Timing of Constitutional Facts

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Abstract

The High Court of Australia is yet to resolve the time when constitutional facts should be assessed. Instead, the Court examines constitutional facts at various points in time, including (1) the legislation's enactment; (2) the relevant application of the legislation to the plaintiff; and (3) the High Court's hearing. The time at which constitutional facts are assessed is important, as legislation can shift from valid to invalid over time where the constitutional facts underpinning the legislation's validity change. This article contends that, generally, constitutional facts should be assessed up until the High Court's hearing. It is argued that doing so is appropriate because such a timeframe is common to all persons, and enables the Court to reflect changing circumstances by assessing the validity of legislation in its most current context.

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I Introduction

The High Court of Australia ('the Court') has acknowledged that facts can be relevant to determining the constitutional validity of legislation.[1] Such facts are defined as 'constitutional facts'.[2] However, despite their importance, the Court has not developed principles to determine the *time* at which constitutional facts should

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1 *Vanderstock v Victoria* (2023) 414 ALR 161, 279 [406] (Gordon J) ('*Vanderstock*'); *Palmer v Western Australia* (2021) 272 CLR 505, 516–17 [15]–[20] (Kiefel CJ and Keane J), 547–8 [125] (Gageler J), 581–2 [227] (Edelman J) ('*Palmer*'); *Clubb v Edwards* (2019) 267 CLR 171, 222 [152] (Gageler J), 334 [470]–[471] (Edelman J) ('*Clubb*'). See also Justice Michelle Gordon, 'Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law' (2023) 49(1) *Monash University Law Review* 1, 5.

2 Gordon (n 1) 16; Susan Kenny, 'Constitutional Fact Ascertainment' (1990) 1(2) *Public Law Review* 134, 135; James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 769–70 ('*Zines and Stellios*').

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be assessed. That is, the Court has not considered whether the validity of laws should be assessed according to facts existing at the time of (1) the legislation's enactment; (2) the legislation's application to the plaintiff; or (3) the High Court's hearing. Rather, constitutional facts are assessed at varying points in time without justification. Timing is crucial where the relevant constitutional facts are dynamic, as changes in factual circumstances may shift the law's validity.[3] That is, where an initially valid law depends upon a set of factual circumstances, and those circumstances change, the law's validity may also change.[4] Therefore, the time at which constitutional facts are assessed can be critical to determining the law's validity — warranting a principled and transparent approach.

For instance, in *Palmer v Western Australia*, the Court determined whether the severity of COVID-19 rendered Western Australia's border closure measures 'proportionate' or 'reasonably necessary'.[5] The time at which the threat of COVID-19 (a constitutional fact) was assessed became important, as the virus's severity changed over time.[6] The threat posed by COVID-19 could have been assessed from the time of the impugned legislation's enactment, the legislation's application to Mr Palmer, or the High Court's hearing. Assessing the constitutional facts at different points in time may have produced different answers concerning the legislation's validity, as COVID-19's fluctuating severity shifted the strength of the law's justification over time.[7] Nonetheless, the Court refrained from analysing the time at which constitutional facts should be assessed, reflecting a major gap in its approach to constitutional questions. The Court has never analysed the timing of constitutional facts, despite such issues arising in multiple contexts involving characterisation and constitutional guarantees.

This article contends that, generally, constitutional facts should be assessed up until the time of the High Court's hearing. The argument is advanced by five key propositions:

(1) Constitutional adjudication serves a predominantly public function, rather than serving merely private interests.[8]

(2) Orthodox constitutional and statutory interpretation principles enable the denotation or application of words to reflect changing circumstances.[9]

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3 *Hume v Higgins* (1949) 78 CLR 116, 135 (Dixon J) ('*Hume*'); *Clubb* (n 1) 334 [470] (Edelman J).

4 *Australian Textiles Pty Ltd v Commonwealth* (1945) 71 CLR 161, 180 (Dixon J) ('*Australian Textiles*'). See also Ben Ye, 'How and When Can a Constitutionally Valid Statute Become Invalid?' (2019) 30(2) *Public Law Review* 120, 134–9.

5 *Palmer* (n 1) 530 [62] (Kiefel CJ and Keane J), 537 [93] (Gageler J), 597 [264] (Edelman J), 569 [192] (Gordon J); *Quarantine (Closing the Border) Directions 2020* (WA); *Emergency Management Act 2005* (WA) ss 56, 67; *Constitution* s 92.

6 Department of Health and Aged Care (Cth), *COVID-19 Reporting* (Web Page, 2 September 2024) <https://www.health.gov.au/topics/covid-19/reporting#covid19-case-notifications>.

7 *Palmer* (n 1) 517 [20] (Kiefel CJ and Keane J). See also Rosalind Dixon and Anne Twomey, 'State Border Closures and the Section 92 Challenge in the High Court' (Speech, The Sydney Institute, 23 July 2020).

8 See below Part V.

9 See below Part VI.

(3) Due to (1), constitutional facts should generally not be constrained to those existing at the time the legislation applied to the plaintiff (causing their constitutional harm), as such periods are unique to the litigant.[10]

(4) Due to (2), constitutional facts should generally not be constrained to those existing at the time of the legislation's enactment, as doing so precludes consideration of changing circumstances — undermining orthodox principles of interpretation.[11]

(5) Due to (1) and (2), constitutional facts should generally be assessed up until the time of hearing because doing so permits statutory terms to be applied in their most current context, and such dates are common to all persons.[12]

The article is structured in seven parts. Part II examines the defining criteria of constitutional facts. Part III analyses the contexts where the timing of constitutional facts may affect the validity of legislation. Part IV suggests that, despite the importance of timing, the Court inconsistently assesses constitutional facts according to different time periods without justification. Furthermore, it is argued that the current ad hoc and inexplicit approach to timing is deficient, and could be remedied through a principled approach.

Part V argues that constitutional facts should not be constrained to the time of the plaintiff's constitutional harm, as such time periods are unique to the litigant — undermining the Court's general justice mandate in constitutional matters. Part VI contends that constitutional facts should be assessed up until the time of hearing in order to best reflect contemporary circumstances, consistent with orthodox principles of statutory and constitutional interpretation.

Part VII considers challenges and exceptions to the principles considered in Parts V and VI, acknowledging that a flexible and pragmatic approach is ultimately required. Consequently, a principled approach is proposed to resolve the time at which constitutional facts are assessed.

II Defining Constitutional Facts

Constitutional facts are general facts which assist in determining the outcome of a constitutional issue.[13] As Dixon CJ established in *Breen v Sneddon*,[14] constitutional facts possess two key defining characteristics: (1) they are 'matters of fact upon which ... the constitutional validity of some general law may depend';[15] and (2) they cannot be unique to the individual litigant.[16] Constitutional facts can determine the validity of legislation where the applicable legal standard depends upon certain

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[10] See below Part V.

[11] See below Part VI.

[12] See below Part VI.

[13] *Vanderstock* (n 1) 279 [406] (Gordon J); *Zines and Stellios* (n 2) 769–70; Kenny (n 2) 135.

[14] *Breen v Sneddon* (1961) 106 CLR 406, 411–12 ('*Breen*').

[15] Ibid 411, cited in *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) ('*Mineralogy*').

[16] *Breen* (n 14) 411; *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon CJ) ('*Commonwealth Freighters*'). See also PH Lane, 'Facts in Constitutional Law' (1963) 37(4) *Australian Law Journal* 108, 108; Gordon (n 1) 6.

factual circumstances. As Gordon J explained in *Vanderstock v Victoria*, constitutional facts are therefore relevant to determining validity 'whenever a constitutional issue requires consideration of the "substance and actual operation" of a law'.[17] For instance, in *Palmer*, the validity of the border ban provisions depended upon whether the measures were 'reasonably necessary' — a question that depended upon facts such as the severity of COVID-19.

Constitutional facts arise in various contexts. For example, in *Thomas v Mowbray*, the terrorist threat posed by al-Qaeda in Australia was assessed to affirm the validity of 'continuing detention orders'.[18] In *Ffrost v Stevenson*, the Court assessed whether New Guinea fell within the British dominions to determine the validity of extradition legislation.[19] In *Garnishee Case No 1*, Australia's economic depression was relevant to assessing the Commonwealth's legislative scheme designed to recoup unsatisfied financial liabilities owed by state revenues.[20] And, in *Palmer*, the severity of COVID-19 was considered to determine the necessity of Western Australia's border closure legislation.[21] In each case, constitutional facts provided a basis to assess the law's validity without regard to the parties' personal circumstances.

Constitutional facts fall within a broader genus known as 'legislative facts',[22] which Davis defined as 'general facts which help … decide questions of law and policy and discretion'.[23] As Heydon J held in *Aytugrul v The Queen*, legislative facts assist in deciding 'what a common law rule should be or how a statute should be construed'.[24] Unlike constitutional facts, legislative facts can apply outside the public law context.[25] Australian authorities have largely adopted Davis's terminology,[26] accepting that constitutional facts operate as a subset within the broader category of legislative facts.[27]

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17 *Vanderstock* (n 1) 279 [406].

18 *Thomas v Mowbray* (2007) 233 CLR 307, 349–50 [83]–[88] (Gummow and Crennan JJ), 481–4 [523]–[529] (Callinan J), 523–5 [640]–[649] (Heydon J) ('*Mowbray*'); Jo Lennan, 'How to Find Facts in Constitutional Cases (2011) 30(3) *Civil Justice Quarterly* 304, 309–12.

19 *Ffrost v Stevenson* (1937) 58 CLR 528, 557 (Latham CJ); *Service and Execution of Process Act 1901* (Cth) ss 28(1)(b), 28(1A); *Fugitive Offenders Act 1881* (Imp).

20 *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155, 181–2 (Rich and Dixon JJ) ('*Garnishee Case No 1*'); *Financial Agreements (Commonwealth Liability) Act 1932* (Cth); *Financial Agreements Enforcement Act 1932* (Cth).

21 *Palmer* (n 1) 516–18 [15]–[23] (Kiefel CJ and Keane J); *Palmer v Western Australia [No 4]* [2020] FCA 1221, [363]–[364] (Rangiah J) ('*Palmer No 4*'); *Emergency Management Act 2005* (WA) ss 56, 67; *Constitution* s 92.

22 Stephen Gageler, 'Fact and Law' (2008) 11(1) *Newcastle Law Review* 1, 17.

23 Kenneth Culp Davis, *Administrative Law Text* (West Publishing, 3rd ed, 1972) 160 [7.03].

24 *Aytugrul v The Queen* (2012) 247 CLR 170, 201 [71], citing *Mowbray* (n 18) 512 [614] (Heydon J); Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021) 49–50.

