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The Accardi Principle

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Introduction

Agencies must comply with their own regulations. This is sometimes called "the Accardi principle," after the decision cited most frequently for it, United States ex rel. Accardi v. Shaughnessy.1 To say that the Accardi principle is poorly theorized would be an understatement. The Supreme Court has never settled on an explanation for the source of this duty. The Court has variously suggested that it is inherent in the nature of delegated "legislative power"; that it is required by due process; and that it is a principle of administrative common law.2 The sparse commentary is not very helpful in sorting out the underpinnings of the Accardi principle either.3

Perhaps this inattention to fundamentals is attributable to the fact that the Accardi principle, at least when stated as an abstract proposition, is uncontroversial: there is no school of thought dedicated to the proposition that agencies should be free to disregard their own regulations. But even if the principle is self-evidently true or rests on an overlapping consensus of justifications, there are potential payoffs from developing a clearer understanding of its underlying rationale.

One such payoff is theoretical. The Accardi principle raises far-reaching questions about what is "law" and who is responsible for making it in a complex republic based on separation of powers precepts. Understanding how officials can promulgate edicts that bind the world—including themselves—like statutes, in a government based on a Constitution that commits all "legis-

* Charles Keller Beekman Professor of Law, Columbia University. This article has benefited greatly from comments by participants in colloquia at the University of Chicago and University of Texas law schools. Thanks also to Debra Livingston and Henry Monaghan for helpful discussions. I am particularly indebted to Mitch Berman, Larry Sager, and Kathryn Watts for extensive and very constructive comments on an earlier draft.

1 United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). The competition for "most cited" is actually closer than I initially imagined based on academic commentary. Another Supreme Court case endorsing the idea, Vitarelli v. Seaton, 359 U.S. 535 (1959), is cited by the D.C. Circuit somewhat more frequently than Accardi (seventy to forty-seven cites as of March 2006). This is probably because federal employment cases have loomed large in the D.C. Circuit, see infra Part II, and Vitarelli involved a claim by a federal employee. Among courts overall, however, Accardi has been more cited than Vitarelli (664 to 549 cites as of March 2006).

2 See infra Part I.

lative powers" to Congress, may help us achieve a better understanding of how separation of powers principles should be translated in the context of the modern administrative state.

A second payoff concerns what may be the central dilemma of administrative law. The modern administrative state continually struggles to strike the right balance between rule of law values—binding officials to clear rules known in advance—and the need for flexibility—allowing officials to exercise informed discretion in individual cases. The *Accardi* principle seems to represent an unequivocal commitment to the rule of law end of this spectrum. But there is an interesting twist: under *Accardi*, officials exercise discretion in such a way as to bind themselves. By allowing administrators to determine, in their discretion, when rule of law constraints should attach, *Accardi* carries the promise of achieving, if not the best of both worlds, at least a degree of reconciliation between stability and discretion. Yet, without a better understanding of what sort of actions trigger the *Accardi* principle, this happy reconciliation is unlikely to be achieved. Instead, what we are apt to get is just another garbled doctrine that permits courts episodically to overturn agency action they do not like.

A final payoff is more immediately practical. Notwithstanding the solid support for the general proposition that agencies must obey their own regulations, the doctrine in its application is laced with uncertainties. As Professor Schwartz has summarized:

Disputed points include whether agencies are bound by all regulations, or only by legislative regulations; by procedural or only by substantive regulations; and in all proceedings, only in civil cases, or only in proceedings for judicial review of administrative action[].

Uncertainty about the scope of this principle is also reflected in controversy as to its exceptions: Are agencies bound only by regulations designed for the protection of members of the public (rather than internal agency governance), or only by those on which a member of the public has relied? Finally, there is little clarity in the case law as to the nature of the remedies that may be granted when an agency violates a regulation that comes within the scope of the doctrine.5

Resolving the underlying rationale for the principle would seem to be the first step in trying to develop answers to these questions about the scope of the doctrine.

This article is organized as follows. Part I reviews the history of the *Accardi* principle in the Supreme Court. We learn that the Court has intimated three different theories about the source of the *Accardi* principle, and has left many questions about its dimensions unanswered. Part II surveys the use of the principle by the D.C. Circuit. This provides additional insights into how the *Accardi* principle works in practice, including the importance of questions about the meaning of agency regulations and whether agency regulations can

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4 See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").

5 Schwartz, supra note 3, at 669-70.
render otherwise unreviewable agency action subject to judicial review. Part III seeks to restate the Accardi principle in a manner that is faithful to the general thrust of the decided cases and overarching principles of administrative law. The restatement I propose tracks the conventional wisdom about when agency rules are “legislative” and the emerging understanding about when agency interpretations have the “force of law” and hence are entitled to Chevron deference. The key to unraveling the mysteries about the Accardi principle, from this perspective, is understanding the criteria for identifying legislative regulations and how such regulations are enforced under the Administrative Procedure Act and the Due Process Clause. Part IV offers some tentative thoughts about the utility of the Accardi principle. A brief conclusion follows.

I. Accardi in the Supreme Court

It is useful to begin by tracing the history of the Accardi principle in the Supreme Court. Broadly speaking, it is possible to identify four stages in this history: (1) the pre-Accardi period, (2) the decade of Accardi itself, (3) the 1970s, and (4) the modern period. It will also be useful briefly to look at another line of decisions, often juxtaposed to the Accardi principle, but perhaps more accurately seen as an instantiation of it. This is the line of decisions holding that agencies cannot be estopped by courts from enforcing their own regulations.

A. Pre-Accardi: Delegated Legislation

Although there were earlier anticipations, the Court’s first full-fledged endorsement of the idea that agencies must follow their own regulations came in a railroad rate case, Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co. Indeed, we might call the idea the Arizona Grocery principle, if the earlier decision had generated a legacy of follow-on decisions comparable to Accardi. But Arizona Grocery was largely confined to the context of railroad rate regulation, and with the demise of that regulation as a central preoccupation of public law, the decision slipped into obscurity.

Arizona Grocery involved the following fact pattern. At T1, the Interstate Commerce Commission (“ICC”) held a hearing into the rate for sugar from California to Arizona and prescribed a maximum rate of 96.5 cents per ton. The carrier subsequently filed rates at or below this level. At T2, the ICC, based on a more “comprehensive” record, concluded that the maximum

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7 The most prominent anticipation is United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155-56 (1923) (“assum[ing],” but finding inapplicable in that case, “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”).
9 Id. at 381.
10 Id. at 382.
rate should be 73 cents per ton.\textsuperscript{11} Not only did the ICC issue a new rate prescription order prospectively reducing the maximum rate to 73 cents, but it also awarded the shipper reparations (damages) for the period between \textit{T1} and \textit{T2}, equal to the difference between the rate it had been charged and 73 cents.\textsuperscript{12}

The Supreme Court struck down the reparations order.\textsuperscript{13} The opinion for the Court, by Justice Roberts, laid great stress on the distinction between rate prescription orders, which the Court said are legislative or quasi-legislative in nature, and determinations of the reasonableness of carrier-filed rates, which the Court said are adjudicatory or quasi-judicial in nature. The order entered at \textit{T1} had a "dual aspect"—it was both an adjudication of the reasonableness of a carrier-filed rate and a prescription of the maximum rate that could be charged in the future.\textsuperscript{14} The Court concluded:

Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.\textsuperscript{15}

In other words, on the understanding that rate prescription orders are a species of legislative regulation,\textsuperscript{16} an agency must follow its own regulations.

In contrast to decisions to come, \textit{Arizona Grocery} stands out because it contains an explanation of sorts for why agencies must follow their own regulations. The explanation was grounded in separation of powers concepts. The Commission initially had been given only the power to determine the reasonableness of carrier-initiated rates.\textsuperscript{17} This was a function "judicial in character" that "affected only the past."\textsuperscript{18} Later, the Act was amended to confer additional power on the agency to prescribe maximum rates for the future.\textsuperscript{19} Under this mandate, Justice Roberts said, the Commission "speaks as the legislature, and its pronouncement has the force of a statute."\textsuperscript{20} In exercising this newly delegated power, the Commission, as the "administrative arm" of Congress, was subject to the same limits that would attach to the action of its principal.\textsuperscript{21} As Justice Roberts put it, "The action of the Commission in fixing such rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same

\begin{itemize}
  \item \textsuperscript{11} \textit{Id.}
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} \textit{Id.} at 390.
  \item \textsuperscript{14} \textit{Id.} at 389.
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} at 384-86. The understanding that rate prescription orders are legislative rules is carried forward by the Administrative Procedure Act ("APA"). See 5 U.S.C. § 551(4) (2000) (defining "rule" to mean "the whole or a part of an agency statement of general or particular applicability and future effect" which "includes the approval or prescription for the future of rates").
  \item \textsuperscript{17} \textit{Arizona Grocery}, 284 U.S. at 384-85.
  \item \textsuperscript{18} \textit{Id.} at 385.
  \item \textsuperscript{19} \textit{Id.} at 385-86.
  \item \textsuperscript{20} \textit{Id.} at 386.
  \item \textsuperscript{21} \textit{Id.} at 388.
\end{itemize}
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purpose. The opinion implied—but did not expressly state—that Congress itself would be barred from imposing liability on a carrier for charging a rate previously prescribed by statute.

Arizona Grocery clearly grounds the understanding that agencies are bound by their own legislative regulations in the logic of delegation. The primary assumption is that the ICC, in prescribing rates, is exercising a delegated power of Congress; consequently, any limitations that attach to the principal (Congress) also apply to its agent (the ICC). The secondary assumption is that Congress, as a legislative body, could not change the legal effect of its own enactments for transactions that have occurred in the past.

The first assumption—that administrative agencies are agents of Congress, and hence partake of constitutional limitations that apply to Congress—is potentially problematic. Today, we regard agencies as part of the executive branch, not the legislative branch, and hence as exercising "executive power." This problem is of little moment, however, if we are willing to assume that Congress can delegate legislative power to an executive branch entity. Because conferring legislative rulemaking authority on agencies appears to be universally accepted today, there would appear to be no fundamental difficulty in amending Arizona Grocery to say that even if agencies are regarded as being executive in nature, they nevertheless are still bound by any limitations on legislative rulemaking that would attach to Congress.

The second assumption—that Congress cannot change the legal effect of its own legislative rules for transactions that have occurred in the past—encounters more serious problems. The Court gave only hints about why it believed Congress could not direct an adjudicator to disregard a previously established legislative rule. The most prominent of these hints came from the Court's repeated distinction between the retroactive nature of adjudication and the prospective operation of legislation, suggesting that perhaps Congress is bound by its own statutes because it has no power to legislate retroactively. If this was the Court's understanding, however, it is no longer true. The Court in the post-New Deal era has often upheld statutes having an explicitly retroactive effect. Indeed, it probably was not true in 1932 ei-

22 Id.
24 See Thomas W. Merrill, Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation, 104 COLUM. L. REV. 2097, 2099 (2004). The orthodox understanding is that Congress cannot delegate legislative power, but the force of this proposition has been reduced to nearly a nullity by defining legislative power for nondelegation purposes to mean the conferral of unconstrained discretion on an agency. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76 (2001); cf. id. at 488–89 (Stevens, J., concurring) (finding no constitutional obstacle to delegation of legislative power).
25 For a more recent argument to the effect that the APA embodies the same restriction on retroactive legislative rulemaking through its definition of "rule," see Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring).
ther,27 which may be why Justice Roberts did not make this understanding explicit.

In the end, therefore, Arizona Grocery provides at most only half an explanation for why agencies must obey their own regulations. The opinion grounds the explanation in limitations that attach to the nature of delegated authority to engage in legislative rulemaking. But it fails to specify the nature of those limitations, and the suggestion that emerges most prominently from the opinion—that rules may never be made retroactive—is unsatisfactory.

B. The Accardi Era: The Principle as Avoidance Doctrine

The Accardi era was characterized by controversies of a very different character. The focus shifted from economic regulation to questions of individual rights, with attempts by the political branches to suppress Communists and their sympathizers playing an especially prominent role.

The first decision of the era involved Harry Bridges, a charismatic Australian national who became head of the radical International Longshoremen and Warehousemen's Union in San Francisco.28 Multiple attempts were made to muzzle him, two of which generated cases that ended up in the Supreme Court.29 The second of these cases, Bridges v. Wixon,30 was a petition for habeas corpus challenging the Attorney General's order directing that Bridges be deported because of his alleged membership in the Communist Party.31 The Court ruled that the Attorney General had improperly relied on evidence gathered in violation of Justice Department regulations and, in part on this basis, reversed the lower courts' denial of the writ.32

As authority for the proposition that agencies must follow their own regulations, Justice Douglas, writing for the majority, made no mention of Arizona Grocery or the limits of delegated legislative authority. Instead, he strongly suggested that the duty is grounded in the Due Process Clause.33 Justice Douglas stressed that Bridges's liberty was at stake in the deportation proceeding, and that it would work a "great hardship on the individual" to deprive him of "the right to stay and live and work in this land of freedom."34 The regulations in question—requiring that witness statements taken in inter-

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29 See id. at 277–78 (overturning a state court contempt conviction of Bridges for sending a telegram to the Secretary of Labor threatening a strike during a trial of other labor activists); see also Bridges v. Wixon, 326 U.S. 135 (1945).


31 Id. at 137, 139–40.

32 Id. at 154–56.

33 Id. at 153. Justice Douglas cited as specific authority only a dictum in an earlier immigration case. Id. (citing United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923)). Bilokumsky, in turn, cited no authority for its dictum. Bilokumsky, 263 U.S. at 155.

34 Wixon, 326 U.S. at 154.
rogation be signed under oath—were "designed to protect the interests of the alien and to afford him due process of law."35

Justice Douglas did not suggest that every violation of agency regulations would violate due process. He engaged in an independent inquiry to show that the statements in question were highly prejudicial to Bridges, and that they were in the nature of hearsay, making some additional assurance of their accuracy especially important.36 With the benefit of hindsight, one might say that this balancing exercise, which prefigures the methodology of Mathews v. Eldridge,37 was designed to show that the process given was not "due process." This, however, leaves us with a puzzle as to the relevance of the agency's violation of its own procedural regulations, other than that this served to establish that the process given was not "law." All of this, however, is purely conjectural. There was no discussion of the foundations of the doctrine.

