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The Erosion of the Principle the Government Must Follow Its Own Rules

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THE EROSION OF THE PRINCIPLE THAT THE GOVERNMENT MUST FOLLOW SELF-IMPOSED RULES

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INTRODUCTION

THE article of administrative faith that duly promulgated regulations have the force and effect of law has long been understood as requiring allegiance to those regulations by both the public and the government.[1] In recent years, however, the established tenet that an agency is bound by its own procedural regulations has been honored as much in the breach as in the observance. Although courts and commentators have always recognized the legitimate need for a modicum of flexibility in holding administrators bound by their own rules,[2] in the last decade the coalescence of several administrative and constitutional law doctrines has led to a new indulgence in both state and federal agency deviations from self-imposed regulations.[3] Particularly

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1. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979); United States v. Nixon, 418 U.S. 683, 695 (1974); Paul v. United States, 371 U.S. 245, 255 (1963); United States v. Mersky, 361 U.S. 431, 437-38 (1960); Service v. Dulles, 354 U.S. 363, 372 (1957); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 267-68 (1954); CBS v. United States, 316 U.S. 407, 422 (1942); Atchison, T. & S.F. Ry. v. Scarlett, 300 U.S. 471, 474 (1937); Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 386-87 (1932); Higginson v. Westergard, 100 Idaho 687, 690, 604 P.2d 51, 54 (1979).

2. *See, e.g.*, NLRB v. Monsanto Chem. Co., 205 F.2d 763, 764 (8th Cir. 1953); NLRB v. Grace Co., 184 F.2d 126, 129 (8th Cir. 1950); NLRB v. J.S. Popper, Inc., 113 F.2d 602, 603-04 (3rd Cir. 1940); E. Freund, Administrative Powers Over Persons and Property 222 (1928); Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 Harv. L. Rev. 385, 385 (1964).

3. *See, e.g.*, Olim v. Wakinekona, 103 S. Ct. 1741, 1747-48 (1983); United States v. Caceres, 440 U.S. 741, 752-57 (1979); Board of Curators v. Horowitz, 435 U.S. 78, 92 n.8 (1978); American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970); Shango v. Jurich, 681 F.2d 1091, 1099-1101 (7th Cir. 1982); Atencio v. Board of Educ., 658 F.2d 774, 779 (10th Cir. 1981); Bills v. Henderson, 631 F.2d 1287, 1298-99 (6th Cir. 1980); United States v. Choate, 619 F.2d 21, 23 (9th Cir.) (per curiam), *cert. denied*, 449 U.S. 951 (1980); Cofone v. Manson, 594 F.2d 934, 938-39 (2d Cir. 1979); Lyman v. United States, 500 F.2d 1394, 1396

when an agency promulgates rules creating procedures that are consistent with but not required by the agency's statutory mandate, courts have shown an increasing willingness to allow agencies to disregard the rules without penalty.[4] This Article critiques the erosion of the judicial conviction that regulations constrain regulators, and argues that mainstream principles of constitutional and administrative law require courts to reinvigorate the precept that an agency must follow its own rules.

Courts have used a number of devices in allowing agencies to deviate from their own rules. On the constitutional level, they have relied primarily on the positivist jurisprudence[5] that currently governs due process analysis to find that particular rules do not create or protect any formal entitlements to life, liberty or property, and therefore do not trigger the protections of the due process clause.[6] This trend has been fueled by a line of cases holding that procedural rules themselves do not create entitlements.[7] When an agency's substantive discretion is unfettered, for example, the Supreme Court has reasoned that breaches of agency-adopted procedures do not violate the due process clause because no substantive entitlement exists and the procedural rule does not create an entitlement.[8] For the most part, courts

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(Temp. Emer. Ct. App. 1974) (per curiam); Municipal Elec. Util. Ass'n v. FPC, 485 F.2d 967, 973 (D.C. Cir. 1973); Coastal States Gas Corp. v. Department of Energy, 495 F. Supp. 1300, 1307-08 (D. Del. 1980); Edwards v. Board of Regents, 397 F. Supp. 822, 829-30 (W.D. Mo. 1975); Bistrick v. University of S.C., 324 F. Supp. 942, 949-50 (D.S.C. 1971).

4. See *infra* pt. I(C).

5. The "positivist approach" relies "exclusively on the authority of state legislative, regulatory, and judicial pronouncements, rather than on constitutional sources." Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. Chi. L. Rev. 60, 71 n.44 (1976).

6. *See, e.g.*, Olim v. Wakinekona, 103 S. Ct. 1741, 1747 (1983) ("Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process clause."); Board of Curators v. Horowitz, 435 U.S. 78, 92 n.8 (1978) (university's rules for evaluating medical students implicate federal administrative practice but not constitutional protections); Shango v. Jurich, 681 F.2d 1091, 1100-01 (7th Cir. 1982) (state administrative rules requiring a hearing prior to an inmate's transfer does not create a liberty interest protected by the due process clause); Bates v. Sponberg, 547 F.2d 325, 329-30 (6th Cir. 1976) (university's disregard of self-imposed rules does not give rise to a cause of action under the due process clause; only administrative law is implicated).

7. Bills v. Henderson, 631 F.2d 1287, 1298-99 (6th Cir. 1980); Cofone v. Manson, 594 F.2d 934, 938 (2d Cir. 1979); *see* Olim v. Wakinekona, 103 S. Ct. 1741, 1747-48 (1983); Shango v. Jurich, 681 F.2d 1091, 1100-01 (7th Cir. 1982); Lombardo v. Meachum, 548 F.2d 13, 15 (1st Cir. 1977).

8. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 466-67 (1981); *see* Olim v. Wakinekona, 103 S. Ct. 1741, 1747-48 (1983); Hewitt v. Helms, 103 S. Ct.

have not carefully considered the possibility that in certain circumstances agency procedural rules either are evidence of the existence of an underlying substantive entitlement, or create a procedural entitlement sufficient to trigger due process protection in its own right.

On the non-constitutional level, courts have allowed agencies to deviate from their regulations by treating certain agency rules as mere internal guides to the channelling of discretion.[9] This characterization avoids invoking rights or doctrines that might otherwise render departure from established rules invalid. Objections based on retroactivity, failure to stay within the agency's statutory grant of authority, or the "arbitrary or capricious" test of the Administrative Procedure Act (APA),[10] are all more easily countered when the administrative action on review before the court conflicts only with prior informal guidelines, rather than with pre-established agency law.

As is the case with constitutional analysis, courts employing an administrative law approach tend to be most lenient when a rule is characterized as procedural and the substantive scope of the agency action is not constricted by statute. Following a loose "no harm—no foul" version of the prejudicial error concept, a number of courts have excused blatant agency departures from procedural rules on the ground that the administrator's decision on the merits is beyond the judicial pale.[11]

864, 869-72 (1983); Montanye v. Haymes, 427 U.S. 236, 243 (1976); Meachum v. Fano, 427 U.S. 215, 228-29 (1976); Wolff v. McDonnell, 418 U.S. 539, 556-57 (1974). The Supreme Court has thus made the focal point for analysis the question whether a particular regulation creates a substantive, as opposed to a merely procedural, restraint on decision-making. See *infra* pt. II(A)(1).

9. *See, e.g.*, United States v. Caceres, 440 U.S. 741, 754 n.18 (1979); American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970); Health Sys. Agency of Okla., Inc. v. Norman, 589 F.2d 486, 489-90 (10th Cir. 1978); Lyman v. United States, 500 F.2d 1394, 1396-97 (Temp. Emer. Ct. App. 1974); Municipal Elec. Util. Ass'n v. FPC, 485 F.2d 967, 973 (D.C. Cir. 1973).

10. 5 U.S.C. § 706(2)(A) (1982). Despite its potential breadth, courts in the last three decades have been reluctant to use the "arbitrary or capricious" standard to overturn agency action. S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 289 (1979). Nevertheless, there are occasional reversals under the standard. *See, e.g.*, Health Sys. Agency of Okla., Inc., v. Norman, 589 F.2d 486, 491 (10th Cir. 1978); Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); National Ass'n of Indep. TV Producers & Distribs. v. FCC, 516 F.2d 526, 542-43 (2d Cir. 1975); Robert E. Derecktor of Rhode Island, Inc. v. Goldschmidt, 506 F. Supp. 1059, 1066 (D.R.I. 1980); Community Nutrition Inst. v. Bergland, 493 F. Supp. 488, 494 (D.D.C. 1980).

11. See *infra* text accompanying notes 54-76.

This new permissiveness is symptomatic of the Supreme Court's recent trend in constitutional and administrative law toward deference to agency discretion in matters of both substance and procedure.[12] Countenancing agencies' violations of their own rules reflects the Burger Court's apparent conviction that federal courts have neither the ability nor the mandate to aggressively police day-to-day decisions across the administrative landscape.[13] Lower courts have been institutionally disposed toward ungrudging acceptance of the Supreme Court's deference.[14] These courts over the years undoubtedly have experienced growing frustration with remands to administrative agencies to repeat their processes by the book, because such remands are often empty gestures that have no effect on ultimate outcomes. Courts are understandably reluctant to add costly new layers of administrative action to what they perceive as an already over-regulated society.

This Article attacks the new permissiveness in agency deviation from self-imposed procedural rules. The attack is launched from an ideological and jurisprudential perspective relatively sympathetic to the prevailing judicial mood. Without adopting any radical interpretations of constitutional or administrative law, it is possible to construct a convincing set of rationales justifying a hardy new vigilance by courts in striking down agency deviations from regulations.

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12. *See, e.g.*, Costle v. Pacific Legal Found., 445 U.S. 198, 214-15 (1980); Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524-25 (1978).

13. In Bishop v. Wood, 426 U.S. 341 (1976), the Court stated:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Id. at 349-50 (footnote omitted).

14. *See, e.g.*, South La. Environmental Council, Inc. v. Sand, 629 F.2d 1005, 1011 (5th Cir. 1980); Swinomish Tribal Community v. FERC, 627 F.2d 499, 515-16 (D.C. Cir. 1980); Seacoast Anti-Pollution League v. NRC, 598 F.2d 1221, 1228-29 (1st Cir. 1979).

