NEWSLETTER 5 OCT 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 Crisis of Appropriations Law

103 Wash. U. L. Rev. (forthcoming 2026). Posted in SSRN: September 09, 2025

Bagenstos, Samuel R

Appropriations law is a unique body of federal law. Appropriations law imposes its own somewhat baroque set of statutory interpretation principles, approves of very broad delegations to the Executive Branch without meaningful limiting principles, and is often exempt from judicial review. But perhaps that is all about to change. Donald Trump's historically aggressive challenge to Congress's power of the purse has spurred an unusually large volume of exceptionally high-stakes appropriations law litigation.

The potential implications go beyond the high-profile issues such as enforcement of the Impoundment Control Act. In general, the unusual features of appropriations law are built on a particular vision of interbranch relations. In that vision, it is the annual appropriations process, bolstered by ongoing congressional oversight, that is the principal check on the Executive Branch: The Constitution gives Congress the power of the purse, it gives Congress the tools to enforce that power, and Congress can be expected to use those tools. Judicial enforcement is thus largely unnecessary. Rather, the Executive Branch has an incentive to create a robust internal system of enforcing the expectations that congressional appropriators had when they adopted the relevant spending legislation. Many of the unusual features of appropriations law can be well understood as implementing that robust internal system.

The first Trump Administration put pressure on the vision of interbranch relations on which so much of appropriations law is premised. The impoundment of security assistance funds intended for Ukraine is only the most notable example. But the second Trump Administration has gone significantly farther. The administration has engaged in impoundment on a massive scale. It has refused to comply with the apportionment transparency law Congress passed in the wake of the Ukraine scandal. And much more. Although GAO has begun to issue opinions finding the administration in violation of appropriations laws, congressional appropriators have generally remained passive in the face of Trump's actions.

The vision of interbranch relations that underlies appropriations law doctrine seems to be breaking down before our eyes. The Executive Branch is abandoning its robust system of internal checks. And Congress does not seem to be enforcing its power of the purse through oversight and the annual appropriations process. It is thus sensible to consider whether these changes in the world should spur changes in the law.

Many will argue that the right response is to expand the judicial role. There may well be a place for expanded judicial review, especially in this moment of crisis, but the courts are unlikely to be the solution. That is in part because many of the most significant appropriations law questions will not present an Article III case or controversy. And it is in part because judicial formalism is not well suited to resolving the merits of appropriations disputes, which involve complex and evolving situations where there's a need for flexibility and mutual accommodation between the branches. The best solution would be for Congress to take steps to reclaim its power.

After elaborating on the analysis discussed above, this article will identify some steps Congress could take, ranging from the simple to the complex. The article will offer the most robust case in modern scholarship for political, rather than judicial, enforcement of appropriations law.

The Legal Perspective of Patient Rights and Healthcare Delivery in Nigeria

Written: December 15, 2023; Posted in SSRN: August 12, 2025

Bello, Sandra

This research delves into the legal perspective of patient rights and healthcare delivery in Nigeria, addressing the historical context, international standards, and theoretical frameworks that underpin the concept of patient rights. The study critically examines the legal framework for the protection of patient rights in Nigeria, considering federal laws, international agreements, and the role of regulatory bodies. Focusing on challenges to the enforcement of patient rights, the research identifies institutional, human resources, and legal/regulatory challenges, emphasizing issues such as inadequate healthcare infrastructure, uneven distribution of facilities, shortage of professionals, brain drain, and the lack of comprehensive legislation. The study explores the implications of patient rights infringement, detailing the legal consequences, remedies available, and the broader impact on healthcare delivery. It concludes with recommendations aimed at addressing the identified challenges, enhancing legal frameworks, and promoting awareness to safeguard and enforce patient rights in Nigeria's healthcare system.

The Italian Journal of Public Law: The Law of the Algorithmic State in Central and Eastern Europe

The Italian Journal of Public Law, Vol. 17 Issue 2/2025

Bussani, Mauro;
Zumbini, Angela Ferrari;
Infantino, Marta

Special Issue of the Italian Journal of Public Law, that is dedicated to a comparative analysis of the Algorithmic State. The book analyzed administrative decision making through algorithms (including AI decision making) in 11 States of Central and Eastern Europe.

