NEWSLETTER 6 NOV 2025 *WHAT'S NEW IN THE COMPARATIVE ADMINISTRATIVE LAW WORLD?*

Comparative Administrative Law Scholarship Corner

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Culpa in Contrahendo: A Solar Eclipse between Contract and Public Procurement Law?

Upphandlingsrättslig Tidskrif (UrT) 2025 p. 47.; UrT 2025 p. 47

Andhov, Marta;
Kania, Michal;
Saljic, Arnel;
Schrøder-Hansen, Torkil

The realm of contemporary EU public procurement is expanding in complexity. This complexity arises not only from the incorporation of sustainability concerns and the procurement of diverse technological solutions but also from an increasing reliance on negotiated procedures. The growing interest in these methods within the EU highlights the need to explore their legal aspects in greater detail. As with other commercial transactions, issues can occasionally arise in public procurement. This raises a crucial question: What are the legal recourses if economic operators involved in the public procurement process are mistreated? Is it solely based on public procurement law, or can contract law doctrines, such as culpa in contrahendo, also be applied?

To address this inquiry, the article is structured as follows: Section 1 outlines the interplay between public procurement and contract law. Section 2 explores potential avenues for compensation arising from breaches of public procurement rules under the Remedies Directive. Section 3 examines the concept of culpa in contrahendo under Danish law. Section 4 assesses the applicability and potential role of the culpa in contrahendo doctrine in Danish public procurement law, with particular attention to how it may be adapted in the context of public contracts. The final section summarises the key findings and draws conclusions based on the analysis.

Ombudsman Institutions: A Study in the Light of Shariah and Pakistani Law

Written: August 11, 2025; Posted in SSRN: October 31, 2025.

Aqdus, Muhammad

Before a few centuries, the word "Ombudsman" was begun to be used as a public office which redressed the public grievances and held public officials accountable for their injustices and abuse of power. But, the concept and philosophy behind this very institution is as old as the concept of public office. Existing literature shows that civilized societies have developed this concept to ensure check and balance above the ruling class. Islam, being a gap-less system, always preferred accountability of public officials in order to watch the ruling class, constituting it as an essential manifesto of the Islamic State. It is based on the Islamic politico-legal Philosophy and includes Shariah doctrines of "Adl" (Justice) and "hisbah" and the one who exercises this function of accountability is commonly known as "Muhtasib". Concerning it, this study seeks to explore the history and philosophy of Ombudsman institutions and its concept. Central to it, this study is dedicated to analyze the concept of Ombudsman or Muhtasib in the light of Shariah and Pakistani Law. It will also highlight the famous doctrine of Islamic Law like "Hisbah" and draw a sketch of Office of Muhtasib from the era of Khulfa-e-Rashiddin and explain how this institution was working in earlier Islamic State. This article will also explore the legal frameworks regarding Ombudsman Institutions in Pakistan and their compatibility with the office of Muhtasib in earlier Islamic States. The article will also identify the loop holes in Pakistani Ombudsman Institutions on the basis of traditional Hisbah Institutions and suggest certain recommendations for its improvement.

The 'America First Trade Policy' in Practice

American Journal of International Law, Vol 119, No. 3, 2025 Forthcoming; Duke Law School Public Law & Legal Theory Series No. 2025-43

Arato, Julian;
Claussen, Kathleen;
Meyer, Timothy

Tariffs are at the center of U.S. President Donald J. Trump's "America First Trade Policy" in his second term. Citing emergency and national security concerns, the Trump Administration has imposed double- and triple-digit percent tariffs on imports from nearly every country in the world. By April 2025, the Trump tariffs had increased the average weighted U.S. tariff to 23 percent—a ten-fold increase from a year prior. In addition to the economic and business ramifications of this policy, two major legal and political moves have followed the president's threats and unpredictable tariff policies: first, importers and other groups have sought relief from these policies in the U.S. courts, alleging that the president's wholesale remaking of tariff rates violate U.S. law; and second, governments across the globe have entered into negotiations with the United States, pursuing agreements to shield them from the worst of the tariffs. Both moves have prompted questions about the reach of the president's foreign commerce authority and the separation of trade law powers in U.S. foreign relations and constitutional law.

The Last Frontier: Fair Procedure in Informal Administrative Adjudication

14 Mich. J. Env't. & Admin. L. 1 (2024)

Asimow, Michael

The federal government engages in massive amounts of informal adjudication - a process that resolves a dispute between the government and a private party by making an individualized and legally binding decision without being required to conduct an evidentiary hearing if the dispute is not settled. This article sketches the highly diverse world of federal informal adjudication and surveys the procedural requirements imposed on it by due process and federal statutes. It proposes a set of best practices for conducting and improving informal adjudication that are rooted in those legal requirements. Agencies should adapt these practices to their individual circumstances and then adopt them as procedural regulations. The process by which federal agencies engage in informal adjudication should be accurate, efficient, and perceived by stakeholders to be fair.

The Crisis of Appropriations Law

103 Wash. U. L. Rev. ___ (forthcoming 2026)

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.

Does The Supreme Court Of Nigeria Have Jurisdiction To Hear Appeals That Are Based On Mixed Law And Facts?

Written: October 14, 2025; Posted in SSRN: October 16, 2025.

Bamidele, Jamaldeen

This paper examines whether the Supreme Court of Nigeria retains jurisdiction to hear appeals based on mixed law and facts following the enactment of the Constitution (Second Alteration) Act, 2010. The research highlights that prior to the amendment, the Supreme Court could entertain appeals both as of right and with leave under Section 233 of the 1999 Constitution. However, Section 6 of the Second Alteration Act replaced the entire provision, effectively removing the Court's power to hear appeals with leave. Through an analysis of recent judicial decisions, particularly Shittu v. PAN Ltd., Amadi v. Wopara, and Anyanwu v. Emmanuel, the paper demonstrates the evolution and eventual clarification of this jurisdictional issue. It concludes that the concurring judgment of Salauwa, J.S.C., in Anyanwu v. Emmanuel conclusively affirms that the Supreme Court no longer has jurisdiction to hear appeals on mixed law and facts, thereby reinforcing its role as a court of law rather than a forum for factual re-evaluation.

Fraud and Fair Process in Benefits Administration: A Socio-Legal Analysis of Targeted Case Reviews in Universal Credit

Written: September 28, 2025; Posted in SSRN: October 23, 2025.

Bennett, Mark;
Meers, Jed;
Tomlinson, Joe

This article provides the first socio-legal analysis of the UK's Department for Work and Pensions' Targeted Case Review (TCR) scheme—a fraud and error reduction programme to which millions of Universal Credit claimants will be subjected in the coming years. It traces the rapid expansion of TCRs since 2022 and provides an account of the law and administrative procedures of TCRs. Drawing on 22 original qualitative interviews with Universal Credit claimants who have undergone a TCR, the article further identifies emerging themes from claimant experiences of these new procedures. The account developed raises significant questions about how fair process can be maintained in the TCR scheme, particularly in a global context where similar programmes have led to systemic failures of administrative justice.

Economic Inequality and the Separation of the Economic and the Political in Modern Constitutionalism

Written: September 15, 2025; Posted in SSRN: October 8, 2025.

Bhatia, Gautam

This essay examines the relationship between constitutionalism and economic inequality from the lens of the critique of political economy. In particular, it argues that the concept of the separation of the economic and the political – which undergirds the critique of political economy, and is constitutive of capitalism – is also one of the founding pillars of modern constitutionalism. In constitutionalism, this is achieved and reflected through encoding the public/private divide into constitutional structure and design, and entrenching it through judicial interpretation. Constitutionalism – like capitalism – presumptively divides up the world into the "political" (structured by norms of democracy, equality, freedom, and so on) and the "economic" (which is walled off from an application of these norms, and from the democratic contestation that defines the "political"). While there have been attempts from within constitutionalism to interrogate the separation of the economic and the political – in particular, through the expansion of equality and non-discrimination doctrine, the entrenchment of socio-economic rights, and the evolution of constitutional horizontality – this essay argues that constitutional design and adjudication has ended up re-affirming the separation rather than meaningfully interrogating it. And while constitutional courts have, on certain occasions, attempted to bring "class" back into the constitution, these judgments only reflect the gap between the courts' identification of the problem, and the constraints and limits of the solutions that they are able to propose. We may therefore conclude that, on occasion, constitutional adjudication may mitigate a degree of economic inequality in a certain context, but it is incapable of addressing the root of the problem that is responsible for economic inequality under contemporary capitalism.

