THE INTERSTATE COMMERCE COMMISSION: AN APPRAISAL

I. L. SHARFMAN†

IT IS well-nigh universally recognized that the Interstate Commerce Commission is not only the oldest but the most powerful of the many federal agencies now operative which exercise some measure of authoritative control of economic conduct. In the half century of its existence it has spanned the most intensive period of our commercial and industrial development, and a full story of its varied activity as a functioning tribunal would traverse the most colorful and significant chapters in the economic history of the United States. Since its creation in 1887 the organization and processes of our economic life have been progressively subjected to governmental control along numerous paths, but in no direction on a more far-reaching and thorough-going basis, and with more fruitful and generally acceptable results, than in the field of railroads and other enterprises engaged in the public carriage of persons and property. There can be little question that the Commission, charged by an extensive and many-sided Congressional charter with protecting and promoting the public interest in this sphere, has long been, and remains today, the outstanding agency of economic control in our governmental establishment.

The Commission's direct powers and duties are confined, of course, to the supervision and regulation of the various means of transport

†Professor of Economics, University of Michigan. The substance of this article will constitute the Conclusion of the author's work, *THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE*, four volumes of which (Parts I, II, III-A, and III-B) have been published, and the final volume of which (Part IV) will soon be published, by The Commonwealth Fund, under the auspices of its Legal Research Committee. In these volumes, which deal with the legislative basis of the Commission's authority, the scope of the Commission's jurisdiction, the character of the Commission's activities, and the Commission's organization and procedure, an attempt has been made to present a detailed and fully documented analysis and critique of all important aspects of the Commission's work. The immediate discussion, which will form an integral part of the concluding volume and is in the nature of a final appraisal of the Commission's status and tendencies as developed in the entire study, must of necessity be largely interpretative in approach and for the most part rather general in character.

entrusted to its "fostering guardianship and control." From the beginning both its formal jurisdiction and substantive authority have been consistently delimited in this way by legislative enactment, and neither its own administrative determinations nor the decisions of the courts bearing upon these determinations have been permitted, at least consciously or deliberately, to transcend the metes and bounds of regulatory power as thus established. Yet no realistic understanding of the numerous problems which inhere in the task of transport regulation, and of the Commission's performance in translating the general statutory standards set up for its guidance into the concrete practical arrangements binding upon the carriers, can escape recognition of the tremendous impact of this regulatory process, though properly circumscribed in conformity with the legislative intent, upon the entire field of economic activity. The inevitable interdependence of the numerous elements which constitute the stream of economic life is increasingly impressing itself upon the public consciousness; it is the growing awareness of the dominance of common over particularistic interests flowing from the recognition of such interdependence that has provided the underlying impetus for the marked expansion of public control of commercial and industrial action which characterizes the contemporary scene. But in no field does the interdependence of economic interests condition and mold the regulatory process more intimately and more significantly than in the field of transportation. The vast capital investments involved in the transportation industry, and especially in the far-flung and indispensable railroad field, render the protection of the integrity of past commitments a major consideration in the solvency of some of our most important financial institutions, and they make the maintenance of sound carrier credit an essential prerequisite to the continuing allocation of resources on an economic basis as between transportation enterprise and other business undertakings. The prices paid for transportation service, particularly in the movement of goods, constitute production or distribution costs throughout the range of our highly specialized economy and thereby operate as important factors in the ebb and flow of the general price level, and the readiness with which these costs are made to react to substantial changes in commodity prices is calculated to facilitate or retard the removal of business maladjustments and the restoration of economic equilibrium. And of most far-reaching import, probably, is the circumstance that the relationships of the rates and charges imposed upon the immense variety of commodities and hauls with which the transportation service is concerned tend to exert, through competitive pressure manifesting itself in a great diversity of forms, a constant and often determining influence upon the direction of consumer demand, the scale of productive operations, the localization of

industrial activity, the organization of distributive mechanisms. These are but the more basic economic implications of the regulatory process. Because of such considerations and numerous less sweeping factors which constitute the conditioning environment of regulation, made the more pregnant with abuse and the more difficult of solution by the need of coordinating the operations of the rail, highway, water, pipeline, and air carriers which aggressively seek to share in the service of the present-day transportation system, the Commission's determinations and adjustments, effectuated through the exercise of control in numerous directions, impinge in very significant fashion upon the entire complex of economic enterprise. Under these circumstances the Commission may well be conceived as an agency of economic control in a much more far-reaching sense than that directly encompassed by the governing statutory enactments with respect to the regulation of transport.

But the significance of the Commission's experience is not confined to the field of transportation, however broadly the regulatory process in this field may be viewed in its indirect economic implications. The pressure for the direct extension of public control to other spheres of commercial and industrial activity, and in its more extreme manifestations to the economic order as a whole, has proved to be virtually irresistible. Enormous strides in this direction have already been made, though not always on a sound basis, and numerous further assertions of mandatory power, though often undefined as to ends and uncertain as to means, are generally believed to lie ahead. The relationships which shall prevail between government and business—between law and economics in their more comprehensive connotations—unquestionably constitute today the most crucial and the most bitter object of public controversy, in the world at large as well as in our own midst. The contemporary struggle between the adherents of democracy on the one hand, and those of fascism and communism on the other, is in great measure an economic rather than a political struggle, since the political forms are largely designed to maintain or establish what are deemed to be desirable economic arrangements. Our democratic institutions, which are fundamentally in conflict with both conceptions of the totalitarian state, are believed to constitute "the middle way," not because they contemplate and assure an unfettered individualism, but because, in the tradition of freedom, they provide continuous opportunities for the flexible adjustment of the rights, duties, and interests of each, to the rights, duties, and interests of all.

In this spirit the Interstate Commerce Act and its enforcement have been evolved, and the Commission's rich experience of half a century furnishes the most enlightening background for testing in perspective the economic soundness, legal validity, and administrative effectiveness

of the newer projects and proposals for public control of private enterprise. The Commission can not only serve, as in fact it has served, as the model tribunal in the molding of the powers and procedures of regulation in connection with the other so-called public service undertakings, but because of the character and range of its problems and policies and practices, as established and developed by legislative enactments, administrative determinations, and judicial decisions, its governmental status and record of performance can contribute potently and realistically to the dissolution, one way or the other, of the many perplexities which naturally accompany the movement for a greater degree of public control in the general field of commerce and industry. No regulatory system can or should, of course, be transferred full-blown, or even in its essentials, from one sphere to another; differences in need and legality and workability must necessarily be controlling in each particular situation. But the more important regulatory projects and proposals of recent years involve fundamental issues which find suggestive counterparts in the evolution of the Commission's powers and activities, and the record in which these conflicts and their accommodation are imbedded constitutes a significant source of illumination based upon actual experience.

The shibboleths of the day which are hostile to extensions of control—the charges of regimentation, centralization, and bureaucracy—as well as the categories of constitutional controversy upon which reliance is placed for their restraint—due process of law, federal encroachment upon state power, and executive usurpation of legislative and judicial authority—have frequently emerged, in one form or another, during the long history of the Commission's development as a regulatory tribunal, with respect to both the statutory basis of its authority and the character of its administrative performance. It is highly significant that the present legislative structure defining the Commission's substantive powers and duties embraces practically every important aspect of the carriers' activities, with the exception of their adjustment of labor relationships, and yet in not a single grant of authority, throughout the course of the extended period of its evolution, has this legislative structure encountered judicial condemnation on constitutional grounds; and it is equally significant that an unprecedented subordination of state to federal power in the exercise of this sweeping authority has been achieved with the acquiescence and express approval of the courts. It is true, of course, that transportation enterprise has from the earliest times been recognized as "affected with a public interest" in a peculiarly intimate sense, and that in this field there has been deemed to be a "direct" relationship between intrastate and interstate commerce sometimes found to be wanting as between local and national

operations in the general industrial field; but the relevant constitutional categories have necessarily been vitalized even in this sphere by convincing showings of practical need of control, despite the formal judicial emphasis in all instances upon the question of power, and there is no conclusive ground for assuming that appropriate extensions of control in fields other than that of the public service industries must perforce encounter insurmountable obstacles in the due process clauses or in those defining the distribution of power between the nation and the states. It is probable that the field of the Commission's jurisdiction has been extensively and yet successfully occupied, in the face of these constitutional limitations, not only because of the nature of the particular subjects sought to be regulated, but also because of the experimental, realistic, and guarded approach pursued in the fashioning of the legislative structure.

But of prime significance in its bearing upon the broader problem of government supervision of economic conduct is the fact that the elaborate regulatory structure thus reared, for the most part on the basis of very general legislative standards as to principle and policy, has been entrusted for its execution and enforcement to an administrative tribunal. The administrative method of control was resorted to at the outset in this sphere, by way of departure from traditional legal processes grounded in the supremacy of the courts, because of severely practical considerations—the pressing need of prompt, continuous, flexible, and competent adjustments of technical and highly complicated relationships; and it has been expanded and enriched, as occasions progressively arose for the broadening and intensification of regulatory activity, because of like considerations, coupled with the impetus afforded by a high tradition of actual performance. Despite the delegation of legislative authority and the exercise of mixed governmental functions which the Commission's status as an administrative tribunal has constantly involved, no grant of power molding that status has been subjected to constitutional restraint because of these factors. On the contrary, the Commission's powers and processes have long served as the most commendable manifestation of the necessary and legitimate unfolding of the administrative method of control; and to the extent that attempted exercises of administrative authority in other fields have been invalidated, except for improprieties in the substantive nature or jurisdictional scope of the regulatory activities sought to be established, the vitiating circumstances have been found to inhere in departures from the legislative and judicial safeguards which have uniformly characterized the development of the Commission's authority.

