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REVIEWING AGENCY ACTION FOR INCONSISTENCY WITH PRIOR RULES AND REGULATIONS

HAROLD J. KRENT*

Judicial review remains an essential, if at times controversial, check on administrative action. Judges protect individuals and firms from the coercive power of the regulatory state. They review administrative action both for procedural regularity and substantive coherence under the Administrative Procedure Act (“APA”)¹ and countless regulatory schemes. Given bureaucrats’ lack of political accountability, external monitoring appears critical to rein in arbitrary or overly intrusive bureaucratic conduct. The propriety of external review seems even more pressing given the reality of interest group pressure, whether from the mining lobby or the Environmental Defense Fund.

Monitoring, however, need not take the form of judicial review. Congress, the President, and even regulated groups may also watch over administrative action. All can exert important checks limiting and shaping agency regulation.

Indeed, courts have recognized that their participation in the administrative process is not indispensable. They have acknowledged their own institutional constraints when faced with the prospect of reviewing certain types of administrative action. Courts have been reluctant to second-guess administrative decisions when judicially administrable standards are wanting. Courts can review such open-ended administrative decisions only at the risk of supplanting agency discretion with their own. The cost of judicial errors may eclipse the benefits that can be obtained through judicial monitoring.

Several doctrines illustrate judicial unwillingness to intrude into the administrative process. For instance, the Supreme Court has held that administrative nonenforcement is presumptively unreviewable

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1. See 5 U.S.C. §§ 551-59, 701-06 (1994 & Supp. II 1996). Section 706 authorizes judges to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion . . . [or] without observance of procedures required by law.” *Id.* at § 706.

under the APA² because it “often involves a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise.”³ Similarly, the Court has declined to review through tort suits⁴ agency action that is “grounded in social, economic, and political policy.”⁵ Courts have thus invoked the discretionary function exception in the Federal Tort Claims Act (“FTCA”)⁶ on countless occasions to protect agency discretion. Moreover, the Court has refused to disturb an agency’s distribution of regulatory benefits.⁷ Assuming legislative authorization, agencies can generally decide whether to confine or withdraw governmental subsidies free from judicial supervision. Agency action in all three contexts will be checked, if at all, by other actors within our political system, whether Congress or the President.

Yet, at the same time, courts reassert authority to monitor administrative action when they can measure the conduct against a judicially administrable yardstick. Thus, in the administrative nonenforcement context, courts review challenges when the challenger asserts that the agency’s nonenforcement is inconsistent with an agency rule.⁸ Courts similarly review agency action grounded in economic and social policy, despite the existence of the discretionary function exception, when the agency’s action contravenes a previously formulated rule or regulation.⁹ And, if agencies (or legislatures) bind themselves to confer a regulatory entitlement on an individual or group, then the Court will force the agencies to comply with due process guarantees in determining whether an entitlement is due.¹⁰

2. See *id.* § 701(a)(2) (precluding from review those issues “committed to agency discretion by law”).

3. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

4. Congress partially waived its immunity under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1994), excepting claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a) (the discretionary function exception).

5. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

6. See 28 U.S.C. § 2680(a); *supra* note 4.

7. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972).

8. See, e.g., *Clifford v. Peña*, 77 F.3d 1414 (D.C. Cir. 1996); *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1991); *Cardoza v. CFTC*, 768 F.2d 1542 (7th Cir. 1985).

9. See, e.g., *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (holding that if officials had “no rightful option but to adhere to the directive,” then the agency action was reviewable); *Irving v. United States*, 49 F.3d 830 (1st Cir. 1995).

10. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972). Regulatory estoppel poses another analogy. See generally Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own “Laws,”* 64 TEX. L. REV. 1 (1985); Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for the Agency’s Violation of Its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653 (1992).

The courts' assertion of review underscores a perplexing anomaly underlying much of administrative law. When no standards control agency action, courts will leave untouched the agency's exercise of discretion despite a pressing need for monitoring. In contrast, when the agency action is less discretionary in light of prior guidelines, then courts will review the action even though external monitoring is arguably less critical.

In effect, courts have adopted a second-best solution to the problem of discretionary agency action that is otherwise unreviewable—if the agency ties its own hands through regulations or directives, then the court will enforce such substantive restrictions on the agency's authority.¹¹ In the courts' view, review for compliance with preexisting rules does not usurp the agency's role as policymaker. Rather, review forces agencies to respect the rule of law and the reliance interests of third parties affected by agency regulation. When agencies fail to comply with their own rules, they open themselves to external review.

In Part I, this article sketches judicial doctrine in the three areas previously mentioned. The courts recognize in these contexts that they should not disturb the agency's discretionary exercise of authority because of the complex resource allocation and social policy considerations implicated. Much of the reasoning in this article is premised on the assumption that the costs of judicial review at times exceed whatever benefits accrue from enhanced judicial monitoring. In the three enclaves, however, courts have fashioned an exception to permit review when the agency has sufficiently committed itself to a particular course of action. In principal part, the courts' rationale for review rests on the fact that agencies no longer retain discretion if a prior course of action has been pledged.

The article suggests in Part II that the courts' approach is misguided. Although the impulse to exercise review over discretionary administrative action is understandable, the consequences can be perverse. Courts insufficiently have recognized that permitting third-party review of an agency's compliance with its own policy may have substantially adverse effects. First, agencies may respond to such judicial decisions by rescinding regulations or changing directives to prevent judicial oversight. Under current doctrine, judges will not intervene as long as the agency does not commit itself to any particular action. Thus, the judicial tack discourages agencies from providing

11. Courts have stated that otherwise unreviewable agency action is reviewable for other reasons as well. See *infra* note 34.

information to the public, promulgating rules to ensure that similarly situated individuals and firms are treated comparably, and effectively controlling subordinate agency officials' actions. Second, and related, judicial stress on previously established rules and regulations may, at least as a theoretical matter, prevent agencies from changing prior directives even when change is in the public interest. Agencies ought to alter policy when new social or political priorities so dictate. Third, reviewing agency action for compliance with preexisting rules may permit courts to effect policy by substituting their interpretation of the prior rule—or their view as to how to enforce compliance with that rule—for that of the agency. This is not to suggest that review for compliance with preexisting rules is never warranted, but only that the courts' doctrine in the three contexts is inadequately nuanced.

In Part III, the article canvasses several alternative courses that courts could chart when confronting allegations that otherwise unreviewable agency action conflicts with preexisting rules and regulations. First, courts could withdraw from the fray and leave agency action undisturbed. If the agency's decision is grounded in resource allocation questions, then courts should stay their hand despite the seeming presence of prior agency directives limiting the agencies' discretion. Second, courts could intervene when convinced that the private parties justifiably relied upon the previously articulated directives. In related contexts, courts have distinguished between agency rules directed at guiding officials' discretion and those aimed at conferring rights on individuals and firms.¹² If agency rules are primarily directed at limiting the discretion of lower-level officials, then such rules should not necessarily transform unreviewable agency action into an occasion for judicial review. Third, courts could inquire whether the agency intended to bind lower-level officials. If so, then ensuring that such officials conform to preexisting policy does not intrude markedly into agency discretion. Fourth, courts could make a normative evaluation as to what type of rules they should force agen-

12. See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (construing congressional directive to agency as precatory only); *Dong v. Slattery*, 84 F.3d 82 (2d Cir. 1996) (refusing to enforce an executive order on immigration priorities); *HHS v. Federal Labor Relations Auth.*, 844 F.2d 1087 (4th Cir. 1988) (en banc) (finding that an agency's compliance with an executive order on contracting out was not subject to bargaining with a federal employee union or oversight by a neutral arbitrator); *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228 (8th Cir. 1975) (holding an executive order not enforceable as law); *Local 1498 v. American Fed'n of Gov't Employees*, 522 F.2d 486 (3d Cir. 1975) (holding an executive order not enforceable as law); *Kuhl v. Hampton*, 451 F.2d 340 (8th Cir. 1971) (finding executive order nonenforceable); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965) (holding an executive order regarding collective bargaining not enforceable by third parties).

cies to follow, whether because of the reliance interest involved or the need to constrain discretion in particular contexts. The Supreme Court recently has adopted a similar approach when reviewing liberty interest claims, distinguishing between claims “of ‘real substance’” and those that are more mundane.¹³ Finally, courts could instead rely on a process approach in the three contexts, scrutinizing agency departures from prior policy to ascertain whether the departures reflect purposeful policy. Requiring a policy decision likely ensures that the agency action has been pursued only after consideration of the resource and policy issues implicated. Thus, even if judges cannot review the ultimate product of agency decisionmaking, they can augment the possibility that such actions are checked by the political process. I tentatively conclude that, although none of the approaches fits each setting perfectly, the process approach is best tailored to the FTCA, APA, and due process contexts.

I. DOCTRINES TO REVIEW OTHERWISE UNREVIEWABLE AGENCY ACTION

Courts, as well as Congress, have determined that the costs of judicial review of agency action at times outweigh the benefits. Review may be excessively expensive or, from a policy standpoint, unwise given the judiciary’s comparative lack of expertise in determining priorities for agency action. Thus, Congress and the courts have determined that judges should not second-guess certain discretionary judgments under the APA or through the medium of a tort action under the FTCA.¹⁴ Nonetheless, courts have asserted review over otherwise unreviewable agency action if the agency allegedly acts inconsistently with a prior rule or regulation. Agencies presumably lack the discretion to discard or ignore previously set rules, and the existence of such rules enables courts to weigh agency action against an easily ascertainable standard. The presence of the prior guidelines

13. *Sandin v. Conner*, 515 U.S. 472, 477 (1995) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)).

14. *See* APA, 5 U.S.C. §§ 701-06 (1994); FTCA, 28 U.S.C. §§ 2671-80 (1994). Congress, of course, has determined that judicial review is unwarranted in other contexts as well. Congress enjoys plenary power to make agency action unreviewable, at least as long as no constitutional claims are involved. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 837 (1984). For two disparate examples, consider Congress’s decision that the Office of Personnel Management’s decisions as to disability and dependency under the federal government’s disability retirement program “are final and conclusive and are not subject to review,” 5 U.S.C. § 8347(c) (1994), as well as its determination to preclude review of the FCC’s award of a “pioneer preference” to three communications giants receiving broadband personal communications licenses, which amounted to millions of dollars of discounts. *See* 47 U.S.C. § 309(j)(13)(E) (1994).

tips the calculus toward review—the benefits from judicial monitoring exceed the costs of review in light of the diminished risk of judicial usurpation of policymaking. Rule-of-law concerns suggest the importance of exercising review over what would otherwise be unreviewable agency action.

A. *Committed to Agency Discretion By Law.*

Although the historical record is not clear,¹⁵ the framers of the APA evidently envisioned that judicial review would be counterproductive in at least some administrative law settings. The APA provides that its mandate for review does not apply “to the extent that . . . agency action is committed to agency discretion by law.”¹⁶ The term “committed to agency discretion by law” is of course diaphanous and, as has been oft noted, difficult to harmonize with the APA’s general provision directing that agency action be set aside for an “abuse of discretion.”¹⁷ If agency action is to be reviewed for an abuse of discretion, how can that discretion be committed solely to the agency? The Supreme Court currently views § 701(a)(2) as a “narrow exception”¹⁸ to the review provisions in the APA, applicable only when the agency’s action is premised on resource allocation or other complex determinations that the judiciary is ill-suited to second-guess.¹⁹

*Heckler v. Chaney*²⁰ is a leading case. There, several death row prisoners contested the Food & Drug Administration’s failure to enforce the Federal Food, Drug and Cosmetic Act²¹ with respect to drugs used in lethal injections.²² The plaintiffs asserted that the drugs

15. See Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969) (reviewing his ongoing debate with Kenneth Culp Davis as to the legislative history of the APA bearing on reviewability).

16. 5 U.S.C. § 701(a)(2). The APA also precludes review “to the extent statutes preclude judicial review.” § 701 (a)(1).

17. *Id.* § 706(2)(A). The Attorney General’s report on the APA unhelpfully noted that the unreviewability section was intended to restate the prior law. See UNITED STATES DEPARTMENT OF JUSTICE, APPENDIX TO ATTORNEY GENERAL’S STATEMENT REGARDING REVISED COMMITTEE PRINT OF OCTOBER 5, 1945, S. REP. NO. 79-752, at 43-44 (1st Sess. 1945). See generally John M. Rogers, *A Fresh Look at Agency “Discretion,”* 57 TUL. L. REV. 776, 787-92 (1983).

18. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

19. See *id.* In *Overton Park*, the Court stated that § 701(a)(2) “is applicable in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’” *Id.* (quoting S. REP. NO. 79-752, at 26 (1st Sess. 1945)). For persuasive critique of the *Overton Park* formulation, see Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 704-10 (1990); Kenneth Culp Davis, “*No Law to Apply*,” 25 SAN DIEGO L. REV. 1 (1988).

20. 470 U.S. 821 (1985).

21. 21 U.S.C. § 301 (1994).

22. See *Chaney*, 470 U.S. at 823.

had not been tested for the purpose for which they were to be used.²³ Use of the drug for capital punishment, in other words, constituted an unapproved use of an approved drug.²⁴ The Court held the challenge precluded from review.²⁵

In reaching its conclusion, the Court explained that agency failures to enforce were presumptively unreviewable.²⁶ Although the Court focused on the failure to enforce context, its reasoning presented a discernible theory underlying the APA's exception from review:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.²⁷

When confronted by a challenge to the agency's allocation of scarce enforcement resources, the courts ordinarily should decline review. Courts are poorly situated to second-guess the priorities that led to the failure to enforce.

The Supreme Court soon extended the *Chaney* rationale beyond the failure to enforce context. In *Lincoln v. Vigil*²⁸ plaintiffs challenged the decision by the Director of the Indian Health Service to discontinue a special clinical service program in the southwest.²⁹ The Court overruled the court of appeals' determination that the Health Service's turnabout was reviewable.³⁰ It reasoned:

Like the decision against instituting enforcement proceedings, . . . an agency's allocation of funds from a lump-sum appropriation requires "a complicated balancing of a number of factors which are peculiarly within its expertise" As in [*Chaney*], . . . the "agency [was] far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."³¹

23. *See id.*

24. *See id.*

25. *See id.* at 837.

26. *See id.* at 831-32.

27. *Id.*

28. 508 U.S. 182 (1993).

29. *See id.* at 189.

30. *See id.* at 193-94.

31. *Id.* at 193 (quoting *Chaney*, 470 U.S. at 831-32). In between *Chaney* and *Lincoln*, the Court held § 701(a)(2) applicable to preclude review in two additional cases not involving an

The Court has therefore construed § 701(a)(2) to preclude review over agency determinations that, for a variety of political and institutional reasons, are best left to the agency. In both cases, judicial review was certainly possible. In *Chaney*, for example, the Court could have determined that the agency had failed to make a reasoned determination as to whether enforcement was warranted under the Act, or it could have questioned whether the agency had correctly assessed the facts when it decided not to enforce the Act. Similarly, in *Lincoln*, the Court could have decided whether discontinuing the program was consistent with the implicit recognition in the legislative history that the clinics be funded.³² Or, the Court could have determined that the agency at least should have articulated why reallocating its resources to a nationwide treatment program was more consistent with its statutory mandate than funding the clinics in the southwest.

Yet, to the Court, the likely costs of review outweighed the potential benefit of increased monitoring despite the possible avenues of review.³³ Courts were not as well positioned as agencies to determine whether redeployment of the Health Service's resources would ultimately benefit Native Americans or whether the FDA correctly conserved resources to investigate other allegations of misbranded drugs. The agency may well have been shortsighted in both cases, but courts were even more likely to err given their inability to assess the resource allocation questions involved.

Nonetheless, the *Chaney* Court suggested that judicial review of a refusal to enforce might still be obtainable in several contexts, of greatest relevance here when the agency's determination not to en-

agency's failure to enforce. In *Webster v. Doe*, 486 U.S. 592, 601, 603-04 (1988), the Court barred (nonconstitutional) review of the CIA Director's discharge of a gay employee. The Court reasoned that the statutory language was so open-ended as to preclude judicial second-guessing of the Director's determination. *See id.* at 600-01. The statute provided that "the Director of the Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. § 403(c) (1994); *see also Webster*, 486 U.S. at 600. In *ICC v. Brotherhood of Locomotive Engineers (BLE)*, 482 U.S. 270, 277 (1987), the Court barred review of an agency's refusal to grant reconsideration of an ICC order with respect to crew operations. The Court reasoned that because the unions could have challenged the order on grounds that they raised in their motion for reconsideration, the subsequent denial of the reconsideration motion was committed by law to agency discretion. *See id.* at 286.

32. *See Lincoln*, 508 U.S. at 190; *cf. Vigil v. Rhoades*, 953 F.2d 1225, 1229-30 (10th Cir. 1992) (giving weight to the implicit recognition in the legislative history), *rev'd sub nom. Lincoln*, 508 U.S. 182 (1993).

33. In essence, there is always "law" to apply—whether from the Constitution, positive law, or common law. The question is, rather, the impact of deciding the particular claim. As a general matter, when no benchmarks exist, judicial resolution of a controversy is likely to usurp agency policymaking. *See Levin, supra* note 19, at 734-50.

force was inconsistent with the agency's rules.³⁴ Presumably, courts could assume their traditional review function to restrain agency excesses or inadvertence when easily administrable constraints existed, such as an agency rule inconsistent with the nonenforcement decision. The Court could exercise a conventional role of resolving legal issues without second-guessing resource allocation questions of the agency. Thus, even in those contexts that would otherwise be committed by law to agency discretion, judicial review could still be important if the agency itself had curtailed its own discretion through a preexisting rule.

Indeed, Congress retains the authority at all times to override the presumption of no review and direct review despite the resource allocation questions involved. If Congress (or agencies) authorize review, then courts must grapple with the resource questions irrespective of the agency's presumed superior expertise.³⁵ As the Court stated in *Chaney*, "we essentially leave to Congress, and not to the courts, the

34. See 470 U.S. at 836. The other exceptions canvassed include a claim that the agency's refusal was "based solely on the belief that it lacks jurisdiction," see *id.* at 833 n.4, that the inaction violated the Constitution, see *id.* at 838, that the agency refused to commence rulemaking proceedings, see *id.* at 825 n.2, or that the agency "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

Several courts have also reviewed agency inaction based on the agency's articulated legal stance. See, e.g., *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753, 756-57 (9th Cir. 1990); *UAW v. Brock*, 783 F.2d 237 (D.C. Cir. 1986). In *UAW v. Brock*, the court wrote:

Even if a statutory interpretation is announced in the course of a nonenforcement decision, that does not mean that it escapes review altogether. . . .

...
Were we to accept the Department's contention, we would be handing agencies carte blanche to avoid review by announcing new interpretations of statutes only in the context of decisions not to take enforcement action.

