# JURISDICTIONAL ERROR AS CONCEPTUAL TOTEM

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*Jurisdictional error is pivotal but not, in any substantive sense, 'central'. It is pivotal because it marks important boundaries (drawn by reference to other ideas) in the law of judicial review of executive action. This pivotal but not central role has enabled jurisdictional error to function as a 'conceptual totem', emblematic of a determinedly 'statutory approach' to the articulation and elaboration of administrative law norms. After elaborating these claims, the article goes on to doubt the constitutional case for the retention of the statutory approach that, in recent years, has come to characterise the Australian approach to jurisdictional error. Recognition of the totemic function of jurisdictional error, it is concluded, is a helpful first step in better understanding and analysing administrative law norms which bear no obvious relation to statute.*

## I INTRODUCTION (AND SOME DISTINCTIONS)

Despite administrative law's interesting subject matter, administrative lawyers everywhere – even the devout – have their doctrinal crosses to bear. In Australia, the centrality of jurisdictional error has emerged as our distinctive, contemporary burden. According to many reports, it exhausts and exasperates. Yet, for the most part, it attracts resignation. Path dependence and constitutional principle (or dogma, depending on your point of view), have induced many to assume the load is one that must be borne.[1] Admittedly, Australia's doyen of judicial review of

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1 There have been doubters of this constitutional determinacy: see, eg, Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36(1) *Federal Law Review* 1; Matthew Groves, 'Judicial Review and Human Rights' (2018) 25(1) *Australian Journal of Administrative Law* 64, 66. For lonely instances of judicial apostasy, see Justice Nye Perram, '*Project Blue Sky*: Invalidity and the Evolution of Consequences for Unlawful Administrative Action' (2014) 21(2) *Australian Journal of Administrative Law* 62; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 184 [129] (Kirby J).

administrative action has comforted that the doctrine need not reduce us to tears.[2] But oftentimes the labour is not one of love.

The purpose of this article is to suggest that there is both scope and good reason for resistance: Australian administrative lawyers need not and should not allow their minds to be colonised by the concept of jurisdictional error. The High Court of Australia – it may readily be accepted – is unlikely, any time soon, to jettison the distinction between jurisdictional errors and non-jurisdictional errors of law as a doctrinal construct. But even if the language sticks for the foreseeable future, there is room to lessen jurisdictional error's demands on our attention and to loosen its grip on our thinking.

The overall argument has two main branches. The first challenges the idea that jurisdictional error has emerged as '*the* central concept in Australian administrative law'.[3] To introduce this aspect of the argument, it helps to distinguish two different senses in which the prominence of a social or legal practice can be explained. First, a concept may be prominent because it is central, in the sense that it provides an organising principle for a social or legal practice.[4] To function as an organising principle a concept must have substantive content. The prominence of a concept need not, however, be explained by its centrality to a social or legal practice (thus understood). A second, alternative explanation for the prominence of a concept is that it is pivotal to a practice or discourse because it is frequently used to mark an important boundary. Importantly, a concept can be pivotal in this sense even if it does not have substantive content. A pivotal concept (which marks a key boundary) may have only formal content. A pivotal concept may thus merely set the form in which substantive conclusions – reached applying other ideas – are expressed.

Distinguishing between these two ways in which a concept may be prominent allows us to see that the conclusion that jurisdictional error is centrally important risks a categorical confusion. Jurisdictional error is obviously prominent, perhaps even pervasive, in judicial review discourse. But the distinction between concepts that are central to a social practice on the one hand, and those that function as pivot points within a social practice on the other, means that the prominence of jurisdictional error does not itself demonstrate its salience for understanding the underlying norms of Australian judicial review law. Rather, I argue that it is the pivotal role jurisdictional error plays in allocating decisional authority that best accounts for its prominence. In playing a pivotal role in judicial review jurisprudence, the concept of jurisdictional error does not provide the criteria for its own application. Thus, even if we accept (as we should) that jurisdictional error is pivotal, this does not show jurisdictional error to be central because the concept

2 Mark Aronson, 'Jurisdictional Error without the Tears' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330.

3 Lisa Burton Crawford and Janina Boughey, 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30(1) *Public Law Review* 18, 23 (emphasis added). See also James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21(2) *Public Law Review* 77.

4 To make the thesis that a particular concept is *central* to a social practice interesting it is necessary to claim more than *importance* for the concept. For example, the rules of procedural fairness are hugely important in the law of judicial review, but we would not say that the underlying idea of fairness is *the* central or organising concept of administrative law.

itself neither supplies nor orders the variety of rules and principles that are enforced by way of judicial review.[5] The task of Part II of this article is to explain all this in more detail.

The title of this article speaks of jurisdictional error as a 'conceptual totem'. A totem points to that which is central, without itself being central. A concept that is pivotal but not central can thus function as a conceptual totem if it represents (that is, stands for and points to) what is truly central to a particular social or legal practice without itself carrying explanatory value. In Part III it is suggested that this is precisely what has happened in the case of jurisdictional error. For the last two decades, jurisdictional error has been the primary doctrinal locus within which the normative content of administrative law (its rules and principles) have been conceptualised and developed. During that period the concept has become emblematic of a determinedly – rather than necessary – 'statutory approach' to the identification and articulation of the norms of administrative law.[6] Understanding jurisdictional error as a totem thus helps to explain why the concept has become so prominent in the Australian cases and literature on administrative law and, also, why it continues to mystify despite its familiarity.

Having established that jurisdictional error is pivotal yet not central – and that what *is* central is the statutory approach – the second branch of the argument (developed in Parts IV and V) casts doubt on the extent to which the statutory approach to jurisdictional error is constitutionally required. Lisa Burton Crawford and Janina Boughey have offered the best constitutionally grounded argument hitherto proposed for the retention of jurisdictional error as the beating heart of administrative law.[7] Yet even their sophisticated defence falls short of requiring what can be described as a determined or full-throated version of the statutory approach to administrative law norms. The constitutional premises on which jurisdictional error rests are, I will argue, less doctrinally demanding than is implied by all the talk of the concept's 'centrality'.

The confusion of that which is merely pivotal for that which is central can lead to the worship of a totem, instead of seeing it for what it is. By treating jurisdictional error as itself 'central' rather than merely pivotal, the obvious risk is that we fixate on a totem and thereby divert attention from what is truly central. The final Part of this article (Part VI) considers some of the consequences the embrace of jurisdictional error as a conceptual totem has had for judicial exegesis

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5 Another way to explain this key contrast – between, on the one hand, jurisdictional error as a prominent because pivotal concept and, on the other, it being prominent because central (and thus explaining what is really going on) – is by reference to a feature of legal concepts more generally. Legal concepts are 'Janus-faced': they 'look both to the criteria of their correct application (for their meaning) and the legal consequences attached to their authoritative use (for their legal, perlocutionary effects)': Michael S Moore, 'Authority, Law, and Razian Reasons' (1989) 62(1) *Southern California Law Review* 827, 841.

