Reflections on Preclusion of Judicial Review in England and the United States

Sandra Day O'Connor
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SANDRA DAY O'CONNOR*

I. INTRODUCTION

Lord Diplock said that he regarded "progress towards a comprehensive system of administrative law . . . as having been the greatest achievement of the English courts in [his] judicial lifetime." Inland Revenue Comm'rs v. National Fed'n of Self-Employed & Small Businesses Ltd., [1982] A.C. 617, 641 (1981). In the United States, we have seen comparable developments in our administrative law during the forty years since the enactment of the federal Administrative Procedure Act (APA) in 1946, as the federal courts have attempted to bring certainty, efficiency, and fairness to the law governing review of agency action while ensuring that agencies fulfill the responsibilities assigned to them by Congress and that they do so in a manner consistent with the federal Constitution. The burgeoning of the administrative state in both countries has meant that more and more of the goods and services on which people depend are made available through administrative proceedings of one type or another. In the United States, this trend is evident simply from the staggering volume of claims decided by the Social Security Administration, the Veterans Administration, and similar agencies, state and federal. The attendant problems of delay and expense have been formidable. The Social Security disability program alone receives some 1,250,000 applications and adds some 10,000 cases to the workload of the federal district courts each year. Liebman & Stewart, Bureaucratic Vision (Book Review), 96 Harv. L. Rev. 1952, 1956 (1983) (reviewing J. Mashaw, Bureaucratic Justice (1983)).

The importance of administrative law in the United States and England was borne out both in the decision to make administrative law the focus of the Seventh Anglo-American Exchange, as it had

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been in the Third Exchange, and in the addresses given at our meeting in London. In addition, as the proceedings of the Seventh Exchange richly attest, the English and American treatments of administrative law are mutually illuminating in numerous important respects. I propose to focus on two of these elements. The first topic, to which I will devote primary attention, is the statutory preclusion of judicial review, by which I mean attempts by the legislature to preclude review of administrative decisions by courts of law. Central to this topic, as I see it, is the following paradox. In England, where Parliament is acknowledged to be supreme, the courts nonetheless defy that supremacy when confronting attempts by Parliament to preclude judicial review of administrative action. By contrast, American courts, despite their power of judicial review of congressional acts, have shown deference to efforts by Congress to limit judicial review of administrative action. I also shall devote some attention to the doctrine of standing, or locus standi, as it is called in English law, which can be seen as a different form of review preclusion. Consistent with the paradox noted above, there appear to be opposing trends in England and the United States—in the former, toward a very relaxed standing doctrine, and in the latter, toward a resurgence of the notion that some interests are not intended to be protected by courts, based largely on the doctrine of separation of powers.

II. PRECLUSION OF JUDICIAL REVIEW

The overarching constitutional difference between the United States and England is the existence here of a written constitution based on the separation of powers, and the absence in England of a written constitution to limit the absolute sovereignty of Parliament. Other pervasive differences derive from this one. For example, the United States Supreme Court is created by Article III and, while the lower federal courts authorized by Article III are created by Congress, all Article III judges enjoy life tenure and undiminished compensation. The English courts, on the other hand, are common law courts, not created by Parliament, but subject to statutory revision of their organization, tenure, and salary: "[T]he Act of Settlement 1700 (which inter alia protects the tenure of the higher judges) could in law be repealed with no more formality than was required for the Act of 1967 which made it a crime to
pick flowers in the Antarctic.” B. Schwartz & H. Wade, *Legal Control of Government* 11 (1972) (footnote omitted). The English courts’ independence, in short, has no basis in a written constitution, and is not guaranteed against legislative encroachment. Furthermore, under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the federal courts have the power, in cases that properly come before them, to declare acts of Congress or of the executive branch unconstitutional. The English courts have no such power, given that Parliament is supreme, though the English courts have on occasion construed a statute most unnaturally in pursuit of “natural justice” or to avoid constitutional change.

Paradoxically, however, it seems that the English courts virtually defy parliamentary supremacy when confronted with statutes that attempt to preclude judicial review, whereas, so long as Congress acts within its constitutional powers, the federal courts in this country generally are careful to discern and respect its intent even in the sensitive area of restraints on judicial review. The English courts’ belligerent posture is by no means a novel development in English law; they historically have given the narrowest possible construction to statutory curtailments of judicial review. For example, in 1759 Lord Kenyon disregarded an express “no certiorari” clause when confronted with an order made by justices at general session outside their jurisdiction. *R. v. The Justices of Peace of Derbyshire*, 2 Keny. 299, 96 Eng. Rep. 1189 (K.B. 1759). The justification for the ensuing line of “no certiorari” cases was pithily given by Lord Denning: “If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.” *R. v. Medical Appeal Tribunal*, [1957] 1 Q.B. 574, 586 (C.A.); *see also* H. Wade, *Administrative Law* 599-601 (5th ed. 1982) (discussing the courts’ willingness to disregard “no certiorari” clauses). Similarly, as to statutes providing that a decision of a tribunal “shall be final,” Lord Atkin said: “Finality is a good thing but justice is a better.” *Ras Behari Lal v. King-Emperor*, 60 I.A. 354, 361 (1933).