783 F.2d. at 246.

Nonetheless, the Supreme Court signaled dissatisfaction with that exception to the unreviewability doctrine in *ICC v. Brotherhood of Locomotive Eng'rs (BLE)*, 482 U.S. 270 (1987). There, two unions filed a petition to reconsider the agency's adverse determination as to usage of particular tracks. See *id.* at 273-76. The ICC's denial of such a petition generally rests within its discretion. See *id.* at 277-78. In this instance, however, the unions argued that the denial should be reviewable because it was based on substantive legal grounds, and the ICC had responded to those arguments. See *id.* at 280-81. The Court explicitly rejected the argument, see *id.* at 282-84, forwarded by Justice Stevens, that review should proceed because the agency had based its denial of the motion on substantive legal grounds that were otherwise reviewable. See *id.* at 290-91 (Stevens, J., concurring). In other words, much as in *UAW v. Brock*, Justice Stevens asserted that agency reliance on legal reasons should open the door for review. Justice Scalia denied that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283. To the Court, the fact that an agency action *could* be reviewed did not justify review if the area were otherwise committed to agency discretion. See *id.* at 282. The D.C. Circuit has subsequently followed the signal in *BLE* to repudiate the position it had set out in *UAW v. Brock*. See *Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994).

35. The APA directs courts to review agency action for consistency with "law," 5 U.S.C. § 706, including agency-made law.

decision as to whether an agency's refusal to institute proceedings should be judicially reviewable."³⁶

Consider, for instance, the decision of the D.C. Circuit Court of Appeals in *National Wildlife Federation v. EPA*.³⁷ There, the plaintiffs asserted that the EPA could not refuse to initiate proceedings to withdraw a state's primary enforcement responsibility for safe drinking water, despite the resource questions implicated, after the EPA determined that excessive contaminants were present.³⁸ The court of appeals held that any agency failure to initiate such proceedings would be reviewable under the APA because Congress had withheld such discretion from the agency.³⁹ The EPA was compelled to take enforcement action upon finding specified contaminants in the water supply.⁴⁰

Similarly, agencies, just as clearly as Congress, can signal their intent to permit judicial review despite the resource allocation questions potentially involved.⁴¹ As the D.C. Circuit summarized, "Just as Congress can provide the basis for judicial review of nonenforcement decisions by spelling out statutory factors to be measured by the courts, so an agency can provide such factors by regulation. . . . fetter[ing] its discretion" ⁴² When agencies specify detailed factors in rules or regulations, they may intend judges to enforce their commitment to a particular course of action.

But agencies do not intend many rules to be subject to third party enforcement. Agencies promulgate internal management directives, interpretative rules, and rules of agency procedure to guide the discretion of lower level officials, not necessarily to benefit third parties. Indeed, although agencies presumably intend most legislative rules adopted through notice and comment rulemaking⁴³ to benefit private

36. 470 U.S. at 838.

37. 980 F.2d 765 (D.C. Cir. 1992).

38. *See id.* at 767-68.

39. *See id.* at 773-74; *see also* *Davis Enters. v. EPA*, 877 F.2d 1181, 1184-86 (3d Cir. 1989) (suggesting that agency decisions otherwise unreviewable under the APA can be reviewed for inconsistency with another statutory command).

40. *See National Wildlife Fed'n*, 980 F.2d at 768, 770.

41. *See, e.g., United States v. Nixon*, 418 U.S. 683, 696 (1974) (stating, "So long as [the] regulation remains in force the Executive Branch is bound by it"); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

42. *Center for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988). The D.C. Circuit, at least, has stated that agencies can bind themselves as well through internal policies. *See Clifford v. Peña*, 77 F.3d 1414, 1417 (D.C. Cir. 1996); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987); *cf. Massachusetts Pub. Interest Group, Inc. v. NRC*, 852 F.2d 9, 16-17 (1st Cir. 1988) (suggesting that courts should not be able to review agency departures from internal policies if the area is otherwise committed by law to agency discretion).

43. *See* 5 U.S.C. § 553 (1994).

parties, some provisions address only internal agency practice. Predicating review on inconsistency with rules or policies not intended to benefit private parties could significantly limit the areas of unreviewability marked out in *Chaney* and *Vigil*.

For example, in *Cardoza v. CFTC*,⁴⁴ plaintiff challenged the Commodities Futures Trading Commission (“CFTC”)’s failure to review a disciplinary action imposed by the Board of Trade of the City of Chicago. The statutory scheme left the issue of when to review a disciplinary action undertaken by a member exchange to the judgment of the agency.⁴⁵ Yet the court concluded in part that the CFTC itself had furnished sufficient standards with which to assess the agency’s decision whether to review a disciplinary action meted out by the member exchange.⁴⁶ The agency had promulgated a regulation to guide its consideration of such challenges:

The determination to review any exchange disciplinary or other adverse action is a matter committed to the Commission’s discretion. In determining whether to grant or deny review of any exchange disciplinary or other adverse action, the Commission may consider such factors as

(a): Whether the issues presented involve an important policy under the Act;

(b) The extent to which a review proceeding would interfere with the efficient disposition of other Commission business;

(c) The precedential value of a Commission decision on the issues presented;

(d) Whether there is substantial divergence among the exchanges in their treatment of similar matters;

....

(f) Any other factors which the Commission deems relevant.⁴⁷

The court explained that “[i]t is not significant in our view that the regulation does not expressly require the Commission to consider these factors, but instead states that it ‘may’ consider them.”⁴⁸ Rather, the court continued, “the use of such discretionary language in a regulation [should not] exempt an agency from its obligation to follow its rules or policies upon which the public justifiably has come

44. 768 F.2d 1542 (7th Cir. 1985).

45. See *id.* at 1547 (quoting 7 U.S.C. § 12c (1994): “The Commission may, in its discretion and in accordance with such standards and procedures as it deems appropriate, review any decision by an exchange . . .”).

46. See *id.* at 1550.

47. Rules Relating to Review of Exchange Disciplinary or Other Adverse Action, 43 Fed. Reg. 59,350, 59,352 (1978) (formerly codified at 17 C.F.R. § 9.30).

48. *Cardoza*, 768 F.2d at 1550.

to rely.”⁴⁹ The court concluded that “an aggrieved party could make a strong showing on the applicability of the . . . factors, advisory though they may be, to indicate an abuse of discretion.”⁵⁰

The recent decision of the Court of Appeals for the District of Columbia in *Clifford v. Peña*⁵¹ is similar. There, three labor unions challenged the Maritime Administration’s grant of a waiver under the Merchant Marine Act to a domestic carrier, permitting that carrier to use six foreign-built vessels flying under foreign flag in its international shipping operations.⁵² Congress had granted the agency wide discretion in considering a waiver request: “Under special circumstances and for good cause shown, the Secretary of Transportation may, in his discretion, waive” the applicable requirements.⁵³ The court acknowledged that the words of the statute “appear unrestricted and undefined.”⁵⁴ Nonetheless, as in *Cardoza*, the court found law to apply because the agency over the years had listed factors to guide its own discretion.⁵⁵ The agency, for instance, had previously enumerated six factors that “should be considered” in determining whether to grant a waiver.⁵⁶ Consequently, the court reasoned that “[t]he agency’s policies have thus provided standards rendering what might arguably be unreviewable agency action reviewable.”⁵⁷ Accordingly, the court reviewed under the APA the agency’s grant of the waiver.⁵⁸

49. *Id.*

50. *Id.* On the merits, the Court sided with the agency and held that its failure to review the disciplinary determination was not arbitrary and capricious. *See id.* at 1552-53; *cf. Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (overturning agency action in part because the agency had failed to comply with an informal rule detailing internal procedures that agency was to follow).

51. 77 F.3d 1414 (D.C. Cir. 1996).

52. *See id.* at 1415.

53. 46 U.S.C. app. § 1222(b) (1994).

54. *Clifford*, 77 F.3d at 1417.

55. *See id.*

56. *See* Certain Bulk Operators, 25 Shipping Reg. (P & F) 1261, 1264 (Mar. Admin. 1990). The six factors are:

(1) whether the proposed foreign-flag vessel will not adversely affect subsidy payments or the subsidized service; (2) whether the applicants would suffer hardship if the prohibition were enforced; (3) whether the proposed vessel use will have an insignificant effect on American-flag service; (4) whether ownership or operation of the vessels under United States registry by citizens is not practicable; (5) whether there is an insufficiency of American-flag vessels of the right type to serve the purpose; and (6) whether the requested waivers are otherwise justified by any other special circumstance and good cause.

Id.

57. *Clifford*, 77 F.3d at 1417.

58. The court concluded that the agency’s waiver was justified in light of changed economic conditions. *See id.* at 1417-18.

Consider, as well, the Sixth Circuit's decision in *Diebold v. United States*.⁵⁹ There, civilian employees of the Army challenged under the APA the Army's decision to contract out food service operations at Fort Knox, thereby eliminating a number of jobs.⁶⁰ The government responded by arguing that its decision whether to contract out food operations was committed by law to the Army's discretion.⁶¹ The court acknowledged the matrix of decisionmaking that typically underlies the decision whether to contract out, and it recognized that cost comparisons can be undertaken in myriad ways.⁶² The court also noted that other courts had previously held the contracting-out decision to be unreviewable.⁶³ Nevertheless, the court found law to apply, principally in the terms of Office of Budget and Management Circular A-76, which directs agencies through several steps to determine whether contracting out goods and services will save the public money.⁶⁴ Regulations governing military procurement incorporated the Circular.⁶⁵ The court explained that "[n]one of [the regulatory requirements is] discretionary, and it all appears to be measurable. . . . [T]hese regulations provide standards by which to judge an agency's contracting-out decision."⁶⁶ Because of the regulations, the court concluded that it could review what otherwise would be unreviewable agency action.⁶⁷ Accordingly, the court remanded the case to the district court to permit plaintiffs to pursue their claim that the agency's departure from the cost comparisons required by the Circular was arbitrary and capricious under the APA.⁶⁸

59. 947 F.2d 787 (6th Cir. 1991).

60. *See id.* at 789.

61. *See id.*

62. *See id.* at 798-99, 807-08; *see also id.* at 816 (Wellford, J., dissenting) ("[P]laintiffs' counsel conceded that cost calculations made by the agency are not reviewable, and that methods of calculation chosen by the agency are within the agency's discretion.").

63. *See id.* at 798.

64. *See id.* at 801.

65. *See id.* at 794.

66. *Id.* at 798.

67. *See id.* at 810-11.

68. *See id.* at 811. Moreover, in *Arnow v. NRC*, 868 F.2d 223, 225 (7th Cir. 1989), Illinois citizens sought review of the NRC's order refusing to suspend operation of certain nuclear power plants pending testing for safety. Petitioners asserted in part that review was appropriate in light of regulations enacted by the NRC, committing the agency to suspend operations of a nuclear facility if certain safety hazards existed. *See id.* One pertinent regulation specified that "the Director of Nuclear Reactor Commission . . . may institute a proceeding to modify, suspend, or revoke a license . . . as may be proper." 10 C.F.R. § 2.202 (1997). Although the court ultimately upheld the agency's position, it found the agency's refusal to institute such proceedings reviewable in part, on the ground that *Chaney* did not apply when the agency's failure to act is inconsistent with its own regulations. *See Arnow*, 868 F.2d at 234. The court stated that "agency regulations can 'provide a sufficient standard for meaningful review.'" *Id.* (quoting *Massachusetts Pub. Interest Research Group, Inc. v. NRC*, 852 F.2d 9, 16 (1st Cir. 1988)). It

Interestingly, *Cardoza*, *Clifford*, and *Diebold* seemingly overlook that the plaintiffs in *Chaney* alleged that the agency's failure to enforce was arbitrary and capricious because agency officials departed from prior agency policy. The agency in *Chaney* had issued a policy statement that "obligated it to investigate" the unapproved use of an approved drug when such use became "widespread" or "endanger[ed] public health."⁶⁹ Agency officials may well have considered the policy binding,⁷⁰ but the Supreme Court noted that "[w]e would have difficulty with this statement's vague language even if it were a properly adopted agency rule."⁷¹ Not every policy statement listing factors to consider should open the agency to review. The Court in *Chaney* concluded that the policy statement, particularly because it seemingly conflicted with a more official agency position, would not "provide courts with adequate guidelines for informed judicial review of decisions not to enforce."⁷²

The presence of a prior rule as in *Chaney*, therefore, should not guarantee sufficient standards for review. For instance, in *Madison-Hughes v. Shalala*,⁷³ the plaintiffs alleged that health providers funded by the Department of Health and Human Services ("HHS") discriminated on the basis of race.⁷⁴ Although the plaintiffs implicitly recognized that nonenforcement actions were generally nonreviewable, they asserted that HHS failed to comply with mandatory federal regulations governing Title VI⁷⁵ that require HHS to collect data and information from providers receiving federal assistance.⁷⁶ Accordingly, they argued that the agency's data collection practices were review-

continued that once an agency imposes standards on itself, it cannot "proceed without regard to them." *Id.* (quoting *Service v. Dulles*, 354 U.S. 363, 388 (1957)); see also *California Human Dev. Corp. v. Brock*, 762 F.2d 1044, 1047 (D.C. Cir. 1985) (asserting that the power to review the Department of Labor's method for allocating funds under the Job Training Partnership Act was in part based upon an agency regulation providing that funds "shall be allocated . . . using the best data available . . . as determined by the Department"); *Schneider Nat'l, Inc. v. ICC*, 948 F.2d 338, 343 (7th Cir. 1991); *Greater Los Angeles Council on Deafness, Inc. v. Baldrige*, 827 F.2d 1353, 1361 (9th Cir. 1987); *CC Distributors, Inc. v. United States*, 883 F.2d 146, 154 (D.C. Cir. 1989); *Hill v. Group Three Hous. Dev. Corp.* 799 F.2d 385, 394-95 (8th Cir. 1986).

69. *Legal Status of Approved Labeling for Prescription Drugs; Prescribing for Uses Unapproved by the Food and Drug Administration*, 37 Fed. Reg. 16,503, 16,504 (1972); see also *Chaney*, 470 U.S. at 826.

70. See *Chaney*, 470 U.S. at 826 (stating that the lower court held that the FDA considered the policy binding).

71. *Id.* at 836.

72. *Id.*; see also *id.* at 837-38.

73. 80 F.3d 1121, 1123 (6th Cir. 1996).

74. See *id.* at 1123.

75. 42 U.S.C. § 2000d (1994).

76. See *Madison-Hughes*, 80 F.3d at 1125-27.

able.⁷⁷ One of the regulations directed the agency to “provide for the collection of data and information from applicants for and recipients of federal assistance sufficient to permit effective enforcement of title VI.”⁷⁸ The court held the claim of inconsistency with the regulation inadequate.⁷⁹ The court reasoned that the regulation imposed no specific legal duty and held that, even if the regulation could be considered mandatory, it would still deny review because the regulation itself was committed to agency discretion by law.⁸⁰ Courts, in other words, should not second-guess the adequacy of discretionary agency action—in this case HHS’s data collection—merely because a prior regulation contemplates that some agency action take place.⁸¹

But, in contrast, the *Cardoza*, *Clifford*, and *Diebold* courts seized upon the prior existence of relatively open-ended agency pronouncements to justify review. In their view, if regulations or policies exist, judges can perform a traditional role of assessing agency action against the benchmark of a preexisting legal standard of conduct. Courts, therefore, have scrutinized agency conduct to ensure conformance not only with rules that have the force and effect of law, but also with internal agency rules of guidance and procedure. Thus, even if the agency’s action is otherwise unreviewable, courts have not hesitated to step in if they can review agency action by determining whether the action is consistent with prior agency policies. To ensure that agencies respect the rule of law, courts intervene where they otherwise would defer to agency discretion.

B. Discretionary Function Exception

Congress waived much of the federal government’s tort immunity under the Federal Tort Claims Act (“FTCA”) in 1946.⁸² The Act subjects the waiver to numerous conditions⁸³ and exceptions, excluding

77. *See id.* at 1124.

78. 28 C.F.R. § 42.406(a) (1996).

79. *See Madison-Hughes*, 80 F.3d at 1130.

80. *See id.* at 1127-28.

81. Similarly, in *Arnow v. NRC*, 868 F.2d 223, 235-36 (7th Cir. 1989), the court concluded that the regulatory language empowering the agency to suspend operation of a nuclear power plant—“as may be proper”—did not commit the agency to any particular course of action, and that the agency’s action should not be set aside. *See also Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (“Pronouncements that impose no significant restraints on the agency’s discretion are not regarded as binding norms.”).

82. Ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 2671-80 (1994)).

83. For instance, all claims must first be presented to an agency, *see* 28 U.S.C. § 2675 (1994), and the government is not liable for punitive damages. *See id.* § 2674. Moreover, there is no right to a jury trial for such claims. *See* 28 U.S.C. § 2402 (1994).

for instance, liability arising out of combatant activities,⁸⁴ or from regulation of the monetary system.⁸⁵ To some extent, such exceptions protect the government from large claims against the public fisc. For example, claims for damages due to negligent Treasury operations could be astronomical. But the exceptions also reflect a judgment that courts are ill-equipped to second-guess certain discretionary agency conduct, such as the judgment of military officials engaged in combat and that of Treasury officials adjusting fiscal policy.

To safeguard agency action further, the FTCA includes one catch-all exception applicable to every agency. The discretionary function exception precludes all claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."⁸⁶ The exception aims to safeguard a certain type of agency action from judicial second-guessing, although the character of the action is left unspecified. Not surprisingly, courts have struggled to devise tests for determining what type of discretion to protect.⁸⁷

Instead of focusing on the identity of the agency decisionmaker or whether the agency decision was reached at the planning or operation level, the Court in the 1980s focused on the type of agency action involved. In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*⁸⁸ the Court stressed the exception's purpose "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."⁸⁹ In *Varig* itself, the Court barred the plaintiffs' challenge to the Federal Aviation Administration's decision to monitor compliance with safety regulations through a spot-check system.⁹⁰ The decision to implement that system reflected a compromise between goals of safety and conserving resources.⁹¹ Checking every plane would be too costly.⁹²

84. See 28 U.S.C. § 2680(j).

85. See *id.* § 2680(i).

86. See *id.* § 2680(a).

87. For the history of the Supreme Court's doctrine in this context, see Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 U.C.L.A. L. REV. 871, 878-84 (1991).

88. 467 U.S. 797 (1984).

89. See *id.* at 814.

90. See *id.* at 820-21.

91. See *id.* at 820.

92. See *id.*

Much like the committed to agency discretion by law provision in the APA, the discretionary function exception sets aside one type of agency action as off limits to the judiciary. Reviewing some agency actions, particularly through the medium of a tort action, could threaten agency policymaking just as in the APA context. Judges could influence agencies by determining which type of agency actions are reasonable, and which are not. The standard of negligence is loose enough to permit judges to reach a wide range of results. Agencies would likely respond by adjusting their conduct to conform to judges' expected views of reasonableness. The costs and course of agency action might accordingly change.

