

NAVIGATING CONTINUITY AND CHANGE: THE HIGH COURT ON CONSTITUTIONAL LAW IN THE 2024 TERM

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The High Court's 2024 constitutional law term was in the shadow of two major constitutional decisions handed down in late 2023. There were no moments of great rupture, and instead the Court had to come to grips with, and work out the implications of, its decision in NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs and the extent of the protections offered by Chapter III. In considering the 2024 constitutional law term, this article looks at how the High Court navigated both continuity and change. It does this by considering the extent to which the Court looks outwards to the world (the present), the extent to which it draws on history and precedent (the past), and finally the question of constitutional change (the future). These orientations of present, past, and future offer one way of understanding some of the deep divisions on the Court in the 2024 term.

I INTRODUCTION

2024 marks the first full term of the High Court with Gageler CJ at the helm, so it is perhaps fitting to begin with words from his Honour. If we step back to 2002, the inaugural Gilbert + Tobin Centre of Public Law Constitutional Law Conference was held. At that event, Stephen Gageler SC, then a barrister at the Sydney Bar, gave the opening address on the subject of the 2001 High Court term, thus beginning the tradition for this annual event.¹ This tradition was imported from the United States ('US'), where reflections on the US 'Supreme Court term' have been published in the *Harvard Law Review* since 1949.² As Gageler remarked back in 2002, since its beginnings as a student note, the foreword has become more

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1 Stephen Gageler, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25(1) *University of New South Wales Law Journal* 194 ('The 2001 Term').

2 Ibid.

comprehensive, and it serves to ‘chronicle and to criticise the recent work of the Supreme Court in times mundane as well as in times exciting’.³

As was noted by Gageler, and then again by Pamela Tate in 2008 when delivering this same address, one of the difficulties of importing this tradition from the US is in terms of its scope.⁴ The High Court does not follow the same defined ‘term’ as the US Supreme Court, instead following an annual calendar. My own approach has been to (largely) confine myself to those cases that were determined during the 2024 calendar year, few in number as they were, though I have touched upon a couple of cases which have not yet been handed down.

In 2002, Gageler remarked that 2001 had not been a ‘watershed’ year for the High Court, and that the Court did not ‘startle the nation’.⁵ Enough of that had occurred in 1999, he said, when the cross-vesting scheme was struck down in *Re Wakim; Ex parte McNally*.⁶ Perhaps we might see some parallels in the 2024 term. For much of 2024, the Court’s workload seemed to be focused elsewhere, and the constitutional cases were relatively few in number. There have been no moments of great rupture, as we might characterise both *Vanderstock v Victoria* (‘*Vanderstock*’)⁷ and *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (‘*NZYQ*’),⁸ both of which were handed down in late 2023. In *Vanderstock*, a majority of the High Court reinterpreted decades of relatively settled jurisprudence to find the Victorian zero and low emissions vehicle charge contravened section 90 of the *Constitution*, and the case revealed deep divisions within the Court (and, certainly, a move away from the collegiate approach that Kiefel CJ publicly tried to foster during her tenure as Chief Justice).⁹ Then, in *NZYQ*, after years of attempts, the Court finally overruled the constitutional finding in *Al-Kateb v Godwin* (‘*Al-Kateb*’).¹⁰ Unlike the lengthy and divisive judgments of *Vanderstock*, *NZYQ* represented an almost united court.¹¹ Relying on the *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (‘*Lim*’) principle,¹² the Court invalidated the indefinite detention of a certain class of non-citizens who had no real prospect of removal becoming practicable in the reasonably foreseeable future.¹³ Its judgment in *NZYQ* has been described as a ‘constitutional watershed’;¹⁴ it also had immediate practical

3 Ibid 194.

4 Ibid 195; Pamela Tate, ‘The High Court on Constitutional Law: The 2008 Term’ (2009) 32(1) *University of New South Wales Law Journal* 169, 170.

5 Gageler, ‘The 2001 Term’ (n 1) 195.

6 (1999) 198 CLR 511.

7 (2023) 279 CLR 333.

8 (2023) 280 CLR 137 (‘*NZYQ*’).

9 See, eg, Chief Justice Susan Kiefel, ‘Judicial Methods in the 21st Century’ (Supreme Court Oration, Banco Court, 16 March 2017) <<https://www.hcourt.gov.au/sites/default/files/assets/publications/speeches/former-justices/kiefelj/KiefelCJ16Mar2017.pdf>>.

10 (2004) 219 CLR 562 (‘*Al-Kateb*’).

11 With the exception of Edelman J, but – somewhat unusually – his Honour’s reasons were not expressed as a separate judgment but were contained within the joint reasons.

12 (1992) 176 CLR 1 (‘*Lim*’).

13 *NZYQ* (n 8) 158 [44] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

14 ‘Explainer: High Court Ruling in *NZYQ*’, *Human Rights Law Centre* (Web Page) <<https://www.hrlc.org.au/reports-news-commentary/2023/11/29/explainer-high-court-ruling-in-nzyq>>.

consequences, leading to the immediate release from immigration detention of 149 people¹⁵ and a raft of legislative responses.

The 2024 term also comes in the wake of another significant constitutional moment – the defeat of the 2023 referendum on a Voice to Parliament. This referendum joins a long line of unsuccessful referenda, and reminds us again that our *Constitution* is notoriously difficult to change.¹⁶

So the end of 2023 was marked by two quite different things. In the political sphere, the defeat of the referendum was a sign of continuity; that the Australian people are largely content with (or perhaps ill-informed about) the status quo, and that effecting change to the constitutional text remains difficult. Yet on the Court, we saw moments of considerable change; particularly the overturning of longstanding precedents in both *Vanderstock* and *NZYQ*.

The Court's 2024 term was, in some ways, in the shadow of these big constitutional changes. There were no moments of great rupture, and we instead see the Court coming to grips with and working out the implications of its decision in *NZYQ* and the extent of the protections offered by Chapter III.

In this review of the 2024 High Court constitutional term, I focus broadly on themes of continuity and change. There have been some significant changes in the composition of the Court, with Gageler CJ taking over from Kiefel CJ, and also the appointment of Beech-Jones J. There is only a small sample of constitutional cases in this term, so it is difficult to draw any definitive conclusions. However, unlike in some previous terms where Gageler J (as he then was) often wrote separately,¹⁷ we see in 2024 Gageler CJ not only joining the majority, but also authoring joint reasons in all of the constitutional cases this term.¹⁸ Of particular note is that Gageler CJ and Gordon J, both of whom dissented in *Minister for Home Affairs v Benbrika* ('*Benbrika*') in 2021,¹⁹ now form part of the majority in both *ASF17 v Commonwealth* ('*ASF17*') and *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*'), bringing with them Gleeson and Jagot JJ. In the 2024 term, Edelman J continued to write separately, elaborating on and expanding his separate reasoning in *NZYQ*.²⁰ While no doubt more can and will be said about

15 Department of Home Affairs, Information Provided in Response to a Request from Senator James Paterson and Senator the Hon Michaelia Cash in Relation to High Court Decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* to Senate Standing Committee on Legal and Constitutional Affairs, 2023–24 *Additional Estimates* (12 February 2024) <https://www.aph.gov.au/-/media/Estimates/legcon/add2324/Home_Affairs/6_Dept_Home_Affairs_Info_request_from_Sen_Paterson_and_Cash_regarding_NZYQ.pdf>.