Arbitration in Scotland

Written: September 17, 2025; Posted in SSRN: September 17, 2025

Cole, Tony

This article discusses the foundations of arbitration in Scotland, including topics such as the arbitration market, the arbitration community, arbitration practice, and arbitration institutions. The interviews on which this article is based were performed as part of a research project funded by the United Kingdom's Economic and Social Research Council. Interviews were performed in 47 countries, including 127 cities and 1,086 interviewees. Further information on the project is available on the project website (https://commercialarbitrationineurope.wordpress.com). 9 interviews were performed in Scotland, involving 18 participants, with 2 interviews performed in Glasgow on 22 September 2022, 2 interviews performed in Aberdeen on 3 October 2022, and 5 interviews performed in Edinburgh on 5-6 October 2022. All interviews were performed by the author. Interviews were recorded and then professionally transcribed.

AI and Transparency in Judicial Decision-Making

Oxford Journal of Legal Studies, 2025 forthcoming. Posted in SSRN: July 1, 2025

Dancy, Tatiana
Monika Zalnieriute

Transparency is essential for maintaining the accountability of the judiciary and justice system as a whole. Yet, judicial reliance upon predictive AI tools is not always compatible with this core value. Drawing upon semi-structured expert interviews with members of the judiciary and legal profession, case-law, and real-life examples, we consider four questions: why transparency matters for judicial decision-making; what information judges must communicate to satisfy its demands; whether this information is accessible; and what we might do about any deficit. We argue that judicial reliance upon AI-generated behavioural predictions warrants a stringent transparency threshold, which demands access to the variables and formulae used to generate an output. At present, this threshold cannot easily be met in cases that involve trade secrecy and/or machine learning. Accordingly, we set out concrete steps to reconcile AI-informed judicial decision-making with transparency, as a foundational aspect of justice and the rule of law.

In Defence of Classical Administrative Law

Published: September 16, 2025. Public Law for Everyone (Website)

Elliot, Mark

The central point of the discussion is whether illegal administrative acts are void ab initio, and can be treated as if they never occurred, or whether they are merely voidable, remaining valid until a court annuls them. The authors argue that abandoning the classical view—which upholds nullity from the outset—is incompatible with maintaining the rule of law. They examine recent direct and indirect challenges to this classical view, including judicial powers to suspend annulment orders or limit their retroactive effects. The text illustrates the practical importance of the issue by citing the case of HM Treasury v Ahmed in the United Kingdom, where the Supreme Court refused to suspend the annulment of illegal legislation to avoid temporarily validating a state act without legal authority. In conclusion, the authors argue that the nullity of illegal acts is essential to ensure that the government acts in accordance with the law and to avoid authoritarian consequences.

Practical paths to risk-risk analysis of solar radiation modification

Oxford Open Climate Change, Volume 5, Issue 1, 2025. Published: March 20, 2025

Felgenhauer, Tyler;
Bala, Govindasamy;
Borsuk, Mark E.;
Camilloni, Inés;
Wiener, Jonathan B.;
Xu, Jianhua

Solar radiation modification (SRM) is increasingly discussed as a potential strategy—in addition to ongoing greenhouse gas emission reduction, carbon dioxide removal, and adaptation—for reducing climate change risks. SRM, in particular stratospheric aerosol injection (SAI), could cool the earth, reducing many of the adverse impacts of rising global temperature; but it could also have unintended consequences both positive and negative, and both biophysical and societal. Because the potential benefits and harms of each SRM option are multiple and uncertain, they need to be analyzed using a comprehensive framework that compares the risks of courses of action that include SRM against those that do not, where the definition of risk captures both the severity and likelihood of impacts. Here we outline such a risk-risk framework for SRM with a specific application to SAI. Four practical steps are needed to perform a risk-risk analysis: (i) specify the candidate risk reduction action(s) to be analyzed, (ii) catalog all important potential benefits and harms of each candidate action, (iii) define the events that constitute the risks of harms and less-than-expected benefits, and estimate their likelihood, magnitude, timing, distribution, and other relevant dimensions, including uncertainty about these estimates, and (iv) compare the risks across different candidate risk reduction actions with the aim of informing decisions that reduce overall risk. We perform an initial cataloging, estimation, and comparison of important risks of a specified SAI deployment in comparison to a non-SAI scenario. We also suggest ways to overcome some key challenges to applying the risk-risk framework across a broad array of possible actions, impacts, and scenarios. We recommend an international assessment of SRM options and their risk-risk profiles.