Of course, there is no bright-line demarcation between areas in which judicial review would be worth the potential costs and those in which they would not. Questions remain as to whether "technical" or "professional" discretion falls within the exception⁹³ and whether all agency decisions bearing on an agency's finances constitute the type of economic policy shielded under the Act.⁹⁴ Nonetheless, much as in *Chaney* and *Lincoln*, the Court has developed a common law approach to unreviewability based on the type of policy underlying the challenged agency action.

Moreover, there are three reasons for particular concern over judicial review in the torts context. First, the FTCA specifies that negligence is to be assessed under state law.⁹⁵ The state law standard—applied by federal judges—exposes agencies to inconsistent judgments across the states. For instance, California may have deemed the FAA's spot-check policy negligent, but other states may have adopted less demanding standards to encourage good Samaritans.

Second, review of administrative conduct in a tort suit is likely to be biased due to the presence of a concrete injury, which may predis-

93. Compare *In re Glacier Bay*, 71 F.3d 1447, 1452 (9th Cir. 1995) (holding that scientific judgment was not protected as policy), and *Ayala v. United States*, 980 F.2d 1342, 1349-50 (10th Cir. 1992) ("We fail to see how the determination in this case can be labeled a policy decision. The choice was governed, as plaintiffs contend, by 'objective principles of electrical engineering,'" with *Ayer v. United States*, 902 F.2d 1038, 1043-44 (1st Cir. 1990) (technical judgment protected).

94. See, e.g., *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995) (rejecting exception's applicability in context of a failure to warn of dangerous road conditions, noting that "[t]he mere presence of choice—even if that choice involves whether money should be spent—does not trigger the exception"); *Arizona Maintenance Co. v. United States*, 864 F.2d 1497, 1504 (9th Cir. 1989) ("Clearly a decision to use the cheapest and easiest method in contravention of safety standards could not be a protected discretionary function . . .").

95. See 28 U.S.C. § 2674 ("The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.").

pose the decisionmaker to finding the action wrongful. Review cannot proceed as in the more detached context of an APA suit.⁹⁶

Third, the prospect of a damages award may furnish the agency even more incentive to cater to judicial attitudes than the prospect of an APA suit. If a court finds a challenged rule arbitrary or capricious, the agency retains the discretion to fashion the policy anew, perhaps even to choose the same policy buttressed merely with a different justification. The threat of a damages award, however, might deter a risk averse or even rational agency from experimenting with policies that conceivably expose it to liability. Indeed, the prospect of damages might lead agency officials to become overly cautious in carrying out governmental responsibilities. Agency officials might wrap themselves in paper work as a means of insulating the government from liability.⁹⁷

Just as in the APA context, however, courts hold otherwise unreviewable agency action reviewable if the agency acts inconsistently with one of its own rules. In *Berkovitz v. United States*,⁹⁸ the plaintiff asserted that he contracted polio after receiving a vaccine approved by the National Institutes of Health's Division of Biologic Standards.⁹⁹ He alleged that the Institute failed to obtain certain information from the manufacturer as required by the regulatory scheme, prior to issuing a license.¹⁰⁰ The Court held that "[w]hen a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply."¹⁰¹ No discretion exists, according to the Court, if a previously established policy limits the employee's choice: "[T]he employee has no rightful option but to adhere to the directive."¹⁰²

96. See Ronald A. Cass, *The Discretionary Function Exception to the Federal Tort Claims Act*, in ADMINISTRATIVE CONFERENCE OF THE U.S., 2 RECOMMENDATIONS AND REPORTS: 1987, at 1503, 1519 (1987).

97. The Food and Drug Administration, for example, might fail to evaluate new drugs expeditiously for fear of incurring governmental tort liability, even though the public as a whole may suffer from the delay. See *id.* at 1522. On the other hand, the FTCA more noticeably serves a compensation function than does the APA, thus suggesting that judicial oversight may be more important. Yet agency actions challenged under the APA can injure individuals as well, and review may be as needed in that context to prevent unfairness.

98. 486 U.S. 531 (1988).

99. See *id.* at 533.

100. See *id.* at 542. Both the statute, 42 U.S.C. § 262(d) (1994), and implementing regulations, 42 C.F.R. § 73.3 (now codified at 21 C.F.R. § 601.2 (1997)), provided that the agency must receive certain data from the manufacturers prior to issuing a license. See *Berkovitz*, 486 U.S. at 542.

101. *Berkovitz*, 486 U.S. at 544.

102. *Id.* at 536; see also Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 No-

Courts of appeals have construed the "specific mandatory directive" language in *Berkovitz* quite liberally, applying the reasoning in *Berkovitz* to reject the government's discretionary function exception defense in many contexts. For instance, consider the Ninth Circuit's decision in *Faber v. United States*.¹⁰³ There, plaintiff sued the United States Forest Service for failing to warn of the danger in diving from atop a falls in a national park.¹⁰⁴ The court noted that, in general, the failure to warn of hazards in a national park is a discretionary act involving questions of access to the park, agency resources, and likelihood of danger.¹⁰⁵ In 1986, however, an internal park management plan resolved to convey warnings to users of the falls, noting that seven percent of all accidents in the park arose due to diving at the falls.¹⁰⁶ When the plaintiff was injured in 1991, no signs had ever been constructed, and park rangers failed to warn the plaintiff verbally.¹⁰⁷ Accordingly, the court concluded that the discretionary function exception did not apply because the park service had ignored the findings in the internal management plan.¹⁰⁸

Similarly, in *Irving v. United States*,¹⁰⁹ the Court of Appeals for the First Circuit held that the discretionary function exception might not bar a FTCA claim based upon the failure of inspectors from the

TRE DAME L. REV. 447, 494 (1997) (defending *Berkovitz* inquiry on the ground that agency choice not to follow prior regulation is not the type of choice that should be protected by the discretionary function exception); Scott D. Barash, Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300, 1327 (1987) ("[T]he judiciary has always sought to hold the executive to its own declared policies; rule of law concerns have long supported judicial review of executive action.").

103. 56 F.3d 1122 (9th Cir. 1995).

104. See *id.* at 1123.

105. See *id.* at 1124-25; cf. *Grammatico v. United States*, 109 F.3d 1198, 1202 (7th Cir. 1997) (holding that Department of Defense's failure to warn of dangerous conditions of surplus property sold to the public at auction reflected balancing of economics and safety that should not be second-guessed by courts).

106. See *Faber*, 56 F.3d at 1123-24.

107. See *id.* at 1124.

108. See *id.* at 1127-28; see also *In re Glacier Bay*, 71 F.3d 1447, 1452 (9th Cir. 1995) (reaching a negligence claim arising from the failure of hydrographers to follow requirements in a fifteen-year-old agency manual); *Appley Bros. v. United States*, 7 F.3d 720, 721 (8th Cir. 1993) (addressing a negligence claim arising from the failure to follow a United States Department of Agriculture policy in checking shortages at a grain warehouse); *Tinkler v. United States*, 982 F.2d 1456, 1464 (10th Cir. 1992) (holding that the FAA violated provisions of its Flight Services Manual regarding weather reports); *Phillips v. United States*, 956 F.2d 1071, 1076-77 (11th Cir. 1992) (holding that the breach of a mandatory directive that the Army Corps of Engineers perform field safety inspections every time it visits a construction site may violate the FTCA); *Sumner v. United States*, 794 F. Supp. 1358, 1367 (M.D. Tenn. 1992) (holding that the Army violated an internal regulation requiring that it warn the public of areas used for target practice); *Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687, 698 (E.D. Cal. 1991) (holding that agency sold hazardous materials without alerting buyers of special handling requirements as required by agency policies).

109. 49 F.3d 830 (1st Cir. 1995).

Occupational Safety and Health Administration ("OSHA") to note the dangerous condition of a particular die-out machine.¹¹⁰ The court acknowledged that neither statute nor regulation required the inspector to inspect each machine.¹¹¹ Nonetheless, the court held that plaintiff was entitled to discovery to ascertain whether OSHA policy in practice permitted individual inspectors the discretion as to how to conduct each inspection and which violation to report.¹¹² Courts accordingly have applied the *Berkovitz* limitation of the discretionary function exception to cover informal as well as formal agency policy. Indeed, half of the discretionary function exception claims that the government has recently lost can be attributed to the agency's failure to follow prior policy.¹¹³

Thus, as under the APA, agency action that is otherwise unreviewable becomes reviewable if the agency's discretion is limited by preexisting agency rules, including those rules that do not have the force and effect of law. Although the agency retains the discretion whether to enact rules, once formulated the rules permit judicial oversight to the extent that judges can consider the rules in evaluating the agency's subsequent conduct. Judges can determine whether the agency has acted consistently with such rules without interfering with sensitive questions of budgetary allocations or political priorities with which judges are presumably not as adept as agencies. Courts can ascertain whether the agency's conduct comported with preexisting standards without arrogating to themselves the agencies' policymaking function.

Finally, even if judges find that the agency has acted inconsistently with the previous rules, courts might subsequently find the conduct not to be negligent. To my knowledge courts have never so held, but in rare cases they might find departures from preexisting standards to be warranted. New information or an unforeseen situation might justify the decision not to follow the prior rule.¹¹⁴ Enforcement

110. *See id.* at 831-32.

111. *See id.* at 834. Indeed, in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, the Court had shielded the agency's decision as to how best to fulfill its mission of promoting airline safety—whether by inspecting each plane, spot checking, or whatever. *See* 467 U.S. 797, 819-20 (1994); *see also supra* notes 90-92 and accompanying text.

112. *See Irving*, 49 F.3d at 835. On remand the district court determined that the discretionary function exception did not apply because the evidently unwritten OSHA policy mandated that every machine be checked. *See Irving v. United States*, 942 F. Supp. 1483, 1496-1502 (D.N.H. 1996).

113. *See Peterson & Van Der Weide, supra* note 102, at 466.

114. *Cf. Collins v. United States*, 783 F.2d 1225, 1230-31 (5th Cir. 1986) (suggesting that government officials should be able to depart from preexisting regulations in an emergency).

officials may knowingly violate internal rules of procedure, for instance, in order to prevent harm to the public, such as by seizing adulterated drugs that otherwise would be introduced into commerce. Or, the rule violated may have only an attenuated connection to the allegedly negligent agency action. Consider if the *Berkovitz* plaintiffs had alleged that the National Institutes of Health received information from the vaccine manufacturers after the time allotted by regulation had lapsed. The hypothetical delay in receiving the data in no way should suggest that the agency ultimately failed to balance resource and social policy issues in determining whether to issue a license for the vaccine. Agencies need not automatically fear liability when departing from preexisting rules, but the price is judicial review and a likely finding of liability.

C. *Procedural Due Process*

At first glance, procedural due process cases have little in common with cases brought under the APA and FTCA. Unlike in the APA and FTCA contexts, the private parties challenging agency action object to the procedures followed by the agency as well as the substance of the agency's decision. Moreover, the private parties can rely on the Constitution rather than a statute in challenging the agency action.

Nonetheless, the Court's decisions in the due process area manifest a similar dynamic to that in the APA and FTCA contexts. The Court generally has eschewed any role in determining the importance of a regulatory benefit. Rather, that decision remains political. Congress and agencies are better positioned than the Court to determine when regulated entities and individuals should receive particular agency benefits and rights.

Once an agency has circumscribed its own authority, however, then the Court will intervene by virtue of the Due Process Clause to ensure that the agency affords sufficient process in granting or denying such regulatory interests, whether they can be characterized as property or liberty.¹¹⁵ The Due Process Clause protects interests in both property and liberty created when agencies so limit their own discretion as to create a legitimate expectation of entitlement. The proce-

115. Liberty interests can also be derived from the Constitution itself. See, e.g., *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (recognizing a liberty interest to be free from the administration of antipsychotic medication).

dural framework established by an agency is not dispositive.¹¹⁶ The Court will force the agency, whether state or federal, to adhere to federal due process guarantees if the agency first has sufficiently constrained its own flexibility.

The Supreme Court's decision in *Perry v. Sindermann*¹¹⁷ provides an apt illustration. Robert Sindermann taught in the Texas state college system from 1959 to 1969: "[H]e became a professor of Government and Social Science at Odessa Junior College in 1965. . . . [and subsequently worked] under a series of one-year contracts."¹¹⁸ When the Board of Regents declined to renew his contract at the end of the fourth one-year contract, he sued, alleging in part that the Board's discharge violated his property interest in continued employment within the system.¹¹⁹ The Board offered him no official reasons for the discharge, but issued a press release accusing him of insubordination.¹²⁰ The Board did not afford him a hearing to contest the accuracy of the charges.¹²¹

To determine whether the plaintiff enjoyed a property interest in employment, the Court first inquired whether he could claim any contractual security in continued employment.¹²² Because he had only entered into one-year contractual agreements, a property interest would not normally arise.¹²³ In addition, plaintiff could not rely on any statutory grant of tenure.¹²⁴ Neither the state legislature, nor the contract, committed the Board of Regents to employ him for any more than the one year promised in the contract.¹²⁵

Nonetheless, the Court held that plaintiff could demonstrate a property interest by pointing to actions that the agencies—the college administration and the Board of Regents—had taken.¹²⁶ Plaintiff alleged that the Odessa Junior College administration had distributed a

116. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (rejecting the bitter with the sweet approach and thus preventing agencies from limiting the procedures attached to entitlements).

117. 408 U.S. 593 (1972).

118. *Id.* at 594.

119. See *id.* at 595. The plaintiff also alleged that his discharge was in retaliation for his exercise of First Amendment rights. See *id.*

120. See *id.* Sindermann had criticized the Board of Regents in a series of disputes that year, focusing in part on whether Odessa Junior College should have been changed into a four-year institution. See *id.* at 594-95.

121. See *id.* at 595.

122. See *id.* at 599-602.

123. See *id.* at 598-99.

124. See *id.* at 599-600.

125. See *id.*

126. See *id.* at 602-03.

Faculty Guide promising a type of tenure, and had encouraged faculty members to rely on that guide.¹²⁷ Moreover, the Texas College and University system as a whole had promulgated guidelines providing that a faculty member who had been employed for seven years or more had some form of job tenure.¹²⁸ Accordingly, the Court remanded the case to the lower court to determine whether, under state law, plaintiff enjoyed a property interest under either theory.¹²⁹

Although the Court will not itself determine whether an individual should enjoy a property interest in continuing government employment, it will intervene to protect property rights once an agency creates a property interest by circumscribing its authority. Individuals and firms may rely upon agency pledges or commitments as much as they rely upon the more traditional forms of real property. In recognition of the importance that governmental programs and entitlements play in all of our lives, the Court has concluded that the Due Process Clause should protect private parties from arbitrary governmental decisions depriving them of a governmental benefit even though the decision whether to confer a benefit is preeminently political. Through the promulgation of rules or regulations, an agency can create a property interest subject to the protections in the Due Process Clause.

The Supreme Court has held that agencies can create liberty as well as property interests protected under the Due Process Clause.¹³⁰ The Court has stated that “the most common manner in which a State creates a liberty interest is by establishing ‘substantive predicates’ to govern official decision-making and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.”¹³¹ In *Board of Pardons v. Allen*,¹³² plaintiffs had alleged that the mandatory language of Montana’s parole release statute created a liberty interest.¹³³ The Court recognized that it was poorly situated to second-guess parole release decisions.¹³⁴ The parole release decision

127. See *id.* at 599-601.

128. See *id.* at 600.

129. See *id.* at 603. For commentary critiquing the Court’s approach, see Rodney Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982-83), and Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984).

130. The agency’s decision to circumscribe its own authority now forms only one condition precedent to creation of a liberty interest. See *infra* text accompanying notes 287-305.

131. *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 462 (1989) (citation omitted) (quoting *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)).

132. 482 U.S. 369 (1987).

133. See *id.* at 371.

134. See *id.* at 374-75.

turned on a matrix of facts leading to a predictive judgment that could not easily be reviewed by judges.¹³⁵

But the Court then continued that if the state, as in *Sindermann*, removes an official's discretion by circumscribing the parole release decision, a liberty interest can be created.¹³⁶ The Montana statute then provided that "[s]ubject to the following restrictions, the board shall release on parole . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community."¹³⁷ Because the Montana statute used mandatory language, and because the statute limited the circumstances in which parole could be denied, the Court concluded that a liberty interest had been created.¹³⁸ Courts have determined that the language in other parole statutes sufficiently circumscribes the discretion of parole authorities so as to create a liberty interest.¹³⁹

Not all mandatory language, however, gives rise to entitlements. In *Olim v. Wakinekona*,¹⁴⁰ administrative regulations for Hawaii prisons required a hearing prior to prisoner transfers to out-of-state institutions.¹⁴¹ The regulations were phrased in mandatory terms, and plaintiff allegedly received a deficient hearing prior to his transfer to a California prison thousands of miles away from family.¹⁴² Had the Court followed the entitlement analysis set forth in *Sindermann*, it would have held that Hawaii had created a liberty interest protected under the Due Process Clause, and required the state to afford plaintiff a full hearing (as specified in the regulations) prior to transfer.

135. *See id.*

136. *See id.* at 380-81.

137. *Id.* at 376 (quoting MONT. CODE ANN. § 46-23-201 (1985)).

138. *See id.* at 376-81. For a critique, see Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984); Timothy P. Terrell, *Liberty: The Concept and its Constitutional Context*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 545 (1985).

139. *See, e.g., Hamlin v. Vaudenberg*, 95 F.3d 580, 584 (7th Cir. 1996) (recognizing a liberty interest in good time credits). The Supreme Court in *Sandin v. Conner*, 515 U.S. 472, 487 (1995), affirmed the parole line of cases, stating that it would continue to recognize liberty interests "where the State's action will inevitably affect the duration of [the] sentence." *See also Wilson v. Kelkhoff*, 86 F.3d 1438, 1446 n.9 (7th Cir. 1996) (recognizing liberty interest in parole after *Sandin*).

Prior to *Sandin*, courts had found liberty interests in an array of other contexts. *See, e.g., Harper v. Young*, 64 F.3d 563, 566-67 (10th Cir. 1995) (recognizing liberty interest in pre-parole supervision program), *aff'd*, 117 S. Ct. 1148 (1997); *Browning v. Vernon*, 44 F.3d 818, 821 (9th Cir. 1995) (finding that the state created a liberty interest by providing the opportunity to participate in a special probation program); *Layton v. Beyer*, 953 F.2d 839, 846 (3d Cir. 1992) (finding a liberty interest in not being placed in protective custody); *Winsett v. McGinnes*, 617 F.2d 996, 1007 (3d Cir. 1980) (finding a liberty interest in a work release program).

