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Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjuciation Administrative Law Discussion Forum

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TAMING THE TAIL THAT WAGS THE DOG: EX POST AND EX ANTE CONSTRAINTS ON INFORMAL ADJUDICATION

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> [A] requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. . . . When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.[1]

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1. Board of Regents v. Roth, 408 U.S. 564, 591-92 (1972) (Marshall, J., dissenting).

INTRODUCTION

One of the most significant omissions in the Administrative Procedure Act (APA)[2] is its failure to prescribe procedures for—or even to address directly—informal adjudications. To be sure, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*[3] interprets the APA to provide for ex post judicial review of informal agency adjudications.[4] Accordingly, a person dissatisfied with an agency's behavior may seek review under the APA after the fact.

An ex post model of accountability, however, leaves much to be desired. To be sure, the prospect of judicial review might well provide a sufficient incentive for agencies to behave rationally (even if they do not think anyone is really looking). On the other hand, the general absence of any ex ante procedural requirements surely burdens the ability of would-be plaintiffs to mount challenges to irrational agency action. Moreover, average citizens may be unaware of the availability of judicial review, or be unable to take advantage of it because of a lack of access to legal representation.

It is more than a little ironic that the vast bulk of federal agency action flies under the radar screen of the APA—yet, this is true. As Professor Edward Rubin noted, "the APA does not actually use the term informal adjudication at all, and barely acknowledges the concept."[5] He suggests that "[t]he drafters have so little to say about it because they did not conceptualize it as an identifiable category of government action."[6] Nevertheless, over ninety percent of agency actions constitute "informal adjudications."[7]

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2. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (2000)).

3. 401 U.S. 402, 414-15, 419-20 (1971).

4. *See id.*; *see also* Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of* Overton Park*'s Requirement of Judicial Review "On the Record,"* 10 ADMIN. L.J. AM. U. 179, 198-211 (1996) (explaining how *Overton Park* altered judicial review of informal agency actions by creating a de facto obligation to create a record that would facilitate judicial review).

5. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 108 (2003).

6. *Id.*

7. *See* PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE 142 (1989) ("Yet informal adjudications constitute the great bulk of government actions meeting the statutory definition of 'adjudication,' perhaps as much as 95% of those actions; and as we shall see, they are fully subject to judicial review."); *see also* Jeffrey M. Sellers, Note, *Regulatory Values and the Exceptions Process*, 93 Yale L.J. 938, 950 n.56 (1984) ("Perhaps 90% of governmental actions that directly affect individuals take the form of informal adjudication beyond the reach of the APA."); John H. Reese, Regularizing Informal Adjudication Under the APA 13-14 (2004) (unpublished manuscript, on file with author) ("It is said that perhaps 90% of the federal agency 'adjudications,' as defined by the APA, are informal. Lacking significant procedural requirements in the APA, the actual procedures followed by the agencies making informal adjudications must vary widely.").

Of course, the APA contains a few provisions applicable to informal adjudications, even though they are not specifically directed toward such proceedings. For example, the Supreme Court has held that § 555 of the APA provides the APA's procedural blueprint for informal adjudications.[8] This would come as something of a surprise to the APA's Framers—they intentionally omitted informal adjudications from the scope of the statute. As the Attorney General's Manual on the APA explains:

> It has been pointed out that "limiting application of the sections [on adjudication] to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing."[9]

Section 555, entitled "Ancillary Matters," does not seem to be addressed to informal adjudications per se. Moreover, the Attorney General's Manual confirms this understanding: "[Section 555] defines various procedural rights of private parties which may be incidental to rule making, adjudication, or the exercise of any other agency authority."[10] Thus, it would be accurate to say that § 555 applies to informal adjudications (unless Congress expressly exempts a particular proceeding or the proceeding falls within a matter otherwise exempt from the APA's provisions), but it would be something of an overstatement to suggest that the APA itself addresses, in a direct fashion, the procedural requirements associated with informal adjudications.[11]

Thus, the APA does not provide any specific and dedicated procedural requirements applicable to informal adjudications, and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (*Vermont Yankee*)[12] effectively precludes reviewing courts from imposing procedures

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8. *See* Pension Benefit Guar. Corp. v. The LTV Corp., Inc., 496 U.S. 633, 655 (1990) ("The determination in this case, however, was lawfully made by informal adjudication, the minimal requirements for which are set forth in the APA, 5 U.S.C. § 555, and do not include such elements.").

9. *See* UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 41 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL] (quoting Senate Comparative Print of June 1945, at 7); *see also* Note, *The Federal Administrative Procedure Act: Codification or Reform?*, 56 Yale L.J. 670, 705 (1947) (presenting grid with a blank for APA procedural requirements applicable to "informal adjudications").

10. ATTORNEY GENERAL'S MANUAL, *supra* note 9, at 61.

11. *See* Harold H. Bruff, *Coordinating Judicial Review In Administrative Law*, 39 UCLA L. REV. 1193, 1216-17 (1992) ("The APA provides only rudimentary procedures for rulemaking and none at all for informal adjudication; for neither function does it define a record for judicial review.").

12. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524, 543 (1978) (holding that federal courts, when reviewing an agency's action, may not impose procedural requirements beyond those mandated by the organic act at issue, the APA, or, when applicable, procedural due process, and must instead review the substance of

on federal administrative agencies. Nevertheless, such decisions are subject to judicial review under the APA. Plaintiffs may seek post-decision review of informal agency adjudications under the rubric of the APA itself.[13] In addition, plaintiffs may bring challenges to adverse agency actions in informal adjudications under the rubric of either an organic statute or a constitutional claim. Procedural due process, substantive due process, and equal protection all provide an after-the-fact means of challenging an arbitrary agency action in the context of an informal adjudication.

