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Applications for Benefits: Due Process, Equal Protection, and the Right to Be Free from Arbitrary Procedures

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Applications for Benefits: Due Process, Equal Protection, and the Right to Be Free from Arbitrary Procedures

Virginia T. Vance*

On January 31, 2003, the Los Angeles Times reported that government-contracted employees shredded approximately 90,000 documents at the INS California Service Center in Laguna Niguel. Among those documents shredded were applications for political asylum and applications for visas. According to federal prosecutors, an inability to keep up with mounting paperwork motivated the contract employees to engage in the "shredding spree." The responsible employees now face federal charges.¹

Query: What happens when applicants for state benefits face similar difficulties?

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1. See Patrick J. McDonnell, *Paper Tear-Up Snafu Hits INS Facility*, L.A. TIMES, May 12, 2002, at B1 (describing the investigation into the incident); Monte Morin, *2 Accused of INS Shredding Spree*, L.A. TIMES, Jan. 31, 2003, at B5 (describing the incident).

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I. Introduction

In 1970, the Supreme Court established that the termination of a person’s welfare benefits demanded procedural due process protections, finding that welfare benefits are a statutorily created entitlement and thus a property interest.² Ten years later, the Supreme Court declined to grant certiorari to address whether the safeguards of procedural due process covered an *applicant* for welfare benefits.³ In fact, over the past twenty years, the Court has repeatedly declined to address the issue of whether an applicant for benefits enjoys the same procedural due process protections as a person already receiving the same benefits or, for that matter, whether an applicant receives *any* procedural due process protections.⁴ Most recently, in *American Manufacturers Mutual Insurance Co. v. Sullivan*,⁵ the Court narrowly dodged the issue once more.⁶ The Court’s repeated acknowledgement of the issue, and habitual avoidance of it, leaves a small but significant question looming over a

2. See *Goldberg v. Kelly*, 397 U.S. 254, 261–62 & n.8 (1970) (finding that the termination of an entitlement created by statute "involves state action that adjudicates important rights" and stating that welfare benefits are "more like 'property' than a 'gratuity'").

3. See *Peer v. Griffith*, 445 U.S. 970, 970–71 (1980) (mem.) (order denying certiorari) (Rehnquist, J., dissenting) (noting a question as to whether applicants for welfare benefits enjoy the same protections as those already receiving benefits).

4. See, e.g., *Lyng v. Payne*, 476 U.S. 926, 942 (1986) (stating that the Court has never held that procedural due process protects applicants for benefits); *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985) (failing to reach the question regarding whether there is a property right in an application for federal veterans’ benefits that implicates the Due Process Clause of Fifth Amendment); *Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1021 (1985) (mem.) (order denying certiorari) (O’Connor, J., dissenting) (asserting that the Court has never determined whether applicants for general assistance have a protected property interest).

5. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 43–44 (1999) (avoiding the issue of whether an employer or insurer may withhold medical treatment by finding issuers not to be "state actors"). For a discussion of the facts and reasoning of *American Manufacturers*, see *infra* notes 23–34 and accompanying text.

6. *Id.* at 61 n.13 (refusing to address the issue of whether there was a property interest in claims for payment under a state-regulated workers compensation act, as distinct from payment itself, because respondents did not contend such an interest).

large body of law: Is due process implicated when a person *applies* for a state benefit, and if not, does an applicant have any claim against a state agency when she feels that the state has arbitrarily denied her application for benefits?⁷

Originally identified as one of the "cracks" in "the new property" by Professor William Van Alstyne, the problem of an applicant's inability to obtain procedural protections to ensure a nonarbitrary denial of benefits still lurks within the framework of the modern administrative state.⁸ As Professor Van Alstyne observes:

When a litigant is adversely affected entirely as a predictable consequence of procedural grossness . . . he is in serious difficulty. The essence of his complaint is to the felt unfairness of procedural grossness itself—that it builds in such a large margin of probable mistake as itself to be intolerable in a humane society. The difficulty of his position appears to be, however, that *unlike* his freedoms of speech, association, assembly, religion, and petition . . . , and *unlike* his entitlement to privacy . . . , he cannot anchor a claim to freedom from procedural grossness per se in any clause of the Constitution.⁹