The leading contemporary instance of this tendency to nullify “ouster” clauses is *Anisminic Ltd. v. Foreign Compensation Comm'n*, [1969] 2 A.C. 147 (1968), which Lord Diplock has described as “a legal landmark [that] . . . has made possible the rapid development in England of a rational and comprehensive
system of administrative law on the foundation of the concept of ultra vires.” In re Racal Communications Ltd., [1981] A.C. 374, 382 (1980). In Anisminic, the Foreign Compensation Commission was charged with deciding claims for compensation for the expropriation of British property abroad, payable out of funds paid by foreign governments to the British government for expropriation. [1969] 2 A.C. at 152. The Commission had rejected a claim concerning a mine in the Sinai that was expropriated after the Suez conflict in 1956 on the grounds that the claimants had not satisfied one of the prerequisites to recovery—namely, that claimants and their successors in title be British nationals as of the time of the 1959 treaty that created the compensation fund. Id. The House of Lords held that the Commission had misinterpreted the law, thereby imposing a condition on recovery that it had no power to impose. Id. at 214. This error, the Law Lords concluded, was subject to judicial review because it was jurisdictional, notwithstanding that the Foreign Compensation Act, 1950 provided that a decision by the Commission “shall not be called in question in any court of law.” 14 Geo. 6, ch. 12, § 4(4).

As Professor Wade points out, insofar as the House of Lords held in Anisminic that a jurisdictional error was subject to judicial review despite the ouster clause, the case broke no new ground. H. Wade, supra p. 645, at 604. As a matter of parliamentary intent, however, the insistence of the courts that agency error going to jurisdiction is necessarily reviewable amounts to a conclusive presumption that the lawgiver may not share. The novelty of the decision lies in the House of Lords’ treatment of what appeared to be an ordinary error on a question of law as an error going to jurisdiction. Id. Subsequently, in Pearlman v. Keepers & Governors of Harrow School, [1979] Q.B. 56 (C.A. 1978), the Court of Appeal read Anisminic as authorizing judicial review of any error of law. The opinion of Lord Denning M.R. stoutly maintained: “The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends.” Id. at 70. As Professor Wade notes, this reading of Anisminic gives no effect to the ouster clause. All errors of law are then reviewable, and errors of fact within jurisdiction are not reviewable in any event when appeal is not provided for by statute. See H. Wade, supra p. 645, at 604. The Privy Council has since

Lord Diplock's speech in In re Racal Communications Ltd., [1981] A.C. 374 (1980), reasserted the position that Anisminic means that, "as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished." Id. at 383. Yet Lord Diplock would have preserved that distinction as applied to inferior courts. He explained that the abolition of the distinction as applied to administrative agencies stemmed from the presumption that Parliament did not intend to "confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy," while rejecting the propriety of a similar presumption "where a decision-making power is conferred by statute upon a court of law." Id. This surely shows the extent to which it is the customary or constitutional prerogatives of the judiciary that are being asserted by means of a "presumption," rather than some pristine notion of what jurisdiction is. Because Lord Diplock's view was not endorsed by a majority of the Law Lords, however, Professor Wade has suggested: "All that can be said with certainty at the present stage is that there is a medley of contradictory opinions in the appellate courts and the conflict between the rival interpretations of Anisminic is unresolved." H. Wade, supra p. 645, at 266-67.

The reaction to Anisminic itself was most interesting:

The Government . . . tacked on to [a] bill at report stage amendments designed unequivocally to exclude the supervisory jurisdiction of the courts in relation to purported determinations by the Commission. The bill as amended was duly passed by the Commons. But a body of informed legal opinion had been aroused. There were letters to The Times, and adverse comments by Law Lords and other peers at the second reading debate on the bill in the Lords; a former Lord Chancellor moved an amendment to provide for a limited right of appeal to the Court of Appeal from the Commission's determinations on jurisdictional issues, and the amendment was carried against the Government; the Government then abandoned its position,
introduced alternative amendments which were accepted, and the Foreign Compensation Act 1969 became law with a novel code for judicial review of the Commission’s determinations.


Defenders of *Anisminic* point to this sequence of events as establishing parliamentary acquiescence in the courts’ insistence on defeating ouster clauses. But *Anisminic*, read broadly, has had its detractors as well. For example, one commentator contended:

[T]he general approach to statutory interpretation, especially when applied to privative clauses, severely confines and often subverts the wishes of Parliament. The rhetoric may be of constitutional partners, but the reality is of constitutional competitors. While pretending to be a bulwark against the usurpation of political power, the judicial process usurps the legislative function. The ghost of Lord Coke is alive and well; it stalks the corridors of legislative power.

Hutchinson, *The Rise and Ruse of Administrative Law and Scholarship*, 48 Mod. L. Rev. 293, 315 (1985). Professor Wade conceded that “[t]he policy of the courts thus becomes one of total disobedience to Parliament,” H. Wade, *supra* p. 645, at 604, but he argued that this is justified to avoid the “paradox of enacting law and then preventing the courts from enforcing it.” *Id.* at 606. This view would necessarily go further than the presumption Lord Diplock favored in *In re Racal Communications Ltd.*, because Lord Diplock indicated that Parliament could overcome that presumption by using “clear words.” [1981] A.C. at 383. Professor Wade’s position seems to imply that a law the courts cannot enforce will not be treated by the courts as law: “This is tantamount to saying that judicial control is a constitutional fundamental which even the sovereign Parliament cannot abolish, at least without some special and exceptional form of words.” H. Wade, *supra* p. 645, at 605.

