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The Lost English Roots of Notice-and-Comment Rulemaking

ABSTRACT. Notice-and-comment rulemaking is arguably the most important procedure in the modern administrative state. Influential accounts even frame it as the 1946 Administrative Procedure Act's "most important idea." But its historical origins are obscure. Scholars have variously suggested that it grew out of the constitutionally sanctioned practice of congressional petitioning, organically developed from the practices of nineteenth-century agencies, or was influenced by German conceptions of administrative rulemaking.

These histories, however, are incomplete. Using original archival research, this Article demonstrates that notice-and-comment rulemaking was the product of a series of American transplantations of English rulemaking procedures that developed in the late nineteenth and early twentieth centuries. In the New Deal Era, influential American reformers tracked important developments in English rulemaking as they grappled with the rapidly changing American legal ecosystem. Yet, as this Article emphasizes, Americans only partially adopted the English procedural framework. While they transplanted the "notice" and "comment" dimensions of English procedure, the Americans ultimately decided not to import a legislative veto, which was a critical part of rulemaking procedures in England.

By offering a revisionist account of the origins of notice-and-comment rulemaking, this Article makes two contributions. First, it takes an initial step toward recovering a largely forgotten world of Anglo-American administrative law. Second, it illuminates current debates about the legitimacy of notice-and-comment rulemaking. With many current critiques of notice-and-comment rulemaking centering on the procedure's supposed lack of democratic accountability, the history this Article traces pushes us to ask whether belatedly transplanting an English-style legislative veto would legitimate the procedure.

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INTRODUCTION

Notice-and-comment rulemaking has seen better days. Enshrined in Section 553 of the 1946 Administrative Procedure Act (APA),[1] notice-and-comment rulemaking (also known as informal rulemaking) has gradually evolved into a cornerstone of modern American governance.[2] Yet over the past decade, like much of the current administrative state, it has come "under siege."[3]

On the right, the procedure has been viewed with increasingly deep suspicion. This mistrust has stemmed from a growing concern that Congress's delegation of power to administrative bodies violates an original and formal tripartite separation-of-powers principle that "basic policy decisions governing society are to be made by the Legislature."[4] With a receptive audience among many of the current Supreme Court Justices (who are also deeply skeptical of regulation and the modern administrative state), this unease has cast a long shadow on the constitutionality of many regulations, including those promulgated through notice-and-comment procedures.[5] Occupied with these constitutional concerns,

1. In the original Administrative Procedure Act (APA), notice-and-comment rulemaking was in Section 4. *See* Administrative Procedure Act, ch. 324, § 4, 60 Stat. 237, 238-39 (1946). When Congress codified the APA in the U.S. Code, Section 553 became the provision detailing informal rulemaking. *See* 5 U.S.C. § 553(b) (2018). Because most lawyers and judges refer to the codified provisions of the Act, I will also do so.

2. *See, e.g.*, William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38 (1975) ("Administrative law, it is said, has entered an age of rulemaking."); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 67 (3d ed. 1988) (concluding that in recent years the "center of gravity" of government policymaking has moved to the notice-and-comment rulemaking process); Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. 1873, 1875 (2023) ("[T]he APA's informal, notice-and-comment process has been firmly established as *the* procedure for the development, modification, and repeal of administrative regulations."). For a sense of the quantity of regulations promulgated, see John M. de Figueiredo & Edward H. Stiglitz, *Democratic Rulemaking*, *in* 3 THE OXFORD HANDBOOK OF LAW & ECONOMICS 37, 38 (Francesco Parisi ed., 2017), which notes that in 2013, agencies finalized over 2,800 regulations while Congress passed only seventy public laws.

3. Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2-3 (2017).

4. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). The late Professor Richard B. Stewart famously termed this the "traditional model of administrative law," whereby the administrative state acts "as a mere transmission belt for implementing legislative directives." Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

5. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 111 (2014) (arguing that informal rulemaking is part of a "cascade of evasions—initially an evasion of law, but then a series of evasions within administrative lawmaking"); Gary Lawson, *The Return of the King:*

the Court has come to assign the actual procedures of informal rulemaking little intrinsic value. As it signaled in its 2020 decision in *Little Sisters of the Poor*—its most recent pronouncement on the value of notice-and-comment rulemaking—so long as an agency "checks the box[]"[6] and gives the public a nominal opportunity to participate, courts should not ask whether this participation meaningfully informed the final regulation.[7] Whereas courts previously insisted that the procedure's participatory character was essential to legitimating regulations,[8]

The Unsavory Origins of Administrative Law, 93 Tex. L. Rev. 1521, 1533 (2015) (claiming that rulemaking is "precisely the kind of prerogative or rump legislation that both British and American revolutionaries worked hard to abolish"). A growing number of Supreme Court Justices have increasingly embraced this view. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 171 (2019) (Gorsuch, J., dissenting) ("If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people."). Chief Justice Roberts and Justice Thomas joined this dissent. *See id.* at 150. The most recent manifestation of this formalist view is the major-questions doctrine, which is a response to the fear that "major" regulations potentially violate "separation of powers principles." West Virginia v. EPA, 597 U.S. 697, 723 (2022).

6. Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 Notre Dame L. Rev. 2071, 2100 (2023); *see also id.* at 2101 (noting that, while the Court "contended that 'the object' of notice and comment 'is one of fair notice,'" it "made no reference whatsoever to the role of public *participation* in notice-and-comment rulemaking" (quoting Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 684 (2020))).

7. *Little Sisters of the Poor*, 591 U.S. at 682-85. This is not the only time that the Justices have displayed a seeming lack of interest in effectuating the underlying purposes of notice-and-comment rulemaking. *See, e.g.*, Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (calling modern rulemaking "a laborious, seemingly never-ending process" that "has not been good as a jurisprudential matter, and . . . continues to have significant practical consequences for the operation of the Federal Government and those affected by federal regulation and deregulation").

8. *See, e.g.*, Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987) ("The purposes of according notice and comment opportunities were twofold: 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,' and to 'assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.'" (alteration in original) (first quoting Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980); and then quoting Guardian Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 662 (D.C. Cir. 1978)). This insistence on notice-and-comment rulemaking's participatory character has not, however, translated into a judicial requirement that agencies address every impactful comment they receive. That said, agencies are obliged to respond to "comments which are of cogent materiality." United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

now the Court has indicated that it does not always care about ensuring that public participation plays a meaningful role in rulemaking.[9]

If the right has foregrounded informal rulemaking's suspect constitutional status, the left has homed in on the "democracy deficit" of the procedure when put into action.[10] Not too long ago, the procedure was celebrated as participatory,[11] representative,[12] deliberative,[13] transparent,[14] and relatively egalitarian.[15] Now it has regularly been found wanting on all of these counts.[16]

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9. At times, the Court has still stringently demanded that agencies engage with public comments—and has invalidated rules that it determined failed to respond adequately. *See, e.g.*, Ohio v. EPA, 603 U.S. 279, 296-99 (2024).

10. *See* Peter L. Strauss, *Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit,"* 98 CALIF. L. REV. 1351, 1352-53 (2010).

11. *See* Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, *Rulemaking 2.0*, 65 U. MIA. L. REV. 395, 402 (2011) (calling notice-and-comment rulemaking "the most transparent and participatory decision-making process used in any branch of the federal government"); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 574 (1977) ("The primary reason that public participation leads to better rules is that it provides a channel through which the agency can receive needed education."); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402 ("The APA notice and comment procedure infuses the rulemaking process with significant elements of openness, accountability, and legitimacy.").

12. *See* Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS., no. 1, 1994, at 127, 129 (terming informal rulemaking "an ingenious substitute for the lack of electoral accountability of agency heads" and "refreshingly democratic").

13. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (describing notice-and-comment rulemaking as "the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity").

14. *See* Farina et al., *supra* note 11, at 402 (describing rulemaking as the most transparent process in the federal government); William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1927 (2023) (arguing that informal rulemaking "impose[d] uniformity, transparency, responsiveness, and publicity/notice requirements on administrative lawmaking").

15. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 66 (1969) ("Rule-making procedure which allows all interested parties to participate is democratic procedure.").

16. *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) ("Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 129 (2006) ("[B]usiness interests enjoy disproportionate influence over rulemaking outputs despite the supposedly equalizing effects of notice and comment procedures."); Michael

Whether the days of notice-and-comment rulemaking—as we know it—are numbered is anyone's guess. But in the face of this confluence of constitutional and democratic critiques, it is safe to say that informal rulemaking no longer enjoys the support that it once had. Administrative-law scholar Kenneth Culp Davis once famously termed it "one of the greatest innovations of modern government."[17] Now it suffers from "the extended sense of crisis" that has long plagued other dimensions of the administrative state.[18]

This crisis has led scholars studying these other facets of administrative law on a search for origins, to understand the initial aims and purposes of the multiple components of our modern administrative state.[19] The gamble is that by recovering these procedures' original visions, we can assuage anxieties about the purported illegitimacy of the administrative state today and find a way to guide administrative practice back toward legitimacy. One result of this work is that we are living through a renaissance of scholarship on the history of American administrative law. Yet oddly, despite this revived interest, we still do not fully understand how and why notice-and-comment rulemaking, once termed the

Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 812-14 (2021) (discussing barriers to public participation and the resulting low levels of public comments); Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1612 (2024) ("[A]gencies engage in behavior, in the implementation and enforcement of regulatory law, that subordinates the interests of vulnerable and marginalized people to institutional priorities." (footnote omitted)). For a critique of these positions, which often call for more procedural safeguards, see generally Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

17. KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 6.1, at 448 (2d ed. 1978).

18. JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 9 (1978). This is not to say that notice-and-comment rulemaking no longer enjoys support in some quarters. It most certainly does. *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 243-57 (2022) (arguing that *Chevron* deference should be limited to interpretations adopted through notice-and-comment rulemaking and not through adjudications).

19. Much of this scholarship has been termed "APA originalism." *See* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 809 (2018); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 899 (2020); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209 (2015) (detailing the deliberation behind the APA). *See generally* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733 (2020) (tracing the doctrinal justification of judicial deference to its origins); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (same). While Emily S. Bremer's work has also explored the APA as "originally designed," she has eschewed APA originalism in favor of an evolving judicially crafted administrative common law. *See* Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 439 (2021). This is also the case for Eskridge & Ferejohn, *supra* note 14, at 1893.

APA's "most important idea," came into being.[20] This is not to say that accounts of notice-and-comment rulemaking's history do not exist in the literature. They do, but they are incomplete. This is true of accounts plumbing the procedure's deep genealogy and those exploring its proximate inspirations.

We know that, despite its novelty, the procedure did not emerge out of thin air when it became part of the APA in 1946. But when and where it originated are matters of disagreement. Professor Maggie Blackhawk has suggested that its roots lie in the constitutionally sanctioned practice of petitioning that predates 1789.[21] Professor Jerry L. Mashaw has singled out one mid-nineteenth-century agency that developed and deployed a procedure that partially resembles notice-and-comment rulemaking.[22] Professor Blake Emerson has offered a third data point, directing attention to procedures used during the Progressive Era.[23] These accounts do not necessarily exclude one another—they could be parts of one overarching narrative—but the fact that they locate the origins of the procedure at different points in a hundred-year span underscores the lack of clarity that hovers over the procedure's history. Further obscuring how the procedure came about, they also disagree over whether it was indigenous to the United States or a foreign import. Blackhawk and Mashaw insist that the procedure originated and developed incrementally in the United States.[24] Emerson is more receptive to the idea that the procedure owes its existence, at least in part, to German

20. Kenneth Culp Davis, Walter Gellhorn & Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 521 (1986) (statement of Kenneth Culp Davis).

21. *See* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1546-47 (2018).

22. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW 193-95 (2012) (arguing that the Board of Supervising Inspectors of the Steamboat Inspection Service had a procedure similar to informal rulemaking).

23. *See* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 94 (2019) (describing how the Forest Service first distributed proposals to interested persons for comment and then "held week-long, deliberative meetings" with grazing organizations before finalizing these regulations). Even as the APA eventually settled for a more "threadbare" and "thin form of participation" in notice-and-comment rulemaking, it drew, according to Blake Emerson, from these more rigorous procedures. *Id.* at 127-28.

24. *See* McKinley, *supra* note 21, at 1546. This insistence is in large part a reaction to originalist claims that the administrative state and administrative law were not part of Founding Era constitutional structure. *See, e.g.*, HAMBURGER, *supra* note 5, at 8; Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994). For an overview of this debate, see Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1298 n.40 (2021).

Hegelian influences on late-nineteenth-century American legal ideas and institutions.[25]

The accounts that describe the sequence of events that directly led to the enactment of notice-and-comment rulemaking in 1946 raise other questions.[26] It is widely agreed that the procedure was publicly proposed for the first time in the 1941 final report of the Attorney General's Committee on Administrative Procedure (AG's Committee) and, specifically, in the minority's "additional views and recommendations."[27] Created in 1939, the Committee was tasked with studying the actual procedural workings of the myriad federal agencies that constituted the New Deal Era administrative state, or as Professor Joanna Grisinger has put it, examining "administrative law not just on the books but in action."[28] Given that the Committee's research staff issued twenty-seven accompanying monographs detailing agencies' practices,[29] it is unsurprising that a number of scholars have looked to these documents as the source of the Committee's ensuing proposals. As Grisinger and Professor Emily S. Bremer have independently argued, these monographs not only illuminated existing agency practices, but

25. *See* EMERSON, *supra* note 23, at 23-24.

26. A substantial body of scholarship has reexamined the first half of the twentieth century and explicated the institutional histories of the modern American administrative state and administrative law, including the 1946 APA. For examples of such scholarship, see generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014); JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL (2014); EMERSON, *supra* note 23; MARK V. TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930 TO 1941 (2022); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 (1992); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000); Bremer, *supra* note 19; Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69 (2022); Eskridge & Ferejohn, *supra* note 14; Reuel E. Schiller, Policy Ideals and Judicial Action: Expertise, Group Pluralism, and Participatory Democracy in Intellectual Thought and Legal Decision-Making, 1932-1970 (1997) (Ph.D. dissertation, University of Virginia) (on file with author); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007) [hereinafter Schiller, *The Era of Deference*]; and Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, *in* TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II 185 (Daniel R. Ernst & Victor Jew eds., 2002).

27. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 203, 224-32 (1941) [hereinafter AG'S COMMITTEE FINAL REPORT].

28. Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 389 (2008).

29. *Id.* at 390.

they also informed—or, according to Bremer, "inspired"—the Committee's proposals, including notice-and-comment rulemaking.[30]

Nonetheless, these explanations paper over a number of questions and even raise new ones. To begin with, if the procedure emerged from the monographs—Bremer has argued that the monographs provided "the 'intellectual foundation' for what became the APA"[31]—why was it that on multiple occasions, several members of the Committee distanced themselves from these documents?[32] That these accompanying studies laid the groundwork for notice-and-comment rulemaking—and were not, as Mashaw put it elsewhere, primarily intended for "burying the critics in facts"—is therefore not at all clear.[33]

Beyond this, the widely held notion that it was the minority's "conservative" bent that led it to propose informal rulemaking seems questionable.[34] This is especially the case when it comes to Carl McFarland, the former Justice Department official credited as being instrumental in bringing about informal rulemaking and, later, getting the APA passed and signed into law.[35] While little is known about him, McFarland appears outside of his work on the APA as a key figure in

30. Bremer, *supra* note 26, at 75; *see* Grisinger, *supra* note 28, at 390-91, 401-02.

31. Bremer, *supra* note 19, at 380 (quoting Kenneth Culp Davis, Walter Gellhorn & Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 513-14 (1986)); *see also* Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 524 (2002) (describing the final report and the monographs as having "laid the intellectual groundwork for the drafting of the APA").

32. E. Blythe Stason told one concerned lawyer that the monographs "d[id] not represent the views of the Committee." Letter from E. Blythe Stason to Louis G. Caldwell (Feb. 21, 1940) (on file with Univ. of Mich., Bentley Hist. Libr., E. Blythe Stason Papers, Various State & Pro. Activities, Box 12, Attorney General's Committee on Administrative Procedure Folder). Likewise, Arthur T. Vanderbilt underscored that each monograph "from the method by which it was prepared, necessarily presented to a very considerable degree the agency's point of view as to how the particular act under consideration should be enforced." *Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary, Part 1*, 77th Cong. 1306 (1941) [hereinafter *Administrative Procedure Hearings*] (statement of Arthur T. Vanderbilt, Member, Att'y Gen.'s Committee on Administrative Procedure). Walter Gellhorn also went out of his way to state in the front matter of each monograph that the research embodied "the views of the staff" and its publication "indicates neither approval nor disapproval by the Committee." *See, e.g.*, Walter Gellhorn, *Preface to* ATT'Y GEN.'S COMM. ON ADMIN. PROC., THE WALSH-HEALEY ACT: MONOGRAPH NO. 1 (unnumbered page before table of contents) (1939).

33. Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267, 273 n.5 (1990).

34. *See* Shepherd, *supra* note 26, at 1632.

35. *See* Davis et al., *supra* note 20, at 514, 518, 520, 523; Paul R. Verkuil, *The Administrative Procedure Act at 75: Observations and Reflections*, 28 GEO. MASON L. REV. 533, 535-36 (2021) (declaring that Carl McFarland should be recognized as one of the "real founder[s]" of the APA given his central role in both drafting the minority report and turning it into law).

conceiving and advancing President Franklin D. Roosevelt's court-packing plan.[36] This was quite incongruous with mainstream "conservative" views, to put it mildly. The enigma of McFarland casts at least some doubt on this understanding of the politics of the AG's Committee and its proposals, including that of notice-and-comment rulemaking.

In sum, the existing histories of notice-and-comment rulemaking either depict its origins in too-broad strokes or are premised on somewhat shaky and incomplete evidence.

One reason for these deficiencies might be that, in the broader story of the winding path toward the passage of the APA, the tale of informal rulemaking has too often been relegated to a minor role. As many have noted, adjudication and ratemaking were the primary modes of administrative action during the New Deal Era.[37] These modes of administration, along with the evergreen topic of judicial review, have as a result received most of the attention of historians studying the emergence of modern administration. Even though much time has passed since rulemaking emerged as the staple policymaking tool of administrative agencies in the late 1950s and early 1960s, historians have still struggled to understand the procedure's early history.[38]

Perhaps we have been looking in the wrong places. As is true for much of American legal history, a guiding assumption in the history of American administrative law is that important changes and innovations developed endogenously.[39] Granted, legal historians have recognized the German influences on

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36. *See* Ashley Sellers, *Carl McFarland—The Architect of the Federal Administrative Procedure Act*, 16 Va. J. Int'l L. 12, 13-15 (1975); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 Sup. Ct. Rev. 347, 391; *see also* Laura Kalman, FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism 18-19, 18 & 315 n.42 (2022) (describing McFarland's close relationship with Attorney General Homer Cummings).

37. *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Admin. L. Rev. 1139, 1140, 1145-47 (2001); Cornelius M. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy 11-15 (1994).

38. On the emergence of notice-and-comment rulemaking in the 1960s and 1970s, see, for example, Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 376; Schiller, *supra* note 37, at 1145-49; and Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137, 1143-44 (2014).

39. For examples of scholarship that relies on this assumption, see generally William J. Novak, New Democracy: The Creation of the Modern American State (2022); Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780-1940 (2013); Daniel Carpenter, The Forging of Bureaucratic Autonomy: Reputation, Networks, and Policy Innovation in Executive Agencies, 1862-1928 (2001); William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (1996); Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United

Progressive Era thought in the United States, but their work has centered on the deep impact of the *Rechtsstaat*[40] on individual thinkers.[41] Yet their work has not demonstrated how this influence, however important, translated into institutional practices. The most likely reason for this is that it most often did not. As Professor Daniel R. Ernst has shown, for all of the Progressive Era interest in German administrative law, the *Rechtsstaat* model, which sought to constrain administrative discretion through narrow legislative grants of power and was promoted by the likes of Professor Ernst Freund,[42] ultimately lost out to a competing Anglo-American model, which allowed for administrative discretion so long as it was subject to ex post judicial review, in the 1920s and 1930s.[43] Consequently, while German influences are undoubtedly important in understanding administrative law's early development among American intellectuals, the fact that the influences ended in a "transatlantic shipwreck"[44] shows that they did not create the lasting institutional and procedural practices that now define American administrative law, including informal rulemaking.[45] With so many

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STATES (Harvard Univ. Press rev. ed. 1995); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982); and WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900 (1982).

40. The concept of the *Rechtsstaat* emerged in nineteenth-century Germany and sought to strike a balance between a recognition of the necessity of growing state power and citizens' individual freedoms by controlling administrative action through legal means and in particular through a special administrative judicial system. For a succinct overview, see Bernardo Sordi, Révolution, Rechtsstaat*, and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law*, *in* COMPARATIVE ADMINISTRATIVE LAW 23, 26-31 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2017).

41. *See, e.g.*, EMERSON, *supra* note 23, at 2-3; JEAN M. YARBROUGH, THEODORE ROOSEVELT AND THE AMERICAN POLITICAL TRADITION 19-24, 44-46 (2012).

42. *See* Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American* Rechtsstaat*: A Transatlantic Shipwreck, 1894-1932*, 23 STUD. AM. POL. DEV. 171, 172-73, 177 (2009).

43. *See id.* at 185-88.

44. *Id.* at 171-72.

45. Americans continued to reject German and continental administrative legal structures in the 1930s and 1940s. *See* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 43-54 (2022). What is more, in one notable area, it was *conservative* opponents of the New Deal who were the ones to call for emulating continental practice: the creation of administrative courts. In its annual reports spanning 1933 to 1937, the American Bar Association's (ABA's) Special Committee on Administrative Law put forth proposed bills that would establish administrative courts; these courts were explicitly modeled on French and German administrative legal systems. *See, e.g.*, Shepherd, *supra* note 26, at 1574-90; *Report of the Special Committee on Administrative Law*, 57 ANN. REP. A.B.A. 539, 549 (1934) ("The preferable way of accomplishing the desired result, in the committee's opinion, is the establishment of a federal administrative court, patterned to some extent, but not entirely, after the

questions about the history of notice-and-comment rulemaking unresolved, it is incumbent on us to look elsewhere for its origins.

This Article excavates the origins of notice-and-comment rulemaking by redirecting attention to the late-nineteenth- and early-twentieth-century transatlantic world of Anglo-American law.[46] Drawing on original archival sources from ten archives in the United States and England, as well as on extensive published sources, it argues that notice-and-comment rulemaking emerged from this vibrant and largely forgotten universe. Throughout this period, American jurists, legal scholars, and legislators acutely felt that the United States was lagging behind England in developing a body of law that would control and standardize the administrative state. This was especially the case with rulemaking, more regularly known in England as delegated lawmaking. In contrast to its relatively sporadic use in the United States during this period, rulemaking served as an important form of English administrative action and received the bulk of attention when it came to crafting procedural guardrails. Keenly aware of the differences between the constitutional systems in the United States and England, Americans found these procedures appealing—to an extent. They therefore adopted and adapted this mechanism in a series of transplantations in the mid-1930s and early 1940s. The result was notice-and-comment rulemaking as we know it.

Part I reconstructs this transatlantic story beginning with its point of origin: England. When Parliament enacted the Rules Publication Act 1893, it imposed three obligations on administrative bodies. It required them, first, to publicize proposed regulations and consult with entities likely to be affected by the rules; second, to afford Parliament an opportunity to approve or reject the formulated piece of delegated legislation through "laying procedures"; and third, to publish finalized regulations. Not only did the informal consultations help administrative bodies gather pertinent information from regulated entities, but they were also critical in getting interest groups to assent to the proposed regulations. The laying procedures, on the other hand, secured democratic legitimacy for the regulations, ensuring that Parliament—generally taken to be constitutionally supreme—remained the true lawmaker, if only in a nominal sense.

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administrative court system in France."). Like Ernst Freund's attempts, this effort ended in failure. *See* Shepherd, *supra* note 26, at 1590-93. Indeed, at the very same time that it abandoned its proposed administrative courts, the ABA's Special Committee on Administrative Law turned to English administrative law as its model. *See infra* Section II.B.3.

46. My contextualization is inspired first and foremost by DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 247-61 (1998). Daniel T. Rodgers does not discuss notice-and-comment rulemaking but masterfully reconstructs the intellectual and political settings in which the procedure and Anglo-American administrative law developed.

As delegated legislation came to be utilized more and more in England in the early decades of the twentieth century—and especially during and after the First World War—the framework of the Rules Publication Act 1893 came under increasing scrutiny. In response, the government established the Committee on Ministers' Powers (the Donoughmore Committee) to examine the workings of the English administrative state. When it issued its final report in 1932, the Donoughmore Committee dismissed claims that a new administrative despotism was rising. At the same time, it made a number of recommendations for improving the Rules Publication Act 1893, including eliminating its myriad loopholes and standardizing and expanding the consultation, laying, and publication requirements. After several years of high emotions, consensus over the procedural framework governing delegated legislation finally seemed near.

