THE HIGH COURT'S PRUDENTIAL APPROACH TO CONSTITUTIONAL ADJUDICATION: WHEN IS IT NECESSARY TO RESOLVE A CONSTITUTIONAL QUESTION?

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Despite having a central constitutional function of determining the validity of legislation, the High Court of Australia adopts a variety of principles and doctrines that can result in it declining to resolve constitutional questions. One way this can occur is by only deciding constitutional questions when they are 'necessary to do justice in the case and to determine the rights of parties'. Although this practice has been followed since the Court's earliest days, it was only recently labelled the 'prudential approach' to resolving constitutional questions by the plurality in Mineralogy Pty Ltd v Western Australia. This article seeks to identify the different ways in which the prudential approach can be followed and why the High Court adopts the practice. It will then turn to analyse the High Court's adherence to the practice during the tenure of Kiefel CJ, arguing that the Court's application would benefit from greater clarity and consistency.

I INTRODUCTION

Justice Stephen Gageler has observed that it is a 'settled' proposition of Australia's constitutional structure that the function of judicial review falls solely to the judiciary.[1] One aspect of this function is constitutional review: determining whether exercises of public power are in accordance with the *Australian Constitution* ('*Constitution*').[2] In accordance with this function, the High Court of Australia ('High Court') has considered itself to have a 'duty' to determine the

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1 Stephen Gageler, 'The Master of Words: Who Chooses Statutory Meaning?' in Anthony J Connolly and Daniel Stewart (eds), *Public Law and the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 12, 15–16.

2 Marshall CJ's famous proclamation of constitutional review from *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) has been accepted as 'axiomatic' in the Australian federal system: see, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3 (Fullagar J). But this is not free from criticism: see, eg, James A Thomson, 'Constitutional Authority for Judicial Review: A Contribution from

validity of legislation since the earliest days of Federation.[3] Yet, despite this duty, the Court adopts various doctrines and techniques that can result in it declining to determine all or part of a constitutional question that comes before it.[4]

Two tools that facilitate this constriction are the well-known doctrines of 'advisory opinions' and 'standing'. But an even older practice exists. In 1908, drawing from a decision of the United States ('US') Supreme Court,[5] Higgins J declared: 'It is only when we cannot do justice, in an action properly brought, without deciding as to the validity of the Act, that we are entitled to take out this last weapon [the *Constitution*] from our armoury'.[6] Over time, this has commonly been referred to as only deciding constitutional questions when it is 'necessary' to do so. While by no means a recent development, this practice was only formally described as the 'prudential approach' to resolving questions of constitutional validity in *Mineralogy Pty Ltd v Western Australia* ('*Mineralogy*').[7] Prudent in principle it may be, but the High Court's recent application of the practice has been far from restrained.[8] In the past four years, various members of the Court have declined to determine a constitutional question in over half of the constitutional cases put before it.[9] Yet, this increase in application has arguably not brought significant clarity to the practice. Many questions loom over precisely when the High Court will draw on this approach and with what justification.

This article seeks to analyse the High Court's prudential approach to resolving constitutional questions.[10] Its central focus is the Court's application of the practice. It will begin, in Part II, by outlining the different ways in which a constitutional question may be avoided under the prudential approach. Part III will consider the

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the Framers of the Australian Constitution' in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, 1986) 173.

3 *D'Emden v Pedder* (1904) 1 CLR 91, 117 (Griffith CJ for the Court). See also *Victoria v Commonwealth* (1975) 134 CLR 81, 118 (Barwick CJ). See generally Geoffrey Lindell, 'Duty to Exercise Judicial Review' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 150.

4 Often referred to as forms of 'judicial gatekeeping': see John Williams, 'Re-thinking Advisory Opinions' (1996) 7(4) *Public Law Review* 205, 206–7; Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24(3) *Melbourne University Law Review* 784, 785.

5 *Chicago & Grand Trunk Railway Co v Wellman*, 143 US 339, 345 (Brewer J for the Court) (1892) ('*Wellman*').

6 *A-G (NSW) v Brewery Employés Union of NSW* (1908) 6 CLR 469, 590 ('*Brewery Employés Union*').

7 (2021) 274 CLR 219, 248–9 [57]–[60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) ('*Mineralogy*'). See also *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655, 680–1 [114]–[116], 681 [120] (Gordon J) ('*Farm Transparency*'). The term 'restrained approach' has also been used: *Mineralogy* (n 7) 248 [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 258 [96] (Edelman J); *Farm Transparency* (n 7) 665 [20] (Kiefel CJ and Keane J).

8 This is not to suggest the practice has not been topical in other periods: see, eg, Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 119; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2008 Statistics' (2009) 32(1) *University of New South Wales Law Journal* 181, 193. Cf *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 613 [335] (Gageler J) ('*CPCF*').

9 In the 23 constitutional cases decided between January 2020 and May 2023, at least one member of the Court followed the prudential approach in 12 of those cases.

10 While this article will focus on the High Court, reference will be made to other courts where appropriate. However, the considerations may vary: see below n 34.

practice's nature, drawing on other doctrines such as standing and advisory opinions for guidance. Part IV will then examine the Kiefel Court's recent application of the prudential approach. This article's primary arguments are two-fold. First, that there is a lack of clarity in the case law over precisely when the prudential approach will or will not be followed. Secondly, that the High Court's recent application of the practice has led to inconsistent approaches and results, particularly when constitutional questions are passed over in the context of reading down, severance and partial disapplication. To address these concerns, Part V proffers a series of suggestions to promote clarity and consistency in the principle's application. Most notably, this article suggests adopting three 'principles of prudence', drawing from the US Supreme Court's practice of 'constitutional avoidance' for guidance.[11] While the origins of the prudential approach may be as old as the High Court itself, greater focus must be brought to its application in light of its recent resurgence.

II The Prudential Approach

A A Trip through Time

When Higgins J first gave judicial expression to the prudential approach in *Attorney-General (NSW) v Brewery Employés Union of NSW* ('*Brewery Employés Union*'), his Honour simply noted that constitutional questions should only be answered 'when [the Court] cannot do justice' in the given case.[12] The next meaningful contribution came two decades later, when Starke J said that a constitutional issue should only be decided 'when it is found *necessary* to secure and protect the rights of a party'.[13] The introduction of the concept of 'necessity' to the precept's formulation was repeated by Dixon CJ in *Lambert v Weichelt* ('*Lambert*').[14] There, his Honour (speaking for the Court) said that:

> It is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it *necessary* to decide such a question in order to do justice in the given case and to determine the rights of the parties.[15]

To this day, Dixon CJ's formulation has been relied on by an overwhelming majority of judgments considering the prudential approach.[16] However, his

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11 The umbrella term given for the US Supreme Court's similar practice: see *Ashwander v Tennessee Valley Authority*, 297 US 288, 345–9 (Brandeis J for Brandeis, Stone, Roberts and Cardozo JJ) (1936) ('*Ashwander*'). See also Lisa A Kloppenberg, 'Avoiding Constitutional Questions' (1994) 35(5) *Boston College Law Review* 1003. The terminology of 'avoidance' has been used in Australia: see *Mineralogy* (n 7) 259 [98], 259–60 [101], 261–2 [106]–[107] (Edelman J); Adrienne Stone, 'Freedom of Political Communication, the *Constitution* and the Common Law' (1998) 26(2) *Federal Law Review* 219, 228–9 <https://doi.org/10.22145/flr.26.2.1>.

12 *Brewery Employés Union* (n 6) 590, quoting *Wellman* (n 5).

13 *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333, 356 (emphasis added) ('*Universal Film Manufacturing*'). See also at 347 (Isaacs ACJ).

14 (1954) 28 ALJ 282 ('*Lambert*').

15 Ibid 283 (emphasis added).

16 See, eg, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 474 [252] (Gummow and Hayne JJ) ('*Re Patterson*'); *Knight v Victoria* (2017) 261 CLR 306, 324 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) ('*Knight*'); *Mineralogy* (n 7) 262 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 261 [105] (Edelman J).

Honour's suggestion that there need exist a sufficient 'state of facts' should not be taken as reflecting the full breadth of the prudential approach. This much was affirmed in *Mineralogy* when the plurality stated that Dixon CJ's dictum was but 'a manifestation of a *more general* prudential approach to resolving questions of constitutional validity'.[17] While the Court in *Mineralogy* did not elucidate a specific formulation of this (general) prudential approach,[18] this article will adopt the expression from Hayne, Kiefel and Bell JJ's joint judgment in *ICM Agriculture Pty Ltd v Commonwealth*.[19] That is, the 'prudential approach' stands for the precept that 'constitutional questions should not be decided unless it is necessary "to do justice in the given case and to determine the rights of the parties"'.[20]

But in what circumstances will it be unnecessary for a court to determine a constitutional question under the prudential approach? While the plurality and Edelman J in *Mineralogy* both outlined certain 'implications'[21] and 'considerations'[22] that may weigh against deciding a constitutional issue, neither paints a complete picture. The remainder of this Part seeks to explain the prudential approach's operation by clarifying the different ways in which a constitutional question may be passed over pursuant to the practice.

B Taxonomy of the Prudential Approach

1 Insufficient Foundation

The first situation directly derives from Dixon CJ's oft quoted passage in *Lambert*: the prudential approach may be followed if 'the Court has insufficient facts … upon which to engage in a proper examination of a constitutional issue'.[23] *Lambert* itself is an example. There, it was alleged that the defendant sold timber in contravention of a sale prohibition in the *Prices Regulation Act 1948* (Vic).[24] The claim was dismissed at first instance on the basis that the prohibition was contrary to section 92 of the *Constitution*. However, upon removal, the High Court held that it was inappropriate to consider the constitutional question as there was not enough evidence to sustain the conviction.[25] As has been later explained: 'The lack of such evidence meant that there were insufficient facts from which to consider the effect on that legislation of

17 *Mineralogy* (n 7) 248 [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) (emphasis added). See also at 259 [100] (Edelman J).

18 Cf ibid 235 [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

19 (2009) 240 CLR 140 ('*ICM Agriculture*').

20 Ibid 199 [141] (citations omitted).

21 *Mineralogy* (n 7) 248–9 [59]–[60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also *Farm Transparency* (n 7) 680–1 [116] (Gordon J) (citations omitted).

22 *Mineralogy* (n 7) 261–2 [105]–[107] (Edelman J).

23 Ibid 261 [105], discussing *Lambert* (n 14). See also at 247–8 [56], 249 [60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See generally Justice Michelle Gordon, 'Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law' (2023) 49(1) *Monash Law Review* 1.

24 *Lambert* (n 14) 282 (Dixon CJ for the Court).

25 Ibid 283.

section 92 of the *Constitution*.'[26] A more recent example can be found in *Duncan v New South Wales* ('*Duncan*').[27] In that case, the special case[28] failed to provide an adequate factual basis concerning the plaintiffs' rights under the *Copyright Act 1968* (Cth) and their infringement.[29] This meant that it was not necessary to consider the constitutional question as to whether state legislative amendments were inconsistent with rights existing under that Commonwealth statute.[30]

Before turning to the next way in which a constitutional question may be passed over under the prudential approach, it is worth noting that a similar course may be taken where there is inadequate legal argument on a particular constitutional issue. However, if the constitutional issue is material to the resolution of the controversy, the Court's usual practice is 'to write to the parties inviting further written submissions and occasionally also to invite further oral submissions'.[31] Thus, the prudential approach will usually only be followed where the constitutional issue is immaterial to the determination of the case.[32]

2 Multiple Bases

In *Mineralogy*, the plurality noted that 'the necessity of answering the question of [constitutional] law to the judicial resolution of the controversy may not sufficiently appear where there remains a prospect that the controversy can be judicially determined on another basis'.[33] This implication can manifest itself in several ways.[34]

One manifestation is where a court is presented with two bases upon which the controversy may be resolved, one constitutional and one non-constitutional. In *AMF15 v Minister for Immigration and Border Protection*,[35] the appellant raised several grounds of appeal, including two grounds relating to section 116 of the

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26 *Mineralogy* (n 7) 261 [105] (Edelman J), discussing ibid.

27 (2015) 255 CLR 388 ('*Duncan*'), cited in *Mineralogy* (n 7) 249 [60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

28 For an explanation of the 'special case' procedure, see Part IV(E).

29 *Duncan* (n 27) 411 [53]–[54] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ).

30 Ibid 410 [52], citing *Lambert* (n 14) 283 (Dixon CJ for the Court).

31 *Mineralogy* (n 7) 261 [105] (Edelman J). See, eg, *Williams v Commonwealth* (2012) 248 CLR 156, 179 [3] (French CJ); *Love v Commonwealth* (2020) 270 CLR 152, 160.

32 See, eg, *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 51 [38] (McHugh, Gummow and Hayne JJ). Cf *Unions NSW v New South Wales [No 3]* (2023) 97 ALJR 150 ('*Unions [No 3]*').

33 *Mineralogy* (n 7) 249 [60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 200 [135] (Gummow J); Stone (n 11) 228–9.

34 These considerations may vary in different courts. Trial courts should generally *determine* all issues: *Gulic v Boral Transport Ltd* [2016] NSWCA 269, [7] (Macfarlan JA, Gleeson JA agreeing at [67], Garling J agreeing at [70]). Yet examples exist of trial judges following the prudential approach: see, eg, *Roach v Minister for Immigration and Border Protection* [2016] FCA 750, [194] (Perry J). Whereas intermediate appellate courts should *consider* all grounds of appeal: *Kuru v New South Wales* (2008) 236 CLR 1, 6 [12] (Gleeson CJ, Gummow, Kirby and Hayne JJ). However, this generally gives way to the prudential approach: see *Searle v Commonwealth* (2019) 100 NSWLR 55, 96–7 [184]–[185] (Bell P, Bathurst CJ agreeing at 58 [1], Basten JA agreeing at 106 [246]).

