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PRIVATIZING DUE PROCESS

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***964 Introduction**

In American law, the term private due process is an oxymoron. Under our Constitution, there must be a "state action" to trigger the Due Process Clause of the Fourteenth Amendment or a comparable federal action to invoke the Fifth Amendment.¹ Therefore, process is only due when the public sector, rather than the private, takes action. Without such action, process is theoretically a matter of choice or discretion.

It did not have to be this way. Other democratic societies impose process judicially in the absence of government action,² and the United States could have as well. The Supreme Court, however, limited the potential reach of the Due Process Clause in the Civil Rights Cases³ when it held unconstitutional a federal statute that forbade discrimination in private settings.⁴ By restricting coverage of the Due Process Clause to state action, the Court left private discrimination to be regulated (or not) by

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state law or private agreements. In limiting the reach of the Clause to “state action,” the Court imbedded the public-private distinction into the Constitution.⁵

However, an “all or nothing” approach paints an incomplete picture.⁶ It implies that, should a litigant fail to establish state action, procedural protections evaporate. What evaporates is not procedural protections per se,⁹⁶⁵ just the Constitution's guarantee of them. When the due process switch is turned off, a litigant seeking procedural protections against private parties is relegated to a variety of second-best alternatives.⁷ Some of these alternatives are governmental and have a venerable history.⁸ But since they arise from disparate sources and have been unevenly applied, these non-constitutional processes have rarely been analyzed or evaluated in a coordinated fashion. That is the goal of this article.

A full understanding of procedural alternatives to due process becomes an urgent matter in the era of privatization, when an increasing number of government activities are being placed in private hands.⁹ When the government privatizes an activity, it delegates public power but it often does not address procedural issues.¹⁰ Those subject to the delegation are at a procedural disadvantage. At this juncture “private due process” becomes a meaningful concept. Included within it are a different set of alternatives: state concepts of fair procedure, available either at common law or by statute; process mandated by statute to effectuate some specific federal purpose; process connected judicially to general federal statutes such as the antitrust laws; and due process protocols that are emerging from alternative dispute resolution procedures.¹¹

After evaluating the current state of the public and private procedural landscape, this Article will address two questions arising from the current privatization debate: Can private procedural alternatives be connected to the privatization of government functions? Should federal law play a role in codifying these privatized procedures in a more general way? In other words, is it time to consider a private Administrative Procedure Act (APA)?

***966 I. Due Process, the Adversary Model, and State Action**

The public-private due process dichotomy may have emerged from the Civil Rights Cases, but it was during the era of *Goldberg v. Kelly*¹² that many of the present difficulties surfaced. *Goldberg* expanded this entitlement theory to encompass due process protection (in the form of full adversary procedures) in a variety of discretionary government programs. As Professors Shapiro and Levy have shown,¹³ entitlement theory has its problematic dimensions; it came to depend on definitions of liberty and property which limited its effectiveness. Similarly, Professor Rubin demonstrated, in the decade after *Goldberg*, that cases like *Board of Regents v. Roth*¹⁴ sought to forestall or repudiate the “extension of due process into the administrative realm” by limiting concepts of liberty and property.¹⁵

I have a different emphasis--it was not just entitlement theory that ultimately limited due process protections after *Goldberg*, but the nature of the process that was due as a result of that case. The limitations that brought the due process era of *Goldberg* to an end were themselves process-based. This retrenchment has been so effective that Professor Pierce now ominously foresees a “due process counterrevolution,” which would revive the right-privilege distinction.¹⁶ Professors Shapiro and Levy's unease with Professor Pierce's formulation has led them to propose a rule of law approach designed to replace entitlement theory by applying process whenever there are standards set by government.¹⁷

Their approach has appeal, but it faces many challenges from Professor Pierce's accurate view of a reluctant judiciary. It was the burden of adversary model procedures upon all manners of administrative ⁹⁶⁷ determinations that forced the Supreme Court to rethink its bold commitment of the 1970s in the first place. It is the relief from that burden that will have to provide

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the solution. Once it understood the revolutionary potential of Goldberg, the Court began to ameliorate its impact. The Court narrowed liberty and property interests, as has been discussed, and then it cut back on the adversary nature of procedures required by due process.¹⁸ But, the Court also took a third and less apparent step: it narrowed the “state action” requirement. Since state action is the touchstone for due process, the manipulation of the public-private distinction is a sure way to reduce the government's procedural responsibilities.

Due process determinations are defined by three steps: (1) finding state action, (2) locating property or liberty interests, and (3) creating the procedures that are “due.”¹⁹ The second and third steps were addressed by Goldberg and involve the often subjective process of matching procedural ingredients derived from the adversary process with the interests asserted.²⁰ But the first step is the biggest, for it determines whether the due process game will be played at all. Professors Rubin and Pierce have shown that the second and third steps of due process were rethought shortly after Goldberg.²¹ However, the Court's ambivalence about the Goldberg proposition led it simultaneously to contract the first step, the state action requirement. The narrowing of this requirement creates much of the difficulty we currently face with applying due process in the privatization context. If privatized activity remains an action of the state, the due process deficit would not exist. Therefore, privatized due process is only needed because state action fails to trigger the constitutional version.

***968 A. The Overlap Between State Action and Due Process**

Two cases best illustrate the overlap between state action and due process: *Jackson v. Metropolitan Edison Co.*²² and *Memphis Light, Gas & Water Division v. Craft*.²³ Both involved utilities (one private, one public) and the procedures required when a relatively minor property interest is transgressed--the termination of a customer's utility service for delinquency in payments. In *Jackson*, the Court found no state action despite the fact that the private utility was regulated by the state as a natural monopoly, a circumstance that has traditionally signaled state involvement.²⁴ Chief Justice Rehnquist's majority opinion shows a Court looking for a state action escape route to avoid engaging in the unrewarding task of prescribing adversary-type procedures for new property claims.²⁵

Later, in *Craft*, the Court exercised its “process is due” powers very sparingly, when it could not avoid the state action requirement because of public ownership.²⁶ But even this concession did not satisfy Justice Stevens who argued, in dissent, that the Court “trivializes” due process by not finding the existing termination procedures procedurally adequate.²⁷ This decision, and others like it,²⁸ narrowed the adversary procedures *969 mandated by due process. The unfortunate part of the *Jackson* decision is that it used the state action concept to achieve this goal, as compared to either the majority's or the dissent's due process arguments in *Craft*. It is *Jackson* and its cramped view of state action that has become a major obstacle to expanding due process to privatized functions.

The post-Goldberg Court did not see its role as becoming, in effect, a drafter of a code of procedures for the administrative state. This was a role it earlier embraced in *Wong Yang Sung v. McGrath*²⁹ and later abandoned. By seeking various exit strategies, including a redefinition of state action, the Court is slowly bringing the era of procedural due process in the new property context to a close. But in terms of privatization, the Court has new choices: It can begin defining the state action requirement in ways independent of its Goldberg-inspired due process withdrawal³⁰ or it can embrace fair procedure alternatives that might arise in statutory form.³¹ But before turning to the future, however, the present state of due process must be explored.

B. The New Due Process Defined

What process will now be due for new property? Professor Pierce predicts that due process protections will remain in only two circumstances: “The jobs of academics and the jobs of government employees whose skills are not transferable to private sector jobs.”³² These two categories offer compelling claims to constitutional consideration either because of First Amendment implications (in the case of academics) or because of the monopoly characteristics of certain types of government employment. Still, Pierce's world free of due process sounds ominous since it potentially excludes many government employees, state and federal, whose interests are not elevated to special status.³³

*970 Due process should ensure nonarbitrary treatment by government, as Professor Van Alstyne long ago proposed³⁴ and Professors Shapiro and Levy have recently advocated.³⁵ However, whether the government acts directly or through its private delegates, it should obtain this condition.³⁶ Indeed, Pierce's due-process-free-world presupposes “private” hearing rights that might ameliorate its harsh effect.³⁷ This alternative will prevent the prospect of a right-privilege revival from becoming a disastrous step backward for the administrative state. And, even with private hearings, we are far from achieving a consistent theory of privatized due process.

Still, the incremental creation of private process alternatives makes a post-Goldberg world potentially less foreboding. For example, in the welfare situation, the use of block grants in lieu of statutory payments frees states from some of the procedural requirements dictated by the Aid to Families with Dependent Children (AFDC) program in Goldberg.³⁸ While individual applicants may now have to take the procedural bitter with the substantive sweet,³⁹ some process can still be due to individuals when states deny claims, whether the process is provided by the Constitution, federal statute, or state law.

Pierce's due process counterrevolution posits a regime whereby procedures will be drawn from multiple sources in the future. Perhaps, some procedural adjustments are already occurring. Due process cases seem to not be reaching the Court in large numbers,⁴⁰ which may indicate *971 that alternative sources of procedures are beginning to complement due process requirements. But the privatization movement poses additional complications. The more we outsource government functions, the greater the pressure will be on these sources to respond procedurally. More federal procedural dictates will be needed. What is now a largely uncoordinated effort to provide private due process will have to be regularized. This question of how to ensure that procedural protections are generally available will be addressed⁴¹ after reviewing the existing private procedural landscape.

II. State Law Alternatives to Due Process

State law often provides default procedural protections when the Due Process Clause does not apply. Common law remedies in the absence of state action may be available, and some states even provide fair process directly by statute when constitutional due process is unavailable. Thus, while the absence of state action ends the due process inquiry, it simultaneously triggers a state law determination of what fairness requires. This second inquiry could have the same practical impact as the first.