The high repute which the Commission has justly achieved, both for the performance of its regulatory tasks in the transportation field and

as the outstanding example of the possibilities of administrative control in the larger economic sphere, is attributable to many factors. Attention need only be directed to such of these factors as are of basic importance. While the confidence which its personnel has generally inspired—beginning with its first chairman, the distinguished Judge Thomas M. Cooley—because of able, industrious, and disinterested devotion to public duty, has without question contributed substantially to the great esteem in which the Commission is held and to the enormous growth of the responsibilities with which it has been charged—while, indeed, the personal competence of the individual commissioners and the subordinate staff and the uniformly unblemished performance of their public service has constituted an essential prerequisite to the attainment of the Commission's present status and influence—the effectiveness and significance of its labors can be largely explained by the dominant tendencies which have characterized the unfolding of the legislative structure and administrative record in the field of its operative jurisdiction. More concretely, the Commission's securely fixed and enviable place in the federal governmental establishment is grounded for the most part in the following considerations: first, the regulatory system which it administers, though involving both mandatory and permissive control in numerous very significant directions, has been calculated to maintain the fundamentals of private enterprise and individual initiative; second, the vast powers embraced in this regulatory system, whether viewed from the standpoint of the types of carriers subjected to control, or the scope of the commerce reached by that control, or the character of the substantive authority applicable to these carriers and their operations, have been evolved by trial-and-error methods based on conflicts and pressures and shortcomings disclosed in the realm of tested experience; third, the exercise of this authority by the regulatory tribunal, while fruitful in accomplishment and in no sense abdicating the principal objective of safeguarding and furthering the public interest, has been dominated by a sense of realism and restraint; and fourth, the administrative processes employed in fashioning adjustments in furtherance of statutory policy, though involving an admixture of legislative, judicial, and executive functions and largely operating with conclusive effect despite the provision for review of the consequent findings by the courts, have been molded by methods and procedures designed to supplement the primary law-making function of the Congress in orderly and pragmatic fashion, to accord every essential judicial protection to the great variety of private rights and interests affected by them, and on the executive side to issue in informed and workable governmental requirements.

In all these connections the difficult problems which have arisen from time to time in the course of the Commission's long history have not been, as might well be expected, invariably solved along the paths here indicated; and many such problems are facing the Commission today, particularly as a result of the great complex of tasks imposed upon it by the latest Congressional mandates in the field of motor-carrier regulation, the probable subjection of additional forms of transportation to its more thorough-going control, and the reorganization of the regulatory mechanism which may thereupon become necessary, with the character of the outcome in all these directions largely dependent upon future developments. It must be kept in mind, too, that serious question has been raised as to whether the quasi-judicial methods which have dominated the Commission's performance are adequate to achieve the promotional ends of what has been called "planning, prevention, and coordination," embracing the transportation system as a whole, which are deemed in some quarters to constitute the most urgent need of the present phase of the transport situation. On the whole, however, the foregoing characteristics of the legislative structure and administrative record reflect the underlying factors responsible for the attainment of the Commission's existing position, and they are believed to represent a more promising basis for the continuance of its accomplishment and influence than the various proposals being put forward for altering its objectives and methods and organization. These characteristics will be briefly elaborated.

First, the essence of private enterprise has been maintained, despite the extensiveness of public control.

The railroad industry is now more than a century old, and the motor carriers and water lines whose increasingly severe competition it has been encountering in recent years are but the modern counterparts of the turnpikes and canals which it largely displaced at the time of its first emergence as an improved source of transportation service. Throughout the long period of the development of the carriers, except for some ill-fated state experiments with railroad enterprise in the early days of the industry and some present-day limited rail and water operations of the Federal Government, public reliance has been consistently placed upon private ownership and operation for the performance of the indispensable transportation function under peace-time conditions. In the beginning the individualistic tradition into which the railroads were born, coupled with the technical and commercial immaturity of the industry, naturally eliminated outright collective effort in this field, as it did even the less radical expedient of public control; since then the policy of public ownership and operation has been intermittently proposed as the most constructive and the most effective method of meeting the

recurring ills of the railroad situation, believed by its sponsors to be rooted in the fact of multiple corporate ownership of railroad facilities, but the proposal appears to have evoked little influential support in public opinion even during the darkest days of the depression years, nor was it recommended for present adoption even by the Federal Coordinator of Transportation, its best informed and most distinguished proponent. On the other hand, while public ownership and operation may possess such commanding merits in strength of credit and unity of management that they will ultimately lead to its acceptance as national policy despite the necessity of providing careful safeguards against the dangers of political interference with managerial freedom, there is little doubt in any responsible quarter that unrestrained private ownership and operation represents unsound and unworkable policy, from the standpoint of the carriers as well as of the users of their service and of the interests of the general public. From at least this segment of the economic order, laissez-faire doctrine appears to have been irrevocably banished. Public ownership on the one hand and public regulation under private ownership on the other constitute but alternative methods of control, with the choice between them resting primarily on a variety of practical considerations; the need of control in this sphere is everywhere unquestioned. This universal verdict is grounded in the facts of experience, as well as in the underlying nature of transportation enterprise. The initial attempts at regulation, first by the states and then by the Federal Government, were an irrepressible response to the numerous abuses, of far-reaching incidence, which characterized the freedom of action enjoyed by the railroads during the first four decades of their existence and the inadequacy of state control that followed; and the many subsequent expansions of the regulatory system, though finally issuing in a structure very sweeping in jurisdictional and substantive scope and latterly dominated by constructive as well as restrictive objectives, have likewise been induced in each instance by the pressure of serious maladjustments. The method of private ownership and operation has been maintained, in conformity with the general tradition of our economic institutions, but public regulation has been progressively intensified, in response to the demands of powerful realities as they have emerged in the functioning of this foundational industry.

But if the underlying rationale of corporate ownership and operation is not to be altogether obliterated, it is indispensable that the essentials of private enterprise and initiative be not merged in public responsibility. Unless a sufficient degree of stimulus is afforded to the owners and operators of the properties, acting individually on specific matters and in concert on matters of general concern, to evoke continuous effort toward the achievement of remedial adjustments and needed improve-

ments in the organization and administration of their enterprises, albeit on the basis of self-interest, the groundwork for retaining the form of private management tends to be entirely removed, and an outright transition to public ownership, with the deliberate assumption of responsibility by the government in all directions, becomes inevitable. This does not mean that any clear-cut separation is possible between the domain of management and that of regulation, in the sense that any important aspect of the carriers' activities must necessarily be free from the impact of public control. Such demands for the maintenance of managerial independence are both illusory and futile. Rate and service regulation, now unquestioningly acknowledged to fall within the sphere of appropriate governmental action, is no less an interference with freedom of management than is the public control of expansion and contraction of plant, or cooperative arrangements and mergers of interest, or the issuance of securities and assumption of obligations; and the extension of the regulatory process to these fields of physical facilities, intercorporate relations, and financial organization has proved to be as essential to the attainment of adequate transportation and reasonable and non-discriminatory charges and practices as has the direct assertion of control over the relationships between the carriers and their patrons. For the maintenance of the indispensable elements of private enterprise, it is chiefly necessary that adequate financial rewards be accorded to the owners of the properties, to the extent that reasonable rates can be made to yield the needed revenue, in order that the capital required in the public interest may be readily attracted into the industry; and that the initiation of policies be left for the most part with the carriers, though subject as established or proposed to the approval or modification or restraint of the regulatory tribunal, in order that adequate opportunity may be afforded for the exercise and development of managerial judgment and responsibility.

Both of these safeguards are in the tradition of the Interstate Commerce Act as evolved through the years, despite the vast accretions of governmental power which the span of time has brought. In the matter of financial return, the carriers have not only been protected by the constitutional requirement of due process, but more largely by the practical necessity of maintaining railroad credit, recognized as in conformity with the spirit of the Act even in the so-called restrictive rate determinations which preceded the war period, and since 1920 demanded by and, in so far as economic conditions have permitted, given effect in execution of, the express mandate of the rule of rate-making. But of principal significance in this connection is the fact that initial responsibility for the formulation of policies has in all important respects been assumed to inhere in the carrier managements, both in the development of the

Commission's directing powers largely operative in the field of rates and charges and in the establishment of its enabling powers largely applicable in the field of organization and finance. Complaints and applications have been designed to serve as the primary sources of corrective adjustments and of regulatory supervision of proposed courses of action, and even investigations on the Commission's own initiative have contemplated the quasi-judicial procedure of ordinary contested cases rather than any assertion of spontaneous executive authority *in loco parentis*. This approach has not been congenial to the prompt achievement of radical alteration or sweeping change in the organization and functioning of the railroad industry, however pressing the need for such alteration or change, but it has possessed the merit of effectuating its ends on a realistic basis and of safeguarding the elements of enterprise indispensable to the continuance of private management. Because of these characteristics, in no small measure, the marked expansion of the legislative structure and the striking growth of administrative power have been made possible; they are responsible in substantial degree for the Commission's prevailing position of solid influence in the direct and indirect control of economic activity.

Under these circumstances proposals for the infusion of a special executive official into the regulatory structure for the assumption of leadership in the exercise of so-called promotional functions, whether such official operate as a Secretary of Transportation independently of the Commission or as a Coordinator of Transportation in conjunction with it, must be subjected to very close scrutiny, from the standpoint of their long-range relationship to the system of public control, despite the superficial attractiveness of such proposals. Planning, prevention, and coordination, unless conceived in an all-embracing sense which would involve the merger of regulation and management under government ownership, are by no means absent from the existing system of public control. All of the numerous activities of the Commission, touching upon practically every important aspect of the carriers' operations, are calculated, through the workable method of piecemeal adjustments, to promote a sounder organization and functioning of the transportation industry; and much of the Commission's authority is exercised with reference to the demands of the transportation system as a whole rather than restricted to the particular interests of its constituent elements, in fulfilment of affirmative responsibilities which constitute an integral part of the standards of action prescribed for its guidance by Congressional enactment. The operation of the established regulatory system in the field of transportation is thus itself producing a degree of planning, prevention, and coordination, when viewed with reference to the complex and dynamic character of the prevailing industrial order, which

far transcends that authoritatively attained in any other important sphere of economic enterprise. Furthermore, facilities for investigation and research are certainly not lacking in the Commission's administrative organization, and they can be readily expanded as the public interest may demand; the methods of conference and counsel and accommodation are firmly rooted in the tradition of the Commission's performance, and they can likewise be more fully utilized as circumstances may require; and the Commission's mandatory powers, progressively developed over a vast field and continuously molding innumerable adjustments deemed relevant to the protection and promotion of the public interest, can be further extended in specific directions as the Congress, on the basis of convincing need largely supported by the disclosures of administrative experience, may amend or supplement existing policy. In substance, then, the contemplated fruits of these proposals can be achieved for the most part without provision for a new and powerful executive authority. Of prime importance is the fact that this gradual attainment through the instrumentality of the Commission itself, in conformity with traditional processes, would not involve a relinquishment of the quasi-judicial methods which assure the orderly and detailed consideration of the claims of all relevant rights and interests, and that it would not substitute public for private responsibility in the initial formulation of policy. A legislative recognition, on a permanent basis, of impatience with the conflicts and delays characteristic of the usual processes required in the regulation of private enterprise, understandable but not wholly commendable even under emergency conditions, would tend to sanction more or less arbitrary action in place of reasoned judgments grounded in showings sufficiently comprehensive to provide reasonable protection to all legitimate interests and sufficiently restricted to be capable of grasp and understanding; and any far-reaching encroachment upon private initiative, superimposed upon the extensive system of control now operative, would tend to destroy the basic rationale of corporate ownership and administration. The choice between public and private management should be a deliberate choice; the transition to public management should not be rendered unavoidable by the preventable breakdown of public regulation.