The Legal Innovation Sandbox

The American Journal of Comparative Law, Volume 72, Issue 3, Fall 2024, Pages 557–600. Published: April 02, 2025

Ford, Cristie;
Ashkenazy, Quinn

The Article examines a novel regulatory approach, called the "innovation sandbox," in the context of the legal profession. The Article makes the claim that the "sandbox" regulatory model is in fact better suited to fostering innovation in the legal services arena than it is in the financial technology, or fintech, arena in which the sandbox concept was developed. However, any effort to transplant a technique from one context to another needs to be carefully considered. This Article is comparative across disciplines—financial regulation and legal services regulation—and across jurisdictions, considering the United Kingdom, the United States, and Canada.

The Article analyzes the key normative assumptions underlying the sandbox concept in fintech: that innovation is beneficial almost by definition, that consumer choice and market preferences can be counted on to winnow out "bad" ideas, and that a private sector-driven strategy based on lifting "regulatory burdens" is an effective way of advancing the public interest. These assumptions, which are fairly mainstream in financial regulation, are unfamiliar if not alarming when transposed to legal services regulation. After discussing normative and contextual differences between these regulatory environments, this Article argues that although these ideas may seem problematic at first glance, the sandbox approach may in fact be particularly promising. It may actually be possible to foster legal innovation, advance the public interest, and take meaningful steps to address the access to justice crisis using an innovation sandbox. However, success will come down to how well the sandbox is implemented. The Article's second half provides a roadmap, informed by rule of law and justice concerns and based on experience from the fintech sector, for how to create a high-functioning, accountable, equity-conscious innovation sandbox for legal services.

Sustainability, Law and Criminology

1st edition 2025; Europe, United Kingdom; Publication date: Aug 12, 2025; Publisher: Larcier

Gruyaert, Dorothy

At the KU Leuven Faculty of Law and Criminology, a sustainability community was created to reflect on the question how our legal discipline can contribute to a more sustainable economy and society. This book is the result of a unique collaboration between more than fifty researchers. It addresses sustainability, law and criminology in a multi-faceted manner.

With this book, the authors aspire to contribute to the sustainability debate and the search for legal pathways to provide solutions for the sustainability challenges of our times. The authors provide insights for legal practice and help to understand the intricacy of sustainability questions in different legal domains.

The core idea which pervades this book is that sustainability is a transversal theme that calls for a cross-cutting approach both in interaction with other disciplines as well as in our own internal dialogues.

The book aims to stimulate and strengthen cross-disciplinary research on sustainability, law and criminology and to provide inspiration for sustainability education and legal practice.

Hardening Soft International Law of Corporate Responsibility in Domestic Courts: A Tort Law Approach

58 the Cornell International Law Journal (2026); Posted in SSRN: August 29, 2025

Ma, Ji

Soft international law is in every corner, in particular those upon multinational corporations (MNCs). How to harden soft international law on MNCs is a continuing issue yet with unsatisfied solutions. Previously, scholars have proposed to create legally binding treaty or deploy soft international law in international arbitral decisions. However, those approaches cannot sufficiently harden soft international law. Different from those insufficient approaches, this Article synthesizes an emerging tort law approach to hardening soft international law by analysing cases from the United Kingdom, the United States, and the Netherlands. It argues that it is plausible for courts-across the globe-to refer to soft international law to impose obligations and liabilities on MNCs.
This article makes three contributions. First, it dissects the rise of the tort law approach to MNC obligations and liabilities. Second, building on the tort law approach, it synthesizes two typologies of referring to soft international law, respectively, in common law principles and civil law statutes. Third, with the explanation of the rise of the tort law approach, this Article assesses the challenges and prospects of referring to soft international law under the tort law approach.