In the end, little came of these recommendations in England until after the Second World War. But their impact across the ocean in the United States was felt far more immediately and strongly. As Part II details, between 1935 and 1946, Americans imported several key components of the English procedural framework governing delegated legislation and the Donoughmore Committee's recommended reforms. The 1935 Federal Register Act required that all finalized regulations be published in the newly created *Federal Register* and was explicitly modeled upon the parallel requirement in the Rules Publication Act 1893. Six years later, the minority's recommendations in the final report of the AG's Committee planted the seed of notice-and-comment rulemaking. Its first two recommendations—to publicize proposed regulations and solicit public comments—were intended to build upon and expand the corresponding provisions of the Rules Publication Act. Its third requirement, that agencies issue final rules, augmented the earlier obligation put forth in the 1935 Federal Register Act. Even as the report remained silent about the origins of this procedural cocktail, traces of its English inspirations are visible just beneath its surface.

Latent English influence can also be seen behind the Committee's inductive approach to studying the American administrative state and the minority's insistence that these rulemaking requirements apply transsubstantively—that is, across the wide swath of federal agencies. Like other New Deal initiatives designed to rationalize and streamline previously complex and uneven procedural regimes, the push for uniform administrative procedural requirements was inspired by England. When the APA came into effect in 1946, it bore these various English fingerprints.

The Rules Publication Act 1893's laying procedures and the Donoughmore Committee's proposed reforms of these procedures, in contrast, did not make it to the United States. This was not for lack of interest. In the 1930s, Roscoe Pound, James M. Landis, and other prominent American lawyers representing a variety of stances on the administrative state called for an increase in

congressional scrutiny over rulemaking and even the adoption of procedures akin to English laying requirements. The AG's Committee, in turn, considered the measure—only to reject it. This decision was a result of several factors. The Committee singled out the procedure's questionable utility in providing meaningful oversight: "Experience, both in England and in this country, indicates that lack of desire, rather than lack of opportunity, has accounted for the absence of legislative interference with administrative regulations."[47] Beyond this skepticism, the ultimate disinterest in adopting laying procedures is also attributable to the structural differences between England's parliamentary system and the United States's separation-of-powers system, the concomitant differences in the role that laying procedures would play, and the demise of the nondelegation doctrine. In the wake of the decision to forgo laying procedures, informal rulemaking assumed the form that is still in place today.

This history has a number of implications. Part III discusses two. First, this history complicates the existing accounts of notice-and-comment rulemaking's origins—and our broader understanding of the American administrative state. As this Article shows, the foreign legal system that had the deepest influence on the actual configuration of American administrative rulemaking was that of England.[48] Critics of rulemaking such as Professor Gary Lawson have likened it to "the kind of prerogative or rump legislation that both British and American revolutionaries worked hard to abolish."[49] But in fact, informal rulemaking developed from within the common-law tradition. Indeed, it developed within a broader and now largely lost world of Anglo-American administrative law. Recovering this lost world is necessary to understand fully how the "fundamental charter" of the administrative state, the APA, emerged.[50]

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47. AG'S COMMITTEE FINAL REPORT, *supra* note 27, at 120.

48. Indeed, even the early American scholars held England in special regard. Frank J. Goodnow, for instance, routinely juxtaposed American and English practice to that of continental systems. *See* FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 59 (1905) (discussing "one of the fundamental principles of Anglo-American administrative law"). Ernst Freund and Bruce Wyman did the same if only to bemoan the "so little attention" that administrative law had received in the two countries. Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 403 (1894); *accord* BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 2 (1903).

49. Lawson, *supra* note 5, at 1533; *see also* Lawson, *supra* note 24, at 1231 ("The post-New Deal administrative state is unconstitutional . . . .").

50. ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 39 (2016); *see also* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 466 (2015) ("The vision underpinning [two Supreme Court] cases is that the APA should be treated as an organizing charter for the administrative state . . . ."); Scalia, *supra* note 38, at 363 ("[T]he Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process . . . .").

Second, this history contributes to contemporary discussions about notice-and-comment rulemaking's future. This Article emphasizes the fact that American informal rulemaking was only a *partial* transplantation of English procedures. This fact has proved fateful. On the one hand, this partial transplantation has given rise to notice-and-comment rulemaking, a centerpiece of American administrative governance that was part of the broader "quasi-constitutional" settlement embodied in the APA.[51] On the other hand, it may be one cause of the perennial debates over American administrative law's supposed legitimacy deficit. In light of this history, one might reasonably ask whether it would be wise to complete the transatlantic transplantation and belatedly enact laying procedures in the United States. Without offering a definitive (or satisfying) solution going forward, Part III considers what the APA's history might tell us about the range of possible answers to that question. Ultimately, by recovering one facet of the lost universe of administrative law and the 1946 APA, this Article aims to reveal the buried roots of our contemporary institutions and enrich the ongoing conversation about ways to improve them.

I. ENGLAND: MAKING DELEGATED LEGISLATION

By 1932, general agreement over the procedural framework governing delegated legislation was close at hand in England. In April, the Committee on Ministers' Powers—more popularly known as the Donoughmore Committee[52]—issued its long-awaited final report.[53] The Committee, composed of politicians from across the political spectrum, lawyers, permanent secretaries, and academics, had been established three years earlier in response to growing conservative criticisms of the English administrative state.[54] The charges included that the English bureaucracy was abusing its power through the use of delegated legislation.[55] Although the Donoughmore Committee's final report rejected most of these criticisms, it made a number of recommendations for reforming existing administrative practices, including those related to delegated legislation. The report represented a compromise. It fully satisfied neither the most outspoken supporters nor the opponents of the wide use of administrative power and

51. *See* Robert Rabin, *Federal Regulation in Historical Perspective*, *in* FOUNDATIONS OF ADMINISTRATIVE LAW 39, 41, 47-49 (Peter H. Schuck ed., 1994).

52. *See, e.g.*, J.A.G. Griffith, *The Constitutional Significance of Delegated Legislation in England*, 48 MICH. L. REV. 1079, 1083 (1950). This more popular name referred to the Committee's first chairman, Richard Walter John Hely-Hutchinson, the sixth Earl of Donoughmore.

53. COMMITTEE ON MINISTERS' POWERS REPORT, 1932, Cmd. 4060 (UK) [hereinafter DONOUGHMORE REPORT].

54. *See id.* at v-vi, 1-2.

55. *See id.* at 1-2.

discretion.[56] Its recommendations were nonetheless "pretty well agreed" upon[57]—in part because, as one commentator explained, they "have not been subject to consistent interpretation in all quarters."[58]

This Part details the common ground about delegated legislation in England at the time. Section I.A provides a brief overview of the development of the English administrative state and the growing use of delegated legislation over the course of the nineteenth and early twentieth centuries. The Section also discusses the ensuing debates regarding the rise of delegated legislation and the changing nature of the English political and constitutional system. Section I.B then examines the Donoughmore Committee's recommendations, focusing on those dealing with delegated legislation. It identifies five aspects of the Donoughmore Committee that subsequently interested Americans: its inductive approach; its pursuit of a transsubstantive governing framework; and three of its recommended improvements to the Rules Publication Act 1893, the forty-year-old statutory framework governing the making of delegated legislation. As Part II will discuss, Americans not only took significant interest in the Rules Publication Act 1893 and the Donoughmore Committee's recommendations, but they also eventually imported several features of the English approach into the United States.

A. The Rise of the English Administrative State and Delegated Legislation

As England industrialized over the course of the nineteenth and early twentieth centuries, its administrative state grew at an unprecedented (but uneven) pace.[59] The sheer size and diversity of England and its empire; the abundance

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56. As administrative-law scholar Cecil T. Carr stated, "The verdict was 'not guilty, but be careful another time.'" C.T. Carr, *Administrative Law*, 51 LAW Q. REV. 58, 61 (1935). Supporters of administrative discretion were pleasantly surprised by the report. For instance, John Willis, who bemoaned the Committee's "restricted" terms of reference as "fetter[ed] . . . behind" the "Never-never Land of legal formalism," appreciated that the report found the "delegation of legislative power" to be "inevitable." JOHN WILLIS, THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS 176 (1933). Opponents, who included much of the bar and bench, were somewhat less satisfied but still acknowledged that the report resulted in a "few improvements." *See* CARLETON KEMP ALLEN, LAW AND ORDERS: AN INQUIRY INTO THE NATURE AND SCOPE OF DELEGATED LEGISLATION AND EXECUTIVE POWERS IN ENGLAND 41-43 (1945).

57. Letter from Harold Laski, Member, Brit. Labour Party, to Justice Felix Frankfurter (Dec. 22, 1931) (on file with Libr. of Cong., Felix Frankfurter Papers, Box 74, Reel 45).

58. *Foreword*, 34 ILL. L. REV. NW. U. 641, 644 n.14 (1940).

59. There is an enormous body of scholarship on this topic and much historiographic debate about the origins of the modern English administrative and welfare state. Earlier scholarship

and complexity of the social, financial, and technological services provided to English society; and the rising demand for administrative expertise were some of the many factors that led to the proliferation of English administrative bodies.[60] Some derided the expansion of the administrative state as "officialism"[61] and an encroachment on individual liberty, while others suggested it was a proper response to the "pressing necessity" of modern governance.[62] Controversial as it was, administrative growth was England's new reality.

A central feature of this administrative growth was the increasing use of delegated legislation.[63] At the beginning of the nineteenth century, members of Parliament saw themselves first and foremost as deliberators, not as legislators with constituencies.[64] Parliament's self-conception was intimately tied to the fact that it was not a democratic institution.[65] At the time, England was still a country of limited suffrage in which power was concentrated in the hands of the monarchy and aristocracy.[66] Because it could not predicate its legitimacy on democratic grounds, Parliament justified its power on the idea that its members served as independent-minded "representatives of the nation, and not as mere delegates of their constituents voting according to instructions."[67] This emphasis on autonomy and deliberation meant that Parliament did not enact much legislation.

placed much emphasis on its "Victorian origins." *See, e.g.*, DAVID ROBERTS, VICTORIAN ORIGINS OF THE BRITISH WELFARE STATE 33 (1969). Newer scholarship stresses the fact that the Victorian state only intervened in select areas. *See, e.g.*, Phil Harling, *The State*, *in* THE OXFORD HANDBOOK OF MODERN BRITISH POLITICAL HISTORY, 1800-2000, at 67, 68-72 (David Brown, Gordon Pentland & Robert Crowcroft eds., 2018). Still, there is nearly universal agreement that by the 1880s the nightwatchman state had given way to the interventionist state.

60. *See* José Harris, *Society and the State in Twentieth-Century Britain*, *in* 3 THE CAMBRIDGE SOCIAL HISTORY OF BRITAIN, 1750-1950, at 63, 68-69 (F.M.L. Thompson ed., 1990); Roy MacLeod, *Introduction* to GOVERNMENT AND EXPERTISE: SPECIALISTS, ADMINISTRATORS AND PROFESSIONALS, 1860-1919, at 1, 9-15 (Roy MacLeod ed., 1988).

61. Chantal Stebbings, *"Officialism": Law, Bureaucracy, and Ideology in Late Victorian England*, *in* 6 LAW AND HISTORY: CURRENT LEGAL ISSUES 317, 317 (Andrew Lewis & Michael Lobban eds., 2004).

62. WILLIS, *supra* note 56, at 4.

63. *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 255 (2d ed. 1998) (noting that "'[d]elegated legislation' and 'administrative justice' were the inevitable accompaniments of the expanded role of government in society" in late-nineteenth-century England).

64. *See* WILLIAM SELINGER, PARLIAMENTARISM: FROM BURKE TO WEBER 20 (2019).

65. *See id.* at 6-7.

66. *See id.*

67. T.A. JENKINS, PARLIAMENT, PARTY AND POLITICS IN VICTORIAN BRITAIN 17 (1996).

When it did, it wrote detailed primary, local, and often private laws.[68] At the same time, in order not to surrender its legislative powers to others, it jealously guarded its legislative prerogative and did not delegate significant unconstrained authority to external bodies.[69]

This all changed as England gradually expanded suffrage in 1832, 1867, and 1884.[70] With the emergence of mass politics came unified and disciplined political parties. Parliament's deliberative nature, which had once been parliamentarism's sine qua non, gave way to party-machine politics and unified voting.[71] Parliament, in turn, shifted from a deliberative body to a forum in which the governing party and the opposition battled one another.[72] Parliament's supremacy was now no longer predicated on its deliberative character but rather on its capacity to channel the electorate's ultimately supreme authority.

Parliament evolved into a body that both legislated and delegated prolifically.[73] As an expanding citizenry became capable of both giving political expression to its grievances and making Victorian calls for moral reform, Parliament faced increasing pressure to become an activist government.[74] Beginning in the 1830s and picking up after 1867, it increasingly enacted centralized legislation and created national programs and services.[75] Well aware of its inability to administer these newly created institutions singlehandedly, Parliament also became more willing to delegate governing power to other bodies, whether

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68. *See* Henry Parris, Constitutional Bureaucracy: The Development of the British Central Administration Since the Eighteenth Century 17-18, 161 (1969).

69. *See id.* at 161-62. To be clear, this did not mean that there was a dearth of legal authority throughout England. Rather, England was marked by a robust pluralist legal order. *See* H.W. Arthurs, 'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England 13-88 (1985); Paul Craig, English Administrative Law from 1550: Continuity and Change 63-74 (2024).

70. *See* Angus Hawkins, Victorian Political Culture: 'Habits of Heart & Mind' 17, 18, 22, 26 (2015).

71. *See* Angus Hawkins, British Party Politics: 1852-1886, at 266-69 (1998).

72. *See* Chih-Mai Chen, Parliamentary Opinion of Delegated Legislation 6 (1933) (describing those who opposed these developments and lamenting "'the good old days' when eloquence and exuberant loquacity counted for something in the House of Commons and when . . . members changed their votes after listening to debates").

73. *See* Peter Fraser, *The Growth of Ministerial Control in the Nineteenth-Century House of Commons*, 75 Eng. Hist. Rev. 444, 460-63 (1960).

74. *See* Jonathan Parry, The Rise and Fall of Liberal Government in Victorian Britain 87-89 (1993).

75. *See id.* at 93-94, 232-33.

government ministers or local authorities.[76] Delegation became all the more necessary as the English state transformed into an interventionist welfare state at the turn of the twentieth century.[77] The wide-ranging social legislation passed by the Liberal Party between 1906 and 1914, which included workers' compensation, old-age pensions, health insurance, and reforms relating to education and children, entailed broad delegations of power to newly created local and administrative bodies.[78] By the time World War I ended, Parliament had fully embraced delegation. "Acts of Parliament," wrote administrative lawyer Cecil T. Carr in 1921, "grow[] more and more dependent upon subsidiary legislation."[79] "In mere bulk[,] the child now dwarfs the parent."[80]

In the closing years of the nineteenth century, even the great constitutional theorist A.V. Dicey—who was no supporter of the budding collectivism—accepted the increased use of delegated legislation.[81] In his 1885 *Lectures*

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76. *See* PARRIS, *supra* note 68, at 162-63. To be sure, Parliament was initially reluctant to delegate its powers broadly. As late as 1877, one observer noted that English lawmakers still needed to be prodded to adopt a system "confining the attention of Parliament to material provisions only, and leaving details to be settled departmentally." HENRY THRING, PRACTICAL LEGISLATION: THE COMPOSITION AND LANGUAGE OF ACTS OF PARLIAMENT AND BUSINESS DOCUMENTS 59 (Madeleine MacKenzie & David Purdie eds., Luath Press 2015) (1877). The necessity of doing so gradually set in, however. As the eminent legal historian F.W. Maitland wrote in 1888, "The new wants of a new age have been met in a new manner—by giving statutory powers of all kinds, sometimes to the Queen in Council, sometimes to the Treasury, sometimes to a Secretary of State, sometimes to this Board, sometimes to the other." F.W. Maitland, The "Crown" and "The Government," *in* THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED BY F.W. MAITLAND, LL.D. 387, 417 (1908). Maitland originally delivered these lectures between 1887 and 1888. H.A.L. Fisher, *Preface* to THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED BY F.W. MAITLAND, LL.D., *supra*, at v. They were posthumously published twenty years later.

77. *See* Stuart Hall & Bill Schwarz, *State and Society, 1880-1930*, *in* CRISES IN THE BRITISH STATE, 1880-1930, at 7, 7-8 (Mary Langan & Bill Schwarz eds., 1985). According to one source, between 1901 and the outbreak of the First World War in 1914, 1,349 pieces of delegated legislation were promulgated annually on average. *See* ALLEN, *supra* note 56, at 26. During the war years, this number increased to 1,459. *Id.*

78. *See* DEREK FRASER, THE EVOLUTION OF THE BRITISH WELFARE STATE 146-76 (2d ed. 1984).

79. CECIL T. CARR, DELEGATED LEGISLATION: THREE LECTURES 1 (1921).

80. *Id.* at 2; *see also* WILLIS, *supra* note 56, at 158-60 (discussing how Parliament went from wanting to be intimately involved in overseeing policy to "a realisation by Parliament that not all specific cases can come under a general form of words, and an unwillingness, when once the plan of attack is set out, to work out its application in detail to the abnormal situation").

81. This was the case even as he (in)famously denied the existence of administrative law in England—by which he meant that there were no recognized separate judicial fora that adjudicated claims involving the state. *See* A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 177-208 (1885) [hereinafter DICEY, LECTURES]. Rather,

Introductory to the Study of the Law of the Constitution, he explicitly called for adopting French practices of delegation.[82] With the executive and administrative officials "work[ing] out the detailed application of the general principles embodied in the Acts of the legislature," he reasoned, "the substance no less than the form of" English laws would be significantly improved.[83]

Yet not everyone looked favorably upon the rapid growth of the administrative state. Following the landslide victory of the Liberal Party in the 1906 general elections and the government's subsequent creation of still more social and political programs that relied heavily on delegated legislation, conservative critics hostile to the emerging welfare state began to complain openly that the policies were not only substantively illiberal but also unconstitutional.[84]

This hostility only grew after the English administrative state increased its output of delegated legislation during and after World War I—with Parliament often circumscribing the ability of the judiciary to review the legislation's legality.[85] The underlying delegations were, critics complained, causing the principle of parliamentary supremacy to be "attacked, whittled down, and in some cases reduced to mere shreds of their former consequence."[86] Especially troubling, on their account, was the fact that Parliament was seemingly undermining its own

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all claims were heard in ordinary courts with appeals being heard by the Court of Appeals and the House of Lords. *See id.* Dicey would later walk back this latter claim. *See* A.V. Dicey, *The Development of Administrative Law in England*, 31 LAW Q. REV. 148, 152 (1915).

82. *See* DICEY, LECTURES, *supra* note 81, at 48-49.

83. *Id.* at 49; *see also* 1 ALPHEUS TODD, ON PARLIAMENTARY GOVERNMENT IN ENGLAND: ITS ORIGIN, DEVELOPMENT, AND PRACTICAL OPERATION 470 (Arthur Horatio Todd ed., London, Longmans, Green, & Co., 2d ed. 1889) (arguing that there is an "undeniable advantage" in the practice of delegated legislation).

84. *See* CHEN, *supra* note 72, at 50-53. Already in 1901, Courtenay Ilbert distanced himself from A.V. Dicey's embrace of delegated legislation, writing that "[t]he ordinary Englishman, as represented by the average member of Parliament, would find much difficulty in assenting to the proposition laid down by" Dicey. COURTENAY ILBERT, LEGISLATIVE METHODS AND FORMS 39 (1901).

85. *See* CHRIS RENWICK, BREAD FOR ALL: THE ORIGINS OF THE WELFARE STATE 126-47 (2017); G.R. Rubin, *The Defence of the Realm Act and Other Emergency Laws*, *in* THE BRITISH HOME FRONT AND THE FIRST WORLD WAR 78, 78-79, 90-91 (Hew Strachan ed., 2023); William A. Robson, *Administrative Law in England, 1919-1948*, *in* BRITISH GOVERNMENT SINCE 1918, at 85, 130-37 (Lord Campion, D.N. Chester, W.J.M. Mackenzie, William Robson, Sir Arthur Street & J.H. Warren eds., 1950).

86. Sidney W. Clarke, *The Rule of Dora*, 1 J. COMPAR. LEGIS. & INT'L L. 36, 36 (1919). For explicit fears arising from the curtailment of judicial review, see WESTEL W. WILLOUGHBY & LINDSAY ROGERS, AN INTRODUCTION TO THE PROBLEM OF GOVERNMENT 99 (1921), which expressed fear that the rule of law was being eroded or even dealt a "death blow." For more on the political and intellectual roots of both this conservative opposition to delegation and the left-leaning and socialist support for it, see MARTIN LOUGHLIN, PUBLIC LAW AND POLITICAL THEORY 138-76 (1992).

supremacy by delegating a large number of powers to the executive.[87] Intermingled with this anxiety was the fear that Parliament, which was coming to be seen as securing the will of majority opinion, was in fact empowering well-organized—and often working-class and left-leaning—minority interests through delegation.[88] To make matters worse, the increasing use of delegated legislation, which had often been used to govern the British Empire,[89] raised the specter of imperial practices coming home to roost.[90] "A growing number of persons," concluded one observer in 1923, "regard the increasing delegation of legislative power as 'a very bad system and one attended by very great danger.'"[91]

These fears ultimately boiled over in the late 1920s.[92] Though by no means the only expression of these sentiments, Lord Chief Justice Gordon Hewart's 1929 book *The New Despotism*[93] was undoubtedly the most important of the "doom-laden prophecies"[94] against the growing "administrative lawlessness" and "departmental despotism" in interwar Britain.[95] Based on a lecture Hewart had delivered at the American Bar Association's (ABA's) annual meeting in

87. *See* HC Deb. (27 Mar. 1929) (226) col. 2507 (statement of Sir John Marriott) ("[T]he position in which we find ourselves amounts to nothing less than an abdication on the part of Parliament of its supreme legislative function.").

88. This fear manifested, for instance, in the debates concerning housing legislation and accompanying administrative regulations in the 1920s. *See* W. Ivor Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation*, 49 HARV. L. REV. 426, 436-40 (1936).

89. *See* G.R. Rubin, *The Royal Prerogative or a Statutory Code? The War Office and Contingency Legal Planning, 1885-1914*, *in* THE POLITICAL CONTEXT OF LAW: PROCEEDINGS OF THE SEVENTH BRITISH LEGAL HISTORY CONFERENCE 145, 156-58 (Richard Eales & David Sullivan eds., 1987).

90. *See* ILBERT, *supra* note 84, at 39 (discussing how, before the Great War, delegated legislation was seen as "necessary in countries like India").

91. Lynden Macassey, *Law-Making by Government Departments*, 5 J. COMPAR. LEGIS. & INT'L L. 73, 78 (1923).

92. *See* CHEN, *supra* note 72, at 5-6. The heated debates surrounding the passage of the Local Government Act 1929 played an especially important role in galvanizing critics of delegated legislation. *See id.* at 60-62; *see also id.* at 65 ("The climax of parliamentary criticism of delegated legislation was reached . . . during the debate on the Local Government Act, 1929 . . . .").

93. GORDON HEWART, THE NEW DESPOTISM (1929).

94. S.A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 334 (Harry Street & Rodney Brazier eds., 4th ed. 1981).

95. HEWART, *supra* note 93, at 43, 156. For other contemporaneous works decrying the English bureaucracy, see CARLETON KEMP ALLEN, BUREAUCRACY TRIUMPHANT 21-22 (1931); and RAMSAY MUIR, HOW BRITAIN IS GOVERNED: A CRITICAL ANALYSIS OF MODERN DEVELOPMENTS IN THE BRITISH SYSTEM OF GOVERNMENT 68 (1930).

Buffalo,[96] the book held little back as it charged the English bureaucracy with trying to bring about "a despotic power which at one and the same time places Government departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts."[97]

By Hewart's telling, the making of delegated legislation was one of the primary means by which "devilishly clever" bureaucrats were surreptitiously using Parliament's constitutional supremacy to divert power to the administrative state.[98] With Parliament distracted, overwhelmed, and "under the spell of the government of the day," conniving civil servants were duping lawmakers into enacting open-ended statutes that not only afforded administrators wide-ranging discretion to make delegated legislation, but also granted them the power to amend parliamentary legislation itself.[99] These "ingenious and adventurous" bureaucrats were then enacting delegated legislation that altered the terms of the parent statutes, including amending and removing provisions affording meaningful judicial oversight.[100] Operating under the guise of implementing Parliament's will, they were in fact hijacking it for their own ends.

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96. *See Chief Justices of Two Nations Address Association*, 13 A.B.A. J. 499, 499 (1927). This lecture was subsequently published as a series of articles in the *Daily Telegraph* before being turned into a book. *See* Elizabeth Fisher, *The Open Road? Navigating Public Administration and the Failed Promise of Administrative Law*, *in* The Foundations and Future of Public Law: Essays in Honour of Paul Craig 218 (Elizabeth Fisher, Jeff King & Alison Young eds., 2020).

97. Hewart, *supra* note 93, at 14.

98. Michael Taggart, *From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century*, 55 U. Toronto L.J. 575, 576 (2005).

99. *Id.* at 576, 620.