35 (2016) 241 FCR 30 ('*AMF15*'). See also *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631, 640, 642 (Mason P, Gleeson CJ agreeing at 634, Priestly JA agreeing at

Constitution.[36] The Full Court ultimately quashed the primary judge's decision on a procedural fairness ground.[37] Consequently, as the controversy was resolved, it was 'both unnecessary and inappropriate' to determine the constitutional grounds.[38] A second way this can manifest is where a court is presented with multiple constitutional bases. An example is *Bell Group NV (in liq) v Western Australia* ('*Bell Group*'),[39] where the High Court held that the impugned State legislation was invalid in its entirety by virtue of being inconsistent with relevant Commonwealth tax legislation.[40] As this finding was sufficient to invalidate the entire statute, it was unnecessary for the Court to consider other asserted constitutional bases.[41] It needs to be emphasised that, in both these circumstances, the resolution of the controversy on one basis must be actually and presently available in order to avoid a constitutional question. This was usefully explained by Keane J in the *Montgomery* proceedings previously before the High Court,[42] where his Honour noted that the mere 'possibility' of a basis resolving the controversy is insufficient to adhere to the practice.[43]

Finally, it has been suggested that the High Court's approach in *Wotton v Queensland* may reflect a further manifestation of this category.[44] In that case, the Court affirmed that, in the context of a statutory conferral of executive power, the constitutional question[45] falls to be considered by reference to the legislation, rather

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647) ('*Multicon*'). But see *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 163 (Brennan J), 194 (Dawson J), 207 (McHugh J) ('*Theophanous*'), discussed in Stone (n 11) 228.

36 *AMF15* (n 35) 43–4 [32]–[33] (Flick, Griffiths and Perry JJ).

37 Ibid 50–2 [47].

38 Ibid 53 [53] (citations omitted).

39 (2016) 260 CLR 500 ('*Bell Group*'). See also *ICM Agriculture* (n 19) 199 [141], 203 [155] (Hayne, Kiefel and Bell JJ); *Spence v Queensland* (2019) 268 CLR 355, 422–3 [112(e)]–[112(f)] (Kiefel CJ, Bell, Gageler and Keane JJ) ('*Spence*'). For an interesting contrast in approach to multiple constitutional issues where one question concerns legislative power and the other concerns a constitutional limitation, compare the approach of Gordon J to other members of the Court in *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560: at 569 [17], 583 [97(1)] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 588 [127]), 588–9 [132], 594–5 [156], 599 [175(1)] (Gordon J), 601 [186], 614 [254(1)] (Edelman J) ('*Alexander*'). In this situation, there is force in Edelman J's recent observation that the prudential approach does not justify 'addressing a consequential constitutional issue before an anterior constitutional issue': *Vunilagi v The Queen* (2023) ALJR 627, 659 [152]. However, the Court's approach in past cases casts doubt upon his Honour's more general observation that the prudential approach 'does not apply at all where two constitutional issues are involved': at 659 [152].

40 *Bell Group* (n 39) 526–8 [69]–[73] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ). Gageler J agreed, but decided this point on a narrower basis: see at 533 [78]–[79].

41 Ibid 528 [75] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ, Gageler J agreeing at 533 [78]).

42 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (High Court of Australia, S192/2021, commenced 3 December 2021). These proceedings were discontinued by the applicant on 28 July 2022.

43 Transcript of Proceedings, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* [2022] HCATrans 38, 150–5 ('*Montgomery*').

44 (2012) 246 CLR 1 ('*Wotton*').

45 While the *Wotton* approach has generally been applied in the context of constitutional freedoms, there is reason to believe it would apply more broadly: see James Stellios, '*Marbury v Madison*: Constitutional Limitations and Statutory Discretions' (2016) 42(3) *Australian Bar Review* 324, 348–9; Joshua Thomson and Tristan Taylor, 'Examining the Intersection of Constitutional and Administrative Review under the

than the individual exercise of executive power.[46] Thus, some have conceptualised the '*Wotton* approach' under the prudential approach, noting that the Court 'eschewed the [constitutional] ground for determining the validity of [the impugned provision] in favour of a non-constitutional (in this case, statutory interpretation and judicial review) ground'.[47] But once it is properly understood that the *Wotton* approach simply reflects an understanding that an exercise of power is limited by its source,[48] there can be no suggestion that applying the *Wotton* approach avoids the constitutional question. It simply clarifies *where* the question is directed.

3 Statutory Interpretation

It is necessary for a court to construe a statute before considering its constitutional validity.[49] The ordinary process of statutory interpretation can result in it being unnecessary to determine a constitutional question. This may occur when the impugned law, properly construed,[50] 'does not have the operation and effect for which the challenger contends'.[51] Thus, as Leeming JA has explained, 'the first step is to construe the statute … If, putting to one side questions of validity, the [Act] would not apply … then the analysis would cease, and the court would not reach the constitutional issues'.[52] The High Court's early decision in *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* ('*Universal Film Manufacturing*') is illustrative.[53] The Commissioner of Taxation assessed the

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Wotton Approach' (2023) 33(4) *Public Law Review* 315, 326. See also *Commonwealth v ALJ20* (2021) 273 CLR 43, 69–70 [43] (Kiefel CJ, Gageler, Keane and Steward JJ).

46 *Wotton* (n 44) 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The approach was recently affirmed in the context of delegated legislation: *Palmer v Western Australia* (2021) 272 CLR 505, 530 [63] (Kiefel CJ and Keane J), 545–8 [117]–[128] (Gageler J), 573–4 [201]–[202] (Gordon J), 580–1 [224]–[225] (Edelman J) ('*Palmer [No 1]*').

47 Sam Thompson, '*Wotton v Queensland* (2012) 285 ALR 1' (2012) 31(2) *University of Tasmania Law Review* 168, 176.

48 See especially Thomson and Taylor (n 45) 322–6.

49 *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ), 68 [158] (Gummow and Hayne JJ), 84–5 [219]–[221] (Kirby J), 115–16 [306] (Heydon J); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ) ('*Gypsy Jokers*'); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ) ('*NAAJA*'). But see at 625–6 [149] (Keane J). For this reason, it is better to discuss these cases separately from cases in the 'multiple bases' category, although they may be conceptualised as a court deciding the case on a non-constitutional basis: cf *Ashwander* (n 11) 347 (Brandeis J for Brandeis, Stone, Roberts and Cardozo JJ).

50 As a matter of the ordinary consideration of text, context and purpose. Certain interpretive presumptions, such as the presumption against extraterritorial operation or the principle of legality, may be relevant to the analysis. For example, if the law is construed so as to not infringe a fundamental right by reason of the principle of legality, then a constitutional question may fall away.

51 *NAAJA* (n 49) 625–6 [149] (Keane J) (citations omitted).

52 *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36, 53 [72] (Leeming JA) ('*Lazarus*').

53 *Universal Film Manufacturing* (n 13). See also *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 249 CLR 398, 419 [53] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority [No 2]* (2021) 106 NSWLR 41, 58 [65]–[66] (Leeming JA, Bathurst CJ agreeing at 43 [1], Bell P agreeing at 43 [2]) ('*Doyle's Farm Produce*'). One could also read *Gypsy Jokers* (n 49) in this way, as the effect of the majority's construction was that 'the principal foundation for the appellant's argument on validity

plaintiff as liable to pay income tax in respect of certain moneys under section 18A of the *Income Tax (Management) Act 1912* (NSW),[54] and the plaintiff subsequently brought proceedings claiming that that provision was invalid on several constitutional bases.[55] Before the Court, both parties proceeded upon the basis that the plaintiff was liable to pay tax under section 18A.[56] But the Court held that, on its proper construction, the impugned provision did not make the plaintiff liable to pay tax.[57] Thus, it was not necessary to determine the constitutional questions, as they were predicated on the legislation applying to the facts before the Court.[58]

In cases like *Universal Film Manufacturing*, the questions of statutory interpretation and constitutional validity are distinct, in the sense that questions of validity do not bear upon the process of statutory interpretation. But that will not always be so. If the statute applies to the circumstances before a court and a finding of constitutional invalidity is on the horizon, then it may be appropriate to consider whether the legislation can be read down to save it from invalidity. In this situation, the questions are linked, as a finding of invalidity may bear upon the construction ultimately adopted.[59] The place of 'reading down' in avoiding the necessity of answering constitutional questions is discussed below.

4 Interpretive Techniques: Reading Down, Severance and Partial Disapplication

Congruent with recent High Court authority,[60] Edelman J has explained that it is often inappropriate to consider the potential invalidity of a provision if it is valid in the circumstances before a court and that provision is capable of being read down, severed or partially disapplied.[61] That is to say, the application of these three techniques enables a court to put hypothetical questions of constitutional invalidity to one side. Before turning to consider how this operates, four preliminary points should be made.

First, this article will adopt Edelman J's terminology that distinguishes 'reading down', 'severance' and 'partial disapplication' as the three interpretive techniques used by Australian courts.[62] This taxonomy has recently found favour

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disappear[ed]': at 552 [8] (Gleeson CJ). See also at 559 [36], 561 [44] (Gummow, Hayne, Heydon and Kiefel JJ), 594 [174] (Crennan J).

54 *Universal Film Manufacturing* (n 13) 337.

55 Ibid 337–8, 341 (Isaacs ACJ), 353 (Rich J).

56 See ibid 342 (Isaacs ACJ).

57 Ibid 344–7 (Isaacs ACJ, Gavan Duffy J agreeing at 348, Powers J agreeing at 348). Cf at 352–4 (Rich J).

58 Ibid 347 (Isaacs ACJ, Gavan Duffy J agreeing at 348, Powers J agreeing at 348).

59 *Doyle's Farm Produce* (n 53) 58 [65] (Leeming JA), citing *Lazarus* (n 52) 53–4 [72] (Leeming JA); *Commissioner of the Australian Federal Police v Elzein* (2017) 94 NSWLR 700, 706–7 [26] (Basten JA).

60 See especially *Knight* (n 16) 324 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216, 229–30 [21] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) ('*Zhang*').

61 *Mineralogy* (n 7) 261–2 [107]. See also *Clubb v Edwards* (2019) 267 CLR 171, 312 [411] (Edelman J) ('*Clubb*').

62 See especially *Clubb* (n 61) 313–18 [415]–[425].

with a majority of the High Court.[63] And, while 'nothing turns on the different labels used',[64] it is helpful to use different labels for the purposes of examining different cases applying the prudential approach.[65]

Secondly, due to the enactment of generalised provisions such as section 15A of the *Acts Interpretation Act 1901* (Cth) by each Australian legislature, legislation is presumed to be capable of being read down, severed or partially disapplied, unless an intention affirmatively appears to the contrary.[66]

Thirdly, the use of reading down, severance and partial disapplication in this context reflects the inverse of their 'traditional' use. That is, the techniques are traditionally used following a finding of invalidity in order to preserve some valid operation.[67] However, in the context of the prudential approach, they are used following a finding of (limited) *validity* in order to avoid any further consideration of validity or invalidity.

Fourthly, these cases differ from the 'insufficient foundation' category considered previously. In those cases, an insufficient factual basis exists to consider the constitutional question in its entirety. However, when applying these techniques, there are insufficient facts, or the circumstances are yet to arise, in which to consider some, but not all, aspects of a constitutional question. Thus, the use of interpretive techniques in the context of the prudential approach does not '[avoid] the constitutional issue altogether'.[68] Rather, it confines the consideration of constitutional validity to some – but not all – interpretations or operations of the statute.[69]

(a) Reading Down

If the process of statutory construction gives rise to a constructional choice – 'both of which are reasonably open in the application of ordinary principles of statutory construction; one of which is in opposition to the *Constitution*, the other of which is in conformity with the *Constitution*'[70] – then the technique of 'reading

63 See *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 511 [89] (Kiefel CJ, Keane and Gleeson JJ), 535 [197], 539 [214], 540 [220] (Edelman J) ('*LibertyWorks*'). See also *Farm Transparency* (n 7) 708–9. While the term 'partial disapplication' is new to the Australian constitutional law lexicon, the substantive effect of it has long been appreciated under different labels: see generally ibid.

64 *Thoms v Commonwealth* (2022) 96 ALJR 635, 652 [75] n 123 (Gordon and Edelman JJ).

65 See generally Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019) 114.

66 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 92 (Dixon J). See also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634, 651–2 (Dixon J) ('*Poole*').

67 See *Clubb* (n 61) 243 [220] (Nettle J), citing *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 369 (Dixon J) ('*Bank Nationalisation Case*').

68 *Mineralogy* (n 7) 261–2 [107] (Edelman J). See also John Hooker, '"Necessity" in the Eye of the Beholder: Leaving Constitutional Questions Undecided' (2006) 17(3) *Public Law Review* 177, 181. Cf Stone (n 11) 228.

69 James Stellios, 'The High Court on Constitutional Law: The 2021 Term: Marking out the Limits of Judicial Review' (Research Paper No 22.8, ANU College of Law, 1 February 2022) 62 <https://doi.org/10.2139/ssrn.4064269> ('Marking out the Limits of Judicial Review'). In the US, a similar distinction has been drawn between 'avoiding constitutional questions' and 'avoiding unconstitutionality': see Caleb Nelson, 'Avoiding Constitutional Questions Versus Avoiding Unconstitutionality' (2015) 128(8) *Harvard Law Review Forum* 331.