Audit Guides and the Administrative State

29 Florida Tax Review __ (forthcoming, 2026); UNC Legal Studies Research Paper No. 5508258; UC Irvine School of Law Research Paper No.5508258

Blank, Joshua D.;
Osofsky, Leigh

Scholars are engaged in deep debate about the transformative power of recent Supreme Court cases that appear to limit the role of agencies in making rules of law. In Loper Bright and West Virginia v. EPA, the Supreme Court overruled a longstanding doctrine of judicial deference to agency rules and prescribed more boundaries around the scope of such rules. Scholars have debated to what extent these changes will usher in new forms of judicial review that will transfer power from agencies to the courts. This Article argues that this debate misses important elements of where agency action is and where it is going. Agencies must be able to say what the law is to be able to enforce it. Agencies often do so by issuing audit guides—enforcement guidelines that agencies formally direct to internal agents, but which agencies frequently make public as well. When agencies issue these guides, recent Supreme Court case law may shift where agencies state what the law is, but it will not shift whether they will communicate their views. Yet, audit guides have eluded any detailed examination by scholars. In this Article, we conduct a study that shows how agency decisions in audit guides not only influence perceptions of the law but also are often treated as if they are law by members of the public, agencies, and even by the judicial and legislative branches. Further, in audit guides, agencies inevitably make choices between different legal interpretations. These choices are often not subject to challenge, leaving the agency as the final arbiter of the law. Our study has several significant implications. First, it offers a counterintuitive rejoinder to current narratives about agency power. Recent attacks on agency rulemaking and enforcement resources suggest that many agencies will have little power to influence the application of the law. In this Article, we illustrate that audit guides can serve as a persistent form of influence, even where agencies do not have the resources to engage in significant enforcement of the law. Indeed, with limited agency resources and less resulting litigation about the law, what agencies say in audit guides may, paradoxically, have a greater impact on public perceptions of the law. Second, we illustrate how agencies' abilities to use audit guides to pick and choose among existing law and even make new legal pronouncements may undermine recent judicial doctrine that purports to shift power to say what the law is from agencies to courts. Finally, our study also suggests that agencies can use audit guides to infuse the law with greater participatory values that have long been absent from the more formal regulatory process. To this end, we propose a concrete framework
for how agencies can better integrate transparency and inclusivity into the development of their audit guides.

Retaliation by Raised Eyebrow

Forthcoming Georgia Law Review, Vol. 60, No. 2 (2025-26)

Blevins, John

The FCC's recent investigations of news media companies represent a novel and problematic evolution of its informal regulatory practices, which scholars have called "regulation by raised eyebrow." The FCC has traditionally exercised these powers as part of its general obligation to regulate broadcasters in the "public interest." By applying informal pressure instead of direct regulation or enforcement, the FCC can signal its policy preferences to private actors at lower cost and with less legal risk. While often flawed and controversial, the FCC's raised eyebrow practices have traditionally been used to advance broader substantive policy agendas. The FCC's more recent actions, however, are something different. Rather than advancing a coherent regulatory purpose, they instead seem designed to retaliate against unfavorable media coverage and to signal political loyalty. Evidence of this intent can be seen by the FCC's unusual revival of dormant doctrines and its substantial departures from recent norms in its enforcement actions. In short, raised eyebrow regulation has been transformed into an instrument of political retaliation. This Article defends that claim and explores the significant legal and policy concerns this development raises, including its implications for First Amendment values and independent agencies.

Practical Wisdom and the Character of Administrative Decisions

Netherlands Journal of Legal Philosophy 54 (1):32-56 (2025)

Chible, Pía

The purpose of this paper is to show that, while judicial decisions might be productively examined through the lens of the virtue of justice, as an instance of proportionate allocation of goods and evils according to law, the same kind of assessment reveals very little about administrative decisions. The reason is that administrative decisions entail a different kind of reasoning, one that is primarily concerned with the assessment of reality. Administration is the realization of the will of the (constitutional) State. It is what allows us to take the legal and political order and make something out of it, by transforming reality in a certain way – it is a bridge between the abstract order and the facts of the world as it is. I will argue that practical wisdom offers a useful template to examine administrative decisions, as it allows us to see how they entail the complex interaction between the ends of the State and the nuances of reality. Practical wisdom, after all, is wisdom in action, and combines an understanding of the abstract goals with the correct identification of what the particular circumstances of life require. It is thus the paradigmatic shape of administration in its ideal form.

Redefining Efficiency in the DOGE Era: The Value of Evidence-Based Policymaking in Federal Agencies

Written: September 02, 2025; Posted in SSRN: September 19, 2025.

Coll, Ally

In one of the first actions of his second term, President Donald Trump established the Department of Government Efficiency ("DOGE") and tasked it with the mission of "making government work for the people again." This basic theoretical goal is shared by a growing bipartisan group of policymakers and practitioners who have called for implementing evidence-based policymaking ("EBPM") in federal agencies as a means of creating regulations that are more effective at achieving their desired policy outcomes. By asking agency officials to proactively build and apply evidence throughout the policymaking process, EBPM goes above and beyond the basic administrative law requirement that prohibits agencies from acting in ways that are arbitrary and capricious. Accordingly, various overlapping federal EBPM mandates have emerged over the past several decades, from Executive Orders requiring Cost-Benefit Analysis ("CBA") to statutory mandates embedded in the 1993 Government Performance and Results Act ("GPRA") and the 2018 Foundations for Evidence-Based Policymaking Act ("The Evidence Act"). Ultimately, however, these efforts have failed to codify inclusive, transparent, and trustworthy EBPM practices into the federal policymaking process, resulting in a gap in the law that ultimately led to the creation of DOGE. Despite its focus on government efficiency, DOGE eschewed evidence-based approaches under Elon Musk's leadership during the early days of the second Trump Administration. As the most democratically accountable branch of government, however, Congress is well-positioned to reassert its control over the federal regulatory process by enacting improved EBPM statutory mandates, either in future authorizing statutes or by amending and improving the Evidence Act. In doing so, Congress can respond to evolving public concerns about government efficiency while protecting regulations that are evidence-based and effective at serving the American people.

Networked Governance, Peer Review And Democratic Accountability: Regulating Money Laundering In Australia

Corbett, Noah;
Edgar, Andrew;
Svetiev, Yane

Scholars have highlighted the advantages and risks of transnational regulatory networks for domestic lawmaking. This article examines Australia's adoption of the Financial Action Task Force ('FATF') anti-money laundering and counter-terrorism financing standards. Existing scholarship characterises the FATF as a coercive regime that dictates policy and empowers the executive to implement non-binding transnational standards into domestic law without legislative oversight, thereby precluding democratic participation and contestation. To address such critiques, we analyse the effects of the FATF's peer reviews on domestic legislative deliberation by examining the contributions to a parliamentary inquiry concerning money laundering from government departments and agencies, representatives of regulated entities and professional and civil society actors. Our analysis demonstrates that the FATF's peer review reports have prompted and facilitated, rather than supplanted, local deliberation by providing law reformers with richer evidence and arguments about reform options and their potential effects.

The Role of Law in Modern Society: A Comparative Perspective between the West and Vietnam

Written: September 30, 2025; Posted in SSRN: October 27, 2025

Do, Kim Them

In the era of globalization and institutional transformation, both Western democracies and Vietnam face significant challenges in reforming legal frameworks to meet the demands of contemporary society. This article explores the multifaceted role of law as a foundational pillar for societal stability, personal freedom, social welfare, and cooperative integration. By examining key legal functions and contrasting democratic and authoritarian approaches, the paper highlights the importance of a transparent, accessible, and morally grounded legal system in fostering sustainable development.