A. Tarkanian's (Cautionary) Tale

Jerry Tarkanian's legendary battle with the National Collegiate Athletic Association (NCAA or Association) is a good place to start in evaluating the alternatives to due process. Twenty years ago, the putatively private NCAA denied Coach Tarkanian a hearing when it penalized the basketball program at the University of Nevada at Las Vegas (UNLV). The NCAA Infractions

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Committee found UNLV in violation of numerous recruiting and academic requirements connected to its basketball program. As part of the penalty phase, the NCAA told UNLV that its probationary period would be reduced if it fired the coach, which it promptly did.⁴² The NCAA viewed Tarkanian as an incidental casualty of its action against UNLV, the institution subject to its jurisdiction. But Tarkanian felt the NCAA was punishing him directly and demanded to be heard during the investigation of his employer.⁴³

Tarkanian sued the NCAA in state court alleging common law and constitutional tort injuries.⁴⁴ The Supreme Court of Nevada found the NCAA to be a state actor under 42 U.S.C. § 1983 and held that it had *972 violated Tarkanian's due process rights.⁴⁵ The NCAA appealed this decision to the United States Supreme Court on the state action point. In NCAA v. Tarkanian,⁴⁶ the Court reversed and limited the reach of state action over nongovernmental organizations like national athletic associations. This was a close question, given the NCAA's economic and legal control over the athletic programs of both state and private universities.⁴⁷ But in the era of Jackson, which the Tarkanian court relied on, the state action requirement was clearly in retreat.⁴⁸ The NCAA had won a crucial victory. By turning off the all or nothing state action switch, the NCAA may have thought the crises had passed.

Tarkanian, however, was far from done. While he lost the protections of due process in his federal action under § 1983, the Supreme Court did not affect his state tort action. Tarkanian returned to state court and a long trial ensued.⁴⁹ The NCAA ultimately settled the case for substantial damages in 1998.⁵⁰ So what are the lessons of Tarkanian's tale? To some degree his status as a local hero (and the NCAA's as an obnoxious outsider) predetermined a ruling in his favor. But his experience had a broader meaning--it affected the state law of fair process in lasting ways, both within and outside Nevada.

The case created a cottage industry in state fair procedure statutes. These statutes, directed at the NCAA, sought to define the procedures required by national athletic associations. In NCAA v. Miller,⁵¹ the Ninth Circuit held such efforts in Nevada to be unconstitutional under the Commerce Clause. Other states enacted similar statutes.⁵² These statutes, while "inspired" by NCAA actions against other state universities, mirrored existing fair procedure statutes in other states.⁵³

*973 Even before the NCAA settled with Tarkanian, it realized that by defeating the state action challenge, it gained a pyrrhic victory. Faced with continuing litigation, even as a private actor, the Association had to rethink its approach to due process to ensure the enforcement of rules of play set by its college and university membership. Clearly, the enforcement procedures employed by its Infractions Committee had to be improved.

Therefore, in 1991, the NCAA undertook what amounted to an exercise in private due process. It convened a blueribbon panel on the enforcement process chaired by then-President of Brigham Young University Rex Lee (with retired Chief Justice Warren Burger serving as honorary chair).⁵⁴ This panel was charged with rethinking and improving upon the procedures employed by the NCAA in order to satisfy due process norms.⁵⁵ After extensive public hearings, involving institutions, coaches, administrators, and outside bodies, the panel recommended numerous changes to the Infractions Committee's practices.⁵⁶

*974 One of the strongest recommendations dealt with the definition of impartial decider.⁵⁷ The panel recommended the use of retired judges instead of Infractions Committee members to preside over cases.⁵⁸ The NCAA ultimately rejected this recommendation but incorporated most of the others.⁵⁹ Specifically, it responded to Tarkanian's objections by strengthening the rights of confrontation and record compilation for affected individuals as well as institutions.⁶⁰ By these actions the NCAA

put itself in a much stronger position to protect against Tarkanian-type actions in the future and to limit any damages that might result from such actions.⁶¹

Thus, Tarkanian's tale has several morals. Principally, although the NCAA was freed from state actor status, it remained bound by state laws to the due process traditions reflected by the Constitution's requirements. Indeed, it is hard to know what would have changed had Tarkanian been decided differently. The Supreme Court would have been reluctant to draft a code of procedures for the Association even if it had found state action.⁶² On remand, the federal trial court would still have had to decide whether the NCAA violated Tarkanian's due process rights by asking the Mathews question of what process was due. To avoid future lawsuits, the NCAA may well have convened the same due process panel to protect its enforcement function from continued legal exposure. Having been through this exercise, it began to see due process and fair procedure as alter egos. In many private associations, the differences in legal exposure under these regimes simply are not all that significant.⁶³

***975 B. Universities and the Public-Private Distinction**

The creation of a private due process regime is not limited to national associations like the NCAA. Other prominent private associations and membership groups have undertaken similar activities. Private universities provide a prime example. Unlike public institutions, private universities are outside the reach of state action-based due process requirements.⁶⁴ Though these institutions are technically free to limit procedures by private agreement, student and faculty pressures force them into providing basic fair procedures in decisionmaking.⁶⁵ Since these institutions serve purposes identical to public ones,⁶⁶ it is hard to rationalize relying upon the state action distinction to deny procedures in one case and not the other. As a result, universities have established procedures for disciplinary cases irrespective of their status. The procedural codes at these institutions reveal few differences between them based on the public-private distinction.⁶⁷

Thus, many private institutions have been forced, by custom, politics, or state law, to behave procedurally as if they were public. Where there is a public analogue, private institutions have less room to maneuver procedurally. They are, like private associations such as the NCAA, held to procedural expectations that reflect due process values, if not requirements. In effect, these institutions are bargaining in the shadow of the law.⁶⁸ The shadow can be cast either by the Constitution, by state law requirements, or by social or community pressures from the entities themselves. Decisions on due process therefore depend on a host of legal and social factors of which the "state action" designation is only one. For many institutions, both private and public, due process has become a matter of bargaining with constituents. As Professor Resnik perceived, *976 "bargaining is increasingly either a requirement of the law of conflict resolution or the expected means of concluding disputes, both civil and criminal."⁶⁹

C. Other State Law Requirements of Fair Procedure

Concepts of procedural fairness apply to both public and private actions in settings that extend beyond national associations and universities.⁷⁰ While not all states employ fair procedure analysis,⁷¹ those that do have developed a common law and sometimes statutory framework for applying fair procedure. An overview on a state-by-state basis is difficult to achieve,⁷² but there are enough salient examples to predict the direction of state law in this regard.

One context for state fair procedure activity involves privileges of doctors to attend at private hospitals. This is an area that has also received federal regulatory attention.⁷³ In these settings, there is often an imbalance in bargaining power between individual and institution that is reminiscent of the Tarkanian situation. Individual physicians may find themselves at the mercy

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of hospital staff physicians who can deny access for arbitrary or anticompetitive reasons. One solution is to let the market correct erroneous decisions by hospitals that arbitrarily deny admission to physicians.⁷⁴ But some states have been unwilling to rely on market responses and have committed themselves to protecting the admitting physician without regard to private agreements.⁷⁵ The scope of such concerns seems to be expanding. In California, the focus has been on the monopoly characteristics of certain associations, like hospitals.⁷⁶ Rather than relying on common law-based processes, however, California has provided *977 statutory protections to doctors seeking access to the staffs of private hospitals.⁷⁷ Ironically, this statutory formula probably exceeds the requirements of due process in a post-Goldberg world.⁷⁸

California has also broadened the notion of fair procedure⁷⁹ to include arbitrary treatment of members of clubs and associations where the monopolistic rationale behind hospital privileges does not apply.⁸⁰ This constraint, which has a corollary in the federal state action cases,⁸¹ is difficult to administer. But once it is jettisoned, a state can expand the application of fair procedures to a seemingly unlimited class of cases.⁸² California prescribes, in great detail, the procedural ingredients required to satisfy the fair procedure requirement. Once limited to notice and an opportunity to be heard,⁸³ cases now dictate the precise procedural ingredients required under the rubric of fair procedure.⁸⁴ By specifying procedural requirements, the state is engaging in a due process analysis similar to that once employed in Goldberg and other due process cases.⁸⁵ California is clearly at the forefront of fair procedure legislation. But it is not alone in providing relief without the aid of state action and the Due Process Clause. While the results would likely prove uneven on a state-by-state basis, the basic proposition has been established: Fair procedures are often effective alternatives to due process.

***978 D. External Review of Managed Care Decisions**

In the specific context of managed care, many states (42 at the most recent count) have adopted privatized external review mechanisms.⁸⁶ Decisions by insurers involving Medicare worker compensation claims have been held not to be state actions triggering the Due Process Clause.⁸⁷ These external review systems create new forms of adjudication that bear close resemblance to arbitration. Indeed, because of that distinction the Supreme Court, in *Rush Prudential HMO, Inc. v. Moran*,⁸⁸ concluded such systems were not preempted by the Employee Retirement Income Security Act (ERISA). These external review systems are, nonetheless, systems for ensuring fair process.⁸⁹

For ERISA purposes, the *Moran* decision places the external review system in a netherworld between adjudication and arbitration. While that may insulate Health Maintenance Organizations (HMOs) from challenges based on procedural fairness,⁹⁰ it still has a regularizing impact. Decisions by HMOs and other private health care providers concerning Medicare coverage may not constitute state action, but they are subject to fairness considerations. A fascinating procedural world remains: state law process constraints upon private decisionmakers.⁹¹ These forms of private due process are in addition to generalized state fair procedure laws. As with the hearing requirements mandated under the Health Care Quality Improvements Act,⁹² state laws--inspired, permitted, or just tolerated by federal law--have begun to establish a creative regime of procedural protections.

***979 III. Federal Laws, Regulations, and Decisions that Mandate Procedures for Private Entities**

At the federal level, statutes and regulations have long established fair procedures to cover private entities that otherwise cannot be reached through the state action doctrine. Private actors regulated by substantive federal law are often subjected to procedural requirements outside the state action requirement. A well-known example is federal labor laws, which have since the 1920s

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created a federal procedural regime between management and labor by statute, and administrative practice. What, after all, is “good faith” in bargaining if not a legal requirement defining inappropriate conduct between employer and employee through procedural means?⁹³ Federal labor law sets substantive standards; it also provides a code of fair procedures for collective bargaining and spawned a regime of self-regulatory standards that are procedurally-based.⁹⁴

Under federal antidiscrimination laws, the conduct of private employers toward protected classes of employees is also regulated substantively and procedurally. Thus, employers are encouraged to provide informal hearings to employees who complain about offensive conduct in the work place.⁹⁵ Private companies provide these hearings in order to reduce the likelihood of onerous damages awards. Like the NCAA after the Tarkanian case,⁹⁶ these companies are bargaining in the shadow of the law--in this case Title VII. Again, it is unlikely these matters would be handled differently if these companies had been declared state actors under the Due Process Clause.