Second, the legislative structure embracing this extensive control has been evolved by a prolonged process of trial and error and reflects actual needs convincingly established by the test of experience.

The Interstate Commerce Act¹ and the supplementary and related laws which serve as the legislative basis of the Commission's authority have been almost half a century in the making. These statutes, as applied

1. 24 STAT. 379 (1887), 49 U. S. C. § 1 (1934).

by the Commission and as interpreted by the courts, constitute what may be called the governing legal code of the transportation industry. More than two score of legislative enactments, hundreds of judicial decisions, and thousands of administrative determinations, developed gradually over the extended period which has elapsed since 1887, have shared in fashioning the concrete content of this code; and in both the formulation of general policies and the settlement of specific controversies arising thereunder, almost every conceivable interest has repeatedly been afforded ample opportunity, in extensive legislative investigations and in numerous administrative and judicial inquiries, to demonstrate to the political representatives of the people and to competent and impartial tribunals the relevance and degree of influence which limited private considerations should bear to the general public welfare sought to be furthered by the regulatory process. The code thus evolved, even in its present matured form, is a flexible rather than a rigid product, being constantly subject to expansion, contraction, and modification by the same orderly methods and with the same realistic objectives as have been operative in connection with the attainment of the status prevailing at every stage of its development. In contrast to the commercial and industrial codes of recent years which, entirely apart from basic constitutional defects and serious shortcomings in administrative effectiveness, rapidly achieved a well-merited oblivion—codes in which a vast variety of complex and controversial relationships, in numerous trades and industries, were somehow precipitately crystallized, in the name of public welfare, into binding charters of economic self-government—the public interest in the transportation field has been found to lie, not in any preconceived body of regulations handed down from above, nor yet in any program of ends and means merely agreed upon by those ostensibly subject to control, but in the adoption as required and in the enforcement on a flexible basis, of such governmental policies and principles and practices as would achieve a realistic accommodation of the aggregate of interests shown by enlightened experience to merit recognition and weight under a system of private management and public regulation. These processes have been extremely laborious, and under them fruitful accomplishment has often been temporarily thwarted or delayed; but the results as attained have constituted an orderly expression of the dominant realities, and they have lent to the regulatory efforts of the government a solidity and stability indispensable to the successful adjustment of private rights and public interests under our existing legal and economic institutions. The approach thus characterized has manifested itself in all the basic aspects of the legislative structure.

The types of carriers subjected to control have expanded in this cautious and experimental fashion, as agencies supplementing and competing with the service of the railroads came to be recognized as constituting sources of maladjustment which require the remedial measures of public regulation. Aside from the jurisdiction over telephone, telegraph, and cable companies, established in 1910² and transferred in 1934³ to a special communications tribunal, the Commission's authority, as thus developed, has been confined to enterprises engaged in the performance of some phase of the transportation function. Because of the pressure of urgent public need, the railroads have constituted from the beginning the primary objects of public concern. The early jurisdictional shortcomings were centered in inability to reach agencies and services closely related to the rail carriers and their operations. Almost two decades elapsed, however, during which numerous concrete difficulties of serious character progressively emerged, before the supplementary express companies and sleeping-car companies were subjected to control and the scope of transportation so defined as to encompass with definite statutory sanction the services of private-car lines and industrial railroads. The test of experience was thus chiefly relied upon even in placing the incidence of railroad control on a sufficiently inclusive basis, in view of the intricacies of transport relationships, to render the performance of the regulatory tasks fruitful and effective.

Extensions of control to alternative or competing agencies have been characterized still more strikingly by slow processes of accretion grounded in persuasive disclosures of actual experience; and despite the growing realization of the organic character of the transportation function and of the need of a unified approach in the exercise of regulatory power, accentuated by the railroad vicissitudes of the depression years which sprang from intensification of competitive pressure and shrinkage of traffic demand, the transformation of the Commission from a railroad tribunal to one charged with public control of the transportation industry as a whole remains as yet far from complete. The Commission's authority to regulate persons and corporations engaged in the transportation of oil by pipe line, which dates from the passage of the Hepburn Act in 1906,⁴ was largely a response to abuses of monopolistic power in the petroleum industry and continues to be limited in its scope as a measure of transportation control; and the emerging difficulties in connection with pipe-line transportation of natural gas in interstate commerce have not yet been found sufficiently impressive to support the assertion of federal power. In the air transport industry, except

2. 36 STAT. 544 (1910), 49 U.S.C. § 1(1) (1934).

3. 48 STAT. 1101, 47 U.S.C. § 601 (1934).

4. 34 STAT. 584 (1906), 49 U.S.C. § 1(3) (1934).

for authority conferred upon the Commission in 1934 and 1935 with respect to air-mail compensation and related practices, the problem of extending the regulatory process to the general activities of commercial air carriers is still in the stage of public investigation and deliberation. Of the two major competitors of the railroads, moreover—that is, motor carriers and water lines—only highway transportation has thus far been placed, in thorough-going fashion, within the ambit of the Commission's jurisdiction.

The initial assertion of authority over water lines, as incorporated in the original Act of 1887, was restricted to joint carriage by rail and water and was wholly induced by the purpose of rendering railroad control coextensive with the operative scope of railroad service. The public interest in water carriage as such was deemed to be amply protected by the maintenance of freedom of competition between water lines, and these water lines, furthermore, were relied upon to provide what was believed to be a desirable competitive check upon railroad operations, in addition to the restraints imposed upon these operations by the regulatory process. Not until a quarter of a century later, through the Panama Canal Act of 1912,⁵ were the water carriers made a further subject of federal legislation, but even then, aside from facilitating the provision of joint rail-and-water services, the objective was largely to increase their effectiveness as untrammelled rivals of the railroads, by requiring the relinquishment of railroad ownership or control of competitive water lines, rather than to extend the regulatory process to them on a basis comparable to that prevailing in the railroad field. Some years later the Transportation Act of 1920⁶ declared it to be the policy of Congress "to promote, encourage, and develop water transportation, service, and facilities, and to foster and preserve in full vigor both rail and water transportation;" but since carriage by water, in contrast to rail transport, was still permitted to remain largely free from the incidence of public control, effective railroad regulation was rendered the more complex and the harder to achieve because of this declaration of policy, especially in the adjustment of transcontinental rate situations affected by the competition of water carriers plying through the Panama Canal, and the attainment of the contemplated coordinating end continued for the most part to lie beyond the scope of established regulatory power. In recent years, under the impact of depression difficulties, the public mind has become sufficiently impressed with the unity of the transportation function and with the close competitive relationships which govern the services rendered by all the prevailing forms of transportation to create a broad and influential support for subjecting both

5. 37 STAT. 566 (1912), 49 U. S. C. § 5 (1934).

6. 41 STAT. 499 (1920), 49 U. S. C. § 142 (1934).

water lines and motor trucks and buses to comprehensive and centralized regulation by the Commission. As far as water carriers are concerned, however, this end has not even yet been achieved. While there is a strong likelihood that the growing pressure for control will be translated into Congressional action in the not distant future, the opposing forces, bent upon safeguarding their distinctive competitive advantages unhampered by general coordination objectives, have thus far succeeded in keeping the establishment of a reasonably inclusive and effective system of water-carrier regulation a matter of future attainment. In the field of motor-vehicle transportation, on the other hand, these recent developments finally came to fruition in legislative action, through the passage of the Motor Carrier Act of 1935.⁷ But even in this case it must be noted that the objective was achieved only after a full decade of increasing dissatisfaction, sharp controversy, extended investigation, and persistent effort; that regulation was established in furtherance of the repeated recommendations of the state authorities, the Commission, and the Federal Coordinator of Transportation; and that the statute as enacted was not only sponsored by the rail carriers and those concerned with the precarious status of the railroad industry but ultimately received the support or acquiescence of practically all the organized interests affected by it.

In sum, then, while there is considerable basis for the contention that the approach thus manifested has resulted in a rather halting and tardy response to public need with respect to the types of carriers to be embraced in the regulatory system, there can be no question as to the complete absence of arbitrary or precipitate assertions of governmental power and assumptions of public responsibility in connection with this aspect of the Commission's jurisdiction.

The statutory provisions defining state and federal relations in the regulatory structure have likewise been developed in response to pressing need and have been marked by a similar course of legislative restraint. From the beginning of federal regulation, which sprang from the emergence of serious maladjustments in the railroad industry, particularly in the form of discriminatory practices, incapable of removal through the limited powers of state authority, the same plant and facilities have served intrastate as well as interstate commerce and the flow of traffic has failed to accommodate itself to the artificial political lines which separate the states; but the far-reaching subordination of state to federal power which now prevails in the field of railroad control has been the outcome of a long evolutionary process, achieved predominantly by means of judicially sanctioned applications of an expressly restricted jurisdiction, rather than of any sweeping assertion of Congressional author-

7. 49 STAT. 543 (1935), 49 U. S. C. A. § 301 (Supp. 1936).

ity, either at the outset or in its subsequent manifestations, over the entire domain of railroad enterprise. The Commission's direct jurisdiction was initially made applicable to traffic between the states and of foreign origin or destination, with an express exemption of transport operations conducted wholly within the limits of a single state; and both this assertion of control over interstate and foreign commerce and this explicit exclusion of intrastate commerce from its incidence have remained to the present day the guiding legislative chart of the Commission's authority in the railroad field and in connection with transportation services supplementing those rendered by the rail carriers. The progressive incursions of the federal tribunal into the sphere thus reserved to the states in conformity with constitutional requirements and the demands of sound policy have been effectuated, with the approval of the courts, in the exercise of regulatory power over interstate commerce, because of the direct, intimate, and inextricable relationships found to prevail in particular situations between the intrastate and interstate operations encompassed by railroad activity.