Next came Accardi itself. Joseph Accardi was an Italian national who entered the United States illegally in 1932.38 Deportation proceedings were brought against him in 1947.39 Accardi admitted deportability, but sought a discretionary suspension of deportation by the Attorney General.40 After the hearing examiner and the Acting Commissioner of Immigration denied the requested relief,41 but before the case reached the Board of Immigration Appeals ("BIA")—the last stop before a further discretionary appeal to the Attorney General—the Attorney General announced at a press conference that he planned to deport a confidential list of "unsavory characters."42 Accardi's name happened to be on the list, which was distributed to members of the BIA.43 The BIA then affirmed the denial of suspension of deportation.44

The Supreme Court again reversed the denial of habeas relief by the lower courts.45 Passing over a variety of objections to the proceedings, the majority ruled that the Attorney General had violated the principle that agencies must follow their own regulations.46 Speaking for the Court, Justice Clark reasoned that the Attorney General's internal distribution of the list of unsavory characters violated regulations fixing the procedures for processing petitions for suspension of deportation.47 In particular, the regulations, by directing the BIA to "exercise such discretion and power conferred upon the

35 Id. at 152.
36 Id. at 153–54.
39 Id.
40 Id. at 262–63.
41 Id. at 263.
42 Shaughnessy v. United States ex rel. Accardi, 349 U.S. 280, 281 (1955). Accardi's unsavoryness consisted of alleged racketeering activity, not being a Communist. See id. at 283. Of the five individuals whose cases came before the Court during what I call the Accardi period, Accardi was the only one not accused of being a Communist. Bridges, Service, Vitarelli, and Yellin were all either accused of being Communists or of having communist associations.
43 Accardi, 347 U.S. at 264.
44 Id. at 263.
45 Id. at 268.
46 Id. at 267.
47 Id.
Attorney General by law,” meant that the BIA was to exercise its authority according to its own “understanding and conscience,” and that the Attorney General had “denie[d] himself the right to sidestep the Board or dictate its decision in any manner.” In other words, the regulations implicitly established the BIA as an impartial adjudicator, and the Attorney General’s edict interfered with the Board’s impartiality.

As in Wixon, there was no reference to Arizona Grocery or theories of delegated authority. To the extent Accardi advances any theory in support of the idea that agencies must adhere to their own regulations, it was, once again, due process. The Court said that Accardi was entitled to a new hearing before the Board, untainted by any preannounced view from the Attorney General. Accardi might again be denied suspension of deportation upon rehearing, “but at least he will have been afforded that due process required by the regulations in such proceedings.” In contrast to Wixon, however, Justice Clark engaged in no independent analysis of the nature of Accardi’s interest, and no explicit analysis of the value of the procedures required by the regulation. The opinion can be read, therefore, to imply that any violation by an agency of its own regulations, at least one that results in prejudice to a particular individual, offends due process.

Subsequent decisions of the era followed the template established in Wixon and Accardi. In Service v. Dulles, the Court vacated the discharge of a State Department “China hand” for disloyalty because the Secretary of State had failed to follow Department regulations. Likewise, in Vitarelli v. Seaton, the Court set aside the dismissal of a discretionary employee of the Interior Department, which was based on his earlier “sympathetic association” with Communists while a graduate student at Columbia University. Again, the Department failed to comply with procedural regulations. Yellin v. United States was to similar effect, with the twist that it involved a legislative body, the House Committee on Un-American Activities. The Court reversed Yellin’s conviction for contempt of Congress on the ground that the

48 Id.

49 Indeed, Accardi seems to advance something of the opposite of the proposition endorsed in Arizona Grocery—that the subordinate is bound by restrictions that attach to the principal. Here, to the contrary, the Court seemed to suggest that because of the “nonstatutory” delegation from the Attorney General to the BIA, Accardi was entitled to more rights than he would have had if the Attorney General had reserved the decision to himself. See id. Subdelegation, at least by rule, creates new procedural entitlements, which will be enforced by courts against the subdelegator. See id. at 268.

50 Id.

51 Id.

52 After further proceedings on remand, the Supreme Court took the case again and upheld the district court’s conclusion that the BIA had not been unduly influenced by the Attorney General’s “list.” Shaughnessy v. United States ex rel. Accardi, 349 U.S. 280, 282–284 (1955).


54 Id. at 365, 372.


56 Id. at 536–37, 546.

57 Id. at 545.


59 Id. at 110.
Committee had violated its own rules by allowing Committee counsel to reject a request that the hearing be held in executive session.\textsuperscript{60}

For present purposes, the most noteworthy of these decisions was Vitarelli, where Justice Frankfurter in a concurring opinion advanced for the first time what was to become the third explanation for the Accardi principle. He described the principle as "firmly established" and characterized it as a "judicially evolved rule of administrative law."\textsuperscript{61} He also suggested that the principle was affiliated with the doctrine holding that agency decisions will be sustained only on the rationale advanced by the agency itself.\textsuperscript{62} He did not elaborate on the connection. Presumably, what he meant is that Accardi is a species of a more general principle of administrative law requiring that agencies give reasons for their decisions. An agency regulation can be seen as a kind of anticipatory explanation for agency behavior, such that agency action inconsistent with the regulation cannot stand without some further explanation for the departure.

Whatever its merit, Justice Frankfurter's administrative common law idea failed to account for the due process rhetoric of Wixon and Accardi, or for the fact that these were habeas corpus cases, not administrative review cases.\textsuperscript{63} Nor did it account for the decision just around the corner in Yellin, which arose in a criminal contempt proceeding involving a legislative body that was also not subject to administrative law review.\textsuperscript{64}

Three general observations can be made about the Accardi principle during the era associated with its name. First, each of the decisions from Wixon to Yellin involved an alleged failure to follow procedural regulations. This is in contrast to Arizona Grocery, where the rate prescription order performed a substantive function, cutting off the ability of the shipper to challenge rates filed within the limits of the rule. Interestingly, all subsequent decisions of the Supreme Court that reference the Accardi principle were also to involve procedural as opposed to substantive regulations.

Second, there is no indication in the cases of this period that the principle is subject to any rule of harmless error or prejudice. Although the procedural irregularities in Wixon, Accardi, and Service were quite arguably prejudicial,\textsuperscript{65} this cannot be said of the last two cases of the era. In Vitarelli, all records of the Civil Service Commission had been expunged of adverse findings,\textsuperscript{66} yet the Court sent the matter back for reconsideration in any event. In Yellin, the Committee almost certainly would have denied the re-

\textsuperscript{60} Id. at 114–15, 124.
\textsuperscript{61} Vitarelli, 359 U.S. at 547 (Frankfurter, J., concurring in part and dissenting in part).
\textsuperscript{62} Id. at 546 (citing SEC v. Chenery Corp., 318 U.S. 80, 87–88 (1943)).
\textsuperscript{63} Cf. id. at 546–49 (omitting any reference to due process or habeas corpus).
\textsuperscript{64} See Yellin, 374 U.S. at 110–11.
\textsuperscript{65} Bridges v. Wixon, 326 U.S. 135, 151 & n.6 (1945), involved the consideration of hearsay evidence, arguably contrary to a regulation requiring that informant testimony be signed under oath; United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 264 (1953), involved a statement prejudging the case by the final decisionmaker; and Service v. Dulles, 354 U.S. 363, 366–68, 370–71 (1956), involved a reversal by the Secretary of State of a favorable decision by the Deputy Secretary of State, when the regulations authorized appeals to the Secretary only of unfavorable decisions.
\textsuperscript{66} Vitarelli, 359 U.S. at 538 n.1.
quest to hold the hearing in executive session if it had been referred to the full committee for decision.  

Third, each of the cases from Wixon to Yellin pitted a single individual against the federal government, and in each case the individual raised constitutional issues, most prominently under the First Amendment, challenging the government's action as an attempt to suppress unpopular groups or beliefs. A majority of the Court was clearly sympathetic to these claims, but was reluctant to overturn action by the political branches on constitutional grounds. Plainly, the Accardi principle served in these years as a kind of avoidance doctrine. It offered a way to "remand" actions to the political branches for further consideration, without having to reach the ultimate question of constitutional power.

In any event, by the time the 1960s rolled around, the Accardi principle seemed to be a secure fixture of public law. Yet if the principle had become secure, the underlying rationale was murkier. The theory sketched in Arizona Grocery, based on the nature of delegated legislative power, disappeared from the cases; indeed, Arizona Grocery was not cited in any decision of the period. As we have seen, Wixon and Accardi strongly suggest the doctrine is grounded in due process. But the opinions in the last three decisions make no mention of due process and rely solely on precedent. Justice Frankfurter had floated the idea that the Accardi principle rests on administrative law, but this was difficult to square with the other cases, especially the constitutional rhetoric of Wixon and Accardi.

C. The 1970s: The Principle Generalized

The 1970s was a period of ferment and change in administrative law. As part of this process, the Accardi principle began to branch out from its foundation in individual liberties cases and was generalized to a wider context. The results were uneven, and the net effect of the opinions was to render the underpinnings of the doctrine even more uncertain.

Perhaps we should start with what is conventionally regarded as Accardi's finest hour: its role in forcing President Richard Nixon to turn over his secret tape recordings to the Watergate special prosecutor, which inexorably

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67 See Yellin, 374 U.S. at 121.
68 See also Peters v. Hobby, 349 U.S. 331, 337–38 (1955) (declining to reach constitutional issues presented by Loyalty Board determination because the Board had acted in a manner inconsistent with the Executive Order setting it up). Although Alexander Bickel did not discuss these cases in his famous discussion of the "passive virtues," see Alexander M. Bickel, The Least Dangerous Branch 111–98 (1962), they fit nicely into his thesis about the need for the Court to temporize in developing new constitutional doctrines—a theme which was formulated out of experience with the same era, see id. at 115–16. Clear statement rules, which refuse to enforce certain enactments that impinge on sensitive constitutional values absent a clear statement by Congress, perform a similar temporizing function. See Thomas W. Merrill, Rescuing Federalism After Raich: The Case for Clear Statement Rules, 9 Lewis & Clark L. Rev. 823, 826 (2005).

led to the end of his presidency. *United States v. Nixon* was a dispute between the President, who claimed the tapes were privileged, and the special prosecutor, nominally a subordinate officer in the executive branch, who had issued a subpoena for the tapes as part of his investigation into the Watergate break-in and cover-up. Nixon's lawyers argued that such an intrabranch dispute was not the kind of case or controversy that could be resolved by the courts.

The Supreme Court rejected the President's challenge to the justiciability of the dispute on the authority of *Accardi*. Congress had vested the power of criminal investigations in the Attorney General, and the Attorney General had promulgated regulations establishing the office of the special prosecutor. The Court said that these regulations, which specifically included authority to contest assertions of executive privilege, had "the force of law." The Court continued:

Here, as in *Accardi*, it 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 sovereign composed of the three branches is bound to respect and to enforce it.

*Nixon* is especially intriguing for our purposes. Due process cannot possibly supply a justification for the *Accardi* principle here. The only individuals whose rights were uniquely affected by the proceeding were the President and the defendants (the Watergate burglars and conspirators), and the *Accardi* principle was invoked to defeat the claim of privilege, not validate it. Nor does the idea of administrative common law explain the holding. This was an interlocutory appeal in a criminal prosecution, not an administrative review proceeding. The closest precedent, given the separation of powers overtones of the decision, was *Arizona Grocery*; but (as usual) it was not cited. Moreover, in contrast to *Arizona Grocery*, which was grounded in the prospective nature of legislative rules, *Nixon* stressed the binding nature of legislative rules. Here perhaps was a new and more valuable insight about the underlying foundations of the *Accardi* principle. But it too passed without any elaboration.

If the Nixon tapes case was the high point of the *Accardi* principle, then *United States v. Caceres*, decided at the end of the decade, was a low point. This was another criminal case—a prosecution for tax fraud—and it too in-

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71 Id. at 692.
72 Id. at 687–88.
73 Id. at 692.
74 Id. at 695–97.
75 Id. at 694.
76 Id. at 694–95.
77 Id. at 696.
78 See id. at 694–95.
volved secret tape recordings. The recordings violated no constitutional or statutory provision, but were conceded by the government to have been obtained in violation of rules set forth in the IRS Manual because the agent had not obtained the required supervisory approval in advance. The question was whether the irregular recordings should have been suppressed under the exclusionary rule in order to deter IRS agents from future violations of the agency manual. Speaking through Justice Stevens, a majority of the Court said no.

One argument Justice Stevens could have made, but did not, was that the IRS Manual was not binding on the agency because it was not a legislative rule. This argument appears to be supported by the record; the IRS Manual provisions were adopted in response to a memorandum sent by the Attorney General to all heads of departments and agencies, not pursuant to a delegation of legislative rulemaking authority from Congress. But the argument was not advanced by the government, nor was it mentioned by the Court.

What Justice Stevens did argue was that the rule violation did not implicate any constitutional or statutory rights, distinguishing Wixon on this basis. This is puzzling, since Wixon had suggested due process was implicated, at least in part, because of the agency's violation of its own procedural rules, not that some violation of a free-floating constitutional due process right made the violation of agency regulations relevant. Justice Stevens further argued that Caceres had not "reasonably relied on agency regulations promulgated for his guidance or benefit." Arizona Grocery, making a rare appearance in a footnote, was distinguished on this basis. Finally, Justice Stevens stressed that "the Administrative Procedure Act ["APA"] provides no grounds for judicial enforcement of the regulation violated in this case" because "this is not an APA case, and the remedy sought is not invalidation of the agency action." He noted that "some of our most important decisions holding agencies bound by their regulations have been in cases originally brought under the APA," citing the complaints in Service and Vitarelli.

80 Id. at 743.  
81 Id.  
82 Id. at 744-45, 749.  
83 Id. at 749, 754.  
84 Id. at 755.  
85 Id. at 744 n.3. The Attorney General's memorandum, reproduced in the government's brief, cites no statutory delegation authorizing the policy. See Brief for the United States, United States v. Caceres, 440 U.S. 741 (1978) (No. 76-1309).  
87 Caceres, 440 U.S. at 749-50.  
88 See supra notes 33-36 and accompanying text.  
89 Caceres, 440 U.S. at 752-53.  
90 Id. at 753 n.15.  
91 Id. at 753, 754.  
92 Id. at 754 & n.19. As Justice Marshall observed in his dissent, there is no suggestion in
Conspicuous by its absence in the Stevens opinion was *Nixon v. United States*, where the Court had recently enforced the *Accardi* principle in a context where there was no claimed due process violation, no claim of individual reliance, and no review under the APA. Putting aside this glaring omission, the Stevens opinion implied that the *Accardi* principle is in fact two separate and distinct principles, one grounded in due process, the other in the APA. Sometimes, if the regulation is designed to protect individual rights and the individual can show reliance or prejudice, a rule violation may implicate due process. Other times, an agency’s failure to follow its regulations can be remedied under the review provisions of the APA. But outside these contexts, the opinion implied that an agency’s duty to follow its own regulations may be a right without a remedy—at least without a remedy recognized in court.

