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PLAYING BY THE RULES: DUE PROCESS AND ERRORS OF STATE PROCEDURAL LAW

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The Supreme Court has generally been unreceptive to claims that violations of state law constitute federal constitutional violations. Rather, the Court has repeatedly stated that "a 'mere error of state law' is not a denial of due process."[1] Specifically, the Court has failed to acknowledge that due process requires compliance with duly established state procedural safeguards before government may deprive a person of life, liberty, or property.

A striking example of the Court's failure to elevate violations of established state procedural safeguards to a violation of due process is found in *Barclay v. Florida*.[2] In *Barclay*, the Court upheld a death sentence admittedly imposed in violation of state law.[3] The state trial judge had

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1. Gryger v. Burke, 334 U.S. 728, 731 (1948), *quoted in* Barclay v. Florida, 103 S. Ct. 3418, 3425 n.8 (1983) (plurality opinion) (Rehnquist, J.).

2. 103 S. Ct. 3418 (1983).

3. The Court voted six to three to affirm the death sentence. The Chief Justice and Justices White and O'Connor joined Justice Rehnquist's plurality opinion. Justice Stevens concurred in the judgment in an opinion which Justice Powell joined. Justices Marshall and Blackmun wrote dissenting opinions, with Justice Brennan joining Justice Marshall's opinion.

rejected a jury's advisory sentence of life imprisonment and sentenced the defendant to death,[4] relying in part upon the defendant's criminal record, a factor which was not a proper aggravating circumstance under Florida law. In the plurality opinion, Justice Rehnquist declared that the federal Constitution did not prohibit consideration of the defendant's criminal record[5] and emphasized that " 'mere errors of state law' are not the concern of this Court, . . . unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution."[6] In dissenting opinions, Justices Marshall and Blackmun offered different approaches to the question whether errors of state law are constitutionally significant. Justice Marshall relied on due process "entitlement" analysis. Justice Marshall argued that Florida's prohibition on consideration of nonstatutory aggravating circumstances constituted a "state-created protection" that "cannot be arbitrarily abrogated . . . without violating the Constitution."[7] Justice Blackmun, in a brief dissent, approached the errors of state law issue more directly, arguing that the state had failed to follow "the rule of law."[8]

The first section of this Article examines the foundations and support for the respective approaches of Justices Rehnquist, Marshall, and Blackmun in the *Barclay* case.[9] The second part of this Article argues that due process requires compliance with established procedural safeguards when a government seeks to deprive a person of life, liberty, or property.[10] This Article proposes a "fair play" approach to defining due process that builds upon Justice Blackmun's "rule of law" approach in *Barclay*. This approach recognizes that procedural "unfairness" may occur in two ways. First, the procedural rules themselves may be unfair.[11] Second, the government's disregard of established procedural safeguards also is unfair. This second variety of unfairness exists regardless of whether the

4. *See* FLA. STAT. ANN. § 921. 141 (1973). *See also* Mikenas v. State 367 So. 2d 606, 610 (Fla. 1978). (construing aggravating circumstances).

5. 103 S. Ct. at 3427 (1983) (plurality opinion).

6. *Id.* at 3428.

7. *Id.* at 3443 (Marshall, J., dissenting).

8. *Id.* at 3445 (Blackmun, J., dissenting).

9. *See infra* notes 12-119 and accompanying text. Justice Stevens' opinion concurring in the judgment did not address the constitutional significance of the state law error apart from a general evaluation of the adequacy of the Florida scheme under eighth amendment standards.

10. *See infra* notes 120-33 and accompanying text.

11. The Court's normative due process inquiry into the minimum procedural requisites of fundamental fairness, typically described as a determination of "what processes is due," reflects this first notion of fairness.

Constitution would otherwise require that the particular safeguard be provided. The fair play interpretation, therefore, posits that both unfair rules and failure to play by established rules violate due process.

The first concept of fairness, that of minimally fair procedures, is firmly embedded in the Court's interpretation of due process. The second concept of fairness, that of "playing by the rules," however, has failed to gain the Court's full approval. This Article argues that fairness under the due process clauses includes "playing by the rules." The fair play approach is consistent with the text of the due process clauses and with common notions of fairness. It also is consistent with a proper understanding of the "rule of law," which underlies the due process clauses. Implicit in the "rule of law" concept is a separation between the process of rule formulation and the processes of rule interpretation and application. "Due separation of processes" requires that governments comply with their own duly established procedural safeguards unless they repeal or modify these rules through duly established legislative, administrative, or judicial processes. Government's ad hoc refusal to apply existing procedural rules violates due process. "Due separation of processes" differs from the doctrine of separation of powers that governs the allocation of powers among the three branches of the federal government. "Due separation of processes" applies to federal and state governments alike and poses limits within and not just between branches of government. The final section of this Article discusses some effects the fair play approach would have upon traditional notions of federalism.

I. THREE APPROACHES TO THE DUE PROCESS IMPLICATIONS OF STATE PROCEDURAL RULE VIOLATIONS

A. The "Mere Error" Approach

Justice Rehnquist's plurality opinion in *Barclay* rejected the argument that the trial judge's consideration of the defendant's criminal record as an aggravating circumstance offended due process because it violated state law. He characterized Barclay's brief as "suggest[ing] that the Florida Supreme Court failed to properly apply its own cases in upholding petitioner's death sentence." Justice Rehnquist responded to this characterization by stating that "mere errors of state law are not the concern of this Court . . . unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution."[12] Treating

12. 103 S. Ct. at 3428.

the constitutional issue as a question of eighth amendment standards, Justice Rehnquist reasoned that the Constitution did not prohibit the judge from considering the defendant's criminal record when imposing the death penalty.[13] He described the "crux of the issue" as "whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court let [sic] the sentence stand."[14] Justice Rehnquist gave the erroneous impression that the Florida Supreme Court had ruled that eliminating the improper aggravating circumstance could not possibly have affected the balance struck by the trial judge. He concluded that the trial court's reliance upon a nonstatutory aggravating circumstance did not unconstitutionally infect Florida's balancing process.[15]

A majority of the Court followed the *Barclay* plurality's approach in *Wainwright v. Goode*.[16] The Court held that Goode's sentence should stand even if the sentencing judge had violated state law by considering the defendant's future dangerousness when imposing the death penalty. The per curiam opinion in *Goode* relied heavily on Justice Rehnquist's *Barclay* opinion, quoting both his "mere errors of state law" statement and his eighth amendment "infection" standard.[17] Seven of the Justices agreed that because the Florida Supreme Court had independently

13. *Id.* at 3427 (1983) (plurality opinion). Justice Rehnquist distinguished Zant v. Stephens, 103 S. Ct. 2733 (1983). In *Stephens*, the Georgia Supreme Court held that one of the statutory aggravating circumstances relied upon was unconstitutionally vague under the federal due process clause but nevertheless upheld Stephens' death sentence. The United States Supreme Court refused to vacate the sentence. Justice Rehnquist's discussion in *Barclay* implied that *Stephens* rested upon a finding of constitutional error coupled with an application of federal harmless error analysis. 103 S. Ct. at 3425 n.8.

14. 103 S. Ct. at 3427-28.

15. *Id.* at 3428. As Justice Marshall pointed out in his dissenting opinion, the Florida Supreme Court had not applied state harmless error analysis in *Barclay*. Indeed, the Florida court had praised the trial judge's performance when the case first came before the court. *Id.* at 3441 (quoting Barclay v. State, 343 So. 2d 1266, 1271 n.8 (Fla. 1977), *cert. denied*, 439 U.S. 892 (1978)). The Florida Supreme Court later vacated this judgment sua sponte after the United States Supreme Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), and remanded for resentencing to give Barclay a full opportunity to rebut information contained in the presentence report provided to the trial judge. On remand the trial judge resentenced Barclay to death relying upon the same aggravating factors. The Florida Supreme Court again affirmed. The court refused to consider Barclay's challenges to the aggravating factors relied upon by the sentencing judge in the reimposition of the death sentence because his arguments were "against the finding previously reviewed here and affirmed." Barclay v. State, 411 So. 2d 1310 (Fla. 1981).

16. 104 S. Ct. 378 (1983) (per curiam).

17. *Id.* at 383.

reweighed the aggravating and mitigating circumstances, the death sentence did not violate the eighth amendment.[18] Only Justices Brennan and Marshall dissented.[19]

Justice Rehnquist relied upon *Engle v. Isaac*[20] to support his plurality opinion in *Barclay*. In *Isaac*, the Court reversed three Sixth Circuit judgments granting writs of habeas corpus based on challenges to jury instructions regarding self-defense.[21] Justice O'Connor's opinion for the Court emphasized that state prisoners seeking federal habeas relief must allege a deprivation of federal rights.[22] The Court concluded that one of the claims raised in *Isaac* "[did] no more than suggest that the instructions . . . may have violated state law,"[23] and thus did not raise a colorable constitutional claim.[24] The Court noted that "we have long recognized that a 'mere error of state law' is not a denial of due

18. *Id.*

19. *Id.* (Brennan, J., dissenting). Justice Brennan reiterated his view that the death penalty violates the eighth and fourteenth amendments and objected to the Court's "growing and disturbing trend toward summary disposition of cases involving capital punishment." *Id.* In the dissent's view, the Court should have remanded for consideration in light of *Barclay*. *Id.* at 384.

20. 456 U.S. 107 (1982).

21. *Id.* at 135. The three respondents in *Isaac* challenged jury instructions that construed a new Ohio statute governing burdens of proof to require defendants to prove self-defense by a preponderance of the evidence. After respondents' trials, the Ohio Supreme Court interpreted this statute's provision regarding affirmative defenses to place only the burden of production on the defendant and not the burden of persuasion. *See* State v. Robinson, 147 Ohio St. 2d 103, 351 N.E.2d 88 (1976). The Ohio Supreme Court later held that *Robinson*'s interpretation of the new statute applied to all trials under that statute. *See* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977). The Ohio court limited the effect of this holding, however, by ruling that a defendant's failure to comply with Ohio's contemporary objection rule waived any objection to erroneous jury instructions on appeal. *Id.* at 102, 364 N.E.2d at 1359. The court distinguished a case allowing a bench-trial defendant to challenge the assignment of the burden of proof of an affirmative defense because Ohio's contemporaneous objection rule applies only to jury trials. *Id.* The Supreme Court refused to read Isaac's petition to state a claim that Ohio's "selective retroactive application" of *Robinson*'s interpretation of the statute violated due process. 456 U.S. at 123-24 n.25. *But see* 456 U.S. at 137-141 (Brennan, J., dissenting) (petition raised unexhausted claim that Ohio's "selective retroactive application" violated due process).

22. *Id.* at 119.