Putting Numbers to Words: Measuring the Readability of Court and Administrative Tribunal Decisions in Canada

Written: July 16, 2025; Posted in SSRN: August 28, 2025

Madden, Mike

This inter-disciplinary law and linguistics dissertation empirically examines the quantitative readability levels of Canadian court and administrative tribunal decisions. It provides current, detailed, and relevant analyses about the extents to which readers of different education levels are likely to understand these adjudicative decisions.

The project makes two original contributions to our knowledge about readability levels of adjudicative decisions. First, it uses linguistic information drawn from recent Canadian decision texts that were scored for readability by human expert raters to create a new law-specific readability formula. Second, it applies the new readability formula to thousands of Canadian decisions from different court levels, authors, legal subject areas, and specialized contexts, in order to assess, compare, and analyze the readability levels of these decisions.

The analyses within this dissertation demonstrate that, with very few exceptions, Canadian judges and administrative tribunal members are writing decisions that cannot easily be understood by large segments of the Canadian population – likely numbering in the millions of people. This research suggests that these authors need to do more, or different, work in order to make their decisions more understandable to the people who may be interested in, or who are affected by, their decisions.

The GPA's Domestic Review Procedures through the Lens of North American Sub-Central Implementation: Flexibility or Incoherence?

Public Procurement Law Review, Volume 34, pp. 270-288. Posted in SSRN: August 19, 2025

McKee, Derek;
Schoeni, Daniel

Article XVIII of the World Trade Organizations revised Agreement on Government Procurement (GPA) requires parties to give foreign suppliers access to independent and impartial fora where they can challenge public procurement decisions. However, many US states and Canadian provinces have domestic review procedures that comply with some, but not all, of Article XVIII s requirements. In addition, some US state and Canadian provincial challenge mechanisms arguably comply with a minimal interpretation of Article XVIIL but not with a more robust, purposive interpretation. In other words, US state and Canadian provincial domestic review procedures help to reveal a host of ambiguities in the text of Article XVIII Some of these ambiguities may have been apparent to the negotiators who drafted the text and may reflect deliberate attempts to accommodate diverse national legal systems. We suspect, however, that some other ambiguities may not have been widely understood at the time the text was adopted. The article proceeds line by line through Article XVIIL identifying ambiguities in the text while providing examples of North American sub-central review systems that embody these ambiguities.

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.

Authoritative Pragmatism? Examining The Influence of the Lee Kuan Yew Leadership Paradigm on Philippine Governance Amidst Flood Control Corruption

Written: August 31, 2025; Posted in SSRN: September 20, 2025

Pajimola, Allan Hil

This article explores whether the leadership principles of Singapore's Lee Kuan Yew-marked by meritocracy, zero tolerance for corruption, and long-term pragmatic governance-have influenced Philippine governance, particularly in the context of corrupt flood-control projects. Using a qualitative multiple-case approach, including reformist cities and flood-control controversy narratives, the paper argues that adaptation of LKY-style governance, contextualized with the nuances of Philippine bureaucracy, will transition this systemically inefficient government into accountable and transparent administration. However, entrenched patronage and systemic corruption-exemplified in flood-control anomalies-limit broader application. Finally, the article concludes that while LKY's model inspires reform, meaningful impact in Philippine governance requires systemic changes in public accountability, merit-based recruitment, and transparency reforms.

Public Participation in Agency Adjudication

Written: May 16, 2025; Posted in SSRN: September 17, 2025

Sant'Ambrogio, Michael;
Staszewski, Glen

This report for the Administrative Conference of the United States (ACUS) examines the institutional structures, practices, and procedures used by federal agencies to support informed public participation in adjudicatory proceedings and suggests strategies for enhancing public participation in agency adjudication. The report provides background on the role of agency adjudication as a policymaking form, the justifications for public participation in such proceedings, the literature on public engagement with regulation, and the basic challenges of participatory agency adjudication. After describing our research methodology, the report presents a conceptual framework for public participation in agency adjudication, provides concrete examples of agencies using available tools, and suggests strategies for enhancing public participation in agency adjudication based on our research.