In addition to questioning whether courts have authority to enforce agency rule violations outside the due process or APA contexts, Justice Stevens raised concerns about the danger of overenforcement of the *Accardi* principle. Specifically, he noted that rigid enforcement of the principle through application of the exclusionary rule might result in agencies adopting “fewer and less protective regulations.” If strict judicial enforcement of agency rules led to fewer agency rules, then paradoxically *Accardi* could result in more arbitrariness overall. As Justice Stevens put it:

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

Also notable is Justice Marshall’s dissenting opinion in *Caceres*. Marshall’s dissent was an ambitious effort to rationalize all previous *Accardi* cases as being “explicable in no other terms” than due process. “Underlying these decisions,” he wrote, “is a judgment, central to our concept of due process, that government officials no less than private citizens are bound by rules of law.” The foundation in due process, he argued, explained the Court’s “consistent[ ] demand[ ]” that the government comply with regula-

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93 *Cf. id.* at 741, 742-57 (majority opinion) (omitting any reference to *United States v. Nixon*, 418 U.S. 683 (1973)).

94 *Cf. id.* at 751 n.14 (noting that even if regulations are not required by the Constitution, “it does not necessarily follow, . . . as a matter of either logic or law, that the agency had no duty to obey them”).

95 *Id.* at 755-56.

96 *Id.* at 756.

97 *Id.* The argument anticipates warnings of later courts and commentators that overly rigid judicial insistence on agency observance of § 553 rulemaking procedures may result in agencies providing inadequate advice to the regulated community through more informal guidance documents. See Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 806, 808 (2001).


99 *Id.* at 758.
tions "designed to safeguard individual interests even when the rules were not mandated by the Constitution or federal statute." It also explained why the Court theretofore had not imposed any showing of individual reliance, nor had it required any showing that compliance with the regulation might change the outcome in the particular case. "Implicit in these decisions, and in the Due Process Clause itself, is the premise that regulations bind with equal force whether or not they are outcome determinative." Justice Marshall's dissent arguably accounted for a larger swathe of decisions than Justice Stevens's majority opinion. But he too failed to explain United States v. Nixon, which as previously noted cannot plausibly be said to rest on due process grounds.

Justice Marshall's vigorous defense of the due process foundations of Accardi highlights a hidden dimension of the dispute over the foundation of the doctrine. Without exception, the Accardi principle has been applied by the Supreme Court in cases involving federal government action. It is treated implicitly as a separation of powers doctrine. But if Accardi rests on due process, then state administrative action should be governed by the doctrine no less than federal, because of course the Fourteenth Amendment contains the same Due Process Clause found in the Fifth. In effect, the due process theory of Accardi could federalize a significant chunk of state administrative law.

Justice Rehnquist, always solicitous of states' rights, had perceived this implication just one year before Caceres and sought to head it off. Writing in a procedural due process case arising out of a decision by a state university to flunk a medical student, Justice Rehnquist dropped a footnote disposing of an Accardi claim that had been raised by the student. He wrote that Accardi was inapplicable to a case challenging state government action because Accardi "enunciate[s] principles of federal administrative law rather than of constitutional law binding upon the States." In other words, Justice Rehnquist sought to commit the Court to Justice Frankfurter's administrative law conception of the foundations of the Accardi doctrine, perhaps to foreclose the federalism implications of the rival due process theory. Justice Marshall, who consistently favored a broad scope of due process rights, was undaunted by the prospect that this might mean federalizing portions of state administrative law. His Caceres dissent should probably be read as an extended essay seeking to refute Justice Rehnquist's footnote, which he dismissed as "dictum."

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100 Id. at 759.
101 Id. at 764.
102 In particular, Justice Marshall was correct in his assertion that the Court had not previously required a showing of reliance or prejudice in order to claim that an agency violation of its rules offends due process.
104 Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 80-82 (1978).
105 Id. at 92 n.8.
106 Id.
107 Caceres, 440 U.S. at 758 n.1 (Marshall, J., dissenting). Justice Marshall's characterization is probably inaccurate. The Rehnquist sentence was one of two reasons given for rejecting
Two other decisions of the 1970s should be noted, each of which concerned the question of whether regulations designed for the internal guidance of agency employees are covered by the *Accardi* doctrine. In *American Farm Lines v. Black Ball Freight Service*, the Court said no. At issue were regulations detailing the information that had to be filed to obtain a type of temporary operating authority under the Motor Carrier Act. Writing for the Court, Justice Douglas seemed to endorse the proposition that when a regulation is not designed "to confer important procedural benefits upon individuals," but rather to allow the Commission to gather "relevant information" in the exercise of its discretionary authority, *Accardi* does not apply. Justice Douglas further stressed that there had been no prejudice to rival carriers because they had filed a voluminous protest disputing the need for the new authority. The case therefore fell within the "general principle"—for which he had to quote a lower court opinion—that it 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." Just four years later, however, the Court enforced the *Accardi* principle as applied to an internal rule of agency procedure. The question in *Morton v. Ruiz* was whether the Bureau of Indian Affairs must make general assistance benefits available to Indians who live "near" but not "on" a reservation. The statute was silent on this matter, as were the Bureau’s regulations. But the Court pointed to a provision of the Bureau of Indian Affairs Manual which said that directives that relate to the public, including Indians, are to be published in the Code of Federal Regulations ("CFR"). The Court held that under this provision, the Bureau was required to publish its eligibility standards in the CFR if it wanted to restrict general assistance benefits to Indians living on reservations. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures," Justice Blackmun wrote, citing *Service and Vitarelli*.

For present purposes, *Ruiz* is remarkable for two reasons. First, it seems to contradict *American Farm Lines*, insofar as the instruction in the Manual to publish certain rules in the CFR was a purely internal procedural instruction. Of course, as Justice Blackmun observed, such instructions can affect persons who deal with the agency, such as individuals seeking general assis-

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the *Accardi* claim in *Horowitz*, so it is probably best characterized as an alternative holding. See *Horowitz*, 435 U.S. at 92 n.8.

109 Id. at 533–34, 534 n.1.
110 Id. at 538–39.
111 Id. at 537–38.
112 Id. at 539 (quoting NLRB v. Monsanto Chem. Co., 205 F.2d 763, 764 (8th Cir. 1953)).
114 Id. at 201.
115 See id. at 207, 212.
116 Id. at 233–34.
117 Id. at 234–36.
118 Id. at 235.
tance benefits. But such instructions can also affect other types of entities, such as trucking firms seeking to preserve their position in particular local markets. In any event, there was no suggestion that Ruiz had been prejudiced by the failure to publish the eligibility criteria in the CFR any more than the protesting trucking firms had been prejudiced by the failure to comply with the information filing requirements in American Farm Lines.

Second, the Bureau of Indian Affairs Manual that the Court held created a binding duty on the agency was not a legislative rule, but merely a nonbinding guidance document. Before Ruiz, the cases had implied that the Accardi principle applies only to legislative rules, i.e., rules having the force and effect of law. In Ruiz, however, the Accardi principle arguably takes on broader significance as a general duty to conform to agency-created guidance documents, whether legally binding or not. Caceres, decided several years after Ruiz, reinforced this impression because the Court made nothing of the nonlegislative nature of the agency manual in that case as a ground for finding the Accardi principle inapplicable.

D. The Modern Period: The Principle Ignored

The modern era, by which I mean everything decided after Caceres in 1979, is notable for only one thing: the Court has said nothing of significance about the Accardi principle. The doctrine has occasionally come up. But there has been no discussion that would bear, one way or another, on either its underlying rationale or its scope. There is no suggestion that the Court has disavowed the Accardi doctrine. It has simply had no occasion to enforce it, and hence has provided no additional guidance about its basis or its dimensions.

119 Id. at 236.
120 Id. at 235.
121 See, e.g., Lincoln v. Vigil, 508 U.S. 182, 199 (1993) (finding principle inapplicable because there was no violation of agency regulation); Webster v. Doe, 486 U.S. 592, 602 n.7 (1988) (finding principle inapplicable because lower court finding of agency compliance with regulations was not challenged); United States v. Fausto, 484 U.S. 439, 451 n.5 (1988) (holding that the Civil Service Reform Act precludes review of adverse personnel action in back pay action, including claim that agency failed to follow its own regulations); Lyng v. Payne, 476 U.S. 926, 942-43 (1986) (reversing judgment predicated on the Accardi principle on the ground that no such violation had occurred); Heckler v. Chaney, 470 U.S. 821, 836 (1985) (finding that agency policy statement couched in vague language and attached to a rule never adopted did not provide a basis for judicial review of agency action); EEOC v. Shell Oil Co., 466 U.S. 54, 66, 82 (1984) (finding principle inapplicable because agency complied with regulation); Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting) (majority finds that agency has been faithful to regulation; dissent would invalidate action under Accardi); cf. Morris v. Gressette, 432 U.S. 491, 512-15 (1977) (Marshall, J., dissenting) (citing binding nature of Attorney General regulations issued under section 5 of the Voting Rights Act in support of argument that decision not to enforce should be reviewable).
122 INS v. Yueh-Shaio Yang, 519 U.S. 26 (1996), contains language that could be characterized as an endorsement of the administrative common law conception of Accardi. The Court stated that an unexplained departure by an agency from past policy established "by rule or by settled course of adjudication" may be set aside as arbitrary and capricious under the APA. Id. at 32. But given that no such "rule" in the sense of regulation was involved in the case before the Court (as opposed to an understanding fixed by a settled course of adjudication), see id., it would be a stretch to characterize this as being addressed to the Accardi principle.
Why the Court has lost interest in *Accardi* is unclear. One explanation might be that the doctrine suffered the fate of other avoidance devices: as the First Amendment issues the Court sought to avoid during the *Accardi* era were eventually resolved or became less urgent because of a changing political climate, interest in the *Accardi* principle naturally waned. Or, perhaps the doctrine has simply fallen out of fashion, somewhat the way the "hard look" doctrine has been eclipsed in recent years by *Chevron*-style review of agency action for compliance with statutory mandates. Or, perhaps the Court came to recognize it had made such a hash of the doctrine that it was best not to revisit the issue if some other basis for resolving the case was available.

**E. The Relevance of Estoppel Decisions**

Before leaving the Supreme Court's decisional law, it is worth pausing to consider a second line of decisions, concerning whether misrepresentations or misconduct by government agents can estop the government from enforcing otherwise applicable legal requirements. This line of cases is often juxtaposed to the *Accardi* decisions, perhaps because the one doctrine (*Accardi*) is used to vindicate private expectations created by government action while the other (no estoppel) is seen as frustrating such expectations. But an important subset of the no-estoppel decisions—those in which the "law" the court is asked to estop the government from enforcing is a government regulation—involves what is in fact the very same principle. In both lines of decisions, some government official seeks to engage in or advocate conduct inconsistent with a government regulation. In both, the Court holds that the agency is bound to follow the regulation.

The fundamental equivalence of the no-estoppel principle and the *Accardi* principle is clearly revealed in the Court's most famous estoppel decision, *Federal Crop Insurance Corp. v. Merrill*. An Idaho wheat farmer was told by local agents of the Department of Agriculture that his reseeded wheat crop was covered by federal crop insurance. When the crop was destroyed by drought, the government declined to pay because reseeded wheat was in fact not insurable under applicable Department regulations. In an opinion by Justice Frankfurter, the Court reversed the decision of the Idaho Supreme Court, which held that the local official's misrepresentation estopped the government from enforcing its regulation. *Merrill* unequivocally extends the no-estoppel reasoning to legislative regulations as well as statutes. In consequence, *Merrill*, like *Accardi*, holds that courts must require agencies to comply with their own regulations.

In explaining the rationale for the strict rule against estoppel of the government, Justice Frankfurter's opinion, like his concurrence in *Vitarelli*, can

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123 See, e.g., Schwartz, supra note 3, at 659 (referring to the one doctrine as an "irresistible force" and the other as an "immovable object").
125 Id. at 382.
126 Id.
127 Id. at 383, 386.
be read as resting on administrative common law.  

But there are also interesting echoes of Arizona Grocery and the notion that the duty to follow regulations follows from the nature of delegated legislative power. Justice Frankfurter noted that if the Federal Crop Insurance Act had by its own terms prohibited insuring reseeded wheat, "the ignorance of such a restriction, either by the respondents or the Corporation's agent, would be immaterial." The same result followed, he said, when the restriction was included in regulations adopted pursuant to delegated authority from Congress. "[T]he Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance."

The Court reaffirmed Merrill in the context of legislative regulations in Schweiker v. Hansen. Hansen had met with a field representative of the Social Security Administration ("SSA"), who told her she was not eligible for certain benefits. Under SSA regulations, the benefits could be awarded only to those who filed a written application. The SSA Claims Manual further instructed field representatives that, in cases of uncertainty, they should advise potential applicants to file a written application. The representative who met with Hansen failed to advise her to file a written application, with the result that she lost about one year's benefits.

The Court rejected a claim that the field representative's failure to follow the agency manual estopped the government from enforcing the requirement of a written application, set forth in the regulation. The opinion is notable for the strong distinction it draws between the regulation, which the Court held to be legally binding, and the Claims Manual, which was not. As to the regulation, Congress "delegated to petitioner the task of providing by regulation the requisite manner of application. A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits." In contrast, "the Claims Manual is not a regulation. It has no legal force, and it does not bind the SSA." This is the strongest endorsement by the Court in all the cases we have considered of the distinction between legislative rules and nonlegislative policy statements, and the clearest insistence that legislative rules trump any obligation to lesser rules and policies. Han-

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128 Justice Frankfurter described agency regulations filling out statutory details as an "inevitable[e]" feature of "modern regulatory enactments," suggesting that their binding nature was a product of evolving perceptions of the needs of the administrative state. See id. at 384.

129 Id.
130 Id. at 384–85.
131 Id. at 385.
133 Id. at 786.
134 Id.
135 Id.
136 Id. at 786–87.
137 Id. at 787–88.
138 Id. at 790.
139 Id. at 789.
sen is obviously in tension with Ruiz and Caceres, insofar as those decisions hold or imply that courts can direct agencies to comply with instructions set forth in agency manuals that do not have the force of legislative regulations.

The final case of significance for our purposes is Office of Personnel Management v. Richmond, where the Court created an absolute rule against estoppel of the government if the result would be to require a payment of money from the Treasury not authorized by statute. In a departure, the Court grounded this rule in a specific clause of the Constitution—the Appropriations Clause, providing that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Richmond involved a claim that the government could be estopped from enforcing a statute, and hence is not directly relevant to our topic. But the decision has indirect implications, insofar as the Court explicitly grounded the no-estoppel rule in separation of powers principles. Richmond explained that the no-estoppel rule was required in order to preserve the Constitution's assignment of the appropriation power to Congress. "If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." On the other hand, under the no-estoppel rule, "Congress has a ready means to see that payments are made to those who rely on erroneous Government advice."

