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GETTING THE HORSE BEFORE THE CART:
IDENTIFYING THE CAUSES OF FAILURE OF THE
REGULATORY COMMISSIONS

Ian D. Volner*

INTRODUCTION

In recent years, with increasing intensity, the cry has gone up that something must be done to reform administrative law. The focus particularly has been upon the so-called independent regulatory commissions: the CAB, the ICC, the FCC, the FTC, the FPC, for example. It has been asserted that these agencies are inefficient and costly; that they conduct their affairs at a glacial pace; that they act disregarding procedural due process for those who have come before them; and that they are substantively ineffective, mere captives of the industries they are supposed to regulate, industries which do not protect the public.1 While the criticisms may not always be consistent or valid, it is plain that the independent regulatory commissions have or are perceived to have "failed to discharge their respective mandates to protect the interests of the public in given fields of administration."2

Remedies abound. Proposals have been made to abolish the independent regulatory commission outright on the premise that whatever the defects of an unregulated market, they are to be preferred to the deficiencies of the existing system of regulation.3 On the other hand, proposals have been made and nearly enacted to increase the number of agencies by the addition of a consumer protection commission, the duty of which presumably would be to represent the public before other regulatory commissions.4

Between these extremes a series of more modest and rarely

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2. Stewart, supra note 1, at 1670.


consistent recommendations for reform have been advanced. It has been suggested that changes be made in the procedures for the appointment of administrators or commissioners in order to make the agencies more (or, sometimes, less) responsive to the political process. Some call for the establishment of a separate administrative tribunal or court to hear cases emanating from all agencies on grounds that this would assure the independence and inherent fairness of the process. In contrast, it has been suggested that the existing system under which the commissions perform their own litigative and adjudicatory functions be retained, but that the hearing procedures be simplified and "streamlined" to facilitate greater public participation. Proposals have been made to give the courts broader or more limited review powers over agency actions.

The foregoing is not a comprehensive list of the remedies which have been offered. Some have been attempted, without notable success. There is no reason to believe that the other proposed changes are likely to resolve significantly the current state of dissatisfaction. Abolition of the agencies might have the appeal of simplicity, but this solution fails to consider the reasons the regulatory commissions were created in the first instance. Proposals to create additional commissions are unlikely to succeed because the causes of agency failure are likely to apply in the case of a new commission. Some changes in the structures and procedures of the regulatory commissions might prove helpful; but these changes will not produce satisfactory and lasting reform unless they address the root causes of the failure of the regulatory commissions to discharge their respective mandates properly. Too little is known of these root causes. The mass of published material on the regulatory commissions is usually critical of the performance of the agencies, often clamorous in the demand for reform and, in varying degrees, sure in the identification of the cure. It is, however, invariably assumed that the causes of the failure of regulatory commissions to serve the public interest are


6. This idea and variants are old ones. See Caldwell, A Federal Administrative Court, 84 U. Pa. L. Rev. 966 (1936). See also Nathanson, Proposals for an Administrative Appellate Court, 25 Ad. L. Rev. 85 (1973).


8. See text accompanying note 90 infra.

apparent or are at least sufficiently clear so as to warrant only
cursory identification.

It is the thesis of this article that we do not know with any
degree of clarity why the regulatory commissions are failing to
fulfill their functions and that to the extent that the causes and
reasons for those failures have been identified, the analyses have
been superficial and incomplete and therefore misleading. Thus,
until we have the clearest possible understanding of the causes
of malfunction, meaningful reform is not possible.

In our efforts to reform the regulatory commissions, we have,
in other words, somehow gotten the cart before the horse: We
have undertaken consideration of remedies to correct the failings
of the independent commissions before knowing exactly what
causes them to fail. This article is intended as a modest beginning
of getting the horse ahead of the cart, of identifying the root
causes of failure. It suggests that the root causes can be learned
only by the development of a model which clearly shows the
purposes of the agency, the performance of assigned functions,
and the constraints on the agency's ability to perform.

I. THE REAL PROBLEM

The real problem of administrative law reform is undeniably
how the regulatory commissions "can be reconciled with the pro-
cess of democratic consultation, scrutiny and control."10 But this
problem exists with respect to all institutions of government, par-
ticularly the judiciary.11 The cause for the shortcomings of the
administrative agencies is not found by viewing administrative
law as if it were based upon precepts of justice different from and
in need of reconciliation with an otherwise unitary system. Too
much is made of Mr. Justice Jackson's dictum that the regulatory
commissions as a fourth branch of government have "deranged
our three-branch legal theories."12 It has never been shown how
or why this is true. Our tripartite theory of government is
"received" only because the Constitution more or less creates
three branches of government. As a fourth branch, the indepen-
dent commissions perform an amalgam of functions of the other
three. It may be that the independent commissions are unique to
our legal system because a single entity performs all three func-

10. Stewart, supra note 1, at 1669 (quoting Aneurin Bevan).
but the fact remains that the functions are discrete and identifiable. The test whether an independent commission's actions conform to our notions of justice is—or should be—identical to the measure applied when one of the constitutionally mandated branches of government engages in the same functional activity. There is nothing inherent in the theory of regulatory commissions causing them to fail.

The means to attack the real problem, then, is not a theoretical, but an empirical model of the functions of a regulatory commission, the performance of those functions and the working of safeguards against abuse of regulatory power. From this a systematic catalog of the causes of disorder can be compiled; further study of these causes will enable us to isolate those problems which demand immediate attention. A comprehensive program of reform can then be drawn to achieve the goals of "democratic consultation, control and scrutiny" or which, at least, will more closely approach those standards. The regulatory commissions bear three characteristics in common: Their powers are wholly determined by statute, they are subject to common procedural requirements and their actions are fully enforceable only after judicial review. These are the foundations upon which a model of a regulatory commission must rest. We can identify the causes of the failure of the regulatory commissions only after understanding (1) the substantive purposes for which the agencies exist, which involves inquiry into the organic statutes pursuant to which the commissions operate; (2) the manner in which the agencies discharge their functions, which involves inquiry into the procedural devices allowed or denied them and the manner in which the devices are used; and (3) the manner in which these administrative actions are to be implemented, which involves inquiry into the role of the judiciary in reviewing and enforcing agency action. The succeeding sections of this article identify questions which must be asked and data which must be compiled in each of these three areas in order to develop an empirical model of regulatory commission behavior.