Court Curbing in the United Kingdom

Written: January 09, 2025; Posted in SSRN: September 9, 2025

Schwartz, Alex

Court curbing has attracted heightened attention in recent years, largely because of its association with "populist" attacks on the constitutional rule of law. The United Kingdom has had its own recent bout of court curbing. During the period of Conservative government from 2015 to 2024, there was a movement to systemically curb the courts' common law powers of judicial review. Ultimately, however, only a few narrowly targeted reforms were enacted. This Article advances an explanation for why the outcome of this recent bout of court curbing was so mild, identifying two features of the British context which may have explanatory power in other established liberal democracies. The first is legislative supremacy (or "parliamentary sovereignty") and the corresponding absence of a judicial power to invalidate primary legislation passed by the national legislature. Because legislative supremacy facilitates the use of ordinary legislation to reverse or limit unwelcome judicial decisions in the public law domain, it tends to temper the intensity of court curbing by offering more palatable, narrowly targeted alternatives to broadly targeted attacks on judicial power. The second is the difficulty of mobilizing populist antipathy against the judiciary from within the ranks of an otherwise "establishment" political party. In the case of the United Kingdom, the Article argues that an enduring reverence for the British judiciary within the Conservative Party inhibits the kind of populist rhetoric that might otherwise be used to promote a broader court-curbing agenda. The Article illustrates how these two factors had a moderating influence on the recent movement to curb the courts in the United Kingdom.

Framing Effects in Proportionality Analysis: Experimental Evidence

Journal of Law & Empirical Analysis, 0(0)

Van Aaken, Anne;
Sarel, Roee

Proportionality Analysis (PA) is usually perceived as applying a rationality-based formula to determine whether a legal act is (un)constitutional. However, behavioral economics suggests that decisionmakers—including judges—may be susceptible to various cognitive biases, which implies that PA might be similarly affected. Using a vignette experiment, we examine how different framings of legal cases influence PA judgments across three groups: administrative judges, law students, and non-law students. Results show that judges demonstrate minimal susceptibility to framing effects when conducting PA, suggesting that legal expertise and professional experience can provide significant protection against cognitive biases in judicial decision-making. These findings provide reassuring evidence for the rationality of PA as applied by professional judges, while demonstrating the debiasing impact of legal training and expertise. However, we also find that judges remain susceptible to other behavioral effects when making decisions that are unrelated to PA. We discuss the relevance of our findings for the current debate surrounding constitutional review, contrasting PA—used frequently around the globe—with the specific constitutional review process in the United States.

Forty-Five Years of Public Interest Litigations in India: Its Changing Constituencies and the Rise of the Regulatory Court

Forthcoming in the International Journal of Constitutional Law. Posted in SSRN: September 09, 2025

Verma, Pranav

The paper presents an empirically informed account of Public Interest Litigations before the Supreme Court of India in the past forty-five years since their inception. It surveys nearly 750 reported PIL judgments and orders from the court in this time frame to present an overview of the court's PIL docket over the years and its changing constituencies. Through hand-coding of the dataset, the paper identifies the various categories of petitioners who come to the court through PILs. It then analyses how these different constituencies of PIL petitioners shape the nature and utility of PILs themselves. The paper finds that the reality of the Indian PIL experience is one of the diminishing poor and disadvantaged petitioners, sidelined to the margins of the PIL docket. They are displaced by a variety of regulatory matters which have transformed the court into a super-regulator, followed by a host of petitioners litigating private disputes through PILs. The rise of PILs enables the Supreme Court of India to emerge as the most powerful regulatory force in the country, and one whose PIL jurisdiction is invoked to routinely service private interests of litigants. This is in stark contrast to the originating logic and focus of the PIL movement, which was to enable the poor and disadvantaged sections of the society to access courts and seek remedies to actualise the rights guaranteed to them in the Constitution of India.