The treatment of statutory preclusion of judicial review in the United States differs markedly from the extreme resistance to such provisions manifested by the English courts. Before turning to some of these differences, the topic should be put in constitutional perspective. The provisions of the United States Constitution significantly constrain Congress’ ability to preclude judicial review.
To begin with, Article III places limits on Congress’ ability to commit decisions involving private rights to administrative tribunals, though these limitations are flexible and turn on “practical attention to substance rather than doctrinaire reliance on formal categories.” Thomas v. Union Carbide Agr’l Prods. Co., 105 S. Ct. 3325, 3336 (1985); see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Moreover, as I had occasion to note in my dissenting opinion in South Carolina v. Regan, 465 U.S. 367 (1984), the original jurisdiction of the Supreme Court has long been thought inviolate. Id. at 397 (O’Connor, J., dissenting); see, e.g., California v. Arizona, 440 U.S. 59, 65-66 (1979) (stating in dicta that Congress may not curtail grant of original jurisdiction); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) (holding that Congress may not add parties not within the constitutional grant of original jurisdiction). Article III “authorizes Congress to establish the ‘inferior Courts’ and places no express limits on the congressional power to regulate the courts so created,” Regan, 465 U.S. at 396 (O’Connor, J., dissenting); see U.S. Const. art. III, § 1, but the Supreme Court’s appellate jurisdiction is subject only to the uncertain scope of the controversial “exceptions and regulations” power conferred on Congress by Article III, U.S. Const. art. III, § 2, cl. 2; see Ex parte McCordale, 74 U.S. (7 Wall.) 506 (1868). That power has been rarely invoked and narrowly employed. Some have argued that due process may require judicial review of some administrative decisions. See Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948); Note, Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers, 97 Harv. L. Rev. 778 (1984). This important question, in the context of state agency decisions affecting constitutional rights, was reserved by the Court last term in Massachusetts Correctional Institution v. Hill, 105 S. Ct. 2768, 2771 (1985) (noting that “[t]he extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law”).

These constitutional limitations, actual and potential, on congressional power to preclude judicial review undoubtedly influence the behavior of Congress. Whereas in England “[c]lauses restricting legal remedies are treated as commonplace technicalities and
normally arouse no interest in the legislature,” B. Schwartz & H. Wade, supra p. 645, at 297, there is little doubt that an attempt to preclude all judicial review normally would receive close scrutiny in the Congress. See generally id. at 15 (noting that Congress is far more interested in legal remedies than Parliament); Fisher, Constitutional Interpretation by Members of Congress, 63 N.C.L. Rev. 707 (1985) (arguing that Congress can, and frequently does, perform an important role in interpreting the meaning of the Constitution). But see Mikva, How Well Does Congress Support and Defend the Constitution?, 61 N.C.L. Rev. 587 (1983) (arguing that, for the most part, Congress fails adequately to explore the constitutional implications of pending legislation).

More than that, the judicial review provisions of the APA itself—which has no counterpart in English statutory law—constitute recognition by Congress that judicial review of agency decisions generally should be available. Section 10 of the APA provides that the APA’s provisions for judicial review apply except when “statutes preclude judicial review” or “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a) (1982). Thus, although on the surface one might equate the Supreme Court’s presumption favoring judicial review of agency action, see, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967), with the presumption Lord Diplock found in Anisminic, there is an important initial difference: the strength of the evidence that in fact the legislature shares the presumption employed by the courts. There is reason to think that Congress intended to codify what previously had been a somewhat erratic, but nonetheless discernible, judge-made presumption in favor of judicial review of agency action. The provisions of the APA support such a presumption, for “[t]he APA confers a general cause of action upon persons ‘adversely affected or aggrieved by agency action within the meaning of a relevant statute,’ 5 U.S.C. § 702, but withdraws that cause of action to the extent [that § 701(a) applies].” Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984); see L. Jaffe, Judicial Control of Administrative Action 372-73 (1965). It requires no great leap to infer from the creation of a cause of action in the APA, plus the statutory provision for federal question jurisdiction, 28 U.S.C. § 1331 (1982), a rebuttable presumption in favor of judicial review of administrative action.
The famous pre-APA statement of this presumption in *Stark v. Wickard*, 321 U.S. 288 (1944), is worth at least brief mention here, and will seem quite familiar to the English reader, attuned to the ultra vires doctrine and the principle of the rule of law:

When . . . definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.

*Id.* at 309-10 (footnotes omitted).

Justice Frankfurter forcefully argued in his dissent in *Stark* that at least the last sentence of the passage just quoted was wrong: Congress had not yet—though it soon would in the APA—“entrusted to the courts” review of agency action as a general rule. Instead,

the manner in which Congress has distributed responsibility for the enforcement of its laws between courts and administrative agencies runs a gamut all the way from authorizing a judicial trial *de novo* of a claim determined by the administrative agency to denying all judicial review and making administrative action definitive.