After-the-fact, ex post opportunities for review undoubtedly encourage agencies voluntarily to adopt procedures that will enable them to defend their actions. Thus, the availability of ex post remedies creates a feedback loop that could affect the quality of the ex ante process. But, with the possible exception of procedural due process claims, this feedback loop is an imperfect mechanism for ensuring fair process in the first instance.

Accordingly, and as explained in greater detail below, this Article's proposal for amending the APA would be to adopt a new subsection within § 554 that addresses informal agency adjudications directly, and sets forth minimal procedural safeguards in the context of those adjudications.

I. EX POST CONSTRAINTS ON AGENCY INFORMAL ADJUDICATIONS

After an agency has made a final decision, several means of seeking judicial review exist. An unhappy claimant may seek judicial review under the APA; alternatively, the claimant could bring constitutional claims (whether as a strategic decision or because, in the particular case, APA review is not available). Both statutory and constitutional means of seeking after-the-fact review of informal adjudications are discussed below.

A. The APA

The APA itself, as interpreted in *Citizens to Preserve Overton Park, Inc. v. Volpe* (*Overton Park*),[14] provides a means of securing after-the-fact judicial review of most agency informal adjudications.[15] A would-be plaintiff may invoke § 706(2)(A)'s "arbitrary and capricious" standard of review to obtain general review of an agency's decision in an informal

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the agency's decision to determine whether the ultimate decision is itself arbitrary and capricious).

13. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-15, 419-20 (1971) (holding that virtually all agency decisions may be reviewed under the APA and requiring reviewing courts to examine decisions carefully and thoughtfully, even though the applicable standard of review requires deference to reasonable agency decisions).

14. *Id.*

15. *See id.* at 414-20 (setting forth requirements for APA review of an agency's informal adjudication, including definition of the "record" in such proceedings).

adjudication.[16] A reviewing court will apply "hard look" review and require an agency to justify its decision on the basis of the record as it existed at the time the agency acted.[17]

APA review provides a powerful tool for enforcing agency accountability ex post, but it does very little to encourage agency accountability ex ante. *Vermont Yankee*'s proscription against reviewing courts imposing procedures on agencies means that an agency is free to use whatever procedures (or non-procedures) it desires, so long as the end result is demonstrably rational.[18] As Professor Young observed, "[e]xcept for some small set of truly exceptional cases, *Vermont Yankee* ended the lower federal courts' practice of occasionally requiring agencies to conduct their informal proceedings with more safeguards than the minimum required by the Constitution, the APA, or more specific statutes."[19]

Viewed ex ante, § 706(2)(A) review[20] imposes only indirect constraints on the actual process of agency decisionmaking; an interested person cannot demand either advance notice or an opportunity to participate in the decisional process at the front end of the proceedings (absent some other claim of right arising under an organic act or the Constitution itself). Accordingly, persons who wish to participate in the process of agency decisionmaking must look elsewhere for relief.

B. Constitutional Claims As A Substitute for APA Review

Would-be plaintiffs have attempted to challenge adverse agency decisions in the context of informal adjudications using procedural due process, substantive due process, and equal protection theories. Each of these potential avenues of review is discussed below, with attention to the potential advantages and disadvantages of each.

1. Procedural Due Process

Procedural due process requires, at a minimum, notice, a hearing with some sort of opportunity to be heard, and the communication of a decision.[21] Depending on the particular circumstances, procedural due

16. 5 U.S.C. § 706(2)(A) (2000).

17. *See* Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (holding that the record for judicial review of an agency action is the actual record that was before the agency at the time of its decision, rather than the new record created incident to judicial review proceedings, and emphasizing that the ultimate validity of an agency's "action must, therefore, stand or fall on the propriety of that [decision], judged, of course, by the appropriate standard of review").

18. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524, 543 (1978) (prohibiting generally a reviewing court from imposing non-statutory procedural requirements on a federal administrative agency).

19. Young, *supra* note 4, at 206 n.96.

20. 5 U.S.C. § 706(2)(A).

21. *See* Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (holding that, consistent with

process might well require additional procedural bells and whistles.[22]

The problem with using procedural due process to challenge an adverse agency decision in the context of an informal adjudication is that one must establish the existence of a liberty or property interest as a prerequisite to claiming a right to procedural due process (the *Roth/Perry* requirement).[23] Although some legal scholars have suggested that the federal courts should frame procedural due process broadly, as a kind of guarantee against "procedural grossness,"[24] the Supreme Court has steadfastly adhered to the liberty/property requirement as a prerequisite to an obligation on the government's part to provide *any* process.[25]

In an informal adjudication, if the would-be plaintiff can establish a legal right to a particular agency action, she can establish a property interest and, correspondingly, a right to the protection of procedural due process. Whether an application for benefits gives rise to a "legitimate claim of entitlement," however, remains an open question.[26] To the extent that the grant or denial of a government action represents truly discretionary government action, however, a would-be plaintiff is probably out of luck.

The primary benefit of using procedural due process to challenge an agency's informal adjudication is that, if successful, the claim would

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the requirements of procedural due process, the government must provide public assistance recipients with minimum process, including notice, an oral hearing, an unbiased decisionmaker, and a formal decision based on the record, before terminating public assistance benefits).

22. *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (cataloguing and discussing various procedural requirements that a reviewing court might deem procedural due process to require, and engaging in a cost/benefit analysis of each procedure); *see also* Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976) (discussing the various factors and considerations relevant to ascertaining the minimum process that the 5th and 14th Amendments require before the government implements a decision burdening a liberty or property interest).