23. *Id.* at 121. The Court rejected the argument that the state statute governing burdens of proof implicitly designated absence of self-defense as an element of defendants' crimes and thus that due process required the state to prove beyond a reasonable doubt that defendants had not acted in self-defense. The Court found no evidence to support such a construction of the statute.

24. *Id.* at 121. The Court conceded that the respondents raised a colorable constitutional claim that due process prohibited the state from shifting the burden of proving self-defense to defendants. *Id.* at 121-22. Federal habeas relief was barred, however, because respondents failed to comply with Ohio's contemporaneous objection rule and did not demonstrate "cause for" this procedural default. *Id.* at 135.

process."[25]

Gryger v. Burke[26] is the primary case the Court has relied upon for the "mere error" approach to the due process implications of state law errors. *Barclay, Goode,* and *Isaac* all quoted from *Gryger.* In *Gryger,* the Court held that the petitioner had not been denied due process when the sentencing judge at his trial allegedly mistakenly construed the Pennsylvania Habitual Criminal Act to provide for a mandatory life sentence after conviction for a fourth offense.[27] Justice Jackson's opinion for the Court contained the "mere error of state law" language quoted in *Barclay, Goode,* and *Isaac.* That language, however, should be read in fuller context:

> It is said that the sentencing judge prejudiced the defendant by a mistake in construing the Pennsylvania Habitual Criminal Act in that he regarded as mandatory a sentence which is discretionary. It is neither clear that the sentencing court so construed the statute nor if he did that we are empowered to pronounce it an error of Pennsylvania law. . . . And it in any event is for the Pennsylvania courts to say under its law what duty or discretion the court may have had. Nothing in the record impeaches the fairness and temperateness with which the trial judge approached his task. His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of state law different from that we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.[28]

This excerpt from Justice Jackson's majority opinion suggests an important limitation to the often "lifted" statement that "a 'mere error of state law' is not a denial of due process."[29] In *Gryger,* the Court was not faced with a failure to follow established law. Rather, the *Gryger* Court faced what it viewed as an alleged erroneous interpretation of state law. A vast difference exists between federal court review of alleged errors in state courts' *interpretations* of state law and federal constitutional review

25. *Id.* at 121 n.21 (citation omitted).

26. 334 U.S. 728 (1948).

27. *Id.* at 731.

28. *Id.*

29. Four Justices objected to the Court's "mere error of state law" conclusion. Justice Rutledge, joined by Justices Black, Douglas, and Murphy argued that "the denial of the very essence of the judicial process, which is the exercise of discretion where discretion is required, is in itself a denial of due process, not merely an error of state law of no concern to this Court." *Id.* at 734.

of *violations* of state law.[30]

Gryger does not support Justice Rehnquist's rejection in *Barclay* of a due process challenge to the conceded violation of established state law. *Gryger* stands for the much more limited proposition that federal courts will not speculate as to the correctness of state courts' interpretations of state law. *Barclay*, *Goode*, and *Isaac* all fail to distinguish allegations of violations of state law from allegations of erroneous interpretations of state law. Moreover, as the following discussion indicates, Justice Rehnquist's *Barclay* opinion fails to acknowledge the inconsistency in the Court's treatment of the constitutional significance of errors of state law.

B. The "Entitlement" Approach

In his dissent in *Barclay*, Justice Marshall applied an "entitlement" approach to analyzing errors in state procedure under the due process clause. Justice Marshall argued that because Florida law prohibited reliance on nonstatutory aggravating circumstances in imposing capital punishment, the denial of this "state-created protection" was not merely a matter of state law.[31] Rather, Justice Marshall contended that "[a] criminal defendant has a substantial and legitimate expectation that such circumstances will not be employed in sentencing him to death,"[32] and that the state cannot arbitrarily abrogate this interest without violating the federal constitution.

In defending his position, Justice Marshall relied upon *Hicks v. Oklahoma*.[33] *Hicks* supports Justice Marshall's "entitlement" approach and illustrates the Court's inconsistency in addressing the constitutional significance of errors of state law. A jury had sentenced Hicks to a mandatory forty year prison term under a provision of the Oklahoma habitual offender statute. After Hicks' conviction, the Oklahoma Court of Criminal Appeals held the statute unconstitutional.[34] Hicks then attempted to set aside his sentence. Despite the unconstitutionality of the statute, the Court of Criminal Appeals concluded that Hicks' sentence fell within the permissible range of punishment for his conviction and refused to order resentencing.[35] The Supreme Court vacated Hicks' sen-

30. *See infra* notes 142-56 and accompanying text.
31. 103 S. Ct. at 3443.
32. *Id.*
33. 447 U.S. 343 (1980).
34. Thigpen v. State, 571 P.2d 467, 471 (Okla. Crim. App. 1977).
35. 447 U.S. at 345.

tence and remanded. Eight Justices agreed that because the state had provided a statutory right to have criminal sentences imposed by the discretion of a jury, the defendant's entitlement to such a jury sentence constituted a "liberty" interest protected by the fourteenth amendment.[36] The Court viewed Oklahoma's denial of Hicks' state law "entitlement" to be sentenced by a jury" simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision . . . as [an] arbitrary disregard of petitioner's right to liberty."[37] Finding a due process violation, the Court rejected the state's argument that "all that is involved in this case is the denial of a procedural right of exclusively state concern."[38]

Logan v. Zimmerman Brush Co.[39] provides another example of the Court's use of the "entitlement" approach to find that state-created procedural protections constitute protected interests under due process. In *Logan*, the Illinois Supreme Court construed the Illinois Fair Employment Practices Act, which required the Illinois Fair Employment Practices Commission to convene a fact-finding conference within 120 days of the filing of a charge of employment discrimination. The Illinois court held that the Commission's failure to comply with this provision deprived the Commission of jurisdiction, thus extinguishing Logan's cause of action.[40] The Illinois court summarily rejected Logan's federal due process and equal protection arguments.[41] The Supreme Court's opinion only addressed Logan's due process claim.[42] The Court stated the issue

36. *Id.* at 346. Only Justice Rehnquist dissented.

37. *Id.*

Two weeks after the Court decided *Hicks*, it refused to consider a federal habeas corpus petitioner's due process claim based on deprivation of an alleged state-created right to resentencing by a jury. Mabry v. Klimas, 448 U.S. 444 (1980) (per curiam). The Court concluded that state remedies had not been exhausted as required by the federal habeas corpus statute, 28 U.S.C. § 2254(b) & (c) (1982). The Court expressed the view that exhaustion was particularly appropriate because Klimas' federal claim challenged an alleged deprivation of a state-created right by a state court. The Court pointed out that "the construction of the state statute, plainly a matter for the state courts to decide, was at best uncertain" and concluded that "obviously, therefore, the state courts can in no sense be said to have arbitrarily denied any right they were asked to accord." 448 U.S. at 447.

38. 447 U.S. at 346. *See* Note, *Protecting State Procedural Rights in Federal Court: A New Role for Substantive Due Process,* 30 STAN. L. REV. 1019 (1978) (argument for a "procedural entitlement" approach similar to that adopted by the Court in *Hicks*).

39. 455 U.S. 422 (1982).

40. Zimmerman Brush Co. v. Fair Employment Practices Comm'n, 82 Ill. 2d 99, 411 N.E.2d 277 (1980).

41. *Id.* at 108, 411 N.E.2d at 282.

42. In separate opinions, however, six of the Justices agreed that the challenged action also was invalid under the lowest level of equal protection scrutiny. 455 U.S. at 439 (separate opinion of

as "whether a state may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure."[43] The Court answered this question by applying its familiar two-step approach to procedural due process claims.[44] First, it found that Logan's state created right to use established adjudicatory procedures to redress discrimination

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Justice Blackmun joined by Justices Brennan, Marshall and O'Connor); 455 U.S. at 443-44 (Powell, J., with whom Rehnquist, J., joins, concurring in the judgment). The Justices based their equal protection analysis on the different treatment afforded claims in which the state agency had convened a fact-finding conference within 120 days as required by the statute and claims in which the agency had not convened a fact-finding conference within 120 days. The Justices did not address whether the agency's failure to comply with the statute in Logan's individual case denied him equal protection. In Beck v. Washington, 369 U.S. 541 (1962), however, the Court rejected the use of equal protection to challenge a state's failure to apply established rules in an individual case. The Court in *Beck*, found no merit in the argument that the state's denial to the petitioner of an unbiased grand jury, which it allegedly provided to others under state law, violated the equal protection clause. *Id.* at 554-55. The Court characterized petitioner's argument as a "contention that Washington law was misapplied" and concluded that: Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the fourteenth amendment does not "assure uniformity of judicial decisions . . . . [or] immunity from judicial error . . . ." Were it otherwise every alleged misapplication of state law would constitute a federal constitutional question. *Id.* at 554-55 (citations omitted).

Justice Black strongly criticized the Court's rejection of the equal protection argument in *Beck*. In a dissenting opinion joined by Chief Justice Warren, Justice Black argued:

> I cannot agree with the Court that such a gross discrimination against a single individual with such disastrous consequences can be treated as a mere trial error. For a judicial decision which sends a man to prison by refusing to apply settled law which has always been and so far as appears will continue to be applied to all other defendants similarly situated is far more than mere misapplication of state law. It is denial of equal protection of the law and a state should no more be allowed to deny a defendant protection of its laws through its judicial branch than through its legislative or executive branch.

Id. at 567-68 (Black, J., dissenting).

Examination of the relationship between violations of state law and equal protection is beyond the scope of this Article. It should be noted, however, that under the *Beck* Court's approach, equal protection provides a vehicle for challenging a state's failure to follow its rules only when the failure is class-based or perhaps otherwise shown to be "invidious." It fails to provide a basis for challenge when a person can show no more than an isolated instance of rule-breaking. *See also* Snowden v. Hughes, 321 U.S. 1 (1944) (equal protection challenge to the unequal application of a facially fair statute requires a showing of intentional or purposeful discrimination).

43. 455 U.S. at 424.

44. Under its two-step approach, the Court first asks whether a protected life, liberty, or property interest is at stake. If so, it then decides how much process is due by balancing three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldrige, 424 U.S. 319, 335 (1976).

was a protected property interest under the fourteenth amendment.[45] Then, to determine what process was "due," the Court considered the private interests, the governmental interests, and the risk of error. Balancing these three factors it concluded that Logan was entitled to have the Commission consider the merits of his charge before terminating his claim.[46]

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45. 455 U.S. at 431. The Court characterized the statutorily mandated 120-day deadline for the fact-finding conference as a state-imposed procedural limitation on Logan's ability to assert his rights, rather than as a substantive element of his claim. *Id.* at 433. It stressed that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures . . . ." *Id.* at 432.

