

## I. SYMPOSIUM ON REGULATORY POLICY ANALYSIS

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### A. Studying Regulatory Policy: Conceptual and Theoretical Problems

#### REGULATORY POLICY ANALYSIS: WORKING IN A QUAGMIRE

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Regulatory policy is high on today's working agenda for both policy-makers and policy analysts (Dubnick, 1981). Of course, public decision makers and academics have been concerned about regulation-related issues for nearly a century, and like other areas of government activity regulatory policy has been up and down the issue attention cycle several times over the past decades. Yet the latest upswing in that cycle is unique for two reasons: first, its longevity and scope; and second, the fact that the generic activity of regulation is itself central to the issues being debated and analyzed.

While it is difficult to pinpoint an exact time when the regulatory policy issue cycle shifted direction, the release of the 1975 *Economic Report of the President* is certainly a key event. Issues surrounding government regulation had been receiving increasing attention in scholarly circles during the late 1960s and early 1970s, especially among economists associated with the modern era "Chicago School" led by such notables as Milton Friedman (1962) and George Stigler (1975). In addition, the ongoing discussion among legal scholars, students of public administration, and government officials regarding the reorganization and reform of regulatory agencies continued unabated during that same period.<sup>1</sup> But it was not until economists advising President Ford convinced him of the relevance of government regulation to general economic problems that regulatory policy became a salient and constant feature of the national public agenda. The issue attention cycle has been up ever since, and it is likely to remain high with the election of Ronald Reagan.

The other unique characteristic of current discussions about regulatory policy is the focus on the problematic nature of regulation itself. The primary theme of most recent reform proposals and analyses is that regulation and other forms of government intervention can no longer be regarded as only possible solutions to public problems. Rather, regulation itself is perceived to be a major cause of public sector inefficiencies and related difficulties. In this context, "deregulation" has become a common political battle cry and editorials calling for the elimination or minimization of regulatory programs are frequently the subject of newspaper columnists. Articles reflecting that theme have found their way into scholarly journals in economics, political science, and related policy areas. Conferences and symposia on regulatory policy are common occurrences, and the focus is typically on the adverse impacts of regulation and what can be done about them. The topic has become so significant that those who deal with the subject now even have their own magazine (*Regulation*) published bimonthly by the American Enterprise Institute for Public Policy Research.

Regardless of all the significance attached to regulatory policy and its reform in recent years, even the casual observer is likely to get the impression that something is amiss in the way the issues are being handled. In spite of all the efforts devoted to understanding and dealing with problems associated with regulation, we seem no more informed today than we were at the turn of the century and no more capable of making significant changes in regulatory programs than we were when reforms were first contemplated.

When the editors first began to develop this symposium on regulatory policy analysis, it became evident that we were dealing with one of those elusive phenomenon which everyone knows about but no one can define to anyone's satisfaction. After many hours of trying to narrow the topic, it was obvious that we had hit upon the fundamental issue in public policy analysis—that is, the conceptual quagmire that envelops and consumes all those who enter the field of government regulation. This realization had both positive and negative implications for our project. On the positive side, it permitted us to take liberties with the topic of "regulatory policy" and thus allowed us the flexibility to consider proposals that covered a wide range of issues and disciplines. On the negative side, we had considerable difficulties intellectually organizing the meetings and publications associated with this symposium since we lacked a clear delineation of the topic.

In addition, it also became clear that the conceptual problem facing us as editors might be central to the problems facing policymakers and policy analysts who try to contend with regulatory policy problems. For that reason we devote this first article to a survey of the conceptual quagmire within which those who study (and those who seek to reform) regulation must work. We believe that only in that context can the reader appreciate both the efforts made by the contributors to this symposium and the many frustrations felt by policymakers who try to do something about regulatory policy problems.

## **"REGULATION-IS-EVERYTHING" DEFINITIONS<sup>2</sup>**

As we surveyed the various ways regulation has been explicitly or implicitly defined, five types emerged. These are not formal definitions in the dictionary sense, but "definitions-in-use" that become evident when we examined the way the concept of regulation has been handled in a variety of contexts. First, *regulation is what government does*. As offered at the outset of a special report for the U.S. Senate Committee on Governmental Affairs, this usage regards regulation as any government activity which "provides benefits and imposes restrictions..." thus giving a regulatory dimension to almost all things governments do (Committee on Governmental Affairs, 1977/78, Vol. I, p. v). A somewhat more focused definition presented in a Congressional Budget Office (CBO) study views government regulation as those activities "which somehow affect the operations of private industry or the lives of private citizens." In the words of that same study, "Such a definition would result in the identification of most federal activities as regulatory" (quoted in Mitnick, 1980:1).