25 See, eg, *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 478 [65] (McHugh J) ('*Woods*').

26 *Maloney v The Queen* (2013) 252 CLR 168, 299 [352] (Gageler J) ('*Maloney*'); *Spence v Queensland* (2019) 268 CLR 355, 499 [322] (Edelman J) ('*Spence*'); *Clubb* (n 1) 343 [495]–[496] (Edelman J); *Mowbray* (n 18) 337 [42] (Gummow and Crennan JJ), 386 [226] (Kirby J), 446 [403] (Hayne J), 481 [522] (Callinan J), 514 [620] (Heydon J).

27 See, eg, *Re Day* (2017) 340 ALR 368, 374–5 [21] (Gordon J) ('*Re Day*'); *Maloney* (n 26) 299 [352] (Gageler J).

Unlike constitutional and legislative facts, adjudicative facts are facts which are *unique* to the litigant.[28] That is, adjudicative facts 'relate to the parties, their activities, their properties, [and] their businesses'.[29] For example, in *Palmer*, the plaintiff's personal motivation to travel interstate was an adjudicative fact which could not influence the validity of the border closure legislation.[30] Indeed, Dixon CJ distinguished between[31] (1) personal 'questions of fact which arise between the parties' (adjudicative facts); and (2) general 'matters of fact upon which … the constitutional validity of some general law may depend' (constitutional facts). Courts continue to maintain this distinction.[32] While adjudicative facts cannot determine the validity of legislation, Justice Michelle Gordon has written extra-curially that they can determine whether a constitutional issue is merely 'hypothetical' and, in turn, whether the Court should, according to its 'prudential' approach, refrain from deciding the constitutional issue.[33]

Importantly, not all facts in constitutional litigation are constitutional facts. For example, in *Re Day*, the applicant defined facts about Mr Day's personal circumstances as constitutional facts because the ultimate issue was constitutional in nature.[34] However, Gordon J rejected this submission for 'fail[ing] to recognise the distinction between "adjudicative facts" and "legislative facts"'.[35] Instead, facts which arise in constitutional litigation remain classified as adjudicative facts if they are peculiar to the litigant.

Distinguishing between constitutional and adjudicative facts is important because the common law and statutory uniform rules of evidence do not apply to constitutional facts.[36] That is, as Heydon J explained in *Mowbray*, constitutional facts can be adduced 'independently' of evidential rules,[37] because such 'rules were never directed to constitutional facts'.[38] Instead, constitutional facts are adduced through flexible procedures, such as the Court's expanded conception of 'judicial notice'.[39]

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28 *Mineralogy* (n 15) 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Woods* (n 25) 478 [65] (McHugh J). In the American context, see generally David Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (Oxford University Press, 2008) ch 1.

29 Kenneth Culp Davis, 'Judicial Notice' (1955) 55(7) *Columbia Law Review* 945, 952–3, cited in Gageler (n 22) 17–18; *Re Day* (n 27) 374–5 [21] (Gordon J).

30 *Palmer* (n 1) 532 [73] (Kiefel CJ and Keane J).

31 *Breen* (n 14) 411, cited in Lane (n 16) 108.

32 *Mineralogy* (n 15) 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Re Day* (n 27) 374–5 [21] (Gordon J), citing *Breen* (n 14) 411 (Dixon CJ).

33 Gordon (n 1) 11–16.

34 *Re Day* (n 27) 374 [20] (Gordon J).

35 Ibid 268–9 [21], citing *Breen* (n 14) 411 (Dixon CJ).

36 *Mowbray* (n 18) 517 [629] (Heydon J).

37 Ibid.

38 Ibid 516 [628].

39 Gageler (n 22) 10–11. See also *Deputy Commissioner v Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 794–5 (Evatt J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 196 (Dixon J) ('*Communist Party Case*').

III Contexts where the Timing of Constitutional Facts Affects the Validity of Legislation

This Part argues that the timing of constitutional facts is important because legislation can shift from valid to invalid depending upon when the constitutional facts are assessed. An initially valid law may be rendered unlawful where (1) the law's validity depends upon a specific set of factual circumstances; and (2) those factual circumstances change over time.[40] Therefore, timing is critical if the law's validity depends on constitutional facts which are capable of changing over time. Such dynamic constitutional facts may alter the validity of laws by changing the scope of the underlying constitutional head of power; the operation, purpose or practical effect of legislation; and, relatedly, the strength of the law's justification or 'reasonable necessity'. It is therefore argued that the timing of constitutional facts is important because dynamic constitutional facts arise in the contexts of characterisation, constitutional guarantees and inconsistency under s 109 of the *Australian Constitution*.

A *Characterisation*

Timing issues can arise in multiple contexts involving characterisation. The characterisation process involves determining whether legislation is supported by a subject matter or purpose prescribed by s 51 of the *Constitution*.[41] Such processes can engage dynamic constitutional facts, raising temporal issues, as Dixon CJ explained in *Australian Textiles v Commonwealth*: 'A law which nothing but transient circumstances justify is valid from its inception only in its operation in or upon those circumstances and never is or becomes capable of operating further.'[42] The powers concerning trade and commerce, defence, aliens, race and external affairs, and the incidental powers, each rely upon factual circumstances which can change, raising issues relating to the time at which constitutional facts are assessed. For instance, the defence power's scope expands and contracts depending on the threat of hostilities towards Australia.[43] Constitutional facts which impact the defence power's scope include the 'nature and dimensions of the conflict ... actual and apprehended dangers, exigencies and course of the war'.[44] Therefore, as Dixon J established in *Andrews v Howell*, legislation justified under the defence power 'depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law'.[45] Or, as Ye explains, 'the scope of the defence power waxes and wanes as the constitutional facts change'.[46]

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[40] *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43, 81 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ) ('*Foster*').

[41] James Stellios, 'Constitutional Characterisation: Embedding Value Judgements about the Relationship between the Legislature and the Judiciary' (2021) 45(1) *Melbourne University Law Review* 277, 278.

[42] *Australian Textiles* (n 4) 180, cited in JD Holmes, 'Evidence in Constitutional Cases' (1949) 23 *Australian Law Journal* 235, 235.

[43] *Foster* (n 40) 81; *Communist Party Case* (n 39) 222 (Williams J).

[44] *Andrews v Howell* (1941) 65 CLR 255, 278 (Dixon J) ('*Howell*'), quoted in Carter (n 24) 118–19.

[45] *Howell* (n 44) 278.

[46] Ye (n 4) 134.

The capacity for initially valid legislation to become invalid due to changing constitutional facts is exemplified by contrasting *Australian Textiles* with *R v Foster*.[47] In 1945, the majority in *Australian Textiles* upheld legislation concerning 'Female Minimum Payment Rates'[48] as the war's recent conclusion necessitated a transitionary period.[49] Nonetheless, Dixon J acknowledged that where a power relies upon a set of dynamic facts, the 'measure cannot outlast the facts as an operative law'.[50] That is, once the threat of warfare ceased, the law's validity could be extinguished. Four years later, in *R v Foster*, the same legislative measures upheld in *Australian Textiles* were struck down because 'all the reasons which provided at the time a foundation for this exercise of the defence power have now disappeared'.[51] Therefore, changes to Australia's perceived threat of warfare shifted the legislation from valid to invalid over time.[52]

The timing of constitutional facts can also affect laws justified under the external affairs power.[53] In *XYZ v Commonwealth*, Callinan and Heydon JJ criticised the 'international concern' test for fluctuating according to changing facts because 'at different times a matter may not be of international concern, may then become of international concern, and may then cease to be of international concern again'.[54] Their Honours explained that such tests enabled initially valid legislation to become invalid.[55] For example, in *Polyukhovich v Commonwealth*, Brennan J questioned whether prosecuting World War II war criminals remained an 'international concern' in 1991, thereby enabling the law's validity to 'alter from time to time'.[56] Furthermore, as Ye explains, under the treaty implementation limb of the power, where treaties are entered, and then subsequently revoked, the implementing legislation's validity ceases (as occurred with Australia's bilateral treaty with Nauru).[57]

In the context of the aliens power, Justice James Edelman has noted extra-judicially that the defining features of alienage rely upon dynamic constitutional facts because notions of subjecthood and citizenship have evolved.[58] For instance,

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47 *Foster* (n 40).
48 *National Security Act 1939* (Cth) s 5; *National Security (Female Minimum Rates) Regulations 1944* (Cth) reg 4A.
49 *Australian Textiles* (n 4) 171 (Rich J), 179–80 (Dixon J), 182–3 (McTiernan J). Cf at 174–5 (Starke J).
50 Ibid 181, cited in *Zines and Stellios* (n 2) 776 n 235.
51 *Foster* (n 40) 86–8 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ). See also Ye (n 4) 124.
52 See also (in the context of terrorism) *Mowbray* (n 18) 349–50 [83]–[88] (Gummow and Crennan JJ), 481–4 [523]–[529] (Callinan J), 523–5 [640]–[649] (Heydon J).
53 *Constitution* s 51(xxix).
54 *XYZ v Commonwealth* (2006) 227 CLR 532, 608 [218] ('*XYZ*'), citing *Soulitopoulos v LaTrobe University Liberal Club* (2002) 120 FCR 584, 598 [51], 599 [53] (Merkel J). See also *Zines and Stellios* (n 2) 776 n 235.
55 *XYZ* (n 54) 607–9 [217]–[219]. See also Elizabeth Brumby, 'The Effect of Treaty Withdrawal on Implementing Legislation' (2019) 47(3) *Federal Law Review* 390, 407.
56 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 555, 562; Brumby (n 55) 407.
57 Ye (n 4) 136; *Republic of Nauru v WET040* (2018) 361 ALR 405, 407 [7] (Gageler, Nettle and Edelman JJ) ('*Republic of Nauru*').
58 Justice James Edelman, 'Original Constitutional Lessons: Marriage, Defence, Juries, and Aliens' (2022) 47(3) *Monash University Law Review* 1, 15–16.

modern social values have extinguished the racist 'alien race' concept.[59] Likewise, in *Ame*, Papua New Guinea's independence from Australia expanded the aliens power to include persons from Papua.[60]

In *Kartinyeri v Commonwealth*, Gaudron J similarly held that laws justified under the race power 'may lose [their] constitutional support if circumstances change'.[61] Finally, laws justified under the trade and commerce power can be susceptible to changing constitutional facts. In *Airlines Case No 2*, the regulation of both intrastate and interstate air navigation was held to be valid because separating the two systems was logistically impracticable (in 1965).[62] However, if regulating intrastate and interstate air traffic became viable due to technological advancements, the law's validity could shift. Consequently, timing issues arise in multiple contexts during the characterisation process.

