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EXECUTIVE RULEMAKING AND DEMOCRATIC LEGITIMACY:  
“REFORM” IN THE UNITED STATES AND THE UNITED KINGDOM’S  
ROUTE TO BREXIT

SUSAN ROSE-ACKERMAN\*

In both the United States and the United Kingdom, political upheavals could leave lasting marks on the relationship between the executive, on the one hand, and the legislature, on the other, with the courts refereeing conflicts, interpreting legal texts, and applying the common law.

In the United Kingdom, the 2016 Brexit referendum approved exit from the European Union by a narrow margin. That vote is putting pressure on the Westminster structure of government. At the time of writing, no deal with the EU is yet in place, and some are pushing for a second popular vote. As Brexit unfolds, established policymaking processes in the executive are facing sharp challenges to their legitimacy both from within Parliament and from outside groups seeking judicial review of government policies and procedures.

In the United States, the Trump administration and the Republican-controlled Senate are appointing sympathetic judges to the federal judiciary who could overturn key administrative law precedents, but the shift will take time as sitting judges gradually retire.<sup>1</sup> In the mean-

\* Henry R. Luce Professor of Jurisprudence, Emeritus, Yale Law School. Peter Strauss, Elizabeth Fisher, and Jerry Mashaw made very helpful comments. Paul Shortell provided excellent research assistance and substantive comments on an earlier draft.

1. President Trump has the potential to fill a record number of vacancies: an anticipated thirty-eight percent of the federal judiciary, compared with the thirty-one percent appointed by Clinton and twenty-nine percent appointed by Obama. Senior judges make up a much greater share of today’s judiciary (twenty-four percent) than under Obama (fifteen percent) and his predecessors (ten percent or less). See Josh Katz, *Older Judges and Vacant Seats Give Trump Huge Power to Shape American Courts*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/interactive/2017/02/14/upshot/trump-poised-to-transform-american-courts.html> [http://perma.cc/27P3-NYV4]. This reflects two trends: First, the average age of federal judges has increased from 57.6 years under George W. Bush to 60.6 years under Obama and 62.6 years under Trump. Presidents are not appointing much older judges; rather, judges tend to be serving longer terms. Aggregate statistics may also overstate the impact of Trump’s nominations. Russell Wheeler calculates that, even if Trump and his allies fill all current and expected vacancies, those nominated by Republican presidents would constitute outright majorities on only four federal courts of appeals. This would leave seven courts of appeals with a majority nominated by Democratic presidents and two courts of appeals evenly split. See Russell Wheeler, *Trump has reshaped the judiciary but not as much as you might think*, BROOKINGS INST. (Aug. 27, 2018),

time, the President, his appointees, and allies in Congress are working to undermine existing administrative law doctrines in ways that could restructure policymaking procedures and the role of the courts.

This article explores ongoing developments in the United Kingdom and United States, but it focuses on the United Kingdom to complement other contributions to this symposium that concentrate on the United States. It examines elements of convergence and points to lessons that each country might take from the experience of the other.<sup>2</sup>

In both countries, contemporary politics are only part of the story. Fundamental differences arise from their contrasting presidential and Westminster constitutions that lead to different views of the separation of powers and checks and balances. In the United States, those seeking a major shift in the role of the state are tying their proposals to their own, deeply contested, interpretation of the Constitution. In the United Kingdom, one strand of pro-Brexit rhetoric invokes a time of past glory and national prominence. Yet strikingly, political pressures are moving each country in directions that are in tension with their recent pasts.

The UK government is facing pressures for more democratic input into executive-branch policymaking as Brexit unfolds. In line with settled constitutional principles, many British commentators focus on enhancing the role of Parliament.<sup>3</sup> Parliament is meant to be sovereign; hence critics argue that it should play a central role in the transition. They interpret the referendum as giving popular legitimacy to whatever comes next, mediated only by elected Members of Parliament (MPs)

<https://www.brookings.edu/blog/fixgov/2018/08/27/trump-has-reshaped-the-judiciary-but-not-as-much-as-you-might-think/> [http://perma.cc/637X-9PEF]. In the first year of his presidency, Trump nominated an unprecedented (if still modest) number of candidates deemed “unqualified” by the American Bar Association. See BARRY J. McMILLION, U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS DURING PRESIDENT TRUMP’S FIRST YEAR IN OFFICE: COMPARATIVE ANALYSIS WITH RECENT PRESIDENTS (2018), <https://fas.org/sgp/crs/misc/R45189.pdf> [http://perma.cc/LHU2-WDJY]. The ABA continues to rate the qualifications of judicial nominees; however, Federalist Society cofounder Steven Calabresi has suggested that “[t]he last two Republican presidents have disregarded ABA ratings, and I think they are relying on the Federalist Society to come up with qualified nominees.” Lydia Wheeler, *Meet the powerful group behind Trump’s judicial nominations*, THE HILL (Nov. 16, 2017), <https://thehill.com/regulation/court-battles/360598-meet-the-powerful-group-behind-trumps-judicial-nominations> [http://perma.cc/SP9V-88D2].

2. For historical background on the failure of administrative law to incorporate the values and practices of competent public administration, see Elizabeth Fisher, *The Open Road: Navigating Public Administration and the Failed Promise of Administrative Law*, in FOUNDATIONS AND FUTURE OF PUBLIC LAW: A CONFERENCE IN HONOUR OF PAUL CRAIG (forthcoming 2019).

3. See, e.g., RUTH FOX & JOEL BLACKWELL, THE DEVIL IS IN THE DETAIL: PARLIAMENT AND DELEGATED LEGISLATION 225–28 (2014).

and the House of Lords.<sup>4</sup> There is little discussion of changing government rulemaking procedures to make ministers and agencies more open to the direct participation of the public in executive branch policymaking. However, as I argue below, there are limits to effective parliamentary involvement in rulemaking; hence reform of government rulemaking procedures should be on the agenda. Much public consultation does take place, and the government has issued a set of internal guidelines for public bodies if they do consult.<sup>5</sup> Nevertheless, the government and the courts seldom justify consultation on democratic grounds, except in the field of local planning. However, a change may be in the offing. In a few cases the courts put public accountability front and center, and these rulings may provide an opening for further developments. The need for democratic accountability will be especially important as the government tries to gain public legitimacy for an exit from the EU. Calls for more direct public involvement could well rival existing efforts by both the Commons and the Lords to assert more control over the enactment of laws and government rules.

In contrast, the US President and some members of Congress are attempting to move away from the blend of public participation and technocratic expertise that underlies American rulemaking. Comparing the “reform” efforts of the Trump administration and of some Republican members of Congress with the legal and political trajectory of the Brexit process illuminates their contrasting models of executive-branch policymaking. As a result of contemporary developments in each country, a paradoxical result seems possible. Rulemaking procedures in the United States blend law, expertise, and public participation in ways that have provided a model for reformers elsewhere.<sup>6</sup>

4. A separate problem, which I do not discuss here, is the ongoing relationship between the EU and the UK after Brexit. Commons generally acts by majority vote, but the EU will not accept a situation where a subsequent Parliament can renege on the agreement. See RAPHAEL HOGARTH, *LEGISLATING BREXIT: THE WITHDRAWAL AGREEMENT BILL AND PARLIAMENTARY SOVEREIGNTY* (2018), <https://www.instituteforgovernment.org.uk/sites/default/files/publications/brexit-article-4-final.pdf> [<https://perma.cc/K76T-HX3R>].

5. Cabinet Office, *Consultation Principles: Guidance*, GOV.UK (July 17, 2012), <https://www.gov.uk/government/publications/consultation-principles-guidance> [<https://perma.cc/8GB7-LYAZ>].

6. See Herwig C.H. Hofmann & Jens-Peter Schneider, *Administrative Law Reform in the European Union: the ReNEUAL Project and Its Basis in Comparative Legal Studies*, in *COMPARATIVE ADMINISTRATIVE LAW* 650–66 (Susan Rose-Ackerman, Peter Lindseth, & Blake Emerson eds., 2d ed. 2017) (summarizing efforts to reform the EU administrative state). See also Javier Barnes, *Three Generations of Administrative Procedures*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra*, at 302–18; Giulio Napolitano, *Looking for Smarter Government (and Administrative Law) in the Age of Uncertainty*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra*, at 352–69.

That system is subject to criticism for not living up to its own ideals,<sup>7</sup> but the present concern is different. Rulemaking could succumb to legislative, presidential, and judicial assault in ways that would make delegated policymaking all but impossible. In contrast, Brexit may move the United Kingdom toward more accountable rulemaking procedures that go beyond parliamentary approval of rules to require public consultation and reason-giving by the government and the agencies.

Accepting the practical reality of policymaking by the executive and regulatory agencies requires democrats to ask how administrative law can help make such delegation legitimate.<sup>8</sup> In the United States, the separation of powers between the legislature and the executive means that Congress has an incentive to require regulators to follow procedures that enhance the democratic legitimacy of policy choices by linking administrative action to input from outside the bureaucracy.<sup>9</sup> Rulemaking procedures establish a direct link from citizens and organized interests to official decisionmakers, although critics emphasize biases in the weight of the disparate voices seeking to influence choices. Political appointees who make the final decisions must take account of public input directly, not only through the statutory text.<sup>10</sup> The reform discussions in the United States highlight the tension between accountability to Congress and accountability to the citizenry and to organized interests. The role of the courts also depends on the United States' constitutional structure. The Supreme Court can void statutes as unconstitutional, although a judicial norm of "constitutional avoidance" counsels the justices, if possible, to interpret statutes in conformity with the Constitution.<sup>11</sup> For unilateral executive actions, the courts must judge the extent of executive privilege and authority.<sup>12</sup>

7. See A. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490 (1992) (characterizing the system as "kabuki theater"); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rule-making Process*, 41 DUKE L.J. 1385 (1992) (critiquing ossification of the process); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

8. As Lindseth writes: "[A]dministrative law is fundamentally about democracy." Peter L. Lindseth, *What's in a Label? The EU as 'Administrative' and 'Constitutional'*, in COMPARATIVE ADMINISTRATIVE LAW, *supra* note 6, at 680–98.

9. See SUSAN ROSE-ACKERMAN, STEFANIE EGIDY, & JAMES FOWKES, *DUE PROCESS OF LAWMAKING* (2015); McNollgast, *The Political Origins of the Administrative Procedures Act*, 15 J.L. ECON. & ORG. 180 (1999).

10. See Peter Lindseth, *Agents Without Principals?: Delegation in an Age of Diffuse and Fragmented Governance*, in REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW 107, 129 (Fabrizio Cafaggi ed., 2006) (arguing that the APA reflects a constitutional obligation on the legislature to ensure "democratically-legitimate oversight and control").

11. See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980)(plurality) "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress

Constitutional due process principles and the common law sometimes resolve individual cases,<sup>13</sup> but the Administrative Procedure Act's (APA) "notice and comment" provisions dominate for rules with the force of law,<sup>14</sup> and they encourage broad participation from affected interests and concerned citizens, although the Act does not require the government proactively to seek input.<sup>15</sup> Government bodies issue an average of one thousand rules per year using notice and comment procedures,<sup>16</sup> but the APA exempts certain programs, e.g., national defense, foreign affairs, awards of patents, and benefit programs. Notice and comment requirements do not apply to guidance documents, policy statements, and executive orders or memoranda that do not have external legal force, even if they do set enforcement priorities.<sup>17</sup> Nevertheless, the APA's scope is broad; it reaches both cabinet departments and independent agencies and commissions that issue rules with legal force. Officials often use notice and comment processes for

intended to give the secretary the unprecedented power over American industry that would result from the Government's view of the [statute]."); *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) ("The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one."); *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems.") (internal citation omitted).

12. The Court has observed that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *United States v. Nixon*, 418 U.S. 683, 706 (1974). Nevertheless, because judicial review "places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances" confrontation between the two branches "should be avoided whenever possible." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389–90 (2004) (citing *Nixon*, 418 U.S. at 692).

13. On constitutional due process, see *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976). "Common law" principles evoke clarity, consistency and fairness to the individuals affected by state action. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT & CASES* 457 (7th ed. 2011).

14. Administrative Procedure Act, 5 U.S.C. §§ 553 (2012).

15. *Id.* at §§ 551–552, 701–706.

16. See Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 *YALE L.J.* (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3228312##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228312##) [<https://perma.cc/UWK5-D7VE>]. The authors summarize data from 2000 to 2017 in an appendix. During that eighteen-year period, 18,898 rules were issued—at an average rate of just over one thousand per year. The mean number of subjects per rule was 4.67.

17. Specifically, formal rulemaking requirements do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. § 553(b)(3)(A), or "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. § 553(b)(3)(B).

guidance documents and policy statements in order to lend public legitimacy to their actions.

Rules take effect with no formal input from Congress. Congress tried to assert its authority to review rules by including legislative or committee vetoes in the text of statutes, but in *I.N.S. v. Chadha* the Supreme Court held a one-house legislative veto of an administrative action unconstitutional on separation of powers grounds.<sup>18</sup> Eventually, it extended that ruling to all types of legislative veto—one house, two house, and committee vetoes.<sup>19</sup> Hence, statutes cannot require stand-alone congressional approval of rules. Congress tried to circumvent the ban through the Congressional Review Act (CRA) under which a rule can be quashed through a joint resolution of Congress and a presidential signature (or a two-thirds override).<sup>20</sup> In practice, the Act has only been meaningfully used during presidential transitions.<sup>21</sup>

At present, the federal courts are the main institutional check on rulemaking in the executive and in independent agencies. Most major rules face court challenges, often by both sides. Of course, the organic statute authorizing a rule could be repealed, and Congress can cut the budgets allocated to rulemaking and enforcement, and it can carry out oversight hearings.