*Id.* at 312-313 (Frankfurter, J., dissenting). Thus, Justice Frankfurter discerned a constitutional basis—unacknowledged in the majority opinion—for the presumption *Stark* asserted: the decision "impliedly denies to Congress the constitutional right of choice in the selection of remedies and turns common-law remedies into constitutional necessities simply because they are old and familiar." *Id.* at 314-15; see L. Jaffe, *supra* p. 650, at 345-46.
Against this backdrop, the enactment of the APA may be seen as a leading instance of constitutional accommodation between Congress and the federal courts. On the one hand, Congress supplied a statutory basis for the presumption of judicial review that the Court had fashioned on potentially constitutional grounds. On the other, Congress reserved the power to overcome that presumption by endorsing preclusion of review of certain broad grants of discretion as well as passing a particular statute precluding review. Here, too, Congress borrowed from the courts: “The doctrine of nonreview antedates the APA,” and “the evolving common law doctrines of nonreview . . . arguably were codified in the APA itself.” Saferstein, Nonreviewability: A Functional Analysis of “Committed to Agency Discretion”, 82 Harv. L. Rev. 367, 374 (1968). The Supreme Court’s statement in Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), that the APA “represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest,” id. at 40, seems applicable both to the balance struck by the Act and to the availability of judicial review. At the end of the day, one is left with a sense that to speak of congressional acquiescence in the presumption in favor of judicial review is far from a fiction. It would be difficult, I think, to say the same of the Anisminic presumption.

The converse of this congressional acquiescence is judicial acquiescence in giving effect to the twin preclusion provisions of section 701(a) of the APA. To be sure, there have been periodic shifts in the Supreme Court’s hospitality to these provisions, but two recent decisions have established that each type of review preclusion is alive and well. The Court has now confirmed that, constitutional limitations aside, it is not hostile to preclusion of judicial review. In Block v. Community Nutrition Institute, 467 U.S. 340 (1984), the Court held that milk consumers could not challenge certain administrative actions closely akin to the actions that milk producers had been allowed to challenge in Stark. The Court stated that the presumption favoring judicial review of administrative action could be overcome in several ways: by specific statutory language or legislative history, by congressional acquiescence in contemporaneous judicial construction barring review, “by inferences of intent drawn from the statutory scheme as a whole,” and, in some cases, “when
a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons.” *Id.* at 349. *Block* was decided on the basis of the third of these categories: the structure of the statute implied that Congress intended to preclude consumer challenges to the milk market orders. *Id.* at 352. Overall, *Block* weakened the general presumption that agency action is reviewable, “by lowering the standard required to demonstrate congressional intent to preclude judicial review.” Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 660 (1985).

The exception to the APA’s judicial review provisions for agency actions “committed to agency discretion by law” was, in the view of some, intended only to make plain that action taken pursuant to reasonably exercised discretion should not be reviewed in full by a reviewing court. *See* 5 K. Davis, *Administrative Law Treatise* § 28.6 (1984); B. Schwartz & H. Wade, *supra* p. 645, at 262-65; Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum. L. Rev. 55, 82-83 (1965). In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court definitively rejected any such interpretation, and made plain that this exception should be given substantial effect by the courts. In the context of affirmative agency decisions under a statute, the Court reaffirmed the “no law to apply” test adopted in *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), under which “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” 470 U.S. at 830. But *Chaney* was a challenge to an agency’s refusal to initiate enforcement proceedings, and it was here that the decision broke new ground. Because enforcement discretion generally is ill-suited to judicial review, is exercised in a manner that does not directly infringe on the liberty or property rights of individuals, and is akin to decisions traditionally entrusted to the executive branch under the “take care” clause, U.S. Const. art. II, § 3, the Court held that in this situation “the presumption is that judicial review is not available.” 470 U.S. at 831. The Court was careful, however, to reserve decision on the reviewability of challenges to nonenforcement decisions based on an agency’s belief that it lacked jurisdiction, *id.* at 833 n.4, or challenges based
on claims that nonenforcement violated the aggrieved party's constitutional rights, id. at 838. While it must be left to later cases to determine just how broadly Chaney sweeps, the opinion reflects both separation of powers principles and notions of institutional competence.

Several salient differences emerge when one compares cases such as Block and Chaney to the Anisminic line. Most obvious is the difference between the irrebuttable Anisminic presumption and the rebuttable APA presumption. One also should note that the dichotomy between questions of law and questions of fact, which remains important in the English cases because most errors of fact are not "jurisdictional," is largely irrelevant to American nonreviewability doctrine, though it is, of course, highly relevant to the standard of review. There is no doubt that the agency action in Block, and the agency's refusal to act in Chaney, involved legal as well as factual determinations. This is in stark contrast to the English attitude, which insists on judicial review, under Anisminic, of all questions of law. Block and Chaney establish the continued accuracy of Professor Jaffe's comment that

[w]hen the intention to exclude judicial review is made manifest, there is (assuming of course that the exclusion does not offend the Constitution), in the federal courts at least, very little disposition to evade the broad sweep of exclusion by resort to a loose conception of "jurisdiction" or some kindred doctrine.

L. Jaffe, supra p. 650, at 353. In Great Britain, the "conception of 'jurisdiction,'" as applied to administrative tribunals, now knows no bounds so far as questions of law are concerned.

It is also notable that the English courts seem generally unwilling to accept the notion that there are matters as to which no standards or relevant factors can be supplied to channel discretion. The explanation for this may in part be that "British law has no restriction corresponding to the A.P.A.'s exception in favour of agency action 'by law committed to agency discretion.'" B. Schwartz & H. Wade, supra p. 645, at 261 (footnote omitted). But, more generally, the federal courts in the United States seem more receptive than their English counterparts to the notion that some executive or administrative decisions turn on so many imponderables, or are so inherently arbitrary, that judicial intervention would contribute little by way of more reasoned decisions, while
impairing the agency's performance of its delegated responsibilities. As one commentator put it, in the form of a fable:

The centipede was happy, quite,
until a toad in fun
Said, 'Pray, which leg goes after which?'
This worked his mind to such a pitch,
He lay distracted in a ditch,
Considering how to run.