16 Since Federation, there have been 44 referendums held, with only 8 being successful.

17 For example, Gabrielle Appleby noted that in the 2018 term, his Honour 'retained a large degree of independence in judgment writing': Gabrielle Appleby, 'The 2018 Australian High Court Constitutional Term: Placing the Court in Its Inter-institutional Context' (2021) 44(1) *University of New South Wales Law Journal* 267, 271 <<https://doi.org/10.53637/UEZU3787>>.

18 See, eg, *A-G (Tas) v Casimaty* (2024) 98 ALJR 1139, *ASF17 v Commonwealth* (2024) 98 ALJR 782 ('*ASF17*'); *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 ('*YBFZ*').

19 (2021) 272 CLR 68 ('*Benbrika*').

20 See above n 11. See also Stephen McDonald, 'NZYQ: A New Style of Unanimous Judgment for the High Court of Australia', *AUSPUBLAW* (Blog Post, 31 January 2024) <<https://www.auspublaw.org/blog/2024/1/nzyq-a-new-style-of-unanimous-judgment-for-the-high-court-of-australia>>.

the effect of changes in the composition of the Court, my focus is more generally on how the Court reconciles continuity and change in its constitutional jurisprudence.

Here I am focusing on constitutional *change*, rather than the question of amendment. As 2023 reminded us, formal amendment of the *Constitution* is rare, but change can occur in other ways. As Lisa Burton Crawford has observed, while the text of the *Constitution* has ‘all but stood still’, there have been significant changes in constitutional doctrine since 1901.²¹ While it is likely that the extent of these changes may not have been imagined by the framers, some possibility of change was certainly contemplated. As Alfred Deakin noted in 1902, the High Court is the organ of government that ‘enables the *Constitution* to grow and to be adapted’ to changed ‘necessities and circumstances’.²² Unlike constitutional amendment, which can effect ‘direct and sweeping’ change, the High Court instead moves ‘by gradual, often indirect, cautious and well-considered steps’.²³

In considering the 2024 constitutional law term, I look at some of the ‘steps’ the High Court took to navigate between the present, the past, and the future. After giving a very brief overview of the key cases, I focus on the extent to which the Court looks outwards to the world (the present), the extent to which it draws on history and precedent (the past), and finally the question of constitutional change (the future).

Note that here I use past/present/future somewhat loosely. I do not claim that these are fixed categories, or that this is necessarily the way that the Court would describe its approach. But thinking about these different orientations offers a way to understand how the Court can be both forward-looking and backward-looking; that is, it can embrace aspects of both continuity and change. What will also become apparent is that there was considerable division on the Court in the 2024 term, and considering these orientations of past/present/future offers one way to understand some of these divisions.

The first orientation I consider is the present: here I use ‘present’ to mean that the Court’s decisions must be grounded in a live issue. The Court, as we know, does not answer hypothetical or advisory questions, and its jurisdiction must be tied to a particular matter. One aspect of this is the need for a factual foundation to ground its decisions. Here I look at the Court’s observations about facts in the 2024 term, and the extent to which facts are relevant in the Chapter III context.

Second, I consider how the judges in the 2024 term sought continuity with the past. While *Lim* remains the governing precedent, it is subjected to contested interpretations. In addition, I show that there are other ways in which the judges have looked to the past to justify their conclusions, and this can be seen in both the definition of the concept of ‘punishment’ and the scope of judicial power.

Finally, in considering the ‘future’ orientation, I turn to consider the question of constitutional change. I look here at what the 2024 term might tell us about trends in the reasoning of the High Court. I focus on two key changes that are

21 Lisa Burton Crawford, ‘Legalism and the Lack of Constitutional Amendment’ (2025) 53 *Federal Law Review* e6:1–19, 3 <<https://doi.org/10.1017/fed.2025.10010>>.

22 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 5 (Alfred Deakin).

23 Ibid.

further developed in the 2024 cases: the first is the more explicit resort to values in constitutional adjudication, and in particular the reference to the protection of ‘human life’, ‘limb’, and ‘liberty’ as underpinning Chapter III. Second, in the 2024 cases we see continuing evolution of the Court’s methodology, in particular the role of proportionality reasoning.

II THE CASES

The key constitutional cases decided in 2024 were *ASF17* and *YBFZ*, but I also touch briefly upon *Ravbar v Commonwealth* (*‘Ravbar’*) and *MJZP v Director-General of Security* (*‘MJZP’*).²⁴ All of these matters concern the aftermath of *NZYQ*. This significant upheaval of constitutional doctrine carried quite a ripple effect,²⁵ we have seen the Parliament rushing to legislate changes and the Court responding.

ASF17 involved an application for habeas corpus on the basis that the applicant’s continuing detention exceeded the constitutional limitation identified in *NZYQ*.²⁶ The application was filed eight days after the Court announced its orders in *NZYQ*, and before its reasons were published.²⁷ The critical difference with *NZYQ* was that in *ASF17*, the detainee had *refused to cooperate* in the administrative processes necessary to facilitate his removal from Australia. Ultimately, the Court dismissed the appeal, and the primary judge’s dismissal of the writ for habeas corpus was upheld. The joint judgment held that there was a ‘real prospect of removal of *ASF17* from Australia to Iran becoming practicable in the reasonably foreseeable future’, and so the constitutional limitation identified in *NZYQ* had not been exceeded.²⁸ Edelman J also dismissed the appeal, but in doing so he developed his separate reasons in *NZYQ*, and the divide between his Honour and the rest of the Court deepened.

The second major case emerging from 2024 is *YBFZ*. In late 2023, following the decision in *NZYQ*, the government rushed through legislation to regulate those released from detention. A specific bridging visa was created, and schedule 2 to the *Migration Regulations 1994* (Cth) provided that certain conditions must be imposed by the Minister on visa holders unless the Minister was satisfied that it was not reasonably necessary to impose that condition for the protection of any part of the Australian community. The challenged conditions were the ‘monitoring

24 At the time of delivering this address, both of these matters were reserved before the Court. Note that *Ravbar v Commonwealth* (2025) 99 ALJR 1000 was handed down on 18 June 2025 and *MJZP v Director-General of Security* (2025) 99 ALJR 1108 (*‘MJZP’*) was handed down on 6 August 2025, but as this article is focused on the 2024 term, I have not addressed the Court’s findings in these decisions.

25 Some have suggested there may be years of litigation ahead: see Anna Talbot, ‘*ASF17 v Commonwealth* and the Illusion of Choice’, *AUSPUBLAW* (Blog Post, 28 November 2024) <<https://www.auspublaw.org/blog/2024/11/asf17-v-commonwealth-and-the-illusion-of-choice>>.

26 *ASF17* (n 18).

27 Ultimately, the primary judge dismissed the application and *ASF17* then appealed to the Full Court of the Federal Court. The appeal was removed to the High Court under section 40(1) of the *Judiciary Act 1903* (Cth). See *ASF17* (n 18) 785–6 [4]–[16] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ) for an overview of the facts and procedural history.