These examples introduce the broader subject of how federal regulation ensures due process for those adversely affected by private entities. As in some states, a law of fair procedure has been established at the federal level which increasingly controls private relationships.

***980 A. Federal Oversight of Self-Regulatory Organizations**

The federal government also delegates power to self-regulatory organizations (SROs) and supervises their activities. Prominent SROs include the private entities that regulate the New York Stock Exchange (NYSE) and National Association of Securities Dealers Automated Quotation (NASDAQ). Federal supervision is both substantive (in terms of delegated powers) and procedural.⁹⁷ While these entities have so far avoided characterization as state actors,⁹⁸ their close relationship to the Securities and Exchange Commission (SEC) keeps them under the purview of government.⁹⁹ As with national associations, universities, and private hospitals, the nonstate action designation hardly defines the limits of SRO procedural responsibility and liability.

Federal law requires exchanges to provide “fair procedures” that mandate notice, comment, and a statement of reasons.¹⁰⁰ In effect, Congress has established a code of fair procedures for stock exchanges, much like it has done for companies regulated under the federal labor laws. At the exchanges, questions now arise over the adequacy of the procedural “code,” not over its existence. In fact, the procedural questions before SROs have become quite complex.

The NYSE constitution, for example, provides that the failure of a broker-dealer to testify before an investigatory committee can result in license suspension or expulsion.¹⁰¹ The fair procedure requirements applying to broker-dealers do not address this forced disclosure requirement. If the NYSE shares information collected from broker- ***981** dealers with federal enforcement agencies,¹⁰² it effectively forces a waiver of the Fifth Amendment privilege against self-incrimination. If the NYSE was a state actor, this forced waiver would be evaluated under the Due Process Clause.¹⁰³ The NYSE, as a private entity, is required under federal law to ensure that its law enforcement officials are free from due process oversight. But whether enforcement officials have been taking advantage of the NYSE's private status in this regard has now been raised as an argument for state actor status.¹⁰⁴

Since the NYSE has been regulated more directly by the SEC in light of corporate scandals,¹⁰⁵ the question of deeming the NYSE a public actor under the Due Process Clause has become a matter for public debate. Even as a privatized entity, federal law requires the NYSE to achieve procedural results that are comparable to those that state actor status might produce.

B. Antitrust Laws as a Source of Federal Fair Procedures

Federally-imposed procedures can also derive from judicial application of the antitrust laws. Fair procedure in this gauge becomes a matter of federal common law, much like states have achieved through the common law. In *Silver v. NYSE*,¹⁰⁶ the Court required the NYSE to provide due process protections as a condition to receiving an implied immunity under the Sherman Act. Congress, in effect, codified the holding of this case in later fair procedure legislation,¹⁰⁷ but the connection between antitrust and due process is still made in other contexts.

In *Patrick v. Burget*,¹⁰⁸ the Sherman Act was utilized to protect a doctor from a loss of privileges at a private hospital.¹⁰⁹ Similar to state fair *982 procedure actions,¹¹⁰ a medical board controlled by self-interested physicians exercised monopoly power over a competitor physician. The court invoked antitrust laws to coerce these private entities to comply with due process at the pain of treble damages. The defendants in *Patrick* raised an intriguing defense. They argued that they were really state actors triggering the immunity defense of *Parker v. Brown* and related cases.¹¹¹ In effect, the hospital defendants tried to use the *Parker* state action defense to antitrust liability as a way to avoid the due process requirement under the antitrust laws. The *Patrick* Court refused to find the necessary “active state supervision” under *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, (*Midcal Aluminum*)¹¹² to justify the immunity and upheld the district court’s Sherman Act treble damage award.¹¹³ Much like the *Tarkanian* situation, the private hospital’s failure to provide the plaintiff doctor a hearing, even though one was not required under due process, opened it up to a devastating damages action.

After *Patrick*, Congress insulated medical peer review activities from antitrust liability.¹¹⁴ While the legislation did not contain a procedural code (as had occurred with the NYSE after *Silver*), it gave some recognition to the need to protect against arbitrary actions by peer review groups.¹¹⁵ This statute, along with the provision of fair procedures by state law,¹¹⁶ created a due process reality in the private hospital setting. These cases show how application of the antitrust laws can make private entities with monopolistic power act procedurally responsible.¹¹⁷ At the state level, *Midcal Aluminum* plays an important role when it requires “active supervision” of privately *983 delegated functions. Behind these cases are legislative actions endorsing fair process. Nowhere is state action determinative of consideration establishing fair procedures.

IV. Alternative Dispute Resolution and Due Process

We have seen by now that private due process not only exists, but is a healthy concept. It emerges from the many sources already discussed. But it can also arise in surprising contexts, including non-adversary settings like arbitration and mediation. While rarely discussed in due process terms, Alternative Dispute Resolution (ADR), an increasingly popular private alternative to the judicial process, has become a source of private due process. Thousands of disputes are resolved through ADR in the commercial setting, and many consumer and employment disputes are now also subject to arbitration or mediation.¹¹⁸ The Supreme Court has endorsed arbitration as an alternative to judicial decisionmaking,¹¹⁹ assuming parties have agreed to forego the judicial process.¹²⁰ By giving up their right of access to the courts, these potential litigants are resorting to a form of private due process. The judicial encouragement of arbitration reflects both a self interest in reducing the judicial burden and an awareness that ADR is a procedural alternative. The Supreme Court affirms arbitral decisions when they are fair procedurally, even when it has reservations about the substantive validity of those decisions.¹²¹ This encouragement raises the stakes for ADR to ensure that it provides an adequate form of private due process.

A. The Federal Arbitration Act as an “Arbitration APA”

The Federal Arbitration Act¹²² (FAA) has become an active and expanding source of federal law on the arbitral process. Utilized to assure the preemptive effect of federal law, it has grown in importance, perhaps *984 exceeding Congress's expectations.¹²³ While used primarily for jurisdictional purposes, it also affects process that is due in arbitration. In effect, the FAA has become an increasingly important source of private due process procedures.

The FAA does not expressly require procedures in arbitration like the Administrative Procedure Act (APA) does for agency adjudication. However, procedural ingredients can be culled out of its provisions. Thus, the FAA mandates neutrality of the arbitrators and provides other procedural protections.¹²⁴ But it does not establish a formal arbitration process. To fashion one under existing law, two assumptions would have to be made by the Court that: (1) Congress intended the FAA to fill a procedural role in arbitration, and (2) The FAA's requirement of an independent decider can ensure the presence of fair procedures more generally.¹²⁵

The parties in arbitration, once they select a neutral decider, often define their procedural universe without outside help. This consensual process works fine in arbitrations between equal parties. In large scale employment and consumer dispute resolution settings, however, there are reservations about the voluntariness of the process.¹²⁶ Here the FAA may have a larger role to play. It can become a statutory vehicle for ensuring that arbitration requires fair access and consent. Thus, even though it would be inaccurate to label the FAA an “APA for arbitration,” the procedural responsibilities it bears for the arbitral process are comparable to those the APA bears for the administrative process.¹²⁷ And it certainly provokes debate to make this connection.

B. “Due Process” Protocols in Arbitration

Private due process in the arbitration setting is growing in significance. Sensitive to charges of unfairness and overreaching, private groups have been establishing “due process protocols” in expanding fields of *985 arbitration, such as consumer disputes, employment, and health care.¹²⁸ The use of the term “due process” is an odd one in this setting, but conveys confidence in adjudicatory procedures that are clearly not required by state action. The motivation for these protocols is mixed. At one level, it seems like a public relations effort to enhance the value of “mass justice” arbitrations; at another level, it shows that fair process is not the exclusive obligation of government.¹²⁹ The Consumer Due Process Protocol, for example, calls for a “fundamentally fair process” in arbitration that stipulates adequate notice, an opportunity to be heard, and an independent decisionmaker.¹³⁰ These procedural ingredients are comparable to those that would be provided pursuant to the informal due process requirements of the Constitution¹³¹ or under the fair procedure requirements of private associations like the NCAA or universities.¹³²

Of course, not all issues in arbitration have been resolved by private protocols or judicial decisions. One open issue is who should pay for the use of arbitrators¹³³ and in what circumstances. Since the judicial process is a public good, imposing the cost of arbitrations on the participants in the noncommercial setting can be a barrier to full utilization. For those compelled to arbitrate under mandatory arbitration clauses in the consumer and employment settings, arbitration can result in severe financial burdens. On the other hand, if companies or employers are required to pay for the mandatory arbitrations, the arbitrator may show bias or, at the very least, operate with less independence.¹³⁴ In order for arbitration to become a fully realized due process alternative, the costs associated with mass justice *986 arbitrations must be negotiated in advance, and parties must be given the freedom to select arbitrators, regardless of their payment obligations.

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The significance of these private protocols is that they explicitly connect arbitration to the due process tradition, thereby encouraging the use of arbitration in areas where the courts had previously exercised over exclusive jurisdiction. While skepticism about the nondemocratic dimensions of ADR remains,¹³⁵ these protocols are reassuring to courts who are increasingly transferring judicial business to the arbitral process. The protocols also offer a model set of procedures that could be employed under the FAA, should the courts choose to read them into the statute.¹³⁶

C. Other Federal Statutes Encouraging ADR Alternatives

Federal substantive statutes, such as Title VII and the Truth in Lending and Equal Credit Opportunity Acts,¹³⁷ also reinforce the use of arbitration by designing it as an administrative procedure that satisfies due process.¹³⁸ Courts and agencies recognize that arbitration, as well as other ADR techniques such as mediation and negotiation,¹³⁹ can reduce the decisionmaking burden on the regulatory state. The challenge has been to find processes that offer alternatives to the traditional adversary model without undermining the procedural values of due process.

Administrative decision mechanisms, however, have long embraced ADR-like alternatives to the adversary model. Mediation, for example, is what Administrative Law Judges (ALJs) used to do in social security disability cases, when they wore “three hats.”¹⁴⁰ Today, the presence of attorneys for claimants in these cases has upset the ALJ's mediating role.¹⁴¹ *987 ALJs often wear two hats, one of which (representing the government) can be seen as jeopardizing decider independence if the claimant is represented.¹⁴²

These statutes have the potential to make arbitration and mediation a greater source of administrative due process in the future. When the government entity is bound by due process requirements, parties can still make use of a consensual process. In circumstances where state action does not apply, ADR due process protocols can improve the private decisionmaking procedure.

