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The Undemocratic Roots of Agency Rulemaking

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THE UNDEMOCRATIC ROOTS OF AGENCY RULEMAKING

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Americans often credit—or blame—Congress for the laws and policies that govern their lives. But Congress enacts broad statutes that give federal administrative agencies the primary responsibility for making and enforcing the regulations that control American society. These administrative agencies lack the political accountability of those in public office. To address this democratic deficit, an agency seeking to adopt a new regulation must publish a notice of proposed rulemaking and provide an opportunity for the public to comment on the proposal. Heralded as "one of the greatest inventions of modern government," the Administrative Procedure Act's (APA) notice-and-comment rulemaking procedure is understood primarily as a means of legitimating administrative regulation by holding agencies democratically accountable to the public. This understanding is wrong.

This Article is the first to examine the pre-APA administrative practices that inspired the APA's informal rulemaking provisions and show that those practices were not about democratic accountability or legitimacy. Instead, they were concerned with the targeted solicitation of views from the representatives of organized interest groups to inform the agency's expert judgment. Congress, however, built a more democratic framework atop the foundation established by these pre-APA administrative practices. Congress also expected that agencies and courts would each contribute, in their own way, to the future elaboration and evolution of the APA's minimal procedural requirements. The analysis reveals that what modern administrative law identifies as pathologies in informal rulemaking are natural—perhaps even intended—consequences of the APA's statutory design. It also offers a more nuanced account of the purposes of the APA's notice-and-comment provisions and further legitimates both agency procedural discretion and judicial common law. The Article concludes that the vision of informal rulemaking that agencies

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and courts have constructed based on Section 553's skeletal provisions vindicates Congress's intentions and is preferable to a vision bound by rulemaking's undemocratic roots.

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INTRODUCTION

The paradox of modern administrative rulemaking is that it suffers simultaneously from too much and too little democracy. Paradigmatic of the "too much" side of the paradox, the Federal Communications Commission (FCC) in 2017 received nearly *twenty-five million* public comments on its proposal to roll back the net neutrality rules that the agency had adopted only two years earlier.[1] Beyond the sheer volume of the comments were more troubling problems that attracted close scrutiny from diverse quarters, including academics, journalists, private consulting firms, federal courts and agencies, and even the New

[1] Protecting and Promoting the Open Internet, 81 Fed. Reg. 93638 (Dec. 21, 2016) (to be codified at 47 C.F.R. pts. 1, 8, & 20). Twenty-two million comments were received before the comment period closed and another three million were submitted thereafter. Steven J. Balla Reeve Bull, Bridget C.E. Dooling, Emily Hammond, Michael Herz, Michael Livermore & Beth Simone Noveck, *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95, 97 (2022) [hereinafter ACUS Mass Comments Report]; *see* Michael Herz, *Fraudulent Malattributed Comments in Agency Rulemaking*, 42 CARDOZO L. REV. 1, 4 (2020).

York Attorney General.[2] Millions of the comments were suspect, containing identical language that suggested the possibility of computer generation or the use of a standardized text or form letter.[3] Subsequent investigations yielded outrageous findings. More than a million comments had been submitted through a pornographic website.[4] Others were produced by Russian bots,[5] were submitted using fake email addresses produced through FakeMailGenerator.com, or were falsely attributed to persons—dead and alive, real and fictitious—with no actual connection to the proceeding.[6] Impressively, one lone nineteen-year-old college student reportedly was responsible for submitting 7.7 million comments in favor of preserving the net neutrality rules.[7] Despite these problems, the FCC's final decision[8] was largely affirmed by the D.C. Circuit.[9]

Although the FCC's net neutrality proceeding offers an extreme case study, other high-profile rulemakings have also witnessed voluminous and chaotic public comment periods.[10] These present real problems. A deluge of duplicative com-

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2 *See* Admin. Conf. of the U.S., Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, 86 Fed. Reg. 36075 (July 8, 2021) [hereinafter Recommendation 2021-1]; James V. Grimaldi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many Are Fake.*, WALL ST. J. (Dec. 12, 2017), https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188 [https://perma.cc/2PDJ-SE3R]; EMPRATA, FCC RESTORING INTERNET FREEDOM DOCKET 17-108: COMMENTS ANALYSIS 2 (2017), https://www.emprata.com/emp2017/wp-content/uploads/2017/08/FCC-Restoring-Internet-Freedom-Comments-Analysis.pdf [https://perma.cc/DV4X-LM3H]; Press Release, N.Y. Att'y Gen. Letitia James, Attorney General James Issues Report Detailing Millions of Fake Comments, Revealing Secret Campaign to Influence FCC's 2017 Repeal of Net Neutrality Rules (May 6, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-issues-report-detailing-millions-fake-comments-revealing [https://perma.cc/SE9G-7C7V].

3 Herz, *supra* note 1, at 2.

4 *Id.* at 5.

5 *Id.* at 14. FCC Commissioner Jessica Rosenworcel published an op-ed addressing this and other problems affecting the net neutrality comment process. *See* Jessica Rosenworcel, *Russians Are Hacking Our Public-Commenting System, Too*, WASH. POST (Mar. 6, 2018), https://www.washingtonpost.com/opinions/russians-are-hacking-our-public-commenting-system-too/2018/03/06/fdfe3dae-1d6a-11e8-b2d9-08e748f892c0_story.html [https://perma.cc/HPR8-SAQT].

6 *See* Herz, *supra* note 1, at 2–3; Rosenworcel, *supra* note 5.

7 *See* NY STATE OFF. OF THE ATT'Y GEN. LETITIA JAMES, FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE 6 (2021), https://ag.ny.gov/sites/default/files/oag-fakecommentsreport.pdf [https://perma.cc/6SER-MYR5].

8 Restoring Internet Freedom, 83 Fed. Reg. 21927 (May 11, 2018) (to be codified at 47 C.F.R. pts. 1, 8, & 20).

9 *See* Mozilla Corp. v. FCC, 940 F.3d 1, 18 (D.C. Cir. 2019).

10 *See* Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1345 (2011).

ments can overwhelm an agency without contributing much of substance to its decision-making process.[11] And the practices that contribute to a deluge—fraud, malattribution, astroturfing, and computer generation—cast a pall over the process and undermine the perceived (if not actual) legitimacy of the agency's final decision.

While a salient minority of rulemakings are afflicted by an excess of democracy, however, a silent majority suffer from the opposite malady. Most proposed rules generate little or no public participation.[12] When public comments are submitted, they predominately come from organizations and interest groups that represent the regulated industry.[13] These sophisticated participants typically file the kind of substantive comments that are believed to have greater influence on agency decision-making.[14] Public interest groups can help to counterbalance industry influence, but they are generally outnumbered and under-resourced by comparison. Meanwhile, there are many barriers to meaningful participation by members of the general public—including regulatory beneficiaries—in the rulemaking process.[15] Information about ongoing rulemakings

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11 It does not require millions of comments to cause problems. For example, when the FCC revised its media ownership rules, it received "tens of thousands of public comments" and these "so overwhelmed the FCC's system that staff contacted one 'mass marketer' to slow down the submissions." Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 899, 899 n.23 (2011) (citing John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 989 (2006)).

12 *See* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 814 (2021).

13 *See, e.g.*, Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 951–52 (2006) (discussing empirical evidence about who submits comments in rulemaking); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128, 133 (2006) (analyzing a "data set of over 30 rules and almost 1,700 public comments across four federal agencies" and finding that business interests submitted over 57% of the comments); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128–29 (2011) (studying public participation at different stages during an EPA rulemaking life cycle and finding systematic evidence of imbalance in favor of regulated industry); Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENV'T L. REV. 175, 184 (2019) (noting evidence showing that business interests participate more consistently in the notice-and-comment process).

14 *See* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005); STEVEN J. BALLA, PUBLIC COMMENTING ON FEDERAL AGENCY REGULATIONS: RESEARCH ON CURRENT PRACTICES AND RECOMMENDATIONS TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 34–35 (2011).

15 *See* Mendelson, *supra* note 10, at 1358.

is not always readily available.[16] And agencies often use language to match the complex, highly technical matters they regulate, making the process inaccessible to non-experts.[17] At one time, it was hoped that the shift to electronic rulemaking would alleviate these and related problems.[18] Such hopes have given way to a more complicated reality.[19] Today, the federal rulemaking process is plagued by accusations of capture and a sense that the APA has failed to deliver on its democratic promises.[20]

Driving this narrative is a dominant understanding of the APA's notice-and-comment process as a tool for legitimating administrative rulemaking by holding agencies democratically accountable to the public.[21] Most federal law today is made by administrative agencies and not by Congress.[22] The difficulty

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16 *See, e.g.*, Cary Coglianese, *A Truly "Top Task": Rulemaking and Its Accessibility on Agency Websites*, 44 ENV'T L. REP. 10,660 (2014) (explaining how federal agency websites can be improved to make the rulemaking process more accessible).

17 Mandates for agencies to use plain language have had little success. *See* Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (codified at 5 U.S.C. § 301 note); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Cynthia R. Farina, Mary J. Newhart & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358 (2015).

18 *See, e.g.*, Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 279 (1998) (positively describing the Clinton administration's use of the internet to solicit public input during notice-and-comment rulemaking). *But see* Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 33, 35 (2005) (arguing that hopes for an electronic revolution in rulemaking were never realistic).

19 *See, e.g.*, Lauren Moxley, *E-Rulemaking and Democracy*, 68 ADMIN. L. REV. 661 (2016) (considering the preconditions and desirability of participatory versus epistemic democracy in the rulemaking process).

20 These concerns arise on both sides of rulemaking's democracy paradox. *See, e.g.*, Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010) (describing the phenomenon of "information capture," whereby expansive participation has made overstretched agencies vulnerable to excessive information costs). *But see* Gabriel Scheffler, *Failure to Capture: Why Business Does Not Control the Rulemaking Process*, 79 MD. L. REV. 700 (2020) (finding evidence that the outsized participation of business interests in the rulemaking process does not necessarily translate to outsized influence).

21 *See* 5 U.S.C. § 553; Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 369–71 (2019).

22 There are various ways to calculate, but each supports the basic conclusion that the administrative state, not Congress, is the modern locus of federal lawmaking. *See* Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 694–95 (2021).

is that administrative officials are not elected.[23] This produces a "democratic deficit" that feeds a seemingly persistent anxiety about the fundamental legitimacy of administrative policymaking.[24] The APA's informal rulemaking procedures offer a potential salve for this anxiety because, by offering the right for the public to participate, they offer "a novel democratic guarantee."[25] As Professor Nina Mendelson has explained, an agency's use of notice-and-comment rulemaking "can help us view the agency decision as democratic and thus essentially self-legitimating."[26] Perhaps it can, but it did not start out that way.

This Article argues that the prevailing, democracy-centered understanding of the APA's informal notice-and-comment procedure is egregiously incomplete. This Article is the first to delve into the APA's forgotten history and trace rulemaking's modern discontents back to the historical practices that inspired § 553.[27] In many areas, including rulemaking, the APA codified then-existing practices of federal agencies. Those practices were comprehensively studied by a special Committee on Administrative Procedure appointed by the Attorney General.[28] The study was contemporaneously viewed as the single most authoritative and comprehensive evaluation of federal administrative procedure.[29] It was a profound contribu-

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23 Of course, top agency positions are filled with political appointees, lending some measure of indirect democratic accountability. *Cf.* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 698–99, 701–02 (2020) (analyzing how the use of acting officials challenges traditional notions of the democratic accountability afforded by political appointees).

24 *See generally* David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611 (2012) (arguing that administrative reform efforts should focus on bolstering legitimacy through increased democratic accountability and citizen participation).

25 Moxley, *supra* note 19, at 666.

26 Mendelson, *supra* note 10, at 1343.

27 This Article focuses exclusively on the rulemaking *process* and not on the scope or nature of statutory grants of rulemaking *authority*. *See generally* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002); Kristin E. Hickman, *Foreword: Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079 (2021).

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

29 *See, e.g.*, Walter F. Dodd, Book Review, 88 U. PA. L. REV. 764, 765 (1940) (reviewing DEP'T OF JUST., ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE MONOGRAPHS NOS. I–II (1940)) ("These monographs . . . will present for the first time detailed studies of the various federal administrative agencies, with a critical analysis of their procedures."); Edward G. Jennings, Book Review, 25 MINN. L. REV. 123, 124 (1940) (reviewing DEP'T OF JUST., MONOGRAPHS OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1940)) ("I believe it can be

tion to administrative law, and it became a substantial part of the APA's legislative history.[30]

This Article revisits that work and shows that the "consultative" rulemaking process that inspired § 553 of the APA bears little resemblance to the democratic process to which modern administrative law aspires. At that time, as now, agencies did much of the work of drafting regulations internally. When agencies sought external consultation on a proposed rule, they did so by inviting comments from the regulated industry through its established interest groups. In some rulemakings, agencies intentionally avoided alerting the general public to proposed rules. Crucially, the Attorney General's Committee subjected these practices to no criticism, apparently accepting them as appropriate—even desirable—exercises of agency discretion. As originally conceived within administrative agencies, the consultative component of the rulemaking process was a method for bringing privately held expertise into the rulemaking process. Subsidiary benefits of the technique included generating buy-in for the regulations (which would later make enforcement easier) and providing protection (or at least the perception of protection) for the private interests affected by the regulations. The historical record reveals a consultative process that was neither intended nor designed to secure democratic legitimacy.

In crafting the APA's notice-and-comment procedures, however, Congress constructed public rights to transparency and participation atop the relatively undemocratic, expertise-focused foundation that had been established by pre-APA administrative practice. The APA's notice-and-comment procedures guarantee the public—and not just regulated industries or more narrowly "interested" parties—the opportunity to par-

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said without exaggeration that these studies . . . constitute the greatest single contribution that has been made to the literature of administrative law in this country.").

30 This Article is part of a larger, ongoing project to rediscover the APA's "intellectual foundation." *See generally* THE BREMER-KOVACS COLLECTION: HISTORIC DOCUMENTS RELATED TO THE ADMINISTRATIVE PROCEDURE ACT OF 1946 (HeinOnline 2021) (providing a comprehensive digital collection of the historic documents that shed light on the APA's meaning); Emily S. Bremer & Kathryn E. Kovacs, *Introduction to the Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946*, 106 MINN. L. REV. HEADNOTES 218 (2022) (offering an introduction to *The Bremer-Kovacs Collection* in order to help users understand the historical context and importance of the documents). For the adjudication counterpart to this Article, see Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021).

ticipate in agency rulemaking proceedings.[31] The legislative history also reveals that Congress expected that both agencies and courts would contribute to a process of liquidating the meaning of the minimal procedures established by the statutory text.[32] Agencies would contribute by using their considerable procedural discretion to interpret the APA's requirements and to offer additional procedures as needed in individual rulemakings. The additional procedures Congress contemplated are found in the historical record and are used to this day: advisory committees, targeted solicitation of privately held views, informal conferences, and quasi-legislative hearings. Congress anticipated that the courts would contribute to the statute's development through "independent judicial interpretation and application" of the APA's procedural requirements.[33]

Reflecting on the statute's structure in light of its undemocratic roots sheds new light on the modern pathologies of the notice-and-comment process. The historical perspective reveals that rulemaking's democratic deficit persists because the process was designed to support an expertise-based model of administration that embraced the influence of regulated interests on agency decision-making. At the same time, the practices that inspired § 553 were nascent, and Congress's compromise pushed the emerging process in a decidedly more democratic direction.[34] Moreover, the text is truly skeletal—and Congress intended that it would be fleshed out through post-enactment implementation and construction by both

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31 *See* 5 U.S.C. §§ 553(b)–(c). Although, as we shall see, the concept of "democracy" was invoked in the legislative history, the APA's drafters did not articulate any theory of what it means to say that the notice-and-comment process is "democratic." And so neither does this Article. The scholarly literature that has taken up this charge is voluminous, sophisticated, and continually evolving. *See, e.g.*, Daniel Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 16–34 (2022) (offering a "brief history" of democratic theory in administrative law). It is also beyond the scope of this Article.

32 I'm borrowing the concept of "liquidation" from the scholarly literature in constitutional law. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). The idea is that the meaning of an indeterminate text (here, the APA) can become settled (not altered, but fleshed out and made more determinate) over time through a course of deliberate practice. In rulemaking, the course of deliberate practice would include agency practice in conducting rulemakings, judicial precedent on review of rulemakings, and political branch decisions that have ratified and built upon the increasingly settled meaning of the APA's minimal text.

33 H.R. REP. NO. 79-1980, at 278 (1946).

34 *See generally* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (examining the history of the APA).

agencies and courts. As rulemaking emerged in the 1960s and 70s as the dominant tool of agency policymaking[35]—and Congress tasked agencies with greater policymaking responsibility[36]—scholars, courts, and agencies have rightly sought to expand the democratic function of the notice-and-comment process. It bears remembering, however, that § 553 was first and foremost intended to serve the informational needs of expert agencies and offer some protection to the private interests that are affected by agency rulemaking. What modern administrative law increasingly views as pathologies in the rulemaking process are more properly understood as tensions among the various purposes that § 553 was designed to serve.

This Article proceeds in three parts. Part I explains the APA's procedural requirements for informal notice-and-comment rulemaking. It describes how the minimal text of § 553 of the APA has been fleshed out by the courts through what is typically characterized (and often maligned) as "administrative common law."[37] Over time, administrative law has come to understand § 553 primarily as a tool for ensuring democratic participation and accountability in the rulemaking process. This has given rise to doubt about whether the APA can fulfill its democratic promises. Part II delves into the APA's intellectual foundation and legislative history with the goal of determining the purposes and limitations of the notice-and-comment process. It finds that the pre-APA practices that inspired § 553 were not concerned with democracy or democratic accountability. But in codifying the nascent "consultative" component of pre-APA administrative practice, Congress imbued the statute with some democratic aspirations. Part III explores the implications of the historical analysis for modern rulemaking's democracy paradox. It argues that § 553 serves multifarious purposes that are sometimes in tension with each

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35 *See generally* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139 (2001) (chronicling the rise of informal rulemaking and the corresponding rise in judicial scrutiny).