II. WHAT ARE WE HERE FOR: PROBLEMS OF DELEGATION, OF REGULATORY OVERLAP, AND OF REGULATORY UNDERLAP

The regulatory commissions are wholly creatures of statute.

The powers they exercise, the jurisdiction within which these powers are applied and the ends to be thus achieved are determined entirely by the statutes creating them. Writing at the beginning of the modern regulatory commission era, Dean Landis asserted that

"For the administrator the task of grasping the legislative thought should not be difficult. The meaning of such expressions is, of course, derivable from the general tenor of the statute of which they are a part. To read them properly one must catch and feel the pace of the galvanic current that sweeps through the statute as a whole."

The search for causes of the apparent failure of the administrative agencies to serve the public begins with a study of the organic statutes which mandate agency power.

A. Broad and Specific Delegations of Power. Congress has commonly tended to make broad legislative grants of power to regulatory commissions. The Communications Act of 1934 is a prime example. It provides that no broadcast license may be granted, renewed or transferred until the Commission finds that "the public interest, convenience and necessity" would be served thereby.

On its face, the statutory mandate provides no definition of the agency mission. Despite Dean Landis' confidence in this matter, it is impossible to understand why something which is a matter of "public . . . necessity" is not also a matter of "public . . . convenience"; and the statute gives no clue whether all three criteria must be met before the action is permitted. Indeed, some sections of the Communications Act refer only to the "public interest," which suggests, under accepted principles of statutory construction, that a different standard applies in these instances. In any event, the term "public interest" is not self-defining and its meaning is not self-evident. The goal which the agency is created to achieve is thus left indeterminate.

Section 5 of the Federal Trade Commission Act vests the

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FTC with power to prohibit "unfair methods of competition."\textsuperscript{10} The Act gives no indication of what is unfair. The Federal Power Commission, by its statute, is required to set rates for the sale of electricity at wholesale rates which are "just and reasonable."\textsuperscript{20} The Supreme Court has held this to mean that the rate of return, net earnings on investment, must be nonconfiscatory and comparable to earnings of nonregulated companies, but not exorbitant.\textsuperscript{21} If anything, the Court's articulation of the standard only confuses the issue. This extremely broad delegation of power is a well-known characteristic common to all of the regulatory commissions.

It is less known that the organic statutes also typically contain provisions which are narrow, specific and concrete. The Communications Act of 1934 mandates that no license for "a broadcast station" may be granted for a period of more than three years.\textsuperscript{22} This three-year limitation has been given substantive significance: The FCC has concluded that the sale of a station within three years after its construction or acquisition constitutes trafficking, which is deemed contrary to the public interest.\textsuperscript{23} The limitation also determines policy: A station may be subjected to sanctions, including short-term renewal, for performance which falls below accepted standards. On the other hand, there is no statutory means to reward a station which far exceeds those standards.

All of the regulatory commissions are, in one way or other, subject to these types of specific statutory constraints. The constraints are not always uniform even though the subject matter may be identical. The Federal Communications Commission may suspend a proposed change in telephone rates for a period of ninety days for the purpose of holding proceedings on the proposed change; if the proceedings are not concluded within the three-month period, the rates thereafter become effective on an interim basis.\textsuperscript{24} The Federal Power Commission similarly has the power to suspend proposed rate changes, but the period of sus-

\begin{itemize}
\item \textsuperscript{20} 16 U.S.C. § 824(a), (d) (1970).
\item \textsuperscript{21} \textit{E.g.}, FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).
\item \textsuperscript{22} 47 U.S.C. § 307(d) (1970). Other licenses may have a five-year term.
\item \textsuperscript{23} 47 C.F.R. § 1.597(a) (1975). The rule specifies exceptions in § 1.597(a)(3), but the Commission has tended to treat cases coming within the exemption as a request for waiver.
\item \textsuperscript{24} 47 U.S.C. § 204 (1970).
\end{itemize}
pension in that case is for five months. In the case of the Postal Rate Commission, which is also involved in the setting of rates, the Commission has no power to suspend a rate increase at all; rather, temporary rates go into effect ninety days after the change is requested and remain in effect until the conclusion of the Commission's investigation.

Thus, the organic statutes of regulatory commissions paradoxically vest broad discretionary power in the regulatory agencies to define their own purposes and, at the same time, sharply and specifically limit the powers granted. Much more needs to be known about the operation of these statutes on an on-going basis:

1. Have the agencies been able to give meaningful content to broad declarations of power? Responding to criticisms of the early 1960's that it had failed to provide guidelines to be applied in determining which of two competing applicants would better serve the "public interest," the Federal Communications Commission issued a series of policy statements purporting to describe the formal governing criteria. The Federal Power Commission has developed criteria for determining what constitutes a "just and reasonable" rate of return: The discounted cash flow and comparable earnings tests are accepted principles of ratemaking. The FTC, through a mixture of adjudicatory proceedings and trade rules and regulations, has given content to the term unfair methods of competition. Although restatements of the law are common in most fields of law and have served as the basis for legislative reform, there is peculiarly no restatement for the law of the regulatory commissions. Without restatements or other cohesive compilations of the law, we have no standards against which to weigh an agency's performance; we have no means of determining whether and how well the commissions have given content to the vague standards under which they operate.

2. Does a broad delegation of power have adverse effects on regulatory independence? Eminent scholars have postulated that the threat of congressional investigation and concomitant loss of

27. See H. Friendly, supra note 9. See also Policy Statement on Comparative Hearings, 1 F.C.C.2d 393 (1965). This proved to be the first of many.
regulatory independence or loss of appropriations is unavoidable "where the regulatory area is a jungle without statutory directives."\textsuperscript{31} It is asserted that frequent congressional investigations of agencies are "designed to serve special interests in and outside of Congress" and by such investigations Congress "severely handicaps the agency in the exercise of its [proper] functions."\textsuperscript{32} Certainly, it is known that congressional investigations of the regulatory commissions are frequent and that the level of interference has at least on one occasion been found constitutional.\textsuperscript{33} But we do not have any evidence that the broad and vague organic statutes under which the regulatory commissions operate are the cause of—or have even facilitated—congressional intervention; it would be interesting to know, for example, whether Congress has exercised less legislative oversight in areas where the organic statutes are narrow and specific. We also have no measure of the extent to which congressional exercise of legislative oversight has had any effect upon the regulatory commissions' determination of substantive policy: Congress may have frequently investigated the regulatory commissions over the past forty years, but it has rarely enacted substantive legislation. Further study may show that the impact of legislative oversight upon regulatory commission formulation of substantive policy is insignificant.\textsuperscript{34}

