NEWSLETTER 12 MAY 2026 *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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🗁 Law-Policy Tethering

112 Iowa Law Review (Forthcoming 2027)

Aaron, Daniel G

This Article identifies and theorizes a set of doctrines that have mediated the relationship between legal claims and public policy in American judicial review. I call them "tethering doctrines." Across constitutional law, administrative law, statutory interpretation, and equity, tethering doctrines required courts to engage with three policy considerations when evaluating public policies: the democratic provenance of a policy, the public goods it aims to advance, and the empirical evidence supporting it. Through mechanisms such as means-end scrutiny, agency deference, remedial statutory interpretation, and the public-interest inquiry in equity, courts traditionally evaluated legal challenges to policy in ways that both constrained and respected democratic governance.
The Supreme Court, however, has recently begun dismantling these doctrinal connections. "Formalist" interpretive methods—most prominently textualism, originalism, and the major questions doctrine—are replacing doctrines that once required courts to weigh policy objectives and empirical support. This Article illuminates the Supreme Court's shift from engaging with policy to eschewing it. Untethering law from policy, it argues, risks empowering courts at the expense of democratic institutions, destabilizing regulatory governance, and detaching judicial review from the empirical foundations of modern policymaking. Restoring law–policy tethering would preserve meaningful legal constraints while ensuring that courts remain institutionally responsive to democratic policymaking and the public problems it seeks to address.

🗁 Limits of Executive Power: DACA and the Instability of Immigration Relief

Written in: Mar 23, 2026; Posted in SSRN in: Mar 31, 2026

Ajani, Ali

The Deferred Action for Childhood Arrivals program has provided temporary relief to hundreds of thousands of undocumented individuals brought to the United States as children. However, a decade of litigation, rescission attempts, and shifting executive priorities has exposed a fundamental structural problem that immigration policy created through executive action alone cannot provide durable legal protection. This paper argues that DACA, as an exercise of executive authority independent from congressional authorization, is constitutionally unjustifiable under the framework established in Youngstown Sheet & Tube Co. v. Sawyer, and that its continued instability will persist until Congress acts.
This paper examines DACA through key executive actions and litigation, including its creation through Department of Homeland Security memorandum, subsequent rescission efforts, and a series of judicial decisions that have shaped its current form. It demonstrates that courts have addressed challenges to DACA on procedural grounds but consistently avoid answering the program's underlying issue about constitutional validity. As a result, DACA remains neither legislatively authorized nor definitively upheld by courts, existing within a legally contested space.
Furthermore, the paper examines the real-world consequences of this instability, focusing on the reliance interests of recipients whose education, employment, and long-term planning depend on the program's continued existence. Specifically, its impact on graduate and postgraduate students, whose professional pathways require sustained legal and economic stability. Using Texas as a case study to demonstrate how, in the absence of federal certainty, state regulatory frameworks can create indirect but significant structural pressures on DACA recipients that may effectively compel relocation. Ultimately, this paper contends that executive action cannot serve as a durable substitute for legislative reform. Absent congressional intervention, DACA will remain a temporary and constitutionally unjustifiable solution, leaving its recipients in a persistent state of legal and economic uncertainty.

Decentralized Harmonization and Agile Inclusivity in Soft Law-Making

ICCA Congress Book 23rd Volume, Kluwer Law International

Ali, Shahla

International soft law-making is becoming more agile and inclusive. This article examines one institutional approach to this process by exploring how UNCITRAL has pursued expanded participation in global norm development through deepened regional engagement. In particular, it traces the impact and significance of its establishment of a permanent regional node, the UNCITRAL Regional Centre for Asia and the Pacific (RCAP), which opened in Incheon in 2012, and the subsequent expansion of UNCITRAL Days across the Asia-Pacific, Latin America and the Caribbean, Africa, and the Arab States. My book Forming Transnational Dispute Settlement Norms: Soft Law and the Role of UNCITRAL's Regional Centre for Asia and the Pacific (2021) provides the empirical foundation for this analysis. Drawing on its mixed-method findings, this article suggests that these developments are best understood as producing a form of decentralised global legal ordering. What this means is that decentralized universality, rather than relying on binding consent, convergence is pursued through widened participation, iterative feedback between regional practice and drafting, and sustained investment in interpretive and capacity-building infrastructures. The article examines the institutional features of soft law that make this kind of ordering possible: the opt-in character of model laws, the modular design of interface provisions, the role of non-State standards in arbitral practice, and the interpretive work done by mechanisms such as CLOUT. These features, taken together, explain why soft law can harmonise legal principles without demanding uniformity of practice. The article ends with a critical appraisal of the tensions of decentralisation and concrete recommendations for ensuring that regional engagement strengthens rather than fragments the universality it is meant to serve.

Executive Power and Crown Prerogative in Canada

Patrick F Baud & Philippe Lagassé, "Executive power and Crown prerogative in Canada" in Samuel White & Matthew Stubbs, eds, Executive Power and the Royal Prerogative in the Commonwealth (LexisNexis, 2025)

Baud, Patrick François
Lagasse, Philippe

In this chapter, we aim to provide an overview of the Crown prerogative as a source of executive power in Canada today. We begin by describing the structure of the core executive in Canada and distinguishing prerogative powers from other types of executive powers. By examining the reception and continuation of prerogative powers into Canadian law, we provide an overview of the extent of and limits on prerogative powers in Canada today. We also examine the extent to which the King, his Canadian representatives – the Governor General of Canada and the lieutenant governors of the provinces – and ministers of the Crown can exercise prerogative powers. Finally, we consider the extent to which decisions made under prerogative powers are justiciable on constitutional and other grounds.

🗁 Abuse of Power in the Second Trump Administration

23 U. St. Thomas L. J. (forthcoming 2026), University of Chicago Law School, Public Law & Legal Theory Research Paper 26-10

Baude, William

The law firm orders are not the most unconstitutional thing the Trump administration has done to date. But they are emblematic of a constitutional problem frequently raised by the Second Trump Administration: the use - and abuse - of a broad range of powers to reward the friends and punish the enemies of the regime. While courts may not be able to stop many of these abuses, that does not mean they are constitutional.

🗁 Primacy of EU Law in the Age of (Dis)Integration

51 European Law Review 3

Bobek, Michal

The principle of primacy of EU law has had a bumpy ride during the last decade. Even if previously never unreservedly accepted by the courts of most Member States, the modus vivendi between EU law and national constitutional orders before 2012 was one of pragmatic acceptance of EU law primacy in individual cases, conditional upon varieties of national reservations of "as long as". The last decade has seen the erosion of that understanding, with several national courts triggering either the ultra vires review of Union measures or asserting more robust reservations towards EU law with reference to their national constitutional identity. This article revisits not only the bifurcated narrative of EU normative ambition and national constitutional realities, but equally speculates on what might the rise of judicial unilateralism mean for the principle of primacy of EU law.

🗁 Administrative Growth and Fiscal Outcomes

Written in: Feb 17, 2026; Posted in SSRN in: Apr 9, 2026

Bosh, Arly

This paper investigates the correlation between the expansion of the federal administrative apparatus and long-term fiscal indicators. By contrasting the structural constitutional constraints of the early Republic with the affirmative mandates following the judicial regime shift of 1937, this research examines whether institutional complexity serves as an explanatory variable for declining fiscal efficiency. Utilizing data from the Federal Register, OPM, and the FRED database, the author operationalizes a 'Complexity Variable' (C) to evaluate its impact on fiscal utility. The findings suggest that structural simplicity is a prerequisite for long-term institutional sustainability.

Revolving In

Columbia Public Law Research Paper No. 6480018

Briffault, Richard

The "revolving door" – that is, the movement of policy-makers from the private sector into government and back out again - is a longstanding issue of concern in law, political science, public administration, and government ethics. Although some applaud this exchange of personnel between the public and private sectors, the general tenor of popular, political, and academic coverage of the revolving door has been highly negative, marked by frequent references to corruption, capture, and conflicts of interest. One striking feature of the scholarly treatment and nearly all the legal regulation of the revolving door has been its focus on "revolving out," that is government employees leaving for the private sector to become lobbyists, consultants, or lawyers representing clients before their former government agencies. Conflicts regulation of the outward-bound revolving door is widespread at all levels of government, but the revolving door swings both ways and there has been much less attention to or regulation of the conflicts issues that arise when lobbyists, corporate executives, or other representatives of private interests enter government. At first blush, that seems paradoxical since the regulatory capture concern behind the focus on the revolving door should be particularly acute when the regulated become government regulators. However, as I discuss, the issues raised by what I call "revolving in" do not fit as easily within traditional government ethics regulation as those posed by revolving out.
This article addresses the gap in the legal analysis and regulation of revolving in. It explores the scope of revolving in, the conflicts of interest it poses, and the patchwork of measures that apply to it. Drawing on general government ethics principles and emergent efforts at regulation, it then proposes a set ethics rules to deal with the conflicts of interest posed by revolving in. It concludes by acknowledging that although the more robust ethics regulation is necessary, ethics rules alone, without political action, are unlikely to be enough to deal with the underlying concern about regulatory capture.

Management of Legal Risks in Maritime and Multimodal Transport: Prevention, Documentation of Circumstances, and Law Enforcement Practice

Written in: Dec 16, 2025; Posted in SSRN in: Apr 29, 2026

Budaragina, Galina

Head of Marine Freight Section, Evicor AG (a leading international company engaged in the trading and safe delivery of fuel and petroleum products (LPG, motor fuels, base oils and lubricants, non-ferrous metals, and other commodities) for the petrochemical, energy, manufacturing, mining, and transport industries). Annotation. The article examines legal risk management in maritime and multimodal transport as an integrated system of prevention, documentation, and legal assessment of disputed situations. It considers risks arising at the stages of concluding and performing carriage contracts, preparing commercial and transport documents, selecting insurance coverage, allocating carrier liability, and distinguishing general average from particular average. Special attention is paid to the practical consequences of maritime incidents, including cargo detention, the need to provide guarantees, loss allocation among participants in the carriage process, and the economic impact of uninsured cargo. The article emphasizes the importance of timely recording of legally significant circumstances, including delays, cargo damage, route changes, unscheduled calls, and other facts that may affect the outcome of a dispute. It argues that effective risk management requires a combination of contractual preparation, insurance protection, internal documentation procedures, and consideration of law-enforcement practice. This approach helps reduce the consequences of uncertainty and provides more stable protection of the interests of transport participants.

🗁 Administrative Law's Fourth Settlement: AI and the Capability-Accountability Trap

Written in: Jan 9, 2026; Posted in SSRN in: Apr 2, 2026

Caputo, Nicholas

Since 1887, administrative law has navigated a “capability-accountability trap”: technological change forces government to become more sophisticated, but sophistication renders agencies opaque to generalist overseers like the courts and Congress. The law’s response—substituting procedural review for substantive oversight—has produced a sedimentary accretion of requirements that ossify capacity without ensuring democratic control. This Article argues that the Supreme Court’s post-Loper Bright retrenchment is best understood as an effort to shrink administration back to comprehensible size in response to this complexification. But reducing complexity in this way sacrifices capability precisely when climate change, pandemics, and AI risks demand more sophisticated governance.
AI offers a different path. Unlike many prior administrative technologies that increased opacity alongside capacity, AI can help build "scrutability" in government, translating technical complexity into accessible terms, surfacing the assumptions that matter for oversight, and enabling substantive verification of agency reasoning. This Article proposes three doctrinal innovations within administrative law to realize this potential: a Model and System Dossier (documenting model purpose, evaluation, monitoring, and versioning) extending the administrative record to AI decision-making; a material-model-change trigger specifying when AI updates require new process; and a “deference to audit” standard that rewards agencies for auditable evaluation of their AI tools. The result is a framework for what this Article calls the “Fourth Settlement,” administrative law that escapes the capability-accountability trap by preserving capability while restoring comprehensible oversight of administration.

