SYMPOSIUM ISSUE
NEW GOVERNANCE AND
THE TRANSFORMATION OF LAW

FOREWORD

The 2010 Symposium issue of the Wisconsin Law Review is a product of the Transatlantic Conference on New Governance and the Transformation of Law. The Conference, held in Madison, WI, on November 20–21, 2009, convened scholars from the United States and Europe to explore the impact of new forms of governance on the theory and practice of law. In recent years a great deal of attention has been paid to new processes being used to establish norms and standards, regulate behavior, solve problems, and resolve disputes. Generically called “new governance,” these include such processes or approaches as “democratic experimentalism,” “reflexive coordination,” “soft law,” “open coordination,” “deliberative supra-nationalism,” and “management-based regulation.” Thus defined, new governance covers a wide variety of processes but all differ to some degree from top-down, rule-based, command-and-control regulation.

New governance processes affect the way law functions in many spheres. While few doubt that new governance is having an impact on the law, there is much debate about the nature and desirability of the changes that are occurring. For some, the impact of new governance is a positive development, expanding law’s capacities and enhancing its legitimacy. For others, these developments may undermine law and values associated with it. These issues have been widely discussed in Europe and are also beginning to attract attention from legal scholars in the United States.

The Fall 2009 conference explored the nature and extent to which these developments may transform areas of law, and debated its broader implications for theory and practice. Twenty-five scholars from six countries attended and made presentations. This Symposium issue is a rich collection of empirical and theoretical contribution that includes a selection of the papers. It includes ten of the papers presented as well as an Afterword that includes reflections on the debates at the conference by three of the participants.

The Wisconsin Law Review thanks the Transatlantic Steering Committee, co-chaired by Joanne Scott and Louise Trubek and including Lisa Alexander, Gráinne de Búrca, William Simon, Jason Solomon and David Trubek, for their work in organizing this
Conference. We also extend our thanks to the sponsors: the University of Wisconsin Law School, the University of Wisconsin-Madison European Union Center of Excellence & The Centre for Law and Governance in Europe at University College London, the Wisconsin Project on Governance and Regulation (WISGAR), the Global Legal Studies Center, the Institute for Legal Studies, the Center for World Affairs and the Global Economy (WAGE).

Papers Presented at the Conference

**Gráinne de Búrca** (Professor of Law, Fordham University School of Law), *New Governance in Europe and the US: Separated Twins or Distant Cousins?*

**Robert B. Ahdieh** (Professor of Law and Director, Center on Federalism and Intersystemic Governance, Emory University School of Law), *The Visible Hand: Coordination Functions of the Regulatory State*

**Edward L. Rubin** (University Professor of Law and Political Science, Vanderbilt University Law School), *The Regulatizing Process and the Boundaries of New Public Governance*

**Jason M. Solomon** (Assistant Professor, University of Georgia School of Law), *New Governance: Blurring Boundaries in Regulatory Theory and Practice*

**Lisa Alexander** (Assistant Professor of Law, University of Wisconsin Law School), *Stakeholder Participation in New Governance: Lessons From Chicago’s Public Housing Reform Experiment*

**Wendy Bach** (Instructor & Clinical Supervising Attorney, City University of New York School of Law), *Governance, Accountability, and the New Poverty Agenda*

**Nan D. Hunter** (Professor of Law, Georgetown University Law Center), *Health Care, Citizenship, and the Potential of New Governance*

**Kenneth Armstrong** (Professor in European Union Law, Queen Mary University London School of Law) & **David Trubek** (Voss-Bascom Professor of Law Emeritus, and Senior Fellow, Center for World Affairs and the Global Economy (WAGE), University of Wisconsin), *The Role of the European Court in Public Law Litigation: Destabilizing Social Sovereignty and Mandating Alternative Processes*

**Diamond Ashiagbor** (Reader in Laws and Director of Research Studies, University College London), *Complex Discrimination and New Governance in the EU*

**Bojan Bugarič** (Associate Professor, University of Ljubljana School of Law, Slovenia), *Regulating Public Services in the European Union: Old, New or Hybrid Form of Governance*
Foreword

Mark Dawson (University Lecturer in European Law, Maastricht University), Transforming Into What? New Governance in the EU and the “Managerial Sensibility”

Tamara Hervey (Professor and Convenor of the Centre for the Study of Law in Society, The University of Sheffield School of Law), “Adjudicating in the Shadow of the Informal Settlement?”: The European Court of Justice, “New Governance” and Social Welfare

Allison Christians (Assistant Professor of Law, University of Wisconsin Law School), Networks, Norms and National Tax Policy

Poul F. Kjaer (Research Fellow, Cluster of Excellence “The Formation of Normative Orders” Goethe University, Frankfurt am Main), The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space

Katharine G. Young (Research Fellow, Center for International Governance and Justice at the Regulatory Institutions Network (RegNet), Australian National University), Courts as Catalysts for Economic and Social Rights: South African Revisions on a New Governance Theme

Bradley C. Karkkainen (Professor and Henry J. Fletcher Chair, University of Minnesota Law School), Law, Norms, and Governance of Transboundary Water Resources: Developments in Europe and North America

Joanne Scott (Professor of European Law and Co-Director, Centre for Law and Governance in Europe, University College London) & William H. Simon (Arthur Levitt Professor of Law, Columbia University School of Law), The Challenge of Regulating Carbon Offsets (in the European Union)

Stephanie Tai (Assistant Professor of Law, University of Wisconsin Law School), Comparing Approaches Towards Governing Scientific Advisory Bodies on Food Safety in the United States and the European Union

Lisa Blomgren Bingham (Professor and Keller-Runden Professor of Public Service, Indiana School of Public & Environmental Affairs), The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance

Amy J. Cohen (Assistant Professor of Law, Ohio State University Moritz College of Law), Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law

Cristie Ford (Assistant Professor and Co-Director, National Centre for Business Law, University of British Columbia Faculty of Law), New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation
Michael Wilkinson (Lecturer in Law, London School of Economics Department of Law), *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*

Louise Trubek (Clinical Professor of Law Emerita, and Faculty Affiliate, LaFollette School of Public Affairs, University of Wisconsin) & David Trubek (Voss-Bascom Professor of Law Emeritus, and Senior Fellow, Center for World Affairs, University of Wisconsin), *The World Turned Upside Down: Reflections on New Governance and the Transformation of Law*