Presidentialism Reconsidered: Liberals' Turn Away from Presidential Power and Its Consequences

Northern Illinois University College of Law Legal Studies Research Paper

Elinson, Gregory

For decades, the Supreme Court's conservatives have articulated an expansive understanding of presidential power—an exception to the Constitution's animating principle of checks and balances. The Court's liberals see the presidency differently, arguing that executive power should be divided between the president and federal agencies, the better to constrain it. Beyond the judiciary, the same is true. Conservatives extol presidential power while liberals venerate bureaucratic independence. But things were not always so. During the New Deal, liberals were vocal champions of presidential control over the bureaucracy, believing it essential to achieving their programmatic ends. It was during the administrations of Democrats John Kennedy and Lyndon Johnson that liberals began to shift their focus away from the White House and toward Congress and the courts.

This Article offers a novel account of why liberals turned away from presidential power and considers the consequences for sustaining an effective and responsive democracy today. It revises modern executive-power historiography, showing that liberals' rejection of expansive presidential power was not driven by their partisan sympathies or shifts in their programmatic agenda. And it draws attention to the fact that the conditions that drove liberals to abandon presidentialism no longer obtain. Accordingly, the Article proposes several models of presidential power that might better balance liberal fears about an emerging autocracy with growing anxieties that government today is unable to deliver core services to the public effectively. In so doing, it suggests that liberals need not be hostile to reforms that are today favored by conservatives, including the consolidation of independent agencies into the executive branch and more expansive presidential removal authority.

Unraveling the Ties That Bind: How Dobbs and Loper Bright Might Reconfigure American Party Politics

57 Loy. U. Chi. L.J. (forthcoming 2025); Northern Illinois University College of Law Legal Studies Research Paper

Elinson, Gregory

What happens to partisan politics when long-standing doctrinal equilibria are upended? In search of answers, this essay engages in an extended comparison of two recent landmark Supreme Court rulings: Dobbs v. Jackson Women's Health Organization, which overruled Roe v. Wade, and Loper Bright Enterprises v. Raimondo, which overruled Chevron USA v. Natural Resources Defense Council.

It begins with the observation that opposition to abortion and judicial deference on the right, and support for abortion and judicial deference on the left, helped unite the major party coalitions, forging durable alliances among elected officials, organized interests, donors, activists, and voters on both sides of the aisle. It is not surprising, then, that the twin demise of Roe and Chevron has already begun to unsettle coalitional arrangements in both parties. On the right, it has exposed disagreements about the use of national power to prohibit abortion and the extent to which the administrative state should be uprooted. On the left, it has promoted new thinking about how to best defend abortion rights and strengthen federal regulatory policy.

Situating these developments in a broader theoretical framework, the essay explores why doctrinal upheaval can alternately fracture and revitalize co-partisan alliances. For those who oppose the doctrinal status quo, change often precipitates coalitional instability, as one-time allies debate what the new doctrinal equilibrium should be. For supporters of the doctrinal status quo, the loss of a favorable equilibrium may be painful, but it also encourages innovation in strategy and communication, which may in turn permit new alliances to be formed. The analysis developed here suggests that party coalitions are likely to change in tandem with changes in legal doctrine.

The Imperious Presidency: Brazen Power Plays and Executive Overreach

UC Berkeley Public Law Research Paper

Farber, Daniel A.

The Trump Administration has been prone to brazen power plays. These actions have three basic characteristics: they are dramatic deviations from conventional governance, generating headlines and online clicks; their legal (and sometimes factual) foundations can be tenuous; and their effectiveness can be independent of whether they are ultimately held lawful. This essay analyzes this phenomenon. It argues that such power plays can be a rational strategy for a President under certain circumstances. They can help dominate the news flow and energize the political base. They can also cause behavior shifts in their targets, even when litigation would be likely to overturn them. One downside, however, is that their brazenness may court legal defeats that would be less likely if an Administration used more nuanced measures to pursue policy goals. Early litigation against the Trump Administration provides strong support for the existence of this increased litigation risk and shows why brazen measures may be more legally vulnerable.

Why Chief Executives (Dis)Obey the Law

UC Berkeley Public Law Research Paper

Farber, Daniel A.
Gould, Jonathan

A key question for the stability of constitutional democracies is when and why chief executives will obey the law, and when and why they will violate it. This Article constructs a general framework for analyzing when a rational chief executive will comply with the law. A chief executive may stand to benefit from lawbreaking if doing so can increase the likelihood of them remaining in office, accomplishing a policy objective, or securing personal benefits. The chief executive may also incur costs from lawbreaking: direct costs include potential punishment by other actors (the electorate, the legislature, courts, civil servants, market actors, and international actors), while less direct costs include the risks of enabling unlawful conduct by other actors, including future chief executives, and making it more difficult for the state to make credible commitments. Additional factors, such as the executive's discount rate and risk tolerance, also bear on benefits and costs. We consider how these various factors combine to shape the behavior of chief executives. Understanding the determinants of executive obedience or disobedience generates both hypotheses for further research and a potential reform agenda for those worried about executive lawbreaking.

Regulation Without Remedy

Saint Louis U. Legal Studies Research Paper No. 2025-10

Griggs, Marsha

The availability of civil remedies is the backbone of democratic societal governance. Remedies operationalize the rule of law by ensuring that individuals can seek justice, redress harm, and hold public power accountable. As the guardians of this framework, members of the legal profession and the judiciary are entrusted with preserving the very structures through which justice is accessed. Yet, paradoxically, the pathway to joining the legal profession—the bar admission process—stands largely outside the reach of the legal accountability system it exists to uphold. Aspiring attorneys who suffer harm at the hands of bar admission authorities or their third-party agents routinely find themselves with no viable legal recourse because state bar exams have been privatized in a manner that prevents access to remedies to redress claims of constitutional violations and common law harms. This structural dysfunction has materialized most vividly in recent crises, such as the 2020 remote bar exam failures and the 2025 California Bar Exam debacle, which left hundreds of examinees harmed without recourse. In a profession devoted to the rule of law, this disjunction between the promise of justice and its unavailability to those seeking to enter the profession represents a profoundly irreconcilable structural fracture. This Article reveals how courts have delegated, to non-judicial actors, the power to determine who becomes a lawyer—effectively outsourcing a core function of judicial regulation. Through widespread adoption of a centrally controlled uniform bar exam, private vendors have become standard setters and decision-makers in the regulation of attorney admission. Courts have repeatedly shielded bar examiners and their private contractors from tort-based claims under doctrines of immunity, while those same private actors can permissibly sidestep constitutional claims by disavowing any public status, leaving bar applicants caught in a circuitous catch-22. This legal loophole allows private contractors to evade all meaningful responsibility by toggling their identity based on the forum and claim type. This Article urges courts to meaningfully address the doctrinal arbitrage and restore transparency, fairness, and redress to the gateway of the legal profession. This Article positions the intersection of outsourcing and governmental immunity as a precarious juncture where delegated judicial power, unchecked private discretion, and doctrinal gaps converge to deny well-needed remedies. By tracing the development of this regulatory structure and proposing targeted reforms, this Article paves a pathway to realign bar regulation with rule-of-law principles. A wide gap in the literature exists because little, if any, attention has been devoted to the problematic intersection of regulatory accountability and doctrines of applied immunity, in the context of bar admission. This article seeks to narrow that gap. It critically analyzes the reasons for, and the problems created by, privatized immunity and explores new remedial avenues for licensure candidates that will not impede the crucial role of autonomous attorney self-regulation.

Automation in Governance: Theory, Practice and Problems

Published: November 27, 2025; Bloomsbury Publishing

Groves, Matthew;
Ng, Yee-Fui

This book examines the principles and practice of automation in public governance. Automation is changing the face of government and public law. This collection examines key challenges posed by automation, focusing on theoretical issues, case studies, as well as practices and proposals for reform. It brings together scholars, public officials and judges from a range of jurisdictions, including the UK, the USA, Australia, Canada, Austria, France and the Netherlands to examine principles that should guide automation in government and what can be learned from the growing policy failures involving automation. The book contains case studies of significant policy failures involving automation - the Dutch 'child benefits scandal', the Horizon accounting software used by the UK Post-Office and Australia's robodebt social security scandal. These chapters are valuable studies about policy failures involving automation and highlight lessons to be learned. Making an important contribution to public law, governance and automation, the collection highlights challenges faced by all jurisdictions and draws out lessons from some serious failures of administration involving automation.