In sum, the image of a state action on-off switch for due process fails to adequately capture the range of the procedural choices involved. State action still determines the standards of compulsory due process. Where the federal government is devolving its decisionmaking responsibilities to state or private actors, compulsory procedures are increasingly being supplemented, if not supplanted, by private due process alternatives.

V. Privatization and Government Accountability

The privatization movement is in high gear today. Many government functions are being delegated to private parties¹⁴³ and it is difficult to imagine the federal government functioning without delegating important, and sometimes controversial, functions to private hands.¹⁴⁴ This trend has profound implications for governance and public accountability, but that issue is beyond the scope of this article.¹⁴⁵ Here, we are concerned solely with the procedural implications of privatization.

To delegate a government function to private hands is one thing; to do so while dispensing with due process protections is quite another. When the state action requirement fails, those subject to privatized functions are at risk procedurally. The world of private due process may offer some consolation to those subjected to privatized activity, but private due process is not a uniform guarantee of adequate procedural protections.

The private alternatives to due process discussed here are a patchwork quilt of alternative procedures, not a comprehensive plan. In some situations, such as privatizing prison functions, the state action requirement *988 still attaches and due process

applies.¹⁴⁶ In other situations, such as doctors' privileges at private hospitals or stock exchange dealings with brokers, federal law establishes fair procedure. In still other circumstances, such as welfare and other discretionary grants and payments, the privatized entity is not an arm of the government, and no statute provides for procedures. Here, one has to rely on private due process to fill the gap. This is the point where the substantive delegation needs to connect to a procedural requirement.

Professor Metzger's concern for "adequate government accountability mechanisms"¹⁴⁷ proposes a reformed nondelegation doctrine to achieve this goal. In this view, procedural fairness to recipients or participants becomes an aspect of the government accountability requirement. This effort should be applauded. The idea that the Constitution has a role to play in these delegations is seen not only in the work of Professor Metzger, but that of Professors Shapiro and Levy as well.¹⁴⁸ My purpose here is to find additional ways to encourage the government to incorporate procedural alternatives when it delegates public power into private hands. Such incorporation can be accomplished through the Metzger nondelegation approach, the Shapiro-Levy due process standards approach, or through procedural requirements contained in existing statutes.

A. Procedural and Substantive Delegations

As we have seen, the federal government already considers a variety of procedural options in connection with the delegation of public power. Most of the attempts have been directed at established programs that receive delegated power, such as SROs. Also, in fields like safety and health regulation, process issues have long been raised¹⁴⁹ and, in some cases, addressed by statute.¹⁵⁰

In addition, audited self-regulation has become a regulatory technique *989 that can subject the private sector to government oversight in an organized way.¹⁵¹ Self-regulation is a delegation of government power to industries that can demonstrate competence to perform their own oversight. For example, Sarbanes-Oxley places reporting requirements upon Chief Executive Officers, Chief Financial Officers, and directors in an effort to achieve responsible private behavior.¹⁵² By delegating responsibility to the private sector with oversight reserved to the SEC, Congress has strengthened industry self-regulation with procedural requirements.

These examples show the government's desire to involve the private sector in its own regulation.¹⁵³ But what has not happened, generically at least,¹⁵⁴ is an equivalent commitment to ensuring procedures when those with delegated powers exercise them in ways that adversely affect other individuals or entities. While it is prudent to mandate process incrementally,¹⁵⁵ the ongoing commitment to privatization makes it timely to consider a more general procedural approach. This approach really borrows from the idea of self-regulation. If private parties are to be trusted to regulate themselves subject to government oversight, then they should be equally trusted to provide adequate procedures when their actions are challenged. Faith in private actors is in the spirit of the stock exchange rules and the Silver case that inspired them.¹⁵⁶

While Professor Metzger's suggestion¹⁵⁷ that an expanded state action requirement could address the problem,¹⁵⁸ that step would not be necessary if alternatives were available. Moreover, making all privatized entities state actors would hamstring the ability of government to delegate functions to those best prepared to perform them. Finally, the state action designation is often made after the fact by the courts, so it has a limited *990 ability to procure procedural uniformity. This reality gives Congress an opportunity to directly address fair procedure requirements that will inevitably arise as government delegates more activities to the private sector.

B. Creating Procedural Alternatives

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There are several approaches Congress could take in creating procedural alternatives. A modest step would involve the inclusion of ADR requirements as part of the delegated activities, and a bolder one would apply an APA approach to the exercise of delegated powers. Each of these approaches would be triggered by authorizing statutes¹⁵⁹ so as not to contradict procedural frameworks that already exist or to apply procedures in contexts where they might prove unworkable.

1. ADR as a Private Procedure

ADR techniques, such as arbitration and mediation, are private procedural remedies.¹⁶⁰ They can be implemented by the FAA, which has become an increasingly influential source of ADR law at the federal level. One step would be to amend that statute to make its provisions available to privately delegated activities of government.

For example, consider the decisions of private nursing home administrators, which are not subject to state action requirements and are not covered by statutory procedures.¹⁶¹ If these decisions are made subject to the FAA, they may extend ADR remedies to those affected by removal from or a change of conditions in private nursing homes. Of course, if the federal government provides procedures by rule or statute, the ADR process may be unnecessary. The FAA alternative is available where there are no specific procedures required, or where ADR might be a better form of process. It becomes a procedural default rule.

This solution uses a recognized form of informal procedure to resolve often unintended gaps in procedural coverage. While the solution may be procedurally inadequate in some circumstances,¹⁶² it at least supplies a consistent procedural minimum. At the very least, an enhanced ADR¹⁶³ presence could improve decision requirements in circumstances where process is unavailable or where its availability is subject to the vagaries of state law.¹⁶³

2. The New Private APA

One way to overcome deficiencies in the ADR process is to create an APA-like procedural code for federal delegations to private entities. A Private APA (PAPA) would fill the process gaps left open in privatized delegations. Admittedly, imposing procedural protections in this manner could generate litigation.¹⁶⁴ Creating a procedural code for private entities, however, is not an extreme step. In the first place, as this article demonstrates, procedures have been attached to many private delegations either by statute or by common law processes. Thus, there is already a background procedural law to draw upon. Second, PAPA should not impose formal APA requirements, in order to avoid the Goldberg error of formalizing procedures under the Due Process Clause.¹⁶⁵

There is a third way. Professor Asimow has proposed a Type A-Type B adjudication dichotomy¹⁶⁶ to allow for the APA to recognize the need for less formal process. PAPA would amount to a Type C procedure by providing only a minimum set of procedures, even below those contemplated by Type B. Type C would restore the category of informal adjudication. Indeed, an adjudicative process that merely incorporated the procedures of informal rulemaking into informal adjudication should be a step forward.¹⁶⁷ Converting APA informal rulemaking procedures of notice, comment, and reasons¹⁶⁸ into an adjudicative format would be like adopting the stock exchange “fair procedure” requirement, which is similarly informal.¹⁶⁹ In this way, a new procedural baseline could be established for all delegated functions.

The goal, above all, is to ensure that delegating bodies give some rational consideration of an affected person's claim before acting. Unlike Type A or B procedures, issues of decisionmakers' independence in Type C would need to be addressed.¹⁷⁰ In the ADR process,¹⁷¹ the due process¹⁷² minimum for decisionmakers' independence has already been established.

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This minimum could be incorporated into the Type C process. Ultimately, the procedures under Type C are so basic that they need not burden the adjudication system.¹⁷³

PAPA is really a consolidation of hearing requirements already set by specific statutes, such as those surrounding NYSE fair procedures for broker-dealers.¹⁷⁴ Generalizing these informal adjudication procedures rests on the necessary assumption that government, when it privatizes, wants to delegate responsibly. PAPA eliminates the fear of having some affected individuals fall between the cracks of the unconnected set of procedural requirements currently imposed in the absence of state action. Congress might favor its limited use for these reasons.¹⁷⁵ As a generic solution it avoids the current dilemma that each federal delegation to a private provider, SRO, or state entity requires further negotiations over whether and how to employ procedures.

Conclusion

The procedural abyss that the absence of state action implies is greatly exaggerated. State law and judicial decisions, federal substantive and procedural mandates, and private due process protocols have all grown up to compensate for the lack of due process-based protections. In these situations, the procedural outcome does not turn on the determination of state action. Thus, there is really a procedural world that the term private due process describes.

This world, however, is hard to describe. It is neither well-coordinated nor uniformly applicable; fair procedure law, for example, is highly variable on a state-by-state basis.¹⁷⁶ This inconsistency means that some ***993** privately delegated actions can still be taken without procedural protections. Privatized government functions that implicate the provision of benefits or services formerly covered by state action doctrine and the Goldberg due process cases reveal process gaps that need to be filled.

Privatization may or may not be a good idea in certain circumstances.¹⁷⁷ But it becomes a controversial concept in all circumstances because of its effect on government process. Since the state action doctrine does an inadequate job of transferring due process to private sector delegations, other fair procedure concepts are needed. While these exist, generic solutions are desirable to close the gap entirely.

A statutory plan that ensures no affected interests fail to receive either due process or fair procedure protection is not a radical idea. Such a plan can include generally available ADR techniques. But it would be more assured if the APA were itself extended to privatized actions on an informal adjudication basis. The PAPA proposed here covers decisions made by private delegates that affect individual rights and benefits not otherwise procedurally protected; individuals subject to such decisions are entitled to protection as much as if those decisions were made by the government itself. Privatizing the procedural function, along with the substantive function, takes the privatization movement at its word--if it is an equally satisfactory way of performing government functions, it should decide them comparably.

Footnotes

^{a1} Professor of Law, Cardozo Law School, Yeshiva University. Aspects of this article were presented during the Administrative Law Panel on the Future of Adjudication at the Association of American Law Schools' annual meeting on January 6, 2005. Thanks to the participants and especially co-panelists Michael Asimow, Gillian Metzger, and Ed Rubin for their valuable comments. Thanks also to Daniel Austin Green, Cardozo Class of 2006, for his excellent research assistance.