The value of these definitions is questionable at best. In both the Senate and CBO studies, staff analysts had to develop "manageable" or "workable" definitions in order to carry out their studies. Among policy-makers this "regulation-is-everything" approach is of very limited utility for it provides no obvious or useful "handle" for bringing about changes in the regulatory policy system. If regulation is everything, then effectively it may be nothing.

Nevertheless, these definitions are of use in the rhetoric of policy debates or political campaigns. As with other terms frequently used in political contexts, regulation carries positive and negative connotations and can be used for either audience arousal or acquiescence (Edelman, 1964). When identified with the public control of undesirable behavior, regulation implies a positive government response and therefore can be used to stimulate or satisfy the need for (or acceptance of) a policy proposal or political candidate. If, however, public controls are themselves perceived as undesirable, then the rhetoric surrounding regulation will generate or reinforce many negative associations. In either case, regulation becomes synonymous with all government activities and is used as a "buzz" word in political campaigns. Thus, it is not surprising to hear a call for getting "government off the backs of the people" associated with suggestions that we must "deregulate" major sectors of the American economy. Under such conditions the identification of regulation with government policy in general is valuable for politicians who use it and analysts who seek insight into the regulatory policy agenda setting process. However, this definition is not very useful for understanding much else about the regulatory policy system or how to change it.

### TARGET-BASED DEFINITIONS

A second definition views *regulation as what government does to some special target population*. Here the focus is on the entity to be regulated, for in this definition the regulated subject provides the criterion for what regulation is. The logic of the approach is rather simple. Through a variety of rationales, certain sectors of society are determined to be so important or technically unique that their structure or behavior must be influenced for the public good. Legalistic rationales describe these entities as "peculiarly and sufficiently 'clothed' or 'affected with a public interest' . . ." (Kahn, 1970:3). Economists discuss them in terms of inherently decreasing cost industries (natural monopolies), businesses with production processes or products that generate undesirable externalities (polluters), or firms that provide basic services or products for the rest of the economy ("infrastructure" industries) (Pegrum, 1949, Chapter I; Kahn, 1970:11-12). Once this special status is achieved, these segments of society become subject to government interventions ranging from special tax breaks and subsidies to complete control through nationalization. Any and all of these government approaches often take on the title of "regulation," although the term is usually used to describe government activities beyond mere subsidies and short of nationalization. Under this definition what matters is not *what*

government does but *who* they do it to. There are no specific characteristics of the regulatory policy system itself attached to this idea of regulation.

That poses a problem for analysts and policymakers seeking to study or reform the regulatory policy system, for like the previous definition it offers no handle to use in either endeavor. Even more critical is the debatable nature of the rationales for determining if an entity should be "regulated." Both the legalistic and economic justifications for giving such special status to an industry or other social entity have been challenged (Steiner, 1977; Nelson, 1966); and even where accepted, questions have been raised regarding the need for and wisdom of government intervention (Friedman, 1962, Chapter VIII).

In spite of these and other problems, this "target-based" definition still plays a significant role in discussions about the regulatory policy system. In the political arena, one still hears the rhetoric of "affected with the public interest" as justification for creating, maintaining, or expanding government regulation in a variety of areas. Thus, as with the first definition, the target-based delineation is relevant for the analyst examining how and why regulatory policy issues reach the public agenda. For those interested in the regulatory policy system per se, however, it is of limited value for it fails to differentiate regulation from other forms of government intervention.

### "AGENCY" DEFINITIONS

A third definition holds that *regulation is what "regulators" do*. For a variety of reasons, certain government bodies become known as "regulatory agencies," and what these entities do—regardless of the types of actions, functions, or target populations involved—becomes government regulation. While they may be called regulatory because of the functions or actions they perform (see the "function" and "action" definitions below), these agencies may also carry that title for other, less rational reasons.