70 *NAAJA* (n 49) 604 [76] (Gageler J). Assuming the constructional choice is binary.

down' provides that a court ought choose the construction that results in constitutional validity.[71] In the context of the prudential approach, this means: (i) if circumstances have not arisen which make adjudication appropriate, and (ii) the provision is capable of being read down to have some constitutionally valid operation to the facts before a court, then (iii) it will be inappropriate to be drawn into a consideration of whether the provision would be invalid if construed another way.[72]

The High Court's recent unanimous decision in *Zhang v Commissioner of the Australian Federal Police* ('*Zhang*') highlights this approach.[73] There, the plaintiff challenged certain offence provisions under the *Criminal Code Act 1995* (Cth) on the basis that they infringed the implied freedom of political communication. Although several search warrants had been issued relating to suspected offences, the plaintiff had not been prosecuted, which meant that circumstances squarely engaging the offence provisions were yet to arise, and the constitutional challenge to the underlying offence provisions was therefore made as a means of invalidating the search warrants.[74] During oral argument, the plaintiff conceded that the word 'covert' in the relevant provision was 'capable' of being read down if necessary to have 'some valid operation' to the facts before the Court.[75] That concession meant that it was 'inappropriate … to be drawn into a consideration of whether … [the] provision would be invalid' on the plaintiff's construction,[76] as the validity of the underlying offence provisions (whatever their construction was) meant that a relevant offence existed to which the warrants could relate. This also meant that the Court did not need to '[determine] the attendant question of the proper construction of the word'.[77] That proper construction, alongside the constitutional question, could be left to when circumstances arose which squarely engaged the provision.

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71 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See generally David Hume, 'The Rule of Law in Reading Down: Good Law for the "Bad Man"' (2013) 37(3) *Melbourne University Law Review* 620, 630–7.

72 See *Zhang* (n 60) 230 [21] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ). It may be that the Court's approach in the context of reading down is somewhat at odds with prior observations of Gageler J, which suggest that courts have no warrant for choosing a read down construction so as to 'avoid constitutional doubt': cf *NAAJA* (n 49) 604–5 [76]–[78], citing *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 381 [66] (Gageler J). For a discussion on this issue, as well as a greater explanation of the approach in *Zhang* (n 60): see Tristan Taylor, '*Zhang v Commissioner of Australian Federal Police*: Reading Down, Prudence and Constitutional Doubt' (2023) 97(12) *Australian Law Journal* 902.

73 *Zhang* (n 60).

74 Ibid 225, [7], 230–1 [24]–[25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ). See also Stellios, 'Marking out the Limits of Judicial Review' (n 69) 56–7.

75 *Zhang* (n 60) 228–9 [18], 229 [20]. See also Zhang, 'Plaintiff's Submissions', Submission in *Zhang v Commissioner of Police*, S129/2020, 18 November 2020, 11–12 [37]. The Court confined its scope to one of the impugned provisions: see *Zhang* (n 60) 225 [8]–[9] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

76 *Zhang* (n 60) 230 [21] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

77 Ibid 229 [20].

(b) Severance

Severance allows a court to 'strike down part of a statute that is beyond power, leaving the remainder of the statute operative'.[78] An entire section, sections, or parts of a section may be struck out or '"blue pencil[led]"',[79] subject to the operation of the remaining parts being unchanged and not creating a substantially different law.[80] In the context of the prudential approach, this means: (i) if the particular section or part engaged by the facts before a court is constitutionally valid, and (ii) that section or part is capable of being severed, then (iii) it will be inappropriate to consider whether others sections or parts are constitutionally invalid until circumstances arise in which they are actually engaged.[81]

An example is *Mineralogy*.[82] In that case, the Court observed that the special case did not adequately identify facts necessary to engage many of the impugned provisions.[83] In relation to the provisions that were separately engaged, the Court held that all of the plaintiffs' constitutional arguments failed.[84] These valid provisions were also held to be severable from the remainder of the legislation pursuant to a specific severance provision in the relevant legislation.[85] Accordingly, it was inappropriate for the Court to be drawn into considering constitutional questions concerning the validity of the provisions which were not separately engaged until circumstances arose which squarely engaged them.[86]

(c) Partial Disapplication

'Partial disapplication' becomes relevant where a provision may be valid in relation to a limited subject matter, territory or class of persons, but it 'is expressed to apply generally without the appropriate limitation, or to apply to a larger subject

78 *Clubb* (n 61) 314 [418] (Edelman J) (citations omitted).

79 *Harrington v Lowe* (1996) 190 CLR 311, 328 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

80 See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow and Co* (1910) 11 CLR 1, 27 (Griffith CJ, O'Connor J agreeing at 45), 35 (Barton J) ('*Ex parte Whybrow*'). See generally *Spence* (n 39) 414–6 [85]–[91] (Kiefel CJ, Bell, Gageler and Keane JJ).

81 See *Mineralogy* (n 7) 261–2 [107] (Edelman J).

82 See also the related decision in *Palmer v Western Australia* (2021) 95 ALJR 868 ('*Palmer [No 2]*'). An early example is *Ex parte Whybrow* (n 80).

83 *Mineralogy* (n 7) 235 [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 262–5 [108]–[116] (Edelman J). The Court noted that the special case provided a requisite basis to determine questions which concerned the validity of sections 9(1)–(2) and 10(4)–(7) of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA): at 249–51 [62]–[69] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 262–5 [108]–[116] (Edelman J). However, some challenges, such as the manner and form challenge, concerned the validity of the legislation as a whole.

84 Ibid 257 [93] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 284 [166] (Edelman J); *Palmer [No 2]* (n 82) 872 [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 876 [27] (Edelman J).

85 See *Mineralogy* (n 7) 239 [30], 249 [63] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 263–5 [113]–[116] (Edelman J). See also Stellios, 'Marking out the Limits of Judicial Review' (n 69) 61–2.

86 *Mineralogy* (n 7) 249–51 [62]–[71] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 262–5 [108]–[116] (Edelman J).

matter, territory or class of persons than the power allows'.[87] The technique allows a court to treat such a provision as being 'distributable',[88] with the effect that it can be disapplied in respect of invalid operations, but continue to operate in respect of its valid operations.[89] In the context of the prudential approach, this means: (i) if a provision is constitutionally valid in its particular application to the facts before a court, and (ii) it can be disapplied from any otherwise potentially invalid operation, then (iii) it will be inappropriate for a court to consider whether the provision is invalid in that other operation until those circumstances actually arise.[90]

A simple illustration is the Court's unanimous decision in *Knight v Victoria*.[91] The plaintiff's second constitutional argument depended on members of the Parole Board being judicial officers.[92] However, no judicial officer had been involved in any consideration of the plaintiff's application.[93] In these circumstances, the provision was evidently valid.[94] The Court further held that it was 'unnecessary and inappropriate' to consider whether the provision would be invalid if the Board comprised a judicial officer because those were not the circumstances before the Court and the impugned provision was capable of being disapplied from those circumstances if necessary.[95]

In circumstances where a party has failed to demonstrate a right, duty or liability which turns upon the validity of the legislation it may be appropriate to consider partial disapplication as a 'threshold question'.[96] That is, *before* any finding of validity or invalidity.[97] This was the approach taken by Gageler J, Gordon J and Edelman J in *Clubb v Edwards* ('*Clubb*') as Mrs Clubb failed to establish that she had engaged in any 'political' communication.[98] It is unnecessary to enter a full discussion on this approach other than to say that answering the question at the threshold basis enables a court to dismiss a challenge to constitutional validity without deciding the merits of a particular challenge.[99]

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87 *Poole* (n 66) 652 (Dixon J), quoted in *Clubb* (n 61) 219 [141] (Gageler J), 290 [340] (Gordon J).

88 *Poole* (n 66) 651 (Dixon J).

89 *Bank Nationalisation Case* (n 67) 369 (Dixon J). See also at 252 (Rich and Williams JJ); ibid 652 (Dixon J); *Clubb* (n 61) 243 (Nettle J), 320–1 [430] (Edelman J).

90 See *Palmer [No 1]* (n 46) 578 [219], 581–2 [227] (Edelman J). See also *Knight* (n 16) 324 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

91 *Knight* (n 16). See also *Palmer [No 1]* (n 46), discussed in Stellios, 'Marking out the Limits of Judicial Review' (n 69) 7–10.

92 *Knight* (n 16) 317 [5], 324 [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

93 Ibid 324 [31].

94 See *Farm Transparency* (n 7) 695–6 [208] (Edelman J), discussing ibid.

95 *Knight* (n 16) 324 [33], 326 [37].

96 *Tajjour v New South Wales* (2014) 254 CLR 508, 589 [176] (Gageler J) ('*Tajjour*').

97 Cf *Clubb* (n 61) 243 [220] (Nettle J).

98 Ibid 215–16 [131]–[134], 221–22 [149]–[153] (Gageler J), 287–93 [330]–[349] (Gordon J), 312–13 [412]–[414], 324–5 [441]–[443] (Edelman J). Cf at 193–4 [36]–[40] (Kiefel CJ, Bell and Keane JJ), 249–53 [231]–[242] (Nettle J). It is arguable that the Court in *Knight* (n 16) also dealt with partial disapplication as a threshold question: see Attorney-General (Cth), 'Attorney-General of the Commonwealth's Note on Severance', Submission in *Spence v Queensland*, B35/2018, 28 March 2019, 5 [13] n 15.

99 For a comprehensive discussion on this practice: see Thomas Wood, 'The "Threshold Question" in *Clubb v Edwards*: Political Communication, Severance and Practice' (2020) 31(2) *Public Law Review* 155.

C Utility

The taxonomy proffered by this Part should not be taken to encapsulate every situation in which it will be unnecessary to consider a constitutional question under the prudential approach.[100] An added complexity is that some cases may overlap into multiple categories. *Zhang* may be an example. There was a strong suggestion that both the constitutional and construction questions were simply 'premature'[101] at the stage of challenging the search warrants.[102] However, it is presently unclear whether this was a sufficient reason for following the prudential approach in and of itself.

While by no means perfect, the taxonomy has two primary benefits. First, it clarifies the precise circumstances in which the prudential approach may be followed. Part V builds upon this foundation by suggesting several principles aimed at bringing greater clarity to the practice. Secondly, distilling the case law in this way assists in understanding the more theoretical question of why the High Court follows the prudential approach. It only becomes possible to identify the rationale underpinning all prudential approach cases by isolating the different instances in which the practice is followed. This article will now turn to consider this second benefit in Part III.

III THE NATURE OF THE PRUDENTIAL APPROACH

Despite being labelled a 'settled practice',[103] until recently the High Court had not given concerted consideration to the nature of the prudential approach. This Part takes a three-step approach to analysing this aspect of the practice. It first considers the rationales for following the prudential approach, before turning to consider how these justifications compare to those given for two other doctrines that may result in it being unnecessary to determine constitutional questions. Finally, it uses these findings to explain the nature of the prudential approach, including how it fits in with these other doctrines.

A Rationales for Following the Practice

When Higgins J first gave judicial recognition to the prudential approach in *Brewery Employés Union*, his Honour noted:

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100 For example, Edelman J identified a further situation where it may be inappropriate for a minority judgment to consider a constitutional question: *Mineralogy* (n 7) 261 [106]. An example of this may be found in the approach of Starke J in *Universal Film Manufacturing* (n 13) 356.

101 Stellios, 'Marking out the Limits of Judicial Review' (n 69) 56–7. See also below n 256 and accompanying text.

102 *Zhang* (n 60) 230–1 [24]–[25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

103 See *Universal Film Manufacturing* (n 13) 356 (Starke J); *Re Patterson* (n 16) 474 [252] (Gummow and Hayne JJ) (citations omitted); *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159, 171 [28] (McHugh, Gummow, Hayne and Heydon JJ); *Clubb* (n 61) 287 [329], 287–8 [332] (Gordon J).

> Nothing would tend to detract from the influence and the usefulness of this Court more than the appearance of an eagerness to sit in judgment on Acts of Parliament, and to stamp the *Constitution* with the impress which we wish it to bear.[104]

This passage appears to reflect notions of judicial restraint and judicial independence.[105] Underlying these notions is a belief that an unelected judiciary should be hesitant to strike down legislation that has been enacted by a representative legislature.[106] This belief has been coined the 'counter-majoritarian difficulty' in the US,[107] and is perhaps why its equivalent doctrine of constitutional avoidance is justified as a practice that upholds judicial restraint and judicial independence.[108] However, while the High Court's prudential approach may have similar undertones of judicial restraint, the Australian context differs greatly. Decisions invalidating legislation are not met with the same controversy or sharp cries of illegitimate counter-majoritarian activism that echo in the US.[109] Thus, this reason, while relevant, can hardly be thought of as the primary rationale for following the prudential approach.

Other reasons have been provided. For example, it has been noted that the prudential approach is 'judicially economical'[110] and that it reflects the judiciary's institutional discipline towards a cautious development of legal principle.[111] But these reasons are no different to the Court's approach in any other area of law. Additionally, it cannot be denied that there are unwritten reasons which may underpin the practice, including a desire to reduce an excessive judicial workload

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104 *Brewery Employés Union* (n 6) 590.

105 See also *Clubb* (n 61) 312 [411] (Edelman J). In the US, the doctrine of constitutional avoidance has been described as a 'fundamental rule of judicial restraint': *Zobrest v Catalina Foothills School District*, 509 US 1, 14 (Blackmun J for Blackmun and Souter JJ, O'Connor and Stevens JJ agreeing at 24) (1993) (citations omitted). See also Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princetown University Press, 1988) 85–7, 116–18 <https://doi.org/10.1515/9781400859573>; Frederick Schauer, '*Ashwander* Revisited' [1995] *The Supreme Court Review* 71, 71–2 <https://doi.org/10.1086/scr.1995.3109610>; Kloppenberg, 'Avoiding Constitutional Questions' (n 11) 1005, 1016.

106 *Raibevu v Minister for Home Affairs* [2020] FCAFC 35, [116] (Perram, Markovic and Charlesworth JJ). See also *Multicon* (n 35) 642 (Mason P); *Technical and Further Education Commission v Pykett* [2015] FCAFC 42, [10] (Buchanan, Perram and Griffiths JJ). See generally Stone (n 11) 229.