Current case law suggests that statutory construction can create a property right that guarantees some applicants procedural due process because of the nature of the interest at stake and the amount of government discretion involved in evaluating the application.¹⁰ However, other applicants who cannot point to

7. This Note primarily discusses this question in the context of state benefits, because the Administrative Procedure Act provides some measure of procedural due process protection, though very minimal, to applicants for most federal benefit programs. See 5 U.S.C. § 555(e) (2000) (requiring notice of denial and reasons for that denial for all applications). Specifically, the statute states:

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Id.

8. See William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 449–51 (1977) (identifying the problem a litigant may face if the government denies her application without reason as partly resulting from the constitution's failure to specifically identify a right to "freedom from procedural grossness").

9. *Id.* at 450–51.

10. See, e.g., *Mallette v. Arlington County Employees' Supplemental Ret. Sys.*, II, 91 F.3d 630, 638 (4th Cir. 1996) (finding that a statute granting a conditional benefit created an expectation of a benefit, and thus procedural due process was needed to protect the property interest in the application). The Court also found that in this particular case the "claim of entitlement . . . [was] bolstered by the nature of the benefit at stake," which was an employee's disability retirement benefits. *Id.* at 636; see also *Nat'l Ass'n of Radiation Survivors v.*

such a statutorily created right still face unsatisfactory answers as to why the government did not extend them a particular benefit.¹¹ Some state courts have sought to eliminate this problem and create uniform results by finding no property interest in any application for benefits.¹² This approach seems arbitrary because in the absence of some sort of statutory protection of fair process, the applicant has no remedy for a mistaken denial of benefits.¹³ Thus, the current state of the law leaves us with two possible alternatives: Either there is a limited right to procedural due process in specific circumstances as

Derwinski, 994 F.2d 583, 588 n.7 (9th Cir. 1992) ("[T]he district court correctly concluded that both applicants for and recipients of [Service-Connected Death and Disability (SCDD)] benefits possess a constitutionally protected interest in those benefits."); Haitian Refugee Ctr., Inc. v. Nelson, 872 F.2d 1555, 1562 (11th Cir. 1989) (concluding that an entitlement interest exists in the right to apply for the Special Agricultural Worker program); Raper v. Lucey, 488 F.2d 748, 752 (1st Cir. 1973) (finding that the freedom to make use of one's own motor vehicle is a liberty interest that due process protects, whether those proceedings relate to the suspension of a license or to the application for a license); Nat'l Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1312 (N.D. Cal. 1984) ("The court concludes that recipients and applicants have a protected property interest in their claims to SCDD benefits."), *rev'd on other grounds*, 473 U.S. 305 (1985); Harris v. Lukhard, 547 F. Supp. 1015, 1027 (W.D. Va. 1982) ("Viewing the Social Security Act and the Virginia regulations which administer the act as a whole, the Court concludes that these statutes and regulations create a legitimate entitlement and expectancy in Medicaid benefits for applicants who claim to meet the eligibility requirements."); Davis v. United States, 415 F. Supp. 1086, 1091-92 (D. Kan. 1976) (finding a property interest in an application for compensation for a work-related injury in prison because statutory language created a "legitimate claim of expectancy" of approval of the application if it fulfilled an objective medical standard for qualification).

11. See *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985) (finding no property right in a license or certificate of approval for an automobile junkyard despite the arbitrary actions of the state zoning board of appeals in denying the application because the evaluation standards set forth by the state gave the zoning board broad discretion in granting or denying licenses); *City-Wide Asphalt Paving, Inc. v. Alamance County*, 966 F. Supp. 395, 401 (M.D.N.C. 1997) (determining that no legitimate claim of entitlement to contract award was present because statutory language provided broad discretion to the local government in making its award decision).