28 *ASF17* (n 18) 792 [49] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

condition', which required continuous electronic monitoring by way of an ankle bracelet, and the 'curfew condition' which required a visa holder to remain in a specified location between 10pm and 6am.²⁹

The plaintiff, a stateless Eritrean, who was arrested and charged with failing to comply with the conditions, sought to challenge the validity of the regulations on the basis of Chapter III.³⁰ A majority of the Court (Gageler CJ, Gordon, Gleeson, and Jagot JJ) held that the imposition of the monitoring and curfew conditions by the Commonwealth executive government was *prima facie* punitive and could not be justified.³¹ Edelman J agreed with the result, but on different grounds.³² Steward J and Beech-Jones J each dissented. Steward J held that the conditions were not *prima facie* punitive or otherwise punitive, and were not contrary to Chapter III.³³ Beech-Jones J held that the monitoring conditions were not *prima facie* punitive, but that *if* they were, they could be justified,³⁴ and the curfew conditions *were* *prima facie* punitive, but could be justified as necessary to achieve a legitimate and non-punitive purpose.³⁵

In terms of the matters which are pending,³⁶ *Ravbar* is a challenge by former construction union officials to amendments made to the *Fair Work (Registered Organisations) Act 2009* (Cth) ('*Registered Organisations Act*') and the *Fair Work Act 2009* (Cth),³⁷ which operate to place the Construction and General Division of the Construction, Forestry and Maritime Employees Union ('CFMEU') into administration. The plaintiffs contend that the challenged provisions are invalid on four bases, including whether the *Registered Organisations Act* involves the exercise of judicial power by the Minister.³⁸ I will focus only on the argument that the provisions impose punishment on the CFMEU, otherwise than by a Chapter III court, which I will discuss in the context of emerging trends in the Court's jurisprudence.

MJZP was argued in mid-December 2024; it is a challenge to section 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*'), which provides that the Federal Court is not able to authorise the inspection of material that has been certified by the Minister to be contrary to the public interest.³⁹ The plaintiff argued

29 *YBFZ* (n 18) 9 [2] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

30 *Ibid* 17 [45].

31 *Ibid* 9 [5].

32 *Ibid* 43 [170]. Edelman J held that the monitoring and curfew conditions were for the purposes of punishment (but in doing so, he reconceptualised what he said was the '*Lim* fiction'). However, because the challenged provisions here were made by regulation (and so the constitutional prohibitions in Chapter III did not operate directly), he held that the relevant paragraphs were invalid as being *ultra vires*.

33 *Ibid* 52 [215].

34 *Ibid* 70 [310].

35 *Ibid* 73 [325].

36 See above n 24.

37 Note the amendments are made by the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) and the determination scheme under the *Fair Work (Registered Organisations) Act 2009* (Cth) ('*Registered Organisations Act*'): see Michael Ravbar and William Lowth, 'Submissions of the Plaintiffs', Submission in *Ravbar v Commonwealth*, S113/2024, 21 October 2024, [2].

38 Ravbar and Lowth, 'Submissions of the Plaintiffs' (n 37) [3].

39 *MJZP* (n 24).

that this provision is contrary to Chapter III in that it requires the Federal Court to depart from the ‘general rule’ of procedural fairness more than is reasonably necessary to protect a compelling and legitimate public interest.⁴⁰ In doing so, the plaintiff sought leave to reopen and overrule *SDCV v Director-General of Security* (‘*SDCV*’).⁴¹ I will discuss this challenge in the context of potential future directions, focusing on the plaintiff’s attempt to introduce proportionality-style reasoning into Chapter III analysis.

What do these cases tell us about how the High Court seeks to navigate between the present, the past, and the future?

III PRESENT: THE NEED FOR A FACTUAL FOUNDATION

The first orientation I consider is what I term the ‘present’ and the need for the Court’s decisions to have a factual foundation. Here, I am concerned with the way in which the Court looks outwards to the world.

The Court has long emphasised that its decisions need to be grounded in a live issue. Unlike some other apex courts such as the Supreme Court of Canada, the High Court has no jurisdiction to issue advisory opinions. Indeed, the exercise of judicial power is premised on the idea that there is a concrete matter to be determined between the parties.⁴² In the 2024 cases, there were some observations about the extent to which facts are necessary for a determination of constitutional validity.

In *ASF17*, despite a unanimous result, we saw some disagreement in terms of the *relevance* of facts to the *Lim–NZYQ* inquiry. In *ASF17*, it will be recalled, the detainee had *refused to cooperate* with the administrative processes necessary to facilitate his removal from Australia.⁴³

Facts were relevant at two levels. First, facts were relevant in terms of the individual circumstances of the applicant, which might be described as the adjudicative facts.⁴⁴ In his Federal Court habeas corpus application, *ASF17* argued that he had a good reason for refusing to cooperate with deportation, namely that he was bisexual and feared being harmed if he returned to Iran. Note, however, that this had not been the basis upon which he had applied for a protection visa. Colvin J at first instance made adverse findings about *ASF17*’s credibility, holding *ASF17* did not have a genuine subjective fear of harm.⁴⁵ The High Court found that on appeal, *ASF17* had advanced no ‘convincing basis for disturbing ...

40 MJZP, ‘Submissions of the Plaintiff’, Submission in *MJZP v Director-General of Security*, S142/2023, 23 August 2024, [2].

41 (2022) 277 CLR 241 (‘*SDCV*’).

42 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 267 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

43 *ASF17* (n 18).

44 For some discussion of the classification of facts, see Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021) ch 3 <doi.org/10.5040/9781509937011>.

45 *ASF17* (n 18) 786 [19] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), citing *ASF17 v Commonwealth* (2024) 300 FCR 530.

those findings',⁴⁶ with the effect that there was no basis to doubt the trial judge's summation that ASF17 had made a voluntary decision not to cooperate.⁴⁷

Second, facts were relevant to the issue of legislative purpose. Here it is necessary to go back a step to *NZYQ*, where the Court set out the relevance of legislative purpose to the *Lim* test. This contained two elements: first, the legislative purpose of a law must be identified at an appropriate level of generality and the purpose must be 'that which the law is *designed* to achieve in fact'.⁴⁸ Second, for a legislative objective to be legitimate and non-punitive, it must be '*capable* of being achieved in fact'.⁴⁹ As Anne Twomey has observed, '[i]t is here that the detention of *NZYQ* fell down – if the legitimate purpose is effectively unachievable, then it is no longer the purpose, and the default purpose of punishment springs back into place'.⁵⁰ Six members of the Court in *NZYQ* held there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future, and so it could not be said that the 'purpose of the detention is to make the alien available for deportation'.⁵¹ Accordingly, the constitutional finding in *Al-Kateb* needed to be overruled, as otherwise the '*Lim* principle would be devoid of substance'.⁵²

Six members of the Court in *ASF17* endorsed the Court's findings in *NZYQ*, explaining that the question was one of 'characterisation'.⁵³ In other words, is there a real prospect of the removal of an alien from Australia becoming practicable in the reasonably foreseeable future? The joint judgment confirmed that these notions of 'practicability' and of the 'reasonably foreseeable future' were 'essential to anchoring the expression of the constitutional limitation in factual reality' and that they accommodated the 'real world difficulties that attach to such removal'.⁵⁴ Such difficulties, the joint judgment emphasised, were the 'root of the problem' in both *NZYQ* and *Al-Kateb*. But, such difficulties were 'categorically not the problem in this case'.⁵⁵ Therefore, the facts found by the primary judge remained undisturbed.

So, in *NZYQ*, and then again in *ASF17*, the Court set out a clear nexus between purpose and fact. A legislative purpose must be capable of being achieved in fact, and cannot merely be hypothetical or theoretical. As Ashleigh Barnes has noted, the second proposition (namely, that the legislative object 'must be capable of

46 *ASF17* (n 18) 787 [20] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

47 *Ibid.*

48 *NZYQ* (n 8) 157 [40] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (emphasis added), citing *Brown v Tasmania* (2017) 261 CLR 328, 392 [209] (Gageler J) ('*Brown*') and *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [171] (Edelman J) ('*Unions NSW*').

49 *NZYQ* (n 8) 157 [40] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (emphasis added).