¹ See Lawrence H. Tribe, *American Constitutional Law* 663-65, 1688-90 (2d ed. 1988) (explaining that the Constitution imposes procedural due process on "state action" of the federal government through the Fifth Amendment and state government action through the Fourteenth Amendment).

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- 2 See Michael Taggart, *The Province of Administrative Law* 6-18 (1997) (considering foreign private law fairness cases in detail); Paul R. Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 *Wm. & Mary L. Rev.* 685, 698-99 (1986) (discussing natural justice in England, which reaches private entities); see also Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 *Int'l J. Con. L.* 79 (2003) (comparing the horizontal, that is private, effects of constitutional provisions in various foreign legal systems).
- 3 See 109 U.S. 3 (1883) (holding unconstitutional under the Fourteenth Amendment a federal statute that would have forbidden private discrimination in certain businesses and industries).
- 4 The Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (Mar. 1, 1875), forbade discrimination in hotels, inns, theatres, and public carriers and accommodations. The Supreme Court held that Congress was not authorized to create “a code of municipal law” under the Fourteenth Amendment. See the *Civil Rights Cases*, 109 U.S. at 3-4, 21-22. Justice Harlan's memorable dissent invoked the “public use” doctrine to justify the federal legislation. *Id.* (Harlan, J. dissenting) at 37-38. Justice Harlan cited *Munn v. Illinois*, where the Court justified state regulation of private elevators as a “business... affected with a public interest.” *Id.* (citing *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 130 (1876)).
- 5 See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349-50 (1974) (finding no state action and no due process requirement and citing the *Civil Rights Cases* for the “essential dichotomy between public and private action”). See generally Henry J. Friendly, *The Dartmouth College Case and the Public-Private Penumbra* 9-12 (1968) (discussing the public-private distinction under the Contracts Clause of the Constitution).
- 6 See Gillian Metzger, *Privatization in Delegation*, 103 *Colum. L. Rev.* 1367, 1431 (2003) (calling state action an “all or nothing” requirement).
- 7 These non-constitutional alternatives are less desirable for a variety of reasons: Many of the remedial advantages to suing the state under 42 U.S.C. § 1983 (2000) are lost, as are the recovery of attorney's fees under 42 U.S.C. § 1988 (2000). And, of course, the government disappears as a deep pocket defendant.
- 8 Even during the period of the *Civil Rights Cases*, state laws that regulated some aspects of private monopoly power were upheld, as Justice Harlan noted in his dissent. See *supra* note 4. But the monopoly theory of regulation, which imposed procedural as well as substantive requirements, was later questioned by the Court because of its open-ended character. See *infra* note 19.
- 9 See Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 87 *N.C. L. Rev.* (forthcoming 2006) (documenting privatization of government functions in a variety of regulatory and military contexts).
- 10 See Jody Freeman, *The Private Rule in Public Governance*, 75 *N.Y.U. L. Rev.* 543 (2000); Metzger, *supra* note 6 (discussing the absence of government procedures when government privatizes various activities and explaining that recognition of the background of private processes helps to complete the procedural landscape).
- 11 See Michael P. Vandenbergh, *The Private Life of Public Law*, 105 *Colum. L. Rev.* (forthcoming 2005) (recognizing that private ordering agreements can affect the relationship between the public and private sectors).
- 12 See 397 U.S. 254 (1970) (finding a new property right in welfare benefits and full adjudicative procedures to support it).
- 13 See Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards Based Theory of Due Process*, 57 *Admin. L. Rev.* 107 (2005) (postulating a right to due process, even to discretionary benefits, whenever there are legal standards to apply).
- 14 See 408 U.S. 564 (1972) (defining property narrowly in the academic setting for due process purposes).
- 15 See Edward L. Rubin, *Due Process and the Administrative State*, 72 *Cal. L. Rev.* 1044, 1062-64, 1083 (1984) (explaining that cases like *Roth* sought to limit the extent to which the Due Process Clause applies).

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- 16 See Richard S. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 Colum. L. Rev. 1973, 1978-79 (1996) (predicting that procedural due process law will revert to the state of the law before the due process revolution that rejected the right-privilege distinction). But see Cynthia R. Farina, *On Misusing “Revolution” and “Reform”: Procedural Due Process and the New Welfare Act*, 50 Admin. L. Rev. 591, 618-33 (1998) (arguing that welfare proceedings should continue to be subject to due process protections).
- 17 See Shapiro & Levy, *supra* note 13, at 134-39 (proposing a standards-based approach requiring due process wherever legal standards determine an individual's eligibility for benefits).
- 18 See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (setting out a three-factor balancing test for determining procedures that are due); see also Rubin, *supra* note 15, at 1067, 1082-83 (describing the impact of *Mathews* on administrative procedures and classifying *Roth* as a right-privilege case); *Hamdi v. Rumsfeld*, 42 U.S. 507, 598 (2004) (applying the *Mathews* balancing test to procedures due to citizens alleged to be enemy combatants).
- 19 See, e.g., Henry P. Monaghan, *Of “Liberty” and “Property,”* 62 Cornell L. Rev. 405, 406-07 (1977) (illustrating that there needs to be state action and a liberty or property interest to invoke the Due Process Clause of the Constitution).
- 20 See generally Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkuil, *Administrative Law and Process* § 6.3 (4th ed. 2004) (explaining the case law determining whether there is a liberty or property interest, and if so, what procedures are required); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739 (1976) (discussing *Goldberg* in terms of its ten “procedural ingredients” and comparing its requirements to various government programs where only three or four of the ingredients were present).
- 21 See *supra* notes 15-16 and accompanying text.
- 22 419 U.S. 345 (1974).
- 23 436 U.S. 1 (1978).
- 24 See *Munn v. Illinois*, 94 U.S. 113, 130 (1876) (holding state regulation of private elevators as a business “affected with a public interest”). In Justice Rehnquist's majority opinion in *Jackson*, the Court rejected the “affected with a public interest” test that historically placed private monopolies under state regulatory control. 419 U.S. at 353-54. See, e.g., *Pub. Util. Comm'n v. Pollak*, 343 U.S. 451, 462 (1952) (explaining that, in finding that the case invoked the Due Process Clause, the Court did not rely on the fact that the party conducted a public utility business or the fact that the party enjoyed a monopoly on the public transportation system in the District of Columbia). The majority in *Jackson* cited *Nebbia v. New York*, 291 U.S. 502 (1934), for the proposition that businesses need not be monopolistic to justify regulation. It ultimately decided that *Jackson* fell on the private side of the state action debate, relying on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).
- 25 Justices Brennan and Marshall, in separate dissents, sought to avoid the merits in *Jackson* by dismissing the writ as improvidently granted. See *Jackson*, 419 U.S. at 365-74 (Brennan, J. & Marshall, J., dissenting) (arguing that the petitioner did not have a basis for the claim of entitlement). Justice Marshall also postulated a narrow procedural duty on the utility that involved only notice and someone to contact before service was cut off. *Id.* at 373 (Marshall, J., dissenting) (explaining the requirement to provide notice before termination of service). This duty was similar to what the utility already provided in its tariffs. See *id.* at 345 n.1 (illustrating the language of Rule 15 of the tariff that allows the company to terminate service upon reasonable notice).
- 26 Justice Powell's opinion for the majority in *Craft* required only notice and the availability of some person at the utility with whom to challenge a bill as due process procedures. 436 U.S. at 12-13.
- 27 *Id.* at 22 (Stevens, J., dissenting).
- 28 Compare *Sandin v. Conner*, 515 U.S. 472 (1995) (finding that there was no liberty interest in prison disciplinary segregation for the use of foul and abusive language), with *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that minimal procedures were due in a school suspension situation).

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- 29 See [339 U.S. 33 \(1953\)](#) (equating administrative due process in the immigration setting with Administrative Procedure Act (APA) formal adjudication). Although that decision was reversed by Congress, it had the virtue of using an available procedural code as a template. See [Marcello v. Bonds, 349 U.S. 302 \(1955\)](#) (upholding legislation exempting procedures from APA formal adjudication). In the Goldberg new property context, there is no available template because informal adjudication procedures under the APA are virtually nonexistent.
- 30 See infra notes 37-40 and accompanying text.
- 31 See infra notes 164-75 and accompanying text (describing these alternatives).
- 32 Pierce, supra note 16, at 1996. Pierce limits procedurally protected government jobs to those without private sector analogues, not to government jobs generally. He believes the latter will be covered only by civil service or contract claims in the future. *Id.* at 1992-94; see also [Bd. of Educ. of Paris Union Sch. Dist. v. Vail, 466 U.S. 377 \(1984\)](#), *aff'g* [706 F.2d 1435 \(7th Cir. 1983\)](#) (upholding a state employee's right to a due process hearing with reservations expressed by Judge Posner's dissent.)
- 33 For example, what happens to Rachel Brawner, the cafeteria worker? Since she has neither academic nor other unique skills that would trigger Pierce's two exceptions, she can be arbitrarily denied access to her job site. See [Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886 \(1961\)](#) (deciding a case that was a precursor to Goldberg and affirming the lower court's decision to deny Rachel Brawner's due process claim). Perhaps the answer is that she will be adequately protected procedurally through her union or through arbitration agreements that employees are increasingly required to accept as a condition of employment. See infra notes 118-21 and accompanying text. Private due process, in other words, will come to the rescue when Pierce's right-privilege distinction is revived.
- 34 See William Van Alstyne, [The Demise of the Right-Privilege Distinction in American Constitutional Law](#), 81 *Harv. L. Rev.* 1439 (1968) (arguing that the right-privilege distinction is not effective in protecting individuals against arbitrary treatments by the government and proposing an alternative due process control).
- 35 See Shapiro & Levy, supra note 13, at 148-49 (comparing the Van Alstyne approach to the authors' standards-based approach).
- 36 See Metzger, supra note 6, at 1394-1400 (describing privatized functions of government that retain procedural controls).
- 37 See Pierce, supra note 16, at 1996 (acknowledging private procedural alternatives to due process).
- 38 See The Personal Responsibility and Work Opportunity Act, 42 U.S.C. §§ 103(a)(1), [401\(a\)\(b\)](#) (expressly declaring that "no individual entitlement" exists); see also Farina, supra note 16, at 605-09 (rebutting the due process demise theory in welfare).
- 39 See [Arnett v. Kennedy, 416 U.S. 134 \(1974\)](#), *reh'g denied*, [417 U.S. 977 \(1974\)](#) (holding that the post-termination procedures at issue adequately protected the federal employee's liberty interest).
- 40 In the 1970s (the ten terms beginning with October 1970) there were 293 U.S. Supreme Court cases addressing due process, compared with only 109 in the ten-year period starting with the October 1994 term. The trend continues throughout the 1990s and beyond. In the October 1992-93 terms there were 34 due process cases, but only 22 in the 1994-96 terms, and 19 in the 2002-03 terms.
- 41 See infra Part VI.
- 42 See NCAA, Coach Tarkanian Settle Suit, Facts on File World News Digest, May 14, 1998, at 335, A1.
- 43 *Id.*
- 44 See [Tarkanian v. NCAA, 741 P.2d 1345 \(Nev. 1987\)](#) (stating that the NCAA is not a state actor).
- 45 See *id.* at 1348-50 (labeling Tarkanian as a public employee).
- 46 See [488 U.S. 179 \(1988\)](#) (5-4 decision) (citing [Jackson v. Metro. Edison, 419 U.S. 345 \(1974\)](#)). The Court reasoned that a private monopolist does not become a state actor when it "impose[s] its will on a state agency." *Id.* at 198.