6 The law of judicial review, it is commonly noted, comprises both a set of procedures and remedies enabling the review of unlawful government power, and a body of substantive legal norms with which government decision-makers must comply. See, eg, Adam Perry, 'Plan B: A Theory of Judicial Review' (Research Paper No 66/2017, Faculty of Law, University of Oxford, 22 November 2017) <https://ssrn.com/abstract=3075886>.

7 See Janina Boughey and Lisa Burton Crawford, 'Jurisdictional Error: Do We Really Need It?' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 395; Crawford and Boughey (n 3).

of the law and the development of administrative law scholarship in Australia. The conclusion is that it is questionable whether the doctrinal and scholarly attention devoted to the concept of jurisdictional error has generated an illuminating or helpful framework for understanding the substantive principles and requirements of administrative law.

## II PROMINENT ≠ CENTRAL

My first task, then, is to demonstrate that the prominence of the language of jurisdictional error in Australian judicial review does not show that some underlying concept of jurisdictional error is itself central to understanding the operative norms of administrative law. Although the 'idea of policing the limits of jurisdiction is deeply embedded in the history of the common law',[8] the supposed centrality of jurisdictional error to Australian judicial review is a surprisingly recent claim.[9] At its simplest, 'jurisdiction' refers to authority to decide.[10] The High Court's definition of the concept of jurisdictional error reflects this basic idea: '[t]here is a jurisdictional error if the decision-maker makes a decision outside the limits of the functions and powers conferred on [them], or does something which [they] lacks power to do'.[11] Where a decision-maker lacks legal authority, any resultant decision is invalid.[12] In this way, notions of jurisdictional error and invalidity have, in modern Australian law, come to be understood as flip sides of the same coin.[13]

There is nothing especially tricky or difficult about the basic concept of jurisdictional error. But this simplicity is deceptive as it pushes all the hard questions further down the line. How exactly is the scope of an administrator's authority to be determined? As is well known, the courts have a long track record of leaving plenty of wiggle room in their answers to that question – raising

8 Peter Cane, 'Divided by the Common Law: Controlling Administrative Power in England and the US' in Swati Jhaveri and Michael Ramsden (eds), *Judicial Review of Administrative Action in the Common Law World: Legacies and Evolutions* (Cambridge University Press, forthcoming) 26.

9 The rise to prominence of the language of 'jurisdictional error' in High Court jurisprudence is charted in Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17(2) *Australian Journal of Administrative Law* 92.

10 In its 'most generic sense', jurisdiction simply 'refers to the scope of the authority that is conferred on a repository': *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1, 7 [23] (Kiefel CJ, Gageler and Keane JJ) ('*Hossain*').

11 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163] (Hayne J), quoted in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 571 [66] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

12 In *Hossain* (2018) 359 ALR 1, 7–8 [24], Chief Justice Kiefel and Justices Gageler and Keane put the point this way: '[A] decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as "no decision at all"'.

13 Invalidity is often thought to be a logical entailment of jurisdictional error, rather than a doctrinal choice about the consequences of certain errors. For probing criticism of that view, see Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76(2) *The Cambridge Law Journal* 289. The focus of Justice Nye Perram's (extra-judicial) critique of jurisdictional error is the bluntness of invalidity as a response to illegality in government decision-making: see Justice Perram (n 1).

suspicions that outcomes in hard cases are 'driven by immediate policy considerations' rather than doctrine.[14] Courts in some jurisdictions responded to the resultant doctrinal wreckage by turning to alternative concepts. However, with the constitutional cards provided by section 75(v) of the *Constitution* in hand, the High Court has doubled down on jurisdictional error as the language through which the limits of legal authority must be recognised.

But what, exactly, do Australian administrative lawyers mean to communicate when they assert the *centrality* of jurisdictional error? The oft-repeated claim that jurisdictional error has become central normally follows the identification of two important contexts where the categorisation of an error as jurisdictional does indeed function as a legal pivot point. The first context has pre-Federation roots; the second is rooted in the High Court's interpretation of the *Constitution*. In the older context, establishing a jurisdictional error continues to be a prerequisite for the availability of particular remedies. Judicial review was forged on a remedial anvil, where the practical focus was to hammer out the requirements for a nominated prerogative writ. As the law developed, the writs, as a rule, were available only to remedy errors concerning a decision-maker's authority to make a valid decision (that is, where a jurisdictional error could be established).[15] The only thing that makes any of this seem at all new is that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') was supposed to largely sweep aside this way of thinking about judicial intervention.[16] Suffice it to say, it did not. The reality is that for the last 30 or so years a high proportion of doctrinally significant judicial review cases have concerned the availability of the 'constitutional writs' (at the Commonwealth level) or orders akin to the old prerogative writs in the Australian State Supreme Courts' supervisory jurisdiction (which now, of course, partly hangs from a constitutional peg).[17] In these contexts, jurisdictional error thus continues to be the pivot point on which judicial intervention in executive decision-making swings. Before the constitutional writs named in section 75(v) of the *Constitution* can be issued, a jurisdictional error must be established.[18] The availability of mandamus, prohibition and (typically) certiorari at the State level also continues to hinge on the identification of a jurisdictional error.[19]

In this remedial (or, ordinary administrative law) context, jurisdictional error identifies the instances where courts may intervene ('supervise') the exercise of a

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14 Margaret Allars, '*Chevron* in Australia: A Duplicitous Rejection?' (2002) 54(2) *Administrative Law Review* 569, 571.

15 The availability of certiorari for non-jurisdictional errors of law introduces an exception to the rule in state administrative law.

16 Cf *Hossain* (2018) 359 ALR 1, 7 [21] (Kiefel CJ, Gageler and Keane JJ).

17 The relationship between State Supreme Courts' supervisory jurisdiction and the *Constitution* was established and elaborated in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580–1 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Public Service Association of South Australia v Industrial Relations Commission (SA)* (2012) 249 CLR 398.