46. *Id.* at 434. In determining what process was due, the Court emphasized that Logan was not challenging the Commission's error, "but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." *Id.* at 436. The Court distinguished Logan's claim from the "tortious loss of . . . property as a result of a random and unauthorized act by a state employee" that was at issue in Parratt v. Taylor, 451 U.S. 527, 541 (1981). In *Parratt*, the Court found the state's tort claims procedure provided all the process due. *Id.* at 543-44. The Court in *Logan* explained that *Parratt* was not designed to reach a situation in which "it is the state system itself that destroys a complainant's property interest by operation of law, whenever the Commission fails to convene a timely conference—whether the Commission's action is taken through negligence, maliciousness, or otherwise." *Id.* at 436. *See also* Hudson v. Palmer, 104 S. Ct. 3194, 3204 (1984) (postdeprivation tort procedures provide sufficient process for tortious loss of property resulting from random and unauthorized intentional acts of state employees; *Logan* is distinguished as holding that postdeprivation remedies do not satisfy due process where the property deprivation is effected pursuant to an established state procedure).

The Third Circuit Court of Appeals recently relied upon *Parratt* and *Logan* to hold that substantive mistakes by administrative bodies in applying local ordinances do not create federal claims so long as state court remedies are available to correct the errors. Cohen v. City of Philadelphia, 736 F.2d 81, (3d Cir. 1984). *See also* Albery v. Redding, 718 F.2d 245 (7th Cir. 1983); Roy v. City of Augusta, 712 F.2d 1517 (1st Cir. 1983); Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982); Ellis v. Hamilton, 669 F.2d 510 (7th Cir.), *cert. denied,* 459 U.S. 1069 (1982); *see generally* Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies*: Parratt v. Taylor *and* Logan v. Zimmerman Brush Company, 1982 U. ILL. L.F. 831; Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts,* 18 GA. L. REV. 201 (1984). In *Cohen*, the Third Circuit distinguished deprivations that occur as a result of an unauthorized failure to follow prescribed state procedures from deprivations as a result of some established state procedure. *But see* Burtnieks v. City of New York, 716 F.2d 982, 988 (2d Cir. 1983) ("[D]ecisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure.") Whatever merit the *Parratt* approach may have when the issue is whether state tort remedies provide sufficient process for random and unauthorized tortious deprivations of property, extension of its reasoning to the failure to follow existing procedural rules governing deprivations that are authorized by established law is unwarranted. An approach that treats procedural safeguards as "procedural entitlements," however, may encourage such an illogical extension. To adopt a view that violations of state procedural safeguards do not violate due process so long as there is an opportunity for state court review of such violations would resurrect the now discredited approach of Frank v. Mangum, 237 U.S. 309 (1915). In *Frank*, the Court reasoned that the state had not deprived the defendant of due process when the state supplied a "corrective process"—appellate review—for

Hicks and *Logan* indicate that, despite broad statements about "mere errors of state law," individuals may sometimes redress a state's "deprivations" of established procedural "entitlements" under current substantive or procedural due process doctrine.[47] Unfortunately, the Court's inconsistent approach to analyzing the due process implications of violations of state procedural law provides little guidance in predicting whether a majority of the Court will dismiss such a claim as alleging a "mere error of state law" or will find the claim redressable under due process analysis.

Justice Rehnquist's opinion for the Court in *Hewitt v. Helms*,[48] illustrates the shortcomings of addressing violations of state procedural law under the current two-step approach to procedural due process. In *Helms*, the Court reviewed a prison inmate's claim that state prison officials violated due process in confining him to administrative segregation. The Court rejected the argument that "the mere fact that Pennsylvania has created a careful procedural structure to regulate the use of administrative segregation indicates the existence of a protected liberty interest."[49] Despite its refusal to accept this argument, the Court did find a

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claims of interference with the cause of justice by mob domination of a trial. *Id.* at 327-29, 335. The Court repudiated this reasoning in Moore v. Dempsey, 261 U.S. 86 (1923). *See* Fay v. Noia, 372 U.S. 391, 420-21 (1963).

47. The Court's recent opinion in Davis v. Scherer, 104 S. Ct. 3012 (1984), contained several suggestions that its analysis would have been different had Scherer argued that the state agency's failure to follow its own procedural regulations in terminating his employment was itself constitutionally significant. *Id.* at 3017, 3019, 3020 n.12. For example, Justice Powell, writing for the Court, noted:

> State law may bear upon a claim under the due process clause when the property interests protected by the Fourteenth Amendment are created by state law . . . . Appellee's property interest in his job under Florida law is undisputed. Appellee does not contend here that the procedural rules in state law govern the constitutional analysis of what process was due to him under the Fourteenth Amendment.

Id. at 3019 n.11. Instead Scherer argued that the violations of state law stripped state officials of their qualified immunity from damages under 42 U.S.C. § 1983 (1982). A majority of the Court rejected this claim. The majority held that state officials forfeit their qualified immunity under § 1983 only if their acts violate clearly established federal rights. The Court found it irrelevant to the qualified immunity issue that the challenged official act violated clearly established state regulations. The majority voiced concern about the wisdom of imposing damages for failure to comply with statutes and regulations. *Id.* at 3021. In dissent, Justice Brennan deemed it unnecessary to reach the issue whether violation of agency regulations would defeat immunity. He argued, however, that the existence of the regulations was relevant to whether the officials were entitled to immunity. Justice Brennan reasoned that "the presence of a clear-cut regulation obviously intended to safeguard public employees' constitutional rights certainly suggests that appellants had reason to believe they were depriving appellee of due process." *Id.* at 3025.

48. 459 U.S. 460 (1983).

49. *Id.* at 471.

state-created liberty interest in *Helms*. The state had "gone beyond simple procedural guidelines"[50] and explicitly mandated certain procedures and substantive predicates. Turning to the determination of what process inmate Helms was due, the Court, however, required less procedural protections than were called for by the prison's own regulations. "Unfortunately," Justice Stevens lamented in his dissenting opinion, "today's majority opinion locates the due process floor at a level below existing procedures in Pennsylvania."[51]

The result in *Helms* is questionable even under the current balancing approach to determining what process is due. The Burger Court has converted the inquiry concerning the minimum procedural protections necessary to satisfy "fundamental fairness" into what is essentially a cost-benefit analysis.[52] When this determination focuses on the necessity for providing existing procedural protections, however, the government has already presumably done its own cost-benefit analysis and concluded that it can "afford" to provide these protections. The Court should accept the government's evaluation.[53]

C. *The "Rule of Law" Approach*

1. *Justice Blackmun's Dissent in* Barclay

Justice Blackmun's dissent is the shortest of the opinions in *Barclay*, but ultimately it may prove the most important. It provides the foundation for the framework this Article proposes for analyzing due process claims based on errors of state law. Justice Blackmun directly addressed

50. *Id.* at 471-72.

51. *Id.* at 496 (Stevens, J., dissenting). Justices Brennan, Marshall, and Blackmun joined this portion of Justice Stevens' dissent.

52. *See, e.g.*, Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423 (1981). *See also* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldrige: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-50 (1976) (criticizing the Court for leaving dignitary values out of the balance); *cf.* Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 885-86 (1982) (arguing that the *Mathews* test allows for weighing the independent value of procedure as part of the individual's interest).

53. For recent arguments over whether the Court should ever interfere with the balance the government has struck, as embodied in existing procedural rules, compare Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (no) with Laycock, *supra* note 52 (yes).

The Court is justified in interfering with the balance struck in adopting existing procedural rules when it determines that the government has *undervalued* the individual interests at stake or *underestimated* the risk of error or the value of additional safeguards. The Court is also justified in rejecting the government's evaluation of its own interests when the Court determines that the government has *overstated* the "costs" of additional protections.

the problem of violations of established state law and found that the Constitution required the state to adhere to the "rule of law."

> [W]hen a state chooses to impose capital punishment, as this Court has held a state presently has the right to do, it must be imposed by the *rule of law*. . . . . The errors and missteps—intentional or otherwise—come close to making a mockery of the Florida statute and are too much for me to condone. Petitioner Barclay, reprehensible as his conduct may have been, deserves to have a sentencing hearing and appellate review free of such misapplication of law, and in line with the pronouncements of this Court.
>
> The final result reached by the Florida courts, and now by this Court, in Barclay's case may well be deserved, but I cannot be convinced of that until *the legal process of the case has been cleansed of error that is so substantial.* The end does not justify the means even in what may be deemed to be a "deserving" capital punishment situation.[54]

Rather than resort to the indirect "entitlement" approach[55] Justice Blackmun focused on the *process* by which the state had deprived Barclay of his right to life. While his opinion does not explicitly refer to the due process clause, Justice Blackmun's reference to the "rule of law" and his call for a cleansing of the legal process suggest that his argument is grounded in due process.[56] From this brief dissent emerges an implicit argument that due process requires compliance with established proce-

54. 103 S. Ct. 3445-46 (Blackmun, J., dissenting) (emphasis added).

55. The entitlement approach could be advantgeous for individuals in situations such as prison administrative proceedings. The Burger Court has been extremely reluctant to recognize that threshold liberty or property interests are at stake in such proceedings. *See, e.g.,* Olim v. Wakinekono, 461 U.S. 238 (1983). *Helms* illustrates, however, that the Court has also been unreceptive to arguments that prison regulatory procedures alone constitute an entitlement. *See supra* notes 48-50 and accompanying text. As Justice Stevens has emphasized, the problem with the Court's analysis of due process challenges to prison proceedings is its positivist view of what constitutes a "liberty" interest under due process. *See, e.g.,* Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting). The Court should acknowledge that persons incarcerated for crimes retain important liberty interests.

