The test is essentially that a legislative means is 'punitive' if it is prima facie punitive, unless a court concludes that it is not punitive because it is not for a punitive purpose."

Conclusion

64. To sum up, since *YBFZ*, a majority of the Court are generally of the following view. To determine the constitutional validity of any given act of Federal Parliament which confers a power on the executive branch: you first must decide whether the means mandated by the act are "prima facie punitive ... (by default or otherwise)";⁸⁶ and if so, then, at the second stage, those means will be actually punitive unless they are "reasonably capable of being seen to be necessary (in the relevant sense of 'reasonably appropriate and adapted' ...) for a legitimate and non-punitive purpose".⁸⁷

65. In conclusion, whether the long march of the Ch III is at an end, I cannot say. But finished or not, part of me does think there is something in the alternative method of keeping the branches of

⁸⁶ *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

⁸⁷ *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468 (footnotes omitted).

government separate as proclaimed by Viscount Hailsham. But I suspect that to make it work you would need a Viscount Hailsham.

66. Thank you for kindly listening to me and may God bless you all.