

Comparative Administrative Law Scholarship Corner

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Public Participation before the Court of Justice of the EU: Enhancing Outside Judicial Participation via Amicus Curiae Briefs

Erasmus Law Review, volume 17, issue 3; Written Feb 21, 2025; Posted in SSRN Apr 23, 2025.

Alemanno, Alberto

This article assesses the participatory dimension of the EU judicial system against increasing demand for civil society's participation before the Court of Justice of the European Union. First, it explores the judicial participatory opportunity structure before the CJEU, that is the various legal remedies foreseen in the EU legal order. Second, it examines the realities of judicial practices open to both parties and third parties to a dispute by identifying the structural conditions preventing them from gaining access to the Court. It also documents the emergence of a new, informal practice of 'shadow' amicus curiae briefs aimed at countering limited outside third-party participation. Third, it assesses whether the extant CJEU's opportunity structure available to outside parties to a dispute is in line with the Treatyenshrined participatory imperative stemming from the principle of openness-Article 11 TEU ('take into account citizens' views)-, that of equality-Article 9 TEU ('equal attention to all stakeholders') and Article 13 TEU ('an institutional framework which 'serve citizens' interests)-, and that of participation under Article 10(3) TEU ('Every citizen shall have the right to participate in the democratic life of the Union'), as they apply to the EU judicial system. Fourth, it argues that these principles require the CJEU to re-evaluate the current judicial framework to ensure that the EU judicial system appropriately addresses not only individual and societal interests when those are parties to a dispute but also when, albeit equally affected, they find themselves outside of it. Ultimately, it demonstrates that the practice of amicus curiae briefs may provide a suitable means to not only compensate for the for limited standing-including in third-party interventions-, but also to broaden the Court's access to the dispersed and untapped expertise and greater civil society participation in court proceedings, thus legitimizing the CJEU's output and throughput.

The Lawfulness of Citizenship Deprivation: Comparing Australia and the UK

Written March 04, 2025; Posted in SSRN Jun 22, 2025.

Baldwin, Guy

The rise in international terrorism has led to a rise in citizenship deprivation. Depriving a person of citizenship represents a harsh national security measure. Although both Australia and the UK have citizenship deprivation legislation, the judicial response has differed. In Australia, two laws providing for deprivation of citizenship have been found unconstitutional. In the UK, significant challenges to citizenship deprivation decisions have failed, including those relating to Shamima Begum, deprived of UK citizenship in 2019, whose request for permission to appeal in respect of the decision was rejected by the UK Supreme Court in August 2024. In this context, it is striking that despite the lesser degree of human rights protection under the Australian Constitution and federal statutes compared with the UK, the Australian courts may have arrived at a significantly rights protective approach to citizenship deprivation, leading to an important procedural safeguard by requiring courts to make decisions on citizenship deprivation. This underlines interesting features of the Australian system, in which the development of doctrines under a written constitution that limits legislative power, such as through the separation of powers, can sometimes lead to significant (if uneven) rights protective outcomes. Short of a shift in UK constitutional law doctrine around the separation of powers (which is unlikely), the Australian decisions cannot be mirrored in the UK. However, they may point towards the possibility of stronger procedural safeguards in the context of citizenship deprivation, as well as some potential human rights law implications.

Bednar, Nicholas;
Phillips, Todd

Multimember commissions are a central feature of the modern administrative state. Yet a growing number have lost their legal authority to function—not through statutory repeal or defunding, but because they lack a quorum. In many cases, these quorum losses stem from the president's assertion of a broad removal power, creating vacancies that Congress never anticipated and that commissions cannot fill without Senate-confirmed replacements. Quorum losses lead to agency inaction, prevent the faithful execution of the laws enacted by Congress, and threaten the rights of individuals who rely on these commissions to adjudicate cases. This Article presents a systematic study of quorum rules in federal commissions. It traces how commissions lose their quorums, explores the consequences of quorum loss for administrative governance and individual rights, and analyzes the legal rules that govern when—and whether—a diminished commission may act. This Article makes three contributions. Doctrinally, it recovers the common-law principles that govern quorums and voting rules in multimember institutions and identifies how courts have been inconsistently applied these principles to commissions. Empirically, it offers a detailed account of how quorum and voting rules vary across commissions using original data from seventy-six agencies. Normatively, it offers a framework for how courts and Congress should respond to the increasing frequency of quorum losses, urging the application of common-law quorum and voting defaults in the face of statutory silence to preserve the deliberative structures Congress designed. It also contends that presidential removals that destroy a quorum may be unconstitutional if they frustrate the executive's duty to faithfully execute the laws, and it calls for relaxation of exhaustion requirements when agency inaction deprives individuals of judicial review. The Article concludes with recommendations for how Congress should restructure statutory quorum requirements.