In the field of safety legislation, developed for the most part independently of the original Act to Regulate Commerce and its subsequent amendments, was accomplished the earliest and most complete supersession of state enactments by federal action, in response to the urgent need of promoting safety of operation in interstate commerce, and on the basis of the plenary and exclusive character of Congressional power toward this end;⁸ and a similar result, though necessarily less sweeping in scope, was in due course achieved under the Act to Regulate Commerce in the crucial sphere of rate control, in response to the urgent need of removing maladjustments in charges and conflicts of authority which issued from the close practical interrelationships between intrastate and interstate rates, and on the basis of a like Congressional supremacy in the field of interstate commerce. In neither situation did the relevant statutes, by their jurisdictional terms, transcend the bounds of authority expressly granted to the Federal Government by the commerce clause of the Constitution. Not until 1920 was the Commission empowered actually to prescribe intrastate rates in lieu of those emanating from the mandatory action of the state authorities as well as from the voluntary action of the carriers, and this power was explicitly restricted to the elimination of discriminations against particular persons and places in interstate commerce and of inequitable burdens imposed upon interstate commerce as a whole, in so far as they might result from the relations between intrastate and interstate rates and charges. In part, this enactment was but declaratory of principles of decision judicially established under the discrimination provisions of the original Act of

8. 27 STAT. 531 (1893), 45 U. S. C. § 1 (1934).

1887, despite the express exemption of intrastate transportation from its incidence; in part, it was an extension of jurisdiction, likewise upheld by the courts, made necessary by more than three decades of revealing administrative experience and adopted in furtherance of the affirmative responsibilities newly imposed upon the Commission with reference to the financial returns of the carriers. The constructive aspects of the 1920 legislation also manifested themselves in a marked expansion of authority for the regulation of service, both under normal conditions and in emergency situations, and in the enactment of a group of important enabling powers in the field of organization and finance, for the control of extensions and abandonments, intercorporate relations, and security issues. Since the authority thus conferred, like that reflected in the affirmative rule of rate-making, was largely induced by the inadequacy of the transportation system as it then existed viewed as a whole, virtually all railroad facilities and capital requirements as well as the entire flow of traffic came to be subjected to these new powers—but once more, it must be emphasized, only in so far as interstate carriers were involved and as an incident to the effective regulation of interstate commerce. Furthermore, in order that this centralization of control, though grounded in unquestioned national need, might not result in an undue disregard of local interests, substantive and governmental, express provision was made for notice to these interests in all proceedings involving matters of local concern, so that appropriate representations might be made by them, and statutory sanction was given to a system of cooperation between the state and federal authorities which involved the holding of joint conferences, the conduct of common hearings, and the utilization of state regulatory machinery, and which was calculated not only to bring to the aid of the federal tribunal the distinctive knowledge, special experience, and actual service of the local bodies, but to harmonize judgments and avert conflicts.

This method of legislative attack, with respect to both formal restriction of jurisdictional scope and practical provision for cooperative performance, has characterized the grants of authority over competing transportation agencies as well as over the rail carriers and the agencies supplementing them. In the Motor Carrier Act, the latest and most important of the regulatory enactments outside the railroad sphere, the Commission's powers of control were not only restricted, in conformity with traditional Congressional policy in this field, to the transportation of passengers or property by carriers and to its procurement or provision by brokers in interstate or foreign commerce, but by express stipulation these powers were not to be so construed as to authorize motor carriers to conduct intrastate operations or as to interfere with the exclusive exercise by each state of its power to regulate such intrastate operations.

Indeed, in connection with the federal regulation of motor-carrier charges, by way of departure from established policy in the field of railroad rate control, the Commission was expressly denied the right to prescribe or in any manner to regulate rates and charges for intrastate transportation, even for the purpose of removing discriminations against interstate commerce. The cooperative procedure as evolved in connection with railroad regulation likewise received full recognition in the Motor Carrier Act, but because of the largely intrastate character of the motor-transport industry and the rather limited scope of even its interstate operations, particularly in the movement of freight, a greater degree of reliance was placed upon the participation of the state authorities than in the field of railroad control. When the matters at issue involve not more than three states it is mandatory upon the Commission to refer them in the first instance to joint boards composed of representatives of each of the affected states, and in its discretion the Commission may refer matters to such joint boards for initial decision even when more than three states are involved. The centralization of actual power over the interstate activities of motor carriers in the federal tribunal was thus tempered by provision for a large measure of decentralized administration by the state regulatory bodies.

It is apparent that throughout the development of the statutory adjustment of state and federal relations in the sphere of the Commission's jurisdiction meticulous consideration has been given not only to the constitutional requirements of a dual form of government but to the practical demands of sound policy and administrative effectiveness. The very cautiousness of these assertions of federal power, molded by the varying circumstances of a long experience, has contributed to their legitimate expansion and successful utilization, as administratively applied and judicially interpreted, in meeting the numerous complexities of intrastate-interstate relationships in the field of railroad control, and the outlook is not unpromising, on this basis, for a like achievement in the newer field of motor-carrier regulation.

But it is in connection with the extensive range and diverse nature of the Commission's substantive powers that the trial-and-error methods which have characterized the development of the legislative structure are reflected most strikingly. The vast authority which the Commission now exercises, entirely apart from the types of carriers and kinds of commerce to which it is applicable, has been the outcome of an extended process of experimentation, fashioned by the pressure of changing conditions in the transportation industry and by the need of accommodating the expedients of public control to the demands of these changing conditions and to the disclosures of regulatory experience. A mere chronological survey of this development focuses attention upon a number of

fairly distinct stages in the adequacy and effectiveness of the legislative structure and in the position and influence of the Commission as a functioning tribunal. At least the following important periods, with their outstanding characteristics, may be noted: the initial decade of substantial promise (1887-1897), by the end of which, though much was accomplished in the interim, the Commission found itself largely shorn of positive power as an agency of control because of the procedural defects of the original Act to Regulate Commerce and the restrictive interpretations placed upon its substantive provisions by the courts; the ensuing nine years of general helplessness (1897-1906), during which, despite the enforcement of publicity of carrier operations, the settlement of numerous shipper complaints (usually through informal proceedings), and the passage of the Elkins Act of 1903 strengthening the law against personal discrimination,⁹ the Commission's most significant contribution lay in impressing upon the Congress and the people the urgent need of removing the basic weaknesses of the Act, both substantive and procedural, by clothing the regulatory tribunal with mandatory and self-enforcing power, particularly in the field of rate control; the period of the rehabilitation and extension of the Commission's authority (1906-1917), in the course of which, through the passage of the Hepburn Act of 1906, the Mann-Elkins Act of 1910,¹⁰ the Panama Canal Act of 1912, the Valuation Act of 1913,¹¹ the Clayton Act of 1914,¹² and the Esch Act of 1917,¹³ the Commission's dominant status in the regulatory system became firmly established, the control expedients to which it might resort were increasingly perfected and expanded, and its administrative performance, though restricted for the most part to the elimination of specific abuses in conformity with the legislative intent, came to be marked by vigorous and effective activity; the twenty-six months of Federal Control (1918-1920), during which, because of public operation of the transportation properties and the virtual merger of management and regulation, the Commission's functions were largely subordinated to those of the Director-General of Railroads, although many new duties were imposed upon the Commission during this period, particularly in aid of adjusting the financial relationships between the Government and the carriers, some of which as supplemented upon the return of the roads to their private owners continued to remain operative long after the termination of Federal Control; the post-war period of affirmative regulation (1920-1932), in the course of which, under the Transporta-

9. 32 STAT. 847 (1903), 49 U. S. C. §§ 41-43 (1934).

10. 36 STAT. 544 (1910), 49 U. S. C. §§ 1, 4, 6, 10, 13, 15, 16, 20 (1934).

11. 37 STAT. 701 (1913), 49 U. S. C. § 19a (1934).

12. 38 STAT. 730 (1914), 15 U. S. C. §§ 12-27, 44 (1934).

13. 40 STAT. 101 (1917), 49 U. S. C. § 1 (1934).

tion Act of 1920, the Commission's functions were directed into constructive channels, involving the assumption of positive responsibilities toward the carriers, not only by according express consideration to the safeguarding of railroad credit in the traditional field of rate control (and in response to the Hoch-Smith Resolution of 1925,¹⁴ to the rationalization of rate relationships, with special reference to the needs of agriculture), but by extending the regulatory process to service and facilities, intercorporate relations, and financial practices, with a view to the development and maintenance of an adequate transportation system; and finally, the recent period of special emphasis upon matters of finance and coordination (1932-1937), largely influenced by the vicissitudes of the economic depression and the exigencies of the new competition, during which, through the Reconstruction Finance Corporation Act of 1932,¹⁵ the 1933 and 1935 amendments of the Bankruptcy Act,¹⁶ the Emergency Railroad Transportation Act of 1933,¹⁷ and the Motor Carrier Act of 1935, important new powers were conferred upon the Commission, entirely apart from the temporary authority vested in the Federal Coordinator of Transportation for the conduct of investigations and the furtherance of cooperative activity among the carriers, in connection with the extension of financial assistance to the railroads, the control of their receiverships and reorganizations, and the supervision of their combinations, as well as by the establishment of a comprehensive system of motor-carrier regulation. A like course of piecemeal development, resulting in the gradual improvement and expansion of tentative policies and practices of control, was achieved in the largely parallel field of safety legislation, through the Safety Appliance Acts of 1893,¹⁸ 1903,¹⁹ and 1910,²⁰ the Hours of Service Act of 1907,²¹ the Accident Reports Acts of 1901²² and 1910,²³ the Locomotive Inspection Acts of 1911²⁴ and 1915,²⁵ and the train-control provisions of the Transportation Act of 1920. Throughout the evolution of the numerous duties and powers encompassed by the far-reaching legislative structure as thus developed, the Commission, continuously and intimately informed concerning transporta-

14. 43 STAT. 801 (1925), 49 U. S. C. § 55 (1934).

15. 47 STAT. 5 (1932), 15 U. S. C. § 601 (1934).

16. 47 STAT. 1474 (1933), 49 STAT. 911 (1935), 11 U. S. C. A. §§ 201, 205 (Supp. 1936).

17. 48 STAT. 211 (1933), 49 U. S. C. § 250 (1934).

18. 27 STAT. 531 (1893), 45 U. S. C. § 1 (1934).

19. 32 STAT. 943 (1903), 45 U. S. C. § 8 (1934).