23. *See* Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972) (establishing the requirement of a cognizable liberty or property interest as a prerequisite to any meritorious claim to procedural due process rights); *see also* Perry v. Sindermann, 408 U.S. 593, 596-98 (1972) (holding that a liberty or property interest must be established).

24. *See* William W. Van Alstyne, *Cracks in* "The New Property": *Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 450-51, 487-90 (1977) (arguing that the Due Process Clauses should protect citizens against "procedural grossness" generally, regardless of whether a plaintiff can establish the existence of a discrete liberty or property interest).

25. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 43-44, 61 n.13 (1999) (noting that "[r]espondents do not contend that they have a property interest in their claims for payment, as distinct from the payments themselves," and declining to reach the merits of this question).

26. *See* Virginia T. Vance, Note, *Applications for Benefits: Due Process, Equal Protection, and the Right to Be Free From Arbitrary Procedures*, 61 WASH. & LEE L. REV. 883, 884-88, 925-27 (2004) (noting the Supreme Court's failure to address whether an application for benefits gives rise to a cognizable property or liberty interest; considering various theories under which one could argue in favor of judicial recognition of a constitutional right to non-arbitrary consideration of an application for benefits; and noting that, under present law, a truly discretionary government decision probably does not trigger procedural due process protection).

require the agency to open its decisional process to the plaintiff. In other words, a successful procedural due process claimant has a right to participate in the agency's decisional process. This could be crucial: because *Overton Park* ultimately applies a very deferential standard of review, the ability to help build the record could be essential in establishing that an agency's decision is irrational.[27]

2. Substantive Due Process

The Due Process Clauses require the government to use fair procedures when burdening a "liberty" or "property" interest. The Due Process Clauses also prohibit fundamentally unfair or unjust government action.[28] A person wishing to challenge an adverse government decision affecting a liberty or property interest might bring a substantive due process claim.

On various occasions, the Supreme Court has held that government action that is utterly arbitrary, to the point of "shocking the conscience," gives rise to a substantive due process violation.[29] In the administrative law context, the Supreme Court has held that an agency must create and

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27. Moreover, the average citizen's practical ability to pursue judicial review of an adverse agency decision is probably quite limited—access to legal representation for litigating such claims requires financial commitments beyond the means of most average Americans, and few citizens probably even realize that recourse to the federal courts exists when an agency denies benefits or rejects a grant application. *See generally* MOLLY IVANS & LOU DUBOSE, SHRUB: THE SHORT BUT HAPPY POLITICAL LIFE OF GEORGE W. BUSH 94-95 (2000) (reporting that most parents of children who are ineligible for the Texas Children's Health Insurance Program (CHIP) because "their families earn too little to qualify for CHIP" nevertheless "automatically qualify for Medicaid," but fail to file the necessary application form to receive the Medicaid benefits for themselves or their children); *id.* at 95 ("In other words, if CHIP applicants qualified for Medicaid, they would have to make an appointment at a Medicaid office and fill out another application. And that application is difficult and complicated . . . 'All the studies show that 66 percent never return.'").

28. *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997) (distinguishing procedural and substantive due process, and arguing for substantive due process protection against irrational or arbitrary government action); *see also* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003) (arguing for judicial recognition of substantive due process protection for both liberty and property interests, whether or not they are "fundamental" in nature).

29. *See* County of Sacramento v. Lewis, 523 U.S. 833, 845-47 (1998) (noting that "[s]ince the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary [government] action," and describing the standard for showing a violation by Executive Branch personnel as behavior that "shocks the conscience" or that "violates the 'decencies of civilized conduct'"); *see also* E. Enterprises v. Apfel, 524 U.S. 498, 548-49 (1998) (Kennedy, J., concurring) (discussing and applying the substantive due process requirement of fundamentally fair, non-arbitrary government action, and finding this norm breached where the federal government imposed severely retroactive funding obligations on former employers of now-retired coal miners to fund health care benefits for the retired coal miners and their dependents); BMW v. Gore, 517 U.S. 559, 574-75, 585-86 (1996) (holding that the substantive due process norm against arbitrary or fundamentally unjust government action limits the size of punitive damage awards, including an award associated with the sale of a repainted BMW automobile as "new").

then observe its own rules and regulations when evaluating a claim.[30] Accordingly, a would-be plaintiff wishing to challenge an adverse government decision might attempt to cast her claim as sounding in substantive due process.

There are two possible difficulties with attempting to obtain judicial review of informal adjudication via this route. First, some circuits have read the *Roth/Perry* liberty/property threshold requirement into substantive due process case law. In these circuits, recasting a claim as "substantive" rather than "procedural" will not avoid the obligation to satisfy the *Roth/Perry* "legitimate claim of entitlement" requirement.[31] In the absence of such a "legitimate claim of entitlement," these circuits refuse to recognize any substantive due process claim.

Other circuits have imposed a requirement that the interest at issue be "fundamental" for substantive due process to apply. The Eleventh Circuit takes this approach.[32] Needless to say, this requirement significantly limits the potential universe of substantive due process claims. It is unlikely that

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30. *See* Morton v. Ruiz, 415 U.S. 199, 232-35 (1974) (requiring agencies to adopt and follow rules that govern the exercise of delegated discretion; explaining that "[w]here the rights of individuals are affected, it is incumbent on agencies to follow their own procedures," and emphasizing that "[n]o matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility [for a government program] cannot be made on an *ad hoc* basis by the dispenser of the funds"); *see also* Bush v. Gore, 531 U.S. 98, 106-07 (2000) (holding that "absence of specific standards" to ensure equal application of a rule violates the equal protection clause in the context of a state-wide recount of the 2000 presidential election ballots in Florida); Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law:* Bush v. Gore *and the Emerging Jurisprudence of* Oprah!, 90 GEO. L.J. 2087, 2121-22 (2002) ("Black letter administrative law principles prohibit agencies from arbitrarily administering their duties.").