36 *See* Cass, *supra* note 22; Jerry Mashaw, *The Rise of Reason Giving in American Administrative Law*, *in* COMPARATIVE ADMINISTRATIVE LAW 268, 277–79 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2019).

37 This type of "administrative common law" is "common law created by courts about the administrative process." Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 3. The dominant view is that there is much administrative common law in rulemaking that goes beyond or is inconsistent with the APA's text. *See, e.g.*, Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134 (2019) (arguing that a textualist reading of the APA cautions against overburdening federal agencies with procedural requirements).

other. But it was also designed to operate as a flexible, dynamic framework capable of adaptation to evolving circumstances. This sheds new light on the "pathologies" of the rulemaking process and offers renewed hope that they can be managed successfully.

I
INFORMAL RULEMAKING AND ITS MODERN DISCONTENTS

For the past half-century, administrative law has embraced rulemaking (over adjudication) as the preferred mechanism for agency policymaking.[38] More particularly, administrative law prefers *informal* rulemaking, which is conducted according to the APA's notice-and-comment procedures.[39] The APA's short text has been fleshed out by judicial precedent and supplemented by procedures crafted by agencies through the exercise of their substantial procedural discretion. At the heart of this regime lies a democracy-oriented understanding of the APA's notice-and-comment provisions. As the regime has matured, however, serious doubts have arisen about whether the APA can fulfill its democratic promises. This Part explains this background to set the stage for evaluating a crucial question: Did the APA promise democracy?

A. The APA's Procedures

The APA divides all agency action into two categories: rulemaking and adjudication. Each of these is defined according to its output: adjudication is the process through which an agency produces an "order;"[40] rulemaking is the process through which an agency produces a "rule."[41] The APA's definition of "rule" anchors this entire structure because "order" is defined to include "the whole or a part of a final disposition . . . in a matter *other than rule making* but including licens-

38 Agencies generally have the discretion to choose between rulemaking and adjudication. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); *see also* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

39 *See* 5 U.S.C. § 553.

40 *See* 5 U.S.C. §§ 551(6)–(7).

41 *See* 5 U.S.C. §§ 551(4)–(5).

ing."[42] The result is that adjudication operates as a catch-all category.

The APA contemplates two procedural modes for rulemaking: formal and informal.[43] Formal rulemaking, which is rarely used today, entails a full "formal" or quasi-judicial hearing conducted using the procedures specified in §§ 556 and 557 of the APA. Informal rulemaking is conducted using the "informal" or "notice-and-comment" procedures specified in § 553. Today, formal rulemaking is so rarely used that it has been described as "the Yeti of administrative law."[44] The consequence is that nearly all rules are developed using § 553's notice-and-comment procedures. These procedures have become synonymous with "rulemaking."[45]

The APA's procedural requirements for informal rulemaking are minimal, even "skeletal."[46] The agency must publish a notice of proposed rulemaking (NPRM), consider comments from "interested persons," and publish a final rule accompanied by a brief explanation of its "basis and purpose." The full text of these requirements is not much more detailed than that—it spans only 143 words:

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42 5 U.S.C. § 551(6) (emphasis added).

43 I have argued elsewhere that this modes-based understanding, which is sound as applied to rulemaking, is wrong as applied to adjudication. *See* Bremer, *supra* note 30.

44 Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 128 n.5 (2015) (Thomas, J., concurring in the judgment); *see* Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 1–5 (2017); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 238–42 (2014).

45 *See* Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1362–66 (2019).

46 *See* Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in* Vermont Yankee*'s White Space*, 32 J. LAND USE & ENV'T L. 523, 533 (2017); Magill, *supra* note 38, at 1439; Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 264; Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 13 (2009); Peter L. Strauss, *Statutes That Are Not Static—The Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767, 788 (2005).

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
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> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.[47]

The reality of modern rulemaking is more complex than this brief statutory text suggests, in part because rulemaking has become more common and important than it was at the time the APA was enacted. Seventy-five years ago, adjudication was the principal tool agencies used to implement statutes. Most agency policymaking was incremental: accomplished over time through individual adjudications. This changed in the 1960s and 70s, when administrative law embraced rulemaking as the preferred type of agency action. Two developments during this period contributed to the shift. First, Congress created a host of new agencies charged with various responsibilities for promoting public health and safety. The statutes that created these agencies contemplated expanded quasi-legislative activities and granted broad rulemaking responsibilities to the newly created entities.[48] Second, the courts (especially the D.C. Circuit) and scholars pushed agencies to make policy through rulemaking instead of through adjudication.[49]

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47 5 U.S.C. § 553(b)–(c). Section 553(c) uses an additional thirty words to identify the circumstances in which agencies must use the APA's formal hearing procedures. Section 553(b) uses sixty-nine additional words to identify rules that are exempt even from informal procedural requirements.

48 Early agencies were viewed as "transmission belts" for carrying into the real-world Congress's relatively detailed instructions. The new health and safety agencies, by contrast, were tasked with making rules to fulfill more broadly articulated congressional goals and policies. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001).

49 *See* Schiller, *supra* note 35.

As agency policymaking shifted from adjudication to rulemaking, administrative law embraced § 553 as the foundation of the rulemaking process.[50] A long-simmering dislike of formal administrative proceedings (i.e., quasi-judicial hearings) became sufficiently widespread in the mid- to late-20th century to crystallize into a preference for informal procedures. This was spurred on by several instances in which mandates to use formal rulemaking procedures impeded (or apparently impeded) an agency's ability to complete a high-profile regulatory proceeding.[51] At the same time, capture theory became dominant.[52] The APA was predicated on a belief that administrative agencies could make unbiased, non-political, expert policy judgments. That faith was fading by the 1950s and was widely lost by the 1960s and 70s. It was replaced by capture theory. And administrative law turned to procedural requirements as a means of preventing agencies from becoming captured by industry.

The result is a procedural equilibrium held taut by contradictory impulses. Informal rulemaking under § 553 became the preferred tool of agency statutory implementation. But its requirements are too skeletal to support meaningful judicial review and ward against capture, so they have been fleshed out with a robust body of administrative common law.[53] In its landmark decision in *Vermont Yankee*, however, the Supreme Court defined the outer limit for administrative common law: courts cannot require agencies to use the despised formal procedures in informal rulemaking.[54]

B. Administrative Common Law

Today, informal rulemaking is more complex than the plain text of § 553 suggests: judicial precedent supplies much additional detail. Proposed rules must identify with reasonable

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50 *See* Bremer, *supra* note 45, at 1362–66.

51 Notorious examples include the FDA's peanut butter rule, as well as FTC and OSHA proceedings that were inhibited by Congress's imposition of hybrid rulemaking requirements (i.e., tailored statutes that imposed certain formal hearing requirements on top of ordinary notice-and-comment procedures). *See, e.g.*, Nielson, *supra* note 44, at 247–50 (describing the FDA's "infamous" peanut butter incident which took the FDA more than 10 years to decide whether peanut butter should be ninety- or eighty-seven percent peanuts).

52 *See generally* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (detailing the emergence of capture theory in the mid- to late-twentieth century).

53 Some decry this development. *See* Bagley, *supra* note 21; Kovacs, *supra* note 37, at 142.

54 Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 525 (1978).

specificity the range of regulatory alternatives the agency will consider, explain why the agency is proposing those alternatives, and include all central elements of the proposal. In addition, the agency must make available to the public all data and information upon which it will rely in the rulemaking.[55] This includes any information that is necessary to enable interested persons to comment effectively on the proposed rule.[56] If significant new information becomes available during the comment period, the agency may be required to publish the information and extend or restart the comment period in order to give interested persons an opportunity to comment on the development.[57] The final rule must be a "logical outgrowth" of the proposed rule.[58] In its "concise statement of basis and purpose," which is often referred to as the "preamble," the agency must respond to all significant comments submitted during the comment period.[59]

This administrative common law is controversial.[60] Some argue courts have overstepped their bounds by imposing notice-and-comment rulemaking procedural requirements that are not explicit in § 553's brief text.[61] In 1978, the Supreme Court held in *Vermont Yankee* that courts may not impose additional procedures on administrative agencies beyond those Congress has required by statute.[62] This admonition put a hard stop to the lower courts' efforts to graft formal procedures—by which I mean the specific, quasi-judicial procedures contained in the APA's hearing provisions—onto § 553's infor-

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55 *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973); Conn. Light & Power Co. v. NRC, 673 F.2d 525, 530–31 (D.C. Cir. 1982).

56 *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008).

57 *See* MCI Telecomms. Corp. v. FCC, 57 F.3d 1136, 1140–41 (D.C. Cir. 1995).

58 Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1373 (Fed. Cir. 2017).

59 La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003). The agency may respond to a comment with new material without first giving notice of the material. *See* Rybachek v. EPA, 904 F.2d 1276, 1286 (9th Cir. 1990).

60 *See* Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011); Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1244–48, 1261–69 (2014); Davis, *supra* note 37; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015); Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

61 *See* Kovacs, *supra* note 60, at 1217.

62 As I discuss in further detail in the next section, *Vermont Yankee* expressly stated that *agencies* are not so limited as courts. Agencies have the discretion to observe additional procedures beyond those required by statute.

mal rulemaking process.[63] Otherwise, the practice of fleshing out § 553's skeletal structure has continued unabated. Many view this as a violation of the spirit, if not the letter, of *Vermont Yankee*. They have waited (so far in vain) for *Vermont Yankee II*.[64]

The justification for administrative common law is that it is necessary to give full effect to the APA's procedural requirements and to facilitate judicial review. A few examples will suffice to make the point. Section 553's plain text requires agencies to "give interested persons an opportunity to participate in the rule making."[65] If the agency does not show its hand early—by providing sufficient information about its proposal and the data and information expected to influence the agency's decision—the "opportunity to participate" will be illusory. When a final rule is not a logical outgrowth of the agency's proposed rule, the agency has failed to afford a meaningful "opportunity to participate" in the decision-making process, for there is no utility in commenting on a proposal that bears no resemblance to the final rule. The APA directs courts to "hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law."[66] The APA's procedural requirements direct agencies to "consider[ ] the relevant matter presented" by comments submitted in response to a notice of proposed rulemaking.[67] How can courts tell whether an agency has complied with this requirement unless the agency shows its work? Thus, courts have held that an agency must respond to comments in the preamble to the final rule. The critics are surely right that many preambles today are extremely long.[68] Is that because administrative common law has stretched too far beyond § 553's requirement that the agency supply "a concise general statement of [a final

63 *See* 5 U.S.C. §§ 556–557. Examples of quasi-judicial procedures include oral hearings, cross-examination, and restrictions on ex parte communications.

64 *See, e.g.*, Richard J. Pierce, Jr., *Waiting for* Vermont Yankee II, 57 ADMIN. L. REV. 669, 670 (2005); Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418, 419–21 (1981).

65 5 U.S.C. § 553(c).

66 5 U.S.C. § 706(2)(D).

67 5 U.S.C. § 553(c).

68 For example, in a recent informal rulemaking, Policy Amendments to New Source Performance Standards, 40 C.F.R. pt. 60 subpart OOOOa, the EPA received 297,253 comments. 2,640 of the comments were docketed. The EPAs' response documents included a total of 638 pages. *See* Response to Public Comments on Proposed Rule, EPA-HQ-OAR-2017-0757-2718. The agency summarized this voluminous response in a twenty-three page document published in the *Federal Register*. *See* New Source Performance Standards, 85 Fed. Reg. 57018, 57043–65 (Sept. 14, 2020).

rule's] basis and purpose"?[69] Or are lengthy preambles the natural result of the increased extent and complexity of federal regulation? If the subject matter is complex, the alternatives multitudinous, and the policy choices deeply divisive, even a "concise general of basis and purpose" will be lengthy.

There is a broad literature debating these justifications and effects, and it ranges beyond § 553's procedural requirements. My goal here is not to thoroughly summarize or participate in the debate, but to give a general sense of its contours. I'm also focusing on the debate as it relates specifically to the plain text of § 553, but I'm doing that because § 553 is this Article's subject, and not because the debate over administrative common law is so limited. To be sure, courts are concerned with ensuring agency compliance with § 553. But courts are also concerned with reviewing the agencies' substantive decisions. Do those decisions comply with statutory mandates? Are they supported by adequate reasons? To answer these and like questions—as required by the APA's judicial review provisions—courts must have access to an adequate administrative record.[70] In informal rulemaking, that record is compiled through the process defined by § 553.[71] Efforts to ensure an adequate record necessarily have upstream consequences for § 553's implementation. There is also a more basic reality: when courts decide cases, they make precedent. Even if courts pay careful attention to the limits imposed upon them by statutes, the judicial process leaves a substantial body of law in its wake.[72] We can reasonably debate its content, but judicial review makes the existence of administrative common law inevitable.[73]

Agencies also contribute to the development of notice-and-comment procedures by implementing § 553 and embellishing upon it through the exercise of their considerable procedural discretion. Although agencies must comply with the minimum requirements established by the APA, the Supreme Court has long recognized "that the formulation of procedures [i]s basi-

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69 5 U.S.C. § 553(c).

70 5 U.S.C. § 706.

71 *See generally* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013) (recommending best practices for compiling the administrative record in informal rulemaking proceedings conducted under § 553).

72 For a classic examination of the effect of statutes on the judicial-legislative balance, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

73 Similarly, a legally enforceable constitution makes constitutional common law inevitable. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012).

cally to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments."[74] In rulemaking, agencies are thus permitted—and sometimes even encouraged[75]—to innovate and develop new procedures in addition to the minimum requirements imposed by law.[76] Unsurprisingly, agency innovation is most common and robust during the parts of the process least regulated by the APA and its attendant administrative common law. Thus, where the APA's good cause exception suspends the notice-and-comment requirements, the practice of direct final rulemaking has evolved.[77] In proceedings subject to notice-and-comment requirements, agency procedural innovation is most robust in the spaces left open by the statute's requirements, such as in the time before an NPRM is issued.[78] In this space, various procedural devices not contemplated by the APA have emerged, including negotiated rulemaking,[79] public workshops and listening sessions, and various species of pre-NPRM requests for written comments or other public engagement.[80]

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74 Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524–25 (1978) (citing FCC v. Schreiber, 381 U.S. 279, 290 (1965)).

75 Much of the work of the Administrative Conference consists of recommendations for agencies to develop and use procedures beyond the minimum in informal rulemaking. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48789 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29653, 29654 (July 19, 1976).

76 Bremer & Jacobs, *supra* note 46, at 527–31. *See generally* RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY (2019) (empirically evaluating how agencies use procedural flexibility in rulemaking to evade political control). Not all agency rules are subject to § 553's procedural requirements, and a substantial portion of agency rules are issued without notice and comment. *See* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 101, 104–05 (2015); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8 (2012) (reporting that, from 2003 to 2010, "agencies published about 35 percent of major rules and about 44 percent of nonmajor rules without an NPRM").

77 *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995); Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43108, 43110 (Aug. 18, 1995). *But see* Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 403 (1999) ("Direct final rulemaking represents one of the responses to rising frustration with the inefficiencies associated with informal rulemaking.").

78 *See* Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269, 76271 (Dec. 17, 2013).

79 *See* Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31039, 31040–42 (July 5, 2017).

80 These include the Advance Notice of Proposed Rulemaking (ANPRM) and Notice of Inquiry (NOI). Although agency procedural discretion is narrower once

These are all products of agency innovation, which is structured and informed by § 553 and its attendant administrative common law.

C. Rulemaking's Unfulfilled Promises

As courts and agencies have implemented § 553, administrative law has developed a democratic theory of the notice-and-comment process. In implementing § 553, both courts and agencies have sought to design procedures with the goal of ensuring meaningful public participation in the agency's decision-making. This approach recognizes a public right to participate in administrative policymaking.[81] It also embraces notice-and-comment as a means of holding unelected bureaucrats accountable to the public for their decisions. At the same time, it is often said that "rulemaking is not a plebiscite."[82] This is an upstream consequence of agency expertise and authority—it means the public has the right to participate, but not the right to decide. Despite this qualification, however, the law aspires to promote a process that will improve regulation through public participation and confer democratic legitimacy on both the resulting rules and the administrative agencies.

In its initial, paper-based incarnation, rulemaking was a relatively closed, non-dialogic process. Comments were submitted to the agency through the mail and added to a physical docket—a paper file—maintained at the agency's headquarters. The docket was public. But accessing it required traveling to DC, visiting the agency's headquarters, and reading the submitted comments in person. Practically speaking, participation was limited.[83] Most comments were submitted by industry, through whatever white-shoe law firms had been hired to represent its interests. Comments were often submitted close to or on the deadline, responding only to the agency's proposed rule and not to other comments filed in the docket. In theory, the process was public; in reality, it was closed to all

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the comment period has commenced, there is empirical evidence that agencies use what flexibility is available to promote the likelihood of successfully completing desired rulemakings. *See generally* POTTER, *supra* note 76.

81 "Interested person" has been defined broadly, to include any person or entity that expresses interest in the proceeding. *See* 5 U.S.C. § 553(c). The right to participate thus extends beyond regulated parties and third-party beneficiaries of the regulatory scheme.

82 A recent ACUS recommendation drew three separate statements from ACUS members—all three agreed on this point. *See* Recommendation 2021-1, *supra* note 2.

