

Law 932: Selected Problems in Administrative Law: Regulatory Reform

3 Credits

Time-1:20-3:20pm Mondays

Instructors: David M. Trubek and Louise G. Trubek

This seminar explores new approaches to regulation and their implications for law, policy, and public administration. Critics of government regulation and the administrative state from the left and right have called for alternatives to conventional top-down, command and control regulatory systems. New approaches involving devolution, public-private partnerships, negotiated regulation, network creation, coordinated data collection, benchmarking, monitoring, feedback, and revisable standards are being tried out. This type of "new governance" changes the way law is created and administered. It restructures relationships among markets, government and the professions and re-opens the age-old issue of how best to maintain social and environmental values in a market economy.

The new governance movement has led to regulatory reform in the US and elsewhere. In the US there have been experiments at federal, state, and country levels. In Europe, reform has occurred at the level of sub-national regions, individual nation-states, and the European Union.

The seminar will examine selected reform experiences. We will ask what is "new governance", whether it is really new, how these approaches work in practice, why they are getting attention today, and what critics have said about the risks involved in these changes. The seminar will pay special attention to the relationship between new governance and traditional legal tools, asking whether the new approaches are complimentary to traditional regulation or in competition with them. We will also look at what these changes mean for the role of lawyers.

The seminar will be linked to a workshop to be organized by the Wisconsin Project on Governance and Regulation (WISGAR) (<http://www.law.wisc.edu/ils/wisgar/>). The workshop will bring practitioners and regulators together to explore recent developments in regulatory reform in the area of environmental protection.

Students will be expected to select an area of regulatory reform for detailed study and will be expected to present their findings at the end of the semester. Students may study reforms in Wisconsin, other US states, the federal government, or Europe and may work individually or in teams.

The seminar is open to law students and graduate students in other schools and colleges. In addition to writing papers of 20 pages or longer, students will be expected to write several short response papers dealing with the readings assigned for class sessions and attend the workshop.

David M. Trubek is Voss-Bascom Professor of Law and Senior Fellow of the UW Center for World Affairs and the Global Economy. Louise G. Trubek is Clinical Professor of Law and directs the Health Law Project. They are co-directors of WISGAR.

September 11 – Introduction

Simon, William H. (2004) “Solving Problems v. Claiming Rights: The Pragmatist Challenge to Liberal Legalism”, 46 *William and Mary Law Review* 127

Trubek, David and Louise Trubek (2005) “Hard and Soft Law in the Construction of Social Europe: The Open Method of Coordination”, 11 *European Law Journal* 343

Scott, Joanne and David Trubek (2002) “Mind the Gap: Law and New Approaches to Governance in the European Union”, 8 *European Law Journal* 1

September 18 – New Governance in Action: U.S.

Fiorino, Daniel J. (1999) “Rethinking Environmental Regulation: Perspectives on Law and Governance”, 23 *Harv. Envtl. L. Rev.* 441

Bochert, Linda H. (2005) “Green Tier: What is it Anyway?” *The Daily Reporter* 7/17/05

Environmental Law News Materials from State Bar of Wisconsin

See Green Tier website: <http://dnr.wi.gov/org/caer/cea/environmental/>

Bernstein, Scott *et al.* (2005) “New Governance and the Green Tier Charters: Benchmarks for Evaluating the Process”, paper presented at the WISGAR Green Tier Workshop 11/28/05 (Excerpted, full paper at: http://www.law.wisc.edu/webshare/02qQ/green_tier_paper.pdf)

Trubek, Louise and Maya Das (2003) “Achieving Equality: Healthcare Governance in Transition”, 29 *American Journal of Law and Medicine* 2-3, 395

September 25 – New Governance in Action: European Union

Zeitlin, Jonathan (2005) “The Open Method of Co-ordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy” in Zeitlin & Pochet (Eds.): *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Peter Lang: Brussels)

de Búrca, Gráinne (2006) “EU Race Discrimination Law: A Hybrid Model” in de Búrca and Scott (Eds.): *Law and New Approaches to Governance in the EU and the US* (Hart)

Scott, Joanne and Jane Holder (2006) “Law and ‘New’ Environmental Governance in the European Union” in de Búrca and Scott (Eds.): *Law and New Approaches to Governance in the EU and the US* (Hart)

October 2 – No Class

October 9 – Analytics: What are the elements of New Governance?

Lobel, Orly (2004) “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” 89 *Minnesota Law Review* 342

Freeman, Jody (1997) “Collaborative Governance in the Administrative State” 45 *U.C.L.A. L. Rev* 1

Simon, William H. (2006) “Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes” in de Búrca and Scott (Eds.): *Law and New Approaches to Governance in the EU and the US* (Hart)

October 16 – Geneology: Why is it emerging now?

(review Lobel paper from 10/9 readings)

Heydebrand, Wolf (2005) “Globalization and the Rise of Procedural Informalism in Europe” Paper presented at the European Ways of Law Conference, Oñati International Institute for the Sociology of Law, Oñati, Gipuzkoa, Spain 6-8 July, 2005

Teubner, Gunther (1983) “Substantive and Reflexive Elements in Modern Law” 17 *Law and Society Review* 239

Dorf, Michael C. and Charles F. Sabel (1998) “A Constitution of Democratic Experimentalism” 98 *Columbia L. Rev.* 267 (excerpted)

October 23 – New Governance and Legal Regulation

Trubek, David and Louise Trubek (2006) “New Governance and Legal Regulation: Complementarity, Rivalry or Transformation?” Paper presented at the conference: “Law in New Governance” University College, London, 26-27 May, 2006

Sabel, Charles and William Simon (2004) “Destabilization Rights: How Public Law Litigation Succeeds” 117 *Harv. L. Rev.* 1015

October 30 – The role of lawyers in New Governance

Bradley C. Karkkainen, Bradley C. (2002) “Lawyering for a New Democracy: Environmental Lawyering in the Age of Collaboration” 2002 *Wis. L. Rev.* 555

Trubek, Louise (2002) “Public Interest Lawyers and New Governance: Advocating for Healthcare” 2002 *Wis. Law Rev.* 575

November 6 – Critiques of New Governance

(review Heydebrand paper from 10/16 readings)

Kennedy, David (2005) Remarks for the "New Governance Workshop" presented at Harvard Law School, Cambridge, MA, 25 February, 2005.

Joerges, Christian (2005) "What is Left of the European Economic Constitution: A Melancholic Eulogy" 30 E.L. Rev. 461 (excerpted)

November 13 – Multi-state Working Group: The new governance of new governance?

Guest speaker: Jeffrey Smoller, President, MSWG / Wis. Department of Natural Resources

Selected MSWG Website materials (also see: www.mswg.org for further information)

MSWG "Path to Washington" chart

Ballentine, Roger (2006) "Multi State Group Eyes New Environmental Law to Promote Innovation" www.greenstrategies.com 12 May, 2006

November 20 – No class, work on paper presentation

November 27 – Student presentations

December 4 – Student presentations