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Paul R. Verkuil

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CROSSCURRENTS IN ANGLO-AMERICAN ADMINISTRATIVE LAW

PAUL R. VERKUIL*

I. INTRODUCTION

Until recently, the notion of a "system" of administrative law in common law jurisdictions was an unfamiliar, if not contradictory, proposition. The common law presupposes a legal eclecticism that eschews systemic solutions. "Systems" are more the province of the civil law, in which a separate regime of public law is clearly entrenched.¹ Despite their common law heritage, however, both the United Kingdom and the United States have moved toward recognition of special rules for administrative decisionmaking in the judicial and legislative branches. The case now can be made for a concept of public law within the common law world.² Interestingly, an awareness of the special characteristics of administrative law that lead to its being labeled "public" have appeared on both sides of the Atlantic in related ways, but without much express recognition. The Anglo-American Exchange serves as a useful transfer agent for these new developments.

The purpose of this Article is to identify points of interaction and comparison between administrative law in the United

* President and Professor of Law, The College of William and Mary.

The perils of an amateur comparativist are many, but they are more subtle in a country with familiar traditions and a common language. A lawyer's instinct is to look for analogies to his own experiences and to suggest alternatives. When the exercise is an event so well done as the Anglo-American Exchange, the desire to compare becomes irresistible. Thus, I hope to be forgiven for venturing to probe the English legal system with foreign ideas. My only defense is that the hospitality of our British hosts invited inquiry. Of course, they are not responsible for the errors that follow, even though they would be too gracious ever to leave me solely on my own. I benefited enormously from the Exchange and, during a sabbatical thereafter, from discussions with Jack Beatson, Aubrey Diamond, and David Williams.

1. See generally L. BROWN & J. GARNER, *FRENCH ADMINISTRATIVE LAW* 41-56 (3d ed. 1983) (describing the structure of the Conseil d'Etat and the differences between public law and private law in the civil law world).

2. See, e.g., R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 1-11 (1985); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

Kingdom and the United States. Three areas invite special attention: the concepts of parliamentary supremacy and judicial supremacy, the doctrines of natural justice and due process, and the approaches toward codification of administrative procedures. A study of these topics helps explain the growth of public law in both countries and suggests how each legal system might benefit from the other. Of course, the picture portrayed by studying these topics is far from complete. The reader must consider the other Articles in this Symposium³ before reaching any conclusions regarding the current state of administrative law in the two dominant common law countries.

II. BACKGROUND AND CONTEXT

This is not the place to document in detail the common law reluctance to embrace an administrative law system. Nonetheless, an appreciation of how far the United Kingdom and the United States have traveled toward acceptance of public law principles helps in evaluating both our present positions and future courses.

The common law concern with administration is rooted in matters of jurisdiction and power. A separate system of administration in the executive branch, as exists in France,⁴ deprives the courts of their role in resolving disputes between the government and its citizens. That type of system implicates separation of powers and due process concerns in both the United Kingdom and the United States, which were profoundly felt in the formative years of the modern industrial state. In his influential 1908 treatise, A.V. Dicey, Vinerian Professor of English Law, effectively interred the idea of administrative law in England by denying its existence.⁵ The United States also struggled with the concept at this time because of deeply felt reservations about abrogating the courts' constitutional role of judicial review, even though, in contrast to England, administrative agencies had gained acceptance at both the state

3. See especially Justice O'Connor's Article, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643 (1986).

4. See L. BROWN & J. GARNER, *supra* note 1, at 41-47.

5. A. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 326 (7th ed. 1908) ("The words 'administrative law,' . . . are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation. . . . [T]he want of a name arises at bottom from our non-recognition of the thing itself.").

and federal levels.⁶ In the early New Deal period, for example, administrative law was equated with tyranny and even with Marxism.⁷ The events of the 1930's highlighted the tension between courts and administration, but even today the relationship between the judiciary and the executive remains highly political.⁸

In the United Kingdom and in the United States, the courts preserve individual rights. Any system that modifies or eliminates the judicial role raises the specter of excessive governmental control. Eventually, courts in both countries came to recognize that some accommodation between the judicial and administrative roles was necessary. Helped in the United States by Congress' enactment in 1946 of the Administrative Procedure Act⁹ (APA), the legitimacy of administrative decisionmaking, with regular but modest judicial intervention,¹⁰ became accepted by the 1950's.

In more recent times, the quest in both countries has been to locate the optimum relationship between judicial review and administrative decisionmaking¹¹ rather than to debate the legitimacy

6. The Interstate Commerce Commission (ICC) was formed in 1887, and state public service commissions regulating utilities and railroads were commonplace before the turn of the century. *See generally* D. BOIES & P. VERKUIL, *PUBLIC CONTROL OF BUSINESS* 15-24 (1977) (discussing the origins of the ICC); *id.* at 29-30 (discussing early regulation of the electric power industry by the states).

7. *See* G. HEWART, *THE NEW DESPOTISM* 37 (2d ed. 1945) ("Between the 'Rule of Law' and what is called 'administrative law' (happily there is no English name for it) there is the sharpest possible contrast. One is substantially the opposite of the other."); Pound, *Report of the Special Committee on Administrative Law*, 63 A.B.A. REP. 331, 339-46 (1938) (referring to the use of administrative tribunals to decide matters scientifically as a "Marxist idea"). *See generally* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 268-74 (1978) (explaining the reaction against administrative procedure during the New Deal period).

8. In *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court emphasized: "Judges are not experts in the field, and are not part of either political branch of the Government." *Id.* at 865.

9. 5 U.S.C. §§ 551-559, 701-706 (1982).

10. In England, courts principally apply the ultra vires doctrine to police administrative action, *see* S. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 94-95 (4th ed. 1980), while courts in the United States apply the "substantial evidence" test, *see, e.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (Frankfurter, J.).

11. *Compare Ridge v. Baldwin*, [1964] A.C. 40, 66-68 (1963) (broadly applying the concept of "natural justice" in judicial review of administrative action) *with* *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519, 523-25, 538-49 (1978) (confirming the judicial role in reviewing administrative rules, but advocating a limited judicial role).

of the administrative decisionmaking process. The role of the courts in controlling administration, however, remains political, and in that sense the judicial role always will be subject to shifting views concerning the propriety of regulation and the welfare state. During the Anglo-American Exchange, for example, one was struck by the apparently different answers that our two judiciaries are giving when they attempt to decide which way conservatism in judicial review should cut. In England, the goal of preserving traditional values has led to an interventionist court, while in the United States President Reagan's judicial appointees increasingly have been defining a modest role for review of administrative action.¹²

III. AREAS OF COMPARISON

A. Parliamentary Supremacy and Judicial Supremacy

One of the traditional distinctions between the English and American legal systems concerns whether the legislative or judicial branch has the last word. In England, Parliament is the supreme body, but in the United States it is the Supreme Court, largely due to Chief Justice Marshall's opinion in *Marbury v. Madison*.¹³ This difference, according to some, necessarily emerged from the fact that the American system is based on a written constitution while the English system is not.¹⁴ Because the supreme body in either system holds the tools for creating or dismantling the bureaucracy, an inquiry into the differences between the two systems is important in developing a concept of public law.

