NEWSLETTER 4 SEPT 2025 *WHAT'S NEW IN THE COMPARATIVE ADMINISTRATIVE LAW WORLD?*

Comparative Administrative Law Scholarship Corner

Affiliation with the Yale Comparative Administrative Law Listserv

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The Law and Governance of the EU Public Ethical System: An Introduction

The Law and Governance of the EU Public Ethical System, Palgrave, 2025, HEC Paris Research Paper No. LAW-2025-1573. Posted in SSRN: June 19, 2025.

Alemanno, Alberto

This edited volume critically analyses the existing 'EU ethical framework' while contextualising it within the unique transnational setting that characterises the EU public administration and its various institutions. Moving beyond single institutions, the volume adopts an exhaustive approach to analyse common normative and institutional challenges. It explores key questions about the purpose, design, enforcement, and effectiveness of EU ethical rules. The book is structured into four parts, covering the foundations of the EU ethics system, the ethical frameworks of key EU institutions, cross-cutting issues including the new interinstitutional ethics body and government affairs regulation, and the external dimension such as anti-corruption and foreign interference. Ultimately, the volume aims to systematise the EU's ethical infrastructure, identify major shortcomings, and propose potential solutions and reforms, reflecting normatively on how the EU can improve.

New Competition Regulatory Tools: Towards a Structure-Behavior-Performance Paradigm

Written: July 30, 2025; Posted in SSRN: August 12, 2025

Arnaudo, Luca

The article delves into innovative antitrust procedures currently branded as "New Competition Tools," (NCTs) originally inspired by the UK's market investigations: it is suggested hereafter to refer to them as Competition Regulatory Tools (CRTs). They address perceived market malfunctions by allowing competition authorities to impose behavioral or structural measures on companies, even when no illegal conduct is present. Following the formal abandonment of the NCT initiative at the EU level, similar tools are now being adopted at the national level by various member states: for instance, Germany and Italy implemented significant reforms in 2023, with other countries following suit.

The article includes a SWOT (Strengths, Weaknesses, Opportunities, and Threats) analysis of a standard CRT model, focusing on its impact and the necessity for a balanced implementation. It underscores the importance of ongoing, careful coordination with relevant sectoral regulators, adhering to the fundamental principle of sincere cooperation.

From a theoretical standpoint, the article proposes adopting an analytical framework called Structure-Behavior-Performance (SBP) to integrate the most effective elements of the traditional Structure-Conduct-Performance paradigm. In practical terms, it suggests a minimal SBP checklist to evaluate the appropriateness of applying these new procedures on a case-by-case basis.

Traité de droit adminitratif transnational (Transnational Administrative Law Treatise)

Book first edition, 2025, Monde; Larcier, France; 736p; ISSN 9782802770688

Auby, Jean-Bernard;
Chevalier, Emilie;
Dubos, Olivier;
Marique, Yseult

La densification des rapports entre appareils étatiques qu'engendre la globalisation et que provoque spécialement la construction européenne se traduit, entre autres, mais de façon accentuée, dans une multiplication des liens entre administrations nationales, qu'il s'agisse de rapports de coopération ou de connexions nées plus spontanément en dehors de tels rapports.

Entre les montages de coopération frontalière et les réseaux d'agences administratives, la gestion transnationale d'équipements, de services et de projets communs, ou encore les planifications transfrontièresd'aménagement, un fort tissu composite de situations administratives transnationales se met en place.

Or, le droit administratif ne s'est jusqu'à maintenant que peu intéressé à ces réalités. Il en laissaitl'appréhension au droit international public et au droit international privé, qui se révèlent pourtant inadéquatspour les appréhender : elles sont, en effet, trop ancrées dans les droits nationaux pour le premier et aujourd'huitrop évidemment difficiles à plier au principe traditionnel de territorialité pour le second.

D'où le travail de recherche dont le présent Traité est le produit provisoire. Engagé au sein d'un Réseau international « Droit Administratif Transnational », il conduit à formuler, dans le présent volume, quelques propositions qui devront être confirmées, vérifiées, étendues par des investigations dans les différents systèmes juridiques nationaux comme dans l'embryon de théorie commune qui cherche à les relier.

Translated by IA:

The densification of relations between state apparatuses generated by globalization, and particularly driven by European integration, is manifested, among other ways but in an especially pronounced manner, through the multiplication of ties between national administrations—whether in the form of cooperative arrangements or through more spontaneous connections arising outside such frameworks.

Between cross-border cooperation schemes and networks of administrative agencies, the transnational management of infrastructures, services, and joint projects, as well as cross-border spatial planning initiatives, a dense and composite fabric of transnational administrative situations is taking shape.

Administrative law, however, has until now shown little interest in these realities. Their analysis was largely left to public and private international law, which nevertheless prove inadequate for this task: the former is too firmly rooted in national legal systems, while the latter is today too evidently difficult to reconcile with the traditional principle of territoriality.

Hence the research effort from which the present Treatise emerges as a provisional outcome. Undertaken within the framework of the international network "Transnational Administrative Law," it has led to the formulation, in this volume, of several proposals that must be confirmed, tested, and further developed both through investigations into different national legal systems and through the embryonic common theory that seeks to link them.

Politicization of Competition Agencies: In Search of an Analytical Framework Fit for Trump Era

Working Papers of the Centre for Antitrust and Regulatory Studies, No. 1-2025; Posted in SSRN: August 12, 2025.

Bernatt, Maciej

The paper proposes an analytical framework to examine the politicization of competition agencies. It aims to clarify how to distinguish between forms of politicization that can be perceived as neutral and those that pose systemic risks to these agencies. The paper explains that such risks arise when politicization involves the implementation of illiberal politics-that is, politics that reject key tenets of constitutional democracy and entail the arbitrary use of state economic powers-thereby undermining the rule-of-law-based character of competition law enforcement. The description of patterns of this impermissible politicization (referred to as the 'illiberal blueprint') is intended to help identify when red lines have been crossed. The illiberal blueprint includes, among other features, interference in the competition agency's decision-making processes, erosion of its independence, attrition of senior staff, restrictions on the scope of the agency's powers, politically motivated enforcement, self-restraint in cases involving politically connected firms, as well as political pressure on courts and judges. The paper draws on lessons from Hungary and Poland and compares them with recent developments in the U.S. since January 2025, particularly those involving the Federal Trade Commission. The article tentatively concludes that the patterns emerging in the U.S. today are not unique but align with those observed in other countries experiencing democratic backsliding and rule of law crisis.