Richmond thus resituates the source of the duty to abide by legislative rules in the constitutional allocation of legislative powers to Congress. This raises anew the question of why certain types of agency regulations trigger the same duty of obedience as do statutes enacted by Congress. Arizona Grocery, of course, had posited that the duty to comply with agency regulations derives from the delegation of legislative power from Congress to the agency. Merrill and Hansen can be read as endorsing a similar explanation in the context of claims of estoppel. Perhaps we have here the most satisfactory starting point for explaining the source of an agency's duty to follow its own regulations.

II. Accardi in the D.C. Circuit

To gain a better appreciation of how the Accardi principle functions in practice, I reviewed all D.C. Circuit decisions applying the principle since 1954, when Accardi was decided. The D.C. Circuit, of course, is the federal appeals court that decides the highest percentage of administrative law cases, and hence has developed the greatest expertise in this law. Reviewing the D.C. Circuit cases provides a larger base of decisions to draw upon in making

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141 Id. at 424–26.
142 Id. at 424.
143 U.S. CONST. art. I, § 9, cl. 7.
144 Richmond, 496 U.S. at 427–28.
145 Id. at 428.
146 Id. at 429.
generalizations about the use of the *Accardi* principle. I was also interested in determining what that court has found to be the principal controversies in the application of the doctrine, and whether it has developed a clearer understanding of the foundations of the doctrine.

In terms of overall patterns of use, the results are not too surprising. I identified a total of ninety-two D.C. Circuit decisions applying the *Accardi* principle in the five decades since the decision was handed down (see Table below). Although the D.C. Circuit has drawn steadily on the principle throughout this period, the rate of invocation has not been uniform, but instead forms something like a bell-shaped curve. The first two decades (1954-1964 and 1965-1974) featured relatively modest usage of the principle, as did the most recent decade (1995-2005). But the middle decades, especially the period from 1975 to 1984, show much more intense usage. One explanation for this might be that the relatively high number of Supreme Court decisions in the 1970s, especially the high-visibility decision in *United States v. Nixon*, gave the *Accardi* principle a degree of prominence during these years that it did not have before or afterwards. Another explanation might be that this is the period of greatest judicial activism in administrative law, and that the court turned to *Accardi* along with other doctrines to invalidate agency action at a record clip.

In terms of the overall pattern of reversal and affirmance, the survey tells us that when agency action is challenged under *Accardi*, the D.C. Circuit has reversed the agency slightly more frequently than it has affirmed. But the disparity is not large (55% reversed, 45% affirmed). And if we take out the “activist” decade of 1975–1984, when the court reversed agencies by a margin of nearly two to one, the bias toward reversal is almost completely eliminated. Moreover, it may be significant that in the last two decades, agencies have been affirmed more often than they have been reversed (44% reversed, 56% affirmed), which may suggest either that agencies are doing a better job of following their own regulations or that the court is becoming less interested in using the doctrine to overturn agency action alleged to violate a regulation.

I also tried to categorize the decisions in terms of whether the regulation the agency was accused of violating was procedural or substantive. This type of classification is often tricky, and so my judgments here may not be per-

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147 I identified these cases by collecting all decisions of the D.C. Circuit citing to *Accardi, Service, Vitarelli, Nixon*, or *Caceres*, supplemented by additional decisions of that court identified in its own decisions or in commentaries. This generated a total of 251 cases. After examining each of these cases, I eliminated those in which the citation was for some proposition other than the *Accardi* principle, or in which the duty of an agency to comply with its regulations was not at issue in the case. The net result was ninety-two decisions. This undoubtedly understates the true number of D.C. Circuit decisions that consider whether an agency has violated its own regulations, since the court has almost certainly enforced the principle on occasion without citing any of the Supreme Court's decisions. But my ninety-two cases probably capture most of the decisions.

Because the survey covers fifty-two years, it does not neatly divide into decades. I “solved” this problem by adding a year to the first and last decades. This is only minimally distorting: the first decade has only one extra case in the first year (1954) and the last decade has only two extra cases in the last year (2005).
### D.C. Circuit Cases Applying Accardi Principle 1954–2005

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Effectively replicable. Nevertheless, for what it is worth I concluded that roughly three-fourths of the decisions overall involved procedural regulations. Interestingly, the imbalance would be even greater if we again discard the middle decades. In the bookend decades—1954–1964, 1965–1974, and 1995–2005—nearly ninety percent of the decisions involved procedural regulations. One inference that might be drawn from this is that, as the court became more aggressive in reviewing agency action and usage of the doctrine increased, the doctrine began to spill over more frequently to questions of compliance with substantive regulations. In terms of types of cases in which the doctrine is used, regulatory cases, in which I included everything from broadcast licensing to natural gas ratemaking to environmental decisionmaking, is the largest category (41%). Interestingly, however, federal employment cases are only slightly behind (40%). Employment disputes have been a major staple of Accardi litigation throughout the period, with cases involving military personnel the largest subcategory of these cases. Immigration issues were present in the early years immediately after Accardi, but have long since disappeared. Government grant and contract disputes, invisible in the early decades, begin to appear on occasion in the later decades. The balance consists of a miscellany of government benefits, tax, and criminal cases.

Generalizing broadly, two issues recur with greatest frequency in the D.C. Circuit’s Accardi cases. One concerns the need to determine the mean-

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148 I would add a word of caution about whether the imbalance in favor of procedural regulations is truly representative of the underlying universe of cases that involve the principle that agencies must follow their own regulations. Because every prominent Supreme Court decision invoking the Accardi principle (after Arizona Grocery) has involved procedural regulations, perhaps the parties and the court tend to cite the Supreme Court’s decisions more often in cases involving procedural regulations. Thus, it is possible that there are a significant number of cases not captured by the survey where agencies are challenged for violating their substantive regulations and the court resolves the claim without citing the Accardi cases at all.
ing of an agency regulation. *Accardi* litigation often takes the following pattern: the challenger claims the agency has violated its own regulation; the agency responds that the challenger has mischaracterized what the regulation means, and cites informal guidance material and/or evidence of agency practice tending to support the agency’s contrary interpretation; the court is then forced to decide what the regulation means in order to resolve the *Accardi* question.

The cases are all over the lot in responding to this recurring issue. Sometimes the court defers to the agency’s interpretation of the regulation under the *Seminole Rock* doctrine;\(^{149}\) sometimes the court insists that the meaning of the regulation is plain and the agency will not be heard to argue to the contrary;\(^{150}\) sometimes the court stretches a regulation to give effect to its perceived purposes;\(^ {151}\) and sometimes the court reads the regulation with narrow literalism to avoid a result the court finds distasteful.\(^{152}\) It would be hazardous to offer any generalizations about trends here, other than to say that the D.C. Circuit has become more aware of the relevance of the *Seminole Rock* doctrine in recent years,\(^ {153}\) perhaps in response to the Supreme Court’s repeated reaffirmation of that doctrine.\(^ {154}\)

\(^{149}\) See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (stating that agency interpretation of its own regulations is entitled to “controlling weight unless it is plainly erroneous or inconsistent with the regulation”).


\(^ {151}\) Thus, in *Holden v. Finch*, 446 F.2d 1311, 1312 (D.C. Cir. 1971), a sociologist had been hired by the Department of Health, Education and Welfare to work on program development but was terminated at the end of her probationary period. An internal memorandum stated that she was being terminated in part because she had permitted “her emotions on civil rights matters to cloud her judgment in performing her official duties.” *Id.* at 1313 n.3. The issue on appeal was whether this action violated Hatch Act regulations that prohibited employment actions based on “political discrimination.” The court acknowledged that the regulation had been interpreted by civil service officers to refer to discrimination based on partisan political affiliation or activity, but said, “With all the deference to be accorded an agency’s construction of its own regulations, we do not think the words used compel this reading.” *Id.* at 1316. It suggested that the regulation covered a wider sphere of speech “relating to public policies of an essentially political, albeit non-partisan, nature,” and remanded for consideration whether the Department had violated its regulation, as thus interpreted. *Id.* at 1316–17.

\(^{152}\) In *Graham v. Richmond*, 272 F.2d 517 (D.C. Cir. 1959), for example, a merchant seaman declined to answer three questions on a form he was required to fill out and submit to the Coast Guard in order to verify his loyalty to the United States. *Id.* at 518–19. The Coast Guard considered his refusal to answer questions to mean he had failed to submit an application, and on this basis declined to certify him for service in the merchant marine. See *id.* at 518. The court assumed that the answers to the questions were relevant to ascertaining the seaman’s loyalty. *Id.* at 521. But it pointed out that the regulations nowhere said in so many words that refusal to answer questions was ground for exclusion. *Id.* The court reasoned that the Coast Guard had acted in violation of its own regulations, as thus interpreted, and remanded on this basis. *Id.* at 521–22. Clearly, the court was invoking a kind of narrow literalism to override the agency’s view of its regulation in order to force reconsideration of a program it found objectionable.


Another recurring issue is whether an agency adoption of regulations renders a controversy judicially reviewable when otherwise it would not be. This is a big theme in the employment cases, especially those involving decisions by military authorities to discharge individuals or deny them promotions.\(^{155}\) It is also a theme in the decisions reviewing denials of government grants or terminating government contracts.\(^{156}\) The early immigration cases, following Accardi itself, can also be seen as finding that the presence of a claim of agency rule violation provides a basis for judicial review when otherwise it would not exist.\(^{157}\)

Here, it is possible to be somewhat more confident about trends. In the early decades, the D.C. Circuit fairly consistently used the presence of an Accardi claim to provide a basis for judicial review in circumstances where review would otherwise be unavailable or at least doubtful.\(^{158}\) More recently, some equivocation about this proposition has begun to appear.\(^{159}\) Most striking, during his relatively brief recent tenure on the D.C. Circuit before becoming Chief Justice, Judge John Roberts authored two Accardi decisions, both of them holding that review of the claim was precluded.\(^{160}\) So the court has evolved from a position of consistently finding Accardi claims reviewable to a position where sometimes such claims are not reviewable.

Perhaps it will also come as no surprise to learn that the D.C. Circuit decisions do little to clarify the underlying rationale for the Accardi doctrine. Lower courts generally accept Supreme Court doctrine as a given and see little need to probe beyond it to consider underlying theories. To the extent that the D.C. Circuit has identified a rationale for the Accardi principle, we can identify two themes.

In the 1970s and early 1980s, some decisions, following Justice Frankfurter, seemed to suggest that Accardi is a species of federal administrative common law. Specifically, a number of decisions of this period suggest that


\(^{159}\) See Fried v. NTSB, 78 F.3d 688, 690 (D.C. Cir. 1996) ("Although courts have generally required an agency to follow its own regulations, ... it is not clear that courts may review a claim of breached regulations when the regulations relate to a determination that has been 'committed to agency discretion by law.'" (quoting 5 U.S.C. § 701(a)(2))); Harrison v. Bowen, 815 F.2d 1505, 1517 (D.C. Cir. 1987) ("An agency cannot create through its implementing regulations a right of review withheld by the underlying statute.").

the principle is part of the judicially imposed duty that agencies give reasons in support of their actions.\textsuperscript{161} As stated in one decision: "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures."\textsuperscript{162} Here we see the duty to follow regulations explicitly assimilated to the duty to adhere to any type of agency policy absent an explanation for a change in course. Another decision, involving an alleged rule violation by local District of Columbia prison officials, expressly holds that the Accardi principle is not required by the federal Constitution, but rather is a doctrine of federal administrative law not enforceable against the District of Columbia government.\textsuperscript{163}

Since the mid-1980s, however, the court has generally grounded the Accardi principle in the notion that regulations are legally binding. The turning point may have been Brock v. Cathedral Bluffs Shale Oil Co.,\textsuperscript{164} where then-Judge Scalia expounded at some length on why legislative regulations give rise to the Accardi duty, but agency policy statements do not.\textsuperscript{165} Two years later, in Vietnam Veterans of America v. Secretary of the Navy,\textsuperscript{166} Judge Williams undertook a more systematic survey of the circuit authority on this point. He acknowledged that previous opinions had been inconsistent, sometimes suggesting that Accardi is limited to binding regulations, other times suggesting a broader doctrine.\textsuperscript{167} He sought to resolve this inconsistency by announcing that henceforth only binding regulations would qualify.\textsuperscript{168} He also sought to explain how binding regulations should be identified, concluding that agency intent to be bound is the key.\textsuperscript{169} Finally, he observed that procedural regulations are subject to the Accardi doctrine, provided they are binding.\textsuperscript{170} This does not necessarily mean that such regulations will have been adopted pursuant to notice-and-comment rulemaking procedures, he noted, because the APA exempts procedural rules from these requirements. After Cathedral Bluffs and Vietnam Veterans, the D.C. Circuit has fairly consistently grounded the Accardi duty in the understanding that regulations which are "binding" impose duties of compliance on the agency as well as the regulated community.\textsuperscript{171}

Finally, in considering the whole body of D.C. Circuit precedent, it is difficult to escape the conclusion that the Accardi doctrine is fairly manipula-
The Accardi Principle

One dimension on which manipulation occurs has already been mentioned: courts either accept or reject agency arguments about what particular regulations mean. If the court agrees with the agency policy or its decision, it can defer to the agency's understanding of the regulation. If it disagrees with the policy or the decision, the court can say the agency understanding is contrary to the plain meaning of the regulation or its purpose, or the court can say that the regulation is not sufficiently explicit on the contested point.

A second commonly encountered ground for manipulation is whether the court regards an agency rule as "binding" or not. When the court is eager to apply the Accardi principle, all sorts of agency statements have been regarded as binding. Among the things the court has so characterized include an agency's "usual practice" in setting a cutoff date for comments on a proposed regulation, an "memorandum of agreement" between two agencies, an "intermediary letter" giving guidance about how to apply a regulation, and an agency's "practice" of permitting only one application per drawing of oil leases. Among the things the court has held not binding include a regulation couched in broadly discretionary terms, personnel rules that do not incorporate an explicit and formalized procedural mechanism for their enforcement, a manual given to U.S. Attorneys, a statement by the agency directing employees how to respond to a judicial decision, and letters sent by the Federal Bureau of Investigation to university placement offices clarifying the agency's employment policies. In one case, the court remanded to the agency for an initial determination of whether a provision in an employment manual was binding.