B *Constitutional Guarantees*

Timing issues concerning constitutional facts can also influence the validity of legislation that engages constitutional guarantees. Laws engaging constitutional guarantees such as those in s 92 of the *Constitution*, the implied freedom of political communication and voting rights cases must generally be justified according to a test of 'structured proportionality'[63] or 'reasonable necessity'.[64] Both tests require the balancing of competing interests, and are 'underpinned' by 'questions of fact', raising temporal issues.[65]

In the context of s 92, Dixon CJ acknowledged in *Armstrong v Victoria [No 2]* that changing facts could influence the validity of legislation:

> If now there is no interference with the freedom of inter-State trade commerce and intercourse there cannot be any present violation of s 92. If tomorrow the facts change so that the operation of the enactment changes too and s 92 is violated … then s 92 will doubtless prevail over it.[66]

In the same case, Williams J saw 'no reason why an Act which is valid may not subsequently become invalid from change of circumstances'.[67] Such possibilities materialised in *Sportodds v New South Wales*, where the impugned gambling legislation's initial 'legitimate purpose' of regulating a 'social evil' eroded due to the growing 'use of electronic gambling … the "privatisation" of what were

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[59] Ibid.

[60] *Ex parte Ame* (2005) 222 CLR 439, 459 [37] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ). See also *Chetcuti v Commonwealth* (2021) 392 ALR 371, 373 [5]–[6] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 381 [39] (Gordon J), 397 [93]–[94] (Edelman J).

[61] *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 367 [43], quoted in Brumby (n 55) 407.

[62] *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 ('*Airlines Case No 2*'), cited in Kenny (n 2) 136.

[63] *Palmer* (n 1) 530 [62] (Kiefel CJ and Keane J), 597 [264] (Edelman J); *Unions NSW v New South Wales* (2019) 264 CLR 595, 615 [42] (Kiefel CJ, Bell and Keane JJ), 638 [110] (Nettle J) ('*Unions NSW*').

[64] *Palmer* (n 1) 559–60 [166] (Gageler J), 571 [196] (Gordon J).

[65] Carter (n 24) 57. See also Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92, 100–1.

[66] *Armstrong v Victoria [No 2]* (1957) 99 CLR 28, 48–9 ('*Armstrong*').

[67] Ibid 73.

government-owned gambling monopolies … and the active promotion by governments of gambling events'.[68]

Other dynamic constitutional facts have appeared in the s 92 context, concerning the fluctuating severity of COVID-19;[69] the diminishing population of crayfish in Tasmania;[70] the increasing environmental threats posed by non-refillable bottles;[71] and the evolving 'cross-elasticity of demand' across the states in Australia's 'national wagering market'.[72] Consequently, the timing of constitutional facts can influence the validity of legislation which engages s 92.

The implied freedom of political communication engages a structured proportionality test which assesses the suitability, necessity and adequacy of the legislative measure.[73] As Appleby and Carter explain, these limbs involve facts concerning the law's purpose, operation and 'likely consequences or effects' and the 'availability of alternative measures' — which can evolve.[74] The Court in *Lange v Australian Broadcasting Corporation* explained that the implied freedom relies upon 'changing circumstances' concerning 'modern competing needs, values and preferences'.[75] For example, in *McCloy v New South Wales*, the threat of political corruption posed by property developers was assessed in order to determine the need for statutory political donation restrictions.[76] If corruption threats diminished over time, the need for such restrictions could be lessened — potentially invalidating the legislation.

Finally, for voting rights cases, McTiernan and Jacobs JJ recognised in *McKinlay* that 'while the essence of representative democracy remains unchanged, the method of giving expression to the concept varies over time and according to changes in society'.[77] Toohey J also held in *McGinty v Western Australia* that Australia's constitutional democracy 'cannot be frozen', but instead must adapt to 'political, social and economic developments'.[78] Similarly, in *Murphy v Electoral Commissioner*, Merkel QC submitted on behalf of the plaintiff that technological

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68 *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63, 78 [38] (Branson, Hely and Selway JJ), cited in *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 235 (Gageler SC) (during argument) ('*Betfair No 2*').

69 *Palmer* (n 1).

70 *Cole v Whitfield* (1988) 165 CLR 360, 383 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

71 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473–4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

72 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 481 [122] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) ('*Betfair No 1*'), quoted in Carter (n 24) 131.

73 *McCloy v New South Wales* (2015) 257 CLR 178, 193–5 [2]–[3] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'). Cf at 235–7 [141]–[148] (Gageler J), 288–9 [338]–[339] (Gordon J).

74 Gabrielle Appleby and Anne Carter, 'Parliaments, Proportionality and Facts' (2021) 43(3) *Sydney Law Review* 259, 264.

75 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 565 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoted in Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27(3) *Federal Law Review* 323, 336.

76 *McCloy* (n 73) 250 [194] (Gageler J), 261–2 [233] (Nettle J), 292–3 [359] (Gordon J).

77 *A-G (Cth) (ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1, 36 ('*McKinlay*'). See also at 69 (Murphy J).

78 *McGinty v Western Australia* (1996) 186 CLR 140, 200 ('*McGinty*').

developments rendered the week-long closure of the rolls period obsolete because 'the *Constitution* is not blind to changes in facts of constitutional significance'.[79]

C *Inconsistency*

Timing issues also arise in the context of inconsistency between state and Commonwealth laws. Where a Commonwealth statute is inconsistent with state legislation, the Commonwealth statute prevails such that the state law ceases operation 'so long as the inconsistency remains'.[80] Therefore, as Williams J expressed in *Armstrong*, state legislation may shift from operative to inoperative due to the enactment of a 'paramount Commonwealth law'.[81] Conversely, the fact that a Commonwealth law has been repealed can shift the state law back into operation.[82] These events occurred in *Wenn v Attorney-General (Vic)* and *Butler v Attorney-General (Vic)*.[83]

In *Wenn*, Commonwealth legislation was enacted in a manner which was inconsistent with Victorian legislation — rendering the state law inoperative.[84] However, 13 years later in *Butler*, the same Commonwealth law was repealed — resulting in the Victorian legislation regaining operation.[85] That is, due to the changing status of a Commonwealth law, the operation of the Victorian statute shifted from operative to inoperative to operative again. As Higgins J acknowledged in 1920, state laws operate dynamically under s 109 — 'subject to the pressure of the Federal Act — like Jack-in-the-box under his lid'.[86]

Similar issues may occur where state and Commonwealth legislation operates 'concurrently'.[87] In this context, the relevant inconsistency between state and Commonwealth legislation 'emerges only upon their application or exercise'.[88] For example, in the *Kakariki Case*,[89] state and Commonwealth legislation both established powers to remove sunken ships from coastal waters.[90] The Court held that if Commonwealth authorities attempted to remove a particular ship, the state legislation would lose operation over that same wreck.[91]

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79 *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 31 (R Merkel QC) (during argument) ('*Murphy*'). See also *Electoral Act 1918* (Cth) ss 94A(4), 95(4), 96(4), 155.

80 *Commonwealth v Western Australia* (1999) 196 CLR 392, 417 (Gleeson CJ and Gaudron J) ('*Mining Act Case*'), citing *Constitution* s 109.

81 *Armstrong* (n 66) 73.

82 *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), quoted in George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law* (Federation Press, 7th ed, 2018) 394 [11.5].

83 *Wenn v A-G (Vic)* (1948) 77 CLR 84 ('*Wenn*'); *Butler v A-G (Vic)* (1961) 106 CLR 268 ('*Butler*').

84 *Wenn* (n 83) 113–14 (Latham CJ), 121–2 (Dixon J); *Discharged Servicemen's Preference Act 1943* (Vic); *Re-establishment and Employment Act 1945* (Cth).

85 *Butler* (n 83) 284–6 (Taylor J), 286–7 (Windeyer J).

86 *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23, 33 (Higgins J), quoted in *Spence* (n 26) 488 [297] (Edelman J).

87 See, eg, *Victoria v Commonwealth* (1937) 58 CLR 618 ('*Kakariki Case*').

88 Williams, Brennan and Lynch (n 82) 406 [11.28].

89 *Kakariki Case* (n 87).

90 *Marine Act 1928* (Vic) s 13; *Navigation Act 1935* (Cth) s 329.

91 *Kakariki Case* (n 87) 632 (Dixon J).

Similarly, in the *Mining Act Case*,[92] a portion of land was encumbered by a state mining licence,[93] yet was also prescribed by Commonwealth legislation as a 'defence practice area'.[94] The majority held that the state mining licence could only operate if the land was not used for defence purposes.[95] Therefore, depending on the defence force's use of the land, the mining licence would move in and out of operation.[96]

IV The Necessity of a Principled Approach to Timing

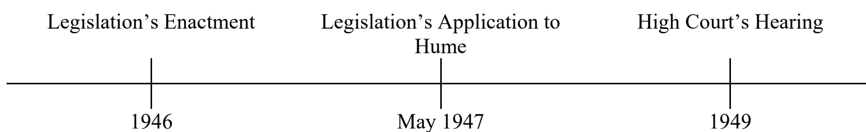
This Part argues that the Court assesses constitutional facts at inconsistent points in time, without justification, and that the current approach is deficient, demanding a principled solution.

A *Assessing Constitutional Facts at Inconsistent Points in Time*

The Court ascertains constitutional facts from varying points in time, including (1) the legislation's enactment; (2) the relevant application of the legislation to the plaintiff; and (3) the High Court's hearing. In some matters, different judges assess constitutional facts at different points of time in the same matter, as occurred in *Hume v Higgins*, a World War II defence power case.[97] *Hume* concerned the validity of a statute passed in 1946 which criminalised the contravention of post-war munitions requirements.[98] On 1 May 1947, Mr Hume violated the statute, resulting in his arrest and conviction. In 1949, the Court heard Hume's appeal against his conviction on the basis that the legislation could no longer be supported by the defence power.

Hume argued that the legislation was invalid because, by 1947, the scope of the defence power had contracted significantly due to the reduced threat of war. As Figure 1 shows, the threat of hostilities in Australia could have been assessed at the time of the legislation's enactment, in 1946; the legislation's application to Hume, causing his arrest (and constitutional harm) on 1 May 1947; or the High Court's hearing, in 1949.

Figure 1: Possible times to assess the threat of hostilities



[92] *Mining Act Case* (n 80).
[93] *Mining Act 1978* (WA) ss 8(1), 18, 27.
[94] *Defence Force Regulations 1952* (Cth) reg 49(1). See also *Lands Acquisition Act 1989* (Cth) pt X.
[95] *Mining Act Case* (n 80) 417 (Gleeson CJ and Gaudron J).
[96] Ibid.
[97] *Hume* (n 3).
[98] *Defence (Transitional Provisions) Act 1946* (Cth) s 15; *National Security (Economic Organization) Regulations 1946* (Cth) reg 21(b).

Rich J assessed Australia's threat of hostilities at the time of the legislation's enactment in 1946.[99] In contrast, Williams J assessed the threat of war at the time the legislation applied to the plaintiff, in 1947.[100] Meanwhile, Dixon J assessed different factual issues at varying points in time — including the legislation's enactment and application in 1946 and 1947.[101] No explanation was provided to justify the time at which the constitutional facts were assessed. This is despite their Honours acknowledging that the law's validity could change over time due to the possibility that '[d]uring the year … the defence power had in the meantime contracted and the regulation could no longer be supported under that power'.[102] The timing issue which arose in *Hume* remains unresolved, as examined below.