56. Justice Blackmun may have grounded his dissent more narrowly in the eighth amendment guarantee against cruel and unusual punishment, as incorporated by the due process clause of the fourteenth amendment. The role, however, that the rule of law plays in our system is not limited to death penalty cases; the principle of the rule of law underlies the basic concept of due process. Nevertheless, death penalty cases present the strongest arguments for requiring states to follow established procedural rules. The Court has held that the Constitution requires states to adopt procedures for insuring that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Prior to *Barclay*, the Eleventh Circuit Court of Appeals required states to comply with established rules designed to assure that the state imposed the death penalty in a constitutional manner. Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983), *cert. denied,* 104 S. Ct. 2375 (1984); Goode v. Wainwright, 704 F.2d 493, *rev'd and remanded,* 104 S. Ct. 378 (1983).

dural protections.[57]

2. *Support for the "Rule of Law" Approach*

Because the "rule of law" approach provides the foundation for the "fair play" framework this Article proposes in the next section, examination of the support for such an interpretation of due process is especially important. The Court and certain members of the Court have occasionally embraced a rule of law approach when defining due process. Consideration of early due process opinions sheds light on contemporary understanding of the limits imposed upon government by the rule of law component of due process. Finally, a discussion of decisions requiring federal administrative agencies to follow their own regulations provides particularly useful insights into the due process implications of government failure to follow established rules, as do recent opinions in cases raising double jeopardy claims.

a. Early Due Process Cases

Justice Harlan's opinion for the Court in *Hopt v. Utah*[58] provides clear support for the proposition that due process requires government to comply with existing procedural protections governing deprivations of life, liberty, and property. The Supreme Court of the Territory of Utah had affirmed Hopt's murder conviction and death sentence. Hopt filed a writ of error with the United States Supreme Court challenging the judgment and sentence. One of the challenges to the judgment was that Hopt had not been present during part of the proceedings against him,[59] contrary to a provision in the Criminal Code of Procedure of Utah, which required the defendant to be present at the trial.[60]

57. It is unclear whether Justice Blackmun incorporated "substantiality" into his "rule of law" standard or assumed that federal courts would dismiss less than substantial errors as "harmless" under federal harmless error doctrine. Several courts have recognized that the cumulative effect of state law trial errors may constitute a violation of federal due process. *See, e.g.*, Walker v. Engle, 703 F.2d 959 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 367, 368 (1983); Niziolek v. Ashe, 694 F.2d 282 (1st Cir. 1982); *see also* L. YACKLE, POSTCONVICTION REMEDIES, § 90 nn.14.15-14.21 (Supp. 1984) (collecting cases). Justice Rehnquist, joined by Chief Justice Burger and Justice O'Conor, dissented from the denial of certiorari in *Walker*. They would have granted certiorari to review "this novel holding that trial rulings on the scope of prosecutorial cross-examination and rebuttal testimony are cognizable on federal habeas." 104 S. Ct. at 368.

58. 110 U.S. 574 (1884).

59. The trial judge had allowed duly appointed "triers" to "try" several challenged jurors outside the presence of the court, the defendant, and his counsel. *Id.* at 576-77.

60. 110 U S. at 576.

The Supreme Court reversed the territorial court's judgment.[61] Writing for the Court, Justice Harlan stated:

> [T]he legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or his liberty without being so present, such deprivation would be without that due process of law required by the Constitution.[62]

Though the *Hopt* case was from a territorial court, Justice Harlan's opinion spoke of due process generally. He did not suggest any distinction between the meaning of the parallel clauses of the fifth and fourteenth amendments in this regard.[63] The Court later upheld laws that permitted the defendant to waive the right to be present at trial.[64] The Court

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61. *Id.* at 590.

62. *Id.* at 579.

63. In *Schwab v. Berggren*, 143 U.S. 442 (1892), Justice Harlan quoted extensively from *Hopt*. In *Schwab*, a state prisoner claimed that he was held in custody in violation of the Constitution because he had not been present when the state appellate court affirmed his death sentence. The Court found that the common law rule, which required the accused to be present at the judgment but not at the appellate review, was consistent with due process of law. *Id.* at 448-51.

64. *See* Frank v. Mangum, 237 U.S. 209 (1915); Diaz v. United States, 223 U.S. 442 (1912). Similarly, in Hallinger v. Davis, 146 U.S. 314 (1892), the Court found that a defendant who elected to plead guilty and thus under applicable state law waived his right to trial by jury had not been deprived of due process.

In *Hopt*, the Court had rejected the argument that the defendant had waived his right to be present by his failure to object, holding that the defendant lacked the power to dispense with the required personal presence. Citing Blackstone, Justice Harlan refuted the suggestion that only the defendant was concerned with whether his trial had complied with the statute:

> The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.

Id. Accord Lewis v. United States, 146 U.S. 370 (1892); *cf.* Ball v. United States, 140 U.S. 118 (1891) (record in capital punishment cases must affirmatively show defendant's presence during sentencing). *But see* Illinois v. Allen, 397 U.S. 337, 341-43 (1970) (holding that a defendant can lose the right to be present and thus be excluded from the courtroom if, after warning, disruptive conduct continues). The *Allen* Court identified the sixth amendment confrontation clause as the basis for a defendant's constitutional right to be present during every stage of a criminal trial. In *Allen*, the appellate court had relied in part upon *Hopt* in holding that a trial judge can never exclude a defendant from his own trial. The Supreme Court disagreed:

> The broad dicta in Hopt v. Utah, and Lewis v. United Staes, that a trial can never continue in the defendant's absence have been expressly rejected. Diaz v. United States. We accept instead the statement of Mr. Justice Cardozo who, speaking for the Court in Snyder v. Massachusetts said: "No doubt the privilege may be lost by consent or at times even by misconduct."

397 U.S. at 342-43 (citations and footnotes omitted).

viewed these cases as presenting due process challenges to the fairness of the application of established law, rather than to a violation of a plain statutory mandate as in *Hopt*.[65] The Court applied an extension of this reasoning to uphold the conviction of a defendant who consented through counsel to the examination of a juror outside his presence under state law that treated defendant's occasional nonprejudicial absence as nonmaterial error.[66]

The *Hopt* Court's view that the failure to follow established procedures violates due process is not the only view offered by the Court in early due process cases. Other cases contain statements that initially appear to support the approach in *Hopt*, but on closer reading suggest a more limited view of due process. For example, in *Kennard* v. *Louisiana ex rel. Morgan*,[67] the Court defined due process as "the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."[68] Despite this definition, however, the *Kennard* Court also stated that the question was not "whether the courts below having jurisdiction of the case and parties have followed the law, but whether the law if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all."[69]

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65. In Frank v. Mangum, 237 U.S. 309 (1915) the Court distinguished *Hopt*, pointing out that in *Hopt* the local code of criminal procedure declared that "the defendant *must be* personally present at trial." The Court explained that the ground of decision in *Hopt* "was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirement . . . was denied on the ground that his life could not be lawfully taken except in the mode prescribed by law." 237 U.S. at 340-41. *See also* Diaz v. United States, 223 U.S. 442, 448 (1912).

66. Howard v. Kentucky, 200 U.S. 164 (1906). More recent challenges to defendants' absences from trials have been raised under the "incorporated" sixth amendment confrontation clause guarantee. *See, e.g.,* Illinois v. Allen, 397 U.S. 337 (1970) (discussed *supra* note 64).

67. 98 U.S. 480 (1875).

68. *Id.* at 481.

69. *Id. See also In re* Converse, 139 U.S. 624, 631 (1891). Similarly, in Arrowsmith v. Harmoning, 118 U.S. 194, 195-96 (1886), the Court stated:

> [A] state canot be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The legislature of a state performs its whole duty under the Constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which if followed, will furnish the parties the necessary constitutional protection.

As these quotations from *Kennard* and *Arrowsmith* illustrate, the Court emphasized the *jurisdiction* of the state court in early due process challenges to state convictions. Paul M. Bator and Gary

A comparison of *Hopt* and its early progeny with the Court's statements in cases such as *Kennard* leads to the conclusion that the Court was no more consistent in its early considerations of the due process implications of failure to follow established procedures than it is today.

b. Justice Black's Definition of Due Process

Justice Black's definition of due process, as set forth in his dissent in *In re Winship*,[70] also required the government to comply with established law: "For me the only correct meaning of that phrase is that our Government must proceed according to the "law of the land" – that is, according to written constitutional and statutory provisions as interpreted by court decisions."[71] Justice Black further asserted that "the Due Pro-

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Peller have offered two explanations for the Court's emphasis on jurisdiction in early due process cases. *See* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441 (1963); Peller, *In Defense of Federal Habeas Corpus Relitigation,* 16 HARV. C.R.-C.L.L. REV. 579 (1982). Bator argues that the frequent references to jurisdiction arose because of the traditional rule that the writ of habeas corpus was available only for challenges that went to the lower court's jurisdiction. Bator, *supra* at 463-99. Peller counters that the Court's discussion of jurisdiction related to the merits of the due process claims and reflected the existing view that a judgment in the regular course of proceedings by a court of competent jurisdiction satisfied due process. Peller, *supra* at 621-34.

Both Bator and Peller's explanations have merit. In light of the close connection historically between the development of the writ of habeas corpus and the implementation of due process, it is not surprising that it is difficult at times to separate the Court's discussion of the scope of habeas review from its discussion of the merits of due process claims. *See, e.g.,* Fay v. Noia, 372 U.S. 391, 402 (1962) (referring to the "union of the right to due process drawn from Magna Carta and the remedy of habeas corpus"; "[v]indication of due process is precisely its historic office"). *See also* D. MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY 3-4. *See generally* L. YACKLE, POSTCONVICTION REMEDIES § 4 (1981) (collecting and discussing authorities on the history of habeas corpus). At times the Court's concern with jurisdiction in early due process cases is attributable to its view of the nature of the writ of habeas corpus. *See, e.g., Ex parte* Siebold, 100 U.S. 371, 375 (1879); *see also* Frank v. Mangum, 237 U.S. 307, 316, 327 (1915); *see generally* D. MEADOR, *supra* at 58-63 (1966). In cases such as *Kennard* and *Arrowsmith,* on the other hand, the Court's discussion of the lower court's jurisdiction seems to refer to the merits of the due process claim. *Kennard* and *Arrowsmith* were before the Court on writs of error, not writs of habeas corpus. It should be noted, however, that historically the writ of error was also a more limited basis for review of a lower court's judgment than appeal. *See* B. CURTIS, JURISDICTION, PRACTICE AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 60-62 (1880) (lectures delivered to Harvard Law students during 1872-73). In cases challenging state court convictions, such as *Kennard* and *Arrowsmith,* the Court's statements may also be explained as attributable to federalism concerns.

70. 397 U.S. 358, 377 (1970) (Black, J., dissenting).

71. *Id.* at 382 (footnote omitted). Justice Black noted that his view of the full applicability of the Bill of Rights to the states was not based on the due process clause "standing alone" but on "the language of the entire first section of the Fourteenth Amendment, as illuminated by the legislative history surrounding its adoption." *Id.* at 382-83 n.11 (citation omitted). Given his definition of due

cess Clause in both the Fifth and Fourteenth Amendments, in and of itself does not add to those provisions, but in effect states that our governments are 'governments of law and constitutionally bound to act only according to law.' "[72]

The issue presented in *Winship* was whether due process requires proof beyond a reasonable doubt during the adjudicatory stage of juvenile delinquency proceedings when a juvenile is charged with an act that would constitute a crime if committed by an adult.[73] The majority held that due process required the state to prove its case beyond a reasonable doubt.[74] Justice Black disagreed. He stressed that "as long as a particular jurisdiction requires proof beyond a reasonable doubt, then the Due Process Clause commands that every trial in that jurisdiction must adhere to that standard," but argued that "when . . . a state through its duly constituted legislative branch decides to apply a different standard, then that standard, unless it is otherwise unconstitutional, must be applied to insure that persons are treated according to the 'law of the land.' "[75]

Justice Black argued that the historical meaning of due process supported his interpretation.[76] To assess the support for his interpretation, Justice Black's definition must be separated into two principal assertions. First, the process provided by written statutory and constitutional provisions *is* due process. Second, the due process clauses require governments to adhere to existing procedural standards. A short review of Supreme Court cases indicates that the purely positivist approach of Justice Black's first assertion truncates the appropriate scope of the due process clauses. The Court has clearly rejected the assertion that due process imposes no independent normative limits on government.