100. Hewart, *supra* note 93, at 17.

The New Despotism garnered significant attention.[101] Despite eliciting a number of scathing critiques from academics,[102] the book "struck a responsive chord among many people in England and throughout the Empire."[103]

In an effort to dispel Hewart's claims, the newly formed Labour Government established the Donoughmore Committee.[104] In a bid to bolster its legitimacy and nonpartisan character, the Committee put in place relatively conservative terms of inquiry: it set its goal as examining how administrative powers, including those exercised through delegated legislation, could be accommodated without altering "the constitutional principles of the sovereignty of Parliament and the supremacy of the Law."[105] Likewise, the sixteen original members of the Committee represented the political and legal spectrum.[106]

B. The Donoughmore Committee's Consensus Regarding Delegated Legislation

The Donoughmore Committee released its final report in April 1932. It generally dismissed the Lord Chief Justice's sense of imminent danger[107] and

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101. *See* Cecil T. Carr, *This Freedom*, 62 LAW Q. REV. 58, 61 (1946) ("*The New Despotism* must have had colossal sales here as well as across the Atlantic.").

102. *See, e.g.*, Felix Frankfurter, *Foreword* to Jennings, *supra* note 88, at 426-27 (stating that Gordon Hewart's book and its treatment of "Dicey as gospel" is the best illustration of "the elder Huxley's observation regarding the frequent survival of a theory long after its brains have been knocked out"); WILLIS, *supra* note 56, at 174 (portraying Hewart's claims as a "chimerical bogey"); Richard Joyce Smith, Book Review, 39 YALE L.J. 763, 764-65 (1930) (reviewing HEWART, *supra* note 93) (criticizing the book for its "voluble style" and for lacking "data of actual practice" of administration); W. Ivor Jennings, *The Report on Ministers' Powers*, 10 PUB. ADMIN. 333, 334 (1932) (noting wryly that Hewart "had nothing to say . . . which had not been more temperately expressed before").

103. IAN HOLLOWAY, NATURAL JUSTICE AND THE HIGH COURT OF AUSTRALIA: A STUDY IN COMMON LAW CONSTITUTIONALISM 74 (2002); *see also* William A. Robson, *The Report of the Committee on Ministers' Power*, 3 POL. Q. 346, 349 (1932) ("It is not too much to say that Lord Hewart's attitude represents 99 per cent[] of the opinion of the bench, the bar and the solicitors' profession.").

104. *See* Fisher, *supra* note 96, at 222-23.

105. DONOUGHMORE REPORT, *supra* note 53, at 1. Progressives bemoaned these terms of inquiry, complaining that "[t]he Committee started life with the dead hand of Dicey lying frozen on its neck." Robson, *supra* note 103, at 351. For some of the behind-the-scenes politicking that went into crafting these terms of reference, see Fisher, *supra* note 96, at 222-24.

106. That said, they also seem to have been selected for their general sympathy toward the administrative state. *See* Taggart, *supra* note 98, at 579 (noting that the committee was stacked with "safe pairs of hands").

107. *See* DONOUGHMORE REPORT, *supra* note 53, at 7 ("[T]he public should be grateful for outspoken criticism, even if exaggerated.").

provided the administrative state with "more or less a clean bill of health."[108] But it refused to sweep away his critiques fully. "[S]urprisingly . . . more agreement" existed between the Donoughmore Committee's final report and *The New Despotism* than the authors of the former "might have liked to acknowledge."[109] They agreed, for instance, that delegated legislation was both "an abandonment by Parliament of its legislative functions"[110] and a necessity in light of the complexities of modern governance.[111] They also agreed that "[t]he practice of delegating legislative powers . . . grew without system," and thus additional measures, especially parliamentary ones, were needed to improve its oversight.[112]

The Donoughmore Committee's final report was ambitious. It included a wide range of proposals aimed at reforming delegated legislation and the broader administrative process (including administrative adjudications). This Section focuses on five aspects of the Committee's report and recommendations, which, as we will see in Part II, singularly interested Americans when they set out to reform American administrative rulemaking a few years later. The first two features characterized the report in general. The final three were reforms specifically related to delegated legislation—in American parlance, rulemaking.

1. The Inductive Approach

The Donoughmore Committee's final report was an innovative, bottom-up study of administrative law and procedure. It was the first comprehensive English effort to assemble a holistic picture of the administrative state based on

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108. Ralph F. Fuchs, Book Review, 20 ST. LOUIS L. REV. 189, 194 (1935) (reviewing, inter alia, WILLIS, *supra* note 56).

109. Jeff King, *The Province of Delegated Legislation*, *in* THE FOUNDATIONS AND FUTURE OF PUBLIC LAW: ESSAYS IN HONOUR OF PAUL CRAIG, *supra* note 96, at 145, 145; *see also* Peter L. Lindseth, *Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England*, 55 U. TORONTO L.J. 657, 670 (2005) ("Despite the heated rhetoric on both sides of the debate over delegation and judicial review, however, there was still a basic consensus on the necessity of some form of independent legal control over the widening legislative and adjudicative discretion of government departments and subordinate authorities.").

110. DONOUGHMORE REPORT, *supra* note 53, at 6.

111. *See* HEWART, *supra* note 93, at 81 ("It is tolerably obvious that the system of delegation by Parliament of powers of legislation is within certain limits necessary . . . ."); DONOUGHMORE REPORT, *supra* note 53, at 4-5 ("It is customary to-day for Parliament to delegate minor legislative powers to subordinate authorities and bodies . . . . We do not agree with those critics who think that the practice is wholly bad. We see in it definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the right way.").

112. DONOUGHMORE REPORT, *supra* note 53, at 58; *see also* HEWART, *supra* note 93, at 81-82 (calling for "proper safeguards" for delegated legislation, as "it is impossible . . . for Parliament to deal adequately and in detail with all the matters calling, or supposed to call, for legislation").

information from administrative agencies and ministries.[113] Information that was "seldom dealt with properly in text-books and works of reference" about the administrative process came to light in the Committee's study.[114] As one reviewer noted, the report and its findings "form[ed] one of the most important documents in the history of our Constitutional Law," not least because they marked "the first time the whole subject of delegated legislation and administrative justice has been officially investigated."[115] "Much of the evidence is so valuable," added another commentator, "that it deserves wider publicity than it is likely to receive if it is to remain buried in the 300 foolscap pages of small print which comprise the Blue Book in question."[116]

The Committee approached its mission in two stages. First, it called upon ministerial departments in England and Scotland to complete surveys that detailed all of the delegated legislative, executive, and judicial powers that they enjoyed.[117] Forty-one departments sent back completed surveys.[118] Second, it conducted twenty-two days of investigations during which it solicited oral and written testimonies about the administrative state and administrative procedure.[119] In addition to hearing from high-ranking parliamentary and ministerial officials and scholars of administrative law, the Committee received testimony

113. *See* Note, *Ministers' Powers*, 48 LAW Q. REV. 307, 307 (1932) ("The Committee has enjoyed the great advantage, hitherto denied to individual writers on the subject, of having full access to the wealth of material available in Government Departments.").

114. K.B. Smellie, *Committee on Ministers' Powers*, 41 ECONOMICA 355, 355 (1933) (reviewing COMM. ON MINISTERS' POWERS, MEMORANDA SUBMITTED BY GOVERNMENT DEPARTMENTS IN REPLY TO QUESTIONNAIRE OF NOVEMBER 1929 AND MINUTES OF EVIDENCE, VOLUME I: MEMORANDA BY GOVERNMENT DEPARTMENTS (1932); COMM. ON MINISTERS' POWERS, MEMORANDA SUBMITTED BY GOVERNMENT DEPARTMENTS IN REPLY TO QUESTIONNAIRE OF NOVEMBER 1929 AND MINUTES OF EVIDENCE, VOLUME II: MINUTES OF EVIDENCE (1932)).

115. K.W.B. Middleton, *Report of the Committee on Ministers' Powers*, 1932 SCOTS L. TIMES 169, 169.

116. E.C.S. Wade, *Departmental Legislation: The Civil Service Point of View*, 5 CAMBRIDGE L.J. 77, 77 (1933).

117. *See* COMM. ON MINISTERS' POWERS, MEMORANDA SUBMITTED BY GOVERNMENT DEPARTMENTS IN REPLY TO QUESTIONNAIRE OF NOVEMBER 1929 AND MINUTES OF EVIDENCE, VOLUME I: MEMORANDA BY GOVERNMENT DEPARTMENTS 3 (1932).

118. *See id.* at 2.

119. *See* COMM. ON MINISTERS' POWERS, MEMORANDA SUBMITTED BY GOVERNMENT DEPARTMENTS IN REPLY TO QUESTIONNAIRE OF NOVEMBER 1929 AND MINUTES OF EVIDENCE, VOLUME II: MINUTES OF EVIDENCE 282 (1932) [hereinafter MINUTES] (indicating that the final oral testimony taken by the Donoughmore Committee occurred on "Day Twenty-Two").

from a variety of interest groups, professional associations, and other private organizations.[120]

The evidence collected during these two stages of investigation was groundbreaking. Published in two appendices that accompanied the final report, it offered the first view inside the black box of the administrative state. In addition to providing the factual basis for the final report, the findings served as the basis for future research into the workings of English administration. And, as we will see, they served as a model for the AG's Committee as it embarked on its study of the American administrative state in 1939. Hinting at the importance of the Donoughmore Committee's inductive approach to Americans, Felix Frankfurter praised it in 1938 as an "authoritative investigation and report."[121] The report and its two appendices, he determined, "constitute, perhaps, the most illuminating analysis yet formulated of those processes of government which are the stuff of administrative law."[122]

2. *Transsubstantivity*

The Donoughmore Committee's final report attempted to establish a framework that would govern all delegated legislation—that is, a transsubstantive framework. The report emphasized the need to replace the existing exception-filled procedures with an overarching system defined by "coherence and uniformity."[123] Once again, this push for a transsubstantive procedural regime would prove attractive to many American reformers in ensuing years.

As both Hewart and the Donoughmore Committee agreed, the main culprit for the lack of uniformity was the fact that the system of delegated legislation had emerged through a process of "haphazard evolution"[124] and "unsystematic growth."[125] The resulting disarray permeated even the overarching procedural framework governing delegated legislation, the Rules Publication Act 1893.[126]

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120. *See id.* at 2-3.

121. Felix Frankfurter, *Foreword*, 47 YALE L.J. 515, 518 (1938).

122. *Id.*

123. Arthur Suzman, *Administrative Law in England: A Study of the Report of the Committee on Ministers' Powers*, 18 IOWA L. REV. 160, 166 (1933).

124. DONOUGHMORE REPORT, *supra* note 53, at 54.

125. *Id.* at 58. Similar themes appear in *The New Despotism*, which discusses how the "system of so-called administrative 'law'" is "not really a system at all." HEWART, *supra* note 93, at 45-46.

126. *See, e.g.*, Rules Publication Act 1893, 56 & 57 Vict. c. 66, § 1(4) (UK) ("The statutory rules to which this section applies . . . do not include any statutory rules if the same or a draft thereof are required to be laid before Parliament for any period before the rules come into operation, nor do they include rules made by the Local Government Board for England or Ireland, the

This Act had been promulgated at the tail end of sustained efforts to reorganize the judicial system in England. The centerpieces of this reform movement were the Judicature Acts of 1873[127] and 1875,[128] which fused the courts of law and equity.[129] With the aim of empowering courts to simplify and streamline their procedures, the Judicature Acts licensed the judiciary to issue new rules, often as delegated legislation.[130] But as courts began to exercise this new power, they often failed to inform litigants and lawyers of the intention to propagate new rules.[131] To prevent this problem, legislators contemplated a bill requiring that all proposed exercises of delegated legislation — or, as the bill called them, "statutory rules" — be publicized and that lawyers and other "public bodies" be consulted.[132] The Rules Publication Act 1893 was initially conceived as part of a broader effort to simplify and standardize judicial procedure. As it went through the legislative process, the Act was rendered transsubstantive: whereas the initial draft focused on delegated legislation issued by courts, the finalized Act applied to delegated legislation issued by Parliament, too.[133] At the same time, it was gradually filled out with exceptions and loopholes.[134] In the words of one scholar, these carve-outs rendered the Act "sadly restricted in operation and badly needing revision."[135]

Like Hewart, the Donoughmore Committee realized the need to reform, simplify, and standardize the Rules Publication Act 1893. Under the original Act,

Board of Trade, or the Revenue Departments, or by or for the purposes of the Post Office; nor rules made by the Board of Agriculture under the Contagious Diseases (Animals) Act, 1878, and the Acts amending the same.").

127. Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66 (UK).

128. Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77 (UK).

129. *See* Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I*, 22 LAW & HIST. REV. 389, 390 (2004); Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II*, 22 LAW & HIST. REV. 565, 598 (2004); Michael Lobban, *What Did the Makers of the Judicature Acts Understand by 'Fusion'?*, *in* EQUITY AND LAW: FUSION AND FISSION 70, 94-95 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019).

130. Supreme Court of Judicature Act 1873 § 68; Supreme Court of Judicature Act 1875 § 17.

131. *See* JOHN ARCHIBALD FAIRLIE, ADMINISTRATIVE PROCEDURE IN CONNECTION WITH STATUTORY RULES AND ORDERS IN GREAT BRITAIN 23 (1927); Samuel Rosenbaum, *Studies in English Civil Procedure*, 63 U. PA. L. REV. 380, 422 (1914-1915).

132. *See* Rules Publication Bill 1890, HC Bill [299] (UK).

133. *Compare* Rules Publication Bill 1890 (applying only to courts), *with* Rules Publication Act 1893, 56 & 57 Vict. c. 66 (UK) (applying to a variety of rules, regulations, and bylaws made under Acts of Parliament).

134. *See infra* text accompanying notes 142-147.

135. CHEN, *supra* note 72, at 35. The concessions and exceptions made in enacting this law may have been especially pronounced. As one scholar noted, the Rules Publication Act was a "largely fortuitous statute." Macassey, *supra* note 91, at 76.

there were three steps in the default path to enacting delegated legislation. First, an administrative body had to engage in a notice-and-comment-like process before the delegated legislation came into effect. Notice of the administrative body's intent to enact delegated legislation had to be published in the *London Gazette*.[136] To provide information about the proposed delegated legislation and where drafts of the text could be obtained, the notice had to invite any "public body interested" to comment on the proposed rule during a forty-day period.[137] Only after this consultation was held and the forty-day period passed would the delegated legislation come into effect.[138] Second, whether before or after the delegated legislation took effect, the Rules Publication Act required that it be "laid before" Parliament.[139] Briefly put, a laying procedure required that a copy of the rule be physically laid in front of Parliament to make it accessible to legislators who wished to read it, comment upon it, and ultimately decide whether to endorse it.[140] Third and finally, the Act stipulated that a finalized piece of delegated legislation had to be sent to the Queen's printer of Acts of Parliament to be published and then made available to the public.[141]

Crucially, however, the Rules Publication Act contained a variety of limitations and exceptions. For example, the Act excluded from its requirements a number of legally binding administrative prescriptions.[142] It also excluded from its notice-and-comment-like requirements any piece of delegated legislation whose parent statute stipulated that it had to be laid before Parliament in draft form—that is, prior to coming into effect.[143] Likewise, it excluded from its notice-and-comment-like requirements pieces of delegated legislation made by various administrative bodies.[144] It excluded other categories of delegated legislation from the publication requirement that applied to finalized pieces of delegated legislation.[145] The Act expressly stated that in cases of "urgency or any

136. Rules Publication Act 1893 § 1(1).

137. *Id.* § 1(2).

138. *Id.*

139. *Id.* § 1(4).

140. *See* DONOUGHMORE REPORT, *supra* note 53, at 41-42.

141. Rules Publication Act 1893 § 3(1).

142. *Id.* § 4. The Act only applied to "statutory rules," and not to all delegated legislation. *See* CARR, *supra* note 79, at 45-47.

143. Rules Publication Act 1893 § 1(4).

144. *Id.* § 1(4)-(5) (exempting rules made by the Local Government Board for England or Ireland, the Board of Trade, the Revenue Departments, the Post Office, the Board of Agriculture under the Contagious Diseases (Animals) Act, 1878, and Scottish rules).

145. *Id.* § 3(3)-(4) (excluding rules whose parent statutes required that they be published in the London, Edinburgh, or Dublin Gazettes and also providing for the "different treatment" of rules that were of "the nature of local and personal or private Acts").

special reason," administrative bodies could issue provisional rules that came into effect immediately and without needing to fulfill the statutory requirements.[146] These assorted exemptions left the procedural framework riddled with what the Donoughmore Committee termed "anomalous exceptions."[147]

It was for this reason that the final report stated that "while the Rules Publication Act, 1893, has worked well within its sphere of application, the time has come to repeal it and replace it by a simpler and more comprehensive" procedural framework governing delegations.[148]

The next three Sections spell out the final report's proposals regarding each of the three steps in the default path to making delegated legislation: consultation, laying procedures, and publication. The common thread was a call to make each step transsubstantive and broadly applicable.

3. Expanding Consultation

The first of these suggested reforms concerned consultation. Recall that the Rules Publication Act required an administrative body setting out to make delegated legislation first to provide notice in the *London Gazette* and then to consult with "public bod[ies] interested."[149] But under this 1893 framework, these procedural steps did not apply in all cases due to a variety of built-in exceptions. Hewart scathingly criticized these exclusions and stressed that it was necessary that the "public opinion" have sufficient opportunity to weigh in on draft bills and specific pieces of proposed delegated legislation.[150] He recommended that "some able member of the editorial staff" of "leading newspapers" regularly report on proposed legislation and delegated legislation.[151] With Parliament and the press "known to be deliberately vigilant," bureaucrats would not try to abuse delegated legislation.[152]

Hewart placed much emphasis on appointing gatekeepers to police administrative bodies. The Donoughmore Committee, by contrast, proposed democratizing the process of consultation. The Rules Publication Act only required

146. *Id.* § 2. While these rules would only remain provisional, the Act did not explicitly stipulate whether or when they would expire.

147. DONOUGHMORE REPORT, *supra* note 53, at 66; *see also id.* at 6 ("There is at present no effective machinery for Parliamentary control over the many regulations of a legislative character which are made every year by Ministers in pursuance of their statutory powers . . . .").

148. *Id.* at 62 (footnote omitted).

149. Rules Publication Act 1893 § 1(1)-(2).

150. HEWART, *supra* note 93, at 149.

151. *Id.*

152. *Id.*

administrative bodies to consult with "public bod[ies] interested."[153] These public bodies, an earlier draft of the 1893 Act explained, included "the Benchers of the Inns of Court, the Incorporated Law Society, the Chamber of Commerce of London, and the council of any county borough."[154] That these had a distinctive middle- and upper-class valence was no coincidence. Like the concept of "public opinion" during the Victorian Era, the "public" reflected the will of the educated elite, not the totality of the population.[155]

The scope of consultation widened in the first decades of the twentieth century as the English state became increasingly interventionist. With the state constantly growing, it became all but impossible to operate the government machinery effectively without some input from external groups and experts.[156] Advisory groups, consisting of representatives of multiple constituencies and industries, came to be widely used.[157] It was for this reason that, by 1932, the ground was laid for the Donoughmore Committee to recommend that "[t]he system of the Department consulting particular interests specially affected by a proposed exercise of law-making power should be extended so as to ensure that such consultation takes place whenever practicable."[158]

This recommendation sought to promote the existing tendency to broaden consultation. Instead of requiring administrative bodies to consult only with "public bod[ies] interested," the Donoughmore Committee recommended that

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153. This 1893 requirement was, in the first place, quite innovative. In the first half of the nineteenth century, there had been marked suspicion of consulting as being "pressure from without." *See* Patricia Hollis, *Introduction* to PRESSURE FROM WITHOUT IN EARLY VICTORIAN ENGLAND 1, 20 (Patricia Hollis ed., 1974) (discussing how, on the eve of the First Reform Act of 1832, external pressure was largely viewed negatively). This coincided with the era during which Parliament was celebrated for its deliberations and independence. *See* S.A. WALKLAND, THE LEGISLATIVE PROCESS IN GREAT BRITAIN 33 (1968) (discussing how consulting with pressure groups was in tension with the "liberal-democratic theory of political representation").

154. *The Rules Publication Act 1893*, 96 LAW TIMES, Jan. 13, 1894, at 230, 230.

155. *See* JAMES THOMPSON, BRITISH POLITICAL CULTURE AND THE IDEA OF 'PUBLIC OPINION,' 1867-1914, at 23 (2013).

156. *See* HAROLD J. LASKI, A GRAMMAR OF POLITICS 390-91 (1925) (stating that external scrutiny and consultation, especially in the form of advisory committees, were needed to ensure that "intolerable or unnecessary rules" not be promulgated); *id.* at 388-89 (noting the recent development of the "virtual creation of many law-making bodies," given that the number of rules promulgated by the executive far outpaced the number of statutes passed).

157. *See* John A. Fairlie, *Advisory Committees in British Administration*, 20 AM. POL. SCI. REV. 812, 812 (1926) ("A comparatively recent development in British public administration has been the creation of advisory committees or consultative councils in connection with a number of government offices.").

158. DONOUGHMORE REPORT, *supra* note 53, at 66.

all "particular interests specially affected" be involved in the process.[159] This laid the groundwork for making consultation significantly more egalitarian. As advisory committees proliferated — and transformed into key components of the administrative state — more and more interests were given the opportunity to have their voices heard.[160]

Yet even this expansion of the consultation process was not entirely satisfactory. As one scholar observed, that the consultation process was limited to organized interests meant that "[t]he consultation of large unorganized interests" — let alone individuals — "still remains a serious difficulty."[161] As we will see, this enduring challenge prompted American reformers to view the Donoughmore Committee's recommended reform as a starting point for a still broader and more inclusive consultation process.

4. Standardizing Laying Procedures

The Donoughmore Committee's next reform concerned laying procedures. Laying procedures first appeared in legislation in the 1830s as delegation to administrative bodies began in earnest.[162] As these procedures proliferated over the subsequent decades, like the administrative state more generally, they developed without clear organizing principles.

Laying procedures came in two general forms. Most pre-1914 parent statutes provided for a passive laying requirement.[163] Under this configuration, delegated legislation would come into effect *unless* either house of Parliament objected to it; when Parliament did nothing, the legislation came into force.[164] A minority of statutes, however, contained an affirmative laying requirement, which stipulated that delegated legislation must be affirmatively supported by

159. *Compare* Rules Publication Act 1893, 56 & 57 Vict. c. 66, § 1(1)-(2) (UK) (requiring notice and consultation with "public bod[ies] interested"), *with* DONOUGHMORE REPORT, *supra* note 53, at 66 (recommending consultation with "consulting particular interests specially affected" and explaining that this consultation should "take[] place whenever practicable").

160. On the importance of advisory committees in twentieth-century England, and especially during the interwar period, see generally KEITH MIDDLEMAS, POLITICS IN INDUSTRIAL SOCIETY: THE EXPERIENCE OF THE BRITISH SYSTEM SINCE 1911 (1979).

161. Suzman, *supra* note 123, at 167.

162. *See* CARR, *supra* note 79, at 24 (describing the laying procedure included in legislation intended to combat the cholera epidemic of 1832).

163. *See* Cecil Carr, *Parliamentary Supervision in Britain*, 30 N.Y.U. L. REV. 1045, 1045-48 (1955).

164. *Id.*

both houses of Parliament in order for it to take effect.[165] Only following World War I did more statutes contain affirmative laying requirements.[166] In the aftermath of the war, Parliament also became more creative, introducing a wide array of new requirements that adapted elements of passive and affirmative laying procedures – the Donoughmore Committee mentions five alone.[167]

Despite these innovations, laying procedures were not spared from attacks in the interwar period. One criticism focused on the fact that Parliament failed to create overarching principles to dictate when the different laying procedures were to be utilized. As the Donoughmore Committee noted critically, it was "impossible to discover any rational justification for the existence of so many different forms of laying or on what principle Parliament acts in deciding which should be adopted in any particular enactment."[168]

A second critique questioned whether laying procedures were even effective mechanisms for ensuring parliamentary oversight. This line of criticism focused attention on the structural configuration of England's parliamentary system, in which a legislative majority produced a government headed by a Prime Minister who appointed other executive-branch officials. Combined with increasing party discipline, this structural configuration disincentivized strict parliamentary scrutiny of power delegated to the executive branch.[169] Although this criticism applied to both passive and affirmative laying procedures, it was sharpest when it came to the former. After all, passive laying procedures did not require parliamentary action in order for delegated legislation to come into effect. In turn, some doubted whether members of Parliament even bothered to inspect pieces of delegated legislation. As Hewart put it, a piece of delegated legislation subject to a passive laying procedure might very well come into effect even if it was objectionable for the simple fact that "no member of Parliament has taken the

165. *See id.* at 1047 (noting that the affirmative procedure was used "where matters of principle are delegated – in particular where a tax or levy may be imposed or where the terms of a statute maybe modified").

166. *See* FAIRLIE, *supra* note 131, at 39-46.