1 *Time of Enactment*

The orthodox position in Australian constitutional law is to assess validity from the time of the legislation's enactment.[103] Therefore, as Edelman J stated in *Clubb v Edwards*, ordinarily the validity of legislation is 'considered based on the circumstances at the time that the law was enacted'.[104] That is, constitutional facts are often assessed at the time the law was passed.[105] However, the remaining issue is whether the Court can also consider facts which arise *after* the legislation's enactment: 'It is far more controversial for the enquiry to assess [the law's validity] … taking into account unforeseeable subsequent, potentially radical, changes in facts and circumstances.'[106] The argument against assessing facts after the legislation's enactment, which this article seeks to refute in Part VI, is that it may result in legislation shifting from valid to invalid due to changing facts.[107] That is, accounting for subsequent developments may result in the legislation becoming 'invalid only from a future point in time rather than being void ab initio'.[108] Consequently, certain judges claim that facts should be constrained to those existing when the law was enacted.[109] For instance, in *Murphy* Keane J rejected the plaintiff's submission that changing technological circumstances could invalidate certain voting restrictions, stating:

> It is the function of Parliament to make laws in order to change the world. To assert that changes in the world may unmake laws made by Parliament is to assert the existence of an exception to this understanding of the role of Parliament.[110]

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99 *Hume* (n 3) 126–7.
100 Ibid 140–1.
101 Ibid 135–6.
102 Ibid 135 (Dixon J).
103 *South Australia v Commonwealth* (1942) 65 CLR 373, 408 (Latham CJ) ('*First Uniform Tax Case*'); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 564–5 [79] (McHugh J), cited in Ye (n 4) 121 n 13.
104 *Clubb* (n 1) 334 [470].
105 Ibid. See also Holmes (n 42) 235.
106 *Clubb* (n 1) 334 [470] (Edelman J).
107 Ibid 334 [470]–[471] (Edelman J).
108 Ibid. See also Ye (n 4) 121–6.
109 *Murphy* (n 79) 54–5 [42] (French CJ and Bell J), 93 [199] (Keane J); *XYZ* (n 54) 608 [218] (Callinan and Heydon JJ).
110 *Murphy* (n 79) 93 [199]), quoted in Brumby (n 55) 405.

Keane J's use of the word 'exception' highlights the flexibility in this starting position. Furthermore, as contended in Part VI, the Court should, in most cases, not be constrained to facts existing at the time of enactment, as being so constrained would prevent the application or denotation of legislation and the *Constitution* from being interpreted according to contemporary circumstances. Consequently, in other cases, the Court has assessed constitutional facts *after* the legislation's enactment — such as at the time of the plaintiff's constitutional harm and the time of hearing.

2 *Time of Constitutional Harm*

Various judges and counsel have suggested that constitutional facts should be assessed up until the time that the legislation applied to the plaintiff, causing their constitutional harm. For example, in *Betfair No 2* Gageler SC submitted that constitutional facts 'should be determined at the time of the events underpinning the proceeding'.[111] In contrast, McLeish SC submitted in the same case that 'the relevant time for the inquiry as to its practical effect is the *time of enactment*'.[112] The question of timing remained unresolved in *Betfair No 2*, as the Court refrained from deciding the issue.

In *Sportsbet v Victoria*, Gordon J rejected constraining constitutional facts to the point of the legislation's enactment as the 'questions of fact [were] capable of changing over time'.[113] That is, the time of enactment was unsuitable as technological advancements had altered the legislation's 'practical operation'.[114] Therefore, Gordon J assessed the facts up until the time of 'the event which underpinned the constitutional challenge'.[115] In doing so, her Honour assessed facts up until the point of the plaintiff's constitutional harm, consistent with previous authorities such as *Sue v Hill*.[116] In that case, Australia's international relations with the United Kingdom was assessed at the time the impugned legislation applied to the plaintiff, rather than the time of the legislation's enactment.[117] This shows that constitutional facts have been assessed from various points in time.

3 *Time of Hearing*

Finally, constitutional facts have been assessed by the Court up until the time of hearing. For example, in *Garnishee Case No 1*, Rich and Dixon JJ assessed the 'conditions which at *present* prevail' when considering the law's validity.[118] Similarly, in *Combet v Commonwealth* the majority determined that 'no Bill … had been introduced by the time oral argument of the present matter was heard in this court'.[119] Likewise, in *Foster* the Court assessed the diminished threat of war at the

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[111] *Betfair No 2* (n 68) 235 (Gageler SC) (during argument).
[112] Ibid 237 (McLeish SC) (during argument) (emphasis added).
[113] *Sportsbet Pty Ltd v Victoria* (2011) 282 ALR 423, 452 [127].
[114] Ibid.
[115] Ibid 452 [129].
[116] *Sue v Hill* (1999) 199 CLR 462, 487 [49] (Gleeson CJ, Gummow and Hayne JJ) ('*Sue*'); *Kruger v Commonwealth* (1997) 190 CLR 1, 36–7 (Brennan CJ), 62 (Dawson J), 84–5 (Toohey J) ('*Kruger*').
[117] *Sue* (n 116) 487 [49] (Gleeson CJ, Gummow and Hayne JJ).
[118] *Garnishee Case No 1* (n 20) 181 (emphasis added).
[119] *Combet v Commonwealth* (2005) 224 CLR 494, 558 [105] (Gummow, Hayne, Callinan and Heydon JJ).

time of hearing to determine that the defence purposes of the legislation 'have now disappeared'.[120] Most recently, in *Palmer*, the plaintiff made 'factually intensive' submissions that Western Australia's border closure measures could not 'be justified at the time of hearing'.[121]

There also exists some academic support for the consideration of constitutional facts up until the time of hearing. Holmes suggested in 1949 that courts may wish to assess facts 'at the time of challenge to the legislation'.[122] Similarly, Barak explained that proportionality tests 'must be satisfied during enactment as well as during a constitutional review of the limiting law by the courts'.[123]

B *The Necessity for a Principled Approach*

This section argues that the Court's currently inconsistent and non-transparent approach to the timing of constitutional facts is deficient, demanding a principled approach. The problem lies not merely in the Court's inconsistent approach to timing, without explicit justification, but also its failure to consider the issue at all (as in *Palmer*). There are three key reasons why such approaches are unsatisfactory.

First, it is contended that neglecting issues of timing undermines the Court's obligation to ascertain constitutional facts effectively. As Dixon CJ explained in *Commonwealth Freighters*, the Court has a constitutional obligation to ascertain constitutional facts 'as best it can'.[124] That is, as Williams J noted in the *Communist Party Case*, 'it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation'.[125] As Gordon J held in *Vanderstock*, the Court's duty to ascertain constitutional facts effectively lies in its institutional role as 'custodian of the *Constitution*'.[126] This is because poor consideration of constitutional facts can undermine the rectitude of decisions involving constitutional issues:

> The Court's reticence to decide constitutional issues … [applies] where the Court has an incomplete understanding of the constitutional facts that may be relevant to validity; it is undesirable to decide constitutional cases 'where large issues of legal principle and legal policy are at stake', and where the issues have profound significance for the Australian polity. Bad facts — absent facts — can make bad law.[127]

It is contended that a precondition to ascertaining the relevant constitutional facts is determining the time at which the constitutional facts should be assessed. If the Court is unclear or imprecise in identifying the time at which it is assessing constitutional facts, it cannot know which constitutional facts are necessary to resolve the constitutional issue. For instance, in *Palmer*, without a clear conception

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120 *Foster* (n 40) 86–8 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).
121 *Palmer* (n 1) 548 [125] (Gageler J).
122 Holmes (n 42) 235.
123 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 331.
124 *Commonwealth Freighters* (n 16) 292, quoted in *Vanderstock* (n 1) 279–80 [407] (Gordon J).
125 *Communist Party Case* (n 39) 222.
126 *Vanderstock* (n 1) 280 [408].
127 Ibid 280–1 [409] (Gordon J) (citations omitted).

of the time at which constitutional facts should be assessed, it was impossible to gauge the relevant time at which the severity of COVID-19 should be considered. This in turn confused the analysis of whether the border ban was 'reasonably necessary' because it remained unclear whether the necessity of the provision should be assessed according to infection rates as at the time of the legislation's enactment or the time of the hearing. A principled approach to the timing issue would enable the Court to systematically determine which constitutional facts should be considered — and at what time — satisfying its obligation to ascertain constitutional facts as best it can.

Secondly, it is contended that the current approach to timing is unclear and non-transparent, creating uncertainty for litigants and judges. As Justice Michelle Gordon has explained extra-curially, the Court must ensure that 'developments in constitutional law, are principled, coherent and clear'.[128] In this context, constitutional facts are 'important and need better and more considered attention'.[129] It is argued that the Court's currently imprecise, inconsistent and non-transparent approach to the time at which constitutional facts are assessed (and in turn, the time at which the validity of the law is determined) undermines certainty and coherence in the development of constitutional law.

For example, even if the *outcomes* in *Murphy* and *Palmer* were correct, the method by which constitutional facts were assessed remains unclear. That is, it remains uncertain why, in cases such as *Murphy*, technological developments could not be considered beyond the point of the legislation's enactment, but in *Palmer* developments in the severity of COVID-19 were assessed beyond the point of the legislation's enactment. Such diametrically opposed approaches seem unjustified without an explicit explanation as to why a specific time period is appropriate.

Thirdly, and relatedly, where the Court refrains from expressly considering the time at which constitutional facts are assessed, it is unclear at what point in time the validity of the legislation is being assessed — creating the risk that judges are deciding different issues in the same case. In *Betfair No 2* and *Hume*, the Court did not explicitly state the time at which it was assessing the relevant constitutional facts. As acknowledged above in Part IV(a)(2), in *Betfair No 2* Gageler SC submitted that the constitutional facts should be assessed at the time of the constitutional harm, while McCleish SC argued in favour of the time of enactment. Despite these submissions, the Court did not consider the issue of timing, leaving open uncertainty as to the time at which the law's validity was determined.

Failing to consider the issue of timing creates risks that different judges may be deciding the legislation's validity according to different time periods. For instance, as explained above in Part IV(A), in *Hume* Rich J, Williams J and Dixon J each determined the law's validity according to different time periods, without explicitly acknowledging their differences as to timing. Given the capacity for legislation to shift from valid to invalid over time due to changing constitutional facts, the failure to consider the point at which such facts are assessed creates substantial risks of incoherence and inconsistency. Consequently, it is argued that a

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[128] Gordon (n 1) 2.
[129] Ibid 16.

principled and transparent approach to the timing issue is necessary, in order to avoid uncertainty and to ensure that the Court fulfils its obligation to ascertain constitutional facts as best it can.