140. 461 U.S. 238 (1983).

141. *See id.* at 242.

142. *See id.* at 241-43.

But the Court held that no liberty interest had been created by the regulations, despite the mandatory language.¹⁴³ Under the regulations, the prison administrator retained the discretion to transfer prisoners irrespective of what transpired at the hearing.¹⁴⁴ In the Court's view, no liberty interest had been created: "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."¹⁴⁵ There is no entitlement to procedure, and an agency's discretionary decision need not be subject to judicial review even if mandatory procedural requirements were violated.¹⁴⁶ The agency's departure from prior regulations does not always trigger judicial scrutiny of the substance of the agency's action, at least at the constitutional level.¹⁴⁷

Thus, as in the APA and FTCA contexts, courts will review otherwise unreviewable agency actions when the agency seemingly departs from prior agency policy, in this case regulations that pledge a particular course of action involving either property or liberty interests. Courts can ascertain whether the agency action comported with the Due Process Clause without directly second-guessing the agency determination whether to confer or limit an entitlement in the first instance.

In general, therefore, courts have exercised judicial review over otherwise unreviewable agency action when agencies have failed to follow their own rules. At times, courts have inquired—as in *Cardoza*¹⁴⁸ and *Faber*¹⁴⁹—whether the agency action violated preexisting policy even when that policy may not have been binding on agency officials. Moreover, courts have reviewed agency action for inconsistency with prior rules despite the fact that the rules allegedly violated were not intended primarily for the benefit of third parties. In *Car-*

143. See *id.* at 249.

144. See *id.*,

145. *Id.* at 250.

146. See *id.* at 250-51.

147. Federalism concerns support this result. Unlike in the APA and FTCA contexts, due process review often requires federal courts to second-guess acts by state and local governmental officials. If every violation of state and local government law gave rise to a federal constitutional violation, then federal courts would become the monitors of state officials' compliance with state law, a task inviting friction between state and federal governments. See *Davis v. Scherer*, 468 U.S. 183, 195 (1984); see also *Paul v. Davis*, 424 U.S. 693, 700 (1976) (quoting *Screws v. United States*, 325 U.S. 91, 108-09 (1945)) ("[v]iolation of local law does not necessarily mean that federal rights have been invaded"); *Boveri v. Saugus*, 113 F.3d 4, 7 (1st Cir. 1997) ("A regulatory violation, like a violation of state law, is not inherently sufficient to support a § 1983 claim.").

148. See *supra* notes 44-50 and accompanying text.

149. See *supra* notes 103-08 and accompanying text.

doza and *Diebold*,¹⁵⁰ the rules rather were directed toward agency personnel. To the courts, the need to ensure consistent administration of the law outweighed any potential adverse impact on the agency's implementation of a discretionary program.

Judicial review unquestionably may have benefits in the three contexts considered. Although I discuss the attributes of judicial oversight more fully later,¹⁵¹ some summary is appropriate here. First, when agencies have limited their own discretion, review can help ensure that the agency treat similarly situated individuals equivalently, a fundamental principle of public law. Review for consistency furthers the ideal of agency legitimacy.¹⁵²

In addition, review for compliance with prior rules and regulations limits arbitrary governance. The potential for bias or vindictiveness is reduced.¹⁵³ At the same time, the appearance as well as the reality (one hopes) of propriety is preserved. Disputes with government regulators often leave private parties frustrated and demoralized. The government's advantage in resources, in tandem with labyrinthine regulations, may suggest that the playing field is not level. Requiring administrators to follow their own rules thus may serve to instill faith in government.

Moreover, individuals and firms may well have relied on the prior agency law in structuring their affairs. Private parties may have shaped deals or expended resources in reliance on government rules and policies. Agencies honor the tremendous individual interest in predictability when they keep their commitments. Thus, concerns both for promoting rule of law values and respecting reliance interests bolster the case for judicial review. Judicial review ensures that governmental programs, which affect many of our lives so fundamentally, are administered in an evenhanded fashion.

II. UNINTENDED IMPACT OF JUDICIAL REVIEW

In the three contexts canvassed, courts have exercised review over discretionary agency actions when the agency has limited its own discretion. In the APA context, courts review otherwise unreviewable

150. See *supra* notes 59-68 and accompanying text.

151. See *infra* notes 250-58 and accompanying text.

152. See Rubin, *supra* note 129, at 1105 ("Nothing leaves a state agent as much room for venality, hatred, caprice, or carelessness as the power to ignore the applicable rules."); see also Yoav Dotan, *Why Administrators Should be Bound by Their Policies*, 17 OXFORD J. LEGAL STUD. 23, 25-31 (1997) (arguing that agencies should be bound to follow their own policies).

153. See Dotan, *supra* note 152, at 29-30.

action to promote consistency with previously articulated rules. In FTCA cases, courts exercise review to assess the reasonableness of the agency's action, taking into account the agency's departure from pre-existing rules and regulations. In due process cases, courts inquire whether the agency has circumscribed its discretion sufficiently to create a legitimate expectation of an entitlement. The assertion of judicial review in the three contexts is based, at least in part, on the ability of courts to monitor agency action without second-guessing the agency's discretionary judgments as to enforcement or political priorities. The premise is shaky, and review ultimately may prove counterproductive.

The impact of review has been most noted in the due process context. Requiring hearings can be an expensive business; so much so that the resources devoted to the governmental program must be redirected from intended beneficiaries to staffing hearings.¹⁵⁴ Moreover, the agency may alter eligibility criteria to simplify the issues to be resolved at the hearing¹⁵⁵ or may seek to limit the entitlement itself in light of budget concerns.

But there are significant costs even aside from potentially time-consuming hearings. Review likely results in similar consequences in all three contexts. First, the courts' doctrine provides an incentive to agencies to create as few clear rules as possible. The fewer and murkier the rules, the less likely that the agency will be saddled with liability from a tort judgment, with review of otherwise unreviewable actions under the APA, or with the need to provide hearings because it has created a regulatory entitlement. Second, review—as a theoretical matter—impedes agencies' ability to modify or disregard prior directives because the courts have signaled that change can only come if particular procedures are followed. Third, judges may misconstrue the nature of the prior rule and thereby impair the agency's efforts to fashion effective policy.

A. *Incentives to Formulate Rules*

Judicial review to force agencies to adhere to previously fashioned rules will unquestionably discourage agencies from articulating

154. See Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 767-68 (1990); see generally Symposium, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective*, 56 BROOK. L. REV. 729 (1990).

155. For sophisticated analyses, see JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) and DANIEL J. BAUM, *THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE* (1974).

rules or policies in the first instance. Such review triggers an activity-level effect, altering the amount and nature of subsequent policymaking. The magnitude of the disincentive remains in question: agencies have numerous reasons to formulate policy despite the risk that they open themselves to judicial review. For instance, senior agency officials may wish to circumscribe the discretion of subordinate agency officials, and clear rules may help current administrators exert influence over their successors in office. Nonetheless, at least at the margin, judicial review to ensure compliance with previously articulated rules and regulations brings with it a cost, and agencies are not immune from such considerations when deciding what type of rules to formulate.

Numerous studies have demonstrated agency sensitivity to judicial review.¹⁵⁶ Commentators have sketched both beneficial and deleterious effects flowing from the potential for review, depending upon both context and commentator. Judicial review has sharpened agency analysis and, on occasion, rectified gross errors.¹⁵⁷ On the other hand, the prospect of review has prompted agencies to devote considerable time and resources into papering the record to withstand review. Even when compiling extensive rulemaking records, agencies lose a substantial portion of cases when the rules are challenged in court.¹⁵⁸ The National Highway Transportation Safety Administration, for instance, arguably shifted resources from rulemaking to recalls in an effort to avoid problematic judicial review in the former context.¹⁵⁹ The Federal Energy Regulatory Commission formulated policy through license proceedings, as opposed to rulemaking, in part to circumvent

156. For a sampling of leading views, see JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990), R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983), JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* (1988), Barry Boyer, *The Federal Trade Commission and Consumer Protection Policy: A Postmortem Examination*, in *MAKING REGULATORY POLICY* 93 (Keith Hawkins & John Thomas eds. 1989), Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995), Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991), Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1 (1989).

157. For a sampling of contexts, see CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 160-92 (1990).

158. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 1992 DUKE L.J. 1385 (1992).

159. See MASHAW & HARFST, *supra* note 156, at 147-71; see also Terence M. Scanlon & Robert A. Rogowsky, *Back Door Rulemaking: A View from the CPSC*, REGULATION, Jul.-Aug. 1984, at 27.

review in the rulemaking context.¹⁶⁰ On balance, the legacy of recent judicial review of rulemaking is mixed, and one byproduct is fewer rules. It should not be surprising, therefore, that agencies may hesitate to bind themselves with rules when one of the consequences is judicial review, with the attendant costs in terms of financial expense and judicial errors.

No definitive empirical study is possible. There are myriad reasons to explain why agencies have formulated fewer or more discretionary rules. Resources may become tight, or political priorities change. Isolating the impact of judicial review is therefore quite difficult.

Nonetheless, some understanding of the impact on agencies can be gleaned from considering agency reaction to judicial decisions in the 1970s and 1980s holding that mandatory language in parole statutes and regulations gives rise to a protected liberty interest.

The Supreme Court first addressed the parole context in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*.¹⁶¹ The Court initially asserted that “[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.”¹⁶² Indeed, the Court continued that the parole determination is not easily subject to judicial review because it “involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker”¹⁶³ The Court recognized that “[i]f parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole.”¹⁶⁴ Nevertheless, the Court stated that statutory and regulatory language can create an “expectancy of release . . . entitled to some measure of constitutional protection,”¹⁶⁵ opening the agency to due process review. Within ten years, the Court reiterated in *Board of Pardons v. Allen*¹⁶⁶ that the mandatory language in a parole release statute could, and in fact had, created a liberty interest.¹⁶⁷ Recognizing a liberty interest led to the requirement of hearings and to ex post review by judges to ensure that the

160. See Jim Rossi, *Reexamining Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 804-06.

161. 442 U.S. 1 (1979).

162. *Id.* at 7.

163. *Id.* at 8.

164. *Id.* at 13.

165. *Id.* at 12.

166. 482 U.S. 369 (1987).

167. See *id.* at 381.

previously promulgated parole criteria were applied in a consistent manner.¹⁶⁸

State legislatures and administrative officials reacted. In addition to Nebraska and Montana, at least ten other jurisdictions had previously enacted traditional parole statutes or regulations that arguably were phrased in mandatory terms.¹⁶⁹ The mandatory language, in conjunction with the structure of the parole statutes, gave rise to the possibility that courts would conclude that a liberty interest had been created. And, in several of the jurisdictions, courts so found.¹⁷⁰ Out of those twelve jurisdictions, six legislative or administrative bodies amended rules after *Greenholtz* to minimize the possibility of creating a liberty interest, including the Montana legislature which amended the statute to bypass the Court's ruling in *Allen*.¹⁷¹

The response of Georgia is illustrative. Under the regulatory system, the Board of Pardons and Parole had promulgated a Georgia Parole Decision Guidelines System, setting forth a step-by-step system to evaluate whether an inmate was entitled to parole.¹⁷² The Board assigned an inmate a crime severity level, and a parole success likelihood score.¹⁷³ Based on a combination of the two, the Board then established a target release date.¹⁷⁴ The parole statute directed that the "guidelines system shall be used in determining parole actions on

168. *See id.*

169. *See* GA. CODE ANN. § 42-9-40 (1997); 9 GUAM CODE ANN. § 80.72 (1992); MO. REV. STAT. § 549.261 (1978) (repealed 1982); N.J. STAT. ANN. § 30:4-123.51(a)-(i) (1997); R.I. GEN. LAWS § 13-8-14 (1994); VT. STAT. ANN. tit. 28, § 501(a) (1996); W. VA. CODE § 62-12-13(d) Supp. 1997); D.C. MUN. REGS. tit. 28, §§ 204.19-.20 (prior to 1994 amendment) (discussed in *Ellis v. District of Columbia*, 84 F.3d 1413, 1416 (D.C. Cir. 1996)); ILL. ADMIN. CODE tit. 20, § 1610.20 (1985) (section repealed 1985); TENN. COMP. R. & REGS. Ch. 1100-1-1-.06 (prior to 1985 amendment) (discussed in *Wright v. Trammel*, 810 F.2d 589, 591 (6th Cir. 1987)).

170. *See* *Bermudez v. Duenas*, 936 F.2d 1064, 1067 (9th Cir. 1991) (Guam); *Mayes v. Trammell*, 751 F.2d 175, 179 (6th Cir. 1984) (Tennessee); *United States ex rel. Scott v. Illinois Parole & Pardon Bd.*, 669 F.2d 1185, 1192 (7th Cir. 1982); *Williams v. Missouri Bd. of Probation & Parole*, 661 F.2d 697, 698 (8th Cir. 1981); *Watson v. DiSabato*, 933 F. Supp. 390, 395 (D.N.J. 1996); *Petrarca v. Rhode Island*, 583 F. Supp. 297, 301 (D.R.I. 1984); *Tasker v. Mohn*, 267 S.E.2d 183, 198 (W. Va. 1980).

171. *See* MO. ANN. STAT. § 217.690 (West 1996) (adopted 1982); MONT. CODE ANN. § 46-23-201 (1996) (amended in 1989); D.C. MUN. REGS. tit. 28, §§ 204.19-.20 (1997) (amended in 1994); ILL. ADMIN. CODE tit. 20, § 1610.50 (1996) (adopted 1985); TENN. COMP. R. & REGS. Ch. 1100-1-1-.06 (1986) (amended in 1985); *Sultenfuss v. Snow*, 35 F.3d 1494, 1496-97, 1497 n.2 (11th Cir. 1994) (en banc) (discussing Georgia Parole Decision Guidelines System which mentions *Greenholtz* in a notice affirming the parole board's discretion not to grant parole); *see also Wright*, 810 F.2d at 591 (discussing Tennessee rules changes).

172. *See* *Sultenfuss*, 35 F.3d at 1495 (discussing the Georgia Parole Decision Guidelines System).

173. *See id.* at 1497.

174. *See id.*

all inmates.”¹⁷⁵ Nonetheless, the Board added a “notice” to its guidelines to make its intent clear:

THE BOARD SPECIFICALLY RESERVES THE RIGHT TO EXERCISE ITS DISCRETION UNDER GEORGIA LAW TO DENY PAROLE EVEN THOUGH GUIDELINES CRITERIA ARE MET BY AN INMATE. IT IS NOT THE INTENTION OF THE BOARD TO CREATE A “LIBERTY INTEREST” OF THE TYPE DESCRIBED IN GREENHOLTZ V. NEBRASKA PENAL INMATES 442 US 1 (1979).¹⁷⁶

The Board’s action may have been inconsistent with the legislature’s intent. The *en banc* court of appeals for the Eleventh Circuit, however, concluded that no liberty interest was created.¹⁷⁷

The changes made by the District of Columbia present another context. Under a complicated point system, D.C. regulations provided that certain adult and youth offenders “shall” be granted parole.¹⁷⁸ The city council subsequently replaced “shall” with “may.”¹⁷⁹ More significantly, the council rescinded two appendices that had guided officials in determining an offender’s suitability for parole.¹⁸⁰

Legislatures and agencies have acted to ensure that liberty interests are not created in other contexts as well, whether work release programs or prison transfers.¹⁸¹ Moreover, with respect to property rights, countless municipalities and school boards presumably have altered practices to minimize the protections that employees receive to avoid any finding of a property interest.¹⁸² School board officials, for

175. GA. CODE ANN. § 42-9-40.

176. See *Sulterfuss*, 35 F.3d at 1503 (quoting Parole Guidelines System, Annexure 2).

177. See *id.* at 1500-03.

178. See *Ellis v. District of Columbia*, 84 F.3d 1413, 1415-16 (D.C. Cir. 1996) (summarizing the D.C. parole regulations).

179. See Technical Amendments Act of 1994, D.C. Act 10-302, § 52(c)-(e), 41 D.C. REG. 5193, 5203 (1994) (codified as amended at D.C. MUN. REGS. tit. 28, § 204.19-.21); see also *Ellis*, 84 F.3d at 1417 n.4.

180. See § 52(f), 41 D.C. REG. at 5203 (repealing appendices); *Ellis*, 84 F.3d at 1415-16 (describing appendices).

181. See generally *Anyon v. Mach*, No. 93-1787, 1993 U.S. App. LEXIS 31950, at *4-5 (1st Cir. Dec. 9, 1993) (holding that when state revised a short term release program for patients confined to the Massachusetts Treatment Center for Sexually Dangerous Persons, it extinguished a possible liberty interest in release); *Tracy v. Salamack*, 572 F.2d 393, 394-96 (2d Cir. 1978) (finding that state altered transition program for prisoners in a way that extinguished the underlying entitlement); *Harrison v. Raney*, 837 F. Supp. 875, 879-81 (W.D. Tenn. 1993) (involving Tennessee agency that changed regulation so as not to create liberty interest in place of incarceration); cf. *Young v. Harper*, 117 S. Ct. 1148 (1997) (explaining that Oklahoma altered regulations governing pre-parole release so that inmates released on pre-parole had no expectation that they would not be reincarcerated if the Governor determined not to grant parole).

182. For instance, consider that the North Harris Montgomery Community College District now includes in its contract for chancellor the following disclaimer: “A contract of employment with this District creates a property interest in the position only for the period of time stated in the contract. Such a contract creates no property interest of any kind beyond the period of time

instance, likely rely upon faculty handbooks much less for fear of creating a property interest.¹⁸³ Counsel for such administrative bodies caution against use of mandatory language in a wide variety of settings.¹⁸⁴

The number of administrative changes is difficult to estimate. But one can comfortably conclude that judicial intervention to compel compliance with prior rules and regulations has some effect in prodding agencies to rescind or amend the rules.

The more important question is whether the changes to agency practices have been beneficial. Some changes, such as Georgia's insertion of cautionary language in its parole statute, probably has had little impact on agency behavior one way or another. But D.C.'s repeal of the guidelines detailing how officials are to make the parole determination likely has a more substantive impact. In the future, there will be less structure guiding the parole determination, and less of a way for D.C. officials to ensure that parole determinations are even-handed. Similarly, school officials can no longer spell out as many duties and benefits in faculty handbooks. Agencies in general may be less willing to publicize internal policies, lest the dissemination of such policies subject the agency to subsequent review.¹⁸⁵ Whether such changes benefit the public is questionable, and the changes are directly attributable to the courts' due process jurisprudence.