The Past and the Future of the 255 Panel

EU Law Live Weekend Edition No 236; Posted in SSRN: August 11, 2025

Bobek, Michal

This paper examines the institutional evolution and the practice of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union. It analysis the impact the operation of that Panel had on the candidates´ profiles proposes to the Union courts in the past fifteen years. The paper concludes with a range of proposals, both on the substantive as well as procedural side, the common denominator of which is that they could be accommodated within the current institutional design.

The European Central Bank and Dissensus over Liberal Democracy

Forthcoming in The Palgrave Handbook of Dissensus over Liberal Democracy in Europe. Posted in SSRN: August 25, 2025.

Bobic, Ana

As the Bretton Woods system fell in the 1970s, the neoliberal consensus came along and established some hard dogmas in the monetary field. Money neutrality brought about a firm belief in the benefits of central bank independence and the technocratisation of money. This inevitably shaped the powers of the European Central Bank (ECB) in 1992. In the wake of the Euro crisis, the ECB significantly affected financial assistance conditionality as part of the Troika and put into place two large-scale public sector purchase programmes, thereby becoming the largest creditor in the Eurozone. This chapter explores the dissensus concerning the ECB's practice of monetary neutrality and independence under conditions of a clear expansion of its original mandate and the increased political character of its decisions, as evidenced by the unprecedented redistributive effects of its policies. Despite these fundamental transformations, the ECB continues to insist it is acting within its original mandate in order to protect its independence. I argue that the severe dissensus over the ECB's policies that we are witnessing focused on the symptoms instead of the root cause of the problem: central bank independence itself. In other words, so long as the values of central bank independence and monetary neutrality remain uncontested, the ECB will continue on its independent path without democratic accountability.

NONDELEGATION UNDER LOPER BRIGHT

Forthcoming Loyola University Chicago Law Journal 2025. Written: Aug 2, 2025; Posted in SSRN: Aug 4, 2025

Chabot, Christine Kexel

This Article analyzes Loper Bright Enterprises v. Raimondo through the lens of Article I and the nondelegation doctrine. In Loper Bright, the Supreme Court rejected Chevron deference and its general presumption that ambiguous statutes implicitly "delegated policymaking responsibilities," and thus primary interpretive authority, to agencies within the executive branch. Loper Bright retained exceptions that continued to recognize implicit delegations of agency policymaking responsibilities on a statute-by-statute basis. Scholars have puzzled over the import of Loper Bright's carveout for delegated agency policymaking. I argue that the ongoing constitutional debates about Chevron and the nondelegation doctrine helped to shape the framework Loper Bright used to replace Chevron. In debates leading up to Loper Bright, formalist critics of Chevron deference claimed that Chevron violated Articles I and III. They argued that deference encroached on courts' Article III power to interpret ambiguous statutes, and that delegated policymaking also violated the nondelegation doctrine under Article I. A wholesale shift of interpretive power from agencies to courts would therefore resolve the Article III concern while transferring policymaking responsibilities and accompanying nondelegation concerns to the judiciary. Loper Bright rejected an absolute, formalist approach and struck a different balance: it directed courts to resolve statutory ambiguities while respecting delegations that allowed agencies "flexibility" to construe vague statutes, such as laws calling for "reasonable" or "appropriate" regulation. Loper Bright's carveout ostensibly relieved courts of the duty to issue definitive constructions of many policy-laden regulatory statutes. It also indicated that agencies would retain the very policymaking responsibilities that proponents of a more rigorous nondelegation doctrine sought to curtail. Nor were the implicit delegations recognized by Loper Bright swallowed by the major questions doctrine and its clear statement rule. The Court's apparent endorsement of delegated agency policymaking was ultimately confirmed the next term, in FCC v. Consumers' Research, when the Court sustained the constitutionality of delegated policymaking under the intelligible principle test.

Loper Bright's Disingenuity

University of Pennsylvania Law School, Public Law Research Paper No. 25-36, University of Pennsylvania Law Review, Vol. 174, forthcoming 2025.

Coglianese, Cary;
Froomkin, David

Loper Bright prompted a tidal wave of reaction throughout the legal community when the Supreme Court announced it was overruling Chevron, the most frequently cited Court decision in administrative law. But Loper Bright cannot mean what it says. This article identifies three respects in which the majority opinion's claim to have overruled Chevron distorts the real substance of the Court's logic. First, we apply Loper Bright's framework to the facts of Chevron and show that it would have produced the same outcome—if nothing else, an exceedingly curious result if Chevron were indeed overturned. Second, even as applied to other cases, the Loper Bright framework does not truly depart from the Chevron framework. Chevron's premise was that Congress had delegated the authority to interpret an ambiguous statutory term in an agency's enabling statute to the agency. Loper Bright may eschew the word "deference" but without changing the underlying analysis. We show that this kind of wordplay is of little value in making institutional decisions about the allocation of authority. Finally, the very craft of the Loper Bright opinion betrays the perils of the exercise that Loper Bright demands of reviewing courts. Loper Bright instructs judges to identify the "best reading" of administrative statutes, suggesting that an even-handed exercise in recovering semantic meaning can identify extant lines of authority in the administrative state. But the decision rests on an interpretation of the Administrative Procedure Act that is itself selective and slipshod. Ultimately, Loper Bright's formalist rhetoric turns out to mask what is going on under the hood. When judges substitute their views of what is "best" for those of agencies, arguments about statutory meaning can quickly succumb to choices about policy. Avoiding such an outcome, of course, was one of Chevron's core aims.