V Against the Time of the Plaintiff's Constitutional Harm

This Part argues that the Court's predominantly general justice mandate in constitutional matters makes it inappropriate to constrain constitutional facts to those existing at the time of the plaintiff's constitutional harm. The principles concerning general justice are rarely expressly articulated, but are intuitive to most constitutional lawyers and scholars. General justice requires constitutional adjudication to be conducted according to factors which are common to all persons.[130] That is, general justice principles require legal issues to be adjudicated according to considerations which apply to all persons — not merely the individual litigants.[131]

The Court's general justice mandate in constitutional matters is highlighted by its unique function in such matters. As Gordon J has explained, the

> Court, as custodian of the *Constitution*, has a duty to enforce the *Constitution*, and fulfilment of that duty (and, therefore determining the validity of a law …) cannot be made to depend on which litigant is better prepared or better resourced.[132]

For this reason, as Kirby J explained in *Wurridjal v Commonwealth*, the Court's duty 'in constitutional cases … necessarily goes beyond the interests and submissions of the particular parties to litigation'.[133] In contrast to the Court's general justice mandate in constitutional matters, individual justice enables the Court to consider factors which are unique to the litigant.[134]

The time of the plaintiff's constitutional harm inhibits the Court's general justice function because such a timeframe is unique to the individual. Consequently, subject to limited exceptions, constitutional facts should not be constrained to those existing up until the time the legislation caused the plaintiff's constitutional harm. This is primarily because, as Justice Michelle Gordon has explained, 'constitutional validity cannot be made to depend upon the conduct of parties to private litigation'.[135]

It is contended in the next sections that the Court's general justice function in constitutional matters is evidenced by the general application of constitutional interpretations to the entire Australian body politic;[136] the Court's special leave and

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130 *Communist Party Case* (n 39) 276 (Kitto J); *Gerhardy v Brown* (1985) 159 CLR 70, 141–2 (Brennan J) ('*Gerhardy*').
131 *Communist Party Case* (n 39) 276 (Kitto J); *Gerhardy* (n 130) 141–2 (Brennan J).
132 *Vanderstock* (n 1) 280 [408] (citations omitted). See also Gordon (n 1) 20.
133 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 313, quoted in Gordon (n 1) 20.
134 *Breen* (n 14) 411 (Dixon CJ); *Commonwealth Freighters* (n 16) 292 (Dixon CJ).
135 Gordon (n 1) 18 (citations omitted).
136 *Communist Party Case* (n 39) 276 (Kitto J), cited in Lane (n 16) 112–13.

jurisdictional requirements;[137] and the general framing of constitutional guarantees.[138]

A *General Application of Constitutional Adjudication*

General justice is necessary in constitutional matters because the Court's interpretation of the *Constitution*, and its ruling on the validity of legislation, apply to the entire Australian body politic.[139] Or, as Gordon J put it in *Vanderstock*, constitutional issues are not the 'exclusive concern of the litigating parties' because 'the interpretation of the *Constitution* affects all people in Australia'.[140] That is, as Kitto J established in the *Communist Party Case*, the Court's ruling on the validity of legislation applies to everyone — not just the individual litigant: 'Although it is only in litigation between parties that the Court may decide whether Commonwealth legislation is valid, it is upon the validity of the legislation in relation to all persons that the Court has to pronounce.'[141]

The Court's general justice approach is reflected by its sole reliance upon constitutional facts, as Kitto J established that only facts 'common to all persons' can 'affirm the validity of a measure'.[142] That is, as Brennan J held in *Gerhardy v Brown*, the 'validity and scope of a law cannot be made to depend on the course of private litigation'. And the Court justifies a general justice approach on the basis that the 'legislative will is not surrendered into the hands of the litigants'.[143] Therefore, due to the general application of constitutional decisions, deciding constitutional facts at the time of constitutional harm is likely impermissible, as it depends on factors unique to the litigant. It is nonetheless acknowledged below in Part VII that exceptions to this general principle exist. For instance, there may be situations where the time of harm coincided with a general harm which had receded by the time of hearing.

B *Special Leave and Jurisdiction*

The Court's general justice approach is further exemplified by its special leave and jurisdictional rules. Constitutional appeals are heard not as of right, but instead rely on general factors such as the matter's 'public importance' before special leave is provided.[144] Sir Anthony Mason explained that the special leave requirements highlight that the High Court's predominant function is to 'serve [the] public interest' rather than litigants' private interests.[145] Similarly, as Dawson J provided

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[137] *Judiciary Act 1903* (Cth) s 35A ('*Judiciary Act*'); Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 20.

[138] *Wotton v Queensland* (2012) 246 CLR 1, 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 23–4 [54] (Heydon J), 31 [80] (Kiefel J) ('*Wotton*'); *Palmer* (n 1) 564 [180] (Gordon J).

[139] *Communist Party Case* (n 39) 276 (Kitto J).

[140] *Vanderstock* (n 1) 280 [408].

[141] *Communist Party Case* (n 39) 276.

[142] Ibid; Leslie Zines, *The High Court and the Constitution* (Butterworths, 2nd ed, 1987) 101.

[143] *Gerhardy* (n 130) 141–2, cited in *Mowbray* (n 18) 519 [634] (Heydon J).

[144] *Judiciary Act* (n 137) s 35A(a)(i).

[145] Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1, 4, 10. See also Pam Stewart and Anita Stuhmcke, 'Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia' (2019) 41(1) *Sydney Law Review* 35, 39.

in *Morris v The Queen*, the Court must 'place greater emphasis upon its public role in the evolution of the law than upon the private rights of the litigants before it'.[146]

The Court's original and appellate jurisdiction similarly reflects the Court's general justice function.[147] The 'matter' requirement ostensibly prioritises consideration of the plaintiff's individual circumstances by examining the plaintiff's 'right or privilege or protection given by law'.[148] However, such requirements have been broadly construed in the constitutional context because a matter 'cannot be identified without regard to the remedies available in the court where it is litigated'.[149] Therefore, as Lindell explains, the definition of a 'matter' has been expanded by 'the broad scope which the High Court has given to the declaratory judgment remedy in public law litigation'.[150] Consequently, as the majority held in *Palmer v Ayres*, irrespective of whether an individual right has been established, only a '*claim* is necessary'.[151] Therefore, the matter requirement highlights that general justice can only be achieved through an individual bringing a claim and enlivening the Court's jurisdiction.[152] Nonetheless, the special leave and jurisdictional requirements reflect the Court's predominantly 'public role', rather than focusing upon the individual claimant's rights.

C *Framing of Constitutional Guarantees*

The importance of general justice is further reflected by the Court's framing of constitutional guarantees in general rather than individual terms. Australia's *Constitution* lacks an 'express conferral of rights which individuals may enforce'.[153] Instead, Australia's constitutional guarantees establish general constraints on governmental power. That is, as Dawson J established in *Brown v The Queen*, Australia's *Constitution* 'almost without exception, deals with the structure and relationships of government rather than with individual rights or freedoms'.[154] Dixon J similarly stated in *Melbourne Corporation* that the *Constitution* primarily 'deals with government and governmental powers'.[155] Such views are consistent with the Court's interpretation of constitutional guarantees including the implied freedom of political communication, s 92 and the right to trial by jury.

For example, in *Wotton v Queensland*, the Court acknowledged that the implied freedom of political communication operates as 'a limitation upon

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146 *Morris v The Queen* (1987) 163 CLR 454, 475.
147 *Constitution* ss 73, 75, 76.
148 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265–6 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
149 *Abebe v Commonwealth* (1999) 197 CLR 510, 529 [36] (Gleeson CJ and McHugh J). See *Re McBain* (2002) 209 CLR 372, 407 [67]–[69] (Gaudron and Gummow JJ).
150 Lindell (n 137) 20.
151 *Palmer v Ayres* (2017) 259 CLR 478, 491 [27] (Kiefel, Keane, Nettle and Gordon JJ) (emphasis in original).
152 *University of Wollongong v Metwally* (1984) 158 CLR 447, 457–8 (Gibbs CJ).
153 *Levy v Victoria* (1997) 189 CLR 579, 646 (Kirby J), quoted in *Coleman v Power* (2004) 220 CLR 1, 51 [95] (McHugh J) and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 290–1 [318] (Callinan J).
154 *Brown v The Queen* (1986) 160 CLR 171, 208 ('*Brown*'). See also *Kruger* (n 116) 61 (Dawson J).
155 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82.

legislative power'[156] and not as 'a personal right'.[157] That is, as Stone suggests, the implied freedom has been described as an 'institutional freedom' since it serves the 'larger interest' of protecting Australia's representative and responsible government.[158] Therefore, as Nettle J held in *Clubb v Edwards*, and as the majority reiterated in *Comcare v Banerji*, the implied freedom of political communication requires consideration of the law's 'effect on political communication *as a whole* rather than on an individual or group's preferred mode of communication'.[159] Consequently, the inquiry engages facts which apply to everyone. Therefore, constitutional facts should not be limited to those existing at the time of the plaintiff's constitutional harm because it excludes other facts which are common to all persons.

The same logic applies to the freedom under s 92 of the *Constitution*. As Brennan J held in *Australian Capital Television*, s 92 establishes 'an immunity consequent on a limitation of legislative power'.[160] That is, as Gordon J explained in *Palmer*, s 92 'does not confer a personal right' but instead operates to limit legislative power.[161] The section's general inquiry is further reflected by the Court's rejection of submissions which merely explain how the legislation impedes the plaintiff's *personal* ability to engage in interstate trade.[162] That is, as the majority held in *Betfair No 2*, the section is not concerned with whether an individual's 'particular circumstances are … adversely affected'.[163] Rather, the issue centres upon whether interstate trade is infringed *generally*. Thus, subject to limited exceptions, constitutional adjudication must involve facts which are common to all persons.

Other constitutional guarantees, such as the right to trial by jury, also establish general rather than individual rights. As the majority in *Brown* established, the right to trial by jury concerns 'the structure of government rather than the grant of a privilege to individuals'.[164] The general justice view of s 80 led to the confirmation in *Alqudsi v The Queen* that the right to trial by jury does not confer 'a personal right capable of waiver by the accused'.[165] Instead, the right operates as a general 'safeguard of the public interest in the administration of justice'.[166]

Consequently, constitutional guarantees in Australia ordinarily operate as a structural limitation on parliamentary power rather than a conferral of individual

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156 *Wotton* (n 138) 14–15 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also at 23–4 [54] (Heydon J).

157 Ibid 31 [80] (Kiefel J).

158 Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 375–8.

159 *Clubb* (n 1) 256 [247]; *Comcare v Banerji* (2019) 267 CLR 373, 395 [20] (Kiefel CJ, Bell, Keane and Nettle JJ) (emphasis in original).

160 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 150.

161 *Palmer* (n 1) 564 [180]; *Betfair No 2* (n 68) 266–7 [42]–[44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

162 See, eg, *Betfair No 2* (n 68) 266 [42] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

163 *Betfair No 2* (n 68) 267 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ), quoting *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356, 388 [104] (Keane CJ, Lander and Buchanan JJ).