3. How do statutory limitations on agency powers affect substantive policy? The provisions limiting the power of regulatory commissions to suspend rate changes have an obvious purpose: They are intended to compel prompt decisionmaking. They may, in fact, result in an abdication of regulatory responsibility. Ratemaking proceedings are by their very nature complex and time-consuming. If an agency or its staff regard it as impossible to complete the investigation within the statutory time period, it is possible that they will not invoke the suspension at all. A study should be made of how often the regulatory commissions have invoked their suspension powers and in what kinds of cases; how

\begin{itemize}
\item 31. L. Jaffe, Judicial Control of Administrative Action 48 (1965).
\item 32. W. Emery, Broadcasting and Government 400 (1971). In discussing this subject, Emery specifically refers to the relationship of the FCC and Congress. Id. at 396-400.
\item 33. Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).
\item 34. That this possibility is fundamentally at odds with prevailing sentiments is only further reason that a study of the interrelationship of Congress and commissions is needed; the fact of oversight does not necessarily make it effective. See Krasnow & Shooshan, Congressional Oversight: The Ninety-Second Congress and the FCC, 26 Fed. Com. B.J. 81 (1973).
\end{itemize}
Failure of Regulatory Commissions

often the commissions have been able to complete their investigation within the statutory period; and what devices, if any, the agencies have fashioned to evade or otherwise nullify the effect of these statutory constraints. Equally, in the case of agencies engaged in licensing, the effects of a statutory maximum term must be more fully understood.

B. Regulatory Overlap. It has been a frequent practice for Congress to vest subject-matter jurisdiction in more than one commission. Whereas concurrent jurisdiction in federal and state agencies may be unavoidable under the Constitution, concurrent jurisdiction vested in two or more federal agencies is within congressional discretion and thus a matter of drafting.

One of the primary responsibilities of the Federal Trade Commission is the regulation of advertising and the prevention of false and misleading advertising.\textsuperscript{35} The FCC also exercises control over false and misleading advertising: It has been held that a licensee who broadcasts false and misleading copy or who fails to investigate adequately the truth or falsity of representations in the advertising it broadcasts may be subject to license revocation.\textsuperscript{36} The Postal Service also has power to prohibit false and misleading advertising, at least to the extent that the copy is sent through the mails.\textsuperscript{37} There are thus three regulatory commissions, each charged with determining exactly what constitutes false and misleading advertising matter. The remedies they may impose in cases coming within their reach are not uniform. Under the Magnuson-Moss Amendment to the Federal Trade Act, the FTC may, upon application to a court, seek consumer redress for injury resulting to consumers as a consequence of false and misleading advertising.\textsuperscript{38} Neither the Postal Service nor the FCC has such power.

In a similar fashion, the FCC and FTC share responsibility for regulation of broadcasting. The rates which broadcast stations are able to charge advertisers are largely dependent upon the size of their audience, as determined by independent audience surveys. The FCC has adopted policies designed to prevent "hypoing," variations from normal practices designed to artifi-

\textsuperscript{36} In re United Television Co., 18 F.C.C.2d 363 (1969).
cially distort survey results, on grounds that these practices are not in the public interest.\textsuperscript{39} Because hypoing is an unfair business practice, the FCC's jurisdiction is concurrent with that of the FTC under section 5 of the Federal Trade Act.\textsuperscript{40}

In the enforcement of the antitrust laws, the responsibility of the regulatory commissions is even more diffuse. By statute, the responsibility for enforcement of the Robinson-Patman Act and section 7 of the Clayton Act, among others, vests in five commissions.\textsuperscript{41} To complicate matters, the Department of Justice, nominally an agency of the executive branch, also has enforcement authority over Robinson-Patman and Clayton Act matters.

Regulatory overlap almost certainly has impact upon the formulation of substantive policy by the agencies sharing concurrent jurisdiction and, therefore, upon the fulfillment of their mandate to the public. There are several possible consequences which require further study:

1. \textit{Does concurrent jurisdiction result in the development of inconsistent substantive standards?} The FCC has rarely exercised its jurisdiction over false and misleading advertising by broadcasters. The FTC and the Postal Service, however, have both vigorously prosecuted the powers vested in them. The liaison between the agencies on substantive matters is virtually nonexistent. It is entirely possible and, indeed, likely, that the standard applied by the FTC in determining what constitutes false and misleading materials is far more rigorous than that applied by the Postal Service. Perhaps because the Postal Service is asked to prosecute its own customers, it is more permissive. Further study is required to determine whether differing substantive standards have emerged when regulatory commissions exercise concurrent jurisdiction, what effect the development of such differing standards may have upon the public interest and whether the disparity in enforcement powers has consequences in the formulation of substantive rules by the affected agency.

2. \textit{Does concurrent jurisdiction result in agency abdication of its responsibility over important matters of public policy?} Although the FCC and the FTC both have authority to prohibit

\begin{itemize}
\item \textsuperscript{39} E.g., Bass Broadcasting Co., 30 F.C.C.2d 2 (1971).
\item \textsuperscript{40} \textit{In re Western Broadcasting Co.}, 14 RAD. REG. 2d (P-H) 459 (1968).
\item \textsuperscript{41} 15 U.S.C. § 21(a) (1970).
\end{itemize}
hypoing by broadcast stations, the fact is that neither has consistently and regularly exercised this authority. Within the past year, the FCC has adopted a policy that all cases involving hypoing will be referred to the FTC; its prior regulation of the subject may be fairly characterized as sporadic and inconclusive, resulting, for the most part, in the imposition of occasional fines upon the offending stations. While the FCC has now determined to refer all such cases to the FTC, there has been no indication that the FTC is willing to accept and enforce vigorously its responsibilities in this area. Similarly, although five regulatory commissions are vested with jurisdiction over section 7 of the Clayton Act, only the FTC has consistently exercised its enforcement powers under section 11 of the Clayton Act. In part, this may be due to the nearly insurmountable difficulty of defining the jurisdiction exercisable by the other agencies charged with enforcement of the Act. In part, it may be due to considerations of budgetary constraints and allocation of resources. Certainly, we need to know whether regulatory overlap has caused agencies to decline enforcement in those areas where overlap exists and, if so, upon what considerations these decisions have been based.