🗁 The Attorney General's 'Devil': An Introduction to the work of First Treasury Counsel

Judicial Review (Forthcoming 2026)

Casey, Conor

This article offers an extended introduction to one of the lesser discussed, but critically important, components of the firmament of government lawyering in the United Kingdom: the First Treasury Counsel who assist the government on matters of civil law. Part I provides a concise overview of the emergence of the position of First Treasury Counsel and its functions, noting its historically intimate relationship with the Law Officers and their own rise as the Crown’s chief lawyers. Part II outlines the contemporary role of the First Treasury Counsel. Part III concludes by outlining some recent significant changes to how the office will work in future.

GOVERNMENT CONTRACT NOVATION: Overlooked Candidate For "Revolutionary Overhaul"

Written in: Nov 1, 2025; Posted in SSRN in: Apr 20, 2026

Castellano, Nathaniel

The Federal Acquisition Regulation provisions governing novation of Government contracts are in desperate need of overhaul. The current novation rules, last reformed nearly 30 years ago, flout commercial practice, creating unnecessary barriers to private capital investment, mergers and acquisitions, and corporate restructuring in the Government contracting industry.
Alas, the "Revolutionary FAR Overhaul" would leave the novation rules largely untouched, save minor stylistic adjustments.
That is a shame: it signals complacency with an embarrassing status quo and ignores readily available proposals for reform.

The Capture of the Congressional Intelligence Committees

17 U.C. Irvine L. Rev. (forthcoming 2026)

Chauvin, Noah

Members of Congress, national security professionals, and academics have long recognized that congressional oversight of the nation's intelligence agencies is less effective than it should be. Scholars have proposed a range of explanations for this phenomenon, including weak electoral incentives for performing robust intelligence oversight, the challenge of accessing classified information, and increasing partisan polarization in Congress. This article proposes a different explanation: That the intelligence oversight committees have been "captured" by the agencies they are intended to oversee.
To support this thesis, the article examines three case studies involving congressional oversight of intelligence in which the intelligence oversight committees have been more deferential to the intelligence community than the judiciary committees, with which they share jurisdiction over these matters and which have similar access to information. A close examination of these case studies--Congress's approaches to the Foreign Intelligence Surveillance Act (FISA) amicus program, FISA Section 702, and the intelligence agencies' acquisition of commercial data--demonstrates that the traditional explanations for weak congressional oversight of intelligence cannot fully explain the intelligence oversight committees' deference to intelligence agencies' interests, but capture can. After using these case studies to demonstrate capture, the article provides recommendations for reform. Rescuing captured committees requires both addressing the immediate problem and building up their long-term capacity to prevent it from recurring. Accordingly, the article argues that in the short term, Congress should limit the amount of time a member may serve on the intelligence oversight committees, ensure that members are allowed a personal staffer with a high-level security clearance, and require a "cooling-off period" before former intelligence agency employees may join the staff of the intelligence committees. Over the long term, Congress should increase the staff of the intelligence oversight committees and centralize its oversight of the intelligence agencies.

🗁 Institutional Sustainability in AI Governance: Comparing Paths in the EU, Japan, and Taiwan

Yearbook of Antitrust and Regulatory Studies, volume 18, issue 32, 2025

Chen, Kuan-Wei

This article explores the concept of institutional sustainability in AI governance by comparing the approaches in the European Union, Japan, and Taiwan. It begins by arguing that the relationship between AI and sustainability extends beyond environmental concerns, encompassing the sustainability of governance institutions themselves. The article posits that institutional sustainability, referring to the capacity of governance frameworks to remain effective over time, is essential in the context of rapidly evolving and future-oriented AI governance. The analysis proceeds by examining the EU's strategy of normative anchoring through legal codification, Japan's agile governance model based on collaboration and coordination, and Taiwan's digital democratic discourse that leverages civic participation. With a comparative assessment of these models along four dimensions: adaptability, legitimacy, coherence, and resilience, highlighting their respective strengths and limitations, this article offers diverse insights for developing sustainable AI governance systems.

🗁 Toward State Capacity Liberalism

Written in: May 5, 2026; Posted in SSRN in: May 5, 2026

Christmas, Billy

This paper maps an emerging school of thought that takes seriously the need for strong and stable state for the protection of liberal society. It often prioritises the maintenance of a strong state, for the sake of liberal values. I call it state capacity liberalism. This school of thought takes a long view of history and identifies three two correlated features of liberal societies: low levels of violence, high levels of economic growth, and high levels of state capacity. State capacity liberals believe that if we care about liberal society we should care about understanding and sustaining the seemingly paradoxical, and certainly contingent, equilibrium that generates it. State capacity liberalism is a form of non-ideal theory that is compatible with a wide range of ideal theories within the liberal family. It advises liberals on the right that their cherished free market and civil society require the kind of credible commitment to negative rights only a strong state can provide. It advises liberals on the left that their cherished welfare protections and democratic participation require economic openness and a growing economy to fund public goods and provide democratic stability. Whatever the policy outcomes a liberal prioritises, then, they ought to support state capacity as a matter of priority.

🗁 Green Labels, Red Flags: Comparative Legal Pathways to Environmental Legitimacy in the European Union and the People's Republic of China

RIDAO, issue 2, 2025

Clementi, Davide

This article explores how greenwashing is regulated through environmental labelling in the European Union and the People's Republic of China. Through a comparative analysis, it contrasts the EU's ex-post model-based on substantiation and market supervision-with China's ex-ante architecture of sovereign certification, grounded in the ideological tenets of ecological civilization. The study reveals how each system embeds environmental legitimacy within distinct legal, institutional, and political logics, offering a broader reflection on the semiotics of sustainability and the governance of credibility in the global green transition.

Institutional Accountability and Legitimate Inference in Algorithmic Adjudication: Beyond Trustworthy AI

Cambridge Forum on AI Law and Governance (forthcoming 2026)

Cofone, Ignacio

The dominant question in debates about AI in adjudication is whether an algorithm is trustworthy. This framing mislocates the problem. Trustworthiness, in the context of judicial and administrative decisions, is not an intrinsic property of algorithmic systems but a property of the institutional frameworks within which those systems operate. Courts and agencies derive legitimacy not only from their outputs but from the procedures that make decisions intelligible, contestable, and subject to revision. Whether an algorithm is accurate and explainable in a technical sense does not determine whether the institution deploying it can maintain those properties. This Article diagnoses two institutional failures and develops the response they require. The first concerns overlooking the character of legal data: past decisions encode interpretive choices, historical inequities, and doctrinal commitments that algorithms absorb and project forward. The second concerns what legal accountability in adjudication actually requires of transparency: the capacity to reconstruct a reasoning path from evidence to outcome in terms that can be evaluated against legal standards, which this Article calls traceability. Institutional trustworthiness requires principles of legitimate inference that treat the incorporation of algorithmic reasoning as a normative act built around four conditions: inferential necessity, permissible grounds, proportionality of reliance, and traceability.

Networked Governance, Peer Review and Democratic Accountability: Regulating Money Laundering in Australia

Regulating Money Laundering in Australia, 2025

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.

🗁 Bridging the Gap of National Policies in the Quest to Implement the Artificial Intelligence Act

Posted in SSRN in: Apr 1, 2026

Costa, Helena

Artificial intelligence governance in the European Union (EU) is entering a decisive phase as the Artificial Intelligence Act (AIA) pursues to translate responsible and human-centred AI principles into binding regulatory obligations across Member States. Although the AIA establishes a common risk-based framework, previous experience with EU digital regulation suggests that formal harmonization does not automatically produce consistent national enforcement, because institutional capacity, supervisory resources, and technical expertise remain unevenly distributed. A central problem, therefore, is whether existing national AI policy frameworks are sufficiently developed to support coherent implementation of the new European regime. Here, we assess 241 AI-related policy instruments across 26 EU Member States using the AI Policy Maturity Model to evaluate national readiness for implementation of the AIA. We show that Member States are distributed across four maturity levels — Emerging, Developing, Moderate, and Leading—and that policy effort is concentrated primarily on visible governance instruments such as national strategies, agendas, and consultations, while the institutional mechanisms most closely tied to operational enforcement, including oversight bodies, coordination structures, and standards or certification pathways, remain much less evenly developed. These findings reveal a fragmented European landscape marked by policy decoupling, in which formal alignment with regulatory ambition often outpaces the administrative and technical capacity required for effective supervision. We argue that the effectiveness of the EU AI regulatory project, and its broader capacity to act as a credible global standard-setter, will depend on a more adaptive and coordinated enforcement architecture, including stronger national implementation capacity and a reinforced European AI Office.

🗁 EU Administrative Law, 4th edn

Oxford University Press

Craig, Paul

Preface:

It has been eight years since the third edition of this book. The intervening period has been difficult for the EU, beset as it has been with the rule of law crisis, the migration crisis, economic slowdown and the consequences of Brexit. These are important substantive topics on which there is a wealth of literature. Detailed consideration of such topics would, however, venture far beyond the remit of this book, the focus of which is EU Administrative law. My strategy has therefore been to integrate material on such issues, where relevant, into the existing chapters of the book.

There have been significant developments in the case law and EU legislation that is directly relevant to the subject matter of this book. The body of academic scholarship has grown considerably, and attests to the vibrancy and importance of this intellectual field. The developments in relation to both primary law and scholarly literature have been fully integrated into the existing chapters of the book.

The structure and chapter content of the book have been modified in the 4th edition. It is now divided into three parts. Part I is entitled 'Foundations' and has two chapters, the first dealing with the historical development of the administrative system and administrative typology, the second dealing with the foundations of judicial review. Part II, which has seven chapters, continues to deal with 'Administration and Law', the focus being on the different ways in EU policy is administered, and the role of law and politics therein. Part III, with seventeen chapters, is concerned with 'Law and Administration', in which the precepts of judicial review are explicated, and set within the broader frame of the workings of the EU. There are two additional chapters in Part III. There is a new chapter on 'AI Systems and Automated Decision-Making', which considers the impact of AI on EU Administrative law. There is also a new chapter on 'Internal Review and Appeal', which analyses remedial mechanisms other than the EU courts. The overall objective is to provide the reader with a clear and informed view of all dimensions of EU Administrative law.

Regarding Agency Actions of Vast Economic and (or) Political Significance: The Major Questions Doctrine as the New Administrative Political Question Doctrine

Vanderbilt Law Research Paper Forthcoming, University of Kansas School of Law Research Paper Series

Craig, Robin Kundis
Ruhl, J. B.

When in 2022 the Supreme Court majority announced the arrival of the Major Questions Doctrine (MQD) in West Virginia v. EPA, it purported to create a multifactor test to police federal agencies who were straying outside of their congressionally delegated authority--or, as Justice Barrett would later phrase it, operating outside their proper "wheelhouses." While many scholars have addressed the MQD's doctrinal legitimacy and purpose, few have focused on how the MQD is actually operating in practice and what additional power the MQD is giving federal courts to void federal agency decisions. This Article helps to fill that gap by showing that the "political and economic significance" factor within the MQD is beginning to take on a life of its own. This emerging trend is best understood by disentangling the various strands of precedent that the West Virginia majority attempted to weave into a single coherent doctrine to reveal the three basic categories of MQD cases: instances where federal agencies interfere with state authority; instances where federal agencies interfere with other federal agencies or congressional schemes; and instances where an agency regulation is "excessively" expensive or politically controversial. This last category, we argue, is where the true emerging power of the MQD lies. In particular, lower courts in the Fifth Circuit are reversing federal agency decisions purely on the basis that they are politically controversial, creating what effectively amounts to a political question doctrine for federal administrative agencies.