31.. *See, e.g.*, Bryan v. City of Madison, 213 F.3d 267, 274-75 (5th Cir. 2000) (requiring the plaintiff to show a legitimate claim of entitlement to a liberty or property interest before proceeding to consider the merits of a substantive due process claim); Zahra v. Town of Southold, 48 F.3d 674, 680 (2d Cir. 1995) (stating that "a party must first establish that he had a valid 'property interest' in a benefit that was entitled to constitutional protection"); RRI Realty Corp. v. Incorporated Vill. of Southampton, 870 F.2d 911, 915 (2d Cir. 1989) (discussing the clear entitlement aspects of claims). Not all circuits require parties to establish a claim of entitlement to the government approval being sought. For example, the Third Circuit has permitted a substantive due process challenge to an adverse zoning decision on the theory that an adverse decision affecting a fee simple absolute interest is sufficient to trigger the property protections of the Due Process Clauses. *See* DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 600-01 (3d Cir. 1995) (permitting a substantive due process challenge to an adverse zoning decision on the theory that an adverse decision affecting a fee simple absolute interest is sufficient to trigger the property protections of the Due Process Clauses); *see also* LRL Properties v. Portage Metro Hous. Auth., 55 F.3d 1097, 1110-11 (6th Cir. 1995) (following a similar approach).

32. *See* McKinney v. Pate, 20 F.3d 1550, 1558-60 (11th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1110 (1995) (requiring a would-be plaintiff with a substantive due process claim to establish the existence of a "fundamental" interest as an essential element of the substantive due process claim, holding that substantive due process provides no protection to non-fundamental liberty and property interests, and concluding that "because employment rights are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection").

most government benefit programs will create an interest on an applicant's part that rises to this level of importance.[33]

Cuyahoga Falls v. *Buckeye Community Hope Foundation* (*Buckeye*)[34] addressed the question of substantive due process challenges to discretionary government action (in the specific context of land use regulation) in very general terms. Writing for the majority, Justice O'Connor avoided deciding whether the *Roth/Perry* requirement of a legitimate claim of entitlement to a land use permit constitutes an essential element of a substantive due process claim, stating: "We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition [for a referendum] was pending in no sense constituted egregious or arbitrary government conduct."[35] The Court found that a city charter provision permitting citizens to seek a referendum on proposed land use permits did not violate the Due Process Clause: "The subjection of the site-plan ordinance to the City's referendum process, regardless of whether that ordinance reflected an administrative or legislative decision, did not constitute per se arbitrary government conduct in violation of due process."[36]

Buckeye seems to establish that substantive due process may be used to challenge adverse government adjudicative decisions. Whether a plaintiff must establish a legitimate claim of entitlement to a particular permit or approval remains to be decided. We do know, however, that such a claim must assert utterly arbitrary or irrational government action.

Justice Scalia, joined by Justice Thomas, concurred in the *Buckeye* decision, but wrote separately to disavow the very existence of substantive due process claims seeking to vindicate non-fundamental rights: "It would be absurd to think that all 'arbitrary and capricious' government action violates substantive due process—even, for example, the arbitrary and capricious cancellation of a public employee's parking privileges."[37] Justice Scalia argued that substantive due process protects "certain 'fundamental liberty interests' from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest."[38]

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33. By way of contrast, however, a would-be plaintiff with an equal protection claim would not have to meet any of these preliminary requirements—indeed, the only unique element in an equal protection case (beyond a showing of irrational or arbitrary government action) is a showing of ill will or animus (and only in those circuits that have adopted this interpretation). *See* Olech v. Vill. of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998); *see also infra* notes 42 to 52 and accompanying text.

34. 538 U.S. 188 (2003).

35. *Id.* at 198.

36. *Id.*

37. *Id.* at 200 (Scalia, J., concurring).

38. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

A plaintiff's interest in a building permit or a parking space "is not among these 'fundamental liberty interests,'" and therefore merits no substantive due process protection.[39]

So, what, if any, provision of the Constitution protects a citizen from arbitrary and irrational government action affecting property interests? Justice Scalia notes that the Takings Clause provides a remedy for the loss of a private property interest, if the government acts to advance a public purpose. In addition, "[t]hose who claim 'arbitrary' deprivations of nonfundamental liberty interests must look to the Equal Protection Clause, and *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), precludes the use of 'substantive due process' analysis when a more specific constitutional provision governs."[40]

Of course, Justice Scalia was writing only for himself and Justice Thomas. Justice O'Connor's opinion for the majority seems to embrace substantive due process review of adverse government decisions affecting non-fundamental property interests, but requires a high threshold showing of arbitrariness in order to prevail. Until the Supreme Court provides better guidance, substantive due process challenges to arbitrary government actions adversely affecting non-fundamental interests will remain something of a doctrinal morass.

Thus, substantive due process provides a means of seeking review in cases not otherwise reviewable under the APA itself (because of an express exclusion or because the precise matter at issue is "committed to agency discretion" under § 701(a)). That said, substantive due process would not require an agency to open its decisional process up to participation by the plaintiff, nor would it require an agency to adopt any particular procedural protections.

