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### The Short and Troubled History of the Printed State Administrative Codes and Why They Should Be Preserved

Kurt X. Metzmeier

University of Louisville, [kurt.metzmeier@louisville.edu](mailto:kurt.metzmeier@louisville.edu)

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# The Short and Troubled History of the Printed State Administrative Codes and Why They Should Be Preserved\*

Kurt X. Metzmeier\*\*

*This article makes a case for the historical importance of early state administrative codes and urges that law libraries preserve them for future researchers of state administrative law and policy.*


## Implications for Practice

1. Printed state administrative codes are being replaced by online-only codes, which has implications for preservation of older printed codes.
2. As states convert their administrative codes to digital versions, they are not typically digitizing backfiles.
3. These superseded codes are valuable for both practical litigation of events that happened in the recent past and as sources of legal history.
4. The collection of state administrative publications has been locally focused; as a result, these publications are not heavily represented in national library collections, which makes their preservation more important.
5. All these factors make the preservation of these materials critical. Law libraries are the best and most natural steward of these endangered legal resources.

|   |    |
|---|----|
| Introduction . . . . .  | 6  |
| Origins of Regulation in the States and Early Administrative Publications . . . . . | 9  |
| Defining “Administrative Regulations” . . . . .                                     | 9  |
| Short History of Regulation in America . . . . .                                    | 9  |
| Early Legislatures and the Influence of Parliamentary Supremacy. . . . .            | 9  |
| County and City Governments as Regulators . . . . .                                 | 10 |

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\*\* Interim Director, Louis D. Brandeis School of Law Library, University of Louisville, Louisville, Kentucky, [kurt.metzmeier@louisville](mailto:kurt.metzmeier@louisville),  <http://orcid.org/0000-0003-0696-687X>. I would like to acknowledge the early assistance of V. Katie Davidson and my colleague Will Hilyerd, who provided an analysis of current state codes in print. I would also like to thank Colin Crawford, who gave encouragement on this project when it seemed too sprawling and too arcane.

|   |    |
|---|----|
| Chartered Corporations . . . . .  | 12 |
| Toward a Modern Administrative System . . . . .   | 13 |
| Boards and Commissions . . . . .  | 13 |
| Pre-Code State Regulations from Boards, Commissions, and Departments . . .  | 18 |
| Researching Pre-Administrative Code Regulations: A Summary . . . . .  | 20 |
| The Long and Winding Path to State Administrative Codes . . . . .   | 22 |
| The Model of Federal Regulatory Publication . . . . .   | 22 |
| Early Federal Regulatory Publication . . . . .  | 22 |
| Origins of the Federal Register . . . . .   | 24 |
| The Code of Federal Regulations . . . . .   | 25 |
| Uniform State Administrative Lawmaking and Publication . . . . .  | 26 |
| Early State Administrative Codes . . . . .  | 29 |
| Wisconsin . . . . .   | 29 |
| California . . . . .  | 29 |
| Indiana . . . . .   | 30 |
| Kentucky . . . . .  | 31 |
| Slow Growth into the Internet Era . . . . .   | 32 |
| The Case for Collection, Preservation, and Eventual Digitization of State<br>Administration Codes (and Registers) . . . . . | 33 |
| Why We Should Preserve State Materials . . . . .  | 33 |
| The State of Administrative Publication Collection in U.S. Libraries . . . . .  | 35 |
| Considerations for Digitalization . . . . .   | 37 |
| Conclusion . . . . .  | 38 |

## Introduction

¶1 In 2019, as I was researching the early history of administrative law publication, the Kentucky Legislative Research Commission announced that it was ending its print version of the *Kentucky Administrative Regulations*. In 2020, Thomson Reuters followed suit, alerting subscribers that it would no longer publish the *Indiana Administrative Code* in print. These two announcements caused me to realize something bigger: that the short history of printed state administrative codes was ending before lawyers and law librarians had begun to realize their utility for researching the history of American law. Moreover, they were ending before law librarians, as a profession, had begun to discuss the comprehensive preservation of these core legal documents before they were inadvertently weeded out of existence.

¶2 With more and more states moving their codes of regulations to online-only versions,<sup>1</sup> we might soon see the end to a type of legal publication, the printed code of regulations, that is relatively new. Indeed, the whole era of state regulatory publications

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1. My 2022 survey of the holdings of state administrative codes in the leading law libraries of that state found only 20 state codes are still published in print. It appears that many states have, like Kentucky and Indiana, eliminated or suspended print publication since 2018.

in print might end without ever being seriously considered as a topic of scholarly comment. This is because while state practitioners of administrative law might be relatively expert users of their own state's regulatory publications, they are often ignorant about administrative laws in the other states. And yet, despite this scholarly neglect, state regulations are laws that touch American citizens most closely. They regulate everything from the cleanliness of restaurants to the operations of local barbers and salons. Americans who hunt or fish are licensed and regulated by a state agency that sets the rules and enforces them through its agents, game wardens.<sup>2</sup> In my state, the Kentucky Derby regularly highlights the administrative activities of track officials of the Kentucky Horse Racing Commission (KHRC). Regulatory issues with Derby winners have arisen with frequency in recent years. In the KHRC's motion to dismiss the lawsuit contesting the disqualification of Maximum Security from the 2019 Kentucky Derby, lawyers attached pamphlet versions of the Rules of Racing from 1959 and 1960 to prove that the rule it was asserting had "for almost 60 years" been part of the state racing regulations.<sup>3</sup>

¶3 Most law librarians, too, are familiar with the regulatory materials for only their state or a few adjacent states. Moreover, administrative law in the law school curriculum has focused traditionally on federal administrative law, and scholars in administrative law rarely reference state regulations in published research except as they intersect with federal law. Also, at a time when federal administrative legal history is drawing more academic interest<sup>4</sup> (and will likely build steam with HeinOnline's new database of documents related to the Administrative Procedure Act of 1946),<sup>5</sup> legal historians are only now beginning to extend their research into state regulatory law.<sup>6</sup> U.S. historians outside the legal academy are increasingly examining many state regulatory subjects such

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2. Game wardens are featured on reality shows like Animal Planet's *North Woods Law*, which followed the activities of game wardens from Maine (2012–2016) and later New Hampshire (2016–). The show's popularity spawned spinoffs, *Lone State Law* (2016–), *Louisiana Law* (2022–), and *Yellowstone Wardens* (2023–).

3. Exhibit 2, Motion to Dismiss, *West v. Ky. Horse Racing Comm'n*, Docket No. 5:19-cv-00211 (E.D. Ky. May 14, 2019).

4. Emily S. Bremer has probed the 27 case studies of federal administrative agencies undertaken as part of the Attorney General's Committee on Administrative Procedure (which President Franklin D. Roosevelt created in the wake of his 1940 veto of the Walter-Logan bill) to find the roots of administrative adjudication and rulemaking. Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021); Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69 (2022). The report is a key touchstone in federal administrative history because it added impetus to the eventual passage of the Administrative Procedure Act in 1946. ATT'Y GEN.'S COMM. ON ADMIN. PROC., FINAL REP., S. DOC. NO. 76-186 (1940), and S. DOC. NO. 77-10 (1941).

5. *The Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946*, is a special collection in HeinOnline that includes the report of the Attorney General's Committee on Administrative Procedure, which met in 1940–1941 and analyzed 27 administrative agencies, a full legislative history of the APA and its predecessors, transcripts of hearings by the ABA Section of Administrative Law, and other relevant documents. See also Emily S. Bremer & Kathryn E. Kovacs, *Introduction to the Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946* (HeinOnline 2021), 2022 MINN. L. REV. HEADNOTES 2018, [https://minnesotalawreview.org/wp-content/uploads/2022/02/Bremer-Kovacs\\_Final.pdf](https://minnesotalawreview.org/wp-content/uploads/2022/02/Bremer-Kovacs_Final.pdf) [<https://perma.cc/P2UG-NMEZ>].

6. For a glaring exception, see WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

as public health, conservation and the environment, the history of professions, and how those issues intersect with race, class, and gender. But they often do so without easy access to state administrative publications or the backgrounds or dispositions to fully explore the legal complexities.<sup>7</sup>

¶4 As these paper resources go out of print, law libraries should be taking a greater interest in collecting and preserving them for future researchers of state administrative law and policy. Even now, law library collections ignore a whole class of nineteenth and early twentieth-century regulatory materials published in ephemeral pamphlets and old agency annual reports.<sup>8</sup> In fact, it is not clear whether any type of library is preserving these resources<sup>9</sup>—which could be anywhere from medical libraries<sup>10</sup> to university libraries to local history collections in public libraries and historical societies. But even the early state administrative codes are imperfectly preserved (especially early loose-leaf publications whose old regulations disappeared in the filing process), and I fear that as dusty, superseded books on law library shelves, disconnected from current online materials, state administrative codes will be weeded from all but those libraries dedicated to preserving them. As the situation now stands, this whole class of legal materials could well be unavailable for future researchers unless efforts are made to systematically collect, preserve, and, perhaps, digitize them.

¶5 This article is designed to start this discussion by showing why these materials should be preserved, outlining the landscape of state administrative publication and its history, and showing how and why each law library should think about the materials in their custody and those that donors and vendors may offer them. It begins with a brief discussion of the roots of administrative law in the states and the publications that those first steps in state regulation produced. Next it discusses the efforts of reformers in the 1940s and 1950s to bring all the disparate state regulations together in one administrative code. The article then moves to how, following the model of federal regulatory publications, states established a model form of regulatory publication that included a register or gazette of new regulations and a state administrative code organized by agency or subject that brought together all permanent and general regulations. The article concludes by noting how the inevitable rise of internet-based resources has led to the cancellation of print versions, thus highlighting the need for preservation of these documents for posterity.

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7. See *infra* notes 192–201 for some sense of this scholarship.

8. I have collected several dozen examples of pamphlets, broadsides, and flyers for an upcoming piece on the role of the pamphlet in early state administrative publishing.

9. As a former archivist, I believe some state archives may have preserved some of these records interleaved among the unprocessed and lightly processed papers of administrative agencies and departments, but this cannot be fully determined by publicly accessible cataloging. Moreover, that is a method of research that few legal researchers are trained to undertake.

10. In my library system (an urban university that has had a medical school and law school for over a 100 years), the old annual reports of the state board of health are held in the medical library, not in the law library. Interestingly, the Kentucky room of the main public library also has a collection.

## Origins of Regulation in the States and Early Administrative Publications

### Defining “Administrative Regulations”

¶6 Before reviewing the history of the origins of the publication history of administrative regulations, we need to define “administrative regulations.” For the purposes of this article, an administrative regulation is a written legal rule promulgated by an administrative agency. An administrative agency, in turn, is created by the legislature and given the task of writing regulations to effectuate the legislative purpose of certain statutes.<sup>11</sup> Such agencies are generally considered to belong to the executive branch, but, for constitutional reasons, administrative regulations cannot go beyond the powers granted to them by the legislature. Indeed, any regulation can be negated by a new statute.

¶7 Like many principles of administrative law, this definition seems self-evident to lawyers trained since the second half of the twentieth century. But lawyers practicing during other periods would have understood the term differently. In the early United States, “regulation” could have been used for any legal control measure, from a statute to a provision in a state charter. The definition we now use evolved after the Great Depression, when the modern administrative state began to form.

### Short History of Regulation in America

#### *Early Legislatures and the Influence of Parliamentary Supremacy*

¶8 Despite no formal doctrine of parliamentary supremacy, early American governments depended heavily on the creativity of legislatures to govern without incurring the costs of a permanent government. Colonial legislatures had wrested power away from royal executives heading into the revolution,<sup>12</sup> and early state constitutions “chose not to wipe [this history] clean and instead preserved”<sup>13</sup> the government structures that privileged legislative power.<sup>14</sup> The idea that there would be a separation of powers between legislative, executive, and judicial branches was a later development.<sup>15</sup> Early governors were delegated few duties, and even when they acquired more constitutional powers, legislatures were loathe, on fiscal grounds, to give them duties that would require new salaried officials.<sup>16</sup>

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11. Statutes that specifically request an agency to write regulations, called enabling statutes, give that agency the power to create rules.

12. Jack P. Greene, *The Role of the Lower Houses of Assembly in Eighteenth-Century Politics*, 27 J. S. HIST. 451, 454–57 (1961).

13. PERCIVAL SQUIRE & KEITH E. HAMM, 101 CHAMBERS: CONGRESS, STATE LEGISLATURES, AND THE FUTURE OF LEGISLATIVE STUDIES 10–11 (2005).