How Binding Is Administrative Guidance? An Empirical Study of Guidance, Rules, and the Courts Telling Them Apart

Journal of Empirical Legal Studies

Haim, Amit

Guidance documents are a main pillar of the modern administrative state. While federal agencies issue thousands of rules every year through notice-and-comment rulemaking, they issue even more guidance documents in various forms. There is, however, an ongoing and fierce dispute over agencies' ability to create binding obligations through guidance without the noticeand-comment rulemaking procedures stipulated by the Administrative Procedure Act. The binding norm doctrine purports to prevent agencies from creating binding obligations through guidance, and often focuses on documents' choice of wording. But to what extent do guidance documents use binding language, and how do courts understand them? Despite the widespread interest in these questions, however, there has been a surprising lack of empirical studies tackling them. This article begins to bridge this gap and presents an analysis based on a novel dataset compiled from an online database of agency guidance, which encompasses nearly 70,000 documents issued by three key federal agencies from 1970 to 2022. Using computational text analysis, it investigates the language of guidance documents to assess their potential bindingness. It identifies specific linguistic cues that courts have used to interpret documents as binding or non-binding and applies these criteria across the dataset. The findings indicate a significant rise in the quantity and the assertiveness of language in guidance documents over the decades and show their near parity with legislative rules in terms of their binding effect, suggesting that guidance has indeed become a main bulwark of administrative policymaking. Moreover, the analysis explores judicial reviews of guidance documents, finding no substantial differences between documents that were set aside as too binding and others that were upheld, suggesting that the application of the binding norm doctrine fails to create a systematic and consistent framework for administrative agencies and regulated entities. In response to these findings, the article proposes a shift from the current focus on the close textual reading of documents to a procedural label test, which assesses only whether a rule has undergone the required procedural steps. This approach aims to simplify the legal assessment of guidance documents and provide a more stable foundation for administrative action.

Concessions and Similar Instruments in the EU and beyond

Book 1st edition 2025 (bilingual); Europe et Monde; Bruylant, Belgium; ISSN : 2031-4922

Huisman, Pim;
Poltier, Etienne;
Van Garsse, Steven

Cet ouvrage prend comme point de départ l'existence de monopoles étatiques (de droit ou de fait) – ce à différents niveaux (État central, collectivités locales) et dans des régimes économiques libéraux ; l'État a ainsi la maîtrise de ressources limitées. Cependant, il ne souhaite pas (toujours) exploiter ces ressources lui-même, notamment parce que cela implique des investissements importants ; il préfère alors les confier à des acteurs privés sous forme de droits exclusifs et met ainsi en place ce qu'il faut appeler des « marchés fermés ». Le problème central est alors de savoir comment est organisé l'accès à ces marchés fermés : au travers d'instruments, souvent qualifiés de concessions, mais aussi par le biais d'instruments analogues ; par ailleurs, l'octroi de la concession obéit souvent, mais pas toujours, à un mécanisme de mise concurrence (concurrence pour l'accès au marché fermé – et non dans le marché, comme pour les biens et services ordinaires).
Ce thème est illustré par des études portant sur des situations extrêmement diverses : l'exploitation de casinos (objets d'un monopole de droit), de ressources naturelles (les mines, notamment), de la publicité urbaine ou encore de parkings locaux. Concrètement, les rapports nationaux qui procèdent à ces études de cas proviennent de pays membres de l'Union européenne (Belgique, France, Allemagne, Pays-Bas, Espagne) ou non (Argentine, Égypte, Etats-Unis, Suisse). Pour faciliter les comparaisons entre ces ordres juridiques très différents, trois questions centrales avaient été soumises aux auteurs de ces rapports: 1) Quel est l'instrument juridique utilisé pour l'octroi du droit d'exploiter la ressource en cause ? 2) Quelle est la procédure prévue par l'ordre juridique étudié pour l'octroi de ce droit ? 3) De quelle protection bénéficie, une fois désigné, le titulaire de ce droit (notamment afin qu'il puisse amortir ses investissements)?
L'ouvrage s'achève enfin par deux études de synthèse : la première porte sur les instruments juridiques utilisé pour conférer ce droit d'exploiter, la seconde sur les procédures d'octroi. Sous l'angle du droit comparé, ces contributions finales constatent la très grande diversité des réponses données aux questions précitées, avec aussi certaines convergences ; elles ouvrent par ailleurs de nombreuses perspectives et champs de recherche.

This work takes as its starting point the existence of state monopolies (legal or de facto) – at different levels (central state, local authorities) and in liberal economic regimes; the state thus has control over limited resources. However, it does not (always) wish to exploit these resources itself, notably because this involves significant investments; it therefore prefers to entrust them to private actors in the form of exclusive rights and thus establishes what must be called "closed markets." The central problem is then how access to these closed markets is organized: through instruments, often called concessions, but also through similar instruments; moreover, the granting of the concession often, but not always, follows the organization of some kind of competition (competition for access to the closed market – and not within the market, as is the case for ordinary goods and services).
This theme is illustrated by studies on extremely diverse situations: the operation of casinos (subject to a legal monopoly), natural resources (especially mines), urban advertising, or local parking facilities. Specifically, the national reports providing these case studies come from member countries of the European Union (Belgium, France, Germany, the Netherlands, Spain) or non-members (Argentina, Egypt, the United States, Switzerland). To facilitate comparisons between these very different legal systems, three central questions were submitted to the authors of these reports: 1) What is the legal instrument used to grant the right to exploit the resource in question? 2) What is the procedure provided by the legal system under study for granting this right? 3) Once designated, what protection does the holder of this right benefit from (notably so that they can recoup their investments)?
Finally, the work concludes with two summary studies: the first focuses on the legal instruments used to confer this right of exploitation, the second on the granting procedures. From a comparative law perspective, these final contributions note the great diversity of answers given to the aforementioned questions, as well as certain convergences; they also open up numerous prospects and fields for research.

Corner Post, Caremark and the Rule of Law: When Corporate Fiduciaries Should Reject Corner Post's Invitation to Sue

Ohio State Legal Studies Research Paper No. 946

Jackson, Katharine;
Dooling, Bridget C.E

The Supreme Court's ongoing overhaul of administrative law is not limited to blockbuster cases striking down Chevron deference and invigorating the Major Questions Doctrine. A lesser-known case—Corner Post Inc. v. Board of Governors of the Federal Reserve System—scraps the long-standing approach to calculating the 6-year window within which a plaintiff may challenge an agency rule. The clock used to start upon the agency's publication of the rule in the Federal Register, but Corner Post starts the clock at the plaintiff's injury. The result is that it is now easier for regulated parties to challenge agency rules under the Administrative Procedure Act (APA) more than 6 years after the rules were put in place, with no apparent limit. Corner Post therefore opens up lanes for legal challenge that have long been closed.

This essay asks corporate fiduciaries to decline Corner Post's invitation to challenge long-standing regulatory schemes when doing so presents a significant risk to the rule of law and the separation of powers. Our concern is that, in those situations, such challenges jeopardize fiduciaries' fulfillment of their duty of good faith. Namely, fiduciaries' Caremark duties impose a responsibility to uphold the separation of powers and the rule of law – the very same values that excessive use of Corner Post places at risk. Excessive challenges may, furthermore, undermine the work the Caremark doctrine does to lend legitimacy to corporations in the eyes of the public.

After describing the invitation issued by Corner Post, this essay will provide a brief primer on corporate fiduciary law, lay out the duty of obedience established by Delaware courts, and argue that corporate fiduciaries are burdened with a unique responsibility to uphold the laws that bind them. Further, the essay addresses the important legitimating role played by fiduciaries' commitment to the rule of law. The essay concludes by suggesting that, at the extreme, corporate fiduciaries' uptake of the Corner Post's invitation can displace the moral and legal priority that the Constitution ascribes to its (human) citizens. Corporations, not the people and their political representatives, may end up using litigation to rewrite the rules that bind us all. Congress could recreate a statute of limitation for APA actions, but if they do not, we fall back on corporate law.

Local Government and the Constitution

Address to Local Government New Zealand's Mayors School (Wellington, 20 October 2025).