20. 36 STAT. 298 (1910), 45 U. S. C. § 11 (1934).

21. 34 STAT. 1415 (1907), 45 U. S. C. §§ 61-64 (1934).

22. 31 STAT. 1446 (1901).

23. 36 STAT. 350 (1910), 45 U. S. C. §§ 38-43 (1934).

24. 36 STAT. 913 (1911), 45 U. S. C. § 22 (1934).

25. 38 STAT. 1192 (1915), 45 U. S. C. § 30 (1934).

tion difficulties and regulatory problems, has exerted a controlling influence upon the character and direction of this structure. The very existence of the Commission as a functioning tribunal, coupled with the statutory obligation to render account of its stewardship from time to time and to submit recommendations for such changes in and additions to the legislative basis of its authority as it might deem to be necessary or desirable, has made the course of administrative experience the most influential factor in the determination of Congressional policy.

But the pervasiveness of the trial-and-error methods thus traced from a chronological standpoint will become the more fully apparent when surveyed briefly from a functional point of view. Since we are concerned, in the last analysis, with the contemporary status and effectiveness which the Commission has attained in the half century of its existence, it is the evolution in concrete terms of the many-sidedness of its powers of control and of the diversity of the regulatory expedients employed therein, rather than the distinctive contributions of each of the significant periods of its development viewed as a whole, which will reveal most suggestively the pragmatic processes whereby the legislative structure has come to constitute a durable, realistic, and reasonably adequate reservoir of regulatory power.

The primary objective of the system of regulation set up in 1887 was to prevent unreasonable and discriminatory rates and practices; and while this objective has come to be visualized with the lapse of time more largely in its positive than in its negative implications, it continues to provide the principal goal of regulatory effort, with the exercise of control in numerous other directions constituting for the most part auxiliary means of furthering this major end. Since the underlying purpose of rate regulation is to maintain proper relationships between the carriers and the users of their service in the public interest rather than merely to condemn existing adjustments with a view to affording private redress, the indispensable requirement for effective rate control is to possess power to prescribe charges for the future in lieu of those found to be unreasonable or discriminatory. For the first ten years of its existence the Commission assumed that it possessed such power, in the performance of its duty to execute and enforce the rate standards incorporated in the original Act, but as a result of adverse judicial decisions it found itself without mandatory rate-making authority till the adoption, after much futile effort and a notable struggle between the carriers and the people, of the highly significant amendments of 1906.²⁶ The Commission's authority to eliminate, except under publicly justifiable circumstances, the flagrant form of local discrimination which manifests

26. 34 STAT. 584 (1906), 49 U. S. C. § 1 (1934).

itself in the charging of lower rates for longer than for included shorter hauls, likewise virtually destroyed in the late 90's by judicial interpretation of the original statutory prohibition, was not restored, despite serious maladjustments and widespread complaints, till the passage of the 1910 amendments;²⁷ and it was not further modified in response to intervening experience, by narrowing the range of administrative discretion in granting relief, till the enactment of the 1920 legislation.²⁸ Two aspects of the Commission's rate-making power as thus expressly conferred and strengthened continued to serve as sources of difficulty: the regulatory process did not become applicable, either upon complaint or upon the Commission's own initiative, till the rates involved were actually in effect, rendering possible the imposition of excessive charges and the distortion of rate relationships, frequently with irreparable consequences, pending the initiation of complaints, the conduct of investigations, and the determination of controversies; and the regulatory authority, even when exercised, was restricted to the prescription of maximum rates, rendering possible the demoralization of the level of charges through general rate wars and the burdening of non-competitive traffic through unrestrained reductions in specific situations. In due course, with the unfolding of administrative experience, both of these sources of difficulty led to amendments of the Act: the rate-suspension power, later modified as to some of the details of its exercise, was conferred in 1910, and the minimum-rate power was conferred in 1920. As a result of this course of development, coupled with the circumstance that as early as 1906 the Commission's orders had been made operative by their own terms with the sanction of heavy penalties (the burden being thrown upon the carriers to resist enforcement through resort to the courts rather than imposed upon the Commission, as in the beginning, to secure enforcement), and that after 1910, despite the short-lived attempts of the Commerce Court to substitute its judgments as to the wisdom or expediency of particular determinations for those of the administrative tribunal, the Supreme Court generally pursued a self-denying policy of narrow judicial review, the Commission's powers of rate control were finally molded into an effective instrument for maintaining railroad charges on a reasonable and non-discriminatory basis.

For the most part, however, these powers as conferred prior to 1920 had been cumulatively developed in a restrictive spirit—as a means of eliminating specific abuses, with special reference to the immediate economic interests of the users of the service, rather than of maintaining and developing adequate transportation facilities, with express consideration for the financial interests of the carriers rendering the service.

27. 36 STAT. 547 (1910), 49 U. S. C. § 4 (1934).

28. 41 STAT. 480 (1920), 49 U. S. C. § 4 (1934).

Accordingly, because of the growing inadequacy of plant and equipment which flowed from this approach, culminating in the serious transportation difficulties of the war period, large affirmative responsibilities were added to the extensive powers of restriction in the sphere of rate control. The basic obligation, enacted in 1920, was incorporated into the so-called rule of rate-making, whereby, in the interest of safeguarding carrier credit and maintaining an adequate transportation system, the Commission was expressly directed so to adjust rates and charges as to provide for the railroads as a whole or in designated groups a fair return on the fair value of their properties. As an integral part of the new policy, moreover, and in furtherance of the same affirmative ends, provision was also made for the recapture of earnings in excess of a fair return realized by particular carriers, for the adjustment of divisions of joint rates with due regard to relative revenue needs rather than in dominant reliance upon relative bargaining power, and, as previously noted, for the protection of the interstate level of charges against the discriminatory burdens of intrastate rate adjustments. The infusion of these constructive elements into the system of rate regulation sprang from the pressure of significant experience, as disclosed both in the functioning of the railroad industry and in the record of its public control; and aside from the mandates of the Hoch-Smith Resolution, with respect to the readjustment of rate relationships, which were in the nature of a political gesture and in effect added no new powers or standards of rate control to those already vested in the Commission or provided for its guidance, such modifications of legislative policy in this sphere as have since followed have been the outcome of like experience. Largely because of administrative difficulties, accentuated by the valuation doctrines of the courts and rendered almost insurmountable by the practical exigencies of the depression economy, the 1933 legislation repealed the recapture provisions, upon express recommendation of the Commission as well as in conformity with the desires of the carriers;²⁹ and predominantly because of the unrealistic interpretation that had come to be placed upon the statutory rule of rate-making by the railroads and their advocates as a result of its being couched in the more or less mechanical terms of value and return, it was recast by the same legislation, although the new emphasis upon the effect of rates on the movement of traffic and upon the need of adequate transportation service and of carrier revenues sufficient to provide such service involved no essential departure from the controlling considerations that had been guiding the Commission in its execution of the old enactment. The Commission's powers over both rate levels and rate structures have thus been gradually developed to

29. 48 STAT. 220 (1933), 49 U. S. C. § 15b (1934).

their prevailing scope and purpose and effectiveness on the basis of trial and error and in response to practical need.

But from the beginning it was evident that effective rate regulation, as the crucial instrument for holding the private provision of transport service within the channels of public interest, required the support of many ancillary expedients of control; and in large measure the various duties with which the Commission is charged and the various powers which it exercises outside the direct sphere of rate control, except for those incident to the maintenance of safety of operation and to the performance of the miscellaneous tasks which have been imposed upon it from time to time virtually as a general service agency of the Government, are essentially designed to serve such auxiliary purposes. The unfolding of these ancillary expedients has likewise been molded by the course of experience, in both transportation and regulation, with a consequent expansion of the authorized range of administrative activity as specific defects of power have emerged and as the general horizon of control has broadened to embrace affirmative ends in the railroad field and coordination objectives in the transportation field as a whole.

The most important of these expedients incorporated into the Act from the outset, as an aid to informed and effective enforcement of its basic provisions with respect to rates and practices, dealt with the prescription of carrier accounts and with the exercise of general investigatory power.³⁰ But while administrative authority in these directions was deemed to be essential from the inception of federal regulation, only upon being strengthened and extended was it calculated to accomplish its initial purposes adequately or to provide a basis for the satisfactory execution of the many regulatory functions later to be added. Not until 1906, with the establishment of punitive sanctions and the provision of enforcing machinery, was the power to prescribe and police general accounting practices rendered an adequate aid to control, and not until 1920 was it expressly made to include supervision of the specific field of depreciation accounting. In its present character and extent the statutory authority over carrier accounts, supplemented by the requirement of regular and special reports and the statistical activities emanating therefrom, is indispensable to the proper performance of practically all of the regulatory functions, not only in the traditional field of rate control as developed through the years, but in the newer field of organization and finance. The powers of general investigation as originally conferred, after being strengthened by the Compulsory Testimony Act of 1893,³¹ have repeatedly grown in their incidence and use as the jurisdictional and substantive scope of the Commission's authority has gradually ex-

30. 24 STAT. 383, 386 (1887), 49 U. S. C. §§ 12, 20 (1934).

31. 27 STAT. 443 (1893), 49 U. S. C. § 46 (1934).

panded. Upon passage of the Valuation Act,³² however, which has resulted in the Commission's most ambitious and most prolonged single administrative activity, a special field of investigation came to be occupied by express Congressional mandate, as a means of providing officially determined measures of capital investment and property value deemed essential to the sound and fruitful exercise of regulatory power. At the outset, as in connection with accounting activity, the costs and values of carrier property sought to be ascertained through the valuation project were designed primarily to facilitate the tasks of rate control, and under the rule of rate-making and recapture provisions of the 1920 legislation these tasks expressly required the use of valuation data; but with the extension of the Commission's duties and powers to spheres of corporate conduct long deemed to be the exclusive function of the carrier managements as far as the impact of its authority was concerned, the valuation results as currently maintained have come to provide a significant factual basis for dealing with various other aspects of the regulatory process, and particularly with those bearing upon the emission of capital instruments and the accomplishment of financial reorganizations.