I. The Evolution and Erosion of the Principle That Government Is Bound by Self-Imposed Rules

An examination of the history of the doctrine that administrators are bound by their own rules reveals three themes. First, as the principle has evolved, the Supreme Court has moved intermittently between constitutional and administrative law vocabulary, generally leaving the legal source of the principle ambiguous. Second, many of the decisions that were not decided on constitutional grounds could have been, but the Court out of self-restraint chose instead the language of administrative practice. Third, the Court has universally and consistently applied the principle since its inception; the softening of the principle is a distinctly recent trend.

A. *The Ambiguity of the Source of the Principle*

Although the precedential support for the doctrine that an agency must adhere to its own regulations is ample,[15] there is no clear explication of the source of law from which the doctrine is derived. This lack of certainty has contributed substantially to the frequency with which the rule is disregarded. There are intimations in Supreme Court opinions that the doctrine has constitutional stature,[16] but these hints are faint by comparison to the larger number of cases that treat the doctrine as a subconstitutional principle of federal administrative law.[17]

Clarification of the status of the principle is important for two reasons. First, if the principle is merely a matter of federal administrative practice, federal courts are powerless to enforce it against the

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15. See *infra* pt. I(B).

16. *See* Bridges v. Wixon, 326 U.S. 135, 152-53 (1945) (agency "rules are designed to protect the interests of the alien and afford him due process of law" by providing "safeguards against essentially unfair procedures"). In United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), the Court reaffirmed the principle that an agency must follow its own rules, *id.* at 266, and for the most part avoided constitutional vocabulary. In the final sentence of the opinion, however, the Court stated that Accardi "may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings." *Id.* at 268.

17. *See* Board of Curators v. Horowitz, 435 U.S. 78, 92 n.8 (1978) (principle that an agency must follow its own rules enunciates "principles of federal administrative law rather than of constitutional law binding upon the States"); Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring) (doctrine is a "judicially evolved rule of administrative law").

states.[18] A substantial number of decisions have adopted this reasoning and accordingly have held that a state agency's failure to follow self-imposed rules does not give rise to a federal cause of action.[19] Second, treating the doctrine as entirely non-constitutional detracts from its force as a tool for judicial control of federal agency action.[20] If the rule is mere federal administrative common law, it is more likely to be diffused, distinguished, or disregarded than if it is a canon of constitutional law. Judge-made rules are more likely to fall victim to judge-made exceptions.

B. *The Evolution of the Principle*

The principle that an agency must follow its own rules traces its genesis to the Supreme Court's 1932 decision in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*.[21] The Interstate Commerce Commission (ICC) was granted authority to fix maximum and minimum rates for public carriers by the Transportation Act of 1920.[22] In response to complaints by shippers that particular railroad rates were unreasonably high, the ICC set a lower maximum rate.[23] Five years later, responding to further complaints, it again lowered the maximum rate and found that reparations were due shippers that had paid the higher rate.[24] Regarding its earlier order, the ICC stated that it

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18. *See* B. Schwartz, Administrative Law § 5.2 (2d ed. 1984).
19. See *infra* text accompanying notes 188-90.
20. In Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976), for example, a tenured faculty member at East Michigan University brought a § 1983 action against the University, alleging that the University's failure to follow its own regulations prior to his discharge was a denial of procedural due process. *Id.* at 326. Stressing that the principle requiring an agency to follow its own rules was a judicially-evolved rule of federal administrative law and not a constitutional principle, the court held that no claim cognizable under § 1983 existed. *Id.* at 330-31. Similarly, in Atencio v. Board of Educ., 658 F.2d 774 (10th Cir. 1981), the court held that violations of procedural rules set forth in statutes and regulations did not create a violation of the due process clause. *Id.* at 779-80. In that case, a school board failed to observe the requisite procedures in attempting to dismiss a school superintendent. Although the court acknowledged that the superintendent had a property interest in his job, it relied on *Bates* to support the conclusion that the principle that an agency must follow its own rules is merely a principle of federal administrative practice. *Id.* at 779.
21. 284 U.S. 370 (1932).
22. *Id.* at 385-86.
23. *Id.* at 381-82.
24. *Id.* at 382.

had the authority to modify its previous findings and declare that a lower rate would have been reasonable during the prior period.[25]

The Supreme Court held that the ICC acted illegally in retroactively repealing its previously prescribed rate.[26] The Court stated that when "the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute."[27] A carrier is entitled to rely upon this "legislative" declaration, and the ICC "may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment."[28] This restriction does not freeze agency action, for the ICC "could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require."[29]

In an unbroken line of precedent stretching over three decades, the Supreme Court never deviated from the principle that an agency must follow its own rules. In fact, in many of the cases in which this principle was tested and sustained the rules were gratuitous, the substantive discretion of the administrator involved was on its face completely unfettered, and the Court acknowledged that the actual decisional outcome was probably justified.[30] Nonetheless, the Court

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25. *Id.* at 382-83.

26. *Id.* at 389.

27. *Id.* at 386. In a footnote to this pronouncement, the Court indicated that it might be enforcing a constitutional principle when it stated:

> As a statute fixing or limiting rates to be charged by one whose business is affected by a public interest may be declared void for violation of the due process and equal protection clauses, . . . an order made by a commission created by statute is subject to the like action of the courts.

Id. at 386 n.15 (citations omitted).

28. *Id.* at 389.

29. *Id.* This passage seems to assume that retroactive legislation would also be unconstitutional. Because the ex post facto provisions of the Constitution concern only criminal legislation, the Court subsequently has held that Congress retains substantial freedom to alter the legal consequences of past events when only civil legislation is at stake. *See* Flemming v. Nestor, 363 U.S. 603, 610-11 (1960); Lichter v. United States, 334 U.S. 742, 788-89 (1948). *See generally* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960). The Court in *Arizona Grocery* was thus applying due process principles to restrain retroactive civil legislation in a manner more rigorous than the present Supreme Court.

30. *See, e.g.*, Yellin v. United States, 374 U.S. 109, 117-18 (1963) (legislative committee with complete discretion to order public testimony after hearing may not require public testimony without hearing); Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959) (Secretary of Interior with power to discharge employee summarily must

emphatically insisted on rigorous adherence to the self-imposed procedural rules.

Most of the important decisions concerning agency fidelity to self-imposed rules that came after *Arizona Grocery* dealt with violations of procedural rather than substantive regulations. In *Bridges v. Wixon*,[31] for example, certain critical evidence against an alien alleged to be affiliated with the Communist Party was admitted during deportation proceedings in violation of regulations promulgated by the Immigration and Naturalization Service (INS).[32] Stating that "[t]he rules are designed to protect the interests of the alien and to afford him due process of law,"[33] the Court held that the action of the INS in disregarding the regulations was invalid.[34]

Similarly, in *United States ex rel. Accardi v. Shaughnessy*,[35] the petitioner Accardi had been denied a suspension of deportation by the Board of Immigration Appeals.[36] Accardi challenged the denial, claiming that he had been deprived of a fair hearing because prior to the Board's decision the Attorney General had released a list of aliens he wished to deport, including Accardi.[37] The Immigration Act delegated authority to the Attorney General to prescribe regulations governing the suspension of deportation.[38] The Attorney General had in

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follow procedural regulations if discharge is based on national security grounds); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 261-62, 268 (1954) (failure of Attorney General to follow procedural regulations makes deportation order invalid even though petitioner was "[a]dmittedly deportable").

31. 326 U.S. 135 (1945).

32. *Id.* at 151.

33. *Id.* at 152.

34. *Id.* at 156. In Peters v. Hobby, 349 U.S. 331 (1955), the Loyalty Review Board of the Civil Service Commission, which was empowered only "to review cases involving persons recommended for dismissal . . . by the loyalty board of any department or agency," *id.* at 334, acted on its own motion to dismiss a professor for disloyalty, *id.* at 340. The Supreme Court reversed the dismissal on the ground that the regulations governing the Board did not permit it to review cases in which the accused employee had been exonerated by the Loyalty Board of his department. *Id.* at 342-43.

In Service v. Dulles, 354 U.S. 363 (1957), the discharge of a foreign service officer for disloyalty was held invalid because the Secretary of State had not followed procedural regulations prior to dismissing the officer. *Id.* at 383. Although the Secretary had statutory authority to unilaterally terminate officers of the Foreign Service, *id.* at 370, State Department regulations required a hearing before the Loyalty Security Board and a recommendation for dismissal by the Deputy Under Secretary before dismissal, *id.* at 383.

35. 347 U.S. 260 (1954).

36. *Id.* at 261-62.

37. *Id.* at 264.

38. *Id.* at 262-63 (citing 8 U.S.C. § 155(c) (1946), *repealed by* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 279 (1952)).

turn delegated discretionary authority to the Board of Immigration Appeals to consider appeals of deportation orders.[39] The Supreme Court held that Accardi, if his allegations were true, was entitled to a new hearing before the Board.[40] If the Attorney General's "hit list" had the practical effect of dictating the Board's decision, the Attorney General was guilty of pre-empting the exercise of discretion the regulation had delegated to the Board.[41] Although the Attorney General could have retained the discretion, once by regulation he had giveth, he could not summarily taketh away, as long as his regulation remained in effect.[42]

The principle that an agency is bound by its own rules continued its unblemished record into the mid-1970's.[43] Perhaps its most dramatic application was in *United States v. Nixon*.[44] President Nixon maintained that Special Prosecutor Leon Jaworski could not seek judicial enforcement of a subpoena duces tecum for the Watergate tapes.[45]

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39. *Id.* at 266.

40. *Id.* at 268.

41. *See id.* at 267.

42. The Court in Vitarelli v. Seaton, 359 U.S. 535 (1959), held that an agency employee's discharge as a security risk was illegal because the Secretary of the Interior fired him without following prescribed procedures. *Id.* at 545. Although the plaintiff could have been dismissed summarily without cause, once the Secretary decided to proceed against him as a security risk, he was bound by self-imposed regulations governing security-risk cases. *Id.* at 539-40. In a separate opinion, Justice Frankfurter, joined by Justices Clark, Whittaker, and Stewart, wrote that "if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed." *Id.* at 546-47 (Frankfurter, J., concurring in part and dissenting in part). Justice Frankfurter described the principle as a "judicially evolved rule of administrative law," which was "firmly established," and added: "He that takes the procedural sword shall perish with that sword." *Id.* at 547.