167. *See* DONOUGHMORE REPORT, *supra* note 53, at 41-42 (noting that, in addition to including either passive or affirmative laying requirements, different statutes stipulated that the laying would occur when the statute was either still in draft form or had already come into effect). For a broader description of these various requirements, see CARR, *supra* note 79, at 41; and JOHN E. KERSELL, PARLIAMENTARY SUPERVISION OF DELEGATED LEGISLATION: THE UNITED KINGDOM, AUSTRALIA, NEW ZEALAND AND CANADA 15-16 (1960).

168. DONOUGHMORE REPORT, *supra* note 53, at 42.

169. This critique continues to be made in the present. *See, e.g.*, Susan Rose-Ackerman, *Executive Rulemaking and Democratic Legitimacy: "Reform" in the United States and the United Kingdom's Route to Brexit*, 94 CHI.-KENT L. REV. 267, 304 (2019) (noting that the current configuration of laying procedures in the United Kingdom "seldom produces real debate on the merits of [a piece of delegated legislation] and usually leads to pro forma approval").

trouble to weigh and consider" it.[170] Against this backdrop, he hyperbolically asked why it was not possible "to secure a real and effective Parliamentary supervision over all rules and orders."[171]

The Donoughmore Committee responded to these criticisms in different ways. It wholeheartedly accepted the first criticism and recognized the necessity of reforming the Rules Publication Act's patchwork regime of laying procedures.[172] In particular, it recommended that a passive laying procedure be established as the default and that the standard laying period be set at twenty-eight days.[173] When it came to Hewart's second criticism, by contrast, the Donoughmore Committee did not fully agree. While it called on both houses of Parliament to scrutinize proposed laws more rigorously to govern the enactment and substance of delegated legislation, it adamantly refused to question the underlying effectiveness of laying procedures.[174] Instead, it suggested that legislators proposing bills be required to submit memoranda drawing attention to and explaining any provisions that allowed for delegated legislation.[175] The Committee likewise called for establishing standing parliamentary committees that would be responsible for scrutinizing the legal form of legislation and delegated legislation rather than engaging in evaluating their substance.[176] These measures, it argued, would bolster the efficacy of laying procedures and ultimately ensure that Parliament knew about "the nature of the legislative powers which it was proposed to delegate and of the general characteristics of the regulation."[177] Rather than discard laying procedures, the Committee sought to render them more effective through reform. As one prominent pro-administration professor put it, reforming the Rules Publication Act's regime governing laying procedures was a

170. HEWART, *supra* note 93, at 86.

171. *Id.* at 150.

172. DONOUGHMORE REPORT, *supra* note 53, at 41-42.

173. *See id.* at 67.

174. *See id.* at 62 ("We are convinced that no system of antecedent publicity, however effective, can relieve the two Houses of Parliament of the duty of exercising an effective supervision over delegated legislation themselves.").

175. *Id.* at 63-64, 67.

176. *Id.* at 62-63.

177. *Id.* at 63; *see also id.* at 67-69 (proposing the memorandum requirement and standing committee and laying out potential procedures for that committee). There was already a standing Special Orders Committee in the House of Lords, but it did not report on all delegated legislation, nor did it have a parallel committee in the House of Commons. *See* Carr, *supra* note 163, at 1049 (citing House of Lords, Standing Order No. 191).

step forward in "ensuring that the sovereignty of Parliament shall be something more than a pious constitutional hope."[178]

As we will see, the Donoughmore Committee's efforts to improve laying procedures—like the rest of the Committee's suggested reforms—were not adopted immediately in England. Beyond this, whereas the other suggested reforms were transplanted to the United States, the same was not the case for the Committee's recommendations for how to improve laying procedures. Notwithstanding the fact that laying procedures were considered by various American lawyers and scholars of administration, they ultimately failed to take root on the other side of the Atlantic.

5. Updating Publication Requirements

The final report's third reform proposed extending the requirement to publish finalized delegated legislation. As noted above, the Rules Publication Act 1893 required finalized pieces of delegated legislation to be printed and published by the Queen's printer of Acts of Parliament.[179] This in itself was an innovation: prior to 1893, there was no overarching legal requirement that either proposed or finalized pieces of delegated legislation be published.[180]

This requirement, however, was riddled with exceptions. Under the 1893 Act, the Treasury was given authority to enact regulations to govern this publication process.[181] In practice, the Treasury's 1894 regulations narrowed the publication requirement in a variety of respects.[182] The Treasury's regulations only required the publication of finalized delegated legislation "of a legislative and not an executive character."[183] Moreover, they distinguished between "statutory rules which are general and those which are local and personal."[184] Only the former (it seems) were required to be published.[185] Together with a number of other exceptions, these regulations severely circumscribed the reach of the publication requirement.

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178. John Willis, *The Delegation of Legislative and Judicial Powers to Administrative Bodies: A Study of the Report of the Committee on Ministers' Powers*, 18 IOWA L. REV. 150, 157 (1933).

179. Rules Publication Act 1893, 56 & 57 Vict. c. 66 § 3(1) (UK).

180. *See* FAIRLIE, *supra* note 131, at 23-25.

181. Rules Publication Act 1893 § 3(1).

182. *See* DONOUGHMORE REPORT, *supra* note 53, at 47, 120-21.

183. *Id.* at 120-21 (detailing regulations, dated August 9, 1894, made by the Treasury with the concurrence of the Lord High Chancellor and the Speaker of the House of Commons in pursuance of the Rules Publication Act 1893).

184. *Id.*

185. *Id.* at 47.

The Donoughmore Committee recommended removing these various exceptions from the publication requirement.[186] In his testimony before the Committee, Cecil T. Carr warned that these exceptions could bring about a situation in which "obscure clerks in Whitehall poured forth streams of departmental legislation about which nobody had any means of knowing."[187] This, Carr determined, would be no different than "the method attributed to Caligula of writing his laws in very small characters and hanging them up on high pillars 'the more effectually to ensnare the people.'"[188] Heeding this criticism, the Committee's final report embraced a broadly applicable publication requirement. Having such a requirement in place was necessary to "remove[] the reproach that the law embodied in statutory rules was less well known and less easy to find than the law embodied in Acts of Parliament."[189] Put another way, only by publishing all finalized pieces of delegated legislation would (what American law terms) due-process interests be realized. Moreover, to ensure the fiction that "all the King's subjects must be taken to know the statute law" applied equally to delegated legislation,[190] it pressed for turning the publication of finalized delegated legislation into a "condition precedent to the coming into operation of a regulation."[191] Under this proposal, all pieces of statutory legislation would have to be published before they could come into effect.

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The Donoughmore Committee's final report was met with general satisfaction.[192] This was especially true of its conclusions regarding delegated legislation. All members of the Committee signed onto the final report.[193] Even Labour Party Member of Parliament Ellen Wilkinson, who filed a separate note (which Professor Harold J. Laski joined) criticizing the Committee for its inclusion of "certain passages which rather give the impression that the delegating of legislation is a necessary evil," nonetheless "agree[d] generally with [the] report."[194] While various commentators picked fights with certain of the Committee's

186. *See* DONOUGHMORE REPORT, *supra* note 53, at 66.

187. MINUTES, *supra* note 119, at 208 (testimony of Cecil T. Carr).

188. *Id.*

189. DONOUGHMORE REPORT, *supra* note 53, at 47 (quoting CARR, *supra* note 79, at 45).

190. 27 EARL OF HALSBURY, THE LAWS OF ENGLAND ¶ 192, at 114 (1913).

191. DONOUGHMORE REPORT, *supra* note 53, at 66.

192. *See, e.g.*, *Report of the Committee on Ministers' Powers: A Critical Survey*, 76 SOLICS.' J. 351, 353 (1932) ("It will be recognised that this report is one of the greatest interest and importance. . . . [T]he committee has accomplished a difficult task concisely, lucidly and successfully.").

193. *See* DONOUGHMORE REPORT, *supra* note 53, at 118.

194. *Id.* at 137-38.

conclusions (especially when it came to those dealing with administrative adjudication), the general sentiment was positive. As one critic conceded, "All things considered, the Committee has done a far better piece of work than might have been expected in view of the unpropitious circumstances attending its birth."[195] In particular, he lauded its recommendations regarding delegated legislation as "exceedingly good."[196]

Despite this general praise, the recommendations laid out in the Donoughmore Committee's final report remained unimplemented in the short term. Notwithstanding the straightforward nature of the recommendations (especially those concerning delegated legislation), Parliament largely ignored the report.[197] Exactly why is not clear.[198] Still, little came of these recommendations in England until Parliament revisited the matter in the later years of the Second World War.[199] As Professor Harold J. Laski stated just a few years after the final report was issued, "When [the government] appoint[s] a royal commission to inquire into a subject, on the average where the royal commission is unanimous it takes 19 years for eventual legislation to follow. And where the commission is divided . . . it takes on an average 33 years for eventual legislation to follow."[200] It was thus of little surprise that, while the Donoughmore Committee "has met with very considerable approval," the government "has not yet found time to deal with [its] report."[201]

Others would later echo Laski and cast the Donoughmore Committee as "learned but ineffective."[202] But, as the next Part shows, this was only half of the story. While the Donoughmore Committee's report was left to gather dust in

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195. Robson, *supra* note 103, at 351. The "unpropitious circumstances" to which William A. Robson was referring were the Committee's terms of inquiry. *Id.* at 350-51.

196. *Id.* at 355; *see also* Jennings, *supra* note 102, at 335 (stating that the Donoughmore Committee's recommendations regarding delegated legislation "ought not to meet with serious opposition").

197. *See* ALLEN, *supra* note 56, at 43 (asserting that, while the report resulted in a "few improvements," "in the main it passed quietly into the oblivion which is the fate of so many Reports").

198. *See, e.g.*, A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN 59 (1992) (suggesting that it was the government's intention to commission a report but not follow through).

199. For efforts to reform the English administrative process during and after the Second World War, see K.C. Wheare, *Controlling Delegated Legislation: A British Experiment*, 11 J. POL. 748, 749-54 (1949).

200. *United States Court of Appeals for Administration: Hearings on S. 3676 Before the Subcomm. of the S. Comm. on the Judiciary, Part 2*, 75th Cong. 104 (1938) [hereinafter *Hearings on S. 3676, Part 2*] (statement of Harold J. Laski, Professor of Political Science, University of London).

201. *Id.*

202. BERNARD SCHWARTZ & H.W.R. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES 4 (1972).

England, it garnered quite a bit of interest in the United States. This interest turned into real change through a series of legal transplantations that would fundamentally reshape American administrative rulemaking.

II. THE UNITED STATES: MAKING NOTICE-AND-COMMENT RULEMAKING

Shortly after the Donoughmore Committee published its report, its last chair, Sir Leslie Scott, expressed the hope that the Committee's "deliberations and recommendations will prove of interest to other nations besides my own—indeed to all students of public law."[203] As this Part demonstrates, Scott's wish came true in the United States during the 1930s and 1940s as the American reform of the procedural framework governing administrative rulemaking looked to England as its model.

This English influence, which sometimes manifested itself in the wholesale transplantation of English procedures, was part of a broader universe of what then-contemporary scholars, such as Frank J. Goodnow, Felix Frankfurter, and Ralph F. Fuchs, each labeled "Anglo-American administrative law."[204] In recent scholarship, there have been glimpses of this lost world. In 2020, Professor Elizabeth Fisher drew attention to the fact that "during the 1920s and the 1930s there was an ongoing dialogue between American and British administrative lawyers, as both wrestled with the same set of issues in their distinctive socio-political and legal cultures."[205] The following year, Professor Peter Cane observed that a "vibrant Anglo-American intellectual conversation" concerning administrative law spanned the sixty-year period from 1880 to 1940 and "reached its zenith in the 1930s."[206] This conversation, this Part shows, developed into action as Americans (partially) imported the English framework governing delegated legislation between 1935 and 1941.

These transplantations of and the underlying American interest in English administrative law grew out of, in Professor Morton Keller's words, a mutual American and English "grass-is-greener admiration for the other country's"

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203. Leslie Scott, *Evolution of Public Law*, 14 J. COMPAR. LEGIS. & INT'L L. 163, 164-65 (1932).

204. GOODNOW, *supra* note 48, at 59; CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW, at vii (Felix Frankfurter & James Forrester Davison eds., 1932); Ralph F. Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory*, 47 YALE L.J. 538, 538 (1938).

205. Fisher, *supra* note 96, at 212 (footnote omitted).

206. Peter Cane, *An Anglo-American Tradition*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 3, 15-16 (Peter Cane, Herwig C.H. Hofmann, Eric C. Ip & Peter L. Lindseth eds., 2021).

political and constitutional system.[207] Many American administrative lawyers felt that the United States lagged behind England both in terms of the substantive services and protections that the state provided and in the accompanying legal and procedural frameworks.[208] As Felix Frankfurter explained, the development of the administrative state and administrative law "happened in England about a generation ahead of our time."[209] Ralph F. Fuchs similarly noted that disagreements over rulemaking "reached a culmination in the New Deal in this country as they had in England a few years earlier."[210] The ABA's Special Committee on Administrative Law issued a 1941 report determining that "Great Britain is usually from twenty to fifty years ahead of the United States in the assumption of governmental power to do for the people what they did for themselves in other years."[211] Despite splitting over how far the United States was behind England, all agreed that it suffered from a lag.

It was for this reason that Americans took much interest in the Donoughmore Committee's final report. While some conservative opponents of the New Deal were receptive to Hewart's *The New Despotism*,[212] the Donoughmore Committee exerted more influence—not the least when it came to those who were either involved in or sympathetic to the New Deal. The scholar of administration John M. Gaus recommended that the Donoughmore Committee's report "should be of great interest and value to American political scientists," not least because "[t]he problems discussed are problems equally characteristic of our own system of government and of the present stage of development of political policy and administrative practice and procedure."[213] After Felix Frankfurter praised the Committee as "an extraordinarily authoritative body,"[214] Cecil T. Carr retorted that "[o]ur own 'Donoughmore Committee' (on Ministers' Powers) has seemed

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207. Morton Keller, *Anglo-American Politics, 1900-1930, in Anglo-American Perspective: A Case Study in Comparative History*, 22 COMPAR. STUD. SOC'Y & HIST. 458, 465 (1980).

208. *See, e.g.*, WARREN I. SUSMAN, CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY 156 (2d ed. 2003) (discussing the centrality of the idea of "cultural lag," a concept defined by the sociologist William Fielding Ogburn, during the 1930s); RODGERS, *supra* note 46, at 423-24 (demonstrating that many New Dealers looked to the English liberal David Lloyd George's policies as a model).

209. Felix Frankfurter, *Summation of the Conference*, 24 A.B.A. J. 282, 283 (1938).

210. Ralph F. Fuchs, *An Approach to Administrative Law*, 18 N.C. L. REV. 183, 195 (1940).

211. *Report of the Special Committee on Administrative Law*, 66 ANN. REP. A.B.A. 439, 445 (1941).

212. *See* Carr, *supra* note 101, at 61 ("*The New Despotism* must have had colossal sales here [in England] as well as across the Atlantic [in the United States]."); Frankfurter, *supra* note 209, at 283 (lamenting that *The New Despotism* "is still quoted with reverence in this country").

213. John M. Gaus, *The Report of the British Committee on Ministers' Powers*, 26 AM. POL. SCI. REV. 1142, 1142 (1932) (book review); *see also id.* at 1147 (stating that the Donoughmore Committee's "specific proposals are full of suggestion[s] for [our] own situation").

214. Frankfurter, *supra* note 209, at 283.

to me to win much more attention on your side of the Atlantic than on ours."[215] The Donoughmore Committee's report, as the dean of Harvard Law School James M. Landis sardonically summarized, "was received in this country with that uncritical praise that we are accustomed to heap even upon the minor performances of our British cousins."[216]

This fascination with the Donoughmore Committee's final report was especially pronounced when it came to rulemaking. Justice Cardozo conveyed this interest when he remarked in his dissent in *Panama Refining Co. v. Ryan* that the Donoughmore Committee had dealt with rulemaking and the related question of delegation with "much enlightenment."[217] The reason for this interest was simple. In England, "delegated legislation was a major issue, at times *the* major issue" in administrative law during the first half of the twentieth century.[218] By contrast, in the United States the primary methods of American administrative policymaking were adjudication and ratemaking, not rulemaking.[219] The relative disuse of rulemaking meant that American rulemaking procedures were much less developed than their English counterparts. Faced with this nascency, American reformers found much to admire in the Donoughmore Committee's recommendations on delegated legislation.

This interest resulted in a series of transplantations that partially imported to the United States the Donoughmore Committee's proposed procedural framework concerning delegated legislation. Section II.A describes the first transplantation, embodied in the 1935 Federal Register Act, which adopted the English requirement that finalized regulations be published.

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215. Letter from Cecil T. Carr to Justice Felix Frankfurter (Mar. 26, 1941) (on file with Libr. of Cong., Felix Frankfurter Papers, 1846-1966, Box 42, Reel 25). Carr made a similar statement the following year. Cecil T. Carr, *Administrative Adjudication in America*, 58 LAW Q. REV. 487, 487 (1942) ("The [Donoughmore] Committee's report attracted less attention in the United Kingdom than in the United States of America . . . .").

216. James M. Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1081 (1940); *see also* Frank E. Horack, Jr., *Administrative Procedure: A Report and an Evaluation*, 26 WASH. U. L.Q. 492, 492 (1941) (comparing the Attorney General's Committee on Administrative Procedure (AG's Committee) to the Donoughmore Committee).

217. 293 U.S. 388, 441 (1935) (Cardozo, J., dissenting).

218. Taggart, *supra* note 98, at 575.

219. *See* Schiller, *supra* note 37, at 1140, 1145-47. This is not to say that Congress did not empower the President or agencies to promulgate regulations. Congressional grants of rulemaking powers trace back to the first session of Congress. *See, e.g.*, JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 52 (1927). It seems that, beginning in the second half of the nineteenth century, Congress enacted more laws delegating rulemaking powers. *See* Merrill & Watts, *supra* note 31, at 496-98. Still, during this period, agencies primarily regulated through adjudication and ratemaking.

Section II.B details the second set of transplantations, which are embodied in the 1941 final report of the AG's Committee. The Donoughmore Committee's inductive approach was a model for the AG's Committee. The transsubstantive nature of the Donoughmore Committee's reforms likewise inspired the influential minority recommendations of the AG's Committee. And the Donoughmore Committee's recommendations on publicization and public consultation guided the two members of the AG's Committee who were most instrumental in crafting what we now know as notice-and-comment rulemaking.

In contrast, and as discussed in Section II.C, the AG's Committee did not adopt English laying procedures. Although various reformers suggested that laying procedures be brought to the United States, the AG's Committee ultimately decided against it. This was due in part to the recognition that laying procedures would have widely divergent effects in the United States's separation-of-powers system. It was also partially due to the recent demise of the nondelegation doctrine and the accompanying perception that concerns about legislative oversight of administrative rulemaking were no longer of primary concern. In the wake of this decision, notice-and-comment rulemaking assumed its now-familiar form.

A. The First Transplantation: The 1935 Federal Register Act and the Importation of Publication Requirements

The Donoughmore Committee's final report recommended that all delegated legislation be published once finalized. Intrigued by this recommendation, Americans transplanted it by enacting the 1935 Federal Register Act[220] to produce the *Federal Register*, which remains the public record of promulgated federal regulations.

This transplantation was long in the making. In 1897, the pioneering scholar of administration and administrative law Frank J. Goodnow proclaimed it imperative that "[a]ll ordinances in all countries must, in order that they shall have force, be brought by some legal means to the notice of those persons whom they will affect."[221] The most straightforward way to do so was by "publication of some sort."[222] Yet no such thing existed in the United States. In 1917, an *Official*

220. Federal Register Act of 1935, ch. 417, 49 Stat. 500 (codified as amended at 44 U.S.C. §§ 1501-1511).

221. 2 Frank J. Goodnow, Comparative Administrative Law: An Analysis of the Administrative Systems National and Local, of the United States, England, France and Germany 112 (1893).

222. *Id.* Thirty years later, John Preston Comer made a similar statement, asserting that "in fairness to the groups affected directly by delegated legislation as well as to the public at large, publicity ought to be given to all such legislation." Comer, *supra* note 219, at 194. Comer also cited

Bulletin of the United States—which published notifications about official acts, orders, and regulations—was created, but it was short-lived.[223] By the time of the New Deal, the lack of such a publication requirement was recognized as a significant shortcoming.[224] As the ABA's Special Committee on Administrative Law complained in 1934, there was no adequate way to obtain physical copies of the "great . . . flood of administrative legislation which is daily poured forth."[225] Even those who did not share the ABA's general hostility toward the New Deal agreed that this was a problem.[226]

The need for this type of requirement became more pronounced in 1934 and 1935. In October 1934, government lawyers dropped a case that was subsequently found to have been predicated upon a nonexistent regulation.[227] Then, in oral arguments in *Amazon Petroleum Co. v. Ryan*[228] (the companion case to *Panama Refining Co. v. Ryan*[229]), the government was forced to admit publicly that it had inadvertently deleted the regulatory provisions upon which it was claiming the authority to impose criminal punishment on the defendant.[230] With even the government unable to keep track of the law on the books, it became increasingly clear that there needed to be a centralized publication of regulations.

It was in this context that Erwin N. Griswold, then a young attorney working in the Solicitor General's Office, raised the idea of what would become the 1935 Federal Register Act.[231] As early as spring 1934, Griswold had drawn attention to the difficulty of obtaining regulations and suggested creating an "Official Gazette," which would be issued daily and would include "all executive orders,

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Cecil T. Carr for the proposition that the publication of finalized regulations is "essential in that it gives an opportunity for individuals and groups to know what the law is." *Id.* (citing CARR, *supra* note 79, at 36).

223. *See* Harold C. Relyea, *The* Federal Register*: Origins, Formulation, Realization, and Heritage*, 28 GOV'T INFO. Q. 295, 296 (2011).

224. *See id.* at 296-97 (describing criticisms by John A. Fairlie and William F. Willoughby).

225. *Report of the Special Committee on Administrative Law*, *supra* note 45, at 553.

226. *See* Lotte E. Feinberg, *Mr. Justice Brandeis and the Creation of the* Federal Register, 61 PUB. ADMIN. REV. 359, 363 (2001).

227. United States v. Smith, 293 U.S. 633, 633 (1934) (mem.). The government had previously moved to have this case, which concerned the constitutionality of the delegation in Section 9(c) of the 1933 National Industrial Recovery Act, dismissed after Attorney General Homer Cummings determined that the case was "sadly defective." PETER H. IRONS, THE NEW DEAL LAWYERS 68 (1982). Soon thereafter, a lawyer in the Department of Justice realized that the entire prosecution in this case had been built on a section in the regulation that "had been inadvertently deleted." *Id.* at 70.

228. 293 U.S. 388 (1935).

229. *Id.*

230. *See* IRONS, *supra* note 227, at 70-71.

231. Feinberg, *supra* note 226, at 361.

proclamations, regulations and codes."[232] Later that year, and at the encouragement of his former teacher Felix Frankfurter (and indirectly Justice Brandeis), he wrote an article expanding on this idea.[233] This article, titled *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, appeared in late 1934 in the *Harvard Law Review* and soon led to legislative action.[234] In early 1935, Representative Emanuel Celler, a member of the House Judiciary Committee, introduced a bill along the lines of that proposed by Griswold at the end of his article.[235] Within a few short months, this bill was enacted into law as the 1935 Federal Register Act. The Act mandated the creation of the *Federal Register,* which served as the official daily publication for regulations, proposed regulations, and notices issued by federal agencies, as well as executive orders and other presidential documents.[236]

It was no mystery why the Act resembled the Rules Publication Act's requirement to publish finalized regulations and the Donoughmore Committee's proposed reforms. In fact, Griswold explicitly presented his proposal as a transplantation of English publication requirements. In September 1934, he came across the Rules Publication Act and shortly thereafter told a colleague, Charles Wyzanski, that it "seems to me to furnish a very good analogy for what is needed here."[237] In the *Harvard Law Review*, he named England as a model for his

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232. *Id.* at 363, 369 n.4; Memorandum from Erwin Griswold, Special Assistant to Att'y Gen., U.S. Dep't of Just., to Jerome Frank 2 (Feb. 20, 1934) (on file with Harv. L. Sch. Archives, Erwin Griswold Papers, Box 74, File 3).

233. *See* Feinberg, *supra* note 226, at 364. In her detailed account of the creation of the 1935 Federal Register Act, Lotte E. Feinberg focuses on the behind-the-scenes role that Justice Brandeis played in this story. *Id.* at 364-65.

234. Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934).

235. *See* Feinberg, *supra* note 226, at 366; H.R. REP. NO. 74-280, at 2-3 (1935).

236. Federal Register Act of 1935, ch. 417, §§ 3, 5, 49 Stat. 500, 500-01 (codified as amended at 44 U.S.C. §§ 1504, 1505).