12. See *supra* note 11; see also *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351-52 (1984) (limiting judicial review of milk marketing orders because congressional intent to preclude was "fairly discernible" from the legislative scheme). See generally C. HARLOW & R. RAWLINGS, *LAW AND ADMINISTRATION* 35-59 (1984) (discussing "green light" theories of limited judicial review, which rely on the political process to control the executive, and "red light" theories, which rely on more extensive judicial review to control the executive and protect individual liberty). In both systems, the policies of the underlying bureaucracies have helped decide what the judicial role should be.

13. 5 U.S. (1 Cranch) 137 (1803).

14. See H. WADE, *ADMINISTRATIVE LAW* 26-31 (5th ed. 1982). With respect to England, Professor Wade observed: "One consequence of Parliamentary sovereignty is that this country has no constitutional guarantees." *Id.* at 28.

The choice of branch finality can have profound implications for administrative law and regulation. In the United States, where separation of powers is one of several constitutional grounds available for striking down legislatively-established administrative schemes, recent dramatic activity¹⁵ demonstrates the considerable current interest in "supremacy" issues. Intriguing signs of reassessment on the British side add to that interest.

Parliamentary supremacy in the United Kingdom theoretically allows the legislature to change the law at any time to suit the current majority, without fear of judicial intervention. Because parliamentary majorities are formed by the government in power, the executive branch, through the prime minister, effectively formulates legislative policy. The transitory nature of this approach makes many in the United Kingdom uneasy.¹⁶ Majorities are easily formed and just as easily dissolved. Legislation grounded only in the politics of the moment easily can ignore principles of a more enduring nature.

Similar concerns may have driven Lord Coke to rule contrary to the notion of parliamentary supremacy almost four hundred years ago, in *Bonham's Case*.¹⁷ According to Lord Coke: "[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."¹⁸ Lord Coke's view did not prevail in the seventeenth century, but it has powerful adherents today. For example, Lord Denning, formerly Master of the Rolls, recently revisited Lord Coke's observation when he declared: "[J]udges here ought to have a power of judicial review of legislation similar to that in the United States."¹⁹ In a country committed since 1688 to the supremacy of Parliament, the importance of this suggestion to the judicial role in public law matters is difficult to overstate.

15. See, e.g., *Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).

16. See, e.g., H. WADE, *CONSTITUTIONAL FUNDAMENTALS* 22-40 (1980).

17. 8 Co. Rep. 113b, 77 Eng. Rep. 646 (C.P. 1610).

18. *Id.* at 118a, 77 Eng. Rep. at 652.

19. A. DENNING, *WHAT NEXT IN THE LAW* 320 (1982). Lord Denning suggested that if Parliament did something radical, such as abolishing the House of Lords, the courts would be forced to intervene. *Id.*

Judicial supremacy in Britain is not limited to the ruminations of the great judicial mind of Lord Denning. Serious discussion is now taking place in the United Kingdom about the advisability of adopting a written constitution and bill of rights.²⁰ This discussion has been encouraged by the European Parliament, of which Britain has been a member since 1973, and by the European Court of Human Rights, which has a power of review over British legislation that theoretically exceeds the power exercised by the House of Lords.²¹ In England, conditions are ripe for a reevaluation of the doctrine of parliamentary supremacy, and that doctrine undoubtedly will be the subject of considerable future debate.

1. The Relevance of the American Experience

The first question that should emerge from this debate is of the "so what" variety. As a practical matter, what difference would it make in the United Kingdom if it were to accept our notions of judicial supremacy? Put another way, how much of our doctrine of judicial supremacy already is impliedly a part of the British system of judicial review, even though it is not stated as such?

An argument can be advanced that an expressed doctrine of judicial supremacy really would not make a fundamental difference in the United Kingdom.²² For example, a doctrine of judicial supremacy in the United Kingdom would apply only at the national level because England does not have a system of sovereign states. As a result, much of the exercise of judicial supremacy for which the United States is known—the overturning of state legislation—would be inapplicable to the United Kingdom, even with a judicial supremacy doctrine. Justice Holmes once observed: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union

20. See P. WALLINGTON & J. McBRIDE, *CIVIL LIBERTIES AND A BILL OF RIGHTS* (1976); M. ZANDER, *A BILL OF RIGHTS?* (1975); Wright, *The Bill of Rights in Britain and America: A Not Quite Full Circle*, 55 *TUL. L. REV.* 291 (1981).

21. See H. WADE, *supra* note 16, at 25, 31 (discussing § 2(4) of the European Communities Act, 1972, which provides that community law shall prevail over future acts of Parliament).

22. But see O'Connor, *supra* note 3, at 656 (making the intriguing point that the presence of a written constitution in England might relieve the courts of some of their reviewing burden).

would be imperiled if we could not make that declaration as to the laws of the several States."²³ Because the United Kingdom need not concern itself with controlling legislation by states, Justice Holmes' observation implies that England has less need for a principle of judicial supremacy to protect the union from "subparliamentary" mischief.

Misconceptions abound in the United Kingdom concerning the judicial power in the United States to invalidate legislation at the federal level. Lord Denning, speaking of judicial review in the United States, stated: "Under the guidance of the great Chief Justice Marshall, the judges there constantly review legislation: and as constantly set it aside if it is against right and reason or repugnant to the Constitution."²⁴ The facts, however, are very much to the contrary. Putting aside review of state legislation, prior to its decision in *INS v. Chadha*²⁵ the Supreme Court had overturned less than one hundred pieces of federal legislation in its nearly two hundred years of judicial review.²⁶

With its *Chadha* decision in 1983, however, the Court potentially struck down approximately two hundred legislative schemes by declaring the legislative veto unconstitutional.²⁷ If the *Chadha* approach were transferred to England, judicial supremacy over legislative enactments still could become a powerful new tool for the English courts. That experience is not transferable, however, because legislation in the United States is struck down due to separation of powers concerns that are foreign to the United Kingdom. *Chadha*, for example, involved an intricate argument concerning whether legislative reversal of agency rules without presentation to the President violates the Constitution.²⁸ No comparable institutional questions exist in England. Parliament and the executive are one, and parliamentary majorities form the government, leaving no

23. O. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 295-96 (1920).

24. A. DENNING, *supra* note 19, at 319.

25. 462 U.S. 919 (1983).

26. See Frank, *Review and Basic Liberties*, in SUPREME COURT AND SUPREME LAW 110 (E. Cahn ed. 1954) (documenting 78 judicial invalidations of congressional acts as of the early 1920's); see also *id.* at 114 ("The bold fact is that, except for [very narrow exceptions], Congress has never yet passed a statute in a fit of repression which the Supreme Court has invalidated.").

27. 462 U.S. at 967 (White, J., dissenting).

28. See *id.* at 944-59 (considering U.S. CONST. art. I, § 7, cl. 2-3).

separate inter-branch territories for the courts to umpire and protect.²⁹

Furthermore, the basic policy issue in *Chadha*—how to ensure that agencies make rules in accordance with congressional and presidential direction—is not the problem for England that it is for the United States.³⁰ In England, administrators are required to lay rules before Parliament for its approval before they can become effective.³¹ What Americans call agency rules are denominated “delegated legislation” in England.³² This characterization alone suggests that Parliament plays a major role in agency policy formulation. Because the prime minister shares in that role, the process creates no branch tension. The *Chadha* problem disappears and the legislative veto becomes an accepted technique in the United Kingdom.