C. Regulatory Underlap. The congressional practice of granting concurrent jurisdiction to regulatory commissions is matched by a tendency of not granting any agency clear regulatory power in certain areas. The economy is unitary and interrelated; the power of the agencies is, on the other hand, limited and discrete. As a result, there are regulatory voids in which no agency functions. Additionally, there are areas in which one agency has jurisdiction over part, but not all, of an interrelated subject, the remaining portion being vested in another commission. These voids and partial jurisdictional grants and the manner in which the agencies cope with them affect the ability of agencies to serve the public interest.

An excellent example of an agency attempt, not entirely successful, to fill a regulatory void is found in the FCC’s assertion of

42. Hypoing, 36 RAD. REG. 2d (P-H) 938 (1976).
43. See Bass Broadcasting Co., 30 F.C.C.2d 2 (1971); In re Western Broadcasting Co., 14 RAD. REG. 2d (P-H) 459 (1968).
44. There are no cases pending.
45. The subject-matter jurisdiction of the other four commissions under 15 U.S.C. § 21 (1970) is narrowly defined; that of the FTC extends to “all other character of commerce.”
46. See, e.g., note 15 supra.
jurisdiction over cable television. A cable television system is nothing more than a high power antenna connected by wire to subscribers who pay a monthly charge for the service. A difficulty arose because, in terms of the jurisdictional grant to the FCC, cable television is neither fish nor fowl. The agency was created for the purpose of “regulating interstate and foreign commerce in communication by wire and radio.”\(^47\) Undeniably, cable television carries signals which originated in interstate communication by radio, but the retransmission of these signals is entirely intrastate.\(^48\) Therefore, the FCC thought that it lacked jurisdiction over cable television service.\(^49\) Appeals to Congress for clarification failed\(^50\) and the FCC in 1965 reversed itself, concluding that it would take jurisdiction over matters involving cable television. The Supreme Court affirmed the FCC’s decision, holding that such jurisdiction is ancillary to the FCC's power to regulate broadcasting in the public interest.\(^51\) But because this jurisdiction is merely ancillary, it is not complete.\(^52\)

There followed what may be politely described as a seven-year experiment during which the Commission attempted to formulate substantive standards governing cable television. In 1972 the Commission issued what purports to be a comprehensive set of regulations, which places principal responsibility for the control of cable television in the state and local governments within whose jurisdiction the systems operate; these controls are subject to pervasive but minimal federal standards.\(^53\) The Commission characterized the arrangement as “deliberately structured dualism.”\(^54\) There are those who would suggest that it is not deliberate, nor structured, nor dualism.

Another type of regulatory underlap arises when jurisdiction

\(^{48}\) The instances in which the cable system itself crosses state lines are few. See generally United States v. Southwestern Cable, 392 U.S. 157 (1968).
\(^{49}\) CATV and TV Repeaters, 26 F.C.C. 403 (1959).
\(^{50}\) Even the Supreme Court has noted the conspicuous absence of legislative guidance: The “almost explosive development of CATV [should be] considered by Congress and not left entirely to the commission and the courts.” United States v. Midwest Video Corp., 406 U.S. 649, 676 (1971) (Burger, C.J., concurring). The reference to “the courts” as a policymaker may have been inadvertent; it is nevertheless significant. See text accompanying note 90 infra.
\(^{52}\) Id.
is conferred upon one agency over part of a regulated market and upon another agency over another part. In setting postal rates, the Postal Rate Commission is statutorily obligated to consider “the effect of rate increase upon . . . enterprises in the private sector of the economy engaged in the delivery of mail matter . . . .” The principal competitor of the Postal Service is United Parcel Service (UPS). Despite the obvious interrelationship of Postal Service and UPS rates, the Postal Rate Commission has no control over the rates which UPS may charge; its rates for interstate service are established by the ICC. Perhaps the clearest example of regulatory underlap is to be found in the transportation industries. Air carriers, motor carriers and railways obviously compete for freight and passenger revenues; they are functional alternatives. The rates for the first are set by the CAB; those for the latter two are set by the ICC. Although the actions of each of these respective agencies may determine the choice which is actually available, they have no formal means of coordinating their policies.

The difficulty is that we know too little about agency reaction to gaps in the scope of their jurisdiction or to situations in which their power is partial or incomplete.

1. How well or badly have the agencies responded to developments beyond their jurisdiction? The FCC’s reaction to the evolution of cable television has not been ideal. Even now, the 1972 comprehensive regulatory program is undergoing constant change. We do not know, however, whether the problem is intractable or whether the agencies’ uncertainty has been caused by the failure of Congress to provide legislative guidelines. We have no measure of the performance of other agencies confronted with similar jurisdictional problems or of the extent to which the efforts of other agencies to fill regulatory voids have been more or less successful than the example cited here.

57. There are some cases in which an agency of the Executive Branch has, with or without statutory foundation, intervened in proceedings pending before an independent regulatory commission. See, e.g., United States v. ICC, 352 U.S. 152 (1956); Secretary of the Army v. FPC, 425 F.2d 496 (D.C. Cir. 1969). There appear to be none where one Commission has intervened before another.
2. What methods exist to resolve difficulties which arise in cases of incomplete jurisdiction? There are no formal mechanisms to coordinate policies between agencies regulating the same or related fields. Judicial decisions do not reflect an awareness that the actions of one commission may have an effect upon matters outside its jurisdiction. Informal coordination arrangements have, from time to time, existed. It may be that there is in any case a *sub rosa* coordination of policy. Further study, however, is clearly required.

Doubtlessly, other questions exist regarding the manner in which the regulatory commissions have implemented or failed to implement their organic statutes and these questions merit serious attention. The point here is that until such a study has been completed—until a restatement of regulatory law has been compiled and until we have determined the effects of underlap and overlap on policy outcome—we cannot determine whether the agencies’ apparent failure to fulfill their mandate to the public is the result of the statutes which create them. A revival of the doctrine against delegation of broad powers or the enactment of substantive rules defining and limiting the exercise of agency discretion is an obvious solution to problems which emanate from congressional failure to define satisfactorily the functions and powers of the regulatory commissions. Just as obviously, these will be effective measures of reform only if the regulatory commissions have failed because of the nature of the statutes under which they operate.