14. *Id.* at 19, 39. As Peter S. Onuf notes, the state legislatures emerged from the American Revolution with their “authority enhanced by their new aura of constitutional authority,” which was bolstered by “independence [that] was grounded in popular elections.” Peter S. Onuf, *The Origins and Early Development of State Legislatures*, in 1 ENCYCLOPEDIA OF THE AMERICAN LEGISLATIVE SYSTEM 189–90 (Joel H. Silbey ed., 1994); see also PERCIVAL SQUIRE, *THE EVOLUTION OF AMERICAN LEGISLATURES: COLONIES, TERRITORIES AND STATES 1619–2009* (2012), for a fuller discussion of the central role of legislatures in early America.

15. SQUIRE & HAMM, *supra* note 13.

16. Rogan Kersh, Suzanne B. Mettler, Grant D. Reeher & Jeffrey M. Stonecash, “*More a Distinction*

### *County and City Governments as Regulators*

¶9 The early state legislatures could and did regulate by statute, but they needed enforcers. Their first impulse was to delegate enforcement duties to existing local authorities at the county level, such as justices of the peace. Individually or collectively, as quasi-executive bodies typically called county courts or fiscal courts, these officials were responsible for carrying out regulatory legislation.<sup>17</sup> County officials regulated the weights and measures at markets, assured food purity, and managed public health emergencies.<sup>18</sup> “Poor laws” gave them the task of administering state laws ameliorating (and controlling) the lives of the poor.<sup>19</sup> Because so many of these cases came before local magistrates, researchers can probe the practical aspect of this early era of regulatory history by looking at the state “justices of the peace manuals” created by legal publishers to assist these often nonlawyer citizens appointed to adjudicate cases.<sup>20</sup> One such manual noted:

among these subjects are included all matters of county police, the superintendence of public roads, great and small; ferries, bridges, streets and alleys, public buildings, court-houses, prisons, hospitals, reformatories, school-houses, poor-houses, and pest-houses. The county court has, either collectively, or within the individual jurisdiction of its members, the control of lunatics, the primary adjudication of questions of lunacy, the support and maintenance of pauper lunatics and other paupers, and the regulation and discipline of tramps and vagrants.<sup>21</sup>

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*in Words than Things*”: *The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 14–19, 25–26 (1998). While the courts found their feet early, the authors date development of executive power to the early twentieth century.

17. RALPH A. WOOSTER, *THE PEOPLE IN POWER: COURTHOUSE AND STATEHOUSE IN THE LOWER SOUTH, 1850–1860*, at 81–89 (1969); RALPH A. WOOSTER, *POLITICIANS, PLANTERS, AND PLAIN FOLK: COURTHOUSE AND STATEHOUSE IN THE UPPER SOUTH, 1850–1860*, at 97–107 (1975); *see also* ROBERT M. IRELAND, *THE COUNTY IN KENTUCKY HISTORY* (1979); *THE COUNTY COURTS IN ANTEBELLUM KENTUCKY* 18–29, 42–45 (1972); *LITTLE KINGDOMS: THE COUNTIES OF KENTUCKY, 1850–1891*, at 18–23, 29–33 (1977) (a trilogy examining the outsized role that local government in one state played in regulating economic activity in the nineteenth century).

18. NOVAK, *supra* note 6, at 3–6.

19. For the degree to which county governments administered these laws, *see* EMIL MCKEE SUNLEY, *THE KENTUCKY POOR LAW 1972–1936* (1942). Legislative act after act directed county courts to administer these laws.

20. Almost every state has its own “Hening’s Virginia Justice” (more formally WILLIAM WALLER HENING, *THE VIRGINIA JUSTICE: COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE, IN THE COMMONWEALTH OF VIRGINIA* (1825)). While early justices’ guides were based on English precedents, nineteenth century editions referenced state legislative mandates. In an era before judicial training sessions and bench books, these manuals taught these officials how to do their jobs. For example, SAMUEL FREEMAN, *MASSACHUSETTS JUSTICE* (3d ed. 1810), instructed magistrates on how to carry the state legislatures acts on read sales, gambling, street peddlers, alcohol sales, poor laws, and preventing the spread of small-pox. Larry M. Boyer, *The Justice of the Peace in England and America from 1506 to 1776: A Bibliographic History*, 34 Q. J. LIBR. CONG. 315 (1977); *see also* John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 AM. J. LEGAL HIST. 257 (1985).

21. WILLIAM L. MURFREE, *THE JUSTICE OF THE PEACE: A COMPENDIUM OF THE LAW RELATING TO JUSTICES OF THE PEACE; THEIR POWERS AND DUTIES; THE PROCEDURE IN JUSTICES’ COURTS, WITH FORMS OF PROCESS AND ENTRIES USED THEREIN* i (1886).

¶10 An early Kentucky meat inspection statement from 1804 is typical of these legislative mandates. It directed that “county courts of the several counties, herein mentioned, shall appoint a fit and proper person as an inspector of salted beef and pork intended for exportation.”<sup>22</sup> The statute set weights for barrels, mandated those barrels be free of “necks . . . heads and shanks,” and sets brands like “Mess Beef,” “Prime Beef,” “Mess Pork,” and “Prime Pork” (apparently leaving the grading to the inspector’s discretion).<sup>23</sup> The inspector would be paid for “every barrel so inspected and packed, and for packing and branding each barrel and giving a certificate thereof, the sum of twenty-five cents,” subject to the jurisdiction of the county court’s determination that the inspector discharged these duties without “envy, favour, or affection.”<sup>24</sup>

¶11 In addition to relying on county officials, legislatures also used their power to charter cities to broadly delegate regulatory duties to these governing bodies. The 1837 Illinois statute chartering the city of Chicago is a famous example. In 34 clauses it directed the city to restrict gaming, regulate alcohol sales, compel businesses to ensure against “unwholesome, nauseous” premises, regulate slaughterhouses and the storage of dangerous materials, prevent pollution by tanneries, regulate cemeteries, oversee cartage and transportation on city streets, and regulate the weighing and selling of hay, wood, and “pickled and other fish,” among other duties.<sup>25</sup> Increasingly, these charters were supplemented with ordinances promulgated by city governments and collected in printed collections.<sup>26</sup> Indeed, while modern American lawyers imagine that the early nineteenth century was relatively free of regulations of trade and commerce, local bodies and cities exerted tight control over the local markets where most Americans bought and sold their produce, meats, and timber. This can be documented because some of the earliest legal publications printed in the United States were codes of ordinances of cities, with cities like New York and Charleston already using printed codes at the time of the Constitutional Convention.<sup>27</sup>

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22. An Act Establishing Sundry Inspections of Beef and Pork, 1804 Ky. ACTS 94.

23. *Id.*

24. *Id.* Beef inspection laws regularly made it into justice of the peace guides; e.g., JACOB SWIGERT, KENTUCKY JUSTICE 36–38 (3d ed. 1838); JOHN C. HERNDON, A GUIDE TO JUSTICES, CLERKS, SHERIFFS, & C 43–44 (1846). And this was not just a Kentucky phenomenon; under the “Inspection of Beef & C” header, the New Hampshire guide summarized the 1802 statute regulating beef and pork and provided a “Form of the Information” for the prosecution of the law and a “Form of the Warrant” for the seizure of illegally imported meats. NEW HAMPSHIRE JUSTICE OF THE PEACE 126–27 (1824)

25. An Act to Incorporate the City of Chicago, 1837, *quoted in* NOVAK, *supra* note 6, at 3–6.

26. Typically, these sets began with collections of the city’s charters, and then the ordinances that those cities passed to handle their regulatory duties.

27. New York City (1719; a second code was published in 1763 before regular editions began in 1793); Albany, N.Y. (1773); and Charleston, S.C. (1784). Other early codes include those of Philadelphia (1790); Baltimore (1797); Trenton, N.J. (1799); New Orleans (1808); Richmond, Va. (1808); Natchez, Miss. (1822); and Cincinnati (1829).



### *Chartered Corporations*

¶12 With the rise of the railroad and more complex banking transactions occurring across county lines and far beyond city borders, these mechanisms began to come up short. The legislatures then began to draw on a mechanism like the one they used to devolve power to cities: the chartered corporation. Arising in English common law (an early borrowing from Roman law),<sup>28</sup> early corporations were artificial entities with specific purposes like chartered municipalities and trade guilds (which were given a monopoly in a specific business area).<sup>29</sup> Most relevant, colleges, hospitals and charitable societies were chartered as corporations.<sup>30</sup> As part of their prescribed powers, these corporations often were given regulatory powers.<sup>31</sup> In the words of William Blackstone, they could become “little republics”:

To shew the advantages of these incorporations, let us consider the case of a college. . . . If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so; but they could neither frame, nor receive any laws or rules of their conduct; none, at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. . . . But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal law of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws.<sup>32</sup>

¶13 These chartered corporations only superficially resemble modern corporations, and the legislature could, as Blackstone notes, prescribe regulations in the charters it enacted or leave them to the new entity.<sup>33</sup> Besides setting basic rules of passenger behavior, corporations created to build toll roads, bridges, and railroads had little need for regulatory power.<sup>34</sup>

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28. Samuel Williston, *History of the Law of Corporations Before 1800*, 2 HARV. L. REV. 105, 109 (1888).

29. *Id.* at 108. Later, the British government outsourced its colonial activities by establishing the East India Company (1600) and, closer to home, the Hudson Bay Company in North America (1692). See also David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 141–42 (2013).

30. Williston, *supra* note 28, at 108–10, 113–16. Indeed, it was a charitable institution that was the subject of the seminal English case of corporations, *Case of Sutton’s Hospital* (1612), in 1 SELECTED WRITINGS OF SIR EDWARD COKE 347–77 (Steve Sheppard ed., 2005).

31. Ciepley, *supra* note 29, at 141–42.

32. Book I, chapter 18, of WILLIAM BLACKSTONE, COMMENTARIES 467 (Thomas M. Cooley ed., 1872), <https://repository.law.umich.edu/books/95/> [<https://perma.cc/4SV3-BQH5>].

33. During the nineteenth century, the U.S. Supreme Court developed a theory, however, that when the legislature created a corporation without restrictions in that charter, it was contractually bound to stay out of its affairs permanently. Kent Newmyer, *Justice Joseph Story, the Charles River Bridge Case and the Crisis of Republicanism*, 17 AM. J. LEGAL HIST. 233 (1973); R. Kent Newmyer, *Justice Joseph Story’s Doctrine of “Public and Private Corporations” and the Rise of the American Business Corporation*, 25 DU PAUL L. REV. 825 (1976).

34. They were (and still are) often delegated the state power of eminent domain.

¶14 However, this was not the case with the colleges, orphanages, poorhouses, asylums, and institutes for the care and education of the blind, deaf, and differently abled, all which needed rules and procedures to manage the persons under their care.<sup>35</sup> Run by boards of trustees, they needed to hire directors and other staff to fulfill their missions and to propagate regulations for the behavior of inmates and staff.<sup>36</sup> Frequently their charters required that the institution report back to the legislature regularly, typically in an annual report, and these publications often reported these regulations.<sup>37</sup> These reports frequently were published in the house or senate reports of the state legislature or in a special series of legislative documents. Sometimes these reports, or the rules within them, were also published in pamphlet form—and even as broadsides, as the *Rules and Regulations of the Salem Alms* were:

(5). Such of the paupers as are capable of any work should be furnished with it and should receive a suitable compensation. . . .

(7). A due sense of religion should be carefully inculcated, as the greatest comfort under temporal afflictions; and for this purpose, a few pious books might be furnished, divine service performed in the house as often as may be convenient and such of the paupers are capable, encouraged in reading to the others.

(8). Spirituous and strong liquor should be absolutely interdicted unless when given by the advice of a physician. . . .<sup>38</sup>

## Toward a Modern Administrative System

### *Boards and Commissions*

¶15 After the Civil War and into the twentieth century, the complexity of an increasingly national economy and the rapid changes wrought by the Industrial Revolution moved states to create institutions more like the ones we can recognize as parts of a modern administrative system. When most meat, poultry, and agricultural products were sold at local market days, weight and purity regulations could be handled by cities and county governments. Those same bodies were also competent to handle public health when diseases traveled at the speed of a horse-drawn carriage. At the same time, when state-chartered charitable organizations began to feed the poor, house orphans, and educate the differently abled, states could efficiently use those mechanisms. But as

35. A few of these are reprinted in SETH ROCKMAN, *WELFARE REFORM IN THE EARLY REPUBLIC: A BRIEF HISTORY WITH DOCUMENTS* (2003); see also JACK R. GANNON, *DEAF HERITAGE: A NARRATIVE HISTORY OF DEAF AMERICA* (1981).

36. DAVID J. ROTHMAN, *DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 279–80 (1971); LESTER M. SALAMON, *AMERICA'S NONPROFIT SECTOR: A PRIMER* 80–82 (2012); WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 35–44 (1999).