While *Chadha* concerns may not be relevant, the same cannot be said about the nondelegation doctrine.³³ The English traditionally have believed that extensive delegation would frustrate the parliamentary role,³⁴ but they long have accepted the necessity for delegated legislation, and no cases equivalent to the important nondelegation cases in the United States³⁵ have been brought. In addition, Parliament monitors administrative activities more closely than is possible in the United States, through ministers who also are members of the House of Commons and through use

29. Although the relative effectiveness of the British and American systems is a political question beyond the scope of this Article, that question currently is being debated in the United States. See REFORMING AMERICAN GOVERNMENT: THE BICENTENNIAL PAPERS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM (D. Robinson ed. 1985) (essays on problems of modern government and assessment of proposed reforms) [hereinafter cited as REFORMING AMERICAN GOVERNMENT].

30. See Beatson, *Legislative Control of Administrative Rulemaking: Lessons from the British Experience?*, 12 CORNELL INT'L L.J. 199 (1979).

31. Doubts about the competence of technical scrutiny by the parliamentary committees assigned to review these rules suggest that this procedure is not a particularly effective restraint. See JOINT COMM. ON DELEGATED LEGISLATION, REPORT, H.L. 184, H.C. 475 (1971-72), reprinted in part in J. BEATSON & M. MATHEWS, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 523-24 (1983).

32. See H. WADE, *supra* note 14, at 733-69.

33. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

34. H. WADE, *supra* note 14, at 733-35.

35. See *supra* note 33.

of the Parliamentary Commissioner for Administration.³⁶ Thus, the fears raised in the United States about the legislative branch surrendering its power to unelected bureaucrats are far less significant in England. In fact, the legislative techniques that are most effective in the United Kingdom in all likelihood would require a constitutional amendment to implement in the United States.³⁷

These differences bear on whether the English should adopt the American experience with judicial supremacy. Following Lord Denning, the English could become more assertive on judicial review in areas unrelated to our separation of powers provisions. Although judicial supremacy rarely has been used in the United States to strike down laws infringing on individual rights,³⁸ the possibility of widespread judicial invalidation of laws needs to be kept in mind when considering whether the English judiciary should review the constitutionality of legislation. Two points should be considered: the inevitable political rupture caused by an active judiciary overturning legislation, and whether judicial control techniques in both countries presently achieve similar goals without producing such upheaval.

In evaluating the need for constitutional review, one should ask whether judicial supremacy makes Congress, or would make Parliament, *more* responsible in legislating in the first place. Conceivably, lawmakers think more carefully and express themselves more clearly when courts are supervising their work. They do so presumably to avoid unnecessary duplication of legislative effort, as well as to avoid the embarrassment of judicial civics lessons such as the one administered in *Chadha*. Unfortunately, little evidence supports the assertion that judicial review encourages legislative responsibility. Indeed, the reality may run in the other direction. A quick perusal of comparative statutes convinces any reader that clarity and care of legislative expression is no more prevalent in the United States than in the United Kingdom. In fact, a negative aspect to judicial supremacy in the United States may be that

36. See, e.g., 2 HOUSE OF COMMONS, PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION, FOURTH REPORT, 1982-83 (1983).

37. See REFORMING AMERICAN GOVERNMENT, *supra* note 29, at 182-85 (constitutional amendment introduced by former Rep. Henry Reuss proposing to make a limited number of members of Congress officers of the executive branch).

38. See *supra* note 26 and accompanying text.

legislatures behave more irresponsibly knowing the courts are there to bail them out. One suspects that more than one legislator has voted for popular, though presumptively unconstitutional, legislation to get elected, relying on the courts to undo the damage and save the Constitution. Creationism statutes enacted at the state level suggest as much,³⁹ as does Congress' "Gramm-Rudman-Hollings" balanced budget act, recently struck down by the Supreme Court.⁴⁰ In short, neither available evidence nor intuition supports the case for judicial supremacy as a method for sharpening legislative minds and rendering them more responsible.

2. *The Relevance of Judicial Review Techniques*

Courts in both countries have developed creative alternatives to overturning legislation via the mechanism of judicial review that are worthy of emulation. In England, where legislative power is supreme, these techniques are matters of necessity, while in the United States, where it is not, they are matters of prudence. In both situations, however, the avoidance of direct confrontation seems to be in everyone's best interest.

This American legal observer is struck by the process of judicial review of the administration of government regularly undertaken by the English courts, in a system in which Parliament is said to be supreme. One gets no sense from the judges or lawyers that the supremacy issue bears very heavily upon the fundamental role of the courts on judicial review of administrative action. Indeed, one could venture the assessment that judges in the United Kingdom currently are more comfortable with an assertive role of review than are their counterparts in the United States.

Support for this assessment can be found in the judicial reaction to legislative attempts to limit judicial review through use of so-called "ouster clauses" in England and "preclusion of review" provisions in the United States. In *Anisminic Ltd. v. Foreign*

39. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating ARK. STAT. ANN. §§ 80-1627 to -1628 (1960)).

40. *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (invalidating, in part, the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified at 2 U.S.C.A. §§ 602, 621-22, 631-656, 901-922 (West Supp. 1986); 31 U.S.C.A. §§ 1104-1106, 1109, 3101 (West Supp. 1986); 42 U.S.C.A. § 911 (West Supp. 1986)).

Compensation Commission,⁴¹ for example, which involved an administrative scheme for determining claims to a compensation fund set up in connection with Egyptian property confiscated during the Suez crisis in 1956, the House of Lords confronted a statute that provided that any determination by the Commission of an application for compensation "shall not be called in question in any court of law."⁴² One might expect deference to these clear words in a country where Parliament's declarations are supreme, but the House of Lords sidestepped them with ease. The Law Lords held that only "valid" or "real" determinations are entitled to preclusive effect.⁴³ According to the Lords, the validity of the determination challenged in *Anisminic*, in which the Commission had denied the plaintiff's claim because of insufficient proof of ownership of the property in question, depended upon an inquiry into whether the determination made was within the Commission's jurisdiction. The Lords treated the ownership issue as one of jurisdictional fact, reviewed it anew, and held that any decision by an administrative body would be a nullity if made outside its jurisdiction.⁴⁴

In later cases, the English courts debated the logical extension of this issue, considering whether any and all errors of law go to the question of jurisdiction.⁴⁵ If all errors of law determined by the courts went to jurisdiction, Parliament literally would be unable to preserve administrative decisions from judicial scrutiny. In this circumstance, Parliament would be hard pressed to assert its sovereignty, and its efforts to delegate legislative power to administrative bodies in circumstances in which judicial intervention

41. [1969] 2 A.C. 147 (1968).

42. Foreign Compensation Act, 1950, 14 Geo. 6, ch. 12, § 4(4).

43. [1969] 2 A.C. at 169-71.