On the Need for Digital Regulators

University of Pennsylvania Law School, Public Law Research Paper No. 25-35, in Research Handbook on Digital Regulatory Agencies, Martha Garcia-Murillo and Ian MacInnes eds., forthcoming. Posted in SSRN: July 30, 2025.

Coglianese, Cary;

The growing digital economy brings increasing recognition of the need for digital regulators. This chapter considers two senses of the term "digital regulators": one of these refers to regulators of digital technology; the other refers to how any regulatory organization can improve its operations with the use of digital technology. Today's economy requires digital regulators of both types. The need for regulators of digital technology grows out of perennial concerns about market failures and other implicated social values, such as privacy. This chapter sketches the rationales that in the past have justified regulating digital technology, and then it explains how market-failure justifications continue to reveal a need for regulating today's rapidly evolving digital technologies, including artificial intelligence. The chapter then shows how the need for regulators with digital technology has been evident since the advent of the internet and has grown even more compelling today with the possibilities created by artificial intelligence. One common thread from the past through to today is the need for multiple regulators both to oversee digital technologies and to use these technologies to improve their regulatory performance.

Finding Administrative Common Law

82 Washington & Lee Law Review (forthcoming 2026); Posted in SSRN: August 25, 2025

Crews, Adam

Much of administrative law doctrine is judge-made common law. To some formalists, that is a problem: The Administrative Procedure Act (APA) was a hard-fought resolution of deeply contested issues, and it leaves little room for judge-made flourishes. To many functionalists, though, this common law is both inevitable and legitimate because the APA's text does not answer every question in modern federal administration.

This Article enters that debate by proposing a new formalist approach to thinking about administrative common law's legitimacy and disciplining its development. In short, administrative common law should be found, not made. The conventional objection to administrative common law is that it is a largely unconstrained exercise in judicial creativity. Traditionally, however, common law courts constrained their discretion by ascribing legal effect to prevailing customary practices. After eighty years of life under the APA, there is ample evidence of the customary way that agencies implement that statute. These customs should count as formal authority informing the APA's legal meaning. Indeed, as the administrative state was taking form in the late nineteenth and early twentieth centuries, courts accepted that customary executive branch practices were a legitimate tool in construing statutes that underdetermine legal questions for the government. That approach has roots in a custom-based common law methodology, and there are sound reasons to think that the APA affirmatively accepts common law evolution of this sort-even if it forecloses raw exercises of judicial creativity.

This Article explores how courts can feasibly find administrative common law in customary practices, defends this approach on formalist grounds, and explains how it bolsters administrative common law's democratic legitimacy. It also discusses doctrinal implications for issues both new and old: Loper Bright's rejection of Chevron deference; judge-made procedural doctrines; the ongoing development of hard look review; and artificial intelligence's arrival to the administrative state.

An interim report on "subjectivization" and "objectivization" of administrative law: Book review of Luis Medina Alcoz, Libertad y autoridad en el derecho administrativo. Derecho subjetivo e interés legítimo: una revisión, Madrid, Marcial Pons, 2016

P.A. Persona E Amministrazione, 11(2), 864–984, 2023

Doi, Tsubasa

The interplay between rights and the public interest is a crucial issue in administrative law. Recent developments in Germany and France regarding the "objectivization" or "subjectivization" of administrative litigation have brought this issue to the forefront. In his book, "Libertad y autoridad en el Derecho administrativo," Luis Medina Alcoz offers an invaluable perspective on administrative law in France, Italy, Germany, and Spain, tracing its evolution from the 19th century to the present and emphasizing the importance of the concepts of rights within the administrative law system. Its sharp insights and broad scope make it a significant contribution to the field. However, this paper explores the book's significance from a different angle. By examining the arguments that the book does not fully address and the underlying assumptions it makes about key concepts, this paper will demonstrate that the book not only describes a possible conception of administrative law, but also raises numerous important issues for further academic inquiry.

The End of Administrative Pragmatism?

Loyola University Chicago Law Journal (forthcoming 2026); University of Michigan Public Law Research Paper No. 25-006; Posted in SSRN: August 14, 2025

Hammond, Andrew;
Walker, Christopher J.,

For decades, the predominant theory in administrative law has been “administrative pragmatism”—i.e., a vision based on rules and doctrines that balance the interests in empowering agencies to fulfill their statutory mandates while constraining agencies from abusing the discretion Congress has delegated to them. In recent years, however, we have seen an “anti-administrativist” turn at the Supreme Court and, at least to some extent, in the rest of the federal judiciary. Although administrative pragmatism is no longer the predominant theory at the Court, that does not mean it has died. Administrative pragmatism remains the principal theory among administrative law scholars, agency officials, and many federal judges. But its continuing vitality will depend on how the theory evolves to respond to the anti-administrativist turn at the Supreme Court.

In our contribution to this symposium issue on administrative law, we argue that Justice Kagan’s articulation of administrative pragmatism in Kisor v. Wilkie captures a rich and nuanced theory of administrative pragmatism. Yet, based on our review of every judicial decision citing Kisor during its first five years of existence, lower courts have not appreciated, much less embraced, Justice Kagan’s vision. Scholars too could and should revisit what Justice Kagan crafted in Kisor. When properly understood, Justice Kagan’s vision addresses most of the concerns raised by administrative skeptics about administrative law and regulatory practice today. And yet it still preserves the administrative state’s critical role in delivering effective governance and ensuring the implementation of Congress’s commands.

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

Cambridge International Law Journal 14(1), pp 123–140. Posted in SSRN: July 29, 2025

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.

🗁 Administrative Obstruction In European Union Education – Part II: A Legal Case Study On Faculty Rhetoric And Systemic Attrition At Semmelweis University

Written: August 25, 2025; Posted in SSRN: August 25, 2025.