3. Equal Protection Doctrine

In *Village of Willowbrook* v. *Olech*,[41] the Supreme Court broadly endorsed the use of the equal protection doctrine to challenge "irrational and wholly arbitrary" government decisions. The case involved Willowbrook's refusal to connect Olech's home to the water and sanitary sewer system unless Olech ceded a thirty-three foot easement to the Village.[42] In all other cases, Willowbrook had required only a fifteen foot easement. After a three month delay, the Village of Willowbrook relented and agreed to connect Olech's home, provided that she conveyed the

39. *Id.*

40. City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 200-01 (2003).

41. 528 U.S. 562, 564-65 (2000) (holding that the Equal Protection Clause prohibits "intentional and arbitrary discrimination" by local officials).

42. *Id.* at 563.

customary fifteen foot easement to the Village.[43]

Olech sued the Village, alleging a violation of her equal protection rights. Olech claimed that the demand for the thirty-three foot easement was "irrational and wholly arbitrary," and "was actually motivated by ill will resulting from Olech's previous filing of an unrelated, successful lawsuit against the Village."[44] The district court dismissed Olech's suit, but the U.S. Court of Appeals for the Seventh Circuit reversed.[45] The viability of Olech's suit turned on whether a plaintiff can bring an equal protection claim involving a "class of one."

The Supreme Court, in a unanimous per curiam opinion, held that Olech could maintain a lawsuit alleging an equal protection violation against a class of one: "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[46] The Equal Protection Clause exists "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[47]

In the case at bar, Olech's allegations of "irrational and wholly arbitrary" treatment, "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis."[48] The Court did not "reach the alternative theory of 'subjective ill will' relied on" by the Seventh Circuit.[49]

After *Olech*, a person or entity aggrieved by an adverse government decision involving differential, negative treatment could proceed directly to

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43. *Id.*
44. *Id.*
45. *See* Olech v. Vill. of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998) (holding that an allegation that the village demanded a greater easement from the homeowner than from other homeowners, due to ill will resulting from homeowner's previous lawsuit against the village, stated a claim under the equal protection clause).
46. *Olech*, 528 U.S. at 564.
47. *Id.* (internal quotations and citations omitted). The Supreme Court has consistently held that the Fifth Amendment's Due Process Clause "reverse incorporates" the Equal Protection Clause—which, on its face, only applies against state and local government entities—against the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (holding that "it would be unthinkable that the same Constitution would impose a lesser duty [to refrain from the use of race-based classifications] on the Federal Government," and concluding that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution"); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213-18, 223-24 (1995) (summarizing the case law to date and noting that "reverse incorporation" of the Fourteenth Amendment's Equal Protection Clause into the Fifth Amendment's Due Process Clause constitutes a well-settled principle of constitutional law).
48. *Olech*, 528 U.S. at 565.
49. *Id.*

federal court with an equal protection challenge to the decision. The plaintiff would have to establish that the adverse government decision was "wholly arbitrary and irrational." Although the Supreme Court did not directly require it, the plaintiff would logically have to show that this shabby treatment was unique, or relatively unique, to her. Equal protection guarantees equal treatment, not reasonable treatment; the prohibition runs against unprincipled *differential* treatment. If government treats everyone disdainfully, it might violate notions of substantive due process, but such behavior probably would not transgress the equal protection guarantee.[50]

In light of *Olech*, equal protection represents a clear and quite viable alternative means of seeking review of adverse agency decisions in the context of informal adjudications.[51] Moreover, the *Roth/Perry* threshold showing of a lack of discretion simply does not apply in this context; equal protection claims are not contingent on establishing a pre-existing liberty or property interest. Cases in which a plaintiff can assert some sort of individualized animus appear to have the best prospects for success, but in some circuits, proving "wholly arbitrary or irrational" government action will be sufficient to establish an equal protection claim.

An equal protection claim will not, however, address the problem of deficiencies in procedure prior to the agency's decision. Like substantive due process, equal protection claims are essentially fungible with APA

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50. A split presently exists in the lower federal courts regarding an additional showing of animus or subjective ill will. The Seventh and Fifth Circuits, for example, require a showing of "vindictive action," "illegitimate animus," or "ill will." *See Olech*, 160 F.3d at 386, 388; *see also* Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000), *cert. denied*, 531 U.S. 1080 (2001) (adhering to a subjective animus requirement); Shipp v. McMahon, 234 F.3d 907, 916 (5th Cir. 2000) ("To state a claim sufficient for relief, a single plaintiff must allege that an illegitimate animus or ill will motivated her intentionally different treatment from others similarly situated and that no rational basis existed for such treatment."); Esmail v. Macrane, 53 F.3d 176, 179 (7th Cir. 1995) ("If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."). On the other hand, the Second Circuit does not appear to require such a showing: "[P]roof of subjective ill will is not an essential element of a 'class of one' equal protection claim." *See* Jackson v. Burke, 256 F.3d 93, 97 (2d Cir. 2001). *But see* Harlen Associates v. Vill. of Mineola, 273 F.3d 494, 500 (2d Cir. 2001) (acknowledging that the Second Circuit has not required a showing of subjective ill will or animus, but noting the existence of a circuit split on this question). Accordingly, a would-be plaintiff should take care to ascertain the local circuit's approach and to incorporate appropriate allegations of fact to address the subjective animus requirement if the local circuit requires it. The Second Circuit's approach better comports with the Supreme Court's opinion in *Olech*. Only Justice Breyer, in his concurring opinion, specifically required a showing of subjective animus. *See Olech*, 528 U.S. at 565-66 (Breyer, J., concurring) (emphasizing the importance of Olech's allegations of "vindictive action," "illegitimate animus," and "ill will," and suggesting that such "added factors" might be necessary to avoid "transforming run-of-the-mill zoning cases into cases of constitutional right"). The majority, by way of contrast, clearly distanced itself from requiring such a showing as an essential element of a class of one equal protection claim.