18 See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

19 For a recent discussion of the jurisdiction of the Supreme Court of New South Wales to make an order in the nature of certiorari for errors that are not jurisdictional, see *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225, 232–3 (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

power conferred on an executive decision-maker. Judicial review's most powerful remedies are thus typically limited to cases of failure to exercise jurisdiction or excess of jurisdiction. More recently, however, the concept of jurisdictional error has also been deployed to mark out the so-called minimum provision of judicial review entrenched by the *Constitution* (at the Commonwealth and State level).[20] In this constitutional context, as in the remedial context, jurisdictional error again marks a division of power between institutional actors. In the constitutional context, however, it also marks a quite distinct division: the limits of a parliament's power vis-a-vis the courts. The High Court has held that neither the Commonwealth Parliament nor the Parliaments of the States can preclude judicial review for jurisdictional errors, though they may (it is generally thought) in relation to non-jurisdictional errors.[21]

In both contexts, the distinction between jurisdictional and non-jurisdictional errors is pivotal because it marks an important boundary. Important legal consequences follow the recognition that an error is jurisdictional in nature in both instances. But while the language of jurisdictional error is deployed to allocate power between institutional actors, the simple idea of limited authority – the concept underlying jurisdictional error – cannot be said to indicate *how* the boundary lines are to be drawn.[22] The pivotal (or boundary-marking) role of jurisdictional error should not, therefore, be confused with its centrality in any substantive sense.

One way of illustrating this point is to observe that it would be odd if the substantive content of jurisdictional error were, in each of the judicial review contexts, determined in the exact same way. In the first (remedial) context, the concept of jurisdictional error includes all those presumptively applicable norms that bind government decision-makers.[23] Only if certain norms or requirements have been breached (or if any conditions on the existence of power remain unfulfilled) will there be a ground for a remedy to issue on the basis that there has been a jurisdictional error. In the second (constitutional) context, jurisdictional error marks the limits of a legislature's power to loosen or free government decision-makers from the bonds of the generally applicable norms of administrative law. There is no a priori reason to think that the norms that must bind administrators as a matter of a constitutionally required baseline will coincide with the set of norms that should generally apply. That would be to assume that a

20 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

21 Putting to one side speculation introduced in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 about whether the constitutional injunction may be available for non-jurisdictional errors. For discussion of this thought bubble, see Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 114. In the context of cases where the source of judicial review jurisdiction is the *Australian Constitution*, the language of jurisdictional error has thus been used to mark out the courts' jurisdiction to grant remedies *and* the limits of an Australian parliament's legislative authority to diminish that jurisdiction. The result has been mixed messages about the extent, if any, to which the entrenched minimum provision of judicial review is constituted by substantive principles that cannot be evaded by a determined and well-advised legislature.

22 This point has also been made by describing a finding that an error is a jurisdictional error as 'conclusory': Aronson, 'Jurisdictional Error without the Tears' (n 2) 330, 333.

23 *Hossain* (2018) 359 ALR 1, 7 [23] (Kiefel CJ, Gageler and Keane JJ).

system's minimum operational requirements are the same requirements needed for a system to function well.[24] For this reason, it is at least plausible that understandings of jurisdictional error will – at least in some respects – diverge in the two contexts. Further, the possibility that the content of jurisdictional error might be determined by different principles in each context suggests that we should be careful about assuming that the idea of limited authority itself meaningfully provides an organising principle of judicial review law.

The simple point, however, is that the pivotal roles played by jurisdictional error do not, without more, indicate the concept is central to understanding administrative law's norms.[25] Judgments may beat to the drum of jurisdictional error and the noise may be loud. But as the category merely marks conclusions reached by reference to other ideas or principles about the availability of a remedy or whether review can be excluded, the noise is liable to distract attention from those underlying ideas.[26] Everything depends on how the concept is filled with meaning in the particular contexts in which it is used.

## III JURISDICTIONAL ERROR AND THE STATUTORY APPROACH

What underlying principles or ideas have been enlisted to mark the boundaries designated by jurisdictional error? If we can identify these principles then we are closer to understanding the inner workings of judicial review and, therefore, what may truly be considered central to it.

In relation to the constitutional context, where jurisdictional error marks a baseline of review immune to legislative override, the High Court has remained relatively tight-lipped. The key questions left unanswered by the 2003 decision in *Plaintiff S157/2002 v Commonwealth* remain unanswered.[27] Some scholars (and at least one Justice of the High Court)[28] think that jurisdictional error in this context

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24 Cf Will Bateman, 'The *Constitution* and the Substantive Grounds of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39(3) *Federal Law Review* 464, 469, which distinguishes between jurisdictional error as an administrative law doctrine and as a constitutional law doctrine.

25 Of course, it can also be observed that judicial review cases continue to be brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') where the concept is neither central nor pivotal. Nor is the concept central in the context of appeals on questions of law. This is not to preclude indirect influence (in these contexts) of subterranean thought associated with the jurisdictional error case law. For example, such thought can be relevant in determining the appropriateness of orders made under section 16 of the *ADJR Act*: see *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253, 257 (Sheppard and Wilcox JJ); *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, 44–5 [141]–[143] (Moore and Lander JJ).

26 For example, Bateman (n 24) 465, 502 argues that the best way to unlock the content of jurisdictional error in the context of the entrenched minimum provision of judicial review is by reference to a non-arbitrariness principle. On that approach, the underlying non-arbitrariness principle enlivens the conceptual shell of jurisdictional error (in the constitutional context).

27 (2003) 211 CLR 476.

28 See Lisa Burton Crawford, 'Who Decides the Validity of Executive Action? No-Invalidity Clauses and the Separation of Powers' (2017) 24 *Australian Journal of Administrative Law* 81; Lisa Burton Crawford, 'Expanding the Entrenched Minimum Provision of Judicial Review? *Graham v Minister for Immigration*

should be understood in *exactly* the same way as in its ordinary administrative law context (that is, where it is used to determine when particular remedies are available).[29] Others have expressed some scepticism about that position for the reason that it would render the much-vaunted entrenched provision of review a matter of form rather than substance.[30] The reality is that the principles underpinning the entrenched minimum provision of review remain 'a work in progress'.[31] Thus, although the existence of principles associated with the idea have loomed large as a warning against legislative overreach, they have failed to crystallise.