Harsh Wardhan, Siddhartha

This continuation of the Administrative Obstruction in EU Education series critically examines the faculty rhetoric employed to normalize elevated attrition rates within Hungarian medical education. Specifically, it scrutinizes the repeated assertion made by Dr. Barna in 2024: "50% of students fail " Microscopic Anatomy and Embryology I" and must repeat first year." This rhetoric is interpreted as an institutional mechanism of administrative obstruction, conditioning students to perceive failure as inevitable rather than due to systemic overcrowding and insufficient resources. Cross-referenced with Hungarian higher education law, EU Directive 2005/36/EC, and Semmelweis University's internal regulations (SZMSZ), this study concludes that such rhetoric is incompatible with legal and accreditation obligations to ensure fair, transparent, and adequate conditions for academic completion.

🗁 Delegating Judgment: AI Agents, Legal Accountability, and the Foundations of Democratic Legitimacy

Written: August 5, 2025; Posted in SSRN: August 12, 2025.

Hart, Rebeccah

Integrating autonomous artificial intelligence (AI) into critical decision-making has outpaced the reach of existing legal frameworks, forcing legal systems to confront unprecedented dilemmas of procedural fairness, explainability, and democratic legitimacy. Autonomous systems now routinely determine access to benefits, jobs, and basic services, often without meaningful human oversight or recourse. Against this rapidly consolidating reality, this Article proposes a novel framework: the Delegated Synthetic Agent (DSA)-an autonomous, nonhuman system deployed by public or regulated actors to perform consequential legal or administrative tasks. Building from first principles in U.S. constitutional law, European rights regimes, doctrines of tort and agency, and contemporary AI regulation, the Article exposes the limits of retrofitting classical liability doctrines to nonhuman agency. It details how the DSA concept can restore procedural dignity, transparency, and institutional accountability that the law requires in automated governance. The analysis draws upon recent court decisions and current U.S. and European legislation-including the EU AI Act and several U.S. state laws-and incorporates current executive orders and policy reports to demonstrate the urgency and feasibility of reform.

🗁 Using Public Nuisance Litigation to Address Industrywide Misconduct: Common-Law Statutes, Nondelegation, and Regulation

74 DePaul Law Review. 461, 2025

Hillel Y. Levin;
Timothy D. Lytton

In this Article, we assert that broad, open-ended public nuisance statutes offer a legitimate legal tool to curb public health harms caused by the unreasonable design, marketing, and distribution practices of product manufacturers. We argue that these statutes are "common-law statutes" by which legislatures authorize courts to apply the concept of public nuisance to new situations using common-law-style reasoning. We demonstrate that this understanding of public nuisance statutes is consistente with well-established interpretive traditions regarding the codification of common law. Statutory delegation of broad interpretive discretion to courts concerning the application of public nuisance law constitutes a legislative choice to regulate through litigation. We contend that the delegation to courts to elaborate on public nuisance law is no less justified than delegation to administrative agencies to exercise policy discretion through adjudication and rulemaking.

🗁 Legal countermeasures against COVID-19 in Japan: effectiveness and limits of non-coercive measures

China-EU Law J 8, 11–32

Kadomatsu, Narufumi

This paper analyzes Japan's legal responses to COVID-19, emphasizing its heavy reliance on non-coercive measures. It discusses the traditional role of "administrative guidance" in Japan and explores reasons for open non-compliance cases by facility managers.

🗁 Denial of "Interpretative Discretion" in Japanese Law? Is it Really Different from Chevron Deference?

Journal of Japanese Law, volume 27, L. 53, 45–69, 2022.

Kadomatsu, Narufumi

This paper argues that although the U.S. Chevron doctrine explicitly recognizes interpretative discretion for administrative agencies, Japanese administrative law doctrine formally denies such discretion. Nevertheless, it contends that the two systems are functionally equivalent in practice.

🗁 Taking Legality Seriously: What the Major Questions Doctrine Is — And Isn't

94 George Washington Law Review (forthcoming 2026); Posted in SSRN: August 12, 2025

Katz, Andrea Scoseria

The Major Questions Doctrine (MQD), a controversial recent innovation of the Roberts Court that applies stricter scrutiny to "major" actions taken by federal agencies, has faced criticism for being atextual, unprincipled, and nakedly ideological. But this critique misses the fact that the doctrine has near-exact analogues in many other legal systems, where it is an established tool for reining in executive overreach. This Article argues that, while the MQD reflects valid rule-of-law concerns, as applied, it lacks theoretical clarity, consistency and limits. More importantly, the Court itself lacks a theory of what the MQD is. We provide an answer grounded in a theory of legality, and propose a revised doctrinal test for its application.

As this Article shows, across legal systems, judicial "majorness" tests are rooted in the principle of legality, which requires that all government action be traced back to a legal authority. In an American administrative law context "legality" has mainly been the concern of those who want to dismantle the regulatory state. Our approach is different. At the core of our theory is the idea that legality is a principle, not a binary, and therefore that a test of majorness can, and ought to, not only hold government to the rule of law, but also allow it to function efficiently. We thus propose a revised test for MQD review: First, we clarify what should qualify as a "major" action, as opposed to routine matters or total delegations. We then argue that "majorness" can take two distinct forms: (1) actions that pose a risk to fundamental rights or the political process, and (2) actions that are exceptionally large in scale or significance but do not carry such risks. Each type, we contend, warrants a different judicial response depending on the clarity or ambiguity of the statutory delegation. We apply our test to a pair of case studies—the student loan debt relief case and a hypothetical executive program banning abortion pills under the Comstock Act—to illustrate its purchase. Legality is about the line between legislation and execution, a line that is fuzzy at best, but one which, we believe, can and should be enforced by judges. This Article offers two novel contributions. First, we provide a better understanding of the MQD, offering both a critique and a constructive path forward. Second, we advance a theory of legality that better grounds executive power in the rule of law, while suggesting how judicial review can place principled limits on its exercise. In the unfolding Trump era and the post-Loper Bright world, both are significant.

🗁 May Federal Courts Create New Presumptions?