Admittedly, there is likely greater impact on agencies from judicial review in the due process context than in either the APA or FTCA setting. A finding of a liberty or property interest triggers hearing requirements. In contrast, agencies cannot gauge as accu-

stated in the contract. *Perry v. Sindermann*, 92 S. Ct. 2694 (1972). . . ." North Harris Montgomery Community College District, *NHMCCD Policy Manual* (visited Feb. 12, 1997) <<http://www.nhmccd.cc.tx.us:80/policy/B/bfb.html>>.

183. See, e.g., *Thomas v. Ward*, 529 F.2d 916, 919 (4th Cir. 1975) (stating that faculty handbook "fostered an understanding that . . . teachers would be employed on a continuing contract basis"); *Zimmerer v. Spencer*, 485 F.2d 176, 178 (5th Cir. 1973) (holding that faculty handbook created expectation of continued employment); *Jacobs v. Stratton*, 615 P.2d 982, 984-85 (N.M. 1980) (remanding for trial to determine whether handbook created entitlement).

184. A similar change can arise whenever agencies attempt to circumvent judicial review. For instance, in *Community Nutrition Inst. v. Young*, 818 F.2d 943, 945, 949 (D.C. Cir. 1987), the court held that the Food and Drug Administration could not issue action levels for aflatoxin (a carcinogenic contaminant) in corn, without first engaging in notice-and-comment rulemaking. The court reasoned that, because the agency had described its own action levels as binding, the levels were legislative rules subject to notice and comment. See *id.* at 947-48. In response, the agency disclaimed any intention to be bound by the action levels. See Joel E. Hoffman, *Public Participation and Binding Effect in the Promulgation of Nonlegislative Rules: Current Developments at FDA*, 22 ADMIN. & REG. L. NEWS 1, 10 (1997). Five years later the agency extended that policy, eschewing reliance on all of the guidance documents that it provides to the public. See *id.*

185. For a recent example in a related context, see Hoffman, *supra* note 184.

rately whether other rules or policies will become the lever justifying review in the APA or FTCA context. For instance, the National Park Service in *Faber* may not have considered that its study of risks at a particular national park would ultimately subject it to liability years later. Similarly, when OSHA officials instructed inspectors on the proper procedures to follow in conducting inspections, they may not have contemplated that such instructions would later expose them to suit as in *Irving*. And the Maritime Administration in *Clifford* did not expect its listing of factors concerning waivers to subject all grants and denials of waivers to suit. But the decisions in *Faber*, *Irving*, and *Clifford* send an unmistakable signal. Agency counsel will likely advise drafting as few mandatory policies as possible, and may suggest limiting the formal directives that agency heads provide to subordinates.¹⁸⁶

On the other hand, agencies may have sufficient incentives to issue rules and regulations irrespective of the risk that the new rules will expose the agency to suit.¹⁸⁷ OMB, for instance, may decide that the benefits of circumscribing agencies' contracting-out decisions outweigh the prospect that some contracting-out decisions may become mired in litigation and perhaps overturned because of promulgation of the Circular. OSHA surely desires its inspectors to do a thorough job despite the threat of suit.

But the parole example suggests that, at least at the margin, agencies will draft less clear rules to govern subordinate agency officials' discretion. That change is problematic. Commentators have long encouraged agencies to issue more rules, and have decried the ossification that is seemingly a byproduct of activist judicial review.¹⁸⁸ They have argued that encouraging rulemaking generally benefits the public.¹⁸⁹ Rules minimize the discretion exercised by subordinate agency officials, afford greater notice to the public of the agency's regulatory strategy, and to some extent ensure equal treatment among similarly

186. For instance, counsel will likely urge that any future study of risks in the national park system be couched in the vaguest of terms, and that any rules to govern inspections include a clause entrusting the thoroughness of any inspection to the discretion of the inspector.

187. See generally Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 76-103 (1983).

188. See, e.g., McGarity, *supra* note 158; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); see also Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking* 75 TEX. L. REV. 483 (1997).

189. See generally CORNELIUS M. KERWIN, *RULEMAKING* (1994); CARNEGIE COMMISSION, *RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING* 56-57, 109 (1993); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

situated individuals. Such benefits can be lost if agencies avoid rules because of the prospect of judicial review. The parole example may not be the exception. Thus, predicating review on a claim of inconsistency with prior rules and regulations may prompt agency practices that do not serve public needs.

B. *The Need to Change Prior Rules*

Agencies frequently change policy when considering how to resolve disputes with private parties, whether in the rulemaking or adjudication context. As a theoretical matter, reviewing agency action for compliance with preexisting policy could dampen agency efforts to change policy.¹⁹⁰

Rulemaking provides the clearest context. Although rules promulgated through notice-and-comment rulemaking under the APA generally have prospective application only,¹⁹¹ those rules frequently reflect changes or even reversals of prior policy. For instance, in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,¹⁹² the Court stated that "we fully recognize that '[r]egulatory agencies do not establish rules of conduct to last forever,' and that an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"¹⁹³ The prior rule may have been based on outdated data, or political priorities may have altered. Accordingly, the Supreme Court in *Motor Vehicle* held that the same standard of review applies to changes in agency rulemaking as applies to formulation of the initial rule.¹⁹⁴ As the Supreme Court has since explained, agencies should respond to changing political winds:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of

190. I do not claim that judicial review of agency action for compliance with preexisting policy has prevented agencies from changing policy, but only that it could. Indeed, the willingness of courts to allow agencies to change policy in most contexts suggests that caselaw reflects a process approach—in fact if not in name: Courts will second-guess agency failure to comply with prior policy only when the agency's action does not itself constitute new policy. *See infra* text accompanying notes 323-38.

191. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) (holding that agencies can enact rules with retroactive reach only when Congress explicitly vests agencies with such authority).

192. 463 U.S. 29 (1983).

193. *Id.* at 42 (alteration in original) (citations omitted); *see also Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1017 (9th Cir. 1987) (holding that an agency can change a prior general statement of agency policy by substituting a new general statement of agency policy without going through notice and comment rulemaking).

194. *See* 463 U.S. at 41.

the Government to make such policy choices—resolving the competing interests which Congress itself . . . left to be resolved by the agency charged with the administration of the statute in light of everyday realities.¹⁹⁵

The Court has also upheld the ability of agencies to change or formulate policy through adjudication. In the adjudicative context, agencies apply new policies to resolve the controversy before them almost as a matter of course. Private parties appearing before agencies are aware that the agency may fashion a new rule to resolve the dispute. The leading case is perhaps *SEC v. Chenery Corp.*¹⁹⁶ There, the SEC conditioned its approval of a public utility holding company's reorganization on the officers' willingness to disgorge shares of preferred stock they had purchased during the reorganization period.¹⁹⁷ The SEC had not found any wrongdoing, and had never before forced directors to sell stock legitimately purchased.¹⁹⁸ The Court explained that

problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. . . .

. . . Every case of first impression has a retroactive effect, But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.¹⁹⁹

Agencies often modify policy in the context of particular factual disputes.

Each time that courts review agency action for compliance with preexisting rules and regulations, however, courts could deny agencies the ability to change the law. For instance, in *Faber*, the National Park Service may have determined, based on new information, that its limited resources were best spent warning of hazards at other parts of the national park as opposed to a spot atop that one cliff. The Maritime

195. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). The Supreme Court more recently has deferred to an agency switch in position, reasoning that "change is not invalidating" as long as the change is explained and no reliance interests are needlessly sundered. *Smiley v. Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996).

196. 332 U.S. 194 (1947).

197. *See id.* at 199-209.

198. *See id.* at 198.

199. *Id.* at 202-03. The Court's reasoning prompted an impassioned dissent from Justice Jackson who decried the "administrative authoritarianism, this power to decide without law It calls to mind Mr. Justice Cardozo's statement that 'Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable.'" *Id.* at 216-17 (Jackson, J., dissenting) (quoting *THE GROWTH OF THE LAW* 3 (1924)).

Administration in *Clifford* may have concluded that waivers for foreign flag vessels would now be appropriate given changing economic conditions. And, in *Board of Pardons v. Allen*, Montana might have decided to alter the way it implemented the parole release statute in order to protect the public from inmates with greater recidivist tendencies. In a wide variety of settings, agencies may wish to implement new policies to address contemporary realities, despite the possible existence of previous agency policies charting a different course.²⁰⁰ In the APA, FTCA, and due process contexts, courts may discourage agencies from applying policies responsive to contemporary concerns if they stringently review agency actions that depart from preexisting rules and regulations.²⁰¹

Agencies, therefore, arguably should be able to formulate new policies and apply them to the case at hand, in both the rulemaking and adjudication contexts, at least as long as they do not thereby punish prior behavior.²⁰² Any judicial doctrine that forces agencies to fol-

200. Any agency decision to depart from preexisting rules might undermine a reliance interest. The justification for applying the Due Process Clause to protect regulatory entitlements stems from the need to protect individuals and firms who have relied on the existence of governmental benefits, whether a job, welfare, or a government grant. When private parties have reason to rely on continued availability of such benefits, then agencies arguably should not be able to change course to deprive them of such benefits, absent notice.

But even if no entitlements are created, private parties often rely on the existing regulatory framework. Private parties take into account the current regulatory system when structuring their business affairs, irrespective of the lack of a property interest. Change in the status quo may affect those interests directly. Nonetheless, courts have upheld agencies' authority to formulate new policies without affording notice. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (holding that the Board may choose whether to fashion policy through rulemaking or adjudication); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1997) (en banc) (holding that the FERC may apply a new statutory interpretation to resolve a dispute with private parties); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972) (detailing the factors for determining whether an exception should be made allowing the retroactive application of new policy).

201. Indeed, the Supreme Court has been reluctant to force agencies to remain tied to earlier erroneous pronouncements of policy, even when detrimental reliance has occurred. In *OPM v. Richmond*, 496 U.S. 414, 417 (1990), for instance, a former employee of the Navy Department sought advice from Navy personnel about how much he could earn without jeopardizing his government annuity. A Navy official informed Richmond of his rights based on regulations that had been superseded, and following that advice, Richmond accepted the new employment. See *id.* at 417-18. Later, however, the Office of Personnel Management cut his annuity because of his earnings. See *id.* at 418. The Supreme Court rejected Richmond's estoppel claim, reaffirming its longstanding view that the government should never be held to the pledges of its employees if those pledges are in fact contrary to government policy. See *id.* at 419-20. The government, in other words, can rely on current policy to deny a claim even when a private party is misinformed or misled as to the nature of that policy.

202. When a significant statutory penalty is at stake, courts have refused to permit agencies to apply unforeseen policy to the parties before it. In *General Electric Co. v. EPA*, 53 F.3d 1324, 1325 (D.C. Cir. 1995), the court refused to enforce a fine. The court reasoned that "[t]he due process clause . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Id.* at 1328 (second omission in

low preexisting doctrines has the potential cost of stymieing agency ability to address problems based on contemporary technological, political, and economic realities.

C. *Impact of Third Party Review*

In addition to the activity-level effect problems and the possibility of discouraging agencies from changing rules, judicial review more directly impinges upon agency policymaking by permitting judges to interpret the nature and scope of the prior agency rule allegedly violated. Courts may intrude into agency policymaking when they disagree with agencies as to whether the prior rules are binding; whether the prior rules were intended to benefit private parties; what requirements the rules delineate; and the consequences attendant upon a failure to follow the prior rules.²⁰³

1. Binding v. Precatory rules

Courts have not always sufficiently recognized the heterogeneous nature of agency rules. Agencies do not intend many policy statements and directives to be binding in the same sense as most, if not all, legislative rules. To predicate judicial review on non-binding policy guidance or directives would chill agencies from offering guidance to lower level officials and private parties alike.

Agencies should be able to provide guidance unfettered by the possibility of later suit because of an official's subsequent failure to follow such guidelines. For instance, agencies may set guidelines, as in *Cardoza*, to guide the discretion of lower level employees without intending to commit the agency to any particular course of action. Simi-

original) (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)). The court further explained that the agency regulations did not clearly enough afford the company notice as to its responsibilities. *See id.* at 1330; *see also Kropp Forge Co. v. Secretary of Labor*, 657 F.2d 119, 122-24 (7th Cir. 1981) (holding that statutes and regulations penalizing conduct must provide an adequate warning). Changed policy may conflict with reliance interests, and courts have accordingly struggled in reaching an accommodation between agency flexibility and individual interests. Courts have only second-guessed the agency's determination to change policy when the agency has applied quasi-criminal sanctions to previously lawful conduct. Despite the reliance interests, therefore, *Chenery* remains the norm, and agencies routinely apply new policies to resolve contemporary disputes.

203. *But see* Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 333 ("[I]t is for the courts, not the executive, to decide when and whether self-imposed executive limitations should be judicially enforced."); Rodney A. Smolla, *The Erosion of the Principle that the Government Must Follow Self-Imposed Rules*, 52 FORDHAM L. REV. 472, 473 (1984) ("[M]ainstream principles of constitutional and administrative law require courts to reinvigorate the precept that an agency must follow its own rules.").

larly, OSHA may encourage inspectors to abide by certain standards in conducting investigations on the shop floor, as in *Irving*, to treat businesses comparably. And parole release guidelines ensure to some extent that similarly situated prisoners are treated alike, without straightjacketing officials as they review specific cases. Senior agency officials may intend that subordinate officials conform their conduct to the guidelines or standards, but allow for deviation given the wide array of circumstances that may confront the decisionmaker.

Moreover, even if courts were only to review agency departures from binding policy, courts and agencies may disagree as to whether the preexisting agency rule is binding. The agency in *Faber* no doubt argued that its study of the risks in the park was not intended to bind agency officials to any particular course of conduct. The regulation in *Cardoza* reads more as a guide than as a mandatory directive.²⁰⁴ Courts, in other words, have considerable latitude in ascertaining which agency rules are binding.²⁰⁵

2. Intended audience for rule

Some agency regulations clearly benefit private parties, and agencies intend private parties to rely on such rules. Absent notice of change, private parties should be entitled to rely on agency compliance with such regulations, whether the regulations are legislative or not. In *United States ex rel. Accardi v. Shaughnessy*,²⁰⁶ the Justice Department had promulgated regulations mandating that an alien was entitled to a hearing before the Board of Immigration Appeals to argue in favor of suspending a deportation order.²⁰⁷ The Court held that, as long as the regulations remained in effect, "the Attorney General denies himself the right to sidestep the Board or dictate its decision"²⁰⁸ Agencies lack the discretion to disregard rules that were formulated to benefit private parties.

But many rules cannot be so characterized. Agencies fashion rules to guide the performance of lower level officials. The logic of permitting private parties to challenge such officials' compliance with the rules, even when the rules are legislative, is not self-evident. In-

204. See *supra* note 47 and accompanying text.

205. See Raven-Hansen, *supra* note 203, at 301-11 (tracing the common law distinction between mandatory and precatory statutory commands); cf. Edward L. Rubin, *Discretion and its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997) (explaining that the idea of discretion can be more helpfully understood in terms of supervision and policy).

206. 347 U.S. 260 (1954).

207. See *id.* at 265-66.

208. *Id.* at 267.

deed, in a variety of contexts, courts have recognized the costs of private enforcement of rules designed to improve internal agency performance.

For instance, in *Independent Meat Packers Ass'n v. Butz*,²⁰⁹ a meat-packing association sought to enjoin enforcement of Department of Agriculture regulations revising grading standards for beef.²¹⁰ The association alleged that the new standards violated the terms of Executive Order No. 11,821 “which require[d] an evaluation of the inflationary impact of all major legislative proposals, rules, and regulations” issued by executive agencies.²¹¹ OMB Circular No. A-107, in turn, implemented the Order and directed agencies to consider the effect of new rules “on employment and energy supplies or demand.”²¹² At the district court level, the association had evidently persuasively argued that the agency had deviated from the guidelines set forth in the Circular.²¹³

The court of appeals, however, held that the Order (and implementing Circular) was “intended primarily as a managerial tool for implementing the President’s personal economic policies and not as a legal framework enforceable by private civil action.”²¹⁴ To permit review at the behest of private parties could well result in transforming the economic policies envisioned by the President.²¹⁵ Judges, instead of the President, would enjoy final say on a wide variety of factors, such as forecasting energy supplies or calibrating future inflation rates.²¹⁶

209. 526 F.2d 228 (8th Cir. 1975).

210. *See id.* at 231.

211. *Id.*; *see also* Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (1974).

212. *Meat Packers*, 526 F.2d at 234.

213. *See* *Independent Meat Packers Ass'n v. Butz*, 395 F. Supp. 923, 932 (D. Neb.), *rev'd*, 526 F.2d 228 (8th Cir. 1975).

214. *Meat Packers*, 526 F.2d at 236.

215. *See id.*

216. The Court of Appeals for the Second Circuit’s decision in *Dong v. Slattery*, 84 F.3d 82 (2d Cir. 1996), is similar. There, a Chinese national argued that, were he deported, he would face substantial punishment in China for attempting to thwart its population control policies. *See id.* at 84. For support, he cited Executive Order 12,711, *see id.* at 85, which directs the Attorney General “to provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country’s policy of forced abortion or coerced sterilization” 55 Fed. Reg. 13,897 (1990). He argued that the Attorney General’s deportation order was arbitrary and capricious under the APA due to its conflict with the Executive Order. *See Dong*, 84 F.3d at 85. Because the Executive Order did not have the force and effect of law, however, the court held that APA review was unavailable. *See id.* at 86; *see also* *Chen v. Carroll*, 48 F.3d 1331, 1339 (4th Cir. 1995) (similarly rejecting a claim under Executive Order 12,711 because a “court should not enforce an executive order intended for the internal management of the President’s cabinet”).

Consider, as well, the Supreme Court's decision in *United States v. Caceres*.²¹⁷ There, a defendant charged with bribing an IRS official sought to exclude tape recordings of his conversations with the agent.²¹⁸ The agent wore a concealed radio transmitter in contravention of IRS regulations limiting recordings to consensual contexts absent specific authorization from senior officials.²¹⁹ The IRS restriction was of benefit to targets of IRS investigations,²²⁰ but principally sought to cabin the authority of lower level officials.²²¹ Senior IRS officials, after all, could order the recordings on their own initiative.²²² In refusing to exclude the evidence from the trial, the Court reasoned that

[i]n the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form.²²³

Violations of the agency rule were to be punished as an internal agency matter.²²⁴

Legislative rules as well as circulars and internal manual provisions may be structured to cabin the discretion of lower level agency officials. The fact that notice and comment rulemaking preceded adoption of a rule makes it far more likely that the rule was intended to benefit private parties, but may not be dispositive.

Indeed, the Supreme Court has held that private parties are not necessarily entitled to the benefit of all *statutory* language limiting agency discretion. In *United States v. James Daniel Good Real Property*,²²⁵ the Supreme Court reviewed the Ninth Circuit's determination to throw out a forfeiture action on the ground that the customs officials had failed to adhere to statutory terms.²²⁶ The statute at issue directs customs officers to "report promptly" every seizure to the

217. 440 U.S. 741 (1979).