Knight, Dean R

These remarks explore the role of local government in Aotearoa New Zealand's constitutional system. The following constitution dimensions are discussed: reason, place, hierarchy, dysfunction, rangapū/partnership, deliberation and practice.

Rotation of Power: A Theory of Democratic Competition

Published: February 19, 2026; Bloomsbury Publishing

Kouroutakis, Antonios

This book explores the often-overlooked democratic principle of "rotation of power". It considers two key questions: What happens when power stops changing hands in a democracy and when incumbents manipulate the system to entrench themselves in office, can democracy survive?

Democracies are often celebrated for their ability to ensure accountability and renewal through the peaceful and unhindered alternation and transfer of power. Yet, they are not immune to a dangerous phenomenon: political self-entrenchment. This phenomenon occurs when incumbents, unilaterally or collectively, exploit the power of office to dominate the political arena, tilt the playing field, and distort democratic competition. Contributing to scholarly and judicial debates, this book offers a fresh perspective on this issue by focusing on the legal and political mechanisms to safeguard the rotation of power.

Between Seminole Rock and a Hard(er) Place: A New(er) Approach to Agency Deference

Written: August 18, 2025; Posted in SSRN: October 17, 2025

Leske, Kevin O

In Loper Bright Enterprises v. Raimondo, the United States Supreme Court in 2024 overruled Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., ending the Chevron doctrine's reign as the applicable rule for courts to use in reviewing agency interpretations of their authorizing statute. Although Chevron's demise was no great surprise, the Court's decision leaves myriad questions that may take decades to answer. The most pressing question is: what is now the precise standard that courts must apply to determine statutory meaning in these cases? But there is a related question that is equally important to our ever-changing administrative state. In light of Loper Bright, what is now the standard for determining regulatory meaning? In 1945, the Court in Bowles v. Seminole Rock & Sand Co. established a lesser-known administrative law doctrine. In Seminole Rock, the Court held that federal courts must defer to an administrative agency's interpretation of its own regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation." Although in its 2019 decision in Kisor v. Wilkie, the Court narrowly upheld Seminole Rock, which is also called "Auer deference," it cabined the doctrine by expounding on the requirements that must be met before courts can defer under Seminole Rock. However, the Court's 2024 decision in Loper Bright could leave Seminole Rock between a rock and a hard(er) place than before. The Court's rejection of the Chevron deference doctrine and its seemingly sweeping language that courts must use "independent judgment" when reviewing agency interpretations make Seminole Rock's future both fragile and indeterminate. In this article, I critically examine Loper Bright and explain why the Loper Bright decision might not be as revolutionary as some decry. I conclude that a strong deference regime for agency interpretations of regulations should survive Loper Bright. But because the Seminole Rock standard will not emerge unscathed, I then sketch out a new(er) approach for courts to apply when determining whether to defer. This test, which is based on the Seminole Rock standard, as elucidated by Kisor v. Wilkie, remains faithful to Seminole Rock while incorporating the holdings of Loper Bright in a way that would reconcile pragmatic and doctrinal concerns with the doctrine.

The Cognitive Science of Comparative Law: An Emerging Area of Study?

U. of Pittsburgh Legal Studies Research Paper No. 2025-31

Linarelli, John

Comparative law is a heterodox field of legal study from the standpoint of method. It is a field because of what it does – "compare" - and not by how the comparing is done. It is open to any method advancing the aim of comparing law across national borders. Despite this methodological diversity, few published works have deployed the cognitive or behavioral sciences in comparative law. Insights from the cognitive sciences, including on the group aspects of human thought and action, on biases and heuristics, and on the evolution of culture, have the potential to offer in some instances significant advances in comparative law scholarship. Moreover, as comparativists we face the potential of interjecting our own biases into our work, or heuristics that work from our own jurisdictional perspective. A view from nowhere is impossible. Call this cognitive imperialism: the domination of a lawyer's thinking about what is good and right about the law, based on what they sense or know about their own law.

This article attempts a contribution to the methodological literature on comparative law by exploring how a new field of the study of comparative law using the cognitive sciences, might contribute to comparative law scholarship. Part I lays out the theoretical and methodological groundwork. It also explains that the cognitive science under investigation here is broader in scope than behavioral law and economics but certainly includes that approach. Parts II through IV explore several directions for this new field of study. Part II offers the case that the cognitive sciences offer tools to aid in understanding global law making, such as the work of UNCITRAL, UNIDROIT, and other intergovernmental organizations. Putting a group of lawyers from different jurisdictions in a deliberative process in an intergovernmental organization to produce a legal instrument that must be widely accepted across many jurisdictions could be understood as the setting for a natural experiment for comparativists. Part III explains that the cognitive sciences offer tools to evaluate legal transplants in a way that may help us to understand how they adapt to local conditions and on why some transplants are more successful than others. Part IV informs that the cognitive sciences may be able help us to get around the epistemological obstacles that "legal culture" has presented in comparative law. Part V deals with potential objections and limitations.

Engaging Abella: Humanity, Imagination, and the Legal Profession

Vanessa A MacDonnell, Stephen Bindman, & Gerald Chan (eds), Justice Rosalie Silberman Abella: A Life of Firsts (Irwin/UTP, 2025) 103-28.

Liston, Mary

This chapter is an encomium in two parts. Part A is a reflection celebrating the artistic and creative dimensions of Justice Rosalie Abella's career with an eye to reinforcing the importance of the humanities for those who comprise legal profession.1 Here I am thinking of a multiplicity of actors ranging from arbitrators, decision-makers in government, judges, lawyers, reformers, and educators. These are the people Justice Abella has tellingly called the "players" — the recurring cast of characters — in the legal profession.2 In this first section, I consider how legal actors profit from a sensibility and set of competencies derived from the humanities, both of which support legal craftship. Skills developed from the humanities also undergird legal actors' capacity to make reasoned and reasonable judgments through the use of pragmatic, principled, and thickly contextualized reasoning. Lastly, I highlight the undeniable importance of narrative skills for persuasive writing. To illustrate these arguments, Justice Abella's powerful dissent in Alberta v Hutterian Brethren of Wilson Colony provides a touchstone throughout this first section.3 Part B constitutes a brief eulogy for the passing of a classic age in one field of law in a concurrence deeply imbued with Justice Abella's spirit. In this part, I will consider how the story of Canadian administrative law is framed and narrated and why these skills matter for law and the legal imaginary. Conceiving law as part of the humanities permits us to understand jurisprudence as a kind of collective historical memory and an important — indeed vital — resource to assist with ethical reflection about justice.

Selecting a Standard of Review: What Does This Entail Post-Vavilov?

Alberta Law Review, 2025: Vol 63, No 1: Special Edition: Vavilov at 5 Conference

Liston, Mary

Considerable scholarly and judicial attention has been devoted to the selection of the standard of review in Canadian administrative law. Through generational analysis of the developments and challenges in administrative law, and a comparison of the different standards of review, the article examines the place of Canada (Minister of Citizenship and Immigration) v. Vavilov in the jurisprudential landscape. The article suggests that Vavilov now serves as the new Baker v. Canada (Minister of Citizenship and Immigration), providing practical guidance and a stable framework by simplifying the selection of the standard of review process but requires further refinement by attending to transparency and justification regarding the reweighing of factors and the use of Charter values. Ultimately, this article proposes that Baker and Vavilov together could inform the next generational shift in administrative law: the formal recognition of a general duty to provide reasons.