Agency Fact-Making

135 Yale Law Journal (forthcoming 2026), Cardozo Legal Studies Research Paper No.2026-05

Damon-Feng, Haiyun

Modern administrative law scholarship, theory, and doctrine generally conceptualize agencies as engaging in three primary functions: rulemaking, enforcement, and adjudication. This understanding of agencies has informed deep debates surrounding the power, independence, and constitutional legitimacy of the administrative state. But the prevailing account is incomplete. It overlooks a fourth core function of the administrative state: its fact-making, or epistemic, function.

Across the administrative state, agencies create and disseminate information in ways that are uniquely comprehensive and uniquely powerful. Agencies' epistemic outputs include the census generated by the Census Bureau, repositories of public-health information maintained by the Centers for Disease Control and Prevention, weather data generated by the National Oceanic and Atmospheric Administration, and economic data generated by the Bureau of Labor Statistics. This information—agency-made facts—wields official power within our democratic legal system. Political apportionment, monetary policy, climate policy, vaccine distribution, and the allocation of resources and social services all hinge on the administrative state's epistemic work.

The administrative state's fact-making function is critically important to democratic legitimacy and participation, but it has been largely understudied and undertheorized. This Feature begins to fill that gap and makes three primary contributions. First, it provides a historical and descriptive account of the administrative state's fact-making function, demonstrating the robust and longstanding tradition of information production and dissemination by the administrative state. Second, it provides a theoretical account of agency fact-making and argues that fact-making should be understood as a separate—and equally important—function of the administrative state. Third, it explores how politicized control over agency fact-making has the potential to degrade important democratic norms, and how politicized fact-making can disproportionately harm marginalized and politically disempowered groups. It argues that fact-making ought to be conducted under truth-seeking procedures that maintain a degree of independence from politics and the President. These central insights enrich administrative law theory and complicate ongoing debates about the role and regulation of the administrative state.

🗁 Drafting Regulatory Preambles (Draft Report to the Administrative Conference of the United States)

Administrative Conference of the United States (Mar. 16, 2026), U of Michigan Public Law Research Paper

Deacon, Daniel

This is a draft report to the Administrative Conference of the United States on best practices for drafting regulatory preambles in light of recent developments in judicial review of agency action. It is based in part on interviews with nineteen current and former agency employees with experience writing the explanations that accompany agency rules. Among other things, it explores how the demise of Chevron affected agencies' approach to regulatory preambles. In addition, it provides guidance to agency rule drafters intended to help those drafters navigate the changing judicial review environment.
The draft report will undergo revisions before becoming final. The views expressed do not represent those of ACUS or the federal government. The ACUS project page can be found here: https://www.acus.gov/projects/drafting-regulatory-preambles.

🗁 Henry VIII Clauses: Problems, Practices and Scrutiny Principles

36 Public Law Review 104

Edgar, Andrew

This paper examines the issues raised for parliamentary scrutiny of bills that include Henry VIII clauses, provisions that enable changes to be made to Acts by administrative officials. While such provisions are not prohibited in parliamentary democracies, they are commonly regarded as constitutionally problematic. It is crucial for parliaments to have strong scrutiny principles and practices for their assessment of them. This paper examines recommendations for improved parliamentary scrutiny of such provisions recently made by the Australian Law Reform Commission.

National Security and the New Command Economy

Harvard National Security Journal, Vol. 18 (forthcoming 2026); Virginia Public Law and Legal Theory Research Paper No. 2026-24

Eichensehr, Kristen
Deeks, Ashley S.,

In the name of national security, the Trump administration has taken a stake in Intel, acquired a "golden share" in U.S. Steel, obtained equity stakes in critical minerals companies, and required semiconductor companies to pay the government a percentage of their profits from sales to China in exchange for export licenses. These actions mark a dramatic departure from the traditional U.S. capitalist system, which relies on the market, not the government, to pick winners and losers. Indeed, they carry overtones of a command economy. But as unusual and occasionally illegal as these developments are, they also build on a broader shift that has pushed U.S. companies into a central role in U.S. national security policy in the last decade.
Recent administrations of both parties have invoked the mantra that "economic security is national security." To implement that philosophy, they have relied heavily on economic tools, including sanctions, export controls, investment screening, and tariffs. While these tools provide important levers for the U.S. government to manage national security threats, their proliferation is also fostering deeper, more diverse, and riskier roles for companies in this new era. We identify five such roles. Companies are: 1) key to security supply chains, prompting government involvement in the companies; 2) front-line enforcers or self-enforcers of economic security; 3) national security proxies for the U.S. government; 4) sources of products that the government uses as negotiating leverage; and 5) sources of funds that the government can extract in exchange for national-security related approvals.
These enhanced, often novel, and sometimes illegal roles for companies in the national security ecosystem pose disturbing costs to public law values, such as legality, rationality, accountability, and fairness. The government's burgeoning reliance on companies to implement national security policy undercuts public law values by fostering incentives for companies and the government to act unlawfully, creating principal/agent problems, and undercutting transparency. The Trump administration's latest moves go even further: by introducing profit motives into security-related decisions, they produce conflicts of interest, potential corruption, and decision-making distortions both for the government and for companies. This approach is especially pernicious in national security policy-making because the stakes are so high. The end result will be a United States that is both less safe and economically weaker.
Because many of these corporate roles likely will continue in future administrations (whether Democratic or Republican), finding ways to minimize the risks to public law values is crucial. For each of the risks that we identify, we propose concrete measures that Congress, the Executive, companies, and even allied governments could undertake to mitigate the corrosive effects of corporate entanglement in U.S. national security policy going forward.

Middle East Legislative Insight: Egyptian Public-Private Partnerships Law

Written in: Jul 22, 2019; Posted in SSRN in: Apr 24, 2026

Elsaman, Radwa

This paper highlights the key aspects of Egypt's legal framework governing public-private partnerships (PPPs). It offers observations on the evolution from traditional public procurement and concession regimes to a specialized PPP legal structure designed to facilitate private sector participation in infrastructure and public utility projects. The article elaborates on key components of the PPP regime, including institutional governance through the Supreme Committee for PPP Affairs and the PPP Central Unit, available legal structures for project implementation, and the role of special purpose vehicles (SPVs). It further explores the contractual framework, risk allocation mechanisms, and regulatory controls governing the relationship between contracting authorities and private investors. In addition, the paper provides an overview of tendering and awarding procedures, emphasizing transparency, competition, and procedural safeguards. It concludes by assessing the role of PPPs in enhancing infrastructure development and service delivery in Egypt, highlighting the law's significance in attracting both domestic and foreign investment.

La transnacionalización de la auditoría pública en América Latina (The Transnational Transformation of Public Auditing in Latin America)

International Journal of Constitutional Law, 2026

García-Huidobro, Eugenio

This article examines the transnational transformation of public auditing in Latin America. It argues that Supreme Audit Institutions—auditors, comptrollers, and courts of accounts—are increasingly moving beyond their traditional domestic roles to operate within a transnational environment shaped by global governance agendas. Through sustained collaboration with international organizations and participation in global networks, they have emerged as transnational actors that internalize international normative agendas and project them onto public administrations they oversee. In doing so, public auditing is shifting from a narrow focus on legality review to a more complex and demanding form of administrative oversight, increasingly influenced by international law. While this transformation remains uneven and still underway, it is already reconfiguring domestic accountability mechanisms and redefining the boundary between international and administrative law.
El artículo analiza la transnacionalización de la auditoría pública latinoamericana como un proceso en el que las Entidades Fiscalizadoras Superiores –auditorías, contralorías o tribunales de cuentas– trascienden su rol puramente doméstico y comienzan a operar en un entorno transnacional marcado por agendas globales. A través de su colaboración con organizaciones internacionales y su participación en redes globales, emergen como actores transnacionales que internalizan marcos normativos internacionales y los proyectan sobre las administraciones públicas que fiscalizan. En este tránsito, el eje de la auditoría pública se desplaza desde una legalidad estricta hacia una juridicidad más compleja y demandante, crecientemente permeada por el derecho internacional. Aunque se trata de un proceso aún en desarrollo, ya está reconfigurando los mecanismos domésticos de rendición de cuentas y redibujando las fronteras entre el derecho internacional y administrativo.

Scoring the European Citizen in the AI era (postprint)

Written in: Jul 1, 2025; Posted in SSRN in: Apr 28, 2026

Genicot, Nathan

Social scoring is one of the AI practices banned by the AI Act. This ban is explicitly inspired by China, which in 2014 announced its intention to set up a large-scale government projectthe Social Credit System-aiming to rate every Chinese citizen according to their good behaviour, using digital technologies and AI. But in Europe, individuals are also scored by public and private bodies in a variety of contexts, such as assessing creditworthiness, monitoring employee productivity, detecting social fraud or terrorist risks, and so on. However, the AI Act does not intend to prohibit these types of scoring, as they would qualify as "highrisk AI systems", which are authorised while subject to various requirements. One might therefore think that the ban on social scoring will have no practical effect on the scoring practices already in use in Europe, and that it is merely a vague safeguard in case an authoritarian power is tempted to set up such a system on European territory. Contrary to this view, this article argues that the ban has been drafted in a way that is flexible and therefore likely to make it a useful tool, similar and complementary to Article 22 of the General Data Protection Regulation, to protect individuals against certain forms of disproportionate use of AI-based scoring.

🗁 Safeguarding Professional Expertise

Northeastern University School of Law Research Paper Forthcoming

Haupt, Claudia E.

Expertise is under attack. Government health agencies are removing scientific information from their websites, firing career experts, and reversing policies on vaccines, nutrition, and public health. Previously existing debates have intensified, not least due to increased politicization of (purported) expert disagreement. As political forces increasingly challenge professional knowledge, an urgent question emerges: who should serve as the institutional guardians of professional expertise?
This Essay argues that the professions themselves must assume that role. To strengthen their capacity as guardians, it proposes three interconnected legal reforms. First, professional licensing should refocus on competence; second, disciplinary systems should enforce adherence to professional standards of expertise in disseminating advice; and third, First Amendment doctrine should shield the generation and dissemination of professional knowledge from government interference.

🗁 Comparative Judicial Enforcement

Washington Law Review 101 (1)

Hayes, Rosa
Hefti, Angela

Almost immediately upon his second inauguration, President Trump took several actions that subvert longstanding norms, contravene long-settled Supreme Court precedent, and disrespect the authority of the coordinate branches to check executive branch excess. The Administration's actions pose both immediate and long-term challenges to the American constitutional order, with many scholars and citizens believing that the United States is in the midst of a constitutional crisis. At minimum, the Trump Administration's actions have illuminated sticking points in both functionalist and formalist conceptions of the separation of powers. For this model of shared but distributed power to function, each branch must give due respect to the outcomes of its dialogic interactions with other branches. When one branch rejects these norms of engagement, the system will not function as intended and the governmental excesses of that branch will go unchecked, even if they violate substantive constitutional or statutory limits. Other scholars have looked to U.S. history for insight into how to mitigate the near- and long-term repercussions of executive branch noncompliance and defiance. This Article takes a different approach. Instead of looking back, we adopt a comparative lens and look abroad to European states' (non)compliance with decisions of the European Court of Human Rights (ECtHR), a supranational court with jurisdiction over forty-six member-states. Despite significant differences between the U.S. and European legal systems, the relationship between the ECtHR and member-states shares important characteristics of the relationship between the federal judiciary and the executive branch in the United States. These characteristics make the ECtHR a good comparator for studying the causes of, and solutions to, breakdowns in norms governing the relationship between the two branches. And the ECtHR's particular experience with enforcement and compliance in the face of political and other backlash offers lessons for how Americans—judges, lawyers, lawmakers, and members of the public—can and should respond to current and future executive branch noncompliance and anti-constitutionality. Drawing inspiration from the European human rights system, which epitomizes respect for the rule of law and human rights, this Article proposes a novel framework for understanding and responding to the challenges of enforcing federal court judgments against a noncompliant executive branch. Specifically, we derive four lessons from the ECtHR experience that can be adapted to fit within the American constitutional structure and have the potential to promote better compliance with and enforcement of U.S. court judgments. First, we recommend formalizing opportunities for civil society oversight and ensuring legislative protections for civil society as central watchdogs of our democratic system. Second, we propose that courts make increased use of court-appointed equitable helpers. Third, an institutional dialogic process should be formalized through a judicially administered enforcement authority, with the power and expertise to assess compliance. Fourth, we suggest employing civil penalties to facilitate enforcement, reflecting the fact that monetary remedies are one of the most straightforward ways European states comply.