Finally, the court can avoid the implications of Accardi by finding that an agency's violation of its own rule is not prejudicial error. Steenholdt v. Federal Aviation Administration illustrates. The petitioner sought review of the Federal Aviation Administration's ("FAA") decision terminating his services as a contract inspector. The Act in question allowed the FAA to terminate a contract inspector "at any time for any reason," and the court held that under this standard the merits of the decision were committed to agency discretion by law. The petitioner also cited a number of procedural irregularities committed by the agency allegedly in violation of its own regu-

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172 Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 225 (D.C. Cir. 1959).
177 Doe v. U.S. Dep't of Justice, 753 F.2d 1092, 1098–1100 (D.C. Cir. 1985).
178 United States v. Kember, 648 F.2d 1354, 1370 (D.C. Cir. 1980).
180 Padula v. Webster, 822 F.2d 97, 98–99, 100-01 (D.C. Cir. 1987).
182 Steenholdt v. FAA, 314 F.3d 633 (D.C. Cir. 2003); see also Nat'l Small Shipments Traffic Conference, Inc. v. ICC, 725 F.2d 1442, 1449 (D.C. Cir. 1984).
183 Steenholdt, 314 F.3d at 634.
184 Id. (quotation omitted).
lations.\textsuperscript{185} The court acknowledged that these could be reviewed under \textit{Accardi}, but concluded that the FAA "acted in substantial compliance with its gratuitous procedural rules, and any departure therefrom was in no way prejudicial to Petitioner."\textsuperscript{186}

Collectively, the decisions suggest that the D.C. Circuit has developed a considerable bag of tricks for manipulating the \textit{Accardi} principle. In theory, the principle is designed to enforce agency fidelity to existing legal norms. In practice, the doctrine appears to function, at least on many occasions, to force agencies to reconsider existing legal norms in light of judicial preferences. This of course should come as no surprise to students of judicial behavior. Innumerable studies have found that judges, including those who sit on the D.C. Circuit, use their power of judicial review to advance their own policy preferences.\textsuperscript{187} The only piece of new information here is that even a doctrine designed to do no more than enforce an agency's own policy judgments has in fact been used to advance judicial policy judgments through devices such as reinterpreting the agency's rule, characterizing nonbinding agency rules as binding (or vice versa), and finding violations of agency rules either to entail or not to entail prejudicial error.

\textbf{III. Accardi Restated}

It is time to attempt to restate the \textit{Accardi} principle. Reconciling all the cases and all the statements in the cases is not possible. The best that can be expected is a kind of coherence that finds support in the larger run of the decided cases, and brings the pieces of the puzzle together in a way that makes sense.

\textbf{A. Agency Duty and Mechanisms of Enforcement}

The critical move in restating the \textit{Accardi} principle is to distinguish between the source of the principle and doctrines for enforcing the principle. The failure to make this distinction is the major source of confusion in the case law. In particular, two of the potential sources of the duty of agencies to follow their regulations alluded to in the cases—the APA and the Due Process Clause—are more properly regarded as causes of action that claimants can invoke in appropriate circumstances to enforce the duty. These causes of action, together with other potential mechanisms of enforcement, such as the assertion of evidentiary privileges or the exclusionary rule, presuppose the existence of the duty; they do not establish it. The source of the duty is anterior to these causes of action.

\textsuperscript{185} Id. at 636–37.
\textsuperscript{186} Id. at 640.
The need to distinguish between the source of the duty and mechanisms of enforcement can be seen most clearly if we consider the APA as a potential basis for the Accardi principle. As observed by United States v. Caceres, § 706 of the APA “authorizes judicial review and invalidation of agency action that is arbitrary, capricious, an abuse of discretion, or not in accordance with law, as well as action taken ‘without observance of procedure required by law.’”\(^{188}\) The Court indicated that in an appropriate case subject to the APA, this authorization of judicial review would permit a court to set aside agency action contrary to its own regulations. If the agency violates its own substantive regulations, presumably this would be action “not in accordance with law.” If, as in Caceres, the agency violates its own procedural regulation, this would be action “without observance of procedure required by law.”

As should be immediately obvious, however, this account of how the APA embodies the Accardi principle assumes without explanation that at least some agency regulations, whether substantive or procedural, are “law” in the sense intended by § 706. The APA itself sheds little light on whether or when agency rules can be considered law. The rulemaking section, § 553, distinguishes between “substantive” rules and “procedural” rules, and between “substantive rule[s]” and “interpretative rules and statements of policy.”\(^{189}\) The term “legislative rule” does not appear in § 553.\(^{190}\) The definitional provisions of the APA define “rule” in a way that clearly presupposes some rules will have the force of law: “[R]ule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”\(^{191}\) But the definitional section says nothing about when and how agency rules can be said to “prescribe law,” and hence could be said to be “law” for purposes of the review provisions of § 706. In order to determine when and how agency rules can be said to be “law,” we need some anterior principle not itself found in the APA.

The need to distinguish between the source of duty and enforcement mechanism is more complicated in the context of due process, and I will postpone for the moment an analysis of the complexities. But if we consider only due process in the “primal sense” of the law of the land—\(^{192}\)the understanding that executive officials must adhere to duly promulgated legal constraints on their freedom of action—we can see the basic point. Due process requires that individuals be afforded a meaningful opportunity to challenge executive action that is contrary to law. Due process case law provides guidance about what constitutes a “meaningful opportunity” in different contexts.\(^{193}\) But

\(^{188}\) United States v. Caceres, 440 U.S. 741, 753–54 (1979) (paraphrasing 5 U.S.C. § 706(A) and quoting § 706(D)).


\(^{190}\) Cf. id. § 553(c), (d).

\(^{191}\) Id. § 551(4) (emphasis added).

\(^{192}\) Berger, supra note 3, at 149–50.

\(^{193}\) See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (discussing three relevant factors: “the private interest that will be affected by the official action,” “the risk of an erroneous
that case law cannot tell us, by itself, when executive action is contrary to law. In particular, it cannot tell us whether or when executive action that violates an agency's own regulation is contrary to law. To make this determination, we need an anterior understanding of whether or when agency regulations are "law."

B. The Source of the Duty

The starting point for restating the Accardi principle, therefore, must be an account of when agencies are legally obliged to comply with self-generated rules. The answer, at least the one supported by the weight of the case law and commentary that attends to this question, is that such a strong duty of compliance attaches when the agency promulgates a "legislative rule." It does not attach when an agency adopts other forms of rules, such as interpretative rules, policy statements, guidance documents, or agency precedents. Legislative rules are universally acknowledged as "binding" on the agency and its personnel, whereas these other sorts of agency-generated rules are either said to be "not binding," or to be binding at most in a "practical" sense as opposed to a legal sense.

Why are legislative rules "binding" on the agency, and what does this mean? This is the key question, the answer to which eluded the Court in Arizona Grocery. Nor does one find an answer in subsequent Accardi cases or decisions about rulemaking more generally. Instead, the equation of legislative rules and binding effects is simply assumed. The commentary does little better.

In the face of such silence, it would be presumptuous to attempt anything more than a preliminary answer. What I would tentatively suggest is that legislative rules are assumed to be binding on the agency because they are thought to share the salient features of statutes. Statutes, in turn, are
regarded as binding on enactors, enforcers, and adjudicators, in the sense that they create duties of compliance that attach to all persons in the relevant legal community.\textsuperscript{199} Thus, if the legislature enacts a statute imposing a speed limit of thirty miles per hour, the police are bound by the statute in their enforcement activities, including enforcement against the members of the legislature themselves. Similarly, the courts are bound to uphold the statute when cases are brought before them involving persons who have been caught speeding, including members of the legislature. It is true that there will be difficulties in persuading courts to intervene if the police engage in unprincipled failures to enforce the statute, say by disregarding legislators who speed at forty miles per hour.\textsuperscript{200} But these difficulties are endemic in any system of judicial oversight of law enforcement and do not excuse the police for their failure to enforce the law. The point is that all relevant actors are bound by the statute, including not just private citizens, but also members of the legislature, the police, and the courts.\textsuperscript{201}

This assumption about the universal duty of compliance created by statutes carries over to the administrative context, except now the same body acts as both promulgator and enforcer of the rule. Given our assumption that when we speak of statutes we are speaking of obligations that are universal, in the sense of applying to all members of the legal community, we assume that the agency, as the promulgator of a legislative rule, is also subject to a duty to comply with its own legislative rule in its capacity as enforcer and adjudicator. Given the nearly universal understanding that the President and his subordinates are duty bound to comply with statutes,\textsuperscript{202} it necessarily fol-

\textsuperscript{199} On the "self-binding" nature of legislation, see, for example, H.L.A. HART, THE CONCEPT OF LAW 42–43 (2d ed. 1994). The duty of universal compliance is closely associated with the concept of legality that features prominently in the criminal law. The law must be uniformly binding on enactors and enforcers as well as subjects in order to "secure evenhandedness in the administration of justice and to eliminate the oppressive and arbitrary exercise of official discretion." HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 80 (1968); see also John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189, 245 (1985).


\textsuperscript{201} This echoes Cicero's adage that there is not one law for Rome, another for Athens, one law for today and another for tomorrow, but one and the same law, for all peoples and all times. ("Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtenebit."). The adage is quoted in Swift v. Tyson, 41 U.S. 1, 19 (1842), and Luke v. Lyde, (1759) 97 Eng. Rep. 614, 617 (K.B.), among other sources.

\textsuperscript{202} See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952); Merrill, supra.
ollows that the President’s subordinates are duty bound to comply with regulations that have the force and effect of statutes. In this sense, the ultimate source of the duty of agencies to comply with their own regulations is conceptual or, perhaps, one could even say metaphorical. It derives from our understanding of what “statute” means, transposed to the context of agency-made rules.

What about nonlegislative agency rules—interpretative rules, policy statements, or rules of decision embodied in agency precedents? These sorts of rules generally are not regarded as binding on agencies, in the sense that any departure from the rule is *ipso facto* a breach of legal duty. Thus, violation of these lesser forms of rules does not automatically provide a basis for invalidation of agency action.203 Does this mean agencies are free to disregard such nonlegislative rules as the whim strikes them? No. Nonlegislative rules, like agency precedents, are subject to the general administrative common law duty of reasoned explanation, alluded to by Justice Frankfurter in *Vitarelli.*204 Thus, the agency may choose not to comply with these sorts of regulations, but only if it provides a reasoned explanation for its departure from the rule or precedent. Failure to provide a reasoned explanation for departure renders the agency action “arbitrary and capricious,” which means the court may vacate and remand the action for a proper explanation.205

What is the status in law of the principle that agencies have a legal duty to comply with regulations that have a status analogous to statutes? Is this a proposition of constitutional law, statutory interpretation, administrative common law, or what? The most honest answer is that it is just one of those shared postulates of the legal system that cannot be traced to any provision of enacted law. In this sense, it is like the rule of stare decisis, or the under-

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203 The self-executing nature of legislative rules has often been cited as a basis for distinguishing legislative rules from other types of rules. See Ronald M. Levin, *Mead and the Prospective Exercise of Discretion,* 54 ADMIN. L. REV. 771, 797 (2002) (“[T]he traditionally recognized difference between a legislative rule and a nonlegislative rule is that the former settles the issues addressed in the rule, so that the agency no longer needs to be concerned about having to defend its position on those issues at the administrative level.”); John F. Manning, *Nonlegislative Rules,* 72 GEO. WASH. L. REV. 893, 931 (2004) (“[T]he important point is that an agency can base an adjudicative decision on the mere applicability of a (valid) legislative rule to the facts before it.”). The self-executing quality of legislative rules is complicated in the United States because nearly all legislative rules in our system are only conditionally binding: they are binding only if the rule is valid. Statutes are only conditionally binding because some court may declare them unconstitutional. This does not take away their quality of providing a justification for the imposition of a sanction without reference to further authority. It only means that courts may decline to impose the sanction for a violation if they are convinced the statute is inconsistent with some higher rule. Legislative rules promulgated by administrative agencies are even more conditional. They are subject to challenge not only for constitutionality but also for inconsistency with authorizing legislation and for illegalities in the manner in which they were promulgated. But again, the possibility of invalidation for these reasons does not subtract from the conclusion that they provide a complete justification for imposition of a sanction without reference to other authority.

204 See supra text accompanying notes 61–62.

205 See, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 808–09 (1973) (plurality opinion).
standing that majority rule prevails in multimember courts, or that later-enacted statutes prevail over previously enacted statutes in the event of a conflict. These rules are not written down in any authoritative text. They are simply foundational assumptions vital to the operations of our legal system—they are constitutional principles in the small "c" sense of the term. Similarly, the understanding that statutes bind enactors and enforcers as well as subjects—extended now to the context of legislative regulations—is a shared assumption about the nature of our legal system; it is, if you will, part of the collective understanding of what it means to identify something as a "statute"—or a legislative regulation.

If pressed for a more precise characterization of the legal status of the Accardi duty, I would say that it is a principle of federal law when the mechanism of enforcement is federal. Thus, if the APA is the mechanism of enforcement, the principle is a federal gloss on the meaning of "law" under § 706, drawn from the shared assumptions of the enactors of the APA.206 Or, if the Due Process Clause is the mechanism of enforcement, the principle is a federal interpretation of the meaning of "law" in the Due Process Clause, drawn from the shared assumptions of the framers of the Due Process Clauses. This allows the scope of the duty to be defined as a matter of federal law when the action is otherwise federal. Insofar as state courts enforce the duty, for example under state administrative procedure acts, then of course the definition of the scope of the duty would be controlled by state law.

Once we have narrowed the source of the Accardi principle to legislative rules, the identification of the rules that trigger a duty of self-compliance becomes, at least in principle, straightforward. Legislative rules are identified through a two-step process.207 First, we must determine whether Congress has delegated authority to the agency to make legislative rules. Second, we must ascertain whether the agency intends to invoke this authority in making a rule. Although this two-part test seems to be well established in principle, it is astonishing how often one or the other of the required steps is disregarded by courts. Given the inattention of the courts, it is perhaps not astonishing that Congress is often ambiguous about whether it has delegated legislative rulemaking authority, or that agencies are often ambiguous about

206 Chairman Francis Walter of the House Judiciary Committee said of the APA that it "accepted the analytical terminology" whereby "we speak of . . . rule making whenever agencies are exercising legislative powers," and that legislative rules adopted by agencies are "binding upon the citizen exactly as statutes . . . are binding." Berger, supra note 3, at 137 nn.2 & 6 (quoting S. Doc. No. 79-248, at 355 (2d Sess. 1946)).

207 As the Court stated in Mead, an agency interpretation has the force of law "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226–27 (2000); see also Am. Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 558 (D.C. Cir. 1983) ("A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue."). Some D.C. Circuit opinions have elided the requirement of delegated power, see, e.g., Vietnam Veterans of Am. v. Sec'y of the Navy, 843 F.2d 528 (D.C. Cir. 1988), discussed supra, notes 166–70; Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984), but this seems impossible to sustain after Mead.
whether they intend their rules to have legislative force. The Accardi cases previously reviewed provide ample evidence of both types of failing.

Agencies acquire authority to make legislative rules only when Congress has conferred it upon them. One can refer to this as a "delegation" of legislative power, following Arizona Grocery, if one is comfortable with the idea of Congress delegating legislative authority. Or, if one is reluctant to countenance the idea of Congress delegating legislative power, one can speak of the enactment of legislation that confers discretionary executive authority on agencies to enact regulations that have an effect analogous to statutes. For present purposes, the exact characterization does not matter. The critical point is that agencies have no inherent power to make regulations having the force of law. They acquire such power only from Congress. Thus, the ultimate source of the duty of an agency to comply with its regulations is the enactment of legislation conferring authority on the agency to promulgate legislative rules.