In contrast, the task of understanding how the substantive content of jurisdictional error is determined in ordinary judicial review cases – where a parliament's powers to diminish the judicial review function are not in issue – is more straightforward. To be sure, the case law is sometimes a heady concoction. But the methodological distillate is clear enough. Jurisdictional error is to be determined by an application of the logic of the High Court's reasoning in *Project Blue Sky Inc v Australian Broadcasting Authority*.[32] Whether or not an error has the remedial consequence of invalidity (and is, by extension, a jurisdictional error) is ultimately a question of statutory purpose. This turn to statutory interpretation (and through it to regulatory purpose and statutory specifics) latterly found reflection in the High Court's aversion to 'a rigid taxonomy of jurisdictional error' and refusal to mark out the concept's 'metes and bounds'.[33]

With Will Bateman, I have argued that this approach to filling the conceptual shell of jurisdictional error cemented a broader way of thinking about the norms of administrative law in Australia.[34] We dubbed this the 'statutory approach' and contrasted it with an alternative approach – namely, the 'grounds' (of review) way of thinking that had been developed by the judges from the middle decades of the twentieth century and informed the categorised grounds listed in the *ADJR Act*. The emphasis on the statutory approach in the identification and specification of the legal norms of administrative law has, we contended, pushed the grounds approach into the background. This claim about the ascendency of the statutory approach should not simply be understood as an overall framing of the analysis by reference to statutory purpose or intention. The core interpretive claim is that, within this frame, there has developed a discernible emphasis on statutory purpose

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*and Border Protection*' (2017) 28(4) *Public Law Review* 282. See also Justice Edelman's dissenting reasons in *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350, 367─404.

29 This context includes cases where a constitutional source of jurisdiction is invoked but there is no question of whether or not legislation has imperilled the minimum provision of judicial review.

30 See Bateman (n 24); Mark Aronson, 'Between Form and Substance: Minimising Judicial Scrutiny of Executive Action' (2017) 45(4) *Federal Law Review* 519, 537─8; Leighton McDonald, '*Graham* and the Constitutionalisation of Australian Administrative Law' (2018) 91 *Australian Institute of Administrative Law Forum* 47.

31 Mark Aronson, 'Retreating to the History of Judicial Review?' (2019) 47(2) *Federal Law Review* 179, 192.

32 (1998) 194 CLR 355. See also *Hossain* (2018) 359 ALR 1, 8 [27] (Kiefel CJ, Gageler and Keane JJ).

33 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573─4 [71]–[73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

34 Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153.

and particulars, and a corresponding reluctance to identify and articulate *ex ante* administrative law norms and requirements.

It is, then, the centripetal pull of statutory specifics and purposes – and a concomitant de-emphasis of generally applicable norms – that allows the High Court's methodology to be described as determinedly statutory. In a similar vein, Justice Basten has observed that the High Court appears to have licensed 'the abandonment of categories' and replaced this approach with 'a critical concept of "jurisdictional error"'.[35] This reorientation of the law, Justice Basten observes, appears 'to involve a departure from the known taxonomy, without a stable alternative standard'.[36] This claimed movement in the law, encapsulated by the statutory approach, is thus not merely marked by acceptance that the ultimate legal source of administrative law norms is statutory.

The mixed empirical and interpretive question of whether or not there has been a discernible shift to what I am now describing as a *determinedly* statutory approach is not susceptible of a straightforward answer. In particular, it is not susceptible to straightforward judicial resolution as the distinction between the 'grounds approach' and the 'statutory approach' demarcates ways of thinking rather than clear-cut doctrinal rules that can be authoritatively settled. Moreover, the statutory and grounds approaches clearly have points of overlap. For these reasons, the ascendency of the statutory approach is best understood as a matter of emphasis and degree.[37] It is also the case that when arcane layers of historical analysis intrude in jurisdictional error cases (as they often do), the first-brush simplicity of the statutory approach to pouring content into jurisdictional error's conceptual shell is sometimes occluded from view. Yet attempts to identify doctrinal 'schemata' or meta-level orientations within legal thought are not undermined by instances of overlap or examples which blend approaches if the key concern is to identify 'the dominant style and the nature of the methods that are foregrounded in the judicial analysis'.[38]

The gist of the interpretive claim, then, is that in contexts where jurisdictional error must be established to get a remedy, naming the ground of review that describes the legal error increasingly matters less than simply finding that there has been a jurisdictional error per se.[39] The conclusion that an error is jurisdictional is still sometimes formulated by reference to the language of the grounds – but jurisdictional errors are often identified without any recourse to that nomenclature. Moreover, to the extent the language of grounds persists, the normative content it

35 Justice John Basten, 'Separation of Powers: Dialogue and Deference' (2018) 25(2) *Australian Journal of Administrative Law* 91, 97.

36 Ibid. See also Justice John Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 35.

37 These methodological issues are discussed in Bateman and McDonald (n 34) 153–9.

38 Dean R Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018) 7.

39 In Bateman and McDonald (n 34) 163–73, the shift was tracked predominantly by reference to key intellectual developments identified in the High Court's judicial review jurisprudence. But examples of the ascendency statutory approach can also readily be found in the Federal Court of Australia's efforts to implement that jurisprudence. See, eg, *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; *Minister for Immigration and Border Protection v Streeton* (2016) 237 FCR 1.

contains is doggedly tethered to, and adjusted by, statutory context. A prominent example is that the norm of legal reasonableness is not nowadays specified by reference to a default ground or standard of judicial review but is to be found by divining the 'standard indicated by the true construction of the statute'.[40] This partly explains the why the cases on jurisdictional error have been a source of bewilderment to practitioners and scholars alike, despite the simplicity of the theory on which the outcomes of the cases now rest. Everything depends on the statute, but there is little analytical clarity about the relationship between the (judge-made) concepts of jurisdictional error and the grounds of review which are productive of the default or general norms of administrative law.

By providing the singular doctrinal locus for this shift in how administrative law norms are understood and specified, jurisdictional error has become increasingly prominent in the cases and commentary on those norms. The concept of jurisdictional error is 'central', however, only to the extent that it represents what is central, namely, the 'statutory approach' to the identification and elaboration of the general norms of administrative law. This is why it is apt to characterise jurisdictional error as a conceptual *totem*: it has become emblematic of a particular way of thinking about administrative law norms.

Jurisdictional error need not have become totemic in this way. The ascendency of the statutory methodology it has come to represent is not required as a matter of conceptual necessity. There is nothing in the basic concept of jurisdiction that demands a statute-centric approach.[41] The idea of limited legal authority does not tell us how limits are to be drawn; it certainly does not demand that limits to authority (even statutory authority) be solely set by the logic of legislative power.[42] Thus, it is not at all obvious why the concept of jurisdictional error requires a statutory approach for the identification and articulation of *all* of the norms of administrative law.

The ascendency of the statutory approach might be associated with democratic advantages (real or perceived).[43] Be that as it may, any purported democratic claim to legitimacy falls short of showing that the High Court's contemporary approach to jurisdictional error is constitutionally required (rather than being merely desired). That is the question to which I now turn.

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40 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363–4 [67] (Hayne, Kiefel and Bell JJ). See also *Hossain* (2018) 359 ALR 1, 8 [27] (Kiefel CJ, Gageler and Keane JJ).