Competition law through the lenses of national constitutions: connecting competitive markets with socio-economic and environmental values

Journal of Antitrust Enforcement, Vol. 13, Issue 2, July 2025, Pages 284–314. Published: 14 Nov. 24

Bernatt, Maciej

Competition law through the lenses of national constitutions: connecting competitive markets with socio-economic and environmental values.

This article analyses competition legislation through the lenses of national constitutions, given that these constitutions establish the foundational structures of national legal systems to which competition laws inherently belong. Building on existing constitutional literature, it posits that competition laws should be construed in accordance with the values promoted in national constitutions. The analysis is situated within the contemporary discourse surrounding the ongoing 'just transition' towards a carbon-neutral economy, i.e., a process in which socio-economic values (pertaining to the right to work, right to healthcare, and right to food) and environmental values (pertaining to a clean environment, biodiversity, and reducing emissions) constitute guiding tenets. Such a context invites the question of whether competition laws should be built and interpreted in a manner that facilitates the enhanced integration of socio-economic and environmental values enshrined in national constitutions. These contemplations are pivotal, since law plays a constitutive role in designing socio-economic structures, with the structuring of competitive markets being no exception. In light of this, the paper conducts a review of how national constitutions across the world safeguard competitive markets, socio-economic values, and environmental values. Specifically, the article categorizes the regulatory frameworks identified within all 52 national constitutions that explicitly protect competitive markets alongside socio-economic and environmental values. Subsequently, the paper transitions to an examination of two countries—Poland and South Africa—to elucidate how national competition laws reflect constitutional choices. It demonstrates that their constitutions and competition laws were shaped in a manner that offers a different space for incorporation of socio-economic and environmental values in the interpretation of competition laws. The article relies on an analysis of the texts of national constitutions and competition statutes, as well as selected case law of constitutional courts and ordinary courts. Overall, the article seeks to incite an academic discourse regarding the significance of national constitutions in the realm of antitrust. At the same time, it expands upon the literature concerning economic constitutions, especially regarding the European Union and its Member States.

Global Administrative Space: Redefining Boundaries in Governance and Law

Written Febr 19, 2025; Posted in SSRN Jun 30, 2025.

Bostan, Alexandru

This paper explores the concept of the Global Administrative Space (GAS) as an integral element of Global Administrative Law, a framework that emerges from the need to address the complexities of governance in an increasingly interconnected and globalized world. The research examines how GAS redefines traditional boundaries between national and international legal orders, dissolves distinctions between public and private regulatory functions, and accommodates the diverse, fragmented, and polycentric nature of global governance. Through a comparative legal approach, the study evaluates the structural evolution of GAS, contrasting it with European Administrative Space and traditional administrative law models. The findings contribute to doctrinal developments in administrative law and emphasize some key characteristics of GAS and offer an original definition for Global Administrative Space.

Procurement as Infrastructure

Written Jun 16, 2025; Posted in SSRN Jun 25, 2025.

**Davies, Nathan;
Sanchez-Graells, Albert**

Public procurement constitutes a fundamental governance mechanism through which states interact with markets. It is a vast and consequential function of government, accounting for approximately one-third of public expenditure in most economies. Existing public management scholarship has predominantly conceptualised procurement through legal-regulatory, economic, or administrative perspectives. Whilst valuable, these approaches insufficiently theorise procurement's role in structuring governance possibilities and enabling or hindering state capacity. This paper advances a novel theoretical intervention by reconceptualizing procurement itself as infrastructure rather than merely as a mechanism for acquiring or outsourcing it. Drawing on Susan Leigh Star's influential work in infrastructure studies (Star, 1999), we systematically analyse how procurement systems—comprising legal frameworks, administrative routines, professional practices, and technological platforms—function as embedded socio-technical infrastructures that enable and constrain governance. Supported by an examination of illustrative UK cases, including the Carillion collapse, Post Office scandal and COVID-19 PPE procurement failures, we argue that these are not isolated implementation failures but manifestations of infrastructural breakdown resulting from systemic overload coupled with maintenance neglect. This reconceptualization bridges public management scholarship with anthropological and socio-legal perspectives and outlines avenues for future research. For policymakers, our analysis emphasises that procurement requires sustained investment and attention, and appropriate use, rather than superficial regulatory adjustments that neglect its foundational capacity to structure governance outcomes.