Similarly, in Yellin v. United States, 374 U.S. 109 (1963), the Supreme Court reversed Yellin's conviction for contempt of Congress for refusing to answer questions of the House Committee on Un-American Activities. *Id.* at 110, 124. It held that the Committee had failed to follow its own rules by refusing to consider Yellin's request for an executive session to avoid exposure to adverse publicity. *Id.* at 121. The Court conceded that Yellin's request might well have been denied on the merits, *id.*, but stated that Yellin was "at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in Rule IV." *Id.*

43. In Morton v. Ruiz, 415 U.S. 199 (1974), for example, a Papago Indian couple was denied general assistance benefits by the Bureau of Indian Affairs (BIA) because of a provision in the BIA Manual that limited eligibility to Indians living on reservations. *Id.* at 204. The Supreme Court struck down the denial of benefits on the ground that the failure of the BIA to follow its own regulations in not publishing this requirement rendered the limitation void. *Id.* at 235. The Court stated: "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Id.* Moreover, the doctrine applies "even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.*

44. 418 U.S. 683 (1974).

45. *Id.* at 688. *See generally* L. Jaworski, The Right and the Power, The Prosecution of Watergate (1976) (personal recollections of events culminating in *United*

The President argued that the dispute over the tapes was a disagreement wholly within the executive branch, analogous to a dispute between congressional committees.[46] Because the executive has exclusive authority and absolute discretion to decide whether to prosecute a case, the President contended that his decision as head of the executive branch as to what evidence is used in a criminal case must be final.[47]

The Supreme Court rejected the President's argument, relying on the rule that administrative regulations cannot be breached by administrators.[48] Congress had vested the power to conduct the criminal litigation of the United States in the Attorney General,[49] including the power to appoint subordinate officers to assist him.[50] The Attorney General had issued a regulation delegating authority to investigate the Watergate events to the Special Prosecutor.[51] That regulation explicitly granted the Special Prosecutor the power to contest the President's invocation of executive privilege.[52] Although the Court recognized that it was "theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority," the Court held: "So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it."[53]

States v. Nixon); Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383 (1974) (analyzing effect of *United States v. Nixon* on executive privilege); Freund, *Foreword: On Presidential Privilege*, 88 Harv. L. Rev. 13 (1974) (analyzing the Supreme Court's opinion in *United States v. Nixon*); Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 UCLA L. Rev. 30 (1974) (discussing the impact of *United States v. Nixon* on relative strengths of the legislature and the judiciary); Van Alstyne, *A Political and Constitutional Review of* United States v. Nixon, 22 UCLA L. Rev. 116 (1974) (discussing political and constitutional ramifications of *United States v. Nixon*) [hereinafter cited as Van Alstyne I].

46. 418 U.S. at 692-93.

47. The argument was not frivolous; the executive branch has exclusive authority to decide whether to prosecute a case. *See* Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 381-82 (2d Cir. 1973); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

48. 418 U.S. at 696.

49. 28 U.S.C. § 516 (1976).

50. *Id.* § 543.

51. 38 Fed. Reg. 30,738 (1973) (as amended by 38 Fed. Reg. 32,805 (1973)).

52. *Id.* at 30,739.

53. 418 U.S. at 696. Professors Jesse Choper and William Van Alstyne have criticized this aspect of the *Nixon* case. Choper first expressed the view that the principle requiring a cabinet officer to observe a regulation as long as it is in force is not a constitutional rule, but a rule of federal administrative practice. J. Choper, Judicial Review and the National Political Process 340-41 (1980). He suggested that

C. *The Erosion of the Principle*

The erosion of the principle that an agency must follow its own rules actually began in 1970, four years prior to *United States v. Nixon*. In *American Farm Lines v. Black Ball Freight Service*,[54] the Supreme Court excused an ICC violation of its own procedural rules using an analysis that presaged much of the thinking that would ultimately prove influential in later Supreme Court cases on the issue. In *American Farm Lines*, the ICC promulgated rules governing applications for granting motor carriers expedited operating authority in certain circumstances.[55] After granting American Farm Lines' request for such authority on the basis of an incomplete application, the ICC was challenged by competing carriers on the ground that it improperly ignored its own rules in granting the application.[56]

In an opinion by Justice Douglas, the Supreme Court held that the ICC's deviation from its own regulations did not nullify the validity of the grant of operating authority to American Farm Lines.[57] Justice Douglas reasoned that the ICC's violation did not prejudice the opposing carriers in their ability to make precise objections to American Farm Lines' application.[58] Justice Douglas then appeared to draw a

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this principle should have given way to the President's plenary power to control prosecutions under Article II of the Constitution. *Id.* William Van Alstyne made a parallel attack, arguing that a President's decisions regarding prosecution ought to be final with regard to any interference by a federal court. If a President abuses that authority, the proper remedy is impeachment. Van Alstyne I, *supra* note 45, at 139-40.

Implicit in these critiques of the *Nixon* decision, however, is the assumption that the regulations can be countermanded without first being withdrawn. Contrary to Jesse Choper's view, the means chosen by the President to assert his will is important. The difference between ordering that the regulations be withdrawn and simply flouting them is the difference between obeying existing law, which by hypothesis is binding even against the President of the United States, and amending the law so that it no longer exists, a power that President Nixon concededly had. And although William Van Alstyne is correct in asserting that what the President says is final with regard to an exclusively executive function such as prosecution, it may still make a difference how he says it. As between a regulation promulgated by the executive branch that has the force and effect of law, and contrary assertions in a brief prepared for litigation, the regulations must be controlling. Not to recognize the distinction is to confuse the will of the President with the law that the President and his subordinate, the Attorney General, have the legal power to establish. The Executive Branch should be judged by the public rules it sets for itself, and not by the ad hoc positions it takes in particular disputes: "An executive agency must be rigorously held to the standards by which it *professes* its action to be judged." Vitarelli v. Seaton, 359 U.S. 535, 546 (1959) (Frankfurter, J., concurring in part and dissenting in part) (emphasis added).

54. 397 U.S. 532 (1970).
55. *Id.* at 533-34.
56. *Id.* at 535-36.
57. *Id.* at 538-39.
58. *Id.* at 538.

distinction between substantive and procedural rules, a distinction he phrased in terms of a comparison between rules designed to confer benefits upon individuals, and rules that were merely internal "aids to the exercise of the agency's independent discretion."[59] The ICC is thus "entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems."[60] Justice Douglas then described as a general principle a notion that seemed contradictory to the general principle established by cases such as *Arizona Grocery* and *Accardi*, stating that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it."[61] Moreover, the government's departure from its own rules "is not reviewable except upon a showing of substantial prejudice to the complaining party."[62]

The somewhat cavalier indifference to the government's violation of its own rules in *American Farm Lines* reappeared in two decisions in the late 1970's. In *Board of Curators v. Horowitz*,[63] the Court held that a medical student was accorded full procedural due process, even without a pre-dismissal hearing, by the existing procedures leading to dismissal for academic deficiencies.[64] Although the main issue presented to the *Horowitz* Court was whether the due process clause requires a hearing prior to dismissal on academic grounds, Horowitz also argued, apparently without much factual support, that the University had failed to follow its own rules respecting evaluation of medical students, and that this failure amounted to a constitutional violation.[65] After pointing out that the record clearly showed that the school followed its established rules,[66] Justice Rehnquist addressed the legal issue, stating in dictum that "both *Service* and *Accardi v. Shaughnessy*, . . . upon which *Service* relied, enunciate principles of federal administrative law rather than of constitutional law binding upon the States."[67] This statement intimated for the first time that a

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59. *Id.* at 539.
60. *Id.* at 538.
61. *Id.* at 539 (quoting NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953)).
62. *Id.*
63. 435 U.S. 78 (1978).
64. *Id.* at 85. The Court distinguished Goss v. Lopez, 419 U.S. 565 (1975), in which the Court had held that the due process clause required an adversarial hearing prior to the disciplinary suspension of a state high school student, by stating that dismissals for academic rather than disciplinary causes do not necessitate a hearing. 435 U.S. at 90.
65. 435 U.S. at 92 n.8.
66. *Id.*
67. *Id.*

majority of the Burger Court was prepared to relegate *Arizona Grocery* and its progeny to non-constitutional status.

One year after *Horowitz*, the Court in *United States v. Caceres*[68] was faced with a violation by the Internal Revenue Service (IRS) of an IRS rule that prohibited electronic surveillance unless prior approval was obtained by designated officials.[69] The Court refused to exclude from a bribery trial evidence obtained in violation of the rule. It noted that although courts have a duty to enforce regulations when compliance with the regulation is mandated by the Constitution or federal law, the IRS was not required to adopt any particular rules before engaging in electronic monitoring or recording.[70] The due process clause was not implicated by the agency's violation of its regulations, because the defendant could not reasonably contend that he relied on the regulations or that their breach had any effect on his conduct.[71] Furthermore, the Court held that the APA provided no ground for judicial enforcement of regulations by means of the exclusionary rule.[72] This is consistent with the Supreme Court's increasing dissatis-

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68. 440 U.S. 741 (1979).

69. *Id.* at 744-46.

70. *Id.* at 749-50. In a footnote, the Court did state that although the IRS was not required by the Constitution to adopt its regulations: "It does not necessarily follow, however, as a matter of either logic or law, that the agency had no duty to obey them." *Id.* at 751 n.14. Quoting Morton v. Ruiz, 415 U.S. 199, 235 (1974), the Court also stated that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Caceres*, 440 U.S. at 751 n.14. The footnote makes no effort to articulate how one knows that "the rights of individuals are affected." The taxpayer-defendant Caceres surely had as much at stake as the individuals affected by the administrative actions in *Morton*, *Accardi*, *Service*, *Vitarelli*, and *Yellin*, cases that the Court cites with approval. What the Court really seemed to be saying in *Caceres* was that the IRS regulations themselves conferred no rights. The same, however, could just as easily have been said of all the regulations in the prior cases, except those in *American Farm Lines*.