Written: August 12, 2025; Posted in SSRN: August 19, 2025

Katz, Emile

Federal courts create and apply new evidentiary presumptions—inferential rules that conclude a particular fact exists—the application of which are frequently outcome determinative, unless the adversely affected party presents contrary evidence. Although the topic of presumptions has been frequently covered in academic literature, there has been little study regarding whether federal courts have authority to create new presumptions. This article analyzes whether federal courts are authorized under the U.S. Constitution or other law to create new evidentiary presumptions. It concludes that federal courts have no inherent power to create new evidentiary presumptions. Rather, federal courts may create presumptions pursuant only to congressional delegation through the procedures set out in the Rules Enabling Act. Accordingly, when courts create new presumptions in individual cases, they violate both the constitutional separation of powers and the Rules Enabling Act. This article additionally explores the implications of new judicially created presumptions for procedural fairness and confidence in the judicial system.

🗁 Algorithmic Due Process Audits: A Legal Framework for AI Accountability in Government Decisionmaking

Written: July 15, 2025; Posted in SSRN: August 7, 2025

Khattak, Waleed

As artificial intelligence (AI) becomes embedded in government decisionmaking, longstanding procedural due process rights face new risks. Agencies increasingly rely on algorithmic systems to determine access to public benefits, assess risk, allocate resources, and inform enforcement. Often without sufficient transparency or oversight. When the government makes consequential decisions using AI tools, the basic constitutional requirements of notice and an opportunity to be heard still stand. Opposingly, the use of automated decisionmaking raises the stakes. The risk of error, blurredness, and institutional bias can be amplified when poorly designed or inadequately monitored systems are used.

This paper argues that procedural due process must be enforced at both the design and implementation stages of government AI use. It proposes a regulatory framework grounded in three pillars: interpretability, auditability, and institutional accountability. Government agencies should not be permitted to shield decisions behind "black box" systems. Instead, due process requires systems to be interpretable to affected individuals and courts. A risk-based oversight model, similar to the tiered approach of the EU AI Act, can help allocate compliance burdens in proportion to the potential harms of the system in use. This model preserves innovation while protecting constitutional rights. Although federal guidance remains layered with gaps, courts and lawmakers are beginning to recognize that meaningful due process cannot coexist with inscrutable or untested algorithms. Algorithmic accountability is a constitutional requirement.

🗁 Data, Control, and Power: Decoding India's Digital Personal Data Protection Act, 2023

Written: July 26, 2025; Posted in SSRN: August 12, 2025

Lakra, Rudraksh;
Kolanu, Medha;
Shrivastava, Abhijeet

This paper offers a critical examination of the Indian Digital Personal Data Protection Act, 2023 ("DPDPA 2023") and the Draft Digital Personal Data Protection Rules, 2025 ("DPDPA Rules 2025"). The analysis is organized into two principal critiques. First, an endogenous critique interrogates the Act and Rules, highlighting concerns such as broad exceptions and exemptions, lack of transparency and accountability, adverse impacts on Data Principals rights, and limited technical, organisational, and security measures. Second, an exogenous critique addresses the legislative silences and structural omissions, including the absence of key fundamental data processing principles, lack of heightened protection for sensitive data, and inadequate responses to emerging harms such as algorithmic decision-making, algorithmic management, and behavioural profiling. Finally, the paper contextualizes these shortcomings within India's broader digital authoritarian turn and its digital political economy, arguing that the DPDPA reinforces a state-centric architecture of control and facilitates data extractivism, concentrating power in the hands of the State and private entities, especially "domestic champions."

🗁 Las agencias reguladoras independientes y sus desafíos de legitimidad democrática: revisión de literatura y agenda para el derecho constitucional en Latinoamérica. (Independent regulatory agencies and their challenges of democratic legitimacy: literature review and agenda for Constitutional Law in Latin America)

International Journal of Constitutional Law, Volume 20, Issue 4, October 2022, Pages 1463–1482.

Latorre, Indira

The Anglo-Saxon and European literature usually presents independent regulatory agencies as institutions capable of solving some of the problems of constitutional democracies and of satisfying the objectives of the so-called regulatory state. It also shows the presence of some problems, which I call constitutional ruptures, caused by the actions of independent regulatory agencies both at the domestic and global level, and presents various responses to the legitimacy challenges that these ruptures generate. In contrast, although the literature in Ibero-America shows growing progress in understanding these institutions, it has not sufficiently explored these constitutional problems. Based on the literature review, this article seeks to set out some lines of argument around such constitutional problems, so as to contribute to shaping a future agenda for constitutional discussion, especially in the Latin American region.

🗁 The global dimension of domestic regulatory agencies: Why do we need a networked perspective of political legitimacy?

Journal of International Political Theory, 21(1), 32-59. (Original work published 2025).

Latorre, Indira

Many domestic regulatory agencies (DRAs) have intensified the use of international cooperation mechanisms, and their decisions increasingly exert a global impact. While the globally interactive nature of DRAs is generally accepted, the theoretical implications of this collaboration remain unexplored. I argue that DRAs have a global-domestic institutional dimension and outline the attributes of this aspect of their authority. Based on my analysis, I claim that the global-domestic dimension of DRAs produces changes in the manner in which they exercise their authority. I further try to ascertain how the political legitimacy of these agencies should be assessed. Finally, I argue that a networked perspective of political legitimacy is normatively sound in capturing and evaluating the global-domestic authority of DRAs.

Bypassing Agency Adjudication

103 Washington University Law Review (2026) (forthcoming). Posted in SSRN: 4 Aug, 2025

Lipshutz, Brian

This Article examines the contested practice of bypassing agency adjudication to accelerate judicial review of non-final executive action. Parties typically challenge final action under the Administrative Procedure Act (APA). But parties may also seek an injunction or declaratory judgment with respect to a non-final action that violates a statute or the Constitution. Traditionally, such "ultra vires" review required a clearly unlawful action and an inadequate administrative remedy. But modern courts further limit it by applying three judicially developed timing doctrines—exhaustion, ripeness, and Thunder Basin.