The Supreme Court first interpreted the due process clause of the fifth

process, Black's reference to the "entire first section" indicates his reliance upon the privileges or immunities clause as the textual basis for incorporating the Bill of Rights. *See* Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting). *See generally* Yarborough, *Justice Black, The Fourteenth Amendment, and Incorporation,* 30 U. MIAMI L. REV. 231 (1976).

72. 397 U.S. at 382.

73. *Id.* at 359.

74. *Id.* at 368.

75. *Id.* at 386.

76. " 'Due process of law' was originally used as a shorthand expression for governmental proceedings according to the 'law of the land' as it existed at the time of those proceedings. Both phrases are derived from the laws of England and have traditionally been regarded as meaning the same thing." *Id.* at 378.

amendment in *Murray's Lessee v. Hoboken Land & Improvement Co.*[77] The *Murray's Lessee* Court squarely rejected the argument that the clause could "be so construed to leave congress free to make any process 'due process of law,' by its mere will."[78] Justice Curtis, writing for the Court, relied upon Lord Coke's conclusion that the words "due process of law" were equivalent in meaning to Magna Carta's "by the law of the land."[79] Consistent with Lord Coke's view that the "law of the land" included some natural law limitations on parliamentary power,[80] the

77. 59 U.S. (18 How.) 272 (1856).

78. *Id.* at 276.

79. *Id.* For a contrary argument, see Berger, *"Law of the Land" Reconsidered,* 74 NW. U.L. REV. 1 (1979).

80. For a contrary argument, see Easterbrook, *supra* note 53, at 96. Easterbrook accepts that Magna Carta's "law of the land" provision is one of the sources of the due process clause in our Constitution, but argues that under its English law antecedents, "[p]rocedures named in statutes were due process of law." *Id.* at 95-96. Easterbrook attacks the dichotomy in the current interpretation of due process that allows legislatures to define substantive entitlements but refuses to recognize legislative control over what process is due. Easterbrook describes Lord Coke as a "solitary voice in English law" insofar as he insisted that the "by the law of the land" language of the Magna Carta included some natural law limitations on parliamentary power. *Id.* at 96. Easterbrook concedes, however, that Lord Coke's *Institutes* were well read in the colonies and thus, "the Framers may have thought Coke right and incorporated his error into our fundamental law." *Id.* He also admits that the Supreme Court's first interpretation of due process in *Murray's Lessee* drew upon Coke's natural law precepts. *Id.* at 101. Easterbrook is willing to assume that the due process clause embodies Lord Coke's natural law views, but trivializes the impact of this assumption through his static method of constitutional interpretation. Easterbrook believes that, apart from legislatively prescribed procedures, due process includes only those procedures that Lord Coke considered inalienable, such as indictment and jury trial. Further, in his view, due process applies only to deprivations of life, liberty, and property as those terms were then understood. *Id.* at 97-98. Easterbrook concludes:

> It may be assumed that the Due Process Clause embodies Coke's views at their broadest. This would not affect very many cases. Whatever reading holds, the Due Process Clause places little or no legitimate restraints on the contents of legislation. Judges and Presidents must follow rules laid down in "law"; judges may not act ex parte in important matters; but Congress may establish as law such procedures as it pleases, subject only to the constraint that it not abrogate certain long-recognized judicial procedures when fundamental natural liberties are at stake. Because Coke's fundamental procedures were secured by other provisions of the Bill of Rights, this branch of the language's ancestry drops out. All that is left are prohibitions designed to compel other departments of government to follow the legislature's plan.

Id. at 98-99 (footnotes omitted).

Easterbrook unwittingly provides support for an interpretation of due process that requires government to play by the rules. His primary argument that due process imposes no independent normative limits on legislative control of process, however, will persuade only those who agree with his static view of constitutional interpretation. ("language and structure, informed by constitutional history, are the proper basis of interpretation and . . . perhaps, they are all that count."). *Id.* at 91.

For criticisms of this approach to constitutional interpretation, see M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITU-

Court concluded that "[t]he article is a restraint on the legislative as well as on the executive and judicial powers of the government."[81]

Despite this early rejection of a purely positivist interpretation of the due process clause of the fifth amendment, in *Walker v. Sauvinet*,[82] the Court momentarily embraced a view of the fourteenth amendment's due process clause that allowed state legislatures to control what process was due. Chief Justice Waite's opinion for the Court cited *Murray's Lessee*, but rejected Walker's claim that a Louisiana statute deprived him of a right to trial by jury in a civil case and thus violated due process. The Court stated: "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."[83] *Walker*'s interpretation of fourteenth amendment due process was short-lived, however. In *Kennard v. Louisiana ex rel. Morgan*,[84] the Court implicitly acknowledged that the due process clause of the fourteenth amendment imposed normative limits on state procedures.[85] Similarly, in *Davidson v. New Orleans*,[86] Justice Miller asked, "can a State make anything due process of law which, by its own legislation, it chooses to declare such?"[87] To adopt such a view "is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation."[88]

The view that the federal constitution imposes normative limits, often referred to as a requirement of "fundamental fairness," now is well established in the Court's interpretation of both due process clauses. The rejection of Black's assertion that due process does not embody independent normative standards, however, does not require rejection of his assertion that due process requires government to follow procedures

TIONAL POLICYMAKING BY THE JUDICIARY (1982); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

81. 59 U.S. (18 How.) at 276.
82. 92 U.S. 90 (1875).
83. *Id.* at 93.
84. 92 U.S. 480 (1875).
85. *Id.* at 481.
86. 96 U.S. 97 (1877).
87. *Id.* at 102.
88. *Id.*

that it has adopted as positive law. To the contrary, several Supreme Court cases support the notion that "fundamental fairness" includes a requirement that government play by the rules. For example, Justice Harlan's opinion in *Hopt* and its early progeny support this argument. More recent support is found in federal administrative law cases and in cases raising double jeopardy claims.

c. Federal Administrative Law Cases

A long series of federal administrative law cases requiring agencies to comply with their own regulations provides additional support for a view that due process requires government to play by the rules.[89] Although the rationale of these cases was often unclear,[90] until recently they were commonly viewed as resting upon the principle that due process requires agencies to follow their own regulations.[91]

89. See cases cited *infra* notes 92-100.

90. Rodney Smolla recently observed that in articulating the principle that administrators are bound by their own rules, "the Supreme Court has moved intermittently between constitutional and administrative law vocabulary, generally leaving the legal source of the principle ambiguous." Smolla, *The Erosion of the Principle that the Government Must Follow Self-Imposed Rules,* 52 FORDHAM L. REV. 472, 476 (1984). Smolla calls for a "new vigilance" in enforcing the principle of binding administrative rules and argues that:

> [V]irtually all rules binding as a matter of administrative law should also be binding under the Constitution. Constitutionally binding rules are three types: rules that create substantive entitlements; rules that create procedural entitlements; and rules that implicate specific enumerated constitutional guarantees such as the first amendment or the ex post facto clause.

Id. at 502-03.

Smolla's framework relies heavily on "entitlement" analysis, but he fails to explain why rules that create substantive or procedural "entitlements" are binding. If agency procedural rules are viewed as constituting threshold protected interests rather than as part of the process due to one deprived of life, liberty, or property, then due process would seem to require only that the agency not "arbitrarily" violate its rule. *See* Hicks v. Oklahoma, 447 U.S. 343 (1980); Barclay v. Florida, 103 S. Ct. 3418, 3443 (1983) (Marshall, J., dissenting); *see also* Note, *supra* note 38 (arguing for an "entitlement" approach, but acknowledging that it would prohibit only "arbitrary" violations of state procedural rights). *See infra* note 138 and accompanying text.

91. *See, e.g.,* Berger, *Do Regulations Really Bind Regulators?,* 62 NW. U.L. REV. 137, 149-152 (1967). Berger pointed out that Gellhorn and Byse, in their 1960 edition of ADMINISTRATIVE LAW: CASES & COMMENTS, viewed Supreme Court decisions requiring compliance with procedural regulations as grounded in one of two rationales: " 'either that the existing regulations have the force and effect of law' and must therefore be deemed binding on the government as well as on the citizen, or that they embody a defacto recognition of minimum standards or procedural decency and may therefore be roughly equated with due process." Berger, *supra,* at 149. Berger believed the second alternative open to question but accepted the first rationale as "solidly based":

> Under our system, the law binds all, officers as well as citizens, "from the highest to the lowest." Compliance with a regulation which has "the force of law," moreover, is required

In 1923, Justice Brandeis, speaking for a unanimous Court in *Bilokumsky v. Tod*,[92] assumed "that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law."[93] In *Arizona Grocery v. Atchison, Topeka & Santa Fe Railway Co.*,[94] the Court stated that the Interstate Commerce Commission could not "acting in its quasi-judicial capacity ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed."[95] In later cases, the Court again focused on the agencies' failure to follow their own procedural regulations.[96] The Court has distinguished procedural rules designed "to protect the interest of the individual"[97] from rules adopted to promote the orderly transaction of business.[98] The Court requires agencies to follow the former, but not the latter.[99]

While the Burger Court has significantly diminished the importance of

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by due process in its primal sense; i.e., a regulation like a statute, is part of "the law of the land" which must be observed by an official for the protection of a citizen.

Id. at 149-50 (footnotes omitted). *But cf.* Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring and dissenting in part) ("This *judicially evolved* rule of administrative law is now firmly established and, I may add, rightly so. He that takes the procedural sword shall perish with that sword.") (emphasis added).

92. 263 U.S. 149 (1923).

93. *Id.* at 155. The Court upheld Bilokumsky's deportation, however, because no agency rule required that a person under investigation be informed of the rights to counsel and to refuse to answer questions. *Id.* at 155-56.

94. 284 U.S. 370 (1932).

95. *Id.* at 389.

96. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199 (1974); Vitarelli v. Seaton, 359 U.S. 535 (1959); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957); Bridges v. Wixon, 326 U.S. 135 (1945). In Yellin v. United States, 374 U.S. 109 (1963), the Court extended the principle of earlier administrative law cases to invalidate a contempt citation when a congressional committee had violated its own rules.

97. Bridges v. Wixon, 326 U.S. 135, 152 (1945); *see also* Morton v. Ruiz, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.").

98. *See* Sullivan v. United States, 348 U.S. 170 (1954).

99. *See, e.g.*, American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532 (1970). The Court rejected the argument that an ICC rule was "adopted to confer important procedural benefits upon individuals." The Court concluded:

> Thus there is no reason to exempt this case from the general principle that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."

Id. at 539 (citations omitted).

this long line of administrative law cases, it has not overruled the earlier cases. Indeed, cases such as *United States v. Nixon*,[100] illustrate the continued validity of the earlier cases. In *Nixon*, the Court stated:

> [I]t is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it.[101]

The Burger Court has undercut, however, the constitutional significance of these federal administrative law cases. In *Board of Curators, University of Missouri v. Horowitz*,[102] Justice Rehnquist rejected Horowitz's contention that the Board of Curators' alleged failure to follow its own procedural rules when it dismissed her from medical school presented a federal constitutional claim. The Court concluded that Horowitz's reliance upon federal administrative law cases to support this contention was misplaced. Justice Rehnquist explained that those cases "enunciate principles of federal administrative law rather than of constitutional law binding upon the States."[103]

Justice Marshall, dissenting in part, characterized this portion of the Court's opinion in *Horowitz* as "nothing more than confusing dictum," given the Court's conclusion that the school had followed its own rules.[104] Justice Marshall admitted that the Court had not expressly grounded the federal administrative law decision relied upon by Horowitz[105] in the due process clause. In Justice Marshall's opinion, however, this did not excuse the Court's failure to respond to Horowitz's argument "that some compliance with previously established rules—particularly rules providing procedural safeguards—is constitutionally required before the State or one of its agencies may deprive a citizen of a valuable liberty or property interest."[106]

In *United States v. Caceres*,[107] the Court again addressed the question whether the Constitution requires federal agencies to follow their own rules. *Caceres* held that a court may admit as evidence in a criminal trial

100. 418 U.S. 683 (1974).
101. *Id.* at 696.
102. 435 U.S. 78 (1978).
103. *Id.* at 92 n.8.
104. *Id.* at 108 n.22 (Marshall, J., dissenting in part).
105. Horowitz relied upon Service v. Dulles, 354 U.S. 363 (1957). *See supra* note 96.
106. 435 U.S. at 108 n.22.
107. 440 U.S. 741 (1979).

conversations seized in violation of Internal Revenue Service regulations governing electronic eavesdropping. Writing for the Court, Justice Stevens concluded that neither the Constitution nor any statute required the agency to adopt the eavesdropping rules and rejected arguments that their violation raised any constitutional questions.[108]

Although the Burger Court has undercut the constitutional significance of many of the Court's earlier administrative law decisions, it has affirmed that the Constitution places some limits on agency violations of established rules. Importantly, in *Caceres* the Court acknowledged that there are two occasions when an agency is constitutionally bound to follow its own rules: First, when due process requires the agency to adopt rules;[109] second, when individuals have reasonably relied on agency regulations promulgated for their guidance or benefit and have suffered substantially because of the agency's violation of the rules.[110]

d. Double Jeopardy Cases

Finally, recent decisions in cases raising double jeopardy claims provide support for the rule of law interpretation of due process. In *Whalen v. United States*,[111] the Court relied upon the double jeopardy clause and the constitutional principle of separation of powers to invalidate a federal court's imposition of multiple punishments that Congress had not authorized. In a footnote, the Court suggested that the due process clause

108. *Id.* at 751-53. The regulations were contained in an IRS Manual and had been instituted pursuant to a memorandum from the Attorney General mandating Justice Department approval of electronic eavesdropping. The Court noted that "it does not necessarily follow, however, as a matter of either logic or law, that the agency had no duty to obey them." *Id.* at 751-52 n.14 (citing Morton v. Ruiz, 415 U.S. 260 (1974)); Yellin v. United States, 374 U.S. 109 (1963); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); United States *ex rel* Accardi v. Shaughnessy, 347 U.S. 260 (1954)). The *Caceres* Court observed that the Administrative Procedure Act, 5 U.S.C. § 706 (1982), authorizes judicial invalidation of action taken by an agency "without observance of procedure required by law," but pointed out that *Caceres* was not brought under the APA; the remedy sought was not the invalidation of agency action but exclusion of evidence. 440 U.S. at 753-54.

109. *Id.* at 749-51. The Court distinguished Bridges v. Wixon, 326 U.S. 135 (1945) as involving rules "designed 'to afford [the alien] due process of law' by providing 'safeguards against essentially unfair procedures' " 440 U.S. at 749. The *Caceres* Court observed that "unlike *Bridges v. Wixon*, the agency was not required by the Constitution or by statute to adopt any particular procedures or rules before engaging in consensual monitoring and recording." 440 U.S. at 749-50. *Cf.* Walker v. Prison Review Bd., 694 F.2d 499, 504 (7th Cir. 1982) (state parole regulation intended to benefit parole candidate and to fulfill due process obligations is analogous to rule in *Bridges* rather than *Caceres* and must be followed).

110. 440 U.S. at 752-53.

111. 445 U.S. 684 (1980).

of the fourteenth amendment would have required the same result if the statute involved had been state rather than federal:

> The Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory of the states . . . It is possible, therefore, that the Double Jeopardy Clause does not, through the Fourteenth Amendment, circumscribe the penal authority of state courts in the same manner that it limits the power of federal courts. The Due Process Clause of the Fourteenth Amendment, however, would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.[112]

Justice Rehnquist dissented and objected to the implication "that a state court can ever err in the interpretation of its own law and that such an error would create a federal question reviewable by this Court."[113] He distinguished cases of "retroactive lawmaking" in which a state court interprets a statute in an unforeseeable manner.[114] Justice Rehnquist expressed concern that the Court's opinion would "raise doubts about questions of state law that heretofore had been thought to be the exclusive province of the highest courts of the individual states."[115]

Justice Rehnquist in *Ohio v. Johnson*,[116] again addressed the federal constitutional limitations on state courts' sentencing decisions. In *Johnson*, Justice Rehnquist's opinion for the Court acknowledged that the double jeopardy prohibition against cumulative punishments "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature."[117] The Court accepted "the Ohio Supreme Court's determination that the Ohio legislature did not intend cumulative punishment for the two pairs of crimes involved here;"[118] but reversed the state court's ruling that double jeopardy barred further prosecution. The Court concluded that the state court had failed to distinguish between double jeopardy's bar to cumulative punishments and a bar to further prosecution.[119]

In summation, the "rule of law" approach suggested by Justice Black-

112. *Id.* at 689-90 n.4.
113. *Id.* at 706.
114. *Id.* at 706 n.2.
115. *Id.* at 706.
116. 104 S. Ct. 2536 (1984).
117. *Id.* at 2541.
118. *Id.*
119. *Id. See also* Missouri v. Hunter, 103 S. Ct. 673 (1983) (accepting state supreme court's interpretation of state statutes, but reversing that court's legal conclusion that statutes violated double jeopardy).

mun's dissent in *Barclay*, enjoys scattered support. *Hopt* provides the strongest support for the proposition that violations of established procedural law are contrary to the due process clause. Justice Black's dissent in *Winship* also supports the "rule of law" interpretation of due process. Finally, a long line of federal administrative law decisions and recent double jeopardy cases indicates that the Court is sometimes willing to interpret the Constitution to require federal agencies or states to adhere to their established rules and procedures.

II. THE FAIR PLAY APPROACH

"The touchstone of due process is protection of the individual against arbitrary action of government."[120] This understanding of due process has led the Court to require that government afford minimum procedural safeguards when it seeks to deprive a person of life, liberty, or property. "Fundamental fairness" is the traditional standard for determining minimally adequate procedural protections. The Burger Court has turned this inquiry into a cost-benefit analysis, however, substituting the question "is it worth it" for "is it fair."[121] This move from "fairness" to "efficiency" unfortunately has lost much in the translation.[122]

Eventually, the diversion from a discussion of fairness will lead to a failure to consider fairness. To the extent the Court remains aware that "fairness" underlies the due process inquiry, its conception of fairness is

120. Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

121. See *supra* note 44 for a discussion of the Court's current approach.

122. *See, e.g.*, Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423, 1423 (1981).

Justice Stevens has argued that a court should not apply the *Mathews* v. *Eldrige* cost-benefit analysis when a person is deprived of "liberty" rather than "property." "The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits . . . . For the value of protecting our liberty from deprivation by the State without due process of law is priceless." Lassiter v. Department of Social Servs., 452 U.S. 18, 60 (1981) (Stevens, J., dissenting); *cf.* Spaziano v. Florida, 104 S. Ct. 3154, 3167 (1984) (Stevens, J., dissenting) (qualitative differences exist between the three protected categories of life, liberty, and property, which require correspondingly heightened procedural safeguards).

John Rawls, a contemporary moral philosopher, argues that "justice has an absolute weight with respect to the principle of utility . . . . This means that an unjust institution or law cannot be justified by an appeal to a greater net sum of advantages, and that the duty of fair play cannot be analogously overridden." J. RAWLS, LEGAL OBLIGATION AND THE DUTY OF FAIR PLAY, *reprinted in* J. RACHELS, UNDERSTANDING MORAL PHILOSOPHY 379 (1976). Rawls' essay focuses on civil disobedience. The duty of fair play that he speaks of is a duty that arises when one accepts the benefits of a "mutually beneficial and just scheme of social cooperation . . . , the advantages . . . [of which] can only be obtained if everyone, or nearly everyone, cooperates." *Id.* at 374.

one that demands fair rules. Fair rules are an important element of fairness. Another element of fairness is "fair play," which the Court has largely overlooked. "Fair play" means that government follows its established rules and its established procedures for changing the rules.[123]

If asked to think about fairness, most persons in our society probably would agree that fairness includes "playing by the rules." From a very early age, children develop a strong sense of the importance of following the rules of the game.[124] This notion of fair play is consistent with the text of the due process clauses.[125] In addition to common notions of fairness and apparent textual support, a less obvious, structural argument supports treating government's failure to follow its own procedural rules as a violation of due process. Underlying the view of due process as a protection against arbitrary actions of government is the principle of the rule of law – laws and not individual will should govern society. Implicit in the rule of law is a separation between the process of formulating rules and the processes of interpreting and applying rules. This separation is referred to here as "due separation of processes."