The extension of the regulatory process to these and other so-called managerial spheres of railroad activity, as well as to the operations of motor carriers on a comprehensive basis, has been the outcome of the affirmative approach introduced by the 1920 legislation and of the emerging emphasis upon coordination which was sharply accentuated by the financial and competitive difficulties of the depression period. Since the underlying objective of the Transportation Act was so to recast the legislative structure as to further the maintenance of an adequate transportation system through the assumption of positive public responsibilities toward this end, it was found necessary to go beyond the liberalization of rate control, as reflected in the various statutory enactments already noted, and to include within the scope of the Commission's reviewing authority all significant carrier policies bearing upon the proper performance of the transportation function. In conformity with this need, the Commission's jurisdiction was made to embrace not only the direct regulation of the transportation service, for the purpose of safeguarding and promoting fair, adequate, and economical practices under normal conditions and of subordinating particular rights and interests in the ownership and use of plant and equipment to general transportation requirements under conditions of emergency, but the control of extensions and abandonments of line, cooperative arrangements and combination expedients, and the issuance of securities and assumption of obligations,

32. 37 STAT. 701 (1913), 49 U. S. C. § 19a (1934).

for the purpose of so molding the physical facilities, intercorporate relations, and financial structures of the carriers as to provide sound foundations for an adequate and properly functioning transportation system. On the side of financial structures, the subsequent increase of the Commission's authority over railroad reorganizations was grounded in the widely recognized defects of the traditional receivership procedures as well as in the growing number of carrier casualties produced by the shrinkage of traffic and intensification of competitive activity of the depression years; and on the side of intercorporate relations, the subsequent subjection of railroad holding companies to the Commission's jurisdiction, as well as the removal of the statutory distinction between acquisitions of control through lease or stock ownership and other forms of merger of interests and the modifications of the Commission's power over combinations and consolidations in other directions, were grounded in the practical obstacles to sound and effective performance encountered during more than a dozen years of crowded administrative experience under the 1920 legislation. Finally, this basis for permanent coordination within the railroad industry itself, though still retaining the established emphasis upon the maintenance of competitive conditions in connection with unifications of ownership or control and still relying upon the voluntary action of the carriers for the achievement of more orderly organization and operation through these means, was supplemented by the adoption of a comprehensive scheme of motor-carrier regulation, in the interest not only of controlling the conduct of this new but vigorous member of the family of transport agencies, but of furthering the coordination of its functions and activities with those of the rail lines and of the transportation system as a whole.

By such methods and through such expedients has the legislative basis of the Commission's authority been gradually evolved to its prevailing sweep and objective. Because of the slow processes of change and accretion, molded by the practical demands of actual experience, which have characterized this development, both the rail and related carriers subject to control and the tribunal exercising control over them have accommodated themselves without serious difficulty to the numerous governmental requirements and diverse administrative tasks involved; and the system of regulation thus established has been widely accepted as a necessary and firmly rooted accompaniment of transportation enterprise. Only the Motor Carrier Act, which has followed the general pattern of railroad control and has supplemented it by special elements distinctive of its own sphere, represents the imposition of a full-blown system of regulation, by single impulse, upon a vast body of motor-vehicle operators that had been virtually free of governmental restriction or supervision. Intelligent and effective administrative performance in this field presents

a challenge to the Commission differing greatly in important respects from that involved in any of the accumulating responsibilities of its previous experience, and only the course of time will disclose whether it can meet this new challenge successfully without departing from the traditional processes and practices which have contributed to the attainment of its outstanding place among regulatory agencies. But in the field of railroad control, with which the Commission's record of a half century has been chiefly concerned, its administrative performance has paralleled the commendable characteristics which have marked the evolution of the legislative structure.

Third, the exercise of the authority thus conferred has resulted in much fruitful accomplishment, but despite consistent adherence to the basic purpose of protecting and promoting the public interest, this accomplishment has been realized through administrative policy dominated by a sense of realism and restraint.

Since, under the influence of numerous and complicated factors lying entirely beyond the scope of carrier control, both the railroad industry and the economic milieu in which it functions have been largely transformed in the course of the half century of federal regulation, no means are available for isolating the fruits of the Commission's performance in their more far-reaching implications. The most that can be said with reasonable assurance is that the forces molding the organization and processes of our general economic life, when deemed to produce anti-social consequences through the instrumentality of transport operations and adjustments, have tended to be restrained or modified by the mechanism of public control in this sphere. There can be no question, however, that the direct effects of the Commission's regulatory activity, in their impact upon transportation policy and practice, have been not only continuing and extensive but salutary and beneficial. In some measure this fruitful accomplishment has been attained through occasional general adjustments of broad significance, but for the most part through the constant flow of specific determinations of limited applicability.

Some of the Commission's outstanding achievements which have operated with sweeping effect readily come to mind, and their nature and characteristics may be indicated summarily: the virtual elimination, through strict enforcement of the principle of equality, of the great variety of indefensible personal preferences which were long prevalent and lent impetus in important degree to the original assertion of public control; the effective maintenance of publicity of carrier operations which, without more, provides a powerful restraining influence upon over-reaching railroad policy and unreasonable or discriminatory transportation practice; the establishment and development of accounting classifications and regulations which furnish an indispensable foundation for the

intelligent conduct of internal operations and for the sound exercise of regulatory power, and which have come to serve in large measure as models of accounting control in all segments of the public utility field; the laborious consummation of an unprecedented inventory and appraisal of carrier property, increasingly maintained on a current basis, which is finding present relevance and use in many aspects of the regulatory process and is calculated to facilitate financial adjustments between the railroads and the government in any future transition to public ownership; the formulation of a comprehensive plan for consolidating the carriers into a limited number of systems which, though remaining as such almost entirely unexecuted, has exerted a marked influence upon such unifications, involving extensive mileage, as have actually been effectuated, and has stimulated frequent and careful consideration of alternative groupings of roads and of less formal cooperative expedients for attaining more orderly and efficient organization and operation of the railroad properties; the complete and constructive overhauling of rates and practices in the express service, attained on a national basis a quarter of a century ago, which put an end to long standing and virtually intolerable conditions of complexity and abuse and substituted therefor methods and adjustments which for their general simplicity and fairness to all interests have won widespread approval; the general rate-level proceedings, both prior to the war period and in execution of the rule of rate-making, which embraced the entire country or the whole of some of its major territories, and which have not only prevented unjustifiable resort to the easy path of rate advances, but, by the requirement of decreases as well as the authorization of increases in charges, have tended to promote the adjustment of carrier revenues and railroad credit to the changing demands of the transportation service; and finally, the considerable number of comprehensive class-rate and commodity-group investigations, involving thorough-going revisions of rate relationships over large areas and with respect to important articles of commerce, which have operated to further greater uniformity, simplicity, and consistency in the rate structure and its constituent elements, and to produce an increased and more pervasive emphasis upon cost factors, and particularly upon the distance principle, in the adjustment of individual rates and charges.

But such sweeping undertakings and such far-reaching results have been the exception rather than the rule; and even in the comprehensive achievements characterized above, the results have been attained in some of the situations through cumulative applications of the regulatory process, rather than by any single course of inquiry and determination, and in the others the broad findings, while the outcome of investigations of general scope and significant in themselves, have only provided new starting-points for repeated readjustments to special circumstances and

conditions in the continuous exercise of the relevant powers of regulation. Not very frequently, considering the extensive record of administrative performance, has the Commission departed from the characteristic regulatory approach pursued in the vast bulk of its activities, which has consisted in effecting correctives for specific maladjustments as they emerge and in subjecting proposed courses of action of individual carriers to scrutiny and control. There has been little disposition to achieve complete transformations in the organization and functioning of the railroad industry. The public interest, under the prevailing system of private management, has been recognized to lie for the most part, not in the attainment by sweeping action of any remote and vaguely defined national purpose, but in the fashioning of particular carrier policies and practices, as they manifest themselves constantly and concretely in the various operations incident to the provision of transportation service, in obedience to the restraints and in conformity with the standards expressly established by legislative enactment. The most significant fruits of the Commission's activity are thus reflected in the great stream of determinations of relatively limited scope which issue from day to day in response to shipper complaints and carrier applications. Much general and indirect administrative effort is essential to the sound disposition of this flow of complaints and applications, and from time to time resort must be had to far-flung investigations designed to achieve comprehensive objectives in particular spheres of control. But the heart of the regulatory system and the most characteristic benefits which its administration has produced are to be found in the vast number of undramatic determinations in ordinary proceedings. These determinations embrace not only the numerous dealings of the roads with shippers and other users of the transportation service, but the various significant relationships of the managements of the lines to their properties. Maladjustments in rates and service and questionable arrangements in organization and finance are being constantly eliminated or prevented by such determinations, and in the aggregate carrier policies and practices are being gradually molded thereby to meet the complex and changing demands of public welfare.

Railroad control under such an approach is necessarily a continuing process. This accounts for the persistence of regulatory proceedings and for the permanence of the Commission's labors. Those who are concerned over the fact that the prodigious activity of half a century has resulted in so few definitive adjustments, and are perplexed over the circumstance that complaints and applications and investigations continue without abatement, misconceive the dominant purpose of the Commission's powers of control. This purpose is not to achieve a fixed goal by reconstituting the organization and operation of the transport agencies,

but to maintain a moving balance between private rights and public interests by directing their various manifestations into nationally desirable channels. Since the conditions surrounding railroad activity are of enormous variety and subject to constant change, the regulatory process must of necessity be flexible in character and the determinations to which it leads subject to repeated modification. The uniform and more or less definitive enforcement of principles and practices in face of these complex and changing conditions, though leading to arrangements symmetrical in nature and stabilizing in effect, would be as harmful and impracticable in the sphere of public regulation as would the pursuit of like policy in that of private management. Such determinations would transcend the express bounds of statutory authority; they would stifle progressive developments; they would be fashioned by artificial reason; they would issue in adjustments less equitable in substance than in form. Under these circumstances the fact that the Commission has refrained from establishing rigid molds has increased rather than decreased the fruitfulness of its accomplishment. The process of continuing control as pursued by the Commission has reflected a realism and restraint in the exercise of its vast powers, through consistent recognition of the immense scope, varied nature, and changing character not only of the transportation agencies and their operations but of the commercial, industrial, and agricultural interests served by them, which have contributed substantially toward rendering the regulatory system both acceptable and enduring.