For example, the term "regulatory" may have been applied during the policy formulation and legitimation phases which eventually led to the agency's establishment, and as a result the label "stuck." To understand how this happens, we must again take note of the rhetorical uses of regulation. In a period or situation when direct and forceful government intervention is deemed desirable, the idea of regulating carries considerable symbolic weight. To label a proposed agency "regulatory" would therefore enhance its chances for passage. The resulting statute may even include provisions that could lead to the performance of regulatory functions or actions if strictly administered. However, effective implementation is not necessarily guaranteed. "Tangible resources and benefits," argues Murray Edelman (1964:23), "are frequently not distributed to unorganized political group interests as promised in regulatory statutes and the propaganda attending their enactment." When this occurs "the deprived groups often display little tendency to protest or to assert their awareness of deprivation."

The fervent display of public wrath, or enthusiasm, in the course of the initial legislative attack on forces seen as threatening the little man, is a common American spectacle. It is about as predictable as the subsequent lapse of the same fervor (Edelman, 1964:24-25).

While Edelman applies this generalization to many federal regulatory agencies, it is more applicable to some than to others. The Shipping Act of 1916 is a prime example, for while the rhetoric of its passage and statutory provisions are regulatory and pro-shipper, it proved to be the foundation for a Federal Maritime Commission that (in its various historical forms) has been an effective supporter and *non*-regulator of carrier interests (cf. Mansfield, 1980).

A related reason for calling certain agencies "regulatory" is that while they may not perform regulatory functions or actions today, they did so initially but have since changed their mode of operations. This phenomenon has been described in the classic "life cycle theories" (Bernstein, 1955; Downs, 1967; also Plumlee and Meier, 1978 and Mitnick, 1980:44-78). The regulatory body typically began life as an active and strident enforcer of its regulatory mandates, but for a variety of reasons (e.g., ambiguities in the mandate, reduced public support, strong organized opposition from the regulated interest) they became more passive and apathetic with age. Unless a crisis or scandal intervened, the agency was eventually "captured" by regulated interests or rendered so ineffective that its impact could be discounted by regulated populations. Despite these developments, the regulatory powers which characterized the agency's youth endured in the abstract, thus resulting in the use of the label "regulatory" to describe the agency.

Still another (but perhaps the weakest) reason for an agency to be called regulatory in spite of its actual responsibilities or activities has to do with its structure. Regardless of whether the multimember "commission" form was initially an "historical accident" or a rationally developed alternative to hierarchical bureaus (cf. Bernstein, 1955 and Committee on Governmental Affairs, 1977/78, Vol. V, pp. 26-32; also Mitnick, 1980: 27-34), this type of agency structure is so frequently associated with government regulation that the distinction between the two is often blurred. The Congressional tendency to use the "independent" commission form "was... encouraged by the success of the Interstate Commerce Commission, which enjoyed widespread respect in its first decades of existence." That tendency was further enhanced by a desire to establish agency forms that could stand "apart from the rest of the government in general, and from the White House in particular" (Committee on Governmental Affairs, 1977/78, Vol. V, pp. 30; also see Seidman, 1980:252-256). But the independent regulatory commission was not the only type of multimember body established by Congress. Early examples included a board of tea-tasting experts established at the turn of the century to recommend standards of tea purity to the Secretary of the Treasury. A more significant example was the formal creation of the Tariff Commission in 1916 which studied and monitored tariff laws, advised Congress on tariff policies, and

recommended changes in U.S. trade policy to both the President and Congress (Noll, 1971:60-62; Bauer, Pool, and Dexter, 1972). While neither body actually made regulatory decisions or implemented regulatory policies, analysts would be inclined to include them as regulatory agencies given their structural resemblance to independent regulatory commissions and their indirect association with regulatory functions. In some cases, this association may have the effect of a self-fulfilling prophesy. For example, the Tariff Commission (now called the International Trade Commission) has been given substantially more authority in recent years, although its recommendations must still meet with the approval of the President and, at times, Congress.<sup>3</sup>

In summary, an agency can be called "regulatory" whether or not it performs regulatory functions or actions. The point here is that once that label is attached to an agency, regulation tends to become whatever that agency does.