71. 440 U.S. at 752-53. Although it may be true that Caceres did not rely on the regulation, it does not follow that the regulation was not promulgated for the benefit of taxpayers. Quite to the contrary, the benefit was in the form of a governmental decision not to engage without special approval in what the government itself obviously perceived as an unsavory form of surveillance.

72. *Id.* at 753-54. The Court conceded that an agency's failure to follow its own rules may invalidate the agency's action under the APA, which requires a Court to strike down agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D) (1982). The Court noted, however, that "this [was] not an APA case, and the remedy sought [was] not invalidation of the agency action." 440 U.S. at 754. The case instead involved the scope of the exclusionary rule in a criminal prosecution. The Court, unwilling to extend the exclusionary rule to such cases, may simply have been withholding one of the remedies available to Caceres for what otherwise remained a viable cause of action. This line of analysis is unconvincing because in this particular situation the only effective remedy is to enforce the exclusionary rule. At least in theory, *Caceres* appears to acknowledge that the IRS regula-

faction with the exclusionary rule,[73] a dissatisfaction that obviously colored the Court's analysis of the traditional proposition that an agency must follow its own rules. In its transparent desire to reject the application of the exclusionary rule, the Court was willing to ravage both the constitutional and administrative law underpinnings of the principle that regulations bind regulators.

The Court's reasoning in *Caceres* was a drastic retreat from its thinking in earlier cases;[74] it took the position that only agency rule violations that independently violate the Constitution are constitutionally prohibited. This reasoning strips the principle that agencies are bound by their regulations of all constitutional significance. If only those rules that are constitutionally required are constitutionally binding, the principle that an agency must follow its own rules has no separate constitutional force.

Similarly, the Court in *Caceres* greatly understated the significance of agency violations of their own rules in terms of federal administrative law. Relying on *American Farm Lines*, the Court stated: "Even as a matter of administrative law, . . . it seems clear that agencies are not required, at the risk of invalidation of their action, to follow all of their rules, even those properly classified as 'internal.' "[75] In an ill-conceived application of pragmatism, the Court cautioned that stringent judicial policing of agency regulations might deter agencies from establishing protective rules in the first place.[76]

This analysis is fraught with contradiction. The Court seems to concede as an initial proposition that the non-surveillance rules are desirable administrative policy. But if such rules are laudatory reforms, the Court's position that they confer no benefit on taxpayers is indefensible. The rules promise governmental restraint in an unsavory activity, a restraint that will be relaxed only after the substantial bureaucratic deliberation that is entailed in requiring that the decision be made high in the chain of command. This is precisely the type of self-restraint that the Court enforced in the *Bridges* line of cases.[77]

Second, the Court's reasoning that beneficial administrative rules do more good in the long run if they are not judicially enforced

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tions were in a sense binding, because the IRS action could have been invalidated pursuant to the APA.

73. *See, e.g.*, Illinois v. Gates, 103 S. Ct. 2317 (1983); Florida v. Royer, 103 S. Ct. 1319 (1983); United States v. Payner, 447 U.S. 727 (1980); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976).

74. See *supra* pt. I(B).

75. *Caceres*, 440 U.S. at 754 n.18.

76. *Id.* at 756. The Court stated: "In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration . . . than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form." *Id.*

77. See *supra* notes 31-53 and accompanying text.

borders on the bizarre. If regulations are rigorously enforced by the courts, the Supreme Court theorized, agencies may be tempted to formulate them in "mere precatory form."[78] A judicial failure of nerve, however, renders facially binding rules merely precatory if an agency suffers no sanction for violating them. The Court's position boils down to the proposition that a rule cast in language that appears to be mandatory, but in fact is not, is somehow more socially useful than a rule that openly states that it is non-binding and admonitory. Certainly the Court cannot believe that bureaucrats are so naive that they will fail to understand the significance of a judicial declaration that agency rules are not judicially enforceable. Moreover, the citizen is lulled into a false sense of security by protective regulations that are in fact unenforceable. Finally, reliance issues aside, there is something deeply disturbing about the idea that the government is free to cheat as long as the rules selectively discarded are not constitutionally mandatory. The Court's position that it is desirable to tolerate occasional abuses delegitimizes and undermines the idea that agency rules are a part of the essential fabric of a society governed by the rule of law rather than official whim and caprice.

II. Rejuvenating the Principle

A. *The Case for Rejuvenation*

In 1983, the Supreme Court in *Hewitt v. Helms*[79] held that a Pennsylvania regulatory scheme setting forth procedures and substantive criteria for confining a prison inmate to administrative segregation created a substantive liberty interest that rendered the regulations binding under the due process clause.[80] Later in the same term, the Court held in *Olim v. Wakinekona*[81] that an elaborate regulatory scheme promulgated by the State of Hawaii to govern the transfer of its prisoners among penal institutions was not binding because it did not create a liberty interest triggering the due process clause.[82] In the Court's view, the crucial difference was that the Hawaii regulations were purely procedural, while the Pennsylvania regulations were substantive.[83]

A comparison of these cases reveals that this dichotomy cannot withstand analysis. Before undertaking this comparison, however, it is necessary to place these decisions against the backdrop of the Burger Court decisions that led to this anomaly.

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78. *Caceres*, 440 U.S. at 756.
79. 103 S. Ct. 864 (1983).
80. *Id.* at 871.
81. 103 S. Ct. 1741 (1983).
82. *Id.* at 1747-48.
83. *See id.* at 1747-48 & n.10.

1. The Evolution of the Substance-Procedure Dichotomy

a. *Due Process Entitlements and the Right-Privilege Distinction*

In *Board of Regents v. Roth*,[84] the Supreme Court officially adopted the "entitlement" approach to due process, an approach that to a large degree resurrects the traditional right-privilege distinction.[85] Roth, an assistant professor hired for a one-year term, challenged his dismissal by university officials,[86] claiming he was being punished "for certain statements critical of the University administration."[87] Under the rules promulgated by the Board of Regents, the university was not required to give a reason for its decision not to rehire an untenured professor.[88] Roth coupled his first amendment claim with a procedural claim, asserting that the failure to give him any hearing or reason for nonretention violated his procedural due process rights.[89]

In analyzing Roth's claim, the Court conceded that Roth's re-employment prospects "were of major concern to him," a concern that was not "insignificant."[90] The Court held, however, that Roth's subjective valuation of his job, even if objectively reasonable, was relevant only to the type of due process to which Roth was entitled if it were first found that he was entitled to any at all.[91] "But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake."[92] The range of interests protected by the due process clause is "not infinite," but limited by the literal terms of the clause to deprivations of life, liberty, or property.[93] The Court then stated: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[94]

Thus, under the entitlement doctrine individuals are entitled to the procedural protections of the due process clause only if they can demonstrate that a right or entitlement to an interest in life, liberty, or property is at stake. When the interest involved is state-created, the individual is entitled to due process only if the state has made the

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84. 408 U.S. 564 (1972).

85. *See* Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982) [hereinafter cited as Smolla I].

86. 408 U.S. at 566.

87. *Id.* at 568.

88. *Id.* at 567.

89. *Id.* at 568-69.

90. *Id.* at 570.

91. *Id.* at 570-71.

92. *Id.* (emphasis in original).

93. *Id.* at 569-70.

94. *Id.* at 577.

interest a formally protected entitlement. Such entitlements do not stem from the Constitution, but from state statutes or regulations.

The coldest extremes in the Supreme Court's due process jurisprudence as it evolved after *Roth* were reached in a plurality opinion written by Justice Rehnquist in *Arnett v. Kennedy*.[95] *Arnett* involved a nonprobationary federal civil service employee who was discharged, without a pretermination hearing, by a superior whom the employee had publicly accused of illegal conduct.[96] Oblivious to the rule in *Bonham's Case* that no man be judge in his own cause,[97] the Court upheld the dismissal. Justice Rehnquist's opinion conceded that the employee had a property interest in his job under the federal civil service statute, but argued that the same statute that created the property interest also defined its dimensions, and those dimensions included the procedural dimensions that protect the interest.[98] "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining the right," Justice Rehnquist wrote, the litigant "must take the bitter with the sweet."[99]

Rehnquist's version of the entitlement doctrine became a lightening rod for criticism.[100] The Rehnquist theory was viewed by some as evidence that the Court's entitlement approach to due process was fundamentally flawed since its inception in *Roth*.[101] The central notion of *Roth* was that the due process clause protects interests created and defined by legislative enactments. The Rehnquist elaboration

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95. 416 U.S. 134 (1974).

96. *Id.* at 136-37.

97. 77 Eng. Rep. 646, 652 (K.B. 1610); *see In re* Murchison, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.").

98. *Arnett*, 416 U.S. at 151-52.

99. *Id.* at 153-54.

100. *See* 2 K. Davis, Administrative Law Treatise § 11:4 (2d ed. 1979); J. Ely, Democracy and Distrust 19 (1980); L. Tribe, American Constitutional Law § 10-12 (1978); Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. Cal. L. Rev. 355 (1978); Michelman, *Formal and Associational Aims in Procedural Due Process*, in Due Process, Nomos XVIII 126 (J. Pennock & J. Chapman ed. 1977); Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405 (1977); Rabin, *supra* note 5; Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 S. Ct. Rev. 261 (1976); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445, 463-64 (1977) [hereinafter cited as Van Alstyne II].

101. *See* Rabin, *supra* note 5, at 87-88; Tushnet, *supra* note 100, at 261-63; Van Alstyne II, *supra* note 100, at 457-66; *see also* J. Ely, *supra* note 100, at 19 (Court's position that only entitlements are protected by the due process clause "has been a disaster"); Glennon, *supra* note 100, at 359-63 (making due process protection contingent on state recognition of a substantive right "threatens to jettison the fourteenth amendment as a significant safeguard of individual rights").

therefore followed quite naturally—the legislature could surely decide how much or how little of an entitlement it wished to create, adjusting the procedural protections that it built into the entitlement accordingly. But this left the fox guarding the chicken coop; virtually all power over the due process clause, which is ostensibly a check on legislative excess, was in the hands of the legislature.[102] Congress had brought the federal employee's job into existence and, in the same creationist breath, had designed the process the employee was due before his job could be taken away; as Congress had given, so could it take. The courts had no power to interfere.

