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Regulatory agencies are frequently criticized for their emphasis on day to day operations at the expense of long-range planning. The author of this article suggests that an important deterrent to the development of agency planning is judicial review of administrative regulation and that the Supreme Court should take the lead in providing a solution to the problem.

The Supreme Court and Government Planning: Judicial Review and Policy Formation

MARTIN M. SHAPIRO*

A striking phenomenon of the last decade has been the profound change in the scholarly attitude toward judicial review of administrative regulation. In place of the solemn invocation of judicial self-restraint and appropriate citations to Learned Hand and Justice Frankfurter, we now see a newly sympathetic approach to review. One major reason for this change has undoubtedly been the successes of the Supreme Court in the areas of civil and constitutional rights. Sympathy for the Court in particular and review in general has increased substantially and has not been confined to those segments of the Court's jurisdiction which inspired it.

Perhaps equally important has been the growing discontent with the regulatory commissions. The large numbers of reports, memoranda, attacks, defenses, and rebuttals of recent years are themselves dramatic evidence of more than passing disappointment with these agencies. The courts no longer look so black now that the white knight of administration has turned grey.

Furthermore, the enthusiasms of the New Deal are gone. Some of the rhetoric of the thirties has begun to fade. Vigorous and steadfast administrative pursuit of policy goals no longer is accepted for its own sake. For example, can an observer steeped in due process and fairness still view with equanimity the old record of the NLRB? Not being at the moment passion-

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ately wedded to any policies, perhaps we are less willing to excuse things that were accepted at one time in the name of policy.

In sum, there has gradually grown up a sense of the politics of administration. It is now clear that every agency and commission is subject to parochialisms and distortions caused by its particular specialization, policy goals, sources of support, and the constellation of political and economic forces within which it operates. Such distortions are not evil or corrupt, but common phenomena encountered everywhere in political life. As the administrative agencies cease to be viewed as carriers of the torch of liberalism and are seen as part and parcel of politics as we have always known it, it seems sensible to search for ways to restrain their sometimes aberrant behavior.\footnote{1} Given this new attitude toward judicial review of administrative regulation, it now seems possible—without offering a special apology for review—to examine its influence on administrative planning as if it were simply a neutral political device.

Judicial review and governmental planning are in one sense practically unrelated. Many planning decisions, such as which measures will best eliminate our cotton surplus or combat inflation, are not normally subject to judicial scrutiny. Even such a major planning operation as the interstate highway program has been free of judicial decisions on such things as routing, construction specifications, or the timing of various projects. Nonetheless, planners still must choose legal means to achieve their goals; in this sense they are constrained by past statutes and judicial decisions and by the anticipation of hostile judicial reaction if they were to adopt certain alternatives. Legal and constitutional limitations are today probably the least important concerns of the planner; in considering alternatives, he is likely to devote most of his attention to the attitudes of Congress and the Bureau of the Budget. He is typically free to choose from a large number of equally legal alternatives; there usually is no mechanism for direct judicial review of his choice. In short, if government planning is visualized as conducted by a group of “planners” at their drawing boards and computers determining long range goals and then specifying in advance the chains of alternatives to be adopted to reach those goals, judicial review plays no major part. Occasionally the planner may erase a certain alternative from his blackboard because it is “illegal,” but the number of such erasures is infinitesimal compared to those erased for a host of “political” reasons.

\textit{Planning by the Administrative Agencies}

Within the realm of administrative regulation, what we mean by planning is probably easiest to understand in a negative way. An agency is not engaged

\footnote{1} The author does not know whether it is cause or effect that the two texts on administrative law now most likely to be studied and consulted—Davis, Administrative Law Treatise (1958), and Jaffe, Judicial Control of Administrative Action (1965)—are vigorously outspoken in their defense of judicial review and their desire to expand its scope. There is no question, however, that the most striking feature of the writings of Professors Davis and Jaffe is the ungrudging support they give to a judicial phenomenon which only recently seemed to be the black sheep of the legal world.
in planning if it constantly solves yesterday's problems and is continually con-fronted by unanticipated new problems for which it has evolved no policy. If the agency is acting to contribute now to two states of being that will short-ly be mutually exclusive, it is not planning. If an agency is not directing its policies toward correcting a present unsatisfactory situation, it is not plan-ning. If an agency is unable to specify whether or not it is satisfied with the present state of affairs or what it wants the next state of affairs to be, it is not planning.