There is nothing startling or even controversial about the proposition that an agency's power to act with the "force of law" comes from a delegation of authority from Congress. The Court has recognized this in contexts other than Accardi. It recognized the proposition in Arizona Grocery, although it misdescribed its consequences. And it recognized the point in two no-estoppel decisions we have considered, Merrill and Hansen. But the Court lost sight of this central insight in the Accardi decisions rendered after Arizona Grocery, which had the effect of obscuring the proper starting point for analysis.

There are, in turn, two dimensions to identifying the required delegation. The first, and more obvious, is whether Congress has delegated authority to make rules over the subject matter in question. A delegation to the Federal Communications Commission to make legislative rules about broadcasting does not imply similar authority to make rules for carriers of wireline

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209 As I am. See Merrill, supra note 24, at 2181.

210 See supra text accompanying notes 22-24.

211 See supra text accompanying notes 124-39.

212 Gonzales, 126 S. Ct. at 916. In Gonzales, the Court concluded that the language and structure of the Controlled Substances Act did not delegate authority to the Attorney General to adopt binding rules construing the meaning of "legitimate medical purpose." Id. at 915-16. This concerns breadth or scope of the delegation. The Court did not focus on whether the statute conferred authority to make rules with the force of law; that is, on the nature of the delegated power. See id. at 916-17.
Determining the scope of delegated power is basically a question of statutory interpretation. Controversy continues to swirl about the extent to which courts should defer to agency views about the scope of their delegated authority, but we need not enter into this thicket here.216

The second, and less recognized, dimension is whether Congress has delegated authority to make rules having the force of law. Unfortunately, most rulemaking grants do not in so many words specify whether they authorize legislative regulations.217 Answering this question would be easy if the Supreme Court had insisted on a clear statement from Congress when it seeks to confer authority to make legislative rules. Congress would have to use words like “legislative” or “binding” or “force of law” in conjunction with a grant of authority to make “rules and regulations.”218 But alas, courts have not imposed such a requirement, and there are too many important rulemaking grants on the books that are ambiguously drafted but nevertheless understood to confer legislative rulemaking power to make it practicable to impose such a clear statement requirement today.219

In the context of substantive regulations, one helpful signal is whether Congress, in delegating rulemaking authority, has simultaneously prescribed some sanction for those who violate the rules.220 Where procedural regulations are concerned—as usually seems to be the case in Accardi controversies—the inquiry is more uncertain. Precedent suggests that, at the very least, Congress must specifically delegate authority to make “rules and regulations” under the relevant agency-specific statutory authority; omnibus grants of authority, such as the Housekeeping Act, should not be read as conferring power to make legislative procedural rules.221

Even under these very imperfect guidelines, the Court should have concluded in some of its Accardi cases that no authority to make legislative rules had been delegated by Congress. Caceres is perhaps the clearest example. The requirement that IRS agents obtain supervisory approval for tape recording conversations originated in an executive branch initiative designed to head off congressional legislation on the subject.222 There is no indication in the opinion or the briefs that the rule was the product of delegated authority from Congress. This should have stopped the Accardi analysis in its tracks.


217 See Merrill & Watts, supra note 215, at 482–93.

218 One early case, ICC v. Cincinnati, New Orleans & Texas Pacific Railway Co., 167 U.S. 479, 505 (1897), can be read as imposing such a requirement. But more recent authority appears, if anything, to adopt the opposite presumption: that all rulemaking grants confer full power to make legislative rules. See Merrill & Watts, supra note 215, at 551–70.

219 See Merrill & Watts, supra note 215, at 581–82 (discussing difficulty of applying a clear statement rule today given extensive history disregarding such a requirement).

220 For the historical importance of this convention, see id. at 493–528.


Once the existence of delegated authority has been established, the next question is whether it has been exercised by the agency. Here the key question, as the D.C. Circuit has recognized, is one of agency intent. With respect to substantive rules, a good (although not perfect) indicator of intent is whether the agency has followed notice-and-comment procedures in promulgating the rule. Most substantive legislative rules are invalid if not promulgated using these procedures. With respect to procedural rules, this test does not work because the APA exempts procedural rules from notice-and-comment requirements. This does not mean that the distinction between legislative rules and nonlegislative rules does not apply to procedural rules. Agencies can issue legally binding procedural rules and procedural rules that are merely advisory or that act as guidelines to good practice. But the procedures followed by the agency in promulgating procedural rules will not help in determining which type of procedural rule it intended.

The D.C. Circuit has recently made a further effort to identify proxies for agency intent to make binding rules, citing factors that operate independently of the process used by the agency in promulgating rules. The court has concluded that a rule can be determined to be legislative by asking:

(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

These factors suggest that the inquiry into agency intent is a search for what might be called “objective” rather than “subjective” intent. That is, we are looking for indicia that would lead a reasonable observer to ascribe a particular intent or purpose to an agency. We are not seeking to uncover the subjective motivations or designs the agency may have harbored when it promulgated a rule.

Note that the first objective indicator of agency intent listed by the D.C. Circuit—whether in the absence of the rule there would be an adequate basis for an enforcement action or other agency action of consequence—is primarily relevant to the identification of substantive legislative rules. For procedural rules, the relevant indicia of intent may boil down to whether the

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223 See, e.g., Chiron Corp. v. NTSB, 198 F.3d 935, 944 (D.C. Cir. 1999) ("The general test is whether the agency intended to bind itself with the pronouncement.").
224 Certain types of substantive legislative rules are exempt from notice-and-comment procedures, including those for which good cause exists to omit these procedures and certain types of rules associated with benefit and grant programs. See 5 U.S.C. § 553(b) (2000); United States v. Mead Corp., 533 U.S. 218, 244 (2001) (Scalia, J., dissenting).
226 See Vietnam Veterans of Am. v. Sec'y of the Navy, 843 F.2d 528, 536–37 (D.C. Cir. 1988), discussed supra notes 166–70.
agency has published the rule in the CFR,\textsuperscript{228} cited a specific grant of legislative rulemaking authority, or is amending previous procedural rules clearly understood to be legislative.

The foregoing exploration of the source of the \textit{Accardi} duty obviously leaves many issues unexplored. But it has established three important doctrinal propositions. First, the \textit{Accardi} principle applies only to legislative regulations because only legislative regulations create binding legal duties on agencies and agency personnel. Second, the \textit{Accardi} principle applies only if the agency has been delegated authority to make legislative rules by Congress. Third, the \textit{Accardi} principle applies only if the agency has exercised such delegated authority in a way that manifests its intention to issue a legislative regulation.

C. Mechanisms of Enforcement

Once we have identified the source of the \textit{Accardi} principle in delegated legislative rulemaking, the next question concerns the mechanisms available to enforce this agency duty. The survey of Supreme Court decisions in Part I reveals that there is a variety of enforcement mechanisms. I will consider here what appear to be the three most important ones: a petition for review of agency action under the APA, an action to enjoin agency action under the Due Process Clause, and a motion to suppress evidence under the exclusionary rule. The survey reveals other possible mechanisms: a petition for writ of habeas corpus (\textit{Wixon} and \textit{Accardi}), a motion to quash a subpoena (\textit{Nixon}), and an appeal from a criminal conviction (\textit{Yellen}). No doubt there are other possible avenues as well, such as an officer suit. In an effort to avoid overburdening the analysis, I will omit any analysis of potential avenues of redress beyond the principal three.

1. The APA

Not until \textit{Caceres} in 1979 did the Supreme Court identify the APA as a law of potential relevance to the \textit{Accardi} principle.\textsuperscript{229} Justices Frankfurter and Rehnquist had opined earlier that the principle was grounded in general principles of administrative law. But \textit{Caceres} was the first decision to suggest that the APA itself might be a source of the \textit{Accardi} principle. We have seen that this is mistaken. Section 706 authorizes courts to “hold unlawful and set aside” agency action found to be “not in accordance with law” or “without observance of procedure required by law.”\textsuperscript{230} But as previously discussed, the APA does not tell us whether or when agency rules can be considered “law” for purposes of these review provisions. We have to look to anterior understandings to determine when agency action is “law.”

\textsuperscript{228} Publication in the CFR is probative of agency intent because the statute establishing the Code specifies that it shall contain only documents “having general applicability and legal effect.” 44 U.S.C. § 1510 (2000) (emphasis added); see Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986).


\textsuperscript{230} 5 U.S.C. § 706.
Subpart B sought to establish that agency action is "law" for purposes of § 706 when it takes the form of delegated legislative rulemaking. Once we have identified this as the source of agency-made "law," then § 706 kicks in to provide a powerful enforcement mechanism. Any person who satisfies otherwise applicable jurisdictional, standing, and reviewability requirements can bring a petition for review asking the court to "hold unlawful and set aside" agency action that violates the agency's own legislative rules, whether they be substantive legislative rules or procedural legislative rules.

What sort of advantage does this confer, relative to the ability of any person who satisfies otherwise applicable jurisdictional, standing, and reviewability requirements, to bring a petition for review asking a court to "hold unlawful and set aside" agency action that departs without explanation from prior agency interpretative rules, policy statements, or precedents, on the ground that this is "arbitrary and capricious" agency action? Under modern reasoned decisionmaking or "hard look" norms, departure from nonlegislative rules and precedents is subject to review and reversal under the APA no less than departure from legislative rules.\textsuperscript{231} Armed with this common-law gloss on the APA, why should a litigant care about the \textit{Accardi} doctrine?

Because there is this critical difference: providing a reasoned explanation will not rescue an agency from reversal when it fails to comply with a legislative rule. The only way an agency can depart from a legislative rule is by undertaking a new rulemaking proceeding to modify the existing legislative rule with a new rule.\textsuperscript{232} Given the time and agency resources needed to conduct a new rulemaking, and given the vagaries of politics that may intercede during the long delay often involved, the need to conduct a new rulemaking represents a powerful form of relief that goes well beyond a remand to the agency for an explanation. In this sense, the \textit{Accardi} principle, as restated and enforced through the APA, represents a significant type of administrative law relief separate and distinct from general principles requiring that agencies conform to norms of reasoned decisionmaking.

We can see, in fact, that the \textit{Accardi} principle (invalidation of agency action as not in accordance with legislative regulation) and ordinary requirements of reasoned decisionmaking (invalidation of agency action as arbitrary and capricious) represent two different degrees of protection of reliance interests. When an agency wants to induce strong reliance on its policies, it can embody them in legislative rules. Under \textit{Accardi}, courts will require the


\textsuperscript{232} See \textit{Appalachian Power Co. v. EPA}, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (stating that EPA cannot amend legislative regulations "without complying with the rulemaking procedures required by [the Act]"); \textit{Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan}, 979 F.2d 227, 240 (D.C. Cir. 1992) (holding new rulemaking is required when an agency attempts to "supplement or amend" an existing legislative rule); \textit{Am. Fed'n of Gov't Employees, Local 3090 v. FLRA}, 777 F.2d 751, 759 (D.C. Cir. 1985) (stating that agency cannot justify departure from regulation by giving a valid reason because this would allow agencies to repeal legislative rules without providing affected parties an opportunity to comment); \textit{see also Syncor Int'l Corp. v. Shalala}, 127 F.3d 90, 95 (D.C. Cir. 1997) (agency cannot change interpretation of legislative rule except through rulemaking); \textit{Paralyzed Veterans of Am. v. D.C. Arena L.P.}, 117 F.3d 579, 586 (D.C. Cir. 1997) (same).
agency to conform to these rules unless and until the agency engages in a new rulemaking to amend the rules. This means, absent some extraordinary authority to promulgate retroactive rules, that any change will be prospective only.\textsuperscript{233} When an agency wants to induce a weaker form of reliance on its policies, it can embody them in nonlegislative rules—interpretative rules, policy statements, guidance documents, or precedent. Under reasoned decisionmaking norms, an agency must adhere to these policies unless and until it gives a valid reason for change. But if it provides a valid reason, it can change the policy, and can make the change effective retrospectively.

Two other issues about the APA as a mechanism of enforcement bear mention before moving on. First, the survey of D.C. Circuit cases reveals uncertainty about whether Accardi claims can render judicially reviewable what otherwise would be unreviewable. That court has on many occasions used Accardi as a way of getting around understandings that certain types of agency actions are not judicially reviewable. A clear example is provided by the cases reviewing decisions by the military to deny promotions or to discharge personnel on less than honorable terms. Ordinarily, such decisions are understood to be outside the purview of judicial review.\textsuperscript{234} But the D.C. Circuit has held that the injection of an Accardi argument magically transforms what is unreviewable into something that is reviewable.\textsuperscript{235} More recently, however, the court has expressed some doubt about whether Accardi claims are always reviewable\textsuperscript{236} and has held that when statutes preclude review, Accardi claims do not survive.\textsuperscript{237}

The confusion here can be resolved by distinguishing between the two bases on which the APA provides that actions may be unreviewable: when "statutes preclude judicial review" and when "agency action is committed to agency discretion by law."\textsuperscript{238} If review is precluded by statute, then it stands to reason that review of Accardi claims is also precluded. But if the rationale for preclusion of review is that the action is committed to agency discretion, then I think the decisions holding that Accardi makes what is otherwise unreviewable reviewable are correct. Certainly they are correct if one takes the Supreme Court at its word when it says that the principal inquiry in determining whether action is reviewable is whether there is "law to apply."\textsuperscript{239} As we have seen, legislative rulemaking is the vehicle agencies can use to generate "law" to apply on their own initiative. Thus, even if the applicable statutes confer complete discretion on agency actors, if those actors have the authority to constrain their discretion by promulgating legislative rules, and they choose to do so, they have created law that can serve as the basis for judicial review of their actions. An agency with broad discretion that wants

\textsuperscript{233} See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 205–06, 208 (1988) (striking down attempt by agency to respond to invalidated rule with a new rule that was made retroactive).


\textsuperscript{235} See supra note 155.

\textsuperscript{236} See Fried v. NTSB, 78 F.3d 668, 690 (D.C. Cir. 1996).

\textsuperscript{237} Fornaro v. James, 416 F.3d 63, 66–69 (D.C. Cir. 2005); Graham v. Ashcroft, 358 F.3d 931, 935 (D.C. Cir. 2004).


to avoid all judicial review can do so consistent with Accardi simply by declining to promulgate legislative regulations.