50 Anne Twomey, 'Constitutional Law: *NZYQ v Minister for Immigration* and Its Legislative Progeny' (2024) 98(2) *Australian Law Journal* 103, 104.

51 *NZYQ* (n 8) 157 [44] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

52 *Ibid* 158 [45].

53 *ASF17* (n 18) 789 [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

54 *Ibid* 789 [34].

55 *Ibid* 790 [40].

being achieved in fact’)⁵⁶ is a novel one.⁵⁷ This inquiry bears strong parallels with the suitability inquiry of structured proportionality reasoning that is employed in other constitutional contexts (such as the implied freedom of political communication and section 92). As I have observed elsewhere, the suitability question is usually a low threshold and one that is easily satisfied: it requires asking only if the law is *capable* of achieving the purpose, not whether it will actually achieve the purpose.⁵⁸ It remains to be seen whether the Court will interpret this requirement – in the context of the *NZYQ* test – in the same manner as the suitability test, and in particular whether the words ‘in fact’ are intended to introduce a different standard.⁵⁹

Edelman J in *ASF17* took a different approach, disagreeing that the legislative purpose needed to be capable of being achieved as a matter of factual reality. Purpose, according to Edelman J, did *not* depend on what was factually possible. It was not ‘to be further qualified or deconstructed according to individual circumstances of particular aliens’.⁶⁰ In adopting this approach, Edelman J distinguished between a legitimate purpose and the manner in which it is implemented. He indicated that he did not consider that *NZYQ* established that one of the legitimate purposes of the relevant provisions of the *Migration Act 1958* (Cth) ‘becomes illegitimate, or will be refuted’ simply because in the *application* of those provisions, there was no real prospect that removal would become practicable in the reasonably foreseeable future.⁶¹ In Edelman J’s view, the purpose of the Commonwealth Parliament in removing classes of aliens was legitimate, even if the implementation of that purpose was not practicable in some cases.⁶² He also noted that it was ‘common that a legislative purpose will not be able to be achieved in every instance of its application’.⁶³

This disagreement about facts continued in *YBFZ*,⁶⁴ although it took place at a different level. In particular, the majority and minority Justices differed on whether the curfew and monitoring conditions were characterised as punitive, and this included a disagreement as to the facts underpinning this assessment.

The joint judgment considered the ‘substance and effect’ of the monitoring condition by reference to the agreed facts of the special case.⁶⁵ They noted that the constitutional question was to be answered by reference to a device of this kind.⁶⁶ Based on the agreed facts, the joint judgment observed that the monitoring device was ‘neither small nor discreet’ but ‘chunky’.⁶⁷ They also drew attention to the

56 *NZYQ* (n 8) 157 [40] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

57 Ashleigh Barnes, ‘Legislative Purpose, Fact-Finding and Preventative Detention following *Lim-NZYQ*’ (2025) 99(8) *Australian Law Journal* 621, 625.

58 Carter (n 44) 58.

59 Barnes (n 57) 629–30.

60 *ASF17* (n 18) 802 [101].

61 *Ibid* 793 [57].

62 *Ibid* 795–6 [69].

63 *Ibid*.

64 *YBFZ* (n 18).

65 *Ibid* 16–20 [46]–[63] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

66 *Ibid* 18 [56], though noting that monitoring could be carried out by a device other than the monitoring device described in the special case.

67 *Ibid* 19 [58].

practical effects of the charging requirements and the fact that individuals may be deterred by the continuous monitoring, concluding that the monitoring device was an ‘encroachment on the personal liberty of the individual’.⁶⁸ A contemplated object or end of the monitoring condition was to ‘set the wearer apart’,⁶⁹ which was ‘likely to expose the wearer to a degradation of autonomy’.⁷⁰

However, these inferences were not universally accepted. Steward J, for example, noted that the plaintiff claimed that wearing the electronic monitoring device ‘stigmatised him’, however there was ‘no agreed fact about whether wearing the device caused any pain or suffering’.⁷¹ While he accepted that it may be inferred that ‘wearing the device is, to an extent, stigmatising for the plaintiff’, his Honour emphasised that this is not a form of punishment.⁷² Beech-Jones J also rejected the inferences drawn by the joint judgment. In particular, he considered that the suggestion that the monitoring condition imposed an ‘involuntary restraint on liberty’ could not be supported.⁷³ His Honour noted that while this had been ‘raised in the joint reasons’, it was not the subject of any argument or consideration in the special case, and was not supported by the materials before the Court.⁷⁴ In particular, Beech-Jones J viewed these findings as ‘hypothetical possibilities’⁷⁵ – they had not been established on the facts and, moreover, they were not relevant to the constitutional question at hand: ‘They do not add to the assessment of whether the legislation imposing the monitoring condition undermines the exclusive vesting of the function of adjudging and punishing criminal guilt in the courts referred to in Ch III.’⁷⁶

So, here we see some differences in terms of what facts were perceived to be relevant, and whether those facts had been made out on the material before the Court. In particular, there was disagreement both in terms of principle (namely, whether any stigmatising effect is relevant to classifying something as punishment) and whether any such stigmatising had been established in fact. While it is the question of principle (the classification of punishment) that was arguably decisive, I suggest that we ought not to dismiss these differing views about facts. Paying attention to the factual underpinnings of constitutional adjudication is important for a number of reasons. I have written about these elsewhere,⁷⁷ but they are equally applicable to the Chapter III context.⁷⁸ First, facts matter as they ensure that the Court’s decisions accurately reflect the external world, and are not divorced from reality.⁷⁹ Second, understanding facts can help ‘elucidate the process of legal

68 Ibid 20 [62].

69 Ibid.

70 Ibid.

71 Ibid 53 [221].

72 Ibid: ‘Any stigmatisation is a by-product of a step designed to protect the community. It is far less burdensome than the ongoing detention found by Nettle J in *Falzon* not to constitute punishment.’

73 Ibid 70 [309].

74 Ibid.

75 Ibid.

76 Ibid.

77 Carter (n 44). See especially ch 8.

78 See Barnes (n 57).

79 Carter (n 44) 6.

reasoning itself’,⁸⁰ thereby increasing the transparency of judicial decisions.⁸¹ Third, understanding facts has important implications for those engaged in the practice of constitutional adjudication. For example, when should evidence be adduced, and what are the limitations of the agreed facts procedure? In *YBFZ*, for instance, we saw the Court drawing different inferences from the facts agreed by the parties, with diametrically opposite results.

One of the main fault lines emerging from the 2024 cases is in terms of legislative purpose, and the extent to which facts are relevant to this task. In both *NZYQ* and *ASF17*, it is significant that the majority has indicated that the purpose must be ‘capable of being achieved in fact’.⁸² This places at the forefront inquiries about the practical operation of legislation, and it is here that the impugned provisions in *NZYQ* ultimately fell down. It is interesting to note that when facts are considered relevant to questions of validity, usually those facts are likely to be legislative or constitutional facts.⁸³ These sorts of facts typically concern the operation of a law in practice and its likely effects or consequences, and they are usually broader than the individual parties to the dispute.⁸⁴ Since at least the 1940s, the Court has recognised that such facts might be relevant to questions of validity,⁸⁵ but under the orthodox approach, the relevant facts are those that go to the practical operation of the impugned statute, rather than the facts peculiarly relevant to the matter litigated.⁸⁶ In other constitutional contexts, such as the implied freedom of political communication, the Court has repeatedly stressed that it is concerned with the operation of a statute as a whole and not with how a statute operates in an individual case.⁸⁷ This is linked to the Court’s insistence that the freedoms protected by the *Constitution* (such as the implied freedom and section 92) are not individual

80 Ibid.

81 Ibid 170.

82 *NZYQ* (n 8) 157 [40] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ). See also *ASF17* (n 18) 789 [34] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

83 For an introduction to the literature on constitutional facts, see JD Holmes, ‘Evidence in Constitutional Cases’ (1949) 23(4) *Australian Law Journal* 235; Patrick Brazil, ‘The Ascertainment of Facts in Australian Constitutional Cases’ (1970) 4(1) *Federal Law Review* 65 <<https://doi.org/10.1177/0067205X7000400103>>; Susan Kenny, ‘Constitutional Fact Ascertainment’ (1990) 1(2) *Public Law Review* 134; Andrew S Bell, ‘Section 92, Factual Discrimination and the High Court’ (1991) 20(2) *Federal Law Review* 240 <<https://doi.org/10.1177/0067205X9102000204>>; Jo Lennan, ‘How to Find Facts in Constitutional Cases’ (2011) 30(3) *Civil Justice Quarterly* 304; Dyson Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2020) ch 2; Carter (n 44) ch 3.