Criticism for Lack of Planning

The great mass of criticism in recent years has been directed precisely at the lack of planning in the regulatory agencies.\(^2\) No one in the federal govern-ment, least of all the ICC, seems to have asked what kind of transportation system we want and how we can get it. The CAB seems to have done little more than serve as a referee in the conflicts engendered by the highly frag-mented planning of the airlines and aircraft producers. Apparently it is this planning vacuum that the new Department of Transportation will be expected to fill. The Federal Power Commission does not seem to know even what future possible alternative power systems are feasible in the United States, let alone which one it wants. The FCC has meekly followed behind the fantastic and tortured growth of the mass communications media, contenting itself with an occasional quixotic foray against its massed vulgarities.

This criticism for lack of planning often is undeserved. Independent com-missions frequently represent congressional refusal to plan or a congressional announcement that governmental planning is undesirable. Regulation, unlike government ownership or direct control, necessarily vests major planning re-sponsibilities in the private management of the regulated industries. Most agencies are not legally, and certainly not politically, able to impose their will upon their industries by fiat, as a central government planner might. Never-theless, does the absence of planning power in this sense excuse an agency for making day to day decisions which undoubtedly do affect the future without some view of what it wants the future to be like? Because a commission

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cannot make and enforce a five-year plan, is it excused from anticipating and avoiding problems before they arise instead of trying to sweep up after the accident? The answers to these questions have given rise to much talk of reforming regulation to encourage planning. The new demand for planning has a certain surface continuity with the old demands of those who were hostile to regulation in any form. In the thirties the American Bar Association argued for separation of the decisions of individual cases from policy-making to avoid contaminating the quasi-judicial functions of the commissions. The same separation is again being urged, but this time because it is believed that case decisions absorb too much of the energies of the commissions, leaving too little for policy-making.

In rebuttal, the defenders of the status quo for the commissions say that, since the decision of cases inevitably involves policy-making, it is impossible to split a commission into two parts, one purely policy-making and the other purely adjudicatory. This, however, is no answer to the complaint that agencies spend so much time on adjudication that they have no time for planning.

**Adjudication and Planning**

It would, of course, be just as incorrect to make a naïve disjunction between adjudication and planning as between adjudication and policy-making. But while adjudication necessarily entails a measure of policy-making, adjudication does not necessarily entail planning. It is quite possible for an agency to immerse itself in case-by-case adjudication with no sense of direction, content with solving today’s problems with yesterday’s solutions or, even worse, solving yesterday’s problems with yesterday’s solution. Certainly adjudication gives no logical guarantee that the adjudicator will not simply drift with events.

The legal profession’s ties with the common law probably have prevented it from seeing the potential disjunction between case-by-case adjudication and planning. Common law case-by-case decision has yielded a highly flexible body of policy that has been responsive to new social problems. Its success in this respect, however, should not be exaggerated, for statutory revision has been repeatedly necessary. The most important successes of the common law have been won in its struggles to bring outmoded legal concepts into line with new commercial practice by pounding the applier of obsolete policy with the patently demonstrable failure of his policy in one concrete instance after another. Under this pounding the law eventually catches up with events and ultimately congratulates itself for not having persisted in its errors indefinitely.

The benefits of legal stability must, of course, be weighed against this sluggishness. The case-by-case quality of the common law, however, is most appealing and satisfying under laissez-faire conditions when the goals are to allow business to develop freely while retaining all planning initiative, and

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3. See 1 Davis, op. cit. supra note 1, § 1.04, at 27-29.
to insure that the law develops to facilitate, rather than hamper, new business policies as they evolve. Thus, the general satisfaction with the common law case-by-case techniques does not automatically transfer to the area of administrative regulation where some degree of government planning and policy initiative may be desirable. Is it possible that what so attached the legal profession to case-by-case common law development was precisely the fact that it seemed to obviate the need for government planning?