This realism and restraint have also manifested themselves in the considerations and objectives which have guided the Commission's substantive performance. Seldom have these considerations differed essentially from the factors involved in the carriers' own adjustments or proposals. The Commission has usually deemed it to be its task to appraise and balance these operative factors by according to them the weight and influence found to be reasonably justified in the public interest, rather than to substitute for them some controlling consideration of its own devising. Moreover, attempts at drastic reform have been very infrequent, and ideal solutions have been sought even more rarely. Prevailing methods both in the railroad field and in surrounding business enterprise have generally constituted the accepted starting-point of regulatory proceedings, and as far as their basic character is concerned they have tended to perpetuate themselves, except in so far as outlawed or altered by express legislative mandate. Even concrete practices, while always subject to condemnation and modification when found to be in violation of statutory standards, have often come under the impact of this conserving influence, in the interest of avoiding disruptive arrangements and disturbing change. This emphasis upon the considerations

which have guided the carriers themselves in the fashioning of their policies and this modest approach in effecting authoritative readjustments have characterized practically the entire range of regulatory activity. Perhaps the most striking illustrations are to be found in connection with the Commission's exercise of its powers of rate control and security regulation. In the important sphere of adjusting rate relationships, as between both commodities and hauls, on a reasonable and non-discriminatory basis, the complex admixture of cost-of-service and value-of-service factors which molded railroad charges before the advent of federal regulation still remains operative. While primary stress has been shifted in considerable measure to cost criteria, value considerations justified by the need of developing and attracting traffic continue to receive widespread recognition. Largely through methods of comparison with established charges, rather than in reliance upon absolute standards, anomalies and injustices have been progressively removed from the rate structure and a greater degree of consistency in rate relationships has been gradually developed. But since the dominant aim has been to apply corrective pressure rather than to achieve sweeping reconstruction, the Commission has not undertaken to impose upon the carriers a so-called "scientific" system of charges. Similarly, in the field of security regulation, while the Commission has sought to mold the financial practices of the carriers in the public interest, it has largely refrained from insisting upon standards of action differing in any important respects from those traditionally recognized by them, at least in principle, and generally approved by the business world. The issuance of securities in excess of capitalizable assets and the assumption of fixed charges in excess of normal earning capacity have generally been disapproved, but the capitalization of surpluses through stock dividends and the resort to bond issues by roads sufficiently strong for stock financing have repeatedly been authorized. Even the requirement of competitive bidding in the sale of securities, because it constituted a departure from prevailing carrier practice, was established only after long agitation and was restricted to equipment obligations. The Commission's performance under this approach has prevented plain departures from sound business policy and clear subversions of the public interest, but it has reflected little disposition to mold financial structures on a constructive basis independently of established carrier methods.

But such restraint, while generally commendable, is believed to have been carried too far in some connections, particularly in view of the transportation difficulties ushered in by the depression period. There appears to be need of bolder and more constructive action, and the broad character of the prevailing legislative standards appears to provide the necessary authority. In the field of rate relationships it is unlikely that

effective emphasis upon more uniform and symmetrical adjustments, designed to achieve a logically integrated system of charges, is either desirable or feasible under existing conditions. Intense rivalry among the railroads, and particularly the competitive pressure of the newer transport agencies, is bound to produce intricate and highly irregular rate structures, if realistic consideration is to be given, as it must, to the continually emerging and constantly changing complex of special circumstances and conditions. But rate levels may well be dominated more largely by the need of stimulating traffic, in the interest of the roads as well as of the users of their service and the general public, despite the unwillingness of carriers to initiate such policy and their usual opposition to authoritative action toward this end. The 1936 reductions in passenger fares were of this character, and they appear fully to have justified themselves. There is precedent for like reductions in freight rates, and much ground for viewing the rate-level determinations of the depression years as unduly restrained. In the field of organization and finance there is especial need for visualizing immediate settlements in relationship to remoter consequences. The Commission's record of performance in issuing certificates of public convenience and necessity for extensions and abandonments of line has been a very creditable one. In the case of extensions it has not only sought to avoid economic waste and destructive competition through unnecessary duplication of facilities and undue diversion of traffic, but as far as possible to give effect to private initiative manifesting itself in proposals for new construction of beneficial promise; in the case of abandonments it has recognized both the significant stakes of established communities in the continuance of transportation service and the financial burdens imposed upon the affected carriers by unprofitable operations; and in both situations its findings and orders have been molded by a characteristically careful balancing of conflicting interests. There is room, however, for according a greater measure of consideration to the demands of the transportation system as a whole in these connections. In view of the considerable excess of carrying capacity which now prevails and the relative ease with which communities can avail themselves of highway service, the continuance of the liberalized policy in authorizing abandonments which has characterized the depression period, coupled with the pursuit in due course of a more stringent control of new construction than was exercised in the 1920's, would be calculated to facilitate needed accommodation between physical facilities and transportation requirements, without imposition of undue burdens upon users of the service and without unreasonable encroachment upon managerial freedom. But perhaps the most crucial need of a less restrained approach lies in the sphere of finance. The prevailing situation in the railroad field clearly requires a

scaling down of capital liabilities and a diminution of emphasis upon fixed obligations. The Commission now possesses important powers of control over railroad reorganizations, and the skill, courage, and vigor with which it exercises these powers will not only determine the magnitude and soundness of the ensuing financial structures but will influence in considerable measure the ability of the roads to maintain their position of dominance in the transportation field. Reductions in fixed obligations, which are of most vital significance, can be achieved in the normal regulation of security issues as well as through the reorganization process. It is common knowledge that huge and inflexible burdens of bonded indebtedness have constituted a prime source of railroad difficulty during the depression years, and that the vulnerability of this capital set-up might have been substantially mitigated in the 1920's, not only through more drastic reorganizations of embarrassed properties, but through greater reliance upon stock financing by carriers of established credit. The Commission's acquiescence in questionable reorganizations was largely grounded in want of power to participate in the molding of reorganization expedients prior to their being presented, virtually as a *fait accompli*, in connection with applications for the issuance of the required securities; its ready approval of bond issues as long as normal earning capacity was shown to be sufficient to support them sprang, not from lack of authority to impose more exacting standards, but from the self-denying assumption that choice of capital instruments under such circumstances should be recognized as a function of management and left undisturbed. The gap in power over reorganizations has been reasonably well filled by statutory enactment; the change of attitude toward bonded indebtedness will largely depend upon administrative policy. The future handling of these financial problems will constitute an important test of the constructive possibilities of the regulatory process. Since the vicissitudes of the depression experience have left their impress upon the Commission, the situation is not without promise.

Fourth, the administrative method is indispensable to the sound and effective achievement of positive regulatory ends, and the processes employed, though constituting a departure from traditional legal arrangements, have safeguarded all essential rights and interests.

In recent years increasingly outspoken concern has come to be expressed over the growth of administrative tribunals. This concern has drawn its primary impetus, not so much from dissatisfaction with the practical consequences of the performance of these tribunals, as from a sense of alarm over their subversive influence upon our legal institutions. It is often contended that the supremacy of law and the separation of powers, deemed essential to the preservation of our liberties and the maintenance of our governmental structure, are being seriously jeo-

pardized by administrative operations which involve the exercise of mixed functions and are largely free from judicial censorship. While the Interstate Commerce Commission as such, because of its long history, fruitful accomplishment, and secure status, generally finds itself beyond the direct impact of these shafts of criticism and is usually excepted from proposals for fundamental reform, the essence of the prevailing strictures goes to the root of the administrative method of control and is as applicable to this federal tribunal as to those of lesser prominence and distinction. Such attacks from bench and bar upon novel and far-reaching modifications of traditional processes and arrangements have their significant parallels in legal history, particularly in connection with the emergence and development of equity jurisprudence; and in the case of administrative law, as in past instances of resistance to inevitable change, they are bound to issue, not in the successful stay of irrepressible forces, but in loss of opportunity through sympathetic acceptance of unavoidable adjustments and vigilant insistence upon all necessary safeguards, to participate in the constructive task of fashioning the newer processes and arrangements into increasingly sound and effective instruments of control. The very rapid and constantly growing establishment of administrative agencies has constituted a practical response to pressing need. These agencies have come into being because of the expansion of governmental activities directed toward positive regulatory ends made necessary by the complex conditions and affirmative objectives of modern life, and because the satisfactory achievement of these ends required more skilled, elastic, and expeditious adjustments of social and economic relationships than could be attained through the customary channels of the courts. Whether resistance to their creation and operation assumes the popular aspect of characterizing them as embodiments of despotic bureaucracy or the more learned guise of finding in them basic subversions of the legal system, in effect condemnation of administrative tribunals *per se* amounts to condemnation of the regulatory ends sought to be effectuated thereby, since no equally adequate "working implements of government" are available for such purposes.

In the sphere of transport control by the Federal Government, attainment of the diverse and extensive regulatory ends now held in view would certainly have been an impossibility without resort to the Commission for concrete administrative application of general legislative standards. Mere reliance upon judicial enforcement of the common-law obligations of common carriers was recognized from the inception of railroad transportation as clearly unsuited to the achievement of affirmative public purposes under the complex and dynamic circumstances of the modern industrial age. Such judicial regulation, in addition to being subject to the difficulties incident to its slow and costly processes and the restriction

of its relief to those directly involved in litigated transactions, was basically defective because limited to the provision of private redress for private wrong, rather than encompassing the protection or promotion of any general public interest, and because concerned solely with the legal validity of past transactions, rather than with the establishment of proper arrangements for the future. Positive control, calculated to eliminate the numerous abuses which were arousing widespread concern, required as a minimum express statutory formulation of the policies and practices which should govern the relationships between the carriers and the users of their service, and this was the primary significance of the beginnings of federal legislation, as it had been of the earlier state enactments. But direct legislative regulation, enforceable through the courts, was also seen to be an inherently inadequate instrument for achieving such positive ends. The relationships involved were numerous and complicated, for the proper adjustment of which general legislative bodies, dealing with all types of matters and functioning under pressure of political considerations, possessed no special competence; and even such legislative adjustments, necessarily of limited scope, as might be deemed sound and just when made, were bound to operate with a harmful frigidity, unresponsive to the constantly changing conditions which surround transportation activity. These vitiating circumstances were apparent to the Congress in connection with proposals for direct exercise of control over the rates and practices, in their numerous ramifications, which were initially the sole objects of concern in the regulatory process, and the virtual impossibility of effectuating public ends satisfactorily through direct legislative regulation was rendered the more obvious as the sweep of rate control was enlarged and its character modified in constructive directions, as supervisory activity was extended on a broad basis to service relations and the more important aspects of organization and finance, as need was progressively disclosed for resort to a great variety of ancillary expedients. From the very outset, therefore, through establishment of the Commission, dominant reliance was placed upon administrative regulation; and in the course of the half century of the Commission's existence there has not only been no retreat from this approach, but the regulatory structure in its charge has been repeatedly strengthened and expanded. The administrative character of the system of regulation thus established and developed, with its principal emphasis upon impartial inquiry and informed judgment by a specialized and continuously functioning commission, has made it possible to draw within its scope all significant relationships between private rights and public interests deemed in need of control, and to mold these relationships on a sound, equitable, realistic, and flexible basis.