Valuing Future Lives

44 Yale Journal on Regulation (forthcoming 2027); University of Chicago Law School, Coase-Sandor Institute for Law & Economics Research Paper No. 26-3; University of Chicago Law School, Public Law & Legal Theory Research Paper 26-9

Hemel, Daniel J.
Masur, Jonathan S.

Federal regulation often involves a tradeoff between monetary costs in the present and life-saving benefits in the future. A central question in regulatory cost-benefit analysis is how to assign a present dollar value to future lives so that future lives and present dollars can be compared. For regulations that are projected to prevent deaths years or decades down the road, agencies make two key analytical moves. First, they adjust the value of a statistical life upward to reflect the fact that society's willingness to pay to save lives will rise as people become wealthier in the future. Second, they discount future benefits downward to reflect the fact that the wealthier people of the future will derive less utility from each dollar precisely because they are wealthier. In theory, these upward and downward adjustments could offset exactly, such that lives saved in the future carry the same weight in agency cost-benefit analyses as lives saved today. In practice, agencies adjust the value of a statistical life upward at a much slower rate than they discount future benefits. The consequence is that agencies assign much less weight to lives in the future than to lives in the present. For example, the Environmental Protection Agency considers a life saved fifty years from now to be worth 69% to 95% less than a life saved today. Other agencies likewise apply large haircuts to future lives. The result is a dramatic antiregulatory bias, particularly with respect to regulations that will have large effects years in the future, such as measures to curb climate change.
his Article critically analyzes federal agencies' practice of devaluing future lives. Through step-by-step reconstructions of methodologies employed by four agencies—the Department of Transportation, the Environmental Protection Agency, the Department of Health and Human Services, and the Occupational Safety and Health Administration—the Article shows how current regulatory practice substantially discounts the prevention of premature deaths over the medium and long term. It then demonstrates—through case studies of recent air pollution and motor safety rulemakings—how the devaluation of future lives stacks the deck against regulatory action. It concludes by calling for agencies to adopt a presumption that lives in the future have the same value as lives saved today, and it explores the implications of this proposal for the broader enterprise of cost-benefit analysis.

Energy Emergencies and Energy Federalism

University of Pennsylvania Law Review, Volume 174, Issue 1, 157-221 (2025)

Jacobs, Sharon
Milcamps, Pierre-Noe

Immediately following his inauguration, President Trump declared a national energy emergency in the United States. While the contours and implications of this declaration remain uncertain, the order's stated purpose is to advance the President's domestic energy policy agenda by promoting extraction and use of fossil fuels and other favored forms of power generation. One likely effect of the declaration is to further shift control over U.S. energy policy from the states to the federal government. Such reallocations of authority during periods of crisis (real or imagined) have been an enduring feature of energy policy on both sides of the Atlantic.
This Article examines the impact of crises on the centralization of authority over energy policy in the United States and the European Union over the past half–century. Using case studies—including the oil price shocks of the 1970s, blackouts and grid failures, and Russia's invasion of Ukraine—it examines the mechanisms by which these shifts in power have taken place. In the European Union, centralization has occurred primarily through the invocation of executive emergency authorities. In the United States, by contrast, the primary mechanism of centralization has been legislation enacted in the immediate wake of crises. However, President Trump's recent declaration and the serious consideration President Biden gave to declaring a climate emergency suggest that the use of executive emergency authority may be on the rise in the United States as well.
Existing literature highlights the dangers of horizontal consolidation of authority in the executive branch of government during emergencies, as well as the potential negative impacts of emergency lawmaking on civil liberties. By contrast, we highlight the potential for emergency governance to produce vertical shifts of authority from the periphery to the center in federal or quasi–federal systems. Vertical consolidation is not necessarily a problem. Crises can highlight failures of existing governance structures and create momentum for needed legal and policy reforms. However, crises also create the opportunity and incentive for self–serving or unreflective consolidation of authority by central government officials. We therefore suggest modest reforms to existing energy emergency laws to ensure they are not overbroad and that there is a chance to assess, either ex ante or ex post, their impact on vertical distributions of power.

Leading cases in food law: EU and the Netherlands – Cases selected by the Dutch Food Law Association

ISBN: 978-90-04-76109-4; Publication: 25 Jun 2026

Jansen, Oswald;
Meulen van der, Bernd

The development of food law in the last 20 years is discussed in case notes of 60 leading cases of the European Court of Justice, as well as national courts and the Advertising Code Committee in the Netherlands.

General Rulemaking Grants and the Federal Trade Commission

Columbia Public Law Research Paper

Katz, Tamar
Lloyd George, Alex
Menand, Lev
Wu, Timothy

The legal campaign against the administrative state has a new front: general rulemaking provisions. General rulemaking provisions authorize agencies, in an open-ended way, to write rules to carry out Congress's directives. Administrative agencies have relied on such provisions for decades. But over the last several years, some litigators, scholars, and judges have advanced limiting theories that would, if applied widely, greatly reduce the ability of agencies to execute federal statutes. The leading edge of this campaign is an effort to negate the rulemaking authority of the Federal Trade Commission (FTC). The reasoning employed by the FTC's opponents, already adopted by a district court, could affect thousands of rules regulating matters from bank powers to air quality. This Article carefully examines the challenge to the FTC's general rulemaking power and rebuts it. Through meticulous reconstruction of the FTC's history, it shows how judges and legislators transformed the FTC into a modern rulemaking agency in the 1970s and built an entire rulemaking apparatus into the FTC Act. It further shows that this is not a special case: Judges and legislators have long approached these provisions using ordinary principles of statutory interpretation. The current attack on their scope often employs the language of restraint. But it is narrowing the FTC's power that would mark a radical departure from administrative law principles, upending over fifty years of settled understandings about the meaning of the word "rules" as employed by legislators across the U.S. Code.

Diminishing Transparency: A Critical Analysis of India's Right to Information Act and Lessons from Nepal

Written in: Jan 1, 2026; Posted in SSRN in: Mar 27, 2026

Kaushik, Navodita

Although it is a notable legislative intervention of India’s transparency architecture, the Right to Information Act of 2005 demonstrates a clear disconnect between effectiveness in operation and statutory sophistication. This paper synthesizes and assesses academic scholarship that includes doctoral jurisprudence, empirical studies, comparative institutional analysis, and critical policy values in order to examine the constitutional history, implementation strategies, and systematic barriers of RTI over its two decades of existence. The research reveals a crucial impasse: India’s RTI loss rank sixth globally for statutory quality, yet their effectiveness and implementation rank sixty-sixth, indicating several enforcement flaws that seriously undermine the law’s capacity to achieve transformative social changes. The evolution of informational rights under legal framework demonstrated how judicial activism translated implicit rights under Article 19(1)(a)into explicit statutory architecture, redefining transparency as a normative standard of democracy rather than a legislative peculiarity.
The effectiveness of RTI is perpetually undermined by seven significant operational pathologies; the2019 amendment’s[2] erosion of Information Commission’s independence through executive control over tenure and compensation; the strategic deployment of exemption provisions as obfuscation mechanisms; the continued exemption of publicly-funded political parties from disclosure requirements despite explicit judicial directives; the ineffectiveness of penalty provisions as deterrents; widespread bureaucratic resistance manifested through personal vacancies, procedural delays and antiquated record management processes, complete non-compliance with proactive disclosure mandates under Section 4[3]; and the absence of adequate whistleblower protections framework highlighted by documented activist deaths. Comparative analysis with Nepal’s RTI framework reveals instructive lessons regarding institutional device design, enforcement mechanisms and civil society mobilization. Important gaps remain in present research including comparative institutional studies and evaluating progressive transparency models; intersectional analyses investigating disparate access patterns among marginal communities; technological integration evaluations assessing digital governance applications; and longitudinal econometric analyses linking RTI utilization with corruption indices. Realizing the RTI’s democratic potential necessitates prioritizing sectoral efficiency evaluations, technology-enabled transparency innovations, rigorous impact assessments, and comprehensive enforcement architecture reconstitution beyond merely symbolic legislative compliance.

Putting Power Back in the 'Separation of Powers'

Forthcoming in Mathieu Leloup et al eds, Cambridge Handbook on Separation of Powers

Khaitan, Tarunabh

This chapter reconceptualises the principle of separation of powers by rebalancing attention from institutional "separation" to agential "power." Traditional accounts have treated separation of powers as a structural arrangement among branches designed primarily to prevent tyranny. By contrast, this chapter argues that the principle is best understood as a general grammar for managing power within a purposive constitutional order. Modern constitutions pursue multiple enduring purposes and must contend with a dynamic constellation of powerful agents capable of realising or frustrating those aims. When a constitution chooses to "domesticate" an agent—transforming it into a constitutional actor charged with performing public functions—the principle of separation of powers supplies the managerial logic through which that agent's power is calibrated. Drawing on a taxonomy of agential power and its modalities—capacity calibration, field structuring, incentive modulation, and perlocution—the chapter shows that separation of powers operates not merely by allocating functions or insulating institutions, but by organising how power flows across a constitutional system. On this account, independence, accountability, checks and balances, comity, and collaboration are techniques rather than ends. The principle is instrumentally oriented yet normatively thin: it can serve liberal, socialist, theocratic, or even authoritarian purposes, while retaining a conceptual core. Separation of powers thus emerges as a dynamic practice of constitutional domestication rather than a static institutional blueprint.

Incapacitating the Immigration Courts

S.M.U. Law Review

Koh, Jennifer Lee

Amidst the dizzying array of developments taking place under the banner of mass deportation, the second Trump Administration is engaged in a sustained effort to fundamentally transform the country's immigration courts by incapacitating them. Although the immigration courts have long been the subject of extensive criticism, they also seek to function as neutral forums in which the Department of Justice adjudicates the removability of noncitizens and certain types of immigration relief, governed by due process principles. Rendering those courts unable to perform their functions could potentially give rise to a more fundamental deterioration of even the semblance of due process in immigration adjudication.

This Article identifies several mechanisms used to achieve this incapacitation. The first is the expansion of removals designed to bypass immigration court adjudication altogether. The second involves the transformation of immigration courts into physical sites of chaos and violence. Third, management strategies designed to alter the composition of the immigration judge (IJ) corps through the firing, politicization, and hiring of judges have impacted the courts. The trends described in this Article carry implications for due process doctrine, the role of the federal judiciary in overseeing immigration policy, and administrative adjudication more broadly.

Procurement as the Gateway of Digital State Power Governance Implications for AI and Digital Systems in African Public Administration

Written in: Mar 16, 2026; Posted in SSRN in: Apr 20, 2026

Kudya, Danai

Africa's governments are procuring AI and digital systems at speed. Revenue authorities, ministries, courts, social protection bodies, and local authorities are acquiring platforms that restructure their internal operations. The governance frameworks surrounding this transformation continue to start too late. This paper argues that the most consequential governance decisions are made not at deployment or regulation, but at procurement. Through procurement, governments determine who controls the data, who can audit the system, whether the state can exit the vendor, and whether public institutions retain meaningful authority over the public functions those systems touch. The paper advances three interlocking doctrines; Continuous Administration, Administrative Hosting Capacity, and the Procurement Entry Doctrine as a governance architecture for digital public procurement in Africa. It grounds this argument in documented African procurement experiences including Uganda, Zimbabwe, and the DRC, and concludes with the AGCIH Procurement Governance Matrix: a scored readiness tool for public institutions before digital system acquisition.