37. ROCKMAN, *supra* note 35, at 98–130.

38. *Rules and Regulations of the Salem Alms House* (1816), in ROCKMAN, *supra* note 35, at 102–05. This is not the only broadside I have found in my research; I have acquired broadsheet versions of the regulations for barbers for two states. From looking at old photos of barbershops, I believe they were meant to be posted in the business premise next to the proprietor's license.

steam power and finance capitalism took hold in the post–Civil War era, these systems became less effective. Cattle arriving from out of state challenged the effectiveness of local meat regulations; meat from refrigerator cars originating hundreds of miles away broke them. National railroad companies could not be reined in with charter provisions. State legislatures needed to create state institutions to meet these challenges. They needed to operate under the aegis of the state governments, employing police powers statewide. These entities needed the power to truly regulate by enforcing laws and using their expertise to write regulatory procedures.

¶16 However, state legislatures still could not imagine executive branch departments housed in the state capital employing permanent employees, so they first looked to the model of the boards of trustees they had used to run asylums and colleges and created new institutions to take on this regulatory work: state boards and commissions. Despite the form they took, the new boards and commissions were fundamentally different. They were agencies of the state administered by staff appointed by public officials. They administered state laws and began to write regulations, starting with procedural rules and later substantive ones. While some of the earliest state boards were set up to promote agriculture and disseminate information about the modern scientific methods of farming and animal husbandry,<sup>39</sup> they usually had no regulatory function.<sup>40</sup> State boards of education similarly operated as informational clearinghouses (although some did distribute state educational statutes with annotations and circumscribed guidance).<sup>41</sup> The first state agencies with true regulatory functions were state boards of health, railroad commissions, and, in some states, hunting and fishing commissions. They set rates, issued licenses, inspected goods traveling through the state, declared quarantines, and wrote both procedural and substantive regulations. And they published these regulations, sparking the beginning of print regulations as an area of legal publication.

¶17 Some of the more prominent and politically controversial bodies were the state railroad commissions, which attempted to prevent rate discrimination on freight carriage through their states. Throughout the nineteenth century, railroad companies had bedeviled state legislators. Before the Civil War, chartered corporations created to build and maintain local lines squandered shareholders' money and went bankrupt, leaving local investors broke and cities without access to markets.<sup>42</sup> The safety of both railroad workers and passengers was largely unregulated. Meanwhile, better financed railroads bought up smaller railroads, concentrating power to set carriage prices. After the war, railroad monopolies set freight rates at will and used their market power to discriminate

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39. ALFRED CHARLES TRUE, *A HISTORY OF AGRICULTURAL EXPERIMENTATION AND RESEARCH, 1607–1925* (1937); Stuart Noblin, *Leonidas Lafayette Polk and the North Carolina Department of Agriculture: Polk as Commissioner of Agriculture*, 20 N.C. HIST. REV. 197 (1943).

40. That is unless the established department acquires additional duties, like the Kentucky Department of Agriculture, Labor and Statistics had in the early twentieth century, leading it to release a pamphlet of *LABOR LAWS OF KENTUCKY PERTAINING TO LABOR INSPECTORS, WORKING WOMEN & CHILD LABOR* (1918).

41. KY. DEP'T OF EDUC., *KENTUCKY OFFICIAL MANUAL & EDUCATIONAL DIRECTORY* (1914).

42. This is a repeated theme in *LITTLE KINGDOMS*, *supra* note 17, at 101–23.

in favor of companies with which they were financially allied.<sup>43</sup> Farmers' groups pushed state legislatures to regulate rates so they could afford to ship their produce to markets.<sup>44</sup> Legislators began to create railroad commissions (or a single commissioner) to oversee the intrastate activities of these companies, giving them varying degrees of regulatory powers. (In many cases, the office of commissioner was enshrined in state constitutions as an elected official.) By 1888, railroad commissions were operating in 23 states.<sup>45</sup> Almost all had a duty to inspect tracks and railroads for safety. Many were empowered to inspect financial records of railroads to assure they were solvent. However, state legislatures differed on how much power they wanted to give commissions to fulfill these duties. Some commissions were given subpoena powers to force compliance and enforce laws; others could only report their findings to the state attorney general or local law enforcement entities.<sup>46</sup> The most powerful railroad commissions could set rates railroads could charge for freight and passenger carriage and enforce them; others could counter discriminatory rate setting, while the least powerful had no jurisdiction over rates.<sup>47</sup> Almost all states required railroad overseers to issue an annual report to the governor or legislature.<sup>48</sup>

¶18 Public health was another area of interest to postwar reformers. Because of the threat that smallpox and yellow fever epidemics posed, city and county boards of health had been established since the colonial period. Early in American history, charters of port cities like New Orleans and Boston were granted the power to quarantine and seize contaminated property, and pamphlets of these quarantine rules are among the earliest regulatory publications.<sup>49</sup> In the new American Republic, major cities quickly established boards of health: New York in 1796, followed by Baltimore (1798), Boston (1799), Charleston (1815), Philadelphia (1818), and New Orleans (1818), to

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43. Thomas D. Clark, *The People, William Goebel, and the Kentucky Railroads*, 5 J. S. HIST. 34 (1939). One example of discrimination was the alleged alliance between the L&N Railroad and the Standard Oil Company that gave that oil shipper an advantage over competitors. Collusion between railroads and preferred customers were often cemented by interlocking boards of directors. IDA TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* 70–103 (1904); William G. Roy, *Interlocking Directorates and the Corporate Revolution*, 7 SOC. SCI. HIST. 143 (1983).

44. James F. Doster, *Trade Centers and Railroad Rates in Alabama, 1873–1885: The Cases of Greenville, Montgomery, and Opelika*, 18 J. S. HIST. 169 (1952).

45. *Abstract of Laws of Other States Creating Railroad Commissions, Showing Their Powers and Duties*, in NINTH REPORT OF THE RAILROAD COMMISSION OF KENTUCKY FOR 1888, at 274–87 (1889) [hereinafter *Abstract*].

46. Only California, Kansas, Massachusetts, Minnesota, and Ohio appeared to have subpoena power. Some, like New York, were directed to report “facts of noncompliance” to the attorney general. *Id.* at 282–83.

47. California, Georgia, Maine, Michigan, New Hampshire, South Carolina, and Tennessee had some power to set either rates or maximum rates. *Id.* at 274–87.

48. *Id.*

49. Titles recently advertised on eBay include *Quarantine Regulations, Port of Providence* [R.I.] (1844); *Quarantine Regulations, Port of Wilmington, N.C.* (1879). These take the form of regulations in other ports around the world. *General Regulations: To Be Observed by All Persons Performing Quarantine in the Lazetto of Malta* (1840), [https://www.um.edu.mt/library/oar/bitstream/123456789/102333/1/JPSM3\(3\)A2.pdf](https://www.um.edu.mt/library/oar/bitstream/123456789/102333/1/JPSM3(3)A2.pdf) [https://perma.cc/TT4Q-UDNX].

name a few examples.<sup>50</sup> The mass movements of soldiers during the Civil War had provided medical professionals hard-learned lessons about public health on a larger scale.<sup>51</sup> Returning to civilian life, doctors saw local boards averse to hard decisions and experienced the effects of poor communications during epidemic outbreaks of disease.<sup>52</sup> State boards of health were seen as ways to coordinate local efforts, collect health statistics, and promote modern science on hygiene and public sanitation.<sup>53</sup> By 1874, eight states—California, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, and Virginia—had established state boards of health.<sup>54</sup> Twenty-years later, 40 states had done so.<sup>55</sup> However, the powers of these early bodies varied widely. Some could establish regulations for public health statewide from the start; others coordinated local activities at first before acquiring stronger powers later in the early twentieth century.<sup>56</sup>

¶19 Kentucky offers a typical example. After the Civil War, the Kentucky state medical society began to push for reforms to state healthcare by focusing on a state board of health to supplement those organizations in the cities.<sup>57</sup> In 1876, the legislature created a new state board of health, but the new entity had little power besides that of collecting information.<sup>58</sup> However, in 1878, Dr. Luke P. Blackburn, a national expert on yellow fever outbreaks and their mitigation, declared his candidacy for governor in the 1879 election, making public health one of his primary issues.<sup>59</sup> This galvanized the state legislature to strengthen the board's powers.<sup>60</sup> The new act gave the board broad power to initiate investigations of disease outbreaks and “adopt and enforce such rules as they deem proper,” to do whatever necessary to establish quarantines in areas of disease outbreaks, including the creation of pesthouses.<sup>61</sup> The law directed the board to work with local officials to inspect all transportation through the state and required “all

50. Howard D. Kramer, *Early Municipal and State Boards of Health*, 24 BULL. HIST. MED. 503, 504 (1950).

51. SHAUNA DEVINE, *LEARNING FROM THE WOUNDED: THE CIVIL WAR AND THE RISE OF AMERICAN MEDICAL SCIENCE* (2014).

52. Colleen Doyle Schiavone, *The Board of Health 1878–1900*, at 22 (1991) (M.A. thesis, University of Louisville).

53. Kramer, *supra* note 50, at 526.

54. *Conference of Boards of Public Health held at New York, May 21 and 22, 1874*, 6 J. SOC. SCI. 210 (1874).

55. INST. OF MED. (U.S.) COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, *THE FUTURE OF PUBLIC HEALTH* 3 (1988), <https://www.ncbi.nlm.nih.gov/books/NBK218224/> [<https://perma.cc/BZP5-6LMQ>].

56. *Id.* at 35–55.

57. Schiavone, *supra* note 52, at 22–23, 25.

58. 1876 Ky. Acts. ch. 494.

59. Schiavone, *supra* note 52, at 25. During the Civil War, Blackburn, a Confederate supporter, was accused of plotting biological warfare from his exile in Canada by planning to have his agents smuggle the clothing of yellow fever patients from Bermuda into northern ports. (Medical science would not conclusively determine that yellow fever was spread by the *aedes aegypti* mosquito until 1901.) He was tried and acquitted by a Toronto court and allowed to return to Kentucky, where he was elected governor. NANCY DISHER BAIRD, *LUKE PRYOR BLACKBURN: PHYSICIAN, GOVERNOR, REFORMER* (1979); *see also History of Yellow Fever in the U.S.*, AM. SOC'Y FOR MICROBIOLOGY (May 17, 2021), <https://asm.org/Articles/2021/May/History-of-Yellow-Fever-in-the-U-S> [<https://perma.cc/6W9G-GR38>].

60. Schiavone, *supra* note 52, at 37.

61. 1879 Ky. Acts 121.

companies or individuals, operating or controlling railroads, steamboats, coaches, public and private conveyances, and steamers plying the Ohio River or its tributaries, in this state shall obey the rules and regulations when made and published by the State Board of Health.”<sup>62</sup> Any of these entities who refused to obey the board’s regulations could be charged with having committed a crime, and the courts were asked to take notice and prosecute these offenses.<sup>63</sup> Like most of these boards of health, the Kentucky board produced annual reports that would eventually include legal materials.<sup>64</sup>

¶20 While farmers were concerned with railroad rates and doctors with public health, no state agency affected more ordinary people than the early commissions that regulated fishing and hunting. Early Americans tended to hunt and fish not only for sport but also to supplement their diets in subsistence economies. However, as the twentieth century dawned, hunting and fishing increasingly became the domain of two competing forces: sportsmen and game hunters. Moreover, as conservation promoting recreational hunters began to make their hobby a lucrative tourism industry, state legislatures began to tilt toward the regulation of hunting and fishing. The classic example is how wealthy New England hunter-conservationists began to lobby for hunting regulations in Maine to protect stocks that had been depleted by local hunters harvesting game for the Boston meat markets.<sup>65</sup> Although Maine had a game law since 1830, it was not widely enforced. In 1883, well-organized sportsmen—conservationists, including Teddy Roosevelt among their ranks—succeeded in passing a strong game law limiting moose, caribou, and deer kills, along with a commission to enforce it.<sup>66</sup> This set up a long battle between game wardens and market hunters that took on an element of class warfare with backwoods hunters portrayed like Robin Hood.<sup>67</sup> This is one area where researching state regulations is so exciting. Historians have created a rich literature discussing this conflict—some even carrying the discussion into racial bias in application of hunting rules in the Jim Crow South.<sup>68</sup>

¶21 New England was not the only region seeking regulatory solutions to support conservation (and tourism). An editorial in the Louisville *Courier-Journal* in 1912 pled for a strong fish and game law in Kentucky. Noting that the “federal government is to distribute a few millions of walleyed pike minnows in the streams of Eastern Kentucky,” the piece argued that “[i]t will be of little avail to stock the rivers with walleyed pike unless something can be done to curtail the activities of the wall-eyed dynamiter and the wild-eyed seiner.”<sup>69</sup> Describing how the dynamiting and bulk netting of fish had destroyed Kentucky stock, the piece proposed that “the state should adopt a modern

62. *Id.*

63. *Id.*

64. 1876 Ky. Acts 59, § 5.