The scholarly hostility to this apparent judicial abdication led to cries that Justice Rehnquist's *Arnett* theory must be undone, and to undo *Arnett* it would be necessary to undo *Roth*.[103] In place of *Roth*, a "unitary" theory of due process was proposed, in which it is assumed that some procedural protection is owing to an individual before the government can harm him, leaving only the question of how much process is due.[104] That question is never for the legislature to decide, but is a matter of independent judicial judgment to be exercised by courts playing their proper constitutional role as the final arbiters of the due process clause.[105]

Justice Rehnquist's *Arnett* theory also had its defenders, who saw the whole package from *Roth* to *Arnett* as both internally logical and externally appropriate.[106] This defense required the rehabilitation of

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102. *See* Smolla I, *supra* note 85, at 93-94.

103. *See* Tushnet, *supra* note 100, at 261-62; *see also* J. Ely, *supra* note 100, at 19 (through the *Roth* doctrine, "procedural protection [has] been steadily constricted [and] the Court has made itself look quite silly in the process"); Rabin, *supra* note 5, at 87-88 (*Roth* "was an unfortunate step").

104. Although the Supreme Court has not followed the unitary analysis, it has adopted a cost-benefit approach to determine how much process is due once it is determined that an entitlement exists. *See* Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976). For a criticism of this cost-benefit balancing, see Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudiction in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976).

105. Professor William Van Alstyne has quite eloquently captured this idea by proposing that we treat freedom from arbitrary procedure as a "substantive element of one's liberty." Van Alstyne II, *supra* note 100, at 487.

106. The most ardent defender has been Professor Simon. *See* Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 Calif. L. Rev. 146 (1983). This author has also defended major elements of the entitlement approach, but with greater reservations and limitations. Smolla I, *supra* note 85, at 102-20. For other treatments generally sympathetic to the entitlement concept, see Grey, *Procedural Fairness and Substantive Rights*, in Due Process, Nomos XVIII 182 (J. Pennock & J. Chapman eds. 1977); Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 Geo. L.J. 861 (1982).

the notorious right-privilege distinction.[107] Stripped of its excesses, the right-privilege distinction could be refitted for new use, with its name changed to the entitlement doctrine to avoid embarrassing memories. The worst that could be said of the right-privilege distinction of old was that it had been wrongly invoked to defeat core constitutional rights such as freedom of expression or freedom of religion, guarantees that have express textual support in the Constitution.[108] Justice Holmes was plainly wrong when he dismissed the first amendment claim of a police officer fired for talking politics while on duty with the epigram that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[109] The freedoms of the first amendment are not so frail that governments can automatically force their surrender as the quid pro quo for accepting a government job or any other form of public largess.[110] This is not to say that curtailing the free expression of public employees is unconstitutional, but only that its validity is to be measured in each case by what the first amendment will tolerate, not summarily permitted on grounds that the employee "takes the employment on the terms which are offered him."[111]

This discredited use of the right-privilege distinction, however, is not a barrier to the resurrection of the distinction in due process analysis. Because the due process clause is limited by its terms to deprivations of life, liberty, or property, and property and some aspects of liberty have traditionally been regarded as springing from

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107. *Compare* Smolla I, *supra* note 85 (reemergence of right-privilege distinction), *with* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968) [hereinafter cited as Van Alstyne III].

108. The response to this improper use of the right-privilege distinction was the doctrine of unconstitutional conditions, a doctrine that the Court did not repudiate in *Roth*. *See* Smolla I, *supra* note 85, at 85. The doctrine essentially provides that government must justify with compelling state interests substantive conditions on largess that restrict the exercise of constitutional rights. For discussions of the unconstitutional conditions doctrine, see G. Henderson, The Position of Foreign Corporations in American Constitutional Law 132-47 (1918); French, *Unconstitutional Conditions: An Analysis*, 50 Geo. L.J. 234 (1961); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. Pa. L. Rev. 879 (1929); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 Calif. L. Rev. 443 (1966); Van Alstyne III, *supra* note 107, at 1445-58; Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 Iowa L. Rev. 741 (1981); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1968).

109. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

110. *See* Elrod v. Burns, 427 U.S. 347, 360-61 (1976).

111. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892) (Holmes, J.).

the sovereign, the use of right-privilege analysis in due process cases does not pose the same problems as it does in the first amendment area.[112] Under this view, *Roth* and *Arnett* did no more than render unto legislatures that which was rightfully theirs: the power to decide the terms and conditions "inextricably intertwined" with the largess they created.[113]

The Supreme Court since *Arnett* has not unequivocally adopted either Rehnquist's pure positivism or its antithesis, the unitary theory of the due process clause. The Court has never had the unanimity of conviction to select the doctrinal purity of either side. The case of *Bishop v. Wood* [114] illustrates the Court's dilemma. A police officer was fired from the Marion, North Carolina police department without a hearing to determine the sufficiency of the cause for his discharge. The relevant statutes and local ordinances did not grant the officer a right to any such hearing.[115] If the Court had rejected Justice Rehnquist's positivism, it would have been in the position of presuming to tell the Marion authorities to handle police dismissals in a manner very different from the manner Marion citizens had initially contemplated. Because the unitary theory of due process gives courts the last word on the procedures that protect a state-created interest, it forever poses the possibility that the shape of the property or liberty interest created by the legislature will look dramatically different once a court is through with it. This is a serious threat to conservative federalism, for it raises the spectre of liberal federal courts adding layers of procedure onto locally-created forms of largess for which procedural protections had been intentionally omitted, allowing these courts to impose responsibility on local governments for entitlements that were never really there.

Conversely, if the Court in *Bishop* accepted the positivism of Justice Rehnquist's *Arnett* theory, the idea of an independent judiciary utilizing the due process clause as part of the arsenal in checking legislative and executive excess would be overwhelmed. The judicial power to determine how much process is due is meaningless if that power can be obviated by the legislature's ability to include the level of procedural protection for an interest as part of the "defining power" that brings these interests into existence.[116]

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112. *See* Smolla I, *supra* note 85, at 87-88, 93-94.

113. Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974); Smolla I, *supra* note 85, at 93-94.

114. 426 U.S. 341 (1976). For a detailed critique of *Bishop*, see Rabin, *supra* note 5.

115. 426 U.S. at 345.

116. Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies*: Parratt v. Taylor *and* Logan v. Zimmerman Brush Company, 1982 U. Ill. L. Rev. 831, 864 n.161 [hereinafter cited as Smolla II].

The Court in *Bishop* apparently did accept Justice Rehnquist's analysis, stating that the ordinance governing police dismissals may "be construed as granting no right to continued employment but [as] merely conditioning an employee's removal on compliance with certain specified procedures."[117] Yet in *Vitek v. Jones*,[118] the Court seemed to reject the *Arnett* theory, holding that a prisoner could not be transferred to a mental hospital without procedures more elaborate than those established by state law.[119] Minimal requirements of due process, the Court stated, are "a matter of federal law [and] are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."[120]

Finally, in the Court's 1982 term it definitively disowned the Rehnquist due process analysis. In *Logan v. Zimmerman Brush Co.*,[121] the Court stated that a legislature "may not constitutionally authorize the deprivation of [a property] interest, once conferred, without appropriate procedural safeguards."[122] The appropriateness of the safeguards is a federal constitutional question.[123] To accept any other conclusion, the Court stated, "would allow the State to destroy at will virtually any state-created property interest."[124]

The compromise position that the Court now seems settled on treats the question of an entitlement's existence as legislative and administrative, while treating the question of how much process is due as judicial. But perversely, the Court has taken the position that procedural rules can never themselves be regarded as entitlements. This position, more than any other development in constitutional or administrative law in the past decade, threatens to undermine the principle first articulated in *Arizona Grocery* that an agency must follow its own rules.

b. *The Application of the Substance-Procedure Theory in* Olim v. Wakinekona

The result that the substance-procedure dichotomy produced in *Olim v. Wakinekona*[125] exposes the bankruptcy of this analysis. In *Wakinekona*, a prisoner serving a life sentence without parole challenged his transfer from the Hawaii State Prison to Folsom Prison in

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117. 426 U.S. at 345.
118. 445 U.S. 480 (1980).
119. *Id.* at 495-96.
120. *Id.* at 491.
121. 455 U.S. 422 (1982).
122. *Id.* at 432 (quoting Vitek v. Jones, 445 U.S. 480, 490 n.6 (1980)).
123. *Id.*
124. *Id.*
125. 103 S. Ct. 1741 (1983).

California.[126] Hawaii had enacted a set of regulations governing such transfers, defining an interstate transfer as a "grievous loss"[127] and requiring that any transfer involving a grievous loss be preceded by a hearing before an impartial program committee established by the prison administrator.[128] Although the regulations did require relatively elaborate procedures at the program committee stage, the program committee's decision was not final. The committee's recommendation was forwarded to the prison administrator, who had authority to "[a]ffirm or reverse, in whole or in part."[129] The regulations contained no explicit standards governing the exercise of the administrator's discretion.[130]

Hawaii prison authorities transferred Wakinekona from the Hawaii State Prison to Folsom Prison without observing the elaborate procedural scheme set forth in the regulations.[131] Wakinekona filed a section 1983[132] action challenging his transfer on the ground that it violated the due process clause because the committee that made the final transfer decision was staffed by the same persons as the committee that had initiated the transfer process.[133] Because the Hawaii prison regulations required that an impartial committee make ultimate transfer decisions and specifically excluded from the committee any person that had been actively involved in initiating transfer proceedings, Wakinekona argued that he had been deprived without due process of a state-created entitlement to an impartial hearing.[134] The Ninth Circuit upheld Wakinekona's due process claim, on the theory that the Hawaii transfer regulations were binding on state officials

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126. *Id.* at 1743.