237. Letter from Erwin Griswold to Charles Wyzanski, Solicitor, U.S. Dep't of Lab. (Sept. 28, 1934) (on file with Harv. L. Sch. Archives, Erwin Griswold Papers, Box 32, Folder 24). Erwin Griswold told Charles Wyzanski that, while he initially called for an official gazette, once he learned of the English practice, he advocated for a similar system in which there would be a "systematic and uniform publication of all rules and regulations in slip form . . . with an annual cumulation." Letter from Erwin Griswold to Charles Wyzanski, Solicitor, U.S. Dep't of Lab. (Nov. 21, 1934) (on file with Harv. L. Sch. Archives, Erwin Griswold Papers, Box 32, Folder 24) Griswold would later credit Frankfurter for making him aware of the English law. *See* ERWIN N. GRISWOLD, OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER 116 (1992). It should also be noted that Wyzanski was himself very interested in English administrative law and the Donoughmore Committee. In marginalia in a 1936 reprint of the Donoughmore Committee's final report, Wyzanski noted that

proposed reforms, asserting that "[t]he condition in which we find ourselves is not novel, nor is the solution suggested original."[238] As he openly acknowledged, his proposed solution came from England, where "[a]s long ago as 1890, the same difficulty was faced."[239]

Griswold's subsequent recommendations were modeled after the Rules Publication Act while incorporating changes along the lines of the Donoughmore Committee's proposed reforms. In addition to requiring that all regulations "which might affect the public as such, or any considerable body of it" be published,[240] he suggested—similar to the Donoughmore Committee's recommendations—that no regulation establishing a criminal offense should have effect until it was published.[241] Moreover, the report accompanying the bill that was introduced in Congress repeated that the inspiration for the legislation came from England and the Commonwealth.[242] "It is high time that we had ours," it determined.[243] It was thus befitting when, shortly after the Act passed, Justice Stone thanked Cecil T. Carr (and England) for helping to find a "satisfactory solution" to the American "problem of delegated legislation" and especially the publication of finalized regulations.[244]

The 1935 Federal Register Act ultimately proved to be the first, though not the last, step in the development of the American publication requirement. The AG's Committee in 1941 drew attention to the fact that the 1935 Act "did not provide affirmatively for the making of needed types of rules or for the issuance

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Carr, who was a member of the Donoughmore Committee, had advised the Department of Justice in 1935 on the Federal Register Act. *See* COMMITTEE ON MINISTERS' POWERS REPORT 3 (1936) (on file with Geo. Univ., Geo. L. Libr., Special Collections, Judge Charles E. Wyzanski Collection) (referring to the margin comments on a copy of the report). This is further evidence of the English influence on the 1935 Federal Register Act. I am indebted to Daniel R. Ernst for drawing my attention to this source and to Hannah Miller-Kim and the staff at the Georgetown Special Collections for providing me with a digital copy of this source on extremely short notice.

238. Griswold, *supra* note 234, at 206.

239. *Id.*

240. *Id.* at 210.

241. *Id.* at 215.

242. H.R. REP. NO. 74-280, at 2-3 (1935).

243. *Id.* at 3.

244. Letter from Justice Harlan F. Stone to Cecil Carr (Nov. 30, 1935) (on file with Cambridge Univ. Libr., Misc. Accessions, 1991-2000, Cecil T. Carr: Letters to him, 3 Oct. 1935-28 Apr. 1941, Box MS Add.8856, Box 1). Carr had played a minor role in the actual transplantation. In 1935, then-Professor Frankfurter arranged for Justice Brandeis (who was working behind the scenes to ensure that the Federal Register Act was passed) to meet Carr and discuss emulating the Rules Publication Act. *See* Feinberg, *supra* note 226, at 362.

of other forms of information."[245] In response, the 1946 APA established a more robust publicization requirement. Section 552 of the APA preserved the 1935 Federal Register Act's requirements, while mandating that agencies publish their organizational structure and procedures in the form of rules.[246] It was described as "among the most important, far-reaching, and useful provisions of the bill."[247]

B. The Second Transplantation: The Attorney General's Committee on Administrative Procedure

The Federal Register Act was only the first development that reflected American interest in the Donoughmore Committee. As this Section details, the AG's Committee—along with its 1941 final report, which included a minority statement that led to the creation of what became known as notice-and-comment rulemaking—was likewise inspired by the Donoughmore Committee.[248]

Like the Donoughmore Committee, the AG's Committee was established in response to mounting criticisms of administrative law and procedure. Likewise, as in England, this criticism came from antiregulatory, conservative forces. As others have shown in detail, the ABA and its Special Committee on Administrative Law were among the most outspoken of these critics in the United States.[249] Since shortly after it was established in 1932,[250] the ABA's Special Committee issued annual reports that were increasingly hostile to the New Deal and its administrative implementation.[251] While they were nominally neutral when it

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245. AG's Committee Final Report, *supra* note 27, at 25-26; *see also* David Reich, *Rule Making Under the Administrative Procedure Act*, *in* The Federal Administrative Procedure Act and the Administrative Agencies 492, 495 (George Warren ed., 1947) (explaining that, prior to the passage of the APA, "the only substantial requirement as to the publication of information about agencies of the Government was found in the Federal Register Act" and that this requirement was itself subject to presidential discretion).

246. 5 U.S.C. § 552 (2018).

247. S. Rep. No. 79-752, at 12 (1945).

248. The final report included a majority view and a statement of additional views and recommendations, the latter of which is generally known as the minority report. *See* Shepherd, *supra* note 26, at 1604, 1651 (discussing the minority report). Arthur T. Vanderbilt, E. Blythe Stason, and Carl McFarland signed onto the minority report. AG's Committee Final Report, *supra* note 27, at 203-47. D. Lawrence Groner wrote his own additional views. *Id.* at 248-50.

249. *See, e.g.*, Shepherd, *supra* note 26, at 1569-70; Grisinger, *supra* note 26, at 21-22, 62-63.

250. *See* Ernst, *supra* note 26, at 119.

251. The ABA's Special Committee published its first report after the first one hundred days of President Roosevelt's presidency. *See id.* The ABA's Special Committee was stridently hostile to the New Deal due in large part to the fact that the ABA "spoke on behalf of the large financial and industrial concerns most threatened by New Deal administrative government."

came to the substance of the New Deal, they "expressed concern about the spreading expanse of national power and national administration."[252] This hostility culminated in the famous—and infamous—1938 report (authored by the Special Committee's chairman and the former dean of Harvard Law School, Roscoe Pound, who turned sharply rightward in the 1930s), which denounced the American administrative process as nothing less than "administrative absolutism."[253]

In response to this criticism—and increasingly restrictive proposed bills that sought to curb administration—President Roosevelt established the AG's Committee in early 1939.[254] Charged with making recommendations based on its "scientific examination"[255] of the administrative state "in action,"[256] the AG's Committee issued its final report in early 1941. With Roosevelt having recently vetoed the restrictive Walter-Logan Bill,[257] the AG's Committee's final report quickly became the basis upon which proposed legislation was put forth.

The AG's Committee drew liberally from the Donoughmore Committee in both methodology and substance, including its inductive method of study, its pursuit of a transsubstantive governing framework, and some—though not all—of its recommendations. The remainder of this Section explores each in turn.

1. Adopting the Inductive Approach

The AG's Committee first emulated the Donoughmore Committee in its inductive approach to the study of the administrative state. As had been the case in England, there was much debate in the United States about the administrative

Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119, 1135 (1997); *see also* RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 81-92 (1995) (discussing corporate law firms' involvement in combating New Deal legislation).

252. Metzger, *supra* note 3, at 58.

253. *Report of the Special Committee on Administrative Law,* 63 ANN. REP. ABA. 321, 342 (1938).

254. The Committee was composed of attorneys who had played roles in the Roosevelt Administration, a federal judge, a past president of the ABA, and several academics. *See* GRISINGER, *supra* note 26, at 66. Most of its members "were presumed to be sympathetic to the Roosevelt administration and to the cause of administrative government." *Id.*

255. Shepherd, *supra* note 26, at 1596.

256. Grisinger, *supra* note 28, at 389.

257. *See* Shepherd, *supra* note 26, at 1625. The Walter-Logan Bill was a controversial bill that sought to constrain New Deal commissions and agencies through a variety of procedural mechanisms, including broad and exacting judicial review. *See id.* at 1598-1625. Congress passed the bill in December 1940, but President Roosevelt vetoed it shortly thereafter. *See id.* at 1625. The House of Representatives then failed to overcome the veto despite efforts by Republicans and half of the Southern Democrats. *See id.* at 1628-32.

state and its procedures but relatively little empirical evidence about how various agencies actually operated.[258] It was against this backdrop that the AG's Committee formulated its plan of study.

The Donoughmore Committee's approach was mentioned on several occasions in the AG's Committee's early meetings in 1939. As the AG's Committee set out to investigate "existing administrative practices," a number of its members called for emulating the Donoughmore Committee's approach.[259] Committee member Dean Acheson, a former Brandeis clerk and Frankfurter acolyte, touted the Donoughmore Committee's inductive style, adding, "I think their methods are a good deal of help."[260] Acheson emphasized that the key benefit of the Donoughmore Committee was that it had first studied the administrative process and only then "allowed the material to form its own patterns" and suggested procedures that could or could not be introduced uniformly.[261]

This approach appealed to other members of the AG's Committee, as well. E. Blythe Stason, who had spent half of 1938 in England "for the special purpose of studying the administrative process there,"[262] called the Donoughmore Committee report "a monument of wisdom" that "might well be given consideration in connection with improving our own system of administrative justice."[263] Former ABA President Arthur T. Vanderbilt similarly emphasized that it was "really imperative" to adopt "the practice followed by the English commission of getting

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258. *See, e.g.*, Edward G. Jennings, *Monographs of the Attorney General's Committee on Administrative Procedure*, 25 MINN. L. REV. 123, 124 (1940) (reviewing DEP'T OF JUST., MONOGRAPHS OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1940)) ("[T]he literature of administrative law in this country has dealt largely with the place of the administrative process in our constitutional system, and with subsequent stages of judicial review . . . . Yet for the purpose both of acquiring a better understanding of the place of the administrative process in our constitutional system, and of achieving competence and effectiveness in administrative practice, study should begin, it would seem, with the process itself.").

259. Order No. 3215, Feb. 23, 1939, *reprinted in* AG'S COMMITTEE FINAL REPORT, *supra* note 27, at 252–53.

260. Conference of the Attorney General's Committee on Administrative Procedure 12 (Mar. 16, 1939) (on file with Nat'l Archives & Recs. Admin., General Recs. of the Dep't of Just., Recs. of the Att'y Gen.'s Comm. on Admin. Proc., Rec. Grp. 60, Entry 276, Box 3, Committee Meeting March 16, 1939 Folder) (statement of Dean Acheson).

261. *Id.* at 14.

262. *Id.*; Letter from Arthur T. Vanderbilt to Alexander Holtzoff (Feb. 1, 1939) (on file with Univ. of Mich., Bentley Hist. Libr., E. Blythe Stason Papers, Various State & Pro. Activities, Box 12, Attorney General's Committee on Administrative Procedure Folder).

263. E. Blythe Stason, *Administrative Tribunals—Organization and Reorganization*, 36 MICH. L. REV. 533, 544 (1938).

both sets of facts before us, the paper facts and the actual facts as it works."[264] The first chairman of the Committee, James W. Morris, likewise recommended following the Donoughmore Committee's blueprint, explaining that it was "the only proper approach" to tackling the problems posed by administrative procedure.[265]

The AG's Committee embraced this inductive approach. The Committee's research staff sent lengthy questionnaires to a wide range of administrative agencies, interviewed agency officials, and attended agency proceedings.[266] The result was twenty-seven monographs detailing the operations of these bodies.[267] While the Committee's final report was not solely based on these studies, they undoubtedly provided the Committee (and the public) with an unprecedented view into the workings of the administrative process. As the Attorney General told Congress, the Committee's approach was "similar to the procedure that had been followed in dealing with similar problems in Great Britain."[268]

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264. Conference of the Attorney General's Committee on Administrative Procedure, *supra* note 260, at 17 (statement of Arthur Vanderbilt); *see also* Conference of the Attorney General's Committee on Administrative Procedure 27 (May 6, 1939) (on file with Nat'l Archives & Recs. Admin., General Recs. of the Dep't of Just., Recs. of the Att'y Gen.'s Comm. on Admin. Proc., Rec. Grp. 60, Entry 276, Box 3, Committee Meeting May 6, 1939 Folder) (statement of Arthur Vanderbilt) (suggesting that "we might profit by the experience of the Sankey Commission, which had a very similar job in England").

265. Letter from James W. Morris, Assistant Att'y Gen., U.S. Dep't of Just., to Elmore Whitehurst, Clerk, Comm. on the Judiciary, House of Reps. 3 (Apr. 4, 1939) (on file with Harv. L. Sch. Libr., Hist. & Special Collections, Henry Melvin Hart Papers, Box 31, Folder 8).

266. *See* Grisinger, *supra* note 28, at 391.

267. *Id.* at 390.

268. *See* Conference of the Attorney General's Committee on Administrative Procedure 13 (Oct. 21, 1939) (on file with Nat'l Archives & Recs. Admin., General Recs. of the Dep't of Just., Recs. of the Att'y Gen.'s Comm. on Admin. Proc., Rec. Grp. 60, Entry 384, Box 1); *see also* Introduction: The Committee—Its Task—Its Methods of Work 1 (July 9, 1940) (on file with Harry S. Truman Presidential Libr. & Museum, Dean Acheson Papers, Box 2, Folder 6) ("The background of criticisms concerning the administrative process in general . . . have not been limited to this country—compare the creation of the Committee on Ministers' Power and its report in 1932."). Outside observers also compared the two committees. In 1941, Carr noted that the Donoughmore Committee "has had recent parallels in the United States." CECIL THOMAS CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 31 (1941). Soon thereafter, Carr told Gellhorn that he hoped that the American final report is "translated (as our Report on Ministers' Power has not been) into legislation." Letter from Cecil T. Carr to Walter Gelhorn (Mar. 29, 1941) (on file with Colum. Univ., Rare Book & Manuscript Libr., Walter Gellhorn Papers, Box 116).

2. *Embracing Transsubstantivity*

The Donoughmore Committee's focus on the need for transsubstantive procedural reform also influenced the AG's Committee. This was especially true of the members of the AG's Committee who submitted an additional report and, particularly, Carl McFarland, who was a driving force behind these minority views.

McFarland's commitment to transsubstantivity seems to owe largely to his close relationship with former Attorney General Homer Cummings, to whom he had served as a special assistant. From his perch in the Department of Justice, Cummings sought to make order out of the chaos and complexity of the bureaucracy of the federal government and judicial system. His template was the English Judicature Act of 1873, the Act that had led to the Rules Publication Act 1893 and the Donoughmore Committee. Cummings saw the Judicature Act as what spurred the process of transsubstantive procedural reform in England—and he wanted to trigger a similar process in the United States. When he promoted transsubstantive civil and criminal procedural reforms, Cummings invoked the Judicature Act as his model. Empowering the Supreme Court to set procedural rules, he argued, "is not an untried, theoretical reform. It has been in full force in England since the Judicature Act of 1873."[269]

Cummings's zeal for transsubstantive reform extended to administrative procedure. As he told McFarland, "You know what my attitude has been with reference to reform of procedure and how far we have gone in that respect. Perhaps I could do something with reference to procedure in administrative law which would help clear up the situation."[270] He spelled out this vision of

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269. Homer S. Cummings, *Immediate Problems for the Bar*, 20 A.B.A. J. 212, 213 (1934); *see also* Homer S. Cummings, *A Rounded System of Judicial Rule-Making*, 24 A.B.A. J. 513, 513 (1938) (celebrating the fact that "we are now witnessing in this country . . . a return to the basic concept which permeated English legal development" of allowing courts to set their own procedures); Homer Cummings, *The New Criminal Rules—Another Triumph of the Democratic Process*, 31 A.B.A. J. 236, 236 (1945) (discussing the Judicature Act in the context of the Federal Rules of Criminal Procedure).

270. Memorandum from Homer Cummings, Att'y Gen., U.S. Dep't of Just., to Carl McFarland (Oct. 3, 1938) (on file with Univ. of Va. L. Sch., Arthur J. Morris L. Libr. Special Collection, Carl McFarland Papers, Box 2, Homer S. Cummings—Correspondence Folder). Cummings made a similar remark to Senator Alben Barkley shortly before the APA was passed in 1946. Administrative reform, he said, "would round out the procedural reformation which I had sponsored, every bill of which, with the exception of S.7 [the Senate version of the APA], has been adopted and has demonstrated its usefulness in actual operation." Letter from Homer Cummings to Carl McFarland (Mar. 6, 1946) (on file with Univ. of Va., Albert & Shirley Small Special Collections Libr., Homer Cummings Papers, Box 69, Correspondence of H.S.C.—Administrative Procedure Act—1936 [sic], March Folder) (relaying a conversation with Senator Alben Barkley (D-KY)).

transsubstantive reform when he recommended that President Roosevelt establish the AG's Committee.[271] As he explained in a draft, the Federal Rules of Civil Procedure, as "far reaching as it is, does not go far enough. Justice also may be made more swift and sure by the overhauling of outmoded and complicated procedures in the field of administrative law."[272] A key model for this reform was the Donoughmore Committee, whose report was "a standard reference."[273]

When McFarland joined the AG's Committee, he dedicated himself to his boss's cause.[274] Stemming in part from his own interest in English administrative law[275]—including the Donoughmore Committee[276]—McFarland insisted on undertaking a "horizontal study of procedural problems as applied to all the agencies."[277]

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271. In late September 1938, Charles Wyzanski urged Homer Cummings to undertake a reform of administrative procedure. *See* Letter from Charles Wyzanski to Homer Cummings, Att'y Gen., U.S. Dep't of Just. 3-6 (Sept. 29, 1938) (on file with Univ. of Va., Albert & Shirley Small Special Collections Libr., Homer Cummings Papers, Box 69, 1937, July 8 – 1939, June 6 Folder). Cummings, in turn, recommended to President Roosevelt that the AG's Committee be established. Letter from Homer Cummings, Att'y Gen., U.S. Dep't of Just., to Franklin Delano Roosevelt, President 2 (Dec. 14, 1938) (on file with Univ. of Va., Albert & Shirley Small Special Collections Libr., Homer Cummings Papers, Box 69, Attorney General Personal File—Administrative Law—1937, July 8 – 1939, June 6 Folder). Wyzanski, as noted earlier, had been interested in the Donoughmore Committee. *See supra* note 237 and accompanying text.

272. Letter from Homer Cummings to Franklin Delano Roosevelt (Dec. 14, 1938), Attached Page (on file with Nat'l Archives & Recs. Admin., General Recs. of the Dep't of Just., Recs. of the Att'y Gen.'s Comm. on Admin. Proc., Rec. Grp. 60, Entry 376, Box 3, Committee Material Re Formation of—Press Releases, Orders, Etc. Folder).

273. SELECTED PAPERS OF HOMER CUMMINGS: ATTORNEY GENERAL OF THE UNITED STATES 1933-1939, at 200 (Carl Brent Swisher ed., 1939) (noting this in an editor's note).

274. *See* Sellers, *supra* note 36, at 14. This was not the first time McFarland helped Cummings pursue reform efforts. He had previously been instrumental in helping Cummings formulate the court-packing scheme. Leuchtenburg, *supra* note 36, at 391. He also coauthored a history of the Department of Justice with Cummings. *See generally* HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE (1937) (recounting the origins and early life of the Department of Justice).

275. *See, e.g.*, Carl McFarland, "Administrative Law"—Its Symptoms and Diagnosis: An Address Before the Institute of Administrative Law, Held Under the Auspices of the Georgia Bar Association 4 (May 25, 1939) (on file with Univ. of Va., Albert & Shirley Small Special Collections Libr., Homer Cummings Papers, Box 69, 1937, July 8 – 1939, June 6 Folder) (citing HEWART, *supra* note 93; JOHN A.R. MARRIOTT, THE CRISIS OF ENGLISH LIBERTY: A HISTORY OF THE STUART MONARCHY AND THE PURITAN REVOLUTION (1930); ALLEN, *supra* note 95).

276. *See, e.g.*, Carl McFarland, *Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, 20 A.B.A. J. 612, 616 n.60 (1934).

277. Letter from Dean Acheson to E. Blythe Stason, Dean, Univ. of Michigan L. Sch. 2 (Jan. 28, 1941) (on file with Harry S. Truman Presidential Libr. & Museum, Dean Acheson Papers, Box 3, Folder 1).

This commitment also informed McFarland's decision to join the AG's Committee's minority report. In contrast to the majority, which shied away from any suggestion of imposing a uniform code on agencies, McFarland and the other members of the minority emphasized that there was a difference between uniformity and transsubstantivity.[278] The former required imposing one form of procedure upon a diversity of agencies; the latter sought only to establish a "general outline and principles which should govern in the administrative process."[279] This approach, they argued, struck a proper balance between congressional oversight and administrative flexibility. As McFarland explained, while "certain general types of rule-making procedures should be noted and recognized by Congress as general guides for administrators," agencies "should be given a choice and wide discretion" so that they could adequately address "the endless variety of rule-making situations they face."[280] When McFarland succeeded in having his vision of a transsubstantive code made into law in the form of the 1946 APA, he finally realized Cummings's longtime goal. "[Y]ou can chalk up 100% score on your legislative recommendations" concerning transsubstantive procedural reform, he wrote to his former boss shortly after the passage of the APA.[281]

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278. *Compare* Walter Gellhorn, Notes for a Progress Report 1 (Dec. 20, 1939) (on file with Harry S. Truman Presidential Libr. & Museum, Dean Acheson Papers, Box 2, Folder 4) (arguing that any "broadly generalized prescription of administrative procedures" would impose "an artificially uniform method of approach"), *with Administrative Procedure Hearings*, *supra* note 32, at 1343 (statement of Carl McFarland) ("[C]ertain general types of rule-making procedures should be noted and recognized by Congress as general guides for administrators.").

279. Carl McFarland, *A Code of Administrative Procedure*, 221 ANNALS AM. ACAD. POL. & SOC. SCI. 160, 168 (1942).

280. *Administrative Procedure Hearings*, *supra* note 32, at 1343 (statement of Carl McFarland). To further underscore the point that McFarland saw a clear difference between uniformity and transsubstantivity, it should be noted that McFarland had previously criticized the ABA Special Committee's 1938 proposed bill concerning administrative procedural reform on the ground that it "sought to standardize the methods and the machinery" of the administrative process. Memorandum from Carl McFarland, Assistant Att'y General, U.S. Dep't of Just., to Assistant Solicitor General 1 (Oct. 17, 1938) (on file with Univ. of Va., Albert & Shirley Small Special Collections Libr., Homer Cummings Papers, Box 1, 1938-1939 DOJ "General Correspondence File" Folder). While McFarland conceded that "no one should object" to "the desirability for improvement and development" of administrative procedure, he insisted that "[i]n the attempt to standardize these procedures and apply them to all agencies, serious practical difficulties may arise." *Id.* It was therefore necessary, he concluded, that "[t]he determination of these questions" "require[s] study, investigation, and consideration." *Id.* at 1-2.

281. Letter from Carl McFarland to Homer Cummings (Mar. 7, 1946) (on file with Univ. of Va., Albert & Shirley Small Special Collections Libr., Homer Cummings Papers, Box 69, Correspondence of H.S.C.—Administrative Procedure Act—1936 [sic], March Folder).

3. Expanding Consultation and Making Notice-and-Comment Rulemaking

The AG's Committee next built on the recommendations of the Donoughmore Committee when it proposed what would become notice-and-comment rulemaking.

This was not the first time that Americans had invoked England in discussions of rulemaking. In 1937, the ABA's Special Committee proposed a bill that would have required all agencies to promulgate their rules during an initial one-year period and only "after the publication of notice to and hearing interested parties."[282] This proposal, which eventually resulted in the vetoed Walter-Logan Bill, pointed to the supposed English practice as its model: "The English practice is for notice and hearing."[283] This characterization of English administration, however, was a clear oversimplification. As we have seen, the "notice" requirement in the Rules Publication Act 1893 was not universal.[284] The Donoughmore Committee *proposed* extending this notice requirement to all regulations that required being laid before Parliament specifically because this was not the existing practice.[285] The same was the case for the "hearing" requirement.[286] In fact, even the Donoughmore Committee emphasized that there was not a universal right to *participate* in rulemaking.[287] When the Special Committee sought to back up its statement regarding English practice, it quoted at length statements that were made in their original context as *suggestions* for reform.[288] The progressive National Lawyers Guild picked up on the ABA's Special Committee's elision: "English experience would seem to suggest the greater utility of devices other than public hearing," including "informal conferences, advisory representative

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282. *Report of the Special Committee on Administrative Law,* 62 ANN. REP. A.B.A. 789, 846-47 (1937).