65. EDWARD D. IVES, *GEORGE MAGOON AND THE DOWN EAST GAME WAR: HISTORY, FOLKLORE, AND THE LAW* 65–66 (1988).

66. *Id.* at 66–67, 284.

67. *Id.* at 139–48, 159–60.

68. Steven Hahn, *Hunting, Fishing, and Foraging: Common Rights and Class Relations in the Postbellum South*, 26 *RADICAL HIST. REV.* 37 (1982).

69. *Waste of Material*, (Louisville) *Courier-Journal*, Jan. 12, 1912.

system of Fish and Game laws with the state warden and a sufficient number of assistants to enforce them.”<sup>70</sup> That year, the state legislature used its traditional powers to charter corporations, with “perpetual succession with power to make and use a corporate seal,” to create a fish and game commission.<sup>71</sup> Despite its form, it was a government agency. The governor appointed the members and charged the agency with “enforc[ing] the laws of this State involving the protection, preservation, and propagation of all game birds [and] game animals.” That included the power to seize illegally caught fish and game and to seize “all dogs, guns, seines, nets, boats, lights, or other instrumentalities unlawfully used” in commission of prohibited acts.<sup>72</sup> The new body also was empowered to “appoint and remove at pleasure a sufficient number of game wardens, whose jurisdiction shall be co-extensive with the State” as well as office workers needed to carry out the commission’s work.<sup>73</sup>

¶22 Similarly interesting histories can be found for other boards and commissions such as horse racing commissions,<sup>74</sup> professional licensing boards, public utility commissions,<sup>75</sup> boxing authorities,<sup>76</sup> and commissions regulating legal gambling.<sup>77</sup>

### *Pre-Code State Regulations from Boards, Commissions, and Departments*

¶23 These new boards, commissions, and departments used a variety of methods to publish their regulations, procedural rules, rate decisions, and guidance documents. The two primary methods of publication were annual reports and pamphlets, although bulletins and broadsheets were occasionally used. But many agencies issued no publications, meaning these materials were available only on file in the agency’s office.

¶24 Early boards and commissions were typically required to give an account of their activities in an annual report. This was a holdover from the practice by legislatures of requiring chartered corporations to periodically report on their activities. These reports were a convenient mechanism for these new agencies to release rules of procedure and guidance. The bulk of such annual reports was a recap of agency activities, various statistical reports, and various policy documents or studies. But increasingly these reports included rules of procedures, regulations, reprints of relevant statutes, and occasionally summaries of relevant court decisions.

¶25 Bulletins were usually issued by state agencies to advise interested parties about scientific information, useful examples of policy choices from other states, and relevant technical news. Perhaps occasionally, they would publish new regulations.<sup>78</sup> Agriculture

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70. *Id.*

71. 1912 Ky. Acts. ch. 35, § 1.

72. *Id.* § 4.

73. *Id.* § 6.

74. JOHN O. HUMPHREYS, RACING LAW 1–12, 72–92 (1963).

75. SAMUEL MERMIN, JURISPRUDENCE AND STATECRAFT: THE WISCONSIN DEVELOPMENT AUTHORITY AND ITS IMPLICATIONS (1963).

76. ROBERT G. RODRIGUEZ, THE REGULATION OF BOXING: A HISTORY AND COMPARATIVE ANALYSIS OF POLICIES AMONG AMERICAN STATES (2009).

77. ROBERT D. FAISS, GAMING REGULATION AND GAMING LAW IN NEVADA (2008).

78. In one case, the Kentucky Board of Health published a bulletin in hardback that appears to have

departments, for example, would dispense advice to farmers based on new science, while state boards of health would send out warnings of advancing epidemics to doctors and local health officials. Published more frequently than annual reports, these documents are very ephemeral and less likely to be collected individually by libraries.<sup>79</sup> Some, however, were bound by libraries as serials.<sup>80</sup> It is also quite likely that much of the more important material was reprinted in the annual reports.

¶26 The most interesting pre-code regulatory publications are pamphlets.<sup>81</sup> They are found in every state in a wide variety of sizes including standard half-sheet pamphlets, pocket-sized booklets, and trifold flyers.<sup>82</sup> The pamphlet was the preferred format for issuing regulations to the general public, but some publications, like explosives regulations for use by miners and farmers, could fit in a workman's pocket.<sup>83</sup> Others, like hunting and fishing regulations, evolved from the staid booklets,<sup>84</sup> to a variety of formats, many of which included stylish graphic art, informative charts and maps, and other design features.<sup>85</sup> While these publications were ephemeral and not widely collected by libraries (especially law libraries), they were published in great enough quantities that they survived and can be widely found on online auction sites, particularly those with collector communities like hunting enthusiasts.<sup>86</sup>

¶27 While these formats made up the bulk of regulatory publications before the administrative codes, a few other formats were used. In some cases, rules and regulations were available only through mimeographed copies available for pick-up in agency offices.<sup>87</sup> Occasionally “desk books” and “manuals” were printed, which compiled generally useful materials like phone directories with state laws and regulations for the use of practitioners. For example, such a manual of laws and regulations for teachers, school

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been published in enough quantity to survive in the used book market. This was no doubt done because this bulletin, the ninth issue of volume 8, contained *The Public Health Manual*, a compendium of health laws, rules and regulations, court decisions, and medical laws. 8 BULL. STATE BD. HEALTH KY. (1919).

79. In addition, I have found very few in bookstores and online auction sites, and the ones I have discovered are useful issues of department of agriculture bulletins (likely retained by a farmer for its topic).

80. For example, an incomplete collection of issues of the monthly *Bulletin of the Virginia Department of Agriculture and Immigration* can be found at the Virginia Tech Library.

81. As late as 1965, more than a dozen states still used the pamphlet as its primary form of regulatory publication. Morris L. Cohen, *Publication of State Administrative Regulations—Reform in Slow Motion*, 14 BUFF. L. REV. 410, 423–26 (1965).

82. I own a variety of such publications in all sizes, colors, and formats in a personal collection I have assembled for an upcoming publication. A 1943 survey of Kansas documents found a variety of “different sizes” with “a mark lack of uniformity” of style and form. EDWIN O. STENE, FILING AND PUBLICATION OF ADMINISTRATIVE REGULATION x (1943).

83. THE LAWS GOVERNING THE MINING OF COAL AND DRILLING OF OIL AND GAS WELLS THRU SEAMS OF COAL IN THE STATE OF KENTUCKY (1934).

84. GAME AND FISH LAWS AND AUTHORITY GOVERNING REGULATIONS (1948).

85. Seven years later, Kentucky fishing regulations were two-color and sported a cartoon. KENTUCKY FISHERY REGULATIONS (1955). By the time that the 1976 and 1977 *Indiana Fishing Regulations* were released by the Indiana Division of Fish and Wildlife, they came in bright oranges and purples.

86. While somewhat obsessively collecting examples for this project on eBay during 2020's lockdown, I found many specialized collectors and resellers who dealt exclusively in hunting and fishing memorabilia.

87. STENE, *supra* note 82.



principals, and school boards was published in Kentucky.<sup>88</sup> As mentioned earlier, some regulations were compiled in broadsides and posters meant to be placed at businesses and workplaces. Barbers were issued versions of their regulations to put in their shops to show their interest in a clean and safe business.<sup>89</sup> And even today, some states require state labor laws and regulations to be placed prominently in the workplace, traditionally near the timeclock or employee entrance.<sup>90</sup>

### Researching Pre-Administrative Code Regulations: A Summary

¶28 Finding regulatory material in the pre-code era was challenging to the lawyers of that era, and it is no less difficult for historians and legal scholars today. The materials were scattered through reports and pamphlets held by different types of libraries and were, with rare exceptions, collected only in the states where they were most relevant. As digital databases began to be compiled, these documents did not always fit the subject era of the products or were no longer in the collections of the libraries that partnered with database producers.<sup>91</sup>

¶29 There is one key resource in regulatory law that has been well represented in digital databases: statutes. As all regulations ultimately derive their power from the authority of enabling legislation, this is always a starting point for researchers. Moreover, early regulatory legislation took on the burden of providing most of the substantive law administered by the bodies to which it delegated enforcement duties. Many law schools have collections of annual legislative enactments and compiled statutory codes for their states. Moreover, most academic researchers have access to HeinOnline's Session Laws and State Statutes databases,<sup>92</sup> which provide, respectively, session laws for all 50 states and public domain statutory codes. HeinOnline also provides a data library of state attorneys' general opinions, which (in some states) may serve as administrative guidance.<sup>93</sup>

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88. KY. DEP'T OF EDUC., *supra* note 41.

89. The *Board of Examiners Regulations for Bar Shops and Barber Schools* (1974) issued by Connecticut was 18in x 12in and came with a signed seal of inspection. Indiana's *Laws and Regulations Governing Sanitary Conditions for Barber Shops, Barber Schools of Colleges of Indiana* was half that size but warned, "This card must be posted in a conspicuous place." My copy is undated, but the regulations comport with the *Board of Barber Examiners, Rules, and Regulations* of 1947, cited in 816 IND. ADMIN. CODE 1-1-2 to 1-1-14 (1984).

90. An entire industry has arisen to provide these state labor law posters; however, most states will issue their own for free. For example, the Kansas Department of Labor has all the required posters (in both English and Spanish) available for download at <https://www.dol.ks.gov/laws/download-posters> [<https://perma.cc/SXS7-66KQ>].

91. As a result, HeinOnline and LLMC Digital, which cater to law libraries, have few of these materials. By simply being sufficiently old American imprints, some are captured in academic library-marketed databases like Readex's Early American Imprints, Series 1, Evans (1639–1800), and Early American Imprints, Series II, Shaw-Shoemaker (1801–1819).

92. HeinOnline's Session Laws Library is a popular add-on to the core database and includes the State Statutes archive.

93. The database is also widely subscribed to by law libraries.

Similar state statutory materials may be found in Gale's Making of Modern Law Primary Sources, 1620–1926.<sup>94</sup>

¶30 Finding broad, multistate collections of justice-of-peace manuals and city ordinances that document early American regulatory practice is far more challenging. Manuals for justices of the peace have traditionally been collected by law libraries, but, for whatever reason, city ordinances have not universally been collected in the same way. Both, however, can be found in the local history collections of public libraries, as well as the rare book or special collections of universities. Online and multistate research is more problematic. There are no comprehensive 50 state databases of these materials, although Gale's Making of Modern Law Primary Sources, 1620–1926, which has both justices' manuals and city ordinances, is the closest.<sup>95</sup> Older city ordinances can be found in Readex Early American Imprints,<sup>96</sup> Gilder Lehrman American History, 1493–1945, and other historical databases.<sup>97</sup> Public domain resources such as Google, HathiTrust, and the Internet Archive also have ordinances and justices' manuals, in similarly noncomprehensive collections.

¶31 For the annual reports of chartered corporations, research is even more challenging. Researchers within a state should consult state legislative records and probably seek expert assistance from the state library or archives to access these reports.<sup>98</sup> If you are lucky enough to be in a state covered by Adelaide R. Hasse's excellent *Index of Economic Material in the Documents of the States of the United States* (1908–1919) series, check either the "legislature" heading or a topic heading like "mining."<sup>99</sup> Broader research is considerably more challenging. Researchers can start with guides like R.R. Bowker's *State Publications, 1899–1908*,<sup>100</sup> although that publication captured only a small selection of state materials. The Library of Congress's Exchange and Gift Division published a similarly uneven *Monthly Checklist of State Publications* for the decades 1910–1994, based on the publications that state governments donated to Congress.<sup>101</sup> However, bibliographic tools can only take you so far; the actual materials are largely

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94. Because this database has significant overlap with more widely subscribed databases like HeinOnline's State Session Laws, it is not available in as many law libraries.

95. Gale Making of Modern Law Primary Sources, 1620–1926, <https://www.gale.com/intl/c/making-of-modern-law-primary-sources-1620-1926> [<https://perma.cc/37SW-5BRD>].

96. Early American Imprints, <https://www.readex.com/products/early-american-imprints-series-i-evans-1639-1800> [<https://perma.cc/MT9S-QLPX>].

97. *American History, 1493–1945*, GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/collection/american-history-1493-1945> [<https://perma.cc/MT27-WPQA>].

98. SUSAN L. DOW, *STATE DOCUMENT CHECKLISTS: A HISTORICAL BIBLIOGRAPHY* (2d ed. 2000), is the best print guide to state bibliographies of legislative and other government materials. However, many states have a documents librarian at their state library who can also be a valuable resource.