In the United Kingdom, the Parliament is sovereign. The directly elected House of Commons is taken to speak for the people, with the House of Lords, an appointive and hereditary body, able to voice objections but not prevent the passage of statutes. Under the UK's unwritten constitution, acts of Parliament are exempt from judicial review.<sup>22</sup> Par-

18. 462 U.S. 919 (1983).

19. See, e.g., *Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983) (summarily affirming the invalidation of a two-house legislative veto).

20. Congressional Review Act, 5 U.S.C. §§ 801–808 (2012).

21. Although CRA resolutions had only been used once prior to 2017, the Trump administration and the Republican Congress relied on the mechanism to challenge an unprecedented number of regulations. Daniel Farber lists the fourteen regulations that were repealed, but points out that another twenty-two eligible for repeal under the CRA were not voided. See Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383 (2019).

22. International courts have occasionally reviewed UK statutes, and UK courts have applied the European Code of Human Rights in some domestic cases. Parliament passed the Human Rights Act of 1998 to incorporate human rights principles into domestic law. See PAUL CRAIG, *ADMINISTRATIVE LAW* 577–631 (8th ed. 2016). Alleged human rights' violations are seldom a route to the judicial review of broad policies; they must be tied to an individual victim. Section 7(1) states that "A person who claims that a public authority has acted (or proposes to act) . . . [unlawfully under the Act] may— . . . (b) rely on the Convention right or rights concerned in any legal proceeding, but only if he is (or would be) a victim of the unlawful act." However, Craig notes that a public interest group with a sufficient interest in a matter might obtain standing in the UK by claiming that the "challenged action was ultra vires in accord with the common law protections of fundamental rights." *Id.* at 608.

liament must approve most secondary legislation (rules with the force of law) issued by the Government, and such rules can be subject to judicial review on limited grounds. The executive is directly accountable to the Parliament, although “the Crown” retains some prerogative powers, especially in foreign affairs.

Brexit is testing the role of Parliament, the extent of the royal prerogative, and the role of the citizenry in making major policy changes. It has generated a profound political crisis, with critics arguing that the Government is seeking to achieve Brexit with insufficient input from Parliament.<sup>23</sup> However, the process could yield a sounder approach when it comes to public administration inside the Government—generating more fruitful engagement between parliamentary democracy, political expertise, and public participation. A referendum triggered Brexit, and this exercise in popular sovereignty may generate more demands for public consultation with Government policymakers and with regulatory agencies that oversee privatized industries.

The anticipated British exit from the European Union places the public accountability of the Cabinet front and center. Because UK and EU law and administration have become deeply intertwined, Brexit will require the United Kingdom to reenact many laws and regulations. The Supreme Court decided in the *Miller* case that the Prime Minister could not invoke the royal prerogative over foreign affairs to notify the EU of the United Kingdom’s intention to withdraw. The House of Commons had to approve that action as a statute.<sup>24</sup> Going forward, Brexit highlights the central importance of delegated legislation to achieve the transition. However, the UK Government faces criticism for trying to achieve Brexit without sufficient political or public input. The reform solutions on the table emphasize more effective parliamentary oversight, not more accountable processes in cabinet ministries and regulatory agencies. Nevertheless, in reviewing the British case law, I locate openings in the some opinions that could motivate more publicly accountable procedures inside the executive, involving the public, over and above parliamentary approval of regulations and referenda.

23. The Hansard Society has been particularly concerned with strengthening parliamentary oversight of Brexit-related secondary legislation. See, e.g., Alison L. Young, *Will Brexit change the UK constitution?*, HANSARD SOC’Y (Aug. 7, 2018), <https://www.hansardsociety.org.uk/blog/will-brexit-change-the-uk-constitution> [<https://perma.cc/Y3N9-LYJT>] (discussing MARK ELLIOTT ET AL., *THE UK CONSTITUTION AFTER MILLER: BREXIT AND BEYOND* (2018)).

24. *R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union* [2007] UKSC 5 (appeal taken from Eng., Wales, and N. Ir.).



## I. THE UNITED KINGDOM

Given the unitary nature of the UK system, it might seem straightforward to pass former EU regulations and directives into UK law in a single omnibus statute. If it wishes, Parliament can act expeditiously.<sup>25</sup> The speed of the parliamentary response in some cases, however, illustrates the weakness built into parliamentary oversight when the same party or coalition controls both the Commons and the Government. Individuals and opposition parties might object, but on a whipped vote, which insists that members follow party leaders' guidance, the Government will win. Why has Prime Minister Theresa May not proposed that option for the next Brexit stage? Obviously, the weakness of her coalition is one answer; the Government's Brexit deal suffered a massive defeat in the Commons on January 14. The vote was 432 to 202 against the deal that she negotiated with the EU, with more than 100 members of her coalition voting no.<sup>26</sup> However, a further reason may be the complexity of the large body of law that it must enact. Objections to particular parts might doom the entire package. Whatever the reason, even without a formal deal, the Government has begun introducing a menu of legal changes, most of which require parliamentary approval, but it does not envisage extended solicitation of public input.

Taking parliamentary sovereignty as given, criticisms of the Brexit process boil down to claims of a high-handed Government and an overly passive legislature. There are two complementary routes forward—enhancing Parliament's oversight of administrative policymaking and expanding the scope of public participation and reason-giving in post-Brexit policymaking. Although much of the internal debate centers on the former route, the latter should be part of the debate as well.

UK policymaking processes frequently include consultations with "stakeholders," including civil society groups and members of the public. However, unless a particular substantive statute mandates consultation, it is not a legally enforceable right and is left to the discretion of

25. After the Supreme Court held in *Miller* that the Parliament needed to pass a statute allowing the Prime Minister to notify the EU of the UK's intention to exit, the Government and the legislature acted quickly, passing the required statute less than two months later. See discussion *infra* at note 100 and accompanying text.

26. However, the next day she narrowly survived a no-confidence vote, 325 to 306. Stephen Castle & Richard Pérez-Peña, *Theresa May Survives No-Confidence Vote in British Parliament*, N.Y. TIMES (Jan. 16, 2019), <https://www.nytimes.com/2019/01/16/world/europe/brexit-theresa-may-no-confidence-vote.html> [<https://perma.cc/N95G-9KD9>]; Martin Kettle, *This was the greatest political power struggle of our time—and ministers lost*, THE GUARDIAN (Jan. 9, 2019), <https://www.theguardian.com/commentisfree/2019/jan/09/power-struggle-ministers-john-bercow-dominic-grieve-vote-parliament> [<https://perma.cc/H3HU-TZVM>].

a government department or agency. Consultations are described as making sure that the policymaker has all the relevant information and acts fairly, not as enhancing democratic legitimacy. Nevertheless, one can identify moves in the executive and in the courts toward acknowledging the democratic value of participation. I outline those developments and posit that they represent a nascent recognition of the democratic benefits of more open and participatory processes in the drafting of secondary legislation.

My discussion begins by considering the role of Parliament as a check and monitor of rulemaking in the executive and the regulatory agencies. I then examine the rulemaking process inside the Government as constrained by the courts. This section concludes by building on this overview of UK law to discuss the specific challenges of replacing EU law with UK law after Brexit in ways that have popular legitimacy.

#### *A. Parliamentary Oversight*

The United Kingdom is a parliamentary system with the majority in the House of Commons appointing the Prime Minister whose Cabinet is composed of Members of Parliament. As in the United States, statutes often delegate policymaking to cabinet departments and agencies—giving them the authority to issue what the British call Statutory Instruments (SIs) and similar ordinances that have the force of law and to promulgate other types of instruments.<sup>27</sup> Although the rhetoric surrounding SIs describes them as filling in “technical” details or improving bureaucratic implementation, in practice, they often make policies that impose costs on and deliver benefits to society in the same way as major rules in the United States. In addition to cabinet ministries, a wide range of other institutions have regulatory mandates. The most important of these regulate privatized public utilities, such as communications, energy, and railroads. Many regulatory agencies or commissions are accountable to a cabinet minister, even if they operate with *de facto* independence.<sup>28</sup> Others have more formal independence, although even those have close links to related ministries.

27. See FOX & BLACKWELL, *supra* note 3, at 89. Box 4 lists other forms of delegated legislation with the force of law, some of which do not require parliamentary affirmation.

28. The earliest agencies had single heads responsible to a cabinet minister. The shift to multi-member commissions increases their *de facto* independence. See ATHANASIOS PSYGKAS, FROM THE ‘DEMOCRATIC DEFICIT’ TO THE A ‘DEMOCRATIC SURPLUS’: CONSTRUCTING ADMINISTRATIVE DEMOCRACY IN EUROPE (2017). Occasionally, a cabinet minister asserts control. This happened in law enforcement when the Attorney General canceled an investigation by the Serious Frauds Office into

Delegation in the United Kingdom sometimes takes the form of Henry VIII clauses that permit the Government in Whitehall to “amend” statutes using SIs, thus avoiding the more time-consuming process of passing a formal statutory amendment through the Parliament. This power will sound illegitimate to American ears, but Henry VIII clauses are written into statutory texts that have passed the Commons. Hence, in practice, they resemble the broad delegations of rule-making authority in US statutes. Furthermore, even when the Government evokes a Henry VIII clause, Parliament must sign-off on the amendment, although their approval is often pro forma. The debate over the legitimacy of such clauses involves not just the power of the Cabinet to legislate, but also the degree of legislative involvement both at the time of the statute’s passage and after the issuance of the SIs.

Unlike UK statutes, SIs can be subject to judicial review. However, no general administrative procedure act applies to their promulgation. Instead, Parliament plays a central role in legitimating SIs. Most must be approved by both houses of Parliament, using a range of different methods.<sup>29</sup> Parliament cannot amend the SIs drafted by the government, but it can send an SI back to the issuing body to be revised or dropped.

Much of the reform discussion in the United Kingdom focuses on making parliamentary oversight stronger and more effective, rather than on codifying rulemaking procedures inside the government or requiring more public input. However, the Parliament faces a conundrum in attempting to act as a check on government rulemaking. Under normal conditions, the House of Commons, although possessing the political legitimacy of popular election, is unlikely to be an effective check on the Government in Whitehall because the Cabinet and the majority in the Commons are members of the same party or party coalition. MPs from the Government’s party who are not in the cabinet (back-benchers) and the opposition may raise objections, but they will generally be unable to vote down an SI on a whipped vote. Most MPs in the majority would not find it in their interest to oppose an SI and risk retaliation from the Government on future issues of concern to them. However, the present situation presents new challenges. Dissident MPs

possible corruption in a major arms deal with Saudi Arabia. See Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT’L L. & POL. 437 (2008).

29. The Parliament Act of 1911 established the primacy of the Commons for the passage of statutes, giving the Lords only an advisory role. However, it did not change the Lords’ power to veto SIs. MEG RUSSELL, *THE CONTEMPORARY HOUSE OF LORDS: WESTMINSTER BICAMERALISM REVIVED* 32, 84 (2013).

from the governing coalition joined with the opposition to oppose the Brexit deal with the EU, and although the no-confidence motion failed, the sitting government is in a weak position.<sup>30</sup> Nevertheless, the Government is very unlikely to fall over opposition to a particular statutory instrument. However, the Commons may increase its scrutiny of important Brexit related SIs.

The House of Lords uses its power selectively to vote down SIs. Its members are a mixture of hereditary peers and those appointed for life, many with no party affiliation or affiliated with the opposition.<sup>31</sup> Perhaps recognizing its lack of democratic legitimacy, the Lords did not vote against an SI until 1968 when it vetoed an SI dealing with sanctions against Rhodesia; it did not quash another SI until 1999.<sup>32</sup> The Joint Committee on Conventions stated that the Lords should not regularly reject secondary legislation, but could do so “in exceptional circumstances”.<sup>33</sup> Consistent with that convention, peers spent only six percent of the chamber’s time on delegated legislation in 2016/17.<sup>34</sup>

However, the House of Lords has not been completely inactive. Between 1999 and 2010, it voted down seventeen pieces of delegated legislation; fifty-three votes upheld SIs.<sup>35</sup> In 2015, the Lords voted down an SI that would have cut tax credits for poor working families with children. The Lords argued that the Government should have proposed a statute, not an SI. It also suggested that if the Government expected deference from the Lords, it should have included the policy

30. See sources cited *supra* note 26.

31. The House of Lords Act of 1999 reduced the number of hereditary peers eligible to sit and to vote in the chamber to 92 from over 650. *Id.* at 30. For a current breakdown by category, see *infra* note 106.

32. See RUSSELL, *supra* note 29, at 32, 140–41.

33. *Id.* at 84. See also JOINT COMMITTEE ON CONVENTIONS, CONVENTIONS OF THE UK PARLIAMENT, 2005-6, HL 265-I and HC 1212-I, at 62 (UK).

34. Delegated legislation accounted for 6.2 percent of business in 2016/17, 5.4 percent of business in 2015/16, and 10.1 percent of business in 2014/15. Most of the Lords’ business (48.2 percent) was dedicated to public bills, with government bills (43.6 percent) accounting for a much greater share than private members’ bills (4.6 percent). See HOUSE OF LORDS, STATISTICS ON BUSINESS AND MEMBERSHIP, 2016-17, HL, at 1 (UK).