Koch, Confining Judicial Authority over Administrative Action, 49 Mo. L. Rev. 183, 212 n.120 (1984).

Some decisions, in short, may turn more on experience and intuition than on any listing of reasons, factors, standards, or the like. For example, Professor Mashaw has argued with considerable force that "the difficult questions posed by the [Social Security disability] program—questions of fact and evaluation, of prediction and intuition and comparison—can be satisfactorily resolved only through systems of bureaucratic management substantially immune from adjudicatory proceedings and judicial review." Liebman & Stewart, supra p. 643, at 1958. Many of these determinations are primarily factual, but the application of law to facts—albeit law that leaves much to the discretion of the factfinder—is part and parcel of the decisions that Professor Mashaw would insulate from judicial review.

These differences may be attributable to a variety of causes. I shall venture to suggest only a few. Because the English courts lack the power to declare acts of Parliament unlawful, they are confined to wielding their power to interpret the law: "Even under the British system of undiluted sovereignty, the last word on any question of law rests with the courts." H. Wade, supra p. 645, at 29. Although this is a very considerable power, particularly once Parliament has delegated authority to an administrative tribunal, it is by no means equivalent to the Marbury power of judicial review vested in the federal courts. The federal courts need not pretend to be interpreting the legislative will when in fact they are attempting to protect their own constitutional role and the rights of individuals. Pretense surely weakens the institutional authority of the judiciary, and hence victories such as Anisminic may not come without cost. The position of the English courts is inherently precarious
and, although Parliament has not retaliated, it may be unwise to infer impotence from accommodation.

Precisely because the role of the federal courts, and especially of the Supreme Court, rarely has been threatened in our history, and has a firm basis in a written constitution, our courts may be more willing to engage in self-restraint. Were the English courts to concede that an ouster clause wholly barred judicial review of an administrative tribunal's decision, the courts would have no way of preserving even a limited role if Parliament wished to give the tribunals a free hand. It is thus ironic that our written constitution allows for more flexibility in judicial interpretation of statutes precluding review, while the English courts are driven to a rigid defense of their constitutional role notwithstanding the axiom that Parliament is free to change that role by ordinary legislation.

Perhaps the closest analogy to the practice of the English courts in construing privative clauses narrowly is the application of the Ashwander principle to preclusion of review in the administrative context. Justice Brandeis' concurrence in Ashwander v. TVA, 297 U.S. 288 (1936), contains the classic proposition that the federal courts should avoid unnecessary adjudication of constitutional questions. Id. at 341 (Brandeis, J., concurring). The leading case in which this principle was applied in connection with preclusion of judicial review is Johnson v. Robison, 415 U.S. 361 (1974). Johnson involved a federal statute which provided that “the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision.” 38 U.S.C. § 211(a) (1970). A conscientious objector who had been denied veterans' educational benefits pursuant to the provisions of a law providing for such benefits raised constitutional challenges to the statute on first amendment and equal protection grounds. The Supreme Court, invoking the need to avoid the “serious questions concerning the constitutionality of § 211(a)” that would arise if it were interpreted to bar judicial review of the constitutionality of the statute, 415 U.S. at 366, concluded that Congress had not intended to preclude judicial review of constitutional questions that might arise in the course of these administrative decisions, id. at 373-74. The Court, it should be
emphasized, did not hold that the alternative interpretation of the statue would itself be unconstitutional, and there were plausible indications in the language and history of section 211(a) favoring the gloss the Court placed on it. Still, Johnson shows that the constitutional doubts that surround preclusion of review of constitutional claims by any federal court will, in a close case, tip the scales of statutory interpretation against finding a congressional intent to go this far.

Surveying the unsettled state of English law in the wake of Anisminic, one wonders whether the doctrine of "natural justice" may, in time, prove to be the settling place for the English courts in their efforts to carve out a secure sphere for judicial review of administrative decisions. Possibly, English courts, which already treat error that rises to a denial of "natural justice" as jurisdictional, see Ridge v. Baldwin, [1964] A.C. 40 (1963), eventually will confine the doctrine of jurisdictional errors to such instances and to those that are jurisdictional in a narrow, pre-Anisminic sense. Such a development might strike a more enduring compromise than the Anisminic regime is likely to produce. The English courts then could insist that the presumption in favor of judicial review is not only grounded in the notion of the rule of law, but also derives much of its force from the concurrent presumption that Parliament would not intend to deprive the citizen of his or her basic rights and liberties, contrary to settled principles of natural justice. The beginnings of such an approach may be discernible in South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union, [1981] A.C. 363 (P.C. 1980), in which the Privy Council was of the view that "if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective." Id. at 370.