107 See generally Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 2nd ed, 1962) 16–23; Neil S Sigel, 'Interring the Rhetoric of Judicial Activism' (2010) 59(2) *DePaul Law Review* 555.

108 See Fisher (n 105) 116–18; Richard A Posner, 'The Rise and Fall of Judicial Self-Restraint' (2012) 100(3) *California Law Review* 519, 525–35; Schauer (n 105) 71–2; Kloppenberg, 'Avoiding Constitutional Questions' (n 11) 1005, 1016.

109 Compare, for example, the reaction to the Supreme Court's decision in *Citizens United v Federal Election Commission*, 558 US 310 (2010), discussed in Geoffrey R Stone, '*Citizens United* and Conservative Judicial Activism' [2012] (2) *University of Illinois Law Review* 485; Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (Anchor Books, 2013) 192–9; Pamela Karlan, 'Foreword: Democracy and Disdain' (2012) 126(1) *Harvard Law Review* 1, 29 ff. In the Australian context, calls of judicial activism are more commonly directed to the High Court's method of constitutional interpretation, as opposed to the result of invalidating legislation: see Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989–2004' (2008) 30(1) *Sydney Law Review* 5, 7–10, 17–18.

110 *Multicon* (n 35) 642 (Mason P). But see *Clubb* (n 61) 193 [38] (Kiefel CJ, Bell and Keane JJ).

111 This has been emphasised by Gageler J: see *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 171 [127]; *Clubb* (n 61) 217 [137], quoted in *Mineralogy* (n 7) 248 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

or a desire to avoid questions that stray into being too political. While all these may be seen as providing some justification for the practice, the Court has focussed on a separate rationale which purports to explain the approach at large. These reasons relate to what Gageler J has described as the 'basal understanding of the nature of the judicial function'.[112]

In *Mineralogy*, the plurality expanded upon Gageler J's observations. They considered that the prudential approach is founded upon a 'basal understanding' that the High Court lacks jurisdiction to answer questions of law if they are 'divorced from the administration of the law'.[113] Their Honours further elaborated:

> Prudential considerations supporting the approach have been identified to include 'avoiding the formulation of a rule of constitutional law broader than required by the precise facts to which it is to be applied' and 'avoiding the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation' … Underlying the prudential approach is recognition that the function performed by the Full Court in answering a question of law stated for its opinion is not advisory but adjudicative.[114]

Thus, the Court's primary rationale behind following the prudential approach is that answering a constitutional question when it is unnecessary would be to declare legal principle divorced from any administration of the law. Looked at another way, it is a desire for the judicial function to resolve legal controversies about rights, duties or liabilities in circumstances that are clearly engaged by the case before it.[115]

Turning back to consider the categories identified in Part II of this article, this rationale goes some way in explaining why the Court follows the prudential approach in each type of case. In 'insufficient foundation' and 'interpretive techniques' cases, the Court has an insufficient foundation (usually facts) to properly administer the law either in whole (insufficient foundation cases) or in part (interpretive technique cases). And in the 'statutory interpretation' and 'multiple bases' categories, once the non-constitutional basis or question of construction has resolved the controversy, then any consideration of the constitutional question would effectively be divorced from the administration of the law as the party's rights have already been determined.

But the 'proper administration of the law' rationale cannot be exhaustive in explaining why the Court adopts the prudential approach. For one thing, it is a justification that can extend to passing over *any* question of law in which there is an inadequate foundation. For another, it does not explain why the Court chooses the non-constitutional or statutory interpretation question over the constitutional question in the first place.[116] What helps to explain these aspects is the nature and

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112 *Clubb* (n 61) 216–17 [136].

113 *Mineralogy* (n 7) 248 [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting ibid. Gageler J himself cited *Mellifont v A-G (Qld)* (1991) 173 CLR 289 ('*Mellifont*') and *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 ('*Re Judiciary Act*').

114 *Mineralogy* (n 7) 248 [57]–[58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) (citations omitted). See also *Tajjour* (n 96) 588 [174] (Gageler J).

115 See *Ex parte Whybrow* (n 80) 54 (Isaacs J).

116 An interesting discussion, beyond the scope of this article, is how a court chooses which issue to decide when there are multiple non-constitutional issues. One influencing factor may be the order and manner

gravity of constitutional issues. As to nature, constitutional rulings affect interests much broader than those of the parties before the Court, creating a decision that affects our legal system in a more profound manner.[117] Indeed, this is why interventions in constitutional matters are permitted by the Commonwealth and State Attorneys-General under section 78A of the *Judiciary Act 1903* (Cth). As to gravity, it is trite that a finding of unconstitutionality is a serious one, it has the 'potentially irremediable consequences of a determination that is beyond legislative correction'.[118] What can therefore be concluded is that the proper administration of the law drives the Court to adhere to the prudential approach, but, as Gageler J has observed, it is the 'overarching importance of constitutional principle [that] makes maintenance of that institutional discipline imperative in constitutional cases'.[119]

The discussion in this section should not be taken as suggesting that there are powerful considerations against the practice of passing over constitutional questions. In the US, there is much criticism towards the US Supreme Court's equivalent practice,[120] including that it eschews the Court's duty to enforce the *Constitution*,[121] that there is a lack of clarity over when such questions will be avoided,[122] and, perhaps most significantly, that it enables courts to manipulate the various rules of restraint in an effort to avoid a question they do not wish to answer or to achieve a particular result.[123] Criticisms of the practice aside, there are also powerful considerations which support broader adjudication more generally. It is useful to refer to two. One reason relates to the role of the High Court. The Court has the function of developing principles of law, including constitutional law, 'in a principled way that aims to guide both the public and lower courts'.[124] But if the Court were to adhere strictly to the prudential approach, then constitutional decisions would stand as authority no broader than the specific facts of the case. This approach could be seen as the Court eschewing its role in the development of

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in which the questions are presented to the court: see Stone (n 11) 228 n 49, discussing *Theophanous* (n 35). Practically, however, a court may choose the simplest approach as a matter of judicial economy and to help prevent unnecessary error. These same observations may explain the order in which a court approaches answering multiple constitutional issues. But see above n 39, discussing *Alexander* (n 39).

117 See Bret Walker and David Hume, 'Broadly Framed Powers and the *Constitution*' in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2017) 144, 155.

118 *Multicon* (n 35) 642 (Mason P). See also *Ex parte Whybrow* (n 80) 54 (Isaacs J).

119 *Clubb* (n 61) 217 [137].

120 Not all criticisms in the American context apply equally. For example, the seventh rule of *Ashwander* – which suggests that a court should choose an interpretation to avoid constitutional doubt – has been critiqued for enabling courts to interpret statutes in a manner 'that might otherwise be difficult to justify': see Brian G Slocum, 'Rethinking the Canon of Constitutional Avoidance' (2021) 23(3) *Journal of Constitutional Law* 593, 595 n 3. This criticism cannot be made of the High Court's practice, as it will only select a read down interpretation if it is 'reasonably open' and if the other interpretation leads to *actual* invalidity: see *NAAJA* (n 49) 604–5 [76]–[78] (Gageler J). But see above n 72.

121 See especially Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73(1) *Harvard Law Review* 1, 10, 19 <https://doi.org/10.2307/1337945>.

122 See Andrew Nolan, *The Doctrine of Constitutional Avoidance: A Legal Overview* (Congressional Research Service Report No R43706, Legislative Assembly, 2 September 2014) 23–4.

123 See Gerald Gunther, 'The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review' (1964) 64(1) *Columbia Law Review* 1, 25 <https://doi.org/10.2307/1120493>.

124 *Mineralogy* (n 7) 260 [103] (Edelman J). See also *Farm Transparency* (n 7) 696 [209] (Edelman J).

legal principle.[125] A second reason relates to the usefulness of obiter dicta. Judicial statements on matters of constitutional law 'not necessary to the decision'[126] may provide guidance to a future court and shape constitutional principle in later years. One example in the Australian context are obiter remarks providing support for an implied right to vote,[127] which later influenced the Court's decisions concerning voter disenfranchisement.[128] If earlier judgments did not make these obiter remarks, then it may have hindered the development of constitutional principle in this area. Thus, obiter considerations can have a powerful effect, which may warrant a broader adjudication in certain circumstances.

It is not the focus of this article to question and critique the existence of the prudential approach. Rather, it has been appropriate to examine the prudential approach's nature and rationale for the purposes of usefully analysing the Court's application of it. However, the considerations favouring broader adjudication in constitutional cases should not be ignored. These justifications for not strictly adhering to the prudential approach are reflected in the 'prudential considerations' that may warrant a broader scope of adjudication in any given case. This article returns to discuss these considerations in Part V(D).

B Other Doctrines

In addition to the prudential approach, the High Court has adopted other principles and doctrines that may result in it being unnecessary to determine questions of law. Unlike the prudential approach, these principles and doctrines are not exclusive to constitutional law. However, their application in a constitutional context can result in a court not answering a constitutional question. For example, if the subject matter of an issue is non-justiciable – in the sense that it is not 'appropriate or fit for judicial determination'[129] – then a court will not decide any constitutional questions associated with that issue. The focus of this section will be on two different doctrines: advisory opinions and standing. These doctrines provide the most useful comparison as the High Court has expressly referred to them when articulating the rationale behind following the prudential approach.[130]

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125 For a similar observation in the US: see Lisa A Kloppenberg, 'Does Avoiding Constitutional Questions Promote Judicial Independence?' (2006) 56(4) *Case Western Reserve Law Review* 1031; Lisa A Kloppenberg, *Playing it Safe: How the Supreme Court Sidesteps Hard Cases and Stunts the Development of Law* (New York University Press, 2001).

126 Andrew G Lang, 'Is There a Ratio Decidendi?' (1974) 48(3) *Australian Law Journal* 146, 147.

127 See, eg, *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254, 271 (Murphy J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ); *McGinty v Western Australia* (1996) 186 CLR 140, 166 (Brennan CJ), 201 (Toohey J), 221–2 (Gaudron J), 287 (Gummow J) ('*McGinty*').

128 See *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1. See especially *Roach* (n 128) 174 [7] (Gleeson CJ), 198 [83] (Gummow, Kirby and Crennan JJ), citing *McGinty* (n 127) 170 (Brennan CJ).

129 Mason (n 4) 788. See generally Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Lawbook, 1992) 180, 182–91 ('Justiciability of Political Questions').

130 For advisory opinions: see above nn 113–14 and accompanying text. For standing: see *Mineralogy* (n 7) 259 [98]–[99] (Edelman J).

The prohibition on the High Court providing advisory opinions was established in *Re Judiciary and Navigation Acts* ('*Re Judiciary Act*').[131] The High Court held that it cannot give a formal opinion on a question of law at the request of a party that is 'divorced from any attempt to administer that law'.[132] The Court's justification was that the *Constitution* only grants the High Court jurisdiction – meaning 'authority to decide'[133] – over 'matters'. While providing an advisory opinion would be an exercise of judicial power,[134] the Court held that there would be no 'matter' within the meaning of that constitutional term, because in providing an advisory opinion there is no 'immediate right, duty or liability to be established by the determination of the Court'.[135] The effect of *Re Judiciary Act* is that the High Court has no jurisdiction to give advisory opinions. The rationale underpinning the doctrine was later elaborated in *Mellifont v Attorney-General (Qld)*, it being noted that the doctrine contains 'two critical concepts':

> One is the notion of an abstract question of law not involving the right or duty of any body or person; the second is the making of a declaration of law divorced or dissociated from any attempt to administer it.[136]

Thus, similar to the prudential approach, the central rationale concerns the proper administration of the law. The force of this reasoning has been appreciated in the various governmental debates that have considered reform to the Court's ruling in *Re Judiciary Act*.[137] And despite many such calls for reform,[138] the doctrine has withstood the test of time.[139]

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131 *Re Judiciary Act* (n 113). This article will put to one side the position of declaratory relief, which the High Court has held itself to have jurisdiction over despite its resemblance to advisory opinions: see generally *Momcilovic v The Queen* (2011) 245 CLR 1, 59–68 [75]–[97] (French CJ); Leslie Zines, 'Advisory Opinions and Declaratory Judgments at the Suit of Governments' (2010) 22(3) *Bond Law Review* 156, 159–60 <https://doi.org/10.53300/001c.5567>. But it should be noted that the Court will not grant declaratory relief when the issues are too 'hypothetical': *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355–6 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Bass*'). The concept of a 'matter' leads inevitably to the conclusion that hypothetical questions give rise to no matter: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 458 [242] (Hayne J).

132 *Re Judiciary Act* (n 113) 266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

133 See *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 377 [6] (Gleeson CJ and McHugh J) (citations omitted). See generally Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) ('*Authority to Decide*').

134 *Re Judiciary Act* (n 113) 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ), 271 (Higgins J). But see Williams, 'Re-thinking Advisory Opinions' (n 4) 207.

135 *Re Judiciary Act* (n 113) 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). See generally at 265–7.

136 *Mellifont* (n 113) 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ). See also at 305; *Bass* (n 131) 355–6 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

137 See, eg, Owen Dixon, Submission No 132 to Royal Commission on the Constitution (13 December 1927) pt 3, 791; *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Perth, 26 July 1978, 54.

138 For a useful account of attempts at reform: see Helen Irving, 'Advisory Opinions, the Rule of Law, and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105, 113–9; John M Williams, 'Advisory Opinions: "A Well-Covered Harbour"' (2010) 22(3) *Bond Law Review* 169 <https://doi.org/10.53300/001c.5568>.

139 See *Mellifont* (n 113) 318 (Brennan J). See also *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 612 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ).