Des citoyens européens sous sanctions américaines sont effacés économiquement et socialement dans l'EU

(European citizens under U.S. sanctions are being economically and socially erased within the EU)

Published on July 26, 2025

De Preter, Christoph

(English abstract translated by IA)

The Le Monde article, authored by lawyer Christoph De Preter, draws attention to the serious plight of European citizens who, despite having committed no crimes under European Union law, face severe social and economic consequences as a result of being included on the U.S. sanctions list (OFAC). Although legally innocent within the EU, these individuals and their families are treated as outcasts: their bank accounts are closed, access to digital services is denied, and delivery companies refuse service—often leading to financial ruin. Inclusion on the OFAC list, frequently based on opaque criteria, results in a form of "civil death" that affects not only their standing in the United States, but—more alarmingly—their daily lives in their own countries. The article illustrates this phenomenon by citing the cases of judges and prosecutors of the International Criminal Court, as well as the UN Special Rapporteur on the Palestinian territories, who have also been added to the list.

Regulation-Making in the United Kingdom and Australia

Published on January 25, 2024, Publisher Bloomsbury Publishing

Edgar, Andrew

This book shines a spotlight on the way in which parliamentary scrutiny of regulations provides the primary support for democratic legitimacy for regulations in the UK and Australia.

This democratic safeguard is supplemented by public consultation processes. Despite commonly expressed concerns that regulation-making is secretive and undemocratic, it can be recognised to be a democratically sound and important feature of modern law. There are, however, modern practices that remove or limit these safeguards on regulation-making, raising concerns about executive aggrandisement.

This book has two aims. The first is to explain the systems of parliamentary scrutiny in the UK and Australia and their historical development. The development of parliamentary checks on regulation-making through the 20th century established the primary basis for the democratic legitimacy of regulations.

The second aim is to examine recent developments in regulation-making that avoid or minimise this safeguard. Constitutional changes in the UK, transnational regulation, and emergencies such as the COVID-19 pandemic have affected regulation-making in a manner that avoids or minimises the parliamentary checks that were carefully developed and implemented in the 20th century.

The book contributes to public law in the UK and Australia by analysing recent developments that involve executive over-reach, with reference to the historical development of parliamentary checks on regulation-making.

Graham, Lewis

Lewis Graham's article examines success rates at the Administrative Court in 2024, utilizing a dataset of 510 cases to assess who tends to prevail—private individuals or public bodies. The research reveals that private parties succeed in approximately one-third of cases, though outcomes vary significantly depending on the type of public authority involved. Notably, the presence of a King's Counsel (KC), the category of judge, or even the individual judge presiding over the case appear to influence the results, suggesting that factors beyond the legal merits may play a critical role in the court's verdicts. The study acknowledges certain limitations in the dataset and highlights the need for further research to corroborate these preliminary findings.

 It's a Complex World: Can Courts Help? Judicial Review and Complexity in Germany, the EU and the US

Cambridge International Law Journal 14, pp 123–140; Written Jun 01, 25; Posted in SSRN Jul 29, 25.

**Hancox, Emily;
Heitzer, Sonja**

Judicial review is in flux. Executive agencies now make many social, economic, scientific and even moral decisions. How can courts, lacking comparable expertise, check the actions of these actors? Our comparative legal analysis of the United States, Germany and the European Union shows courts around the world are finding it hard to examine complex administrative decisions. Different approaches are being developed to questions of law and factual determinations, but judicial review still has a role to play. However, the true value of judicial review has long since ceased to lie solely in enforcing subjective rights. Rather, it includes presenting complex legal problems in an understandable way and interpreting technical standards in a generally comprehensible manner to aid public comprehension.

 Amazon.Gov: Disintermediation In Public Procurement Through Digital Platforms -Benefits And Risks

Written March 18, 2025; Posted in SSRN June 18, 2025.

Klingler, Désirée U.

