LAW AND CONTEMPORARY PROBLEMS

Foreword

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On November 13-14, 1992, *Law and Contemporary Problems* hosted a conference at Duke Law School, sponsored by the Olin Foundation, entitled "Regulating Regulation: The Political Economy of Administrative Procedures and Regulatory Instruments." The conference papers published here reflect the growing influence of the positive political theory ("PPT") of institutions in studies of traditional legal questions of administrative and constitutional law. The articles were written by political scientists, legal scholars, and economists using a variety of methodologies: game theory, leading case analysis, case studies, and statistical testing (including regression analysis). Taken together, the articles focus attention on a large number of the actors involved in translating legislative proposals into effective regulations: congressional committees and coalitions; executive and independent agencies; the president and the executive branch (especially the Office of Management and Budget ("OMB")); the Supreme Court; appellate courts; interest groups; and voters, who often lurked behind the scenes in the articles as the source of positions taken by reelection-minded legislators.

Two themes unite these disparate articles: the roles that information problems play in the development and implementation of rules, and the impact of institutional structure on regulatory policies. The statement that delegated decisionmaking—whether it involves Congress granting discretion to an agency or legislators authorizing committees to act as their agents—involves information problems is not "news" to scholars familiar with principal-agent models. The ability of regulators to use hidden action and hidden information to further their own policies that may not be explicit in statutory language is part of the story of tradeoffs between delegation and monitoring. What distinguishes the conference papers is an attempt to determine the circumstances under which information

conveyed by words and actions by legislative, judicial, executive, and interest group actors can be credible and informative. Drawing on lessons from signaling models in the economics of information, the authors emphasize how costly action can convey information about the preferences and plans of parties involved in the regulatory process. This point is summarized in two different articles by the maxim "actions speak louder than words." The signals discussed in the regulatory environment include the attempts by congressional coalition leaders and committee members to indicate to the courts the "meaning" of a statute, the ability of interest groups to convey information about the nature of agency actions to Congress, and the efforts by the Supreme Court to indicate to appellate courts the policies to adopt with regard to agency discretion. While an emphasis on the meaning of words and deeds is not new in models of administrative law, these articles take new analytical steps toward deriving the circumstances under which particular statements and actions convey information in the interpretation of statutes or monitoring of agency action.

The second conference theme is one of the mantras of PPT: structures shape outcomes (or, in other words, procedures produce policies). The articles address many different questions involved in administrative law, for example: How or why should courts look to congressional intent in statutory interpretation? Are members of Congress, judges, or the agencies dominant in the development of regulations? What roles do the president and OMB play in regulatory politics? Each article, however, focuses on the power of institutional constraints to shape the policy outcomes chosen. The mix of mathematical models, legal analysis, and statistical testing in these articles should provide scholars interested in advancing the theories of regulation and administrative law with new tools and evidence to understand the policy environment. Results that emphasize how incentives in policymaking structures affect outcomes should also be of interest to those designing changes in the procedures that govern rulemaking and regulation.