99. Hasse was able to complete guides to 13 states: California, Delaware, Illinois, Kentucky, Maine, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Vermont.

100. Published in four volumes: v. 1, New England states, 1899; v. 2, North central states, 1902; v. 3, Western states and territories, 1905; and v. 4, Southern states, 1908.

101. *THE MONTHLY CHECKLIST OF STATE PUBLICATIONS, 1910–1994*.

undigitized and unavailable outside the state library and the libraries of older state universities and colleges.

¶132 The annual reports of early boards and commissions might also be listed in Hasse, Bowker's *State Publications*, and the *Monthly Checklist*, but they also could be cataloged as individual items, as monographs, or as serials. For this reason, searching WorldCat and local catalogs for the agency's name as an author-creator should be part of the research process. The official version of the agency name should be found in the enabling legislation of the board or commission.<sup>102</sup> Early government publications are notoriously haphazard in the bibliographical niceties; researchers should expect numerous title variations and not be surprised by serials cataloged as monographs.<sup>103</sup> Full online collections are rare, but there are several examples of single annual reports found on public domain sites.

¶133 Researching pamphlets can take a similar path. WorldCat and local discovery tool searches can find existing versions in libraries and bibliographic information to databases. Print collections are very dispersed, and individual titles are as likely to be found at a public library as a law library. Online, HathiTrust and the Internet Archive are as reliable a resource as any commercial databases. Even if you are not in the market to buy pamphlets, eBay is a pretty good discovery tool to find what materials exist.

¶134 This eclectic mix of resources makes for a challenging research project, but if legal scholars (or the reference librarians assisting them) are diligent (and lucky), they can reconstruct the textual history of a regulatory regime. So, researchers of the regulation of meat could trace the state statutes on beef and pork distribution, and then check state justice-of-peace manuals and the ordinances of leading cities for more procedural detail. Next, they should look for state agencies regulating food purity and see whether those agencies released annual reports. By searching an agency's name as a creator on WorldCat, HathiTrust, and the Internet Archive, researchers can occasionally find early regulatory pamphlets.

## **The Long and Winding Path to State Administrative Codes**

### **The Model of Federal Regulatory Publication**

#### *Early Federal Regulatory Publication*

¶135 The publication of federal regulations is a later development in the history of American legal publishing, and it started in a haphazard manner in the early twentieth century as the United States emerged as a modern industrial power with all the concerns that involved. Early presidents used executive orders to take actions of a limited administrative nature, such as managing the public lands; creating Indian reservations,

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102. Researchers should be wary that early cataloguers would occasionally modify agency names to versions more uniform from state to state.

103. Agency serial practices are so erratic as to be a common bugbear of government document librarians. D.H. Hutto, *Government Documents Cataloging in Oregon: The State of the State*, 4 OLA Q. 7 (1998).

military naval, and lighthouse installations; establishing customs houses, and managing natural resources.<sup>104</sup> Later, the executive order was employed to manage the civil service.<sup>105</sup> By law, these presidential documents were lodged with the U.S. Secretary of State.<sup>106</sup> National regulation of food and drug safety,<sup>107</sup> which began in the Theodore Roosevelt administration, required more regulatory guidance, as would the administration of the new 1913 national income tax.<sup>108</sup> The new agencies released regulatory materials in pamphlet form;<sup>109</sup> others followed the precedent of railroad regulators and released them as appendices to required annual reports to Congress.<sup>110</sup> Tax regulators were more active, releasing regular circulars that soon after were republished in the commercial loose-leaf reporters that would be the focus of tax law research until the last days of the century when they began to be replatformed as proprietary databases.<sup>111</sup> During the first World War, the Wilson administration used emergency powers to reorganize the domestic economy to support the war effort, necessitating several written executive orders and directives. The powerful Committee on Public Information<sup>112</sup> created a gazette called the *Official Bulletin* to publish these regulations, with some war-time propaganda.<sup>113</sup> However, the latter role unnerved members of Congress, and as soon as the war ended, they killed off the *Official Bulletin*.<sup>114</sup>

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104. PRESIDENTIAL EXECUTIVE ORDERS, 1862–1938, v (Clifford L. Lord ed., 1944); see also LIST AND INDEX OF PRESIDENTIAL ORDERS, UNNUMBERED SERIES 1789–1941 (Clifford L. Lord ed., 1944; 1979 rep).

105. After he signed the Pendleton Civil Service Reform Act into law in 1883, 22 Stat. 403, ch. 27, President Chester A. Arthur moved swiftly to implement it with a series of executive orders to set up the new Civil Service Commission. A May 7 order adopted Civil Services Rules I–XXII; later orders revised them, and several new orders throughout 1884 and 1885 added to and amended these rules, substantively as well as procedurally. LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS, *supra* note 104, at 104–19.

106. To Provide for the Safe Keeping of the Acts, Records, and Seal of the United States, and for Other Purposes, 1 Stat. 68 (1789). The Secretary of State was fully relieved of these duties in current Federal Housekeeping Statute, Pub. L. No. 89-554 (1966) (codified at 5 U.S.C. § 301 (2023)).

107. Pure Food and Drug Act, 34 Stat. 768 (1906) (codified at 21 U.S.C. §§ 1–15 (2023)).

108. The Commerce Clearing House (CCH) was founded in 1913—that same year—with its *Standard Federal Tax Reporter* specifically designed for this new administrative practice area.

109. MILES O. PRICE & HARRY BITTNER, EFFECTIVE LEGAL RESEARCH 143 (1969).

110. Typical is the Interstate Commerce Commission (ICC), which released 108 volumes of its *Annual Report* from 1887 to 1994. Typical of the early volumes is the first volume, which included regulatory information in the main text and as appendices, including dockets and summaries of cases (apps. A and B), letter rulings on questions of law and procedure (app. C), rules of procedure in cases before the commission (app. D), and circulars to carriers (app. E).

111. The CCH *Standard Federal Tax Reporter* was joined by publications of the Bureau of National Affairs in 1929 and Pike & Fischer in 1930.

112. Known as the Creel Committee for its powerful leader, George Creel, the Committee on Public Information waged war against pacifists, including some in Congress, and was blamed for setting off America's first Red Scare. REGIN SCHMIDT, RED SCARE: FBI AND THE ORIGINS OF ANTICOMMUNISM IN THE UNITED STATES, 1919–1943, at 136–37 (2000).

113. Robert A. Emery, *The Official Bulletin, 1917–1919: Proto-Federal Register*, 102 LAW LIBR. J. 441 (2010).

114. *Id.* at 446.

### *Origins of the Federal Register*

¶36 It took the stock market crash of 1929 and the ensuing New Deal for the United States to develop permanent publications to collect the many regulations that were promulgated, amended, repealed, and replaced as the administration of Franklin Roosevelt and his brain trust attempted various programs to restart the U.S. economy. These regulatory actions, which included a surge of executive orders and circulars from the new agencies, overwhelmed the ability of even the most active DC law firm librarians to collect these documents. This caused confusion among lawyers trying to sort out their clients' affairs in this active time, and this uncertainty came to a head when regulatory disputes entered the courts, which had trouble figuring out which executive order or directive governed the disputes before them.<sup>115</sup> As it developed, even the U.S. Department of State, charged in its 1797 enabling act with "safe-keeping of the Acts, Records, and Seal of the United States,"<sup>116</sup> struggled to collect accurate copies.<sup>117</sup>

¶37 This drew the attention of the orderly mind and reforming impulses of Associate Justice Louis D. Brandeis of the U.S. Supreme Court. He, along with friends in government and at Harvard Law School, began to envision a solution.<sup>118</sup> As his friend, confidant, and unofficial fixer Felix Frankfurter later said, "I suppose no person is ultimately more responsible for the intellectual impetus that gave rise to the Federal Register Act than Mr. Justice Brandeis."<sup>119</sup> Famously interested in transparency in government and suspicious of big institutions, Brandeis was concerned that in the rush to reform the U.S. economy, the FDR administration and newly created New Deal agencies were issuing executive orders and directives without adequately providing for their retention and access. This meant that citizens and regulated industries often were unclear on the law binding them.

¶38 Brandeis's efforts were highlighted by an exchange in oral arguments regarding two joined cases, *Amazon Petroleum Corp. v. Ryan* and *Panama Refining Co. v. Ryan*.<sup>120</sup> The oil companies were challenging the National Industrial Recovery Act (NIRA). As the lawyers for the companies were preparing their petitions for certiorari, they discovered errors in the official executive order that ultimately had to be resolved with the issuance of another executive order. In the oral argument, Justice Brandeis sharply questioned Harold M. Stephens, the assistant attorney general in the antitrust division

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115. Finding early executive orders was a challenge long after they began to be collected in the third volume of the *Code of Federal Regulations* in 1938. When Clifford L. Lord of the Historical Records Society of New York City begin to collect and index these records, he found that "some compilations of orders have been published on such special topics as Indian reservations, the Panama Canal, the PWA, Veterans Regulations"; many others had never appeared in print. PRESIDENTIAL EXECUTIVE ORDERS, 1862–1938, *supra* note 104, at vii.

116. An Act to Provide for the Safe Keeping of the Acts, Records and Seal of the United States, and for Other Purposes, 1 Stat. 68 (1798).

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

118. *Id.* at 363–66.

119. *Id.* at 359, quoting a 1935 letter from Frankfurter to Cecil T. Carr.

120. *Panama Refining Co. v. Ryan*, 293 U.S. 398 (1935).

who was arguing the case on behalf of the government. Brandeis asked, “Who promulgates these orders and codes that have the force of laws?”<sup>121</sup> Stephens replied that they were “promulgated by the president and I assume they are on record at the State Department.” Brandeis followed up: “Is there any official or general publication of these executive orders?”—knowing the answer was no—and later queried whether there was “any way by which one can find out what is in these executive orders when they are issued?”<sup>122</sup> Stephens offered that “it would be difficult, but it is possible to get certified copies of the executive orders and codes from the NIRA.” Unbeknownst to Stephens, he had been set up.<sup>123</sup> Brandeis was using the oral argument to push for an official register of executive documents. At the same time, Frankfurter, then a law professor at Harvard Law School, had pushed a junior Harvard professor, Erwin N. Griswold, to write a law review article to coincide with this exchange for the purpose of prodding Congress into passing a law requiring the publication of federal executive orders and agency regulations. That article was published in the *Harvard Law Review* in 1934 and, combined with the press comment on the *Amazon Petroleum* and *Panama Refining* oral arguments, had the effect that Brandeis desired: promoting legislative action on regulatory publication.<sup>124</sup>

¶39 The next year, Congress passed the Federal Register Act of 1935.<sup>125</sup> The statute required that the national archivist take custody of all presidential proclamations, executive orders, and other documents with legal effect, and provided for the publication of a *Federal Register*. Section 5 mandated:

There shall be published in the Federal Register (1) all presidential proclamations and executive orders, except as such shall have no general applicability and legal effect or are effective only against federal agencies or person in their capacity as officers agents or employees thereof; (2) such documents or classes of documents that the president as the president shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by act of Congress.<sup>126</sup>

¶40 Recalling the fears engendered by the propagandistic *Official Bulletin*, the law cautioned “in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register.”<sup>127</sup>

### The Code of Federal Regulations

¶41 The Federal Register Act originally envisioned a comprehensive codification of all existing regulations to be published around the time of first publication of the

121. Feinberg, *supra* note 117, at 365.

122. *Id.*

123. *Id.* at 363–66.

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

125. Pub. L. No. 74-220, 49 Stat. 500–503 (1935).

126. *Id.*

127. *Id.*

*Federal Register*,<sup>128</sup> but the law was amended in 1937 to give the government more time and require a codification of all regulations every five years.<sup>129</sup> In 1938, the *Code of Federal Regulations* was published in 17 volumes. A nine-volume cumulative supplement was issued in 1943, and annual multivolume supplements followed annually with increasing frequency.<sup>130</sup> By 1967, the Office of the Federal Register began publishing yearly editions.<sup>131</sup> The role of publication of federal regulations was incorporated into the Administrative Procedure Act (APA),<sup>132</sup> which required publication of proposed and final texts of regulations.