Interplanetary Risk Regulation

Chicago Journal of International Law. Volume 26 No. 1, 2025

Wiener, Johnathan B.;
Hamilton, Charles

Space exploration promises new opportunities but also new risks. After centuries of national settlements and international conflicts on Earth, and the Cold War era of two great power states racing to the Moon, today we see a rapidly proliferating arena of actors, both governmental and non-governmental, undertaking bold new ventures off-Earth while posing an array of new risks. These multiple activities, actors, and risks raise the prospects of regulatory gaps, costs, conflicts, and complexities that warrant reconsideration and renovation of legacy legal regimes such as the international space law agreements. New approaches are needed, beyond current national and international law, beyond global governance. We suggest that interplanetary risks warrant new institutions for risk regulation at the interplanetary scale. We discuss several examples, recognizing that interplanetary risks may be difficult to foresee. Some interplanetary risks may arise in the future, such as if settlements on other planets entail the need to manage interplanetary relations. Some interplanetary risks are already arising today, such as space debris, space weather, planetary protection against harmful contamination, planetary defense against asteroids, conflict among spacefaring actors, and potentially settling and terraforming other planets (whether to conduct scientific research, exploit space mining, or hedge against risks to life on Earth). These interplanetary risks pose potential tragedies of the commons, tragedies of complexity, and tragedies of the uncommons, in turn challenging regulatory institutions to manage collective action, risk-risk tradeoffs, and extreme catastrophic/existential risks. Optimal interplanetary risk regulation can learn from experience in terrestrial risk regulation, including by designing for adaptive policy learning. Beyond national and international law on Earth, the new space era will need interplanetary risk regulation.

Multi-Risk Governance of Solar Radiation Modification

European Journal of Risk Regulation, 2025, p. 1-17

Wiener, Jonathan B.;
Felgenhauer, Tyler;
Borsuk, Mark E.

Solar radiation modification (SRM) presents important challenges to risk regulation and governance, arising from the array of multiple risks that SRM may influence. SRM would not simply reverse climate change, but could pose further ancillary impacts, depending on the method of SRM, such as stratospheric aerosol injection (SAI), marine cloud brightening (MCB), or a space-based planetary sunshade system (PSS). We identify multiple risks that SRM may influence, both biophysical and sociopolitical, to be compared to the multiple risks that may be affected by greenhouse gas (GHG) mitigation and climate adaptation. This multi-risk framework helps analysts and decision makers identify, evaluate, and compare multiple risks holistically; helps identify affected groups to overcome problems of disregard and omitted voice; helps compare policy options and map the array of risks to corresponding (or missing) governance mechanisms; and seeks risk-superior policies that would reduce multiple risks in concert. We then examine governance frameworks: uncoordinated, coordinated and comprehensive. We suggest two key mechanisms that can help build up from uncoordinated toward more coordinated or even comprehensive approaches, and that can gain support from SRM advocates, observers and critics alike: a series of international assessments of SRM, and a transparent international monitoring system for SRM.

Colouring Outside the Lines: A Regulatory Shaming Framework for Black, Red, White, and Green Lists

Humanities and Social Sciences Communications, volume 12, issue 1, 1264 (2025). Posted in SSRN: August 12, 2025

Yadin, Sharon

Regulation by shaming is gaining momentum across various jurisdictions worldwide. One growing approach involves creating and publicising naming and shaming lists, such as blacklists, red lists, and other types of lists. Companies are named, scored, and ranked by government agencies within these lists based on their performance, characteristics, and behaviour. However, despite their distinct goal of targeting corporate reputation and prompting stakeholder action, legal actors and policymakers frequently frame them as nothing more than transparency or disclosure. Drawing primarily on examples from Israeli regulation, the article advocates for conceptualising this regulatory tool as shaming lists, featuring unique mechanisms, objectives, involved actors, and justifications. To advance this argument, the article delineates the contours of regulatory shaming lists, particularly in comparison to regulatory transparency and regulatory disclosure frameworks. The article then points out the legal and regulatory risks of wrongly conceptualising regulatory shaming lists and argues that policymakers and legal actors should instead begin developing and applying a more suitable framework rooted in regulatory shaming theory. By focusing on this burgeoning approach of shaming lists, the article aims to make a novel contribution to the theory and practice of governmental information-sharing tools in the regulatory age.

The Hidden Nature of Regulation

31(1) Harvard Negotiation Law Review (forthcoming 2025). Posted in SSRN: April 14, 2025

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:

- **Call for Submissions: Annual Meeting of The Association of American Law Schools (AALS)** Administrative Law Section - New Voices in Administrative Law – **New Orleans, January 6, 2026** **- for more information, click here.**

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