This Article explains why the traditional ultra vires model—without the timing doctrines—should govern the bypassing of agency adjudication. Traditional ultra vires review ensures that consequential actions are not shielded from scrutiny and protects plaintiffs against irreparable harm. It simultaneously protects agency discretion by limiting the scope of review and requiring plaintiffs to show the inadequacy of administrative remedies. And the timing doctrines improperly flip the presumption against implied repeals, abdicate the policing of jurisdictional boundaries, and force plaintiffs to rely on inadequate remedies.

More broadly, this Article challenges the scholarly consensus that the APA-style appellate model of judicial review has replaced the older ultra vires model. Ultra vires review ensures review in an important set of cases. And that model of review rests on a different analogy for the relationship between courts and agency adjudicators. Rather than having only a trial-appellate relationship, courts and agency adjudicators also relate to each other as separate court systems in ultra vires cases.

Does Nature Need Rights?

Written: June 15, 2025; Posted in SSRN: June 25, 2025

Mullins, Rob;
Weis, Lael K.

Rights of nature (RoN) appear to provide a promising alternative to anthropocentric environmental rights. But do they meet the demands of transformative green constitutionalist projects? This article addresses that question by examining the juridical dimensions of RoN. We draw on empirical studies of RoN laws to identify and examine the challenges of redeploying 'rights' and 'legal personality'-concepts associated with liberal normative frameworks-in the service of green normative theory and its fundamental concern for ecological well-being. We reject the dominant rights-based paradigm, which locates the green potential of RoN laws in constituting nature as a rights-bearing legal subject, and we propose an alternative: the governance paradigm. Our alternative locates the green potential of RoN laws in reconfiguring authority relations and supports ecocentric legal frameworks instead of RoN: emphasising ecocentric values and duties instead of rights, and ecological community membership instead of legal personhood.

Judicial Independence, the Separation of Powers, and Criminal Investigations of Judges

Singapore Management University School of Law Research Paper Forthcoming. Posted in SSRN: August 12, 2025.

Ong, Benjamin Joshua

In Haris Ibrahim [2023] 2 MLJ 296, the Federal Court of Malaysia discussed the legal limits to executive authorities' powers to investigate judges on suspicion of crime. The case is a rare contribution to the jurisprudence on judges' criminal liability at common law, as well as a case study in the challenges of reconciling judicial independence with other principles of the constitutional framework and other actors' roles therein. The Court held that the implied constitutional principle of judicial independence requires that executive authorities follow a "set of protocols" (which the Court formulated) when investigating sitting judges. This was not wrong in principle, but the Court's understanding of the separation of powers did not give sufficient weight to other constitutional principles which require that the executive, too, be able to do its job without being unduly hindered-particularly when that job itself serves to safeguard constitutional values such as judicial accountability.

A Global Administrative Act? Refugee Status Determination between Substantive and Procedural Law

Stiftelsen Juridisk Fakultetslitteratur, no. 1, 2022, pp. 65–98

Okitsu, Yukio

This article analyzes the distinction between substantive and procedural law in refugee status determination (RSD), highlighting that while the definition of “refugee” is globally standardized, procedural authority remains with individual states. It also examines the role and legal impact of UNHCR’s RSD decisions within this international and administrative law framework.

Judicial Review: Substance and Procedure

Written: July 19, 2025; Posted in SSRN: July 24, 2025

Perry, Adam;
Ryu, Angelo

Here we distinguish two questions about judicial review. First, substance: what acts or decisions are properly subject to the grounds of review? Second, procedure: what acts or decisions are properly reviewable through the judicial review procedure? Then we settle both. Our answer to substance is that two principles determine the scope of the grounds of review, the first a principle of regularity, the second a principle of non-arbitrariness. Our answer to procedure is that acts or decisions are amenable to judicial review when two conditions are met, the first that the grounds of review apply, the second that no alternative procedure adequately enforces those grounds.

🗁 Ships Still Passing In The Night? The Deepening European-US Divide On Regulating The Online Public Sphere

Forthcoming in Ash Bhagwat and Alan Chen (eds) The Elgar Companion to Freedom of Speech and Expression (2025). Posted in SSRN: July 25, 2025.

Phillipson, Gavin

This chapter argues that long-standing doctrinal, conceptual and constitutional divides between European and US approaches to free speech law have only been deepened by the emerging, sharply-divergent approaches to regulating the online public sphere. It expounds this thesis via comparative analysis of constitutional design, influence of 'the marketplace of ideas' theory, privacy and the right to be forgotten, defamation and disinformation, hate speech, terrorism-related material and regulation of social media. It argues that Europe has taken important steps to empower individuals against corporate media power, in stark contrast to the US, which continues to place enormous faith in the marketplace to restrain corporate abuses and neglect. It concludes that US and European scholars can nevertheless fruitfully engage with each other: recent European experience can inform current US debates about Sullivan and reforming CDA 230; European scrutiny of its regulations on offensive and hate speech should be influenced by the US constitutional prohibition against viewpoint discrimination.

🗁 Integrity and Efficiency in Sustainble Public Contracts: Balancing Corruption Concerns in Public Procurement Internationally

Collection Droit Administratif (Administraitve Law) Jean-Bernard Auby; Larcier, France, 2014. ISSN 2031-4922.

Racca, Gabriella M.;
Yukins, Christopher R.

This book is based on the joint efforts made by the international research network “Public Contracts in Legal Globalization” (PCLG) that carried out collective research on a number of topics linked to Public Contracts since 2007.

[...]

The purpose of this book is thus to improve the outcomes of the aforementioned publications with a specific focus on integrity issues in public contracts. Corruption, collusion, favourtism and conflict of interest seem to undermine the efficiency of a relevant amount of public spending. Such discussion emerged from the workshop “Integrity and Efficiency in Sustainable Public Contracts” organized by Gabriella M. Racca (www.ius-publicum.com) of the University of Turin and Christopher R. Yukins og George Washington University (Government Procurement Programme) in Turin on june 8th, 2012.

Joint Public Procurement and Innovation: Lessons Across Borders

Éditions Bruylant, Paris, 2019. ISBN: 978-2-8027-6380-2

Racca, Gabriella M.;
Yukins, Christopher R.