At the very minimum, reliance on the case-by-case technique in administrative agencies is slightly anachronistic. This technique flourished when society had few tools of economic or scientific research, when it was the only available "scientific" method of solving problems. Case-by-case decision is a science of small changes, in harmony with much organizational decision making.4 There are certain situations, however, in which broad changes in government policy are necessary, precisely because the small step changes of private organizations have proven unsuccessful. Case-by-case decision also tends to fix the frame of reference on a series of small discrete segments of a problem; many areas of administrative regulation, however—again transportation is a major example—require systems analysis that simultaneously considers all factors and problems.

There is also the broader argument that planning must flow from day to day operations and the concrete realities of specific situations. The point is obviously well taken—past experiences with isolated planning agencies or staffs, completely liberated from operations in order to "think," have rarely been happy. Nevertheless, the need for a close juxtaposition between planning and operations does not eliminate the potential conflict between the two. Operators do frequently get so involved in emptying today's "in" baskets that they have no time to think ahead. Planners, if too closely associated with day to day decision, will often end up in the same situation.

Organizations frequently provide us with the paradoxes of decision making by specialized experts. Experts wholly understand the substance of the problem but lack breadth of view and sophisticated judgment. If decision makers are generalists with no competence in a particular field of substantive knowledge, they have the breadth of view, but are making decisions on substantive matters they really know nothing about. If operators are given responsibility for planning, no planning is done because they are too busy with today. Non-operating planners have time to make beautiful plans which are then neatly filed away because they are too unrealistic or too abstract or too irrelevant to the new situations that actually arise to give any guidance to the operators. There is no absolute solution to such dilemmas, but neither is it

desirable to commit one's self completely to one of the alternatives. Most organizations partially solve the specialist-generalist problem, for instance, by maintaining both specialist and generalist chains of command with some overlap and extensive communication between the two. The problem can be partially solved either by embedding planners deeply within the operating organs or by limiting the operator's work load sufficiently to give them free time to think ahead, and by fighting vigorously against the natural tendency of work loads to increase to fill all available time. The problem cannot even be partially solved, however, by blithely ignoring that it exists and simply praising the virtues of case-by-case, day by day, decision.

If all of this seems a long way around on the road to judicial review of administrative planning, the end is now nearly in sight. Several of the regulatory commissions that have been subject to severe criticisms have working patterns that approach the classic type of operation without planning. The ICC, CAB, FPC, and FCC all have very heavy routine work loads, at least in relation to the size of their staffs, and also are confronted with a steady stream of critical decisions. This pattern almost inevitably drives planning out of operations. Heavy day to day routine absorbs most of the operator's time. The steady stream of big cases which cannot wait, and in which much of the immediate prestige of the agency is invested, diverts the best minds from any long range thinking to dealing with the critical problems of the moment. The decision-making process in these agencies is heavily judicialized. But lest one assume what is to be proven, that judicial review is at the heart of the problem, it should be constantly borne in mind that it is not necessarily judicialization itself but the heavy stream of routine decision plus the constantly repeated crisis of the big case, which are the natural results of congressional commissions to the agencies, that may be causing the trouble. Work loads of this sort are found in many parts of government, using many differing decisional techniques; and wherever they are found they tend to inhibit planning.

The debate over separating policy-making, i.e., planning, from case-by-case adjudication should not be prematurely cut off by facile reference to the "inevitable" policy dimensions of adjudication. The real question is not separating policy from adjudication, but making room in the agencies, or outside of them, for some human energies devoted to looking ahead rather than clearing the in-basket and meeting the crisis of the moment. It is the thesis of this article that judicial review of administrative decisions is one of the congeries of forces inhibiting agency planning.

The Inhibiting of Agency Planning by Judicial Review

The inhibitory influence of judicial review is related directly to the legal profession's enchantment with the common law case-by-case decisional technique. When he found that he had to live with the commissions, the lawyer fought hard and successfully to force upon the agencies the familiar form of decision-making. It seemed almost as if the common law style would insure
good results, *i.e.*, results fair to the private interests he represented, despite
the sinister and radical intentions of the regulators. Thus, the first and fore-
most task of judicial review of regulatory agency decisions was to insure that
the agencies acted like common law makers: follow their own precedents,
make only small changes at any given moment, and rationalize those changes
by proper verbal manipulations. They were expected to obey the mores of the
common law—mores essentially designed for law-making that followed after
business practice rather than seeking to plan economic development. Indeed,
most of the judicial demands for due process are reiterations of the require-
ment that the commissions preserve the style, if not quite the letter, of the
common law courts in formulating their adjudicatory decisions.