44. *Id.* at 171-75.

45. See, e.g., *Pearlman v. Keepers & Governors of Harrow School*, [1979] Q.B. 56, 69-70 (C.A. 1978) (Lord Denning M.R.) ("But the distinction between an error which entails absence of jurisdiction—and an error made within jurisdiction—is very fine. . . . I would suggest that this distinction should now be discarded."). In *In Re Racal Communications Ltd.*, [1981] A.C. 374 (1980), however, Lord Diplock refused to go as far as Lord Denning, wishing to preserve the distinction in *Anisminic* between errors within jurisdiction and errors outside jurisdiction, however fine that distinction might be. *Id.* at 381-85; see also H. WADE, *supra* note 14, at 252 (interpreting the cases as "holding that every error of law by a tribunal must necessarily be jurisdictional.").

arguably would be counterproductive or too time consuming, would be crippled.

Ironically, the system of judicial supremacy in the United States seems more comfortable with congressional preclusion of review than the British system seems to be. Since the demise of the jurisdictional fact doctrine in the 1930's,⁴⁶ United States courts do not equate all errors of law by administrative agencies with jurisdictional error. Preclusion statutes, though often controversial, have been honored by the courts,⁴⁷ and have been avoided only when fundamental constitutional rights have been at issue.⁴⁸ As long as the United States continues to treat most errors of law as within the agency's jurisdiction, cases with facts similar to *Anisminic* will be decided differently from the House of Lord's decision in that case.⁴⁹

The arguments used by courts in the United States to avoid the impact of preclusion statutes are similar to those used by the British courts. They say, in effect, that Congress or Parliament really could not have meant to preclude claims of a certain kind. The difference lies in what kinds of claims are precludable. In the United Kingdom, preclusion extends beyond claims that would be labeled "constitutional" in the United States. Some justices of the United States Supreme Court even have urged Congress to prohibit judicial review of projects long delayed as a result of litigation extended by the presence of judicial review.⁵⁰ Such a proposal by English judges to Parliament is difficult to envision.

This brief comparative exposure to ouster and preclusion provisions suggests that the judicial role in administrative law is alive

46. See *Crowell v. Benson*, 285 U.S. 22 (1932).

47. E.g., *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984); *Yakus v. United States*, 321 U.S. 414 (1944). See Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733 (1983).

48. See *Johnson v. Robison*, 415 U.S. 361 (1974) (first amendment and equal protection claims survived preclusion provision in Veterans Administration benefit statute).

49. For example, the Supreme Court held that President Carter's suspension of judicial claims to Iranian assets by American citizens was within the President's power and not subject to judicial review. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); see Note, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 COLUM. L. REV. 155 (1985).

50. *Volpe v. D.C. Fed'n of Civic Ass'ns, Inc.*, 405 U.S. 1030, 1031 (1972) (mem.) (Burger, C.J., concurring in and commenting on denial of certiorari); see Verkuil, *supra* note 47, at 743 & nn.40-41.

and well in the United Kingdom. It also makes the point, to this observer at least, that the formal shift from parliamentary supremacy to judicial supremacy in the United Kingdom is unnecessary and even contraindicated. The shift is unnecessary because of the lack of federal-state relationships and separation of powers concerns. It *could* be counterproductive because, once it is undertaken, fears of judicial hegemony will make the courts more controversial to the public, especially when they already are viewed as a conservative force in a politically divided country.⁵¹ Prudence would counsel that, because most judicial business is being accomplished without a formal transfer of power, parliamentary sovereignty may be a convention worth preserving.

B. Natural Justice and Due Process

A second area of comparison involves the ideas of natural justice and due process which, although conceptually distinct, have common roots in English common law and principles as old as those emanating from the Magna Carta. Indeed, *Bonham's Case*⁵² has been a basic part of United States law since the beginning of the Republic. In that case, a licensing board sought to fine Dr. Bonham of Cambridge for practicing as a physician in London. The board benefited from half of all fines collected. Lord Chief Justice Coke held that, because no man can be a judge in his own cause, the financial interest of the board prevented it from ruling on Dr. Bonham's right to practice in London.⁵³ This principle has been incorporated into the due process clause of the United States Constitution,⁵⁴ although its full implications continue to be debated.⁵⁵

Natural justice is the core concept of the rule of law in England, and it is the method by which judges control public behavior and

51. See generally C. HARLOW & R. RAWLINGS, *supra* note 12, at 11-22 (describing themes of judicial review designed to limit state power by proscribing activities of administrative bodies).

52. 8 Co. REP. 113b, 77 Eng. Rep. 646 (C.P. 1610); see *supra* notes 17-18 and accompanying text.

53. *Id.* at 118a, 77 Eng. Rep. at 652.

54. See *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986); *Ward v. Village of Monroe*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

55. See *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J., dissenting to the Court's refusal to apply the rule of *Bonham's Case* to preliminary administrative hearings).

administrative action. That natural justice is as fundamental to the United Kingdom as due process is to the United States raises the problem of parliamentary supremacy in another guise—namely, whether the rule of law or parliamentary sovereignty should triumph in the event of a clash. Professor Dicey avoided the dilemma by denying that it existed when he said: “The sovereignty of Parliament favours the supremacy of the law of the land.”⁵⁶ But this assumption that Parliament and the courts have no area of disagreement is itself a matter of faith.

Theoretically, Parliament could pass a law that violates the rule of law or, to put the matter in a more relevant context, could give administrative bodies the right to exercise powers that violate the rule of law. In the latter circumstance, English courts often avoid clashes through judicial methods of construction that also are familiar in the United States:⁵⁷ they simply refuse to accept that Parliament intended to violate natural justice, and they interpret Parliament’s statutory authority accordingly.⁵⁸ Fortunately for both Parliament and the courts, push never comes to shove. Parliament could pass legislation directly in order to create a clash, but it wisely chooses not to do so. Lord Denning mentioned one possibility, abolition of the House of Lords, as an incident in which parliamentary supremacy would have to give way to the rule of law,⁵⁹ but fundamental confrontations of this nature have not occurred so far. Thus, natural justice can remain “supreme,” along with Parliament, without a formal declaration to that effect.

1. The Reach of Natural Justice and Due Process

Several differences between the concepts of natural justice and due process are worth exploring, especially because these concepts are the most venerable common ground shared by the American and English legal systems. Natural justice is wider in its application (its “horizontal effect”) than due process, but narrower in its

56. A. DICEY, *supra* note 5, at 406.

57. In both *Zemel v. Rusk*, 381 U.S. 1 (1965), and *Kent v. Dulles*, 357 U.S. 116 (1958), for example, the Court interpreted the delegation of discretionary authority to the Secretary of State to issue passports as presumptively limited by fifth amendment concerns. *Zemel*, 381 U.S. at 17-18; *Kent*, 357 U.S. at 128-29.

58. See J. BEATSON & M. MATHEWS, *supra* note 31, at 284-86.

59. See *supra* note 19.

procedural requirements (its "vertical effect"). Viewed from a comparative perspective, both concepts have unrealized potential.