83 *See* Coglianese, *supra* note 18, at 36–39.

but the most knowledgeable, connected, and well-funded participants.

The shift to an Internet- and digital-based process brought with it renewed hope that rulemaking would fulfill its democratic promises.[84] Rulemaking comments could now be submitted electronically and posted in online dockets. The federal government created the Federal Docket Management System (FDMS), a centralized electronic docket tool for agencies to use,[85] as well as a public-facing website, Regulations.gov, which allows anyone with a computer to access and read submitted comments. The *Federal Register* moved online[86] and each individual agency created a website through which the public can access information about agency activities, including rulemaking.[87] Some agencies experimented with using social media[88] or third-party facilitators[89] to encourage broader participation and a more robust dialogue.

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84 *See, e.g.*, Dooling, *supra* note 11, at 894–95 (describing how e-Rulemaking could be used to "promote public awareness of and participation in regulatory proceedings"); Coglianese, *supra* note 13, at 945 ("Reformers promise great things from the application of new information technology to the regulatory process—chief among them being the ability to expand public participation in rulemaking."); Cynthia R. Farina, Mary Newhart & Josiah Heidt, Cornell eRulemaking Initiative, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENV'T & ADMIN. L. 123, 123 (2012) (describing the ways that technology can enhance efforts to increase public participation in rulemaking); Johnson, *supra* note 18, at 279 (explaining that technology can bring "agency 'shadow law' into the light of day"); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 433 (2004) (stating that the democratic value underlying the incorporation of technology in administrative rulemaking depends on if it is used to strengthen citizen participation in the rulemaking process).

85 Executive agencies are required to use FDMS. *See* Dooling, *supra* note 11, at 896. Independent agencies can maintain their own docket systems. *See, e.g.*, *Electronic Comment Filing System*, FCC, https://www.fcc.gov/ecfs/ [https://perma.cc/Z8FS-VNTH] (last visited Aug. 2, 2022) (serving as the FCC's docket system).

86 *See Federal Register: The Daily Journal of the United States*, NAT'L ARCHIVES, https://www.federalregister.gov [https://perma.cc/YH8Y-5A62] (last visited Aug. 2, 2022).

87 *See* Coglianese, *supra* note 16, at 10,661; Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENV'T & ADMIN. L. 1, 12 (2012); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2257, 2264–65 (Jan. 17, 2012).

88 MICHAEL HERZ, USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS (2013), https://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf [https://perma.cc/SQD2-9F8F]; Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269, 76269 (Dec. 17, 2013).

89 Despite some promising efforts, this technique has not been broadly adopted. *See* Mary J. Newhart & Joshua D. Brooks, *Barriers to Participatory eRulemaking Platform Adoption: Lessons Learned from RegulationRoom*, CORNELL

Despite the advantages of the electronic process, rulemaking still struggles to live up to its democratic promises.[90] Most proposed rules generate few, if any, comments. The occasional high-profile rulemaking generates an avalanche of public comments. These comments tend to be extremely short and largely non-substantive, expressing only an opinion as to what the agency should do but offering no reasons, data, or argument. These mass comments are often the result of interest group fundraising campaigns, and the comments submitted are identical or nearly identical.[91] Today, it remains true that the most detailed, well-written, and useful comments tend to be submitted by industry groups represented by white-shoe law firms. Agencies and public interest advocates continue their efforts to bring ordinary citizens and traditionally unrepresented voices into the rulemaking process.[92]

The democracy-centered approach to the notice-and-comment *process*, however, is in tension with the expertise-focused model that governs the *product* of rulemaking—the final rule (sometimes referred to as the "regulation"). From this output-based perspective, the law recognizes that Congress has granted the agency the legal authority to make the requisite policy decisions and promulgate the regulation. This institutional choice is motivated by—and creates the conditions precedent for—the agency's special capacity for making expert decisions. As a result, courts defer to agency rules that are within the boundaries established by the statute[93] and give significant weight to determinations that reflect an agency's special competence and experience.[94] These legal consequences of agency expertise are concentrated post-promulgation, although the theory may also have upstream effects on rulemaking procedures. Most notably, the expertise theory provides a compelling justification for the principle that agency

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ERULEMAKING INITIATIVE PUBL'NS (2017), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1018&contextcgri [https://perma.cc/NZ3J-2ARM].

90 *See, e.g.*, Steven J. Balla & Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 REGUL. & GOVERNANCE 46 (2007) (analyzing the effects of the transition from a paper-based to an electronic rulemaking process and concluding that "contrary to expectations held by many researchers and practitioners, the overall levels and patterns of stakeholder behavior showed a remarkable degree of similarity across the two periods").

91 *See* ACUS Mass Comments Report, *supra* note 1, at 121–22.

92 *See* Memorandum of January 20, 2021, Modernizing Regulatory Review, 86 Fed. Reg. 7,223 (Jan. 26, 2021).

93 *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

94 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

rulemaking decisions may be based on information beyond what is contained in the rulemaking record. The law expects agencies to make expert judgments that are not and cannot be distilled to any record.

There is tension between the APA's promise of democracy in rulemaking and administrative law's broader affirmation of agency authority to make expert judgments. This tension manifests in the most difficult questions about how to implement § 553 and manage the rulemaking process. And it emerges on both sides of rulemaking's democracy paradox.[95] First, on the "too much democracy" side of the paradox, if a high volume of comments makes it harder for an agency to do its job, can the agency take steps to limit the comments or dissuade people from participating in the rulemaking? To do so may further the agency's ability to make a sound, expert judgment, but it may also suggest that the agency does not value public comment. Similarly, if an agency receives a high number of non-substantive comments—votes, in essence—how should it incorporate that feedback into its decision-making? All seem to agree that "rulemaking is not a plebiscite," but does that mean that an agency is justified in setting aside or ignoring vote-type expressions of viewpoint? Second, moving to the "too little democracy" side of the paradox, what can (or should) an agency do to encourage or facilitate participation by people whose interests have traditionally been underrepresented in the rulemaking process? Should (or must?) agencies use scarce resources to facilitate expanded participation, such as by hiring a third-party facilitator, holding listening sessions or workshops around the country, or convening focus groups? Does such outreach suggest a commitment to acting on the information received? If so, does that undermine the agency's authority to make an expert decision? And should we be concerned that agency outreach might be designed, consciously or unconsciously, to manipulate the feedback to support the agency's preferred outcome?

Underlying these contentious issues are fundamental questions: Did the APA promise democracy? Was § 553 designed *only* to protect a public right to participation, thereby ensuring democratic accountability in agency rulemaking? If so, does that public right restrict an agency's authority to manage the rulemaking process in service of other values, such as expertise? These are questions best evaluated in historical per-

95 *See supra* notes 1–20 and accompanying text.

spective by delving into the APA's intellectual foundation and legislative history.

II
RULEMAKING'S UNDEMOCRATIC ROOTS

This Part examines the pre-APA notice-and-comment (or "consultative") process as it emerges in the research that informed the APA. It begins by describing that research and its importance in the legislative process that culminated in the APA's adoption. Compared to adjudication, rulemaking was less common, important, and controversial during the pre-APA period. For these and other reasons, rulemaking procedures were in a nascent period of development. The process was relatively ad hoc, with much of it wholly internal to each agency. Nonetheless, external consultation was emerging as a common practice across agencies. Legislative-type hearings modeled after congressional committee proceedings were also used, either to satisfy statutory hearing requirements or as a matter of agency procedural discretion. These were viewed as inefficient and poorly tailored to the nature and needs of administrative rulemaking. Informal consultation with the representatives of organized industry or interest groups—through conferences, correspondence, or other written comments—was viewed as substantially more useful to the agency. It is easy to identify § 553's roots in the pre-APA practices that informed the statute, although Congress put its own distinctive mark on the procedure. This Part accordingly concludes by examining the legislative history to evaluate how and why Congress deviated from pre-APA practices when it codified the consultative process in the form of § 553's notice-and-comment requirements.

A. The APA's Historical Foundation

A significant input into the congressional process that produced the APA was an expansive study of pre-APA administrative procedures conducted by the Attorney General's Committee on Administrative Procedure.[96] Convened in 1939 at President Roosevelt's request, the Committee conducted a detailed "scientific" study of the actual procedures and practices of existing federal agencies. Supported by a staff of attorney-investigators, the Committee produced twenty-seven

96 *See generally* Bremer, *supra* note 30, at 396–402; Grisinger, *supra* note 28, at 380–81.

monographs examining individual agencies and regulatory fields, including:

1. Division of Public Contracts, Department of Labor, the Walsh-Healey Act.[97]
2. Veterans' Administration (VA).[98]
3. Federal Communications Commission (FCC).[99]
4. United States Maritime Commission.[100]
5. Federal Alcohol Administration.[101]
6. Federal Trade Commission (FTC).[102]
7. Administration of the Grain Standards Act, Department of Agriculture (USDA).[103]
8. Railroad Retirement Board (RRB).[104]
9. Federal Reserve System (The Fed).[105]
10. Department of Commerce, Bureau of Marine Inspection and Navigation.[106]
11. Administration of the Packers and Stockyards Act, USDA.[107]
12. Post Office Department.[108]
13. Federal Control of Banking, Comptroller of the Currency and Federal Deposit Insurance Corporation.[109]
14. Administration of the Fair Labor Standards Act of 1938, Wage and Hour Division, Children's Bureau.[110]
15. War Department.[111]
16. Social Security Board (SSB).[112]
17. Railway Labor, the National Railroad Adjustment Board, the National Mediation Board.[113]

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97 S. DOC. NO. 76-186, pt. 1 (1940) [hereinafter MONOGRAPH 1 (PUBLIC CONTRACTS)]. The monographs were published in two sets numbered 1–13 (in 1940) and 1–14 (in 1941). For purposes of clarity, this Article will refer to the monographs by the numbers 1–27. All are available as part of THE BREMER-KOVACS COLLECTION, *supra* note 30.

98 S. DOC. NO. 76-186, pt. 2 (1940) [hereinafter MONOGRAPH 2 (VA)].

99 S. DOC. NO. 76-186, pt. 3 (1940) [hereinafter MONOGRAPH 3 (FCC)].

100 S. DOC. NO. 76-186, pt. 4 (1940) [hereinafter MONOGRAPH 4 (MARITIME COMM'N)].

101 S. DOC. NO. 76-186, pt. 5 (1940) [hereinafter MONOGRAPH 5 (ALCOHOL)].

102 S. DOC. NO. 76-186, pt. 6 (1940) [hereinafter MONOGRAPH 6 (FTC)].

103 S. DOC. NO. 76-186, pt. 7 (1940) [hereinafter MONOGRAPH 7 (USDA GRAIN)].

104 S. DOC. NO. 76-186, pt. 8 (1940) [hereinafter MONOGRAPH 8 (RRB)].

105 S. DOC. NO. 76-186, pt. 9 (1940) [hereinafter MONOGRAPH 9 (THE FED)].

106 S. DOC. NO. 76-186, pt. 10 (1940) [hereinafter MONOGRAPH 10 (COMMERCE MARINE)].

107 S. DOC. NO. 76-186, pt. 11 (1940) [hereinafter MONOGRAPH 11 (USDA STOCKYARDS)].

108 S. DOC. NO. 76-186, pt. 12 (1940) [hereinafter MONOGRAPH 12 (POST OFFICE)].

109 S. DOC. NO. 76-186, pt. 13 (1940) [hereinafter MONOGRAPH 13 (BANKING)].

110 S. DOC. NO. 77-10, pt. 1 (1941) [hereinafter MONOGRAPH 14 (FAIR LABOR)].

111 S. DOC. NO. 77-10, pt. 2 (1941) [hereinafter MONOGRAPH 15 (WAR)].

112 S. DOC. NO. 77-10, pt. 3 (1941) [hereinafter MONOGRAPH 16 (SSB)].

113 S. DOC. NO. 77-10, pt. 4 (1941) [hereinafter MONOGRAPH 17 (RAILWAY LABOR)].

18. National Labor Relations Board (NLRB).[114]
19. Civil Aeronautics Authority.[115]
20. Department of the Interior.[116]
21. United States Employees' Compensation Commission (ECC).[117]
22. Administration of Internal Revenue Laws, Bureau of Internal Revenue, Board of Tax Appeals, Processing Tax Board of Review.[118]
23. Bituminous Coal Division, Department of the Interior.[119]
24. Interstate Commerce Commission (ICC).[120]
25. Federal Power Commission (FPC).[121]
26. Securities and Exchange Commission (SEC).[122]
27. Administration of the Customs Laws, United States Tariff Commission, Bureau of Customs.[123]

These twenty-seven monographs informed a 474-page Final Report to Congress that included minority views and competing proposals for legislative reform of the administrative process.[124] All together, these documents provided the APA's "intellectual foundation."[125] The Committee's members unanimously relied upon the monographs' research. There does not appear to have been any dispute between the Committee's majority and minority about the facts on the ground. The disagreement was predominately normative, involving the question of *how much* Congress should do to regulate administrative procedure.[126] The majority thought that cross-agency generalizations were difficult and dangerous to make, and accordingly it recommended Congress impose fewer uniform procedural requirements. In contrast, the minority believed more general-

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114 S. DOC. NO. 77-10, pt. 5 (1941) [hereinafter MONOGRAPH 18 (NLRB)].

115 S. DOC. NO. 77-10, pt. 6 (1941) [hereinafter MONOGRAPH 19 (AERONAUTICS)].

116 S. DOC. NO. 77-10, pt. 7 (1941) [hereinafter MONOGRAPH 20 (INTERIOR)].

117 S. DOC. NO. 77-10, pt. 8 (1941) [hereinafter MONOGRAPH 21 (ECC)].

118 S. DOC. NO. 77-10, pt. 9 (1941) [hereinafter MONOGRAPH 22 (INTERNAL REVENUE)].

119 S. DOC. NO. 77-10, pt. 10 (1941) [hereinafter MONOGRAPH 23 (BITUMINOUS COAL)].

120 S. DOC. NO. 77-10, pt. 11 (1941) [hereinafter MONOGRAPH 24 (ICC)].

121 S. DOC. NO. 77-10, pt. 12 (1941) [hereinafter MONOGRAPH 25 (FPC)].

122 S. DOC. NO. 77-10, pt. 13 (1941) [hereinafter MONOGRAPH 26 (SEC)].

123 S. DOC. NO. 77-10, pt. 14 (1941) [hereinafter MONOGRAPH 27 (CUSTOMS)].

124 *See* ROBERT H. JACKSON, OFF. OF THE ATT'Y GEN., FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) [hereinafter FINAL REPORT]; *supra* notes 98–124 and accompanying text.

125 K. C. Davis, Walter Gellhorn & Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 513–14 (1986) [hereinafter *Present at the Creation*].

126 *See, e.g.*, FINAL REPORT, *supra* note 124, at 203–04 (providing the additional views and recommendations of Messrs. McFarland, Stason, and Vanderbilt).

izations could be made, and it favored more extensive regulation of administrative procedure.[127] This central division is evident in the Committee's competing proposals for legislative reform: the majority's proposals were modest compared to the minority's comprehensive "Code of Fair Standards of Administrative Procedure."[128]

Interestingly, "the majority completely missed th[e] vital idea" of notice-and-comment.[129] This centerpiece of what ultimately became § 553[130] was recommended by the Committee's minority.[131] In a later panel discussion celebrating the APA's 50th anniversary, Kenneth Culp Davis (one of the attorney-investigators that had supported the Committee) remarked that notice-and-comment rulemaking "has proved to be a truly great idea. Maybe everyone here thinks that the idea is so obvious that it could not have been a great idea, but that is contrary to fact. *Maybe most truly great ideas are obvious after they have been developed.*"[132] He further admitted that "[i]t wasn't until 1970 that I began saying that it was one of the great inventions of modern government."[133]

> [T]he birth of the idea of notice and comment rulemaking occurred in the minority report in Section 207 of the minority's code: "Wherever practicable and useful in the judgment of the agency, tentative rules or proposed amendments or rescissions shall be issued sufficiently in advance of their effective date to permit comment, the submission and consideration or oral or written criticism or argument, and the revision or suspension prior to the designated effective date."[134]

As the remainder of this Part will show, the minority's proposal emerges clearly from the Committee's research. And yet the minority's proposal changed somewhat significantly during the legislative process.[135] The rulemaking requirements Congress actually adopted are in some ways more demanding—and in

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127 The familiar debate over whether procedural reform will be beneficial or unduly hampering was strongly evident here, as it was in the broader discourse surrounding the APA's adoption. *See* Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 90 (2008).

128 *See* FINAL REPORT, *supra* note 124, at 217–47.

129 *Present at the Creation*, *supra* note 125, at 520.

130 In the APA as enacted in 1946, the rulemaking procedures were contained in § 4. In 1966, Congress repealed the 1946 statute and codified the U.S. Code version of the law. What was originally § 4 became § 553.

131 *Present at the Creation*, *supra* note 125, at 520.

132 *Id.* (emphasis in original).

133 *Id.*

134 *Id.* (quoting FINAL REPORT, *supra* note 124, at 227–28).