E-marketplaces have the potential to disrupt traditional public procurement systems. While the U.S. General Services Administration (GSA) Commercial Platforms program was criticized for abandoning competition, transparency, and accountability as safeguards of traditional procurement, this article shows that e-marketplaces do not abandon but redefine those principles. Process transparency becomes data transparency, formal tendering and bidding become competition as observed in private markets, and accountability is shifted from the government to platform operators and users. A concept that is elevated on e-marketplaces (and to some degree replacing value for money) is the standard of customer satisfaction. It is the customer (and not the government official) who buys the product from the seller and who assess the quality and price of the product. At the same time, e-marketplaces also pose new challenges in government procurement that must be properly managed. Rather than disintermediating public procurement, digital platforms re-intermediate public procurement and create new principal-agent problems – since private marketplaces like Amazon are profit-seeking and do not aim to maximize social welfare. While competition law helps to deter anticompetitive behavior of platform operators, mandatory government requirements (such as cybersecurity concepts) remain necessary to protect the government and its users against external threats. Although e-marketplaces hold promising features to simplify procurement processes, such as digital supplier profiles, interoperability between different platforms is still an issue. One of the greatest advantages of e-marketplaces is the functionality to define filters, which can help promote socioeconomic policies. The added function to search and filter platform offerings for “green” products increases the salience of sustainable products and helps promote sustainable procurement.

Regulatory Mismatches in the United States and the European Union

Virginia Public Law and Legal Theory Research Paper No. 2025-56, Virginia Law and Economics Research Paper No. 2025-15, U of Penn, Inst for Law & Econ Research Paper No. 25-12, Working Paper of the Max Planck Institute for Tax Law and Public Finance No. (Forthcoming).
Written Jan 01, 2025; Posted in SSRN July 17, 2025.

Knoll, Michael S.;
Mason, Ruth;
Schoen, Wolfgang

This article explores regulatory mismatches, differences in regulations between different states, in the United States and the European Union, focusing on their differing approaches to market integration and regulatory diversity. The US emphasizes state autonomy, allowing regulatory pluralism to foster local experimentation and reflect diverse democratic preferences. The Supreme Court's handling of mismatches through balancing tests in decisions like *Pike v. Bruce Church* (1970), is limited and inconsistent, with a preference for leaving unresolved issues to Congress. In contrast, the EU prioritizes legislative and, to a lesser extent, judicial, harmonization and mutual recognition, with the Court of Justice rigorously reviewing member-state regulations for necessity, proportionality, and compatibility with fundamental market freedoms. Recent trends toward subsidiarity, however, signal a growing respect for national diversity. Both unions weigh state and market interests, but the United States tends to see regulatory diversity as a federalism benefit, whereas the EU views harmonization as essential to its integration goals.

Blowing the Rule of Law Away? Autocratic Legalism Meets Supranational Opportunism

Bárd & Krommendijk eds Elgar 2025; Written May 05, 2025; Posted in SSRN June 19, 2025.

Kochenov, Dimitry

This book chapter approaches the EU's response to the democratic and Rule of Law backsliding over the past ten years from the perspective of the effects of the steps, which supranational institutions took in this context. While a significant shift of power towards the supranational level is immediately observable, any change to the better at the national level, in the name of which the federal bargain has been altered is more difficult to decipher. It emerges that the autocratic legalism at the national level prompts supranational opportunism, which is ultimately unrelated to solving the proclaimed crisis, which such opportunism was aiming to tackle. The EU is weaker as a result: the supranational shift produced an evolution of EU Rule of Law away from the ideals of justice, legality and human rights protection, resulting in what I frame as 'supremacy Rule of Law', consisting in deploying the Rule of Law largely as supremacy of EU law, whatever its substance or its relation to the values of the Union. The outcome is helplessness vis-à-vis national-level values abuse, growing impunity and rising death-toll at the borders as well as the diminishing level of human rights protection for the European citizens in the European legal space, prompting further divergence between the substance of EU and ECHR law at the expense of EU citizens and values. Supranational opportunism has further eroded the robustness of EU federalism while reaching none of the stated goals which gave the rise of supremacy Rule of Law the initial push in the first place.

Balancing Rights and Governance: A Comparative Analysis of Open Disclosure Frameworks in Australia and New Zealand

Written May 01, 2025; Posted in SSRN Aug 01, 2025.