The horizontal effect of natural justice exceeds the horizontal effect of due process in at least two important ways: it reaches activities that American courts would label "private" in a state action sense, and it applies to administrative activities that courts in the United States would distinguish for due process purposes as legislative policymaking or rulemaking. The application of the principles of natural justice to all manner of clubs and union activities⁶⁰ suggests that the English courts have not had to draw the line between state and private action that the due process clauses of the fifth and fourteenth amendments have required in the United States.⁶¹ This line-drawing is made necessary in the United States because of a constitution that includes not only express restrictions on the application of due process, but also countervailing constitutional concerns for freedoms of religion, assembly, and privacy that may tolerate some limits on private discrimination.

In the realm of legislative activities by administrative bodies, however, judicial developments by English courts bear study. In the United States, a line is drawn for due process purposes between administrative adjudication and administrative rulemaking, with the latter category being outside the ambit of protection.⁶² This traditional dichotomy has informed our law for many years, but its persuasiveness certainly is not self-evident.⁶³ In the British system, on the other hand, a newly emerging duty of fairness has taken hold. This doctrine suggests that principles of natural justice may impose upon administrative bodies a "duty to consult" before promulgating rules affecting members of the public.⁶⁴ In a recent

60. See, e.g., *Enderby Town Football Club Ltd. v. Football Ass'n Ltd.*, [1971] Ch. 591 (C.A. 1970) (fine and censorship by the Football Association for financial misconduct); *Calvin v. Carr*, [1980] A.C. 574 (P.C. 1979) (suspension from membership in Australian Jockey Club).

61. U.S. CONST. amends. V, XIV; see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 18-1 to -7 (1978).

62. See *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (Holmes, J.).

63. See *Thompson v. Washington*, 497 F.2d 626, 639 (D.C. Cir. 1973) (holding that established rulemaking procedures are a due process necessity); Verkuil, *supra* note 7, at 290-92.

64. See Mullan, *Fairness: The New Natural Justice?*, 25 U. TORONTO L.J. 281, 300 (1975) (traditional categorization of administrative activity into quasi-judicial and quasi-legislative

case involving the Prime Minister's decision to prohibit trade union membership among the staff of the Government Communications Headquarters, the House of Lords expounded upon the duty to consult affected persons before making rules, although the Lords held that the duty to consult was outweighed by the national security considerations involved in the particular case.⁶⁵ The Law Lords all agreed that in proper circumstances natural justice would have ensured the union members a "legitimate expectation" of consultation.⁶⁶

Admittedly, the "duty to consult" in England is not so broad as to repudiate in all circumstances the due process line drawn between adjudication and rulemaking in the United States, but it does suggest that the due process inquiry should not depend solely on the number of people affected by a rule.⁶⁷ The importance of the rule to persons affected also is a relevant factor.⁶⁸ Although this factor may not persuade courts in the United States to redraw or erase the line between adjudication and rulemaking for due process purposes,⁶⁹ it does bear further examination. The English concern with giving special consideration to established relationships is difficult to administer, but it does make sense. It would avoid, for example, the summary disposition given in the United States to the claims of those few individuals who have known interests in particular agency rules.⁷⁰ While the Supreme Court remains concerned about constraining the policymaking process with due

classifications does not determine application of natural justice principles); J. BEATSON & M. MATHEWS, *supra* note 31, at 280-86.

65. Council of Civil Serv. Unions v. Minister for the Civil Serv., [1985] A.C. 374 (1984). For a more extensive discussion of the facts, procedural history, and holding in this case, see Ablard, *Judicial Review of National Security Decisions: United States and United Kingdom*, 27 WM. & MARY L. REV. 753, 757-61 (1986).

66. See, e.g., [1985] A.C. at 401 (Lord Fraser).

67. See R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 2, at 248-55.

68. Cf. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (discussing a due process interest in rulemaking in which the claimant is, or later becomes, the focus of the resulting rule).

69. But see *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973) (making the duty to consult before raising rents in federally funded low income housing an aspect of due process protection in a rulemaking situation).

70. See, e.g. *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973) (denying an adjudicatory hearing concerning an EPA rule even though only one company was immediately affected).

process requirements,⁷¹ the English experience suggests that compromises that would improve the democratic process are not only possible; they may be desirable.

Another aspect of the natural justice/due process connection, the "vertical effect," produces different outcomes. While the British have expanded the horizontal application of natural justice principles in a variety of new settings, they have been less willing to deepen the coverage of natural justice principles vertically by specifying procedures in individual situations. The use of due process analysis to specify procedures is an innovation of American courts that may or may not be worthy of transfer from the United States to the United Kingdom. Courts in the United States have discovered that the procedural due process revolution of the 1970's, inspired by *Goldberg v. Kelly*,⁷² has left them in the frequently uncomfortable position of trying in specific contexts to narrow the explicit procedural requirements mandated by the principles in *Goldberg* so they can avoid paralyzing the public law decision process.⁷³ They have come to realize that only certain core ingredients are essential to fulfill mandates of procedural due process in the administrative state.⁷⁴

2. Wrestling with a Reasons Requirement

The core ingredients necessary to procedural due process are three in number: notice, a comment period or hearing, and a

71. See *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 283-85 (1984) (discussing the rationale for applying the adjudication/rulemaking dichotomy in the context of public teacher contract negotiations).

72. 397 U.S. 254 (1970) (holding that procedural due process requires that welfare recipients be given an evidentiary hearing prior to the termination of benefits).

73. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (balancing away certain procedural ingredients, such as cross-examination, to expedite the decisionmaking process with respect to disability benefits); see also J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 1-49 (1985) (asking, in the title to Chapter One: "Was the Revolution a Success?"). In England, ingredients such as cross-examination and legal representation never have been incorporated into natural justice principles. See J. BEATSON & M. MATHEWS, *supra* note 31, at 250-60.

74. See Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (weighing the importance of procedural ingredients of the informal decision process).

statement of reasons.⁷⁵ Interestingly, the British concept of natural justice incorporates the first two ingredients, but ignores the third. To an American observer, the failure to incorporate a reasons requirement under the natural justice/due process umbrella is inexplicable. The English courts, however, have stood firmly against a reasons requirement in order, one assumes, not to burden the process of administrative decisionmaking.⁷⁶

A recent decision by the Judicial Committee of the Privy Council, *Mahon v. Air New Zealand Ltd.*,⁷⁷ however, indicates a rethinking of that position in favor of a doctrine that requires a statement of reasons under some circumstances as an aspect of natural justice. The question in *Mahon* was whether Air New Zealand had received proper procedural protections when it had presented its side of the facts to a Royal Commissioner investigating an airline crash in Antarctica.⁷⁸ While conceding that the procedures for investigative inquiries were less formal than judicial trials, Lord Diplock held that principles of natural justice still apply.⁷⁹ He then proceeded to lay out the appropriate rules:

The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that

75. See Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 779-96 (1976) (documenting the predominance of notice, comment, and reasons in a variety of informal adjudicative settings).

76. See *R. v. Gaming Board for Great Britain*, [1970] 2 Q.B. 417, 423 (C.A.) (Lord Denning M.R.); *R. v. Northumberland Compensation Appeal Tribunal*, [1952] K.B. 338, 351-52 (C.A. 1951).