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- 47 State action was later found in the context of a state-specific athletic association. See [Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n](#), 531 U.S. 288 (2001) (5-4 decision) (finding a non-profit association a state actor). The closeness of the athletic association decisions illustrates how difficult the state action doctrine has been for the Court to manage. See *supra* notes 22-25.
- 48 See *supra* notes 4, 5, and 46 (highlighting cases regarding state actors).
- 49 See [Nat'l Collegiate Ath. Ass'n v. Tarkanian](#), 488 U.S. 179 (1988).
- 50 The NCAA settled the case for \$2.5 million once the Nevada Supreme Court denied its motion for change of venue. NCAA, Coach Tarkanian Settle Suit, Facts on File World News Dig., May 14, 1998, at 335, A1.
- 51 See [NCAA v. Miller](#), 10 F.3d 633 (9th Cir. 1993), cert. denied, 511 U.S. 1033 (1994) (voiding a statute providing due process protections to Nevada institutions and employees during NCAA enforcement proceedings on Commerce Clause grounds).
- 52 See *id.* at 640 (describing similar due process legislation against the NCAA in Florida, Kansas, and Illinois).
- 53 See *infra* notes 83-84 and accompanying discussion (describing the procedure for due process in California courts). The Commerce Clause objections to the Nevada Statute in the Miller case, directed exclusively at the NCAA, would presumably not apply to state fair procedure statutes of general applicability.
- 54 See Special Comm. to Review the NCAA Enforcement and Infractions Process 1-8 (1991) [hereinafter Special Comm. NCAA Report] (on file with author). The Committee consisted of nine members, including the author of this article. Its mission was described as follows:
The U.S. Supreme Court has determined that the NCAA is not a state actor for purposes of the Fourteenth Amendment to the U.S. Constitution. Nevertheless, the special committee is of the view that the NCAA, in the interest of its members and in its own interest, should afford procedural fairness protections. These protections should be provided and administered by the NCAA itself, in order to assure uniformity across all member institutions and all parts of the nation.
Id. at 3.
- 55 From the Committee's perspective, the goal was to create, by private agreement, procedures that would satisfy informal due process standards then encompassed by Goldberg and related cases. Attached as an appendix to the report was a statement (prepared by this author) that set out the procedural ingredients necessary to satisfy then-prevailing notions of informal due process. See Verkuil, *supra* note 20 (discussing the procedural "ingredients" of Goldberg).
- 56 The changes included ten recommendations: (1) "Enhance the adequacy of the initial notice of an impending investigation and assure a personal visit by the enforcement staff with the institution's chief executive officer." (2) "Establish a 'summary disposition' procedure for treating major violations at a reasonably early stage in the investigation." (3) "Liberalize the use of tape recordings and the availability of such recordings to involved parties." (4) "Use former judges or other eminent legal authorities as hearing officers in cases involving major violations and not resolved in the 'summary disposition' process." (5) "Hearings should be open to the greatest extent possible." (6) "Provide transcripts of all infractions hearings to appropriate involved parties." (7) "Refine and enhance the role of the Committee on Infractions and establish a limited appellate process beyond that committee." (8) "Adopt a formal conflict-of-interest policy." (9) "Expand the public reporting of infractions cases." (10) "Make available a compilation of previous committee decisions." Special Comm. NCAA Report, *supra* note 54, at 3-8. Some of these recommendations were incorporated into the procedures employed by the NCAA Infractions Committee.
- 57 See *id.*; see also Henry J. Friendly, [Some Kind of Hearing](#), 123 U. Pa. L. Rev. 1267 (1975) (labeling the impartial decider as the most crucial procedural ingredient).
- 58 Special Comm. NCAA Report, *supra* note 54, at 6.
- 59 See Special Comm. NCAA Report, *supra* note 54 (detailing specific due process procedures); see also Memorandum to NCAA Council 1-5 (April 3, 1992) (on file with author) (reporting on council's acceptance of the panel's recommendations).

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- 60 See Special Comm. NCAA Report, *supra* note 54, at 5-6 (describing possible solutions for enforcement). One problem the NCAA has is that, as a private association lacking subpoena power, it cannot compel individuals to testify or produce documents. Member institutions are required to cooperate based upon the Association agreement, which is a commitment based on contract.
- 61 Fair procedure cases against the NCAA have still arisen, but their impact and number seem to have been reduced. See conversation by author with NCAA officials, Sept. 14, 2005 (on file with author).
- 62 See *supra* notes 12-18 (discussing Goldberg and related cases).
- 63 Much depends of course on the status of the private association and of the litigants against it. The NCAA has deep pockets, a high-profile role in society and a group of potentially appealing victims, who are often identified with the institutions they served and admired by loyal alumni.
- 64 See e.g., *Harris v. Tr. of Columbia Univ.*, 470 N.Y.S.2d 368, 371 (N.Y. App. Div. 1983) (describing process procedures involving disciplinary charges against a student at Columbia University).
- 65 See Scott R. Sinson, *Judicial Intervention in Private University Expulsions: Traditional Remedies and a Solution Sounding in Tort*, 46 *Drake L. Rev.* 195 (1997) (analyzing the use of tort suits as a check on private university disciplinary action).
- 66 Religious institutions provide special situations under the First Amendment, but these are not usually due process based distinctions.
- 67 See Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 *Colum. L. Rev.* 289, 291 (1999) (discussing contract law enforcement and fair procedures).
- 68 See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 *Yale L.J.* 950 (1979) (detailing extra-judicial means of negotiation during divorce proceedings).
- 69 Judith Resnik, *Procedure as Contract*, 80 *Notre Dame L. Rev.* 593 (2005).
- 70 See *Falcone v. Middlesex County Med. Soc'y*, 170 A.2d 791 (N.J. 1961) (scrutinizing important admissions decisions of private medical societies); *Mahmoodian v. United Hosp. Ctr., Inc.*, 404 S.E.2d 750 (W. Va. 1991) (finding that the scope of review over privileges of medical staff is essentially the same for public and private hospitals). See generally Jack M. Beermann, *The Reach of Administrative Law in the United States*, in *The Province of Administrative Law 186-91* (Michael Taggart ed. 1997) (discussing the relationship between private institutions and fair procedures).
- 71 See *Jain v. Northwest Comm. Hosp.*, 385 N.E.2d 108 (Ill. App. 1978) (rejecting judicial review over a surgeon's appointment to a private hospital).
- 72 Indeed, a productive project might be to survey each state's law on fair procedures. From that assessment, a code of procedures for private due process could be drafted. It might be reflected in a Model State Private Administrative Procedure Act. See *infra* notes 164-69.
- 73 See *infra* notes 114-15 (citing case law and statutes regarding due process).
- 74 See Robert S. Trefny, Comment, *Judicial Intervention in Admission Decisions of Private Procedural Associations*, 49 *U. Chi. L. Rev.* 840, 841-42 (1982) (claiming that private hospitals that behave arbitrarily will lose qualified candidates to those who do not).
- 75 See generally *Falcone v. Middlesex County Med. Soc'y*, 170 A.2d 791 (N.J. 1961); *Mahmoodian v. United Hosp. Center, Inc.*, 404 S.E.2d 750 (W. Va. 1991).
- 76 See *Falcone*, 170 A.2d at 791; *Mahmoodian*, 404 S.E.2d at 750.
- 77 See *Cal. Bus. & Prof. Code § 809* (West 2002) (outlining procedures peer review groups are required to follow); see also Health Care Quality Improvements Act, 42 U.S.C. §§ 11,101, 11,111(b) (2000) (eliminating the preemption issue regarding *Cal. Bus. & Prof. Code § 809* through opt-out provisions); *supra* note 52.