Regulation

Andrea Biondi and Oana Stefan, Elgar Encyclopedia of European Law (2026) Edward Elgar

Kukavica, Jaka

Regulations are one of the main legal acts through which the European Union (EU) exercises its competencies. Alongside directives and decisions, they are one of the binding legislative acts EU institutions may adopt. They are legally binding acts of general application, binding on Member States, individuals, and EU institutions alike. Regulations are directly applicable in all Member States. They are also acts of general application since Member States do not need to adopt transposing measures for regulations to have legal effects in their legal systems: they binding automatically with their adoption. Their legal nature is symbolised by the attempt of the rejected Treaty establishing a Constitution for Europe to rename regulations as "European laws". Indeed, the legal nature of regulations is akin to the legal nature of federal laws in federal legal systems.

Beyond Predictability: Epistemic Plurality, Institutional Coordination, and the Transformation of Legal Rationality in Global Governance

Written in: Apr 11, 2026; Posted in SSRN in: Apr 20, 2026

Lagrotta, Luiz Carlos Nacif

This paper develops an integrated framework to analyze the transformation of legal and economic coordination under conditions of epistemic plurality. Moving beyond conventional accounts centered on instability, it argues that contemporary challenges in global governance stem from a gradual erosion of shared interpretive baselines that traditionally sustained predictability. Drawing on law and economics, international relations theory, and institutional analysis, the article examines how this shift affects transaction costs, risk allocation, compliance structures, and the functioning of global institutions. The analysis engages with transnational regulatory frameworks associated with the United Nations and the Organisation for Economic Cooperation and Development, as well as enforcement practices such as those developed by the U.S. Department of Justice, to demonstrate how formal convergence of norms coexists with increasing variability in interpretation. This dynamic is further explored through the lens of institutional economics, drawing on Douglass North, Avner Greif, Oliver Williamson, and Fábio Nusdeo, highlighting the dependence of coordination on shared expectations and institutional stability. At the domestic level, the paper connects these global developments to the expansion of interpretive discretion in constitutional systems, engaging with contributions from Luís Roberto Barroso, Humberto Ávila, and Tércio Sampaio Ferraz Jr. It argues that legal certainty is being reconfigured from a systemic guarantee into a context-dependent outcome shaped by institutional and interpretive conditions. The paper concludes that contemporary legal systems are transitioning from a paradigm of convergence to one of managed plurality. In this context, the central challenge is not to restore uniform predictability, but to design institutions capable of sustaining coordination across diverse interpretive frameworks. Rather than signaling institutional breakdown, this transformation points toward the emergence of more adaptive and resilient forms of governance.

FROM DIGITAL AGRICULTURE TO RESPONSIBLE TECHNOLOGY: AGRI-FOOD DATA GOVERNANCE AND DATA SPACES IN COMPARATIVE PERSPECTIVE

Posted in SSRN in: Apr 1, 2026

Lara Ruiz, Maria Luisa
Gallardo Cobo, Rosa
Montero Simo, Maria José

The digitalisation of the agri-food sector is reshaping relationships among farmers, public authorities, and technology platforms, raising urgent questions about data control, benefit distribution, and exclusion risks. This article analyses agri-food data governance through the lens of responsible technology, integrating responsible innovation, data justice, and responsible AI frameworks with comparative regulatory analysis. Adopting a doctrinal and public-policy-oriented methodology, it examines governance approaches in the European Union, Spain, the United States, Brazil and Latin America, Japan, China, and India. The paper proposes a functional characterisation of agri-food data, develops a multi-level model of actors and data flows, and identifies six structural challenges: undefined ownership, power asymmetries, interoperability fragmentation, privacy and security risks, digital divides, and data sovereignty tensions. It concludes by outlining criteria for regulatory frameworks and data spaces combining hard-law instruments with enforceable soft-law mechanisms, centred on digital inclusion, equitable value return, and ecological sustainability.

Main Developments in Competition Law and Policy 2025 – Korea

Written in: Mar 23, 2026; Posted in SSRN in: Apr 20, 2026

Lee, Sangyun

The Korea Fair Trade Commission (KFTC) remained highly active, breaking new ground with the first information exchange cartel case under the 2020-revised framework and securing effective commitment packages from Google YouTube Music Tying and Broadcom Set-Top Box Exclusive Dealing in abuse cases. The article pays particular attention to the KFTC's continued reliance on its broad unfair trade practices (UTPs) regime, illustrating through a range of cases—from refusals to supply without dominance to promotional practices without competitive harm—how the KFTC's enforcement reach extends well beyond traditional antitrust boundaries. In merger control, the newly introduced remedy submission system saw its first applications, Korea's first data consolidation remedy was imposed, and the Korean Air/Asiana Airlines saga revealed the costs of remedy non-compliance. Beyond enforcement, the article covers the KFTC's competition advocacy and the parallel criminal enforcement by the Korean Prosecution Service (KPS), which brought inter-agency competition but also raised concerns about over-criminalisation. The article then turns to the Supreme Court, which played a more visible moderating role in 2025 through landmark rulings on self-preferencing (NAVER Shopping), criminal intent in ASBP cases (Delivery Hero), exclusive dealing (Korean Re), and sectoral exemptions (Evergreen). The article concludes that the MRFTA continued to serve as a powerful enforcement instrument, while judicial review became increasingly important in maintaining the balance between over- and under-enforcement.

Uncovering Motivations Behind Open Government Policy: A Policy Diffusion Approach

Written in: Mar 23, 2026; Posted in SSRN in: Apr 20, 2026

Lee-Geiller, Seulki
Santoro, Caterina
Ali, Mohsan
Charalabidis, Yannis

Why do states commit to open government reforms amid growing concerns over democratic backsliding? Understanding this question can illuminate how governments attempt to navigate democratic erosion through open governance. Yet, the motivations driving state participation in global initiatives like the Open Government Partnership (OGP) remain underexplored. Prior research has examined definitions, adoption patterns, and diffusion mechanisms but rarely investigates why states themselves choose to pursue such reforms. These gaps have fuelled competing interpretations: some scholars view open government as a sincere effort to counter democratic erosion, while others criticise it as "open-washing." Methodologically, the field has also lacked scalable tools capable of capturing nuanced motivational claims across countries. This study addresses these gaps by analysing policy documents from all 75 OGP national member countries using a hybrid method that combines natural language processing with qualitative validation. Drawing on policy diffusion and institutional theories of state behaviour, we identify four primary motivational logics: coercion, mimesis, attraction, and competition. Our findings reveal that these motives often co-occur, forming layered repertoires of rationalist, instrumental, and socialising justifications. This article challenges rigid models of state behaviour and advances policy diffusion theory by treating motivations as empirically observable discursive constructs rather than merely inferred from structural conditions. These findings also inform open government scholarship and practices by providing analytical tools to better interpret and support adaptive reform efforts.

🗁 Administrative Substitution and the Constitution: Restoring Decision-Making at the Margin

Written in: Feb 19, 2026; Posted in SSRN in: Apr 21, 2026

Lewarne, Stephen

The Constitution regulates who may exercise power and through what procedures, but it is largely silent on where government may intervene within ordinary decision processes. That silence has permitted systematic administrative substitution-the displacement of decentralized, consequence-bearing private choice with centralized administrative judgment. Unlike traditional regulation, which constrains conduct while preserving choice, administrative substitution replaces choice itself: administered prices for market discovery, licensing for entry, guarantees for risk-bearing, institutional assignment for family authority. The result is margin suppression-the elimination of decision points through which societies generate information, discipline error, and adapt to change. Using public education as a case study, this Article demonstrates how administrative substitution has displaced families from meaningful authority over their children's schooling. Recent decisions rejecting Chevron deference restore judicial responsibility for statutory interpretation but do not address this structural problem. The Article concludes by proposing a constitutional amendment to restore decision-making margins while preserving regulation necessary to prevent direct and material harm.

🗁 Public-private partnerships and the transformation of urban planning. Public authority and private interests. A comparison of European and US models

Written in: Feb 03, 2026; Posted in SSRN in: Apr 20, 2026

Loddo, Giuseppe

This paper analyses the institution of infrastructure works in lieu of fees as a technique for implementing urban planning and a tool for involving the private sector in the creation of the public city. The study begins with a comprehensive overview of the Italian system, followed by an examination of the legal nature of urban planning obligations and the associated issues, focusing particularly on their compatibility with European public procurement law. The analysis adopts a comparative approach, examining the French, German, British and Spanish models, as well as the US experience with exactions and impact fees. In conclusion, the paper proposes a systemic interpretation of the institution as an expression of a broader trend towards the delegation of urban development functions, highlighting the risks involved in terms of transparency, competition and the protection of the public interest.

🗁 Complementary Protection in Italian Case Law (2024): Procedural Rights, Administrative Practices, and Judicial Trends

Written in: Jan 01, 2024; Posted in SSRN in: Apr 24, 2026

Loscerbo, Fabio

This paper provides a systematic analysis of Italian case law on complementary protection in 2024, with particular focus on procedural rights, administrative obligations, and judicial enforcement. Complementary protection, as regulated under Article 19 of the Italian Immigration Consolidation Act (Legislative Decree No. 286/1998), has undergone significant interpretative developments following the amendments introduced by Decree-Law No. 20/2023 (the so-called "Cutro Decree").
The study examines a selection of judicial decisions issued by Italian courts, highlighting the increasing role of the judiciary in ensuring access to protection mechanisms, particularly in cases involving administrative inertia or refusal by local authorities to process applications. Special attention is given to the recognition of a procedural subjective right to submit an application for complementary protection and to obtain a formal response within a reasonable timeframe.
The analysis further explores key issues such as the obligation of the authorities to register applications, the legal value of the receipt as a provisional residence permit, and the impact of delays on fundamental rights, including the right to work, access to healthcare, and private and family life under Article 8 of the European Convention on Human Rights.
The paper argues that, despite legislative restrictions, complementary protection continues to function as a critical safeguard within the Italian legal system, operating at the intersection of constitutional asylum, European human rights law, and administrative law principles. The findings confirm a growing judicial trend toward reinforcing access to protection through procedural guarantees, even in the absence of explicit administrative pathways.

🗁 "Embedded Courts under Campaign-Style Enforcement: How Top-Down Reforms Reshape Conditional Justice in China

International Review of Law and Economics, 86, 106331

Ma, Chao;
Cheng, Chao-Yo

Drawing on over 360,000 Chinese court records, we employ a regression-discontinuity-in-time (RDiT) design to examine a top-down reform intended to prevent local governments from pressuring courts to decline administrative litigation cases upon submission. We find that while the total number of cases spiked briefly following the reform, increases in the volume of sensitive land-related disputes have remained stable. Meanwhile, while cases are increasingly dismissed without a formal judgment, plaintiffs who reach trial are significantly more likely to win. Combining quantitative results with qualitative evidence, we argue that Chinese local courts strategically utilize top-down mandates to pursue a subnational separation of powers. Such campaign-style reforms can produce lasting change by allowing the judiciary to gain leverage over the executive branch. While citizens' access to justice remains subject to selective gatekeeping, the continued practice of conditional justice suggests a reduced political embeddedness of local courts.