Justice Blackmun's "rule of law" dissent in *Barclay* and the sources of support for his approach examined above provide implicit support for the proposed fair play approach. Justice Blackmun's dissent provides the principle that a state can impose criminal punishment only by the rule of law; substantial departures from established law fail to satisfy this requirement.[126] In his *Winship* dissent, Justice Black also relied upon the rule of law to support his assertion that the due process clauses require governments to follow their own rules.[127] Overall, Justice Black's interpretation of due process is inadequate because it fails to acknowledge

123. *Cf.* United States v. Leon, 104 S. Ct. 3430, 3457 (1984) (Stevens, J., dissenting) ("In a just society those who govern, as well as those who are governed, must obey the law.").

124. Anyone who has observed young children's game playing can verify this assertion. Nothing disrupts a game as quickly as an accusation of not "playing by the rules." It seems unlikely that an assurance that the broken rule was not essential to a fair game would placate a child's sense of moral outrage, generally expressed as "that's not fair." *See generally* J. PIAGET, THE MORAL JUDGEMENT OF THE CHILD (1932) (children learn respect for rules through playing games). *Cf.* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (exploring gender differences in moral development). For example, one might imagine a fair game of hide-and-seek which required the "hunter" to count only to 15. If, however, the rules of the game require a count to 20, the "hiders" will object strongly to a hunter who breaks this rule.

125. *See infra* note 137.

126. *See supra* notes 54-57 and accompanying text.

127. Justice Black in *Winship* stated:

> Our ancestors' ancestors had known the tyranny of the kings and the rule of man and it was, in my view, in order to insure against such actions that the Founders wrote into our

that due process also requires fair rules. Nevertheless, by requiring states to follow existing rules, Justice Black's definition points to an aspect of fairness that the Court frequently overlooks. Justice Blackmun's and Justice Black's dissents reveal the importance of compliance with established rules as an underlying principle of due process. *Hopt*, *Whalen*, and the federal administrative law cases are also helpful in understanding the limitations the rule of law imposes on governmental actions.

Justice Harlan's opinion in *Hopt* sets the stage for an understanding of the fair play approach. *Hopt* held that when the legislature had deemed a felony defendant's personal presence at trial essential, due process required compliance with the statutory requirement.[128] Later cases upheld convictions despite defendants' absences when the applicable state law allowed the defendant to waive the right to be present.[129] In these later cases, the proceedings complied with established law; in *Hopt*, the proceedings did not comply with the applicable law.[130]

Similarly, the Court in *Whalen*, assumed that the due process clause of the fourteenth amendment limited the sentencing power of state courts to that authorized by state law. The petitioner in *Whalen*, challenged his conviction under federal criminal statutes on the grounds that it constituted a multiple punishment. The majority found that the sentences imposed violated not only the double jeopardy clause but also the doctrine of separation of powers, because the federal court exceeded its authority in imposing sentences Congress had not authorized. As Justice Stewart's footnote pointed out, however, the problem of courts' exceeding legislative authority when imposing criminal punishments has constitutional implications beyond those arising from the separation of powers between the branches of the federal government.[131] Justice Rehnquist's opinion for the Court in *Ohio v. Johnson* reaffirmed *Whalen's* recognition that the Constitution requires state courts to follow the legislative plan when imposing criminal sentences.[132]

Failure to play by the rules can occur *within* a branch of government as well as between branches of government. The administrative law cases

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own Magna Carta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase "due process of law."

397 U.S. at 384 (Black, J., dissenting).

128. 110 U.S. at 579. *See supra* notes 58-63 and accompanying text.

129. *See supra* note 65.

130. *See supra* note 65-66.

131. *See supra* notes 111-12 and accompanying text.

132. *See supra* notes 116-19 and accompanying text.

discussed earlier illustrate this point. Despite the Burger Court's "dressing down" of some of these cases, they continue to provide insight into the essential structural attributes of the rule of law. They stand as an example of the importance of the separation between the processes of rule-making and rule-application. From *Arizona Grocery* to *Nixon*, the Court has refused to condone the blurring of these distinct functions.[133] While an agency may have the power to repeal or reformulate existing rules, until it does, it must adhere to the rules. It cannot engage in the ad hoc repeal of rules by refusing to apply existing rules.

From these sources the rough contours of a "fair play" model for analyzing errors of state procedural law under due process emerge. The due separation of processes implicit in the rule of law provides the basis for this model. The fair play approach posits that due process requires government to comply with duly established procedural safeguards when depriving a person of life, liberty, or property. Until the appropriate governmental body repeals or modifies these rules by duly established procedures, government is required to follow them. Government must respect the boundary between rule-making and rule-application.

III. Fair Play and Federalism

A. The Scope of Fair Play

The proposed approach would have significant effects upon contemporary conceptions of federalism.[134] But these effects should not be exaggerated. Adoption of the "fair play" approach would *not* mean that "every erroneous decision by a state court on state law would come [to the Court] as a federal constitutional question."[135] First, due process is the source of the fair play approach and thus the fair play approach applies only when government deprives a person of life, liberty, or property. Second, the proposed approach extends only to those state law violations that consist of a failure to comply with a "procedural safeguard."

Because fair play applies only when the state seeks to deprive a person

133. *See supra* notes 95-96, 92-101 and accompanying text.

134. In Pennhurst State School Hosp. v. Halderman, 104 S. Ct. 900 (1984), the Court held that the eleventh amendment bar applies to pendent state law claims and is not overriden by allegations that state officials' actions are contrary to state law. The *Pennhurst* holding severely limits federal courts' jurisdiction to review state law claims. Fair play would ameliorate the effects of the holding in *Pennhurst* by elevating some errors of state law to the status of federal constitutional claims.

135. Gryger v. Burke, 334 U.S. 728 734 (1948), *quoted in* Engle v. Isaacs, 456 U.S. 107, 121 n.21 (1982).

of a protected life, liberty, or property interest, it differs from the *Hicks* approach of viewing procedural safeguards as constituting protected entitlements.[136] Using the entitlement approach to address government's failure to follow its own procedural rules is problematic. While substance and procedure are more intertwined than traditional categorical thinking reflects, there are important distinctions between the two that may be overlooked in an approach that regards procedural protections as substantive entitlements.[137] Our adversary system is incapable of producing completely accurate results when depriving persons of substantive entitlements. We cannot be sure deprivations are not erroneous; what we can do is provide procedures designed both to reduce the inherent risk of erroneous deprivations and to provide individuals with a sense of having been treated fairly and with respect. By focusing on procedure as an entitlement, and then asking whether a state "arbitrarily" deprived a person of this procedural entitlement,[138] the *Hicks* approach may lose sight of the instrumental and intrinsic importance of insisting that governments follow procedural rules. The consistent application of procedural rules promotes accuracy when a state terminates individuals' substantive interests and assures that the state treats affected individuals with respect.

The second major limitation of the proposed fair play approach is that it applies only to violations of state rules that constitute "procedural safeguards." Drawing guidance from the federal administrative law cases, this Article distinguishes procedural safeguards—rules that are designed to protect individuals' interests—from procedural rules that are designed to promote efficiency or administrative convenience.[139] Courts should determine whether an established procedure constitutes a procedural safeguard by looking to the values underlying the due process clauses. Thus, when a state adopts a procedural rule that is designed to further accuracy or to foster human dignity,[140] the rule should be considered a

136. *See supra* notes 33-38 and accompanying text; *see also* Smolla, *supra* note 90 (adopting "procedural entitlement" approach); Note, *supra* note 38 (same).

137. *See* Laycock, *supra* note 52, at 887-89 (arguing that a due process theory that fails to distinguish between substance and procedure is inconsistent with the text of the Constitution).

138. *See supra* note 90.

139. *See* Smolla, *supra* note 90, at 505 (recognizing an analogous limitation); Note, *supra* note 38, at 1024 n.20, 1047-48 n.126 (same).

140. For further discussion of due process values, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7 (1978); Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981).

procedural safeguard for fair play analysis, regardless of whether the rule would otherwise be constitutionally required. Insisting on compliance with these established procedures is critical, not just because it facilitates the accurate application of substantive law in particular cases, but because it provides individuals with the sense that the system has treated them fairly and with respect.[141]

B. Interpretation of State Law

The due separation of processes model for dealing with errors of state law recognizes that state court interpretation is a legitimate part of rule application. If the challenged error of state law is an allegedly erroneous interpretation of a state rule, rather than a violation or ad hoc repeal of the rule, due separation of processes is not offended.[142] Thus fair play is consistent with the Court's practice of regarding state courts' interpretations of state law as authoritative. Unfortunately, the boundary between interpretation and violation is not always clear.[143] The real challenge in the development of this model is to provide guidance in locating the dividing line.[144]

In *Mullaney v. Wilbur*,[145] the Court stressed that "state courts are the ultimate expositors of state law . . . and that [federal courts] are bound

141. The theory of due separation of processes may have implications beyond requiring compliance with established procedural safeguards, but for the reasons already stated the proposed fair play approach is limited to this context.

142. The problem of distinguishing between authoritative interpretations of state procedural rules and violations of these rules also arises under approaches that regard procedural rules as "procedural entitlements." *See* Note, *supra* note 38, at 1025-26 n.25, 1027 n.29, 1047-48 n.162; *cf.* Smolla, *supra* note 90, at 500 (arguing that "the existence of an entitlement is never entirely a state law question").

143. The summary disposition of many cases by state appellate courts compounds the difficulty of discerning this boundary.

144. Cases involving alleged violations of state common law procedural rules are likely to pose particular problems. In such cases, the state court's authority extends both to fashioning governing rules and applying them to individual cases. It may be difficult to determine whether a court has legitimately formulated and applied a new rule or illegitimately disregarded a rule that has governed similar cases in the past and will continue to govern future cases. Compare Justice Black's equal protection argument in his dissenting opinion in Beck v. Washington, 369 U.S. 541 (1962).

> This failure [of the trial judge to insure an unbiased grand jury] would be case in a different light if the Washington Legislature had repealed its law or if its Supreme Court had altered its interpretation and set out a general rule abrogating the right to have judges take affirmative action to insure an unbiased grand jury. But without any change in the prior law or any sure indication that Beck's "law" is the law of the future, the State of Washington in convicting Beck applies special and unfair treatment to him.

Id. at 567. See *supra* note 42 for further discussion of *Beck*.

145. 421 U.S. 684 (1975).

by their constructions except in extreme circumstances. . . ."[146] Fair play review would not require the Court to depart from this rule of binding state court interpretation of state law. Routine acceptance of arguments characterizing state courts' disregard of established safeguards as authoritatively "construing" the state procedural protection to be inapplicable, however, would severely limit the reach of the fair play approach. Closer review of the Court's opinions indicates sufficient flexibility in the "rule" of federal court deference to state court interpretation of state law to avoid this result.