35. See RUSSELL, *supra* note 29, at 140–41, 144–45 (table 6.1), 155 (“Although . . . [defeats] have been rare, the possibility of defeat over delegated legislation remains real and ever-present. This induces caution on the government side as well, and statutory instruments are occasionally withdrawn (either before or after debate) when the peers are known to be unhappy.”). The Lords more commonly will oppose the government on specific amendments; during the 2016–17 parliamentary session, for example, the government was defeated 38 times in the House of Lords. See The Constitution Unit, *Government Defeats in the House of Lords*, U.C. LONDON <http://www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords/lords-defeats> [<https://perma.cc/N56L-8XVF>].

in its party manifesto.<sup>36</sup> The Lords objected, not to the policy per se, but rather to the stealthy way it was introduced by the Government with little publicity or consultation, making the Lords the only institution that could hold the government to account.<sup>37</sup>

This concern with the democratic legitimacy of Government action, arising in the non-democratic Lords, may signal the upper house's approach to Brexit. Perhaps it will provide active oversight of the efforts to use SIs to implement post-Brexit policies. If the House of Lords remains committed to defending democratic and constitutional principles, it may garner public support for its actions. The convention of deference to the government may not operate as strongly as in the past, especially when the Lords detects Government efforts to skirt constitutional norms. As Brexit goes into effect, Parliament, and especially the Lords, may not be a rubber stamp, especially if the Government proposes SIs, using Henry VIII powers to amend the relevant statutes.<sup>38</sup> Some argue that using SIs to smooth the Brexit process undermines constitutional principles because of the inadequacies of parliamentary oversight of delegated legislation.<sup>39</sup>

#### *B. Judicial Review of Policymaking Processes*<sup>40</sup>

One response to criticisms of achieving Brexit through SIs and Henry VIII clauses is to use publicly accountable processes to draft SIs and other forms of government guidance and orders. Such processes could require heightened public consultation.

Consistent with that possibility, several recent cases suggest that some courts are reexamining the place of consultation in administrative law. Although still a nascent development, these opinions recognize that textual consultation requirements can support democratic

36. Patrick Wintour, *How George Osborne got himself into a fix over tax credits*, THE GUARDIAN (Oct. 27, 2015), [https://www.theguardian.com/politics/2015/oct/27/how-george-osborne-got-himself-into-a-fix-over-tax-credits?CMP=share\\_btn\\_link](https://www.theguardian.com/politics/2015/oct/27/how-george-osborne-got-himself-into-a-fix-over-tax-credits?CMP=share_btn_link) [<https://perma.cc/TB3C-KJT4>].

37. Russell makes the general point that since the 1980s the Lords has had a particular interest in what she calls "constitutional propriety" and has frequently argued that government bills allocate too much discretionary authority to the executive. See RUSSELL, *supra* note 29, at 187–89.

38. However, so far that has not happened with Brexit-related SIs that amend statutes. See the Hansard Society tabulations at *Westminster Lens: Brexit Statutory Instruments Dashboard*, HANSARD SOC'Y (Jan. 21, 2019), <https://www.hansardsociety.org.uk/blog/westminster-lens-brexit-statutory-instruments-dashboard> [<https://perma.cc/KVJ4-467V>].

39. See FOX & BLACKWELL, *supra* note 3; Adam Tucker, *Parliamentary Scrutiny of Delegated Legislation*, in *PARLIAMENT AND THE LAW* (Alexander Horne & Gavin Drewry eds., 2d ed. 2018).

40. This section draws heavily on material on consultation prepared by Daniel Greenberg, barrister, for Thomson/Reuters Westlaw, and on CRAIG, *supra* note 22.

values. These challenges involve government policies whose effects extend beyond individualized harms to include broad social concerns.

Parliamentary sovereignty limits the reach of the UK courts both as a matter of law and as a matter of politics.<sup>41</sup> The courts will not often ask if the executive has followed the intent of the legislature. The unitary nature of parliamentary government makes that distinction untenable as the basis of a lawsuit. Of course, a new government might repudiate the policies of a prior government, and it may amend statutes and replace old SIs with new ones. There would be no need for a judicial challenge to make those changes, and those who favor the original position would gain little from a lawsuit because the incumbent Government can use its majority in the Commons to enact its favored policies. There is scant value in lawsuits challenging a Government's refusal to follow statutory language and SIs promulgated by a prior government.

Nevertheless, some cases do grapple with the legality of SIs and other government actions. The cases that come closest to US-style review of rules and rulemaking processes arise when the plaintiff claims that a government action with broad coverage is unreasonable, *ultra vires*, or outside the bounds of the governing statute or SI. These are substantive standards, but sometimes procedures are relevant to the judges' evaluations.

Some statutes require public consultations, but if decision-makers consult with outsiders, the aim is usually to acquire expertise or to access the concerns of those affected—for example, in regulating privatized utilities or in making land planning decisions at the local level. In villages, those affected may include most residents, so the distinction between democratic accountability and fairness to affected households has little bite. However, at the national level many policy decisions have an impact that cannot be parsed into concrete individualized concerns. The developing law dealing with this second class of public actions is my focus here.

Traditionally, judicial review only considered individual cases where the administrative process violated common law standards of fairness or where the government's action was manifestly unreasonable in the sense of *Wednesbury*, a deferential standard close to the US

41. Primary statutes can be challenged for compatibility with EU law or the Human Rights Act of 1998. See CRAIG, *supra* note 22, at 19-004.

standard in *Williamson v. Lee Optical*.<sup>42</sup> Most cases dealt with the treatment of individuals or businesses in their interaction with the state. Recently, human rights cases have added an extra layer to this individualized jurisprudence, and most of that law will remain after Brexit.<sup>43</sup>

Unlike their US counterparts, the UK courts seldom remand an SI, or indeed any administrative action, to correct procedural failings. They may quash the government's action, but the courts have been reluctant to impose particular procedures on public bodies for fear that their choices will be overly judicialized and will interfere with the freedom of public officials to craft processes pragmatically to fit the particulars of individual cases. However, litigants do sometimes invoke the human rights implications of process under the United Kingdom's Human Rights Act, and judges sometimes confront the ambiguous distinction between substance and process.

To illustrate the courts' struggle to articulate procedural standards consider *Denbigh High School*, a case that concerns individual rights, not policymaking processes. Nevertheless, it illustrates the judicial reluctance to articulate specific procedural requirements. The litigant claimed a violation of the European Convention on Human Rights, an international obligation of the Council of Europe that will remain applicable to the United Kingdom after Brexit. It challenged a state-financed school's dress code as applied to a female Islamic student.<sup>44</sup> The case raised sensitive issues of how far the state should go to accommodate cultural pluralism, and it turned, in part, on whether the school's procedures were sufficient. An Appellate Committee of the House of Lords unanimously upheld the school's processes<sup>45</sup> and rejected the detailed procedural steps proposed by Judge Brooke in the

42. Compare *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 KB 223 (Eng.), with *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See also CRAIG, *supra* note 22, at 633–45 (providing an overview of *Wednesbury*).

43. The UK Human Rights Act of 1998 will remain in force, and the UK will remain a member of the Council of Europe whose European Court of Human Rights interprets the European Convention on Human Rights. The UK Act was passed in response to the jurisprudence of that court, and its repeal seems unlikely in the aftermath of Brexit, although some have raised that possibility. However, after leaving the EU, the UK will not be subject to the EU's very similar Charter of Fundamental Rights as interpreted by the European Court of Justice.

44. *R (on the application of Begum) v. Headteacher & Governors of Denbigh High Sch.* [2006] UKHL 15 (appeal taken from Eng. and Wales). See also *Belfast City Council v. Miss Behavin' Ltd* [2007] UKHL 19 (appeal taken from N. Ir.) (following and applying *R (Nasseri) v. Sec'y of State for the Home Dep't* [2009] UKHL 23 (appeal taken from Eng. and Wales)).

45. Some justices found that the student's rights had not been violated, and others found a violation but one "directed to a legitimate purpose" and "proportionate in scope and effect" under the European Convention on Human Rights. *Begum* [2006] UKHL 15 [26].

lower-court judgment.<sup>46</sup> Lord Hoffman described those proposed procedures as “an examination paper,” apparently a damning epithet.<sup>47</sup> He says that although domestic judicial review is “usually concerned with whether the decision-maker reached his decision in the right way,” the Convention is “concerned with substance, not procedure.”<sup>48</sup> One can read that statement, not as putting process is off-limits, but rather as holding that courts should not impose judicialized procedures on public institutions in the name of human rights. The Lords praised the school administration for its care and thoughtfulness and supported a case-specific “pragmatic” approach.

In spite of the language of the opinion, the justices are not exclusively concerned with outcomes. Thus, Aileen Kavanagh shows that the Lords “took account of the extent to which the primary decision-maker considered [Human Rights] Convention issues as part of its decisionmaking process.”<sup>49</sup> Although human rights were at issue here, the general point extends to many challenges to government decisions. Judicial review of process can be a way of justifying or overturning substance. Similarly, judicial review of substance can depend upon the use of reasonable processes. If courts assess the outcome of a balancing test, are they reviewing the substance of the resulting decision or the process that led to that outcome? The frequently invoked concept of proportionality used in these cases is a balancing test that combines substance and process and provides a greater margin of appreciation to decisions taken with care.<sup>50</sup> *Denbigh* holds that schools should make such decisions “in a sound way, taking proper account of the affected interests” taking, as Lord Bingham writes, a “pragmatic approach.”<sup>51</sup> However, one could imagine a statutory response that established guidelines for administrative procedures without imposing rigid checklists, not just for human rights cases but in other areas as well. If the government is setting general policies or developing policies through a string of case-by-case decisions, consultation with concerned

46. See *R (on the application of SB) v. Denbigh High Sch.* [2005] EWCA (Civ) 199.

47. *Begum* [2006] UKHL 15 [66].

48. *Id.* at [68].

49. Aileen Kavanagh, *Reasoning about Proportionality under the Human Rights Act 1998: Outcomes, Substance and Process*, 130 L.Q. REV. 235 (2014). Her claim also applies to *Miss Behavin'* [2007] UKHL 19.

50. The exact nature of that concept is much discussed; for an overview in the UK context, see CRAIG, *supra* note 22, at 645–68. Proportionality is commonly applied in cases where a right is violated and the court must decide if the violation is permissible as a proportionate response to a legitimate objective.

51. *Denbigh* [2005] EWCA (Civ) 199 [30]; Kavanagh, *supra* note 49.



citizens, not just those directly affected, could be part of the framework.

However, at present, no general statute provides procedural guidelines for rulemaking, and the common law has limited application. There is no general right to participate in rulemaking, and no common law duty to consult persons who may be affected by a measure before it is adopted.<sup>52</sup> A few statutes have specific consultation requirements, sometimes providing a list of those to consult or giving officials discretion to decide whom to consult.<sup>53</sup> Laws dealing with infrastructure planning emphasize consulting local individuals and communities that will be particularly affected, both positively and negatively. The Planning Act of 2008 covers both National Policy Statements (NPSs) for projects of national importance and more focused Nationally Significant Infrastructure Projects (NSIPs).<sup>54</sup> Both require some degree of consultation, and NPSs also have to be approved by Parliament.

If a statute requires consultation or if a public body decides to consult, then it must conform to certain “common law duties.”<sup>55</sup> These duties mostly refer to the treatment of individuals or affected business,<sup>56</sup> but they are consistent with assuring public legitimacy, over and above the fair treatment of individuals. Thus:

52. See CRAIG, *supra* note 22, at §§ 12-032, 12-033, 15-018 to 15-024; *id.* at 362–65, 449–54. Lord Reed in *Moseley* cites Judge Sedley from *BAPIO Action Limited*, stating that there is no general common law duty to consult persons who may be affected by a measure before it is adopted. However, there may be a statutory duty to consult; or an obligation to consult may arise because of the common law duty of fairness. See *R (on the application of Moseley) v. London Borough of Haringey* [2014] UKSC 56 [35] (appeal taken from Eng. and Wales) (quoting *R (BAPIO Action Limited) v. Sec’y of State for the Home Dep’t* [2007] EWCA (Civ) 1139). Lord Reed in *Moseley* also stressed that the content of the duty to consult is highly fact-specific, i.e., it depends on the circumstances.” See [2014] UKSC 56 [41].

53. See CRAIG, *supra* note 22, § 12-032; *id.* at 362–64. To take an extreme example, one statute requires the decision maker only to “consult the Treasury.” Local Democracy, Economic Development and Construction Act 2009, c. 20, at sch. 1, ¶ 11 (Eng.).

54. Planning Act 2008, c. 29 (Eng.).

55. See *R v. N. & E. Devon Health Auth. ex parte Coughlan* [2001] QB 213 [108] (“It is common ground that, whether or not the consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.”) (citing *R v. Brent London Borough Council ex parte Gunning* [1985] 84 LGR 168).

56. Thus, in *Agricultural, Horticultural & Forestry Industry Training Bd. v. Aylesbury Mushroom Ltd.*, the court held that failure to consult the mushroom growers implied that they were not required to participate in a training program that would have assessed costs on the association. Notice that the remedy is not an order to redo the consultation but rather a holding that the public program does not cover the association. [1972] 1 All ER 280 (Eng.).

[C]onsultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.<sup>57</sup>

In other words, the courts and, at least, some members of Parliament have a rather well-developed view of what consultation entails, and recent cases, discussed next, recognize the link between policymaking processes and public legitimacy. First, I discuss Lord Reed's opinion interpreting a statute requiring consultation that explicitly views consultation as furthering democratic values. Then I discuss several cases where the courts have decided cases dealing with broad policy issues, and finally consider how standing or "leave" to access the courts can complement efforts to enhance the democratic value of consultation.