77. [1984] A.C. 808 (P.C. 1983) (N.Z.). Decisions of the Privy Council, which reviews certain decisions of Commonwealth jurisdictions, technically are not part of English law. Because most of the five-member Council were Law Lords, however, and because the Council determined in *Mahon* that the law of judicial review in New Zealand was the same as the law in England, see *id.* at 816-17, the decision is for practical purposes that of the House of Lords.

78. *Id.* at 814-15. A preliminary inquiry had blamed the accident on pilot error in continuing a low level flight in an area of poor visibility. *Id.* at 812. The Royal Commissioner, however, had determined that the dominant cause of the incident was the airline's decision to change the computer track of the flight without telling the crew. *Id.* at 813. He had exonerated the crew, *id.*, had called the airline's presentation "an orchestrated litany of lies," *id.* at 818, and had ordered the airline to pay \$150,000 toward the cost of the Royal Commission. *Id.* Air New Zealand had appealed this order to the Court of Appeal of New Zealand, which had set it aside for failure to observe the rules of natural justice. The Privy Council upheld this decision. *Id.* at 819-22.

79. *Id.* at 820.

has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.⁸⁰

This statement concerning the limits of natural justice reserves to the administration an option that jars the concepts of due process generally accepted in the United States. Lord Diplock's rule requires only that if the administrator elects to give his reasons, they must not be contradictory. In *Mahon*, the Commissioner did so elect, his reasons were contradicted, and his decision was overturned. The central question, however, is why an administrator ever should have such a choice. The statement of reasons ingredient is critical to American due process jurisprudence, in informal proceedings, for at least three reasons: first, it gives the parties notice of the basis on which their claims are denied so they can decide whether to appeal; second, it satisfies the parties and the public that the democratic principle of rational decisionmaking has been vindicated; and third, it forces intellectual discipline upon deciding officials, which enhances the correctness of the initial decision process.⁸¹

The English courts currently seem content to limit the reasons requirement in the manner described by Lord Diplock. But this limitation allows the most devious administrators never to give

80. *Id.* at 820-21 (emphasis in original).

81. Many American judges are aware of the salutary effect of stating reasons upon the decision process. Only the need to produce reasons exposes error; wrong decisions won't "write."

reasons, unless statutorily bound to do so.⁸² Statutory requirements are not to be gainsaid, but one would think that natural justice standards should lead rather than follow statutory innovations. The kind of abuses present during the Royal Commissioner's inquiry in *Mahon* are not systematically correctable without a reasons requirement. American due process jurisprudence offers an impetus to extend the logic of the rule of law to require of natural justice a reasoned explanation.⁸³

The consequences of giving natural justice recognition to a reasons requirement may be treated with skepticism on the English side. One concern relates to the lack of limitations on the reasons requirement. Taken to the extreme, administrators in the informal decision setting ultimately might be required to render formal opinions, complete with findings of fact and conclusions of law, thereby imposing an overwhelming decisional burden on all administrators, and especially on the lay magistrates who are the voluntary decisionmaking backbone of the informal justice system.⁸⁴

82. The Committee on Administrative Tribunals and Enquiries, responsible for passage of the Tribunal and Inquiries Act, 1958, 6 Eliz. 2, ch. 66, gave its rationale for requiring reasons in administrative functions in language that deserves much broader application:

We are convinced that if tribunal proceedings are to be fair to the citizen reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have been set out in writing because the reasons are then more likely to have been properly thought out. Further, a reasoned decision is essential in order that where there is a right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal.

COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES, REPORT, CMD. 218, ch. 66 (1957) [hereinafter cited as FRANKS REPORT]. Professor Wade also made a strong case for a broad-based reasons requirement as "an important element of administrative justice." H. WADE, *supra* note 14, at 486.

83. See Verkuil, *supra* note 75, at 739. Some English cases indicate that the judiciary would not tolerate a systematic refusal to give reasons among its corps of judges. In *R. v. Knightsbridge Crown Ct.*, [1982] Q.B. 304 (1981), for example, Lord Justice Griffiths made this point emphatically:

[I]t is the function of professional judges to give reasons for their decisions and the decisions to which they are a party. This court would look askance at the refusal by a judge to give his reasons for a decision particularly if requested to do so by one of the parties.

Id. at 314-15.

84. One suggested explanation for Lord Denning's view that a strict reasons requirement was unnecessary, *R. v. Gaming Bd., ex parte Benaim & Khaida*, [1970] 2 Q.B. 417, 430-31, concerns the impact on stipendiary magistrates who, as nonlawyers, might not function well under such a requirement. See J. BEATSON & M. MATHEWS, *supra* note 31, at 254.

The experience in the United States, however, should be reassuring. The Supreme Court, in important procedural due process cases such as *Londoner v. Denver*⁸⁵ and *Goldberg v. Kelly*,⁸⁶ required only brief explanations, not formal opinions. Moreover, as Professor Davis has wisely counseled, the reasons requirement need not be applied stringently in the mass decision setting.⁸⁷ Informality and flexibility need not be jeopardized by a reasons requirement.

Another possible reservation on the English side concerning the reasons requirement relates to the nature of judicial review of administrative action. In England, judicial review of the correctness of an administrative decision, as opposed to its legal validity, is unknown. The English courts may be concerned that imposing a reasons requirement would be the first step toward requirements relating to the weighing of evidence. If reasons are required, according to this theory, the courts might not be able to avoid asking whether the reasons given are adequate.

This apprehension can be readily dismissed. With the apparent demise of the error of fact and law requirement,⁸⁸ the English courts are moving in the direction of reviewing findings of fact anyway. In any event, this sort of review does not implicate concerns of natural justice magnitude. Due process in the United States does not require that substantial evidence or its equivalent accompany an informal reasoned decision. Only the absence of any evidence would violate natural justice or due process principles.⁸⁹ This experience should reassure English judges that natural justice can encompass a reasons requirement without becoming a code of procedures or a substantive judicial review process.

85. 210 U.S. 373 (1908).

86. 397 U.S. 254 (1970).

87. See 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 14.26, at 122-23 (2d ed. 1980). In addition, a decisionmaker is required to give reasons only if the applicant requests them. But see 5 U.S.C. § 555(e) (1982) (APA requirement of brief statement for grounds for denial of request, except when self-explanatory); *supra* note 83 (statement of Lord Justice Griffiths that professional judges *always* should give reasons for their decisions).

88. See *supra* notes 41-50 and accompanying text.

89. See *supra* note 80 and accompanying text; see also *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (holding that a conviction based on no evidence violates due process). Conclusive presumptions that have the effect of denying factual proof also may deny procedural due process. *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

C. Codification of Administrative Procedure: Public Law in the Common Law World

In a country without a written constitution, such as England, written administrative procedure statutes may be more unfamiliar than in the United States, where the Administrative Procedure Act⁹⁰ and related legislation long has been part of the landscape. On the other hand, recent statutory innovations in the United Kingdom have introduced the subject of public law in a more defined manner than exists in the United States. On these decks, as well, crosscurrents carry intriguing cargo.