283. *Id.* at 809. The Special Committee's report also claimed that it was modelling this requirement on contemporaneous practices around congressional hearings. *See id.* O.R. McGuire, the Chairman of the Special Committee, repeated this claim about English practice elsewhere. *See United States Court of Appeals for Administration: Hearings on S. 3676 Before the Subcomm. of the S. Comm. on the Judiciary, Part 3*, 75th Cong. 139 (1938) (statement of O.R. McGuire, Member, Committee on Administrative Law, American Bar Association); *Administrative Procedure Hearings*, *supra* note 32, at 949 (statement of O.R. McGuire, Chairman, Special Committee of Administrative Law, American Bar Association). James Hart had previously suggested that United States should "imitate with profit" the protections of the Rules Publication Act 1893. *See* JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 300 (1925).

284. *See supra* notes 142-147 and accompanying text.

285. *See supra* notes 149-161 and accompanying text.

286. *See supra* notes 149-161 and accompanying text.

287. DONOUGHMORE REPORT, *supra* note 53, at 53-54.

288. *Report of the Special Committee on Administrative Law, supra* note 282, at 809-10.

committees, [and] publication of draft regulations."[289] Renowned administrative-law professor Louis L. Jaffe put it more bluntly: "The [ABA's Special] Committee claims that this is the English practice. It quite definitely is not the English practice."[290]

It is therefore unsurprising that the AG's Committee drew a different lesson from the Donoughmore Committee's report. This was especially the case for Professor Ralph F. Fuchs, who was tasked with writing the draft of the chapter on rulemaking for the final report over the course of the summer of 1940.[291] Fuchs's role in the making of notice-and-comment rulemaking has been ignored to date. This is primarily because he joined the majority in the final report,[292] and it was the minority that put forth the kernel of notice-and-comment rulemaking in its proposed code. In his place, Carl McFarland has largely been credited with inventing the procedure.[293] Yet, as the minority itself conceded, its proposed rulemaking provision was "simply a reflection of the views expressed by the Committee in chapter VII of [the Committee's] report [the chapter on

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289. *The American Bar Association Administrative Law Bill*, 2 NAT'L L. GUILD Q. 49, 51 & n.1 (1939).

290. Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1229 (1939) (footnote omitted).

291. Unfortunately, little of his draft still exists. I was only able to locate one part of an intermediate draft of Ralph F. Fuchs's chapter. *See* Letter from Ralph F. Fuchs, Professor, Washington Univ. Sch. of L., to Walter Gellhorn or Dick Salant (Sept. 19, 1940) (on file with Colum. Univ., Rare Book & Manuscript Libr., Walter Gellhorn Papers, Box 116) (enclosing a partial revised draft of a chapter on rulemaking). Although this draft was significantly shorter than the first one, it too was an "academic discussion . . . lacking in real meat," according to Richard S. Salant. Letter from Richard S. Salant to Walter Gellhorn, Professor, Columbia Univ. Sch. of L. 1 (Sept. 23, 1940) (on file with Colum. Univ., Rare Book & Manuscript Libr., Walter Gellhorn Papers, Box 116). This draft underwent at least one subsequent revision at the hands of Dean Acheson, who insisted on "run[ning] riot on the issue of shortening the material." Letter from Richard Salant to Walter Gellhorn, Professor, Columbia Univ. Sch. of L. 1 (Nov. 8, 1940) (on file with Colum. Univ., Rare Book & Manuscript Libr., Walter Gellhorn Papers, Box 116); *see also* Letter from Ralph Fuchs to Dean Acheson, Chairman, Att'y Gen.'s Comm. on Admin. Proc., Dep't of Just. (Dec. 10, 1940) (on file with Harry S. Truman Libr., Dean Acheson Papers, Box 3, Folder 1) (responding to Acheson's revisions of the chapter).

292. While I was unable to find any specific documents in which Fuchs stated his reasons for joining the majority, it is clear that he was deeply skeptical of the minority's call for transsubstantive procedures. He wrote in 1939:

> At all these stages in the determination of administrative procedure the central question is, or ought to be, what procedure will be most conducive to the successful performance of the particular administrative function for which the procedure is being devised, having in mind, also, due protection to affected private interests. That question must remain a specific one. It is a question which in each instance bears directly upon the procedure of a particular administrative agency.

Ralph F. Fuchs, *Symposium on Administrative Law*, 9 AM. L. SCH. REV. 139, 141 (1939).

293. *See* Davis et al., *supra* note 20, at 514, 518, 520, 523; Verkuil, *supra* note 35, at 535.

rulemaking], although its legislative proposal contains no similar provision."[294] While McFarland deserves credit for turning the majority's proposal into a transsubstantive legislative provision and for his instrumental role in the ultimate passage of the APA, it is essential to look at Fuchs's work to understand the intellectual origins of notice-and-comment rulemaking.

A professor of law at the Washington University School of Law in St. Louis, Fuchs was long interested in rulemaking and making the consultative process more inclusive. In his early work on labor law, he exhibited his propensity for interest-group pluralism[295] and enthusiastically supported collective-labor agreements as the best way for establishing "mini-democracy" in the workplace.[296] The short-lived National Industrial Recovery Act of 1933—with its creation of industry-wide, fair-competition codes—made clear to him the extent to which large corporations enjoyed entrenched and disproportionate influence over government officials.[297] The general exclusion of consumers and employees from the negotiating table meant that the resulting process "was far from being as palatable as had been hoped."[298] Even more troubling was the realization that

294. AG's Committee Final Report, *supra* note 27, at 229 (reporting the Attorney General's note on § 209 of a Code of Standards of Fair Administrative Procedure).

295. *See generally* Ralph F. Fuchs, *The Newer Social Scientists Look at Law*, 13 St. Louis L. Rev. 33 (1927) (writing a positive review of a work by John R. Commons, a proponent of pluralism). Professor Reuel E. Schiller singles out John R. Commons as an influential industrial pluralist thinker. *See* Reuel E. Schiller, F*rom Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 Berkeley J. Emp. & Lab. L. 1, 6 (1999). The Supreme Court only embraced interest-group pluralism in the early 1940s in decisions such as *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). *See* Stewart, *supra* note 4, at 1730-31; Tushnet, *supra* note 26, at 549-50.

296. *See* Ralph F. Fuchs, *Collective Labor Agreements in American Law*, 10 St. Louis L. Rev. 1, 29, 32 (1924) (supporting the recognition of collective-labor agreements as binding contracts and agreeing that the view of them as "aggregations of enacted rules has two large elements of reality"); Ralph F. Fuchs, *Labor Contract*, *in* 8 Encyclopedia of the Social Sciences 629, 631 (Edwin R.A. Seligman & Alvin Johnson eds., 1932) ("Collective bargaining has . . . for its purpose the democratic establishment of the terms of employment relations."); Ralph F. Fuchs, *Collective Labor Agreements Under Administrative Regulation of Employment*, 35 Colum. L. Rev. 493, 518 (1935) (arguing that "[o]pposition to the entire tendency in regard to collective bargaining reflected in the [National Industrial Recovery Act]" would result in "anarchy, public ownership of producing enterprises, and political dictatorship over economic activity").

297. *See* Ralph F. Fuchs, *Alternatives in Government Control of Economic Enterprise*, 21 Iowa L. Rev. 325, 340 (1936) (lamenting, in the context of an extended discussion about the National Industrial Recovery Act, that "[e]specially in a democracy, pressure groups having special interests to serve are able to favor a friendly government and to endanger an unfriendly one out of all proportion to their numbers, because of the immediacy and conscious character of their interest as compared with that of the body politic").

298. *Id.* at 341-42.

this exclusion was unexceptional. "There exist no precedents," Fuchs lamented, "for the inclusion" of diffuse consumer interests that were "not a sufficiently definite group to be incorporated" in negotiations.[299]

As he looked for a mechanism that would be less rigid and exclusionary but would nonetheless allow government officials to learn from different interests, he happened upon the English practice of consultation.[300] The brilliance he saw in this procedure was that "[p]ublic power remains lodged definitely in the hands of responsible officials whose primary duty is to the interest of the public" and these officials are "informed by contact with those whose affairs are to be regulated."[301] The informal character of consultations—with the possibility of communicating through writing and the ability of holding multiple meetings—seemed to him to level the playing field even more.[302] The "free exchange of views and information" would ensue.[303] Consultation, it would seem, could enable officials to "balance the scales justly between conflicting interests and win as well as compel acceptance of their measures."[304] What is more, it was an "ingenious device" for getting different interests to the table all while "increasing the insulation" of the process "from politics."[305]

Fuchs optimistically predicted in his 1936 remarks that consultations "might easily be required with considerable uniformity in many fields of governmental control."[306] As he shifted to study administrative rulemaking procedures more generally over the following years, he embraced this expansionist view. While at Columbia University for a research year during 1938, he published two articles on rulemaking procedures.[307] Both were, in Fuchs's mind, in the vein of the

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299. *Id.* at 343.

300. *See id.* at 344 & n.56. Fuchs was not the only American scholar of labor law who found England's consultative methods worthy of emulation. *See, e.g.*, JOHN B. ANDREWS, ADMINISTRATIVE LABOR LEGISLATION: A STUDY OF AMERICAN EXPERIENCE IN THE DELEGATION OF LEGISLATIVE POWER 9 (1936) ("Although there have been many careful investigations of so-called 'delegated legislation' in England and in other countries, the development of similar administrative regulations in the United States has thus far received inadequate attention.").

301. Fuchs, *supra* note 297, at 344.

302. *Id.* ("The process of consultation is different from that of conducting hearings. The latter usually is more formal and more or less advisory in character.").

303. *Id.*

304. *Id.*

305. *Id.* at 350.

306. *Id.* at 344-45.

307. Fuchs, *supra* note 204; Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259 (1938).

inductive research carried out by the Donoughmore Committee.[308] Both were also quite generous in their praise for English rulemaking consultations.[309] Not only was the practice of consultation "almost uniformly followed" in England, he wrote, but the English had also developed techniques to ensure that consultations would be conducted with a variety of interests.[310] Advisory committees proved workable for consulting with already-organized interests.[311] It was another matter, however, when it came to consulting with unorganized interests and soliciting their views.[312] Nonetheless, as Fuchs emphasized, it was imperative that these unorganized voices be heard even if the "ministry itself must, in a sense, represent" them.[313]

Fuchs's comparison of English consultations to those in the United States drove home the superiority of the former. Unlike in England, consultation was not standard in the United States. When statutes required agencies to consult with individuals, they sometimes displayed a degree of "mistrust of the administrative authorities" and often stipulated that these be formal hearings.[314] Given their formality, these consultations were often with "business interests."[315] The ensuing regulations also often resulted in "[t]he delegation of official power to private groups."[316] But even if this arrangement was efficient, it was bad as a matter of governance. After all, delegation to private groups "divorces public

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308. *See* Letter from Ralph F. Fuchs, Professor, Washington Univ. Sch. of L., to O.R. McGuire (July 20, 1937) (on file with Ind. Univ. Bloomington, Lilly Libr., Fuchs mss., 1920-1979, Box 1, 1937, June – Dec. Folder) (noting that the Donoughmore Committee "made only a start" and his research would hopefully fill in the factual picture of rulemaking); *see also* Ralph F. Fuchs, *Current Proposals for the Reorganization of the Federal Regulatory Agencies*, 16 TEX. L. REV. 335, 343 (1938) (criticizing existing proposals to reorganize administrative procedure as "perhaps" lacking in or overlooking data).

309. Fuchs, *supra* note 204, at 571; Fuchs, *supra* note 307, at 275.

310. Fuchs, *supra* note 204, at 571.

311. *See* Fuchs, *supra* note 307, at 275 ("At times advisory committees, established by administrative action or by legislation, engage regularly in the review of proposed regulations.").

312. *See id.* at 275-76 (observing that this type of consultative procedure "obviously is inapplicable where the groups affected by regulations are very numerous or the parties are unorganized").

313. Fuchs, *supra* note 204, at 571 (citing MINUTES, *supra* note 119, at 120 (describing the various parties with interests in the Ministry's work in a supplementary memorandum from the Ministry of Health)).

314. Ralph F. Fuchs, *The Formulation and Review of Regulations Under the Food, Drug, and Cosmetic Act*, 6 LAW & CONTEMP. PROBS. 43, 45 (1939); *see also* Fuchs, *supra* note 307, at 278 ("[R]ecent federal legislation has displayed a tendency to require the adversary type of procedure in rulemaking and, moreover, to subject the resulting regulations to rather thorough judicial review." (footnote omitted)).

315. Fuchs, *supra* note 204, at 571 (citing COMER, *supra* note 219, at 198-270).

316. *Id.* at 572.

officials from the administrative process which formerly they monopolized."[317] Absent this governmental guidance, "the ideal of a direct, purified transmission of policy from its responsible source to its execution is completely lost."[318]

In England, by contrast, the government's relationship with interest groups was less formal. In fact, the government saw itself as obligated to represent certain underrepresented voices.[319] Even if such representation departed from judicial norms, it resulted in a far more cooperative relationship. Individuals were not treated like mere "inert subject[s]"[320] and instead became "rightful participant[s] in administration."[321] The English "consultative means," he concluded (with a quote from a member of the Donoughmore Committee), "have thus effected 'an extension of representative government . . . in the course of the last century.'"[322]

With this inspiration, Fuchs sat down to prescribe American rulemaking procedures.[323] Rulemaking, Fuchs insisted at this time, lay at the center of the controversies that plagued New Deal Era administrative law.[324] And yet, despite its importance, there were no standard procedures governing it. The research carried out by the AG's Committee illustrated the sheer diversity of practices that American agencies had independently developed as they set out to consult with "the scattered private interests affected by administrative regulations."[325] "[I]t

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317. *Id.*

318. *Id.*

319. *Id.* at 571 ("[T]here are important unorganized interests which the ministry itself must, in a sense, represent.").

320. *Id.* (quoting John M. Gaus, *A Theory of Organization in Public Administration*, *in* JOHN M. GAUS, LEONARD D. WHITE & MARSHALL E. DIMOCK, THE FRONTIERS OF PUBLIC ADMINISTRATION 66, 90 (1936)).

321. *Id.*

322. *Id.* (quoting MINUTES, *supra* note 119, at 130 (statement of Sir Leslie Scott)).

323. During the course of his research year at Columbia, Fuchs proposed writing a book entitled "Procedure in Administrative Rule-Making," which would have included an entire chapter on "Consultation in English and American Practice." *See* Letter from Ralph F. Fuchs, Professor, Washington Univ. Sch. of L., to Walter Gellhorn, Professor, Columbia Univ. Sch. of L., at app. (May 22, 1939) (on file with Colum. Univ., Rare Book & Manuscript Libr., Walter Gellhorn Papers, Box 22, Fuchs Folder) (presenting a proposed table of contents for Fuchs's book).

324. *See* Fuchs, *supra* note 210, at 195 ("When . . . agencies in the executive branch began to exercise rule-making powers and to deal authoritatively with private interests on a new and larger scale, it seemed as though the fundamental character of the government were being changed. As this tendency increased, the opposition to it grew. Both reached a culmination in the New Deal in this country as they had in England a few years earlier.").

325. *See* Letter from Ralph F. Fuchs to Walter Gellhorn or Dick Salant, *supra* note 291, app. at 16; *see also* Bremer, *supra* note 26, at 96-99 ("There was variation in rulemaking procedures even within individual agencies.").

would be futile and unwise to attempt to eliminate" this variety in favor of uniformity, he concluded.[326] Still, it was not enough to settle for the existing procedures. He further explained:

> Although the agencies have on the whole been resourceful in setting up conferences, as well as communicating with affected interests . . . there undoubtedly is room for the extension of these techniques with a resulting increase in the quality of the regulations that issue and in the satisfaction with which they are received.[327]

He suggested that agencies could encourage affected interests to participate in rulemaking "by one or more of the following means: (1) oral or written communication and consultation; (2) specially summoned conferences; (3) advisory committees; and (4) hearings, either of an investigational character or for the purpose of permitting affected parties to appear and testify."[328] As he explained elsewhere, this procedural flexibility was indispensable: "The procedure . . . is necessarily going to vary with the number of parties affected."[329] It was with this template in mind that he wrote the chapter on rulemaking for the final report of the AG's Committee.

McFarland, in turn, worked with Fuchs's chapter as a template. Like Fuchs, he believed in the importance of rulemaking, testifying before Congress that it "is one of the most important and most neglected of the subjects of administration."[330] Armed with Fuchs's English-inspired general framework for rulemaking, he set out to render it in code form. Unsurprisingly, section 209 of the minority's proposed bill only slightly repackaged the four types of procedures that Fuchs had laid out in the chapter. Section 209(a) provided for the "[s]ubmission and consideration of written views"; section 209(b) for "[c]onsultations and conferences," including "advisory committees or any other suitable means"; section 209(c) for "[i]nformal hearings"; and section 209(d) for "[f]ormal hearings."[331] Combined with section 208, which stated that a "[g]eneral notice of proposed rule making shall be published wherever practicable, together with an invitation to interested parties to make written suggestions or to participate in

326. *See* Letter from Ralph F. Fuchs to Walter Gellhorn or Dick Salant, *supra* note 291, app. at 23.

327. *Id.* app. at 26.

328. *Id.* app. at 17.

329. Fuchs, *supra* note 292, at 143.

330. *Administrative Procedure Hearings*, *supra* note 32, at 1335. Unsurprisingly, the minority's recommendations used identical language. AG's Committee Final Report, *supra* note 27, at 224.

331. AG's Committee Final Report, *supra* note 27, at 224.

rule-making proceedings," the foundation for notice-and-comment rulemaking was laid.[332]

Even after the minority's proposal was enshrined in Section 553 of the APA, its English inspiration was still visible beneath the surface. In 1947, administrative-law scholar Bernard Schwartz remarked that Section 553 embodied "a similar purpose" as section 1 of the Rules Publication Act 1893.[333] Section 553 received additional praise because it was not "honeycombed" with exceptions like its English counterpart.[334] This emulation, he added a few years later, was "a laudable effort to obtain some democratization of the rule-making process without, at the same time, destroying its flexibility by imposing procedural requirements which are too onerous."[335]

The minority's proposal for notice-and-comment rulemaking, then, was not a purely endogenous American idea. Its roots, instead, lie across the Atlantic Ocean, in the Donoughmore Committee's recommendations for improving the process of enacting delegated legislation in England.

C. The Failed Transplantation: Laying Procedures

The 1935 Federal Register Act and the 1941 AG's Committee endorsement of notice-and-comment rulemaking proved to be successful transplantations of key features of the Donoughmore Committee's framework. But the resulting reality in America differed in a key respect from its English model: it lacked a transsubstantive laying procedure.

This omission was not preordained. Throughout the 1930s, there was clear interest in instituting this procedure and completing the transplantation of the English model. By 1941, however, this interest had waned. This Section describes the rise and fall of this procedure in Americans' eyes. It argues that three main reasons informed their ultimate decision not to embrace laying procedures. First, architects of the administrative state appeared to worry that the structural differences between England's parliamentary system and the United States's separation-of-powers system meant that laying procedures would have unduly impeded the enactment of regulations. Second, Americans perceived English laying

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332. *Id.* at 228-29.

333. Bernard Schwartz, *The American Administrative Procedure Act, 1946*, 63 LAW Q. REV. 43, 48 (1947).

334. *Id.* at 48-49.

335. Bernard Schwartz, *A Decade of Administrative Law: 1942-1951*, 51 MICH. L. REV. 775, 792 (1953); *see also* SCHWARTZ & WADE, *supra* note 202, at 87 ("These provisions were modelled upon those contained in the British Rules Publication Act 1893, and constitute a belated effort to obtain democratization of the rule-making process without destroying its flexibility by imposing procedural requirements that are too onerous.").

procedures as ineffectual. And third, the demise of the nondelegation doctrine lessened the practical need for congressional oversight to shield regulations from judicial invalidation.

The idea of giving Congress the power directly to veto administrative and executive decisions was, as the final report of the AG's Committee put it, "not . . . unknown in American practice."[336] In the late 1920s and early 1930s, a conciliatory President Hoover, who had long sought the power to reorganize the executive branch, offered Congress a legislative veto over any proposed executive reorganization plan.[337] After Congress finally agreed to this offer in the Economy Act of June 30, 1932, it used its newly acquired veto power to disapprove of Hoover's reorganization efforts.[338] A short while later, Attorney General William D. Mitchell determined that a legislative veto raised a "grave" question about the "validity of the entire provision . . . for Executive reorganization of governmental functions."[339] This legal question remained ostensibly open until the Supreme Court indicated in the 1941 case *Sibbach v. Wilson & Co.* that legislative vetoes—which had been put in place after Congress agreed to delegate rulemaking power to the judiciary to write the Federal Rules of Civil Procedure[340]—were constitutional.[341] Though some continued to question the procedure's constitutionality, this matter did not prove to be an obstacle to the procedure's transplantation.[342]

Throughout the mid-1930s, various American legal scholars endorsed the idea of instituting a transsubstantive legislative veto over administrative rules. Often, they pointed out that England had a comparable mechanism. After finding an argument about the constitutionality of the procedure "persuasive," constitutional-law scholar Edward S. Corwin added that laying was itself "borrowed from British practice."[343] Frederick F. Blachly and Miriam E. Oatman, two respected political scientists who worked at the Brookings Institution, discussed the procedure's English provenance and argued that "if properly operated," the

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336. AG's Committee Final Report, *supra* note 27, at 120.

337. *See* Louis Fisher & Ronald C. Moe, *Delegating with Ambivalence: The Legislative Veto and Reorganization Authority*, *in* Cong. Rsch. Serv., 96th Cong., Studies on the Legislative Veto 164, 170-77 (Comm. Print 1980).

338. *See* John D. Millett & Lindsay Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 Pub. Admin. Rev. 176, 178 (1941).

339. Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'ys Gen. 56, 63-64 (1933).

340. *See* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 Denv. U. L. Rev. 377, 382, (2010).

341. 312 U.S. 1, 14-16 (1941).

342. When Franklin Delano Roosevelt became President, a number of reorganization plans contained legislative vetoes. *See* Millett & Rogers, *supra* note 338, at 178-86.

343. Edward S. Corwin, The President: Office and Powers 126 (1940).

procedure was "advisable in respect to special and important questions only, concerning which the legislature desires to retain a good deal of control."[344] Professor James M. Landis thought along similar lines. He turned to England's laying procedures when discussing the need for an administrative agency that would serve "as the technical agent in the initiation of rules of conduct, yet at the same time [would enable] the legislative [body to] share in the responsibility for their adoption."[345] "In English administrative law," he wrote, "two techniques have been developed which might be adapted to our needs": the passive and affirmative laying procedures.[346] He recommended adopting these procedures in some form because they would give the legislature "a definitely recognized share in the exercise of the regulatory power of the administrative" state, and they would enable the agency to "overcome a hesitancy to take responsibility for action that sometimes makes the administrative process stagnant."[347] Even Roscoe Pound, who had previously denounced the lawlessness of American administrative law, inched toward endorsing the procedure when he stated that substantive rules "should not merely be promulgated but brought affirmatively to the attention of the legislative body."[348]

Once the 1939 Reorganization Act contained a provision[349] giving Congress "time to nullify any order that it did not wish to have become operative,"[350] it

344. Frederick F. Blachly & Miriam E. Oatman, Administrative Legislation and Adjudication 82-83 (1934).

345. James M. Landis, The Administrative Process 76-77 (1938).

346. *Id.* at 77.

347. *Id.* at 78.

348. *Report of the Special Committee on Administrative Law*, *supra* note 253, at 361; *see also* Joseph Postell, *The Anti-New Deal Progressive: Roscoe Pound's Alternative Administrative State*, 74 Rev. Pol. 53, 54 (2012) (describing Roscoe Pound as "an example of a Progressive who opposed the New Deal and the creation of the administrative state"). It is not clear whether these Americans who showed interest in English laying procedures wanted to adopt passive procedures, affirmative procedures, or some combination of the two. On the one hand, it would seem that they were referring to passive laying procedures given their predominance in England. On the other hand, it is plausible that they were thinking of affirmative procedures, especially when it came to what Frederick F. Blachly and Miriam E. Oatman referred to as the "special and important questions" in which there was particular interest in having the legislature "retain a good deal of control." Blachly & Oatman, *supra* note 344, at 82-83. That said, their failure to specify which form of laying procedures appealed to them is in and of itself quite interesting. It is possible that they did not fully think through how the two procedures would operate on American soil. This could have been a result of the fact that divided government had been relatively uncommon in the preceding fifty years or because the political parties were not as ideologically cohesive as they are today.

349. Reorganization Act of 1939, ch. 36, § 5, 53 Stat. 561, 562-63.

350. AG's Committee Final Report, *supra* note 27, at 120.

seemed the United States was not far away from fully transplanting the Donoughmore Committee's framework for delegated legislation.