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- 78 See [Unnamed Physicians v. Bd. of Tr.](#), 113 Cal. Rptr. 2d 309 (Cal. Ct. App. 2001) (finding that the statutory scheme delegates due process requirements of notice, discovery, and full hearing rights to the private sector).
- 79 See [James v. Marinship](#), 155 P.2d 329, 334-36 (Cal. 1944) (establishing that a union has a quasi-public position).
- 80 See, e.g., [Ezekial v. Winkley](#), 572 P.2d 32, 35-36, 38-39 (Cal. 1977) (expanding common law protection against arbitrary expulsion from associations and social groups); see also [Potvin v. Metro. Life](#), 997 P.2d 1153, 1169 (Cal. 2000) (practicing judicial review of removal from preferred provider list).
- 81 See generally Jeffrey L. Harrison, Thomas D. Morgan, & Paul R. Verkuil, *Regulation and Deregulation* 56-57 (4th ed. 2004) (discussing the impact of cases like [Munn v. Illinois](#) upon the state action requirement of the Due Process Clause). See *supra* notes 4-5 (limiting the reach of [Munn](#) in the state action context).
- 82 See [Cotran v. Rollins Hudig Hall Int'l, Inc.](#), 948 P.2d 412 (Cal. 1998) (imposing procedures on the company as part of a “duty to investigate”). In this wrongful termination of employment case, the three justices in dissent warned that this open-ended requirement would cover a huge number of potential defendants). See Michael Asimow and Marsha N. Cohen, *California Administrative Law* 65-66 (2002) (questioning an expansive view of fair procedures).
- 83 [Pinsker v. Pac. Coast Soc'y of Orthodontists](#), 526 P.2d 253 (Cal. 1974).
- 84 See [Sywick v. O'Connor Hosp.](#), 244 Cal. Rptr. 753, 763 (Cal. Ct. App. 1988) (listing a notice and opportunity to respond, impartial tribunal, opportunity to confront and cross-examine witnesses, and an opportunity to present a defense as the elements of a fair procedure).
- 85 See generally *supra* Part II (describing the history of the expansion of due process requirements).
- 86 See generally Nan D. Hunter, *Managed Process, Due Care: Structures of Accountability in Health Care*, 6 *Yale J. Health Pol'y L. & Ethics* (forthcoming 2005) (cataloguing state laws and describing the external review systems in great detail).
- 87 See [Am. Mfrs. Mut. Ins. Co. v. Sullivan](#), 526 U.S. 40 (1999) (holding that a private insurer's treatment decisions under workers' compensation is not state action).
- 88 See [536 U.S. 355 \(2002\)](#) (5-4 decision) (concluding that the external review systems in Illinois were not adjudications that would be preempted by the Employee Retirement Income Security Act (ERISA) but insurance regulations that the states were free to pursue under ERISA). Where ERISA applies, its scope preempts damages claims made under state law. See [Aetna Health, Inc. v. Davila](#), [542 U.S. 200 \(2004\)](#) (reinforcing ERISA's power to overrule conflicting state statutes due to congressional intent to make ERISA remedies exclusive).
- 89 For a discussion of the use of arbitration to satisfy fair (or even due) process, see *infra* Part V.
- 90 See generally Richard C. Reuben, [Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice](#), 47 *UCLA L. Rev.* 949, 952 (2000) (noting the lack of procedural safeguards in private alternative dispute resolution proceedings).
- 91 For a detailed discussion of the quality of process due in this privatized regime, see Hunter, *supra* note 86.
- 92 See *supra* note 77.
- 93 Courts have drawn a fine line in demarcating the difference between appropriate and inappropriate employee-employer bargaining. See [Epilepsy Found. of N.E. Ohio v. NLRB](#), 268 F.3d 1095, 1097 (D.C. Cir. 2001) (refusing to retroactively apply a National Labor Relations Board (NLRB) mandate requiring union representation at an employee-management meeting because employee was not a union member); see also [NLRB v. J. Weingarten, Inc.](#), 420 U.S. 251, 260-61 (1975) (recognizing a right of union representation at investigatory interview where union employee may face disciplinary action). The right to a representative is a procedural ingredient

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encompassed by due process. *Id.* But see [Epilepsy Found.](#), 268 F.3d at 1097 (distinguishing Weingarten because employee was a non-union employee).

- 94 See Cynthia Estlund, [Rebuilding the Law of the Workplace in an Era of Self-Regulation](#), 105 Colum. L. Rev. 319 (2005) (advocating a system of “monitored self-regulation”). Self regulation is discussed in Part IV.
- 95 See, e.g., [Burlington Indus., Inc. v. Ellerth](#), 524 U.S. 742, 765 (1998) (defining procedures necessary for an employer to rebut charges of “hostile environment” under Title VII).
- 96 See supra notes 44-47 and accompanying text.
- 97 See 15 U.S.C. § 78o-3(b)(8) (2000) (requiring self-regulatory organizations (SROs) to provide “fair procedure” in their regulation of broker-dealers); see also 15 U.S.C. §§ 78f (d), 78o-3(b) (2000) (requiring SROs to “bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record”).
- 98 See [Desiderio v. Nat'l Ass'n of Sec. Dealers](#), 191 F.3d 198, 206 (2d Cir. 1999) (citing *Jackson v. Metro. Edison Co.* to find the National Association of Securities Dealers (NASD) is not a state actor). Compare *Freeman*, supra note 10, at 580 (arguing that the state action inquiry “cannot tailor procedural protections to the specific threats posed by a particular regulatory regime in which both public and private decisionmakers play a significant role”), with [Blum v. Yaretsky](#), 457 U.S. 991 (1982) (holding that nursing homes (like SROs) employ independent professional care standards that obviate constitutional analysis).
- 99 See Norman S. Poser, *Broker-Dealer Law and Regulations* § 13.01-.02 (3d ed. 2005) (describing the evolution of the New York Stock Exchange (NYSE) and the National Association of Securities Dealers Automated Quotation (NASDAQ), as well as aspects germane to self-regulation).
- 100 These procedures are reminiscent of the APA's requirements for formal rulemaking. See 5 U.S.C. § 553(c) (2000) (providing for notice and comment and requiring agencies to publish a statement of “basis and purpose” alongside their rules); see also *infra* Part VII and notes 166-69.
- 101 See NYSE Const. art. XIV; see also *Nat'l Ass'n of Sec. Dealers, Manual 7271* (2005) (including suspension and expulsion among sanctions for violating federal securities laws).
- 102 See [United States v. Solomon](#), 509 F.2d 863, 867-71 (2d Cir. 1975) (outlining multiple rationales for not extending the privilege against self-incrimination to private bodies); [D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.](#), 132 F. Supp. 2d 248 (S.D.N.Y. 2001), *aff'd*, 279 F.3d 155 (2d Cir. 2002) (demonstrating the interwoven relationship between the NASD and state actors that risks Fifth Amendment waiver).
- 103 See William I. Friedman, [The Fourteenth Amendment's Public-Private Distinction Among Securities Regulators, in the United States Marketplace--Revisited](#), 23 Ann. Rev. Banking & Fin. L. 727 (2004) (calling for application of *Brentwood Academy v. Tenn. Secondary School. Athletic Association's* state action formula to SROs, similar to stock exchanges).
- 104 See Friedman, supra note 103, at 758-59 (indicating that a real fear exists that the government will intentionally circumvent constitutional constraints if SROs are rarely held as state actors); see also [Lebron v. Nat'l Rail Passenger Corp.](#), 513 U.S. 374, 400 (1995) (holding that the government cannot avoid constitutional responsibilities through its creation of a corporate body for the purpose of carrying out government objectives).
- 105 See *New York v. Grasso*, No. 401620/2004 (N.Y. Sup. Ct. 2004) (alleging excessive payments to former NYSE President Richard Grasso).
- 106 373 U.S. 341 (1963).
- 107 See supra note 86 (discussing substantive and procedural aspects of federal regulation).
- 108 486 U.S. 94(1988).

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- 109 See [id. at 96](#) (involving a plaintiff who refused to join defendants' medical group in a community with only one private hospital). The defendants, acting as medical review board, excluded plaintiff from access to hospital. *Id.*
- 110 See [supra](#) notes 73-78.
- 111 See [Parker v. Brown](#), 317 U.S. 341 (1943) (establishing state action immunity defense); [Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.](#), 445 U.S. 97 (1980) (creating a two-pronged test to determine whether private anticompetitive conduct could be considered state action for purposes of the immunity defense); see also [Hallie v. Eau Claire](#), 471 U.S. 34 (1985) (discussing active supervision requirement). See generally Christopher L. Sagers, [Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction](#), 25 *Cardozo L. Rev.* 1393 (2004).
- 112 445 U.S. at 105.
- 113 See [Patrick](#), 486 U.S. at 100-06 (holding that the state action doctrine did not protect peer review activities from application of federal antitrust laws on the facts of this case).
- 114 See The Health Care Quality Improvements Act, 42 U.S.C. § 11,101 (2000) (listing findings justifying protection of medical peer review groups).
- 115 See 42 U.S.C. § 11,112(a)(1) (2000) (requiring peer reviewers' actions to further “quality health care”). This requirement implies some sort of procedural review before the action is taken and may result in an informal hearing.
- 116 See [supra](#) notes 70-78 (discussing state concepts of procedural fairness that apply to both public and private actions); see also [Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n](#), 531 U.S. 288 (2001) (applying constitutional standards to an incorporated statewide athletic association).
- 117 But see [Northwest Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.](#), 472 U.S. 284 (1985) (questioning the Silver monopoly-due process relationship).
- 118 See Thomas J. Stipanowich, [ADR and the “Vanishing Trial:” The Growth and Impact of ‘Alternative Dispute Resolution’ and Conflict Management Systems](#), 3 *J. Empirical Leg. Studies* 843, 872-74 (2004) (documenting growth in ADR cases).
- 119 See [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.](#), 473 U.S. 614, 628 (1985) (stating that parties should be held to their bargains to arbitrate unless Congress has determined otherwise).
- 120 See Jean R. Sternlight & Elizabeth L. Jensen, [Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?](#), 67 *Law & Contemp. Probs.* 75 (2004) (questioning whether consumer arbitration clauses are fairly drawn).
- 121 See, e.g., [E. Associated Coal Corp. v. United Mine Workers](#), 531 U.S. 57 (2000) (affirming arbitrator's reinstatement of truck driver who was suspended for drug use under a collective bargaining agreement, even though drug use was against federal regulatory policy); see also [Major League Baseball Players Ass'n v. Garvey](#), 532 U.S. 504 (2001) (calling Ninth Circuit's setting aside of an arbitrator's partial findings “baffling”).
- 122 9 U.S.C. §§ 1-16 (2000).
- 123 See Thomas J. Stipanowich, [Contract and Conflict Management](#), 2001 *Wis. L. Rev.* 831 (discussing congressional actions that address “consumerized” arbitration).
- 124 See 9 U.S.C. § 5 (2000) (providing for appointment of a single arbitrator as a default rule if the arbitration agreement fails to provide otherwise); 9 U.S.C. § 16 (2000). All are procedural ingredients. See generally Katherine V. W. Stone, [Private Justice: The Law of Alternative Dispute Resolution](#) 602-03 (2000) (discussing due process in arbitration).
- 125 See [supra](#) notes 57-61 (arguing that the role of an independent decider is the most important procedural ingredient).