*Judicial Review and Statutory Enforcement*

Judicial review has also had an impact on statutory enforcement by adminis-
trative agencies. The courts were authorized by tradition and specific con-
gressional injunction to insure that the commissions acted within the terms
of those statutes. This statutory strain in judicial review has had almost the
same effect as the first or common law strain. To the courts, "obeying the stat-
ute" usually required that a commission's policy changes be small and grad-
ual, and supported by records and opinions built adroitly enough not to vio-
late obviously the terms of the statute. In short, the major thrust of judicial
review has not been to determine whether a commission policy is substan-
tively good but whether its construction and enunciation are in accordance
with certain "legal process" norms.

The most dramatic example of this enforcement of style is undoubtedly the
"long standing practice doctrine." In effect, the agency is told that if it can
introduce policy changes gradually and subtly enough to make each new
decision appear to be an application of a long standing agency practice, those
changes will be legally validated. If, on the other hand, it breaks sharply with
its own past practice, it is likely to be accused by the courts of going beyond
the bounds of the statute. If the agency acts like a common law court it wins;
otherwise it may lose.

The great difficulties of the ICC, CAB, and FCC with comparative hearings
and joinder of parties illustrate the same phenomenon. The simplest way to
plan transportation and communications routes and their allocation among
various applicants obviously is to consider various routes and applicants si-
multaneously, at least to the extent feasible. In the context of judicial review
and a legal tradition that demands a single, clear-cut conflict between two
parties, however, comparative hearings and joinder become anomalies. When

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5. See 1 Davis, *op. cit. supra* note 1, § 5.06, at 324-30; Shapiro, *Law and Politics in the
Supreme Court* 154-56 (1964).
agencies resort to such practices they are not acting like courts. Consequently, they must either waste time and effort forcing the natural and sensible operation into the traditional juristic pattern or devote their institutional energies to persuading the courts to allow them to do what is normal and sensible.\(^6\)

**Judicial Review and Rule Making**

The recent flurry of interest in rule-making for planning as an alternative to case-by-case adjudication\(^7\) soon encountered similar difficulties. A rule enunciated by a commission independent of any given case is vulnerable to judicial review, whereas an identical policy imbedded in an agency opinion in a complex case is easily camouflaged and protected. The policy can be characterized as not really new; it can be stated vaguely and in two or three alternative forms. Ambiguity will allow the reviewing court to make what interpretation it pleases. Most important, in a case decision the new policy can be disguised as a decision based on the peculiar facts of the case. A clearly stated rule unrelated to a case stands as a direct challenge to the reviewing court on a pure question of law. A new policy embedded in a case can present itself as a mixed question of fact and law or even a pure question of fact.\(^8\)

Courts are much more likely to challenge an agency on interpretation of its governing statute, which they feel a special duty to enforce, than on questions of fact that seem to lie within the agencies' areas of expertise. Moreover, if the agency can go on avoiding judicial challenge long enough by dwelling on the peculiarities of each case, it can perhaps develop its new policy into a long standing practice which will then be acceptable to the courts as part of the governing statute itself. Judicial review thus provides rather strong disincentives to clear and forward-looking rule-making.

The reenactment doctrine\(^9\) creates even stronger pressures toward agency obscurantism. It in effect instructs the agency to introduce new policies gradually and inconspicuously, so that Congress will not become aware of them and will pass over them in silence in the next revision of the statute, thus unconsciously incorporating them into law. This is very much a bad man's theory of the law, but administrative agencies are very frequently bad men in the sense of protecting their own institutional interests. Of course, this is not


\(^7\) See Friendly, *supra* note 2, at 1295; Shapiro, *Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965).

\(^8\) For example, the IRS might rule that Y was income or it might find in a whole series of cases involving Y-type transactions that in each instance the Y-type transaction had, in fact, resulted in income to the taxpayer due to his peculiar business position. I am not, of course, suggesting a simplistic disjunction between questions of fact and of law. The less obviously a question is one of law, however, the less tempted courts may be to acquiesce to agencies under the cover of the question of fact rubric.