Institutional Complementarities and Frictions Between Public and Private Antitrust Enforcement

Written in: Feb 01, 2026; Posted in SSRN in: Apr 15, 2026

Macedo, Thyago

The expansion of private antitrust enforcement has been widely promoted as a means of strengthening deterrence and complementing public prosecution. Much of the existing debate, however, evaluates private enforcement primarily in terms of enforcement intensity, paying limited attention to how private litigation interacts institutionally with public enforcement mechanisms. This article develops a general institutional framework for analyzing the interaction between public and private antitrust enforcement across jurisdictions. The analysis shows that the welfare effects of private enforcement depend less on its volume than on its alignment with the incentives, information, and discretion of public authorities. Within this framework, private enforcement enhances welfare when it improves detection or compensation without increasing expected legal error or undermining public cooperation incentives. Conversely, when private litigation distorts enforcement priorities or weakens institutional screening, expanded private enforcement may reduce welfare even if deterrence rises. By shifting the focus from enforcement intensity to institutional alignment, the article provides a framework applicable to both developed and developing jurisdictions, particularly those facing resource constraints or institutional asymmetries. The analysis contributes to the law and economics literature on enforcement design and offers guidance for policymakers reconsidering the balance between public prosecution and private litigation in diverse institutional environments.

Against Deferential Skidmore

78 Administrative Law Journal ___ (forthcoming 2026), Northwestern Public Law Research Paper No. 26-13

McGinnis, John
Pillari, Phil

This Article argues that any version of Skidmore that grants agencies institutional weight for expertise in their interpretation of statutes is incompatible with § 706 of the APA and cannot survive Loper Bright. The Article distinguishes between "educational Skidmore," which treats agency views as useful information, and "deferential Skidmore," which gives agencies a doctrinal thumb on the scale for their legal interpretations. Contrary to the emerging scholarly consensus, we show that deferential Skidmore is unlawful. Section 706's text, structure, and history foreclose a standard of review for legal questions that defers to agency expertise beyond what its persuasiveness warrants, and neither Skidmore nor Hearst is plausibly incorporated as "old soil" importing as matter of past doctrine expertise-based deference into section 706. Deferential Skidmoremeets every criterion Loper Bright used to abandon Chevron: it is egregiously erroneous, unworkable, and elicits no substantial reliance. Changed conditions also favor overruling deferential Skidmore: the premises for institutional deference have eroded in a world where the political control of agencies is recognized and where there is wider access to the technical knowledge relevant to interpreting texts. The "respect" due to agency expertise under Loper Bright is consistent with "educational Skidmore." Agency expertise in statutory interpretation is a source of illumination, not authority.

Can Law Adapt to Meet the Climate Crisis?

Lawfare

Nevitt, Mark

On the North Carolina Outer Banks, homes are collapsing into the Atlantic. Along the Louisiana bayou, whole communities are being swallowed by the sea. Tragically, Americans are choosing to move to coastal barrier islands and the wildland-urban interface (WUI), favoring climate-exposed locations over safer communities. The underlying culprit is climate change. And the situation is exacerbated by existing laws, statutes, and doctrines that hide climate risk and incentivize risk-taking.
These laws, statutes, and doctrines have failed to adapt and keep pace with our climate-destabilized future. In sum, we have a legal crisis lurking within the climate crisis.
As I discuss below, several statutes, legal doctrines, and policies may have worked for a stable "Earth 1.0. But they are proving unworkable for our climate- destabilized "Earth 2.0." This legal inertia thwarts innovative adaptation action. It may already be having a chilling effect on forward-looking adaptation efforts. Just as communities must take action to avert a climate disaster, laws designed for a more stable time must adapt to meet the climate moment. As climate change destabilizes the physical environment, governments have just four core adaptation strategies at their disposal: resistance, accommodation, deliberate disinvestment, and managed retreat. Each one quickly confronts legal and fiscal realities.

"Corrupting" Expertise in the Age of Loper Bright

U of Texas Law, Legal Studies Research Paper Forthcoming

Nielson, Aaron

This essay -- drawn from remarks made at the 44th Annual National Student Symposium for the Federalist Society for Law and Public Policy Studies -- argues that in the wake of Loper Bright, there is a danger that agencies will increase their use of what Professor Wendy Wagner has called "the science charade." That is, because agencies know that courts tend to defer to agency's scientific judgments, agencies may increasingly disguise their policy views as technical scientific conclusions.
This corruption of science is regrettable but may be the product of the same incentives that encouraged agencies to advance strained readings of old statutes in a pre-Loper Bright world. There is no perfect solution to this problem but combatting it may counsel in favor of greater use of formal rulemaking.

Article II and the Civil Service

Virginia Law Review, Vol. 113, forthcoming 2027; U of Michigan Public Law Research Paper No. 25-038

Nielson, Aaron
Walker, Christopher J.

The federal government employs more than two million civil servants. Most are hired through a competitive process centered on competence and cannot be fired for holding political opinions different from the President's. At the same time, federal agencies are led at the highest levels by a small group of appointees selected by the President or another presidential appointee. Although much has changed over the last 150 years, this division of labor has broadly characterized Executive Branch staffing since the presidency of Chester Arthur.
Today, however, the civil service faces an existential threat from the combined force of four dynamics connected with Article II of the U.S. Constitution. Two are doctrinal. First, the Supreme Court has adopted a strong unitary-executive view of the President's constitutional power to fire those within the Executive Branch. Second, the Court almost certainly will offer a sharper test for who is an "officer of the United States" under Article II. The third is methodological. Rather than relying on functionalism or the judgment of Congress, today's Court increasingly answers separation-of-powers questions with formalistic bright lines grounded in text, structure, history, and tradition. Finally, the fourth is opportunity. Not only has the Trump Administration proved itself willing to push Article II to its limits, but it has vowed to "destroy the Deep State." The Court thus soon will confront questions about Article II and the civil service that were at best academic just a few years ago.
This Article addresses the civil service in the context of Article II. Working within the Court's modern precedents and methodological commitments, moreover, it charts a path that vindicates both bureaucratic competence and Article II accountability. This path is built on three insights. First, Article II does not prevent Congress from imposing competency requirements for hiring employees or protecting employees from at-will removal. But second, no matter what label Congress uses, "civil servants" with enough authority are Article II officers, not employees, and so are subject to the Appointments Clause and some are removable at will. Yet third, even for officers removable at will, the Constitution provides Congress with an anti-removal power to discourage removal through potent political means. Although use by Congress of that power will not preserve all aspects of the civil service in every case, Congress can stave off a return to the infamous Nineteenth Century spoils system.

🗁 The Article III Factfinding Power

111 Minnesota Law Review __ (forthcoming 2027)

Nunn, Alex

Factual disputes of national consequence dominate modern federal dockets. In recent years, federal judges have been asked to determine whether widespread fraud occurred in a presidential election, whether politically charged abortion restrictions are medically sound, whether climate regulations rest on scientific data, whether FDA-approved vaccines caused injury, and whether recent deportations have any factual justification at all. The stakes of Article III factfinding can be enormous, with ramifications just as significant as any question of law.
Yet despite this manifest importance, Article III theory has developed with a pronounced asymmetry. Constitutional theory remains fixated on Marbury and the judiciary's power "to say what the law is," generating a vast jurisprudential canon around law declaration while leaving the extent to which Article III grants federal courts control over questions of fact remarkably undertheorized. For the first century of the Republic, that gap was mostly benign, as federal judges directly supervised the epistemic conditions of Article III factfinding through the institution of trial. But that historical norm has vanished. Criminal cases now resolve through guilty pleas entered on a prosecutor's unilateral factual proffer. Civil disputes conclude in settlements resting on stipulated facts no adjudicator has tested. Arbitration proceeds in private forums imposed through contracts of adhesion. Administrative agencies compile evidentiary records that arrive in federal court as closed dossiers. And as external factfinding increasingly displaces the trial, federal courts are now asked merely to confer the Article III imprimatur on settled factual predicates of opaque, even dubious, epistemic provenance.
But what are the constitutional limits of external factfinding? To answer, this Article excavates and recenters the "Article III Factfinding Power," the constitutional authority and duty of a federal court to preserve an essential baseline of epistemic legitimacy in the factfinding that grounds its judgments. Put simply, federal judges need not oversee factfinding themselves, but they must ensure external factfinding is epistemically legitimate. The Article defines this power fully, identifies its constitutional justification in text, structure, and history, and details its function as the fact-facing counterpart to Marbury. Once recognized, the Factfinding Power brings numerous doctrinal reforms into focus, implicating agency adjudication, plea bargaining, immigration courts, habeas proceedings, civil settlements, arbitration, algorithmic proof, and myriad other sites where external factfinding seeks the sovereign force of an Article III judgment. The Factfinding Power thus provides a unified theory for judicial oversight of factual predicates in the post-trial era, demonstrating that while the Constitution permits the delegation of factfinding, it forbids Article III courts from laundering epistemically illegitimate facts.

🗁 Te Ture Mana Puna Kōrero—The Right to Know Act: A Framework for World-Leading Transparency Legislation

Written in: Apr 6, 2026; Posted in SSRN in: Apr 20, 2026

Opland, Russell

New Zealand's Official Information Act 1982 was once among the most progressive transparency laws in the common law world. Four decades later, it is substantively unchanged, governing a world of artificial intelligence, mass surveillance, and platform capitalism with a statute designed for the era of the fax machine. The country's Corruption Perceptions Index score has fallen from 91 to 81 in a decade. Over 85 statutory clauses now exempt agencies from disclosure. The maximum penalty for obstruction is $200. Three decades of reform recommendations from the Law Commission, the Chief Ombudsman, and civil society organisations remain unimplemented. This discussion draft presents a complete replacement framework: Te Ture Mana Puna Kōrero-The Right to Know Act. Drawing on comparative analysis of over forty national FOI frameworks and international model laws, the Act introduces a three-tier scope model extending coverage to all private bodies; mandatory personal financial penalties for delay with no organisational reimbursement; binding independent enforcement through a specialist Information Commission; the abolition of the "free and frank advice" withholding ground; Aarhus-aligned environmental information protections; proactive disclosure obligations including algorithmic transparency; and placeholder provisions for Māori Data Sovereignty reserved for iwi co-design. Designed for New Zealand's constitutional structure, the framework's core architecture is transferable to any jurisdiction seeking to modernise its transparency regime.

🗁 The Statutory Ethics Officer - The Ethics Dividend: A Model of Earned-Trust Regulation for Replacing Prescriptive Compliance with Incentivised Ethical Governance

Written in: Apr 10, 2026; Posted in SSRN in: Apr 20, 2026

Opland, Russell

Regulatory compliance costs across OECD economies are material and rising. In the United States, an estimated 4.2% of the total wage bill-approximately USD 521 billion-is now devoted to regulation-related tasks. In New Zealand, business compliance costs were estimated at NZD 5 billion, or 2.9% of GDP, based on 2012 data that no government has updated since. The country's product market regulation ranking has fallen from 2nd in the OECD in 1998 to 20th in 2023. Econometric evidence links these rising costs to lower labour productivity and reduced business dynamism. This paper proposes a structural alternative-a model of earned-trust regulationin which a statutory Ethics Officer is embedded in organisations as an independent operational function, incentivised through a maturity-based framework that progressively reduces regulatory burden in exchange for demonstrated ethical governance capability. No trust is assumed; it is earned. The model integrates three proven incentive mechanisms-tax credits, liability relief (drawing on the US Federal Sentencing Guidelines for Organizations), and regulatory relief-into a tiered structure where organisations progress by demonstrating readiness, not by waiting out arbitrary timeframes. At higher maturity tiers, a safe harbour protects good-faith ethical decisions from punitive enforcement, with an actuarial compensation model addressing harm at fair market value. The return on this ethical investment-the ethics dividend-is the measurable economic benefit organisations receive for building genuine ethical capability. The paper argues that this model could absorb a significant share of the regulatory burden currently imposed by fragmented, overlapping prescriptive regimes, while producing equal or better outcomes for the people those regimes are designed to protect. It draws on the structural precedent of the GDPR Data Protection Officer, the substantive precedent of health research ethics oversight, and the incentive precedent of the US Federal Sentencing Guidelines. The model addresses scalability for small and medium enterprises through publicly funded training, decision support tools, and a distributed cultural enforcement mechanism.