84 See generally Carter (n 44) ch 3.

85 See also *Stenhouse v Coleman* (1944) 69 CLR 457, 469 (Dixon J); *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon CJ).

86 Legislative or constitutional facts are distinguished from ‘ordinary’ or ‘adjudicative’ facts, which concern the immediate parties to the dispute. As Kenneth Culp Davis explained when setting out this distinction, adjudicative facts concern ‘who did what, where, when, how, and with what motive or intent’: Kenneth Culp Davis, ‘Judicial Notice’ (1955) 55(7) *Columbia Law Review* 945, 952 <<https://doi.org/10.2307/1119390>>.

87 Note that this arises in relation to the question of whether a law burdens the freedom, and the Court has acknowledged that the individual operation may provide ‘useful examples of the statute’s practical effect’: see *Brown* (n 48) 360 [90] (Kiefel CJ, Bell and Keane JJ).

rights.⁸⁸ It is curious, then, that in the majority reasoning in both *NZYQ* and *ASF17*, it was the circumstances of the individual claimant – and whether there was a prospect of removal becoming practicable in the reasonably foreseeable future – that were critical. These facts are more readily viewed as ordinary or adjudicative facts (rather than constitutional facts), as they concern the individual parties. This, as I have explained, was a major point of difference for Edelman J, who held that whether the purpose could be achieved in fact was not relevant to the question of validity.⁸⁹ In this respect, Edelman J's position, which separates purpose from the manner in which it is implemented, seems closer to the orthodox approach adopted in other contexts.

IV SEEKING CONTINUITY WITH THE PAST: PRECEDENT AND HISTORY

The second orientation I want to explore is the past, and how the Court, in its 2024 term, sought continuity with the past.

Of course we have a fixed *Constitution*, created at a particular point in time, but one that is applied in the present.⁹⁰ The High Court itself contemplates the possibility of change in the way the *Constitution* is interpreted and applied,⁹¹ and the Court can and does depart from its own decisions.⁹² But here I am also concerned with the past more broadly, not just in terms of fidelity to past decisions, but also with the influence of history. History can play a role both in terms of historical facts but also in terms of how particular concepts have been understood at different points in time. In this Part I map out two ways in which the Court appeals to the past to justify its decisions: first, how the Court interprets and applies the *Lim* precedent, and second, how it relies on history more broadly. Again, across both of these areas we see significant divisions in the 2024 cases, suggesting the past can cut both ways.

88 Ibid. See also *Palmer v Western Australia* (2021) 272 CLR 505, 523 [42] (Kiefel CJ and Keane J).

89 *ASF17* (n 18) 793 [57].

90 While historically the *Constitution* was often characterised as 'rigid', there is a growing body of scholarship – dubbed the 'new constitutional scholarship' – which seeks to challenge this view and explore the distinctiveness of the *Constitution*. For an overview, see Chief Justice Stephen Gageler, 'The New Constitutional Scholarship in Australia' (2024) 48(1) *Melbourne University Law Review* 202.

91 Rosalind Dixon, 'The Functional *Constitution*: Re-reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455, 469 <<https://doi.org/10.1177/0067205X1504300305>>, citing Chief Justice Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4(2) *Australian Bar Review* 93.

92 Though the High Court may reconsider its own decisions, it does so sparingly, reflecting the need for certainty and predictability: see *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). See also David Bennett, 'Overruling' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 516.

A Coherence with Past Decisions

In terms of coherence with past decisions, I will focus on the judgments in *YBFZ*.⁹³ While in *NZYQ* the Court momentarily overturned the constitutional finding in *Al-Kateb*, stating that it represented an ‘inaccurate’ and ‘incomplete’ statement of the *Lim* principle,⁹⁴ it continued to rely on *Lim*. This continued in *YBFZ*. That is, the Court’s approach continues to be governed by *Lim*, and all members of the Court claimed they were acting consistently with the precedent created by *Lim*. However, we see vastly different interpretations of what the *Lim* principle entails.

The joint judgment in *YBFZ* reaffirmed the key principle from *Lim*: ‘the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt’.⁹⁵ The joint judgment emphasised that ‘in contemporary Australia’, the relevant constitutional question was whether there was a *justification* for a non-judicial exercise of power interfering with liberty or bodily integrity.⁹⁶ The joint judgment concluded that the power to impose the monitoring and curfew conditions was ‘prima facie punitive’, and there was no legitimate non-punitive purpose justifying the power.⁹⁷ Beech-Jones J affirmed both *Lim* and the ‘broader principle’ endorsed in *NZYQ*, but emphasised that not every form of hardship or detriment imposed by the executive constitutes punishment.⁹⁸

In contrast, Steward J was deeply critical of the more recent ‘extension’ of the *Lim* principle and sought to contain its scope.⁹⁹ Steward J accepted as orthodox that ‘the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt’.¹⁰⁰ However, his Honour took issue with what he saw as the extension of *Lim*, noting that the majority sought to reinforce this by reference to dissenting reasons in *Vella v Commissioner of Police (NSW)* (*‘Vella’*) and *Alexander v Minister for Home Affairs*.¹⁰¹ This extension of *Lim*, according to Steward J, risks a judge-made bill of rights. The principle had ‘slipped away, indeed has become entirely uncoupled, from established and basal principle as implied from the structure of the *Constitution*’.¹⁰² In particular, this ‘slipping away’ was seen in the concept of punishment and who may punish. According to Steward J, *Lim* ‘now applies whenever a law entrusting

93 *YBFZ* (n 18).

94 *NZYQ* (n 8) 158 [43] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

95 *Lim* (n 12) 27 (Brennan, Deane and Dawson JJ) (emphasis added).

96 *YBFZ* (n 18) 12 [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

97 *Ibid* 23 [83].

98 *Ibid* 56 [240]. This approach, according to his Honour, ensured consistency with parliamentary sovereignty.

99 *Ibid* 44 [176].

100 *Ibid* 44 [175], quoting *Lim* (n 12) 27 (Brennan, Deane and Dawson JJ).

101 *YBFZ* (n 18) 44 [176], citing *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 (*‘Vella’*) and *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 (*‘Alexander’*).

102 *YBFZ* (n 18) 45 [176].

power to the executive may be characterised as “punitive”, regardless of whether judges in the past had ever enforced such a power and had done so exclusively from the executive’.¹⁰³ So, we can see here that Steward J is trying to contain the *Lim* principle, and he ultimately finds both the monitoring and curfew conditions do not amount to punishment.

