

## The Creative Regulator

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*[C]reativity is never simply the achievement of a lone individual or even a small group. Rather, creativity is the occasional emergent from the interaction of three autonomous elements: (1) The individual who has mastered some discipline or domain of practice and is steadily issuing variations in that domain.... (2) The cultural domain in which an individual is working, with its models, prescriptions, and proscriptions.... (3) The social field—those individuals and institutions that provide access to relevant educational experiences as well as opportunities to perform.*

— Howard Gardner, *Five Minds for the Future* at pp. 80-81 (citing the work of psychologist Mihaly Csikszentmihalyi) (emphases in the original)

Today's regulatory challenges resist on-the-shelf solutions. In energy, we face overconsumption, excess emissions, the need to mesh new renewable sources with old fossil units and to integrate wholesale competition with retail monopolies. In telecommunications, we still struggle to find the appropriate mixes of competition and regulation, while redefining universal service to accommodate society's dependence on the internet. In water, we search for a stable compromise between local management and regional economies of scale, between our need to improve infrastructure and our consumers' concern about price rises. Our century of experience provides plenty of principles; their application calls for creativity. Let's look at Gardner's three requirements.

“The individual who has mastered some discipline or domain of practice and is steadily issuing variations in that domain....” Chapter 27 talked of mastering the discipline of regulation. Looking around our organizations: Can we identify people who are “steadily issuing variations in that discipline”? Are there people who are “perennially dissatisfied with current work, current standards, current questions, current answers”? Gardner at 83. People who seek “to extend knowledge, to ruffle the contours of a genre, to guide a set of practices along new and hitherto unanticipated directions”? *Id.* at 98-99. People “motivated by uncertainty, surprise, continual challenge, and disequilibrium”? *Id.* at 99. Do we attract, recognize, and encourage these individuals?

U.S. regulation has a consistently large percentage of new commissioners, new to the field. We can make their newness a weakness or a strength. Many have the ability and urge to create, but confess that their newness invites others to stifle that urge, to warn the new commissioner, “You can't do that, we haven't done that before, you don't want to get out in front.” Newness thus becomes a weakness, if we disable their creative potential by discouraging their ideas or by making mastery unnecessarily difficult. Newness becomes a strength if we (a)

view the newcomer as unhampered by old habits, as already “disciplined” about the important things (like establishing clear missions, fostering openness, living with gradualism); and then (b) connect that person with those who have mastered regulation but who also crave creativity. Pairing creativity with mastery can produce the “steadily issuing variations” that Gardner describes.

“The cultural domain in which an individual is working, with its models, prescriptions, and proscriptions....” Regulation’s “cultural domain” has features that both inspire and impede creativity. Among the inspirations is the injection of issue challenges falling outside traditional utility regulation but unavoidably connected to it—disseminating broadband, responding to climate change, addressing affordability during a down economy, introducing regionalism into a state-based regulatory system. Unlike rate of return, depreciation, and prudence, these challenges have no precedent; they press regulators toward new solutions. Regulatory culture also facilitates creativity through its procedural flexibility, allowing commissions to frame questions, gather experts, and seek ideas.

At least five factors can impede creativity. (1) If the dominant voices in regulatory proceedings are not objective experts but competing interests, it is hard to maintain the clearheadedness, the unpressured mental balance, necessary for creativity. (2) If the ratio of work to workers, and of deadlines to days available, is unfavorable, creativity becomes more luxury than necessity. (3) Asymmetry of knowledge and expertise between regulator and regulated can cause commissions to favor the familiar, avoid options with unclear consequences. (4) The inflexibility of civil service rules can slow efforts to realign staff skill sets with the new regulatory challenges. (5) Finally, creativity often results in failure. Gardner 83. Does our regulatory culture accommodate experiments and failures, or does the risk of judicial or legislative reversal cause commissions to avoid creativity?

“The social field—those individuals and institutions that provide access to relevant educational experiences as well as opportunities to perform.” The access-providers, Gardner asserts, should see themselves as incubators of creativity, responsible for attracting and exposing new ideas, for giving the spotlight to risk takers. A commissioner recently asked me about speakers on “something like the newest, latest technology in the world.” That’s a commissioner looking to spur creativity.

Here are some thoughts on how to replicate that commissioner’s approach:

1. Look for the most knowledgeable people; they are not always the most prominent people. The control room operator who watches the power plants ramp up and down as the system’s wind generators ramp down and up can explain the challenges of intermittency better than the utility spokesperson whose position is opposition.
2. Look for people unaffiliated with entities having business before commissions. Among the best speakers I’ve observed were professors, employees of the DOE-funded national

labs, and researchers from consulting firms with client bases so diverse that their independence is unquestionable.

Given limited air time, these efforts at diversity can cause disgruntlement. NRRI once hosted a teleseminar on the “expanding universe” of commission authority. Within 48 hours of the program, we absorbed two arrows: A Midwest utility official complained that the program focused only on the “public interest and the consumer interest” but had no representative of the “utility interest.” A consumer advocate criticized us for having no consumer representative.

Had we made two mistakes or no mistake? The program’s subject was not about utilities versus consumers, but about the expansion of regulatory authority and the institutional changes that might be necessary to handle that expansion expertly. The speakers were a law student and his professor, who had coauthored the paper; a commission chair whose long experience as a legislator and regulator made her an optimal discussant; and a regional transmission organization official responsible for coalescing multiple state commissions toward a regional plan—a task requiring reinterpretations of century-old state statutes. We based speaker selection on relevant experience, not interest-group representativeness.

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Gardner describes three prerequisites for creativity—disciplined individuals with the urge to vary, a cultural domain that makes space for those variations, and a social field that invites and rewards these efforts, while tolerating failure. In today’s regulatory profession, all three are present. Can we move these three features from presence to prominence?