The major difficulties with these "agency" definitions lies in the risk that those who use it are likely to commit errors of omission or commission. For instance, by defining regulation as what so-called regulatory agencies do, one may overlook the regulatory functions or actions undertaken by non-regulatory bodies. This problem may plague practitioners as well as analysts. "The Department of Agriculture is literally swamped with regulatory functions," states James Bonnen: but many "of these are not even conceived of as . . . regulatory by those who execute them" (Noll, 1971:72-73). The institutional idea of regulation has such a tight hold on the perceptions of many analysts and policymakers that it may blind them to the reality of regulatory policy functions or actions.

At the same time, there are examples of functions and actions performed by those agencies which might be regarded as regulatory even though they could not live up to more substantive and technical definitions of the term. The EPA, for instance, undertakes research into the health and ecological effects of pollutants, and while these investigations may have little or no direct or immediate impact on regulatory functions or actions, they are still usually analyzed as if they were regulatory policy activities (Marcus, 1980:110-111). A contrasting example is found in the work of the National Bureau of Standards (NBS). The NBS is not often regarded as a regulator; it has a greater reputation for the technical and research services it provides for the private sector. Nevertheless, NBS performs many regulatory functions through its constitutional, statutory, and contractual standard-setting authority (see Dubnick and Walker, 1979). The difficulty analysts and others may have in making these distinctions is attributable in large part to the frequent use of the agency definition of regulation.

In spite of these significant drawbacks, the agency definition is quite useful. Its primary virtue is that it simplifies analytic and policy-making tasks by providing concrete focal points for discussion and change. Using institutional parameters to designate what is or is not regulatory, one is not only able to specify what constitutes regulatory policy (what institutional actors do) but one can also focus on key agency variables (e.g.,

structures, procedures, personnel) when investigating the causes and conditions of regulatory policy failure. In short, the agency definition provides what the previously discussed usages do not: "handles" which can be operationalized, scrutinized, and changed when necessary. Thus it is not a view of regulation that we can easily dismiss.

### "FUNCTION" DEFINITIONS

The fourth definition-in-use relevant to both analysts and policy-makers views *regulation as the performance of "regulatory" functions*. The key here is, of course, how one defines a regulatory function. In an early attempt, Koontz (1942) provided a descriptive list of "control"-oriented government activities: public service industry controls, controls over extractive industries, controls over labor-management relations, controls over financial institutions, etc. Bernstein (1961) offered a similar list, although he stresses the programmatic nature of government regulation: competition programs to promote the effectiveness of the marketplace, public utility programs where competition is perceived to be inappropriate, financial programs to protect basic fiduciary relationships, etc. Still another function-based approach reflects the long-standing association of regulation with the control of public utilities and the idea that regulation entails price-setting, the awarding of franchises, the prescription of service obligations and standards, and so on (Kahn, 1970:3; and Noll, 1971: Chapter 3).

Two attempts to develop analytically useful concepts of regulatory policy deserve special note for the insights they give us about the functional definition. Lowi (1964 and 1972) noted the differences between three types of policy arenas: distributive, redistributive, and regulatory. Basic to those differences was the quality of resources at stake in the policymaking process. In the distributive arena those resources are easily "disaggregated and dispensed unit by small unit." In the redistributive arena, the resource-derived benefits and costs of policy decisions are allocated among broad categories of social classes. In the regulatory arena, however, the resources in question are desired by two or more narrowly defined interests but cannot be satisfactorily disaggregated and distributed among them. The result is a confrontation between those competing groups as they fight for a favorable policy decision. In this context, regulatory functions are those which government undertakes to settle zero-sum disputes among contending special interests. (Also see Ripley and Franklin, 1980: for a critique see Dubnick, 1979.)

Mitnick's (1980) attempt to develop a definition of regulation provides perhaps the most useful delineation of what constitutes a regulatory function. He explores various meanings of regulation and builds toward the idea that it is a "process consisting of the intentional restriction of a subject's choice of activity, by an entity not directly party to or involved in the activity" (p. 9). What is interesting about this and other functional definitions is that they deemphasize the questions of *who* regulates and *how* they go about their tasks while emphasizing the desired *consequences* (restriction of choices) of government activities.