41 Indeed, the High Court has not offered a philosophical or conceptual defence of the necessity of jurisdictional error in these terms. James Grant has recently argued that jurisdictional error should be the central concept in administrative law on philosophical grounds. His argument, however, is inconsistent with the statutory approach; he specifically rejects a concept of jurisdiction that is cabined within statutory authority. For this reason, his account is of limited use in explaining how the High Court's approach to jurisdictional error can be understood as central: see James A Grant, 'Reason and Authority in Administrative Law' (2017) 76(3) *Cambridge Law Journal* 507.

42 On this point, see Part V below.

43 For discussion, see Bateman and McDonald (n 34) 175, 178–9.

## IV THE CONSTITUTIONAL FOUNDATIONS OF THE STATUTORY APPROACH TO JURISDICTIONAL ERROR

It is often alleged or assumed that the concept of jurisdictional error – and the distinction between this category of error and non-jurisdictional legal error – is hard-wired into our constitutional arrangements.[44] However, as Crawford and Boughey have shown, the constitutional foundations of this assumption have been overstated by the High Court.[45] The text, structure and history of section 75(v) do not demand adherence to jurisdictional error (still less the statutory approach to fill it out), nor does the Australian separation of powers doctrine.[46] Perhaps recourse to the concept of jurisdictional error is 'plausible enough' given our constitutional inheritance,[47] but Crawford and Boughey make a powerful case that parochial features of the *Constitution* do not require its adoption.

Crawford and Boughey's purpose, however, is not to debunk jurisdictional error, but to firm up its foundations.[48] Having relied upon their critique, my focus here will be on their alternative argument for the retention of jurisdictional error as central to how Australian administrative law is best conceptualised.

According to their helpful precis of the doctrine, jurisdictional errors are *invalidating* errors whereas non-jurisdictional errors of law are not. And, for statutory powers, the line between the two categories of legal error is to be drawn by reference to what the 'empowering statute stipulates'.[49] Their aim is to defend the High Court's 'current' approach to identifying jurisdictional error, namely, a statutory approach that involves 'interpreting the empowering statute'.[50] Crawford and Boughey's defence of the Australian approach to understanding jurisdictional error is nuanced, but the nub of their 'legislative power rationale'[51] for the retention of a statutory approach to jurisdictional error is elegantly simple.[52]

Although there are constitutional limits on legislative power in Australia, Crawford and Boughey argue that there are no significant constraints on the 'scope

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44 See, eg, Bradley Selway, 'The Principle behind Common Law Judicial Review of Administrative Action: The Search Continues' (2002) 30(2) *Federal Law Review* 217, quoted with approval in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 25 (McHugh and Gummow JJ).

45 Boughey and Crawford (n 7) 406–13.

46 On the role of the separation of judicial power, see also Bateman and McDonald (n 34) 166–7.

47 Cheryl Saunders, 'Constitution as Catalyst: Different Paths within Australasian Administrative Law' (2012) 10(2) *New Zealand Journal of Public Law and International Law* 143, 157.

48 Crawford and Boughey are not wedded to the language of jurisdictional error, but contend that the 'idea that that label presently connotes in Australia is necessary': Crawford and Boughey (n 3) 22.

49 Ibid 20.

50 Ibid 19.

51 Boughey and Crawford (n 7) 413–15.

52 Although they use the language of the 'statutory approach' the extent to which Crawford and Boughey believe that the High Court has gravitated towards statutory purposes and particularism, backgrounding *general* administrative law norms in administrative law jurisprudence, is not entirely clear. The High Court's rejection of categories and taxonomy, they say, is consistent with the (necessary) primacy of the statute. Moreover, application of the statutory approach is said to be 'necessarily somewhat ad hoc': see Crawford and Boughey (n 3) 22. Nevertheless, it may be that Crawford and Boughey would reject, as an empirical or interpretive matter, the thesis that there has been a discernible shift to what was described in Part III as a *determinedly* statutory approach.

of executive power that Parliaments may confer', nor, they maintain, are there limits on the conferral of powers subject to legal limits which are not conditions of validity.[53] It is in this way that the rule of law and the principle of parliamentary supremacy can both be said to be foundational in the Australian constitutional system.[54] Viewed in light of these principles, jurisdictional error is not only explicable as a 'sound device for distinguishing between those errors of law that a court can remedy, and those that a court cannot',[55] but 'it may be the only device that coheres with the constitutional distribution of powers between the Parliament and the courts'.[56] Thus, the 'core of the case' for jurisdictional error – and maintenance of a category of non-jurisdictional errors of law – is 'to respect the legislative supremacy of Parliament, and its power to define the scope of statutory power as it thinks fit'.[57] This argument is not constitutionally parochial – it applies with equal force in any jurisdiction where parliamentary supremacy (at least in relation to Parliament's powers to determine the scope of executive power) is acknowledged. And although not put on this basis, the argument has obvious normative attraction to the extent that legislatures have comparatively better democratic credentials to set the scope of executive powers than do courts.

The legislative power rationale is no less powerful for being straightforward. *Ceteris paribus*, simplicity is a theoretical virtue. Nevertheless, the justificatory success of the legislative power rationale is modest when assessed in the context of the ascendancy of the statutory approach in Australian administrative law.[58] If the argument is supposed to justify the statutory approach (as described in Part III), it fails. It fails because the legislative power rationale does not require it. If the defence, on the other hand, establishes merely that there must be *a* concept of jurisdictional error (and, also, a concept of non-jurisdictional error of law) to reflect an Australian parliament's authority to 'give an administrative decision whatever force it wishes',[59] then it lacks explanatory power. It lacks explanatory power because it does not explain *why* the statutory approach to jurisdictional error has swamped alternative approaches to thinking about how administrative law norms are identified and articulated. The recognition of Parliament's authority to

53 That is, conditions the breach of which will be mere non-jurisdictional errors. See Crawford and Boughey (n 3) 20.

54 Ibid.

55 Ibid 21–2. Crawford and Boughey reject the view that the idea of non-remediable legal error is either incoherent or incompatible with the rule of law. Every system, they rightly suggest, will likely tolerate a certain level of legal error and therefore will need to devise doctrine or filtering mechanisms for that purpose.

56 Ibid 22. The distinction between jurisdictional and non-jurisdictional errors is 'required because of the constitutional distribution of powers between Parliament and the courts vis-à-vis executive power': Crawford and Boughey (n 3) 20.

57 Boughey and Crawford (n 7) 414. For sharp questions about the continuing reliance on the notion of parliamentary sovereignty and supremacy in the Australian constitutional context: see Ryan Goss, 'What Do Australians Talk about When They Talk about "Parliamentary Sovereignty"?' (Public Law Conference, Melbourne Law School, 11–13 July 2018).