164 *Brown* (n 154) 214 (Dawson J). See also at 197 (Brennan J), 202 (Deane J).

165 *Alqudsi v The Queen* (2016) 258 CLR 203, 231 [59] (French CJ) ('*Alqudsi*').

166 Ibid 232 [59] (French CJ) (citations omitted). See also at 251 [116] (Kiefel, Bell and Keane JJ).

rights.[167] Therefore, constitutional facts should be applicable to all persons — not just the individual litigant. The time of the plaintiff's constitutional harm is generally unique to the litigant. Such a timeframe may exclude important facts which are common to all persons subject to the legislation, thereby impeding the Court's general justice function. For example, in *Palmer*, if the factual inquiry was restricted to the time that the border ban prevented Mr Palmer from travelling to Western Australia, COVID-19 developments after April 2020 could not be considered. Therefore, the time of constitutional harm will rarely be a suitable period to constrain the assessment of constitutional facts, subject to the limited exceptions outlined in Part VII below. Instead, the Court should assess the relevant constitutional facts at a time period which applies to everyone — not just the immediate litigants.

VI Against the Time of the Legislation's Enactment and Towards the Time of Hearing

This Part argues that orthodox principles of statutory and constitutional interpretation support a flexible consideration of changing circumstances, thereby rendering the time of hearing, rather than the time of the legislation's enactment, as the generally appropriate time to assess constitutional facts.

The appropriateness of either time period depends upon whether the Court's statutory and constitutional interpretive models favour flexibility or certainty in the face of changing circumstances. Where the Court's interpretive model permits the application or denotation of words to adapt to contemporary circumstances, constitutional facts should generally be assessed up until the time of hearing, to enable the text to apply in its most current context. In contrast, where the interpretive model is averse to permitting the application of words to new circumstances, and favours certainty over flexibility, the Court may choose to confine the available constitutional facts to those existing at the time of the legislation's enactment.

Consequently, there cannot be one absolute approach to the timing question, reflecting the Court's broader rejection of a 'single all-embracing theory of constitutional interpretation'.[168] Instead, it is argued that judges should be explicit about how their approach to interpretation in a particular case impacts the time at which constitutional facts are assessed.

Nonetheless, the orthodox 'always speaking' and connotation–denotation approaches to statutory and constitutional interpretation, discussed in Parts VI(A) and (B) below, support a *flexible* consideration of contemporary circumstances.[169] Both approaches permit the application of statutory or constitutional terms to adapt

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[167] Cf certain constitutional cases involving *Constitution* ss 116–17. In the context of s 116, see *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116; *A-G (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559. In the context of s 117, see *Street v Queensland Bar Association* (1989) 168 CLR 461 ('*Street*'); *Davies v Western Australia* (1904) 2 CLR 29.

[168] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 455 [14] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Marriage Equality Act Case*').

[169] Jeffrey Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the "Always Speaking" Principle' (2022) 43(1) *Statute Law Review* 79, 93 ('Always Speaking'); *Aubrey v The Queen* (2017) 260 CLR 305, 321–2 [29]–[30] (Kiefel CJ, Keane, Nettle and Edelman JJ) ('*Aubrey*').

to changing circumstances, subject to a core immutable meaning.[170] Such orthodoxy reflects the Court's generally 'flexible approach to ascertaining constitutional facts'.[171] Therefore, orthodox interpretive principles generally require consideration of recent factual developments — warranting examination of constitutional facts up until the time of hearing.

However, as explored below, rare exceptions exist where certainty is prioritised through the *contemporanea expositio* and strict originalist approaches — which constrain the meaning *and application* of words to the point of enactment. These interpretive models value certainty above flexibility, limiting constitutional facts to those existing at the time of enactment. While such approaches are rarely applied, they are occasionally employed, highlighting the role of interpretive theories in influencing the solution to the timing question. Therefore, judges should be explicit in explaining how their interpretive approach influences the time at which they assess constitutional facts. Consequently, orthodox interpretive theory suggests that constitutional facts should be assessed up until the point of hearing — subject to exceptions outlined below.

A *Statutory Interpretation*

This section argues that the orthodox approach to statutory interpretation supports the consideration of constitutional facts up until the time of the High Court's hearing. Australia's modern approach to statutory interpretation requires consideration of the legislation's text, context and purpose.[172] A corollary to the modern approach is the doctrine that statutes are 'always speaking'.[173] The always speaking approach enables the application of statutes to adapt to changing social, economic, political and scientific advancements — subject to a fixed core meaning.[174] That is, as Bell and Gageler JJ acknowledged in *R v A2*, the 'application of a statutory word or phrase may change over time',[175] however the essential 'meaning of the expression itself cannot change'.[176] The always speaking principle therefore reflects the orthodox 'distinction, familiar to the law, between the meaning of a word and its application to things'.[177] As Goldsworthy explains, the application of a word includes everything 'it denotes or refers to' while its 'meaning consists of the criteria or function that determine its application'.[178]

Therefore, the application of statutory words and phrases can evolve depending upon contemporary 'judgments of fact or value'.[179] That is, as Goldsworthy suggests, the always speaking approach 'provides additional scope for

[170] Goldsworthy, 'Always Speaking' (n 169); *Aubrey* (n 169).
[171] Gordon (n 1) 18.
[172] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow J).
[173] *Aubrey* (n 169) 322 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ); *R v A2* (2019) 269 CLR 507, 552 [141] (Bell and Gageler JJ), 562 [169] (Edelman J) ('*A2*').
[174] *Aubrey* (n 169) 322 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ); *A2* (n 173) 552 [141] (Bell and Gageler JJ), 562 [169] (Edelman J).
[175] *A2* (n 173) 552 [141].
[176] Ibid 553 [144], quoting *R v G* [2004] 1 AC 1034, 1054 [29] (Lord Bingham).
[177] Goldsworthy, 'Always Speaking' (n 169) 92.
[178] Ibid.
[179] Ibid 93.

legitimate temporal variation in the application of unchanging legal provisions'.[180] Notably, as examined further below, the always speaking approach is distinguished from a 'wholly dynamic' approach, which enables the application *and meaning* of words to change according to evolving facts. Consequently, the orthodox approach to statutory interpretation is flexible to changing circumstances — suggesting that constitutional facts should be assessed up until the time of hearing. In doing so, the application of statutory phrases can adapt to new circumstances not previously envisaged by Parliament at the time of enactment, while maintaining the essential meaning or core.[181]

For example, in *Lake Macquarie v Aberdare*, Barwick CJ applied the statutory term 'gas' to liquified petroleum gas, despite only coal gas existing when the impugned legislation was enacted.[182] His Honour expanded the application of the term 'gas' by assessing technological advancements *after* the legislation's enactment.[183] Similarly, in *Aubrey v The Queen*, the application of 'actual bodily harm' was broadened to include the infliction of sexual diseases by considering scientific advances in the 'aetiology and symptomology of infection'.[184] Furthermore in *A2*, Edelman J applied the offence of 'otherwise mutilat[ing]' another person to the practice of female genital mutilation — reflecting changing social and cultural attitudes towards the practice.[185] Each case required a consideration of recent social, political and technological developments. Therefore, the always speaking approach promotes the assessment of constitutional facts up until the time of hearing.

Despite the orthodoxy of the always speaking principle, there are rare instances where certainty is prioritised through the *contemporanea expositio* approach.[186] This maxim, as reiterated by Brennan J in *Corporate Affairs Commission v Yuill*, provides that 'the best and surest mode' of interpretation is to read the words as they were understood when 'drawn up'.[187] Similarly, as Lord Esher established, the 'words of a statute must be construed as they would have been the day after the statute was passed'.[188] The *contemporanea expositio* principle therefore requires facts to be constrained to those existing at the time of enactment. This approach may be required where the law's text, context and purpose support a 'fixed time construction' or if 'the words in question had a clear legal meaning at the time of their enactment'.[189] If such an approach were to be adopted, the relevant time to assess constitutional or legislative facts would prima facie be the time of enactment.

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180 Ibid.

181 Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 22.

182 *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327, 330–1 ('*Lake Macquarie*'); *Local Government Act 1919* (NSW) s 418(1)(b).

183 *Lake Macquarie* (n 182) 329–32 (Barwick CJ).

184 *Aubrey* (n 169) 320 [24] (Kiefel CJ, Keane, Nettle and Edelman JJ); *Crimes Act 1900* (Cth) s 35(1)(b) ('*Crimes Act*').

185 *A2* (n 173) 562 [169].

186 D Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) 150–1 [4.15].

187 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322–3 ('*Yuill*').

188 *Sharpe v Wakefield* (1888) 22 QBD 239, 242, cited in Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1, 9 ('Originalism').

189 Pearce (n 186) 152 [4.16], citing *Yuill* (n 187) 322–3 (Brennan J). See also *Kenneally v New Zealand* (1999) 91 FCR 292, 302 [53] (Burchett, Weinberg and Gyles JJ).

Such instances arose in *Forsyth v Deputy Commissioner of Taxation*.[190] Here, the legislation concerned a monetary cap on the District Court's jurisdiction,[191] which was defined by reference to the caps pertaining to the Common Law Division of the Supreme Court.[192] Subsequent legislation changed the monetary caps concerning the Supreme Court,[193] leaving the question of whether the cap under the District Court's legislation should also change. Under the always speaking approach, the District Court's monetary cap would evolve in accordance with changes to the Supreme Court's jurisdiction. However, the majority refused to apply the always speaking principle — preferring the *contemporanea expositio* approach for three reasons: first, the text provided no reason to assume the Court's jurisdiction 'should be construed in an ambulatory or "always speaking" manner';[194] secondly, an always speaking approach would undermine the legislation's purpose of 'removing doubts as to the District Court's jurisdiction';[195] and finally, the surrounding provisions did not permit 'an ambulatory construction'.[196] Therefore, the majority restricted the District Court's jurisdiction to caps existing at the time of the legislation's enactment.

Similarly, in *Joyce v Grimshaw*, the concept of 'imposing upon' could only be understood in its earlier 18th and 19th century application concerning 'cheating or deceiving by false representations'.[197] In doing so, the Court rejected contemporary applications of the term, such as 'to place a burden upon' or 'to inflict upon'.[198] Therefore, *Forsyth* and *Joyce* suggest that a *contemporanea expositio* method can operate consistently with the modern approach to interpretation. While the *contemporanea expositio* method would constrain constitutional facts to those existing at the time of the legislation's enactment, as Pearce explains, these instances are rare.[199]

Instead, Australia's orthodox approach to statutory interpretation supports a flexible consideration of contemporary circumstances and values. For this reason, the Court should generally assess constitutional facts up until the time of hearing to reflect recent developments.