12. See, e.g., *Zobriscky v. Los Angeles County*, 105 Cal. Rptr. 121, 123 (Cal. App. 1972) (finding no "general requirement for an evidentiary hearing in connection with the denial of an application for welfare benefits"); *Gregory v. Town of Pittsfield*, 479 A.2d 1304, 1308 (Me. 1984) ("In Maine a general assistance applicant has no property interest in benefits until he has been found qualified and eligible by the local authority . . ."); *Sumpter v. White Plains Hous. Auth.*, 278 N.E.2d 892, 894 (N.Y. 1972) ("[A] party aggrieved by loss of a pre-existing right or privilege may enjoy procedural rights not available to one denied the right or privilege in the first instance.").

13. See *Van Alstyne*, *supra* note 8, at 448-51 (discussing the "predicament of an individual foreclosed from some connection with government for a reason that he is unable to ascertain at all"); see also *supra* text accompanying note 8 (describing an applicant's difficulties in obtaining procedural protections).

defined by the property interest created by state statute, or there is absolutely no protection for applicants.

One may ask why it matters whether applications for benefits ought to trigger any due process concerns. The answer is simple: If the Court fails to acknowledge any due process concerns and sustains arbitrary and capricious state decisions with respect to any given application, it would in essence be signing off on a state government's right to treat its citizens arbitrarily and irrationally.¹⁴ For instance, a city zoning review board with broad discretion could deny any real consideration to an application for a license or certificate of location for a junkyard by rejecting the application as a favor to the mayor.¹⁵ In this situation, if the state did not provide any right to appeal or a right to sue under its own laws, the government disappoints a citizen's expectation that her government will at least observe minimal standards of fairness and rationality when considering her application.¹⁶ Legitimizing a state's arbitrary treatment of its citizens, irrespective of the discretion level a state actor enjoys in distributing a benefit, sets a dangerous precedent. Taking certain federal circuit court cases seriously, a state could easily escape its obligation to observe due process in certain circumstances by rewriting statutes to provide state decisionmakers with higher levels of discretion.¹⁷ Thus, decisions that do not

14. See Van Alstyne, *supra* note 8, at 450–51 (discussing the difficulty in challenging adverse decisions when a person believes that inadequate procedural protections, which create a significant potential for the mistaken denial of benefits, caused the denial).

15. See *Yale Auto Parts*, 758 F.2d at 56 (citing state superior court's findings of fact that the local zoning board had acted arbitrarily and against public policy in denying application for license before a hearing). The Second Circuit later found that there was no property interest in a license or certificate of approval and, hence, no right to due process protection, even though the zoning board violated procedures set forth by state law. *Id.* at 58–59.

16. See *id.* at 58–59 ("[E]ven an outright violation of state law in the denial of a license will not necessarily provide the basis for a federal claim . . . at least when the applicant has a state law remedy."); see also Van Alstyne, *supra* note 8, at 487 (discussing the possibility of locating the "freedom from arbitrary adjudicative procedures" in a liberty interest). As Van Alstyne states:

There is . . . an implication that the protected essences of personal freedom include a freedom from fundamentally unfair modes of governmental action, an immunity (if you will) from procedural arbitrariness Such a liberty may be at least as old as the idea of the social contract, which informs so much of our Constitution.

Id.

17. See, e.g., *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002) ("[A] party cannot possess a property interest in the receipt of a benefit when the state's decision to award or withhold the benefit is wholly discretionary."); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) ("Although procedural requirements ordinarily do not transform a unilateral expectation into a protected property interest, such an interest is created 'if the procedural requirements are intended to be a significant substantive restriction on . . . decision making.'" (quoting *Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984))); *Mahone*

acknowledge an individual's right to be free from procedural grossness threaten applications for benefits currently covered by procedural due process under the federal court property interest paradigm.