58 It is more successful if its ambitions are limited to the maintenance of a category of non-jurisdictional error of law.

59 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613–4 [47] (Gaudron and Gummow JJ).

set the scope of executive power does not explain, that is, why a full-throated version of the statutory approach has emerged as the dominant way of conceptualising the nature of administrative law norms in Australia.

Before elaborating on these points (in Part V), it is worth noting how the 'legislative power rationale' for the statutory approach to jurisdictional error does not explicitly explain how the relationship between courts and the executive is to be mediated through the specification of administrative law norms. According to Crawford and Boughey's 'legislative power rationale', the basal reason for the courts to take a statutory approach to the doctrine of jurisdictional error is to ensure doctrinal coherence with the 'constitutional distribution of powers between Parliament and the courts'.[60] This posits that the core function of judicial review judges is to ensure that the executive acts within power, and not without. And when judges review the exercise of statutory powers they are, Crawford and Boughey imply, necessarily directed to ascertaining the scope of those powers through statutory interpretation. As I noted above, one of the key functions of the doctrine of jurisdictional error in Australian administrative law is to allocate power between the legislature and judiciary in the context of a constitutional guarantee of judicial review. It is apparent, then, that this defence of the statutory approach proceeds with this institutional relationship – as opposed to that between the courts and executive decision-makers – most clearly in view.

Given this focus, it is not surprising that the argument has obvious ramifications for how the entrenched provision of judicial review is understood. To proceed from what I will call the 'parliamentary supremacy premise' (in relation to the scope of executive powers), is clearly to take a parsimonious position on the content of the entrenched minimum provision of judicial review.[61] However, accepting arguendo the parliamentary supremacy premise, does this acceptance also resolve the question of how jurisdictional error should be fleshed out in the context of demarcating the relationship between the courts and executive decision-makers? In this ordinary administrative law context – when no issues of legislative power to limit judicial review arise – jurisdictional error functions as the conceptual shell within which the default norms of administrative law (ie principles and requirements of general applicability) are developed.

## V TWO QUESTIONS (AND A HYBRID ANSWER)

To think through whether or not a statutory approach to defining administrative law norms is required for the task of elaborating the default norms of administrative law I will ask two questions. The first question is this: does the logic of parliamentary supremacy (on the scope of executive powers) require that *all* norms of administrative law must necessarily be sheeted home to the statute?

60 Crawford and Boughey (n 3) 25.

61 See Crawford, 'Who Decides the Validity of Executive Action? No-Invalidity Clauses and the Separation of Powers' (n 28). This view of the entrenched minimum provision of review has been contested: see above n 28.

The allocation of authority to Parliament to define the scope of executive power (and thus to give an administrative decision whatever force it wishes) does require courts to respect the scope of power so established (by Parliament) when exercising judicial review jurisdiction. It would certainly not be consistent with such legislative authority (that is, the parliamentary supremacy premise) for the courts to refuse to enforce statutory requirements for the valid exercise of executive powers. For this reason the parliamentary supremacy premise (if accepted) does require that one of judicial review's norms is that 'mandatory' conditions on power must be fulfilled and that statutory limits on power must not be exceeded.[62] This requires that jurisdictional error for breach of statutory requirements be recognised as a ground of judicial review. Furthermore, Crawford and Boughey persuasively argue that the parliamentary supremacy premise also entitles a parliament to establish legal requirements which, if breached, do not invalidate decisions (that is, to create legal errors that are non-jurisdictional).[63] Yet none of this compels the view that all legal norms binding on statutory decision-makers or conditions which must be fulfilled for a power to be validly exercised must derive from statute.

To explain why, I need (with due apologies) to return to the debate between the so-called 'ultra vires' and 'common law' theories of the foundations of judicial review. According to the ultra vires approach, administrative law's norms are to be understood as implied legislative conditions on statutory powers; whereas, on the common law theory, the substantive norms of administrative are judge-made, imposed by an exercise of judicial, not legislative, power. One of the many confusions generated by this debate arose from a premise shared by participants on both sides: that each theory is offered as a complete answer to the question of the constitutional foundations of judicial review. Participants on both sides of the debate (especially in England) assumed that either *all* the grounds of review are sourced in statute or *all* ultimately spring up from the common law.[64] Yet clearly there is an alternative, middle position: some conditions on statutory power enforced by the judges are justified by the logic of statutory authority, but others by judicially developed principles. Not only is the correctness of this premise a theoretical possibility, but it also seems to account for the relevant judicial review 'data' in a manner that minimises theoretical exertion (I return to this point below). Would the recognition of two legal sources of authority for administrative law norms be inconsistent with the correctness of parliamentary supremacy over the scope of executive powers? No, it would not.

Compliance with judicially imposed norms and requirements will not undermine a parliament's legislative authority to set the scope of executive powers so long as those norms and requirements place conditions on the exercise of the power rather than depriving the executive decision-maker of the capacity to exercise power that the legislature has conferred.[65] Conditions on a power (like a

62 Review on the basis of express or implied statutory limits on powers in this way respects a parliament's authority to set the scope of executive powers.

63 Crawford and Boughey (n 3).

64 Thomas Adams, 'Ultra Vires Revisited' [2018] (January) *Public Law* 31, 32.

65 This argument is ably made in ibid.

requirement to give a hearing, to consider certain matters, to make inquiries, or to give reasons) do not (or, at the very least, need not) limit the scope of the power that a parliament has actually conferred.[66] It is, of course, true that failure to comply with a judicially imposed norm or condition does result in invalidity – in just the same way as failure to comply with a mandatory requirement imposed by the Parliament will invalidate a decision. Nevertheless, so long as requiring compliance with a condition imposed by the judiciary does not remove the power granted by the Parliament, there is no necessary inconsistency. For this reason, it is possible to accept that the logic of parliamentary supremacy requires that non-compliance with statutory conditions or limits must be an invalidating error, without also holding that *all* of the legal norms which constrain the exercise of statutory powers have been imposed by statute.

The premise of parliamentary supremacy does not, therefore, require all administrative law norms – even those that bear 'no obvious relation' to the particular statute being administered[67] – to be conceptualised as deriving from statute. But even if that is not correct, we can ask a second question: does the parliamentary supremacy premise also demand an approach to statutory interpretation that (in Justice Basten's words) abandons 'categories' and which is determinedly (albeit not relentlessly) focused on statutory purposes and specifics?