127. *Id.* at 1743-44.

128. *Id.* Under the regulations the prisoner was entitled to prior notice of the transfer hearing, and the notice had to state "what the committee will consider at the hearing" and "any recent specific facts which may weigh significantly in the classification process." Wakinekona v. Olim, 664 F.2d 708, 711 (9th Cir. 1981), *rev'd*, 103 S. Ct. 1741 (1983) (quoting Rule IV of the Supplementary Rules and Regulations of the Corrections Div., Hawaii Dep't of Social Servs. & Housing (1976)). "The prisoner has the right to examine all relevant, nonconfidential material related to his case, a right to confront and cross-examine witnesses, a right to retain counsel and a right to respond to the evidence presented to the committee and to offer evidence on his own behalf." *Id.* The regulations further required that the committee "render a recommendation based only upon the evidence presented at the hearing to which the individual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing." *Id.*

129. *Id.* at 712.

130. 103 S. Ct. at 1744.

131. 664 F.2d at 711-12.

132. 42 U.S.C. § 1983 (Supp. V 1981).

133. 664 F.2d at 709.

134. *Id.*

and created an entitlement to the prescribed procedures that was protected under the due process clause.[135]

Shortly thereafter, the Supreme Court of Hawaii held in *Lono v. Ariyoshi*[136] that the Hawaii prison-transfer regulations did "not limit the authority of the director."[137] The regulations, therefore, did not create a liberty-interest entitlement protected under the due process clause.[138] In light of the result in the *Lono* case, the State of Hawaii petitioned for rehearing in *Wakinekona*, arguing that the Ninth Circuit was required to defer to the Supreme Court of Hawaii on the interpretation of Hawaii law.[139]

On rehearing, the Ninth Circuit conceded that "it is of course the sole prerogative of the highest state court to determine the meaning of a state statute or regulation," but nonetheless held that "it is a federal question whether the interest created by the state statute or regulation is to be accorded protection under the fourteenth amendment."[140] The court distinguished *Lono* because *Lono* had merely established that the ultimate decision-maker, the prison administrator, had unfettered discretion in deciding whether or not to transfer a prisoner.[141] The *Lono* decision, the court reasoned, did "not suggest any weakening of the preconditions required by the Regulation for the exercise of the prison administrator's discretion."[142] The court added that the regula-

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135. *Id.* The Ninth Circuit distinguished two prior Supreme Court cases, Meachum v. Fano, 427 U.S. 215 (1976), and Montanye v. Haymes, 427 U.S. 236 (1976), which had held that prison transfers do not automatically trigger the protections of the due process clause. In *Meachum*, the Court had held that upon conviction a prisoner's liberty is sufficiently extinguished to empower the State to confine him in any of its prisons. 427 U.S. at 224. Although prisoners retain a residuum of liberty, that residuum does not include an entitlement to incarceration in any particular facility. *Id.* at 225. The Court specifically found: "Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct." *Id.* at 226. In *Montanye*, the Court similarly stated that under New York law a prisoner "had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct." 427 U.S. at 243.

Hawaii, the Ninth Circuit reasoned, did what Massachusetts and New York had failed to do: It created a due process entitlement by promulgating rules that set forth specified procedures before any transfer of a prisoner involving a "grievous loss," and had then explicitly defined interstate transfers as a "grievous loss." 664 F.2d at 711. Because Hawaii did not follow its self-imposed procedures prior to transferring Wakinekona, his due process rights were violated.

136. 621 P.2d 976 (Hawaii 1981).

137. *Id.* at 980.

138. *Id.* at 981.

139. Wakinekona v. Olim, 664 F.2d 708, 714-15 (9th Cir. 1981), *rev'd*, 103 S. Ct. 1741 (1983).

140. *Id.* at 714.

141. *Id.* at 715.

142. *Id.*

tions governing the program committee processes themselves established a liberty interest, and stated: "On that federal question, we respectfully disagree with the Supreme Court of Hawaii."[143]

The *Lono* decision doomed the Ninth Circuit's decision in the United States Supreme Court. In light of the Court's steady devaluation of the principle that the government must follow its own rules, and its parallel movement toward an ever-constricting view of the scope of the due process clause, there was little doubt as to the outcome of a battle over the binding effect of state prisoner transfer rules waged between a federal court of appeals and a state supreme court. The Supreme Court held that Wakinekona's transfer from Hawaii to California did not implicate any liberty interest inherent in the due process clause.[144]

Wakinekona also argued before the Court that an interstate transfer involved hardships qualitatively more severe than intrastate transfers, and therefore came within the residuum of liberty that a prisoner maintains even after conviction.[145] In support of this argument, Wakinekona invoked *Vitek v. Jones*,[146] which held that the transfer of an inmate from a prison to a mental hospital brought about "consequences . . . qualitatively different from the punishment characteristically suffered by a person convicted of [a] crime,"[147] and thus was "not within the range of conditions of confinement to which a prison sentence subjects an individual."[148]

The Supreme Court rejected this prong of Wakinekona's argument,[149] closing the loophole left by its prior cases and refusing to accept Wakinekona's reliance on *Vitek*. The methodology of the Court's rejection of Wakinekona's claim is symptomatic of the positivism that now dominates the Court's approach to the due process clause. The Court's sole basis for this rejection was that interstate transfers are statutorily authorized by many state and federal statutes. The existence of these statutes, the Court reasoned, makes interstate transfers, unlike transfers to mental institutions, a part of the liberty

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143. *Id.*

144. 103 S. Ct. at 1748.

145. *Id.* at 1745. This was only an issue because of a loophole left open by two prior Supreme Court decisions that dealt only with intrastate transfers. See *supra* note 135.

146. 445 U.S. 480 (1980).

147. *Id.* at 493. The Court acknowledged that, unlike most other Hawaii state prisoners, Wakinekona would be moved across the ocean and parted from his family and friends indefinitely, perhaps for the rest of his life. 103 S. Ct. at 1747 n.9. Wakinekona argued this cut-off from most of the contacts of the outside world was analogous to the English punishment of banishment, a punishment not within the range of confinement contemplated by his sentence. *Id.*

148. 445 U.S. at 493.

149. 103 S. Ct. at 1747 n.9.

interest that is extinguished upon conviction, rather than part of the residuum that remains.[150]

This approach replaces analysis of the quality and nature of the harm suffered by the prisoner with a mere description of the status quo. In effect, the Court reasoned that because interstate transfers are commonly provided for by statute, they are not qualitatively more egregious than intrastate transfers. This analysis would have required the Court in *Vitek* to defer to the State of Nebraska's action and to hold that transfers from a prison to a mental hospital are within the range of confinement options open to states after conviction. Such transfers are also common, and were in fact authorized by Nebraska statute.[151]

The most troubling aspect of *Wakinekona* was the Court's unwillingness to see any significance in the fact that Hawaii had defined an interstate transfer as a grievous loss, and had prescribed the procedures required before inflicting such a loss. This is an extremely unhappy development in constitutional law, for it means that procedural rules, even if "unmistakably mandatory"[152] in character, can never be vested entitlements under the due process clause. This approach is egregiously short-sighted, even if one accepts the framework embraced by the Court since *Roth*.

2. A Rationale for Regarding Procedural Rules as Constitutionally Binding

There are three reasons why the Supreme Court's decision in *Wakinekona* that procedural rules cannot be vested entitlements should be overruled. First, it ignores the quid pro quo that ought to be implicit in the approach to due process now followed by the Court: The due process clause may not require government to bind itself with promises, but once promises are made, they must be kept. Second, it attributes irrationality to the administrative scheme. American legislators and administrators are not, it should be presumed, in the habit of requiring scenes like those in Franz Kafka's *The Trial*,[153] in which the formalities of a trial exist in a nightmarish vacuum wherein the issue being tried is never disclosed. Rather, substantive restraints on administrative action are normally implicit in the creation of procedural rules, and should be relatively easy to discern. Third, the Court's approach ignores the possibility that a legislative or administrative agency has decided to use positive law to recognize and vest due process interests. Even if the Constitution does not require that

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150. *See id.* at 1746 & n.8.
151. 445 U.S. at 483-84 & n.2.
152. Hewitt v. Helms, 103 S. Ct. 864, 871 (1983).
153. F. Kafka, The Trial (1937).

the government recognize the value of procedure for its own sake (that is, for the sake of enhancing certain values involving human dignity that inhere in fair procedure), it is nonetheless possible that the government has done so of its own volition. Interests in human dignity expressed through procedural rights that go beyond the requirements of the Bill of Rights should be regarded as no less capable of becoming vested entitlements than interests of a more substantive nature.

a. *Of Promises Made*

It may be thought to beg the question to assert that gratuitous procedural rules should be binding simply because they are part of the law of the land,[154] because the critical issue is whether purely procedural rules are law at all. If, however, procedural rules do have the force and effect of law, it is difficult to believe that the Justices would not agree that such rules bind the government as much as the governed. The idea that the government is free to declare through formal legislative or administrative processes that certain procedures will be followed, and then ignore that declaration, is outrageous to American sensibilities. The outrage emanates from due process in its "primal sense":[155] Because administrative regulations are solemnly declared to be law binding on the citizenry, they must be law binding on the government.

Nothing logically separates substantive rules from procedural rules with regard to this elemental constitutional value.[156] To treat procedural rules as something less than binding law flies in the face of the logical underpinnings of the Supreme Court's modern approach to the due process clause. As the much maligned decision in *Paul v. Davis*[157] made clear, most of the Justices on the Court regard liberty and property interests protected by the due process clause as arising from two basic sources. Some liberty interests are created by the Constitution, but those interests are limited to the enumerated guarantees in the Bill of Rights and their penumbral fellow travelers.[158] Outside of that small and select constitutional grouping, all liberty and property

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154. *See* Berger, *Do Regulations Really Bind Regulators?*, 62 Nw. U.L. Rev. 137, 149-50 (1967).

155. *Id.* at 150.

156. *Id.* at 144-52.