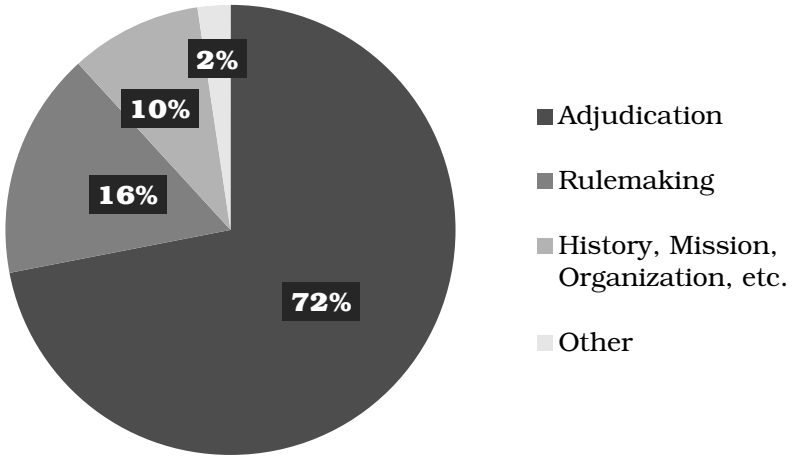
135 *See supra* subpart I.A.

some ways less demanding—than what the minority proposed. And compared to the underlying administrative practices that inspired notice-and-comment rulemaking, Congress seems to have imbued the statute with greater concern for transparency and the general public's interest in the administrative process.

B. Nascent Procedure

The Attorney General's Committee devoted most of its attention to adjudication, which at the time was more common, important, and procedurally sophisticated than rulemaking. Most of the monographs discuss adjudication in detail and at length but devote only a page or two to rulemaking.[136] Of the total 1,365 pages of analysis contained in the Committee's twenty-seven monographs,[137] only 222 pages examine rulemaking. Here is a visual representation of the universe of agency action as it emerges in the monographs:

FIGURE 1. TOTAL PAGES IN THE MONOGRAPHS DEVOTED TO:



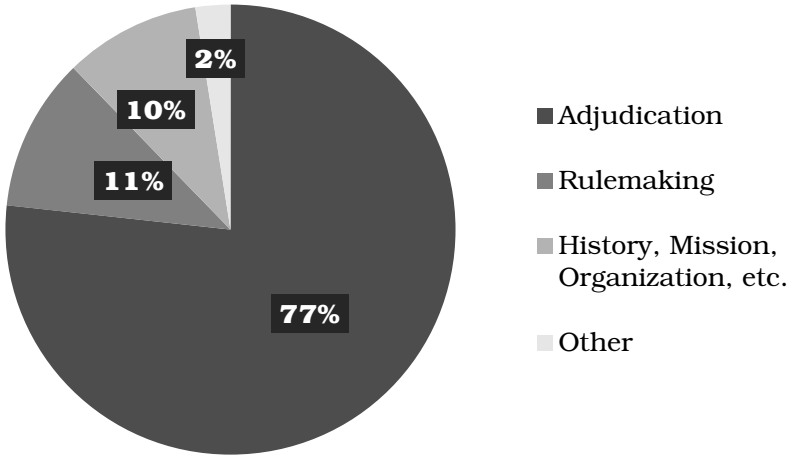
These overall figures slightly overstate the attention the Committee gave to rulemaking in the typical agency. The principal reason is that 81 of the 222 total pages on rulemaking are found in a single monograph examining a pair of agencies—the Wage and Hour Division and the Children's Bureau (both of the Department of Labor)—that were statutorily authorized to

136 *See, e.g.*, MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 97 (devoting one page out of 34 to "Rules and Regulations").

137 This excludes appendices and the Attorney General Committee's Final Report to Congress.

make rules but not to adjudicate.[138] The picture changes subtly but significantly once this atypical agency is removed from the data set:

FIGURE 2. TOTAL PAGES IN THE MONOGRAPHS DEVOTED TO:



Adjudication's predominance in the Committee's study reflects a reality both actual and definitional. Before the APA's adoption, most agency action was adjudication.[139] And "adjudication" was (as it remains) a catch-all category that includes adjudicatory hearings, licensing, and *all other non-rulemaking actions* affecting private parties.[140] In addition, while the APA defines ratemaking as rulemaking,[141] the most notorious ratemaking agency, the ICC, treated ratemaking as more quasi-judicial than quasi-legislative.[142] This was reflected even in the agency's organization. Most of the ICC's work was handled by two divisions: the Bureau of Formal Cases and the Bureau of Informal Cases, mirroring the deeper structure of

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138 The Fair Labor Standards Act vested rulemaking powers in the agency and empowered it, "with the assistance of the Department of Justice," to "prosecut[e]" violations. MONOGRAPH 14 (FAIR LABOR), *supra* note 110, at 3. But "[a]djudication is reserved for the Federal courts." *Id.*

139 At the Civil Aeronautics Authority, economic regulation was carried out through permitting and ratemaking, while safety regulation was primarily accomplished through licensing and discipline. *See* MONOGRAPH 19 (AERONAUTICS), *supra* note 115.

140 *See* 5 U.S.C. §§ 551(6)–(7); Bremer, *supra* note 30, at 384–85.

141 *See* 5 U.S.C. § 551.

142 The APA codified the pre-APA categories of quasi-judicial and quasi-legislative as adjudication and rulemaking, respectively. *See, e.g.*, H.R. REP. NO. 1980, at 28–29 (1946). But the classifications are not on all fours—the APA reformed even as it codified. *See* Emily S. Bremer, *Blame (or Thank) the APA for* Florida East Coast Railway, 97 CHI.-KENT. L. REV. 79, 96–97, 101 (2022).

adjudication.[143] Adjudicatory hearings, which were synonymous with quasi-judicial or "formal" hearings, were the centerpiece of the procedures used by the ICC and other ratemaking agencies.[144] Many of the agencies included in the Committee's study engaged in ratemaking, a common administrative function in the New Deal era.[145] Post-APA, this would be classified as rulemaking, but in the Committee's work it is treated more as adjudication.

In many agencies, rulemaking activity was limited to "rules of practice" (i.e., procedural regulations) and other rules required to support primary, adjudicative activities (such as by interpreting statutes or articulating policy).[146] Hence, fifteen of the twenty-seven monographs devote three or fewer pages to rulemaking (two of these do not discuss rulemaking at all). In addition to the Fair Labor agencies mentioned above, legislative rulemaking was an important part of the work in just a handful of the agencies. Only five of the monographs devote more than ten pages to rulemaking:

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143 *See* Bremer, *supra* note 30, at 402–10.

144 *See, e.g.*, MONOGRAPH 19 (AERONAUTICS), *supra* note 115, at 27–32.

145 *See* MONOGRAPH 3 (FCC), *supra* note 99, at 53–57; MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 107, at 22–25; MONOGRAPH 24 (ICC), *supra* note 120, at 2.

146 *See* MONOGRAPH 6 (FTC), *supra* note 102, at 30–32; MONOGRAPH 16 (SSB), *supra* note 112, at 23–25; MONOGRAPH 18 (NLRB), *supra* note 114, at 3 n.11; MONOGRAPH 21 (ECC), *supra* note 117, at 55; MONOGRAPH 27 (CUSTOMS), *supra* note 123, at 67. Rulemaking activity was even more scant in some agencies. For example, the National Railroad Adjustment Board only "adopt[ed] a bare skeleton of procedural rules," MONOGRAPH 17 (RAILWAY LABOR), *supra* note 103, at 2 n.5, while at the Mediation Board, "[n]o rules of procedure have ever been adopted." *Id.* at 23.

FIGURE 3. TOP FIVE RULEMAKING MONOGRAPHS

Monograph	Total Pages	Adjudication	Rulemaking
No. 3: Federal Communications Commission	80	53	20
No. 9: Federal Reserve System	41	14	16
No. 20: Department of the Interior	70	56	13
No. 26: Securities and Exchange Commission	111	85	12
No. 1: Division of Public Contracts, Department of Labor, The Walsh-Healey Act	34	20	11

At the same time, this page-counting approach offers an extremely rough measure that obscures rulemaking's character, importance, and volume. The monographs that devote the most attention to rulemaking (and thus appear in the chart above) examined agencies that operated in areas of exclusive federal control or operation. At the FCC, "[v]ast rule-making powers ha[d] been delegated to the Commission," mostly to support the agency's core responsibility of common carrier and radio licensing and regulation.[147] The Department of the Interior regulated Indian affairs, commercial fishing in the Alaska Territory, and the use of public land, often under very broadly worded statutes that required significant elaboration through agency rulemaking.[148] The Federal Reserve Board had broad regulatory power over the Federal Reserve System,[149] while the Division of Public Contracts used rulemaking to establish contractual conditions that would be imposed on federal contractors.[150]

147 MONOGRAPH 3 (FCC), *supra* note 99, at 3; *see id.* at 61–63.

148 *See* MONOGRAPH 20 (INTERIOR), *supra* note 116, at 58. The Committee explained that, although the Department of the Interior's "adjudicative functions . . . are of unquestioned significance, . . . their importance is justifiably obscured by the momentousness of the [agency's] rule-making activities." *Id.* at 57. "Thousands upon thousands of regulations have been issued by the Department, and hundreds of additional and amendatory rules are promulgated annually." *Id.*

149 *See* MONOGRAPH 9 (THE FED), *supra* note 105, at 8–9.

150 *See* MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 97, at 24.

Other agencies that do not appear in the chart above also maintained substantial bodies of rules.[151] These rules were often internally focused on regulating the conduct of agency employees. Since the Committee defined "administrative" action as affecting private parties, this internal or executive-type rulemaking garnered less scrutiny.[152] For example, the Post Office Department had "a large body of rules and regulations," the "great mass" of which

> deal[t] with the manner in which postal employees shall conduct the huge business of the Department, both in relation to other parts of the postal service and in relation to the public. Many of these "internal" or "lunch hour" hour regulations [did], of course, more largely affect persons not within the Department than [did] comparable regulations of other agencies.[153]

The VA likewise "issue[d] numerous rules and regulations, covering some 4,000 pages" and "concerned not only with broad substantive matters but with matters of the smallest administrative detail."[154] The consequence was that "employees of the Administration, whether adjudicative or not, f[ound] that the rules for their conduct in all matters [was] rather strictly formulated, with discretion considerably minimized."[155]

The Committee's modest attention to rulemaking also reflects the reality that rulemaking procedures were in a nascent period of development. Procedures were often ad hoc and rarely had crystallized, even in agencies that regularly promul-

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151 One example is the Department of Commerce's Bureau of Marine Inspection and Navigation, which maintained exceedingly voluminous regulations. "Some of the more comprehensive sets of regulations" included regulations addressing: (1) load lines ("a printed pamphlet of some 140 pages"); (2) measurement of vessels (a printed pamphlet "of about the same volume"); (3) ocean and coastwise navigation (consuming "nearly 300 pages"); (4) tank vessels ("127 pages"); and (5) "what is known as the fifty-first supplement to General Rules and Regulations" ("183 pages"). MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 29. At the time of the Attorney General Committee's Study, the Bureau had just completed and was preparing to promulgate "[a] new set of ocean and coastwise regulations approximating 1,000 mimeographed pages." *Id.* The agency also "contemplate[d] the preparation of another such comprehensive set to govern the Great Lakes; a third to govern bays, lakes, and sounds; and a fourth to control river navigation." *Id.*

152 *See* FINAL REPORT, *supra* note 124, at 2–3.

153 MONOGRAPH 12 (POST OFFICE), *supra* note 108, at 40. The regulations were "gathered in a thousand-page volume of 'Postal Laws and Regulations,'" that was only periodically updated. *Id.* at 41 n.122. The monograph, written in 1940, states that the then-most-recent edition of the postal regulations had been published in 1932 and that a "new edition [was] currently being prepared." *Id.*

154 MONOGRAPH 2 (VA), *supra* note 98, at 39.

155 *Id.*

gated regulations. For example, in the Division of Public Contracts, which appears in the table above, there was "no established procedure for the promulgation of regulations."[156] Similar statements appear throughout the monographs. At the Post Office Department, "there [was] no formalized practice or procedure" in rulemaking.[157] At the RRB, there was "no established rule with respect to initiation of a proposed regulation" or "for reexamining regulations," whether on the agency's own initiative or "upon the request of interested persons."[158] In the Department of Agriculture's Stockyards Division, "no procedure for the adoption of regulations [was] prescribed, nor ha[d] such a procedure solidified through departmental practice."[159] Similarly, the Department of Agriculture was empowered to establish grain standards, but "[n]o procedure [was] prescribed by the act or the Secretary's regulations and that followed is not well-defined."[160] At the FDIC, "[t]he statute [did] not provide any established procedure for the formulation and issuance of regulations, and the [FDIC] . . . had little occasion to develop such a procedure."[161] The FCC followed no "single procedure" in rulemaking, and "[t]he entire rule-making process [was] extremely flexible, the main objective being to dispose of matters as expeditiously and intelligently as possible."[162] Other monographs contain similar statements attesting to the underdeveloped nature of agency rulemaking procedures.[163]

There was variation in rulemaking procedures even within individual agencies. Sometimes the variation is explained by differences in the underlying statutory mandates[164] or the disparate needs of different rulemaking proceedings.[165] For example, at the Federal Reserve, "[i]t is difficult to generalize concerning the precise course which a regulation follows since, in fact, the procedure depends upon the circumstances and the

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156 MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 97, at 33.
157 MONOGRAPH 12 (POST OFFICE), *supra* note 108, at 40.
158 MONOGRAPH 8 (RRB), *supra* note 104, at 44.
159 MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 107, at 7. Similarly, "[t]he [Federal Reserve] Board ha[d] devised no formal procedure for reexamining and revising its regulations," and "[i]n general, there [was] no formal procedure for the handling of 'applications' for revisions." MONOGRAPH 9 (THE FED), *supra* note 105, at 17–18.
160 MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 4.
161 MONOGRAPH 13 (BANKING), *supra* note 109, at 41–42.
162 MONOGRAPH 3 (FCC), *supra* note 99, at 65.
163 *E.g.*, MONOGRAPH 25 (FPC), *supra* note 121, at 39.
164 *See* MONOGRAPH 7 (UDSA GRAIN), *supra* note 103, at 5; MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 32.
165 *See* MONOGRAPH 24 (ICC), *supra* note 120, at 82–86.

nature of the regulation."[166] Similarly, subagencies (or "divisions") within the Department of the Interior took various approaches to incorporating public participation in rulemaking, depending on factors "including the differences in the subject matter of the regulations, the availability of articulate persons with informed views, the speed with which the regulations must be issued, and the organizational structure of the divisions."[167] In other instances, however, no explanation for an agency's variable rulemaking procedures is provided or apparent.[168] In an influential *Harvard Law Review* article published in 1938,[169] Professor Ralph Fuchs explained colorfully that:

> Many regulatory administrative agencies, undirected and unhampered by statutory prescriptions, and unenlightened as well as undeterred by advice of counsel, have developed methods which are quite informal and which never have become involved in litigation. In many instances these have remained uncodified practice, often varying from case to case as practical officials, untrained in law, have gone about their business of getting things done as expeditiously and smoothly as possible.[170]

Wide procedural variation in rulemaking was possible because there was little law governing the process and most agencies' practices had not yet crystallized sufficiently for them to fill the void with regulations or policies. The Due Process Clause requires no specific procedures for legislative or quasi-legislative action,[171] and administrative statutes rarely specified procedural requirements for rulemaking.[172] As Professor Fuchs noted, there was not much litigation over rulemaking procedures. Thus, the courts had neither basis nor opportunity to develop common law to structure the process. Each agency authorized

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166 MONOGRAPH 9 (THE FED), *supra* note 105, at 13.

167 MONOGRAPH 20 (INTERIOR), *supra* note 116, at 65.

168 *E.g.* MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 5.

169 *See* MONOGRAPH 3 (FCC), *supra* note 99, at 61 n.58 (citing Ralph F. Fuchs, *Procedure in Administrative Rulemaking*, 52 HARV. L. REV. 259, 265 (1938)); Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 933, 933 n.2 (D. Del. 1973) ("The APA's distinction between rulemaking and adjudication was intended in large part as a codification of existing law and practice." (citing Robert W. Ginnane, *"Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act*, 95 U. PA. L. REV. 621 (1947))).

170 Fuchs, *supra* note 168, at 272.

171 *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 442, 445 (1915); Londoner v. Denver, 210 U.S. 373, 378 (1908).

172 Exceptions include statutes that required agencies to craft rules in collaboration with committees of industry or to hold hearings before issuing rules. *See, e.g.*, MONOGRAPH 14 (FAIR LABOR), *supra* note 110, at 5; *see also infra* subpart II.D. (discussing hearings in rulemaking).

to make rules or regulations was left on its own to determine what process should be used. There are examples of agencies that had experimented with different approaches and begun to establish policies solidifying a rulemaking process.[173] But within most agencies, the process was emergent and malleable.[174]

Looking across the administrative state, however, common practices were emerging. In rulemaking, much of the process was internal to the agency. But external consultation, through written comments and oral conferences, was increasingly common. Some agencies also conducted legislative-type hearings. The seeds of § 553's notice-and-comment process are readily identifiable.

C. The Consultative Process

The monographs reveal that much or even most of the rulemaking process was internal to the agency.[175] Rulemaking proposals were often generated within the agency, although many agencies also welcomed or accepted suggestions from external sources, even in the absence of any established rule or practice governing the practice.[176] Agencies also often undertook the "initial spadework" and other investigation required to initiate and conduct the rulemaking.[177] Agencies typically drafted their own regulatory proposals,[178] often through or with the involvement of the agency's legal unit or office.[179] Much of the monographs' analysis of rulemaking procedures is thus focused on internal organization and procedures. Some

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173 In 1939, the Marine Bureau "adopted, as a general policy, the procedure of advising the industry insofar as is practicable on all new regulations which will affect the inspection of their vessels" and stated its "intent . . . to hold a public hearing on all proposed regulations of extensive scope and character, at which all interested parties will be heard." MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 33.

174 *E.g.*, MONOGRAPH 4 (MARITIME COMM'N), *supra* note 100, at 22–23, 29; MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 5.

175 *E.g.*, MONOGRAPH 3 (FCC), *supra* note 99, at 69–73.