\(^9\) Where a practice is long-standing, and Congress has enacted a statutory revision in the area of the practice which does not alter the practice or its premise, or otherwise instruct the agency involved, courts hold that Congress intended to incorporate the policy into the statute. See Shapiro, *op. cit. supra* note 4, at 154-55.
to say that by imbedding policy in cases rather than in rules, a commission could automatically avoid judicial review of its findings of "fact." Enunciation of a rule does, however, directly confront the courts with a legal question, whereas if the policy comes imbedded in a complex opinion and set of facts, courts can avoid committing themselves irrevocably. The commissions obviously can exploit the tendency of courts to avoid saying a clear no to administrative agencies.

The potential conflict between review and planning should not, on the other hand, be overstressed. In the first place, review is only one of a complex of factors tending toward the judicialization of regulatory decision-making. The statutes governing the commissions, including the Administrative Procedure Act, evince strong congressional desires for judicialization. The bar and the business clientele of the commissions usually prefer judicialization. The general American suspicion of bureaucrats means that commissions who act like judges and not administrators enjoy more public esteem and support. Similarly, the American ideological aversion to government planning makes it good public relations to decide concrete disputes rather than plan future developments. Finally, and most importantly, the statutes administered by the commissions were created to require resolutions of thousands of relatively routine problems which typically involve conflicting interests of various parties. In order to administer these statutes effectively, the commissions inevitably must involve themselves in settling these conflicts; the judicial model would, in our culture, be the natural one for them to adopt. In another sense, too, judicial review is not solely to blame for the excessive judicialization of some of the commissions. The courts have not been totally unimaginative nor excessively hostile to use of informal regulatory techniques. Indeed, the bulk of regulation today is done by informal methods.

Finally, the intractability of the policy problems in the areas confided to the commissions must also be taken into account. Many problem areas have been delegated to the commissions precisely because Congress was unable to develop a policy. In nearly all cases no agreement has been reached upon what level of policy initiative should lie with the regulator and what with the regulated firm. This is particularly true in transportation where private operators have been unable to respond rapidly and effectively to technological change; there is no particular reason to believe that the ICC could have done better had it tried. In communications, it is not clear what, if anything, government ought to do about radio and TV programming. Of course, despite the magnitude of problems, some greater element of rationality could have been introduced in the allocation of radio and television wave lengths.
Some Possible Improvements
Statute Drafting by Commissions

One panacea is easy to propose, although it may not be possible to implement. More emphasis should be laid on the statute-drafting function of the commissions. Alternatively, some separate government agencies for statute drafting should be created. The new department would undoubtedly become a center for creating major proposals aimed at shaping long term developments. New department or no, the commissions might be persuaded to go beyond their old practice of submitting minor proposals for administration of past statutes and to embark upon the drafting of new major legislation in their specialties.

The natural evolution of the regulatory commissions as traced by Professors Davis and Bernstein\(^{10}\) tends to show that as long as policy and adjudication are closely grouped, policy becomes case-by-case pronouncement. Judge Friendly points out\(^{11}\) that such pronouncements do not give the clear and advance announcements of future policy that are at the heart of regulatory planning. He finds that courts, unlike agencies, do announce such standards. Others, however, have shown that courts do not always succeed in this respect.\(^{12}\)

It seems that in some social and economic problem areas, case-by-case adjudication will yield standards; that in others it will not; and that regulatory commissions are working in the latter kinds of areas. Moreover, when policy is made case-by-case, and the cases are subject to judicial review, the policy may become even more fragmented, vague, and particularistic than it otherwise would be.

Positive planning in many areas is done by statute drafting—planning relatively liberated from the case-by-case approach. Years ago such planning could be and was done by Congress; increasingly it is done by the executive branch. There is no logical reason why it should not be done by the commissions. Experience indicates that major statutory planning and case-by-case policy change are natural companions and might be combined in the commissions.

Such a shift is, of course, less a matter of shuffling commission resources than of finding commissioners willing to take major initiatives and a congressional climate receptive to such initiatives. It is not at all clear that such things are possible. It is clear that in most parts of government, statute drafting has become a major vehicle for planning, and commission neglect of this activity has left them largely outside the sphere of major policy planning.

An alternative to increased statute drafting by the agencies is broader interpretation of their enabling statutes, many of which are, on their face, incredibly permissive, sometimes invoking little more than the public interest.