51. *See, e.g.*, *Harlen*, 273 F.3d at 499-500 (applying *Olech* and holding that an adverse land use decision, if irrational, constitutes an equal protection violation).

claims under § 706(2)(A). This is not to say that such claims are irrelevant. Both equal protection and substantive due process present opportunities for review that might not exist under the APA; as such, they are important arrows in an administrative practitioner's quiver. That said, if a plaintiff's objective is to obtain a seat at the table prior to the agency rendering a decision in an informal adjudication, equal protection and substantive due process do not provide much help.

II. EX ANTE CONSTRAINTS ON INFORMAL ADJUDICATIONS: AMENDING § 554 TO PROVIDE MINIMAL PROCEDURAL SAFEGUARDS IN SOME INFORMAL ADJUDICATIONS

The APA's failure to address procedural requirements for informal adjudications does not represent the end of the matter. The use of the APA and constitutional claims to seek review of final agency decisions, coupled with the potential applicability of procedural due process protection in an important subset of informal adjudications, should ensure that agencies will adopt fundamentally fair procedures to govern informal adjudications that materially affect an individual or discrete class of persons. Even so, it would make sense to provide a unified standard of review for such proceedings.

Many administrative law scholars have noted the APA's failure to provide procedural rules for informal adjudications and suggested that the conflicting goals of fairness and efficiency explain this state of affairs. Professor Peter Strauss observes that "[p]erhaps the most striking aspect of the APA's provisions on adjudication is their essential failure to specify *any* procedure for informal adjudications."[52] Strauss posits that "[t]his general failure of procedural specification reflects, in part, the demands of informality," and "the enormous difficulty the drafters would have faced in devising and stating general procedural provisions to govern matters that, in 1946, made no substantial claim for procedural detail."[53]

The problem, of course, is the sheer volume of informal adjudications. Taken to its logical extreme, a decision to turn on the lights or lower an agency's office building temperature two degrees constitutes "informal adjudication." An administrative model that subjected every such agency decision to mandatory procedures and judicial review could be a prescription for chaos. As Professor Young has noted, "informal proceedings are a set of proceedings by a wide variety of agencies on widely differing subjects, but possessing a single characteristic," namely

52. STRAUSS, *supra* note 7, at 141.

53. *Id.* at 142. For an excellent general political history of the APA, see George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

that "all of these are matters as to which more formal procedures and exacting judicial review are not cost-justified."[54] He suggests that "[o]n this view, if agency proceedings are thoughtfully aligned to the formal or the informal set, then informal proceedings presumably would be either matters in which little was at stake, or matters in which additional procedures would yield little extra fairness, or both."[55]

Even so, many scholars and commentators have suggested that mandatory procedures to govern at least some informal adjudications would be desirable. Three papers presented at the symposium meeting advance this view.[56] Professor Marshall Breger, a former head of the Administrative Conference of the United States (ACUS), has noted that "[t]he drafters of the APA purposely eschewed any attempt to establish minimum procedural requirements for most 'informal agency action.'"[57] "Nevertheless, without formalizing such decision-making, significant improvement is possible in the process by which these decisions are made."[58] Moreover, other legal scholars have suggested that the APA should establish minimum procedural requirements for at least some informal adjudications.[59]

The Administrative Law Section of the American Bar Association, in a draft report, describes informal adjudication as "the black hole of administrative law" and proposes a "barebones system of notice, participation, and statement of reasons to assure a civilized interchange between government officials and private parties when it is practicable to

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54. Young, *supra* note 4, at 199-200.

55. *Id.* at 200.

56. *See* William D. Araiza, *In Praise of a Skeletal APA:* Norton v. Southern Utah Wilderness Alliance, *Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 ADMIN. L. REV. 979, 1001 (2004) ("For example, it might be appropriate to amend the APA to mandate general procedures governing informal adjudication, given the large numbers of such informal proceedings and their perhaps unanticipated rise in importance since 1946."); *see also* Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required By Statute*, 56 ADMIN. L. REV. 1041 (2004) (advocating adoption of procedural requirements to govern non-ALJ adjudications, a particular subset of informal adjudications); Reese, *supra* note 7, at 15-16 (proposing minimum procedural safeguards for informal adjudications by amending § 555(e)).

57. Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 359 (1986).

58. *Id.*

59. *See, e.g.*, Arthur E. Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 322 (1986) (noting that "many types of federal agency adjudications are entirely ungoverned by the adjudication provisions of the [APA], although a few of the adjudication provisions of that statute might properly be applicable to those excluded adjudications," and suggesting that "perhaps some other provisions should be added to the federal act to deal specifically with those adjudications"); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 481 (1986) ("Informal adjudication is the third type of adjudication, and the APA might be amended here to provide some modest procedural rules.").

do so."[60] These requirements would be "aspirational, more like a code of best practices than a set of legally binding requirements."[61] These provisions sparked a great deal of debate within the section, but did not garner consensus support; accordingly, the current working version of the Report has omitted these "best practice" provisions.[62]

Of course, separation of powers issues loom in the background of any proposal to broaden APA review to encompass all informal adjudications. At some point, one might question whether a particular review scheme does harm to Article II's vesting and faithful execution clauses.[63] In this regard, one should note that the ABA Administrative Law Section's Draft Report would not have permitted judicial review of an agency's compliance with the notice, participation, and statement of reasons requirements.[64]

Even granting the salience of these concerns, the adoption of an analogue to § 553(c)'s provisions on informal rulemaking seems a reasonable approach to the problem, provided that the new procedures only apply to a limited subset of informal adjudications. Professor Verkuil has identified "fairness, efficiency, and satisfaction" as the hallmarks of a fundamentally fair administrative process.[65] These values should shape the procedures applicable to covered informal adjudications. Moreover, any new APA provisions should probably establish a floor, or minimum, that effectively would preempt procedural due process claims, rather than attempt to set a ceiling.[66]

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60. MICHAEL ASIMOW, PRESCRIPTIVE RECOMMENDATIONS: ADJUDICATION, REVISED DRAFT at 1, 5, 15 (Dec. 5, 2003) (document on file with author).