The utility of functional definitions is a mixture of both possibilities and limitations. On the one hand, they allow analysts and policymakers to focus attention on the consequences of many government activities. The consequences become more significant than the institutional forms and actors that undertake the regulatory functions. Among other things, this facilitates the comparative assessment of regulatory policies and helps point out both the strengths and weaknesses of many government programs. On the other hand, since they tend not to include specifics about what agencies or actions are involved in carrying out regulatory functions, these definitions do not provide the analyst or policymaker with the handles that are needed for detailed policy studies or effective reform. Despite these limitations, function definitions have been put to considerable use in recent years. Among analysts, economists have become nearly fixated on the consequences of regulatory policy; while among policymakers, there has been an evident shift in perspective from agency-based to function-based views as debates over regulatory policy focus more and more upon the impacts of regulation rather than the effectiveness or efficiency of institutional forms (see McCraw, 1980).

### "ACTION" DEFINITIONS

The fifth definition-in-use views *regulation as the performance of "regulatory" policy actions*. As intentional behaviors by government officials (or their sanctioned agents), policy actions constitute the most basic operational form a policy can take. It is at this level of analysis that regulatory agencies do their "thing" and regulatory functions are carried out, although in neither instance is any particular form of policy action involved. And it is at this level that the true and distinguishing nature of regulation—its ultimate reliance on coercion (see Neiman, 1980)—becomes central to the concept.

There have been several attempts to define regulation in policy action terms. One analyst (Balch, 1980) views regulation as one of several "strategies" used to change target population behavior. As an alternative to information (providing knowledge), facilitation (making the desired behavior easier to undertake), and incentive (relying on market and pricing mechanisms) strategies, regulation "requires" individuals to do something "under threat of penalties such as fines or imprisonment" (Balch, 1980:45; also see Gardiner and Balch, 1980).

Another policy action definition was developed by three Canadian researchers (Priest, Stanbury and Thompson, 1980). In distinguishing regulation from other types of policies (e.g., "moral suasion," expenditures, taxation, public ownership), they draw attention to the primary role of rules and commands in regulatory policy. They regard regulation "as the imposition of rules by a government, backed by the use of penalties, that are intended specifically to modify the . . . behaviour of individuals and firms in the private sector."

Still another version of an action definition (Dubnick, 1979) offers a delineation of regulation based on three characteristics: the target population involved; the "operational lever" used in the action; and the extent to



which the targeted population is directly approached. The target population can be either (a) specified individuals or firms; (b) "sectors" of the social or economic systems (e.g., the elderly or the passenger airline industry); or (c) all members of society (this form of regulation usually is found in criminal law). The operational levers are those characteristics of the target population which policy actions can effect: e.g., size, structure, resources, risk/liability, behavior. Finally, the actions taken can be either direct or indirect. Given these three dimensions, there is obviously a great variety of policy action options available to policymakers. Within this context, regulation is defined as policy actions by governments (or their sanctioned agents) which intentionally and directly proscribe or prescribe the behavior (or behavioral norms) of individual, sectoral, or societal populations.

With varying degrees of specificity, all three versions of policy action definitions provide analysts and policymakers with a useful concept to study or change government regulation. But this utility is obtained at a cost, for this view is so narrow and specific that it excludes significant dimensions of regulatory policy while highlighting some of the more mundane and unimportant examples of government regulation. As a policy action, regulation is applicable to both administrative and substantive rules handed down by government agencies. Administrative regulations can be found in even the least regulative of government programs, and while some of these may have important substantive implications (e.g., the 55 m.p.h. speed limit requirement for states receiving federal highway funds), many more are merely intended to facilitate or improve agency operations. Taken in its purest form, the policy action definition fails to make a clear distinction between administrative and substantive regulation. To do so would mean developing a much more elaborate and awkward policy action concept.

However, even assuming that such a clear distinction can be made, the taking of substantive regulatory actions need not necessarily be equated with regulatory policy. Regulatory actions can be used to fulfill non-regulatory functions by either regulatory or non-regulatory agencies. As a set of regulatory actions, the Internal Revenue Code is used to perform revenue-raising functions. On the other side of that coin, there are many advocates for using revenue-raising actions to perform such regulatory functions as pollution control (see Committee on Environment and Public Works, 1977). In short, even this most basic definition of regulation poses major problems for regulatory policy analysts and decision-makers. Yet, it too cannot be dismissed for these reasons when one considers just how much influence this perspective has had.