The book is based on joint efforts made by the Public Contracts in Legal Globalization (PCLG) international research network, whose members have carried out collective research on a number of topics linked to public contracts since 2007. (1) Driven by the Sciences Po Governance and Public Law Centre (Chaire Mutations de l'Action Publique et du Droit Public), the PCLG Network comprises European and non-European researchers and practitioners as well.

The PCLG Network publication Comparative Law on Public Contracts (2010) has shown that public procurement law offers suitable topics for comparative research also on account of its cross-border implications.

[...]

Building on the aforementioned publications, the aim of this book is to focus on procurement innovation in organizations, cross-border procurement, and award procedures while examining the subject matter of the contract and the procurement process also with a view to suggest ways of encouraging the participation of innovative suppliers.

Digital Transformation for Effective e-Procurement

In: Hamer, Carina Risvig; Andhov, Marta; Bertelsen, Erik; Caranta, Roberto: Into the Northern Light – in memory of Steen Treumer. ExTuto Publishing. P. 215-228

Racca, Gabriella M.

The text addresses digital transformation in e-procurement and its significance for enhancing efficiency, integrity, and innovation in public procurement. It highlights how digitalization enables standardization, data analysis to identify inefficiencies, and the prevention of irregularities through predictive tools and innovative monitoring. The document underscores the "once-only" principle and the Virtual Company Dossier as mechanisms to streamline documentation and reduce bureaucracy, thereby fostering trust and mutual cooperation between administrations and economic operators. Moreover, it discusses the qualification and specialization of contracting authorities and the application of technologies such as Building Information Modeling (BIM) to improve the quality of public works. Finally, the article emphasizes that digitalization serves as a tool for accountability and the continuous improvement of procurement processes.

Towards a Knowledge History of Chinese Law: An Introduction to the History of Chinese Administrative Law Science, Its Pioneering Actors, and Knowledge of Normativity

Asian Journal of Law and Society. Published online 2025:1-47. doi:10.1017/als.2025.1

Röseler, Sandra Michelle

Within Chinese legal studies, the construction of a distinctly Chinese knowledge system emphasising "Chinese subjective consciousness" (中国主体意识) has become a new important agenda. This introductory article responds to this methodological turn and growing interest in a broader intellectual history of Chinese law. Until recently, traditional Western scholarship on Chinese legal history has largely focused on written legal documents, not on their underlying processes of knowledge production. While Chinese scholars acknowledge the significance of (cultural) translation of foreign legal knowledge, the entanglements of Chinese and Western legal genealogies within a knowledge-historical framework remains underexplored. This article introduces a knowledge-historical approach to study Chinese legal history by narrating the history of administrative law through the lens of local knowledge production through cultural translation. It reveals compelling stories of local actors, who engaged with new knowledge of administrative law in multiple processes and layers of knowledge production from the late Qing dynasty to the late 1980s.

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

Written: June 01, 2025; Posted In SSRN: July 2, 2025

Röseler, Sandra Michelle

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.

Rethinking the Applicability of Section 8 of the Canadian Charter for the Information Age and Beyond

This paper is forthcoming in the Supreme Court Law Review (SCLR), Osgoode Legal Studies Research Paper No. 5365721. Posted in SSRN: July 29, 2025

Tanguay-Renaud, François

The Supreme Court of Canada's interpretation of the right to be secure against unreasonable search and seizure guaranteed by section 8 of the Canadian Charter of Rights and Freedoms has remained fairly stable since the adoption of the Charter. Or at least, that is how the Court's section 8 jurisprudence to date makes it seem. Yet, in some recent decisions dealing with digital communications and the internet—culminating in the 2024 case of R. v. Bykovets—the Court has, implicitly, brought into question the foundational principle based on which the right has historically been circumscribed. Or so I argue in this article, contending further that this development should be applauded and pave the way for a rethinking of the scope of applicability of the section.

In section I, I explain the orthodox position about the applicability of section 8 and outline key controversies that arose in its development and have since remained unaddressed. I then seek to problematize the position further by identifying some questionable implications that the Court has held it to have over the years. In section II, I situate and review the recent decision in Bykovets and show how it invites a rethinking of the scope of applicability of section 8. In section III, I argue that the logic of the Bykovets majority opinion should lead the Supreme Court to expand the reach of 8 section to all non-accidental gatherings of information about individuals by the state. In an era in which, more than ever before, information is power, I argue that, for section 8 to protect us meaningfully against unjustified informational overreach by the state, all such collections should be subject to the rule of law and the attendant possibility of judicial control.

Possible Utilization of Personal Data and Medical Care in Japan, Focusing on Japan's Act on Anonymously Processed Medical Information to Contribute to Medical Research and Development

In: Kreps, D., Davison, R., Komukai, T., Ishii, K. (eds) Human Choice and Digital by Default: Autonomy vs Digital Determination. HCC 2022. IFIP Advances in Information and Communication Technology, vol 656. Springer

Terada, Mayu

This paper analyzes the fragmented legal framework for medical data use in Japan, focusing on the limitations of the Act on Anonymously Processed Medical Information. It argues that the current system is overly complex and ineffective, especially during the COVID-19 pandemic. The study suggests the need for a more comprehensible and unified legal system to enable effective use of medical data while protecting personal information, ultimately supporting medical research and cost reduction.

The Changing Nature of Bureaucracy and Governing Structure in Japan

The Changing Nature of Bureaucracy and Governing Structure in Japan, 28 Washington International Law Journal, 43, 2019

Terada, Mayu

This paper examines the changing relationship between political leadership and the bureaucracy in Japan from the perspectives of administrative organization and public law. It analyzes the operation of limited political appointments under prolonged Liberal Democratic Party rule, the shift in executive personnel and leadership following the 1993 political transition, and the establishment of the Cabinet Bureau of Personnel Affairs in 2014, thereby clarifying the institutional basis for the expansion of administrative power. Furthermore, it considers the challenges of coordinating political control with administrative expertise and ensuring democratic legitimacy, and offers reflections on how to maintain a proper balance between political leadership and administrative autonomy.