176 *E.g.*, MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 97, at 34; MONOGRAPH 3 (FCC), *supra* note 99, at 63; MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 4; MONOGRAPH 5 (ALCOHOL), *supra* note 101, at 29, 33; MONOGRAPH 8 (RRB), *supra* note 104, at 44; MONOGRAPH 9 (THE FED), *supra* note 105, at 18.

177 *E.g.*, MONOGRAPH 9 (THE FED), *supra* note 105, at 13–14.

178 *E.g.*, MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 107, at 7.

179 At the Federal Reserve Board, the process included investigation and outreach prior to drafting regulations; drafting and evaluation of the draft by the General Counsel; circulation, review, and analysis by Senior Staff members; and submission of draft to Board for initial consideration. *See* MONOGRAPH 9 (THE FED), *supra* note 105, at 13–14.

agencies used periodic "staff conferences"[180] or specially created internal committees to undertake the work of drafting or revising regulations.[181] A few agencies used a *wholly* or *primarily* internal process for rulemaking.[182] For example, although the Federal Reserve System had "broad" regulatory powers, "their exercise [was] informal in the procedural sense of the word. Determination [was] not preceded by a hearing of any character. Rather it [was] almost wholly internal, based upon the special knowledge and research of the Board and its staff."[183] Similarly, the VA process was mostly internal, and many regulations were not published in the *Federal Register*.[184] Even in agencies that included some external consultation in the rulemaking process, there was often a lengthy internal process of deliberation and decision that occurred post-consultation and pre-promulgation.[185]

Most agencies included a period of external consultation as a centerpiece of the rulemaking process.[186] There was wide variation across agencies in many of the key details of this consultative component, including with respect to format, timing, and notice.

Format. External consultation was sought in different ways, thus generating comments or feedback in various formats. Comments might have been oral if they were received during an informal conference[187] or interview.[188] Or the com-

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180 MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 97, at 33–34.

181 *See, e.g.*, MONOGRAPH 3 (FCC), *supra* note 99, at 65 ("[T]he Commission in 1937 created a Rules Committee whose main function was to act as a funnel through which rules matters would pass to the Commission."); MONOGRAPH 12 (POST OFFICE), *supra* note 108, at 40 ("Periodically . . . a committee comprised of officers of the various divisions of the Department is set up to revise and amend existing regulations."); MONOGRAPH 13 (BANKING), *supra* note 109, at 41 (noting a five-member "committee on regulations and forms").

182 *E.g.*, MONOGRAPH 13 (BANKING), *supra* note 109, at 41–42; MONOGRAPH 25 (FPC), *supra* note 121, at 39.

183 MONOGRAPH 9 (THE FED), *supra* note 105, at 9.

184 MONOGRAPH 2 (VA), *supra* note 98, at 40.

185 *E.g.*, MONOGRAPH 9 (THE FED), *supra* note 105, at 17.

186 Consultation was sometimes referred to as "informal hearing," but the Committee recognizes that this terminology is inaccurate because the technique is clearly distinguishable from a true hearing in either the adjudicative or legislative sense. *See id.* at 16, 20.

187 *E.g.*, *id.* at 16 (discussing the Federal Reserve System's use of "informal hearings" in the sense of "conferences, described as 'round table discussions of the highest order'"); MONOGRAPH 14 (FAIR LABOR), *supra* note 110, at 6; MONOGRAPH 23 (BITUMINOUS COAL), *supra* note 119, at 54.

188 In connection with one rulemaking, the Federal Reserve Board "aides traveled about the country interviewing the persons who might be affected in an effort to familiarize themselves with the subject matter." MONOGRAPH 9 (THE FED), *supra* note 105, at 13.

ments might have been written, such as when they were received through correspondence[189] or the submission of a feedback form or questionnaire prepared and distributed by the agency.[190] Whatever its format, information submitted to the agency included data, views, and arguments.[191]

Timing. Agencies engaged in external consultation at various points in the rulemaking process. There are examples in the monographs of every possibility: (1) before a tentative rule was drafted;[192] (2) after a tentative rule was drafted but before it was finalized;[193] and (3) post-promulgation, during the period before the rule became effective.[194] The emerging norm was for consultation to be sought on a draft or final rule text.[195]

Notice. Agencies solicited external feedback on regulations through a variety of channels, including press releases,[196] agency-specific publications,[197] letters and other targeted communications,[198] and reliance on the diffusion of the informa-

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189 *E.g.*, MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 107, at 7; MONOGRAPH 14 (FAIR LABOR), *supra* note 110, at 6–7.

190 Although this technique does not appear to have been common, there are examples of it. At the Marine Bureau, "[a]ccompanying each set of proposed ocean and coastwise regulations are forms on which suggestions for changes may be made." MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 32. "The Bureau's officers have estimated that some 10,000 of these forms are likely to be returned to the Bureau. An elaborate system for tabulating suggested changes has been worked out and the expectation is that the Board of Supervising Inspectors will profit greatly from the suggestions submitted." *Id.* at 33. Similarly, in connection with one Federal Reserve Board regulation, "some 200,000 questionnaires were sent out by the New York Stock Exchange and other securities exchanges to their members at the request of the Board in order to obtain information concerning the condition of their margin accounts." MONOGRAPH 9 (THE FED), *supra* note 105, at 13.

191 *E.g.*, MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 5 ("By deferring the effective date of its proposed regulations, an administrative agency may assure interested parties of opportunity to influence its judgment through information or argument. The advantages of this method are clear.").

192 *E.g.*, MONOGRAPH 9 (THE FED), *supra* note 105, at 13–14.

193 *E.g.*, MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 97, at 34; MONOGRAPH 4 (MARITIME COMM'N), *supra* note 100, at 29; MONOGRAPH 26 (SEC), *supra* note 122, at 103–04; FINAL REPORT, supra note 124, at 228.

194 *E.g.*, MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 5; FINAL REPORT, *supra* note 124, at 227–28.

195 *See Present at the Creation*, *supra* note 125, at 520–21.

196 MONOGRAPH 5 (ALCOHOL), *supra* note 101, at 29; MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 4.

197 *E.g.*, MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 32.

198 *E.g.*, MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 97, at 26; MONOGRAPH 5 (ALCOHOL), *supra* note 101, at 29; MONOGRAPH 13 (BANKING), *supra* note 109, at 42; *cf.* MONOGRAPH 22 (INTERNAL REVENUE), *supra* note 118, at 64 ("Nor, in the main, is it possible for the Bureau to maintain, as do many other agencies, a mailing list of interested parties whom it may circularize for suggestions and criticisms.").

tion through private networks.[199] As this list suggests, an NPRM was not typically published in the *Federal Register*.[200] When comment was sought post-promulgation, the final rule would have been published in the *Federal Register*, but consultation was often sought through other channels.[201]

Taking a step back from these details, more profound generalizations about the pre-APA use of external consultation in rulemaking emerge. The most striking characteristic is that external consultation entailed the targeted solicitation of views from representatives of organized industry or interest groups. Agencies would reach out to persons known to be knowledgeable about the relevant subject matter, especially representatives of organized affected interests. Examples are legion, as the table below shows.[202]

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199 *E.g.*, MONOGRAPH 9 (THE FED), *supra* note 105, at 14; MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 32 n.34 ("Most [industry] associations have their own weekly publications, in which they reprint proposed regulations.").

200 *But see* MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 32 ("Much newspaper publicity has accompanied the preparation of the proposed regulations and notice has been given in the Federal Register and in the Bureau's monthly bulletin."). The Federal Register Act was enacted in 1935, so the *Federal Register* was quite new at the time when the Attorney General's Committee was doing its research.

201 Many of the monographs note that final rules were published in the *Federal Register*. *E.g.*, MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 97, at 34; MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 4; MONOGRAPH 9 (THE FED), *supra* note 105, at 19; MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 107, at 7; MONOGRAPH 13 (BANKING), *supra* note 109, at 42. Some agencies also published pamphlets of regulations, notified the press of new regulations, or mailed a notice or copy of them to known affected private parties. *E.g.*, MONOGRAPH 3 (FCC), *supra* note 99, at 64; MONOGRAPH 9 (THE FED), *supra* note 105, at 19.

202 *See* Monograph 1 (Public Contracts), *supra* note 97, at 34; MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 4; MONOGRAPH 8 (RRB), *supra* note 104, at 44; MONOGRAPH 9 (THE FED), *supra* note 105, at 14; MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 32; MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 107, at 7; MONOGRAPH 13 (BANKING), *supra* note 109, at 42.

FIGURE 4. PERSONS CONSULTED IN RULEMAKING

Monograph	Agency	Consultees
1	Department of Labor, Division of Public Contracts	• Trade Associations • Labor Organizations
2	Veterans' Administration	• Service Organizations
3	Federal Communications Commission	• Federal Communications Bar Association • National Association of Broadcasters • Institute of Radio Engineers, • Amateur Radio Relay League • American Civil Liberties Union • Aeronautical Radio, Inc. • Other Trade Associations • Regulated Carriers • Members of Congress • Federal Agencies • Local Governmental Officials
4	Maritime Commission	• Known Interested Parties
5	Federal Alcohol Administration	• Attorneys w/Substantial Practice Before Agency • Industry Members and Representatives • State Authorities • Alcohol Tax Unit
6	Federal Trade Commission	• Members of Affected Industry
7	Department of Agriculture, Grain Standards	• Trade Organizations • Persons Engaged in the Industry
8	Railroad Retirement Board	• Labor Unions • Railroad Management

Monograph	Agency	Consultees
9	Federal Reserve Board	• Federal Reserve Banks • American Bankers' Association • Federal Advisory Council • Interested Governmental Agencies (e.g., Comptroller of the Currency, FDIC, SEC, State Bank Supervisors)
10	Department of Commerce, Marine Inspection Bureau	• National Council of American Shipbuilders • American Merchant Marine Institute • Pacific Steamship Owners Association • Lake Carriers Association • Labor Unions • Maritime Commission • Navy Department • Coast Guard • United States Steel Co. • Westinghouse Co. • American Petroleum Institute • Standard Oil Co. • General Electric Co. • Engineering Professors in Various Universities
11	Department of Agriculture, Packers and Stockyards Act	• Stockyard Owners • Commission Merchants • Others Engaged in the Trade • Trade Associations
13	Federal Deposit Insurance Corporation	• American Bankers Association • Reserve City Bankers Associations

Monograph	Agency	Consultees
16	Social Security Board	• Congress of Industrial Organizations • American Federation of Labor • Employer Representatives selected by the Business Advisory Council of the Department of Commerce • Labor Organizations
19	Civil Aeronautics Authority	• Industry Organizations, *e.g.*, Private Pilots Association
20	Department of the Interior	• International Association of State Game, Fish, and Conservation Commissioners • Heads of State Game Departments • National, State, or Local Sportsmen's and Conservation Organizations • American Wool Growers Association • American Livestock Association • Other Associations of Stockmen • Tribal Councils
25	Federal Power Commission	• State Regulatory Bodes • National Association of Railroad and Utilities Commissioners

Monograph	Agency	Consultees
26	Securities and Exchange Commission	• American Institute of Accountants • Comptrollers' Institute of America • Investment Bankers Association • New York Stock Exchange • State Insurance Commissions • Eastern States Association of Dealers in Oil and Gas Rights • Midcontinent Royalty Dealers Association • American Mining Congress • Leading Banks and Banking Associations • American Institute of Consulting Engineers, Inc.
27	Bureau of Customs	• Trade Associations • Customs Brokers • Customs Attorneys

The monographs reveal some concern that the consultative process was too closed or might sometimes produce insufficiently representative information. Most consultation was targeted in the sense that agencies directly solicited feedback from known persons or groups included in the agencies' mailing or contact lists. Agencies might mail a rulemaking proposal to the entire list for comment or might simply make a few phone calls or hold individual "conferences" with people thought to have information useful to the agency in its rulemaking. Many of the monographs reveal no significant concern about these practices. But the agencies' ad hoc approach to notice and consultation occasionally drew criticism. A colorful example comes from the Post Office Department, which was subject to complaints "that outsiders have an opportunity to present their views only when by diligent detective work around the Department they 'get wind of' a proposed regulation or when the Department feels that 'there is likely to

be heat' about the regulation."[203] And in evaluating the Federal Reserve Board's practices, the Committee explained that "[i]t is difficult to reach a definite conclusion concerning the extent to which the Board's present method of circulating its drafted regulations does in fact elicit full and representative opinion of the banks or persons affected."[204]

The suggested remedy for these ills, however, was for the agency to do a better job of reaching all the right interest groups.[205] Responding to the complaints described above about the Post Office Department's rulemaking procedures,[206] the Committee opined that:

> [I]t . . . seems desirable that the Department should make a more definite effort to canvass the views of those who might be affected. No very complicated process would be necessary, since business and other groups using the mails are apparently well organized in Washington. All of these at one time or another are affected by postal regulations and consult with the Department. It would seem possible for the Department to list these organizations, and group them according to the general subject matter in which they would be interested. Notification of a proposed change, together with an invitation to submit comments, would seem to be a simple procedure, and considerably more orderly than that now in effect.[207]

The Committee's recommendation in response to the FDIC's ad hoc approach to soliciting comment from knowledgeable people similarly urged better outreach to organized groups:

> It seems possible, however, that the Corporation might advantageously solicit the views of the organizations representing the persons subject to the regulations, leaving to such organizations the task of selecting the individuals who may be regarded as best fitted to reflect the informed opinion of the banking community. The Board of Governors of the Fed-

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203 MONOGRAPH 12 (POST OFFICE), *supra* note 108, at 41.

204 MONOGRAPH 9 (THE FED), *supra* note 105, at 15.

205 *E.g.*, MONOGRAPH 26 (SEC), *supra* note 122, at 108–11. In the tax space, where consultation was not generally used, the Committee suggested that "personal conferences might even be arranged with representative bodies or groups such as, for example, the tax section of the American Bar Association." *See* MONOGRAPH 22 (INTERNAL REVENUE), *supra* note 118, at 64–65. Agencies sometimes voluntarily took this approach to expanding the reach of their consultative efforts. For example, and as reflected in the table above, when the Marine Inspection Bureau sought to reach a broader audience, it sent copies of its proposed rules "to associations and corporations not engaged directly in the maritime industry," as well as "to engineering professors in various universities." MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 32.

206 *See supra* note 202 and accompanying text.

207 MONOGRAPH 12 (POST OFFICE), *supra* note 108, at 41.

> eral Reserve System has made a practice of submitting to the appropriate committees of the American Bankers Association tentative drafts of proposed regulations. The value of the comment and suggestions which have been received by the Board in conference with such committees suggests that the Corporation should give consideration to the utility to it of such a consultative procedure.[208]

In considering whether the Federal Reserve Board's process elicited adequately representative feedback, the Committee focused on whether the outside groups consulted by the Board were adequately representative:

> At first blush, it might appear that only the largest of legal, banking, and financial institutions are notified and consulted. But the generalization is too easy. The crux of the matter is the extent to which the several Federal Reserve banks and the American Bankers' Association represent large and small banks alike. In this connection, there is good reason to believe that, in fact, both groups are representative. As noted above, the directors of the Federal Reserve banks are deliberately chosen with a view toward giving representation to small banks; and similarly, each Reserve bank has one or more 'traveling representatives' whose duty, among others, is said to be to sound out the opinion of the member banks in the district. In like manner, it is not apparent that the American Bankers' Association fails to act in a truly representative capacity; on the contrary, examination of its publication indicates that its spokesmen and officers are, in large part, recruited from the smaller country banks and its committees are composed in part of their representatives.[209]

It is also notable that the Committee seems to have been of the view that a state or federal agency or other governmental authority could serve as an adequate representative of persons whose interests would be affected by a proposed regulation. Thus, while the Federal Reserve Board made "no attempt to tap the opinion of individuals composing the investing public,"[210] the "Securities and Exchange Commission, which was invariably consulted, is the representative of such individuals."[211]

When interested persons were not well organized and represented by interest groups or industry organizations, an agency might use an advisory committee to obtain needed consultation of the affected interests. Such committees might be

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208 MONOGRAPH 13 (BANKING), *supra* note 109, at 42.

209 MONOGRAPH 9 (THE FED), *supra* note 105, at 15.

210 *Id.*

211 *Id.* at 16.

organized by private industry organizations or by federal agencies, either as called for by statute or as a matter of agency discretion. For example, the Department of Interior's Grazing Service used "advisory boards established under the Taylor Grazing Act" to channel feedback from affected persons and "to offer advice concerning regulations."[212] The Committee explained that "[a]ny livestock operator who desires to express an opinion as to the desirability of existing or proposed regulations, may present his ideas to a member of the advisory board for his district."[213] Proposed changes to the regulations would be "considered at a conference to be attended by two representatives of the advisory boards from each State."[214] The Committee opined that such advisory committees could "be a valuable adjunct to the rule-making process."[215]

Participation by individual members of the general public was thought likely to be impractical and unhelpful—and yet it was generally accepted and, in some cases, might appropriately be sought. The Federal Reserve Board could rely on the SEC to represent the "investing public" in part because to have consulted directly with that large mass of unorganized persons "in any practical way would have been virtually impossible . . . ."[216] Indeed, the unwieldy nature of such consultation was one reason why legislative-type hearings were viewed with disfavor.[217] At the FDIC, "the number of insured banks, nearly 14,000, [was] too great to permit of even informal consultation with all interested parties."[218] Moreover, "[i]n view of the technical nature of most of the regulations, the Corporation's General Counsel [was] of the opinion that the views of a group of individuals selected because of their peculiar knowledge and experience [were] of greater assistance to the Corporation than would be the expressions of opinion received at random in a public hearing."[219] At the same time, agencies were generally receptive to feedback from anyone who might have relevant

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212 MONOGRAPH 20 (INTERIOR), *supra* note 116, at 68. Section 18 of the Act required that "all rules and regulations affecting a grazing district must be submitted to the advisory board unless the Secretary declares an emergency to exist." *Id.* at 68 n.186.