Mordaunt, Dylan

Aim: To comprehensively analyse the open disclosure frameworks in Australia and New Zealand, identifying their strengths, weaknesses, and trade-offs, and to propose a hybrid model integrating best practices.

Method: This qualitative comparative policy analysis systematically reviewed key policy documents from Australia (e.g., Australian Open Disclosure Frameworks, NSQHS Standards) and New Zealand (e.g., Guidance on Open Disclosure Policies, Code of Health and Disability Services Consumers' Rights). Data extraction focused on principles, processes, governance, legal aspects, and implementation strategies. Four core theoretical frameworks-Institutional Theory, Regulatory Governance, Ethics of Care, and Implementation Science-were applied to analyse the extracted data. The analysis involved thematic coding, cross-country comparison through each theoretical lens, and synthesis to identify trade-offs and inform a refined hybrid model.

Result: Australia's framework, embedded in national safety standards, emphasizes systemwide governance and accreditation, offering flexibility but risking implementation variability. New Zealand's model, legally mandated under consumer rights legislation, prioritizes individual accountability and patient rights, ensuring strong enforcement but potentially fostering a compliance-driven culture. Key differences emerged in legal specificity, enforcement mechanisms, and the practicalities of implementation. The analysis highlighted the critical role of ethical considerations, workforce capacity, and organizational readiness for effective open disclosure.

Conclusion: Both Australian and New Zealand open disclosure frameworks offer valuable insights into balancing systemic governance and consumer rights. A hybrid approach, integrating Australia's focus on systemic learning with New Zealand's robust legal mandate for patient rights and explicit ethical considerations, could enhance healthcare quality and transparency. Future research should empirically evaluate the practical implementation and outcomes of such hybrid models.

Granting Nature a Voice: Rethinking Environmental Regulation through Legal Rights of Nature

Written Apr 30, 2025; Posted in SSRN June 23, 2025.

Odili, Joel

Environmental regulation has traditionally been based on an anthropocentric perspective, prioritising human interests over the environment. This approach is rooted mainly in balancing environmental protection with economic growth. However, it has proven inadequate in addressing escalating anthropogenic ecological degradation. Enforcement challenges and regulatory loopholes further weaken environmental regulation under this ideology. Consequently, there is a growing shift toward a more ecocentric approach, which recognises the intrinsic value of nature by granting it legal rights and standing in court, independent of human interests.

Judicial Review of Prosecutorial Discretion: Missed Opportunities

Law Quarterly Review, volume 141, issue 2 (April 2025), pp 191-196, Singapore Management University School of Law Research Paper Forthcoming
Written Dec 01, 2024; Posted in SSRN June 12, 2025.

Ong, Benjamin Oshua

Director of Public Prosecutions v Durham (also called *Bouye*), decd and others [2024] UKPC 21; [2024] 1 W.L.R. 3900 involved an application for judicial review of a decision to prosecute. On the facts, the Privy Council was right to dismiss the application. Unfortunately, the Privy Council missed several opportunities to address various lingering problems with the law on judicial review of prosecutorial decision.

First, the Privy Council followed a line of cases that have treated judicial review of prosecutorial decisions as *sui generis* by holding (I argue, wrongly) that not all the grounds of review of executive action generally are available when it comes to reviewing prosecutorial decisions, and that the standard of review must be more permissive to the Director of Public Prosecutions than to other executive actors.

Second, the Privy Council erred in holding that the criminal trial is necessarily an alternative remedy that one must exhaust before applying judicial review.

Third, the law on judicial review of prosecutorial decisions continues not to sit well with the law on stays of criminal proceedings for abuse of process.

Rethinking Resilience: A Third-Generation Critique of Holzhacker and Umar's 'Thinking Through Crisis' THINK TANKS

Written Jun 27, 2025; Posted in SSRN July 07, 2025.

Qatrani, Osama

This critical review evaluates the article *THINK TANKS Crisis* by Hans Holzhacker and Khalid Umar, which explores how think tanks adapted to the challenges of the COVID-19 pandemic. While their work highlights important institutional shifts, it remains confined within second-generation frameworks of resilience and adaptation. This review offers a third-generation perspective, rooted in symbolic foresight, digital complexity, and epistemological reconstruction. It argues for a redefinition of the role of think tanks—from passive connectors of knowledge to active agents in cognitive and structural transformation. The critique situates the original article within the broader paradigm shift demanded by global disruptions in the 21st century.