But the most radical interpretation of *Lim* comes from Edelman J. According to his Honour, *Lim* had created a ‘punishment fiction’, and *NZYQ* had introduced a related fiction.¹⁰⁴ In terms of *Lim*, Edelman J held that the Court ‘extended the constitutional concept of punishment, beyond any meaning that the concept is capable of bearing’.¹⁰⁵ His Honour relied on HLA Hart’s standard or central case of punishment, which involved pain or unpleasant consequences imposed for an offence against legal rules.¹⁰⁶ According to Edelman J, the ‘extension’ of punishment in *Lim* ‘involves a different concept and should be described by a different label’.¹⁰⁷ Under this ‘novel conception’,¹⁰⁸ forms of detention have been described as *prima facie* punitive, or have been deemed to be punitive, because the detention is disproportionate to its legitimate purpose.¹⁰⁹ Edelman J sought to reconceptualise the *Lim* punishment fiction as a question of the ‘scope or boundaries of a head of power’:

[A] law that effects a large imposition or constraint, at least upon a person’s bodily integrity or liberty, such as a serious violation of their liberty by custodial detention, may not be a law with respect to the relevant head of power to the extent that the imposition or constraint is not reasonably capable of being seen as necessary for the purpose of the law. Expressed in these terms, the issue is one of the scope or boundaries of a head of power.¹¹⁰

Edelman J’s analysis seems to flip the conventional analysis on its head. Rather than treating *Lim* as a Chapter III limitation, Edelman J reconceptualises it as a question of the scope of a head of power, to be determined according to principles of characterisation.¹¹¹

These divisions within the Court show that the *Lim* precedent, and how it should be interpreted, remain contested. While Edelman J’s ‘reconceptualisation’ is the most radical, we also see Steward J attempting to contain the scope of the principle and departing from the majority’s interpretation. So, while *Lim* remains authoritative, the scope of its authority is contested.

But the pull of the past is not confined to previous judicial decisions.

103 Ibid 45 [181].

104 Ibid 25 [93].

105 Ibid 25 [92].

106 Ibid 32 [124].

107 Ibid 37 [143].

108 *NZYQ* (n 8) 161 [52] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

109 Ibid. See also Gabrielle Appleby and Stephen McDonald, ‘Punishment and Chapter III of the Constitution’ in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) 64, 78.

110 *YBFZ* (n 18) 39 [150].

111 Ibid. For some earlier precursors to this approach, see *Lim* (n 12) 55–7 (Gaudron J); *Kruger v Commonwealth* (1997) 190 CLR 1, 110–11 (Gaudron J); *Al-Kateb* (n 10) 647 [253] (Hayne J).

B References to History

History, of course, can be used in different ways by courts,¹¹² and in this section I will illustrate some of the ways that the judges in *YBFZ* referred to history to give content to the scope of the protections offered by Chapter III.

The joint judgment in *YBFZ* sought to show continuity with the past in a number of ways. For instance, reference was made to the framers of the *Constitution* to emphasise that Chapter III does not give rise to individual rights.¹¹³ In addition, the joint judgment drew on longstanding common law principles, which were inherited at the time of Federation, to support what it said was the ‘pre-eminent value the law of this country gives to the protection of human life ... limb ... and liberty’.¹¹⁴ It thus sought to show that these values were not novel or controversial, but deeply rooted in history. As I will discuss later, this statement of values was not universally accepted by the other members of the Court.

The joint judgment also drew on history in order to determine the boundaries of judicial power. Their Honours noted that whether the courts had historically exercised a power to punish or to interfere with life, bodily integrity, or liberty was ‘relevant’ but not ‘determinative’.¹¹⁵ Instead, their Honours emphasised the evolving nature of the common law’s rejection of arbitrary punishment.¹¹⁶ Referring to Gageler J’s dissenting reasons in *Vella*, the joint judgment noted that the characteristics of judicial power are not ‘frozen in time’, but are ‘deeply rooted in a tradition’ in which a core value is the protection of individual liberty.¹¹⁷ So, here we see an emphasis on evolution and adaptation, but one that is anchored in tradition (and values).

Steward J, dissenting, also appealed to history but used it as a way of containing the *Lim* principle. His Honour rejected the ‘seemingly free-range investigation into whether a law is punitive or harmful’ and stressed the need to ‘properly inquire into what, having regard to history, may correctly be seen as exclusively judicial functions’.¹¹⁸ His Honour accepted, as did the joint judgment, that the characteristics of judicial power are not ‘frozen in time’,¹¹⁹ but went on to emphasise that these must be ‘anchored in our legal heritage, either as historical fact, or as a permitted analogy to that legacy’.¹²⁰ His Honour thus sought to draw closer ties with the past,

112 See, eg, Bradley Selway, ‘The Use of History and Other Facts in the Reasoning of the High Court of Australia’ (2001) 20(2) *University of Tasmania Law Review* 129; Tanya Josev, ‘Australian Historians and Historiography in the Courtroom’ (2020) 43(3) *Melbourne University Law Review* 1069; Caitlin Goss, ‘History and Historical Facts in Constitutional Law’ in Joe Tomlinson and Anne Carter (eds), *Facts in Public Law Adjudication* (Hart Publishing, 2023) 263 <<https://doi.org/10.5040/9781509957415.ch-014>>.

113 *YBFZ* (n 18) 9 [6] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

114 *Ibid* 11 [12].

115 *Ibid* 11 [14].

116 *Ibid*.

117 *Ibid*, quoting *Vella* (n 101) 276 [141].

118 *YBFZ* (n 18) 46 [183], citing *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374–5 (Kitto J); *Lim* (n 12) 67 (McHugh J).

119 *YBFZ* (n 18) 46 [187].

120 *Ibid*.

and relied on historical conceptions of judicial power to try to limit the scope of the *Lim* principle.

This is only a brief snapshot of how history was used by the Court, but I have sought to show that history can, and is, used in different ways to try to seek continuity with the past (and thus legitimise court decisions). While in *YBFZ* both Steward J and the joint judgment noted that the characteristics of judicial power are not ‘frozen in time’,¹²¹ their emphasis on the weight to be given to historical considerations differed.

V LOOKING TO THE FUTURE: CHANGES IN DIRECTION

In this final Part I consider some trends we see in the Court’s constitutional reasoning, and what future directions might be. The 2024 cases represent the latest chapter in the evolution of the *Lim* principle.¹²² Here I will touch upon: (i) the role of what might be described as ‘values’ in the Court’s reasoning; and (ii) the development of structured proportionality analysis in the context of Chapter III.

A The Role of Values in Constitutional Adjudication

One trend we see in *YBFZ* is the articulation of what might be called the ‘liberty values’ underpinning Chapter III: the ‘protection of human life’ (from arbitrary capital punishment) limb, now called bodily integrity (from arbitrary corporal punishment), and liberty (from arbitrary detention).¹²³ These values were grounded in the common law and constitutional tradition, especially the ‘compact between the individual and the state’.¹²⁴

It is worth noting that this conception was not universally endorsed by the Court. Steward J rejected these ‘highly generalised, undefined and abstract concepts’.¹²⁵ In particular, his Honour rejected the references to the ‘underlying compact’ and also ‘basic rights’, indicating that these abstract concepts ‘would inevitably mean very different things to very different people and judges’.¹²⁶

While the joint judgment’s articulation of the liberty values is significant, there remain a number of unresolved questions. First, while recent scholarship has directed our attention to the values that underpin Australia’s constitutional system,¹²⁷ the very notion of what is a ‘value’ remains somewhat unclear. For example, to what extent are values tied to the text and structure of the *Constitution*,

121 *YBFZ* (n 18) 11 [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 46 [187] (Steward J), quoting *Vella* (n 101) 276 [141] (Gageler J).