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\(^{10}\) Bernstein, op. cit. supra note 2; Davis, op. cit. supra note 1. These two largely conflicting sources are cited to show that the argument here does not depend upon a hostile view of the commissions nor upon an assumption of their inherent incapability.

\(^{11}\) Friendly, supra note 2.

It is possible to envisage a political system in which the commissions were free to initiate major changes in policy to meet anticipated changes in circumstances by administrative law-making and without resort to new statutes. The Interstate Commerce Commission, told by Congress to preserve the inherent advantages of all forms of transportation, thus would be free to conclude, for instance, that water carriers have no advantage at all and decree a rate structure dooming them to extinction. In short, the commissions would not draft major statutes, but would make what amount to statutory changes by means of administrative determinations subject to congressional reversal.

While some strains of this approach persist in the United States, it seems that the dominant philosophy has been that of holding the commissions on a tight leash of congressional intent. Judicial review is partially responsible for this dominance, though the weak political position of the commissions and the general hostility to government intervention in the economy are more basic factors. More agency statute drafting would, it would seem, offer a mode of agency planning which could accomplish something within the premises of the "short leash" philosophy.

Changes in Court Behavior

Judicial review is one of a cluster of factors that has inhibited planning in the commissions; changes in court behavior might possibly induce the agencies to look ahead. It must be admitted at the outset, however, that much of what most observers seek in judicial review must be purchased at a strong cost to planning. Judicial insistence on due process, on a certain stability of expectations of those regulated, and on avoidance of "arbitrary" changes in policy designed for particular parties interferes with an agency's urge to plan and tends to force the agency back into the common law mold. Judicial insistence that agencies keep within the terms of the statutes they administer, at least when coupled with a static view of congressional intent, severely restricts a commission's capacity to plan for new events.

It is unlikely that we will be willing to give up the elements of rule of law in review simply in order to encourage government planning. Indeed, without those elements judicial review would be reduced to little more than a second policy decision by a second set of political decision-makers called judges. While this dual decision-making system might have certain major advantages, it is not likely to satisfy fervent defenders of judicial review.

The only realistic approach is to see what courts can do within the legal process to encourage more and better planning in the commissions. There are a number of points on which the Supreme Court might shift emphasis without making major doctrinal changes. Where a commission has long followed a given practice in interpreting or enforcing a vaguely or generally worded statutory provision, the commission ought to be allowed—indeed, encour-
aged—to change that practice when circumstances have markedly changed or if the practice has not achieved the intended results. In short, even in the most adjudicatory-like spheres of commission activity, the Supreme Court ought to support an administrative form of prospective overruling, possibly by de-emphasizing the analytical aspects of the long-standing practice and reenactment doctrines. Behind these doctrines lies a strong and correct judicial concern for continuity of legal expectations. This concern is expressed analytically by regarding the agency practice as part of the statute itself. Thus, the agency finds it cannot create a new practice because the old one has become, by judicial magic, part of its governing statute. It appears that the Supreme Court might well rely on general due process arguments to protect those regulated from retroactive or sporadic and inconsistent applications of agency policies. An attempt to lean its intervention on the more judicially modest support of congressional intent necessitates a set of fictions about the statutes that tends to inhibit agency planning.

Additionally, the Court might recognize more clearly that commissions were established by Congress for the purpose of making new policy, and might look more to the general intent of Congress enunciated in the basic statutes rather than to the detailed provisions obviously adopted to meet circumstances at the moment of passage. The Court has frequently taken the position that changes in specific provisions, interpretations, policies or practices ought to be made by new legislation. In theory this position acts as a salutary goad to Congress. In practice, given the scarcity of congressional time and the enormous effort required to get new legislation, it frequently serves merely to discourage agency planning without eliciting new congressional action. What is needed is simply greater judicial recognition of the utility of policy-making by the agencies when Congress itself furnishes no policy. Here again an analytical fiction might well be at least in part discarded. It simply is not true that when Congress does not speak it is declaring its support for the old policy. When Congress does not speak, it is frequently because Congress has nothing to say and would welcome initiatives from elsewhere.