61. *Id.* at 15. *But see* Rubin, *supra* note 5, at 176-82 (proposing a requirement that agencies develop and publicize a "goal and plan" requirement for the implementation of various policies and programs, and arguing that "[t]he goal and plan requirement provides an assurance of fairness in these situations by revealing action based upon such motivations ['personal antipathy, bias, politics, or unjustified retaliation'] as deviations from the stated plan").

62. *See* WILLIAM FUNK, CHAIR, SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, AMERICAN BAR ASSOCIATION, REPORT, AMENDMENTS TO THE ADJUDICATION PROVISIONS OF THE FEDERAL APA (CIRCULATION DRAFT) 1-20 (June 2, 2004) (omitting all proposals regarding the adoption of "best practices" to govern non-ALJ federal agency informal adjudications) (document on file with author).

63. *See* FEC v. Akins, 524 U.S. 11, 34-37 (1998) (Scalia, J., dissenting) (arguing that the President, as Chief Executive, must have authority to oversee and direct operations of the Executive Branch, and positing that citizen-attorney general provisions effectively transfer "faithful execution" of laws from the President and executive branch to private litigants and Article III courts); *see also* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. II, § 3 ("He shall take Care that the Laws be faithfully executed.").

64. *See* Asimow, *supra* note 60, at 15 (noting that "[b]ecause compliance with these recommendations would not be judicially reviewable, the requirements should be viewed as aspirational").

65. Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279-80 (1978).

66. As Professor Bonfield has noted, "[a] scheme with several distinct classes of agency

In informal adjudications that especially affect the interests of an individual or group of individuals in a way that is not generalized, the APA should provide judicially enforceable, minimal procedural rights that safeguard ex ante fairness in the agency's decisional process. When government action "resembles real adjudication, since it involves the imposition of governmental authority on particular individuals, and thus implicates issues of fair treatment that are typically absent from rulemaking,"[67] the APA should afford some minimal procedural rights to the potentially affected person or persons. To borrow the language of the Supreme Court's standing doctrine,[68] a would-be participant in the agency's decisional process should possess a concrete and particularized, as opposed to a diffuse and widely-held, interest in the outcome of the proceeding.[69]

Such a limitation would avoid the embarrassment of creating a right to public participation when an EPA staffer decides to raise or lower the office thermostat. Moreover, creating a more limited class of potential process claimants in informal adjudications would underprotect the participation rights of the public. To state the matter plainly, an APA amendment that failed to preempt procedural due process claims would not be sufficient; although one could draw a more limited universe of informal adjudications,[70] this approach would fail to provide a uniform basket of

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adjudication is more efficient because it assures a better fit between the adjudicatory procedures required and the importance of the matters at stake." Bonfield, *supra* note 59, at 324. Consequently, "[t]he overhead costs of the procedures will be proportionate to the significance of the issues involved in a particular case." *Id*; *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (adopting a balancing test to determine whether an agency has provided adequate process, including consideration of "the private interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function involved and the fiscal and administrative burden that additional or substitute procedural requirements would entail").

67. Rubin, *supra* note 5, at 178.

68. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-78 (1992) (holding that Article III requires a would-be plaintiff to establish a personal injury that is both concrete and particularized).

69. This approach would track an ACUS "best practices" proposal that provided that "each agency which takes actions affecting substantial public or private interests, whether after hearing or through informal action, should, as far as is feasible in the circumstances, state the standards that will guide its determination in various types of agency action, either through published decisions, general rules or policy statements other than rules." Recommendation 71-3, 1 C.F.R. § 305.71-3 (1985); *see also* Breger, *supra* note 57, at 359-60 (discussing proposals for "best practices" guidelines that would encourage minimum procedural protections in informal adjudications).

70. *See* Asimow, *supra* note 60, at 12-13 (proposing new APA-based procedural rules to govern informal adjudications for which a statute requires an evidentiary hearing, which he designates "non-ALJ adjudications," and emphasizing that "[n]on-ALJ adjudications must be carefully distinguished from the vast realm of true 'informal adjudication,' which does not involve statutorily required evidentiary hearings"); *see also* Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1341-42

procedural rights that would preempt ad hoc procedural due process analysis.[71]

The requirement of an individual, concrete, and particularized interest would ensure that administrative decisionmaking would not be strangled. The kinds of interests that would trigger process requirements are not difficult to imagine: covered informal adjudications would include, for example, making "initial grants or denials of benefits (such as National Science Foundation applications) or rights of access to government facilities (for example, the park rangers who control access to national parks)."[72] Similar decisions that adjust individual rights also would trigger the new APA process requirements.

Looking in the opposite direction, establishing a broader, generally applicable set of procedures that would open up virtually all agency decisionmaking to interested persons would probably create more problems than it would solve. A broader, generalized right of participation in all informal adjudications would be impractical, unnecessary, and unjustified on cost-benefit grounds. It might also run up against the Supreme Court's efforts to limit standing in the context of citizen suits to enforce purely procedural rights.[73]

Although defining with precision the nature of the procedural rights that should apply in covered informal adjudications lies beyond the scope of this Article, it seems logical to start with notice, some sort of opportunity to be heard, and an explanation of how the agency decided to resolve the question. In addition, some sort of internal agency appeal might be required.