### 1. Moseley

In 2014, the UK Supreme Court in *Moseley* interpreted a UK statute that required local authorities to consult "interested persons."<sup>58</sup> The five-person panel all signed onto the judgment of Lord Wilson that emphasized the common law duty of fairness in judging the borough's process of consultation. He held that the consultation was inadequate because it only mentioned the option preferred by the local authorities and gave no reasons for selecting it over other plausible responses to a change in Government policy.<sup>59</sup> Going further, Lord Reed, joined by two other justices, accepted the common law analysis but went on to view the consultation as a way to further democratic values. Although his holding is limited to the language of the statute, the underlying

57. *R (on the application of Compton) v. Wiltshire Primary Care Trust* [2009] EWHC (Admin) 1824 [104] (citing *R v Brent London Borough Council ex parte Gunning* [1985] 84 LGR 168). See also *Coughlan* [2001] QB 213 [108]. This is further reflected in a speech by Lord Whitty at the Committee Stage in the House of Lords of the Bill for the Greater London Authority Act 1999, observing that consultation must be "a genuine invitation, extended with a receptive mind, to give advice . . . without communication and the consequent opportunity of responding, there can be no consultation." These conditions for meaningful consultation appear to be accepted in Parliament. 23 June 1999, Parl Deb HL (1999), col. 946 (UK). Proposals must be a formative stage where "the decision maker has not pre-determined the issue upon which he goes out to consultation, i.e. that he has an open mind. That said, . . . to have an open mind does not mean an empty mind." *Royal Brompton & Harefield NHS Found. Trust v. Joint Comm. of Primary Care Trusts* [2011] EWHC (Admin) 2986. However, there is no obligation for a decisionmaker carrying out a consultation to disclose all material relied upon for his or her decision.

58. See *R (on the application of Moseley) v. London Borough of Haringey* [2014] UKSC 56 (appeal taken from Eng. and Wales).

59. *Id.* at [19].

rationale invites a broader application to any statute that includes a consultation mandate:

Such wide-ranging consultation, in respect of the exercise of a local authority's exercise of a general power in relation to finance, is far removed in context and scope from the situations in which the common law has recognised a duty of procedural fairness. The purpose of public consultation in that context is in my opinion not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. *The purpose of this particular statutory duty to consult must, in my opinion, be to ensure public participation in the local authority's decision-making process.*<sup>60</sup>

Lord Reed's opinion outlines "certain minimum requirements" that will make meaningful public participation possible. It is not sufficient only to canvass individual harms and benefits. The public agency should give consultees basic information about the draft scheme, an outline of alternatives, and "an indication of the main reasons for the authority's adoption of the draft scheme."<sup>61</sup> Lord Reed quotes the boiler-plate language from earlier cases that requires the government "[to tell participants] enough . . . to enable them to make an intelligent response."<sup>62</sup> However, he puts that phrase in a broader context of a consultation that seeks to discover the public's view of a policy in their role as citizens.

Thus, there were essentially two majority opinions—one, from the entire panel, stressing fairness and the common law and one, from three of the five Lords, emphasizing that the statutory language sought to further democratic values per se. Lord Reed's opinion provides support for the claim that if Parliament places consultation requirements in a statute, the courts could articulate acceptable procedures directed toward the public legitimacy of executive and agency policymaking, not just the fairness of the process. Even Lord Wilson, with his emphasis on fairness and the common law, nevertheless, recognizes "the democratic principle at the heart of our society" and its connection to fair procedures.<sup>63</sup> However, the remedy for Ms. Moseley was simply a declaratory judgment that the process was inadequate; the court did not require a new consultation, noting that two years had passed.<sup>64</sup>

60. *Id.* at [38] (emphasis added).

61. *Id.* at [39].

62. *Id.* (quoting *Coughlan* [2001] QB 213 [112]).

63. *Id.* at [24].

64. *Id.* at [33].

## 2. Reason-Giving and Openness

Giving reasons is an important aspect of legitimate government action. Citizens should know not only what their government is doing but also why it has made particular choices. Even if they have not participated in a decision themselves, citizens should have the information to judge public actions as a route to public accountability. For environmental effects, these principles have been given legal meaning under the Aarhus Convention of the United Nations Economic Commission for Europe, ratified by both the EU and the UK.<sup>65</sup> The treaty requires public participation before the approval of major projects with environmental effects and mandates judicial review of the adequacy of participation. A European Union directive implements those requirements. A five person panel of the UK Supreme Court applied Aarhus in the joined cases of *Dover District Council v. CPRE Kent* and *CPRE Kent v. China Gateway International Ltd.*<sup>66</sup> The cases concerned a local planning authority that granted permission for a large development in Dover against the advice of its professional advisers who cited environmental harms. The case turned on whether the planners given adequate reasons, and Lord Carnwath, for the court, complains that the UK rules on giving reasons are only contained in subordinate legislation and lack coherence.<sup>67</sup> Under the EU's Aarhus-inspired environmental impact assessment requirements, reason-giving is "an intrinsic part of the procedure essential to ensure effective public participation."<sup>68</sup> However, he goes on in dicta to argue that although there is no general common law duty to give reasons, "fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed."<sup>69</sup> He is ready to extend the notion of fairness beyond the state's treatment of an individual to "a much wider range of parties, private and public" and to extend the principle of open justice

65. The formal name of the Aarhus Convention is the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. See U.N. Econ. Convention for Eur., *About the Aarhus Convention*, <https://www.unece.org/env/pp/treatytext.html> [<https://perma.cc/M5D5-L2UU>]. The European Communities approved it in Council Decision 2005/370/EC of February 17, 2005. Council Directive 2003/35/EC, 2003 O.J. (L 156) (implementing the Aarhus Convention). The UK has also ratified the Aarhus Convention, but post-Brexit, without ECJ oversight, it will be a weak constraint.

66. [2017] UKSC 79 (Eng.).

67. *Id.* at [23].

68. *Id.* at [48].

69. *Id.* at [51].

or transparency to statutory inquiries and procedures, not just to the courts.<sup>70</sup>

One aspect of accountability is the willingness of public bodies to share their background technical data and methods with outsiders. Greater openness implies a greater ability to challenge technical aspects of a decision. In a case concerning government failure to approve an expensive drug for coverage by the National Health Service, the Court of Appeal held that the National Institute for Health and Clinical Excellence must make available a “fully executable” version of its economic model, instead of a read-only version.<sup>71</sup> Fairness to the drug’s manufacturer was at issue, but clearly, greater openness could enhance the ability of all participants to affect the ultimate policy choice.

### 3. Review of Policy Processes: Nuclear Power and a Third Runway at Heathrow

At the national level, recent cases demonstrate the courts’ willingness to review policymaking processes in which substantive statutes require the government to consult the public. They are anchored in cases that raise environmental issues that cannot be reduced to ones that “directly and specifically” affect individuals;<sup>72</sup> they concern procedures related to general policymaking. The admissibility of procedural complaints linked to public legitimacy is especially salient to environmental organizations with policy goals that do not arise from individualized harm to their own property and local communities. Hence, such groups play a key role in legal challenges to the procedures used to implement general policies and to develop infrastructure projects with broad effects.

Nuclear energy is a prominent policy area where a UK court dealt with a procedural challenge to a policy process. In *Greenpeace*, the high administrative court issued a declaratory judgment in 2007 finding inadequate consultation preceding the government’s decision to expand nuclear power-plant capacity. Judge Sullivan held that the government’s consultation exercise was unlawful.<sup>73</sup> In explaining his

70. *Id.* at [55].

71. R (on the application of Eisai Ltd.) v Nat’l Inst. for Health & Clinical Excellence [2008] EWCA (Civ) 438 (Eng.).

72. See HOUSE OF COMMONS, HIGH SPEED RAIL (LONDON-WEST MIDLANDS) BILL: PROMOTER’S NOTE ON LOCUS STANDI CHALLENGES RELATING TO PETITIONS AGAINST ADDITIONAL PROVISIONS (“APS”), 2015–16.

73. R (on the application of Greenpeace Ltd.) v. Sec’y of State for Trade and Ind. [2007] EWHC (Admin) 311 [63] (Eng.). For an overview of the nature of consultation in that case, see

decision, he wrote that for a consultation process to be unlawful on the grounds of unfairness required the court to find “not only that something went wrong but that something went ‘clearly and radically’ wrong.” Notice that “fairness” is the touchstone, not democratic legitimacy, but there seems to be little practical difference between the two criteria in this case. The Government decided not to appeal, carried out a new consultation, and in 2008 decided once again to support expansion of the nuclear industry but with more adequate public input, pro and con.<sup>74</sup>

Consider also the proposal to add a third runway at Heathrow Airport, a project that will have both narrowly focused effects on near-by communities and broader environmental impacts. Greenpeace joined with local interests to challenge the consultation process behind the airport expansion proposal, which falls under the Planning Act of 2008. The government issued a NPS and carried out a mandated sixteen-week consultation on the initial plan and an eight-week consultation on the revised NPS. Passage of the NPS by the Commons in June 2018 triggered another round of consultations in 2019 under the same Act. The Act anticipates legal challenges, and seven lawsuits were filed before the statutory deadline in August 2018. Greenpeace filed a case, along with several communities, claiming that past consultations were inadequate.<sup>75</sup> The project’s environmental effects raise broad policy issues, especially with respect to climate change. The law requires the government to take into account the issues raised in the consultation and may also require a statement of reasons that applies to broad poli-

PSYMKAS, *supra* note 28, at 213–16. Either the document on which the consultation was based was just an issues paper that should have led to a second more specific set of proposals that were open to consultation, or the document was a policy proposal in which case it needed more comprehensive consultation. See also *Devon CC v. Sec’y of State for Cmty. and Local Gov’t* [2010] EWHC (Admin) 1456 (Eng.); *R (on the application of Breckland DC) v. Boundary Comm.* [2008] EWHC (Admin) 2929 (Eng.).

74. In May 2007, the Government issued a new consultation document to comply with the High Court ruling. See DEP’T OF TRADE & INDUS., *THE FUTURE OF NUCLEAR POWER* (May 2007), <https://webarchive.nationalarchives.gov.uk/20081105160613/http://www.berr.gov.uk/whatwedo/energy/whitepaper/consultations/nuclearpower2007/page39554.html> [https://perma.cc/2J7-G7BX]. A 2008 document further sets out the decision taken after the new consultation. See DEP’T FOR BUS., ENTER. & REGULATORY REFORM, *MEETING THE ENERGY CHALLENGE: A WHITE PAPER ON NUCLEAR POWER* (Jan. 2008), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228944/7296.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228944/7296.pdf) [https://perma.cc/QKW8-SWUZ] (citing *Greenpeace* [2007] EWHC 311). I am grateful to Athanasios Psygkas for this follow-up information.

75. See, e.g., *Judicial review launched against Heathrow expansion*, HILLINGDON LONDON (Aug. 6, 2018), <https://www.hillingdon.gov.uk/article/34097/judicial-review-launched-against-Heathrow-expansion#.W7EwSqp15iA.mailto> [https://perma.cc/J3DB-Y56V] (Hillingdon is one of the communities that will be affected by the third runway).

cy choices as well as to narrow individualized complaints from neighbors of the airport.

#### 4. Government Consultations and the Legislative Process

A massive high-speed rail project, HS2, confronts the distinction between legislative and executive powers. Focusing on environmental effects, the litigants asked the courts to consider the adequacy of public consultations behind a proposed bill approving the first-stage of the project. Such a bill, whose only goal is to approve a single project, is called a “hybrid-bill” in UK parlance.<sup>76</sup> The case, like the *Dover* case above, is rooted in the Aarhus Convention. However, Aarhus does not apply to legislation. This raised a novel issue under UK law. To state the issue in its starkest form: Can a government with a majority in parliament circumvent the EU directive by recasting a cabinet decision as a special purpose bill? If so, does the democratic legitimacy of Parliament moot legal complaints about inadequate consultation by the government with stakeholders or the general public? The lawsuit claimed that the expected parliamentary process would likely not comply with the deliberative and consultative processes required by the European Union for projects with important environmental effects. The Supreme Court held against those who challenged the process in *HS2 Action Alliance Ltd. v. Secretary of State for Transport*,<sup>77</sup> refusing to review the adequacy of parliamentary procedures. They also did not review the Government’s own consultation because the final decision would be made by Parliament. However, the justices did reassure themselves and the public that they expected the future parliamentary deliberation to be well-informed. The language of the opinion leaves some space for the courts to refuse to defer in an extreme case.

The justices raised and rejected the possibility of referring the case to the European Court of Justice (ECJ). If the ECJ had considered the case, it might have ruled for the Action Alliance because it had confronted the same issue a few years earlier, in *Marie-Noële Solvay & Others v. Région wallone*.<sup>78</sup> In that decision, invoking Aarhus, the ECJ held

76. R (on the application of HS2 Action All. Ltd.) v. Sec’y of State for Transp. [2014] UKSC 3 [57] (appeal taken from Eng. and Wales).

77. *Id.* at [108]–[113].