213 *Id.* at 68.

214 *Id.* at 68–69.

215 *Id.* at 68.

216 MONOGRAPH 9 (THE FED), *supra* note 105, at 15.

217 *See infra* subpart II.D.

218 MONOGRAPH 13 (BANKING), *supra* note 109, at 42.

219 *Id.*

information.[220] Statutes or regulations that contemplated the participation of "interested persons" in agency proceedings were typically interpreted generously: an "interested person" was anyone who expressed interest in the agency's proceeding.[221] And there are examples in the monographs of the Committee urging an agency to solicit views from the general public. Coming back again to the Federal Reserve Board, the Committee opined that:

> Nevertheless, the thought may still persist that the public at large has an important stake in many of the regulations issued, and that a more affirmative effort should be made to permit expression of its members' views. It may, therefore, be suggested as to those regulations which do concern the public, as in the case of regulation T, and to somewhat less extent regulations O, Q, and U, that public announcement be made of the tentative drafts, that such drafts be made available upon request, and that comments thereon be announced as welcome.[222]

Tempering this advocacy of what a modern reader might recognize as a notice-and-comment process, the Committee also recounts—with no criticism and, indeed, with apparent approval—at least one instance in which an agency specifically *avoided* public knowledge of a proposed rulemaking. In the regulation of banking, the Committee explained that

> [w]ith one or two exceptions, the proposed regulations ha[d] not been announced publicly through the press. On the contrary, they [were] stated to be 'not for publication,' and on at least one occasion, in connection with the circulation of the revision of regulation T, precautions were taken to prevent the proposals from becoming general knowledge.[223]

The agency's animating concerns were that publication would "increase the risk of publicity, which is undesirable at this time" and would also "introduce some element of confusion" among those whose views should be (and otherwise would be)

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220 *See, e.g.*, MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 4 ("Anyone, regardless of interest, is heard if his comments are relevant.").

221 Most of these legal provisions applied in adjudicatory proceedings, but the term is interpreted consistently across the contexts in which it appeared. *E.g.*, MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 97, at 7 n.7; MONOGRAPH 14 (FAIR LABOR), *supra* note 110, at 23, 54–55; MONOGRAPH 24 (ICC), *supra* note 120, at 21; MONOGRAPH 27 (CUSTOMS), *supra* note 123, at 15; *cf.* MONOGRAPH 20 (INTERIOR), *supra* note 116, at 29, 29 n.75 (explaining that a person may have an "interest" in land that is inadequate to support an adverse claim in court but is sufficient to file an administrative protest).

222 MONOGRAPH 9 (THE FED), *supra* note 105, at 16.

223 *Id.* at 14.

channeled through the exchanges.[224] The Committee seems to view the agency's decision with approval, as a reasonable exercise of the agency's expert judgment. That the subject matter of the regulation was highly technical seems to have bolstered the Committee's approval of the agency's decision.

This introduces an important point: in pre-APA rulemaking, agencies had broad procedural discretion, including with respect to the questions of whether and how to engage in external consultation. The monographs seem to accept that an agency might have valid reasons *not* to seek or accept comment on a proposed rule. Some proposed rules might not be sufficiently important or interesting to warrant external consultation.[225] Modifications of long-existing regulations might not warrant consultation, particularly when the changes were relatively minor or technical.[226] Even if the changes were significant, consultation might not be sought in appropriate circumstances, such as where the revision was "liberalizing."[227] An agency might also appropriately dispense with consultation in the face of an emergency[228] or to prevent regulated parties from changing their conduct in anticipation of the rule.[229] The monographs are largely uncritical of these decisions, as is the majority report of the Committee.[230]

D. Hearings in Rulemaking and Beyond

A final method of public engagement in the administrative process—hearings—bears some discussion. Two kinds of hearings appear in the monographs: judicial-type hearings and

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224 *Id.* at 14 n.66.

225 *E.g.*, MONOGRAPH 12 (POST OFFICE), *supra* note 108, at 41 ("To give notice of all proposed postal regulations and amendments would, of course, be scarcely sensible; even the critics of the present failure to utilize consultative methods concede that a great many of the regulations are of such minor importance that they would not want to be bothered with notice.").

226 *E.g.*, MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 5 n.7; MONOGRAPH 8 (RRB), *supra* note 104, at 44.

227 "Where the changes are minor they may be promulgated without consultation with the Federal Reserve banks or outside parties. Even where the change is a major one, but is deemed to be 'liberalizing,' . . . there is no submission to outsiders." MONOGRAPH 9 (THE FED), *supra* note 105, at 19. In one instance in which "the liberalization was a compromise and did not answer the demands completely, submission at least to the American Bankers' Association may be in order. On the other hand, it can be argued with some force that all the pros and cons on the issue had been thoroughly discussed at the time of the original consideration of the regulation, and a reopening would not have been fruitful in presenting new views." *Id.*

228 *E.g.*, *id.*; MONOGRAPH 19 (AERONAUTICS), *supra* note 115, at 61.

229 *E.g.*, MONOGRAPH 26 (SEC), *supra* note 122, at 105.

230 *E.g.*, *id.*; FINAL REPORT, *supra* note 124, at 105.

legislative-type hearings. In adjudication, there was only one kind of hearing, and it replicated the kind of proceeding that would be available in a court.[231] The principal purpose of an adjudicatory hearing was to provide a fair and reliable method by which an agency could finally and unilaterally resolve an individual matter.[232] From this perspective, a statutory hearing requirement in adjudication vindicated Congress's decision that an agency—and not a court—should be principally responsible for the statute's implementation. The procedures used in an adjudicatory hearing were designed to replicate the procedures of the courtroom and, in doing so, to give the affected private party similar rights to participation as would be available in a court.[233] The procedures thus vindicate an *individual right* to participate in the proceedings and thereby to ensure that the record, which would be the exclusive basis for the agency's decision, was reliable and complete. The legislative-type hearing is markedly different in both purpose and procedural design.

Agencies conducted legislative-type hearings as part of the rulemaking process, either to satisfy statutory hearing requirements or as a matter of the agency's own procedural discretion.[234] As its name suggests, legislative-type hearings were modeled on congressional committee hearings. The principal benefit of this type of hearing was that it could offer an efficient way for the agency to gather views and information about the proposed rule and its likely consequences.[235] This was especially valuable when affected interests were numerous, geographically dispersed, and poorly organized. In such circumstances, an agency might even hold multiple hearings in various locations across the country, gathering views and data that could not be more readily obtained from a representative or organization.[236] This process gave affected interests the satisfaction of being heard and sometimes helped the agency to "sell" its proposal, thereby easing later enforcement efforts.[237] Compared to adjudicatory hearings—the principal purpose of which is to resolve fact-bound disputes—legislative-type hearings used more relaxed rules of evidence, omitted cross-examination or other tactics of the courtroom, and were not subject

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231 Bremer, *supra* note 30, at 428.
232 *Id.* at 437.
233 *See id.* at 416, 431.
234 *See id.* at 418–21.
235 *E.g.*, MONOGRAPH 3 (FCC), *supra* note 99, at 75–76.
236 *E.g.*, MONOGRAPH 7 (USDA GRAIN), *supra* note 103, at 4–5.
237 Bremer, *supra* note 30, at 419.

to the exclusive record principle.[238] Although the hearing would inform the agency's judgment, the agency was not confined to making its final decision based exclusively on the information contained in the hearing record. Rather, the expectation in a legislative-type hearing was that the final rule would reflect a legislative determination that was not—and could not be—reduced to a record.[239]

The monographs frequently express skepticism about the value of hearings as part of the rulemaking process. A representative example comes from the Committee's study of proceedings before the Children's Bureau of the Department of Labor:

> If these hearings are—as they should be—a step taken by the [Children's] Bureau properly to inform itself of conditions in the industry and of the possible effects of the proposed regulation, the hearings thus far held may fairly be characterized as useless. Fair play in rule-making procedure of this nature would seem to require careful investigation and analysis, and an opportunity for all persons to make known their views. It is improbable that fair play can be interpreted to require formal steps which are useless . . . .[240]

E. The Committee's Competing Legislative Proposals

The Attorney General's Committee unanimously relied on the research foundation supplied by the monographs and agreed on the discussion contained in its Final Report.[241] The Report explained that, while rulemaking is often analogized to legislation, agencies are "not ordinarily . . . representative bod[ies]," and their "function is not to ascertain and register . . . [t]he sovereign will," which "has already been broadly expressed" by Congress in the statute.[242] Administrative "deliberations are not carried on in public and [agency officials] are not subject to direct political controls as are legislators."[243] The function of an agency is to "investigate[ ] and make[ ] discretionary choices within its field of specialization."[244] Al-

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238 *Id.* at 420; *see id.* at 421.

239 *Id.* at 420–21.

240 MONOGRAPH 14 (FAIR LABOR), *supra* note 110, at 84. The Committee often used "formal" in the procedural sense to mean a "hearing." *Id.*

241 *Supra* subpart II.A; *see also* FINAL REPORT, *supra* note 124, at 203 (introducing the minority report by explaining that "we have accepted the major outlines of the report and . . . have made free and full use of the studies, views, and experience of all our associates").

242 FINAL REPORT, *supra* note 124, at 101.

243 *Id.*

244 *Id.* at 101–02.

though an agency has greater expertise than the legislature, "its knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect."[245]

The Committee advised that rulemaking procedures should be designed to reflect these differences between legislatures and agencies.[246] It admonished that rulemaking procedures "cannot wisely be patterned unthinkingly after legislative analogies."[247] This means, first, that the procedures should "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses."[248] In addition, rulemaking procedures should be designed "to elicit[ ], far more systematically and specifically than a legislature can achieve, the information, facts, and probabilities which are necessary to fair and intelligent action."[249]

In the Committee's view, consultation in rulemaking served two distinct purposes: (1) informing the agency's expert judgment by giving the agency access to information it might not otherwise possess, and (2) protecting the private interests that would ultimately be affected by the agency's rule.[250] The Final Report's discussion suggests that the former purpose was more important than the latter. The Committee believed it was essential to sound regulatory decision-making that the agency should have access to all relevant information, including expertise held in the private sector.[251] With respect to the subsidiary concern of protecting private interests, the Committee's analysis focuses on individual rights rather than a broader commitment to democracy or the public interest.[252] The discussion also makes clear that consultation could be accomplished through a variety of different procedures—including conferences, written correspondence, advisory committees, or hearings.[253]

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245 *Id.* at 102.

246 *Id.* at 101–02.

247 *Id.* at 102.

248 *Id.*

249 *Id.*

250 *See id.* at 103.

251 *See id.*

252 *See id.* at 104.

253 *See id.* at 103–11. The Report distinguishes between "Hearings," of the legislative type that are more suited to rulemaking proceedings, *see id.* at 105–08, and "Adversary Hearings," of the judicial type that are more cumbersome, expensive, and ill-suited to legislative-type proceedings, *see id.* at 108–111.

The Committee's majority thought that, while external consultation could be beneficial in rulemaking, the decision of whether and how to engage in it should be left entirely to agency discretion.[254] It "recommend[ed] the wider use of these methods of obtaining the knowledge, views, and criticism of outside interests in the process of rule making."[255] But it also concluded that "[c]onsultation cannot be prescribed by legislation" because it is sometimes unnecessary and, when it is useful, the precise mechanism must be tailored to the circumstances and the agency's needs.[256] In keeping with these sentiments, the majority's proposed legislative text contained less than one page addressing "Administrative Rulemaking."[257] It would not have required the publication of proposed rules.[258] And the provision addressing the "[f]ormulation of rules," provided in its entirety that "[e]very agency shall designate one or more units, committees, boards, officers, or employees to receive suggestions and expedite the making, amendment, or revision of rules, subject to the control and supervision of the agency."[259]

In contrast, the Committee's minority concluded that "[m]anifestly, Congress must provide alternative procedures for the making of the various kinds of rules and regulations which administrative agencies issue."[260] This was consistent with the minority's broader judgment that administrative action is more successful—and private interests better protected—when Congress is more engaged in administration through legislation

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254 *See id.* at 97–113.

255 *Id.* at 105.

256 *See id.* The Committee explained that "[t]he occasions when consultation and conferences should be employed can scarcely be specified in advance; their use must be left to administrative devising, in the light of a conscious policy of encouraging the participation of those regulated in the process of making the regulations." *Id.*

257 *See id.* at 195.

258 *See id.* It would have required the publication of final rules, however, and it contained a provision establishing the "[e]ffective date of rules." *Id.* (emphasis omitted).

259 *Id.*

260 *Id.* at 215. At the start of its report, the minority explains that "[t]he report of the Committee represents a composite of studies, views, and recommendation which, if carried out, would go very far toward effecting major improvement." *Id.* at 203. The minority, however, added "further views and recommendations . . . to secure . . . a more adequate solution." *Id.* In so doing, the minority "accepted the major outlines of the report and . . . departed as little as possible from the solutions suggested by the full Committee." *Id.* In addition, the minority "made free and full use of the studies, views, and experience of all [their] associates." *Id.* Thus, the minority report is not in the nature of a dissent, but rather an elaboration upon the shared foundation of the monographs and the Final Report.

and oversight.[261] The minority emphasized that the goal should be to facilitate—and not to impede—effective administrative action. This could be accomplished by offering, through legislation, a general pattern of administrative procedure that agencies could start with and build upon. "What is needed is not a detailed code but a set of principles and statement of legislative policy. The prescribed pattern need not be, and should not be, a rigid mold. There should be ample room for necessary changes and full allowance for differing needs of different agencies."[262]

The minority's proposed legislation contained an entire Title—nearly seven and a half pages—addressing "Administrative Rules and Regulations."[263] Although detailed, the provisions are predominately discretionary, empowering and guiding agencies rather than imposing a procedural mandate. The title began with a "[d]eclaration of policy" that emphasized transparency and explained that the rulemaking procedures were "designed to extend the legislative process by securing the participation of interested parties."[264] Section 208 of the proposed Code required that "[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 rule-making proceedings."[265] The provision further urged agencies to provide notice "with as much particularity and definiteness as deemed practicable" and suggested—but did not require—that the agencies should make available "proposed or tentative rules."[266] Section 209 addressed "[p]ublic rule-making procedures" by offering a non-exhaustive menu of options,[267] including the "[s]ubmission and reception of written views," "[c]onsultations and conferences" (including

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261 *Id.* at 215.

262 *Id.* It is a little ironic that the minority says "a detailed code" is not needed and then offers what could be fairly described as a detailed "Code of Standards of Fair Administrative Procedure." *See id.* at 215, 217.

263 *Id.* at 224–32. Here and throughout the minority's "Code," the proposed legislative text is interspersed with explanatory comments, which contribute to the length.

264 *Id.* at 224–25.

265 *Id.* at 228.

266 *Id.* The minority noted that "[t]he Logan-Walter bill requires in all cases the formal publication of *proposed* rules in extenso, a requirement which is unnecessarily burdensome and which would fill the Federal Register with confusing masses of merely tentative rules." *Id.*

267 The provision begins by stating that "[w]ithout limiting the adoption of any other procedures, agencies are authorized to utilize in situations deemed appropriate by them any one or more of the following types of public rule-making procedures." *Id.*

advisory committees), "[i]nformal hearings" of a quasi-legislative character, and "[f]ormal hearings" of a quasi-judicial character but with some release from the full procedural requirements of adjudicatory hearings.[268] The provision repeatedly affirmed agency discretion. The least latitude for agency discretion appears with respect to the written commenting procedure. Here, the Code stated that "[p]rovision for the submission and consideration of written views shall be made in all cases of announced rule making, unless the agency concerned determines such a course to be impracticable."[269] The explanatory note emphasized: "Congress should not attempt to prescribe in detail just what rules or what kind of rules should be made according to any one procedure. The agencies, except where special statutes prescribe otherwise, should be given a choice and wide discretion."[270] To promote transparency and uniformity, however, the agencies should be required to "formulate and publish a regularized procedure or procedures for the making of rules."[271] This approach, the minority explained, would best accommodate the great variety of rules used across administrative agencies and reduce incentives for agencies to avoid rulemaking or issue "secret rules."[272]

The minority report contains the first glimmers of a democratic theory of administration in general and rulemaking in particular. It began by declaring: "Administrative agencies are staffed for the most part by intelligent, capable, hard-working, and conscientious men and women. No careful student of administrative law would impair their efficiency, yet all desire that their procedures promote justice, fairness, and responsiveness to the public will, *as in a democracy they should*."[273] In making the case for "[t]he need for a legislative statement of standards of fair procedure,"[274] the minority opined that "[t]o govern the courts by weighty tradition, a bulky 'Judicial Code,' and uniform rules of practice but to give administrators only slight statutory attention is at least questionable in a democracy."[275] Judicial review of administrative action is one way to check administrators and protect individual rights—but judi-

268 Id. at 228–29.
269 *Id.* at 228.
270 *Id.* at 229.
271 *Id.* at 227.
272 *Id.* at 229. In this respect, the minority seems to have predicted the likely consequences of ossifying the rulemaking process.
273 *Id.* at 203 (emphasis added).
274 *Id.* at 214.
275 *Id.* at 215.

cial review is "available only to those few who can afford it."[276] Ex ante legislative regulation of administrative procedure offers protections more broadly available—more democratic, one might say—than exclusive reliance on the ex post judicial review.[277]

The minority explained that its legislative proposal for rulemaking procedures was designed to promote transparency and democratic accountability. First, it sought "to secure the making of all the essential kinds of rules necessary *to inform the public* of administrative law, policy, procedure, and practice."[278] Second, it "suggest[ed] methods of *democratizing the rule-making process* without, at the same time, imposing such burdensome requirements that rules with either not be made or policy will be driven underground . . . and remain inarticulate or secret."[279] Finally, the minority was ahead of its time in advocating for Congress to express an affirmative preference that agencies should make policy via rulemaking rather than adjudication.[280]

F. Congress Builds on the Administrative Foundation

In enacting the APA, Congress built upon the foundation of administrative practice reflected in the Attorney General Committee's work.[281] That work was completed in 1941 and trans-

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276 *Id.*

277 *See id.*; *see also id.* at 213 (explaining that "[t]hose of modest means or humble interests rarely question a decision by a Federal official" and "[o]thers feel that, no matter what the outcome, their business or their pocketbooks suffer by a contest;" thus, it is "necessary to devise methods, and constantly improve them, by which the exercise of the diverse and far-reaching powers of the national Government will be kept more nearly within those channels of justice which everyone feels to be desirable").