### Uniform State Administrative Lawmaking and Publication

¶42 Brandeis was not the only one concerned with the mechanics of the new administrative state. Lawmakers, independent scholars, and bar associations found themselves debating the new machinery. The issue of publication, as both a practical issue and a matter of fairness, was regularly raised. Citizens, after all, needed to know how to find the regulations they must abide by. A 1943 survey by the Kansas Legislative Council showed a problem all states faced. It sent researchers out to state agencies with the task of finding regulations.<sup>133</sup> The assembled file of materials was “a miscellaneous collection of bulletins, pamphlets, mimeographed booklets, newspaper clippings, and typed and mimeographed documents of different sizes,” the report noted.<sup>134</sup> There was a “marked lack of uniformity in the style in which the regulations are couched, and in the form in which they are issued.” Some had “the language of legislative acts; others are written . . . [like] parental advice.”<sup>135</sup> The result was a lack of clarity that made “it difficult for the reader to determine the force or intent of a regulation.”<sup>136</sup>

¶43 In 1937, the American Bar Association (ABA) created a committee on administrative agencies and tribunals that would eventually take up the issue.<sup>137</sup> Its activities started a push that on the federal level would lead to the 1946 APA.<sup>138</sup> One of the integral players was E. Blythe Stason, dean of the University of Michigan Law School. He

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128. *Id.* § 11.

129. An Act to Amend the Federal Register Act, Pub. L. No. 75-158 (1937).

130. At some point (the accession history is muddled), the University of Louisville Law Library acquired a pristine copy of the original set, along with the cumulative and annual supplements, which it has retained as a piece of history.

131. RICHARD J. MCKINNEY, *A RESEARCH GUIDE TO THE FEDERAL REGISTER AND THE CODE OF FEDERAL REGULATIONS* (2019).

132. Pub. L. No. 79-404, 60 Stat. 23 (1946) (codified as amended at 5 U.S.C. ch. 5, subch. I, §§ 500-596 (2023)).

133. STENE, *supra* note 82.

134. *Id.* at x.

135. *Id.*

136. *Id.*

137. *Prefatory Note, Model State Administrative Procedure Act*, *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 197-99* (1946) [hereinafter *Prefatory Note*]. This note provides a good summary, which can be supplemented by E. Blythe Stason, *The Model State Administrative Procedure Act*, 30 *IOWA L. REV.* 196 (1948).

138. *Prefatory Note, supra* note 137, at 198.

was a working member of the U.S. Attorney General's Committee on Administrative Procedure (whose 1940 and 1941 reports played a critical role promoting passage of a federal administrative procedure law).<sup>139</sup>

¶144 When the APA turned its attention to state administrative procedure,<sup>140</sup> Stason had a leading role. As early as 1938, the ABA had been looking at state administrative law, but in 1939 it proposed the creation of a draft administrative process act, the implementation being referred to the House of Delegates in 1940.<sup>141</sup> As the ABA was then deeply involved in lobbying for the federal APA, the drafting of a model act briefly languished, but the work was eventually referred to the National Conference of Commissioners on Uniform State Laws (NCCUSL) on which Stason served as a commissioner.<sup>142</sup> Stason was later recalled to have been “an assiduous participant in the deliberations” and “largely instrumental in the formulation and publication of the model statute,” which was promulgated in 1946.<sup>143</sup> By 1962, an estimated “sixteen states [had] adopted significant portions of the Model Act,” and many others were influenced by it.<sup>144</sup>

¶145 One of the important features of the 1946 model act was its promotion of open publication of administrative regulations. While the state model act was influenced by scholarly comment, the laws of a few leading states, and the influential 1942 report by Robert M. Benjamin on New York state administrative law,<sup>145</sup> it went further in advising publication of regulations than many reformers had, including Benjamin.<sup>146</sup> “One of the major contributions of the Model Act . . . is in the area of rulemaking,” wrote one scholar. “It provides a uniform procedure for the adoption of rules that assures notice to interested parties with an adequate opportunity to present conflicting viewpoints and

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139. While introducing his tentative draft of the then Uniform Act on Administrative Agencies, Stason noted that the work of the U.S. Attorney General's Committee on Administrative Procedure “furnished a lot of material, a number of good ideas” that he incorporated into his draft. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS FORTY-NINTH ANNUAL CONFERENCE, *Uniform Act on Administrative Agencies* 1, 2 (1939).

140. While interested in state administrative law, the ABA Committee on Administrative Law noted in 1933 that it deliberately “restricted its studies to federal administrative tribunals, at least for the present” and generally that was the ABA's focus through 1946. *Report of the Special Committee on Administrative Law*, 57 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 539, 539 fn. 1 (1933).

141. Prefatory Note, *supra* note 137, at 197–98.

142. National Conference of Commissioners on Uniform State Laws, *supra* note 140, at 1.

143. E. Blythe Stason, *Model Administrative Procedure Act*, 33 IOWA L REV. 196, 209 (1948).

144. KY. LEGIS. RSCH. COMM'N, *ADMINISTRATIVE PROCEDURES LAW IN KENTUCKY* (1962).

145. *ADMINISTRATIVE ADJUDICATION IN NEW YORK: REPORT OF ROBERT M. BENJAMIN AS COMMISSIONER UNDER SECTION 8 OF THE EXECUTIVE LAW 40* (1942).

146. While the Benjamin report had recommended that regulations be available in “limited and less expensive departmental publications,” from its earliest drafts the model act called for a published register of new regulations and printed compilations of all agency regulations in force. The draft Uniform Administrative Procedure Act that was presented to the NCCUSL Fifty-Second Annual Conference in 1942 had language establishing lodgment with the secretary of state (or other state agency), publication of new regulations in a regularly published register, and the publication of compilation of acts in force by agencies. The language was tinkered with in later conferences but survived into the final model act.



with provision for filing, indexing, compiling, publishing, and keeping current the publication of rules.”<sup>147</sup>

¶146 Section four of the Model State Administrative Procedure Act was explicit:

#### § 4. Publication of Rules

(1) The [Secretary of State] shall, as soon as practicable after the effective date of this act, compile, index, and publish all rules adopted by each agency and remaining in effect. Compilations shall be supplemented or revised as often as necessary [and at least once every two years].

(2) The [Secretary of State] shall publish a [monthly] bulletin in which he shall set forth the text of all rules filed during the preceding [month] excluding rules in effect upon the adoption of this act.

(3) The [Secretary of State] may in his discretion omit from the bulletin or the compilation rules the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if such rules are made available in printed or processed form on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

(4) Bulletins and compilations shall be made available upon request to [officials of this state] free of charge, and to other persons at a price fixed by the [Secretary of State] to cover publication and mailing costs.<sup>148</sup>

¶147 The model act leaned heavily into the mechanisms that were working in the federal system: registers or bulletins like the *Federal Register* for new regulations and notice of proposed regulations and well-indexed comprehensive compilations like the *Code of Federal Regulation*. However, the drafters of the act—knowing how cost-conscious legislatures could be—did not want to scare away potential adopters of the model act by requiring “unduly cumbersome, expensive, or otherwise inexpedient” publication standards.<sup>149</sup> Nevertheless, the drafters clearly believed printed state administrative registers and codes were the gold standard.

¶148 The drafters envisioned that the state secretaries of state would oversee publication, although they indicated that other options were possible. Some state legislatures would eventually create new agencies to task with this duty.<sup>150</sup> “There are certain functions under the Model Act which have to be performed either by an existing agency or department or by a new agency,” one commentator noted. “The principal function involved is the publication and compilation of rules and proposed rules.”<sup>151</sup>

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147. Harold S. Bloomenthal, *The Revised Model State Administrative Procedure Act—Reform or Retrogression?*, 1963 DUKE L. REV 593, 599.

148. *Model State Administrative Procedure Act*, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1946).

149. Bloomenthal, *supra* note 147, at 602–03.

150. One commentator on the model act, Harold Bloomenthal, noted that the state of Kentucky “place[d] these functions in its legislative research commission.” *Id.*

151. *Id.* at 603.

## Early State Administrative Codes

### *Wisconsin*

¶49 Even before the approval of the final draft of the Model Administrative Procedure Act, some reform-minded states were considering its provisions. In 1939, the Wisconsin legislature passed a law calling for the collection of all “procedural rules and standing orders and regulations which have the force of law” to be published as a supplement to the Wisconsin statutes.<sup>152</sup> The resulting work, called the *Wisconsin Red Book*, was published first in 1940.<sup>153</sup> The regulations were listed by agency with limited indexing. However, as NCCUSL worked through versions of the model law, Wisconsin began work to adopt a revised version of an early 1942 draft by Stason, which the state legislature enacted in 1943.<sup>154</sup> The legislation was concerned largely with other parts of the model act, but it adopted the publication provision (which survived unchanged in the final version of the model act). While that law was largely met by the existence of the *Red Book*, Wisconsin was not completely satisfied with an annual supplement; in 1955, the legislature passed legislation to create a loose-leaf updated *Wisconsin Administrative Code*, which was to be regularly updated and indexed.<sup>155</sup>

### *California*

¶50 On the West Coast, California was also instituting new regulatory publications. As early as 1938, the state bar association had been calling for reforms to state administrative law.<sup>156</sup> Largely concerned with the judicial review of administrative decisions, California’s bar committee on administrative agencies and tribunals was nonetheless interested in the publication of the rules of procedure of state boards and commissions. In its 1939 report, the committee called for “adoption by administrative agencies of rules and regulations affecting the conduct of business and the conduct of proceedings before those agencies.”<sup>157</sup> In 1941, the state legislature enabled the creation of a *California Administrative Code*, creating a codification board charged with the “purpose of assembling, codifying, and publishing the tremendous, unorganized mass of administrative rules and regulations.”<sup>158</sup> The law envisioned that after the code was compiled, it would be regularly updated by the *California Administrative Register*.<sup>159</sup> In 1943, the legislature fully funded the publication,<sup>160</sup> and by 1947, the *California Administrative*

152. 1939 Wis. Sess. Laws 688.

153. WISCONSIN RED BOOK: ADMINISTRATIVE RULES AND ORDERS (E.E. Brossard ed., 1940).

154. 1943 Wis. Sess. Laws 670.

155. 1955 Wis. Sess. Laws 256.

156. *Report of the Committee on Administrative Agencies and Tribunals*, [CAL.] STATE BAR J., Aug. 1939, at 46. The state bar’s efforts continued in 1940 and 1941. *Report of the Committee on Administrative Agencies and Tribunals*, [CAL.] STATE BAR J., Sept. 1941, at 31.

157. [CAL.] STATE BAR J., at 49.

158. 1941 Cal. Stat. 2087. The board was to consist of the secretary of state, finance director, and legislative counsel.

159. *Id.* 1941 Cal. Stat. 2087.

160. *Bureau Regulations May Be Available*, SACRAMENTO BEE, Apr. 21, 1943.

*Code* had grown to “some 23 titles” and was, in the eyes of some, “virtually complete at the present time.”<sup>161</sup> However, the legislature was concerned that it was not as widely distributed as it could be and wanted to ensure that the system was easier for lawyers and libraries to purchase. A new law ordered distribution of the *California Administrative Code* and *Register* to every county clerk’s office along with “copies of any changes in rules within 10 days of the receipt of such changes.” The county clerks were charged with maintaining the code and register sets as well as an “up-to-date file of current changes.”<sup>162</sup> Having completed its work, the codification board was abolished, and its remaining duties were transferred to the Division of Administrative Procedure, which had been created in 1945 to assist it.<sup>163</sup> In 1987, the *California Administrative Code* was renamed the *California Code of Regulations*.<sup>164</sup>

### Indiana

¶151 In 1941, Indiana University Law Professor Frank E. Horack Jr., published the *Indiana Administrative Code* for the Bobbs-Merrill Publishing Company. Horack, Indiana’s NCCUSL commissioner, created the unofficial two-volume loose-leaf to fill a gap caused by the lack of a uniform publishing practice by Indiana administrative agencies.<sup>165</sup> The “pioneering” work was the first time in the history that any state’s regulations had been published along with annotations to the authorizing statutes, applicable judicial decisions, and interpretive opinions of the attorney general.<sup>166</sup>

¶152 Horack was later instrumental in the passage of Indiana’s first legislation on administrative publication in 1943 and 1945.<sup>167</sup> The 1943 act required that any new administrative rules be filed with and approved by the state attorney general.<sup>168</sup> The 1945 act voided any rules not adopted under its terms or the 1943 act and required the secretary of state to compile and publish all rules in effect by 1946 (as well as publish an accumulative supplement each year after).<sup>169</sup> Unfortunately, while its apparent promise led to

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161. 1941 Cal. Stat. 2087; Ralph Klaps, *California Administrative Procedure Act*, 22 J. STATE BAR CAL. 391 (1947).

162. 1947 Cal. Stat. 2985.

163. *Id.* at 2655.

164. The new code was to be updated in the *California Regulatory Code Supplement*. The *Register* was renamed the *California Regulatory Notice Register*. The *California Code of Regulations* is published in loose-leaf binders. A UCLA Law Library guide indicates that “most” state law libraries own microfiche and a “few print copies” of administrative materials and that UCLA has microfiche of historical California codes and registers from 1945 to 2002 when online versions were created. *California Administrative Law, Finding Historical Text of Regulations*, UCLA L. LIBR. (Sept. 22, 2022), <https://libguides.law.ucla.edu/calad-minlaw/history> [https://perma.cc/V2KT-9XAG].