One additional factor accounting for the differences between the English and American approaches is the influence of the system of separated powers built into the United States Constitution with such farsighted ingenuity. One example is the "take care" clause of the United States Constitution, which entrusts to the executive branch the constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. That clause
supplies a basis for treating some decisions as "the special province of the Executive Branch," Heckler v. Chaney, 470 U.S. 821, 832 (1985), and hence as presumptively unreviewable. More generally, the checks and balances set up by our constitutional framework give us, I think, a justified confidence that, so long as judicial review is ordinarily available, exceptions will not prove the undoing of "the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). When the English courts suggest that the rule of law would come to an end if the decisions of administrative tribunals were made unreviewable, the greater dangers they foresee may well stem from the comparative inefficacy of such checks and balances in the English constitution. Lord Diplock said that it is not "a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions." Inland Revenue Comm'r's v. National Fed'n of Self-Employed & Small Businesses Ltd., [1982] A.C. 617, 644 (1981). Here again, the American attitude seems less categorical. No one would suggest that the President's accountability to Congress for the behavior of administrative agencies is an across-the-board substitute for judicial review. Still, it is not farfetched to think that if Congress found that the unavailability of judicial review in a particular program had led to widespread abuse and dissatisfaction, Congress would have ample incentive to intervene by providing for judicial review. Legislative oversight also may be more effective in the United States because the legislature and the managers of the executive are not one and the same. This, again, is a consequence of the separation of powers in the United States.

III. Standing

The Article III standing doctrine serves as an additional and highly important limitation on the timing, frequency, and scope of judicial review of agency action in the United States. Cases such as Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982), and Allen v. Wright, 468 U.S. 737 (1984), have reinvigorated the link between standing doctrine and the principle of separation of powers. Indeed, the
Supreme Court has said that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." Allen, 468 U.S. at 752. As a result, mere dissatisfaction with the allegedly unlawful or unconstitutional operation of government does not confer standing to sue on individuals. A claim to this effect "would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury." Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 217 (1974) (footnote omitted). As Justice Frankfurter once wrote, "One who is merely the self-constituted spokesman of a constitutional point of view can not ask [the courts] to pass on it." Coleman v. Miller, 307 U.S. 433, 467 (1939) (separate opinion). A concrete, legally cognizable injury must be alleged before the federal courts may find a justiciable case or controversy. The Supreme Court also has made clear that "[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." Schlesinger, 418 U.S. at 227.

Although it may not be immediately obvious what these pronouncements have to do with separation of powers, Judge Bork has offered a succinct explanation of the connection, as applied to one of the facets of Article III standing—the requirement that the plaintiff allege a judicially cognizable injury:

A critical aspect of the idea of standing is the definition of the interests that courts are willing to protect through adjudication. A person may have an interest in receiving money supposedly due him under law. Courts routinely regard an injury to that interest as conferring upon that person standing to litigate. Another person may have an equally intensely felt interest in the proper constitutional performance of the United States government. Courts have routinely regarded injury to that interest as not conferring standing to litigate. The difference between the two situations is not the reality or intensity of the injuries felt but a perception that according standing in the latter case would so enhance the power of the courts as to make them the dominant branch of government. There would be no issue of governance that could not at once be brought into the federal courts for conclusive disposition. Every time a court expands the definition of standing, the definition of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts.
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It goes without saying that there are deep differences of opinion among members of the American bench and bar as to just where the balance between the powers of the courts and those of the legislative and executive branches should be struck in a particular case or category of cases. But it seems fair to say that there is a consensus that Article III not only protects the federal courts but restrains them. The source of this restraint is found not only in the standing doctrine but also in the other aspects of justiciability, including mootness, ripeness, and the political question doctrine. See Allen, 468 U.S. at 750. The restraining influence of Article III is an instance of the separation of powers doctrine embedded in the structure of our Constitution. Moreover, there is reason to think that Article III helps ensure that courts continue to function as courts, and not as the arbiters of disputes that are the stuff of politics in a democracy. As Justice Scalia has said, “The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon when and at whose instance they are permitted to address them.” Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U.L. Rev. 881, 892 (1983) (emphasis in original). Justice Scalia has given the following explanation of the standing requirement:

[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interests of the majority itself.

Id. at 894 (emphasis in original). Thus, he has suggested that the fundamental dichotomy is between the plaintiff who seeks to challenge a legal requirement or prohibition of which he is “the very object,” and the plaintiff who complains of “an agency’s unlawful failure to impose a requirement or prohibition upon someone else.” Id. (emphasis in original).

Functionally, standing, along with “[o]ther doctrines, such as . . . exhaustion of administrative remedies, and ripeness, while not literally doctrines of nonreview, [is] often used to reach the same
result." Saferstein, *supra* p. 652, at 367 (footnote omitted). Doctrinally, once standing is seen as an aspect of separation of powers, as applied to the federal judiciary through Article III, the connection between standing and statutory preclusion of review becomes clear. As one commentator has noted, in addition to grounding standing doctrine on separation of powers considerations, the Court also has relied on separation of powers in interpreting "the broader doctrine of 'reviewability' developed under the Administrative Procedure Act." Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862, 868 (1985) (footnote omitted). Indeed, statutory preclusion of review can be seen as the obverse of another important problem—instances in which Congress *confers* standing on individuals who otherwise might not be able to satisfy either the prudential or the constitutional standing requirements. Professor Floyd believes that the Court has treated Congress' power to create legal interests whose impairment will satisfy the Article III "injury in fact" requirement with some ambivalence: "At times [the Court] has suggested that this power is unlimited, while at other times it has suggested that this power is subject to a bedrock constitutional requirement of injury in fact which exists prior to and apart from congressional recognition." *Id.* at 881 (footnote omitted). As he correctly observed:

Which view applies is of critical significance in light of the broad citizen standing provisions found in much current legislation, not all of which can be seen as merely recognizing some pre-existing injury, and some of which appear to encroach on the Court's general proscription against basing standing on "generalized grievances."