122 See, eg, *Benbrika* (n 19); *Alexander* (n 101); *Garlett v Western Australia* (2022) 277 CLR 1 (‘*Garlett*’); *Jones v Commonwealth* (2023) 280 CLR 62 (‘*Jones*’).

123 *YBFZ* (n 18) 11 [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

124 *Ibid.*

125 *Ibid* 46 [184].

126 *Ibid.*

127 See, eg, Rosalind Dixon, ‘Functionalism and Australian Constitutional Values’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 3, 4 <<https://doi.org/10.5040/9781509918430.ch-001>>.

or informed by sources beyond the *Constitution*? And how do values interact with or inform constitutional reasoning?

Second, the nature and content of constitutional values is not self-evident. In *YBFZ*, the liberty values were specifically confined to interests affecting people (life/limb/bodily integrity) and not to property. The joint judgment also sought to tie its conception of liberty to ‘the relationship between the individual and the state’.¹²⁸ However, there are different ways to understand this relationship,¹²⁹ and the Court itself has expressed differing views on this in the past. For example, in *Benbrika*, there were differences between the majority justices (who focused on the independence and impartiality of Chapter III courts), and Gageler J and Gordon J, who emphasised ‘the role of the judiciary as the protector of liberty’.¹³⁰ In *YBFZ*, of course, Gageler CJ and Gordon J now form part of the majority: here, they clearly tie the Chapter III values to the separation of powers,¹³¹ but in doing so emphasise the ‘judicial protection of individual liberty’.¹³²

In terms of future directions, it is worth watching how this articulation of liberty values is developed in both *MJZP* and *Ravbar*. In *MJZP*, as discussed above, the argument is that section 46(2) of the *AAT Act* infringes Chapter III because it requires the Federal Court to depart from the ‘general rule’ of procedural fairness to an extent that is more than is reasonably necessary to protect a compelling and legitimate public interest.¹³³ In framing the challenge in this way, the plaintiff has sought to apply a *Lim*-type justification, so it will be interesting to see whether the Court draws any distinction between the values underpinning the *Kable v Director of Public Prosecutions*¹³⁴ and *Lim* principles.¹³⁵ In terms of *Ravbar*, one of the arguments is that the provision which grants the administrator power to control, manage, and dispose of CFMEU property¹³⁶ is punitive. The defendants and state interveners reject this submission, arguing that *YBFZ* does not create a constitutional limit that applies to *every* law that imposes hardship or detriment.¹³⁷ In particular, they submit that the power to control and manage *property* does not involve any interference with ‘human life, bodily integrity or liberty’.¹³⁸

128 *YBFZ* (n 18) 11 [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

129 James Stellios, ‘Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of “The Relationship of the Individual to the State”’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 177, 178 <<https://doi.org/10.5040/9781509918430.ch-010>>.

130 *Benbrika* (n 19) 132 [138] (Gordon J). See also at 109–11 [68]–[74] (Gageler J). Cf at 92 [20] (Kiefel CJ, Bell, Keane and Steward JJ), 164 [216] (Edelman J).

131 *YBFZ* (n 18) 11 [13] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

132 *Ibid* 11 [14], quoting *Vella* (n 101) 276 [141] (Gageler J).

133 See above Part II.

134 (1996) 189 CLR 51 (*Kable*’).

135 James Stellios, ‘The High Court on Constitutional Law: The 2021 Term’ (Research Paper No 22.8, Australian National University College of Law, 1 February 2022) 22 n 112 <<http://doi.org/10.2139/ssrn.4064269>> (*‘The 2021 Term’*).

136 *Registered Organisations Act* (n 37) s 32B.

137 Commonwealth and Attorney-General (Cth), ‘Submissions of the First and Second Defendants’, Submission in *Ravbar v Commonwealth*, S113/2024, 18 November 2024, [54].

138 *Ibid*. See also Attorney-General (SA), ‘Submissions of the Attorney-General for the State of South Australia (Intervening)’, Submission in *Ravbar v Commonwealth*, S113/2024, 25 November 2024, [27];

In 2024 we also saw some examples of the Court's prudential approach,¹³⁹ which might be termed an 'adjudicative value'.¹⁴⁰ Under this approach, the Court will 'avoid the formulation of a rule of constitutional law broader than required by the precise facts to which it is to be applied'.¹⁴¹ This prudential approach can be seen in *YBFZ*¹⁴² and also in the *Pearson v Commonwealth* matters.¹⁴³ These involved a Chapter III challenge to legislation that sought to retrospectively validate visa cancellation decisions, but the High Court resolved the matters on the basis of statutory construction, meaning it was not necessary to address the constitutional question.

B Methodology: Proportionality and Chapter III

The second major trend I want to address is the role of proportionality reasoning in the context of Chapter III. Following *NZYQ*, *ASF17*, and *YBFZ*, the approach of the majority now seems fairly settled. The *Lim* principle involves a 'single question of characterisation': namely, whether the power is properly characterised as punitive and therefore exclusively judicial.¹⁴⁴ The 'single question' involves a number of distinct inquiries: one, does the law have a *prima facie* punitive character (by default or otherwise)? If yes, is there a *justification* for a non-judicial exercise of power interfering with liberty or bodily integrity? In particular, is the power 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?¹⁴⁵ If the law can be justified in this way, then the power's constitutional character will be 'non-punitive'.¹⁴⁶

So, what is the role of proportionality within this test?

Attorney-General (Tas), 'Submissions of the Attorney-General for the State of Tasmania (Intervening)', Submission in *Ravbar v Commonwealth*, S113/2024, 26 November 2024, [43].

139 James Stellios refers to the 'values underlying adjudication': Stellios, 'The 2021 Term' (n 135) 64.

140 Note that this practice has a long history: see Tristan Taylor, 'The High Court's Prudential Approach to Constitutional Adjudication: When Is It Necessary to Resolve a Constitutional Question?' (2024) 47(1) *University of New South Wales Law Journal* 211 <<https://doi.org/10.53637/EJCN5510>>.

141 *YBFZ* (n 18) 17 [47] (Gageler CJ, Gordon, Gleeson and Jagot JJ). I note there is an emerging body of scholarship critiquing this approach: see, eg, Jonathan Tjandra, 'The Prudential Approach to Constitutional Adjudication' (2024) 35(1) *Public Law Review* 69; *ibid*.

142 As the curfew condition was *prima facie* punitive, there was no need to answer all of the plaintiff's contentions: *YBFZ* (n 18) 17 [47] (Gageler CJ, Gordon, Gleeson and Jagot JJ), citing its approach in recent cases such as *Tajjour v New South Wales* (2014) 254 CLR 508, *Clubb v Edwards* (2019) 267 CLR 171 ('*Clubb*'), *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216, *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 and *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 ('*Farm Transparency*').

143 (2024) 99 ALJR 110, 123–4 [72] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ). Note that the three matters were *Pearson v Commonwealth*, *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* and *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs*.

144 *NZYQ* (n 8) 158 [44] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), citing *Jones* (n 122) 82 [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *YBFZ* (n 18) 12 [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ), citing *Jones* (n 122) 82 [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

145 *YBFZ* (n 18) 12 [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

146 *Ibid*.