Memories of the Information Disclosure Law and Public Document Management Law

University of Hawai'i at Manoa; Asian-Pacific Law & Policy Journal, Volume 25, Issue 3, May 12, 2024

Uga, Katsuya

Prof. Katsuya Uga is Professor Emeritus at the University of Tokyo, who recently retired from the position of Justice of the Supreme Court of Japan. He was directly involved in the drafting of both the Information Disclosure Law and the Public Document Management Law. This article provides a detailed account of the background and legislative history of these two statutes.

The Future of Public Law in Aotearoa New Zealand

Written: September 01, 2024; Posted in SSRN: August 12, 2025

Varuhas, Jason N. E.

This is a lightly revised version of the 21st Robin Cooke Lecture delivered at Victoria University of Wellington in December 2023.
The paper focuses on judicial method, and specifically the role of “values” in legal reasoning. Drawing on comparative insights from Australia, Canada and the UK, the paper elaborates three models of legal reasoning, within which values play a different role:
1. Legalism – a mode of reason which largely rejects any role for values in legal reasoning, which may be associated with a persistent majority of the High Court of Australia over the last 25 years.
2. Normativism – on this approach, cases are determined by courts balancing values on the facts, a model which has exerted influence in Canada, and which was beginning to take hold in the UK until recent course-correction.
3. Common law reason – within the common law model, judges decide cases on the basis of reasonably determinate rules or principles. In turn, these rules and principles are manifestations of deeper values.
The paper argues that normativism and legalism should be rejected, in favour of orthodox common law reason, and commends this approach to the New Zealand courts, which have more recently begun to experiment with values-based reasoning.
The paper goes on to consider judicial development of the common law, distinguishing different types of legal change:
1. Ordinary legal development.
2. Changes to deeper commitments.
3. Changes judges cannot make.

Progressive Anti-Deference

Loyola University Chicago Law Journal, Vol. 57, Forthcoming 2026, Texas A&M University School of Law Legal Studies Research Paper; Posted in SSRN: August 14, 2025

Walters, Daniel E.

On the surface, the overturning of Chevron deference seems like yet another win for the conservative, antiregulatory movement that has risen to power in American politics. On this account, and if all goes according to plan, courts will now be freed to limit agencies' statutory powers and thereby tame or deconstruct the administrative state. Yet developments in the law often have unintended consequences, and it may be that Loper Bright's rejection of deference will not inexorably move administrative law and regulatory policy in a less protective direction. This article shows that, taken to its logical implications, the formalistic theory of interpretation that the Loper Bright majority espoused compels greater scrutiny of all forms of agency error, including errors that involve the agency failing to regulate as much or as stringently as the best reading of statutes requires. More systematically, this would entail revisiting several areas of administrative law doctrine that put a thumb on the scale in favor of deferential review of agency inaction. As they currently stand, these standards of review are incompatible with Loper Bright's theory of interpretation. This article identifies these implications, argues that an asymmetrical approach to different types of errors that agencies might commit is undesirable for administrative law, and urges litigants and judges to begin the hard work of unpacking and faithfully pursuing Loper Bright's full implications, which may often involve a boon to those who government fails by doing less than Congress required.

Decarbonization Infrastructure & Indigenous Communities: Consultation, Consent, and Complexities

Book Chapter - forthcoming in Ed Vol by Sabin Inst at Columbia. Posted in SSRN: July 30, 2025

Wright, David V.

Virtually all decarbonization pathways include infrastructure projects that will affect the rights and interests of Indigenous communities. This chapter explores the intersection between decarbonization infrastructure and the rights of Indigenous peoples, with a particular focus on Canada. Given its ambitious decarbonization objectives, sophisticated Indigenous rights legal regime, and natural resources-based economy, Canada's law and policy developments hold relevance for many jurisdictions around the world that are also home to Indigenous peoples. The chapter begins by succinctly presenting the decarbonization public policy context in Canada. It then turns to explaining the Canadian legal landscape pertaining to the rights and interest of Indigenous peoples, including commentary on government consultation obligations and recent evolutions in law and policy toward Indigenous consent, collaboration, and decarbonization infrastructure ownership. Specific examples of Indigenous involvement in infrastructure projects in Canada are then discussed before presenting concluding perspectives.

Introduction to Comparative Environmental Law

Santa Clara University Legal Studies Research Paper Forthcoming; Posted in SSRN: August 25, 2025.

Yang, Tseming;
Telesetsky, Anastasia;
Phillips, Sara K.

This chapter provides an overview of the research handbook "Comparative Environmental Law."

Birth and Growth of French Administrative Law

Rivista Italiana di Diritto Pubblico Comunitario 2025. Posted in SSRN: August 12, 2025

Ziller, Jacques

The traditional presentation of French administrative law held that it was first and foremost the product of the case law developed since the beginning of the nineteenth century by the Conseil d'État established in 1799. Contrary to the traditional narrative, administrative law existed since the fourteenth century; it was not merely protecting public bodies and offices, but also protecting individuals, as was further developed by "adult" administrative law. After the Revolution administrative law has mainly developed as judge made law by the Conseil d'État. The article explains the main features of the law that developed since the nineteenth century, the contribution of academia to that development and gives details about scope, tools and principles of French administrative law, including the impact of constitutionalisation and Europeanisation.

Events and Informations:

- **Call for Papers: Public Law Conference: Public Law and Future of Constitutional Democracy - Cape Town, 1-4 July, 2026** - for more information, click here.

  Abstracts must be submited in the Oxford Abstracts eletronic system, wich will open on Monday 18 August 2025 and close on Friday 14 November 2025.

- **Call for Papers: Scholarship Roundtable on State and local Governance: Agencies, Institutions and Infrastructure - University of Michigan Law School, Ann Arbor, April 10, 2026** - for more information, click here.

  Scholars interested in presenting a paper and participating in the Roundtable should submit a one-to-two-page abstract by November 15, 2025.

Please contact the editor at his e-mail with your comments, informations, questions or suggestions for our Comparative Administrative Law listserv.