🗁 Quantitative Easing and the Accountability Gap: Central Bank Mandate Limits in the UK, USA, and EU

Written in: Aug 24, 2023; Posted in SSRN in: Apr 20, 2026

Palu Junior, Ivan Luiz

This paper examines the accountability deficit that arises when central banks deploy unconventional monetary instruments, specifically quantitative easing, that lack explicit statutory authorisation and blur the boundary between monetary and fiscal policy. Through comparative analysis of the Federal Reserve Act 1913, the Bank of England Act 1998, and Article 127 TFEU, the paper maps the mandate gaps in each jurisdiction, analyses the constitutional litigation they have generated (including Case C-493/17 Weiss and BVerfG 2 BvR 859/15), and proposes a transparency and accountability framework for the UK drawing on comparative practice from the Federal Reserve and the Bank of Canada.

🗁 Non-Monetary Incentives and Bureaucratic Performance: Evidence from U.S. Courts

Posted in SSRN in: Apr 7, 2026

Petkun, Jonathan

Federal judges—who enjoy lifetime tenure and constitutionally protected salaries—represent an especially hard test case for incentive-based bureaucratic reform. I study the "six-month list," a reform requiring U.S. federal courts to publicly identify judges with overdue matters. Using a regression discontinuity design and other methods, I find that matters most exposed are resolved approximately 14% faster than those least exposed, with larger effects among younger, non-white, and female judges. The speed gains come with tradeoffs: upfront time savings are partially offset by downstream delays, and more-exposed matters are less likely to be affirmed on appeal. A bunching analysis estimates aggregate time savings of approximately 4%, demonstrating that non-monetary levers can shift behavior even among highly insulated elite professionals.

🗁 Social Norms 2.0: From Private Governance to Co-evolution

Duke Law School Public Law & Legal Theory Series No. 2026-27, Law & Social Inquiry, forthcoming

Qiao, Shitong

This essay engages with Florian Grisel's *The Limits of Private Governance* and uses it as a springboard to rethink the theoretical foundations of the social norms and private governance literature. Drawing on Grisel's historical study of the *Prud'homie de pêche* of Marseille—a centuries-old institution that governed fisheries—as well as my own research on property and neighborhood governance in China, including *Chinese Small Property* and *The Authoritarian Commons*, the essay proposes a new framework: "social norms 2.0." This approach views governance as a process of co-evolution in which norms, legal institutions, and political authority continuously reshape one another. By reframing private governance as a dynamic and relational process, the co-evolutionary model moves the field beyond conventional debates about whether governance emerges primarily from informal norms or from state support. The essay suggests that future research should focus instead on the recursive interactions through which social norms, legal institutions, and political authority jointly produce and transform systems of governance.

🗁 Climate Litigation as Conversation: Courts, Climate and Legitimacy

Posted in SSRN in: Mar 24, 2026

Ramos Munoz, David

Climate litigation is widespread, important… and controversial. Climate lawsuits have attracted interest due to their social, economic, financial and governance implications. However, the question they raise is essentially, and existentially legal: should courts adjudicate climate policy? This article tries to answer that question. It argues that courts are not well placed to adjudicate under a traditional model of litigation where plaintiffs ask courts to allocate them concrete rights and prescribe specific outcomes. In fact, when disputes are framed in this way, courts tend to abstain from adjudicating or defer to other authorities. When they decide, they put their legitimacy at risk. However, a different model of litigation is possible, which this article labels "litigation as conversation". Under that model courts facilitate the discussion of climate facts and policy by public and private actors. They do so by, first, ensuring coherence between law, policy and execution, i.e., between what is promised, what is done, and what is lawful. Second, they can elicit information production, and verify the information produced, possibly the most important, and most overlooked function. Third, courts enable coordination and participation, fostering reflection through an iterative process. This model captures how courts try to engage in climate disputes (descriptive perspective), but it also provides arguments to critically assess whether, and when courts fall short of their duty, or go too far (normative perspective). Thus, "litigation as conversation" can help understand what courts do (and can do), and to buttress their role in climate disputes, and their legitimacy.

🗁 Blacklisting Of Contractors: A Necessary Evil Or Abuse Of Power By Public Authorities

Written in: May 15, 2025; Posted in SSRN in: Mar 10, 2026

Ranjan, Sudeep

The blacklisting of contractors by public sector companies and the government has been a controversial topic for a long time. On one hand, it can be seen as a necessary evil to prevent unreliable and unethical contractors from receiving public contracts. On the other hand, some argue that a misuse of power by public authorities can unfairly damage the reputation and livelihood of contractors. This article explores both sides of the debate and examines the reasons behind contractor blacklisting, including issues such as poor performance, safety violations, fraud, and corruption. It will also discuss the potential consequences of contractor blacklisting, both for the affected contractors and for the public sector companies and government agencies involved. The article will further analyse the role of transparency in contractor blacklisting and public procurement, and consider whether there are alternative approaches that could be used to address the concerns that lead to blacklisting. The article further sheds light on the international framework on public procurement. The author has done an analysis of three countries, mainly Switzerland, Singapore and the United States and has explained how India can adopt lessons from these systems in areas of transparency, competition, efficiency, fairness and international integration. Finally, the article will conclude with a critical analysis of the pros and cons of blacklisting contractors in government projects, and offer recommendations for policymakers and stakeholders in the public procurement process.

The Exclusive Powers Presidency

Arizona Legal Studies Discussion Paper No. 26-03, 106 Boston University Law Review __ (forthcoming 2026)

Roisman, Shalev

Over the last decade, the Roberts Court has quietly transformed separation of powers law by centering the President's "exclusive" powers. Yet the Court does not seem to understand what it means to call a power "exclusive," or what consequences may flow from organizing separation of powers law around this concept. Scholars, meanwhile, have yet to confront the exclusive powers-turn head on.

This Article identifies the underlying conception of exclusivity that animates the Court's recent doctrine and explains what it means for the separation of powers. It argues that the Roberts Court has adopted a distinctive conception of exclusivity consisting of two principles: (1) The Sole Ownership Principle—the notion that, if the President's power is exclusive, only the President has any authority that falls under it; and (2) The Noninterference Principle—the notion that no other branch can interfere with an exercise of the President's exclusive power, even if that branch is exercising its own constitutional powers. Taken together, these principles have an unsparing doctrinal force. As the Article shows, given the presidential powers that the Court has deemed "exclusive," taking this conception to its logical conclusion would lead to an essentially unconstrained presidency in some of the most important areas of modern governance.

This is not merely a theoretical concern. The second Trump administration has repeatedly invoked exclusive-powers reasoning to justify unprecedented and expansive executive action in various domains. And it – or future administrations – might yet go considerably further on exclusive power grounds. Ultimately, while the exclusive powers conception yields clear answers in resolving disputes between the branches of government, it proves incompatible with foundational features of the Constitution's separation of powers and other strands of the Court's own doctrine. The Article concludes by charting potential paths out of the exclusive powers presidency.

🗁 Political Question Doctrine: A Comparative Analysis of the US, UK & Nepal

Written in: Jan 15, 2025; Posted in SSRN in: Apr 20, 2026

Saud, Mahesh Singh

This seminar paper undertakes a comprehensive comparative doctrinal analysis of the Political Question Doctrine (PQD) a foundational principle of judicial non-justiciability across three distinct constitutional systems: the United States, the United Kingdom, and Nepal. The doctrine, at its core, identifies categories of disputes that courts decline to adjudicate, not merely because they are politically sensitive, but because their resolution is deemed constitutionally or functionally inappropriate for the judiciary. While all three jurisdictions nominally uphold the separation of powers and acknowledge the existence of a non-justiciable sphere, they employ fundamentally divergent approaches to defining the boundary between law and politics.

The United States operates what this paper terms the Abstention Model. Rooted in the landmark formulation of Baker v. Carr (1962), the American doctrine treats the PQD as a jurisdictional barrier, anchored in two dominant prongs: a textually demonstrable constitutional commitment of an issue to a coordinate branch, and the absence of judicially discoverable and manageable standards for resolution. As confirmed in Nixon v. United States and most controversially in Rucho v. Common Cause (2019), this model creates an effective zone of immunity for political actors, allowing constitutional violations to go unremedied when the Court perceives itself as institutionally incompetent or politically exposed. The doctrine, in the American context, has increasingly been criticized as a strategic tool of judicial avoidance rather than a principled rule of constitutional structure.

The United Kingdom, by contrast, employs a Legal Limits Model. Having evolved from the absolute prerogative immunity of the pre-GCHQ era to the assertive constitutionalism of the Miller cases, the UK Supreme Court rejects the political question label entirely. Instead, it draws a careful distinction between the non-justiciable political merits of a government decision and the justiciable legal scope of the power exercised. In R (Miller) v. Prime Minister (2019), the Court demonstrated that even the most politically charged executive actions remain subject to judicial scrutiny when they frustrate the fundamental constitutional functions of Parliament. The UK model affirms that legal constitutionalism, not political deference, is the ultimate safeguard of democratic governance. Nepal, this paper argues, has forged a distinct third model, termed Corrective Jurisprudence, born of chronic political instability and constitutional fragility. The Supreme Court of Nepal operates on a functional Wisdom vs. Legality dichotomy, respecting genuine policy discretion while actively intervening to correct political deadlocks that threaten the constitutional order. Most significantly, the Court has replaced subjective executive assessments with objective Constitutional Arithmetic, treating verifiable statutory facts such as signature counts and party name provisions as binding legal obligations that override political discretion, as seen in Sher Bahadur Deuba v. Office of the President and the NCP Name Case. This activism is explained through the Vacuum Theory, which posits that judicial intervention fills the normative accountability void created by paralyzed or self-interested political institutions.

However, the paper also identifies a critical Institutional Self-Interest Exception, most visible in the Constitutional Council Ordinance Case, where the Court retreated toward US-style abstention when judicial appointments were directly implicated, revealing the fragile limits of the corrective model. The study concludes that Nepal's democratic sustainability depends on formalizing this third model into a transparent, rule-based doctrine, ensuring the judiciary remains a constitutional safety valve rather than a surrogate governor of the state.

🗁 Non-Majoritarian Institutions at the Domestic Level: The Rise of the Unelected

2026, André Freire et al. (eds), The Elgar Encyclopedia of Political Representation, 707-714

Sethi, Amal
Jones, Brian Christopher

Non-majoritarian institutions have moved from the margins of constitutional design to the center of modern governance. Once limited to courts and a handful of oversight bodies, they now span central banks, regulatory agencies, ombudsmen, electoral commissions, and data protection authorities. This entry traces the evolution and growth of these institutions, from Enlightenment-era concerns about judicial independence through the post-war expansion of administrative governance and the later influence of public choice theory and neoliberalism. It then examines the central criticisms directed at them, including democratic deficit, transparency failures, elite capture, regulatory overreach, and the paradox that institutions designed to counter public disengagement may deepen it. The entry concludes by exploring reform options that seek to reconcile expert decision-making with democratic accountability, including advisory models, legislative approval requirements, diversified appointments, and mechanisms for meaningful public engagement.