The primary analogue in the United Kingdom to the APA is the Tribunal and Inquiries Act, 1958,⁹¹ which sets out the procedures of tribunals such as the Supplementary Benefits Commission, the Immigration Appeals Tribunal, and the Medical Appeals Tribunal. Tribunals are the United Kingdom equivalent to United States administrative agencies or, more precisely, to United States independent agencies. They provide a mechanism for adjudicating rights to government benefits, although their role in overall administration is limited because government ministers and local governments do much of the Crown's business.

Until recently, regulation as such has been less important because major industries there are nationalized. Recent developments in the United Kingdom, however, hint at an expanded role for regulation that could create an environment much like the one that led to the creation of independent regulatory agencies in the United States in the 1930's. Nationalization is coming under increasing attack in the United Kingdom. Privatization of companies such as British Telecom and British Airways will free large monopolies from government control. The present regulatory structure in England probably will not be able to meet the anticipated public demand to control the rates and charges of these new unregulated monopolies.⁹² Agencies with missions like the FCC and the CAB

90. 5 U.S.C. §§ 551-559, 701-706 (1982).

91. 6 Eliz. 2, ch. 66. The Act became law upon recommendation of the Committee on Administrative Tribunals and Enquiries. See FRANKS REPORT, *supra* note 82.

92. The Monopolies Commission, which presently exercises powers in the United Kingdom similar to those exercised by the Federal Trade Commission in the United States, is no more likely than the FTC to regulate monopolies through the use of antitrust principles.

almost certainly are on the horizon. A fascinating expectation is that regulation likely will become a prominent subject in the United Kingdom even as it is waning in importance in the United States. Inevitably, efforts to legislate administrative procedure will follow any such expansion of the agency or tribunal concept.

The virtues of broad-based legislation governing administrative procedure, such as the APA, are debatable even in the United States.⁹³ But England already has gone half way with the Tribunal and Inquiries Act, and has seen a judicial review statute work with no real difficulties in another Commonwealth country, Australia.⁹⁴ Thus, administrative law codification in the United Kingdom is worthy of consideration.

During the Anglo-American Exchange, the individuals who appeared most concerned with parliamentary intrusion into administrative procedure were the judges. They expressed concerns about freezing the law in a way that would hamstring the courts in their judicial review function and would stultify their creativity and flexibility. One can appreciate this reluctance to accept limitations of freedom in reviewing administrative action. Given the creativity already exhibited by the English courts,⁹⁵ however, one wonders how Parliament really could constrain the courts in this regard. The American experience with the judicial review provisions of the APA⁹⁶ has not been negative, largely because of the general and inclusive nature of the judicial review provisions and because of the creation of an experienced corps of administrative law judges who can implement the formal adjudication provisions.⁹⁷

93. See, e.g., Schotland, *We Come To Praise the APA and Not To Bury It*, 24 AD. L. REV. 261 (1972); *The Administrative Procedures Act—A Fortieth Anniversary Symposium*, 72 VA. L. REV. 215 (1986).

94. In Australia, the Administrative Decisions (Judicial Review) Act, 1977 has operated effectively to set out the grounds for judicial review and to establish a broad-based reasons requirement. See ADMINISTRATIVE REVIEW COUNCIL, NINTH ANNUAL REPORT, 1984-1985, at 60-61 (1985).

95. Consider, for example, the decision on facts and law rendered in *Anisminic Ltd. v. Foreign Compensation Comm'n*, [1969] 2 A.C. 147 (1968). See *supra* notes 41-50 and accompanying text.

96. 5 U.S.C. § 554-556 (1982).

97. Formal adjudication requirements such as the ones contained in the APA may be more difficult to implement in the United Kingdom because of its tradition of amateur and part-time deciders, which appears to be working well at low cost.

The affirmative arguments for codifying the principles of judicial review, if not the formal adjudication provisions, at least should be considered. In a democratic state—especially one that espouses parliamentary rather than judicial supremacy—the legislature properly should stake out the standards of judicial review. Democratic legitimacy, however, is not the only consideration favoring codification. Legislatively-mandated procedures for judicial review also might clarify and expand the applicable standards for the benefit of the public, especially with regard to review of administrative procedures for adjudication and rulemaking. Explicit guidelines for agency hearings also would be useful, even for the part-time deciders now prevalent in the system. Development of a cadre of experienced administrative decisionmakers similar to the corps of administrative law judges in the United States may or may not be desirable for a country with a tradition of volunteerism, but more professional rules for amateur deciders would not necessarily be undesirable.

Certainly, the decision to codify procedures is a costly one that may not be warranted under all circumstances. In the United Kingdom, the need for standardized procedures may be greater when it comes to administrative rulemaking. Rules in England often are promulgated with no requirement of public participation, in stark contrast to the notice and comment procedures mandated by the APA,⁹⁸ which stand as one of the triumphs of administrative law reform in the United States. The United Kingdom could benefit from a similar generic, informal, give-and-take statute that would help guide their professional deciders through complicated proceedings.⁹⁹

IV. CONCEPTUALIZING PUBLIC LAW

Ironically, for a country that has been less than eager to codify principles of administrative law, the United Kingdom is further ahead than the United States in articulating a concept of public

98. 5 U.S.C. § 553 (1982).

99. Statutory inquiries in the United Kingdom do provide for legislative-type hearings. For example, the location of the proposed new airport in London has been the subject of years of public inquiry. The same is true for nuclear power plant sitings. See Beatson, *A British View of Vermont Yankee*, 55 TUL. L. REV. 435 (1981).

law. The revision of Order 53 of the Rules of the Supreme Court¹⁰⁰ in England specifically has created a public law litigation framework and a judicial review process that encourages systematic scrutiny of public law cases. Prior to the new Order 53, litigants had to use remedies of certiorari, prohibition, mandamus, and habeas corpus, as well as injunctions and declarations, to control administrative action. These remedies had historical limits and procedural disadvantages that were removed through the single application for judicial review promulgated under Order 53 in 1977. Unlike the prerogative writs, the revised Order 53 provides for discovery and cross-examination, and allows applicants to combine claims for injunctive relief and damages.¹⁰¹ The new Order, however, does have two strict eligibility requirements: leave of court must be sought, and the application for leave must be filed within three months of the injury. These limitations have salutary effects in most cases because they eliminate frivolous appeals and protect against delayed and stale claims.

A complication arose, however, when the House of Lords declared in *O'Reilly v. Mackman*¹⁰² that Order 53 is the exclusive remedy for those seeking "public law" relief.¹⁰³ This decision introduced a distinction between public and private law in a country that long had ignored the presence of such a concept.¹⁰⁴ The English courts are now required to struggle to define this elusive concept.¹⁰⁵ In *O'Reilly*, a prisoner sued the prison authorities for

100. STAT. INST., 1977, No. 1955. This new version of Order 53 has been amended twice. See Supreme Court Act, 1981, ch. 54, § 31; STAT. INST., 1980, No. 2000.

101. For a discussion of how Order 53 operates, see Owen, *Placing the Facts of Administrative Decisionmaking Before Reviewing Courts: English and American Techniques*, 27 WM. & MARY L. REV. 741, 743-44 (1986).