The 'first requirement in a constitutional case' is for a plaintiff to demonstrate that they have standing to challenge the alleged unconstitutional action.[140] In the Australian constitutional context, the requirement of 'standing' requires a plaintiff to have a 'special interest'[141] that is prejudiced by an exercise of public power in order to challenge the alleged unconstitutional action.[142] Standing, or rather a lack thereof, can therefore operate to put governmental action 'beyond the reach of judicial challenge'.[143] Put another way, a constitutional question will be passed over if a plaintiff lacks standing to challenge the particular legislation.[144] For many years the precise nature of the doctrine was left untouched by the High Court.[145] However, beginning with observations by Mason J in 1980,[146] members of the Court began to lean towards a jurisdictional basis for matters in federal jurisdiction. This has resulted in the understanding that 'a justiciable controversy does not arise unless the person who seeks to challenge the validity of the law has a sufficient interest to do so'.[147] In other words, 'questions of "standing" … are subsumed within the constitutional requirement of a "matter"'.[148] While some have argued against this view,[149] it must now be regarded as settled following the High Court's recent decision in *Hobart International Airport Pty Ltd v Clarence City Council*.[150] In that case, all members of the Court affirmed the jurisdictional basis of standing: if a plaintiff lacks standing, then no 'matter' arises.[151] What underpins the doctrine of standing is that the party 'does not seek to have [the] Court establish by its determination of his [or her] challenge to the relevant provisions any immediate right, duty or liability which

140 Sawer (n 8) 92. See also *Brewery Employés Union* (n 6) 491 (Griffith CJ). But see *Kuczborski v Queensland* (2014) 254 CLR 51, 61–2 [7]–[8] (French CJ) ('*Kuczborski*').

141 Nothing turns on using different labels such as 'sufficient interest', 'sufficient material interest' or 'real interest': *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, 253 [65] (Gageler and Gleeson JJ) ('*Hobart International Airport*').

142 *British Medical Association v Commonwealth* (1949) 79 CLR 201, 257 (Dixon J) ('*British Medical Association*'); *Croome v Tasmania* (1997) 191 CLR 119, 126–8 (Brennan CJ, Dawson and Toohey JJ) ('*Croome*'). See generally Graham DS Taylor, 'Standing to Challenge the Constitutionality of Legislation' in Leslie A Stein (ed), *Locus Standi* (Lawbook, 1979) 143.

143 Sawer (n 8) 94.

144 See, eg, *Kuczborski* (n 140) 65–6 [19], 69–70 [28]–[30], 71 [34] (French CJ), 88 [100] (Hayne J), 106–10 [176]–[188] (Crennan, Kiefel, Gageler and Keane JJ), 130–4 [277]–[285] (Bell J). In that case, the plaintiff had standing to challenge certain legislative provisions but not others.

145 Cf Leslie A Stein, 'The Theoretical Bases of *Locus Standi*' in Leslie A Stein (ed), *Locus Standi* (Lawbook, 1979) 3.

146 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 550–1 ('*ACF*'). However, this view was not novel: see Peter W Johnston, 'Governmental Standing under the *Constitution*' in Leslie A Stein (ed), *Locus Standi* (Lawbook, 1979) 173, 181–2.

147 *Croome* (n 142) 126 (Brennan CJ, Dawson and Toohey JJ). See also at 132–3 (Gaudron, McHugh and Gummow JJ); *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 35 [50]–[51] (French CJ), 68 [152] (Gummow, Crennan and Bell JJ, Hayne and Kiefel JJ agreeing at 99 [273]).

148 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 262 [37] (Gaudron, Gummow and Kirby JJ), citing *ACF* (n 146) 550–1 (Mason J). But see *Kuczborksi* (n 140) 60–1 [5] (French CJ).

149 See, eg, Simon Evans, 'Standing to Raise Constitutional Issues' (2010) 22(3) *Bond Law Review* 38, 56–9 <https://doi.org/10.53300/001c.5558>.

150 *Hobart International Airport* (n 141).

151 Ibid 245–6 [30]–[31] (Kiefel CJ, Keane and Gordon JJ), 249–50 [49], 251 [56] (Gageler and Gleeson JJ), 256–7 [79] (Edelman and Steward JJ).

the plaintiff claims or which he alleges he is subject'.[152] Or, as Professor Johnston has written, standing 'may be justified on the ground that a proper and full ventilation of the issues requires a genuine adversity of interests between the contestants to the litigation'.[153] Thus, yet again, the same concerns that underpin the prudential approach are also the key rationale behind the doctrine of standing.

C Prudential Approach: Jurisdictional Principle or Evaluative Choice?

The High Court has settled upon a jurisdictional basis for both advisory opinions and standing. That is, they concern the 'constitutional boundaries of adjudicative authority in an action instigated by a party whose interests are unaffected, in whole or in part, by the resolution of the action'.[154] Constitutional questions are therefore passed over because the *Constitution* itself does not permit the Court to resolve them. Given that the prudential approach is founded upon the same 'basal understanding of the nature of the judicial function' that underpins the doctrines of advisory opinions and standing, it raises the question: does the High Court lack jurisdiction to resolve constitutional questions when it follows the prudential approach, or does it have jurisdiction but choose not to exercise it?[155]

Edelman J provided an answer to this question in *Mineralogy*. After outlining standing's jurisdictional basis,[156] his Honour noted that different considerations arise in the context of the prudential approach. In this context:

> [The] question is no longer one of the constitutional boundaries of adjudicative authority. Instead, the court must choose whether to exercise restraint in deciding the dispute. That choice requires evaluation of different factors. … [It is] an evaluative choice.[157]

Similar, albeit less explicit, comments have been made. In particular, the Court has recently drawn from early observations of Higgins J and emphasised that the practice is 'not a rigid rule imposed by law which cannot yield to special circumstances'.[158] Many examples exist of the practice yielding to special circumstances. Effectively, in these cases, the Court proceeds to determine a constitutional question when the prudential approach would otherwise suggest that its resolution is not necessary. The precise 'special circumstances' or 'prudential considerations'[159] which may lead a court to decline following the prudential approach will be considered in Parts IV and V, but what is presently important is that members of the Court *chose* to take this course. If the prudential approach

152 *Kuczborski* (n 140) 87 [99] (Hayne J). See also at 109 [186] (Crennan, Kiefel, Gageler and Keane JJ).
153 Johnston (n 146) 181. See generally at 181–2.
154 *Mineralogy* (n 7) 259 [99] (Edelman J).
155 On this distinction generally: see Lindell, 'Justiciability of Political Questions' (n 129) 183; Lindell, 'Duty to Exercise Judicial Review' (n 3) 150–1.
156 *Mineralogy* (n 7) 259–61 [101]–[104].
157 Ibid 259 [100]. See also *Farm Transparency* (n 7) 696 [209] (Edelman J).
158 See *Zhang* (n 60) 230 [22] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ), quoting *Clubb* (n 61) 193 [36] (Kiefel CJ, Bell and Keane JJ). See also *Universal Film Manufacturing* (n 13) 350–1 (Higgins J).
159 See *Clubb* (n 61) 192 [35], 193 [40] (Kiefel CJ, Bell and Keane JJ); *Private R v Cowen* (2020) 271 CLR 316, 355 [107] (Gageler J) ('*Cowen*'); *Ruddick v Commonwealth* (2022) 96 ALJR 367, 396–7 [145] (Gordon, Edelman and Gleeson JJ) ('*Ruddick*').

operated as a jurisdictional doctrine, then these examples would be instances of the Court determining a constitutional question when it lacked jurisdiction to do so.[160] The peculiarity of this result helps to confirm that the prudential approach operates as an evaluative choice.

The practice's foundation therefore differs to the doctrines of advisory opinions and standing despite being informed by a similar rationale. Yet this distinction should not be doubted: 'There is a basic difference between rules of standing, which make an adjudication possible, and pragmatic rules concerning the extent to which adjudication is appropriate'.[161] In this sense, the prudential approach largely mirrors the US practice. In *Ashwander v Tennessee Valley Authority* ('*Ashwander*'), Brandeis J identified a series of seven rules under which the Supreme Court will avoid determining a constitutional question.[162] In explaining their nature, Brandeis J said that: 'The Court developed [these rules], for its own governance in the cases confessedly *within its jurisdiction*'.[163] Given that the High Court has referred to US authority in developing the prudential approach,[164] it is perhaps to be expected that these practices align.[165] Part V further explores this relationship in considering suggestions for the High Court's approach moving forward.

This Part has examined why the High Court follows the prudential approach. It has been necessary to examine its nature for the purposes of analysing the Court's recent application of the practice. Understanding that the prudential approach operates as a discretionary practice means that one is better placed to assess when and how the practice should apply.

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160 This would amount to jurisdictional error: see Brendan Lim, 'The Case for Hypothetical Jurisdiction: Postulating Jurisdiction in Unmeritorious Civil Proceedings' (2012) 86(9) *Australian Law Journal* 616, 626–8. Cf at 629.

161 *Farm Transparency* (n 7) 696 [209] (Edelman J) (citations omitted). See also at 680 [112] (Gordon J).

162 *Ashwander* (n 11) 346–8 (Brandeis J for Brandeis, Stone, Roberts and Cardozo JJ). However, the doctrine's roots go back at least as far as Marshall CJ's judgment in *Ex parte Randolph*, 20 F Cas 242 (CCD Va, 1833): see Schauer (n 105) 73. The importance of these rules has oft been emphasised: see, eg, *Spector Motor Co v McLaughlin*, 323 US 101, 105 (Frankfurter J for the Court) (1944).

163 *Ashwander* (n 11) 346 (Brandeis J for Brandeis, Stone, Roberts and Cardozo JJ) (emphasis added). See also Kloppenberg, 'Avoiding Constitutional Questions' (n 11) 1009, 1016. Admittedly, however, these rules share some overlap with jurisdictional doctrines: see at 1005–6, 1009, 1017–23; Schauer (n 105) 72.

164 Without being exhaustive: see *Clubb* (n 61) 216 [135] (Gageler J), citing *Liverpool, New York & Philadelphia Steamship Co v Commissioners of Emigration*, 113 US 33, 39 (Matthews J for the Court) (1885) ('*Liverpool Steamship*'); *United States v Raines*, 362 US 17, 21 (Brennan J for the Court) (1960) ('*Raines*'); *Washington State Grange v Washington State Republican Party*, 552 US 442, 450 (Thomas J for the Court) (2008). See also *Zhang* (n 60) 231 [25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ), citing *United States v Fruehauf*, 365 US 146, 157 (Frankfurter J for the Court) (1961); *Mineralogy* (n 7) 248 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), citing *Poe v Ullman*, 367 US 497, 503 (Frankfurter J for Warren CJ, Frankfurter, Clark and Whittaker JJ) (1961).

165 The High Court's broader jurisprudence in this area has been influenced by the US position: James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 2nd ed, 2020) 48–51 [3.1]–[3.11]. For example, the *Constitution of the United States* 'cases' or 'controversies' requirement in Article 3 § 2 was referred to in shaping the broader 'matter' requirement in our *Constitution*: see *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 319 (Josiah Symon). See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, rev ed, 1976) 765.

IV THE KIEFEL COURT'S APPLICATION

What then are the practical consequences of the prudential approach operating as an evaluative choice? One consequence is that, as a unanimous Court said in *Zhang*, 'different views have been expressed by different members of the Court as to the application of the practice'.[166] While differences in application may be expected, they can also raise jurisprudential concerns. This Part will assess the Kiefel Court's use of the prudential approach against formal aspects of the rule of law.[167] While the rule of law is a 'complex concept',[168] the essential 'formal' aspects are clear. It requires legal rules to be clear and understandable, as well as requiring a degree of certainty and consistency in the way rules are applied by courts to the cases in front of them.[169] This is not to say that a certain degree of vagueness and flexibility in the law is bad. To the contrary, it may even be desirable.[170] However, these formal aspects provide a suitable yardstick for testing legal doctrines. This Part turns to consider four recent cases where the Court has considered the prudential approach before assessing whether these formal aspects of the rule of law are being met.

A *Ruddick v Commonwealth* ('*Ruddick*')

In *Ruddick*, the plaintiff challenged certain items of the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth)[171] upon the basis that they contravened either (i) the constitutional mandate in sections 7 and 24 of the *Constitution* that members of the House of Representatives and Senators be 'directly chosen by the people' or (ii) the implied freedom.[172] The impugned provisions had two central operations. On the one hand, items 11 and 14 provided for the deregistration of an *existing* political party if a prior registered party objected to that party's name on the basis that it contained a word that was also in their name.[173] All members of the Court accepted that these provisions were engaged by the facts: the Liberal Party of Australia had objected to the Liberal Democratic Party ('LDP') (an existing political party) from using the word 'liberal' in their name.[174] On the other hand, items 7 and 9 created a similar process for refusal of registration

166 *Zhang* (n 60) 230 [23]. Indeed, as Edelman J has noted, this is 'unsurprising': *Mineralogy* (n 7) 259 [100].

167 In this sense, the concept will be used in a familiar manner to other pieces of constitutional law scholarship: see, eg, Irving (n 138) 118–22; Hume (n 71).

168 *Palmer [No 2]* (n 82) 872 [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

169 See Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 39; Joseph Raz, 'The Rule of Law and Its Virtue' in Keith C Culver (ed), *Readings in the Philosophy of Law* (Broadview Press, 1999) 13, 16; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009) 214–18. See generally Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 21, 83–92.

170 Timothy Endicott, 'The Value of Vagueness' in Adrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011) 14.

171 This legislation amended certain provisions of the *Commonwealth Electoral Act 1918* (Cth).

172 *Ruddick* (n 159) 395 [138] (Gordon, Edelman and Gleeson JJ).

