

New Course: Fall 2005

Law 932: Selected Problems in Administrative Law: Regulatory Reform

3 Credits

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 with various new governance techniques at both the federal and state governments. The seminar will examine selected reform experiences with primary emphasis on developments in Wisconsin. It will be linked to workshops on regulatory reform in Wisconsin government conducted by WISGAR, the Wisconsin Project on Governance and Regulation. Seminar sessions will be divided between presentation of background materials, class discussions of reforms, and workshop presentations.

The workshops will bring students together with Wisconsin public officials, lawyers, and business leaders to explore regulatory reform in environmental protection, health care, and occupational health and safety. Students will work in teams in one of the policy areas. They will explore recent reforms, assess their impact, and prepare reports for presentation at the end of the semester. Reports may be shared with officials and others.

The seminar is open to law students and graduate students in other schools and colleges. Students will be expected to participate in one of the teams and contribute to a team report of approximately 35 pages. Students will also be expected to write one short response paper dealing the readings, lead a class, and present at a workshop session.

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 the Wisconsin Project on Governance and Regulation (WISGAR) (<http://www.law.wisc.edu/ils/wisgar.htm>)

Louise G. Trubek is Clinical Professor of Law and directs the Health Law Project (www.law.wisc.edu/healthlaw/).

Unit 1: Background

September 12-Introduction-Selection of Teams

New Theories in Administrative Law

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

Richard Stewart, *Administrative Law in the 21st Century*, 78 N.Y.U. L. Rev. 437 (2003)

Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 342 (2004).

Bradley C. Karkkainen, *Reply: "New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 Minn. L. Rev. 471 (2004).

Orly Lobel, *Surreply: Setting the Agenda for New Governance Research*, 89 Minn. L. Rev. 498 (2004).

September 19-Hard and Soft Law

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

William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, LAW AND NEW GOVERNANCE IN THE EUROPEAN UNION AND THE UNITED STATES, Hart (DeBurca and Scott eds.) 2006.

David M. Trubek and Louise G. Trubek, *The Coexistence of New Governance and Legal Regulation: Complementarity or Rivalry?*, Paris Paper July 2005.

Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Columbia L. Rev. 267 (1998) (optional reading not included in packet).

September 26-Changing Administrative Law Practice

Louise G. Trubek, *Old Wine In New Bottles: Public Interest Lawyering in and Era of Privatization*, 28 Fordham Urb. L.J. 1739 (2001).

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

Unit 2: Case Studies

Oct. 3-students meet in their teams during class time

Environment

Oct. 10

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

Bradley C. Karkkainen, *Information-Forcing Regulation: Penalty Defaults, Destabilization Rights, and New Environmental Governance*, LAW AND NEW GOVERNANCE IN THE EUROPEAN UNION AND THE UNITED STATES, Hart (DeBurca and Scott eds.) 2006.

Oct. 17

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

Linda H. Bochert, *Green Tier: What is it Anyway?*, The Daily Reporter July, 17, 2005.

See also Green Tier through the DNR web site.

Environmental Law News Materials from State Bar of Wisconsin

OSHA

Oct. 24-OSHA

Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Worker Safety*, (forthcoming in the Administrative Law Review)

Alison Morantz, *Has Regulatory Devolution Injured American Workers? A Comparison of State and Federal Enforcement of Construction Safety Regulations*, at <http://ssrn.com/abstract=755026>.

OSHA partnership grid

Health

Oct. 31

Louise G. Trubek, *New Governance Practices in U.S. Health Care*, LAW AND NEW GOVERNANCE IN THE EUROPEAN UNION AND THE UNITED STATES, Hart (DeBurca and Scott eds.) 2006.

Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*

Michelle M. Mello et al., *Fostering Rational Regulation of Patient Safety*, 30 J. Health Pol. Pol'y & Law 375 (2005).

Nov. 7

John Chapin, *Health Data in a Banana Republic*, January 2005 unpublished manuscript.

Frederick H. Cohen, *An Unfulfilled Promise of the Medicaid Act: Enforcing Medicaid Recipients' Right to Health Care*, 17 *Loyola Consumer Law Review* 374 (2005).

Dennis Cauchon, *Medicaid Insures Historic Number*, USA Today August 2, 2005

Dennis Cauchon, *Welfare Reform Opens Medicaid to Millions*, USA Today August, 2, 2005

Unit 3: Workshops

Nov. 14- OSHA workshop

Nov. 21-No class

Nov 28-Environmental workshop

Dec. 5-Health Workshops