I take it that anyone who is familiar with the administrative law's historical development would acknowledge that the courts have played a substantial hand in the development of at least some of the so-called grounds of judicial review. As a ground of review establishes the substantive basis for judicial intervention, it also necessarily establishes a legal norm or requirement with which executive decision-makers must comply to make a lawful decision. The point to emphasise for present purposes is the broad acceptance by judges and scholars that at least some of the norms and requirements that underpin the grounds of judicial review bear no obvious connection to an exercise of legislative power. The most natural explanation, as suggested above, for this well-known feature of the law of judicial review is that the judges have consciously or unconsciously driven the adoption of these doctrines. The continuing references, including by Australian administrative lawyers, to the 'common law' grounds of review reflect precisely this acceptance. One of administrative law's perennial questions is how to calibrate its general/default requirements and principles with the particulars of statutory powers and contexts. But the creative role played by the judges in the emergence of the body of administrative law doctrine that transcends statutory specifics and particular contexts is widely conceded. If this were not so, judicial review would be comprised only by its remedies and procedures, and its normative content could only be understood regulatory sector by regulatory sector.

The judges' contributions to administrative law norms can, however, be acknowledged yet safely cabined within the 'ultra vires' account of the

66 Depending on how conditions of legal reasonableness are understood, they may but need not abrogate a decision-maker's capacity to exercise a statutory power conferred on them. See ibid 35, 41–2. See generally above n 21.

67 This helpful formulation is borrowed from Adams (n 64) 32.

constitutional foundations of judicial review.[68] In theory, there is no reason why principles of statutory interpretation cannot, through interpretive presumptions, leave plenty of space for norms which bear no obvious relation to particular acts of legislation to develop.[69] It was largely for this reason that Australian jurists, after dipping their toes into the murky waters of the ultra vires common law debate, concluded that picking a winner in that dispute was practically unimportant. It was (and is), many have observed, possible to continue to recognise administrative law's general norms regardless of whether they are justified as common law obligations subject to legislative override or, in the alternative, as implied legislative conditions on statutory powers subject to contrary indications. No matter which theory is correct, the substance of the norms applied by the courts to determine the legality of executive decisions can be held constant.

In commenting on the legal source of the requirement on executive decision-makers exercising statutory powers to give a fair hearing, the High Court recently put the point this way:

> It is in this sense [whereby principles of statutory construction not displaced by statute are understood as part of the common law] that one may state that 'the common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.[70]

The point is a good one. The recognition of administrative law norms as the outworking of principles of statutory interpretation need not lead to any change in how the courts calibrate statutory specifics with generally applicable principles.

Nevertheless, if I am right that jurisdictional error has become totemic of an approach that encourages judges to focus their interpretive efforts on statutory specifics and purposes, it is possible that the associated rhetoric has in practice contributed to the judicial reticence to emphasise and develop general categories and principles.[71] Here, what matters is not whether statutory interpretation is a possible explanation of judicial creativity. It is. The relevant question is whether the grandiloquence of the statutory approach has fed into a change about how judges think about and justify their judicial review role. Through the language of jurisdictional error, the statutory approach has installed the Parliament and its statutes at the centre of the legal limits on executive powers and (re)directed judicial creativity through an avowedly statutory channel.[72] It is at the very least

68 Namely, the view that the authority of the norms and requirements of administrative law are ultimately (though not expressly or impliedly) based on an exercise of legislative power.

69 Justice Brennan's preferred word for interpretive creativity was 'sophisticated': see *A-G (NSW) v Quin* (1990) 170 CLR 1, 36.

70 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 *CLR* 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ) (citations omitted).

71 Clearly, we are talking about distinctions that are drawn in terms of degrees, not fixed lines. Statutory specifics and particulars will always provide the context for the application of judicial review's principles. Nevertheless, the strength of the centripetal force exerted by particular statutory contexts exerted upon an interpreter of a statute can vary.

72 For an extended discussion of this point, see Bateman and McDonald (n 34) 175 ff.

possible that this emphasis has had some influence on how judges approach their judicial review function. If we are told over and over again that jurisdictional error is all about what the statute actually requires and allows – that the only question to be asked and answered is whether a decision was either inside or outside the power which Parliament conferred – it is possible this message has influenced how judges approach their judicial review role. The extent to which judges have so been influenced rests on contestable interpretations of the judicial review data,[73] but the analytical frame is apt to push *ex ante* default norms into the background.

Thought about this way, it becomes obvious that the determinedly statutory approach that has (arguably) dominated recent doctrinal thinking in the cases is not set in stone. In particular, the statutory approach is not locked into place by the High Court's acceptance of ultra vires as a theoretical stipulate. Indeed, it may well be that after sufficient time spent scouring statutes for normative content Australian courts may become disenchanted with the totemic role currently played by jurisdictional error. In fact, there are some early, albeit inconclusive, signs that this process is already underway. Of particular interest is Justice Gageler's increasing use of the language of 'common law presumptions' as the foundation of the default standards that are taken to be implied conditions on statutory conferrals of power.[74] Notably, this locution was recently picked up by a plurality of the Court in *Hossain v Minister for Immigration and Border Protection* ('*Hossain*'), where Justice Gageler was joined by Chief Justice Kiefel and Justice Keane. There, the point made was not only that 'common law principles' inform statutory construction. These principles 'reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary'.[75] This statement frankly recognises that the statutory approach to jurisdictional error cannot avoid qualitative judgments (over which the judges superintend) informing the outcomes of cases. Whether it portends a greater emphasis in the articulation of legal standards of good administration – (re)packaged in the language of default statutory presumptions – will depend on the extent to which Justice Gageler's thinking gains traction.

To sum up the argument thus far: jurisdictional error is pivotal but not central. This pivotal but not central feature has enabled jurisdictional error to function as a conceptual totem, emblematic of a determinedly statutory approach to administrative law norms. It is that statutory methodology for articulating administrative law norms that can be described as the central organising principle of Australian administrative law. Although the High Court has claimed jurisdictional error is hard-wired into our constitutional arrangements, the methodology it has come to represent for determining when judicial intervention

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73 See above nn 33–8.

74 See, eg, *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408, 421–2 [53]. On the marked contrast between the plurality and Gageler J in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, see Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25(2) *Public Law Review* 117.

75 *Hossain* (2018) 359 ALR 1, 8 [28] (Kiefel CJ, Gageler and Keane JJ).

in administrative decision-making is warranted (namely, the statutory approach) is not required by the parliament supremacy premise. That premise sits at the core of the best available constitutionally grounded argument for jurisdictional error on offer. But an acceptance that Parliament has supreme authority to set the scope of administrative powers is not inconsistent with recognising that administrative law's generally applicable norms principally derive from judicial, not legislative, power. In practice, the rhetoric of parliamentary supremacy and jurisdictional error may encourage an emphasis on statutory purposes and specifics (contrasted with general categories and principles). But, at most, that is a matter of tilt, not necessity. The parliamentary supremacy premise does not, therefore, lock us into a full-throated statutory approach to thinking about administrative law norms. Still less does the concept of jurisdictional error. There is more constitutional flex in our administrative law than sometimes supposed.

