THE REGULATORY STATE
SYLLABUS, ver. 3

Jon Weinberg
Winter 2010

Course materials


What the course is about

Lawyers in the twenty-first century are deeply involved in public law and the regulatory state. This course looks at the reasons for regulation; the strengths and limits of legal institutions; how courts and agencies (should) deal with statutes; the ways regulation can go wrong; and the nature of different regulatory instruments. Since, in important degree, all law is about the strengths, limits and goals of legal institutions and legal tools -- about how various actors exercise the authority of the state, and how and why they shape the world in the process -- this course has broad and overarching scope. We will bring it down to earth by looking at those broad issues through the prisms of workplace health and safety, environmental protection, and food and drug law -- subjects that can be grouped within the larger category of "risk regulation." The idea is for us to address theoretical, empirical and doctrinal issues in a concrete setting, rather than trying to get a handle on them in the abstract.

About the syllabus

This is a new class; we've never taught it at Wayne Law before, and I've never taught it anywhere else. The syllabus is tentative, and will be supplemented further before the semester's out.

Office hours

My office hours this semester will be Tuesday 3:00-5:00 p.m., Wednesday 2:15-3:15 p.m., and Thursday 11:00 a.m.-12:00 noon. You can reach me most easily at <weinberg@wayne.edu>.

Attendance and grading policy

Before each class meeting, I will set out a copy of the seating chart, dated for that day. If you are prepared and ready to participate in class discussion, you can circle your name on the chart. If you do so for five-sixths of our classes, starting on January 14, I will automatically raise your final grade. (Translation: In order to get the bump, there can be no more than four classes, after the first day, when you don't circle your name.) If you circle your name on a given day, of course, you must actually be prepared; if it turns out that you weren't, you forfeit your eligibility for the bump. Whether or not you circle your name, please sit in the seat you've selected on the chart, so that I can monitor attendance (as the ABA requires). I reserve the right to lower grades in egregious cases.

Examination


The final exam will be limited open-book. That is, you will be allowed to consult only the casebook, any class handouts, an English-language dictionary, and any materials prepared by you. You will have three hours to write your answers. The final examination will determine your grade, subject to the adjustment I described above. One exception: If you earn an "A" on the final exam, you are not entitled to an "A+" solely on the basis of the automatic bump.

ALLOCATING RISK BETWEEN CONTRACTING PARTIES

Introduction [CB 20-36]
Lochner v. New York

An Economic Perspective [CB 7-20, 42-52, 63-69]
"A Trench Caves In; a Young Worker is Dead. Is It a Crime?"
W. Kip Viscusi, Risk by Choice: Regulating Health and Safety in the Workplace
Julie Graham & Don Shakow, Hazard Pay for Workers: Risk and Reward
John M. Mendeloff, Regulating Safety: A Political and Economic Analysis of OSHA

An Alternative Perspective [CB 70-104]
Susan Rose-Ackerman, Progressive Law and Economics and the New Administrative State
Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power
Bill New, Paternalism and Public Policy

CRIMINALIZING THE IMPOSITION OF RISK

Criminal Law: The Role of Mens Rea [CB 109-28]
Indictment of Ford Motor Company
Illinois v. O'Neill

RECOVERING FOR RISK IN TORT

Recovery for Risk [CB 128-47, 155-66]
Ayers v. Township of Jackson
Metro-North RR. Co. v. Buckley

Valuing the Costs of Risk [CB 171-92]
Paul Slovic, Perception of Risk
Paul Slovic, Trust, Emotion, Sex, Politics and Science: Surveying the Risk Assessment Battlefield
Neil D. Weinstein, Optimistic Biases about Personal Risks

Institutional Differences; The Sociology of Claiming Legal Rights [CB 205-221, 231-45]
Clayton P. Gillette & James E. Krier, Risk, Courts, and Agencies
William L.F. Felstiner et al, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming
THE ADMINISTRATIVE STATE

Statutory Interpretation: Theory [CB 319-350]
Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed
Frank H. Easterbrook, Statutes’ Domains
Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes

Statutory Interpretation: Cases [CB 350-378]
Church of the Holy Trinity v. United States
United States v. Marshall
Chisom v. Roemer
Chickasaw Nation v. United States

Statutory Interpretation by Administration Agencies [CB 378-413]

The Development of Administrative Law; Rule Making Under the APA [CB 415-438]
Richard Stewart, The Reformation of American Administrative Law
"Flooded with Comments, Officials Plug Their Ears"

Baltimore Gas & Electric Co. v. Natural Resources Defense Council

ASSESSING REGULATION

How Regulation Can Fail: Theory, Practice [461-79, 483-94]
John Mendeloff, The Dilemma of Toxic Substance Regulation
Cass R. Sunstein, Paradoxes of the Regulatory State
United States Environmental Protection Agency, Consolidated DDT Hearings, Opinion and Order of the Administrator

The Case for Cost-Benefit Analysis [CB 494-518]
Frank Ackerman & Lisa Heinzerling, Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection
Lester B. Lave, Benefit-Cost Analysis: Do the Benefits Exceed the Costs?
Nicholas Ashford, Crisis in the Workplace
W. Kip Viscusi, Fatal Tradeoffs
American Trucking Associations v. Whitman, 1999 U.S. Briefs 1426
John F. Morrall III, A Review of the Record

The Case against Cost-Benefit Analysis [CB 518-33, 541-45]
Frank Ackerman & Lisa Heinzerling, Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection
Corrosion Proof Fittings v. EPA
INFORMATION PROVISION

General Considerations; Generating Information Collectively [CB 547-566]
Stephen Breyer, Regulation and its Reform
Susan Rose-Ackerman, Progressive Law and Economics and the New Administrative Law
Albert Nichols & Richard Zeckhauser, OSHA after a Decade: A Time for Reason
W. Kip Viscusi, Risk by Choice
Peter Dormán, Markets and Mortality: Economics, Dangerous Work, and the Value of Human Life
Cass R. Sunstein, Informing America: Risk, Disclosure, and the First Amendment

California's Proposition 65: A Case Study in Information Provision; The First Amendment and Information-Based Regulation [CB 566-72, 598-611]
Nicolle Wagner v. Deukmejian
International Dairy Foods Association v. Amestoy

STANDARD SETTING

Zero or De Minimis Risk; Significant Risk and Feasibility [CB 613-37]
Les v. Reilly
Industrial Union Department, AFL-CIO v. American Petroleum Institute ("Benzene")

Public Health Standards [CB 638-49]
Whitman v. American Trucking Associations, Inc.
American Lung Association v. Environmental Protection Agency

The Nondelegation Problem [CB 665-82]
American Trucking Associations v. Environmental Protection Agency
Whitman v. American Trucking Associations
Geo-Tech Reclamation Industries, Inc. v. Hamrick