Although courts have primarily attempted to address this issue under the framework of a property interest that triggers procedural due process,¹⁸ reframing the issue as a liberty interest that implicates substantive due process may help cure the problem.¹⁹ In the alternative, recent Supreme Court precedent would seem to promote the use of equal protection to protect citizens from utterly arbitrary treatment by a state government.²⁰

This Note discusses the various means by which a plaintiff could attempt to state a claim against a state agency she feels has arbitrarily denied her application for benefits. In attempting to seal these cracks in "the new property,"²¹ Part II examines applications for benefits as property interests, an

v. Addicks Util. Dist., 836 F.2d 921, 931 (5th Cir. 1988) (finding no property interest in petition for annexation of land and stating that the court found "nothing to suggest that this policy is anything more than . . . a guiding principle" that assists the utility district in exercising its discretionary power). *But see* People v. Ramirez, 599 P.2d 622, 626 (Cal. 1979) (criticizing the theory that the broad discretion of decisionmakers removes the protections of procedural due process). The California Supreme Court reasoned that such a conclusion would allow states to bypass the Due Process Clause of the Fourteenth Amendment. *Id.* Specifically, it stated:

[A]s long as the interest is not one that would otherwise fall within the scope of constitutional concepts of liberty, the state may "define it out" of the due process clause by specifying that it is subject to the unconditional discretion of the person in charge of its administration; further, the state may apparently limit the scope of the clause in this manner irrespective of the extent to which "grievous loss" or "substantial adverse impact" results. The Supreme Court's doctrine has thus been criticized as ultimately leading to circular reasoning that contravenes the clause by leaving the state free to decide whether and to what extent procedures are to be followed in dealings with its citizens without regard to federal standards.

Id. (citations omitted).

18. *See supra* note 10 and accompanying text (discussing circuit court precedents that find a property interest in statutory language that gives rise to a legitimate claim of entitlement protected by procedural due process).

19. *See* Van Alstyne, *supra* note 8, at 487 (suggesting that liberty interest in a person's freedom to be free from procedural grossness may be found in substantive due process, thus triggering procedural safeguards).

20. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (*per curiam*) (upholding equal protection claim brought by class of one to address plaintiff's claim that she had been treated arbitrarily and differently from other similarly situated persons). For further discussion of *Village of Willowbrook*, see *infra* Part IV.B. *Cf.* Olech v. Vill. of Willowbrook, 160 F.3d 386, 387-89 (7th Cir. 1998) (finding valid equal protection claim for plaintiff under theory of "subjective ill will"), *aff'd*, 528 U.S. 562 (2000) (*per curiam*).

21. *See* Van Alstyne, *supra* note 8, at 445 (labeling problems within case law interpretation of government benefits, such as the lack of protection for applicants for benefits, in the title of his article, *Cracks in "the New Property"*).

approach utilized by several federal circuit courts. Next, Part III discusses the idea that liberty interests rooted in substantive due process may protect plaintiffs from such arbitrary treatment. Part IV analyzes equal protection as a viable tool to overcome the inherent difficulties presented in finding a liberty or property interest that implicates procedural or substantive due process. This Note concludes that locating a liberty interest under substantive due process effectively solves the problem; however, the current Supreme Court may be more likely to honor an equal protection claim as a means of providing relief to a citizen who suffers from an utterly arbitrary adverse government decision.²²

II. Procedural Due Process and the Property Interest Paradigm

The Supreme Court's comments in *American Manufacturers Mutual Insurance Co. v. Sullivan*²³ set the stage for the ongoing debate over due process protections and whether they should be afforded to applicants for benefits, though the Court managed to skirt the issue. In this case, the Court considered Pennsylvania's workers' compensation scheme.²⁴ To control costs, the state formed a "utilization review" procedure that analyzed the reasonableness of workers' claims before an insurer paid any medical expenses.²⁵ Respondents claimed that the state, through the Workers' Compensation Bureau of the Pennsylvania Department of Labor and Industry, withheld payment without predeprivation notice and without an opportunity to be heard in violation of due process.²⁶ In response to these claims, the Court noted that a deprivation of a constitutional right under the Fourteenth Amendment, as a 42 U.S.C. § 1983 claim, requires a state actor.²⁷ By attributing all withholding decisions to the private insurer, the Court found that the respondents failed to meet the requirements of their § 1983 claim because no state action was implicated in the withholding of the medical payments.²⁸

22. See *Village of Willowbrook*, 528 U.S. at 565 (2000) (per curiam) (finding valid an equal protection claim asserting that the Village treated plaintiff arbitrarily and differently from similarly situated persons).

23. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

24. *Id.* at 44.

25. *Id.* at 45–46.

26. *Id.* at 46–47.

27. See *id.* at 50 ("[T]he party charged with the deprivation must be a person who may fairly be said to be a state actor." (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982))).

28. *Id.* at 58.

The Court then evaluated "[w]hether the Due Process Clause requires workers' compensation insurers to pay disputed medical bills prior to a determination that the medical treatment was reasonable and necessary."²⁹ By phrasing the question in this manner, the Court avoided the broader question of whether a claim or application for benefit payments represented a property interest that deserved procedural protections.³⁰ Ultimately, the Court found no property interest in payments for medical treatments before a determination of the payments' reasonableness and necessity, because the state statute specifically defined the right as a right to necessary and reasonable payments.³¹

Though the majority easily discarded the issue of a property right in the application (or claim) itself without elaboration,³² Justice Ginsburg addressed the issue directly: "I do not doubt . . . that due process requires fair procedures for the adjudication of respondents' claims for workers' compensation benefits, including medical care."³³ Justice Stevens appeared to agree with this view, reasoning that because the procedures in place for the utilization review determined the scope of a plaintiff's property interest in the benefit, due process required that the procedures to determine the scope of the benefit be fair.³⁴ Thus, at least two Justices support the view that a property interest may exist in an application for a benefit, thereby implicating the procedural concerns of due process.

Although the Supreme Court has left the issue open, the circuit courts seem to agree that a property interest in an application will arise if a statute

29. See *id.* at 59 (quoting petition for certiorari).

30. See *id.* at 61 n.13 (declining to determine whether plaintiffs had a property interest in their claims for payment because respondents did not contend that they had such an interest).

31. See *id.* at 60–61 (stating that the employee's property interest only vests upon the clearing of two hurdles). As the Court stated:

[F]or an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, the employee must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary. Only then does the employee's interest parallel that of the beneficiary of welfare assistance in *Goldberg* and the recipient of disability benefits in *Mathews*.

Id.

32. See *id.* at 61 n.13 (declining to address whether there was a property interest in the claims for payment because the respondents failed to argue such an interest).

33. *Id.* at 62 (Ginsburg, J., concurring).

34. *Id.* at 63 (Stevens, J., concurring in part and dissenting in part). Justice Stevens cites *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), for support in finding a property interest in the claim at issue in *American Manufacturers*. *Id.* at 63–64. In *Logan*, the Court found that a statute creating a right to use adjudicatory procedures found in an employment law was a protected property interest. *Logan*, 455 U.S. at 429–30.

narrows the decisionmaker's discretion to specific eligibility criteria and the statute creates a legitimate claim of entitlement to that benefit if the applicant meets the specific eligibility criteria.³⁵ Mere guidelines that instruct a decisionmaker's discretion typically do not create a property interest.³⁶ The Supreme Court's decision in *Board of Regents v. Roth*³⁷ guides the lower