278 *Id.* at 225 (emphasis added); *see also id.* at 226 ("For example, not a single important agency now discloses in practical form its own internal organization and set-up, though without such disclosure neither Congress nor the public can be informed as to the avenues of approach open to the citizen who must do business with the agency.").

279 *Id.* at 225 (emphasis added).

280 *Id.*; *see supra* note 38 and accompanying text. The minority was not alone in its prescience: four years earlier, the President's Committee on Administrative Management expressed a similar preference for rulemaking. *See* FINAL REPORT, *supra* note 124, at 225.

281 *See, e.g.*, S. REP. No. 79-752, at 187, 189 (describing how the committee was formed to make a comprehensive survey of and suggestions regarding "administrative methods, overlapping functions, and diverse organization"). The Senate Judiciary Committee print of S. 7, the bill which became the APA, "collate[d] in parallel columns the provisions of the present bill with the pertinent portions of the final report of the Attorney General's Committee on Administrative Procedure, indicat[ing] the care with which the recommendations of that committee [had] been studied in framing" the new law. H.R. REP. NO. 79-1980, at 246;

mitted to Congress, where the monographs and Final Report were published as Senate documents and became a key component of the APA's legislative history.[282] The competing legislative proposals of the majority and minority were introduced in Congress, and the Senate Committee on the Judiciary held extensive hearings in the spring and summer of 1941.[283] The hearings introduced written and oral testimony from many federal agencies as well as "representatives of business, professional, labor, and agricultural organizations" and "members of the Attorney General's Committee on Administrative Procedure."[284] As World War II loomed, Congress turned its attention away from the task of reforming administrative procedure.[285] In 1944, during the 78th Congress, new bills were introduced in both the House and the Senate.[286] Although there was some discussion of the matter, no hearings were held. "The Attorney General, utilizing some of the staff of his former Committee on Administrative Procedure, had a voluminous analysis made of the new bill."[287]

In 1945, after the war was over, the 79th Congress returned to the subject, but under new and different circumstances. The wartime expansion of the federal government had a double-edged effect: it increased both acceptance of expanded federal power and concern that administrative reform was needed to protect individual rights and prevent authoritarianism.[288] New "revised and simplified bills" were introduced into both houses of Congress, and additional written comments were submitted by both federal agencies and private organizations.[289] In June 1945, the House Committee on the Judiciary

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see also id. at 248 (explaining how the present bill has been thoroughly analyzed by administrative agencies and private organizations).

282 *See supra* subpart II.A.

283 *See* H.R. REP. NO. 79-1980, at 246–47; *Hearing on S. 674, 675, and 918 Before the Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. (1941). A wonderful chart of the history of legislative bills on administrative reform is provided in S. REP. NO. 79-752, at 188.

284 H.R. REP. NO. 79-1980, at 247.

285 *See id.* at 248.

286 *See* S. 2030, 78th Cong. (1944); H.R. 5081, 78th Cong. (1944).

287 H.R. REP. NO. 79-1980, at 248.

288 *See generally* Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573 (2021) (laying out the foundation for understanding why the APA failed to forestall the growth of authoritarianism in the United States); Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022) (showing how the Committee's report was drawn and adapted from an older Progressive Era tradition to reject formal constitutionalism and the principle of separation of powers).

289 H.R. REP. NO. 79-1980, at 248, Appendix B; S. REP. NO. 79-752, at Appendix B.

held hearings, and negotiations also continued off the record.[290] Attorney General Tom C. Clark endorsed Congress's efforts in letters sent to both the House and Senate Judiciary Committees.[291] The bill was reported favorably by the Senate Committee on the Judiciary on November 19, 1945 and was passed in the Senate on March 12, 1946.[292] The House Judiciary Committee made various changes to S. 7 and introduced H.R. 5988 as an amendment in the nature of a substitute.[293] Attorney General Clark sent a letter stating that the changes were "not objectionable to the Department of Justice" and "may be described as clarifications of the language and intention" of bills that the Attorney General had previously endorsed.[294] The House passed the bill on May 24, 1946, the Senate subsequently accepted the House amendments, and the President signed the bill on June 11, 1946.

The APA's legislative history reveals broader congressional concern for the interests of "the public"—not just organized interest groups—in agency information and rulemaking proceedings.[295] Indeed, the text of the APA's rulemaking provisions refers expressly to "notice and *public procedure* thereon."[296] Section 4 of the bill, which established the notice-and-comment rulemaking procedure, was understood to have "[t]he principal purpose" of "provid[ing] that the legislative functions of administrative agencies shall so far as possible be exercised only upon *public participation* on notice" as required by the statute.[297] The debate in Congress ubiquitously refers to "public" rulemaking procedures, containing little acknowledgment or concern for the role organized interest groups played in the pre-APA practices that Congress was codifying. Congress's

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290 A lot of the negotiation on the APA during this key period took place outside the formal, recorded proceedings in Congress.

291 H.R. REP. NO. 79-1980, at 249–50.

292 *See* 92 CONG. REC. 2148, 2148, 2167 (1946).

293 *See* H.R. REP. NO. 79-1980, at 250.

294 *Id.* at Appendix B.

295 The Senate and House Reports often use identical language to explain the rulemaking sections, although it appears that the House strengthened the rulemaking requirements in various ways and had greater concern for the public's interest in the rulemaking process. Since the House acted later and made amendments to the bill that were approved by the Senate, I view the House Report as more probative of the statute's meaning as enacted. To the extent there are differences, however, they appear to be more in the nature of evolution than change. This judgment is in accord with the views expressed by the Attorney General. *See id.* at Appendix B.

296 5 U.S.C. § 553(b)(3)(B) (emphasis added). This language, which appears in the statute today, was in the APA as originally enacted in 1946.

297 H.R. REP. NO. 79-1980, at 257 (emphasis added).

focus on the interests of the general public in agency proceedings is further evidenced by the public information sections of the APA, as enacted in 1946.[298] Section 3 of the bill embraced the proposition that "[t]he general public is entitled to know agency procedures and methods or to have the ready means to of knowing with certainty."[299]

The legislative history also conveys a clear sense of rulemaking as a matter of minimum requirements beyond which agencies have broad procedural discretion, including to continue with the pre-APA rulemaking practices. Section 4(b) (which is now § 553(c)) was explained as "stat[ing] the minimum requirements of public rulemaking procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal 'hearings.'"[300] Congress plainly expected that agencies would use their discretion to afford more procedure when it was appropriate to do so: "Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures."[301] Congress expected that the required rulemaking notice would give the public meaningful detail about the agency's proposal and seems to encourage the inclusion of draft rule text.[302] The required statement of basis and purpose was similarly expected to satisfy the public's interest, and therefore should, "with reasonable fullness[,] explain the actual basis and objectives of the rule."[303] Although certain matters were exempted from Section 4's public procedures, "these exceptions [were] not to be taken as encouraging agencies not to adopt voluntary public rule-making procedures where useful to the agency or beneficial to the public. They merely confer a discretion upon agencies to decide what, if any, public rule-making procedures

298 Although the APA rarely has been amended, these provisions have been enhanced, most notably with the 1966 enactment of the Freedom of Information Act.

299 H.R. REP. NO. 79-1980, at 255; *see also* S. REP. NO. 79-752, at 194 ("The public information provisions of section 3 are of the broadest application because . . . all administrative operations should as a matter of policy be disclosed to the public."); *id.* at 198 ("[Section 3] has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance.").

300 H.R. REP. NO. 79-1980, at 259.

301 S. REP. NO. 79-752, at 201; H.R. REP. NO. 79-1980, at 259.

302 H.R. REP. NO. 79-1980, at 258.

303 *Id.* at 259.

shall be utilized in a given situation within their terms."[304] Similarly, although the bill exempted interpretive rules, general statements of policy, and procedural and organizational rules from notice-and-comment requirements, the legislative history suggests that "this does not mean that [agencies] should not undertake public procedures in connection with such rule making where useful to them or helpful to the public."[305] While the monographs reveal broad agency discretion to forego notice-and-comment procedures, Congress's extension of the good cause exception was considerably more limited.[306]

Finally, the legislative history conveys Congress's expectation that the courts would, through "independent judicial interpretation," flesh out the procedural requirements established by the new law. In discussing Section 10(e), regarding the scope of judicial review with respect to procedural requirements (what is now § 706(2)(D)),[307] the House Report explains that the APA's procedural requirements

> must, to be sure, be interpreted and applied by agencies affected by them in the first instance. But the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis. It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used.[308]

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304 *Id.* at 257; *see also* S. REP. NO. 79-752, at 199 ("None of these exceptions, however, is to be taken as encouraging agencies not to adopt voluntary public rule making procedures where useful to the agency or beneficial to the public.")

305 H.R. REP. NO. 79-1980, at 258.

306 *See, e.g.*, H.R. REP. NO. 79-1980, at 258–59 (noting that the exemption for emergency or necessity situations is not an "escape clause" and that a "true and supported . . . finding of necessity or emergency must be made and published"). The Senate seemingly foresaw the possibility of something like direct final rulemaking. *See* S. Rep. No. 79-752, at 200 ("It should be noted that where authority beneficial to the public does not become operative until a rule is issued, the agency may promulgate the necessary rule immediately and rely upon supplemental procedures in the nature of a public reconsideration of the issued rule to satisfy the requirements of this section," i.e., § 4(a), which is now § 553(b).).

307 *See* H.R. REP. NO. 79-1980, at 278. This provision directs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

308 H.R. REP. NO. 79-1980, at 278. The Report goes on to offer the good cause exception as an example. *See id.*

III
LESSONS FOR MODERN AGENCY RULEMAKING

Tracing § 553 back through the APA's legislative history to the undemocratic roots of pre-APA administrative rulemaking practices offers a more nuanced account of the modern notice-and-comment rulemaking process. At § 553's core is an administratively generated norm that serves the information-gathering and cooperation-inducing needs of expert agencies, while offering private interests some protection and individual right of participation. The Attorney General's Committee—and particularly its minority—saw in these pre-APA practices the possibility for a more transparent and democratic mode of administration. In crafting the APA, Congress expanded upon these public-oriented possibilities, while codifying undemocratic pre-APA practices. The result is a flexible regime capable of post-enactment evolution through both administrative implementation and judicial construction.[309]

This analysis (1) explains that public participation in rulemaking serves a diverse array of purposes, (2) reveals a dynamic framework for ongoing norm generation, and (3) offers hope that modern rulemaking's democracy paradox can be effectively managed.

A. The Multifarious Purposes of Public Participation

To understand the notice-and-comment process, we must begin with the pre-APA administrative practices that inspired it. As the previous Part shows, external consultation in pre-APA rulemaking was provided through various mechanisms, at different points in the process, and to serve various (albeit sometimes interconnected) purposes. These mechanisms—most of which should be familiar to the modern reader—included: (1) unsolicited requests for new regulations or amendments to existing regulations (i.e., petitions for rulemaking);[310] (2) solicitation of oral or written information and views from interested persons, particularly through institutions or organizations known to the agency to be knowledgeable about the subject matter;[311] (3) the use of privately or publicly coordi-

309 *See supra* Part II.

310 *See* 5 U.S.C. § 553(e); *see generally* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1575–76 (2018) (tying the APA's petitions provision to broader American commitments to petitioning).

311 *See* 5 U.S.C. §§ 553(b)–(c).

nated advisory committees;[312] (4) legislative-type hearings;[313] and (5) judicial-type hearings.[314] How these tools were used in pre-APA rulemaking can help to illuminate the various purposes of public participation in agency rulemaking, as well as the practical realities that make interest group participation valuable and perhaps inevitable.

In evaluating the purposes of public participation in rulemaking, it may make sense to begin with that widely maligned device—the hearing. In rulemaking as defined by the APA, hearings may be either legislative- or judicial-type.[315] Judicial-type or "formal" hearings, which are defined in detail by the APA's hearing provisions, are rarely used in post-APA rulemaking.[316] Pre-APA, they were used in ratemaking, a function that was conceived as more quasi-judicial than quasi-legislative in character. Ratemaking agencies used formal hearings because: (1) applicable statutes required a hearing, and (2) the courts specified the characteristics of those hearings as a matter of due process.[317] Traditional ratemaking had a dual character—it was an adjudication as a condition prece-

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312 In 1972, Congress enacted the Federal Advisory Committee Act to regulate agency use of advisory committees. *See* 5a U.S.C. §§ 1–16.

313 The APA does not acknowledge or regulate legislative-type hearings. Bremer, *supra* note 141, at 99–101.

314 The APA codifies the minimum requirements of a judicial-type hearing in substantial detail. *See* 5 U.S.C. §§ 554, 556–57. Over the decades, however, agencies have avoided the APA's hearing provisions, mostly with the support of Congress, the courts, and scholars. *See generally* Bremer, *supra* note 45, at 1351 ("Congress, the courts, agencies, and scholars have embraced the use of unique institutional structures and procedural rules tailored to suit the needs of individual agencies and regulatory programs. As a consequence, most [administrative] adjudication is conducted outside of the APA . . . ."); Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749, 1749 (2020) (arguing that adjudication's "exceptionalism norm overemphasizes specialization, at great cost").

315 *See* DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 29 (1947) [hereinafter AG'S MANUAL]. The AG's Manual was prepared by the Department of Justice in 1947 as a guide to federal agencies on how to comply with the new law. *See* Bremer & Kovacs, *supra* note 30, at 225. At least one of the attorneys who had supported the work of Attorney General's Committee on Administrative Procedure, Robert W. Ginnnane, helped to write the AG's Manual. *See* Bremer, *supra* note 141, at 91 & n.70. Although agencies and courts have relied on the AG's Manual as an authoritative guide to interpreting the APA, some caution is warranted because the document is in part a political statement in support of the liberal view of the APA. *See* Bremer & Kovacs, *supra* note 30, at 219, 222, 225; Duffy, *supra* note 60, at 119, 133.

316 *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 128 n.5 (2015) (Thomas, J., concurring in the judgment); Barnett, *supra* note 44, at 4; Bremer, *supra* note 141, at 79; Nielson, *supra* note 44, at 239–40.

317 *See, e.g.*, Ariz. Grocery v. Atchison, 284 U.S. 370, 381 (1932) (rail carrier rates); Morgan v. United States, 298 U.S. 468, 471 (1936) (agriculture marketing rates); AG'S MANUAL, *supra* note 314, at 33–34.

dent to a rulemaking. First, the agency had to adjudicate whether a particular party (or parties) was legally liable for violating a statutory obligation to charge reasonable and non-discriminatory rates. If the agency found a violation, it could issue a rate order specifying a reasonable and non-discriminatory rate to be charged in the future.[318] The adjudicative component of the ratemaking necessitated the formal hearing. Its principal purpose was to satisfy the due process rights of the named party to participate in the adjudication of his or her liability and to ensure that the fact-bound dispute was decided fairly and exclusively on the basis of reliable evidence.[319]

The individualized focus of a hearing is ill-suited to generalized rulemaking. The Attorney General's Committee recognized this, and it seems to have convinced Congress of the proposition as well. In the APA, Congress codified judicial-type hearings but not legislative-type hearings.[320] By classifying ratemaking as rulemaking,[321] Congress put a thumb on the scale against hearings in that context and contributed to ratemaking's long evolution from an adjudicative to a legislative function. That evolution was already underway in 1946, and it continued in the decades after the APA was enacted.[322] More broadly, Congress shifted away from economic regulation

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318 The agency might also be empowered to require the offending carrier to pay reparations, but that retrospective action would be adjudication and not rulemaking.

319 *Cf.* Wong Yang Sung v. McGrath, 339 U.S. 33, 49–51 (1950) (recognizing the APA's hearing provisions as Congress's specification of due process requirements in adjudication).

320 *See* AG'S MANUAL, *supra* note 314, at 33–35. The legislative history suggests that some in Congress lumped all statutory hearings together and did not understand that there were two types of hearings. The misunderstanding or confusion of individual legislators, however, does not alter the bill's meaning. The AG's Manual argues that because the possibility that a statutory "hearing" in rulemaking might mean either an adjudicatory or a legislative-type hearing was "specifically called to the subcommittee's attention, it is a legitimate inference that with respect to rule making . . . the present dual requirement i.e., 'after opportunity for an agency hearing' *and* 'on the record', was intended to avoid the application of formal procedural requirements in cases where the Congress intended only to provide an opportunity for the expression of views." *Id.* at 35 (emphasis in original). The inclusion in § 556(e) of the exclusive record principle, which did not apply in pre-APA legislative-type hearings, helps to define the APA's "on the record" language and offers perhaps the clearest indication that the APA codified only judicial-type hearings.