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- 126 This assumes that the parties actually endorse the use of arbitration, a proposition that sometimes fails in the consumer class action context. It is also self-interested since alternative dispute resolution (ADR) alternatives reduce the burden on the courts.
- 127 See, e.g., Michael R. Asimow, [The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute](#), 56 Admin. L. Rev. 1003 (2004) (likening the APA to the Federal Arbitration Act (FAA) in terms of the inadequacy of informal adjudication procedures).
- 128 See Nat'l Acad. of Arbitrators, [Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems](#), 103 DLR E-1, 1997 (May 21, 1997); Nat'l Acad. of Arbitrators, [Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship](#) (May 9, 1995) [hereinafter [Employment Due Process Protocol](#)], available at <http://www.bna.com/bnabooks/ababna/ababna/monographs/PROTOCOL.doc>; Nat'l Consumer Disputes Advisory Comm.; [Due Process Protocol for Mediation and Arbitration of Consumer Disputes](#) (Apr. 17, 1998) [hereinafter [Consumer Due Process Protocol](#)], available at www.adr.org/si.asp?id=1588; Nat'l Consumer Disputes Advisory Comm., [Due Process Protocol for Mediation and Arbitration of Health Care Disputes](#) (July 27, 1998) [hereinafter [Health Care Due Process Protocol](#)], available at www.adr.org/si.asp?id=1588.
- 129 See [Consumer Due Process Protocol](#), supra note 128, at 5 (addressing "legitimate concerns regarding the fairness of consumer conflict resolution mechanisms required by suppliers").
- 130 See [Consumer Due Process Protocol](#), supra note 128, at 42 (listing procedures for structuring fair ADR programs).
- 131 See supra Part II (discussing due process, the adversary model, and state action).
- 132 See supra notes 64-67.
- 133 See [Cole v. Burns Int'l Sec. Serv.](#), 105 F.3d 1465, 1467-68 (D.C. Cir. 1997) (enforcing arbitration in a Title VII context, but placing the cost of arbitration on the employer); see also [Green Tree Fin. Corp. v. Randolph](#), 531 U.S. 79 (2000) (refusing to overturn an arbitration agreement because the agreement was silent in regards to arbitration costs).
- 134 See [Stipanowich](#), supra note 118, at 872-74 (discussing a growth in ADR cases over a ten-year period).
- 135 See Richard C. Reuben, [Democracy and Dispute Resolution: The Problem of Arbitration](#), 67 Law & Contemp. Probs. 279 (2004) (exploring the democratic consequences of expanding the use of arbitration).
- 136 Indeed, neutral deciders already expressly required by the FAA may well look to these protocols to flesh out procedural requirements in federal arbitrations even without explicit legislative direction.
- 137 See, e.g., 42 U.S.C. § 2000 (2000) (prohibiting discrimination in public places); 15 U.S.C. §§ 1601, 1691 (2000) (listing findings necessitating consumer credit act and defining the scope of the prohibition on discrimination against credit applicants).
- 138 See [Thomas v. Union Carbide Agric. Prod. Co.](#), 473 U.S. 568 (1985) (ruling that the Environmental Protection Agency's (EPAs) use of binding arbitration did not violate Article III in a public rights context).
- 139 See, e.g., [Negotiated Rulemaking Act](#), 5 U.S.C. § 561 (2000) (representing a statutory example which reduces the decisionmaking burden on the state).
- 140 See [Richardson v. Perales](#), 402 U.S. 389 (1971) (approving the Administrative Law Judges' (ALJ) three hat role of claimant, government representative, and neutral decider against due process challenges). Of course, mediation is a nonbinding process, whereas ALJs made final decisions on behalf of claimants.
- 141 See Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, [Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications](#), 25 Cardozo L. Rev. 1, 6-7 (2003) (indicating that 70% of claimants are represented at ALJ hearings).

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- 142 This imbalance has led to suggestions to have the government separately represented--but on a nonadversary basis so that the mediating role of the ALJ will not be lost in the process. See *id.* at 50-52.
- 143 See generally Jody Freeman, [Extending Public Law Norms Through Privatization](#), 116 *Harv. L. Rev.* 1285 (2003) (characterizing privatization as a tool to broaden the government's reach); Freeman, *supra* note 10 (describing a variety of privatized government functions).
- 144 See Jon D. Michaels, [Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War](#), 82 *Wash. U. L.Q.* 1001, 1003-05 (2004) (highlighting the multitude of government functions that have been privatized).
- 145 See Verkuil, *supra* note 9.
- 146 See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Richardson v. McKnight*, 521 U.S. 399 (1997) (ruling that individual guards in privatized state prisons are not entitled to qualified immunity under 42 U.S.C. § 1983). Both cases accept that state action applies to the transfer of prison functions to private hands. See also *West v. Atkins*, 487 U.S. 42 (1988) (deciding that a private prison doctor is a state actor).
- 147 See Metzger, *supra* note 6, at 1456-76 (raising a concern about government accountability mechanisms).
- 148 See Shapiro & Levy, *supra* note 13 (reviewing the role of the Constitution in regulating privatized government functions).
- 149 See Administrative Conference of the United States (ACUS), 1 C.F.R. § 305.78-4 (2003) (confirming agencies' powers to set health and safety standards); 44 *Fed. Reg.* 1, 357 (Jan. 5, 1979) (publishing airspace regulations); Robert W. Hamilton, [The Role of Non-Governmental Standards in the Development of Mandatory Federal Standards Affecting Safety and Health](#), 56 *Tex. L. Rev.* 1329, 1484 (1978) (supporting ACUS Recommendation 78-4).
- 150 See Technology Transfer Act, 15 U.S.C. § 1301 (2000) (requiring private Standard Setting Organizations to follow open procedures).
- 151 See Douglas C. Michael, [Federal Agency Use of Audited Self-Regulation as a Regulatory Technique](#), 47 *Admin. L. Rev.* 171 (1995) (supporting ACUS Rec. 94-1, 1 C.F.R. § 305.94-1).
- 152 See 18 U.S.C. § 1350 (Supp. II 2002) (requiring corporate officers to certify financial reports and listing criminal penalties for failure to do so).
- 153 See generally Estlund, *supra* note 94 (seeking to create a regime of "monitored self-regulation").
- 154 In specific ways, Congress has prescribed procedures for self regulatory activities. See, e.g., 15 U.S.C. §§ 78f(d), 78b(3)(b) (2000) (explaining the necessity for the securities regulation and describing disciplinary procedures for persons violating the regulation); 42 U.S.C. § 11,101 (2000) (listing findings necessitating regulation of medical physicians).
- 155 The question of generic versus specific procedures for agencies is one that was raised during the drafting of the APA. See Paul R. Verkuil, [The Emerging Concept of Administrative Procedure](#), 78 *Colum. L. Rev.* 258, 260 (1978). But that debate was of course resolved in favor of the generic approach with the passage of the APA.
- 156 See *supra* notes 97-105. The Silver case offered defendants a trade-off: antitrust immunity for procedural regularity.
- 157 See Metzger, *supra* note 6, at 1420-22 (discussing how current state action doctrine is both over and under-inclusive and emphasizing that the current doctrine seems unconcerned with the control by delegated private entities over third parties).
- 158 Of course, current state action requirements would not reach much privatized action. See *supra* note 5.
- 159 This approach is similar to how the formal adjudication and rulemaking provisions of the APA operate. See 5 U.S.C. §§ 554, 556-57 (2000) (mandating that on the record requirements be triggered by organic agency legislation).
- 160 See *supra* notes 118-21.

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- 161 See [Blum v. Yaretsky](#), 457 U.S. 991, 1005 (1982) (stating that government is not “responsible” for private nursing home transfers of long term care patients).
- 162 See supra notes 89-90 (questioning who pays for arbitrators).
- 163 It is also possible that nursing homes would provide some form of procedural protection by contract.
- 164 Once the APA applies, then judicial review attaches pursuant to [5 U.S.C. § 702 \(2000\)](#).
- 165 See supra notes 40-41.
- 166 See Asimow, supra note 116 (proposing a Type A-Type B adjudication).
- 167 See Verkuil, supra note 156 (suggesting that excluding APA procedures for “informal adjudication” is a major flaw in the privatization process); Verkuil, supra note 20 (showing how many federal informal adjudications use the three procedural ingredients even in the era of Goldberg).
- 168 See [5 U.S.C. § 553\(c\)](#) (2000) (listing APA procedures).
- 169 See supra note 100.
- 170 See supra notes 57-61.
- 171 See supra notes 124-25 (concerning arbitrator independence).
- 172 If Congress wanted to go further in a given delegation it could of course enhance the procedure, or incorporate Professor Asimow's Type B procedures.
- 173 One concern with the bare bones Type C procedure is that it could be modified by judicial review. But the [Vermont Yankee Nuclear Power Corp. v. Nat'l Resources Def. Council](#), 435 U.S. 519 (1978), admonition about adding procedures to APA informal rulemaking has been incorporated into informal adjudication, see [PBGC v. LTV Corp.](#), 496 U.S. 633, 634 (1990), and should apply to Type C situations.
- 174 See generally [Tumey v. Ohio](#), 273 U.S. 510, 511 (1927) (reversing lower court order requiring imprisonment of the plaintiff until satisfaction of fines and costs assessed). See [Withrow v. Larkin](#), 421 U.S. 35, 36 (1975) (concluding that the lower court erred in preventing the appellee from using administrative hearing process).
- 175 For example, the welfare reform legislation took the step of denying an entitlement so as to avoid due process consequences of unknown magnitude. See The Personal Responsibility and Work Opportunity Act of 1996, [Pub. L. No. 104-193, §§ 103\(a\)\(1\), 401\(a\)-\(b\)](#), 110 Stat. 2105, 2112-2113 (1996). [Section 401\(b\)](#) expressly declares that “no individual entitlement” exists. The Type C procedure could be employed instead to ensure basic procedural protections without triggering Goldberg-type adversary process.
- 176 It is also possible that state fair procedure statutes will be preempted by federal law. See supra notes 51-53, 88-89.
- 177 See Verkuil, supra note 9, at 129-36 (discussing inherent functions of government that cannot be privatized).

57 ADMLR 963