173 Ibid 394 [128].

174 Ibid 381 [54] (Gageler J, Kiefel CJ and Keane J agreeing at 371 [3]), 395 [135]–[137] (Gordon, Edelman and Gleeson JJ, Steward J agreeing at 403 [174]).

of a *new* political party if a prior registered party did not give its consent to the new party using that word.[175] The Court split over whether the circumstances before the Court made it appropriate to consider the validity of the second set of provisions.

The majority held that the provisions were not engaged and therefore followed the prudential approach. The issue was not only that the plaintiff failed to establish that there existed a sufficient 'state of facts' which made it necessary to decide on their validity, but the plaintiff 'failed to put before [the] Court *any* facts' against which the validity of items 7 and 9 could be tested.[176] In contrast, the minority held that the provisions were engaged. Gageler J (Kiefel CJ and Keane J agreeing) reasoned as follows: if items 11 and 14 were valid and the LDP were deregistered pursuant to them, the LDP 'would then be incapable of reregistration under that [same] name without the consent of the Liberal Party'.[177] This inevitable denial of reregistration following deregistration was not only sufficient for the plaintiff to have standing to challenge items 7 and 9,[178] but it seemingly meant that the factual basis was sufficient to make adjudication upon their validity appropriate.[179]

The divergence in *Ruddick* therefore arose due to a difference in judicial opinion over a factual question. That is, the Court split over whether the facts engaged items 7 and 9. This is an understandable way a court may vary in adherence to the prudential approach: members of the court are not expected to always agree on factual matters.[180] This divergence is 'unremarkable'.[181]

B *Clubb*

Clubb concerned an implied freedom challenge to 'safe access zones' around abortion clinics.[182] Mrs Clubb was charged with an offence for 'communicating by any means in relation to abortions' in such an area.[183] In Part II, it was noted that, Gageler J, Gordon J and Edelman J each followed the prudential approach in

175 Ibid 394 [127] (Gordon, Edelman and Gleeson JJ).

176 Ibid 396–7 [145] (Gordon, Edelman and Gleeson JJ, Steward J agreeing at 403 [174]) (emphasis in original). See also at 396 [144]. Their Honours referred to Starke J's observation that a plaintiff cannot 'roam at large' over a statute: see *Real Estate Institute of New South Wales v Blair* (1946) 73 CLR 213, 227 ('*Blair*'). See also *British Medical Association* (n 142) 258 (Dixon J). While this prohibition was developed in the context of constitutional boundaries of adjudicative authority, it appears to be a neat aphorism and has recently been used in the context of the prudential approach: see, eg, *Knight* (n 16) 324–5 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). Given the prudential approach cases that were cited by Gordon, Edelman and Gleeson JJ, it appears to have been used in this sense in this case: see ibid 396 [144] nn 140–1, 397 [145] nn 143–4.

177 *Ruddick* (n 159) 375 [25] (Gageler J, Kiefel CJ and Keane J agreeing at 371 [2]–[3]).

178 Ibid 381 [54] (Gageler J, Kiefel CJ and Keane J agreeing at 371 [3]). See also at 380 [51] (Gageler J).

179 See ibid 375 [25], 381 [54] (Gageler J, Kiefel CJ and Keane J agreeing at 371 [3]). As Gageler J further explained, it was the 'immediate effect' of items 7 and 9: at 386 [86].

180 See especially *Sun v Chapman* [2022] NSWCA 132, [4]–[7] (Leeming JA, Brereton JA agreeing at [189]) ('*Sun*').

181 *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679, 686 [43] (French CJ, Bell, Keane, Nettle and Gordon JJ).

182 See *Public Health and Wellbeing Act 2008* (Vic) s 185B(1) (definition of 'safe access zone').

183 *Clubb* (n 61) 185 [2] (Kiefel CJ, Bell and Keane JJ). Mrs Clubb was charged under section 185D, which prohibited such communication by virtue of the definition of 'prohibited behaviour' in section 185B(1).

Clubb's appeal.[184] On the other hand, the plurality of Kiefel CJ, Bell and Keane JJ declined to follow the practice. In their Honours' view, there were 'three unusual features' (or 'prudential considerations')[185] which warranted determining the constitutional question in this case.[186]

The first consideration was that, although their Honours found that Clubb was not engaged in 'political' communication,[187] the line between political and non-political communication on abortion may be 'very fine'.[188] The second consideration was that, although the constitutional question may not squarely have arisen in Clubb's case, the 'likelihood of the question arising [was] obvious'.[189] Evaluative considerations of this nature have the potential to create inconsistency and unpredictability moving forward. This could occur in two ways. First, a party may advocate for the prudential approach to be followed, only to have the Court not follow the practice due to a prudential consideration that was unknown at the time. This is effectively what occurred in *Clubb*. Secondly, it is possible that a party could rely on one of these features in a future case, but the Court could adhere to the prudential approach in any event. Yet, although there is a desire to have the practice applied consistently, these considerations form part of the Court's evaluative choice and ultimately vindicate the prudential approach's nature. Part V(D) will return to consider the application of these considerations.

The plurality's third feature was that, as it was contested by the parties, the plurality would need to consider the disapplication question if they chose to follow the prudential approach and, therefore, 'considerations of judicial economy [did] not strongly favour adhering to the practice in this case'.[190] The problem with this consideration is that it downplays the importance of partial disapplication in this context. In cases such as *Clubb*, disapplication was not simply a factor to balance in deciding whether to follow the prudential approach. Rather, it was a *condition* that needed to be satisfied before the prudential approach could be followed.[191] If the provision was incapable of being disapplied, then the provision would be valid or 'invalid in its entirety'.[192] A person with standing (such as Clubb)[193] could then challenge the validity of the provision in its entirety, whether they were engaged in 'political' communication or not.[194] This was effectively the approach of Nettle J: having doubted that the provision was capable of being partially disapplied, it was 'not open' for his Honour to follow the prudential approach.[195] It follows that

184 See above nn 96–9 and accompanying text.
185 *Clubb* (n 61) 192 [35], 193 [40] (Kiefel CJ, Bell and Keane JJ).
186 Ibid 193 [36]–[39].
187 Ibid 191 [31].
188 Ibid 193 [37].
189 Ibid [38].
190 Ibid [39].
191 Wood (n 99) 170.
192 *Clubb* (n 61) 288 [333] (Gordon J) (citations omitted).
193 Ibid 324 [441] (Edelman J).
194 See ibid 288 [333], 228–9 [335] (Gordon J) (citations omitted).
195 Wood (n 99) 170. See ibid 249 [231] (Nettle J). Albeit Nettle J uses the term 'sever' rather than 'partially disapply': at 250–1 [235], 252 [237].

it is the availability of partial disapplication which means that 'no further analysis is required in order to dismiss a challenge'.[196]

It needs to be emphasised that – consistent with the prudential approach operating as an evaluative choice – *declining* to follow the prudential approach was entirely open to the plurality. That is, it was always open for their Honours to choose to determine the constitutional question, as a matter of discretion, regardless of whether the provision could be partially disapplied. But downplaying the importance of partial disapplication in this manner could lead to greater difficulties if the prudential approach were to be followed. Unfortunately, this latter course was subsequently taken by Harrison J in *Elzahed v Kaban* ('*Elzahed*')[197] and by the plurality in the next High Court case to be considered.

C *LibertyWorks Inc v Commonwealth* ('*LibertyWorks*')

In *LibertyWorks*, the High Court dismissed an implied freedom challenge to the *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*') by a 5:2 majority. The impugned provisions required the plaintiff to register under the scheme for communicating material to the Australian public on behalf of a foreign principal.[198] Importantly, there were two different registers: a publicly accessible register;[199] and a 'secret register', which could be shared with government agencies but was not accessible to the public.[200] The relevant Secretary had discretion over who they shared the secret register information with[201] and what information was included on the secret register.[202] In dissent, Gageler J and Gordon J viewed the Secretary's discretions as creating a 'gap' between the information in the two registers. This gap was a significant factor in their Honours concluding that the impugned provisions unjustifiably burdened the implied freedom.[203]

In contrast, the plurality of Kiefel CJ, Keane and Gleeson JJ followed the prudential approach by declining to answer questions about the effect of the Secretary's discretions upon the validity of the scheme.[204] This was because such questions did not arise from the case's factual basis and they were not pursued by the plaintiff after being raised during the course of oral argument from the bench.[205] Critically, the plurality noted that if these questions were pursued then 'further

196 *Clubb* (n 61) 289 [336] (Gordon J), citing *Tajjour* (n 96) 586–7 [172] (Gageler J). See also Wood (n 99) 166–8, 170, 172.

197 [2019] NSWSC 670 [121], discussed in Wood (n 99) 172.

198 *Foreign Influence Transparency Scheme Act 2018* (Cth) ss 16(1), 18(1) read together with s 21(1) item 3 ('*FITS Act*'). See also ss 10 (definition of 'on behalf of'), 11.

199 Ibid s 43.

200 Ibid s 42. See *LibertyWorks* (n 63) 527–8 [159]–[165] (Gordon J).

201 *FITS Act* (n 198) s 53(1). See *LibertyWorks* (n 63) 515 [107], 517 [116] (Gageler J).

202 See *FITS Act* (n 198) ss 42(2)(g), (3)(c) in conjunction with the power under section 46. See *LibertyWorks* (n 63) 515–6 [109], 517 [116] (Gageler J). See generally at 515–17 [107]–[117] (Gageler J); Stellios, 'Marking out the Limits of Judicial Review' (n 69) 43.

203 *LibertyWorks* (n 63) 517 [116]–[117] (Gageler J), 533 [189] (Gordon J). See also Stellios, 'Marking out the Limits of Judicial Review' (n 69) 57.

204 *LibertyWorks* (n 63) 510–1 [86]–[90]. See especially at 511 [90]. Steward J generally agreed with the plurality's analysis: at 545 [246].

205 Ibid 510–11 [86]–[90].

questions would arise, such as whether the application of familiar techniques such as severance, reading down or disapplying the provisions affected might save them from invalidity'.[206] Except these were not 'further' questions: they were a condition to considering the validity of the registration provisions in isolation from the discretion provisions.[207] The plurality expressly acknowledged their necessity in the following paragraph of their reasons,[208] but did not engage in any such analysis.

Consequently, the plurality declined to answer the constitutional question without proper justification. This creates a practical problem in the context of *LibertyWorks*: it is possible that the plurality may have struck down the impugned provisions as invalid if they considered the application of interpretive techniques. This should be elaborated. If the plurality considered these 'further' questions, then they may have concluded that the provisions concerning the Secretary's discretions could not be read down, severed or partially disapplied. This was the view Gageler J and Gordon J came to.[209] The inclusion of the Secretary's discretions into the analysis may have then altered the plurality's view on the validity of the impugned provisions in the same way that they did for the minority. This shows the importance of addressing questions of reading down, severance and partial disapplication. Simply noting that the provisions concerning the Secretary's discretions were not challenged by the plaintiff was insufficient in circumstances where they were central to the dissentients' view that the scheme was invalid.[210] The requisite justification was, however, provided by Edelman J. It was made clear that the Secretary's discretions were capable of either being read down, severed or disapplied.[211] It was therefore appropriate for his Honour to follow the prudential approach by omitting any consideration of the Secretary's discretions in upholding the validity of the impugned provisions.

If the plurality's view remained that the parties did not have a chance to address the application of reading down, severance and partial disapplication,[212] an available course was to ask for further submissions on this point. Such a course is not uncommon: the Court did exactly this two years earlier in *Spence v Queensland*.[213] Without doing so, the plurality's approach may have created an air of uncertainty as to the actual validity of the registration provisions in the *FITS Act*.

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206 Ibid 511 [89].

207 Stellios, 'Marking out the Limits of Judicial Review' (n 69) 58. For the reasons given by Gordon J in *Clubb* (n 61): see above nn 192–4 and accompanying text.

208 *LibertyWorks* (n 63) 511 [90], citing *Knight* (n 16) 324–5 [32]–[33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Tajjour* (n 96) 587–8 [173] (Gageler J).

209 *LibertyWorks* (n 63) 517 [116] (Gageler J), 520 [130] (Gordon J).

210 Cf ibid 510–11 [86]–[89] (Kiefel, Keane and Gleeson JJ), 543 [232] (Edelman J). Although this can be contrasted to the typical situation of following the prudential approach in this instance, where the provisions are challenged but not engaged by the facts: see, eg, *Mineralogy* (n 7).

211 *LibertyWorks* (n 63) 535 [197], 540 [220], 543 [232].

212 See ibid 511 [89] (Kiefel CJ, Keane and Gleeson JJ).

213 *Spence* (n 39) 383–4.

D *Farm Transparency International Ltd v New South Wales* ('*Farm Transparency*')

In *Farm Transparency*, the plaintiffs were animal rights activists who possessed and published records of animal agricultural practices in purported contravention of sections 11 and 12 of the *Surveillance Devices Act 2007* (NSW).[214] The plaintiffs challenged these provisions on the basis that they impermissibly burdened the implied freedom.[215] Contravention of these provisions was predicated on the plaintiffs having installed, used or maintained either a listening device (section 7), optical surveillance device (section 8), tracking device (section 9) or data surveillance device (section 10) on certain premises.[216] The plaintiffs initially asked whether sections 11 and 12 were invalid 'in all of their operations respecting sections 7 to 10'.[217] However, the amended special case did 'not contain any facts which point[ed] to either of the plaintiffs' conduct as having involved section 7, section 9 or section 10'.[218] Consequently, the Court unanimously held that the plaintiffs could only challenge sections 11 and 12 in their application to them; in other words, the Court held that it should only consider the validity of sections 11 and 12 as engaged by section 8.[219]

A question then arose as to whether the Court's scope of adjudication should be further confined. As Edelman J noted:

> The difficult question in many cases will be the identification of the appropriate level of generality, between the particular application to the party before the Court and all possible applications, at which to adjudicate upon validity.[220]

His Honour (Steward J agreeing) chose to adjudicate on a narrow basis. Important to this approach was the factual basis identifying that the plaintiffs were either a trespasser[221] or had been complicit in a trespass,[222] and a lack of evidence that the activities depicted in the records were unlawful.[223] In Edelman J's view, this made it appropriate to only consider the provisions' validity 'in the generality of circumstances involving the publication or communication by trespassers or those complicit in the trespass of a record or report of lawful activities on private

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214 *Farm Transparency* (n 7) 662 [1]–[3], 665 [16] (Kiefel CJ and Keane J), 672 [62] (Gageler J), 679–80 [108]–[109] (Gordon J).