78. 2012 E.C.R. C-182/10.

that pro forma legislative approval did not exempt a government's policy choice from EU consultation requirements.<sup>79</sup>

The first hybrid-bill on HS2 passed both houses with super-majorities and gained royal assent in early 2017; subsequent hybrid-bills are in progress. A pressure group, Stop HS2, remains opposed and points to cost overruns, environmental damage and other costs that, to them, outweigh the benefits.<sup>80</sup> Stop HS2 reports that the actual level of deliberation in both Common and Lords was very short and not what the Supreme Court claimed to have expected.<sup>81</sup>

### 5. Standing in Court and Feedback Loops

Cases brought by civil society groups that deal with the substance of government action can, nevertheless, have procedural consequences. If the courts void or remand an executive action, officials may decide that, going forward, they will include the complainants in consultations over the scope and content of the policy. They may seek to avoid subsequent legal challenges by hearing from the groups with standing to sue. Thus, doctrines on standing, or "leave to access the courts", in UK parlance, can indirectly affect government policymaking procedures in a feedback loop. Furthermore, if the courts become more willing to consider the democratic legitimacy of government policymaking, they have a readymade set of plaintiffs available to help develop the law.

In the judicial review of administrative action, UK courts are both stronger and weaker than in the United States. It is quite easy for individuals and civil society groups to obtain leave to bring a case in the United Kingdom, but the grounds of review are narrower and less connected to the democratic legitimacy of state action. There is no analogy to the US Supreme Court's restrictive interpretation of the "case or controversy" requirement in the Constitution. Although there are dissenting jurists, a prominent string of UK cases argues for broad standing for organizations and individuals with "sufficient interest" to bring

79. In *HS2 Action Alliance*, the ECJ *Solvay* decision is cited along with other cases; however, the basic holding in the case is not addressed. For additional discussion, see ROSE-ACKERMAN ET AL., *supra* note 9, at 258–59.

80. Stop HS2's platform is available at <http://stophs2.org>. See also Eleni Courea, *Northern MPs tell Labour: change your mind on HS2*, THE GUARDIAN (Oct. 27, 2018), <https://www.theguardian.com/uk-news/2018/oct/27/northern-mps-tell-labour-change-your-mind-on-hs2> [<http://perma.cc/7F8Y-QGKX>].

81. *HS2 rushed through with just 37 minutes debate for £56bn spend*, STOP HS2 (Mar. 23, 2018), <http://stophs2.org/news/15313-hs2-rushed-37-minutes-debate-56bn-spend> [<https://perma.cc/KV74-NKLV>].



cases to court.<sup>82</sup> Two leading cases make the key points.<sup>83</sup> The first, from Lord Reed in *Walton v. Scottish Ministers*, was a challenge to a road scheme brought by environmentalists:

[T]here may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring the proceedings to challenge it.<sup>84</sup>

The second is from Lord Diplock in a case brought by a federation of self-employed and small businesses. He supports standing even if the plaintiff's individualized harm is no greater than that experienced by the general community:

It would, in my view, be a grave *lacuna* in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful action stopped.<sup>85</sup>

The *Walton* case is of particular interest because the plaintiff was given leave to raise procedural objections to the government's approval of a road-building scheme. However, these statements are about access to the courts, not about the outcome, and in both cases the plaintiffs were denied the remedies they sought.

Human rights and environmental cases have provided openings. Violations of human rights require individual victims, but general policies may produce a broad class of potential victims. For example, in *R (on the application of UNISON) v. Lord Chancellor*,<sup>86</sup> the Supreme Court heard a challenge to labor court fees brought by a trade union under the Human Rights Act. The panel unanimously found that the fee schedules violated the Human Rights Act because they deterred many

82. Access to the courts for public interest suits is a relatively recent development. See *R v. Inspectorate of Pollution ex parte Greenpeace (No 2)* [1994] 4 All ER 329; *R v Sec'y of State for Foreign Affairs ex parte World Dev. Movement Ltd* [1995] 1 All ER 611; *R v Somerset CC ex parte Dixon* [1997] EWHC (Admin) 393.

83. Consider also *ClientEarth (No 2) v. Secretary of State for the Environmental, Food & Rural Affairs*, discussed *infra* note 93 (where an environmental group was given leave to sue with respect to a government policy choice).

84. *Walton v Scottish Ministers* [2012] UKSC 44 [94] (Eng.).

85. *R v. Inland Revenue Comm'rs ex parte Nat'l Fed'n of Self Employed & Small Bus. Ltd* [1981] UKHL 2 (Eng.).

86. [2017] UKSC 51 (Eng.).

claims, especially those by low-income individuals. The main opinion cited data showing the sharp drop-off in claims after the introduction of the new fee schedule. The Government set the fees using an SI subject to parliamentary approval;<sup>87</sup> hence, unlike a statute, the fee schedule was subject to judicial review, and parliamentary approval of the SI did not limit the intensity of review. The Court treated the costly fees as a substantive violation, but the high fees are also part of an adjudicatory process that permitted the violation of rights.

The Child Poverty Action Group (CPAG) states that “[t]hrough its strategic litigation work, CPAG brings or intervenes in cases where benefit claimants’ rights are violated with a view to bringing about systemic change for others who find themselves in the same situation.” In cases that target named individuals, it challenges substantive policies that disadvantage children based on claimed violations of the UK Human Rights Act and the European Code of Human Rights (ECHR). For example, it intervened in a case (*In the matter of Sobhan McLaughlin*) challenging a legal provision that denied the Widow’s Parent’s Allowance to a bereaved mother not married to her children’s father.<sup>88</sup> CPAG’s view of the matter prevailed in a 4–1 panel decision. The case involved the direct application of a statute, not an SI, so the Court could only rule on the individual case.<sup>89</sup> However, the court found that the law will be incompatible with the Human Rights Act in “a legally significant number of cases” so it is “for the relevant legislature to decide whether or how it should be changed.”<sup>90</sup> In a case, yet to be decided by the Supreme Court, *R (DA and Others) v. Secretary of State for Work and Pensions* (heard July 17–19, 2018), CPAG is acting on behalf of two single mothers to challenge the legality of a benefit cap.<sup>91</sup> These cases illustrate the courts’ willingness to accept CPAG as an intervener even though it suffered no direct harm. A series of government losses of this type might push the public agency either to seek a statutory amend-

87. *Id.* at [15] (stating that the fees order was laid before Parliament and that both houses approved it under the affirmative resolution procedure). If the Court holds that a statute violates the Human Rights Act, it cannot overturn the offending provision, but it does recommend statutory amendments, sometimes drafting the language itself. In most cases, the Commons complies. In *UNISON* the Court could directly order the Government to amend its SI.

88. *In re Siobhan McLaughlin* [2018] UKSC 48 (appeal taken from N. Ir.).

89. *Id.* at [34].

90. *Id.* at [43].

91. Appealing the lower court decision in *R (on the application of DA) v. Sec’y of State for Work & Pensions* [2018] EWCA (Civ) 504 (Eng.), CPAG also intervened in an earlier case which lost in a divided Supreme Court panel, *R (on the application of SG) v. Sec’y of State for Work & Pensions* [2015] UKSC 16 (appeal taken from Eng. and Wales).

ment or to propose an SI that makes its general policy compatible with the Act. In doing so, it may refer to these cases as a justification for consulting the CPAG about its drafting plans.

Moving to the environment, a lower-court case, dealing with the United Kingdom's failure to implement the EU Air Quality Directive,<sup>92</sup> illustrates the judiciaries willingness to give standing to civil-society groups seeking review of policymaking. The case, *ClientEarth (No 2) v. Secretary of State for the Environment, Food & Rural Affairs* [*ClientEarth2*],<sup>93</sup> challenged the UK Government's ongoing breach of the 2008 Air Quality Directive of the European Union. The Government's December 2015 Air Quality Plan announced a program to limit nitrogen dioxide to lawful levels. ClientEarth argued that because the modeling was flawed, the plan was unlawful.<sup>94</sup> The judge sided with ClientEarth and required the Government to produce a new plan by April 2017. *ClientEarth2* raises a fundamental question: Does the case illustrate traditional grounds of review applied to a novel set of facts, or does it represent a reappraisal of the role of judges in checking the grounds of policy choice, whether under EU or domestic law? Technical modeling exercises are not "procedural" on their face, but the fact that the court was willing to give leave to a civil-society environmental group to challenge a broad policy choice indicates a willingness to broaden the review of policy choices. If the Supreme Court follows this lower-court decision, the courts may decide cases after Brexit where environmental groups challenge the implementation of UK laws and SIs. If it does so, one predictable governmental response would be to include such groups in its consultation processes *ex ante* to be sure that the SI or other policy document has been well vetted. What appears as a purely substantive challenge may produce more open and inclusive procedures inside government ministries and agencies as a pragmatic response by officials seeking to avoid future lawsuits.

Broad UK standing doctrine allows courts to enforce public rights, as well as private rights. This can be done, as in the two cases summarized here, by permitting ("giving leave to") civil society and individuals to bring such cases.<sup>95</sup> These decisions suggest that there will be

92. 2008 O.J. (L 152).

93. *ClientEarth (No 2) v Sec'y of State for the Env'tl., Food & Rural Affairs* [2016] EWHC (Admin) 2740. I am grateful to Elizabeth Fisher, Oxford University, for directing me to this case.

94. The discussion in the text draws heavily on Joanna Bell, *Client Earth (No 2): A Case of Three Legal Dimensions*, 29 J. ENVTL. L. 343 (2017).

95. CRAIG, *supra* note 22.

space to mount court challenges against the Government's Brexit choices that take the form of SIs rather than statutes. Thus, developments in the law of standing could work in tandem with decisions that recognize the value of publicly accountable procedures. These are separate legal developments, but they could lead to more robust review of the democratic legitimacy of rulemaking procedures. Even if they continue to operate on separate tracks, taken together they may encourage public rulemaking bodies to open their procedures to more input from citizens and civil society groups.

Nevertheless, one limit is the courts' unwillingness to accommodate "mere busybodies," that is, people with no expertise or stake in the outcome. The term has an anti-democratic origin; a monarchist used it to denigrate those who sought to hold the king to account, that is, early democrats and liberals. An opponent of publishing legal material for all to read argued that: "The people must not be busy-bodies to pry into the prince's duty."<sup>96</sup> Given this history, many judges recognize the risks of ruling out plaintiffs who aim to protect the public interest. Thus, in *Kides* the judge in dicta objected to using the term "busybody" to deny standing to a committed advocate of a social cause or someone seeking more public accountability.<sup>97</sup> He quoted another judgment: "Common sense should enable one to identify a sufficient interest when it presents itself. Like a horse which is difficult to define but not difficult to recognize when one sees it."<sup>98</sup> Although the judges' willingness to permit advocates of social causes to access the courts is a welcome development, the reliance on judicial "intuition" is quite vague.

To illustrate the tension in the judiciary, Lord Hope in *Walton* first eloquently supported standing for a person defending the interests of wildlife and then goes on to rule out busybodies.

152. . . . An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not

96. Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520–1640*, 146 U. PA. L. REV. 323, 452 (1998) (quoting ROBERT SIBTHORPE, APOSTOLIC OBEDIENCES 33 (1627)). Apparently during Sibthorpe's time busybodies were especially problematic. Ross refers to Joseph Hall, the Bishop of Exeter, who included "the busybody" as one of his vices, second only to the hypocrite. JOSEPH HALL, CHARACTERS OF VIRTUES AND VICES (Ben Ross Schneider, Jr., ed., Renaissance Editions 1998) (1608).

97. R (on the application of Kides) v. S. Cambridgeshire DC [2001] EWHC (Admin) 839 [109]; CRAIG, *supra* note 22, at 773.

98. R v. Legal Aid Bd. *ex parte* Bateman [1992] WLR 711 [720] (Eng.).

of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.

153. Of course, this must not be seen as an invitation to the busybody to question the validity of a scheme or order under the statute just because he objects to the scheme of the development. Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity. . . . [T]here has to be some room for individuals who are sufficiently concerned, and sufficiently well-informed, to [have standing.] . . . It will be for the court to judge in each case whether these requirements are satisfied.<sup>99</sup>

Lord Hope thus provides guidance to judges wishing to confront the problem of integrating citizen accountability and expertise in the post-Brexit era. The test would be the plaintiffs' ability to contribute to a more legitimate and publicly acceptable choice based on both their genuine concern for the policy outcome and sufficient knowledge to contribute to the government's balancing of pluses and minuses. Lord Hope's statement could also be a guide to a government ministry or regulatory agency trying to design a process to make rules and draft SIs that are both technically competent and that incorporate the interests of the public and concerned stakeholders. His language resonates much beyond the courts, which are usually poorly equipped actually to make policy in complex areas of the law.

## 6. Conclusions

Consultation is a fact of life in the United Kingdom, but its legal status is tied to particular substantive standards, and the common law does not provide the courts with much guidance. To help create some consistency, the Government has issued "consultation principles," but the document has no formal legal force and leaves wide room for min-

99. *Walton v. Scottish Ministers* [2012] UKSC 44 [152]-[153] (Eng.).

isterial judgment.<sup>100</sup> The document states that consultations should be clear and concise, have a purpose, be informative, take “a proportionate” amount of time, be targeted, etc. The principles follow the case law outlined above, but they do not go much beyond instructing officials to take a look at relevant judicial decisions and to use common sense. Will the post-Brexit process push the United Kingdom toward more government accountability for policymaking exercises that take the form of SIs and other regulatory instruments?

Recent cases suggest that at least some jurists espouse the benefits of consultation and see it as a route to more publicly accountable government action. These judges recognize the link between process and responsible policymaking. However, the courts have not articulated clear public law principles of procedure that apply to the decisions of governments and agencies, especially in the production of statutory instruments and other policy relevant documents.