*Id.* (footnote omitted). Of course, it is clear that insofar as that proscription is a prudential rule of judicial self-restraint, Congress may relax it. *See Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). But, in some situations, the presence of a generalized grievance and the absence of an injury in fact may be two ways of describing the same deficiency, and to that extent the problem Professor Floyd poses is a real and intensely interesting one, and one not fully resolved by the Supreme Court.

No discussion of the intimate connection between standing doctrine and separation of powers would be complete without reference to the role played by the power of judicial review in the
Marbury sense. As Justice Powell said in his concurring opinion in United States v. Richardson, "The power recognized in Marbury v. Madison is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing." 418 U.S. 166, 191 (1974) (Powell, J., concurring) (citation omitted). In language that strongly reminds one of Justice Scalia's hypothesis, Justice Powell urged:

The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

Id. at 192.

The situation in England provides a striking contrast with regard to the standing requirements for challenging administrative action. The decision in Inland Revenue Commissioners v. National Federation of Self-Employed & Small Businesses Ltd., [1982] A.C. 617 (1981) (Fleet Street Casuals), is illustrative. That case involved a challenge by an association of taxpayers to an agreement between the tax collector and thousands of newspaper printing employees, colorfully known as the "Fleet Street casuals," who had defrauded the government by collecting their pay under fictitious names. The Inland Revenue had essentially agreed not to seek recovery of back taxes in return for future compliance by the Fleet Street casuals under a special arrangement whereby the tax would be collected at the source. While the House of Lords ultimately held that the taxpayer association lacked "sufficient interest" to permit the application for relief to proceed, the Law Lords' reasoning expanded taxpayer standing considerably. Lord Scarman described the issue as one involving "the rights of the private citizen to invoke the aid of the courts in compelling the performance of public duty or in righting public wrongs." Id. at 648. He rejected the Lord Advocate's argument that "the law neither imposes nor recognises a duty owed to an individual taxpayer or a group of
taxpayers to collect from other taxpayers all the tax due from them,” and that “the duty to collect ‘every part of inland revenue’ is a duty owed exclusively to the Crown.” *Id.* at 651. Lord Scarman held a contrary view:

[T]he modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims.

*Id.* According to Lord Scarman, the taxpayer association would have had standing had it “shown reasonable grounds for believing that the failure to collect tax from the Fleet Street casuals was an abuse of the revenue’s managerial discretion or that there was a case to that effect which merited investigation and examination by the court.” *Id.* at 655. The other Law Lords agreed, albeit with important differences as to how egregious the breach of duty or abuse of discretion must be to infringe the duty owed to taxpayers. Lord Diplock’s speech captured the nature of the shift away from a true standing requirement: “Since judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful,” this version of standing subsumes the “specific ground of no sufficient interest” into “the more general ground that it has not been shown that in the matter of which complaint was made . . . the board did anything that was ultra vires or unlawful.” *Id.* at 637. Hence the upshot of *Fleet Street Casuals*, as Professor Wade put it, is that only “hopeless or meddlesome applications” are turned away at the threshold stage, H. Wade, supra p. 645, at 588; then follows a second inquiry, which “does not appear to be a test of standing but rather a test of the merits of the complaint,” *id.* at 589. But because “[t]he essence of standing, as a distinct concept, is that an applicant with a good case on the merits may have insufficient interest to be allowed to pursue it, [Fleet Street Casuals] would seem virtually to abolish the requirement of standing in this sense.” *Id.*

The extent of the current disparity between English and American standing doctrine is evident when one applies the reasoning of *Fleet Street Casuals* to cases such as *Allen v. Wright*, 468 U.S. 737 (1984). The plaintiffs in *Allen* were the parents of black school
children. They alleged that the IRS guidelines and procedures adopted “to fulfill [the IRS’] obligation to deny tax-exempt status to racially discriminatory private schools,” id. at 739, were so deficient and unreliable as to be unlawful—or, if you like, ultra vires and an abuse of discretion. It seems apparent that, in Great Britain under Fleet Street Casuals, the plaintiffs in Allen would have had standing if it appeared that a case could be made in support of their allegations. Nevertheless, after finding that the plaintiffs’ claims of actual injury were insufficient, the Supreme Court declined to “recogniz[e] standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.” Id. at 761. Similarly, a taxpayer association dissatisfied with the government’s enforcement policies vis-a-vis some other group of taxpayers would have little chance of establishing standing in the United States. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) (denying standing to taxpayers seeking to challenge the federal government’s conveyance of property to a religious institution).