🗁 Envisioning a Protective Administrative Law Framework

Harv. CR-CL L. Rev. (forthcoming), Boston College Law School Legal Studies Research Paper

Shah, Bijal

The administrative state is an instrument of deprivation and intrusion. While civil rights statutes and constitutional law have sought to rectify some of these dangers, the role of administrative law has been undervalued. This Essay initiates the construction of a protective administrative law paradigm. More specifically, it explores the idea that administrative law tools drawn from the Administrative Procedure Act (APA) could be utilized to protect people engaging with or targeted by the administrative agencies, including as directed by the President, in a manner that is complementary to—but distinct from—civil rights and constitutional law models. In doing so, it locates administrative law in conversations about preserving individual interests vis-à-vis the administrative state. Indeed, the APA is a cornerstone of administrative law that offers possibilities for constraining damaging administrative behavior, including violence furthered by nontransparent and arbitrary immigration enforcement policies. More specifically, this Essay explores the use of notice-and-comment rulemaking; arbitrary and capricious review; and APA-based review of administrative detention to protect individuals' liberty and bodily autonomy. The suggested approaches fit within current doctrine, are useful across presidential administrations, and may also be pertinent to restraining harmful administration outside of the immigration context.

🗁 Power and Immunity in Youngstown and Trump v. United States

U of Penn Law School, Public Law Research Paper No. 26-10, University of Pennsylvania Law Review Online, Vol. 174, p. 39

Shaw, Katherine

In Chief Justice John Roberts's opinion for the Court in Trump v. United States, granting ex-presidents broad immunity from criminal prosecution, Justice Robert Jackson's famous concurrence in Youngstown Sheet & Tube Company v. Sawyer loomed large. Indeed, Roberts cited Youngstown at least ten times, casting his immunity opinion as a faithful application of much of Jackson's logic. But as this Essay shows, a close examination of the ways Roberts invoked Jackson reveals a cynical and disingenuous reliance on Jackson's famous opinion--one that in fact inverted its core premises. The Essay also argues, however, that although the opinion's application of Jackson's concurrence to presidential immunity badly misapprehended the concurrence, it appeared to leave intact the positions of both the Youngstown majority and the Jackson concurrence on the sources of presidential power. In a moment in which the executive has sought to slip the bonds of constraint on presidential power, this enduring aspect of Youngstown provides a critically important limit on the presidency.

🗁 Co-Creation and Polycentric Democracy in Multi-Level Governance

Written in: Apr 22, 2026; Posted in SSRN in: Apr 23, 2026

Trein, Philipp
Marjanovic, Marjan
Papadopoulos, Yannis

The horizontal dimension of multi-level governance (MLG) — especially the inclusion of non-state actors and citizens — remains underexplored. This paper examines whether co-creation can strengthen this aspect and contribute to democratizing multi-level politics. Drawing on the policy coordination literature, we distinguish the scope and depth of coordination in MLG, highlighting trade-offs that emerge when both expand. We then compare co-creation's potential across general-purpose (Type 1) and task-specific (Type 2) jurisdictions and introduce the concept of polycentric democracy. Central to our argument is that co-creation functions as a second-order democracy: it operates within and in the shadow of representative institutions, deriving legitimacy not from electoral competition but from collaborative problem-solving. This form of democracy is problem-oriented, locally anchored, and reliant on boundary-spanning capacities. Finally, we identify four structural tensions that constrain co-creation's democratizing promise and outline a research agenda treating co-creation in MLG as a diverse set of democratic practices.

🗁 Resisting Surveillance Procurement

Univ. of Wisconsin Legal Studies Research Paper No. 1912, 74.3 Buffalo Law Review (Forthcoming 2026)

Walker-Peddakotla, Arti

We live in a time where police surveillance is omnipresent. Police and federal law enforcement can now conduct dystopian-like searches of surveillance databases with the hope of tracking and capturing people categorized as targets of the current political epoch. Sitting at the center of the surveillance state are the decisions and backdoor conversations that occur mostly out of public sight and lead to the municipal procurement of police surveillance technologies—a phenomenon I call "acquiescence through obfuscation." The municipal surveillance procurement process is an understudied area in the literature but represents a growing area of interest for community organizers and municipal officials attempting to resist the procurement of police surveillance. Much of the surveillance literature argues in favor of regulating surveillance technologies, recommending greater community oversight to ensure transparency over the use of police surveillance. This Article is the first to situate the municipal procurement process as a site of surveillance resistance.
Drawing on first-hand accounts, empirical evaluation of municipal records, public recordings and documents of municipal board meetings, and publicly available surveillance company materials, this Article uses the acquiescence through obfuscation frame to locate and make visible four mechanisms that private surveillance companies use to ensure greater likelihood of surveillance procurement. The acquiescence through obfuscation frame not only locates the mechanisms used to increase the likelihood of surveillance procurement but also exposes the ways that we can recapture municipal procurement power and prevent the procurement of police surveillance. In this way, approaching surveillance procurement from a surveillance resistance lens allows us to confront the surveillance state directly rather than limit ourselves to mitigating the harm within it.

🗁 After the FTC Noncompete Rule

Posted in SSRN in: Apr 3, 2026

Waller, Spencer Weber

Noncompete clauses in employment agreements are pervasive in the United States. The Federal Trade Commission (FTC) estimated that 20% or more of all workers in the United States are covered by such agreements.
The study of noncompete clauses has remained largely siloed. This essay seeks to bridge that gap by looking at noncompete clauses as a holistic issue that harms workers and the economy regardless of the legal labels used to address the problem. I provide a taxonomy of the main approaches that currently exist and argue for the abolition of noncompete clauses moving forward on all fronts following the failure of the 2024 FTC rule to come into effect.
By highlighting the benefits of a comprehensive ban on noncompetes under each of the respective regulatory regimes, this essay identifies how a multi-faceted approach not only better protects workers but also limits unnecessarily broad exceptions that have developed over time. I argue that noncompete clauses harm workers by limiting their bargaining power at their present jobs and prevents them from pursuing the most likely next jobs that will better their lives. Society at large is also harmed the prevalence of noncompetes because of the loss of new companies, innovation, and competition through the restrictions on entrepreneurship when a worker wants to strike out on their own or join a competing venture.
Firms do have legitimate interests to protect, but not to the degree they frequently assert. The firms also have numerous less restrictive options in most cases to protect those legitimate interests ranging from less draconian agreements to simply treating their workers better.
In the event that a total ban is not politically feasible, I suggest four improvements to the current patchwork approaches at the state level including: 1) a narrow "C-Suite exception" in lieu of the more common existing salary cap exceptions; 2) banning noncompetes for all workers and not just traditional employees; 3) banning other post-employment restrictions that amount to "defacto" noncompetes; and 4) creating procedural protections including advance notice, cooling off periods, and burdens of proof on employers seeking to enforce noncompete obligations.

🗁 Building Public Renewables

Written in: Mar 24, 2026; Posted in SSRN in: Apr 15, 2026

Welton, Shelley

This Article examines emerging experiments in public renewables as a novel tool of climate change governance, using New York and the United Kingdom (UK) as case studies. As these jurisdictions have lagged in meeting their ambitious and legally binding climate targets, each has passed legislation creating a new public renewables company. But as the article explains, the theory of these new entities remains underdeveloped. They differ considerably from past public power campaigns that have largely focused on trying to "take over" private utilities. Public renewables companies, in contrast, are envisioned as "complements" to private renewables developers, working alongside and often with the private sector to accomplish climate change goals. This article theorizes these new public renewables experiments as responses to challenges in state capacity-that is, the ability of the state to deliver on its commitments. Public renewables fill gaps in climate governance left by reforms in both New York and the UK that deeply liberalized electricity markets, giving states a cramped set of tools to plan and steer the clean energy transition. The article demonstrates how these innovative institutions may enhance state capacity to accelerate climate progress, while also improving energy affordability and better coordinating the energy transition. In so doing, it contributes to a burgeoning debate in the legal literature about why state capacity is flagging and how it might be fixed, offering a more capacious understanding of the challenges facing modern states and their potential solutions.

🗁 A Functional Theory of State Action

Yale Law School, Public Law Research Paper Forthcoming, 121 Nw. U. L. Rev. (forthcoming 2026)

West, E. Garrett

Scholars have long dismissed the "state-action doctrine" as incoherent, insisting that there is no principled way to distinguish between the state and private parties when private power is backed by law. But the search for coherence is a mistake. The state-action doctrine is a functional tool to manage the interaction between constitutional and subconstitutional law. First, the doctrine prevents displacement of subconstitutional legal regimes (e.g., employment law, the Uniform Commercial Code, or public-utilities regulation) better targeted to the regulatory problems those regimes address, while still permitting courts to constitutionalize discrete domains like policing and incarceration. Second, the doctrine makes constitutional adjudication manageable by channeling constitutional claims through subconstitutional regimes. That functional theory also suggests that constitutional law operates as a substitute for or complement to subconstitutional regimes. Accordingly, determining whether to deploy constitutional law requires a theory about the joint aims of a legal system containing both constitutional and subconstitutional modules, which suggests that constitutional interpretation must integrate theories about the other legal regimes that it sometimes preserves and sometimes displaces. Finally, the functional theory offers a framework to understand some pressing constitutional issues, including the First Amendment's application to social media platforms, the Second Amendment's application to firearms on private property, and the Due Process Clause's application to private arbitration.

The Brave New World of Administrative Law

78 Administrative Law Review (forthcoming 2026), Minnesota Legal Studies Research Paper No. 2026-26

Wildermuth, Amy J.

Administrative law is in substantial flux. Over the last fifteen years, beginning with its decision in Free Enterprise Fund v. Public Company Accounting Oversight Board, the Supreme Court has transformed administrative law in profound ways. In the decade and a half since that case, we have witnessed core precedents fall or be substantially narrowed, with seemingly more on the horizon. Many have characterized the Court's project as aggrandizing power to the President, as seeking to rein in runaway agencies, or even as undoing the administrative state.
The reality is more complex. To grasp where the Court's project might take us, we must begin by understanding what the Court has done and why. Many have struggled to identify exactly what is motivating the Court's actions, particularly given their seemingly disparate impulses and outcomes. How can we make sense of cases in which the Court, for example, radically shifts power away from the executive, as in Loper Bright, but then embraces a return of robust powers to the executive, as in Trump v. Wilcox?
This Article begins to offer that explanation. It seeks to show that the Court's recent administrative law cases must be understood by dividing them into two categories: constitutional cases and APA cases. It argues that each category has a distinct underlying theoretical foundation, resulting in different modes of analysis. The constitutional cases tend to embrace formalism and a robust unitary executive theory. The APA cases, on the other hand, follow a more text-bound, APA originalist approach. Recognizing these different approaches is critical to understanding what will resonate with the Court in the future--and vital to those who seek to shape the future of the reimagined administrative state.

'Bureaucracy and Distrust: The Civil Service in the Constitution'

79 Current Legal Problems

Ben, Yong

Faith in democracy and established institutions seems to be at a low ebb. Democratic backsliding – the weakening or evisceration of institutions designed to sustain democracy – appears to be spreading. ‘Intermediary’ institutions like the bureaucracy are seen as obstructing populist politicians. But we are in danger of forgetting that no successful state can function without a bureaucracy. So what is the role of the civil service in a democracy, and what are the limits to that role? This article examines traditional understandings of the UK civil service in public law theory. The civil service has largely been neglected by constitutional scholars, in part because the dominant constitutional doctrine of ministerial responsibility tells us that what matters are ministers. Ministerial responsibility also underpins the internal law of the civil service: the primary duty of civil servants is to support ministers. This duty, however, crowds out other institutional norms and practices that the UK civil service has quietly maintained but whose basis has been kept deliberately ambiguous. An alternative view – that the civil service has a constitutional personality separate from the incumbent government (sometimes expressed as a higher duty to ‘the Crown’ or state) – is explored in this article but found wanting. Finally, this article addresses a hypothetical: how might the civil service respond to a populist government intent on backsliding? It concludes that the UK civil service is highly vulnerable to a government intent on democratic backsliding. It also concludes that preparations for this eventuality should start sooner rather than later.

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