35. See, e.g., *Mallette v. Arlington County Employees' Supplemental Ret. Sys. II*, 91 F.3d 630, 635 (4th Cir. 1996) (finding that a county ordinance stating that "qualifying members 'shall receive' benefits" created a "legitimate claim of entitlement" in the application for the benefit); *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 588 n.7 (9th Cir. 1992) ("[T]he district court correctly concluded that both applicants for and recipients of SCDD benefits possess a constitutionally protected interest in those benefits."); *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989) (concluding that an entitlement interest exists in the right to apply for Special Agricultural Worker status because Congress promulgated rules that restricted the discretion of decisionmakers to grant benefits under the system); *Daniels v. Woodbury County*, 742 F.2d 1128, 1132 (8th Cir. 1984) ("[T]he authorizing statute coupled with the implementing regulations of the county creates a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements." (quoting *Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir. 1979))); *Ressler v. Pierce*, 692 F.2d 1212, 1215 (9th Cir. 1982) (finding that applicants for federal rent subsidies have a property interest in the application for those subsidies because "the authorizing statute coupled with the implementing regulations of the county creates a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements" (quoting *Griffeth*, 603 F.2d at 121)); *Holbrook v. Pitt*, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981) ("Applicants who have met the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause.").

36. See, e.g., *Jacobs, Visconti & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir. 1991) ("[T]he state law's requirement that zoning decisions be reasonable . . . is insufficient to confer upon the applicant a legitimate claim of entitlement."); *Madhane v. Addicks Utility Dist.*, 836 F.2d 921, 930-31 (5th Cir. 1988) (finding no property interest in property owner's application for annexation by a municipal utility district because the court "found nothing to suggest that this policy is anything more than that—a guiding principle which each district is to consider when making annexation decisions"); *Davis v. Ball Mem'l Hosp. Ass'n*, 640 F.2d 30, 38 (7th Cir. 1980) (finding that indigent patients had no property right in uncompensated medical services because "mere abstract qualification for the program [was] insufficient and that any expectation of receiving benefits [was] not fully justified"); *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980) (finding that decisionmaker's discretion to deny a license, limited only by reasonableness requirement, did not create a property interest, but that "[a] property interest may be created if 'procedural' requirements are intended to operate as a significant substantive restriction on the basis for an agency's actions").

37. See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (discussing the nature of a property interest). In *Roth*, a Wisconsin state university informed the respondent, an instructor hired for a specific term, that the university would not rehire him. *Id.* at 566. Though he had no tenure rights, the respondent challenged the university's decision, stating that the university failed to give him notice of any reason for their adverse hiring decision. *Id.* at 568. The Court held that respondent had no right to a statement of reasons or a hearing because he had no legitimate claim of entitlement to re-employment. *Id.* at 578. Specifically, the Court stated, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Property rights, according to the Court, "are

courts' ability to find a property interest in some applications.³⁸ The *Roth* court stated that property interests are creations of state law—"rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."³⁹

*Mallette v. Arlington County Employees' Supplemental Retirement System II*⁴⁰ provides a good example of the type of analysis a court uses when determining whether an applicant has a property interest in her application for benefits. In *Mallette*, the plaintiff challenged a denial of her application for service-related disability benefits.⁴¹ The plaintiff suffered from spina bifida, a condition that became aggravated after various work-related duties.⁴² As a result of these injuries, the plaintiff received worker's compensation benefits from 1983 through June 6, 1993, the end of the maximum statutory term for disability benefits.⁴³ The termination notice of the worker's compensation benefits led the plaintiff to believe that her benefits would convert to service-related retirement benefits.⁴⁴ The plaintiff submitted her application for retirement benefits on March 17, 1993, and a subsequent visit to a physician for the retirement system resulted in a recommendation that the plaintiff receive those benefits.⁴⁵ The plaintiff received notice that the retirement system's board of trustees would consider her application on July 1, 1993, and the board encouraged the plaintiff to attend this hearing.⁴⁶ At this hearing, the plaintiff,

not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

38. See, e.g., *Mallette v. Arlington County Employees' Supplemental Ret. Sys. II*, 91 F.3d 630, 634–35 (4th Cir. 1996) (using *Roth*'s interpretation of a legitimate claim of entitlement to determine whether plaintiff has a property interest in an application for retirement disability benefits); *Jacobs, Vinconsi & Jacobs*, 927 F.2d at 1116 (citing *Roth* and stating that "[a] property interest protected by the due process clause results from a legitimate claim of entitlement created and defined 'by existing rules or understandings that stem from an independent source such as state law'" (quoting *Roth*, 408 U.S. at 577)); *Daniels v. Woodbury County*, 742 F.2d 1128, 1132 (8th Cir. 1984) (citing *Roth*'s language regarding legitimate claims of entitlement and determining that Iowa relief statute created such an interest for applicants).