218. *See id.* at 743.

219. *See id.* at 743, 744 n.4 (quoting IRS Manual, para. 652.22. (in effect Sept. 1975)).

220. *See id.* at 755.

221. *See id.* at 743 n.3 (describing the IRS process for requesting permission to conduct monitoring).

222. *See id.*

223. *See id.* at 756.

224. *See id.*; *see also* *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970) (tolerating violation of internal procedural rule because "[t]he rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion . . .").

225. 510 U.S. 43 (1993).

226. *See id.* at 45.

United States Attorney who then must “forthwith” initiate any forfeiture action that the information warranted.²²⁷ The timing directive at least indirectly benefits private parties, encouraging prompt legal action stemming from a seizure. Nonetheless, the Supreme Court disagreed that the government’s failure to abide by such statutory terms warranted dismissing the forfeiture action.²²⁸ The Court explained, “We have long recognized that ‘many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not limit their power or render its exercise in disregard of the requisitions ineffectual.’”²²⁹ In other words, some statutes, like agency rules, address agency behavior without committing agencies to outside scrutiny.²³⁰

Thus, the lesson of *Meat Packers* and *Caceres* is that agencies promulgate rules for reasons other than affording rights to private parties.²³¹ Agencies may set time limits as in *James Daniel Good Real Property* (or in a hearing context as in *Olim*) to guide the discretion of subordinate officers. The same is true under a variety of Executive Orders, whether under Order 12,866,²³² which imposes cost-benefit rules upon agencies, or under OMB Circular A-76, to govern the considerations in reaching the contracting-out decision.²³³

227. *Id.* at 63 (quoting 19 U.S.C. §§ 1602-04 (1988)).

228. *See id.* at 65.

229. *Id.* at 63 (quoting *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)). Much as the Court noted in *Olim* when addressing the due process context, not every mandatory rule is crafted solely for the benefit of third parties. *See supra* notes 140-46 and accompanying text.

230. *See also* *Lewis v. United States*, 70 F.3d 597, 602 (Fed. Cir. 1995) (holding that the Customs Service’s statutory obligation to refer cases to the Department of Justice reflects internal requirements only).

231. In the entitlements context, most regulation is intended to benefit private parties directly, but the APA and FTCA cases are quite different.

232. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,744 (1993) (requiring cost-benefit analysis of proposed major regulations), states in Section 10 that “[t]his Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity.”

233. OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76 (1983). In *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1991), the court exercised review over a challenge to an agency’s implementation of the Circular. *See supra* text accompanying notes 59-68. Indeed, the result in *Diebold* is striking given that the Circular itself stated that it “shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with” it. CIRCULAR A-76, at 4. The Supplement echoed that view, stating that the internal appeals procedure specified “does not authorize an appeal outside the agency or a judicial review.” OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-76 SUPP., at I-14 (1983). The court of appeals in part was influenced by Congress’s apparent endorsement of the cost comparison rules in the Circular, and its implicit incorporation of that methodology in legislation. *See Diebold*, 947 F.2d at 790.

Nonetheless, in *HHS v. Federal Labor Relations Auth.*, 844 F.2d 1087, 1094-96 (4th Cir. 1988) (en banc), the Court of Appeals for the Fourth Circuit in contrast held that the Circular was not intended to be binding. HHS challenged the FLRA’s order requiring it to bargain with the union over its duty to comply with OMB Circular A-76. Under the Civil Service Reform Act

3. Court v. Agency understanding of the rule

In addition, the agency and court may well disagree as to the proper application of the preexisting policy. It is one thing for the Commodities Futures Trading Commission to determine whether review proceedings would “interfere with the efficient disposition of other Commission business,”²³⁴ and quite another for a court to second-guess that determination. The court lacks experience in gauging the agency’s assessment of its own objectives and priorities.²³⁵ Similarly, in *Diebold*,²³⁶ the court of appeals directed the lower court to determine whether the agency followed the cost comparisons in OMB Circular A-76 correctly,²³⁷ determinations that courts previously had ruled off limits to the judiciary.²³⁸ The *Diebold* court did not acknowledge the important differences between review by a court for compliance with agency-created law, and review by the agency itself.

(“CRSA”), a union proposal—even if rejected by the agency—can become incorporated into any eventual agreement through a binding resolution mechanism. See 5 U.S.C. § 7119(b), (c)(5)(B)-(C) (1994). The FLRA reasoned that because agencies were required under the CRSA to make determinations with respect to contracting out “in accordance with applicable laws,” CRSA, 5 U.S.C. § 7106(2) (1994), the union’s proposal in no way interfered with management prerogatives. See *HHS*, 844 F.2d at 1090. The FLRA held that the agency was required to abide by the Circular in reaching the contracting-out decision. See *id.*

The en banc court of appeals disagreed. See *id.* at 1088. It held that subjecting an agency’s compliance with the Circular to outside review would intrude sharply into the agency’s managerial prerogatives. See *id.* at 1094-95. It explained that if review were permitted

it would be impossible for the executive branch to formulate policy directives, and for the President to instruct his subordinates, without giving rise to third party rights to challenge those policies and instructions. Whether an agency head is following the directives of the President is not for an arbitrator to determine. . . . [The] only alternative would be to cease issuing such directives, which would . . . result in confusion and inefficiency.

Id. at 1095. As in *Meat Packers*, the Court concluded that the Circular was binding only to the extent enforced by the President and OMB. See *id.* (stating that the Circular “create[s] no rights enforceable by third parties”).

234. Rules Relating to Review of Exchange Disciplinary or Other Adverse Action, § 9.30(b), 43 Fed. Reg. 59,350, 59,352 (1978) (formerly codified at 17 C.F.R. § 9.30(b)); see also *Cardoza v. CFTC*, 768 F.2d 1542, 1550 (1985).

235. Similarly, while the agency in *Faber v. United States*, 56 F.3d 1122, 1123 (9th Cir. 1995), determined to warn of particular risks posed by hazards at the national park, a court upon review may take a different view as to the priority or extent of such warnings.

236. See *supra* notes 59-68 and accompanying text.

237. See 947 F.2d at 789.

238. See, e.g., *American Fed’n of Gov’t Employees, Local 2017 v. Brown*, 680 F.2d 722, 723 (11th Cir. 1982) (declining to review Army decision to contract out); *Local 2855, American Fed’n of Gov’t Employees v. United States*, 602 F.2d 574, 576 (3d Cir. 1979) (declining to review same); see also *Matter of Northrop Worldwide Aircraft Services*, B-243318, 1991 U.S. Comp. Gen. LEXIS 522 (Comp. Gen. April 12, 1991) (agency declining to review the same).

4. Consequences of departing from prior policy

Finally, permitting judicial review to assess compliance with pre-existing rules and regulations results in consequences likely unintended by the agency.²³⁹ Even when an agency official's acts unquestionably depart from a prior rule or policy, there may exist wide disagreement as to what the ramifications of that departure should be. The agency's view of what consequence should attend agency officials' deviation from previously set policy may be quite different from those envisioned by a court upon review in either the APA or FTCA context. Agency officials who implement policy ineffectively may be subject to discipline, but not suit by private parties.

In the APA context, for instance, agency action should not necessarily be set aside merely because agency officials acted inconsistently with prior policy. The departure may well signal that some discipline is warranted. The issue of compliance does not directly illuminate, however, whether the agency's action was arbitrary and capricious, unless a failure to follow prior policy is automatically considered arbitrary and capricious. After finding that the agency did not comply with a prior rule, a reviewing court must still subsequently determine whether the agency's otherwise unreviewable action was unlawful.

For instance, in *Cardoza*, CFTC officials may have decided not to review the disciplinary action for reasons other than those enumerated in the agency guidelines, but if Congress implicitly vested the entire decision in agency hands because of the agency's institutional advantages, then judicial review remains problematic, at least absent constitutional challenge to the agency's failure to act.²⁴⁰ In *Chaney*, even if the agency had promulgated an internal policy to investigate each instance reported in which an approved drug was used for unapproved purposes, the agency's subsequent determination not to investigate the charges in that case may still have stemmed from resource allocation determinations and thus be inappropriate for judicial second-guessing.²⁴¹

In the FTCA context, the consequences of permitting the tort suit to proceed are even more striking than in the APA context—a possi-

239. See *Irving v. United States*, 49 F.3d 830, 834 (1st Cir. 1995).

240. See *id.* at 834-35.

241. In contrast, courts determining whether to imply causes of action directly from statutory or agency directives use the touchstone of legislative or agency intent. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Cort v. Ash*, 422 U.S. 66 (1975); see also Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 680 (1985) (explaining that a regulation that obligates an agency to act may not provide law to apply unless it was intended to create enforceable rights).

ble tort judgment. Even though an official may deviate from policy, that official's acts may nonetheless be grounded in social and political policy and therefore arguably should remain immune from judicial second-guessing. In *Irving*, the First Circuit acknowledged that the agency's decision of how to inspect workplaces was susceptible to policy analysis.²⁴² Nonetheless, the court ruled that it could review the agency's action if plaintiff demonstrated that the official's actions contravened prior practice.²⁴³ Courts, in other words, reserved for themselves the power to determine whether the agency's action was negligent even though it was grounded in economic and political policy. The agency official's departure from prior policy is not tantamount to negligence and thus does not obviate the court's necessity to second-guess the agency's judgment as to inspection priorities. The upshot is that a court gauges the reasonableness of agency action that it is ill-equipped to assess.

In sum, reviewing agency action that is otherwise unreviewable for compliance with previously set rules and regulations may have considerable costs. Agencies may heed the signal and create fewer, or at least more discretionary rules, as the parole example attests. In addition, agencies theoretically may be denied the ability to apply new policies more responsive to contemporary realities to resolve a particular dispute. Moreover, courts may arrogate to themselves policymaking authority by interpreting the prior rules differently than would the agencies themselves. In addition, courts may sanction agencies for departing from prior policy far more harshly than the agencies would themselves.

Despite those costs, courts currently permit review of most claims of agency departures from prior policy, irrespective of the nature of the rule allegedly violated.²⁴⁴ Perhaps the benefits from review outweigh the potential costs enumerated. Concerns for limiting agency discretion and for safeguarding individual reliance interests may militate for continued review. Judicial oversight can, in addition, help ensure that similarly situated firms are treated comparably. Moreover, the appearance of propriety cannot likely be maintained if judges fail to respond when agencies fail to comply with their own rules. Judicial

242. See *supra* notes 44-50 and accompanying text.

243. See *supra* notes 20-27 and accompanying text.

244. As noted previously, see *supra* text accompanying notes 110-13, some courts have demanded that the rule violated at least be binding in the sense that agency officials are to exercise no discretion in applying the rule's terms. Others, however, have not. See *supra* notes 44-58 (discussing *Cardoza* and *Clifford*).

review however, might not be needed in every case to attain such laudable goals. More limited review might help courts oversee agencies without intruding as far into their policymaking realm. Courts could exercise review over agency action that would otherwise be unreviewable only when reliance is most important or when there is greater need for monitoring subordinate agency officials for compliance with prior rules and regulations.

III. ALTERNATIVE APPROACHES

In light of the costs engendered by reviewing otherwise unreviewable agency action for compliance with preexisting rules and regulations, courts might adjust doctrine in a number of ways. Review might be tailored to minimize the costs of review sketched above, while still preserving judicial oversight where most needed.

A. *Deference to Agency*

First, courts could decline to entertain such claims at all. If the agency action is grounded in resource allocation or other discretionary policy, then the courts could decline to review challenges to that policy unless Congress so directs. The fact that agencies might at times act arbitrarily in allocating resources, or even act against their own prior pledge of conduct, would be immaterial. In short, while the hands-off approach might be unacceptable in some due process contexts, there is no reason why private parties must be able to sue agencies when agency acts are based on discretionary financial or political decisions. The scope of the areas that should be reserved to agency discretion may be debatable, but agency officials do not forfeit their claim to discretion merely by acting inconsistently with prior rules and regulations.

The discretionary function exception and the nonreviewability section in the APA might act something like the political question doctrine, marking an area off limits to the judiciary. For instance, in *Nixon v. United States*²⁴⁵ a majority of the Supreme Court concluded that it would not reach the merits of Judge Nixon's claim that the Senate had failed to *try* him within the meaning of the Constitution's impeachment clause, which provides that the "Senate shall have the sole Power to try all Impeachments."²⁴⁶ Nixon asserted that the founding generation intended *try* to refer to judicial proceedings and that the

245. 506 U.S. 224 (1993).

246. U.S. CONST. art. I, § 3, cl. 6; see *Nixon*, 506 U.S. at 226.

committee deliberations leading to his impeachment violated this constitutional protection.²⁴⁷ The Court, however, concluded that the *try* language “lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions”²⁴⁸ Even though the Senate in the past had afforded trial-type proceedings,²⁴⁹ the Court did not intervene. The call was reserved to the Senate despite the possible inconsistency over time. Just as an assertion that a government action contravened previously set policy would not open the door to judicial review if the political question doctrine applied, so such an assertion should not arguably open to review claims that are otherwise unreviewable under the FTCA’s discretionary function exception or the APA.

The political question analogy, however, is problematic in the entitlement cases in particular. The Constitution limits agency decisions to alter distribution of benefits principally because of reliance concerns.²⁵⁰ Individuals are entitled to rely upon some agency commitments, whether in the welfare or job context. In choosing jobs, for instance, job security plays a key role. Applicants may well trade greater security for less pay, as in the case of civil service²⁵¹ and some union jobs.²⁵² In the benefits context as well, individuals rely on agency commitments to particular levels of benefits.²⁵³ To permit agency officials to ignore stated guidelines for providing those benefits would substantially disrupt individuals’ lives. The very rationale of the Supreme Court’s due process jurisprudence turns on safeguarding private parties’ legitimate expectations of entitlement.²⁵⁴ Whenever individuals fundamentally rely on agency commitment of resources, review may be critical to protect that reliance interest.²⁵⁵

247. See *Nixon*, 506 U.S. at 229.

248. *Id.* at 230.

249. See Rose Auslander, *Impeaching the Senate’s Use of Trial Committees*, 67 N.Y.U. L. REV. 68, 74 (1992); Alexa J. Smith, *Federal Judicial Impeachment: Defining Process Due*, 46 HASTINGS L.J. 639, 649 n.64 (1995).

250. See *supra* notes 115-29 and accompanying text.

251. See James M. Dodge, *Taxing Human Capital Acquisition Costs—Or Why Costs of Higher Education Should Not Be Deducted or Amortized*, 54 OHIO ST. L.J. 927, 936 (1993).

252. See ROBERT J. FLANAGAN ET AL., *ECONOMICS OF THE EMPLOYMENT RELATIONSHIP* 335 (1989) (noting that if unions push for too high a wage rate, then they risk losing too many union jobs).

253. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972).

254. See, e.g., *id.* at 577.

255. The reliance interest can be overstated. Private parties at times should anticipate and protect themselves from changes in government regulation, just as they protect themselves by anticipating changes in the market supply and demand. Investors should discount the value of their activities by the possibility of alteration in the legal regime. See generally Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 522-39 (1986). Moreover,

The reliance interest, however, cannot explain review in the FTCA and APA contexts. No reliance interest was created by the internal management study in *Faber* addressing park safety. The union in *Clifford* did not rely on agency waiver practice under the Merchant Marine Act to structure its affairs.²⁵⁶ Employees have not relied upon OSHA practices to safeguard their safety in most workplaces. Employees may prefer that OSHA investigates their place of employment, but they presumably do not rely on particular OSHA inspection policies before deciding where to work or what level of safety precautions to take on their own.²⁵⁷ Similarly, the OMB Circular addressed in *Diebold* has not created any expectation among federal employees that their work would not be contracted out to the private sector. Unlike in the benefits or work tenure context, therefore, judicial review in the FTCA and APA contexts cannot be based on protecting a reliance interest. The political question analogy may still hold sway.

Nonetheless, there still may be need to protect private parties from inconsistent agency action, even when no reliance interest is at stake. The potential for arbitrary action is greater whenever agencies fail to comply with preexisting rules. The departure from prior rules may signal bias or inadvertence. In *Berkovitz*, for instance, the agency may have tried to cut corners in approving doses of vaccine prior to obtaining the necessary information from vaccine manufacturers. In *Diebold* the court may have sensed that the agency's decision to contract out goods and services at Fort Knox stemmed from anti-union animus. And in *Faber*, agency officials may have failed to erect the warning signs atop the falls as recommended years before merely because of bureaucratic sloth.

In addition to the potential for bias or arbitrariness, requiring consistency helps legitimate administrative agencies. Particularly when the policy is embodied in a legislative rule, departures undermine the public's faith in the administrative process. Consistency is a value prized by the public, both for private ordering as well as for assuring deliberate governance. Thus, the political question option

private parties have no justifiable warrant to rely on particular forms of governmental regulation if their activities are wrongful. Cf. Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2160-65 (1996) (arguing that individuals should not be protected from retroactive lawmaking if their conduct is inherently wrongful).

256. See *supra* notes 51-58 and accompanying text.

257. But see Barash, *supra* note 102, at 1331 (arguing that "[t]he reliance concern . . . is equally applicable in the context of regulations giving rise to potential liability under the Federal Tort Claims Act" as it is in due process cases).

not only fails to address a reliance interest that may be created by agency rules and regulations, but it fails as well to further rule-of-law values²⁵⁸ which require agencies to follow their own previously set rules when important policy is at stake.

B. *Justifiable Reliance By Private Parties*

A slightly less deferential alternative would be to allow judicial review only when the private parties can justifiably rely on a prior agency rule or regulation intended to confer rights upon outsiders. As in the *Meat Packers* case, courts would focus on the issue of justifiable reliance, irrespective of whether the challenged agency action could be considered discretionary. When the agency manifests a sufficient intention to confer rights upon private parties, judicial review will act to further, rather than frustrate, agency regulatory efforts.

There is undoubtedly a spectrum along which agency rules—whether legislative or less formal policy statements—can be placed. At one end lie rules primarily crafted to control agency subordinates. At the other end lie policies specifically directed at involving private parties and guaranteeing some right to notice, participation, or even suit. Because all agency rules have at least an indirect effect upon private parties, crafting a test to distinguish rules principally intended as internal management directives from those benefiting private parties is problematic. Despite this difficulty, a key determinant, as in the due process cases, is reliance—was the private party entitled to rely on the agency policy?²⁵⁹ When reliance exists, permitting agency officials to depart from prior policy should not be countenanced. The justifiable reliance theory would be relevant in all the contexts addressed.