Second, the D.C. Circuit survey also reveals that courts occasionally avoid the Accardi principle by holding that violations of agency regulations have caused no prejudice to claimants. This is in accordance with the APA. The last sentence of § 706 says, "In making the foregoing determinations [e.g., that agency action is not "in accordance with law" or is "without observance of procedure required by law"], . . . due account shall be taken of the rule of prejudicial error."240 This sentence has never been cited by the Supreme Court in an Accardi case, and to my knowledge it has been cited by the D.C. Circuit in such a case only once.241 But it provides a fully adequate textual basis for resolving what is otherwise an inconsistency in the case law. Some cases, most prominently Vitarelli and Yellin, imply that Accardi sets forth a standard of strict compliance, with no exception for rule violations that cause no harm or prejudice. Other cases, most prominently American Farm Lines, imply that courts will enforce agency rules only when the rule violation has caused harm or prejudice. The text of the APA—once we bother to read it—reveals that American Farms Lines is right here, at least for cases in which the APA provides the enforcement mechanism.

Of course, this still leaves the question of what sorts of rule violations should be excused by giving "due account" to the "rule of prejudicial error." Raoul Berger has devoted much of a law review article to arguing that the prejudicial error safety valve should be read narrowly, and should be invoked only when the agency has caught its error and has provided an equivalent measure of protection to the claimant before making a final decision.242 The argument is based on legislative history. Apparently, the prejudicial error provision originally appeared in the same sentence as the "without observance of procedure" provision.243 Some Senators objected to this as providing insufficient assurance of agency adherence to procedural rules.244 So the prejudicial error language was moved to the end of § 706 (making it applicable to all standards of review in that section), and was qualified with the "due account" language.245 Some legislators explained that the exception, as modified, was intended to capture cases in which the agency caught a procedural error and corrected it before any harm was done.246

This is all quite interesting, but is subject to the usual objections to using legislative history to give statutory language a specialized interpretation the text itself does not reveal. We know what only a handful of participants in the debates said about the change in placement of the provision, and the explanations they gave may have been intended only as illustrations, not as limiting principles. I agree with the thrust of Berger's comments that courts

242 Berger, supra note 3, at 158–76.
243 Id. at 160.
244 Id. at 161.
245 Id. at 161–62.
246 Id. at 162.
should be cautious about overusing the prejudicial error safety valve. It is always difficult to know how a proceeding would have come out if timely notice had been given, or a fuller opportunity to present evidence had been afforded. General rule of law values also suggest that courts should reinforce the importance of agency compliance with their own legislative regulations. But rigid insistence on compliance with rules when no substantive rights are at stake also has its costs. Congress has directed courts to apply ordinary standards of prejudicial error in this context, and that is how they should proceed, at least when the APA is invoked as a mechanism of enforcement of the Accardi principle.

2. Due Process

The Due Process Clause is an alternative basis for seeking judicial enforcement of the Accardi principle. Due process was explicitly invoked in Wixon and Accardi—cases that were not governed by the APA. And Caceres reaffirms that under certain circumstances the Due Process Clause requires that agencies comply with their own regulations. On the other hand, Justice Marshall was mistaken in his Caceres dissent in arguing that due process is the sole source and means of enforcing the Accardi duty. All this, however, leaves many uncertainties about when and to what extent an agency's violation of its own regulations is also a violation of due process.

The standard elements that must be shown in order to establish a procedural due process violation are that: (1) the government (2) is threatening to deprive the claimant (3) of a recognized interest in life, liberty, or property (4) in a proceeding that turns on facts individual to the claimant (5) without observing the package of procedures that the judiciary determines are required by “due process of law.” Two elements that have been obscured in the Accardi decisions that invoke due process are numbers (3) and (5).

The threshold requirement that a claimant show she has an interest in life, liberty or property (element 3 above) is sometimes called the “entitlements” limitation on due process. This limitation stems from Board of Re-

247 See supra text accompanying notes 33-37, 49-52.
249 The first three elements follow from the text of the Clause. See U.S. Const. amend. XIV, § 1. The first is the state action requirement, which appears expressly in the Fourteenth Amendment (“nor shall any State”) and is implicit in the Fifth. The second proscribes the “deprivation” of entitlements and is also expressly stated in both Amendments. See Daniels v. Williams, 474 U.S. 327, 331-32 (1986). The third imposes a threshold determination that the deprivation be of an interest that can be described as “life, liberty or property,” which is also supported by the text, although only in the modern era has the Court insisted that these concepts be given discrete definitions. See Bd. of Regents v. Roth, 408 U.S. 564, 569-72 (1972). The fourth element is not textual, but has long been recognized as an implicit limitation on the scope of procedural due process. See Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915). The fifth has roots in the text, but the understanding that the judiciary is uniquely competent to prescribe the procedures required to satisfy due process of law is also relatively modern. Cf. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (providing judicially created analysis of whether “administrative procedures ... are constitutionally sufficient”).
The entitlements limitation means that one possible reading of *Accardi*—that any violation by an agency of its own procedural regulations is for this reason alone a violation of due process—is incorrect. An agency violation of its own regulations will violate due process only if the violation has the effect of depriving the claimant of life, liberty, or property.

This qualification significantly reduces the universe of agency rule violations that can be redressed by a due process action. Indeed, several of the Court's decisions of the *Accardi* era, if framed as due process cases, would have come out the other way after *Roth*. Consider, for example, *Vitarelli*, holding that a discretionary employee of the Interior Department could not be dismissed in a manner inconsistent with agency regulations. Once we confine procedural due process claims to those that implicate life, liberty, or property, Vitarelli would have to show that his interest in keeping his government job was a protected "property" interest. This he almost certainly could not do. Vitarelli was an at-will employee of the Department of Interior who could be dismissed for any or no reason at all. Under *Roth* and succeeding decisions, he therefore had no "property" interest in the job and hence could make no due process claim. Nor would the government's self-imposed adoption of procedural regulations for terminating discretionary employees transform this interest into a property right. Self-imposed termination procedures do not create a "property" right, so long as the government avoids limiting the substantive reasons for terminating entitlements.

That the scope of due process has been reduced by the life-liberty-property threshold does not mean, however, that procedural regulations adopted by an agency do not define the content of the package of procedures that are due once this threshold is crossed. It is quite intelligible to argue that once a claimant has crossed the life-liberty-property threshold, the government is forbidden from departing (in a downward direction, at least) from any self-imposed legislative regulations that prescribe procedures for terminating such an interest. *Accardi* itself, which appears to be grounded in due pro-

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252 The most recent case is *Town of Castle Rock v. Gonzalez*, 125 S. Ct. 2796, 2802, 2810 (2005) (holding that a promise by town to enforce restraining order was not a property right, and hence the town's failure to notify respondent that it would not enforce order did not violate due process).
255 The Court has explicitly so held in the liberty context, see *Hewitt v. Helms*, 459 U.S. 460, 471 (1983), and implicitly so held in the property context, see *Bishop v. Wood*, 426 U.S. 341, 347 (1976) (suggesting that ordinance found not to restrict reasons for termination of employees, but to qualify termination on observance of certain procedures, did not create a protected "property" right).
256 The Court has said that "'[p]roperty' cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). But this goes to the proposition that the substantive entitlement cannot be
cess, reasons as follows: the government granted by regulation a package of procedures to persons like Accardi; the government failed to follow these procedures; therefore, Accardi was denied due process.

The prospects for judicial recognition of this fallback position have been clouded by another development in due process doctrine—the emergence of the understanding, most prominently associated with *Mathews v. Eldridge*, that the judiciary is the sole and final authority in specifying what package of procedures constitutes “due process of law” (element 5 above). Once it is established that the procedures required by due process consist of whatever package of procedures the judiciary believes to be required in any given context, courts may be unwilling to accept agency-generated procedures as defining what is required by due process. Suppose, to take the extreme case, the judiciary concludes that no procedures are required by due process. Then, the fact that the government promised a particular package of procedures to the claimant might seem to be beside the point in establishing any due process claim. If the judiciary says no procedures are required, then the adoption of a package of procedures by regulation seems like a gratuitous regulatory benefit—enforceable perhaps in an APA action, but of no consequence so far as due process is concerned.

Nevertheless, I think a normative case can be made for taking *Accardi* at face value and requiring agencies to adhere to their own procedural regulations as a matter of due process (provided, of course, an entitlement to life, liberty, or property is at stake). Notwithstanding *Mathews v. Eldridge*, courts have no claim to special expertise in prescribing procedural packages for different administrative contexts. Agencies themselves are likely to have a much better understanding of the tradeoffs between the benefits and costs of different degrees of procedural formality. Nor do courts have any special warrant for making policy through devising procedures, any more than they have for making policy in other ways such as statutory interpretation. Agencies are the bodies to which Congress has delegated authority to make policy, not the courts. Using the *Accardi* principle to fix procedural entitlements thus promises to transfer authority for the design of procedural entitlements to entities better suited to make these judgments.

As applied to procedure packages, the *Accardi* principle in effect proposes a simple tradeoff: the agency determines the appropriate package of procedures, and the court assures that the package is followed. This allows the agency to draw upon its comparative advantage based on its familiarity with the issues and its greater legitimacy as a policymaker. The courts can defined downwards by the package of procedures provided by legislatures or agencies. It does not foreclose the possibility that the question of what process is due can be expanded upwards by additional procedures prescribed by legislatures or agencies for the protection of recognized entitlements.


258 *See Vitek v. Jones*, 445 U.S. 480, 491 (1980) (stating that because “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 that it may deem adequate for determining the preconditions to adverse official action”).

draw upon their comparative advantage in assuring that the rules laid down have in fact been followed. This tradeoff, moreover, is faithful to the original understanding of due process as adherence to the law of the land. Due process in its “primal” understanding forbids any form of lawless executive action that deprives individuals of protected entitlements—including lawless disregard of procedures that have been voluntarily adopted in legislative regulations.

Several objections to this interpretation of the Accardi principle can be anticipated. First, what if the agency adopts woefully deficient procedures to protect entitlements—or no procedures at all? In these circumstances, presumably Mathews and its judicial cost-benefit approach to determining procedural packages would be called upon to set a judicially prescribed procedural floor. Such intervention, however, should be limited to cases in which the agency choice of procedure can be said to be plainly unreasonable. Mathews would not be overruled, but merely reinterpreted as requiring significant deference to agency choice of procedures, with a revived Accardi principle perhaps serving as the vehicle for such a reinterpretation.

Second, would this interpretation of Accardi transform any state procedural violation that results in a deprivation of a protected entitlement into a federal claim under 42 U.S.C. § 1983? It would have this implication. On balance, however, this would probably represent a lesser degree of federal intrusion into state administrative law than currently exists under Mathews. Under Mathews, any state agency action that results in the deprivation of a protected entitlement gives rise to a claim under § 1983, in which the federal court can, if it chooses, prescribe new procedures for state agencies to follow in the future. Under Accardi, the only question (save in extreme cases involving unreasonably deficient procedures) would be whether the state agency has disregarded its own prescribed package of procedures. The frequency for potential federal court intervention might increase, but the degree of remedial intrusion would be greatly diminished.

Third, would this interpretation of Accardi trivialize due process by rendering every violation of agency procedure an automatic violation of due process? There is a potential for concern here. The Constitution, we presume, is concerned with real and substantial rights, not with compliance with procedures for the sake of compliance with procedures. But there are

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260 See Raoul Berger, "Law of the Land" Reconsidered, 74 Nw. U. L. Rev. 1 (1979). Berger notes that most colonial and state constitutions required that the government afford process in accordance with the "law of the land," a phrase borrowed from the Magna Carta. Id. at 4. The Magna Carta, in turn, "laid down that the laws bind the king." Id.

261 The Court has in fact increasingly applied Mathews in a spirit of deference to procedures established by politically accountable bodies. See, e.g., Weiss v. United States, 510 U.S. 163, 177 (1994) (declining to apply Mathews to military justice system); Medina v. California, 505 U.S. 437, 442-45 (1992) (declining to apply Mathews to criminal trial procedures); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 320-26 (1985) (applying highly deferential version of Mathews to congressional procedures for contesting veterans' benefits).

262 See Olim v. Wakinekona, 461 U.S. 238, 250 (1983) ("The Court of Appeals thus erred in attributing significance to the fact that the prison regulations require a particular kind of hearing before the Administrator can exercise his unfettered discretion . . . . Process is not an end in itself.").
mechanisms for mitigating this concern. Several Accardi precedents, including American Farm Lines and Caceres, can be cited for the proposition that procedural errors that cause no prejudice should not result in invalidation of agency action. And agencies themselves can reduce the danger of trivialization by incorporating provisions for waiver of procedural requirements when good cause exists to do so.

Subject to these qualifications, and subject to the important qualification that the government must be threatening to deprive the individual of a protected interest in life, liberty, or property, I believe courts should read Accardi to mean what it says: an agency's violation of its own legislative procedural regulations is a violation of due process.

3. Exclusionary Rule

The exclusionary rule is yet another mechanism that could be used to enforce the duty of agencies to follow their own regulations, at least for the subset of regulations that seek to control the gathering of evidence used in criminal prosecutions. In Caceres, of course, the Court held that agency violations of evidence-gathering regulations generally do not warrant application of the exclusionary rule. I think this judgment is correct, given the danger of overdeterrence in this context. When a legal duty is imposed on an agency by the Constitution or by statute, the agency has no choice but to continue to adhere to the duty, even if the costs of doing so are high. But when the duty is self-imposed, if the agency comes to perceive that the costs of adhering to its regulations are too high, the agency has the option of repealing or amending its own regulations. Justice Stevens was therefore correct in Caceres to worry that imposing the very strong medicine of exclusion might induce agencies to avoid promulgating regulations seeking to control the gathering of evidence, resulting in less regularity in the administration of justice rather than more.263

The basic problem with using the exclusionary rule as a mechanism to enforce the Accardi duty is that the Double Jeopardy Clause prohibits retrial of defendants once a conviction is reversed for use of impermissible evidence.264 In contrast, both APA enforcement and due process enforcement generally result in remands to the agency, with instructions to follow the agency's rules. Remands impose delays, and delays are costly. But they hold forth the promise that the agency may eventually be able to vindicate its policy (at least if the case involves a violation of procedural rules). Hence they are inherently less costly from the agency's perspective than application of the exclusionary rule, which generally means the agency's enforcement action is dead. The high costs of the exclusionary rule have of course been long recognized and have made this enforcement mechanism controversial.265 Whatever its merits in the context of constitutional and statutory duties, its

264 See U.S. CONST. amend. V.
265 The high cost is reflected in the many exceptions to the exclusionary rule carved out by the courts. See, e.g., United States v. Leon, 468 U.S. 897, 922 (1984) (“good faith” exception). It is also reflected in decisions by Congress not to extend the exclusionary rule to recent enactments designed to protect privacy rights, such as the Electronic Communications Privacy Act, 18
high costs mean it is likely to be counterproductive when used as a mechanism for enforcing the agency's duty to follow its own regulations.

D. The Restatement Restated

It may be useful, by way of summary, to restate the principal conclusions of the foregoing restatement of Accardi.