### *C. Public Consultation and Public Policymaking after Brexit*

With this background, consider the massive task before the UK government post-Brexit under any of the available options. The Brexit referendum, open to all UK voters, passed with 51.9 percent of the vote in 2016. The public made the decision, although it was formally only advisory, and voters were given much misleading information. The United Kingdom is now in the process of managing the exit, with some calling for a second referendum under the banner of The People’s Vote. Leaving that possibility to one side, the United Kingdom must decide how to replace the statutes that will become meaningless without EU membership and enact domestic laws that copy or reject EU legislation. Issue-by-issue, the Government must propose statutes, draft SIs, or invoke the royal prerogative.

The Government sought to use the royal prerogative in foreign affairs to notify Brussels of the United Kingdom’s intention to withdraw. Members of Parliament objected and brought suit. In *R (Miller) v. Secretary of State for Exiting the European Union*, the Supreme Court held that the notification needed to be passed by Parliament as a statute, using the ordinary process of referral to committees, floor debate, and so forth.<sup>101</sup> Two days after the January 24, 2017, decision, the Govern-

100. Cabinet Office, *supra* note 5.

101. *R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union* [2007] UKSC 5 (appeal taken from Eng., Wales, and N. Jr.).

ment submitted its bill to the Parliament. The bill became law on March 16, less than two months after the court's decision. There was debate in both Houses and a few proposed amendments; none passed, and the Commons enacted the Government's text. The rapid response hardly illustrates the democratic benefits of parliamentary involvement. Rather, it shows how the Government is able to get what it wants if it demands unity and acts decisively, even with a weak coalition. The text had only one operative clause that stated:

1 Power to notify withdrawal from the EU

- (1) The Prime Minister may notify, under Article 50(2) of the Treaty of the European Union, the United Kingdom's intention to withdraw from the EU.
- (2) This section has effect despite any provisions made by or under the European Communities Act of 1972 or any other enactment.<sup>102</sup>

Although the Government's bill passed the Commons as drafted, the Parliament extracted one concession. The Minister for Exiting the EU promised that the detailed Brexit bill would need the approval of the Commons. Theresa May negotiated a deal with the EU in November 2018. However, the deal was massively defeated in the Commons on January 14. Although she survived a subsequent no-confidence vote, she emerged in a weakened position.<sup>103</sup> Debate over the terms for the UK exit continues both domestically and in the EU, raising the possibility of a hard Brexit in 2019 that would place the United Kingdom in the same position as any other non-EU state.

If a Brexit deal does emerge in the coming months, the question of whether to proceed with statutes or other instruments will be front and center. The choice of technique will be especially salient because of the time pressure introduced by the delay in making a deal in the first place. In fact, the Government is already taking steps to avoid an overloaded parliamentary calendar by sending hundreds of Brexit-related SIs to the Parliament even though no deal with the EU has been made final.<sup>104</sup>

As the Government ponders its options, Brexit highlights the latent power of the Lords, surely an odd result for a decision passed by a

102. European Union (Notification of Withdrawal) Act 2017, c. 9 (Eng.).

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

104. See *Westminster Lens: Brexit Statutory Instruments Dashboard*, *supra* note 38. According to the Hansard Society, as of January 11, 2019, 305 had been laid before Parliament of which 30.2 percent amended primary legislation. The number of SIs needed was originally set at 1000, but the Government has reduced the total to about 600 partly through consolidation.

popular vote. In the face of active scrutiny of SIs by the Lords, the Government has three choices: proceeding via SIs to save time but risking a negative vote in the Lords on controversial issues, proposing statutes that require more process but can be enacted by the Commons over objections from the Lords, or avoiding parliamentary scrutiny by refusing to formalize much of the post-Brexit regime.<sup>105</sup> This last option may seem especially attractive to the Government if the House of Lords threatens to play an active role in reviewing and voting on SIs. Its members justify its involvement by claiming that the Lords—now dominated by Labour and Independent (cross-bench) members<sup>106</sup>—can look out for the public good, over and above partisan politics.

The British courts may scrutinize both the adequacy of parliamentary oversight, and may possibly also require the government to use publicly accountable processes when it uses SIs or direct executive powers to effectuate the transition. The Supreme Court, after *Miller*, seems likely to limit the use of prerogative powers. It might also give restrictive interpretations to Henry VIII powers in transition statutes to limit the Government's discretion in implementing key aspects of the transition. However, if the sovereign Parliament does not itself police the extent of its own delegation to the government, there is little that the British courts can do besides reading ambiguous statutory language to limit Government actions.

The second role for the courts during Brexit is to police the public accountability of government and agency rulemaking as a substitute for or complement to parliamentary oversight. Given the weakness of parliamentary oversight of SIs, the courts could build on past cases that deal with rulemaking processes and infrastructure to emphasize the value of participation, especially in the fraught political climate of Brexit. Building on the role of civil society plaintiffs in lawsuits that challenge government policies, the courts could clarify that the involvement of such groups in agency rulemaking processes would limit the claims that they could bring before the courts *ex post*. The courts could explicitly endorse the language of recent cases to support public

105. On the reduced role of hereditary peers and the shift toward labor and cross-bench influence, see, e.g., Matthew Tempest, *Labour becomes biggest party in Lords*, THE GUARDIAN (May 13, 2005), <https://www.theguardian.com/politics/2005/may/13/lords.uk> [https://perma.cc/T92U-YAAA].

106. Labour and Crossbench constitute 186 and 185 peers, respectively, while Conservative peers number 248. Bishops (26), Liberal Democrats (98), Non-affiliated (31) and Other (16) peers account for the remainder of the Lords. Regularly updated statistics are available at *Lords by party, type of peerage and gender*, PARLIAMENT.UK, <https://www.parliament.uk/mps-lords-and-offices/lords/composition-of-the-lords/> [https://perma.cc/HA4G-AR7U].



participation in rulemaking, not just to assure fairness and factual accuracy but also to increase public legitimacy. As a result, they could examine consultation practices with that goal in mind and would defer to executive branch decisions and SIs if the courts find the processes consistent with that last goal.

However, at present, the courts will only require consultation if a statute mandates such a procedure. Thus, unless the Brexit bill itself contains requirements for consultation, the courts will not go beyond existing provisions to require a blanket notice and comment process that is judicially reviewable. However, such procedures would be a constructive response to those who want a referendum on the Brexit deal itself. They would allow individuals and groups with concerns for particular parts of the legal transition to express their views without the Government giving up its ability to draft rules and retaining parliamentary oversight of the final product.<sup>107</sup>

## II. THE UNITED STATES

The US system of checks and balances, with broad delegation to the executive, constrained by the democratic safeguards of notice, public participation and reason-giving, is under threat from both the White House and Republicans in Congress. The Donald Trump Administration is trying to overturn fundamental aspects of the regulatory-welfare state and reorient administrative law. Its efforts to undermine federal programs (with the exception of security and defense) are hollowing out government capacity, and its actions will not be easy to reverse. In addition, the 115th Congress put statutory reforms on its agenda that would have transformed executive-branch rulemaking procedures. Some of these initiatives are grounded in principled beliefs about the best public-policy responses to complex modern problems, but others arise from opposition to government per se and from a kneejerk attraction to the free market. Some of these initiatives will be shelved with the House returning to Democratic-party control, but they remain on the wish list of those seeking to stymie regulatory activity without repealing the underlying substantive statutes.

The United States is a “common law” country with a history of British rule, but unlike the United Kingdom and most other polities in

107. Some groups are now demanding that the final Brexit deal be placed before the voters in a referendum. Prime Minister May has rejected that proposal. See Laura Hughes, *UK business leaders call for ‘people’s vote’ on Brexit deal*, FIN. TIMES (Nov. 3, 2018), <https://www.ft.com/content/01d534d4-dfa6-11e8-a6e5-792428919cee> [<https://perma.cc/B5UU-VBYK>].

that tradition, it does not have a parliamentary system. Instead, the American presidential system produces a separation of powers between the legislature and the executive. Its regulatory statutes allow substantive delegation to the executive and the agencies, and they mandate rulemaking and adjudicative procedures inside cabinet departments and independent agencies. Rulemaking procedures, most importantly the notice-and-comment provisions of the Administrative Procedure Act (APA) of 1946,<sup>108</sup> aim to assure the transparency and public accountability of regulatory policymaking.<sup>109</sup> Unlike the provisions governing adjudication, these requirements do not primarily protect individual rights against state overreaching; rather, they are tied to the democratic legitimacy and competence of policymaking inside the executive in a modern regulatory state that relies on technocratic expertise. These provisions have no strong anchor in the constitutional text, which was largely drafted before the rise of the modern regulatory/welfare state. Hence, even though some commentators label the APA a “landmark” or “super” statute with quasi-constitutional stature,<sup>110</sup> it is, in fact, as vulnerable to repeal and amendment as any other statute.

Why was a statute that constrains the executive passed in the United States and not in the United Kingdom? Stefanie Egidy, James Fowkes and I argue that the US separation of powers system gives the legislature an incentive to hold both the president and the independent regulatory commissions to account.<sup>111</sup> Because different political parties may control the executive and one or both houses of Congress, the legislature may seek to constrain executive actions through procedural controls and judicial review, rather than micro-manage the executive’s substantive decisions. The risk for the legislators, of course, is that US judges trained in the common law will build on the statutory language to further their own views. The interplay between judicial decisions and legislative action, however, ameliorates that risk. Unless constitutional values are at stake, Congress and the President can override judicial decisions by amending statutes. (Congress can even act alone if it can muster sufficient super-majorities.) Thus, if the system works

108. 5 U.S.C. § 553 (2012).

109. US Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

110. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1727, 1743 (2007); WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

111. ROSE-ACKERMAN ET AL., *supra* note 9, at 31–102. See also SUSAN ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN THE UNITED STATES AND GERMANY* (1995) [hereinafter ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY*].

well, an active judiciary helps to control the bureaucracy and the presidency in the interest of the elected legislature, and, ultimately, the citizens. However, if it works poorly, the judiciary can stray quite far from congressional goals and interfere with effective administration, limited only by the threat of legislative overrides.

To understand the current challenges, one needs to consider bills that were before the 115th Congress and ongoing actions by the executive branch. These initiatives threaten settled administrative law principles and reveal the fragility of the existing system of administrative law and delegated policymaking. That fragility is anchored in the text of the US Constitution that barely mentions the public administration. The due process provisions of the Constitution create affirmative procedural duties, but these mostly apply to adjudications, not policymaking, and in any case, emphasize fairness rather than democratic legitimacy.

Independent agencies, not under a cabinet officer's supervision, have operated since the creation of the Interstate Commerce Commission in 1887, and regulatory statutes affect the functioning of much of the economy. Although the courts have held that some statutory innovations violate the separation of powers, they have permitted many others to stand.<sup>112</sup> They have upheld the constitutionality of independent regulatory agencies and of substantive regulatory laws. However, because the framework is statutory, any of these laws could be repealed. The Constitution does not require their existence.

Furthermore, if a statute leaves room for interpretation, officials in the executive branch and in the independent agencies can set priorities that conflict with statutory purposes. Such efforts may eventually be struck down by the federal courts, but even so, administrators have a good deal of leeway. Furthermore, the legislature can starve an agency of the budget needed to implement the law and set priorities through explicit language in budget bills that may contravene the original purpose of a statute.

However, the US constitutional structure limits the administration's options, even with Republican control of both houses of Congress during President Trump's first two years in office. In ordinary times, the US system cannot quickly overturn policies embodied in either statutes or rules. Legislative change is difficult and time consum-

112. Compare *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the independent counsel statute), with *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down a statute as a violation of the separation of powers).

ing. Statutes can only be repealed by a vote of both houses and a presidential signature or, in case of a presidential veto, by a two-thirds vote in each house. The legislative process is more contested than the usual law-making process in the United Kingdom, especially if one or both houses are not controlled by the President's party. It would be very unusual to pass a statute in under two months, as occurred in the United Kingdom after the *Miller* decision. Of course, as the Brexit controversy illustrates, sometimes UK back-benchers and even cabinet members join with the opposition to defeat a government bill, but such coalitions can seldom pass statutes on their own.<sup>113</sup>

Furthermore, unlike the United Kingdom, Congress cannot vote down executive or agency rules with the force of law unless the repeal takes the form of a statute signed by the President or passed over his veto.<sup>114</sup> The APA notice-and-comment process has been overlaid with decades of case law plus special procedural requirements in some statutes. Although the Supreme Court halted the D.C. Circuit's efforts to enhance administrative procedures,<sup>115</sup> the basic requirements of notice, open-ended hearings, and reason-giving remain. *State Farm* held that the repeal of a rule with the force of law must follow the same APA procedures as a new rule, slowing down attempts to revise or eliminate rules.<sup>116</sup> That process must permit input from those who favor the old rule—not just direct beneficiaries, but also citizens and civil society groups that make policy arguments. Rushing through a rule suspension has led to judicial pushback.<sup>117</sup>

For example, the Clean Water Rule, an Obama-era rule governing the waters of the United States was suspended by the Trump Environmental Protection Agency (EPA) in February 2018. Also known as Waters of the United States, or WOTUS, the regulation redefined which wetlands and small waterways are covered by the Clean Water Act. Green groups and states immediately sued the administration, arguing that it rushed through the rulemaking with inadequate time for comments. Judge David Norton, a district judge in South Carolina, agreed that the EPA violated the APA because it did not provide a “meaningful

113. Meg Russell & Philip Cowley, *The Policy Power of the Westminster Parliament: The “Parliamentary State” and the Empirical Evidence*, 29 GOVERNANCE 121 (2016).