Bridging Legal Worlds: Latour's Ethnography of the French Conseil d'État and its Indonesian Echoes

Written Jun 01, 2025; Posted in SSRN July 02, 2025.

Saputra, Beny

Bruno Latour's *The Making of Law: An Ethnography of the Conseil d'État* challenges traditional views of legal reasoning by demonstrating that law is not simply a collection of abstract rules or a fixed body of doctrine, but a living process actively constructed through everyday practices, interactions, and material conditions. Written by an anthropologist and sociologist rather than a lawyer, Latour's study of France's highest administrative court—the Conseil d'État—deploys methodologies such as ethnographic fieldwork, Actor-Network Theory (ANT), and material semiotics to reveal the complex dynamics behind legal decision-making. This essay is organised into two main parts. Part 1 examines Latour's unique methodology, highlighting how it diverges from conventional legal research methods and discussing its advantages and potential pitfalls. Part 2 focuses on the insights that Latour's work provides into the French legal system, particularly the functioning of the Conseil d'État, and offers a comparison with aspects of the Indonesian legal system. By contrasting these two systems, we understand how legal traditions structure judicial authority and decision-making.

Association of Democratic Reforms v. Union of India - Reflections on the Scope and Nature of Judicial Review

Written March 03, 2025; Posted in SSRN Jun 27, 2025.

Sindhu, Jahnavi;
Narayan, Vikram Aditya

This essay critically analyzes the Indian Supreme Court's judgment in *Association of Democratic Reforms v. Union of India*, which invalidated the Electoral Bonds Scheme for violating voters' right to information. Beyond its contribution to electoral transparency, the decision is significant for its doctrinal development of judicial review. The authors examine the Court's nuanced rejection of blanket judicial deference in economic matters, emphasizing that fundamental rights cannot be sidelined by labeling a law as economic policy. Central to the judgment is the structured use of the proportionality test, which the Court employs to scrutinize state justifications and rights restrictions. The essay situates the test within Indian constitutional history and comparative jurisprudence, highlighting its potential to enhance rights protection. The paper also critiques the continued reliance on the presumption of constitutionality and advocates for a rigorous, evidence-based judicial approach.

The Gray Area: Finding Implicit Delegation to Agencies after Loper Bright

Written June 28, 2025; Posted in SSRN July 07, 2025.

Stephenson, Matthew

In *Loper Bright v. Raimondo*, the Supreme Court overruled *Chevron v. Natural Resources Defense Council* and repudiated *Chevron's* across-the-board presumption that statutory ambiguities should be treated as implied delegations of discretion to agencies. But *Loper Bright* did not repudiate the possibility that a court might properly find implied delegation in some cases. How should a court identify such cases? *Loper Bright* did not offer much guidance, and in the coming years, a central project of administrative law will be articulating, elaborating, and refining the doctrine that is to govern this inquiry.

This Article argues that the canonical pre-*Chevron* cases *Gray v. Powell* and *NLRB v. Hearst Publications*, together with their antecedents and progeny, provide a useful framework for distinguishing those interpretive questions on which courts ought to find implicit delegations to agencies from those issues that are for the courts to decide without deference. The Gray doctrine establishes a presumption that, when a statute empowers an agency to take some authoritative action which necessarily involves the application of an imprecise statutory term to particular situations, the statute should be read as implicitly delegating to the agency the authority to make the necessary line-drawing decisions. At the same time, the Gray doctrine does not call for judicial deference to an agency's views on the resolution of interpretive questions that can be answered through abstract textual or structural analysis. Courts can and should incorporate the Gray doctrine into the implicit delegation prong of the *Loper Bright* framework. Doing so would be both legal—consistent with the Administrative Procedure Act (APA) as interpreted by *Loper Bright*—and desirable. The Gray doctrine provides a structured, workable method—one well-grounded in decades of pre-*Chevron* case law—for deciding when a finding of implicit delegation is appropriate. Integrating Gray into *Loper Bright* would achieve a more appropriate allocation of authority between the judicial and executive branches than would alternative and more restrictive approaches to *Loper Bright's* implicit delegation prong.

Onopticon and Homovictimus: The Dialectic of the Digital Leviathan and the Limits of Resistance

Written Jun 09, 2025; Posted in SSRN Jun 23, 2025.