## VI THINGS WE DO AND DO NOT TALK ABOUT

Despite the simplicity of the contemporary doctrinal distillate of jurisdictional error (that one must interpret the statute), in the High Court's most recent epistle on the topic Justice Edelman referred to 'deep fissures and uncertainties underlying the notion and nature' of the concept.[76] Given over 20 years of unremitting judicial effort to unlock the mysteries of jurisdictional error (not to mention the contemporary deluge of scholarly writing precipitated by this toil), how can such high levels of confusion persist?

One possible explanation is that the emphasis on jurisdictional error has diverted focus from more direct inquiries into what the judicially created principles and requirements of administrative law are (and, perhaps, what they should be). Blinded by our conceptual totem, it is possible that central questions have been missed or misidentified. In contrast, it is easier to identify the nature of the discourse that the focus on jurisdictional error has promoted. There has certainly been a lot of discussion in the cases about the historical development of the concept and, latterly, its controversial sidekick, non-jurisdictional error on the face of the record.[77] An historically informed understanding of the role of courts as law-makers and controllers of the administration may, of course, yield insights into how the High Court should define their position in the contemporary legal and constitutional landscape. Nevertheless, even as the judgments wrestle with subtleties of English law that developed prior to the full-scale emergence of representative government and the administrative state, perhaps more could be done to relate this learning to the extent to which administrative law's general norms contribute to administrative legitimacy in an administrative state.[78]

76 Ibid 12 [45].

77 See generally *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225.

78 For an argument that the High Court's turn to history is unhelpful, see Aronson, 'Retreating to the History of Judicial Review?' (n 31) 180 ff.

In addition to the recurring focus on history,[79] there is also much contemporary interest in presumptions of statutory interpretation thought to have particular significance in administrative law, like the so-called principle of legality. The principle of legality is invoked to narrow the scope of administrative powers. Although this mode of analysis transparently injects values into judicial review (often in defence of liberty interests), it is focused on the relationship between the courts and the Parliament, rather than the way in which default principles and requirements mediate the relationship between the courts and executive decision-makers. The principle of legality is simply too abstract to provide a source of meaningful guidance for administrative decision-makers. Analogously, the presumption of a 'threshold of materiality' asserted in *Hossain* – which helpfully inserts a dose of the 'real world' into setting remedial consequences of legal errors – does little to clarify the generally applicable administrative law norms themselves. It is a meta-level principle, hovering above the substantive presumptions about how administrators should lawfully exercise administrative powers. To be clear, the overarching interpretive presumptions of 'legality' and 'materiality' are important. Nevertheless, they carry little capacity to provide *ex ante* guidance to administrators about how to lawfully perform their functions, not being directly framed as 'qualitative judgments about the appropriate limits of an exercise of administrative power'.[80]

When it comes to the scholarly literature, a similar story can be told. The voluminous contemporary output on jurisdictional error contains surprisingly little direct examination of the norms of administrative law. Why the discrete (albeit overlapping) norms of administrative law matter, how (if at all) they fit together as part of a package, how they can best be integrated in particular statutory contexts, and whether they usefully contribute to making the administrative state more legitimate, are not questions which feature prominently. One might speculate that these sorts of questions may have been obscured from view because they are not suggested by the idioms of jurisdictional error.

There is, of course, interesting doctrinally-oriented work on particular administrative law norms, especially the principles of procedural fairness.[81] It is also the case that in the heyday of the *ADJR Act*, scholarship on how various administrative law norms fit together and interact was beginning to surface.[82] However, since our preoccupation with jurisdictional error has taken hold, it has become necessary to look outside Australian literature for theoretically informed

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79 See especially *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225.

80 *Hossain* (2018) 359 ALR 1, 8 [28] (Kiefel CJ, Gageler and Keane JJ).

81 See, eg, Kristen Rundle, 'The Stakes of Procedural Fairness: Reflections on the Australian Position' (2016) 23(3) *Australian Journal of Administrative Law* 164; Matthew Groves, 'The Unfolding Purpose of Fairness' (2017) 45(4) *Federal Law Review* 653; Emily Hammond, 'Procedural Fairness in Application Cases: Is Compellability of Consideration a Critical Safeguard?' (2018) 25(2) *Australian Journal of Administrative Law* 122.

82 See Geoff Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24(3) *Melbourne University Law Review* 543. See also Denis J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1990).

or doctrinally rich work on how the set of judicially crafted aspects of judicial review do or might cohere and the extent to which they contribute to government legitimacy in an administrative state.[83] If we want to make progress on these sorts of questions in an Australian context, perhaps recognising jurisdictional error as the totemic concept it has become is a necessary first step.

It may be that after considering such questions the conclusion will be that administrative law should develop along a more ad hoc path – that its general principles should become less, not more, prominent. On this view, judicial review would be defined by the procedures and remedies which enable the review of unlawful government power but not also by a body of substantive legal norms. Be that as it may, it would be wrong to pretend that the totem of jurisdictional error or the *Constitution* requires that conclusion.

## VII CONCLUSION

The High Court is unlikely to turn away from its jurisdictional error jurisprudence in the foreseeable future. Nor are scholars likely to lessen their engagement with that body of law. The question, however, is how that jurisprudence gets built from here. There is room to continue with the nomenclature to mark boundary lines while at the same time focusing more directly on the underlying principles and methodologies which are doing the real work in judicial review cases. Indeed, *Hossain* could be read as a step in that direction.

The legitimacy of administrative governance requires that those exercising statutory power stay within the *terms* of their authority. It also requires that repositories of statutory powers comply with further legal norms that bear no obvious relationship to the statutes being implemented. As matters stand, the Australian courts have authority to police both. While it is undeniable that statutory authorisation is a necessary condition for administrative legitimacy, it is time for judges and scholars alike to question how much more insight about the operative norms of administrative law can be mined from the concept of jurisdictional error – whether by reference to a better understanding of its history or more refined conceptual analysis. Perhaps this is just an elaborate way to suggest that Australian administrative lawyers (judges and scholars alike) have spilled too much ink on jurisdictional error. Given the topic of this article, that closing observation contains more than a hint of irony.

83 See, eg, Perry (n 6); Cass R Sunstein and Adrian Vermeule, 'The Morality of Administrative Law' (2018) 131 *Harvard Law Review* 1924; Knight (n 38).