III. How Are We To Do It: Problems of Formal and Informal Procedures and Organization

Since 1946, the regulatory commissions have been subject to more or less standard procedural requirements. The Administrative Procedure Act (APA) minimally specifies the formal procedures which regulatory commissions are permitted or prohibited from using and the manner in which they carry out their functions. Although not without controversy, the APA at least

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60. *E.g.*, Wright, Book Review, 81 *Yale L.J.* 575 (1972).
61. Stewart, *supra* note 1, at 1702.
provides uniform standards of procedure which have eliminated some of the mystery of the regulatory process and thus has contributed to an overall improvement of the system. In recent years, however, commentators have become increasingly aware that important functions are performed by regulatory commissions on an informal basis to which the APA has little application; and the informal or quasi-ministerial functions of the commissions have increasingly become a matter of concern.\(^6\)

Of all the aspects of independent regulatory commissions, their formal and informal methods of proceeding have been the most studied. To the extent that the Administrative Conference has dealt with broad questions affecting the regulatory commissions generally, it has been almost entirely in the area of procedure and procedural reform.\(^6\) Professor Davis' definitive treatise itself represents an empirical model of the manner in which the regulatory commissions perform their functions, both on formal and informal levels. There have been countless articles in law reviews and elsewhere dealing with the subject. Perhaps, then, the question of how the agencies best perform their functions is known. With diffidence, it may still be suggested that further study of both formal and informal procedures employed by the regulatory commissions and their organizational arrangements is required.

A. The Effect of Formal Procedures on Substantive Policy. The APA in substance specifies two types of proceedings: adjudication and rulemaking.\(^7\) The former involves trial type proceedings, but the agencies have been allowed to experiment with hearing procedures and have done so with notable success. They may require that testimony be submitted in writing and in advance; even written cross-examination has been employed in some instances.\(^8\)

Nevertheless, questions regarding the adjudicatory process itself persist:

1. Is agency adjudication fair? Under the APA, a judicial officer may initially decide the case; but ultimately, the full com-


\(^{68}\) E.g., 47 C.F.R. § 1.248(d) (1975); 39 C.F.R. § 3001.53 (1975); Postal Rate and Fee Increases No. 71-1 (1971).
mission—the very agency which initiated the proceeding—will determine its outcome. Frequently, agency employees participate as public representatives in the litigation. Under these conditions, arguably, the result is foreordained. While the question whether agency adjudication is inherently fair may not be susceptible of a quantitative answer, it would certainly be interesting to know (as a statistical matter) the number of license revocation cases initiated by the FCC which result in license revocation, or the number of cases initiated by the FTC claiming a violation of the antitrust laws which result in a decision by that agency finding such a violation to exist. There is, moreover, a basis for cross-reference to the judiciary system: Is the FTC's record of success better or worse than that of the Department of Justice which presents its antitrust cases to the presumptively independent judiciary? These are merely illustrative.

The other mode of formal determination of policy, rulemaking, is a legislative function. Indeed, Professor Davis has said: "It can be ... a virtual duplicate of legislative committee procedure." Professor Davis also asserts that the rulemaking process is "one of the greatest inventions of modern government." Although rulemaking procedures are diverse, the general process prescribed by the APA is that proposed rules be published and that interested parties be afforded the opportunity to submit written comments or objections. Certainly, the rulemaking procedure mandated by the APA is quicker and less expensive than the adjudicatory process, thereby affording a greater opportunity for public participation.

Despite this, regulatory commission response to the rulemaking power has varied widely. The NLRB has made virtually no use of its rulemaking power; the FTC, on the other hand, within the last five years, has made extensive use in the development of trade rules and regulations defining on an industry-by-industry basis unfair and deceptive practices. The FCC uses rulemaking, but more as a means of particularizing substantive policy than as a means of formulating policy itself. On broader substantive

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69. The formal title given to agency trial counsel varies, but it is invariably the rule that trial counsel in the employ of the commission participates in all hearings. The extent of participation is not uniform among commissions or even between cases in the same commission.
71. Id.
matters the FCC has in recent years resorted to a variant form, the "policy statement." This consists of a narrative description of the FCC's policies and expectations with respect to those who are subject to its jurisdiction; sometimes the policy is articulated as a "primer" in question and answer form. In essence, the policy statement is a rulemaking process without the promulgation of formal regulations. Although ratemaking is itself characterized as a "legislative function," it is noteworthy that the commissions engaged in ratemaking make virtually no use of their rulemaking powers in reaching substantive results.

2. Why does the use of rulemaking vary? It is simplistic to say that agency response to the use of rulemaking is determined by the nature of the subject matter. There is no compelling evidence that the response or nonresponse of agencies to their rulemaking power is a function of subject matter. It may well be that the limited use of rulemaking by at least some agencies is a function of other causes. Court decisions and the organic statutes themselves suggest limitations on the use of rulemaking where the agency is engaged in licensing or ratemaking. Other constraints may equally affect the use of rulemaking as a means of carrying out regulatory commission functions. The causes of varying use can and should be identified.

3. Is Rulemaking Fair? Despite the prevailing view that rulemaking is a desirable means of formulating policy, we do not know whether rulemaking, any more than the adjudicatory process, is inherently fair. Again, there are limits to the usefulness of quantitative analyses but it would be fascinating to know whether and to what extent regulatory commissions failed to adopt or even modify substantially regulations which they have proposed.

4. Is Rulemaking Effective? There is, finally, the question whether rulemaking is as effective as its proponents make it out

75. See, e.g., In re Primer on Ascertainment of Community Problems, 27 F.C.C.2d 650 (1971).
to be. The FCC’s assertion of jurisdiction over cable television,
for example, was carried out almost entirely through the rulemak-
ing process. The results leave a great deal to be desired. It may
be appropriate to ask whether the agency in that instance might
have been better advised—or indeed should have been re-
quired—to proceed on a case-by-case basis. A distinction may be
drawn between rules in the form of generalizations and rules in
the form of hypotheticals.\textsuperscript{8} It may be suggested that the FCC’s
difficulties were the result of its attempt to develop generaliza-
tions. The FCC’s policy statements and particularly its primers
are rules in the form of hypotheticals; the question remains
whether this form of rulemaking has been any more effective in
evolving substantive policy than generalizations. We need further
study to determine how well the rulemaking process has worked.
Only then can common principles of limitation and of compulsion
be developed.