Furthermore, the Supreme Court should broaden the concept of standing. This proposal now has strong backing from the commentators and some slight judicial recognition. It has been put forward largely out of concern for the rights of individuals, many of whom, though technically not parties in interest, are severely affected by administrative decisions. It is interesting for quite another reason. Planning involves choice among alternatives; while some arbitrary upper limit on the number of alternatives is necessary, the current rules of standing tend to inhibit unduly the range of alternatives considered. It is not that the commissions have insufficient facts. They probably

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14. See 3 Davis, op. cit. supra note 1, §§ 22.05 & 22.18, at 223-26, 291-94; Jaffe, op. cit. supra note 1, at 495-500.
have too many. Under the present rules of standing, however, all parties may
be presenting precisely the same alternative and simply quarreling over which
of the various private entrepreneurs ought to be allowed to employ it. Hear-
ings on radio broadcasting licenses are typical. Two or more firms may con-
tend for a given frequency, but probably each wants to operate a rock and
roll plus spot news station. A doctrine of standing broad enough to include
consumers and business firms operating in entirely different, but potentially
substitutable, fields would force the commissions to think about in what con-
tdition they want the world, not simply who should benefit from its present
condition.\(^{16}\)

The most important task the Supreme Court might perform vis-à-vis com-
mmission planning involves the nature of the courts themselves and of the
legal doctrines they purvey. The overwhelming impression received by a nov-
ice coming to administrative law is one of a mass of very confusing and con-
tradictory detail. Unlike many other areas of law, administrative law does not
necessarily become clearer after the novitiate is over. What could be more
strangely disturbing than Professor Davis's review of Professor Jaffe's text-
book\(^{17}\) which reveals that these two eminent scholars are in major disagree-
ment not as to what the law ought to be, but as to what the law is.\(^{18}\) Between
them they convey a very clear message that administrative law is highly un-
clear.

The most striking feature of administrative law as announced by the Su-
preme Court is, as Professor Davis points out in the introduction to his treat-
ise, that the Court has not only failed to announce guiding principles but
seems to maintain two conflicting lines of precedent upon every crucial issue.
The laws of ripeness, standing, exhaustion, primary jurisdiction, and scope
and enforcement of administrative orders are in a state of great doctrinal and
analytical confusion. This confusion undoubtedly increases the "legalistic"
work loads of the agencies in the same way that legal confusion always cre-
ates excessive commitment of intellectual resources. More important, the con-
fusion leads to even greater agency preoccupation with case-by-case concerns
as it wends its way through legal pitfalls that are not clearly marked. An
agency must devote excessive energies to perfecting its case records against a

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\(^{16}\) See Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C.
Cir. 1966).


\(^{18}\) This statement is, to be sure, an oversimplification. The basic conflict may be that
Jaffe's work is styled in the older tradition of finding generalizations and rationales underlying
the confused and conflicting legal data. Davis works in the more recent—one might call it
behavioral—tradition of seeking to describe what courts actually do, no matter how con-
fused or conflicting. In the older tradition, then, Jaffe interchanges his is's and oughts more
than is fashionable in positivistic circles. His work, when subjected to narrowly positivistic
analysis, will sometimes appear to be factually in error when it actually may be normatively
shaped.
wide range of dangers. Because of the difficulties in the law, more cases go to court, more become crisis cases, and more individual cases become the occasion of major decisions affecting the future of the agency.

In short, where litigation is simple and routine, it will be assigned to lesser talents and slip into the background. Where it is complex and may lead to major consequences, it engages top-level attention. The complexity and confusion of the case law of judicial review of administrative decisions is thus one of the several factors leading to excessive agency preoccupation with case-by-case decision making.

It would be delightful if one could conclude with the simple injunction: fix it. It is not easy, however, to fix a large body of law affecting crucial interests. A naïve Benthamist might attribute the whole problem to the shortcomings of the legal mind. Much of the contradiction, however, seems to arise because reviewing courts are faced with many quite different law and fact situations, because few of these involve conflicts between government discretion and private interests which engage the justice's sense of injustice on one side or the other, and because the difficult and subtle relationship between court and agency complicates the already difficult and subtle relationship between the litigants. The Supreme Court may, nonetheless, have been excessively preoccupied with case-by-case settlement of substantive policy questions and may have paid too much attention to getting good policy results in a given case and too little to creating continuity and clarity from case to case.