114. Congressional Review Act, 5 U.S.C. §§ 801–808 (2012).

115. *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519 (1978).

116. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

117. William W. Buzbee, *Deregulatory Splintering*, 94 CHI.-KENT L. REV. 439 (2019), provides several examples of courts finding APA violations in connection with Trump administration efforts to rollback regulations.

opportunity for comment.”<sup>118</sup> Ruling on similar grounds, a judge in the Western District of Washington ordered nationwide vacatur of the Applicability Date Rule.<sup>119</sup>

Congress is not legally involved in the repeal of rules, unlike the United Kingdom, where repeal of an SI must be laid before Parliament so long as the original SI was subject to parliamentary approval. However, given the unitary nature of the UK government, that requirement seldom presents difficulties. As a legal matter, SIs can be more easily repealed in the United Kingdom than administrative rules in the United States. Although the contested nature of the Brexit debate may affect parliamentary review of the passage, revision, and repeal of SIs, in practice, most Brexit related SIs are passing easily through the Parliament.

The United States judiciary helps to preserve the status quo. The case law evolves slowly because federal judges have life tenure, so new appointees have limited impact. Ordinarily, a new administration can only slowly change the composition of the courts. However, an aging Supreme Court and many lower court vacancies open a window for the current administration to nominate judges committed to a deregulatory agenda. Republican control of the Senate and the end of the filibuster rule, which gave veto power to a united minority party, mean that the Senate will vote favorably on most nominations. However, the new lower-court judges will remain a minority of all federal judges for many years, including on the District of Columbia Circuit, which hears a disproportionate number of major administrative-law cases.<sup>120</sup> Thus, the effect of the current administration’s judicial picks on administrative law may show up only decades in the future under a different political configuration. Instead, both statutory initiatives and executive actions are a more important source of administrative law developments, at least in the short- to medium-run.

118. *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 963 (D.S.C. 2018).

119. Judge John C. Coughenour of the Western District of Washington ordered nationwide vacatur of the Applicability Date Rule in November 2018. *See Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 WL 6169196, at \*7 (W.D. Wash. Nov. 26, 2018). Previously, the Court of Appeals for the Sixth Circuit had issued a nationwide stay. *See In re Env'tl. Prot. Agency*, 803 F.3d 804, 808 (6th Cir. 2015). However, a unanimous Supreme Court ruled that review of WOTUS must be undertaken by federal district courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

120. *See supra* note 1 and accompanying text.

### A. Statutory Initiatives

As in the United Kingdom, regulatory statutes set out broad principles but do not resolve all questions of implementation. In promulgating rules with the force of law, the APA requires the government to combine input from civil servants and political appointees with outside expertise and public input. After considering the public's views, along with comments from the affected industry and others, the agency must justify its final rule with a public statement of reasons. Interested parties with standing can challenge the rule in the courts—with judges reviewing rules in a way that takes the agency's expertise and political legitimacy into account.<sup>121</sup>

This system is by no means perfect, and there are many proposals to fine-tune its operation,<sup>122</sup> but the bills reported out of the House in the 115th Congress, if passed into law, would have undermined the value of the rulemaking process as a way to combine expertise and public accountability. The Regulations from the Executive in Need of Scrutiny (REINS) Act requires that major rules cannot go into effect unless explicitly approved by a joint resolution of Congress signed by the president.<sup>123</sup> According to the statement of purpose, the act will result in a “legislative branch that is truly accountable to the American

121. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

122. Some of these critiques and proposals are discussed in ROSE-ACKERMAN ET AL., *supra* note 9, at 74–93, 98–101. Modern technology is raising new possibilities and hazards. Thus, broad-gauged public input is increasingly feasible using the internet, but so are fake comments generated by computer programs. Thus, the public comments on the Federal Communications Commission's proposed rule to end “net neutrality” were contaminated with thousands of computer generated comments supporting both side of the issue. (The final rule ends net neutrality). See James V. Grimaldi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many are Fake*, WALL STREET J. (Dec. 12, 2017), <https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188> [<https://perma.cc/4PM7-VFZA>] (providing an investigative report on the problem at the FCC and other agencies).

123. The texts of REINS are at: S. 21, 115th Cong. (2017); H.R. 26, 115th Cong. (2017). It passed the House, and the Senate Committee on Homeland Security and Government Affairs reported out a somewhat streamlined bill. A major rule is one “that the Office of Management and Budget finds has resulted in or is likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs of prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; OR significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” 5 U.S.C. § 804(2) (1996). This definition is taken from the Congressional Review Act under which rules go into effect *unless* Congress passes a joint resolution of disapproval that is signed by the President. Minor rules under REINS would go into effect unless disapproved by a joint resolution. There are exceptions to the requirements for emergencies and threats, for rules dealing with national security and criminal law and budgetary matters. Rules affecting hunting, fishing and camping are exempt, suggesting that at least one lobby group benefits from federal rules.

people for the laws imposed upon them.” Each major regulation would be considered under an expedited procedure in Congress with limited debate, and if it does not win a majority in each House, the rule dies and cannot be reconsidered or reissued in the near future.

As a practical matter, Ronald Levin notes that REINS would likely increase the workload of Congress to an “unmanageable” level, while exponentially increasing the potential for regulatory stalemates.<sup>124</sup> The bill could also implicate constitutional concerns under *Chadha*, which invalidated a “legislative veto” provision of the Immigration and Nationality Act. Notwithstanding certain formal differences from the provision at issue in *Chadha*,<sup>125</sup> Levin suggests that REINS would “accomplish virtually the same result as the ‘traditional’ one-house veto—namely, it would enable a single house of Congress to nullify an agency rule, regardless of the wishes of the other house, let alone the President.”<sup>126</sup>

Notice the similarity to the up-or-down votes on SIs in the United Kingdom. As I argued above, the UK process seldom produces real debate on the merits of an SI and usually leads to pro forma approval. Under REINS the process is similarly expedited, but the result, under divided government, could be just the reverse—pro forma debate with many rules voided. A hostile Congress could void rules that resulted from a considered balance of expertise and public input under statutory mandates.<sup>127</sup> Faced with such arbitrary second guessing, agencies may decide to abandon rulemaking altogether in favor of case-by-case adjudications that are likely to be less fair, less well-grounded in expertise, and less transparent.<sup>128</sup>

124. Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446 (2015).

125. *Id.* The Immigration and Nationality Act allowed Congress to proactively nullify administrative determinations by vote. Under REINS, by contrast, nullification would follow automatically from congressional inaction.

126. *Id.*

127. The Senate Committee Minority Report states: “[T]he REINS Act would replace the current system’s reliance on science, expertise and public process in developing rules with Congress’ partisan considerations and the potential influence of industry lobbyists. . . . Members of Congress simply do not have the technical and scientific expertise that agencies possess. . . .” S. REP. NO. 115-169, at 12 (2017).

128. The Minority Report states: “One practical effect of REINS would be to discourage agencies from taking on major rulemakings in the first place and could grind the entire rulemaking process to a halt if they choose to pursue rulemaking.” *Id.* at 11–12.

The second bill is the Regulatory Accountability Act (RAA), assessed by Ronald Levin in his contribution to this symposium.<sup>129</sup> The RAA would make the rulemaking process more procedurally difficult, and it limits judicial deference to agencies' statutory interpretations and their use of delegated powers. Although Levin finds parts of the RAA supportable, to me it is only slightly less destructive than REINS. The bill replaces the concise notice and comment provisions of the APA, which take up less than a page of the US Code. Its detailed requirements impose a very high burden of proof on agencies that enact rules, including burdensome fact-finding and cost/benefit analyses, even for rules that do not aim to correct market failures.

There is a deep tension at the heart of the RAA. The bill seeks to revive "formal rulemaking" with its court-like procedures—procedures permitted under the APA that have become all but a dead letter.<sup>130</sup> Under the RAA, interested parties could petition for oral hearings covering technical matters that would use judicialized procedures, requiring cross-examination and "on the record" decisions. At first glance, lawyers might support such court-like procedures, but their superficial appeal is misleading. Adversarial judicial procedures are a poor way to judge the truth value of technical material. In science, there are no "parties" in the sense of a court case, but rather debates over the quality of evidence and standards of proof based on scientific, not legal, norms. The agency's expert personnel ought to be involved in that debate, not pose as neutral observers of a "trial" that produces a record of the arguments pro and con submitted by advocates for each "side"—both documents and oral testimony. Of course, the agency should justify the content of its rules in legal and policy terms, as it must do under the reason-giving requirements of the APA. However, the RAA would make it difficult to issue rules whenever there is controversy over the facts. Yet, the proposed judicialized response fits awkwardly with calls for use of the scientific method and seems to misunderstand the nature of scientific truth.

129. See H.R. 5, 115th Cong. (2017). The amended Senate bill retains some of the most restrictive aspects of the House bill. See S. 951, 115th Cong. (2017). See also Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 CHI.-KENT L. REV. 487 (2019).

130. According to the Congressional Research Service, "When agencies engage in formal rulemaking, the agency must hold a trial-like hearing. Presently, formal rulemaking is a rarely used process, and its requirements are only triggered when Congress explicitly states that the rulemaking proceed 'on the record' 5 U.S.C. § 553(c); *United States v. Fla. E. Coast Ry.*, 410 U.S. 224 (1973)." MAEVE P. CAREY, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 2 n.6 (2016).



The RAA seeks to tighten judicial review, with the courts required to apply a “substantial evidence” test in reviewing “high impact rules” with over a billion dollars of effect annually,<sup>131</sup> presumably an effort to limit deference to agencies’ legal interpretations.<sup>132</sup> It also expands the scope of review to include compliance with the Information Quality Act, a vaguely worded statute that requires federal agencies to maximize “the quality, objectivity, utility, and integrity of information” that it disseminates.<sup>133</sup> It puts judges in the position of evaluating technical information far from their expertise and tilts the task of statutory interpretation further toward the judiciary. If enacted, a likely result would be the ineffective implementation of statutory mandates. Once again, as with REINS, the result would likely be less rulemaking and more use of case-by-case adjudication if agencies seek to comply with their substantive policy mandates, not evade statutory responsibilities.<sup>134</sup> Neither bill passed the Senate when both houses were under Republican control, but public lawyers concerned with encouraging competent, accountable rulemaking procedures need to be alert for any revived interest in these so-called “reforms”.

### *B. Policy Change inside the Core Executive and the Agencies*

The Trump administration’s attacks on regulation have proceeded along various fronts; as William Buzbee observes, these actions often are uncoordinated and lack “factual and legal engagement.”<sup>135</sup> Most of the deregulatory action is occurring inside the administration in the

131. The test is generally seen as more stringent than the more usual “arbitrary and capricious” test. The Senate report identifies the proposed change in judicial review as “shifting from the more deferential *Seminole Rock/Auer* deference to *Skidmore* deference.” See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945); *Auer v. Robinson*, 519 U.S. 79 (1997) (both stating that courts will defer to an agency’s interpretation of its own rules unless it is “plainly erroneous”). *But see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (granting agency interpretation only “persuasive authority”).

132. *Chevron, U.S.A. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984).

133. Pub. L. No. 106-554 app. C, § 515, 114 Stat. 2763A-154 (2000).

134. Two other bills were also before the Senate committees: the Independent Agency Regulatory Analysis Act, S. 1448, 115th Cong. (2017), and the Regulatory Responsibility for Our Economy Act, S. 69, 115th Cong. (2017). The former allows the President to extend White House regulatory oversight to independent agencies. The latter essentially codifies the provisions of the executive order that requires cost/benefit analyses of major rules and set up the Office of Information and Regulatory Affairs. It provides for judicial review of compliance with its provisions and requires agencies retrospectively to review “significant” regulations on a five-year schedule.

135. See Buzbee, *supra* note 117. Buzbee describes the “splintered” approaches to deregulation including welcoming judicial stays based on pending litigation, refusing to enforce, launching own legal attack, passage of “midnight regulations,” and so forth. *Id.*

cabinet departments, the independent agencies, and the Executive Office of the President.

Soon after taking office President Trump issued Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, which requires executive departments and agencies to repeal two rules for every new one they propose.<sup>136</sup> The costs of new regulations must be balanced by the cost savings from the eliminated rules. The EO's fundamental weakness is the complete lack of interest in the social benefits of new or existing regulations. The EO will keep officials busy cutting rules, rather than responding to substantive regulatory challenges.

In spite of the fanfare over the claimed cost savings from regulatory cutbacks, it is difficult to document the impact of the EO. For FY 2018, the Office of Information and Regulatory Affairs in the Executive Office of the President announced that the "regulatory cost cap" will save an estimated \$9.8 billion in regulatory costs (calculated at present value), or \$686.6 million per year, from final rulemakings. The total savings are \$23 billion in present value terms if one adds in the \$12.5 billion savings from paperwork reductions in the Medicare program under the Department of Health and Human Services. The Departments of Labor and Interior report savings of \$3.3 and \$2.5 billion, respectively.<sup>137</sup> In Fiscal Year 2107 seventy-three percent of the \$8.1 billion in savings came from a single decision not to pursue a change in the Federal Acquisition Regulations (FAR).<sup>138</sup> A search of the FAR website suggests that the claimed "deregulation" was a proposed rule that would have favored sustainable choices in procurement, such as recycled products and renewable energy, but the rule was only proposed in January 2017, and its costs had not yet been borne by anyone.<sup>139</sup> The benefits were, of course, ignored. An assessment of the 2018 Medicare savings points out that they involve reductions in the time needed to

136. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (entitled "Reducing Regulation and Controlling Regulatory Costs"). An interim guidance document was issued on February 2, 2017.