165. *Frank E. Horack Jr.*, 4 [IND. BAR ASS’N] BRIEF 205 (1948). As a scholar, Horack had carefully reviewed the work of the U.S. Attorney General’s Committee on Administrative Procedure and favored more formal promulgation of regulations. Frank E. Horack, *Administrative Procedure: A Report and an Evaluation*, 26 WASH. U. L.Q. 492, 497–98 (1941).

166. Oliver P. Field, *Indiana Administrative Code: Laws, Rules, Regulations and Annotations*, 10. U. KAN. CITY L. REV. 210 (1941) (book review).

167. *Foreword*, IND. ADMIN. CODE xvi (1979).

168. 1943 Ind. Acts 624.

169. 1945 Ind. Acts 250.

the discontinuing of Horack's Indiana Administrative Code, the 1945 act failed to create uniformity in agency publication practices.<sup>170</sup> In 1967, the secretary of state collaborated with Bobbs-Merrill to create the unofficial compilation of rules entitled *Burn's Administrative Rules and Regulations Annotated*. The work was roughly organized on the same line as *Burn's Indiana Statutes Annotated*.<sup>171</sup> However, because this publication was not official, Indiana agencies continued to organize, number, and publish regulations as they saw fit.<sup>172</sup>

¶53 In 1977, the Indiana legislature finally took charge by passing a law requiring an official compilation that was to contain the full text of all Indiana rules and regulations in effect on December 31, 1978.<sup>173</sup> The new set, entitled the *Indiana Administrative Code*, was to be updated annually and supplemented with a monthly *Indiana Register*, which was designed for use as an advance sheet supplement. The 1977 law also mandated the methods of organizing, numbering, and indexing of existing and new regulations. The first set was published in 1979. The current online code, which debuted in 2007, is still organized under these principles.<sup>174</sup>

### *Kentucky*

¶54 Kentucky evolved its administrative code several times from minimal alignment with the model code to a more robust system of code and register by the 1970s. The intellectual history of Kentucky's codification of its regulations started with an entirely different effort: the thorough revision, reorganization, and rational recodification of the state's statutes, which had not been revised since 1894. In 1936, the Kentucky General Assembly created a statutes revision committee charged with thoroughly revising and reorganizing Kentucky's laws.<sup>175</sup> The committee devised basic principles of the process, set up an office, and hired an experienced director, Robert K. Cullen, to oversee the herculean process.<sup>176</sup> The final *Kentucky Revised Statutes* was adopted in 1942.

¶55 Fresh from this reform, the legislature passed legislation to regularize the promulgation and publication of state regulations. Not surprisingly, the industrious Cullen was named head of the state codification board. In September 1942, Cullen voided regulations that had not been filed with the secretary of state as mandated.<sup>177</sup> World War II slowed the work of the board, but a one-volume *Kentucky Administrative Code*

170. P. Allan Dionisopoulos, *Procedural Safeguards in Administrative Rulemaking in Indiana*, 37 IND. L.J. 423 (1962).

171. *Foreword*, IND. ADMIN. CODE xv.

172. *Id.* at xvii–xviii.

173. 1977 Ind. Acts 226.

174. LEGIS. SERVS. AGENCY, IND. REG. & ADMIN. CODE DIV., ADMINISTRATIVE RULES DRAFTING MANUAL 7 (2022), <http://iac.iga.in.gov/iac/IACDrftMan.pdf> [<https://perma.cc/NX7X-QXE6>].

175. 1936 Ky. Acts 343. The legislature's reforming spirit was evident in its direction that the revisers rewrite the laws in clear, plain language, with a minimum of duplicate terms. To deal with ancient, useless legal deadwood, in 1940 the legislature adopted a series of acts repealing more than 1,000 laws. 1940 Ky. Acts 737, 738, 739, 740, and 741.

176. Kurt X. Metzmeier, *Happy Birthday, KRS!*, LOUISVILLE BAR ASS'N BAR BRIEFS 10 (July 2017).

177. *Rules Voided in 40 Agencies by New Law*, COURIER-J., Sept. 2, 1942.

was finished in 1946. A second edition was released as *Kentucky Administrative Code 2d* in 1951.<sup>178</sup>

¶156 The legislature was not satisfied with five-year updates, and a 1952 act revised the law, leading to the publication of the *Kentucky Administrative Regulations Service* in 1953.<sup>179</sup> It was a loose-leaf service with regular updates. By 1962, it had grown to four volumes.<sup>180</sup>

¶157 In 1975, the *Kentucky Administrative Regulations* (KAR) replaced the loose-leaf service.<sup>181</sup> It was soft-bound and was to be replaced each year with a new set.<sup>182</sup> The law also created an *Administrative Register of Kentucky*, a monthly gazette of proposed regulations, notices of hearings, and final regulations to update the KAR and provide due process to persons and groups wanting to oppose or alter new regulations.<sup>183</sup>

### Slow Growth into the Internet Era

¶158 Despite the promising activities by states like Wisconsin, California, Indiana, and Kentucky, and a few other states in the 1940s and 1950s, the creation of state administrative codes was slow and painful in others. A survey by Morris L. Cohen in 1965 found that only 14 states published administrative codes.<sup>184</sup> Loose-leaf sets accounted for eight of these codes; the rest were bound volumes with supplements.<sup>185</sup> Interestingly, 13 states still published their regulations in pamphlets, most issued separately by agencies on schedules Cohen designated as “irregular.”<sup>186</sup>

178. The 1951 volume appears to have been updated with eccentrically sized updates sent to owners, because one of the law library’s copies has such slips pasted in various places. Something similar is surmised for the 1946 edition; it has penciled-in notes referencing changes that the owner must have learned of somewhere.

179. 1956 (1st Extra. Sess.) Ky. Acts 21.

180. ADMINISTRATIVE PROCEDURES LAW IN KENTUCKY, LRC Rsch. Rep. No. 12, at 5–6 (1962). The University of Louisville Law Library has two sets. The first is a complete five-volume set that terminated at the end of 1974. This is very likely the complete version that was replaced by the bound, annual KAR the next year. The law library also has a four-volume set that its owner stopped updating in 1971 and later donated to the law library.

181. 1974 Ky. Acts 74, § 4; see Edward H. Ziegler, Jr., *Primer on Administrative Rules and Rule-Making in Kentucky*, 67 Ky. L.J. 103 (1978–1979).

182. The suspension of the print KAR is still “temporary” according to the official compiler, although 2020, 2021, and 2022 editions were never published. An unofficial version of the KAR is available online.

183. The *Register* is still published in print and online. See *Administrative Register of Kentucky*, Ky. Legis. Rsch. Comm’n, <https://legislature.ky.gov/Law/kar/Pages/Registers.aspx> [<https://perma.cc/8QW3-75EQ>].

184. Cohen, *supra* note 81, at 423–26. The states in Cohen’s attached table included Alaska, Arizona, California, Connecticut, Indiana, Iowa, Kentucky, Michigan, New York, South Carolina, Washington, and Wisconsin. ERVIN H. POLLACK, *FUNDAMENTALS OF LEGAL RESEARCH* 379 (3d ed. 1967) counted 15, likely including Minnesota, which Cohen marked as “being compiled” in his table.

185. Cohen, *supra* note 81, at 423–26.

186. *Id.* Alabama, Arizona, Colorado, Hawaii, Illinois, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, Ohio, Pennsylvania, and Rhode Island.

¶159 Significant progress occurred in the early 1970s. By 1979, “thirty-eight of the fifty states” had “published codes or are preparing to do so.”<sup>187</sup> A decade later, “40 states and the District of Columbia” had compilations of administrative regulations “more or less resembling [the] CFR.”<sup>188</sup> But only just before the creation of the World Wide Web in 1994 did most of the states have an administrative code. (Even then, Arkansas, Delaware, and Mississippi had no codes, and Nebraska, Nevada, and North Dakota had no registers.)<sup>189</sup> Then, slowly but inevitably, the pressure to put these codes online began—a development that would lead just as certainly to the end of many printed state codes.

## **The Case for Collection, Preservation, and Eventual Digitization of State Administration Codes (and Registers)**

### **Why We Should Preserve State Materials**

¶160 As the era of print codes and registers nears an end, law libraries should take on the responsibility of preserving these valuable sources of law until they can be digitized in permanent online repositories—if for no other reason than there is no other institution that will do so. It is essential because these resources may document current legal controversies, assist scholars to determine the history of areas subject to state regulation, and preserve the legal history of state administrative practices and policies. Ultimately, we should do this because it is what law libraries do.

¶161 Even though these codes date back to the 1970s and earlier, they still can be sources of law for some current controversies. Every time a state pension law issue arises, the vested rights under that pension could derive from the regulation governing an event that occurred decades before. Determining fault for environmental damage might require determining regulatory duties imposed by an old regulation that may or may not have grandfathered certain obligations, depending on the exact language of that clause. Until the persons and corporations affected by an old print administrative code have passed out of existence, those regulations could still be the law despite what the current code says.<sup>190</sup> Moreover, as we have seen in the recent Kentucky Derby cases, these older codes can be leaned on as evidence of the solid foundations of current regulatory regimes.

¶162 Moreover, the topics and the issues covered by state regulations are increasingly drawing the interest of historians who are exploring the intersections between class, race, and gender in the exercise of police powers in the states. Books and articles in

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187. Henry P. Tseng & Donald B. Peterson, *Commentary: Acquisition of State Administrative Rules and Regulations—Update 1979*, 31 ADMIN. L. REV. 405 (1979); see also MILES O. PRICE, HARRY BITNER & SHIRLEY RAISSI BYSIEWICZ, *EFFECTIVE LEGAL RESEARCH* 136 (4th ed. 1979). Thirty-two states plus the District of Columbia had registers by 1982. Elyse H. Fox, *Status of State Administrative Codes and Registers*, 2 LEGAL REFERENCE SERVS. Q. 77 (1982).

188. MORRIS L. COHEN, *HOW TO FIND THE LAW*, 9TH 301 (1989).

189. BNA, *DIRECTORY OF STATE ADMINISTRATIVE CODES AND REGISTERS* (2d ed. 1995). This was the last edition of this guide.

190. Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1255 (2014).

recent years have explored the history of the regulation of railroads,<sup>191</sup> public health,<sup>192</sup> hunting and wildlife conservation,<sup>193</sup> food purity<sup>194</sup> and drug safety,<sup>195</sup> commercial fishing,<sup>196</sup> mining,<sup>197</sup> public utilities,<sup>198</sup> and gaming.<sup>199</sup>

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191. Academic historians have written much on this topic, including two major monographs: GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877–1916* (1970); WILLIAM G. THOMAS III, *LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH* (1999). Legal historians, however, have not abandoned the field: JAMES W. ELY JR., *RAILROADS AND AMERICAN LAW* (2001) (Ely is a legal historian with a law school appointment); Albro Martin, *The Troubled Subject of Railroad Regulation in the Gilded Age—A Reappraisal*, 61 J. AM. HIST. 339 (1974). Texas historians have been particularly active, with two monographs examining the state's powerful Texas Railroad Commission alone: WILLIAM R. CHILDS, *THE TEXAS RAILROAD COMMISSION: UNDERSTANDING REGULATION IN AMERICA TO THE MID-TWENTIETH CENTURY* (2005); DAVID F. PRINDLE, *PETROLEUM POLITICS AND THE TEXAS RAILROAD COMMISSION* (2011).

192. JOHN DUFFY, *THE SANITARIANS: A HISTORY OF AMERICAN PUBLIC HEALTH* (1990); BARBARA ROSENKRANTZ, *PUBLIC HEALTH AND THE STATE: CHANGING VIEWS IN MASSACHUSETTS, 1842–1936* (1972); R. ALTON LEE, *FROM SNAKE OIL TO MEDICINE: PIONEERING PUBLIC HEALTH* (2007); GEORGE ROSEN, *A HISTORY OF AMERICAN PUBLIC HEALTH* (1958); Stephen Woolworth, *The Warring Boards: Sanitary Regulation and the Control of Infectious Disease in the Seattle Public Schools, 1892–1900*, 96 PAC. NW. Q. 14 (2004/2005); Eugenia Tognotti, *Lessons from the History of Quarantine, from Plague to Influenza*, *EMERGING INFECTIOUS DISEASES*, Feb. 2013.