B *Constitutional Interpretation*

This section argues that the orthodox approach to constitutional interpretation also supports the consideration of constitutional facts up until the time of the High Court's hearing. Similar to the always speaking approach, the Court's orthodox connotation–denotation distinction in constitutional interpretation permits the application of constitutional words to adapt to new circumstances, subject to a fixed

[190] *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 ('*Forsyth*').
[191] *District Court Act 1973* (NSW) s 44(1)(a).
[192] *Supreme Court Act 1970* (NSW) ss 52–5.
[193] *Courts Legislation Further Amendment Act 1998* (NSW) sch 10.
[194] *Forsyth* (n 190) 548 [41] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
[195] Ibid 548–9 [42] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
[196] Ibid 549 [44]–[45] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
[197] *Joyce v Grimshaw* (2001) 105 FCR 232, 244 [63] (Miles, Mathews and Weinberg JJ) ('*Joyce*'); *Crimes Act* (n 184) s 29B.
[198] *Joyce* (n 197) 244 [62] (Miles, Mathews and Weinberg JJ).
[199] Pearce (n 186) 150–1 [4.15].

essential meaning.[200] As Goldsworthy suggests, 'a term's connotation is the criteria that define the term, while its denotation is made up of all the things in the world to which the term refers'.[201] Therefore, as Dawson J explained in *Street v Queensland Bar Association*, words and phrases in the constitutional context have 'a fixed connotation but their denotation may vary from time to time'.[202] The denotation of constitutional words can adapt to changing circumstances because, as O'Connor J established in *Jumbunna Coal Mine v Victorian Coal Miners' Association*, Australia's *Constitution* was flexibly designed 'to apply to the varying conditions which the development of our community must involve'.[203] Thus, as Barwick CJ held in *King v Jones*, 'changing events and attitudes may in some circumstances extend the denotation' of constitutional words.[204] Kirk suggests that such adaptation is necessary to ensure that the *Constitution* remains 'in tune with modern Australian society'.[205] Consequently, constitutional terms may apply to new circumstances which the 'framers of the Constitution could not be expected to foresee'.[206]

The Court's predominantly 'moderate originalist' approach to constitutional interpretation therefore suggests that constitutional facts should be assessed up until the time of hearing — to ensure constitutional words are applied in their contemporary context.[207] For instance, as McHugh J explained in *Eastman*, the denotation of 'internal carriage' in s 92 has expanded to include 'carriage of goods … by aeroplane' rather than merely 'transport by horse-drawn carriages and trains'.[208] Similarly, in *Jones v Commonwealth [No 2]*, technological advancements permitted Parliament to regulate television activity under the 'postal, telegraphic, telephonic and other like devices' power.[209] Furthermore, in *Grain Pool of Western Australia*, the term 'patents of invention' in s 51(xviii) was expanded to include 'breeding' of new plant species, despite such scientific methods not existing in 1900.[210] In each instance, the Court expanded the denotation of constitutional terms by considering modern scientific and technological advancements.

Political and social changes may also expand or contract the denotation of constitutional terms. In *Sue*, the essential meaning of 'aliens' and 'foreign power' remained unchanged,[211] despite the application of both terms expanding to include British subjects following Australia's independence from the United Kingdom.[212]

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200 *King v Jones* (1972) 128 CLR 221, 229 (Barwick CJ) ('*Jones*'), quoted in Goldsworthy, 'Originalism' (n 188) 12; Justice James Edelman, '2018 Winterton Lecture: Constitutional Interpretation' (2019) 45(1) *University of Western Australia Law Review* 1, 17 ('Winterton Lecture').

201 Goldsworthy, 'Originalism' (n 188) 31–2.

202 *Street* (n 167) 537.

203 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367–8, quoted in *Betfair No 1* (n 72) 453 [19] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

204 *Jones* (n 200) 229, cited in Goldsworthy, 'Originalism' (n 188) 12.

205 Kirk (n 75) 353.

206 *Brown* (n 154) 183 (Gibbs CJ), quoted in *Alqudsi* (n 165) 229 [51] (French CJ).

207 Goldsworthy, 'Originalism' (n 188) 3–4.

208 *Eastman v The Queen* (2000) 203 CLR 1, 45 [143].

209 *Jones v Commonwealth [No 2]* (1965) 112 CLR 206, 222 (McTiernan J), 226 (Kitto J), 229 (Menzies J).

210 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 496 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), cited in *Zines and Stellios* (n 2) 20.

211 Goldsworthy, 'Always Speaking' (n 169) 92; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173 (Gleeson CJ). See also Kirk (n 75) 334.

212 *Sue* (n 116) 490 [59], 496 [78] (Gleeson CJ, Gummow and Hayne JJ), 526 [166]–[168] (Gaudron J).

Similarly, in *Cheatle v The Queen*, the Court expanded the denotation of 'trial … by jury' to include women in order to reflect social 'contemporary standards and perceptions'.[213] Furthermore, in *McGinty*, the majority expanded voting rights to include women by reflecting 'developments in democratic standards' and transcending 'circumstances as they existed at federation'.[214] Therefore, Australia's connotation–denotation approach suggests that constitutional facts should be assessed in their most current context — up until the time of hearing.

While the Court currently adopts a flexible 'moderate originalist' approach, alternative modes of interpretation are possible. For instance, 'strict originalism' aims to constrain the meaning and application of words to those existing at the time of the *Constitution*'s framing.[215] Strict originalist interpretations are rare in the modern Australian constitutional context.[216] An early example is the *Union Label Case*, where the majority refused to expand the application of 'trade marks' under s 51(xviii) beyond those recognised in 1900.[217]

More recent strict originalist interpretations may include Dawson J's judgment in *McGinty*, where his Honour provided that 'the qualifications of electors … may amount to less than universal suffrage, however politically unacceptable that may be today'.[218] This position may be considered strict originalist because his Honour refused to incorporate changing societal values in relation to universal suffrage. Therefore, a strict originalist interpretation of the *Constitution* would prima facie support the constraining of constitutional facts to those existing in 1900. However, as Goldsworthy explains, Dawson J did not consistently promote a strict originalist approach.[219] For instance, in *Cheatle*, his Honour rejected the notion existing in 1900 that 'women or unpropertied persons' should be excluded from being jury members.[220] Consequently, strict originalist modes of interpretation are not currently supported by the Court. Similarly, there exists almost no support for the 'non-originalist' or 'living tree' approach, which permits both the application and meaning of constitutional terms to change over time.[221]

In summary, the Court's flexible interpretive approach suggests that constitutional facts should be assessed up until the time of hearing — to reflect social, economic, political and scientific developments. However, if an alternative interpretive theory were adopted, the approach might be different. Where a

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213 *Cheatle v The Queen* (1993) 177 CLR 541, 560–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Cheatle*').

214 *McGinty* (n 78) 221 (Gaudron J), cited in Goldsworthy, 'Originalism' (n 188) 3.

215 Lawrence B Solum, 'What is Originalism? The Evolution of Contemporary Originalist Theory' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) 12, 16–20.

216 Goldsworthy, 'Originalism' (n 188) 4–6.

217 *A-G (NSW) ex rel Tooth & Co Ltd v Brewery Employees Union of NSW* (1908) 6 CLR 469, 512–13 (Griffith CJ), 526–9 (Barton J), 538–41 (O'Connor J) ('*Union Label Case*'). Cf at 610–11, 616 (Higgins J).

218 *McGinty* (n 78) 183, quoting *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 199 (McHugh J), quoted in Goldsworthy, 'Originalism' (n 188) 4.

219 Goldsworthy, 'Originalism' (n 188) 4.

220 Ibid 3, citing *Cheatle* (n 213) 560–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

221 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 145 [423] (Heydon J), quoted in Edelman, 'Winterton Lecture' (n 200) 28.

contemporanea expositio or strict originalist approach is used, facts may be constrained to those existing at the time of enactment. By contrast, if a wholly dynamic or 'non-originalist' approach is engaged, the Court could assess facts up until the time of hearing to update the application *and meaning* of words. Consequently, the interpretive approach adopted by the Court will ultimately guide the time at which constitutional facts are assessed. Therefore, based on the Court's current practice, constitutional facts should be assessed up until the time of hearing, subject to the exceptions discussed in the next Part.

VII Challenges and Exceptions

This Part analyses the challenges and exceptions to the above guiding principles. The main challenge to assessing facts up until the time of hearing is that doing so can produce legal instability, as changing facts may shift the law's validity. Nonetheless, it is argued that a degree of instability is not only tolerated by the Court but required by orthodox interpretive theories. The Court's approach to the timing question may also be influenced by the parties' submissions, case management principles and procedural fairness.

A *Challenges of Shifting Validity*

A potential, albeit somewhat weak, criticism of assessing facts up until the time of hearing is that it may create instability, as it enables an initially valid law to become invalid due to changing facts. For instance, in *Murphy*, Keane J rejected the proposition that 'a law valid when made may become invalid by changes in the milieu in which it operates'.[222] His Honour provided that the validity of laws should not shift due to changing constitutional facts, with the exception of the defence power and potentially ss 92 and 109.[223] In the same case, French CJ and Bell J refused to permit the law's validity to change as it would impermissibly 'pull the constitutional rug from under a valid legislative scheme'.[224] Similarly, in *XYZ*, Heydon and Callinan JJ rejected the 'international concern' test as its 'volatility and elusiveness … would operate antithetically to the rule of law'.[225] It is accepted that assessing constitutional facts up until the time of hearing may invite instability towards the law's validity. However, there are three answers to this objection.

First, stability is not an absolute or unyielding constitutional value.[226] Instead, as Coper explains, 'the achievement of certainty is one but not the only object of the law'.[227] Therefore, as acknowledged in *Re Heagney*, '[a] degree of uncertainty is

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222 *Murphy* (n 79) 91 [194]. Cf *Betfair No 1* (n 72) 452 [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).
223 *Murphy* (n 79) 92–3 [196]–[200].
224 Ibid 54–5 [42].
225 *XYZ* (n 54) 608 [218]. See also *Commonwealth v Tasmania* (1983) 158 CLR 1, 123 (Mason J).
226 See above Part VI.
227 Michael Coper, 'Joint Judgments and Separate Judgments' in Michael Coper, Tony Blackshield, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

permissible'.[228] For example, a degree of instability is tolerated by the Court in the context of s 109 by permitting inconsistent state legislation to shift in and out of operation over short periods of time.[229] Similarly, evolving wartime circumstances can alter the defence power's scope — shifting the law's validity.[230] Therefore, as Stone argues, the Court must balance 'certainty and democratic legitimacy on the one hand, and flexibility and adjustment to changing circumstances on the other'.[231] Consequently, as Dixon J expressed in *Australian Textiles*, flexibility in reflecting contemporary circumstances may outweigh priorities of legal certainty in factually dynamic cases, because '[where] a power applies to authorise measures only to meet facts, the measure cannot outlast the facts as an operative law'.[232]

The second reason that instability should not preclude assessing facts up until the time of hearing is that, under this article's model, dynamic constitutional facts can only affect the *application* of statutory or constitutional words — not their essential meaning. That is, this article does not promote an 'updating' or 'wholly dynamic' approach to statutory or constitutional interpretation, where contemporary facts may change the essential *meaning* of terms.[233] Instead, this article's model operates within Australia's orthodox principle that statutes and constitutions can apply to new circumstances which could not be envisaged at the time of enactment.[234] Assessing facts up until the time of hearing is therefore the optimal method to achieve the Court's mandate of flexibly applying contemporary circumstances to statutory and constitutional words.