This, however, did not happen, as enthusiasm for adopting laying procedures waned relatively quickly. In the 1940 Carpentier Lectures at Columbia, Cecil T. Carr criticized the English laying requirement as "in itself . . . a feeble safeguard; so many documents are laid before the House, so few are examined."[351] As an authority on English administrative law, Carr seemed to have sway over American scholars' view of the procedure.[352] Shortly thereafter, Walter Gellhorn — who was still serving as the director of research of the AG's Committee — expressed a lukewarm view about the procedure. "In view of the actual experience in Great Britain," wrote Gellhorn, "the editor doubts the value of automatically laying regulations before the legislators."[353] Yet, he conceded, the procedure might be of value for "those regulations which the agencies themselves thought to be important because of policy considerations."[354] The influential 1942 Commissioner's Report on Administrative Adjudication in the State of New York (more commonly known as the Benjamin Report) more emphatically rejected the procedure.[355] It would "unduly hamper the adoption and amendment of administrative rules, and for no sufficient purpose. The method suggested is not required to assure ultimate legislative control, which can always be accomplished through the ordinary legislative process."[356] It was perhaps for this reason that Congress declined to follow suggestions that it institute a laying procedure as part of the 1946 Legislative Reorganization Act.[357]

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351. CARR, *supra* note 268, at 58.

352. Ironically, Carr later revisited his conclusion, writing that "an industrious group of legislators at Westminster might ask leave to challenge" the conclusion of the AG's Committee that lawmakers had little appetite for reviewing regulations. Cecil T. Carr, *Delegated Legislation in the United States*, 25 J. COMPAR. LEGIS. & INT'L L. 47, 51 (1943).

353. WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 273 n.7 (1940).

354. *Id.*

355. ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 44 (1942). On the Benjamin Report's influence, see Louis L. Jaffe, *Administrative Procedure Re-Examined: The Benjamin Report*, 56 HARV. L. REV. 704, 707 (1943). In many ways, the politics of administrative law in New York was a microcosm of the national-level politics of administrative law. *See* Daniel R. Ernst, *The Politics of Administrative Law: New York's Anti-Bureaucracy Clause and the O'Brian-Wagner Campaign of 1938*, *27* LAW & HIST. REV. 331, 371 (2009).

356. BENJAMIN, *supra* note 355, at 44.

357. For such suggestions, see ROBERT HELLER, NAT'L PLAN. ASS'N, STRENGTHENING THE CONGRESS 22 (1945), which called to "expand use of provisional legislation (or legislative veto)"; and Leonard D. White, *Congressional Control of the Public Service*, 39 AM. POL. SCI. REV. 1, 5, 10 (1945), which noted that "imposing obligations upon citizens" to be reported to the legislature and "to be subject to a legislative veto" "has long been accepted by the British House of Commons" and argued for the use of a similar procedure in the United States given that "Congress must have ultimate control of policy and its execution."

While the Benjamin Report did not explicitly spell out why such a procedure would "unduly hamper" rulemaking, one reason was quite obvious: the structural difference between England's parliamentary system and the United States's separation-of-powers system. In England, as Lord Hewart had pointed out, laying requirements – especially passive ones – most often proved easily surmountable.[358] After all, the governing party invariably constituted both the executive and the majority in Parliament. It was therefore rare for Parliament to disapprove (or fail to approve affirmatively) a piece of delegated legislation. By contrast, in the United States there was the possibility of divided government, with one party controlling the executive branch and another controlling Congress. Absent compromise, a legislative veto would enable Congress to impede the passage of regulations for partisan reasons. Even while Democrats remained firmly in control of both the presidency and Congress in 1942, it was not hard to imagine that this would not always be the case.[359] Against this backdrop, the implications of adopting laying procedures were clear.

This skepticism animated the AG's Committee's evaluation and ultimately its rejection of laying procedures. While noting that the procedure had been tried in England and was "met with the approval of the Committee on Ministers' Powers,"[360] the AG's Committee declined to follow suit. Instead of dwelling on the challenges posed by the American system of separated powers, however, the AG's Committee instead emphasized the ineffectiveness and superfluity of laying procedures. "Legislative review of administrative regulations . . . has not been effective where tried."[361] Review of proposed regulations by the "whole membership of Congress" was not feasible, and even "a joint committee entrusted with the task" would lack the expertise needed to "supply an informed check upon the diverse and technical regulations it would be charged with watching."[362] Plus, "[e]xperience, both in England and in this country, indicates that lack of desire, rather than lack of opportunity, has accounted for the absence of legislative

358. *See supra* notes 169-171 and accompanying text.

359. Democrats had already lost three seats in the Senate to Republicans in the 77th Congress. *See Party Division*, U.S. Senate, https://www.senate.gov/history/partydiv.htm [https://perma.cc/YV7G-B4LA] (noting that Democrats had 69 seats in the 76th Congress but only 66 in the 77th Congress). Democrats fared even worse in 1938: "Republicans picked up eighty-one seats in the House, won eight in the Senate, and captured a net of thirteen governorships." William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 271 (1963). For more on the increasingly evident cleavages within the Democratic Party during these years, see generally Susan Dunn, Roosevelt's Purge: How FDR Fought to Change the Democratic Party (2010); and Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War (1995).

360. AG's Committee Final Report, *supra* note 27, at 120.

361. *Id.*

362. *Id.*

interference with administrative regulations."[363] Having another procedure whose utility was questionable at best—and obstructive and time-consuming at worst—made little sense. Even though the AG's Committee suggested as an alternative oversight mechanism that agencies be required to submit annual reports to Congress detailing their rulemaking activity, this requirement was ultimately rejected in the subsequent legislative process.[364]

At least one other force seems to have been at play in this ultimate decision: the demise of the nondelegation doctrine by the late 1930s.[365] The Supreme Court invoked the nondelegation doctrine three times in 1935 and 1936 to strike down key provisions in hallmark New Deal legislation.[366] During this short-

363. *Id.*

364. *See id.* at 120-21. For its rejection, see Summary of Proposed Amendments to S. 675, at 7 (n.d.) (on file with Colum. Univ., Rare Book & Manuscript Libr., Walter Gellhorn Papers, Box 116), which documents that the Department of Labor and Interstate Commerce Commission suggested, and the Solicitor General's Committee agreed, to eliminate the section.

365. This is not to say that there were no other factors that potentially played roles in the decision not to adopt laying procedures in the United States. Four others immediately come to mind. First, the enduring appeal of expertise during the New Deal (and the concomitant belief that experts were held responsible by science) explains why close legislative oversight was deemed unnecessary. This factor does not, however, adequately explain why the appeal of the legislative veto waned specifically at this point in time—after all, expertise appealed to reformers as far back as the Progressive Era. *See* Schiller, *The Era of Deference*, *supra* note 26, at 413.

Second, the outbreak of World War II can explain why there was a desire not to saddle the legislature with the additional responsibility of close oversight at a time when it was overburdened and when policy needed to be made quickly. While this explanation is plausible, it is important to note that the AG's Committee released its report in January 1941, at which point the United States was not yet officially at war. *See* Shepherd, *supra* note 26, at 1632.

Third, Congress's conservative turn in the 1940s can explain why a Roosevelt-appointed Committee would be hesitant to embrace a legislative veto. *See supra* note 359. Although this explanation is also convincing, it does little to explain why Congress itself decided not to embrace such a veto in the 1946 Legislative Reorganization Act. *See supra* text accompanying note 357.

Fourth, it is possible that the reembrace of judicial review by New Dealers (such as Professor Louis L. Jaffe) in the 1940s explains why the transsubstantive legislative veto fell out of favor. *See, e.g.*, Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1159-60 (1997). On this view, a strong consensus emerged that the judiciary, not Congress, was the best mechanism for controlling (or at least policing) the administrative state. *See id.* While this is certainly possible, the timing is slightly off again. New Dealers generally only reassessed their stance on judicial review at the end of World War II and during the postwar period, following their encounters with fascists and Stalinists during the war and after Democratic appointees were a firm majority of the federal judiciary. *See, e.g.*, ANNE M. KORNHAUSER, DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930-1970, at 81-82 (2015).

366. Panama Refin. Co. v. Ryan, 293 U.S. 388, 414-15, 433 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30, 537-42, 551 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 310-12, 317 (1936).

lived period—roughly 1934 to 1938—in which the Court's nondelegation doctrine was seen as more than a mere "jejune abstraction[],"[367] active congressional oversight of rulemaking was seen as an attractive way to tighten the nexus between legislative delegations of power and executive and administrative policymaking. Even if laying procedures were not a panacea (as there remained the possibility that the Court would hold unconstitutional a statute delegating power), they were understood as a means through which administrative rulemaking could be legitimized in the eyes of the skeptical Court. As Landis explained, laying procedures were one way through which Congress could neutralize "the old doctrine against delegation of power."[368]

At the very moment that Landis was writing, however, the Supreme Court was already interring this doctrine on its own. While the Court's "turnaround on the nondelegation doctrine was neither as abrupt nor as dramatic" as its *volte-face* on interstate commerce or substantive due process, it too took place in the late 1930s.[369] The demise of the nondelegation doctrine removed the obstacle that laying procedures were intended to bypass. With the Court getting out of the business of policing the scope of delegations, there was ostensibly little need for Congress to approve exercises of delegated power lest the Court strike them down.[370]

Instead, what came to matter was the procedural propriety of the rulemaking process.[371] As Carl McFarland put it in 1942, only recently had there developed "at least tacit understanding" that struggles over the administrative state had shifted to procedural grounds.[372] Similarly, Ralph F. Fuchs noted how the "great questions of public law only three or four short years ago" concerning "the scope

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367. Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1013 n.11 (1924).

368. LANDIS, *supra* note 345, at 80.

369. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 385 (2017).

370. Professor Martin Shapiro has made a somewhat similar argument, writing that

> [t]he administrative law invented by Professor Gellhorn and company adopted the executive delegation aspect of parliamentary government by rejecting the nondelegation doctrine. . . . The new administrative law also managed the Wilsonians' trick of having the sweet without the bitter because the executive got the delegated lawmaking power but was not directly answerable to Congress for the laws it made.

Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 451 (1986).

371. One example of this was the emergence of the *Chenery I* principle. *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 981-89 (2007). For the broader transformation of the nondelegation doctrine into a series of canons, see generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

372. McFarland, *supra* note 279, at 162.

of legislative power" had, as of 1939, "for the time being at least, seem[ed] largely to have been settled."[373] Or, as Walter Gellhorn wrote in 1941, administrative law had just recently entered "its third great phase, when concern is addressed chiefly not to constitutional divisions of power, not to appropriate boundaries of judicial review, but to the procedure of administration itself."[374]

Louis L. Jaffe drew out more connections between the decline of the nondelegation doctrine and the waning appeal of laying procedures. In two articles in 1947, Jaffe argued against the conception, once common among administrative-law scholars, that agency action and administrative rulemaking were subservient to legislative lawmaking and policymaking. Whereas this view animated the nondelegation doctrine, it was now, according to Jaffe, passé. After all, he argued, the nondelegation doctrine as expressed in *Schechter Poultry* "has been put in the museum of constitutional history."[375] In place of this clear-cut hierarchical understanding of delegation, Jaffe called for reconceptualizing the legislative-administrative relationship as one of symbiosis: "Delegation involves a permanent creative partnership between legislation and administration."[376] Rather than administration serving as junior partner to legislation, the two informed and transformed one another. "'Basic policy' does not stand in absolute contrast to administration since the latter is continuously developing new situations which demand policy decisions."[377] Administrative procedure needed to reflect this, Jaffe argued.[378]

Against the backdrop of this new understanding of administrative law, Jaffe questioned the utility of formal mechanisms intended to structure the previous principal-agent view. This skepticism extended to laying procedures. As Jaffe put it, the laying procedure developed by "[t]he English, whose Parliament works in closer harness with the Government," was a "device . . . of limited value."[379] What is more, it was potentially destructive. After all, not only was it difficult to believe that laying procedures would drive Congress to supervise administration properly, but it was also easy to see that they could be used to "disable the legislature" when a controversial delegation was in front of it.[380] If it was appealing during the heyday of the nondelegation doctrine to have Congress actively or passively approve regulations through laying requirements, the doctrine's

373. Fuchs, *supra* note 292, at 139.

374. Walter Gellhorn, Federal Administrative Proceedings 43 (1941).

375. Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 Colum. L. Rev. 561, 581 (1947).

376. Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 Colum. L. Rev. 359, 364 (1947).

377. *Id.*

378. *See id.* at 365.

379. *Id.* at 371-72.

380. *Id.* at 372.

interment meant these procedures came to be seen as an empty ritual. It was for this reason that the final report of the AG's Committee could easily dismiss the laying procedures as having "not been effective where tried."[381]

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As this Part has shown, American notice-and-comment rulemaking partially owes its origins to a series of legal innovations transplanted from England. The English requirement that finalized rules be published inspired the American creation of the *Federal Register* in 1935. And several key features of the English Donoughmore Committee inspired the 1941 final report of the AG's Committee in the United States. Most notably, they inspired the transsubstantive requirement that agencies promulgating regulations publish notices and provide opportunities for the public to comment.

In constructing the notice-and-comment framework, Americans often built upon the English recommendations. This was apparent, for example, when it came to consultation. The Donoughmore Committee had recommended that consultation extend beyond interested public bodies—the language in the Rules Publication Act 1893—and include "particular interests specially affected."[382] Sensing that this language was still too restrictive and would not afford unorganized interests an opportunity to have their voices heard, the AG's Committee extended the requirement to all "interested parties."[383] For this reason, one commentator who compared the two reports concluded that "the [AG's Committee's] *Report* as a whole is a great improvement on the report of the" Donoughmore Committee.[384]

The AG's Committee declined, however, to transplant the Donoughmore Committee's recommendations concerning laying procedures. This declination stemmed from the demise of the nondelegation doctrine, the procedures' questionable efficacy, and the understanding of their potentially far-reaching consequences in a separation-of-powers system. Notice-and-comment rulemaking was, then, the culmination of longstanding and multifaceted American interest in English administrative law, but it was also only a partial transplantation of England's procedural framework. Though the intellectual inspiration for notice-

381. AG'S COMMITTEE FINAL REPORT, *supra* note 27, at 120.

382. DONOUGHMORE REPORT, *supra* note 53, at 45, 66.

383. *See, e.g.*, CARL MCFARLAND & ARTHUR T. VANDERBILT, CASES AND MATERIALS ON ADMINISTRATIVE LAW 574 (1947) (explaining that the Donoughmore Committee's method of consultation was limited to "closed meeting[s]" and that the minority recommendations to the AG's Committee sought to supplement them with "open meetings").

384. J. Forrester Davison, *Administrative Technique—The Report on Administrative Procedure*, 41 COLUM. L. REV. 628, 643 (1941). Even so, J. Forrester Davison acknowledged that the two reports "both agree in somewhat abstract devotion to the concept of a judicialized type of proceeding." *Id.* at 643-44.

and-comment rulemaking stemmed from American interest in tapping into English experience to democratize, standardize, and control administrative rulemaking, the United States ultimately went in a different direction than England. Rather than embrace close and continuous legislative oversight of administrative rulemaking—which continues to be the central feature of the English process of making delegated legislation[385]—the Americans opted to root rulemaking in the participatory procedures that are now hallmarks of their conception of administrative law.

III. IMPLICATIONS

This Anglo-American history of the origins of notice-and-comment rulemaking has important consequences for contemporary law and legal scholarship. First, it challenges the standard narratives of the endogenous or continental origins of notice-and-comment rulemaking, encouraging a fundamental reexamination of late-nineteenth- and early-twentieth-century American administrative law as embedded within a broader Anglo-American legal universe. Second, by illustrating the partial nature of the transplantation that resulted in notice-and-comment rulemaking, this new history illuminates the potential benefits and detriments of adopting laying procedures in the United States, thus informing the contemporary debate over American administration. A full analysis of the benefits and drawbacks of adopting such procedures is beyond the scope of this Article, but the history of the decision not to adopt them can help answer the question whether the United States should belatedly complete its transplantation of English administrative law.

385. For an overview of the current English procedural framework governing delegated legislation, see PAUL CRAIG, ADMINISTRATIVE LAW 437-47 (7th ed. 2012). Ironically, this framework, which came into effect in 1946 (the same year that the APA was passed), does not include a general statutory requirement for consultation. The Statutory Instruments Act 1946 stipulated that all "statutory instruments" should be laid before Parliament for forty days before coming into effect (with a provision for exceptions), but it also removed the Rules Publication Act 1893's requirements that proposed regulations be publicized in the *London Gazette* and subject to public feedback prior to coming into effect. *See* Statutory Instruments Act 1946, 9 & 10 Geo. 6 ch. 36, § 6(1); S.A. de Smith, *Delegated Legislation in England*, 2 W. POL. Q. 514, 518 (1949). This omission was in large part due to the fact that the practice of consulting with affected interests had become entrenched to the point that a statutory obligation was deemed to be unnecessary. *See* de Smith, *supra*, at 518; J.F. Garner, *Consultation in Subordinate Legislation*, PUB. L., Summer 1964, at 105, 105.

A. Rethinking the History of American Administrative Law

The history narrated in this Article complicates existing scholarly accounts of the origins of informal rulemaking in particular and of modern American administrative law more generally. As noted in the Introduction, legal historians and scholars have hitherto largely ignored the English influences on American administrative law. At least two factors explain this omission.

First, consider sources and methodology. With a few exceptions, studies of the APA have centered on its published legislative history.[386] This is understandable: lawyers are more familiar (and comfortable) with legislative history, and the unpublished archival material relating to the APA is not easily accessible. Although the published legislative history is undoubtedly valuable and has served as a source for a number of important recent historical studies, it also has a particularly limited—and U.S.-centered—perspective. This perspective reflected the reality that members of Congress were not nearly as embedded within the transatlantic Anglo-American legal dialogue as academic scholars were. For instance, Senator Marvel Mills Logan, sponsor of the Walter-Logan Bill, admitted to Laski, the English political theorist, that, although he had read Hewart's *The New Despotism*, he had never read the final report of the Donoughmore Committee.[387] This limited knowledge of English developments made the English influence on the AG's Committee increasingly faint as the legislative process moved forward. Combined with the fact that most American legal historians and lawyers naturally focus on developments internal to the United States, it is unsurprising that the English origins of informal rulemaking have been overlooked.

Second, this story does not fit easily into existing scholarly frameworks of the APA. A number of scholars, such as Professor Philip Hamburger, have claimed that the American administrative state is a transplantation of European continental legal structures.[388] Constructing an account that presents administrative law as antithetical to Anglo-American jurisprudence, these scholars have called into question the constitutionality and legality of the modern American administrative state.[389] Other legal scholars and historians have, in turn,

386. For exceptions, see generally GRISINGER, *supra* note 26; ERNST, *supra* note 26; and Schiller, *The Era of Deference*, *supra* note 26.

387. *See Hearings on S. 3676, Part 2*, *supra* note 200, at 107 (statement of Sen. Logan).

388. *See, e.g.*, HAMBURGER, *supra* note 5, at 12 ("Although the details of absolute power in England may at first seem merely historical . . . they are disturbingly like the details of contemporary American administrative power—not exactly the same, but nonetheless remarkably close."); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 179-204 (2017); RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 231-38 (2005).

389. *See, e.g.*, HAMBURGER, *supra* note 5, at 13.

disputed this account and the idea that the American administrative state is a foreign transplant.[390] This group has shown that, from its establishment, the American state has contained an administrative apparatus governed by administrative law.[391] Even as these works chart the changing nature of this legal system, their focus on the endogenous origins of the American administrative state seeks to counter its purported illegitimacy.

This Article's account of the English influence on the formation of modern American administrative law unsettles both of these dominant narratives. This Article allows that many American students of administrative law were deeply interested in continental administrative legal systems, yet it underscores the historical fact that, when it came time to enshrine legislatively a system of administration, England—not Germany or France—was the primary external influence. That England, with its rich common-law tradition, served as the dominant model largely sweeps away the charges of the alien character of American administrative law. The categorical difference in the critiques of administrative law offered, on the one hand, by the ABA's Special Committee in the late 1930s and, on the other hand, by contemporary scholars such as Hamburger underscores this point. Even after criticizing American administrative law as engendering "administrative absolutism,"[392] the ABA's Special Committee called for *procedural* reform. On its view, instituting tighter procedural protections for administrative rulemaking—which, as discussed above, were modeled on purported English procedures[393]—would eliminate the possibility of a nascent absolutism. The vetoed Walter-Logan Bill was the capstone of these efforts.[394] By contrast, the current critics of rulemaking view it as part of a broader German transplantation that is antithetical to the American constitutional system and is "unlawful."[395] In staking out this claim, these critics do not believe that bolstering the procedural safeguards around notice-and-comment rulemaking will cure its fatal shortcoming.[396]

Meanwhile, this Article's argument that a key feature of modern American administrative law came from England also complicates the internalist accounts. Even though it does not question that many components of the administrative

390. *See, e.g.*, McKinley, *supra* note 21, at 1554-66.

391. *See, e.g.*, Parrillo, *supra* note 24, at 1301-02; MASHAW, *supra* note 22, at 2-65.

392. *Report of the Special Committee on Administrative Law*, *supra* note 253, at 342.

393. *See supra* notes 282-290 and accompanying text.

394. *See supra* note 283 and accompanying text.

395. *See* HAMBURGER, *supra* note 5, at 13 (arguing that administrative law is "unlawful").

396. In this sense, although Professor Gillian E. Metzger is correct in describing the present anti-administrative attacks as "1930s redux," she seems to understate partially the novelty—and radical nature—of the current attacks. *See* Metzger, *supra* note 3, at 7-8.

state and legal mechanisms to democratize and control it emerged endogenously in the United States,[397] this Article shows that these developments were necessary but not sufficient. Only by looking to the English administrative legal tradition were Americans able to forge notice-and-comment rulemaking.

This rich transatlantic tradition has become nearly invisible over the years. The passage of time—with the robust development of a sophisticated, self-confident, and largely self-referential American administrative legal jurisprudence and scholarship—has obviously played its part.[398] Stirrings of this were already apparent by the early 1960s, when Kenneth Culp Davis assuredly concluded that "English administrative law ought to be inspiring and exciting, not dull and forbidding. The literature of English administrative law needs to move from bombast to realism."[399] Along with legal hubris, the very fact that Americans used to look to other systems as models worthy of emulation has come to be forgotten—at least when it comes to administrative law. The United States's ascent to global hegemony has created a mindset in which it is almost impossible to imagine a world in which the country does not act as solely an exporter of legal ideas.[400] Notwithstanding the reemergence of the study of comparative administrative law,[401] it rarely engages with its own history.[402] At the same time, current

397. At the risk of belaboring this point, this Article's emphasis on the important role that English rulemaking procedures had on American notice-and-comment rulemaking does not seek to detract from the groundbreaking historical work of scholars such as Maggie Blackhawk, Nicholas R. Parrillo, or Jerry L. Mashaw. Nothing in this Article contests their findings concerning the earlier history of the development of the American administrative state or administrative law. Rather, this Article simply seeks to offer a corrective to their and others' accounts regarding how notice-and-comment rulemaking—as it developed into a coherent form that eventually found its home in the APA—came about.

398. *See* RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930, at 291-92 (1987) (arguing that the rich tradition of convergent Anglo-American law came to an end at some point in the 1930s). This Article argues that, although Richard A. Cosgrove may be correct in respect to a sense of a shared common law, he is mistaken when it comes to administrative law.

399. Kenneth Culp Davis, *English Administrative Law—An American View*, 1962 PUB. L. 139, 139.

400. *See, e.g.*, DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 139 (2009); R.W. KOSTAL, LAYING DOWN THE LAW: THE AMERICAN LEGAL REVOLUTIONS IN OCCUPIED GERMANY AND JAPAN 325 (2019). For a similar point, see RODGERS, *supra* note 46, at 502-08.

401. For some examples of this reemergence, see generally COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010); COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS (Francesca Bignami & David Zaring eds., 2016); COMPARATIVE ADMINISTRATIVE LAW, *supra* note 40; and THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW, *supra* note 206.

402. For notable exceptions, see generally Oren Tamir, *Our Parochial Administrative Law*, 97 S. CAL. L. REV. 801 (2024); and John K.M. Ohnesorge, *Western Administrative Law in Northeast Asia:*

scholarship on the history of American administrative law has remained stubbornly committed to a nationalist framing of its subject. This is the case even as it routinely nods to English jurist A.V. Dicey and his early dismissal of the existence of administrative law in the Anglo-American common-law tradition. The early stirrings of an "APA originalist" scholarship has—like its judicial counterpart—only exacerbated the U.S.-centrism of the study of the past.[403] Louis L. Jaffe's 1950 statement that "[t]he American lawyer has long been interested in comparing the English administrative process with his own" seems to belong to a bygone era.[404]

To the contrary, as this Article has argued, modern American administrative law developed within a broader transatlantic context. This context extended beyond administrative law to English government and constitutionalism. Beginning with the founding of the United States and continuing intermittently until the mid-twentieth century, Americans showed sustained interest in English public law.[405] During the New Deal, this Anglophilia surfaced in full force. Major pieces of legislation and governmental programs either were transplanted outright from England or could at least claim descent from English ancestors.[406]

A Comparativist's History (Univ. of Wisconsin Legal Stud. Rsch. Paper Series, Paper No. 1518, 2002), https://ssrn.com/abstract=3483842 [https://perma.cc/K72Z-BMZM].

403. *See supra* note 19.

404. Louis L. Jaffe, Book Review, 63 HARV. L. REV. 1088, 1088 (1950) (reviewing BERNARD SCHWARTZ, LAW AND THE EXECUTIVE IN BRITAIN (1949)).