B. The Effect of Informal Procedures on Substantive
Policy. Although the APA does not explicitly provide for it, all of
the regulatory commissions have evolved informal means of dis-
ping advice and rulings. SEC action letters are one example.
The IRS annually disseminates large numbers of revenue rulings.
The FTC has established a procedure for the issuance of advisory
opinions and the FCC will, in certain circumstances, issue decla-
ratory rulings. These last two procedures require a formal submis-
sion and consideration by the agency and may properly be consid-
ered a hybrid formal procedure which is neither adjudicative nor
rulemaking. Both agencies, however, regularly dispense informal
advice at the request of practitioners.

The legal status of these informal decisions is uncertain. It
has been said that the IRS revenue ruling may not be relied upon
as a precedent even by a taxpayer with the identical set of facts;
the precedential effect and reviewability of no-action letters is
equally doubtful.\textsuperscript{7} Certainly, the advice issued informally by the
FCC does not have the force of law and may not even be binding
on the agency itself.\textsuperscript{8}

Despite these legal limitations, substantive policy is created
through informal adjudication employed by the regulatory com-

\textsuperscript{8} Sugarman, Tax Ruling Procedure Revisited, 9 WM. & MARY L. REV. 1011, 1024-
30 (1968).
\textsuperscript{8} Evening Star Broadcasting Co., FCC 76-135 (Sept. 18, 1976).
missions. What we do not know, however, is precisely how impor-
tant these informal procedures are in the formulation of substan-
tive policy. On the one hand, it has been asserted that "'infor-
mal procedures . . . are truly the life blood of the administra-
tive process.'"81 On the other hand, Professor Davis points out that
"informal adjudication is only a small portion" of the overall
range of discretionary action which an agency may take.82 Cer-
tainly, we need to know to what extent informal rulings, whatever
their legal infirmities, are taken by the public to be, or are re-
garded by the agency as, substantive policy; we need to know
whether and to what extent these informal rulings are crystallized
at some stage into more formal substantive standards. And even
this inquiry stops short of the question of the substantive effect
of other discretionary action—"[r]egulation through 'raised eye-
brow'"83—which an agency may take. The identical questions
raised with regard to formal procedures may be asked here as
well.

C. The Effect of Organizational Structure on the Develop-
ment of Substantive Policy. On the unassailable premise that
they would otherwise be overwhelmed by the sheer volume of
business, the regulatory commissions delegate authority in either
general or specific areas to staff subordinates. The fact of sub-
delegation itself creates questions.84 Beyond that, however, the
manner in which the regulatory commissions are organized raises
a number of unexplored issues which may have serious impact
upon the formulation of substantive policy.

The regulatory commissions are invariably organized on
functional lines and by subject matter. Thus, the FCC is divided
into a Broadcast Bureau, Cable Television Bureau and a Com-
mon Carrier Bureau, among others.85 The FTC has a Bureau of
Competition charged with the responsibility of administering the
antitrust laws and a Bureau of Consumer Protection, which has
responsibility for the prosecution of false and misleading adver-

Attorney General's Committee on Administrative Procedure 35 (1941)).
83. The quote is virtually impossible of original attribution. See Consolidated Edison
of N.Y., Inc. v. FPC, 512 F.2d 1332, 1341 (D.C. Cir. 1975) (Bazelon, C.J.). Judge Bazelon
attributes this type of unofficial regulatory action to the amalgamation of policymaking
and adjudicative functions in the same entity. But see text accompanying note 113 infra.
to create employee boards).
tising cases and other consumer-related problems. The theory is that these functional bureaus will concern themselves with the details of administering policy and that policy will be developed by the commissioners at the top. The fact is, however, that difficult substantive policy matters may be decided—or may fail to be decided—in the handling of “details” and at the point of conflict between two bureaus within the same commission.

Thus, the difficult questions facing the FCC in terms of the evolution of a coherent policy for cable television involves the relationship between cable television and the existing system of off-the-air broadcasting. The responsibilities of the FCC’s Cable Television Bureau extend only to matters directly affecting cable. Those of the Broadcast Bureau extend only to matters directly affecting broadcasting. The organizational structure of the FCC may require it to depend upon protest from the public or from a representative of a competing industry before it becomes clear that an issue is one of policy, not detail. This is true of all of the commissions.

The organizational structure also bears directly on the degree of independence which the regulatory commissions have from the industries which are subject to their jurisdiction. In the case of the commission which has responsibility for more than one industry and which is divided on functional lines corresponding to the industries subject to its jurisdiction, the agency’s ability to subvert the “public interest” in favor of the private interests of regulated firms may or may not be cancelled out by countervailing pressures from competing industries subject to the same agency’s jurisdiction.

Certainly, the need to organize regulatory commissions or any institution of government along some lines cannot be disputed. Although it seems patronizing, Dean Landis’ forty-year-old observation that “government will be operated by men of average talent and average ability and we must therefore devise our administrative process with that in mind” still remains true. Much more information is needed, however, so that we can at least understand fully the effects of the existing organizational structure.

86. 16 C.F.R. §§ 0.735-1 to 15.491 (1976).
88. It is not clear whether this in fact occurs or what the nature of its impact is on “unorganized interests.” See generally Bonfield, Representation for the Poor in Federal Rulemaking, 67 Mich. L. Rev. 511 (1969).
89. J. Landis, supra note 13, at 87.
structure of the regulatory commissions upon the formulation of substantive policy.

IV. Who Watches the Watchman: The Role of the Judiciary in the Formulation of Policy

The last cornerstone of the system of regulatory commissions is that their actions, at least the formal ones, are subject to judicial review. Where the organic statute of the agency does not provide for judicial oversight, the APA does. It is far too late in our history to inquire why Congress found it necessary to integrate the regulatory commissions with the constitutionally mandated judicial system. Perhaps it was felt that review of the decisionmaking activities of the regulatory commissions by an article III court was somehow constitutionally required. Perhaps it was felt from the outset that "neither the industry nor the [agency which regulates it] can be trusted to protect [the public] interest." In any event, the fact is that the actions of the regulatory commissions are subject to judicial review and that this process must be considered in developing a model of how a regulatory commission does or should operate.