At times, the language of the regulation may itself clarify whether private parties can justifiably rely on the prior policy. In *Greater Los Angeles Council on Deafness, Inc. v. Baldrige*²⁶⁰ the plaintiffs challenged the Department of Commerce's failure to follow its own regulations requiring agency investigation of certain complaints about discrimination on the basis of disability.²⁶¹ The plaintiffs had alleged that a public television station discriminated against the hearing im-

258. On the differing conceptions of the rule of law, see Richard H. Fallon, Jr., "The Rule of Law" As a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

259. Asking whether the policy intended to benefit the third party is a more open-ended inquiry because of the focus on agency intent as opposed to justifiable reliance by third parties. Such an inquiry would lead to review more frequently.

260. 827 F.2d 1353 (9th Cir. 1987).

261. See *id.* at 1356.

paired by failing to caption its programs.²⁶² The pertinent agency regulation mandated that the agency investigate all complaints and then “so inform” the complainant if no remedial steps were advised.²⁶³ The agency at a minimum had committed itself to communicating its decision to those lodging the complaint.²⁶⁴ Complainants were entitled to rely on that pledge. A challenge based on the agency’s refusal to communicate therefore was properly held to be reviewable.²⁶⁵ In contrast, the language of Circular A-76 evinces OMB’s intent not to invite third party reliance on the Circular’s terms: “[The Circular] should not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such an action or inaction was not in accordance with it.”²⁶⁶ Accordingly, the reliance theory would not permit review on the grounds that the agency decision to contract out conflicted with the terms of the Circular.

If the language is not dispositive, then the structure of the agency regulation could be assessed to determine the justifiability of the reliance.²⁶⁷ For instance, government officials’ assessment of park risks in *Faber* obviously was in no way intended to invite reliance by private parties.²⁶⁸ Private parties generally have only a limited ability to influence or even learn of an internal study such as the one completed in that case. On the other hand, had officials erected a sign inviting all comers to enjoy the diving, the reliance would be apparent. Similarly, in *Cardoza*, the question would be whether private parties justifiably rely on standards promulgated by the agency to govern when agency officials should review discipline meted out by the member exchanges. A negative answer is relatively clear: individuals may structure their conduct so as to escape discipline by the member exchanges, but are highly unlikely to factor in the prospect of CFTC review before undertaking the contested action. The Seventh Circuit’s statement that “the

262. *See id.* at 1356-57.

263. *Id.* at 1360-61.

264. *See id.*

265. *See id.* at 1361.

266. OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76 (1983); *see also supra* note 233.

267. *Cf. Raven-Hansen, supra* note 10, at 21-22 (exploring, in the regulatory estoppel context, whether agency regulation is primarily intended to benefit the agency or individuals).

268. Neither could private parties justifiably rely on the requirement in *Berkovitz* that drug companies submit specific information to the National Institute of Health before receiving drug approval. *See Berkovitz v. United States*, 486 U.S. 531, 542 (1988). Individuals may have relied on the fact that government regulators monitored the drug companies, but not that any particular regulatory path was followed.

public justifiably has come to rely" upon the CFTC's internal guidelines²⁶⁹ is difficult to understand.

Similarly, in the parole cases, the question the courts would ask is whether prisoners are entitled to rely on established guidelines governing release. Under a reliance approach, the liberty interest cases are quite close, for agencies establish parameters for administrative segregation or work release programs to provide incentives for prisoners as well as to attain consistency within the system. For instance, providing good-time credits to shape an inmate's behavior would satisfy the test, but providing good time credits in the case of overcrowding might not.²⁷⁰ On the other hand, because agencies create most job, welfare, and grant entitlements for the purpose of fostering reliance in private parties, such rules would open the agency to external review.

The reliance approach would not leave all agency departures from prior rules unchecked. The agency officials who promulgated the preexisting rules—whether senior officials at the same agency or at OMB—have an incentive to ensure that the rules are followed. Departures from the rules undermine the policy goals animating formulation of the rules. OMB can exert pressure on recalcitrant agencies to adhere to its rules,²⁷¹ and high level agency officials can discipline wayward subordinates who ignore preexisting policy. Employees' prospect for advancement may be blocked. Some checks exist, therefore, even in the absence of judicial review.

Although the reliance approach would preserve agency discretion, it may insufficiently compel compliance with preexisting regulations for the sake of consistency. Courts may be suspicious that the departure from preexisting rules signals arbitrary behavior or masks some invidious motive. Senior agency officials may lack the information or will to impose effective discipline on government employees—whether inspectors or park officials—who stray from prior policy. Or, they may condone short cuts because of scarce resources. In *Faber*, the lack of a warning may have benefited senior officials who personally believed that warning signs detracted from the beauty of the falls. Senior OSHA officials may worry that forcing inspectors to investi-

269. *Cardoza v. CFTC*, 768 F.2d 1542, 1550 (7th Cir. 1985).

270. An *ex post facto* problem, however, would still exist. See *Lynce v. Mathis*, 117 S. Ct. 891, 898 (1997).

271. See, e.g., Susan J. Tolchin, *Presidential Power and the Politics of RARG*, REGULATION, July-Aug. 1979, at 44, 44-45 (addressing presidential enforcement of the OMB cost-benefit order).

gate each machine would prompt factory owners, because of the intrusion and delay, to complain stridently to influential members of Congress.

Ultimately, therefore, the desirability of the reliance approach is debatable. The approach avoids intruding upon agency prerogatives, yet may insufficiently account for the harms arising from agency officials' departure from preexisting policy, even that primarily intended to benefit the agencies themselves.

C. *Agency Intent to be Bound*

A less deferential approach would inquire whether the agency intended to bind lower level officials, irrespective of the reliance on such rules by private parties. This approach would focus principally on whether agency officials enjoyed the discretion or flexibility to ignore the rule or regulation, whatever the language of the provision. Agencies intend virtually all legislative rules—but only a portion of the interpretive rules, policy statements, circulars, and advice that typify agency practice—to be binding.

As with the reliance approach sketched above, courts could often ascertain whether the agency sought to bind lower level officials by examining the language of the prior rule. The phrasing in the OMB Circular did not evidently permit agency employees the discretion to ignore its terms.²⁷² Similarly, the court in *Irving* inquired whether agency inspectors had any choice but to examine each machine.²⁷³ In contrast, the management study in *Faber* did not evidently intend to bind agency officials because no mandatory steps were specified.²⁷⁴

When the language is not clear, the structure of the rule may lend clues. For instance, the regulation in *Cardoza* providing guidance as to whether the agency should review challenges to discipline meted out by the member exchanges²⁷⁵ was not likely intended to be binding. The regulation reads as a discretionary guide to conduct, not as a rigorous algorithm. Thus, language and context must be assessed to determine whether the agency intended to remove all discretion from officials.

The agency intent version, however, may insufficiently respect agency prerogatives. Judicial review for compliance with previous

272. See *Diebold v. United States*, 947 F.2d 787, 798 (6th Cir. 1991).

273. See *Irving v. United States*, 49 F.3d 830, 834 (1st Cir. 1995).

274. See *Faber v. United States*, 56 F.3d 1122, 1123-24 (9th Cir. 1995) (quoting the study's vague language).

275. See *Cardoza v. CFTC*, 768 F.2d 1542, 1548 (7th Cir. 1985).

rules and regulations, as discussed previously, may subject agencies to consequences that are incommensurate with their failure to comply. Even if we all value agency fidelity to prior rules, we may not agree as to the result or penalty that should follow. The Supreme Court recognized in *James Daniel Good Real Property*²⁷⁶ and *Caceres*²⁷⁷ that consequences can be critical. It may be excessive to punish agencies by permitting review of otherwise unreviewable action merely because some agency rule was violated.

For instance, exposing the government to tort liability because of the government's failure to follow some internal directive, as in *Faber*, may be disproportionate. The failure to place warning signs stems from a resource allocation question, no matter that the agency at one point indicated that it would commit resources a particular way. For whatever reason, agency officials changed course and did not comply with the preexisting policy. That departure might warrant sanction by the agency, but not necessarily subject the government to a tort judgment. If the Supreme Court means to protect from tort suit all agency actions "susceptible to policy analysis,"²⁷⁸ then the agency's action remains susceptible to policy analysis whether it represents a departure from preexisting policy or not.

In the APA context as well, if the agency's action is otherwise unreviewable, judicial error costs will not be kept to a minimum merely because an agency official departs from some prior regulation. A nonenforcement decision, for instance, may be quite difficult to second-guess, irrespective of the agency official's failure to comply with an internal rule, as arguably occurred in *Cardoza* and *Clifford*. A departure from a prior rule may be unfortunate, but is not tantamount to finding the ultimate action arbitrary and capricious. Departures should be kept to a minimum, but not necessarily through the threat of such sanctions.

D. Normative Approach

Instead of reviewing *all* otherwise unreviewable agency actions that are alleged to be inconsistent with preexisting rules and regulations—as many courts do now—courts could review agency departures only from prior positions that they deem most important. The importance could lie in the individual interest at stake, or in the im-

276. See *supra* notes 225-31 and accompanying text.

277. See *supra* notes 217-24 and accompanying text.

278. *United States v. Gaubert*, 499 U.S. 315, 325 (1991). For a scathing critique, see Peterson & Van Der Weide, *supra* note 102, at 465-73.

portance of the policy implicated. Courts could devise doctrine to ascertain when compelling agencies to follow preexisting rules is critical.

The Supreme Court has recently manifested such an approach in the due process context.²⁷⁹ Although the Supreme Court has not altered its doctrine in the property context,²⁸⁰ it no longer requires agencies to abide by all rules implicating liberty interests.²⁸¹ It will only enforce liberty interests it believes to be "of real substance."²⁸²

Change in the Supreme Court's approach to liberty interests first appeared in *Olim*.²⁸³ There, the Court held that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."²⁸⁴ In refusing to apply due process guarantees, the Court reasoned that the agency's departure from prior regulations does not automatically trigger judicial review of the merits of the agency's action.²⁸⁵ Rather, the Court asserted the power to distinguish substantive from procedural interests underlying the prior regulatory pledge.²⁸⁶

The Court distanced itself further from its former entitlement approach in *Sandin v. Conner*.²⁸⁷ Prison authorities charged Conner with several prison infractions arising out of a conflict with correctional officials.²⁸⁸ He appeared before a prison adjustment committee, which refused his request to present witnesses at the hearing.²⁸⁹ Based on the available testimony, the committee concluded that Conner was guilty of the misconduct charged and sentenced him to thirty days disciplinary segregation for the more serious charge.²⁹⁰ Conner subsequently sued the prison officials in federal court, asserting that the truncated hearing deprived him of due process.²⁹¹ The district court granted summary judgment in favor of the prison officials, but the Court of Appeals for the Ninth Circuit disagreed.²⁹² The circuit court held that Hawaii's regulations created a liberty interest in allowing Conner to remain in the general prison population absent mis-

279. See *Sandin v. Conner*, 515 U.S. 472 (1995).

280. See *supra* notes 117-29 and accompanying text.

281. See *Sandin*, 515 U.S. at 478.

282. *Id.* (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)).

283. *Olim v. Wakinekona*, 461 U.S. 238 (1983).

284. *Id.* at 250.

285. See *id.* at 251.

286. See *id.* at 250-51.

287. 515 U.S. 472 (1995).

288. See *id.* at 475.

289. See *id.*

290. See *id.* at 475-76.

291. See *id.* at 476.

292. See *id.*

conduct.²⁹³ The mandatory language, in other words, created a liberty interest. Because Conner had not been afforded an adequate hearing to determine whether he in fact was culpable of the misconduct, the court remanded the case back to the district court.²⁹⁴

The Supreme Court in turn reversed, concluding that—despite the mandatory language in the regulatory scheme—Hawaii had not created an entitlement protected under the Due Process Clause.²⁹⁵ In so holding, the Court acknowledged that it was departing from prior precedents.²⁹⁶ Plaintiffs could not demonstrate a liberty interest merely by pointing to mandatory language in a regulatory scheme.²⁹⁷ Rather, plaintiffs additionally must persuade the court that the interests protected by the regulatory scheme were of “real substance.”²⁹⁸

The Court explained that its new approach was necessary to avoid the mischief arising from its prior practice of relying on mandatory language in regulations to determine whether a liberty interest existed.²⁹⁹ The Court wrote, “First, [the entitlement approach] creates disincentives for States to codify prison management procedures in the interest of uniform treatment.”³⁰⁰ Prison rules “are not set forth solely to benefit the prisoner. They also aspire to instruct subordinate employees how to exercise discretion . . . and to confine the authority of prison personnel in order to avoid widely different treatment of similar incidents.”³⁰¹ Second, the entitlement approach enmeshed the “federal courts in the day-to-day management of prisons,” blunting the flexibility needed by prison administrators in their jobs.³⁰²

The Court concluded, therefore, that liberty interests are “generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”³⁰³ The Court will not intervene if prison authorities in many contexts depart from preexisting guidelines.³⁰⁴ The lower courts

293. *See id.*

294. *See id.* at 477, 505.

295. *See id.* at 487.

296. *See id.* at 482-84.

297. *See id.* at 481-82.

298. *Id.* at 478.

299. *See id.* at 481.

300. *Id.* at 482.

301. *Id.*

302. *Id.*

303. *Id.* at 484.

304. Courts presumably will apply the *Sandin* reasoning outside of the prison context. For instance, a school limiting its teachers' discretion to issue after-school detentions would not necessarily create a liberty interest.

have responded to *Sandin* by rejecting numerous liberty interest claims that previously would have been cognizable.³⁰⁵

The *Sandin* approach might be extended to other contexts in which private parties seek to force agencies to comply with previously formulated rules.³⁰⁶ For instance, courts could determine whether other agency regulations conferred rights of *real substance* in the property context. The *Sindermann* framework³⁰⁷ could be amended such that only regulations protecting interests of sufficient weight would be protected. Individuals relying upon civil service tenure, for instance, might be protected, but perhaps not individuals seeking a hearing prior to their landlord's effort to raise rent.³⁰⁸ Social security disability beneficiaries may justifiably rely on regulatory promises,³⁰⁹ but not necessarily regulations permitting their physicians to participate in Medicare.³¹⁰ Indeed, the same policy concerns underlying *Sandin* apply just as forcefully in many property contexts. Some employment rules are created to limit the discretion of supervisors as well as to protect employees. And, the entitlement approach in the property context unquestionably has enmeshed "the federal courts in the day-to-day management" of schools³¹¹ and other institutions.

Moreover, in the FTCA context, courts could similarly determine whether the prior rule violated by the agency was of *real substance*. The court in *Faber*, for instance, could have assessed the importance of the study of natural risks posed by park users. The court in *Irving* could have gauged the significance of the OSHA practice—in contrast

305. See, e.g., *Babcock v. White*, 102 F.3d 267, 270, 274 (7th Cir. 1996) (holding that alleged violation of a regulation requiring an inmate to be separated from gang members who had sworn to kill him was not of real substance); *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995) (holding that alleged violation of a regulation leading to the loss of opportunity to earn good time credits was not of real substance), *cert. denied*, 116 S. Ct. 1690 (1996); *Kraushaar v. Flanigan*, 45 F.3d 1040, 1045 (7th Cir. 1995) (holding that an allegation that a strip search violated regulatory protections was not cognizable).

306. See Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1988-89 (1996) (arguing that *Sandin* signals the Court's willingness to retreat from the due process jurisprudence of the 1970s and 1980s).

307. See *supra* notes 117-29 and accompanying text.

308. Cf. *Hahn v. Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970) (holding that tenants in a government-subsidized housing development do not have a right to be heard on their landlord's request to the Federal Housing Authority for approval of rent increase).

309. Cf. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (addressing the hearing required following the termination of Social Security disability benefits).

310. Cf. *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980) (holding there is no constitutional right to participate in a hearing when one's nursing home is decertified from Medicare).

311. See, e.g., *Ingraham v. Wright*, 430 U.S. 651 (1977) (requiring that some process be afforded to protect students from excessive corporal punishment if only through "common-law constraints and remedies"); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (mandating hearing prior to suspension).

to that adopted by the FAA and scrutinized in *Varig*—of requiring inspectors to inspect each machine. Similarly, in the APA context, the *Diebold* court could have inquired as to the OMB Circular's import in specifying the steps that agencies should follow prior to reaching the contracting-out determination. In both contexts, the court could alternatively have considered whether the individual interests at stake were so vital as to warrant review.

The normative approach, however, is quite troubling. The judiciary—as opposed to agencies—would be the institution determining the importance of agency benefits and protections. Such normative assessments are generally made by the legislature, or its delegates in agencies. Ironically, the normative approach forces the courts to engage in some of the same second-guessing of political priorities that the *Sandin* court hoped to avoid.

For instance, courts are currently distinguishing among a wide variety of liberty interests in the prison context to ascertain which regulatory entitlements are important enough to protect under the Due Process Clause. In *Mitchell v. Dupnik*,³¹² the Ninth Circuit determined that a pre-trial detainee's interest in the confidentiality of his legal papers was not of real substance under *Sandin*.³¹³ The Eighth Circuit in *Callender v. Sioux City Residential Treatment Facility*³¹⁴ determined that state regulations that seemingly provided a right for participation in a work release program outside prison walls did not create a liberty interest.³¹⁵ And, the Seventh Circuit in *Babcock v. White*³¹⁶ held that a Federal Bureau of Prisons directive requiring that an inmate be housed in a facility separate from members of a gang that had tried to kill him also did not rise to the level of a liberty interest.³¹⁷ On the other hand, the Court of Appeals for the Ninth Circuit in *Carlo v. Chino*³¹⁸ held that California's guarantee of a post-booking telephone call created an interest of real substance protectible under the Due Process Clause.³¹⁹ Courts have split as to whether challenges to protracted periods of time in administrative

312. 75 F.3d 517 (9th Cir. 1996).

313. See *id.* at 523.

314. 88 F.3d 666 (8th Cir. 1996).

315. See *id.* at 668; accord *Dominique v. Weld*, 73 F.3d 1156, 1160 (1st Cir. 1996).

316. 102 F.3d 267 (7th Cir. 1996).

317. See *id.* at 274.

318. 105 F.3d 493 (9th Cir. 1997).

319. See *id.* at 499-500.

segregation, in violation of prison regulations, state a claim of *real substance*.³²⁰

Aside from the difficulties in reaching a normative judgment, the *Sandin* approach is ill-suited to the APA and FTCA contexts. Courts do not review claims in such contexts because of the importance of the rule allegedly violated, but because of the consequences of the agency action challenged. In *Faber*, for example, the court reviewed the tort claim due to the need to deter park officials from future negligence—the internal study by itself was not critical.³²¹ In *Cardoza*, the court was troubled by the impact of the agency's inaction on the plaintiff, not by the intrinsic importance of the agency regulations themselves.³²² Thus, in contrast to the due process context, courts generally strain to review cases in the APA and FTCA contexts when the injury is significant, and the importance of the rule violated is secondary.