157. 424 U.S. 693 (1976). Unsympathetic critiques of *Paul* include Monaghan, *supra* note 100, at 423-29; Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293, 324-28 (1976); Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist*, 64 Ky. L.J. 753 (1976); Note, *Reputation, Stigma and Section 1983: The Lessons of* Paul v. Davis, 30 Stan. L. Rev. 191 (1977). This author has attacked the reasoning in *Paul* but defended the result. Smolla II, *supra* note 116, at 836-47.

158. *See* 424 U.S. at 710-11 & n.5.

interests emanate from statutes or regulations.[159] The Court regards both constitutional and subconstitutional entitlements as originating with the sovereign. In the case of Bill of Rights entitlements, the sovereign was the newly constituted federal government, and the entitlement-creating words are contained in the constitutional text. True to their positivist predispositions, a majority of the current Justices believes that these entitlements would not exist were they not part of the text;[160] rather, they are creatures of the constitutional language, and would not bind the government if the language were not there. The same is true of entitlements emanating from the language of statutes or administrative regulations.[161]

If one accepts all of this—as the Court has—there is no room for the arbitrary division that the Court has drawn between substantive and procedural rules. Most of the entitlements in the Bill of Rights are procedural, not substantive. If constitutional language vesting procedural rights is binding law without more, the same should be true of language in statutes or administrative regulations. It is no answer to say that statutory or administrative procedural rules are often gratuitous; to the positivist, all law is gratuitous. To the current Court, not even the provisions of the Bill of Rights are required by a higher law.[162] The Supreme Court, however, does not dispute the elemental notion that federal and state sovereigns can bind themselves through statute and regulation.[163] The division between procedural and substantive rules, therefore, proves too much. Under this analysis, even Bill of Rights entitlements that are procedural would be mere admonitory guideposts, to be honored or not at the government's whim.

b. *The Foolishness of Presuming Irrationality*

In the eyes of the Supreme Court, *Hewitt* and *Wakinekona* are distinguishable because Pennsylvania purposefully limited official discretion by the procedural rules it created, while Hawaii did not.[164] Pennsylvania set up its procedural scheme to determine whether a particular prisoner should be segregated because the prisoner needed "control" or posed a threat of "serious disturbance."[165] By contrast, if we are to believe the Supreme Court, the elaborate and detailed procedures for hearings established by Hawaii were created for no

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159. *See id.*
160. *See id.* at 711-12; Rabin, *supra* note 5, at 71-72; Shapiro, *supra* note 157, at 327-28.
161. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
162. See *supra* text accompanying notes 157-61.
163. *See* Hewitt v. Helms, 103 S. Ct. 864, 871 (1983).
164. *See* Olim v. Wakinekona, 103 S. Ct. 1741, 1747-48 & n.10 (1983).
165. Hewitt v. Helms, 103 S. Ct. 864, 871 (1983).

purpose at all. The Court is not being true to its own modernity; it has abandoned the hard-nosed realism that it purported to adopt in *Roth* and its progeny and has attributed schizophrenia to the state of Hawaii. It is clear that Hawaii's purpose in promulgating its regulations was the same as Pennsylvania's: Every prison, every correctional system, must deal with troublemakers. The Constitution provides little guidance about how prisons should handle such matters. Unless a sanction implicates the cruel and unusual punishment clause, violates some other explicit Bill of Rights guarantee, or is racially discriminatory, prisons can do as they please. Prisoners have no inherent liberty or property interest protected by the due process clause in any particular place or mode of confinement.[166] States can, however, create such an interest, and *Hewitt* stands for the proposition that once created it cannot be taken away without due process.[167] To assume that a state has not created such an interest by promulgating procedural regulations is to assume the ridiculous or the perverse: The state makes its procedural promises out of Kafkaesque mockery for the prisoner—the hearing will be held or not held at the administrator's whim, and if it is held, its only purpose is to determine what the administrator's whimsy happens to be.

In *Wakinekona*, the evidence was overwhelming that the administrators based their decision on the fact that they thought Wakinekona was dangerous and needed to be sent to a facility better able to handle him.[168] Hawaii created its detailed procedural scheme to insure that prisoners such as Wakinekona would not be transferred for such reasons unless the relevant facts supporting such a decision were impartially determined. Hawaii even went so far as to describe the transfer as a grievous loss,[169] mimicking the language of Supreme Court precedents[170] and apparently assuming that the regulations would thus be understood as creating an entitlement. Hawaii was under no obligation to create these self-restraints.[171] Nor was Pennsylvania under an obligation to do so in *Hewitt*. Having once decided to hamper itself, however, Hawaii should have been bound by its decision.

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166. Montanye v. Haymes, 427 U.S. 236 (1976); Meachum v. Fano, 427 U.S. 215 (1976).

167. *See* 103 S. Ct. at 870-71.

168. *Id.* at 1743.

169. *Id.* at 1744 n.2.

170. Vitek v. Jones, 445 U.S. 480, 488 (1979). Professor Davis has proposed that whenever government officers "impose a grievous loss on any person, due process requires not less than whatever procedural protection is justified by a cost-benefit analysis." K. Davis, *supra* note 100, § 11:14, at 399. *But see* Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976) (finding no due process violation even though "grievous loss" occurred).

171. See *supra* note 135.

This analysis is complicated by the fact that the Supreme Court of Hawaii ultimately decided that the regulations created no entitlement. Because we are all compelled by our reverence for *Erie Railroad Co. v. Tompkins*[172] to consider state supreme courts as infallible arbiters of their own states' law, there is a natural reluctance to allow federal courts to read entitlements into regulations when the highest court of the state denies they exist. *Roth*, after all, made the existence of an entitlement a matter of state law when it is a state activity that is challenged.[173]

Nonetheless, the existence of an entitlement is never entirely a state law question, because that would allow states to defeat the due process clause by resorting to the device of the "evanescent entitlement."[174] Every vested entitlement—indeed, all law—is in one sense grounded in words printed on paper. Some base requirement of fidelity to the ordinary meaning of words is essential if the due process clause is to have any force whatsoever, for only words can vest an entitlement. When a state supreme court disingenuously reads one of its own state's statutes or regulations so as to give a "now you see it, now you don't" quality to what appears to be a straightforward entitlement, the federal courts should not follow that reading.[175]

The deference the United States Supreme Court paid in *Wakinekona* to the Hawaii Supreme Court decision in *Lono* is misplaced. The *Lono* court was deferring to the Supreme Court's prior decisions dealing with intrastate transfers.[176] *Lono* essentially reasoned that because the United States Supreme Court did not require Hawaii to vest entitlements in prisoners, Hawaii's Supreme Court would not do so.[177] *Lono* skirted the real question—whether Hawaii's administrators had created an entitlement. In light of the elaborate procedures they created for themselves, it is inconceivable that they did not.

c. *Dignitary Process Values Embodied in Positive Law*

The most demoralizing theme of *Wakinekona* is the Court's failure to accept that when legislators and administrators create procedural rules they may be choosing to vest individual rights in fair procedure for fair procedure's sake alone. If solicitude for "process values" is the legislative or administrative motivation behind a procedural scheme,

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172. 304 U.S. 64 (1938).

173. 408 U.S. at 578.

174. *See* Smolla II, *supra* note 116, at 859-62.

175. *See id.* The Supreme Court lived up to this responsibility in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). The Court refused to accept the Illinois Supreme Court's interpretation of an Illinois statute, holding that the Illinois law at issue created a property interest. *Id.* at 428-33; *see* Smolla II, *supra* note 116, at 859-68.

176. Lono v. Ariyoshi, 621 P.2d 976, 979-81 (Hawaii 1981).

177. *Id.*

a court should not hunt for the magic words that indicate substantive restraints on discretion. Instead the court, confident that the regulations are intended to insure that certain values inherent in the procedures themselves be nurtured, should find that the procedures themselves are entitlements. The Supreme Court's belief that government is not constitutionally required to adopt fair procedure for its own sake does not mean that government is powerless to do so and to make that procedure a vested individual entitlement.

In reaction against *Roth*, a rich body of scholarship has developed identifying the values of procedure for its own sake.[178] One important value is the ventilation that procedure brings to the administrative process, which may discourage administrative conduct motivated by an illicit purpose.[179] Under our constitutional scheme no administrative action can be undertaken with truly unfettered discretion. Even if a prisoner can be assigned to any facility within a prison system, prison officials are not free to give harsher assignments to prisoners because they are Jewish or black.[180] Binding procedures may at least ferret out some administrative action that goes beyond discretion into the realm of impermissible activity.[181]

Another process value advanced by procedural protections, even when substantive discretion is virtually unlimited, is participation.[182] Citizens about to be hurt by administrative action should have at the very least the chance to face the decision-maker and state their case. The psychic value in being heard out is important to the citizen, even when he is unsuccessful. Further, it may be critical to the apparent legitimacy of the administrative scheme, even when no formal substantive entitlement is at stake. When the state treats procedure as merely a means for the implementation of its own economic goals, the individuals who feel the impact of that procedure also become merely a part of the means.[183] The state ignores the individual's demand to be treated as an end—to be given certain cathartic courtesies that preserve the individual's sense of dignity and worth.

The Supreme Court has not found these arguments persuasive, and has rejected calls to treat freedom from arbitrary adjudicative proce-

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178. *See* Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. Rev. 885 (1981); Michelman, *supra* note 100; Monaghan, *supra* note 100; Pincoffs, *Due Process, Fraternity, and A Kantian Injunction*, in Due Process, Nomos XVIII at 172 (J. Pennock & J. Chapman eds. 1977); Rabin, *supra* note 5; Van Alstyne II, *supra* note 100.

179. *See* Michelman, *supra* note 100, at 127; Rabin, *supra* note 5.

180. See *supra* notes 108-10 and accompanying text.

181. *See* Rabin, *supra* note 5, at 77-79.

182. *See* Michelman, *supra* note 100.