215 Ibid 662–3 [4] (Kiefel CJ and Keane J), 679 [106] (Gordon J).

216 Ibid 663 [8] (Kiefel CJ and Keane J), 679 [107] (Gordon J).

217 Ibid 665 [19] (Kiefel CJ and Keane J). Cf Gordon J who did not include section 10 in the plaintiffs' original challenge: at 680 [111].

218 Ibid 665 [17] (Kiefel CJ and Keane J), 694 [198] (Edelman J). Cf at 680 [113], 681 [118]–[120] (Gordon J).

219 Ibid 665 [21] (Kiefel CJ and Keane J), 672 [60] (Gageler J, Gleeson J agreeing at 708 [272]–[273]), 680 [113], 681 [118]–[120] (Gordon J), 696 [210], 697 [217] (Edelman J, Steward J agreeing at 707 [269]). It should be noted, however, that other members of the Court did not step through this disapplication analysis as expressly or extensively as Edelman J.

220 Ibid 696 [209], citing *Palmer [No 1]* (n 46) 518–19 [25] (Kiefel CJ and Keane J), 574 [202] (Gordon J), 580 [223]–[234] (Edelman J).

221 For the purposes of an offence against section 8 of the *Surveillance Devices Act 2007* (NSW), which required the person to be a trespasser in order to offend that provision.

222 See *Farm Transparency* (n 7) 672 [61] (Gageler J), 680 [110] (Gordon J), 694–5 [199]–[203] (Edelman J).

223 Ibid 695 [204] (Edelman J).

premises or in a vehicle'.[224] In this operation, the provisions were valid. And, while a broader ruling was possible, there were no facts regarding, or argument on, the provisions' application to records of unlawful activities or to 'third-party publishers' which made it appropriate to do so.[225] The other members of the majority, Kiefel CJ and Keane J, were prepared to find sections 11 and 12 completely valid as engaged by section 8.[226] However, because they took a broader view, their Honours were content to agree with Edelman J's narrower view for the purposes of answering the questions in the special case.[227]

The majority judgments highlight the spectrum of approaches that can be taken towards disapplication in the context of the prudential approach. This variation can cause problems. When some members of the Court choose to adjudicate broadly, but others do not, it can create a real uncertainty as to the validity of legislation in these further operations. This suggests that greater care may need to be taken with partial disapplication to avoid varied outcomes in the context of the prudential approach. This observation about partial disapplication is fortified by the dissenting judgments. For the minority, the question was not whether a consideration of further validity need not be addressed under the prudential approach, but whether the provisions could be given a narrower operation so as to retain an aspect of validity.[228] Gageler J (Gleeson J agreeing) would have disapplied the provisions with respect to political communication.[229] Gordon J would have gone further and disapplied the provisions 'to the extent that the[y] place an *unjustified burden* on … [political] communications'.[230] The minority judgments therefore also highlight varied approaches to disapplication, albeit in context that was not following the prudential approach.

E Observations

In all cases considered, the Court has diverged in its adherence to the prudential approach. As an evaluative choice, divergence is to be expected.[231] But it can also lead to inconsistent and problematic results.[232] The first two 'prudential considerations' outlined by the plurality in *Clubb* are evaluative considerations that may lead to such divergence.[233] While they are to be expected given the nature of the practice, it is important that courts endeavour to treat these features consistently

224 Ibid 696 [210]. See also at 697 [217], 707 [268].
225 Ibid 696–7 [210]–[217]. See especially at 693–4 [193]–[196].
226 Ibid 671–2 [57]–[58].
227 Ibid [58]. This meant that the answers to the questions asked were couched in Edelman J's terms: cf at 671 [57] (Kiefel CJ and Keane J), 707 [268] (Edelman J).
228 Ibid 678 [96] (Gageler J).
229 Ibid [97] (Gageler J, Gleeson J agreeing at 708 [272]–[273]), citing *Victoria v Commonwealth* (1996) 187 CLR 416, 502–3 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also ibid 678–9 [101] (Gageler J).
230 *Farm Transparency* (n 7) 682 [123], 693 [191] (emphasis in original). This type of disapplication was doubted by Gageler J: at 678–9 [98]–[102], citing *Pidoto v Victoria* (1943) 68 CLR 87, 108–11 (Latham CJ).
231 *Mineralogy* (n 7) 259 [100] (Edelman J).
232 Nolan (n 122) 22. See also Kloppenberg, 'Avoiding Constitutional Questions' (n 11) 1004.
233 Others are discussed below: see below nn 273–80 and accompanying text.

across cases to avoid an element of uncertainty for litigants. Divergence is also acceptable where a court disagrees as to whether a provision is engaged by the circumstances before the Court, as in *Ruddick*, or over the application of reading down, severance and partial disapplication, as Nettle J did in *Clubb*. These merely reflect differences in judicial opinion on certain factual or legal issues.[234] However, *Farm Transparency* highlights that greater care may need to be taken with partial disapplication to avoid highly varied outcomes in the context of the prudential approach. Troubles with the application of interpretive techniques also underpins the approach taken by the plurality in *LibertyWorks*, which, with respect, seems inconsistent with prior statements of principle[235] and leads to practical uncertainty over the validity of legislation. The final Part of this article turns to consider how each of these concerns may be ameliorated moving forward.

There is another, more practical, observation to make about the Court's recent decisions. In each of these cases there has been an insufficient factual foundation for the Court to properly adjudicate upon all aspects of the dispute. The High Court's primary method for bringing a case within its original jurisdiction is the 'special case' procedure outlined in rule 27.08 of the *High Court Rules 2004* (Cth).[236] The special case contains the facts and documents necessary to answer the questions of law raised in the proceedings, which the parties have agreed to put before the Court.[237] This procedure has great utility, as it can allow for a timely and efficient determination of a case.[238] However, in the pursuit of a quick resolution, parties may either omit certain factual matters altogether or bring less precision to their framing.[239] As the plurality emphasised in *Mineralogy*, this 'use and misuse' of the special case procedure has resulted in an inadequate factual basis being put before the Court several times in recent years, with the consequence that it has declined to answer constitutional questions.[240] Yet, the Court or a single Justice must grant leave before a special case can be referred to the Full Court. Thus, in each of these cases, the special case was effectively approved by a member of the Court. Following from this, there has been greater judicial supervision from the Court at the anterior stage to a hearing before the Full Court. In one recent example, Gageler J declined to grant leave to approve a special case being moved to the Full Court until the parties had clarified the factual foundation.[241] And in another, Gordon J remitted proceedings to the Federal Court because, amongst other things, the facts outlined in the special

234 For factual issues: see especially *Sun* (n 180) [4]–[7] (Leeming JA, Brereton JA agreeing at [189]).

235 See, eg, *Knight* (n 16) 324–5 [32]–[33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

236 *Mineralogy* (n 7) 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

237 See ibid 246–7 [54]–[55].

238 Ibid 247 [55].

239 For omitting facts: see, eg, Transcript of Proceedings, *Palmer v Western Australia; Mineralogy Pty Ltd v Western Australia* [2021] HCATrans 33, 26–32, 78–82; ibid 250 [66], 256 [91]. For lack of precision: see, eg, Transcript of Proceedings, *Hornsby Shire Council v Commonwealth* [2022] HCATrans 105, 53–77 (Gageler J) ('*Hornsby Transcript*'); Transcript of Proceedings, *Crawford v Western Australia* [2022] HCATrans 213, 68–74, 79–81 (Gordon J) ('*Crawford Transcript*').

240 *Mineralogy* (n 7) 247–8 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) (citations omitted).

241 *Hornsby Transcript* (n 239) 30–77.

case were incomplete and lacked precision.[242] Ultimately, however, the Court's case management function cannot be relied upon to ensure that the parties provide an adequate factual basis in every case.[243]

V PAVING THE PATH FORWARD

This article has identified two primary concerns with the High Court's application of the prudential approach. First, Part II identified a lack of clarity in the case law over precisely when the prudential approach will or will not be followed.[244] Secondly, Part IV has observed that the High Court's recent application of the practice has led to inconsistent approaches and results, particularly when constitutional questions are passed over in the context of reading down, severance and partial disapplication. This Part considers ways to overcome these problems.

The first suggestion is aimed at overcoming the lack of clarity in the case law over precisely when the prudential approach will be applied. Consistent with the influence it has had in shaping the High Court's jurisprudence to date,[245] American jurisprudence can assist. Just as the US Supreme Court has identified the seven 'rules of *Ashwander*' to guide their discretionary practice of passing over constitutional questions, it is suggested that three 'principles of prudence' be adopted in Australia to guide the instances in which it will not be necessary for a court to resolve a constitutional issue.[246] The choice of the term 'principle' over 'rule' is deliberate. There is a distinction between the two concepts:[247] legal rules offer specific obligations, which ought to be followed if certain conditions are made out;[248] whereas legal principles are less specific norms that should be taken into account as a consideration in decision making, but may give way to other legal obligations. It follows that the term 'principle' is more suitable in the Australian context because, as Part III has explained, the prudential approach is 'not a rigid rule imposed by law'.[249] Similarly, the principles should not be thought of as a rigid

242 *Crawford Transcript* (n 239) 68–74, 79–105.

243 On the role of facts in constitutional adjudication generally: see especially Gordon (n 23) 10–48.

244 This concern is shared for the US Supreme Court's doctrine of constitutional avoidance: see Nolan (n 122) 22.

245 See especially above nn 164–5. See also above nn 5–6. But note the general criticisms and cautions about relying on US materials in the context of constitutional review: see, eg, Thomson (n 2) 174–5, 187.

246 In this sense, the principles of prudence will be used in similar manner to how 'principles of restraint' have been used to help guide the judiciary's discretionary application of deference: see, eg, Jeff A King, 'Institutional Approaches to Judicial Restraint' (2008) 28(3) *Oxford Journal of Legal Studies* 409 <https://doi.org/10.1093/ojls/gqn020>.

247 See Ronald M Dworkin, 'The Model of Rules' (1967) 35(1) *Chicago Law Review* 14, 25–7 <https://doi.org/10.2307/1598947>. See also Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81(5) *Yale Law Journal* 823, 829–39 <https://doi.org/10.2307/795152>.

248 Cf Raz, 'Legal Principles and the Limits of Law' (n 247) 830–2.

249 *Universal Film Manufacturing* (n 13) 350–1 (Higgins J), quoted in *Clubb* (n 61) 193 [36] (Kiefel CJ, Bell and Keane JJ). See also *Zhang* (n 60) 230 [22] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

taxonomy;[250] new principles may be included if further instances arise in which it is unnecessary to consider a constitutional question.[251]

The High Court has referred to some of these principles – or close derivatives of them – as 'considerations' underlying the prudential approach or 'implications' flowing from it. However, they are apt to be elevated to flexible principles which guide its application. The desire for clearer guiding principles appears to have been recognised by Gordon J in *Farm Transparency*, where her Honour crystallised 'four implications' of the prudential approach identified in *Mineralogy*.[252] But, as was noted previously,[253] these implications do not capture every situation in which the prudential approach may be followed. In particular, her Honour's implications would not capture a reading down case, such as *Zhang*. As well, the first two implications appear to be directed towards the same situation: partial disapplication in the context of the prudential approach.[254] The suggested principles of prudence therefore reflect another way in which Gordon J's desire for greater clarity can be achieved.

Of course, these principles will only be considered after a court has satisfied itself that it has jurisdiction, including any questions of standing or advisory opinions.[255] This ensures that, consistent with its theoretical underpinnings, the prudential approach operates as a discretionary practice in circumstances where a court has jurisdiction.

A The First Principle of Prudence: 'Necessary Foundation'

The first principle of prudence is: 'The Court should not ordinarily anticipate or decide a constitutional question if it lacks the necessary foundation to decide it'. This principle primarily reflects Dixon CJ's oft quoted passage from *Lambert*,[256] but uses the notion of a 'foundation' rather than a 'state of facts'. That is because the generality of 'necessary foundation' is sufficient to capture cases lacking either a necessary factual basis or adequate legal argument, as well as allowing for new cases which lack some foundation to properly administer the law that do not fit neatly into either of these two types of case. *Duncan* is an example of a case that would fall squarely within the ambit of this principle. As explained in Part II, the plaintiffs in that case failed to put forward a sufficient factual foundation for the Court to examine the inconsistency question. Absent this, the first principle of prudence would suggest that it is not necessary for the Court to decide that question.

250 See especially Gordon (n 23) 67.

251 See, eg, *Mineralogy* (n 7) 261 [106] (Edelman J).

252 *Farm Transparency* (n 7) 680–1 [116], citing ibid 847 [59]–[60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also *Unions [No 3]* (n 32) 168–9 [81] (Edelman J).

253 See above nn 21–2 and accompanying text.

254 Cf *Knight* (n 16) 324–5 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

255 To do otherwise would be contrary to a court's 'first duty': see *Federal Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398, 415 (Griffith CJ). See generally Leeming, *Authority to Decide* (n 130) 37–41.

256 *Lambert* (n 14) 283.