321 Actually, the APA provides that rulemaking "includes the *approval or prescription for the future* of rates," which may suggest an attempt to separate out the rulemaking component from dual judicial-legislative character of traditional ratemaking. 5 U.S.C. § 551(4) (emphasis added).

322 *See generally* Bremer, *supra* note 141 (exploring the evolution in the ICC's statutory authority).

through quasi-judicial devices such ratemaking and licensing and towards environmental and consumer protection regulation that is more suited to purely legislative rulemaking.

The APA's minimum requirements for agency rulemaking do not include hearings or the discrete procedural elements that are uniquely associated with the formal hearing procedure. Agencies may choose to observe those (or other) procedures when a rulemaking will benefit from such observance,[323] but the APA does not specify any procedural requirements for hearings in the quasi-legislative context of rulemaking.[324] Courts consequently have nothing to enforce in that context. The procedural consequences of shifting from adjudication to rulemaking as the preferred vehicle for agency policymaking[325] was to shift away from formal hearings to notice-and-comment proceedings. Altogether this is, of course, precisely the interpretation the Supreme Court arrived at through *Allegheny-Ludlum*,[326] *Florida East Coast Railway*,[327] and *Vermont Yankee*.[328]

The APA's notice-and-comment procedures recognize that affected individuals have different interests in participating in rulemaking than they do in adjudication. Rulemaking is the process by which agencies establish general rules of prospective effect.[329] Due process protections for individual affected parties are minimal or absent in this context.[330] There will be no judgment of individualized legal liability, and there is no need for tightly controlled rules of evidence or cross-examination. Regulated parties who will be subject to the rule, however, may desire an opportunity to be heard and to share information that will contribute to a rule that is well designed and minimally intrusive. But the class of affected persons is also broader and more diverse in a rulemaking proceeding, particularly when the agency is tasked with social regulation, such as under environmental or consumer protection statutes. In these circumstances, the agency must consider the views of

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323 *See* AG'S MANUAL, *supra* note 314, at 31.

324 *See* 5 U.S.C. § 553.

325 This shift is pegged to the 1960s and 1970s, but the minority of the Attorney General's Committee urged it much earlier. *See* FINAL REPORT, *supra* note 124, at 225.

326 United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756–58 (1972).

327 United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 227–28 (1973).

328 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 525 (1978).

329 *See* 5 U.S.C. §§ 551(4)–(5).

330 *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 443–45 (1915); Londoner v. Denver, 210 U.S. 373, 378–79 (1908).

"interested persons" in a narrow sense, but it must also consider the views of "the public."[331] Like regulated parties, the innumerable beneficiaries of the rules have an interest in being heard and providing information that will enable the agency to craft an effective rule.[332] But it would be extremely burdensome and probably impossible to *require* all regulated parties and regulatory beneficiaries to submit comments to an agency in rulemaking. The APA's notice-and-comment process is thus necessarily open-ended, offering to all *the opportunity* to participate in rulemaking.[333]

The APA's notice-and-comment procedures also recognize that agencies have different interests—and authority—in rulemaking proceedings than they do in adjudication. The agency's principal interest is in obtaining the information necessary to inform its expert judgment. Notice-and-comment procedures provide an efficient way for the agency to obtain information, data, and views that are available in the private sector. The APA's drafters recognized that expertise may lie outside of the agency. The statute thus requires that the agency be transparent about its organization and procedures, give effective notice of proposed rulemaking, accept and consider comments submitted during the rulemaking, explain the purpose and basis for the rules, and publish the final rules in the *Federal Register*.[334] This regime also acknowledges, albeit sub silentio, that the most important input into the rulemaking process is the agency's own legislative judgment. The exclusive record principle, so essential in adjudication, is inappropriate in rulemaking.[335] Finally, consulting with the public helps an agency to craft a rule that will have buy-in. This can help to ease later enforcement efforts.[336]

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331 This explains Congress's evolution towards broader concern for "the public" in designing the APA's information and rulemaking provisions. *See supra* subpart II.F.

332 Thus, in designing informal rulemaking procedures beyond the APA's minimum, an agency's "objective should be to assure informed administrative action and adequate protection to private interests." AG'S MANUAL, *supra* note 314, at 31.

333 *See* 5 U.S.C. § 553(c).

334 *See* 5 U.S.C. § 553.

335 *See* 5 U.S.C. § 556(e); *see also* AG'S MANUAL, *supra* note 314, at 31 ("It is entirely clear . . . that section [553(c)] does not require the formulation of rules upon the exclusive bases of any 'record' made in informal rule making proceedings."). The exclusive record principle controls the basis of the agency's decision and is distinguishable from issues related to the record for judicial review.

336 *See, e.g.*, MONOGRAPH 10 (COMMERCE MARINE), *supra* note 106, at 33–34 (describing an announcement that says it is the Bureau's intent to "hold a public hearing on all proposed regulations of extensive scope and character, at which all interested parties will be heard"); MONOGRAPH 26 (SEC), *supra* note 122, at 109–10

As Congress codified the pre-APA administrative practices documented by the Attorney General's Committee, it grafted onto § 553 the democratic values of transparency and public participation.[337] The key point is that democracy or democratic accountability is just one purpose of a process that was principally designed to serve the informational needs of expert agencies and to protect the private interests of regulated parties.[338] These various purposes of public participation in rulemaking can be in tension with one another. But it is not a matter of tension between § 553 and other doctrines of administrative law—the tension is within § 553 itself. This insight should dispel concerns that § 553 is failing. The perceived pathologies of modern rulemaking flow instead from an incorrect, unidimensional understanding of § 553's purpose.

Changes in administrative practice and American society do, however, create challenges for § 553's implementation. The shift from adjudication to rulemaking as the preferred tool of agency policymaking made § 553 far more important than it was in 1946.[339] The shift from economic to social regulation demanded that agencies make more important policy choices with broader effects on American society. The shift from a paper-based to an electronic rulemaking process made broad public participation radically more possible than it was before the Internet.[340] Larger political trends also impose pressures on the system. The recent populist turn in American politics seems to have reduced the public's appetite for political control by unelected elites. Meanwhile, calls for greater equity and

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(noting how persons affected, including the public, should have an opportunity to "speak their pieces").

337 *See* AG'S MANUAL, *supra* note 314, at 31.

338 Recognizing these core purposes of public rulemaking proceedings, the AG's Manual advised agencies that, in designing rulemaking procedures beyond the APA's minimum requirements, "[t]he objective should be to assure informed administrative action and adequate protection to private interests." *Id.* at 26, 31.

339 *See, e.g.*, Cass, *supra* note 22, at 686 (explaining the "evolution of rulemaking from a relatively infrequent method of guiding executive action to the engine for a massive regulatory system that both complements and substitutes for congressional lawmaking"); Schiller, *supra* note 35 (explaining the growth in agency rulemaking).

340 *See* Dooling, *supra* note 11; Noveck, *supra* note 84, at 436–38; *cf.* Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 136 (2013) ("Today, widespread use of the Internet, combined with e-rulemaking initiatives and pushes for greater transparency in government, have raised expectations regarding the accessibility of agency processes and regulations."). The shift to electronic rulemaking also offered a wide variety of other informational and efficiency benefits to administrative agencies. *See* Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353 (2004).

inclusion have heightened pressure to bring traditionally unrepresented groups into the rulemaking process.[341]

Fortunately, Congress designed § 553 to evolve through a combination of administrative implementation and judicial interpretation. These mechanisms—combined with § 553's multifarious purposes—allow notice-and-comment rulemaking to operate as a dynamic procedural regime.

B. A Dynamic Procedural Regime

In § 553, Congress provided a skeletal framework, imposing only minimal requirements subject to judicial enforcement, while affirming broad agency discretion to tailor rulemaking procedures beyond the minimum. This created two valid mechanisms for adapting rulemaking procedures to new circumstances: judicial construction and agency discretion.

To begin with the judiciary's role, the APA's intellectual foundation and legislative history validate the administrative common law that has emerged under § 553. As previously explained, administrative common law is controversial.[342] Some argue that courts should read § 553 narrowly and enforce only its plain text.[343] But the nascent character of the process that inspired § 553 limits the extent to which the historical record can be read to fix the meaning of the statutory text. Broadly speaking, the APA is a complex, sometimes tense mixture between codification and reform.[344] In adjudication, there was plenty of pre-APA law governing adjudication procedures, including agency-specific statutes, judicial common law under the Due Process Clause, and extensive agency experience that had been broadly crystallized into established procedural rules and policy. The APA's adjudication provisions codified established best practices, with the goal of reforming non-compliant agencies.[345] A strong argument could be made in favor of a strict textualist enforcement of the APA's adjudication provisions.[346]

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341 These are issues that administrative law scholarship is only beginning to discuss. *See, e.g.*, Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 95 (2021) ("Despite their salience in other fields and this budding reconceptualization, questions of equity, including the subordination question, have been left out of the analysis of separation-of-powers tools.").

342 *See supra* subpart I.B.

343 This argument comes from diverse ideological viewpoints. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 401, 429 (9th ed. 2022); Kovacs, *supra* note 37.

344 *See Present at the Creation*, *supra* note 126, at 521.

345 Bremer, *supra* note 30, at 401.

346 The courts have opted for non-enforcement instead, but that is another story. *See, e.g.*, Bremer, *supra* note 45, at 1353 ("[C]ourts have acquiesced in—

The APA's rulemaking provisions, by contrast to its adjudication provisions, ran out ahead of both the law and existing agency practice.[347] In rulemaking, the Due Process Clause offered no traction for judicial development of minimum requirements, statutes rarely addressed procedural matters, and most agencies' practices had not yet crystallized. As a consequence, § 553 is more inspiration than codification. It took tidbits from various agencies to cobble together a process that was still decades away from becoming the preferred means of agency policymaking. If § 553 seems skeletal, that's because it *is* skeletal. The text invites, even demands, post-enactment liquidation of its meaning. As explained above, the legislative history suggests that Congress expected courts would help to determine the meaning of the APA's procedural requirements through independent judicial construction of the statute.[348] When administration shifted from adjudication to rulemaking—and from economic to social regulation—§ 553's guarantee of public participation rights took on new importance and meaning. It is entirely appropriate that these shifts would be reflected in the caselaw interpreting § 553.[349]

Turning from courts to agencies, understanding § 553 in its full historical context reveals the central importance of agency procedural discretion in rulemaking procedures. Broadly speaking, the process by which the APA was developed and enacted itself affirms the legitimacy of agency participation in generating norms of administrative procedure.[350] More par-

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and even supported—the proliferation of non-uniform adjudicatory procedures . . . ."); Bremer, *supra* note 30, at 390 ("[C]ourts have recognized broad agency discretion . . . .").

347 As Kenneth Culp Davis said, the APA's "most important idea, notice and comment procedure, was original, not merely declaratory of what had already developed." *Present at the Creation*, *supra* note 126, at 521. *See also* Cass, *supra* note 22, at 696 ("[T]he requirement of notice and comment for rulemaking that emerged from the process has been heralded as 'the APA's most important reform' and the APA's 'most important idea.'").

348 *See supra* subpart II.F.

349 Congress's 1976 waiver of sovereign immunity to allow pre-enforcement review of agency rules only lends further support to this regime. *See* Act of Oct. 21, 1976, Pub. L. No. 94–574, § 1, 90 Stat. 2721, 2721; *see generally* Mashaw, *supra* note 36, at 271 (addressing the fundamental questions of the appropriate relations or roles of courts and agencies when they "inhabit the same jurisdictional space—a space composed of mixed questions of law, fact, and policy").

350 This subject has garnered some scholarly attention but warrants further consideration in the U.S. context. *See, e.g.*, Dorit Rubinstein Reiss, *Administrative Agencies as Creators of Administrative Law Norms: Evidence from the UK, France and Sweden*, *in* COMPARATIVE ADMINISTRATIVE LAW 319, 319–20 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2019) ("[T]here is a long history of agencies creating administrative law norms on their own . . . .).

ticularly, Congress understood that agencies would be the first to implement § 553's notice-and-comment requirements, subject to judicial review. It also contemplated that agencies would supplement § 553's minimum requirements with additional procedures to suit the agencies' various and changing needs.[351] The APA's intellectual foundation offers a menu of procedural possibilities, but the list is non-exhaustive. The operative background norm in rulemaking is agency procedural discretion.[352]

C. New Light on Rulemaking's Democracy Paradox

Understanding § 553 in its full historical context reveals that some of the supposed pathologies of the modern rulemaking process[353] are better understood as inevitable—perhaps even intended—characteristics of § 553's design. First, the pre-APA practices that inspired § 553 help to explain the prevalence of organized interest groups in the notice-and-comment process. This is not a new phenomenon. It was a core feature of New Deal-era administrative practice. Organized interest groups are well situated to channel privately held expertise, offering it to agencies in an organized and substantive format that is more manageable for agencies to process and use. Second, although § 553 creates public participation rights, agencies have always found feedback from the general public difficult to manage and sometimes simply undesirable.[354] The Internet and electronic rulemaking certainly amplify—but did not create—these realities. Here again, a seemingly modern pathology of the notice-and-comment process is revealed to be a longstanding challenge of external consultation in rulemaking.

Fortunately, § 553's flexible framework is designed to empower agencies and courts to manage these procedural challenges. Section 553's plain text and democratic purpose

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351 There are some textual clues in the statute. *See, e.g.*, 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments *with or without opportunity for oral presentation*." (emphasis added)).

352 *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978); Bremer & Jacobs, *supra* note 47.

353 *See supra* notes 1–20 and accompanying text (describing the apparent pathologies of the notice-and-comment process); *supra* notes 81–92 and accompanying text (same).

354 *See, e.g.*, MONOGRAPH 9 (THE FED), *supra* note 105, at 16 (suggesting that tentative drafts of regulations that concern the public should be publicly announced and made available upon requests).

require agencies to accept and consider all public comments.[355] But the statute's technocratic values empower agencies to resist the widespread misperception that rulemaking comments are votes[356] and to use technological tools to make large volumes of public input manageable.[357] Interest group participation can channel valuable information to an agency, but it can also contribute to a more closed process in which the agency receives asymmetrical feedback. Section 553 affords agencies broad discretion to fashion innovative procedures—conferences, public workshops or listening sessions, third-party comment facilitation, etc.—to counterbalance these effects.[358] Agencies have the front-line authority and responsibility to balance § 553's competing purposes, while courts serve as a backstop to enforce the statute's minimum requirements.

There are limits, however, to the ability of agencies and courts to manage deeper tensions in administrative governance through § 553's procedural mechanism. When circumstances threaten to fundamentally unsettle the balance among the APA's competing values, Congress may need to step in to address the matter by statute. It has done this on several occasions. For example, when the APA's public information provisions proved inadequate to secure the public's right to transparency, Congress enacted the Freedom of Information Act (FOIA).[359] When the federal agency use of advisory committees threatened to make public-private consultation too closed and non-transparent, Congress enacted the Federal Advisory Committee Act (FACA).[360]

In some cases, the problem (and therefore the solution) may not be procedural. Extremities in the rulemaking process

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355 *See* AG'S MANUAL, *supra* note 314, at 31.

356 *See* Recommendation 2021-1, *supra* note 2, at 36079 (separate statement of Public Member Richard Pierce).

357 *See, e.g.*, Dooling, *supra* note 11, at 895 (describing the legal issues that arise when agencies engage in e-Rulemaking).

358 *See, e.g.*, Sant'Ambrogio & Staszewski, *supra* note 12, at 820 (providing a variety of methods for agencies to solicit data, comments, or other information from the public in person to encourage more interactive conversations and follow-up questions).

359 *See* Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250. *See generally* MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT (2021) (documenting how agencies have responded by creating new processes, systems, and specialists—which have had a deleterious impact on journalists and the media).

360 *See* Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972). In addition, when the Internet transformed the possibilities for publication of agency information, Congress enacted the E-Government Act of 2002. *See* E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899.

may indicate a need for substantive congressional action. From this perspective, the FCC's extraordinary experience with mass comments and swift policy reversals in its net neutrality proceedings looks like a different kind of red flag. Perhaps Congress simply has not yet legislated on the subject with sufficient specificity to empower the FCC to do its job.

CONCLUSION

This Article has shown that the APA's notice-and-comment process is not a simple statutory mandate for democracy in administrative rulemaking. Section 553 is far more valuable and dynamic than that. It is an administratively generated norm of administrative procedure, which was simultaneously codified and modified by Congress, and is designed to accommodate post-enactment evolution through a blend of agency implementation and judicial construction. Congress imbued the APA's notice-and-comment process with public rights to transparency and participation. But as an original matter, consultation in rulemaking served other, less democratic purposes. It enabled agencies to get targeted, manageable access to the privately held information that is necessary to inform the agencies' expert judgment. It offered a way for agencies to build consensus to support new regulatory efforts. And it offered protection for the private interests directly affected by regulation, guaranteeing a right to be heard and offering the opportunity to influence administrative decision-making. The informal rulemaking process can be managed more effectively if we acknowledge § 553's competing purposes and embrace the dynamic characteristics of the APA's procedural regime.

The deeper reality, however, is that the APA seeks to manage through procedural means a fundamental tension between expert administration and democratic governance. Managing the rulemaking process seems more possible when we acknowledge how this tension manifests in § 553, in the provision's competing purposes and institutional mechanisms for evolution. But the APA is commonly understood as a political compromise: preservation of the New Deal's administrative apparatus in exchange for increased procedural regulation and judicial review.[361] If that underlying compromise falls apart, the APA's procedures fall with it.

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361 *See generally* Shepherd, *supra* note 34.