In general, it may be said that the judiciary performs a two-fold role in its supervision of the regulatory commissions. Review is intended, first, to assure that the agency has complied with constitutional and statutory procedural standards, and, second, to assure that the end result is, on its merits, consistent with the purposes of the commission and the common good. The line between these two functions is assuredly blurred. A decision conferring standing may affect the substantive outcome of the agency's action. Certainly, that is the assumption of both the courts and the commentators. Nevertheless, a distinction can and should be drawn between the courts' review of procedural matters and their review of regulatory commission decisions on

90. 5 U.S.C. §§ 703-706 (1970). For present purposes, we may leave aside the issue of what is, or is not, reviewable.
93. See, e.g., Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000-02 (D.C. Cir. 1966) [WLBT I]; Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615-16 (2d Cir. 1965); Stewart, supra note 1, at 1723.

The subsequent history of WLBT I suggests that the assumption may be unfounded. See Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 547 (D.C. Cir. 1969). That, in itself, merits further study. See text accompanying note 96 infra.
the substantive merits. The distinction is of significance for present purposes at least because altogether too much attention has been paid to the role of the court in influencing, shaping and controlling the processes which commissions follow and altogether too little attention has been paid to the direct impact of court decisions on substantive policy.

It cannot be seriously disputed that in the last fifteen years the courts have significantly expanded the concept of standing as it applies to the regulatory process. It cannot be seriously questioned that courts have done so in an effort to make the regulatory commissions more accessible to public participation and, therefore, presumably more democratic. But inevitably the administrative process ends and results in a substantive decision, a policy or a set of rules. These actions are reviewable on their merits by the federal courts. Precisely because there is no further recourse, the courts' pronouncements on substantive review may be the definitive statement of commission policy. Equally, for that reason the function which the courts perform on substantive review deserves much closer study than it has heretofore been given.

The standards of judicial review of a substantive regulatory commission decision are familiar. Where the agency has reached a result based on "substantial evidence" and has set forth the reasons for its actions, reasons which conform with the organic statute, then the decision should be affirmed. The theory is that this leaves to the agency the exercise of its "[e]xpert discretion [which] is the life blood of the administrative process," thus enabling the courts to determine whether the exercise of expertise is reasoned according to the law and accepted principles of justice. Although cogent in theory, the application of this test has varied widely in practice and almost certainly has had an important influence on the formation of substantive policy.

A. Judicial Nonintervention. Twenty-six years elapsed between the Supreme Court's decision in NBC v. United States and its decision in Red Lion Broadcasting Co. v. FCC. During

94. See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).
95. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
97. 319 U.S. 190 (1943).
that period, few cases reached the Supreme Court for review of the FCC's regulation of broadcasting. With a single exception, more than seventy years have elapsed since the Supreme Court has undertaken to review the standards applied by the Postal Service in defining a "newspaper and other periodical" which are eligible for preferential rate treatment; and that exception involved the question of censorship, an issue to which the Supreme Court is particularly sensitive.

The result is that these agencies have been left largely to their own devices and to the devices of the lower courts in evolving policy. In the case of the FCC, by quirk of statute, the Court of Appeals for the District of Columbia is largely the court of last resort. In the case of the Postal Service, judicial review of its administrative decisions is virtually nonexistent. Actions of the Federal Power Commission and the FTC, on the other hand, are reviewed by the Supreme Court with far greater frequency.

1. What is the Effect of Judicial Abstention on the Formulation of Substantive Policy? The foregoing discussion, of course, touches upon what may well be an insoluble problem. What standards does the Supreme Court apply in selecting cases for consideration? What standards should be applied? The resolution of the latter question certainly ought not to be limited to the Supreme Court's oversight of the federal regulatory commissions. It is appropriate, however, in a narrower context, to say that we need more information as to the types of cases from the commissions which are reviewed by the Supreme Court and the courts generally, the grounds which underlie that selection process, and the reaffirmance-reversal record for agency action.

Even when the courts nominally exercise their review function, they have on occasion managed to achieve judicial nonintervention in the formulation of policy by rearticulating the standards which supposedly govern review. This phenomenon is particularly pronounced in the area of ratemaking. Noting that rate-

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101. 47 U.S.C. § 402(b) (1970). The section provides that appeals from an enumerated category of FCC decisions may be taken to the D.C. Circuit; the categories to which this requirement applies represent the largest proportion of Commission action.
making is an unavoidably predictive function involving highly technical and complex economic concepts, the courts have fashioned a somewhat different standard for review of regulatory commission ratemaking decisions: The commission may make “pragmatic adjustments” even in the absence of substantial evidence so long as the end result falls within a “zone of reasonableness.” This formulation of the standard of review has almost certainly had the effect of moving the courts away from the consideration of the merits of the regulatory actions. The courts have never explicitly acknowledged that a different standard has been applied in the ratemaking cases. But the fact is that such a different standard has evolved. Indeed, it is not overly cynical to say that the more attention the courts pay to an articulation of the traditional standards of judicial review, the more likely they are to be permissive and uncritical in their results. The affected agencies cannot help but be aware of this phenomenon.

2. **What is the Effect of Merely Nominal Judicial Review on the Formulation of Regulatory Commission Policy?** Mr. Justice Holmes defined law as prophecies of what the courts will do. The definition seems particularly apt in the case of the regulatory commissions because the courts exercise an extraordinary degree of control. When the courts, however, have failed to exercise oversight entirely or when the oversight is merely nominal, the task confronting the agency in attempting to predict probable results is considerably more difficult. The manner in which regulatory commissions respond to a failure by the courts to exercise stringent standards and the effect of the commissions’ response on the formulation of substantive policy is plainly a question which warrants further investigation. Indeed, by failing to exercise stringent review, the courts may be undoing their own efforts to make the process more responsive to the public. To confer standing but to avoid the merits is an exercise in futility.

B. **The Judiciary as Superagent.** At the opposite extreme of the judiciary’s performance of its function are the cases in which it has, in the guise of judicial review, itself directly formulated substantive policy. In some instances, the courts’ direct involvement in policymaking has been only thinly veiled and its intervention palpable. In *Office of Communication of the United Church of Christ v. FCC* [WLBT II], the court found that the

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agency had "hopelessly bungled" the determination of whether a station's virulent racist policies disqualified it for renewal of its license. Although its authority to do so is doubtful, the court itself set aside the license and ordered the Commission to consider proposals from competing applicants.

In other cases, the courts have proceeded less directly. In *Association of American Publishers, Inc. v. Board of Governors of the United States Postal Service,*\(^\text{105}\) the court (in a concurring opinion in which all three judges joined) embarked upon a long discourse on the appropriate cost methodology to be applied by the Postal Rate Commission in establishing postal rates.\(^\text{106}\) It is significant that the issue of costing methodology was not presented on the appeal. The court's discussion was entirely gratuitous. It is even more significant in terms of the court's function as a superagency that this was the first appeal from the then newly established Postal Rate Commission.