For example, if a park ranger must decide between two applicants for a camp site in a national park, the claimants should have some sort of opportunity for an informal give and take with the ranger, an explanation of how the ranger decides to award the camp site, and the ability to appeal an adverse decision after the fact.[74] Although a camper's interest in a

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(1992) (distinguishing between ALJ adjudications, non-ALJ adjudications involving formal evidentiary hearings, and "the millions of decisions that are rendered by countless other deciders who adjudicate public rights, opportunities, or obligations in other settings that are non-confrontational and often not even face-to-face").

71. *See generally* Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976) (describing and critiquing various federal agencies' approaches to conducting informal adjudications).

72. Verkuil, *supra* note 70, at 1342 n.2.

73. *See, e.g.*, *Lujan*, 504 U.S. at 571-78 (holding that core separation of powers concerns limit Congress's power to create generalized citizen standing, whether by creating procedural rights or by some other means, to challenge the Executive Branch's implementation of the law).

74. *See* Goss v. Lopez, 419 U.S. 565, 580-84 (1975) (requiring an opportunity for notice and an informal hearing before imposition of suspension from public school for up to ten days on the theory that "[r]equiring that there be at least an informal give-and-take between student and disciplinarian" before the imposition of a suspension will reduce the

particular camp site might well be date and site specific, a repeat customer could have an ongoing interest in the rules and policies that govern access to such sites.

For example, suppose that the ranger flipped a coin, rather than applying a rule of first in time, first in right. Or suppose the ranger favored a family with children over a couple without them. The requirement of a statement of reasons, coupled with a right to an internal post-decision review within the agency, would permit an aggrieved citizen to seek review, clarification, and possibly reform of the relevant policy. As noted earlier, the APA already provides for review on the merits of such decisions (unless expressly excluded from the APA's coverage).

The adoption of minimum procedural safeguards, even in the context of something as picayune as a dispute over a camp site, would simply facilitate such review and, perhaps, create an adjudicative system for covered informal adjudications that reduces the number of persons who feel ill-used by the government. As Professor Rubin has explained, "general claims to administrative discretion can conceal actions based on unfair motivations such as personal antipathy, bias, politics, or unjustified retaliation."[75]

Other examples might include applications for employment or grants, license and benefits applications, and any other individualized adjudicative decision. Undoubtedly, most agencies already meet the rather low threshold suggested here; accordingly, the cost of compliance with such a regime should not be terribly high.

The benefits of such an approach are reasonably clear. For many who apply for benefits, the possibility of ex post review, whether under the APA and *Overton Park* or under the Constitution, is more theoretical than real. Many applicants will lack simple awareness of a right to an appeal of an adverse decision; even those aware of the possibility of judicial review and wishing to seek such review will have difficulty obtaining and paying for legal counsel.[76] In sum, ex post review will be useless to many average citizens.[77]

Moreover, the opportunity for notice, an opportunity to be heard, and the

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risk of erroneous determinations because the school administrator's "discretion will be more informed").

75. Rubin, *supra* note 5, at 178.

76. *See generally* Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) (holding that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard," and requiring that administrative procedures be designed to facilitate their effective use by the average citizen).

77. *See* IVANS & DUBOSE, *supra* note 27, at 94-95 (describing a low follow-up rate (33%) when an agency requires program applicants ineligible for one children's health insurance program to file a new application with a different office in order to enroll in a different program for which they probably qualify).

creation of a written decision and internal appeal would facilitate judicial review. Although *Overton Park* and *Camp v. Pitts* both suggest that the absence of a record need not preclude judicial review, as a practical matter the absence of a contemporaneous paper record inhibits the ability of both the reviewing court and the appellant to discern precisely why the agency acted as it did.[78] Many agencies provide notice, an opportunity for hearing, a decision, and an internal appeal already; for those that do not, however, an APA requirement to do so would enhance important voice values that would, at a minimum, improve the perceived fairness of an adverse decision.[79]

CONCLUSION

Although the APA does not directly address informal agency adjudications, the Constitution itself imposes minimum requirements on the conduct of all government action. The guarantees of due process and equal protection, in particular, establish a baseline requirement of rational government action. Just as §§ 554, 556, and 557 effectively pretermit most constitutional claims involving procedural due process in formal adjudications, the APA should provide some minimal procedural safeguards in informal adjudications that significantly affect a particularized individual interest.

The benefits of such an approach are clear. As Justice Thurgood Marshall noted, "a requirement of procedural regularity at least renders arbitrary action more difficult."[80] Moreover, "proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error."[81] Establishing a guarantee of minimum process ex ante in a limited class of informal adjudications would advance these values in an important and significant way.[82]

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78. Moreover, *Overton Park* itself discourages the adoption of procedures that generate a paper record precisely because doing so facilitates judicial review. As Professor Rubin has suggested, "[r]eliance on such agency procedures will attract judicial attention the way honey attracts bears, and any agency that wants to avoid the added scrutiny attendant to an informal adjudication would be well advised to use some other mechanism for obtaining the public's views." Rubin, *supra* note 5, at 128. In this sense "[t]he procedural requirements that *Overton Park* devised are therefore parasitic on the agency's fortuitous choice to engage in trial-type procedure for collecting information." *Id.*

79. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 115-57 (1990) (arguing that people accept adverse decisions more readily when they perceive such decisions to have been the product of a fundamentally fair process).

80. Board of Regents v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting).

81. *Id.*

82. *See* Tyler, *supra* note 79, at 62-68, 162-78 (noting and explaining the importance of process values to the perceived fairness or justice of a government agency's action).

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