183. Mashaw, *supra* note 104, at 912-16; Pincoffs, *supra* note 178, at 176-79.

dures as a substantive element of one's constitutional liberty.[184] Indeed, there is an almost reactionary theme to the Court's apparent fixation on the rejection of process values. It is as if the Court believes that although the positivism of *Roth* may sometimes work harsh results, these harsh results must be stoically accepted by judges as the necessary consequence of an intellectually pure and neutral due process jurisprudence. The view that it is exclusively for legislatures to create entitlements is a straightforward consequence of the Constitution's separation of powers. Resolute judges with grit, backbone, and a sense of institutional self-control will not invade the province of the legislature because of weak-kneed compassion. Concepts of "property" and "entitlement" are hard, neutral, and emotionless; concepts of "revelation," "participation," and "dignity" are soft, submissive, and passionate values that the stoic constitutionalist must resist. Property interests and liberty interests explicitly created by positive law are objective and substantial; dignitary process values are philosophical, subjective, and ephemeral.

In a failure of imagination, the Court has neglected to consider the possibility that in certain cases entitlements to fair procedure for its own sake may be precisely what the legislature or administrative agency had in mind. To enforce those entitlements does no violence to the Court's infatuation with positivism, for the procedural entitlements are the positive law of the state. A state would not enact procedures that restrict administrative freedom in an area in which the administrator's discretion remains substantively unencumbered. Courts that refuse to enforce procedural rules against agencies must assume some legislative or administrative motive other than the circumscription of discretion and the concomitant creation of substantive entitlements or, in the alternative, the embodiment of process values and the creation of procedural entitlements. The only other explanation possible is that the rules were the product of legislative or administrative blunder.

B. *A Proposed Framework*

The principle that an agency must follow its own regulations is better understood not as a unified doctrine but as a two-tiered concept. Some rules, both state and federal, should be regarded as binding as a matter of federal constitutional law. Other rules should be treated as not implicating either the Constitution or the statutory or common law governing administrative practice. The latter rules may be breached by a state or federal agency with impunity.

Contrary to the approach taken by the Supreme Court, virtually all rules binding as a matter of administrative law should also be binding

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184. *See* Van Alstyne II, *supra* note 100, at 487.

under the Constitution. Constitutionally binding rules are of three types: rules that create substantive entitlements; rules that create procedural entitlements; and rules that implicate specific enumerated constitutional guarantees such as the first amendment or the ex post facto clause.

The first type creates a substantive entitlement to a liberty or property interest. Such rules narrow the exercise of discretion when governmental action adversely affects an individual, by allowing the government to take the adverse action only when defined factual situations exist. The requirement that those factual conditions exist prior to the official action makes the rule substantive, and creates the entitlement of the affected individual.[185] Because self-imposed rules of this type create substantive entitlements, these rules are constitutionally binding under the due process clause.

The second type of constitutionally binding rule includes those that mandate certain prescribed procedures but do not on their face appear to narrow substantive discretion. When administrators ignore the procedural mechanisms established by statute or regulation in an area in which their substantive discretion is ostensibly unhampered, they act in a netherland of constitutional and adminstrative law. Contrary to the Supreme Court's current view, however, procedural rules creating entitlements should be binding under the due process clause in precisely the same manner as rules governing substantive entitlements. Procedural rules can themselves be entitlements, even when the administrative official ultimately retains discretion on the merits.

Finally, many regulations that are purely discretionary nonetheless cannot be ignored once promulgated without violating specific federal constitutional limitations, such as the ex post facto clause, the equal protection clause, or a discrete Bill of Rights guarantee. The two ex post facto clauses,[186] for example, should be regarded as restraining the power of parole authorities to disregard rules and retroactively increase punishments even though the parole rules were not required by the Constitution.[187] Although these constitutional provisions are

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185. *See* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 466 (1981); Vitek v. Jones, 445 U.S. 480, 488-91 (1980).

186. U.S. Const. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

187. In Weaver v. Graham, 450 U.S. 24 (1981), the Supreme Court held that a Florida statute that retroactively altered Florida's "good time credit" scheme violated the ex post facto clause as applied to persons who committed crimes prior to the statute's enactment. Federal courts faced with similar challenges to retroactive increases in Federal Parole Commission guidelines, however, usually have not found that retroactive increases are prohibited by the ex post facto clause. These courts have used the rationale that the Parole Guidelines are not law, and therefore are not subject to the ex post facto clause. Instead, these courts have characterized the

less frequently violated by the breach of a prudential rule than is the due process clause, courts must still be alert to the possibility that in certain circumstances the departure from a self-imposed rule may affect these constitutional protections.

Usually, federal courts need not reach the federal constitutional issue when a rule is binding as a matter of federal administrative law. Rules that are constitutionally binding are also binding under federal administrative law. Federal courts as a matter of course treat some agency departures from rules that could have been analyzed as federal constitutional violations simply as violations of federal administrative common law.[188] This wise judicial self-restraint, reflecting the traditional admonition that a court should never reach constitutional questions if it can avoid them,[189] has had the unfortunate effect of distorting the approach that many federal courts take toward review of departures by state agencies from self-imposed rules. Many courts

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Guidelines as mere internal guideposts that assist the Commission in exercising its discretion. *Id.* at 25-36; *see* Portley v. Grossman, 444 U.S. 1311, 1312-13 (Rehnquist, Circuit Justice 1980); Stroud v. United States Parole Comm'n, 668 F.2d 843, 847 (5th Cir. 1982); Hayward v. United States Parole Comm'n, 659 F.2d 857, 862 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1991 (1982); Zeidman v. United States Parole Comm'n, 593 F.2d 806, 808 (7th Cir. 1979); Rifai v. United States Parole Comm'n, 586 F.2d 695, 698-99 (9th Cir. 1978); Ruip v. United States, 555 F.2d 1331, 1335-36 (6th Cir. 1977); Wilson v. United States Parole Comm'n, 460 F. Supp. 73, 77 (D. Minn. 1978); Richards v. Crawford, 437 F. Supp. 453, 456 (D. Conn. 1977).

These decisions reflect a general devaluation of the principle that valid regulations have the force and effect of law and erroneously interpret the ex post facto prohibition by relying on the verbal sleight of hand implicit in characterizing the regulations as guideposts rather than law. The better reasoning is to acknowledge that the Parole Guidelines do have the "force and effect of law." *See* Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1114 (D.C. Cir. 1974). In the eyes of the prisoner, the guidelines are the law controlling his fate. Particularly when dealing with criminals, who should have the sanctity of law reinforced rather than eroded, the government should not play fast and loose with the definition of "law" to avoid the interdictions of the ex post facto clause. The government suffers no appreciable damage in not retroactively applying changes in parole rules. There are some decisions that appear at least somewhat sympathetic to this view. *See* United States v. Ferri, 652 F.2d 325, 328 (3rd Cir. 1981) (wooden application of changes in guidelines could violate ex post facto clause, but finding no violation in case before court); Shepard v. Taylor, 556 F.2d 648, 654 (2d Cir. 1977) (applying ex post facto clause to youth offender parole guidelines, but not to adult guidelines); *cf.* Rodriguez v. United States Parole Comm'n, 594 F.2d 170, 176 (7th Cir. 1979) (ex post facto clause violated by change in parole rules governing frequency of review of parole release decisions); United States v. Tully, 521 F. Supp. 331, 336 (D.N.J. 1981) (acknowledging possible ex post facto problems but finding no violation as applied to the particular prisoner before the court).

188. *See* Morton v. Ruiz, 415 U.S. 199, 237-38 (1974); Yellin v. United States, 374 U.S. 109, 111 & n.1 (1963); Service v. Dulles, 354 U.S. 363, 372 (1957); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 265-68 (1954).

189. Rescue Army v. Municipal Court, 331 U.S. 549, 568-69 (1947); Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

have erroneously assumed that deviations by state agencies from their own rules never rise to the level of a constitutional violation because corresponding federal agency deviations usually are analyzed as violations of federal administrative law. Faced with section 1983 actions complaining of state agency departures from their rules, these courts have dismissed the claims for failure to state a federal question.[190]

Rather than blindly adopting this mistaken assumption, courts should presume that any rule binding as a matter of state law is an entitlement requiring federal due process protection before the state can deprive a person of its benefit. It is difficult to imagine self-imposed rules that fall short of creating or protecting constitutionally cognizable entitlements while nonetheless partaking of sufficient formality and inducing sufficient reliance to make them binding under provisions of state administrative law. Federal courts, therefore, should approach with great skepticism state agency departures from their own rules.

Lastly, some rules should be breachable by either state or federal agencies. Neither a federal nor a state court should grant relief to any person disadvantaged as a result of a breach of such rules. Some might argue that there is no principled basis for acknowledging the legitimacy of breachable rules because all self-imposed regulations should be binding in a society governed by law and not men. This absolutist position, however, is as practically and theoretically untenable as its antithesis that gratuitous self-imposed rules are never binding.

It is impossible to implement or to defend a requirement of unyielding adherence to every agency rule. The doctrinal purity of making any agency statement that falls within the definition of a rule under the APA absolutely and unequivocally binding does not eliminate the problem of segregating the binding from the nonbinding, but only focuses the problem on a different definitional plane. Inevitably, some looseness in the joints would be tolerated, if by no other means than by classifying rules that should not be binding as something other than rules. All governmental institutions have prudential operating principles intended to bind them externally, and all have prudential operating principles of lesser importance intended only for internal use that are not meant to create external obligations. The breach of an internal regulation may be tolerated or not, but sanctions, if they exist, should not be matters of public consequence. Even the most firmly-entrenched internal rule banning first-class travel on airlines, for example, should not give an individual who violated the Internal Revenue Code grounds to challenge his conviction because the IRS auditor who uncovered the tax fraud booked a first-class flight to pursue the investigation.

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190. See cases cited *supra* note 3.

Conclusion

Many agency rules are in the middle range on the spectrum between rules that we intuitively regard as optional and rules that we intuitively recognize as binding. Courts in the last decade have begun to slip toward an unacceptable permissiveness in handling cases that fall into this middle ground. The Supreme Court, by supporting the unfettered discretion of agencies to disregard self-imposed procedural rules, has failed to recognize that such rules create entitlements by virtue of the protection they provide to the public. This trend should be reversed by treating most state and federal rules as binding under the due process clause. A government that expects respect for the law from its populace can do no worse than create rules—particularly procedural rules that appear to recognize individual worth—and then cavalierly take them away.