What accounts for these divergent tendencies in our respective standing doctrines? Judge Friendly is undoubtedly right to point to the more litigious nature of the American people and to the deterrent function served by the English rule on costs and attorney’s fees as part of the explanation for the persistence of a vigorous standing doctrine in the United States. Friendly, Foreword to B. Schwartz & H. Wade, supra p. 645, at xx. At least the first of these reasons is in good measure attributable to the long-term effects of our written constitution: “Americans have become a people of constitutionalists, who substitute litigation for legislation and see constitutional questions lurking in every case.” B. Schwartz & H. Wade, supra p. 645, at 6. In addition, the constitutional preservation of the separation of powers has given durable support to the American standing requirement. Article III of the United States Constitution both confines and protects the federal courts. Lacking the protection of an ineradicable constitutional role, the English courts also lack the discipline of the Article III “case or controversy” limitation. It may be that, precisely because the English courts cannot wield a Marbury power, the fear of judicial
overreaching at the expense of the sound functioning of the legislative and executive branches has no true counterpart in Great Britain. Reading *Fleet Street Casuals*, one is struck by the absence of any concern lest the courts become too powerful. The gist of the English attitude, judging from *Fleet Street Casuals*, is that the limits on the proper role of the courts are to be determined exclusively in terms of the scope of review rather than the availability of review. See, e.g., *Fleet Street Casuals*, [1982] A.C. at 662 (Lord Roskill); cf. *Heckler v. Chaney*, 470 U.S. 821, 840 (1985) (Marshall, J., concurring) (arguing that the considerations relied on by the majority should not bar review, but should warrant unusually great deference to the merits of the agency's nonenforcement decision). This may reflect the fact that both the checks and balances set out in the United States Constitution and the power asserted in *Marbury* make it far easier for legislative minorities to block far-reaching change in the United States than in England. See B. Schwartz & H. Wade, supra p. 645, at 16. Thus, the Supreme Court's standing doctrine, framed in terms of separation of powers, may be seen as serving to limit the more expansive side of *Marbury*.

It is perhaps useful to make the point by noting the limits of the “rule of law” rationale offered by the defenders of broad judicial review and relaxed standing rules in England. That rationale, in a nutshell, is that in England the view that a statute “confers unfettered discretion with which the court cannot interfere” is “constitutional blasphemy” because “[e]very legal power must have legal limits, otherwise there is dictatorship.” *Id.* at 254. Yet Schwartz and Wade also said that “[i]n financial affairs particularly the [English] system is virtually dictatorial.” *Id.* at 14. Why, then, does not the rule of law allow judicial review of the process whereby budgets and taxation schemes become effective? The answer is that the English taxpayer generally lacks any legal basis for challenging the expenditures of the central government “merely as such.” *Id.* at 293. Schwartz and Wade explained that “[s]ince government expenditure is subject to no constitutional restraint of a legal kind, and since it is always given express parliamentary authority, if necessary retrospectively, it is hardly surprising that the question of the national taxpayer’s standing has not arisen.” *Id.* (emphasis added).
At first blush, this answer sounds strange indeed to American ears. But this answer follows straightforwardly from the nature of English judicial review, which is bottomed on the ultra vires doctrine: "[t]he simple proposition that a public authority may not act outside its powers." H. Wade, supra p. 645, at 38. "[I]n nearly every case" this entails the question whether the public authority's acts are "authorised by Act of Parliament." Id. at 22. Thus, judicial review is not available when there is no delegation of power by the sovereign, as when Parliament acts directly through legislation, without an administrative intermediary. Even in such instances, to be sure, the courts retain the power to interpret what Parliament has enacted, but that is a power with severe practical limitations.

This limitation is largely unparalleled in the United States. Constitutional challenges to the statute pursuant to which an administrative agency has acted are an everyday occurrence in the federal courts, just as are claims that the agency has acted outside its statutory authority or otherwise unlawfully. It necessarily follows that shifts in standing doctrine, in the United States, have more sweeping consequences: not only is the relationship between the courts and the executive branch altered, but so too is the relationship between the courts and the legislative branch. These consequences tend to be more permanent, as well as more sweeping, because the process of amending the United States Constitution was deliberately made difficult, whereas in Great Britain ordinary legislation can effect constitutional change. Much of the caution with which the Supreme Court typically has approached alterations in standing doctrine—whether in the direction of a more or less demanding test for standing—is attributable to recognition of these facts.

There also appears to be a second important limit on English judicial review. As Schwartz and Wade have implied, there are some English constitutional constraints that are not "of a legal kind." See B. Schwartz & H. Wade, supra p. 645, at 293. This formulation is reminiscent of our political question doctrine, see Baker v. Carr, 369 U.S. 186 (1962), and suggests a fruitful area for further inquiry: To what extent are English constitutional questions nonjusticiable, to use the American term? I shall not attempt to pursue this topic, involving as it does the subtle interplay between constitutional law and constitutional convention in Great Britain. Nevertheless, the answer to the inquiry may shed light on
the greater willingness of the English courts to relax standing requirements. My point is a simple one: the presence of nonjusticiable constitutional duties in England may serve as another important curb on the impact of judicial relaxation of the standing requirements. See S. de Smith, supra p. 648, at 54 (noting that "many [English constitutional] conventions are not buttressed by the threat of legal sanctions"). It would be most interesting to compare the spheres insulated from judicial review through convention in England and through the political question doctrine in the United States. One might then be able to make an informed estimate of the true significance of Fleet Street Casuals.

IV. CONCLUSION

The Anglo-American Exchange has provided an opportunity for a focused inquiry into comparative features of the law in our two nations. The Exchange is particularly useful because we share the common law traditions, which have played no small part in shaping administrative law. In the field of administrative law there are some notable contrasts in legal doctrine with respect to the availability of judicial review and the requirements of standing. The differences noted here illustrate the interesting questions that emerge from the project of comparison, and the value to practitioners and judges in both countries of the opportunity to examine the nature of those differences. As is often the case, we learn more about our own laws when we undertake to compare them with those of another sovereign. That learning is especially valuable because it invariably highlights those elemental features of our own laws whose importance is easily overlooked because familiarity makes them seem unremarkable. Comparison lifts the spell of familiarity and sheds a fresher light.