The Commission is the most powerful of the so-called independent regulatory agencies, but it operates with ample safeguards calculated to maintain the traditional supremacy of law. While its determinations result in numerous and significant adjustments not specifically covered by the basic legislative provisions and largely free from the restraints of judicial process, the Congress and the courts play a crucial and continuing role in molding the policies and practices of control which it enforces and keeping them within the bounds of legal validity. The very existence of the Commission, no less than the adequacy of the financial resources at its disposal, is of course dependent upon the will of the national legislature, and its jurisdiction is uniformly recognized as in all respects a statutory jurisdiction. Both the scope of its authority as to types of carriers and kinds of commerce embraced and the range of its substantive powers over these carriers and their commerce are expressly defined by legislative enactment, with far-reaching modifications in the legislative structure achieved from time to time by direct Congressional action, as the demands of changing conditions, manifesting themselves concretely through the interaction of established government policy and prevailing transportation practice, become sufficiently impressive to evoke effective public support. Perhaps the Commission's most distinctive characteristic as an administrative tribunal lies in the extensive grants of discretionary power with which it is clothed in connection with all aspects of its labors, but this vast authority is anchored, none the less, not only in the ultimate objectives and guiding standards deliberately formulated by the Congress, but in the procedural safeguards against arbitrary translation of these objectives and standards into concrete arrangements, centering around the requirements of notice and hearing, which likewise constitute an integral part of the legislative structure. In the last analysis, furthermore, the courts operate as an effective bulwark against abuse of administrative power. In conformity with the unequivocal legislative intent, variously and repeatedly disclosed in the entire course of statutory development, that dominant reliance be placed upon the Commission, as the tribunal "appointed by law" and "informed by experience," for the execution of Congressional policy and the application of its controlling principles in the field of transport regulation, the courts decline to interfere with such of its determinations as involve the lawful exercise of judgment and discretion. Preliminary resort to the Commission is required in such circumstances before judicial process will attach; so-called negative orders, through which the relief sought has been denied by the Commission, are held not to be reviewable; and the Commission's affirmative orders are not disturbed because of any adverse judicial conviction concerning the wisdom or expediency of the resulting adjustments. With the exercise of discretion as of the very

essence of the contemplated administrative action, the courts appropriately refrain from substituting their judgment for that of the Commission in testing the legal validity of its determinations. But this self-denying attitude, designed to give effect to the characteristic advantages of the administrative method of control responsible for its original adoption and subsequent development, involves no sacrifice of essential safeguards. The bounds of the Commission's power are constantly held in view by the courts, and all rights and interests affected by findings and orders transcending these bounds are accorded as a matter of course the unquestioned benefits of judicial protection. While censorship is thus centered, essentially, in whether the Commission possesses the power sought to be exercised, the problems which emerge in review proceedings are not confined to the single issue of statutory construction and the scope of authority supported thereby. Unconstitutional assertions of power, whether through the basic legislative provisions or through administrative determinations in execution of authority legitimately conferred, are of course subject to restraint; and findings and orders unsupported by substantial evidence or made in palpable disregard of the circumstances and conditions disclosed of record, as well as those involving the neglect or misapplication of controlling legal rules, likewise evoke judicial condemnation. In other words, private rights and interests are being continually protected against mistakes of law and abuses of discretion tending to issue in arbitrary action, and not merely against direct departures from the limitations established by constitutional and statutory authority. With judicial review an integral part of the regulatory system and with insistence by the courts upon adherence to due process broadly conceived, there has been little occasion for concern lest the Commission's administrative performance endanger the supremacy of law. The fact that relatively few of its determinations have been invalidated on any ground and that adverse judicial holdings have been consistently accepted as authoritative guides to future action reflects the Commission's own appreciation that administrative control, to be durable as well as effective, must be developed as an organic expression of the legal structure as a whole.

Similarly, the concern often expressed over the Commission's infringement upon the separation of powers is grounded more largely in disturbance over appearances than in the menace of realities. That the performance of its numerous tasks involves a marked blending of functions—legislative, executive, and judicial—cannot be gainsaid; but this admixture of functions, as in connection with the more traditional forms of administration, manifests itself for the most part in the processes essential to the sound and effective achievement of its primary purposes rather than in the independent exercise of separable types of govern-

mental power. The propriety of performance of executive functions by an administrative arm of the government raises little question; the source of difficulty is generally alleged to lie in the exercise by the same tribunal of both legislative and judicial functions. But as a regulatory tribunal designed to further positive public ends, the Commission's powers are predominantly legislative in character, and such judicial functions as it exercises are largely incidental to the proper performance of its legislative duties. In their essence these duties involve the completion, for particular situations and in concrete detail, of the legislative acts of the Congress which provide governing policies and guiding standards. Such delegation of ancillary law-making power is indispensable to sound and effective control, and with the safeguards furnished by Congressional enunciation of basic policies and standards it has uninterruptedly elicited judicial approval. Since the Commission is principally concerned with the establishment of proper relationships for the future, both in its settlement of controversies over prevailing adjustments and in its supervision of proposed courses of action, its investigatory activities and the preliminary findings resulting therefrom are but incidental to the exercise of directing or enabling powers of a law-making character. When, for example, existing rates and charges are found to be unreasonable or discriminatory, this finding, though of a judicial nature, merely constitutes an unavoidable step in the prescription of reasonable or non-discriminatory rates to be charged in lieu thereof under the circumstances and conditions disclosed of record. Only in the reparation awards which frequently accompany such determinations does judicial authority appear to be exercised in any real sense, and even then the awards are enforceable, not by their own terms, but by resort to the courts, and with the Commission's findings and orders but *prima facie* evidence of the facts stated therein. The reparations function, moreover, is not an essential part of the regulatory process, and the Commission has soundly recommended at times that it be relieved of the burdens imposed by its exercise. Viewing the regulatory structure as a whole, it is the Commission's employment of quasi-judicial methods, rather than the judicial character of any of its determinations, which is of prime significance, and the use of these quasi-judicial methods tends to mold its exercise of legislative power constructively rather than to threaten subversive infringement upon the domain of judicial authority. The Commission's inquiries are analogous to those conducted by legislative committees as preliminaries to acts of law-making, except that they are mandatory rather than optional in most aspects of its activity, that they are usually incidental to the establishment of specific adjustments rather than to the formulation of general policies, and that the results which issue therefrom are subject to a much more stringent judicial review than the corresponding enactments of

legislatures. These inquiries, directed to the fashioning of concrete determinations, are characterized by orderly methods calculated to safeguard all relevant rights and interests; but since their underlying purpose is to root the exercise of discretion, with respect to appropriate future relationships, in all facts and circumstances essential to sound judgment, rather than merely to adjudicate particular controversies growing out of past transactions on the basis of immediately pertinent but often artificially controlled records, they are expressions of administrative resort to broad investigatory power and are largely free from the hampering procedural restrictions of traditional legal processes. Complaints are entertained from whatever source they may arise; proceedings are initiated even in the absence of complaint; much latitude is allowed in the submission of evidence; reliance is continually placed upon the assistance of the technical staff; and rules of practice are enforced which assure orderly but simple procedures. These quasi-judicial methods make possible a realistic and flexible adjustment of the Commission's determinations to the distinctive circumstances of each proceeding, to the organic requirements of the regulatory system as a whole, and to the changing demands of constantly changing conditions. They enrich the process of law-making, in so far as legislative authority is properly delegated to the Commission, rather than encroach upon the performance of the judicial function.

The administrative method of control, as exemplified in the Commission's activities, is probably established beyond recall, and more fruitful results are bound to flow from efforts looking to its improvement than from outright condemnation of its use. Such improvement, in the field of the Commission's jurisdiction as elsewhere, may be effected in a variety of ways: through increased emphasis upon a strong personnel; through more ample provision of financial support; through greater vigilance against executive interference with administrative independence, whether by manipulation of the appointing power or otherwise; through more vigorous resistance to legislative recognition of special political influences, whether by concession to disgruntled litigants or to other pressure groups; through greater consistency by the courts in the restriction of judicial review to matters of administrative power; through more meticulous attention by the administrative tribunals to the importance of orderly procedures, careful findings, and reasoned determinations. Only by means of this character, coupled with complete relinquishment of obstructive tactics, can the possibilities of the administrative method be fully realized. While the Commission's processes and practices, which have pointed the way in many directions, are subject to continuing development and betterment, its record of half a century has clearly demon-

strated that there is no basic conflict between regulation by an administrative tribunal and the preservation of essential legal values.

There can be no certainty as to the future pattern of our commercial and industrial arrangements, either in the general economic sphere or in the special field of transportation. It may well be that a larger degree of public enterprise, in one form or another, will eventually displace our prevailing reliance upon private initiative, not only in connection with public service undertakings, including transportation, but throughout the economic order. Under such conditions the functions of management and regulation would tend to be fused in governmental authority, and the problems of control would manifest themselves for the most part in a guise far different from that which has traditionally shaped the character and direction of the regulatory process. Even in these circumstances, however, the numerous complexities of transport relationships, particularly in the matter of rates and charges, would require continuous adjustment, and the results of the Commission's vast, intelligent, and impartial labors would tend to exert a determining influence upon policy and practice. Under the existing economic system, with which we are primarily concerned, the type of regulatory structure evolved in the past half century of federal administrative activity in the field of carrier control has constituted the most orderly and fruitful instrument available for avoiding the pitfalls of both unrestrained individual freedom and outright collective action. It has attempted to harmonize the maintenance of established institutions and the attainment of changing objectives; it has sought to safeguard the essence of the prevailing order, but to direct its concrete manifestations into channels of public welfare; it has aimed to conserve the significant gains of past effort, to remove emerging maladjustments, and to establish arrangements so fashioned as to meet future needs. The Interstate Commerce Commission, as the outstanding agency of this character, has achieved a high degree of effectiveness in its own sphere and has contributed substantially to the development of the general essentials of sound regulatory process.