405. For the historical pedigree of American interest in England, see generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967), which discusses how the American Revolution influenced the development of the Constitution; and DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF EMANCIPATION (2014), which describes the influence of slavery on Americans.

American interest in English history and constitutionalism became increasingly prevalent in the second half of the nineteenth century. Throughout, Americans were particularly historicist in their thinking. In turn, they were extremely aware of the fact that the American system of government and American constitutionalism had developed along their own trajectories and, thus, that any transplantation of English (and European) ideas had to be adapted to fit American circumstances. For variations on this broader point, see generally ROBERT KELLEY, THE TRANSATLANTIC PERSUASION: THE LIBERAL-DEMOCRATIC MIND IN THE AGE OF GLADSTONE (1969); JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920 (1986); DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991); and DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY (2013). I thank Ajay Mehrotra for encouraging me to state this contextualization in explicit terms.

406. *See, e.g.*, Daniel T. Rodgers, *An Age of Social Politics*, *in* RETHINKING AMERICAN HISTORY IN A GLOBAL AGE 250, 260 (Thomas Bender ed., 2002) (discussing how the National Employment System Act of 1933 was borrowed from England and the Social Security Act of 1935 "was

New Dealers also invoked England in their efforts to transform the shape of the federal government. The New Deal's general empowerment of the President through large (and sometimes vague) delegations of power from Congress echoed American progressives' earlier calls to discard the formal separation between the President and Congress in favor of the English executive-legislative relationship whereby the Prime Minister and Cabinet are "responsible" to Parliament.[407] The effort to implement judicial reform also bore English markings as President Roosevelt routinely likened court-packing to "Lords-packing" – the repeated decision (or, at least, threat) of English monarchs to add peers to the House of Lords in order to reduce its veto power over legislation passed in the House of Commons.[408]

Within this broader milieu, the component parts of notice-and-comment rulemaking were imported from England. Recovering this lost legal world is necessary to appreciate fully the development of American administrative law.

B. Laying Procedures as Legitimating Rulemaking?

This Article also informs and provides historical context for an ongoing debate about whether Congress should tighten its oversight of agency rulemaking by adopting a full-scale legislative veto. In light of the history put forth in this Article, this debate can be understood as revolving around the question whether Americans should belatedly transplant English laying procedures.

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a highly conscious borrowing from German and British precedents, drafted by committees stocked with experts on European social insurance experience"); James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 34 (1959) (describing the English Companies Act of 1929 as the "base of the" Securities Act of 1933); Barry Supple, *The Political Economy of Demoralization: The State and the Coalmining Industry in America and Britain Between the Wars*, 41 ECON. HIST. REV. 566, 573-75 (1988) (discussing the British Coal Mines Act of 1930's role in shaping the Guffey-Snyder Act of 1935 and its successor, the Guffey-Vinson Coal Act of 1937); KIRAN KLAUS PATEL, THE NEW DEAL: A GLOBAL HISTORY 206-07 (2016) (describing how British public housing influenced the United States Housing Act of 1937); PATEL, *supra*, at 216 (discussing how the Resettlement Administration "was embedded in an international conversation on rural development and model villages" in which England also participated).

407. *See, e.g.*, WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 128-29 (Cambridge, Riverside Press 1885); James T. Young, *The Relation of the Executive to the Legislative Power*, 1 PROC. AM. POL. SCI. ASS'N 47, 52-53 (1904); WILLIAM MACDONALD, A NEW CONSTITUTION FOR A NEW AMERICA 25-32 (1921); HENRY HAZLITT, A NEW CONSTITUTION NOW 282 (1942).

408. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 319 (1998); *see also* Leuchtenburg, *supra* note 36, at 364 (describing President Roosevelt's invocation of the Lords-packing analogy).

Now is not the first time that laying procedures—or, as they are more commonly known in the United States, legislative vetoes—have been contemplated. As described earlier, several debates about transsubstantive legislative vetoes took place in the decades before the passage of the APA.[409] In the years following 1946, interest waned but by no means disappeared.[410] The 1970s and early 1980s then saw a revival of interest and a lively scholarly debate.[411] In that period, members of Congress proposed bills providing for a comprehensive legislative veto over agency regulations.[412] Although no transsubstantive legislative veto was signed into law, hundreds of specific statutory schemes that included various forms of legislative vetoes—including two-house vetoes, one-house vetoes, and committee vetoes—made their way into the U.S. Code.[413]

In 1983, in *INS v. Chadha*, the Supreme Court held unconstitutional the legislative veto in Section 244(c)(2) of the Immigration and Nationality Act.[414] That provision had authorized either chamber of Congress to veto the Attorney General's decision to suspend the deportation of a noncitizen.[415] Writing for the Court, Chief Justice Burger held that this legislative veto was unconstitutional given that it had the "purpose and effect of altering the legal rights, duties, and relations" of persons outside of the legislative branch, but had nonetheless not been subject to the requirements of bicameralism and presentment as provided in Article I, Section 7 of the Constitution.[416] The Court's decision was widely

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409. *See supra* Section II.C.

410. *See* Bernard Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U. L. Rev. 1031, 1035-36 (1955); *see also* Carr, *supra* note 163, at 1048-49 (describing parliamentary supervision).

411. *See generally, e.g.*, Jacob K. Javits & Gary J. Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. Rev. 455 (1977) (supporting the legislative veto); Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977) (opposing it).

412. *See Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658, H.R. 8231 Before the Subcomm. on Admin. L. & Gov't Rels. of the H. Comm. on the Judiciary*, 94th Cong. 1-2 (1975); 129 Cong. Rec. 4224 (1983) (statement of Rep. Levitas).

413. For a partial list of these legislative vetoes, see Brief of the United States, Appellee-Petitioner at 39-48, INS v. Chadha, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171), *reprinted in Chadha*, 462 U.S. at 1003-13 (appendix to opinion of White, J., dissenting). *See generally* Cong. Rsch. Serv., 96th Cong., Studies on the Legislative Veto (Comm. Print 1980) (collating various analyses of the legislative veto).

414. *Chadha*, 462 U.S. at 928, 932.

415. *Id.* at 923.

416. *Id.* at 952.

debated and often criticized in subsequent scholarship.[417] Still, in *Chadha*'s wake, Congress continued to pass a variety of legislative vetoes.[418] Even as these vetoes failed to satisfy *Chadha*'s pronouncements, they constituted a stark reminder that Congress was not willing to delegate power without retaining the ability to have a mechanism—even if only an informal one—through which to express and maintain its interests vis-à-vis the Executive.[419]

To further instantiate its desire to oversee rulemaking, Congress enacted the transsubstantive Congressional Review Act (CRA) in 1996.[420] The CRA created an expedited process for Congress to pass joint resolutions of disapproval to overturn major regulations. Whereas the legislative veto that was struck down in *Chadha* failed to satisfy the Article I, Section 7 process, the CRA stipulates that major regulations will be overturned only after Congress passes a joint resolution of disapproval *and* the President signs the resolution (or if Congress overrides a presidential veto).[421] Congress has used the CRA increasingly in recent years, garnering scholarly attention.[422]

Meanwhile, the Regulations from the Executive in Need of Scrutiny Act (REINS Act)[423] has repeatedly come up for votes in Congress over the past

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417. *See, e.g.*, E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 126; Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 792 (1984).

418. *See* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS., no. 4, 1993, at 273, 273, 288.

419. *See id.* at 292 ("In one form or another, legislative vetoes will remain an important mechanism for reconciling legislative and executive interests.").

It is important to note that the proliferation of these legislative vetoes in the decades following 1946 can be read as complicating this Article's argument that the English rulemaking framework was only *partially* transplanted to the United States. In particular, the fact that these legislative vetoes emerged in the post-1946 period lends itself to an alternative argument that the English rulemaking framework was in fact *fully* transplanted to the United States—though the legislative veto came over not as a transsubstantive veto but in individual statutes. On this reading, the American transplantation of the English rulemaking framework was essentially completed in 1946 and was only undone in 1983 with *Chadha*. Of course, in order to do justice to this argument it is necessary to examine the histories of at least some of the post-1946 legislative vetoes and more fully probe the history of *Chadha*. I hope to pursue this line of research in the near future.

420. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 847, 868-74 (codified as amended at 5 U.S.C. §§ 801-808).

421. *See* 5 U.S.C. § 801(b)(1) (2018).

422. *See, e.g.*, Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 281 (2022); *see also* Coral Davenport, *Democrats Eye Trump's Game Plan to Reverse Late Rule Changes*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/17/climate/trump-regulations-election.html [https://perma.cc/EVN4-BZAA].

423. Regulations from the Executive in Need of Scrutiny Act of 2009, H.R. 3765, 111th Cong.

decade but has yet to garner sufficient support to be enacted.[424] Whereas the CRA requires Congress to disapprove of major regulations to prevent them from taking effect—and is thus similar to an English passive laying requirement—under the proposed REINS Act Congress would have to approve major regulations before they can be put into operation. In particular, under the REINS Act, Congress would have to pass a joint resolution of approval (with the President's signature or a veto override) in order for any major rule to come into effect.[425] It thereby resembles an English affirmative laying requirement. The REINS Act has likewise been the subject of much legal scholarship.[426]

Without fully rehashing this rich and multifaceted debate, the following paragraphs sketch the historical arguments that can be made for and against adopting affirmative laying procedures. At the outset, it should be stressed that this Article does not offer a vision as to whether such laying procedures should in fact be adopted in the United States. While some might believe that history should play a role in this debate, history is not the sole factor that should dictate any ultimate decision.[427]

As we have seen, laying procedures were considered but ultimately excluded, and explicitly so, from the original compromise that led to the APA. Under the terms of this quasi-constitutional settlement, agency rulemaking under congressional delegations of power was deemed legitimate so long as the public was allowed to participate in the rulemaking process and ex post judicial review was made available to ensure that the regulations were both procedurally and substantively reasonable. Congress determined that with these procedures in place it did not need to oversee continuously the making of regulations.

An argument in favor of belatedly transplanting affirmative laying procedures would stress that the history recounted in this Article actually bolsters the validity of current anxieties about agency rulemaking. While the APA ultimately did not contain a legislative veto, the initial desire to transplant one stemmed from a recognition that administrative rulemaking was analogous to legislation—and hence Congress needed to be involved in some way in its oversight.

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424. *See, e.g.*, Regulations from the Executive in Need of Scrutiny Act of 2023, S. 184, 118th Cong.

425. *See id.* § 3.

426. For some examples of scholarship and media coverage about the Regulations from the Executive in Need of Scrutiny Act (REINS Act), see generally Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446 (2015); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 161 N.Y.U. J. LEGIS. & PUB. POL'Y 131 (2013); and Margot Sanger-Katz, *Little-Noticed Part of G.O.P. Bill Could 'Make It Impossible to Regulate*,' N.Y. TIMES (May 12, 2023), https://www.nytimes.com/2023/05/12/upshot/republican-bill-government-regulations.html [https://perma.cc/CV88-L487].

427. Other crucial elements that surely should be considered before making any such decision include political circumstances, efficiency concerns, and legitimacy concerns.

Although the drafters of the APA declined to adopt a legislative veto, this argument would contend that it did not reject that underlying recognition. Rather, Congress's decision not to adopt a legislative veto in the APA was driven by the fact that rulemaking was not a major policymaking tool at the time. As Professor Reuel E. Schiller and others have emphasized, rulemaking did not have a large-scale impact or bring about major economic and social effects when the APA was passed.[428] Yet that is no longer the case: since the late 1950s and early 1960s, rulemaking has come to be widely used as a policymaking tool.[429] With these deep-seated changes emerging just over a decade after the APA became law, it is hard not to notice how quickly a core feature and presumption undergirding the APA was upended.[430] While we can only speculate, it is likely—such an argument would assert—that had the procedure been of such importance in 1941, the AG's Committee would have endorsed tighter congressional oversight.

In support of that last claim, this argument would point to the fact that calls for the imposition of a legislative veto were not unheard of in the years between the passage of the APA and the rise of rulemaking. In 1953, Robert W. Ginnane (who had served on the research staff of the AG's Committee) discussed the utility of the procedure, only to conclude that its creation of an "undue concentration of power in Congress" likely violated the separation of powers.[431] Two years later, Professor Bernard Schwartz enthusiastically called on Congress to adopt English laying procedures, terming them "one of the most promising methods of control of agency rule-making authority."[432] Congress seemingly heeded this advice as it increasingly inserted provisions for legislative vetoes in legislation

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428. *See, e.g.*, Schiller, *supra* note 37, at 1145-49.

429. *See id.*

430. *See, e.g.*, Farber & O'Connell, *supra* note 38, at 1140 ("[T]here is an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation.").

431. Robert W. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 611 (1953). The previous year, a student note in the *Harvard Law Review* recommended transplanting the procedure, determining that "the present inadequacy of congressional supervision of administration suggests its possible extension in this country." Note, *"Laying on the Table"—A Device for Legislative Control over Delegated Powers*, 65 HARV. L. REV. 636, 637 (1952).

432. Schwartz, *supra* note 410, at 1044. Other articles published during this period likewise recommended legislative supervision. *See, e.g.*, Charles H. Melville, *Legislative Control over Administrative Rule Making*, 32 U. CIN. L. REV. 33, 37 (1963); Harold V. Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638, 638 (1956).

during the 1970s.[433] In short, even though the APA rejected a blanket adoption of laying procedures, the quasi-constitutional settlement by no means extinguished either discussion or utilization of the technique.

What is more, according to this argument, now is the right time to transplant laying procedures. For one thing, laying procedures would arguably provide rulemaking with a form of "basic legitimacy" that it currently does not enjoy.[434] Put another way, close congressional oversight of notice-and-comment rulemaking would afford the procedure a degree of what Professor Richard H. Fallon, Jr. has termed "[s]ociological legitimacy."[435] Laying procedures could also address several of the concerns about informal rulemaking that have been voiced in recent years. For those who argue that rulemaking is at present not sufficiently democratic or participatory,[436] laying procedures would make it easier for administrative bodies to experiment with the mechanics of notice-and-comment rulemaking. Less stress would be placed on the notice-and-comment process's participatory and democratic credentials, and agencies would also have more room to tinker with the process. Meanwhile, for those worried that executive agencies' use of rulemaking is usurping the constitutionally sanctioned role of the legislature, laying procedures would enable Congress to play a more active role in the making of legally binding regulations.[437] This, in turn, would arguably reduce the strife that currently engulfs administrative rulemaking. Indeed, the post-1946 English experience with delegated legislation buttresses this argument. In contrast to the "enormous controversy" that notice-and-comment rulemaking garners in the United States, in England—where parliamentary laying procedures exist—"nearly everyone seems satisfied with (and hardly anyone seems interested in) procedural and substantive aspects of delegated legislation."[438]

A laying regime that employed the CRA and some type of modified version of the REINS Act would—again, according to this argument—effectively

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433. *See* INS v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting) (describing the majority's decision as "sound[ing] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto'"); Brief of the United States, Appellee-Petitioner, *supra* note 413, at 39-48 (listing fifty-six statutes containing legislative vetoes).

434. FREEDMAN, *supra* note 18, at 10.

435. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018).

436. *See supra* notes 10-16 and accompanying text.

437. This is not to say that Congress does not already play an active role in the making of such regulations. For the myriad formal and informal ways in which Congress oversees the administrative state, see, for example, Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 71, 121 (2006).

438. Michael Asimow, *Delegated Legislation: United States and United Kingdom*, 3 OXFORD J. LEGAL STUD. 253, 253 (1983).

transplant the Donoughmore Committee's suggested reforms concerning laying procedures to the United States. There is much validity to the criticism that the strong versions of the REINS Act would create far too much of an impediment to the adoption of "rules."[439] Requiring *all* major rules to be affirmatively approved by Congress before coming into effect would unquestionably overburden Congress and forestall regulations.[440] In order to preserve rulemaking, this argument would readily recognize that the current proposals for the REINS Act must be revised. Making the CRA the default laying procedure for all major regulations and only requiring certain exceptionally consequential regulations to be subject to the strictures of the REINS Act would follow the Donoughmore Committee's proposal of establishing a passive laying requirement as the default option (and mandating an affirmative laying requirement only in special situations). This type of integrated laying regime would allow for different levels of congressional scrutiny based on the magnitude of the regulation in question.[441] Deploying these two Acts together could, then, introduce the English laying regime into American administrative law without too much difficulty.

At the same time, these laying procedures would arguably reduce much of the current bite of the major-questions doctrine. They would serve as a mechanism through which Congress could expeditiously approve or disapprove regulations and thereby satisfy Chief Justice Roberts's demand that, when an agency claims the authority to make a major regulation, it "must point to 'clear congressional authorization' for the power it claims."[442] Moreover, and given the

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439. Levin, *supra* note 426, at 1451; *see also* Susan Rose-Ackerman, Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany, and France 81 (2021) ("Under REINS with divided government, the result could be . . . pro forma debate with many rules voided.").

440. *See* Levin, *supra* note 426, at 1453-60. The current proposals for the REINS Act all seem to seek to supplant the Congressional Review Act, rather than complement it. This would create a situation in which all major regulations were subject to an affirmative laying requirement—a reality that would depart from the English regime that integrates passive and affirmative laying requirements.

441. Of course, determining the cutoff that subjects any given regulation to the REINS Act's more demanding laying procedure is crucial and has enormously high stakes. Determining where this line should be drawn and deciding who gets to conduct this analysis would be subject to political bargaining.

442. West Virginia v. EPA, 597 U.S. 697, 723 (2022) (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). For a somewhat similar suggestion, see Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 Harv. J.L. & Pub. Pol'y 773, 774 (2022). *See also* Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, 123 Mich. L. Rev. (forthcoming 2025) (manuscript at 41-44), https://ssrn.com/abstract=4787041 [https://perma.cc/N8M6-ZN93] (discussing methods of legislative overrides of judicial rulings). One possible objection to this argument is that, under the major-questions

Supreme Court's recent overturning of *Chevron* deference in *Loper Bright*,[443] these laying procedures could provide Congress with a speedy way of affirming agencies' interpretations of statutes and preempting contrary judicial interpretations.[444]

By contrast, an argument against adopting laying procedures would emphasize the fact that the APA and its accompanying procedural framework amounted to — and remain — a quasi-constitutional settlement and therefore deserve our utmost respect and continued fidelity. This applies, not least, to the absence of laying procedures. On this view, the exclusion of laying requirements from the APA was by no means an oversight: while it is clear that there were anxieties in the leadup to the APA about Congress's role in rulemaking, laying procedures were duly considered but ultimately rejected.

This rejection — such an argument would emphasize — was for good reason. For one thing, close congressional oversight of rulemaking is, as a practical matter, impossible given the constraints on Congress's time and ability to supervise agencies, not to mention Congress's general lack of interest in assuming such a role. In this respect, little has changed in the past eighty-plus years to counter the determination of the AG's Committee that Congress's "lack of desire" was — and is — the primary reason it does not closely oversee rulemaking.[445]

In addition, the notion that Congress needs to supervise administrative rulemaking — and the underlying conception that administrative rulemaking functions "as a mere transmission belt for implementing legislative directives" — is overly simplistic and constraining.[446] As Professors Gillian E. Metzger and Kevin M. Stack have put it, not only is a requirement of "external control" over administrative action "fundamentally at odds with the logic of contemporary

doctrine, the Supreme Court would still invalidate "major" regulations given the lack of an ex ante congressional approval of an agency's proffered interpretation of a statute at issue. Creating a laying mechanism by which Congress could quickly approve an agency's regulation as a valid interpretation of a statute could offset this possibility.

443. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

444. Moreover, the availability of these laying procedures could arguably better legitimate modern rulemaking — and judicial deference thereto. *Chevron* deference was predicated in many ways on "a fictionalized statement of legislative desire." David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212. The availability of a laying regime could, by contrast, be seen as legitimating rulemaking as based on an actual congressional desire given that laying procedures would allow Congress to approve (actively or passively) agency interpretations of law.

445. AG'S COMMITTEE FINAL REPORT, *supra* note 27, at 120.

446. *See* Stewart, *supra* note 4, at 1675.

administrative governance," it also "will never be able to ease anxieties about the administrative state or successfully regulate the exercise of administrative power."[447]

What is more, and as commentators then and now have observed, laying procedures are quite ineffective methods of controlling administrative rulemaking. In both parliamentary and separation-of-powers systems, passive laying procedures are trivial and often provide little actual legislative oversight.[448] Meanwhile, in a separation-of-powers system, affirmative laying procedures have the potential to bring rulemaking to a practical halt.[449] That affirmative laying procedures would be wholly obstructionist seems particularly likely at present. After all, sharply polarized political parties are often willing to engage in obstructionist opposition, even if doing so might torpedo policy initiatives that align with some of their own policy preferences. Given the increasing prevalence of divided government, where the executive branch and the legislature are controlled by different parties, the disruptive potential of affirmative laying procedures—and any form of the REINS Act—would likely be realized.[450]

Such an argument would further stress that Congress's decision that these procedures were not necessary to legitimate rulemaking continues to be valid today. This is the case notwithstanding the expanded scope of rulemaking in the decades since the APA's enactment. This argument would contend that there is no indication that the statute's drafters would have adopted laying procedures had rulemaking been more consequential at the time. After all, the APA allowed for expansive rulemaking[451] and did not require laying procedures for such exercises of power. The judicial interment of the nondelegation doctrine meant that Congress no longer considered close supervision of the scope of delegations

447. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1246 (2017).

448. *See, e.g.*, Rose-Ackerman, *supra* note 169, at 304 (arguing that a passive laying procedure "usually leads to pro forma approval").

449. *See, e.g.*, *id.* (arguing that an affirmative laying procedure along the lines of the REINS Act would result in "just the reverse [of pro forma approval]—pro forma debate with many rules voided").

450. Moreover, such an argument would assert that the introduction of a passive laying procedure would likely further amplify the importance of increasingly informal mechanisms (such as informal guidance) that arguably suffer from even more acute legitimacy deficits than notice-and-comment rulemaking.

451. *See, e.g.*, Blake Emerson, *"Policy" in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy*, 97 CHI.-KENT L. REV. 113, 119-29 (2022); Eskridge & Ferejohn, *supra* note 14, at 1950.

to be a constitutional necessity.[452] Notwithstanding the enactment of the CRA, it would thus be unwise (and perhaps even unconstitutional[453]) to transplant laying procedures fully to the United States.

The current Supreme Court's worries about the scope of rulemaking — and the momentous changes in administrative law that have ensued — do not change this calculus, according to this argument. After all, the terms of the APA's settlement omitted laying procedures and foreclosed judicial review that scrutinized rulemaking simply because of its broad impact. Put another way, the history and final terms of the APA make the current Court's anxiety unjustified. The Court's increasing interest in reviving the nondelegation doctrine and its creation of the major-questions doctrine are little more than "a guerilla campaign to undermine the administrative state that was entrenched by the APA's deep compromise."[454] Adopting laying procedures in the hope that they would assuage the Court would be nothing less than acceding to a contrived anxiety.

CONCLUSION

In 1946, as the Senate debated the APA, Senator Pat McCarran of Nevada termed the proposed bill a "bill of rights" for the administrative state.[455] McCarran, who had introduced the bill in the Senate, chose this comparison to underscore the importance of the APA in ensuring that administrative action and discretion would not unduly encroach on Americans' rights and liberties. "It is designed," he emphasized, "to provide guaranties of due process in administrative procedure."[456]

As this Article has shown, this analogy was also apt on another level. Like the 1791 Bill of Rights, which incorporated — and expanded upon — English precedents (among others), the APA built upon existing English administrative procedural practices. The APA's provisions concerning notice-and-comment rulemaking, along with the 1935 Federal Register Act, bore the marks of English ancestry. This was the case even as Americans declined to adopt the English

452. Furthermore, such an argument would emphasize that a full-fledged regime of laying procedures would effectively convert those regulations subject to laying procedures into acts of legislation because they would be subject to bicameralism and presentment. This development, in turn, would preclude meaningful judicial review. Instead of deploying arbitrary-and-capricious review and hard-look review, courts would only be able to review these acts under rational-basis review and other constitutional standards.

453. *Chadha*, according to some scholars, arguably renders the REINS Act unconstitutional. *See* Levin, *supra* note 426, at 1464-82.

454. Eskridge & Ferejohn, *supra* note 14, at 1960.

455. 92 CONG. REC. 2148 (1946) (statement of Sen. McCarran).

456. *Id.*

laying procedures. Ultimately, the APA's provisions on informal rulemaking were not only the result of a domestic American "hard-fought compromise,"[457] but also the product of a lost transatlantic Anglo-American world of administrative law.

Recovering this history is important today. It clarifies the origins of informal rulemaking — one piece of the understudied universe of Anglo-American administrative law that shaped the modern administrative state. In a period in which the modern administrative state and notice-and-comment rulemaking are subject to increasingly harsh criticisms, looking to the past — and to other countries such as the United Kingdom — might offer clues for adapting for the future.

457. *See* Shepherd, *supra* note 26, at 1560.