Structural Indeterminacy and the Separation of Powers

Cornell Legal Studies Research Paper Forthcoming

Macey, Joshua;
Richardson, Brian

Despite ongoing disagreement about how the Constitution allocates powers among the different branches, the two dominant schools of thought in American separation-of-powers debates— formalism and functionalism—agree on three premises: Certain powers inhere in certain government branches, some powers are vested exclusively in one or another branch, and the judiciary is the final arbiter of separation-of-powers disputes. Disagreement is largely about how powers should be parsed and which should be shared. Yet over the long lifespan of our constitutional tradition, momentous doctrinal upheavals are relatively commonplace. This Article describes four tectonic shifts in separation-of-powers doctrine: Founding-era debates about how to define and blend powers, nineteenth-century debates about the constitutionality of the nascent civil service, Lochner-era debates about legislatures' authority to define and regulate public utilities, and mid-nineteenth-century debates about the sources of international law. The first, which we call the Inherency Theory, assumes that certain powers and functions are vested by force of the Constitution, are core to a single branch, and are discernible by the judiciary. This is a taxonomical theory of how the Constitution allocates powers, and it animates nearly all of today's separation-of-powers debates. The second, an Antidomination Theory, denies that the words executive, legislative, and judicial imply any new or distinct powers and instead creates formal separation between the three branches based on the procedures federal actors deploy to enact, enforce, and interpret policy. The third, a rights-based Public Utility Theory, distinguishes between a public sphere that is subject to congressional, presidential, and administrative control, and a private sphere that is not. Recently, this public-private distinction has been marshalled to define the judicial power. Historically, however, it was used to deduce a whole panoply of structural limits, including the constitutionality of agency adjudication and deference. And the fourth, a General Law approach, discerns the limits of government power by reference to the eclectic authority of the common law and right reason. Recovering these theories reveals a rich set of tools for resolving interdepartmental disputes, highlights that current receptions of past settlements are nearly unintelligible without understanding the theoretical context in which they emerged, and suggests that, while different theories have risen and fallen, no one theory of separation of powers has been liquidated in our constitutional tradition.

Comparing the Right to an Explanation of Judicial AI by Function: Studies on the EU, Brazil, and China

Written: October 28, 2025; Posted in SSRN: October 29, 2025

Metikoš, Ljubiša;
Keller, Dr. Clara Iglesias;
Qiao, Cong-rui;
Helberger, Natali

Courts across the world are increasingly adopting AI to automate various tasks. But, the opacity of judicial AI systems can hinder the ability of litigants to contest vital pieces of evidence and legal observations. One proposed remedy for the inscrutability of judicial AI has been the right to an explanation. This paper provides an analysis of the scope and contents of a right to an explanation of judicial AI in the EU, Brazil, and China. We argue that such a right needs to take into account that judicial AI can perform widely different functions. We provide a classification of these functions, ranging from ancillary to impactful tasks. We subsequently compare, by function, how judicial AI would need to be explained under due process standards, Data Protection Law, and AI regulation in the EU, Brazil, and China. We find that due process standards provide a broad normative basis for a derived right to an explanation. But, these standards do not sufficiently clarify the scope and content of such a right. Data Protection Law and AI regulations contain more explicitly formulated rights to an explanation that also apply to certain judicial AI systems. Nevertheless, they often exclude impactful functions of judicial AI from their scope. Within these laws there is also a lack of guidance as to what explainability substantively entails. Ultimately, this patchwork of legal frameworks suggests that the protection of litigant contestation is still incomplete.

COVID-19 Sports Competition Lockdowns, Return-to-Play Decisions, and Participation Requirements: A Retrospective Review and Future Medicolegal Framework

Written: August 19, 2024; Posted in SSRN: August 14, 2025.

Mitten, Matt;
Montag, Laurel

This article considers the COVID-19 pandemic's adverse effects on sport, physical activity and fitness, and athletes' mental health and provides illustrative examples of how the world's two predominant models of sports governance (i.e., the hierarchical European model of sport; the decentralized North American model of sport) were used to decide whether or when to resume sports competition and under which applicable conditions and requirements. It discusses some resulting legal disputes and their respective resolutions as well as provides a brief summary of readily available reports and studies regarding sports-related transmission of COVID-19 infections during the pandemic. It provides a medicolegal framework for determining whether to play particular sports at various levels of competition during a future pandemic or epidemic and, if so, the appropriate athlete participation requirements. This article concludes by identifying a model for facilitating collaboration between international public health agencies, national governments, and private sport governing bodies throughout the world to prevent the spread of infectious diseases during local, national, and international sports competitions.

Patent linkage and the rule of law in the context of pharmaceutical marketing approval in Japan

Journal of Intellectual Property Law & Practice, Volume 20, Issue 11, November 2025, Pages 713–723

Okitsu, Yukio

This article critically examines Japan's patent linkage system, which allows the Ministry of Health, Labour and Welfare (MHLW) to withhold marketing approval for generic drugs if they infringe the patent rights of originator drugs. Although the system is broadly aligned with Japan's obligations under the TPP11 Agreement, it lacks statutory authorization and is based solely on non-binding administrative notices. This raises serious concerns regarding the rule of law, particularly in relation to legality and procedural fairness.
The article argues that neither the Pharmaceuticals and Medical Devices Act nor any other statute, including the Patent Act, permits the MHLW to consider patent rights as a ground for withholding approval. The commonly cited policy objective of ensuring a stable supply of generics is not recognized in the statute and cannot justify this practice. The current framework also lacks an adequate mechanism for judicial review.
Through analysis of cases such as Nipro v Eisai and Samsung Bioepis, the article shows how courts have either dismissed declaratory actions or issued non-binding findings, resulting in asymmetrical procedural outcomes. These shortcomings highlight the need for systemic reform.
The article proposes two alternatives: (i) a bilateral procedure before the Japan Patent Office, followed by judicial review, or (ii) a statutory cause of action allowing parties to seek declaratory judgments in civil court. Both models would require procedural safeguards and access to patent information. Ultimately, the article concludes that meaningful judicial review must be incorporated to align the system with constitutional principles and the rule of law.

The Blurring of the Public-Private Dichotomy in Risk-Based EU Digital Regulation: Challenges for the Rule of Law

Written: April 01, 2025; Posted in SSRN: August 18, 2025

Palumbo, Andrea;
Ducuing, Charlotte

The risk-based approach to legislating has been increasingly prominent in the European Union (EU) legal order, especially in the digital environment. It bears the promise to future-proof the law and balance between the goods and bads of new technologies, by responsibilising private actors with the preservation of public values. The systemic risk management requirements under the Digital Services Act (DSA) and the AI Act go particularly far, in requiring private actors to manage the systemic risks that they incur for a wide range of broadly-phrased fundamental rights and public values, with little further substantive guidance in the law. Liberal democracy essentially ties the exercise of coercive collective power to the interests and judgements of those who are affected by collective decisions, which implies that actors operating in a public capacity shall abide by dedicated rules and especially by the rule of law. The rule of law plays indeed a central role in preserving the public-private divide-a central value in liberal democracies. Against this background, the paper investigates the fitness of the rule of law to fulfil its function in the situation of an imbrication of the public and the private spheres, such as the hybrid governance models of the systemic risk management requirements under the DSA and the AI Act. We pursue two main objectives. First, to clarify the extent to which the DSA and the AI Act thereby disrupt the public-private divide, by exploring the hypothesis that they go as far as to allocate, through secondary legislation, regulatory powers to private actors. Second, and on this basis, we explore the frictions that this phenomenon causes to the rule of law. By so doing, we seek to chart a path for future research that connects the rule of law with democracy, and analyses the problems outlined in this paper also in relation to democracy as a founding value of the EU.

Artificial Intelligence and the State from a Comparative Perspective

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

Scarciglia, Roberto

The extensive literature on artificial intelligence (AI) frequently explores its relationship with state systems, a topic dense with issues touching on different areas of law and the organization of public authorities, both from the perspective of domestic law and on a comparative level. In the context of legal comparison, there are obvious difficulties in addressing this subject, since the public policies and regulatory solutions adopted in different legal systems often appear to be similar, without actually being so. This article highlights key variables within legal systems that have a bearing on the development of AI and the theoretical construction of an 'algorithmic state'. It further demonstrates that, in addition to traditional research methods, a quantitative approach relying on global indicators and interdisciplinarity can be useful in exploring the relationship between public law and AI from a comparative perspective.

Methodological Pluralism as a contemporary challenge of legal comparison

Scarciglia, Roberto

The aim of this paper is to show how the methodological tools used in much more comparative analyses are not suitable to study complex phenomena as the diversity and legal implications of religious factors on the decision of the courts.

The Russian invasion of Ukraine: what consequences for EU enlargement to the Western Balkans?