First, the Court acknowledged in *Mullaney*, that there may be "extreme circumstances" in which federal courts should not defer to state court interpretations of state law. The Court noted that "[o]n rare occasions the Court has re-examined a state court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.' "[147] Similarly, the Court has recognized that there are instances when a state court's action cannot fairly be viewed as an "interpretation" of state law.[148] In *Douglas v. Buder*,[149] the Court rejected the argument that a state judge's revocation of the petitioner's parole for failure to "report all arrests . . . without delay" when petitioner failed promptly to report a traffic citation was merely a matter of a state court interpreting state law.[150] The Court pointed out that "neither [the hearing judge] nor the Missouri Supreme Court specifically made such a finding and no prior Missouri decisional law is cited to support the contention that a traffic citation has ever before been treated as the equivalent of an arrest."[151]

146. *Id.* at 691.

147. *Id.* at 691 n.11 (citing Radio Station WOW v. Johnson, 326 U.S. 120, 129 (1945)). Compare Smolla's argument that "the existence of an entitlement is never entirely a state law question, because that would allow states to defeat the due process clause by resorting to the device of the "evanscent entitlement." Smolla, *supra* note 90, at 500.

148. Compare Smolla's argument that:

> Some base requirement of fidelity to the ordinary meaning of words is essential if the due process clause is to have any force whatsoever, for only words can vest an entitlement. When a state supreme court disingenuously reads one of its own state's statute or regulations so as to give a "now you see it, now you don't" quality to what appears to be a straightforward entitlement, the federal courts should not follow that reading.

Smolla, *supra* note 90, at 500. Smolla points to the Supreme Court's decision in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), as an example of the Court rejecting the state supreme court's interpretation of state law. Smolla, *supra* note 90, at 500 n.175.

149. 412 U.S. 430 (1973) (per curiam).

150. *Id.* at 432.

151. *Id.*

A federal court's refusal to view a state court decision as resting on an interpretation of state law may be particularly appropriate when a state appellate court did not review a lower court decision or summarily affirmed a lower court judgment without purporting to construe a state rule. If a state court's treatment of a rule is novel or seemingly inconsistent with prior state court interpretations, the basis for rejecting the argument that the state court's decision rests on an "interpretation" of its law is strengthened.

The Court's recent opinion in *James v. Kentucky*[152] underscores the flexibility in the Court's deference to state court interpretation of state law. In *James*, the Court refused to view a state procedural default as constituting independent and adequate state grounds for upholding a criminal conviction. After reviewing the state law, the Court concluded that the state law distinction between jury "instructions" and "admonitions" upon which the state court based James' procedural default was "not the sort of firmly established and regularly followed state practice that can prevent the implementation of federal constitutional rights."[153]

Cases dealing with "retroactive lawmaking" also demonstrate that the Court will examine the consistency of state court interpretations of state law. In *Bouie v. City of Columbia*,[154] the Court held that due process barred a state court from giving retroactive effect to an unforeseeable and unsupported judicial construction of a criminal statute. The *Bouie* Court reasoned that due process includes a "standard of state decisional consistency."[155] *James* and *Bouie* indicate that federal courts can and do examine the consistency of state court interpretations of state law. If federal courts can review state court decisions to determine whether the

152. 104 S. Ct. 1830 (1984).

153. *Id.* at 1835 (citing Barr v. City of Columbia, 378 U.S. 146 (1964)).

154. 378 U.S. 347 (1964).

155. *Id.* at 354. Justice Brennan further stated:

> The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state court procedure does not constitute an adequate ground to preclude this Court's review of a federal question . . . . This standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him . . . .

Id.

In *Mullaney*, the Court pointed out that it was not dealing with a case of retroactive lawmaking as in *Bouie*. 421 U.S. at 690 n.10. Similarly, Justice Rehnquist, in his *Whalen* dissent, distinguished *Bouie* and thus recognized that retroactive lawmaking by state courts violates due process. 445 U.S. at 706 n.2.

court has engaged in retroactive lawmaking in violation of the basic due process concept of fair notice, no obstacle impedes federal court review of state court decisions to determine if the state court has engaged in ad hoc lawmaking in violation of due separation of processes. Finally, as *Barclay* and *Hicks* illustrate, in some cases the state has conceded that it failed to provide an established procedural protection.[156]

C. Harmless Error Analysis

One implication of fair play review that is likely to provoke federalism-based objections is that violations of state procedural safeguards governing protected deprivations will be subject to federal, rather than state, harmless error rules. The fair play approach provides no room for arguments that due process requires states to "play by the rules" only when their violations are "harmful" under state harmless error doctrine.[157] Government denies due process under the fair play approach when it violates due separation of processes by failing to provide established procedural safeguards. Thereafter, if harmless error doctrine applies, federal harmless error rules govern the analysis.[158]

Refusing to allow state harmless error analysis to "condition"[159] the

156. *See supra* notes 3 & 33-38 and accompanying text.

157. State harmless error rules may prove more problematic under an "entitlement" approach. The Court could determine that state courts' application of state harmless error analysis provides sufficient process to protect against "arbitrary" deprivations of procedural entitlements. *See supra* note 46. *But see* Note, *supra* note 38, at 1053-54 (courts should apply federal, rather than state, harmless error doctrine under "procedural entitlement" approach). Compare Justice Rehnquist's reliance in *Barclay* on the Florida Supreme Court's practice of applying state harmless error analysis to support his conclusion that the trial judge's error did not unconstitutionally infect Florida's balancing process of imposing capital punishment. See *supra* note 15 and accompanying text.

158. This Article does not attempt to delineate the role courts should accord federal harmless error doctrine when government has failed to play by the rules. Justice Marshall's argument in his dissenting opinion in United States v. Caceres, 440 U.S. 741 (1979), should be noted, however.

> As its very terms make manifest, the Due Process Clause is first and foremost a guarantor of *process*. It embodies a commitment to procedural regularity independent of result. . . . If prejudice becomes critical in measuring due process obligations, individual officials may simply dispense with whatever procedures are unlikely to prove dispositive in a given case.

Id. at 764.

159. Under the "entitlement" approach, by comparison, the Court might be tempted to resurrect Justice Rehnquist's argument from Arnett v. Kennedy, 416 U.S. 134 (1976), and treat state harmless error rules as "conditioning" procedural entitlements. In *Arnett*, Justice Rehnquist argued:

> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet. Here the property interest which [Kennedy] had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest.

due process obligation of fair play does not show lack of respect for these state law rules, but reflects the established parameters governing the applicability of state and federal standards of harmlessness. As the name implies, state harmless error analysis does not purport to "convert" errors into nonerrors. Rather, state harmless error doctrine is precipitated by an error of state law and addresses the effect of such an error under state law. When errors of state law also constitute violations of federal due process, there is no justification for allowing state law to determine the effect of such federal constitutional errors.[160] The Court has long recognized that errors that violate the federal constitution must be judged under federal harmless error standards, even though the errors might otherwise be deemed harmless under state standards.[161]

D. Responses to Fair Play

The practical effect that adoption of the proposed approach would have upon governments' willingness to extend protections beyond those otherwise required by the Court's existing interpretation of federal constitutional guarantees is another question that merits attention. Adoption of fair play review should not lead to widespread repeal of existing protections, nor to steadfast refusal to provide additional procedural protection in the future.[162] First, there are the obvious difficulties surrounding repeal of existing laws. Second, if the federal courts adopt the proposed fair play approach, states would not necessarily curtail the procedural protections they afford to their citizens. An argument that states would curtail procedural safeguards cynically presumes that governments tailor their laws to avoid providing any protections that the federal

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Id. at 154-55. Six of the Justices, however, disassociated themselves from this portion of Justice Rehnquist's plurality opinion in *Arnett*. The Court has since expressly rejected Justice Rehnquist's *Arnett* argument. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-33 (1982); *see also supra* note 45.

160. The Court's willingness to allow state procedural default rules to bar federal habeas relief provides no support for allowing state harmless error rules to "defeat" fair play claims. To the contrary, procedural defaults are based on *defendants'* failure to follow state procedural rules and *penalize* rather than excuse the failures.

161. *See* Chapman v. California, 386 U.S. 18 (1967).

162. Of course, the fair play approach would not bar states from repealing or changing existing procedural rules. *See, e.g.*, Dobbert v. Florida, 432 U.S. 282, 293 (1977) (change in procedural rules does not violate ex post facto clause); Hopt v. Utah, 110 U.S. 574, 591 (1884) (same).

For the argument that constitutionalizing every violation of agency regulations would result in fewer and less protective regulations, see United States v. Caceres, 440 U.S. 741, 755-56 (1979). In his dissent, Justice Marshall pointed to the lack of any evidence that prior decisions holding agencies bound by their regulations had led to withdrawal of the regulations. *Id.* at 768.

Constitution does not independently mandate. Experience, particularly recent experience with state constitutions, has shown that this is not so. Many state governments have adopted laws that provide individuals more protection than the Federal Constitution independently mandates.[163]

Moreover, as previously indicated, the proposed approach supplements existing due process review. Fair play specifies that compliance with existing procedural safeguards is a *necessary*, but *not a sufficient* element of "fundamental fairness." Thus, the Court may hold that due process requires more extensive safeguards than provided under existing law. Because "entitlement" analysis deals with the creation of threshold interests, a government may escape due process review by eliminating or refusing to "create" an entitlement.[164] Fair play analysis, however, applies only when a protected interest is at stake. "Fundamental fairness" always requires a floor of procedural safeguards in these cases. This recognition, and the uncertain location of this floor under current case law, should lessen any incentive to repeal or limit procedural protections.

CONCLUSION

The Supreme Court has been inconsistent in its treatment of due process claims based on violations of state procedural rules. As *Barclay* illustrates, at times the Court has dismissed such claims as alleging "mere errors of state law." In *Hicks*, however, the Court found that a state procedural rule constituted an entitlement, which could not be arbitrarily abrogated without violating due process. This Article proposes a new fair play approach that demands allegiance to the rule of law as embodied in the due process clauses. Specifically, it posits that due process requires compliance with established procedural safeguards governing deprivations of life, liberty, and property. A Supreme Court that professes concern with "law and order" should embrace this fair play interpretation of due process. As Justice Stevens recently reminded us, "[i]n a just society those who govern, as well as those who are governed, must

163. *See e.g.*, Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); *Developments in the Law – The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

164. *Cf.* Hewitt v. Helms, 459 U.S. 460, 465 (1983) (Rejecting the argument that prison's procedural guidelines constituted entitlement: "It would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause.").

obey the law."[165]

165. United States v. Leon, 104 S. Ct. 3430, 3457 (1984) (Stevens, J., dissenting).