1. The principle that agencies must comply with their own regulations applies only to agency legislative rules.

2. Agency legislative rules are identified by determining that (a) Congress has delegated authority to the agency to make legislative rules and (b) the agency intended to exercise this authority by making such a rule.

3. The principal mechanism for enforcing the agency's duty to comply with its own legislative rules is § 706 of the APA. Agency action invalidated for noncompliance with an agency legislative rule is enjoined until the agency makes a new legislative rule.

4. Agency rules that do not qualify as legislative are enforced under § 706 of the APA by requiring that the agency give a reasoned explanation for any departure from the rule. Agency action invalidated as arbitrary and capricious because it is an unexplained departure from a nonlegislative rule is enjoined until the agency gives a reasoned explanation for the departure.

5. The APA applies to both substantive and procedural legislative regulations, but judicial enforcement of both types of rules is limited by the rule of prejudicial error.

6. If the APA does not apply, then agency violation of a legislative rule may also violate due process, provided the rule violation affects an interest in life, liberty or property.

7. Agency violations of procedural rules also constitute a violation of due process, provided the rule is legislative in nature, the violation causes prejudice, and the rule violation affects an interest in life, liberty, or property.

8. Violations of agency rules should not be enforced by the exclusionary rule.

IV. Accardi's Utility

I will close with some tentative thoughts about the utility of the Accardi principle. It will be useful for these purposes to distinguish between Accardi's potential utility as an ex post monitoring device and its potential utility as a system of ex ante incentives. Viewed as an ex post monitoring device, Accardi allows courts to review and set aside agency decisions that frustrate expectations that have been created by agency rules. Considered an ex ante system of incentives, Accardi allows agencies to signal what degree of expectation persons should have in different types of agency action and hence empowers agencies to induce different degrees of reliance.

Accardi has historically functioned as an ex post monitoring device. The Supreme Court's decisions of the Accardi period were all concerned with

U.S.C. § 2510 (2000), relying instead on civil damages and disciplinary action against federal employees who intentionally violate protections. Id. § 2511.
providing a measure of protection to hapless individuals caught up in political whirlwinds that gave little heed to the fate of individuals. Similarly, the D.C. Circuit has used the doctrine as a device to force reconsideration of harsh government action, such as termination of a military career, in circumstances where courts ordinarily would not intervene. Used as a tool for ex post monitoring of individual injustices, the doctrine will have the greatest utility if its analytical foundations remain vague, and the circumstances in which it applies remain ill defined. This gives courts flexibility in deciding when to invoke the doctrine in order to force reconsideration of executive action they find disconcerting. Certainly the classic Accardi doctrine fits this description.

Whatever utility the Accardi principle may have had in bygone years for purposes of ex post judicial monitoring of agency action, this function seems to be dying out. The Supreme Court has largely forgotten the case and the principle for which it stands. When the Supreme Court ignores a legal doctrine for a significant period of time, other actors in the legal system tend to lose interest, and the doctrine gradually loses vitality. In the D.C. Circuit, the Accardi principle continues to limp along. Yet the doctrine in its current form is highly manipulable, and the recent cases suggest that it is being manipulated increasingly to deny relief to claimants.

The Accardi principle, as I have restated it, would function more as an ex ante system of incentives. Agencies would in effect be given a clear menu of options that would allow them to induce three different degrees of reliance: strong reliance—by promulgating legislative rules, which courts would enforce until changed by other legislative rules; intermediate reliance—by announcing policies or precedents, which courts would enforce by precluding agencies from changing their rules without giving a reasoned explanation; and no reliance—by disclaiming any fixed rule or policy on an issue, which would give courts no basis for intervention. Armed with this greater clarity about regulatory tools available to them, agencies could decide which tools to use, and hence what degree of reliance to elicit, without having to worry about courts construing their actions to have different consequences. This greater clarity about regulatory tools, in turn, would empower agencies by giving them greater confidence that the regulatory instruments they select will have predictable consequences. The result might be more effective regulation, achieved at lower costs.

266 See supra text accompanying note 155.

267 This assessment may understate the degree to which courts set aside agency decisions for failing to comply with substantive legislative regulations. In part because the Accardi cases did not involve substantive regulations, and in part because the duty to comply with substantive regulations is uncontroversial, courts may not always refer to Accardi (or Service, Vitarelli, or Nixon) when they render decisions invalidating agency action for noncompliance with substantive regulations. Thus, it is possible that the Accardi principle has become identified in the judicial mind with niggling enforcement of agency procedural regulations, a project which has largely fallen out of favor. Meanwhile, the far more significant manifestation of the principle, reflected in judicial enforcement of substantive regulations, remains unlabeled and hence largely invisible, but nonetheless functions as an important bulwark of the rule of law in our system of government. Further research to measure the frequency of judicial enforcement of substantive agency regulations would be valuable in testing this hypothesis.

268 Agencies may want to induce reliance for a variety reasons, including persuading pri-
The ex ante incentives story represents a type of argument for legal formalism. Formalism is often identified as a mechanism of control: higher-ups issue formal orders to lower-downs, thereby constraining their discretion. But formalism can also be empowering, insofar as it provides a roadmap showing actors how they can exercise different options without having to worry about ex post meddling by higher-ups. Formal rules of property and contract law have this quality. By specifying in advance what consequences will follow from adopting different forms of property or different contractual clauses, formalism allows parties to structure their affairs to maximize their own advantage without fear of after-the-fact second guessing by courts. Something similar may be true in administrative law. By specifying in advance how agencies can signal that they are adopting different policy instruments, and by clarifying in advance the consequences of choosing different instruments, courts can empower agencies by allowing them to structure their regulatory programs so as to achieve their policy goals at the lowest cost.

Obviously, none of this demonstrates that the greater formalism of the restated Accardi principle would necessarily be a good thing. Such a judgment would require investigation of many other variables related to comparative institutional performance. If one takes a dim view of agency policymaking, perhaps because one thinks agencies are prone to capture, then ex post review by courts, even if conducted on an ad hoc basis, has relatively more appeal. Conversely, if one thinks that courts will intervene primarily to advance their own policy preferences, and that these are likely to be less legitimate and less informed than the judgments of agencies, then ex ante incentives look better. The matter is even more complicated if gross generalizations like these do not apply across all agencies and all courts. And it is always necessary to consider which version of the doctrine provides a better set of incentives for Congress, which of course creates and funds the agencies, and delegates legislative rulemaking authority to them in the first place.269

The critical role of these comparative institutional judgments can be seen by considering the issue that, according to the D.C. Circuit survey, is possibly the most contested in Accardi cases. This is the vexed question of how courts should resolve questions about the meaning of agency regulations, and in particular whether courts should adhere to the venerable Seminole Rock doctrine that an agency interpretation of its own regulation is entitled to “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”270 The doctrine has been much maligned by commentators on the grounds that it violates separation of functions principles and cre-

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269 For some thoughts about this dimension of the problem, see Merrill, supra note 24, at 2139–59.
ates a loophole around the *Chevron* doctrine.\textsuperscript{271} But when viewed in light of the *Accardi* principle, the *Seminole Rock* doctrine takes on new significance.

If we assume that agencies are in need of close judicial supervision in order to police against interest group capture or other failings, then *Seminole Rock* looks like an impediment to effective ex post monitoring. Suppose an agency regulation is ambiguous as to whether it means X or Y. The agency has informally followed a practice of treating it as if it means X, giving rise to expectations among regulated entities that this is what it in fact means. But then, perhaps in response to lobbying from other interests, the agency changes its mind and officially interprets the regulation to mean Y. In these circumstances, judicial vigilance against agency capture and the vindication of legitimate expectations appear to require that the court reject the agency interpretation and insist that the regulation means X. *Seminole Rock* seems to foreclose this kind of ex post monitoring.

Conversely, if we assume that the main danger comes not from agency failure, but rather from unaccountable courts seeking to foist their own policy preferences on agencies through judicial review, then *Seminole Rock* makes a great deal of sense. *Seminole Rock* instructs courts to enforce regulations that are unambiguous. In this sense it is consistent with a baseline understanding that agencies must adhere to their own regulations. But it does not allow courts to seize upon ambiguity in a regulation—or to create ambiguity in a regulation—in order to override an agency's policy judgments while purporting to enforce the *Accardi* principle. From this perspective, therefore, *Seminole Rock* deference, like *Chevron* deference, is a vital part of the complex of understandings necessary to empower agencies to pursue their own policy preferences and to insulate politically accountable agencies from meddling by unaccountable courts.

Furthermore, if we are relatively more confident that agencies, on the whole, will seek to further policies that they conceive to be in the public interest, there is less reason to worry about the need for a broad and flexible doctrine permitting ex post judicial vindication of expectations. To be sure, agencies committed to a change in policy will be tempted from time to time to take a shortcut by reinterpreting existing legislative regulations rather than amending such regulations through notice and comment. But agencies should learn over time that if they want to preserve flexibility to make changes, they should stick to nonbinding rules and precedents as regulatory tools and not try to effect change through novel readings of legislative rules. Agencies that use legislative rules and then try to change them through aggressive interpretation will defeat the very advantage of using legislative rules in the first place, which is to assure the public that the policy will remain unchanged. Such opportunism will undermine the agency's ability to regulate effectively in the future. The agency's understanding that this would be the consequence of such behavior may be a greater source of protection to the public than relying on episodic judicial protection after the fact.

Rather than pursue this line of inquiry further here, I will close with yet another complication: whether transforming something like the Accardi principle into a system of ex ante incentives for agencies is possible given current judicial attitudes. The recent history of the Chevron doctrine suggests that caution is in order on this score. Like Accardi, Chevron has been for much of its life a doctrine of uncertain analytical foundations and uncertain scope. In Christensen v. Harris County, and then in United States v. Mead Corp., the Supreme Court moved toward a rationalization of Chevron that parallels the restatement of Accardi I have offered here. Under Christensen and Mead, strong Chevron deference attaches when Congress delegates power to agencies to act with the force of law, and the agency interpretation is issued pursuant to that delegated authority. Otherwise, agencies are entitled to a lesser degree of deference or no deference at all. The result is to create three tiers of deference to agency interpretations: strong Chevron deference—when agencies interpret pursuant to delegated lawmaking power; intermediate Skidmore deference—when agencies interpret in an area of expertise but without the force of law; and no deference—when the legal issue is beyond the ken of agency expertise altogether.

In articles written before and after Mead, I sought to defend such a conception of the source and scope of Chevron on grounds parallel to the argument for the restated Accardi principle sketched here: that it would empower agencies by spelling out the matrix of payoffs that follow from the selection of different regulatory options. Agencies that submit to public procedures associated with legislative rulemaking or formal adjudication would be rewarded with strong deference; agencies that decline to interpret in these participatory formats would get a lesser reward from courts. This formalized conception of Chevron would permit agencies to choose the degree of deference they would receive by specifying the price they would have to pay in advance, in terms of commitment to public involvement in development of the interpretation.

So far, the results from the Mead experiment are not encouraging. Commentators who have examined the lower courts' response report that Mead did not result in a clear conception of the rationale and scope of Chevron, but rather has generated chaos. Courts have variously read the decision as restricting Chevron to legislative rules and formal adjudication, as mandating a case-by-case inquiry into whether Chevron applies, and even as mandating

274 See Christensen, 529 U.S. at 587; Mead, 533 U.S. at 227–28.
a wholly new all-things-considered test for determining whether to defer to agency interpretations.

All of this raises a cautionary flag about any proposal to inject more formalism into administrative law. But there may be an explanation for the Mead debacle that does not call into question the underlying case for shifting from ex post monitoring to ex ante incentives in administrative law. Justice Souter's Mead opinion, while endorsing in the abstract a formal test for Chevron deference, was executed in such a way as to suggest overall that the inquiry should be very antiformal.278 Lower courts were understandably confused by the signal they were receiving. Moreover, the Court compounded the puzzlement by rendering a decision the next Term that seemed to eschew Mead's underlying formal test altogether and instead to embrace a pure multifactoral balancing approach to the degree of deference.279 So the confusion in the lower courts does not necessarily reflect what we would see if the Supreme Court hewed to a consistent line. The Court's most recent decisions appear to tack back toward an unambiguous theory of delegation for determining the application and scope of Chevron,280 and once those messages are absorbed, perhaps the discord in the lower courts will begin to abate.

Moreover, even if we assume perfect judicial execution in the explication of the theory, the argument for ex ante incentives is admittedly weak in the Mead context. This is because the consequences of courts adopting different standards of review (Chevron versus Skidmore) are debatable, given the manipulability of the standards and the likelihood that judicial policy preferences will swamp any influence from the standard of review. In contrast, the potential payoffs from giving agencies a clear matrix of regulatory options are more powerful in the Accardi context. Departing from a legislative rule requires a prospective change in the rules; departing from a nonlegislative rule requires an explanation. This is a real and substantial difference, which will influence both the response of the regulated community as well as the agency’s assessment of the benefits and costs of proceeding in different formats. Thus, there may be greater justification for attempting to achieve more formalization in the Accardi context than there is in the Chevron context.

Conclusion

Administrative law is a web of constitutional principles, in the small “c” sense of term. These are principles that define the structure of government, only some of which are actually derived from the Constitution, in the big “C” sense of the term. Some of these constitutional principles become controversial and gather lots of attention from courts and commentators. Others grow musty and lie around unexamined for long periods of time. The Accardi principle, the subject of this article, is in the latter category. It was once a widely used tool of judicial review, but of late it has been rather neglected.

278 See Merrill, supra note 276, at 809–19.
What I have tried to show is that this settled but neglected principle shares more in common with what is perhaps the central issue of modern administrative law than might be expected. That issue is whether the distribution of governmental power, such as the power to determine the meaning of ambiguous statutes or regulations, should be resolved in terms of an amorphous functionalism characteristic of the Legal Process School, or whether such issues should be resolved in terms of more formal principles derived from separation of powers, such as the need to ground agency power in a delegation of authority from Congress. I have argued that if we take up the separation of powers tradition and pursue its logic with modest rigor, we can restate a fairly coherent Accardi principle. Moreover, this restated Accardi principle generates relatively clear answers to most of the puzzles about the scope of the principle that commentators say are unresolved.

I have also suggested that such a restated Accardi doctrine would function more as a device for empowering agencies, rather than an instrument allowing courts to correct perceived agency misbehavior, and I have intimated that this reorientation would be a good thing. Whether our federal courts, the jealous guardians of the administrative constitution, are prepared to embrace a doctrine having this implication remains in doubt. Courts are an interested party in determining the allocation of power in the administrative state. Like other political actors, they may be reluctant to cede their power willingly. But should they become convinced of the wisdom of modest abdication, the tools are at hand to begin such a transformation. The Accardi principle, as here restated, is one tool that could play an important role in such a reorientation.