Tan, Hakki

This article introduces the theory of the Onopticon to conceptualize digital power beyond the Foucauldian surveillance paradigm. The Onopticon is defined as a "prediction regime" where the "optic" no longer signifies passive seeing but the machinic pattern recognition and probabilistic modeling of future behavior. The subject of this regime is Homovictimus, whose participation in exploitation is manufactured through "consent engineering" and whose degree of victimization is empirically supported by data from a pilot field study. The paper comparatively analyzes the state-platform dialectic in the US, China, and the EU using a transparent, weighted, and normalized index. The analysis is universalized with detailed case studies from the Global South (India's Aadhaar, Kenya's Huduma Namba, Latin America). Finally, resistance strategies are subjected to a realism test, focusing on effective tactics like "data obfuscation" and "shadow IT syndicalism" and the corporate counter-tactics against them.

The Principle of Sustainable Development

Houston Journal of International Law, Volume 46, No. 2, p. 185-243.
Written Oct 01, 2024; Posted in SSRN Jun 30, 2025.

Varella, Marcelo Dias

The principle of sustainable development comes from the fusion of two major legal principles, 1) the right to development and 2) the preservation of the environment. The first major principle comes from development law, a branch of law that was born from the independence movement after the Second World War within the broader field of international economic law. Development law was defended by developing countries against the positions of developed countries, with rare exceptions. International economic law has been its main forum for legal formulation. Development law had several concrete repercussions until the 1980s when its norms were dismantled by the advance of liberal theories. International environmental law, which for a long time was presented as antithetical to development, especially by developing countries, absorbed the principles of development law from the Stockholm Conference in 1972 onwards, but especially from the framework conferences of the 1990s. What constitutes development is controversial to this day. Several authors relate it to economic development; others add education and health, such as the Human Development Index, which is used in many countries to destinate public resources. There is also the idea of a multifunctional poverty index, recently proposed by the United Nations. Finally, several authors consider that it would be necessary to evaluate other relevant criteria, such as the environment, cultural diversity, and others to really measure sustainable development. It is from this evolution and its understanding that we will be able to appreciate the values that make up today's international environmental law, based on the environment-economic growth binomial. At the end, we explore what sustainable development is and some ideas on how to measure it.

Where Proportionality Meets the “Most Important Factor” of National Security; (there is no link)

Sweet & Maxwell Journal

Wan, Trevor T. W

This article discusses how the proportionality framework for rights adjudication may be contorted ex ante under Hong Kong's new Safeguarding National Security Ordinance.

The Hidden Nature of Regulation

Harvard Negotiation Law Review (forthcoming 2025)

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Yadin, Sharon

The question of choosing the right regulatory tool and rule type has been a cornerstone of regulatory theory and policy for decades. Scholars and policymakers have long debated the pros and cons of approaches such as self-regulation, performance-based standards, command-and-control, voluntary programs, and disclosure-based regulation, studying their unique features and optimal applications. Directly challenging this view, this article argues that the specific legal framework under which industries are regulated is less important than traditionally assumed, as regulation is frequently subject to negotiation and agreements with regulated firms. The conventional dichotomy between “hard” and “soft” regulatory approaches—and between rigid versus flexible rule types and regulatory instruments—is far less consequential when considering that all forms of regulation are, in essence, negotiable and thus “soft.” The article introduces a novel theory of agreement-based regulation, suggesting that negotiation and agreement are not merely an additional tool in the regulator's toolkit, but rather constitute the dominant paradigm of regulation. It further shows how this hidden yet fundamental nature of regulation extends to both classic regulatory tools—typically viewed as restrictive and one-sided—and innovative instruments such as regulatory sandboxes and regulatory shaming. The theory is illustrated through a diverse range of established and emerging fields, from climate change and artificial intelligence to gun control and public health and safety, where regulators and regulated entities routinely negotiate rulemaking, supervision, and enforcement. The article examines various mechanisms employed to establish both direct and indirect agreements for creating, implementing, and modifying regulation, often in ways that remain hidden from public view. It also considers the broader conceptual and regulatory implications of these mechanisms, including in light of the Supreme Court's landmark *Loper Bright* ruling, which overturned *Chevron* deference and significantly limited agencies' regulatory scope and authority.

Events and Informations:

- **Stanford Law Review Symposium 2026: The APA at Eighty: What's Next for Administrative Law?" – for more information, [click here](#).**

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