102. [1983] 2 A.C. 237 (1982).

103. *Id.* at 285.

104. See A. DICEY, *supra* note 5, at 328-30, 396. In civil law jurisdictions, such as France, much time is spent debating whether a matter is public law or is private, or civil, law. These decisions require a separate arbiter, the Tribunal des Conflicts. See L. BROWN & J. GARNER, *supra* note 1, at 92-96. After *O'Reilly*, English courts will have to undertake a similar kind of analysis.

105. The Supreme Court Act, 1981 was not much help. It provides:

A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—(a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari; (b) the nature of the persons and bodies against

alleged breaches of prison rules.¹⁰⁶ This claim properly was labeled "public law." Having held that Order 53 was the prisoner's exclusive remedy, the House of Lords dismissed the prisoner's suit as time-barred under the three-month limitation.¹⁰⁷

In subsequent cases, the House of Lords has become embroiled in closer definitions of public law. It has sought to have public law matters turn on the presence of a legal right against government.¹⁰⁸ These attempts, however, may prove unconvincing and ultimately unavailing.¹⁰⁹ In *Wandsworth London Borough Council v. Winder*,¹¹⁰ for example, the House of Lords permitted a tenant in public housing to challenge his eviction outside of the judicial review provisions of Order 53 because the Lords concluded that the claim included private contract law elements.¹¹¹ This kind of public versus private rights determination is not likely to yield a clear rule of decision. It brings to mind the longstanding, and still unsatisfactory, governmental-proprietary distinction that courts in the United States have wrestled with in determining governmental tort liability.¹¹² This confusion ultimately may force the English courts to rethink the wisdom of making the Order 53 remedy an exclusive one.¹¹³

This confusion, however, does not mean that the definition of public law is conceptually barren. The public law definitional debate has focused attention on the difficult problem of understanding the kinds of remedies that are appropriate for injuries caused

whom relief may be granted by such orders; and (c) all the circumstances of the case, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

Id. ch. 54, § 31(2).

106. [1983] 2 A.C. at 243.

107. *Id.* at 285.

108. See *Davy v. Spelthorne Borough Council*, [1984] A.C. 262 (1983); *Cocks v. Thanet Dist. Council*, [1983] 2 A.C. 286 (1982).

109. See J. BEATSON & M. MATHEWS, *supra* note 31, at 657-60 (discussing various approaches to the definitional problem).

110. [1985] A.C. 461 (1984).

111. See *id.* at 509-10. The case would have been time-barred under the three-month provision of Order 53 had the plaintiff not been able to proceed in private law.

112. See Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).

113. The Law Commission earlier had argued that the remedy should not be exclusive largely because of its definitional problems. See LAW COMMISSION, REPORT ON REMEDIES IN ADMINISTRATIVE LAW, 1976, CMD. 6407, No. 73, ¶ 45.

by government. Many government functions simply do not have private analogies. The government, for example, operates prisons, runs the military, and conducts foreign policy. The United States has tried to deal with these differences through various limitations in the Federal Tort Claims Act.¹¹⁴ Definitional problems surrounding government liability can be helped by a fully articulated concept of public law. The meaning of public law in a common law world is worth further elaboration in both countries.¹¹⁵

Another useful aspect of the Order 53 public law process is the expert administrative court structure it created to hear applications for review. Under Order 53, a few High Court judges are selected to rule on the leave to appeal issues, and most of the cases go to an established three-judge panel of the Court of Appeal after this initial disposition. In England the judiciary is small enough that it can create a truly expert group of administrative law specialists, which benefits the process by fostering consistency of rulings, efficiency in disposing of claims, and experience in dealing with the various administrative bodies involved. The workings of the Supplementary Benefits Tribunal of the Immigration Appeals Tribunal, for example, may be mysterious to the vast run of British judges, but they are familiar to the few judges who hear these cases regularly. Ideally, this expertise should produce more reasoned and informed decisionmaking.

Whether such an approach would work in the United States, however, is a different question. The United States has a federal system with ten times as many district and court of appeals judges as in England, sitting in separate circuits. In addition, the United States traditionally has resisted the expert tribunal notion at the judicial level. Americans' love for the energetic generalist, however, is no less than that of the English, from whom we probably inherited the concept. In fact, as a practical matter the United States does have an expert administrative judiciary in the District of Columbia Circuit, although it is not officially recognized as such. Because the vast majority of the D.C. Circuit's docket consists of

114. 28 U.S.C. §§ 1291, 1346(b)-(c), 1402(b), 2401(b), 2402, 2412(c), 2671-2680 (1982). The most important of these limitations is the "discretionary function" exception. *Id.* § 2680(a). See, e.g., 4 K. DAVIS, *supra* note 87, § 25.08.

115. See Stewart & Sunstein, *supra* note 2, at 1193.

administrative law cases,¹¹⁶ the United States may be closer to the English public law judge concept than we care to admit.

The United States could usefully examine the possibility of a leave to appeal process similar to the procedure provided for in Order 53. Under this system, the High Court judges in England, who are equivalent to United States district court judges, are able to dispose of between one-third and one-half of all appeals by denying leave after an *ex parte* examination of the applicant's claim.¹¹⁷ Given the growing concern in the United States about frivolous litigation, a leave to appeal procedure holds out the possibility of an efficient method of disposition, assuming that the far larger and more diverse judiciary in the United States can gain appropriate experience with the kinds of public law cases that arise.

V. CONCLUSION

In terms of public law development, the legal systems in the United States and United Kingdom have many points of similarity as well as contrast. The common language and legal tradition of the Anglo-American legal system helps enormously, but description and evaluation of comparative experiences nonetheless remain a challenge. The areas examined in this Article involve subjective evaluation, and the conclusions represent only this observer's ideas about some common elements that may offer fruitful areas for reform. Other articles in this Symposium highlight different points of productive comparison.

From my list, I am willing to sit on the following limbs. The question of parliamentary versus judicial supremacy remains one that should not be resolved. Good reasons exist not to change either one. In England, where the possibility of reform has been raised, the differences in judicial approach do not seem significant enough to warrant the disruption that formal change would produce. A number of lessons, however, can be learned. In the areas of natural justice and due process, for example, each country can

116. See generally Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427 (discussing, in a critical context, the vast administrative law docket of the D.C. Circuit).

117. See C. HARLOW & R. RAWLINGS, *supra* note 12, at 258-61 (citing statistics concerning denials of leave to appeal in prerogative writ and Order 53 cases).

learn from the other. The United States might benefit from a more careful analysis of the relevance of due process to rulemaking, while England could benefit from inclusion within natural justice of a reasons requirement. The concept of a generic administrative procedure act also is worthy of further study in the United Kingdom. The United States might consider more closely the notion of a public law judicial review process that incorporates a leave to appeal requirement and enhances the establishment of an administrative review tribunal at the judicial level. Finally, both countries need to investigate the concept of public law more closely at the remedial level.

Comparing differing systems offers an opportunity to learn about one's own system as well. The point should not be so much whether change ultimately results, but whether rational analysis of common experiences reinforces or undermines confidence in established ways of proceeding. The Anglo-American Exchange performed that self-examination function admirably.