### **AN OUTLINE--AND A WARNING**

The implications of having to contend with these five views of government regulation become evident as one tries to make sense of the many criticisms and analytic studies associated with regulatory policy. The conceptual quagmire we've stepped into is, like all such terrains, easy to enter

but difficult to leave. What makes matters worse is our inability or unwillingness to deal with the conceptual problem. Despite the many frustrations suffered by both regulatory policymakers and policy analysts, few have found it necessary to extricate themselves from the quagmire. Rather, most continue to move deeper and deeper into the muddy trap. They cling to narrow perspectives and models which provide very little help in clarifying or dealing with public problems associated with regulation.

In one sense, the papers collected for this volume are no different from the general literature on government regulation. Most of the articles fail to focus on a specific conception of regulation and the results are evident in the mixture of topics found in this symposium. Yet, in another sense these papers are different from the "mainstream" literature on the subject; in fact, these articles either challenge the current state of regulatory policy analysis or take it in new directions. William D. Berry directly challenges the utility of current theories of regulation and advocates the development of a more inclusive framework while Mitnick offers a brief description of one such theory. The next four articles attempt to explain, critique and apply various approaches to regulatory reform. Berman demonstrates how regulatory reforms are guided by the advocate's paradigm. Samuels and Shaffer provide an insightful critique of the arguments used to justify reforms by "deregulation." Hahn and McRae advocate the use of market mechanisms in pollution abatement and in the process provide us with an articulate presentation of that reform's logic. Finally, Marcus and his colleagues offer a rationale for including implementation analyses in the development of regulatory policy alternatives.

The politics of regulation are central to the next three papers. Anderson examines the relevance of "capture" theory to the newly created Texas Public Utilities Commission, while March provides a description of the Colorado Sunset review process and its "political" implementation. Jeffrey M. Berry's contribution is an insightful analysis of the relationship between interest group behavior and regulatory reform.

The assessment of regulatory policy can be accomplished using either quantitative or qualitative approaches, and the next four selections represent that complete range. Kleiner and colleagues use econometric models to examine the impact of occupational licensure restrictions on the costs of various services. Lipscomb uses a similar approach in his studies, but in this article he undertakes a critical evaluation of those analytic methods. While they do not rely on sophisticated quantitative models, both Tobin and Halpern offer insightful assessments of two automobile safety regulatory programs.

The last four articles demonstrate that we cannot ignore structural and institutional factors in analyzing regulatory policy. Kamerschen and his colleagues provide empirical evidence that links five political variables to the level of electric utility rates. Calvert and Weingast argue the relevance of congressional influence when developing regulatory reforms. Bullock and Regens examine the role courts have played in the area of civil rights enforcement. Finally, Rowland and Marz develop an interesting application of Gresham's Law to regulatory policy implementation and, in the process,

show that intergovernmental relations are significant for effective enforcement of government regulations.

Collectively, these articles reflect the variety of topics and analytic perspectives that characterizes regulatory policy studies today. It is obviously a fertile policy arena where policymakers and policy analysts need to cultivate a greater understanding of the problems and possible solutions associated with government regulation. If there was one piece of advice we offer to them, it is simply: beware the quagmire!

#### FOOTNOTES

1. For example, Nixon's Ash Council issued its report in 1970, but it added nothing new or significant to the discussion of regulatory agency power or executive organization. See Noll 1971 for a detailed critique.
2. The authors would like to thank Kathy Newcomer, John Comer and the Department of Political Science, University of Nebraska-Lincoln, for permission to use some of the following material which was originally presented at the Sixth Annual Hendricks Public Policy Symposium, (March, 1981).
3. A more significant (although arguable) example is the National Labor Relations Board (NLRB). Noll has noted the uniqueness of the NLRB as a "regulatory commission" which is more a "referee" than a resolver of conflicts.

The NLRB does not make decisions in lieu of a market; rather it defines the rules that the parties to a dispute must abide by and determines what constitutes fair behavior by each party. If the NLRB were like other agencies, it would be required to decide the terms of the final bargain between labor and management (Noll, 1971:50).

Assuming that we accept this view of regulation as government decision-making "in lieu of a market" (and, as we see below, this is but one alternative among many possible views) it could be argued that the NLRB is usually regarded as a regulatory body in spite of the fact that it does not technically carry out or impose regulatory decisions; that is, it is regulatory in form and reputation only. The same can be said for a variety of other commissions at the national and sub-national level that enforce "rules of the game" instead of making primary decisions.

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