The real culprit has been the tradition of judicial modesty or self-restraint. Courts have sought to hide their instincts for sound policy and just decision behind a screen of legalism which would make it appear that judicial review and, particularly reversal of an administrative decision, was a distasteful duty forced upon the judge by "the law." It is little wonder that in this essentially artificial endeavor the judge became primarily concerned with finding the doctrinal pronouncement that provides the best screen in a given case rather than the one that provides the clearest guidance for the court's future actions. When legal opinion was generally hostile to review, the judge could not simply say that in a given instance the agency had gone beyond any acceptable limits. Instead, he had to search for some allegedly binding law that compelled him to substitute his judgment for that of the agency. The result has been law as excuse rather than law as explanation. The opinions have not explained what the court was doing—the only route to clarity of doctrine—but instead have sought the best possible excuse in each case for what it is doing. Quite naturally, different (and often mutually contradictory) excuses were best for different cases.

The main route to simpler administrative law, and thus to some relief from case-by-case pressure for the agencies, would be the open judicial acknowledgement of what fairly shouts from the cases: courts and commissions are parallel political organizations and both are concerned with policy-making. As the day to day expert administrator of the statute, the agency will normally be the first to sense policy inadequacies and suggest remedies. Normally there is no reason for the courts to repeat this same process of decision mak-
There are, however, a set of exceptions warranting a second round of decisions on some questions. One major family of exceptions arises out of the specialized nature of agencies. Bureaucratic specialization leads to parochialism, excessive preoccupation of the agency with its own goals and its own vision of the public interest, and a disproportionate sacrifice of other social and economic interests to those it feels itself commissioned to protect and foster. Agencies are, of course, supposed to pursue their functions energetically. At some point energy becomes zealotry, disruptive of the goals of the legal and social system; it is desirable that some generalist, not himself excessively committed to any particular program or action, decide when that point has been reached.

A second family of exceptions arises when an agency has failed to observe the rules of fair play established by business and governmental tradition. Here again outside review is necessary.

A third group of exceptions occurs when the administrator embarks on major changes in policy without awaiting directions from his superior, the statute-maker. The point at which commendable initiative becomes insubordination is a matter of judgment. Congress itself will exercise some of that judgment, but Congress is so busy that it obviously needs to be notified about major administrative policy changes so that it may decide whether to accept or reject them.

The courts have in fact been operating on precisely this philosophy all along, but judicial modesty has led them to follow it covertly. Instead of saying they have reviewed the agency policy and found it not excessively parochial, courts have denied standing or held that the question is one of fact, not law. Instead of saying the agency has clearly gone beyond what Congress could have wanted or anticipated, courts have found the party to have standing and that the question is one of law not fact—and then ruled against the agency action. The consistency of purpose and function that is often found behind the decisions is consequently accompanied by—indeed, obscured by—the inconsistency of doctrine expressed in the opinions.

If courts openly acknowledge their responsibilities for going through precisely the same decisional processes as the agencies have, they could soon clear up many of the doctrinal obscurities. Such an open acknowledgement could encourage the commissions to abandon excessive legalism and engage in more adequate planning and in frank discussions of their policy goals. The litigational atmosphere in which the commissions operate would then be one that encouraged defense and justification of the agency's policies in terms of their effectiveness in carrying out congressional intent and their impact on other policies of government—precisely the framework of planning—instead of in terms of how well the agency had succeeded in acting like a miniature court.
The agency would be faced with as much or even more judicial review, but it would be a type that challenges the agency to articulate and defend its policy preferences in terms of their impact on the future. The courts would present themselves as intelligent and disinterested generalists seeking to learn whether the agency was acting with proper perspective, and would cease presiding over a legal labyrinth that could be threaded by an adept construction of record and legal argumentation.

**Conclusion**

It is the Supreme Court that would have to take the lead in such an endeavor. This suggestion is not a panacea that will immediately cure the commissions of their lack of foresight. But surely it would be healthy for the Supreme Court to say in its opinions, clearly and without pretense, what administrative law scholars say every day to their readers and listeners. Once the Court has begun to say that it is primarily interested in agency policy and the defense of that policy in terms of the whole system of goals created by statutes and the whole picture of the world as it is and will be, the agencies will have to begin arguing their cases that way. In the process perhaps they can also be induced to use the cases as vehicles for thinking ahead. At least they will be deprived of the strong incentive for hiding behind the cases that judicial review has too frequently provided them in the past.