137. See OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, REGULATORY REFORM RESULTS FOR FISCAL YEAR 2018 (2018), <https://www.reginfo.gov/public/do/eAgendaEO13771> [<https://perma.cc/Y5EJ-PCVU>].

138. OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, REGULATORY REFORM: TWO-FOR-ONE STATUS REPORT AND REGULATORY COST CAPS (2017), [https://www.reginfo.gov/public/pdf/eo13771/FINAL\\_TOPLINE\\_All\\_20171207.pdf](https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf) [<https://perma.cc/7X27-JTXX>].

139. Federal Acquisition Regulation: Sustainable Acquisition, 82 Fed. Reg. 5490 (Jan. 18, 2017).

fill in forms, not the repeal of regulations.<sup>140</sup> In other words, the red tape reduction aims to make a major government spending program work more smoothly, not limit the regulation of the economy. As the author of the assessment points out, the Executive Order gives officials an incentive to void rules that were dead letters and to find ways to streamline existing programs—beneficial developments but hardly major deregulatory efforts.

Another aspect of the administration's attack on regulation is its proposals to restrict applicable scientific evidence. Although a bill on the subject passed the House in the last Congress,<sup>141</sup> with the change in party control most of the action will occur inside federal agencies, especially the EPA. That agency is in the midst of a rulemaking process that aims to restrict the type of evidence and the identity of experts who can be consulted. Best scientific practices recommend that data be publicly available, that models be presented in a transparent way, and that researchers should not have conflicts of interest. However, these are aspirations, not rigid rules given the variety of contexts in which scientific results can be useful. According to Wagner, Fisher and Pascal: "To set rigid legal rules that attempt to dictate how science should be conducted is to betray the very essence of science."<sup>142</sup>

One can expect that changes in rules that have real effects on people's lives will soon start to take effect. Even some businesses are becoming alarmed. For example, although the coal industry supports weakening a rule to curb mercury and air toxics,<sup>143</sup> several energy groups and labor unions in the energy industry opposed the repeal.<sup>144</sup> The electric power industry has already spent over \$18 billion to comply, and, although they opposed the original rule, the affected firms now want to retain it to preserve the value of their investment in compliance.

140. BRIDGET C.E. DOOLING, SPOTLIGHT: HHS ENTRIES IN OIRA'S LATEST REGULATORY REFORM REPORT (2018), <https://regulatorystudies.columbian.gwu.edu/spotlight-hhs-entries-oira%E2%80%99s-latest-regulatory-reform-report> [<https://perma.cc/SN4X-G826>].

141. H.R. 1430, 115th Cong. (2017).

142. Wendy Wagner et al., *Whose Science? A New Era in Regulatory "Science Wars"*, 362 SCIENCE 636, 639 (2018).

143. Coral Davenport, *Trump Administration Prepares a Major Weakening of Mercury Emissions Rules*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/climate/epa-trump-mercury-rule.html> [<https://perma.cc/QY33-BPRU>].

144. Letter to Hon. William L. Wehrum, Assistant Adm'r, Office of Air & Radiation, re the Clean Air Act (July 10, 2018), [https://www.eenews.net/assets/2018/07/11/document\\_gw\\_04.pdf](https://www.eenews.net/assets/2018/07/11/document_gw_04.pdf) [<https://perma.cc/2N2Q-SE7B>]. See also Amena H. Saiyid, *Air Pollution: We Already Spent the Money, Keep Air Toxics Rule: AEP, Duke to EPA*, BLOOMBERG (July 12, 2018), <https://www.bna.com/already-spent-money-n73014477383/> [<https://perma.cc/FY8L-C7QX>].

In addition to explicit regulatory rollbacks, many individuals holding high-level positions in the Administration are opposed to the basic missions of the agencies that they head or manage. The career bureaucracy cannot do much to push back, even though they have civil service protections and cannot simply be fired.<sup>145</sup> They can be assigned trivial and humiliating tasks not commensurate with their training and experience. As a result, many have headed for the exit.<sup>146</sup>

The exit of experienced staff will exacerbate a long-term negative trend affecting the civil service. Its members are aging with a wave of retirements taking place and with little effort being made to recruit a new cadre of committed public servants.<sup>147</sup> The decline of the civil service is partly the result of budget cutbacks, but it has been exacerbated over recent decades by two developments: the increase in the number of political appointees and the massive contracting out of public service responsibilities to the private sector. The former contrasts sharply with the United Kingdom, where the layer of political appointees is very thin, giving the Government more continuity whatever party or coalition is in power. The latter is a contested issue in both polities. Sometimes contracting out can be desirable for tasks with proven private-sector counterparts, but over the long haul, it can hollow out the civil service making it unable to respond competently to new programs and challenges. Paul Verkuil sounds the alarm in the United States and makes the case for reinvigorating the professional civil service.<sup>148</sup> His argument has promoted a lively debate between those advocating reform and those who argue that reform is no longer tenable given the recent history of underinvestment in the civil service.<sup>149</sup>

145. See Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019).

146. An overview of the situation inside the agency in 2017 is Coral Davenport & Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html> [<https://perma.cc/3XGN-M5NK>]. On the Department of the Interior, see *Interior Department whistleblower resigns; bipartisan former appointees object to Zinke's statements*, WASH. POST (Oct. 6, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/10/04/whistleblower-resigns-keeping-my-voice-more-important-than-keeping-my-job/?utm\\_term=.584aa9fce511](https://www.washingtonpost.com/news/energy-environment/wp/2017/10/04/whistleblower-resigns-keeping-my-voice-more-important-than-keeping-my-job/?utm_term=.584aa9fce511) [<https://perma.cc/QMU3-TDRH>].

147. See generally PAUL C. LIGHT, *A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT* (2008).

148. See generally PAUL R. VERKUIL, *VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT* (2017).

149. For a range of views, see the series of essays published in the *Regulatory Review*, an online publication of the Penn Program on Regulation. *Valuing Professional Government: Series of Essays*, REG. REV. (Dec. 4, 2017), <https://www.theregreview.org/2017/12/04/valuing-professional-government/> [<https://perma.cc/4X9R-WZ7Q>]. See also JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* (2017) (warning of excessive contracting out).

However, the Trump Administration's aggressive deregulatory agenda must confront administrative law doctrines. A rule promulgated through the notice and comment process must go through that same process on repeal, which takes time.<sup>150</sup> Thus, President Trump faces more obstacles than a similarly committed UK Prime Minister, who could simply repeal an SI subject to pro forma parliamentary acceptance. If repeal is too cumbersome, however, the US administration has other strategies: enforcement can be lax; budget cuts can help reduce compliance, and reduced inspections and limited reporting requirements can permit violations to persist. These strategies would not show up in the deregulatory numbers reported by OIRA under EO 13771. Furthermore, a legally binding rule is not the only way to make general policy. Cabinet secretaries and independent agencies may issue memoranda, "interpretative rules, . . . [and] general statements of policy" without engaging in the notice-and-comment rulemaking process.<sup>151</sup> Much policymaking can go on out of the purview of the notice-and-comment process.

### *C. Conclusions*

All presidents try to bend the bureaucracy to their will and seek to enact the policies they favor.<sup>152</sup> However, that effort has been particularly aggressive in the Trump administration. The hollowing out of regulatory capacity without the repeal of underlying statutes is ongoing and occurring largely out of the headlines. Environmental and health and safety advocacy groups are pushing back, but lacking the dramatic appeal of major disasters and amid the drumbeat of other news, it is difficult to raise public awareness. Yet, the damage done will be hard to reverse even under a future president with a stronger commitment to environmental preservation and health and safety protections.

### CONCLUSIONS

Government policymaking processes are under strain in both the United Kingdom and United States, as each faces challenges to established public law principles. The controversy over Brexit in the United Kingdom and actions of the Trump Administration and its allies in the

150. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

151. 5 U.S.C. § 553(b)(3)(A) (2012).

152. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

United States are forcing defenders of the status quo to think through their support of existing public law doctrines. In the United Kingdom, my focus has been on the role of Parliament in approving Statutory Instruments and on evidence that the judiciary is beginning to acknowledge and support public accountability in executive policy-making. In the United States, my emphasis has been on critiques of rulemaking procedures under the APA and on the power of the president to reshape the public administration without statutory changes. Although some of the most draconian measures have died with the return of the House to Democratic-party control, they may remain on the wish list of advocates of deregulation. The responses of the US courts will remain important as the administration and its allies attempt to dismantle established practices.

In the United Kingdom, conflicts between the Government and Parliament over the use of SIs to achieve Brexit are opening schisms as both MPs and members of the House of Lords raise objections to the Government's unilateral actions. Some demand a greater say in approving statutory instruments, and others argue for the use of statutes. However, the Brexit debate is impoverished by the focus on accountability to Parliament, not on a more consultative and open process of drafting SIs that would involve the public. This is ironic given the role of the voters in pushing the UK government toward exit from the EU and the popular movement for a second referendum. However, the experience of the first suggests that an up-or-down vote is a poor way to incorporate public input into a complex policy choice.

Instead, I have considered the possibility of institutionalizing consultations over SIs. At present, some consultations are serious and wide-ranging. They occur for local government improvements and major infrastructure projects, but are not legally required for most UK-level policy choices. If Brexit does proceed, relying on the Parliament to be a thoughtful and informed check on the executive seems risky, given the wide range of legal changes necessary. Its weakness as an oversight body is exacerbated by the fact that the same party or coalition controls both Commons and the Government, even if it is fragile and fractious. The Lords is raising difficult questions that force a response from the Government, but relying on an unelected body that, unlike the courts, is not constrained by legal principles is not a route to enhanced democratic legitimacy.

A move toward more publicly accountable policymaking processes is supported by some UK judicial decisions that incorporate demo-

cratic values into executive policymaking. Although no general statute requires a notice and comment process with public input and reason-giving, the judiciary is beginning to view public involvement, if required by statute, not just as assuring fairness and good faith and providing factual information, but also as promoting the democratic accountability of executive policymaking. Perhaps those developments in the courts will encourage the government to increase its use of public comment periods and public justifications. Furthermore, even in cases that do not deal explicitly with process, the courts' quashing of administrative actions in cases brought by civil society groups could lead prudent officials to consult such groups before issuing SIs that could be subject to subsequent judicial challenges.

In short, the widespread use of Statutory Instruments to implement post-Brexit legal changes may limit thoughtful input from UK citizens at the same time as it marginalizes Parliament. The response that I defend would enhance public input, instead of (or in addition to) increasing parliamentary control. That perspective garners some support from recent case law, but it would rest on firmer ground if given a statutory base. In addition, it is an answer to those urging a second referendum on the Brexit bill. If the Brexit bill incorporated effective public consultation for policy changes, it could achieve public accountability without the admitted weaknesses of a referendum over the entire package of legal changes.

The United States has a statutory base for public input under the notice-and-comment provisions of the APA. These provisions require openness to public input and reason-giving by regulators. The courts explicitly invoke democratic values to justify rulemaking procedures that require transparency, public participation, and reason-giving.<sup>153</sup> Some find the notice and comment process burdensome and argue that the existing US practice "ossifies" rulemaking.<sup>154</sup> That claim is overblown, but it would have become accurate if the bills passed by the House had become law and if the Trump administration remains in power. Those bills would have made expertise-based policymaking increasingly difficult and limited civil society input. They either fail to understand the difference between policymaking and a legal trial or

153. *E.g.*, ROSE-ACKERMAN ET AL., *supra* note 9; ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY, *supra* note 111; Susan Rose-Ackerman & Thomas Perroud, *Policymaking and Public Law in France*, 19 COLUM. J. EUR. L. 225 (2013). *See generally* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT (2018).

154. The usual critique, however, is overly aggressive judicial review, not restrictive statutory language. *See, e.g.*, McGarity, *supra* note 7; Pierce, *supra* note 7.

seek to stymie executive branch policymaking by setting up legal roadblocks. The shift in party control of the House will slow statutory efforts, but could further invigorate efforts inside the Administration to undermine regulatory mandates. The Administration is undermining the professional competence and public accountability of the executive. President Trump is seeking to rollback regulations and to prevent the promulgation of new ones under executive orders and existing laws that give discretion to administrators to set agendas and time frames for action. The reaction of the US courts will be important if the other branches attempt to dismantle established practices, but their role will be limited if the changes are embedded in statutes or fall within areas of presidential discretion.

American notice-and-comment requirements, overseen by the judiciary, strike a balance between democratic accountability and policymaking discretion that could help the United Kingdom craft more publicly responsive procedures. However, if legislative and executive branch changes in the United States succeed, we may see a reversal. If the United Kingdom moves toward higher levels of public consultation post-Brexit, the rulemaking procedures in the United Kingdom would then become more accountable to the public at the same time as the US administration moves away from rulemaking and operates in a less transparent manner with little effort to articulate reasons.

In short, the worry in the United Kingdom is that the transition to the post-Brexit world will be only weakly informed by thoughtful democratic input from the public. The worry in the United States is that executive and agency policymaking will become increasingly difficult and subject to challenge by those seeking to limit government's response to pressing economic and social problems. Both the competent use of expertise and democratic responsiveness are necessary aspects of policymaking, and both face serious threats.