193. Academic historical works: KARL JACOBY, *CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES, AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION* (2014); R.K. SAWYER, *TEXAS MARKET HUNTING: STORIES OF WATERFOWL, GAME LAWS, AND OUTLAWS* (2013); EDWARD D. IVES, *GEORGE MAGOON AND THE DOWN EAST GAME WAR: HISTORY, FOLKLORE, AND THE LAW* (1993); STUART A. MARKS, *SOUTHERN HUNTING IN BLACK AND WHITE* (1992); Andrea L. Smalley, *“They Steal Our Deer and Land”: Contested Hunting Grounds in the Trans-Appalachian West*, 114 REG. KY HIST. SOC. 303 (2016); Richard W. Judd, *Reshaping Maine's Landscape: Rural Culture, Tourism, and Conservation, 1890–1929*, 32 J. FOREST HIST. 180 (1988). Legal scholarship: THOMAS A. LUND, *AMERICAN WILDLIFE LAW* (1980); Irus Braverman, *Conservation and Hunting: Till Death Do They Part? A Legal Ethnography of Deer Management*, 30 J. LAND USE & ENV'T L. 143 (2015).

194. DEBORAH BLUM, *THE POISON SQUAD: ONE CHEMIST'S SINGLE-MINDED CRUSADE FOR FOOD SAFETY AT THE TURN OF THE TWENTIETH CENTURY* (2018); KENDRA SMITH-HOWARD, *PURE AND MODERN MILK: AN ENVIRONMENTAL HISTORY SINCE 1900* (2017); Matthew Booker, *Before the Jungle: The Atlantic Origins of US Food Safety Regulation*, 11 GLOBAL ENV'T 12 (2018); Marc T. Law, *The Origins of State Pure Food Regulation*, 63 J. ECON. HIST. 1103 (2003); Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD, DRUG, COSMETIC L.J. 2 (1984).

195. Joseph M. Gabriel, *Restricting the Sale of “Deadly Poisons”: Pharmacists, Drug Regulation, and Narratives of Suffering in the Gilded Age*, 9 J. GILDED AGE & PROGRESSIVE ERA 313 (2010), reprinted in 53 PHARMACY HIST. 29 (2011); LEE, *supra* note 193.

196. Ralph W. Johnson, *Regulation of Commercial Salmon Fishermen: A Case of Confused Objectives*, 55 PAC. NW. Q. 141 (1964).

197. Mark Aldrich, *The Perils of Mining Anthracite: Regulation, Technology and Safety, 1870–1945*, 64 PA. HIST. 361 (1997); John C. Lacy, *The Historic Origins of the U.S. Mining Laws and Proposals for Change*, 10 NAT. RES. & ENV'T 13 (1995).

198. SAMUEL MERMIN, *JURISPRUDENCE AND STATECRAFT: THE WISCONSIN DEVELOPMENT AUTHORITY AND ITS IMPLICATION* (1963); David Nord, *The Experts versus the Experts: Conflicting Philosophies of Municipal Utility Regulation in the Progressive Era*, 58 WIS. MAG. HIST. 219 (1975).

199. ROBERT G. RODRIGUEZ, *THE REGULATION OF BOXING: A HISTORY AND COMPARATIVE ANALYSIS OF POLICIES AMONG AMERICAN STATES* (2009). The University of Nevada Oral History Program has published a series of books on the state's signature business: ROBERT D. FAISS, DWAYNE KLING & R.T. KING, *GAMING REGULATION AND GAMING LAW IN NEVADA: AS REMEMBERED BY ROBERT D. FAISS* (2006); MEAD DIXON, R.T. KING & KEN ADAMS, *PLAYING THE CARDS THAT ARE DEALT: MEAD DIXON, THE LAW,*

¶63 A few legal scholars have begun to explore the sociolegal history of regulations. A recent law review explored how hunting laws enforced echoes of the slave codes in the Jim Crow South.<sup>200</sup> In addition, as legal historians begin to examine in detail the development of federal administrative law, and modern students of federal regulations continue to explore and revise interpretive doctrines like Chevron deference and major question,<sup>201</sup> others will begin to examine these issues at the state level where they will find that these issues have played out differently in many of the 50 states and the District of Columbia.<sup>202</sup> At some point, legal scholars will go beyond studying judicial decisions and scholarly comment, and dig deeper into the history and texts of the regulations themselves that are documented in these print codes and registers.

¶64 Of course, preserving legal documents is already something law libraries, especially academic law libraries, do. As case law and treatises migrate to online services, preserving and providing access to rare legal materials becomes a more important part of a law library's print collection missions. While a 1946 administrative code volume may not seem like a rare book, like an early copy of Blackstone's *Commentaries*, it is scarce and almost irreplaceable.<sup>203</sup> They never were issued in great numbers and usually were purchased in numbers only in the states that issued them. Most law firms never attempted to retain old copies, and those that did weeded them out as law firm libraries dropped print in the 1990s or discarded surplus copies after mergers. The law libraries that have retained them should realize they are retaining a piece of history. Moreover, preservation is the first step. Things that are not preserved cannot be digitized in the future.

### The State of Administrative Publication Collection in U.S. Libraries

¶65 Preserving what we own is the one thing law libraries can do; taking advantage of opportunities to collect other state administrative materials is another. The key phrase is "taking advantage of opportunities." This article is not calling for expensive purchasing plans to collect the administrative materials on all 50 states or even their

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AND CASINO GAMING : FROM ORAL HISTORY INTERVIEWS WITH MEAD DIXON (1992); R.T. KING, GARY ELLIOTT & GRANT SAWYER, HANG TOUGH! GRANT SAWYER AN ACTIVIST IN THE GOVERNOR'S MANSION: FROM ORAL HISTORY INTERVIEWS WITH GRANT SAWYER (1993).

200. Brian Sawers, *Race and Property After the Civil War: Creating the Right to Exclude*, 89 MISS. L.J. 70 (2019).

201. As the U.S. Supreme Court gets closer to fundamentally altering the understanding of these two doctrines, a few stand out as having good historical instincts: Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619 (2021); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217 (2022).

202. Scholars attempting to apply these principles to state administrative law have found that courts' "recital of deference rules does not seem always to reflect the actual nature of the deference that they provide agencies," and to the degree they can be determined, surveys find states spread over the "extreme ends of the spectrum." Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 558 (2014–2015).

203. During this project (which began in 2020), I have spent hours on eBay looking for state administrative documents. I have found many pamphlets and a few volumes of annual reports but only one volume of an administrative code, a 1970s' era volume of the *Wisconsin Administrative Code* obviously retained because it had the building code in it.



own state. In most cases, large purchases of these materials are not possible. But if they show up as a possible law firm donation or from a library seeking to deaccession them, a law library should seize the opportunity to preserve them.

¶166 However, some of these materials might be in a tenuous place in a library system, long ago collected for purposes that are no longer part of that institution's mission. Consider two examples from my own institution. The first concerns railroad regulations. Although the University of Louisville has had a law school since 1848, as well as a law library, that law library did not collect annual reports of the Kentucky Railroad Commission. Nonetheless it did acquire a partial collection of these reports when the L&N Railroad law department was disbanded after a merger and donated its significant collection of transportation law materials to the library.<sup>204</sup> Even then these annual reports were not recognized as containing regulatory materials and spent decades uncataloged on shelves in special collections. Shortly before starting this project, I first noticed that several collections of rules, procedures, and regulations were included in these books as appendices or chapters. At any point in these books' prior lives, a law librarian could have unwittingly weeded them as interesting but not essentially legal materials.

¶167 Another example involves the medical library of the University of Louisville. As many such institutions no doubt did, the library kept annual reports of the state public health commission in its collections. However, for the last two decades, the trend of libraries associated with medical and healthcare campuses has been to build online collections and then discard print collections as not central to the institutions' overall mission. Luckily, the University of Louisville's medical library recognizes a mission to preserve the history of medical institutions in the state and thus has preserved these public health publications.

¶168 The medical library example highlights that most pre-administrative code regulatory materials are likely not found in law libraries but in collections of university libraries and sister institutions like agricultural department libraries, education school libraries, science libraries, and other special libraries interested in the subjects of the regulations—and none specifically interested in the legal implications of the publications. So, when contemplating the administrative publication histories of their states, all law libraries need to consider these other institutions and perhaps be ready to accept transfers from them.

¶169 One place that a law library can go to at least find a fraction of the pamphlet history of state administrative law is eBay, which often has dozens of state agency pamphlets in their paper ephemera and rare books offerings. I have collected several for this project as an individual, but it is an unusual way to build a library collection. Prices vary widely, with some items wildly overpriced. In some cases, the materials intersect with certain historical "fandoms," like communities that collect all things related to early

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204. DWAYNE D. COX & WILLIAM J. MORISON, *THE UNIVERSITY OF LOUISVILLE* (2014).

railroads. This niche area of collecting perhaps is not fruitful for individual law libraries—at least for items not from their own states.<sup>205</sup>

### Considerations for Digitalization

¶70 The goal of preserving state administrative codes registers and pre-code administrative materials would be to have them available for nondestructive digitization at some point. For researchers, both historians and legal scholars, the best result would be a durable platform that provides access and search capability for regulatory materials across the many states, districts, and territories of the United States. At present, there is no mechanism for such a platform to be created as a public domain website. Moreover, publishers like HeinOnline, Gale, and Readex would be daunted by such an endeavor, particularly since the rarity of the materials makes it impossible to use the more inexpensive destructive digitization that might make such a project commercially viable.<sup>206</sup>

¶71 Regarding administrative codes and registers, some modest digital access to older regulatory materials has been taking place by public entities like states and private enterprises like Thomson Reuters (Westlaw), Lexis, and Fastcase (which inherited some databases from its merger with Casemaker). Most of these collections are simply providing access to “born-digital” backfiles, but some involve digitizing of print. For example, in Kentucky, the Legislative Research Commission, which is the official publisher of regulatory material, recently digitized the state register back to its origin.<sup>207</sup> Indeed, states might be the only entity that can undertake destructive digitization simply because they often have surplus copies.

¶72 Copies of annual reports of boards of commissions, as well as pamphlets, might be the subject of minor digitization projects by individual law libraries. Finding reliable places to provide access to digitized materials can be challenging but is not impossible. The software used for content management and institutional repositories might be employed, although in many cases software has problems dealing with these text-based resources, especially when making the text searchable in any fashion recognizable to legal researchers.<sup>208</sup> One option could be to partner with the Internet Archive or HathiTrust, which allows digitized materials from the physical collections to be placed in its online library.<sup>209</sup> For example, the State Library and Archives of Florida has con-

205. While railroad collectors are interested in all kinds of material, print items are prime collectibles—something that drives up prices. *Paper*, RAILROADIANA COLLECTORS ASS’N, <https://www.railroadcollectors.org/what-is-railroadiana/paper/> [<https://perma.cc/VHL7-HDSG>].

206. While commercial databases often digitize items in a manner that preserves the items, databases that are based on extra copies that can be disbound and/or destroyed cost less and can be marketed at a lower cost. Any commercial digitalization project will need to balance the cost of building the database with the payoff in libraries that can afford to buy that database.

207. *Administrative Register of Kentucky*, KY. LEGIS. RSCH. COMM’N, <https://legislature.ky.gov/Law/kar/Pages/Registers.aspx> [<https://perma.cc/R8Z8-JHZJ>].

208. Content management systems such as OCLC’s ContentDM work better for single-object items, photographs, and maps than multi-object books and institutional depositories, which work better at delivering multi-page texts and often have underdeveloped (or implemented) search engines.

209. These arrangements are nonexclusionary and could be a secondary access point.

tributed more than 2,000 scanned documents to its collection on the Internet Archive, including most of the annual reports of the Florida State Racing Commission and the Railroad Commission.<sup>210</sup> If enough law libraries from enough states digitize existing materials and place them on one of these national digital libraries, they could collectively become a useful resource for historians and legal scholars attempting to study regulations across states. They also are built to be permanent, which, in my experience, is not always the case with the internet platforms that university IT departments provide to academic units and libraries.

### Conclusion

¶73 The history of U.S. administrative regulations tells the history of ordinary American lives. From the purity of the food they eat to opportunities to enjoy the natural resources of their states, Americans benefit from these regulations. And yet these materials are largely unused by historians and legal scholars studying the very areas that these regulations cover. Collection, preservation, digitization, and knowledgeable legal reference could be the key to unlocking these resources. However, just as interest in researching the subjects of these materials increases, so too does the risk of losing them. As the print series of these primary source materials go out of publication, librarians need to make sure these resources are not forgotten and are preserved for when technology can be inexpensively digitized in a nondestructive manner and placed on durable platforms that can be searched by modern researchers. Law libraries are the best stewards of these materials.

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210. *State Library and Archives of Florida*, INTERNET ARCHIVE, <https://archive.org/details/statelibraryandarchivesofflorida> [<https://perma.cc/DCH6-M65T>].