In short, the normative approach suffers from two serious defects. We do not generally trust courts to distinguish important from more modest regulatory initiatives. Establishing such priorities is rather vested in political actors. Moreover, distinguishing among cases because of the importance of the rule violated misses the point of the APA and FTCA cases, which is to focus on whether the prior rule so confined the agency's discretion as to permit judicial review of the substance of the challenged agency decision.

E. Process Approach

If courts cannot easily second-guess the importance of agency rules, they nonetheless could oversee agency departure from rules—whether legislative or less formal—to safeguard the process leading to the decision to deviate from the prior rule. They could ensure that agencies depart from rules only when sufficient consideration and deliberation have been afforded. In effect, agencies can change their minds, but only if in so doing, they create new policy for the future. The process approach would modify the agency intent to be bound approach. First, courts would determine through conventional means

320. Compare *Whitford v. Boglino*, 63 F.3d 527, 533 (7th Cir. 1995) (remanding to consider liberty interest), and *Lee v. Coughlin*, 902 F. Supp. 424, 431 (S.D.N.Y. 1995) (finding liberty interest), with *Wycoff v. Nichols*, 94 F.3d 1187, 1189 (8th Cir. 1996) (finding no liberty interest), and *Moorman v. Thalacker*, 83 F.3d 970, 973 (8th Cir. 1996) (same).

321. See *Faber v. United States*, 56 F.3d 1122, 1124-25 (9th Cir. 1995) (emphasizing safety).

322. See *Cardoza v. CFTC*, 768 F.2d 1542, 1544-45 (7th Cir. 1985) (discussing impact on plaintiff rather than reasons for regulations).

whether the agency intended to bind subordinate officials with the rule. In the context of legislative rules, that intent to bind is almost always clear, but the intent becomes murkier with policy statements, circulars, and the like. Then, before exercising review, courts would determine whether any departures from binding rules reflected purposeful policy. Although not articulated as such, courts currently follow a process approach in many contexts.

For instance, the Supreme Court has held that agencies should almost always be entitled to change prior rules as long as they do so through rulemaking.³²³ The agency may be under a duty to explain any change, but the agency need not maintain policy in perpetuity. Moreover, the notice and comment period affords sufficient process to ensure that reliance interests are not arbitrarily violated.³²⁴

Changing prior rules through adjudication, however, is more problematic. The Court in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*³²⁵ stated that an agency could not repeal a legislative rule in the midst of a subsequent adjudication.³²⁶ The potential process protections did not suffice because most of those participating in the prior rulemaking were shut out of the subsequent determination. Only those parties in the adjudication—who might not share the same interests as those involved in the earlier rulemaking—could participate.

In contrast, the Court has permitted agencies to change rules developed in adjudication as long as the agencies explain any change in the second adjudication. In *Shaw's Supermarkets, Inc. v. NLRB*,³²⁷ the Board had determined that Shaw's Supermarkets committed an unfair labor practice in a representation election when, five days before the election, an official implicitly warned employees they would receive lower wages and benefits in the case of a pro-union vote.³²⁸ On review, the court of appeals stated that it would have upheld the agency "[w]ere the Board writing on a blank slate."³²⁹ However, because the agency had previously held that such warnings by

323. See *supra* text accompanying notes 191-95.

324. Similarly, courts have held that agencies can change less formal rules through the same process that preceded the initial rule. In *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1017 (9th Cir. 1987), the court determined that the INS could rescind a general policy statement providing for deferral of an alien's deportation status as long as it issued another general policy statement reflecting the change.

325. 284 U.S. 370 (1932).

326. See *id.* at 389.

327. 884 F.2d 34 (1st Cir. 1989).

328. See *id.* at 34-35.

329. *Id.* at 36.

themselves did not constitute unfair labor practices, the court set aside the agency's conclusion.³³⁰ It stated that "the Board remains free to modify or change its rule . . . as long as it focuses upon the issue and explains why change is reasonable."³³¹ An agency's duty to justify any position extends to the fact that a present-day position conflicts with a prior one. The court in effect adopted a process approach, forcing the agency to confront any change consciously and explain its departure from past policy. Courts will intervene only when agencies have failed to acknowledge that their current approach is intended to create new policy.

Similarly, in *Faber*, assume that the agency, prior to the diving accident, had commissioned another study and concluded that warnings should be placed only at National Park sites presenting the most grave risks, and therefore no longer recommended constructing any warning atop the falls. That change in policy would have shielded the federal government from liability under the FTCA. As in *Shaw's Supermarkets, Inc.*, the agency would be free to change policy as long as it did so in a purposeful manner. In *Berkovitz*, had the agency decided in all cases no longer to collect certain data from the manufacturer, then its failure to conform to past policy on that issue would have been protected under the discretionary function exception, assuming that the agency had the power to change course.³³² In *Clifford*, if the agency decided to rely on new factors in granting waivers, then no review under the APA should have occurred, despite the ostensible failure to follow the prior guidelines.

As opposed to what I have termed the normative and agency intent to be bound approaches, scrutinizing the process by which agencies depart from preexisting rules would preserve a more fundamental policymaking role for the agency. This approach recognizes, as the Supreme Court has noted on occasion, that Congress has delegated the power to agencies to change their minds, whether for political or

330. See *id.* at 39, 41.

331. *Id.* at 41; see also *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion) ("Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."); *Service v. Dulles*, 354 U.S. 363, 388 (1957) (stating that although an agency need not bind itself, "having done so [it] could not, so long as the Regulations remained unchanged, proceed without regard to them"); *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) ("If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely to explain why the departure is reasonable.").

332. Courts may insist that the agency change policy in conformance with appropriate procedures. See *infra* text accompanying notes 335-37.

technological reasons.³³³ If the change in position itself reflects new policy, then that policy is worthy of deference.

Moreover, the process approach may not deter the agency as much from formulating rules in the first instance as might other approaches. Agencies can depart from rules as long as their departure sets policy for future action. Parole boards or OSHA can set priorities or new procedures without fear of liability due to the presence of policy directives issued by their predecessors. The activity-level effect³³⁴ therefore would not likely be as pronounced. In comparison to the agency intent to be bound and normative approaches, the message is different—courts will step in only when agencies have not purposely (or with the proper process) deviated from prior policy.

At the same time—in contrast to the normative approach—the process approach does not leave the agency departure from preexisting policy unchecked. Agency policies are generally formulated only after considerable debate and input from different levels within the agency itself. Both the requirement of prospectivity and the period of deliberation help ensure that the change in policy is not arbitrary.

First, the act of making policy to control future behavior constrains agency discretion. Before the agency acts, more contexts are considered than just the particular dispute before the agency. Different factual scenarios must be addressed, and contingencies contemplated. A requirement of setting policy for the future safeguards against ad hoc decisionmaking or decisions based upon impermissible factors because of the wider and more uncertain application. Second, and related, the presence of prior deliberation minimizes the risk of bias or arbitrary governance. The precedential effect of policy suggests that a significant number of people will be interested in the outcome of the policy formulated by agency officials. That level of interest in turn provides added incentive for care,³³⁵ as long as those with reliance interests are represented in the political process.³³⁶ The

333. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

334. See *supra* notes 156-89 and accompanying text.

335. Cf. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489-90 (1996) (arguing that deference should be afforded to government interpretations of federal criminal law adopted as official government policy after deliberation).

336. For instance, in the *Motor Vehicle* case, automobile manufacturers and consumer representatives all participated in the rulemaking leading to the agency's change in policy. 463 U.S. at 34-38. The policy change was checked to the same extent as formulation of any new policy. Moreover, even in *Diebold*, the agency may well have consulted with the federal employee union prior to changing its contracting-out policy—it would have been politically infeasible (and impossible for long) to keep union representatives in the dark. As long as agency departures stem

process approach relies upon political checks to make the trade-offs among contemporary political needs, reliance interests, and rule of law concerns.

In some contexts, the second factor of deliberation may not be present. Officials may formulate policy without great discussion. But only the relatively few agency officials with policymaking authority can create policy for the future.³³⁷ Even if there is no prior deliberation within the agency, the fact that an official vested with policymaking authority changes policy at least makes that official more accountable for the switch, and the switch is likely more visible if made by a senior agency official with policymaking authority. Policy creation therefore is likely to be less arbitrary than case-by-case or ad hoc determinations.

Unlike the normative and reliance models discussed earlier, the process approach would allow courts to exercise review when lower level officials ignore binding rules for no apparent reason. In other words, even if private parties cannot justifiably rely on the rule, courts arguably should encourage fidelity to binding policy unless there are good reasons not to. If the OSHA inspectors in *Irving* did not inspect the die-out machine because of inadvertence, there is no reason to protect the agency. If they missed the machine due to a prior decision to inspect only one out of two similar machines, however, courts should decline review. And, if an official without policymaking authority made that decision, courts should still review the action.

Hard cases undoubtedly exist. It may be difficult at times to determine which agency officials have policymaking authority and whether the current policy pursued was intended to change prior policy or resulted rather from disagreement over what the prior policy in fact was. Accordingly, there is a risk of judicial assumption of agency policymaking. But that risk must be balanced against the harm that may stem from failing to monitor lower level officials who depart from previously set rules. The process approach, therefore, plausibly accommodates the agency's interest in policymaking with the need to ensure consistent and deliberative agency practice.

Despite its potential attributes, the process approach does not directly respond to the reliance argument. Reliance interests can be

from considered change in policy, therefore, some political checks outside of judicial review circumscribe the agency's discretion, and there is less need to permit judicial review merely because of the allegation of inconsistency with a prior rule or regulation.

337. If the officials lack policymaking authority, their decision to depart from the prior policy cannot then shield the agency from suit.

sundered, as long as the agency decides to override the reliance interest in a deliberative manner. That objection, however, should not prove dispositive.

In the FTCA and APA contexts, reliance interests are not critical. As discussed previously, individuals rarely learn of, let alone rely on, the internal policy allegedly violated by the agency. And, even some legislative rules like the forfeiture statute in *James Daniel Real Property* may not justifiably induce reliance.

In the FTCA context, therefore, the discretionary function exception would shield the government from suit in tort despite the allegation of noncompliance with prior policy if that policy were not binding, as likely was the case in *Faber*. Even when the policy is binding, the government could still claim the exception if it could demonstrate that the deviation stemmed from purposeful policy, formulated by officials with policymaking authority. Moreover, when the discretionary function exception does not apply, a failure to comply with prior rules should not necessarily be tantamount to a finding of negligence. The departure from prior rules might evince more care than the policy itself.³³⁸

In the APA context, courts should first scrutinize the rule allegedly violated to determine if it is binding. The courts in *Cardoza* and *Clifford* should never have proceeded to ascertain whether the agency complied with the regulations because the regulations evidently were not intended to be binding. The courts should next assess whether the rule itself sufficiently constrains agency action, as in the *Madison-Hughes* case.³³⁹ Even if the rule does provide constraint, courts should still permit agencies to make a showing that the failure to comply stemmed from purposeful policy formulated by officials with policymaking authority, and thus that the agency action should remain exempt from review.

But, even when reliance is fundamental as in the entitlements context, the process approach should play a critical role. Agencies must honor the entitlements they create until they decide to change the entitlement through the appropriate process. Currently, individuals seeking entitlements are entitled to some kind of hearing to assess whether they are eligible for the job, welfare, or license. For instance, once one is granted an expectation of continued employment absent misconduct, then the agency must afford notice and an opportunity to

338. See also *supra* text accompanying note 114.

339. See *supra* notes 73-81 and accompanying text.

respond before determining that one has engaged in misconduct. In part, the hearing ensures that low-level agency officials have not denied one the benefit of the entitlement for impermissible reasons or simply because of carelessness. The reliance interest demands at least a hearing before the deprivation becomes permanent.

But suppose, instead, that the agency decides to alter the entitlement for everyone, in other words, to change the tenure provisions of the job so that no one has any expectation of continued employment. Conducting a hearing would be beside the point, given that there would no longer be any function for the hearing.

Judges have not, however, always recognized that across-the-board rules can limit or remove entitlements without triggering procedural due process guarantees. For instance, in *Mahlers v. Halford*³⁴⁰ the Iowa Department of Corrections instituted a new policy deducting twenty percent of all funds received by an inmate—including from outside sources—to fulfill any restitution obligations.³⁴¹ Iowa requires inmates to pay restitution to the state to cover court costs and to compensate victims for injuries received.³⁴² Inmates challenged the new policy on due process grounds, principally arguing that notice and an opportunity to be heard were required prior to the sequestration of funds.³⁴³

All three judges on the Court of Appeals for the Eighth Circuit analyzed the case on procedural due process grounds.³⁴⁴ The judges balanced the individual interest against the risk of erroneous deprivation through the procedures used and the governmental interest at stake.³⁴⁵ Indeed, the district court judge and a dissenting court of appeals judge would have required the state to afford inmates additional pre-deprivation opportunity to contest the twenty percent deduction.³⁴⁶ As a substantive matter, the automatic deduction rule may be arbitrary, but there appears no reason to afford individualized opportunity to contest what is avowedly an across-the-board provision. The

340. 76 F.3d 951 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 696 (1997).

341. *See id.* at 952.

342. *See id.*

343. *See id.* Iowa has since revised the policy to provide additional procedural protections for the inmates. *See id.* at 953 (discussing IOWA CODE ANN. § 904.702 (West 1997)).

344. *See id.* at 954, 956 (majority and Heaney, J., dissenting).

345. *Id.* at 955-57 (majority and Heaney, J., dissenting).

346. *Id.* at 957 (Heaney, J., dissenting). The hearing would have focused on the source of the outside funds and on the importance of the inmate's intended use of such funds. *See id.* at 954.

new rule may have violated the Takings Clause,³⁴⁷ but no hearing to contest applicability of the rule constitutionally should be due.³⁴⁸

The process approach in the entitlements context recognizes that political checks safeguard against arbitrary agency action. Agencies can respond to contemporary realities and alter entitlements as long as they do so overtly. Judicial review should not lock agencies into policy ill-suited for the present. The process approach therefore suggests that—barring some other constitutional right such as that grounded in the Takings or Ex Post Facto Clause—agencies can change entitlements if they reach the new policy in a purposeful manner.

Similarly, in the liberty interest context, consider that an agency might desire to revamp parole or work release policies in light of new perspectives on rehabilitation. Must the agency apply the old policies to those prisoners already in the system? Although the Ex Post Facto Clause might bar retroactive changes in parole policies,³⁴⁹ the Due Process Clause would not compel a hearing in light of the fact that the agency has reached its new policy in a deliberative fashion.

Courts have at times ignored the possibility, however, that application of changed policy affecting liberty interests does not itself violate the Due Process Clause. For instance, the Third Circuit in *Winsett v. McGinnes*³⁵⁰ decided that, while Delaware could add new conditions for eligibility for a work release program in the future, it could not retroactively impose new substantive predicates without violating procedural due process.³⁵¹ From a process perspective, however, ab-

347. The Supreme Court in *Atkins v. Parker*, 472 U.S. 115, 129 (1985) (quoting *Richardson v. Belcher*, 404 U.S. 78, 81 (1971)) reiterated that “[t]he procedural component of the Due Process Clause does not ‘impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.’” The legislative process, in essence, provides all the process that is due. See also *Washington Teachers’ Union Local #6 v. Board of Educ.*, 109 F.3d 774, 779-80 (D.C. Cir. 1997) (questioning whether procedural due process issues arise when Reduction-in-Force seemingly abrogates state created property interest).

348. If an agency had fashioned the new policy, however, state courts nonetheless should review the new rule to ensure that it was reached in an appropriate manner. For instance, a warden, by decree, may not be able to limit an entitlement created by the state prison administration, and the state prison administration may only be able to change a prior policy through appropriate state procedures under the state administrative procedure act. However, on review the hands of federal courts might be tied given that only state procedural law might be violated. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124-35 (1984) (holding that federal courts may not enjoin state institutions or officials on the basis of state law).

349. See *Lynce v. Mathis*, 117 S. Ct. 891 (1997).

350. 617 F.2d 996 (3d Cir. 1980) (en banc).

351. See *id.* at 1007-08. After *Sandin*, a state’s work release framework would likely not be considered an interest of “real substance” entitled to protection under the Due Process Clause. See *supra* text accompanying note 298; see also *Shields v. Purkett*, 878 S.W.2d 42, 47-48 (Mo. 1994) (holding that due process prevents state from applying new parole policies instead of poli-

sent ex post facto strictures, agencies can apply new policies if they follow the proper procedures in reaching that determination, just as agencies do in changing eligibility criteria for welfare.

In sum, the process approach restructures doctrine in an effort both to preserve agency policymaking and yet ensure that ad hoc departures from prior agency policy are prevented. Compliance with prior policy is not an end in itself; rather, review for compliance should only be the means to ensure greater deliberation before the agency changes course.

CONCLUSION

Requiring agencies to follow prior policy is beguiling. Courts reason that they will not intrude into agency policymaking if the agency has no discretion but to follow the preexisting rule. Courts can assess the agency action against the benchmarks provided by the prior rules and regulations.

Yet, despite the rule of law concerns, courts often cannot ascertain an agency's compliance with preexisting rules and regulations without intruding into the agency's policymaking domain. First, the prospect of more extensive judicial review is itself significant. Agencies will react to the threat of judicial review by promulgating fewer or at least vaguer rules. The magnitude of the activity-level effect may be uncertain, but not its existence. Second, if forced to comply with preexisting rules, agencies, as a theoretical matter, may be unable to apply new policies to current disputes. Agencies may lose the flexibility to change policy when contemporary technological or financial realities so dictate. Third, courts may and have disagreed with agencies as to whether their prior policies were binding or what the policies in fact required. The consequences of reviewing otherwise unreviewable agency action thus can be quite striking: courts instead of agencies determine both the ambit of internal management directives and the sanction to be accorded for failure to comply with preexisting rules and regulations.

Courts should therefore modify their approach in the three contexts canvassed to preserve agency discretion without sacrificing the benefits that unquestionably can flow from judicial review. Courts

cies applicable when inmate committed his offense). *But cf.* *Tracy v. Salamack*, 572 F.2d 393, 396 (2d Cir. 1978) (agreeing that states can alter entitlements as long as they do not do so in an arbitrary way—an entitlement “does not have the substantive effect of prohibiting alteration of the underlying law which creates the entitlement”).

should review otherwise unreviewable agency action only to determine whether the agency failed to comply with binding rules upon which third parties can justifiably rely, or to ensure that the agency purposefully departed from the prior policy. Political checks in both contexts safeguard to some extent against arbitrary departures from previously formulated policy, while nonetheless preserving the agency's ability to direct lower level officials to change policy when contemporary needs dictate.