This process of justification – framed in the familiar language of ‘reasonably capable of being seen to be necessary’ – seems to invite some form of proportionality reasoning in the broad sense. Indeed, in *NZYQ* the Court acknowledged it would require an ‘assessment of means and ends, and the relationship between the two’.¹⁴⁷ This more general form of proportionality has long been used in Australian constitutional law – without significant controversy – across a range of different areas.¹⁴⁸ But of course, we need to consider the more recent march of a structured form of proportionality that we have seen in *McCloy v New South Wales* and the cases which followed.¹⁴⁹

In *YBFZ*, Beech-Jones J addressed this question head on. His Honour accepted that the ‘single question of characterisation’ set out by six members of the Court in *NZYQ* required an assessment of both means and ends, and the relationship between the two.¹⁵⁰ However, in his Honour’s view, the second question of justification did not involve any process analogous to proportionality testing which applies to constitutionally guaranteed freedoms.¹⁵¹ Citing *Falzon v Minister for Immigration and Border Protection* (*Falzon*) where the majority stated rather categorically that ‘[q]uestions of proportionality cannot arise under Ch III’,¹⁵² his Honour noted that the consideration of alternatives was only relevant to the single question of characterisation as to whether the true purpose of the law is punitive.¹⁵³

Edelman J in *YBFZ* embraced a more explicit role for proportionality, akin to that found in other constitutional contexts. In particular, his Honour confirmed that the categorical statement in *Falzon* (to which he was a party) was in error.¹⁵⁴ As I have explained above, Edelman J reconceptualised the basis of *Lim* and in doing so, relied on proportionality as part of the characterisation inquiry in determining whether the law is supported by a head of power.¹⁵⁵

So, in *YBFZ* a majority appears to accept a more general form of proportionality reasoning, framed in terms of ‘reasonable necessity’.¹⁵⁶ The joint judgment does not expressly address the question of structured proportionality (or the comments of the majority in *Falzon*), but it appears to accept, consistently with *NZYQ*, a more general form of proportionality. So, at this stage the Court has not accepted a role

147 *NZYQ* (n 8) 158 [44] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ). See also *YBFZ* (n 18) 56 [238] (Beech-Jones J).

148 Even if we go back to *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, well before the more recent debates about structured proportionality, it was acknowledged that there was ‘little difference’ between the formulations of ‘reasonably appropriate and adapted’ and ‘proportionality’: at 567 n 272 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

149 (2015) 257 CLR 178 (*McCloy*). See also *Brown* (n 48); *Unions NSW* (n 48); *Clubb* (n 142); *Comcare v Banerji* (2019) 267 CLR 373; *LibertyWorks v Commonwealth* (2021) 274 CLR 1; *Farm Transparency* (n 142).

150 *YBFZ* (n 18) 59 [252].

151 *Ibid.*

152 (2018) 262 CLR 333, 344 [32] (Kiefel CJ, Bell, Keane and Edelman JJ).

153 *YBFZ* (n 18) 59 [252].

154 *Ibid* 38 [147].

155 See above Part IV(A). Edelman J accepts that proportionality can be stated at different levels of generality; while he does not adopt the structured, tripartite test, he acknowledges the similarities in the method of reasoning: see *Jones* (n 122) 279 [151].

156 *YBFZ* (n 18) 22 [29] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

for structured proportionality in Chapter III (and it is worth noting that in other contexts both Gageler J and Gordon J have expressly rejected a ‘one size fits all’ approach).¹⁵⁷ In addition, as Adrienne Stone has pointed out in the context of the implied freedom,¹⁵⁸ however the test is framed, courts will be required to undertake similar evaluative exercises.¹⁵⁹

In terms of future directions, this question – about the role and form of proportionality analysis – arises again in *MJZP*. The Chapter III argument being made in this matter rests upon the proposition that it is an essential feature of Chapter III courts that they observe the requirements of procedural fairness.¹⁶⁰ We see in the submissions a reliance on some familiar cases concerning state courts and their essential characteristics: for example, *Condon v Pompano Pty Ltd*, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*, and *Wainohu v New South Wales*.¹⁶¹ However, the plaintiff goes further and seeks to apply a *Lim*-type justification. Seeking to revisit *SDCV*,¹⁶² the plaintiff makes a case for using proportionality-style reasoning to assess restrictions on the institutional integrity of courts.¹⁶³ The end said to be pursued by section 46(2) is the prevention of the disclosure of information where that disclosure would be injurious to the public interest or Australia’s security, which can be characterised as compelling and legitimate.¹⁶⁴ Further, the plaintiff submits, the blanket and inflexible non-disclosure requirement meant that the general rule was departed from to an extent ‘far greater than reasonably necessary to protect the end’.¹⁶⁵

This is a question that has been brewing for some time, with some hints (but little clarity) in *SDCV*.¹⁶⁶ *MJZP* presents an opportunity for the Court to clarify whether a *Lim*-style process of justification is appropriate in this context, and whether and to what extent it involves proportionality analysis.

157 For example, in context of the implied freedom of political communication: *McCloy* (n 149) 235 [142] (Gageler J); *Brown* (n 48) 477 [475]–[476] (Gordon J); *Clubb* (n 142) 305–8 [391]–[399] (Gordon J).

158 See, eg, Adrienne Stone, ‘Proportionality and Its Alternatives’ (2020) 48(1) *Federal Law Review* 123 <<https://doi.org/10.1177/0067205X19890448>>.

159 See Zachary Gomes, Aryan Mohseni, and Charlie Ward, who suggest the structured proportionality test is not appropriate in the *Lim* (n 12) context, but that the inquiry might be ‘more analogous to the limited proportionality inquiry posed in cases of *characterisation*’: Zachary Gomes, Aryan Mohseni and Charlie Ward, ‘Going Out on a *Lim*: Reconceptualising the Constitutional Limit on Preventative Detention’ (2025) 99(7) *Australian Law Journal* 550, 557 (emphasis in original).

160 *MJZP*, ‘Submissions of the Plaintiff’ (n 40) [34].

161 *Ibid* [34], [50], citing *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, and *Wainohu v New South Wales* (2011) 243 CLR 181.

162 *SDCV* (n 41) 293–4 [138] (Gageler J).

163 *MJZP*, ‘Submissions of the Plaintiff’ (n 40) [23]. Note that the Court has previously considered whether the *Lim* (n 12) and *Kable* (n 134) principles overlap, and in *Garlett* (n 122), the Court divided on whether *Lim* (n 12) applies to the states: *Garlett* (n 122) 23 [40] (Kiefel CJ, Keane and Steward JJ). Cf at 50 [136] (Gageler J).

164 *MJZP*, ‘Submissions of the Plaintiff’ (n 40) [44].

165 *Ibid*.

166 *SDCV* (n 41) 293–4 [138] (Gageler J).

VI CONCLUSION

These reflections on the High Court's 2024 term have sought to illustrate how the Court can embrace both aspects of continuity and change. In drawing attention to the *present*, I have focused on the need for the Court's decisions to be empirically grounded. In *ASF17*, the Court divided in terms of whether the statutory purpose needs to be able to be achieved as a matter of factual reality, whereas in *YFBZ* we saw differences in terms of what inferences can be drawn from the agreed facts. In terms of fidelity to the *past*, I have illustrated that while *Lim* remains the governing precedent, just how it should be interpreted remains deeply contested. I also suggested that history can be used more broadly, and that in both the minority and majority judgments we see attempts to draw on common law and constitutional history. Finally, when looking ahead to the *future*, I have suggested that two areas to watch are: (i) the development of constitutional values and how these concepts are employed by the Court; and (ii) that the perennial debates about proportionality look set to continue in the context of Chapter III.