Book: Memories, identities and current conflicts: mapping the challenges of EU enlargement to the Western Balkans CEDAM, 2024, CISR - Centro Italiano per lo Sviluppo della Ricerca ; 81

Scarciglia, Roberto

Abstract of the book when the chapter can be found:

This edited volume gathers a diverse group of legal researchers, historians, political scientists and anthropologists, who together widen the scholarship on the European integration of the Western Balkans, particularly in the area of memory, identity and conflicts. The book contributes to the debate on the future of Europe and EU integration by promoting an understanding of Europe as a state of mind rooted in the shared values of peaceful coexistence in diversity, freedom, democracy and the rule of law. The opening chapters of the book focus on the impact of current conflicts on EU enlargement, and on the prospects of candidate countries and their changing perception of the EU and the West in a broader sense, showing how this triggers the (re)action of other non-West political actors. A second section is dedicated to the specific particularities of the cultural Europeanisation of the region, current (identity) conflicts and memory constructions, and how certain models and patterns might act as drivers of cultural Europeanisation. Finally, three chapters are dedicated to the multifaceted challenges of Montenegro and its path to the EU, from both contemporary and historical perspectives, which pars pro toto explain the complexity and problems of the region as a whole in its development after 1989, and the redefinition of concepts like multiculturalism, national minorities, ethnic nations, and social cohesion.

The Ordinance Quagmire: Analysis of the Krishna Kumar Singh case

Written: September 28, 2025; Posted in SSRN: October 23, 2025

Shaiyam, Niharika

This paper uses the well-known Krishna Kumar Singh v. State of Bihar case to analyze the constitutional boundaries and extent of the authority to enact ordinances under Articles 123 and 213 of the Indian Constitution. The case addressed the legality of the Bihar government's repeated re-promulgation of ordinances. It clarified two fundamental questions: the circumstances that justify the exercise of ordinance-making powers, and the constitutional requirement to place ordinances before the legislature. Justice D.Y. Chandrachud's majority opinion underscored that ordinances are an emergency measure, contingent on genuine necessity, and subject to mandatory legislative scrutiny to preserve democratic accountability. The judgment rejected the misuse of re-promulgation as a substitute for regular law-making and limited the scope of the "enduring rights" doctrine by holding that legal effects of ordinances ordinarily lapse with them, except where public interest or constitutional necessity requires continuity. By reinforcing the principles of separation of powers and legislative supremacy, the Supreme Court reaffirmed that while the executive may act swiftly in extraordinary circumstances, such power must remain subject to constitutional safeguards.

The Fed, Offices as Property, and the Meaning of "Cause"

Boston Univ. School of Law Research Paper Forthcoming

Shugerman, Jed H.

The Federal Reserve Act states that "each member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President." 12 U.S.C. § 242. Based on the historical record, when Congress creates an office with a fixed term of years and protects against removal without "cause," Congress has both granted "a constitutionally protected property interest" under the Fifth Amendment (that cannot be taken away without "due process") and extended a statutory entitlement to receive fair notice and a meaningful opportunity to respond before any removal may take effect.
Constitutional Protection: Under English law through the eighteenth century, termed executive offices-even cabinet-level offices-were considered "freehold" property, subject to protections from removal akin to those applicable to real property. This conception-of termed offices as "property"-would have been well known to the Founders and was reflected in Founding-era documents and commentary. The Constitution was drafted with this understanding.
Statutory Protection: Independent of the Fifth Amendment, the "cause" requirement has a long-established common law meaning of requiring notice and an opportunity to be heard before removal. This understanding hails from pre-Founding English common law, and it is likewise reflected in American precedents soon before Congress drafted the Federal Reserve Act of 1913. The Act's text of "cause" should be read in this context.
Faithful Execution: Article II of the Constitution requires the President to undertake a "faithful execution" of the laws. From a historical perspective, there is nothing inconsistent with that obligation and recognizing procedural protections for employees who can be terminated only for cause.

Constitutional Dimensions of Environmental Jurisprudence in India: An Analysis

Indian Constitution: Changing Paradigms, Pp. 114-125, Pacific Books International

Singh, Manjit;
Singh, Sahibpreet

This study undertakes a doctrinal jurisprudential analysis of evolving environmental constitutionalism, with a particular emphasis on the Triveni Sangam framework, an integrative schema comprising Fundamental Rights, Directive Principles of State Policy (DPSP), and Fundamental Duties. Situated against the backdrop of India's post-Stockholm legal transformations, this research fills a critical gap in literature that often isolates these constitutional components rather than examining their synergistic interplay. The principal objective is to investigate how judicial interpretation has operationalised environmental mandates in the absence of robust legislative frameworks. This study maps the constitutional trajectory of landmark decisions from Subhash Kumar to Hanuman Laxman Aroskar. It highlights the role of judiciary in upholding salus populi suprema lex. Preliminary results reveal that the Supreme Court has consistently expanded the ambit of Art. 21 to include the right to a pollution-free environment. The precautionary principle and polluter pays doctrine strengthen enforcement. The 42nd Amendment's insertion of Articles 48A and 51A(g) has further enabled judicial innovation, allowing courts to construct a composite eco-centric jurisprudence. Promising findings underscore that the judiciary's use of locus standi expansion and interpretive harmonisation has compensated for legislative inertia, thereby reinforcing sustainability as a constitutional imperative. The implications are manifold. The study demonstrates how constitutional courts act as ecological sentinels, transforming aspirational provisions into enforceable rights. This research not only contributes to comparative constitutional environmentalism but also provides normative scaffolding for embedding environmental justice within Global South legal systems. This marks a significant doctrinal advance in green constitutional theory.

The Secular Decline of the American State

N.Y.U. L. Rev. (forthcoming 2025)

Sitaraman, Ganesh

The Trump administration's assault on the administrative state has received significant attention. But it is a mistake to interpret the weakening of the administrative state during the first or second Trump administration as exceptional, or as a cyclical, asymmetric phenomenon that characterizes Republican administrations. Rather, we are in the midst of a period of secular decline of the American state, albeit one that has become more acute in the second Trump administration. This Article outlines fifteen dynamics in American politics, law, policy, and society that all push in the direction of secular decline. Some of these dynamics have been at play for decades, contributing to the already comparatively weak American state. Others are recently emergent or systemic features of decline. The consequences of decline are significant: a rise in harms to consumers, increased economic instability, less innovation, weakened resilience in crises, weakening global power and the rise of the power of adversaries, and social fracturing within society. Disrupting decline will require not just a commitment to building state capacity but understanding and accepting the uncomfortable truth that many of the causes of state decline have been longstanding.

A New Chapter for Governmental Candour? The Public Office (Accountability) Bill

UKCLA Constitutional Accountability

Somers-Joce, Cassandra

The Public Office (Accountability) Bill was introduced into the House of Commons on 16 September 2025. It gives effect to the Labour Party's 2024 Manifesto commitment to introduce a 'Hillsborough Law' which will 'place a legal duty of candour on public servants and authorities and provide legal aid for victims of disasters or state-related deaths'. As the Government's 'Duty of Candour Factsheet', produced to supplement the Bill, explains, the Bill represents 'a powerful new package of measures to address these failings and others seen at Grenfell Tower, in the infected blood and Horizon scandals – and in too many other examples over too many years'.

The preamble to the Bill explains that its purpose is to "Impose a duty on public authorities and public officials to act with candour, transparency and frankness; to make provision for the enforcement of that duty in their dealings with inquiries and investigations; to require public authorities to promote and take steps to maintain ethical conduct within all parts of the authority; to create an offence in relation to public authorities and public officials who mislead the public; to create further offences in relation to the misconduct of persons who hold public office and to abolish the common law offence of misconduct in public office; to make provision enabling persons to participate at inquiries and investigations where the conduct of public authorities may be in issue; and for connected purposes".

Accordingly, the Bill contains several distinctive provisions, each geared towards improving the integrity of public authority participation in investigations and inquiries. A principal feature of the Bill is the creation of the 'duty of candour and assistance'. This blog post considers this statutory duty, placing it in the context of the pre-existing public law protections surrounding candour and disclosure.