Finally, where facts are assessed up until the time of hearing, the Court is not bound to use those facts to invalidate a law. Instead, depending on the interpretive approach, contemporary circumstances may hold little or no weight in determining the law's validity.[235] Such a result occurred in *Murphy*, where the Court assessed recent technological developments, yet refused to consider those facts as determinative or even relevant to the law's necessity or validity.[236] Therefore, arguments concerning legal uncertainty are better directed towards theories of interpretation and the extent to which constitutional standards permit the consideration of dynamic constitutional facts.[237] Consequently, while issues of

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[228] *Re Heagney; Ex parte ACT Employers Federation* (1976) 137 CLR 86, 87 (Marks QC) (during argument), citing *Reg v Williams; Ex parte Pressed Metal Corporation* (1973) 47 ALJR 130, 131 (Menzies, Gibbs and Stephen JJ).

[229] *Wenn* (n 83) 113–14 (Latham CJ), 121–2 (Dixon J); *Butler* (n 83) 284–6 (Taylor J), 286–7 (Windeyer J).

[230] *Australian Textiles* (n 4) 179–81 (Dixon J); *Foster* (n 40) 86–8 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).

[231] Adrienne Stone, 'Constitutional Interpretation' in Michael Coper, Tony Blackshield, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

[232] *Australian Textiles* (n 4) 181.

[233] Cf William N Eskridge, 'Dynamic Statutory Interpretation' (1987) 135 *University of Pennsylvania Law Review* 1479; T Alexander Aleinikoff, 'Updating Statutory Interpretation' (1988) 87(1) *Michigan Law Review* 20; *Yemshaw v Hounslow London Borough Council* [2011] 1 WLR 433, 441–2 [24] (Lady Hale).

[234] Goldsworthy, 'Always Speaking' (n 169) 93; *A2* (n 173) 552 [141] (Bell and Gageler JJ); *Aubrey* (n 169) 322 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ); *Jones* (n 200) 229 (Barwick CJ).

[235] See above Part VI; Goldsworthy, 'Originalism' (n 188) 4–5.

[236] *Murphy* (n 79) 75 [116], 82 [159] (Keane J).

[237] *Zines and Stellios* (n 2) 775–6.

stability are important, they do not undermine the general principles proposed in this article.

B Nature of Pleadings and Submissions

The time at which constitutional facts are assessed may be limited by the nature of the parties' pleadings and submissions. In the Court's original jurisdiction, facts are often introduced by way of 'special case' which requires the relevant facts and questions of law to be agreed between the parties.[238] Therefore, the timing of constitutional facts may be limited by the parties' submission of evidence. That is, if the parties fail to adduce information existing at the time of the plaintiff's constitutional harm or hearing, the Court may not inquire into constitutional facts at those respective points in time.

For instance, in *Wilcox Mofflin v New South Wales*, the majority criticised counsel's failure to provide adequate evidence, yet nonetheless constrained its analysis to the limited constitutional facts provided.[239] That is, the Court restricted its inquiry despite more 'formal or full proof' of the attendant facts being 'indispensable to a satisfactory solution'.[240] Such issues continue to arise. Recently, in *Vanderstock*, Gordon J criticised counsel's failure to place any constitutional facts concerning the effect of a tax on dampening or depressing market demand.[241] Furthermore, in *Unions NSW*, the majority refused to adduce constitutional facts provided by amicus curiae as '[t]hose facts did not form part of the special case agreed by the parties'.[242]

However, Justice Gordon has noted extra-curially that special case procedures can undermine the Court's access to all relevant constitutional facts where there is an imbalance in resources between parties, because one side may be better equipped to gather the relevant constitutional facts.[243] Therefore, due to the Court's 'general justice' function in constitutional matters, the Court may in rare circumstances 'discover the constitutional fact through its own inquiries'.[244] Furthermore, as Justice Gordon has explained, the involvement of amicae may ensure that relevant constitutional facts are adduced which the parties 'consciously omit, or merely "overlook or neglect"'.[245] Additionally, as Edelman J acknowledged in *Mineralogy v Western Australia*, the Court can invite further written or oral submissions to elicit greater information.[246] Finally, the parties' submissions may be

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238 *Mineralogy* (n 15) 846 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also Gordon (n 1) 9–10.

239 *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488, 507 (Dixon, McTiernan and Fullagar JJ) ('*Wilcox*'). See also Patrick Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970) 4(1) *Federal Law Review* 65, 71.

240 *Wilcox* (n 239) 507 (Dixon, McTiernan and Fullagar JJ).

241 *Vanderstock* (n 1) 279–80 [407].

242 *Unions NSW* (n 63) 619 [55] (Kiefel CJ, Bell and Keane JJ).

243 Gordon (n 1) 10.

244 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, 138; Gabrielle Appleby, 'Functionalism in Constitutional Interpretation: Factual and Participatory Challenges: Commentary on Dixon' (2015) 43(3) *Federal Law Review* 493, 496.

245 Gordon (n 1) 21.

246 *Mineralogy* (n 15) 853 [105].

inherently limited by the nature of the challenged statutory provision. For instance, in the rare circumstance that the impugned statute is no longer in operation, the parties may be confined to assessing constitutional facts up until the point that the statute ceased operation.[247] Consequently, while not determinative, the nature of the parties' submissions may influence the timing issue in a particular case — necessitating a flexible approach.

C *Procedural Fairness and Case Management Principles*

Notions of procedural fairness and the Court's case management principles may also influence the time at which constitutional facts are assessed. Despite the flexible procedures used to admit constitutional facts, parties must be afforded procedural fairness.[248] As Heydon J established in *Mowbray*, procedural fairness requires that parties are (1) advised of any constitutional facts which have not been 'tendered', but are relied upon by the Court to resolve the legal issue;[249] and (2) afforded sufficient opportunities to challenge the materiality, accuracy and trustworthiness of the impugned constitutional facts.[250] Issues of procedural fairness arise in the context of assessing constitutional facts up until the time of hearing as parties may not be afforded sufficient opportunities to comment upon fresh evidence. Such issues have historically arisen in the context of judicial notice, where parties are unsure of the information the Court has relied upon.[251] Therefore, assessing constitutional facts up until the time of hearing may be impermissible if such a timeframe would compromise the parties' capacity to comment upon new evidence.

However, the Court's flexible procedural rules can likely accommodate temporal pressures created by emerging facts or circumstances. For example, as in *Republic of Nauru v WET040*, the Court may flexibly 'enlarge' or 'abridge' the date of filing of submissions or hearing if required.[252] Therefore, if important evidence emerges close to the hearing date, the Court can extend the hearing date to afford parties sufficient opportunity to comment on the facts. For instance, in *Clodumar v Nauru Lands Committee*, the Court extended the 'time for appeal' due to 'new evidence' coming to light before the hearing.[253] Consequently, while it is important to acknowledge the interaction between issues of timing and case management principles, the Court is procedurally well equipped to assess constitutional facts up until the time of hearing.

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[247] Barak (n 123) 312. See, eg, *Jerger v Pearce* (1920) 28 CLR 588, 589–90 (Starke J); *War Precautions Act 1914–1918* (Cth). See also *Williams v Commonwealth* (2012) 248 CLR 156, 291 [327] (Heydon J).

[248] Gageler (n 22) 26–7.

[249] *Mowbray* (n 18) 521 [636]. See also *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559, 622 (Jacobs J).

[250] *Mowbray* (n 18) 521 [636]. See also Gageler (n 22) 27.

[251] Holmes (n 42) 236. See also JD Heydon, 'Constitutional Facts' (2011) 23 *Samuel Griffith Society Proceedings* 85, 91.

[252] *Republic of Nauru* (n 57) 407–9 [10]–[18] (Gageler, Nettle and Edelman JJ); *High Court Rules 2004* (Cth) r 4.02.

[253] *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561, 574–5 [35]–[37] (French CJ, Gummow, Hayne and Bell JJ), 587 [78] (Heydon J). See also Gageler (n 22) 26–7, 29.

VIII Conclusion

Solutions to constitutional issues often depend upon balancing context and principles.[254] Questions concerning the timing of constitutional facts are no exception. The Court must grapple with timing issues in multiple contexts — requiring general principles to guide the solution in a particular case. That is, there cannot be a 'one size fits all' solution to the issue of timing, as the answer depends on various contingencies. The timing of constitutional facts can influence the validity of laws where the attendant constitutional facts are dynamic. Therefore, a principled and transparent approach to the timing issue is required to guide litigants in effectively adducing facts in constitutional matters. A major gap in the reasoning of *Palmer* was the Court's reluctance to consider the time at which constitutional facts should be assessed.[255] Such gaps are emblematic of Australia's historical reluctance to consider temporal questions relating to constitutional facts.

This article seeks to provide guidance as to the time at which constitutional facts should be assessed. Constitutional facts could be assessed up until the point of the legislation's enactment, the application of the legislation to the plaintiff, or the time of the High Court's hearing. It is argued that the appropriateness of constraining constitutional facts to each time period largely depends upon whether the Court (1) performs a general or individual justice function in constitutional matters; and (2) prioritises certainty or flexibility when reflecting contemporary circumstances in statutory and constitutional interpretation. Ordinarily, the Court's general justice mandate in constitutional matters precludes the time of the plaintiff's constitutional harm because such periods are unique to the litigant.

Furthermore, the Court's 'always speaking' and connotation–denotation interpretive approaches suggest that facts should not be limited to those existing at the time of the legislation's enactment. Therefore, constitutional facts should generally be assessed up until the time of the High Court's hearing — satisfying its responsibility to adjudicate constitutional issues according to modern circumstances. Nonetheless, there are exceptions and limitations to these principles, requiring consideration of the parties' submissions and notions of procedural fairness. Therefore, the principles established in this article are not absolute, but are instead subject to the nature of the relevant statutory and constitutional provisions. Consequently, this article proposes a flexible yet principled framework to facilitate the Court in ascertaining constitutional facts 'as best it can'.[256]

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[254] Gageler (n 22) 26.

[255] *Palmer* (n 1) 516 [15] (Kiefel CJ and Keane J); *Palmer No 4* (n 21) [5]–[6] (Rangiah J).

[256] *Commonwealth Freighters* (n 16) 292 (Dixon CJ), quoted in *Mowbray* (n 18) 517–18 [631] (Heydon J). See also *Gerhardy* (n 130) 142 (Brennan J).