The principle also borrows the terminology of 'anticipate' from the second rule of *Ashwander*,[257] which imports notions of 'ripeness' from the US jurisprudence.[258] In *Texas v United States*, the Supreme Court noted that 'a claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all"'.[259] This concept may be more suitable for explaining prudential approach cases such as *Badger v Bayside City Council*.[260] That case concerned an implied freedom challenge to provisions that required the plaintiff to have a permit in order to display a sign outside their residence. Strictly speaking, the Court had a factual basis to engage in the implied freedom analysis, as the plaintiff displayed a sign outside their residence and did not have a permit to do so. However, the real essence behind following the prudential approach was that it was premature to consider the plaintiff's constitutional challenge because the plaintiff was entitled to display the sign for three months without a permit.[261] As the Court explained: 'Circumstances may change before the sign must be removed. [The council] may not determine to enforce any prohibition'.[262] The potential of such events occurring meant that it was premature – or not necessary – to resolve the constitutional question at this point in time.

B The Second Principle of Prudence: 'Multiple Bases'

The second principle is: 'The Court should not ordinarily decide a constitutional question, although properly presented by the record, if the controversy can be resolved on another basis'. This principle derives from the fourth implication identified by the plurality in *Mineralogy*,[263] and is also mirrored by the fourth rule of *Ashwander*.[264] This principle is adequate to cover 'multiple bases' and 'statutory interpretation' cases discussed in Part II. In particular, resolving the case on a pure question of construction, as was the case in *Universal Film Manufacturing*, can be understood as resolving the case on a non-constitutional basis. As well, pitching the principle as 'the Court should not decide *a* constitutional question' (that is, as the singular), ensures that the concept of 'another basis' is apt to extend to a different constitutional question, ensuring that the principle captures cases where there are multiple constitutional questions, such as *Bell Group*.

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257 See *Ashwander* (n 11) 346–7 (Brandeis J for Brandeis, Stone, Roberts and Cardozo JJ), quoting *Liverpool Steamship* (n 164) 39 (Matthews J for the Court). See also *Clubb* (n 61) 216 [135] (Gageler J) (citations omitted).

258 The second rule of *Ashwander* is closely related to the justiciability concept of 'ripeness': see Nolan (n 122) 9.

259 523 US 296, 300 (Scalia J for the Court) (1998), quoting *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 580–1 (O'Connor J for the Court) (1985).

260 (2022) 67 VR 15.

261 Ibid 34 [69] (John Dixon J).

262 Ibid 37 [83].

263 *Mineralogy* (n 7) 249 [60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), discussed in *Farm Transparency* (n 7) 681 [116] (Gordon J).

264 See *Ashwander* (n 11) 347 (Brandeis J for Brandeis, Stone, Roberts and Cardozo JJ). This is commonly referred to as the 'last resort rule' in the US: see Kloppenberg, 'Avoiding Constitutional Questions' (n 11).

C The Third Principle of Prudence: 'Reading Down, Severance and Partial Disapplication'

The third principle of prudence is: 'It is ordinarily inappropriate for the Court to consider whether a legislative provision would have an invalid operation in circumstances which are not before the Court, if the provision can be read down, severed or partially disapplied from those circumstances and is otherwise valid in the circumstances before the Court'. This combines statements from the Court concerning each technique into one principle.[265] This is appropriate because the thrust behind each is the same: 'In each of these circumstances, the ability of the Court to sever, read down or disapply the provision means that a consideration of any circumstance in which it might be invalid can be left to when those circumstances actually arise.'[266]

Some elaboration is required as to what is meant by 'ordinarily inappropriate' in cases of partial disapplication. Edelman J has suggested that the qualifier 'ordinarily' is an 'error' as it 'state[s] the restriction too strictly'.[267] His Honour's concern is that it may suggest that the Court should only adjudicate upon the immediate facts before the Court.[268] However, with respect, the qualifier is apt. Unlike the third rule of *Ashwander*, the third principle of prudence does not refer to the '*precise* facts' or the '*precise* circumstances' before the Court.[269] This distinction allows for judicial variance in the generality of the circumstances at which the case is adjudicated. Further, his Honour does not take into account that other 'prudential considerations' may suggest that it is appropriate to adjudicate on a broader basis. The effect of these will be discussed next.

D Application of the Principles

It is now appropriate to consider how to reconcile the issues identified in Part IV with the Court's recent application of the practice. First and foremost, for the prudential approach to be followed the content of a principle must be made out. For example, the second principle only applies 'if the controversy can be *resolved* on another basis': if there is only a 'possibility' that the controversy can be resolved on a different basis, then this principle of prudence cannot be followed.[270] And for the third principle to apply, the legislation *must* be capable of being severed or partially

265 For reading down specifically: see *Zhang* (n 60) 230 [21] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ). For partial disapplication specifically: see *Knight* (n 16) 324–5 [33]. For severance specifically: see *Mineralogy* (n 7) 261–2 [107] (Edelman J). A rule described as 'kindred' to the rules of *Ashwander* is directed to a similar idea in the US: see *Brockett v Spokane Inc*, 472 US 491, 502 (White J for the Court) (1985); *Raines* (n 164) 21–2 (Brennan J for the Court).

266 *Mineralogy* (n 7) 261–2 [107] (Edelman J). See also *Clubb* (n 61) 322 [411] (Edelman J).

267 *Farm Transparency* (n 7) 696 [209].

268 Ibid. See also *Cowen* (n 159) 375 [158] (Edelman J).

269 Cf *Liverpool Steamship* (n 164) 39 (Matthews J for the Court), quoted in *Ashwander* (n 11) 347 (Brandeis J for Brandeis, Stone, Roberts and Cardozo JJ).

270 Consistent with Keane J's observations in *Montgomery* (n 43): see above nn 42–3 and accompanying text.

disapplied. This ensures that the specific issues with Harrison J's judgment in *Elzahed* and the plurality's judgment in *LibertyWorks* do not repeat themselves.[271]

But consistent with the prudential approach operating as a discretionary practice, it is always open for a court to resolve a constitutional question *even if* a principle of prudence applies. In one sense, this can be understood as the principle of prudence giving way to a competing principle (or 'prudential consideration').[272] Examples of the types of prudential considerations that may warrant a court resolving a constitutional question are:

- if the question is one of general or public importance;[273]
- if answering the question would resolve a longstanding legal controversy and/or give certainty to a practical problem;[274]
- if the question is likely to arise in the future;[275]
- if the question has been subject to full argument;[276]
- if the resolution of the constitutional question is straightforward, as opposed to the antecedent question of construction or a separate ground;[277]
- if other members of the Court find it necessary to address the question;[278]
- if resolution of the question could have a significant effect upon the interests of a party;[279] or
- if leaving the question unanswered would leave the parties with a sense of injustice.[280]

This list is by no means exhaustive, and some prudential considerations may be case specific.[281] It should also be borne steadily in mind that the potential for these prudential considerations to broaden the scope of adjudication is subject to any countervailing considerations. This explains why some prudential considerations listed above have not been influential in swaying the Court to resolve constitutional questions in past cases. Take the consideration that a court should favour adjudicating on a broader basis when a constitutional question

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271 See above n 197 and accompanying text, and Part IV(C). It is arguable that Gordon, Edelman and Gleeson JJ should have explicitly considered severance in *Ruddick* (n 159). However, it is implicit in their reasons given the passages they cite: see at 396–7 [144]–[145], citing *Blair* (n 176) 227 (Starke J); *British Medical Association* (n 142) 258 (Dixon J).

272 This aligns with Dworkin's idea of 'principles', which suggests that principles may not be followed in circumstances where they conflict with other legal obligations: see Dworkin (n 247) 25–7.

273 *Mineralogy* (n 7) 260 [103] (Edelman J). Although in a non-constitutional context: see also *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419, 422 [3] (Kiefel CJ and Gageler J), 441 [86]–[87] (Gordon J), 445 [111] (Edelman J) ('*QYFM*'). But see at 475 [271] (Gleeson J).

274 *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689, 696 (Griffith CJ), 718 (Higgins J) ('*Owners of SS Kalibia*'); *Re Day [No 2]* (2017) 263 CLR 201, 238 [115] (Gageler J) ('*Re Day*'); *Cowen* (n 159) 355 [107] (Gageler J), 377 [162] (Edelman J).

275 See *Clubb* (n 61) 193 [38] (Kiefel CJ, Bell and Keane JJ).

276 See *Owners of SS Kalibia* (n 274) 696 (Griffith CJ); *Re Day* (n 274) 238 [115] (Gageler J); *QYFM* (n 273) 422 [3] (Kiefel CJ and Gageler J).

277 *NAAJA* (n 49) 625–8 [149]–[153] (Keane J).

278 *Alexander* (n 39) 589 [132] (Gordon J). See also *Mineralogy* (n 7) 260 [103] (Edelman J).

279 *Mineralogy* (n 7) 259–60 [101] (Edelman J), citing *Jones v The Queen* (1989) 166 CLR 409.

280 *Mineralogy* (n 7) 260–1 [104] (Edelman J).

281 See, eg, *Clubb* (n 61) 193 [37] (Kiefel CJ, Bell and Keane JJ).

has been subject to full argument. This factor is present in many cases where constitutional questions are avoided. Most notably, in *Mineralogy*, the High Court did not adjudicate on various constitutional issues, despite hearing argument on all constitutional questions across a four-day hearing, in which submissions in excess of the page length were filed, and most Attorneys-General intervened. However, counteracting that prudential consideration was the fact that the special case lacked the factual basis needed to properly assess those constitutional questions.[282] In like circumstances, the Court must give weight to these considerations and make an evaluative choice.[283]

This article has sought to avoid a detailed consideration of idiosyncratic or unwritten reasons that may influence whether a court does or does not resolve constitutional issues. Reasons in favour of resolving a question may include a peculiar interest in the question by a particular judge; while reasons against answering a question may include an excessive judicial workload. Such reasons are not the focus of this article. And, in any event, concerns that these unwritten reasons influence the Court's approach should be ameliorated through judicial transparency in the considerations that influence its approach. Thus, as Edelman J recently observed in *Unions NSW v New South Wales [No 3]*:

> It is important … that the use of [the prudential approach] does not degenerate into an idiosyncratic exercise based upon unstated preferences for when a question should be answered. To avoid such a consequence, this Court should articulate the reasons that weigh in favour of, or against, answering constitutional questions when a constitutional question need not be answered.[284]

Transparency in reasoning ensures greater consistency and certainty in the Court's application of the practice moving forward. It also has the additional benefit of providing litigants with greater clarity over when a constitutional question may nevertheless be answered despite falling within the ambit of the prudential approach. Anytime a prudential consideration warrants a broader or narrower adjudication, the Court should state those reasons clearly.

VI CONCLUSION

It is reported that Brandeis J of the US Supreme Court once remarked: 'The most important thing we do is not doing'.[285] The increase in the prudential approach's application under the Kiefel Court has brought these words to life in the context of the High Court of Australia. And while this practice is almost as old as the Court

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282 Compare this to observations in other cases where the Court expressly noted that the questions which were subject to full legal argument were also engaged by the facts: *Re Day* (n 274) 238 [115] (Gageler J); *QYFM* (n 273) 422 [3] (Kiefel CJ and Gageler J).

283 In circumstances of conflict, Dworkin noted that principles have respective 'weights' that guide which principle should be followed: Dworkin (n 247) 27. Raz helpfully modified this, noting that each principles relative weight may change depending on the situation: see Raz, 'Legal Principles and the Limits of Law' (n 247) 831–2.

284 *Unions [No 3]* (n 32) 169 [81], citing *Mineralogy* (n 7) 259–62 [100]–[107] (Edelman J).

285 See Jeffrey Rosen, *Louis D Brandeis: American Prophet* (Yale University Press, 2016) 101.

itself, its modern resurgence since the turn of the century, particularly under the Kiefel Court, is perhaps why Gageler J remarked, in 2015, that the practice had 'only recently been affirmed'.[286]

The Kiefel Court's increased application of the prudential approach has coincided with the Court's robust use of reading down, severance and partial disapplication. So much so that the Court will now, in appropriate cases, consider partial disapplication as a 'threshold question'. There are no objections to this practice in principle: it is judicially prudent and ensures that the declaration of legal principle is not divorced from administering the law. However, inconsistencies seem to have arisen in cases where these techniques are involved, particularly in *LibertyWorks* and *Farm Transparency*. In truth, this is less about concerns with the prudential approach, and more about the application of these techniques and how they fit in with declining to resolve constitutional questions. If this practice is to continue, it is imperative that there is greater clarity as to how they operate both generally and in the context of the prudential approach.

This article has shown that the prudential approach operates as an evaluative choice. It sits behind other jurisdictional doctrines and operates as an additional layer of protection to ensure a court's exercise of judicial power goes no further than is necessary to resolve a legal controversy. The Kiefel Court's application of the prudential approach is consistent with its theoretical basis. As an evaluative choice, divergence in adherence to the practice is to be expected.[287] However, there remains a risk of inconsistency and uncertainty as to when the practice will be applied. To help alleviate these concerns, this article has suggested learning from the US Supreme Court's discretionary practice and implementing three principles of prudence, as well as clearly elucidating 'prudential considerations' that influence adjudication. These suggestions would, in service of the rule of law, bring much needed specificity and clarity to an otherwise very general tenet of constitutional law. In so doing, these principles can help guide, precisely, how it is that the 'Court reaches constitutional issues last, not first'.[288]

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286 *CPCF* (n 8) 613 [335], citing *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 372 [148] (Crennan, Bell and Gageler JJ).

287 *Mineralogy* (n 7) 259 [100] (Edelman J).

288 These words were expressed by Frankfurter J during the course of argument in *Peters v Hobby*, 349 US 331 (1955): see Henry J Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France* (Oxford University Press, 6th ed, 1993) 364.