On still other occasions, the courts have used their review powers in attempts to compel agencies to adopt substantive policies which the court has deemed, or at least appears to have deemed, the appropriate ones. In *WAIT Radio v. FCC,*\(^\text{107}\) the regulatory commission was faced with an application to operate during nighttime hours, fundamentally in conflict with the agency's substantive principles governing the allocation of radio frequencies. The applicant sought a waiver of the Commission's established operating requirements on the grounds that it had a first amendment right to operate during nighttime hours. The Commission found this argument frivolous and made short shrift of it. The court of appeals reversed, insisting that the Commission give serious consideration to an argument, the acceptance of which would have required a complete reorganization of the agency's regulatory program.

Similarly, in *Consolidated Edison Co. v. FPC*\(^\text{108}\) the court of appeals literally dictated the arrangement which the FPC was
compelled to accept. The case involved the lawfulness or acceptability of a natural gas pipeline proposal to curtail delivery of that resource to the utility's customers in the face of the early 1970's shortage of available supplies. The procedural history of the case is long and complex, involving a stay which the court refused to lift. Despite persistent efforts of the Commission, the ultimate plan ordered by the court was one "not . . . of the Commission's choosing but . . . one that the Commission specifically had rejected."109

3. What is the Effect Upon the Regulatory Commissions When the Court Itself Formulates, Attempts to Formulate or Compels Formulation of Policy? The Consolidated Edison case is one of the few in which the regulatory commission has openly attempted to resist the formulation of policy by the judiciary sitting as a superagency. But other devices have been used by the agencies to avoid court policymaking, prompting one court to assert with some asperity: "We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect" of controlling precedent to their specific facts.110 The prevailing view is that the relationship between the courts and agencies is an "intimate, cooperative interrelationship between two supplementary lawmakers" in which there exists "a flexibility which allows either side to intervene to correct the faults of the other."111 Empirical evidence confirming or denying this hypothesis would be of substantial benefit in understanding the role of the courts in the regulatory process.

Again, other questions regarding the role of the courts and their effect upon agency performance of its functions in the public interest can be compounded. The only point here is that the matter of judicial review of regulatory commission decisions and its effect on policy and the way in which policy is made warrants far more attention than it has heretofore been given. Judge Skelly Wright has stated that his experience on a court of appeals which is particularly involved in review of regulatory agency decisions has afforded him "a compulsory education" on such diverse subjects as the "intricacies of nuclear breeder reactor development,

pipeline construction through the Alaskan tundra and its possible ecological implications, the effect of different gasoline grades on automobile engine performance, the future of air transport between the small cities of New England, and the differing methods of producing sulphuric acid.”

Certainly, before it is decided whether the courts should be given greater or lesser control over policymaking by regulatory commissions, it must be first determined what effect upon policy outcome occurs when the courts decide to use their education and what occurs when they do not.

V. CONCLUSION: THE ULTIMATE PROBLEM REDEFINED

The course of action proposed in this article for coming to grips with the problems of the regulatory commissions is by no means novel. The empirical approach suggested here has been used in other areas of the law. The conceptual and practical obstacles to such an approach in the case of the regulatory agencies cannot readily be surmounted. That is inevitably the case when the purpose of an inquiry is an attempt to identify root causes.

Nevertheless, the need to identify the causes of the apparent failure of the regulatory commissions to perform their functions and to make that identification on the basis of detailed knowledge seems imperative. Without such a study, a feeling persists that criticisms are made of the performance of the regulatory commissions without a sure knowledge that the criticism is justified and that remedies are offered with little idea whether they are necessary or will work.

The suspicion of this writer (and it is no more than suspicion) is that an empirical analysis of the type here proposed will show that the regulatory commissions have performed their functions far better than currently credited and that their failings and shortcomings are specific, concrete and readily susceptible to remedy. Certainly, the regulatory commissions are not the all-


113. See, e.g., Levine, Methodological Concerns in Studying Supreme Court Efficacy, 4 Law & Soc'y Rev. 583 (1970). Daniel Fiorino advocates (and has undertaken) such a study in the case of the regulatory commissions, but it appears to be limited only to the impact of the judiciary on regulatory policy. Fiorino, supra note 109. It is not, nor is it meant to be, a criticism of Mr. Fiorino's work to suggest that the study must be broader because the causes of regulatory malfunction may arise from other areas of the field.
purpose cure for the problems of government which their early proponents thought them to be. The type of study here proposed will doubtlessly confirm this observation. By the same token, such a study should lay to rest the view that the regulatory commissions somehow do not fit with our system of government, that they have "deranged" it and that they must therefore be judged by some different standard, if not abandoned entirely.

The function of the commissions has been identified as quasi-judicial, quasi-legislative and even quasi-administrative. The qualifier is used to suggest that the regulatory commissions do something different than and must therefore be judged by standards other than those applicable to the constitutionally mandated branches of government. Justice Jackson observed: "The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications are broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." The real problem and the ultimate purpose of the study suggested here is to dispel this sense of "confusion," to understand that the functions performed by regulatory commissions are analytically no different than those of the other branches of government. Dean Landis, with atypical anger and profound insight, anticipated the real problem best. Forty years ago he said that the

[sweeping condemnation of the [administrative] process seems to proceed almost upon the mystical hypothesis that the number "four" bespeaks evil or waste as contrasted with some beneficence emanating from the number "three." The desirability of four, five or six "branches" of government would seem to be a problem determinable not in the light of numerology but rather against a background of what we now expect government to do."

This has been occasionally recognized: "[W]hen governmental agencies adjudicate or make binding determinations . . . it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." By parity of reasoning, when the regulatory commissions legislate they may and must use the procedures traditionally associated with

115. Id.
116. J. Landis, supra note 13, at 47.
legislation, and when they engage in administrative functions, they may and must use the procedures identified with administration. The commissions should do so, their statutes should permit them to do so, and the courts should not prevent them from doing so.

The ultimate premise of this article and the reason for an empirical study of the purposes, functions and safeguards of the regulatory commissions is that we cannot know what we expect the regulatory commissions to do until we know what they do now and why. That is the best way of making the commissions subject to "democratic consultation, control and scrutiny." It is therefore the best reason of all for getting the horse before the cart.