Automated State Action in India: Administrative Justice, Privacy and Constitutional Accountability

Written: October 20, 2025; Posted in SSRN: October 29, 2025

Sonkar, Aman

This paper examines how principles of administrative justice in India can be adapted to ensure constitutional accountability in the use of algorithmic decision-making (ADM) by public authorities. The study is motivated by growing reliance on automated systems in governance and the accompanying risks of opacity, exclusion, and rights violations. The central research question asks: How can doctrines and institutions of administrative law safeguard accountability when state functions are delegated to algorithms? To address this, the paper adopts a doctrinal approach rooted in Indian constitutional principles of legality, nonarbitrariness, due process, and privacy, complemented by comparative insights from the European Union, the United Kingdom, and the United States. Three Indian case contexts are analysed: Aadhaar-linked welfare delivery (DBT), predictive policing systems, and automated facial recognition technologies. The analysis reveals persistent gaps in transparency, contestability, and oversight, highlighting tensions between ensuring accountability and protecting privacy rights. The paper proposes a framework that integrates statutory algorithmic impact assessments, independent oversight bodies, and judicial innovations, such as protective disclosure mechanisms. These findings underscore the urgent need for regulatory and institutional reforms to align ADM practices with constitutional values, ensuring that technological adoption strengthens rather than undermines administrative justice in India.

‘Ineligibility Clause / ART. I, § 6, CL. 2’

Written: September 01, 2025; Posted in SSRN: September 29, 2025

Tillman, Seth Barrett

Josh Blackman & Seth Barrett Tillman, Essay No. 33, ‘Ineligibility Clause / ART. I, § 6, CL. 2,’ in The Heritage Guide to the Constitution 104–10 (Josh Blackman & John Malcolm eds., 3d ed. 2025) No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time.

Shaping Administrative Law for a Participatory Democracy

University of Hawai'i Richardson School of Law Research Paper No. 5433454

Turcan, Kamaile

This Article begins from the premise that it is valuable and desirable for the judicial branch to promote active public participation in government, and from there it suggests an approach to administrative law that furthers this goal: When they articulate administrative law, courts should recognize and promote the ways agency rulemaking enhances a participatory democracy.

Part I briefly lays the setting by comparing the Hawai‘i Supreme Court's and U.S. Supreme Court's divergent approaches to administrative law and agency rulemaking authority. Part II describes three democracy-enhancing mechanisms that are unique to agency rulemaking: notice and comment procedure, the petition right, and arbitrary and capricious judicial review. Part III further explores the role of the public in agency rulemaking with an environmental case study. Part IV focuses on the judicial branch's role and, gleaning insight from the jurisprudence of the Hawai‘i Supreme Court , suggests ways legal doctrine can promote a participatory democracy. This Part names a "Public Voice Doctrine," which captures the complex structural considerations judges face when issuing rulings that directly or indirectly impede the role of the public.

Greening Democratic Constitutionalism

Written: September 01, 2025; Posted in SSRN: September 17, 2025

Weis, Lael K

This chapter considers the challenges that non-anthropocentric green constitutionalist projects pose for traditional liberal conceptions of democratic constitutionalism, which focus on human well-being. It suggests that whereas a green approach requires rejecting liberal understandings of the relationship between human beings and nature, it embraces democracy. In doing so, however, a green approach also requires reconceptualising the ‘demos’ and its ‘persons’ in terms of its animating focus on ecological well-being. Thus understood, a green approach cautions against recent calls for ‘climate constitutionalism’ that appeal to ‘emergency’ or ‘crisis’ governance. Climate-centric approaches threaten the democratic structures needed to advance green governance — favouring top-down, command-and-control decision-making that perpetuates human hubris and anthropocentrism. Moreover, climate-centric approaches also risk perpetuating a neoliberal economic paradigm — treating nature as a set of commodified resources embedded in the carbon economy.

Administrative Law in Aotearoa New Zealand

Published: November 13, 2025; Bloomsbury Publishing

Wilberg, Hanna

This book on administrative law in Aotearoa New Zealand fills a gap with its fresh scholarly account of the law in this area, focusing on analysis of structures and principles. It identifies underlying tensions between competing objectives and outlines current trends and debates. It includes chapters on administrative justice, and throughout promotes an awareness of wider administrative law beyond judicial review. Given the recent recognition of tikanga – Maori customary law – as part of the laws of Aotearoa New Zealand, this book also offers tentative explorations of the roles tikanga may come to play in administrative law.
The book is suitable for use in university courses, especially in specialist administrative law courses. It is also addressed to judges, officials and practitioners seeking to deepen their understanding of this area of law; to academic audiences around the common law world; and to policy makers designing or evaluating administrative regimes.

Regulatory Governance: Learnings, Challenges and Way Forward

Published April 1, 2025 by Routledge India

Yadav, Abha

This book explores the role of regulatory bodies and their emergence as the fourth branch of governments. It brings together professionals, academicians, and experts working in regulatory sector to present a foundational text on regulatory regime in India. From case studies to theoretical interventions, the book brings together a wide range of insights on an important but often neglected aspect of governance. It examines a range of themes including, the need for regulatory policy in a post-Covid world, regulatory excellence, impact of regulatory assessments, regulation of hazard, competition commissions, regulation of digital assets, stakeholder interests and investor activism, and anti-trust laws.
The volume will be of great interest to scholars and researchers of law and governance, public policy and South Asian studies.

The Effectiveness of Entry Deregulation: Quasi-experimental Evidence of China's export Compulsory Inspection Deregulation

Posted in SSRN: September 26, 2025.

Yang, Zhiqing;
Zhu, Zhiyuan;
Luo, Lianfa

When and how to exit regulation is a critical issue in government governance. This paper explores the effects of export entry deregulation, using the exit of China's compulsory inspection regulation on export commodities as a quasi-experiment. We constructed a unique panel data of 8,799 firm level observations, by converting 10-digit HS codes at product level to firm level and matching 4 different data sources. We apply DID strategy and the results show that the deregulation of compulsory export commodity inspection significantly promoted governance efficiency with a notable positive effect on export volume and export quality. An important mechanism underlying this outcome is the enhancement of the innovation capacity of firms. The conclusion of this paper offers insights for government regulation, advocating for the dynamic evaluation of the costs and benefits of regulatory policies, and ensuring the timely withdrawal of overregulation to reduce the negative impact on market.

The Credit Pool of Governance: A Generative Model of Trust, Delivery, and Resilience

Written: September 22, 2025; Posted in SSRN: October 15, 2025

Yu, Qinshu

This paper re-explores the definition and operating mechanism of "good governance" from a generative perspective. Traditional ontological understandings (such as democracy being good governance, benevolent rule being good governance, and integrity and efficiency being good governance) have limitations of insufficient cross-cultural adaptability and static nature. This paper proposes a generative explanatory path centered on the SBFFE Framework and the institutional credit pool model, arguing that the essence of good governance is a dynamic credit cycle: the public "lends" in the form of trust and resources, the polity conducts financing through narratives, and repays by means of delivery; Robustness, as risk control, determines whether the institution can avoid collapse under the impact of Black Swan events. This paper further points out that good governance cannot be an eternal state because the increment is limited and entropy increase is inevitable. After the increment reaches its peak, the institution must clear bad debts through three paths: genuine repayment (restoring delivery), ledger reset (baseline reset), and cosmetic extension (Ponzi-fication). A cross-civilization comparison shows that the United States relies on responsibility dilution and external transfer, China centers on delivery-driven development, and Singapore implements the Small-State Hard-Delivery Model, but their common logic conforms to the dynamic cycle of the institutional credit pool.
The conclusion holds that good governance should be understood as a dynamic balancing act with a limited cycle, rather than an ultimate utopia. The key to future institutional innovation lies in whether it can expand the "currency" of user experiences, transform fairness, dignity, and meaning into deliverable experiences, so as to prevent the credit cycle from falling into Ponzi-fication. This paper proposes that the MemeOS Framework is expected to provide new solutions and open up new paths for the exploration of good governance in the 21st century.

Events and Informations:

- **Book presentation: The EU Artificial Intelligence Act and the Public Sector – J. Ponce/A. Cerrillo-i-Martínez (Eds) – Transatlantic Dialogue on AI and Regulation with Carry Coglianese and Nicoletta Rangone**

  December 10, 2025 at 4pm (16h) Barcelona/Rome time | 10am Philadelphia time **– hibrid event, attendance online: http://ub-edu.zoom.us/j/92754692802 | in person: Sala de Professors, Facultat de Dret, Universitat de Barcelona (UB)**

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