39. *Roth*, 408 U.S. at 577.

40. *Mallette v. Arlington County Employees' Supplemental Ret. Sys. II*, 91 F.3d 630 (4th Cir. 1996).

41. *Id.* at 632.

42. *Id.* at 632–33.

43. *Id.* at 633.

44. *Id.*

45. *Id.*

46. *Id.*

unaccompanied by counsel, learned that the retirement system's physician had revised his medical report and recommended denying the plaintiff's application.⁴⁷ The plaintiff received no opportunity to question the doctor or the system administrator and the board ultimately denied the plaintiff's application.⁴⁸ After unsuccessfully seeking an administrative remedy, the plaintiff filed a complaint in district court, alleging due process and equal protection violations.⁴⁹

The court began its analysis by reviewing the two-part inquiry made in cases that allege a due process violation:⁵⁰ First, did the plaintiff lose an interest that constitutes life, liberty, or property, and if so, did the plaintiff receive adequate procedural protection?⁵¹ Citing *Roth* and Justice O'Connor's discussion of administrative discretion in *Board of Pardons v. Allen*,⁵² the court

47. *Id.*

48. *Id.* at 634.

49. *Id.*

50. *See id.* ("[I]t is by now axiomatic that the language of the Due Process Clause—'nor shall any State deprive any person of life, liberty, or property, without due process of law . . . '—calls for two separate inquiries in evaluating an alleged procedural due process violation.").

51. *Id.*

52. *Bd. of Pardons v. Allen*, 482 U.S. 369, 382 (1987) (O'Connor, J., dissenting) (citing *Roth* and concluding that an entitlement is only created if a decisionmaker's discretion is constrained by law). In *Board of Pardons*, Montana prisoners not granted parole filed suit on behalf of prisoners who were eligible for parole or may become eligible for parole in the future. *Id.* at 370–71. Specifically, the prisoners claimed that the Montana Board of Pardons had denied prisoners their civil rights because the Board neither followed statutory criteria to determine parole nor provided reasons for denying parole. *Id.* at 371. The district court determined that the case was controlled by *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979). *Id.* "In *Greenholtz* the Court held that, despite the necessarily subjective and predictive nature of the parole-release decision, state statutes may create liberty interests in parole release that are entitled to protection under the Due Process Clause." *Id.* (citations omitted). The appeals court reversed the district court's decision. *Id.* at 372. The Court agreed with the district court and found that *Greenholtz* governed the case. *Id.* at 378. Specifically, the Court found that even though the factors guiding the Board were subjective, these factors significantly limited the discretion of the Board in granting parole, and thus created a liberty interest. *Id.* at 379–81. However, in her dissent, Justice O'Connor disagreed with the finding that the statute limited the discretion of the Board in a meaningful way. *Id.* at 382–83 (O'Connor, J., dissenting). Specifically, Justice O'Connor stated:

In my view, the distinction between an "entitlement" and a mere "expectancy" must necessarily depend on the degree to which the decisionmakers' discretion is constrained by law. An individual simply has nothing more than a mere hope of receiving a benefit unless the decision to confer that benefit is in a real sense channeled by law. Because the crucial inquiry in determining the creation of a protected interest is whether a statutory *entitlement* is created, it cannot be sufficient merely to point to the existence of some "standard." Instead, to give rise to a protected liberty interest, the statute must act to limit meaningfully the discretion of the decisionmakers.

focused on whether the county ordinance curbed the decisionmaker's discretion in granting or denying the benefit.⁵³ Noting that the county ordinance spoke in mandatory terms—"qualifying members 'shall receive' benefits"—and finding that particularized eligibility criteria substantially limited the decisionmaker's discretion, the court found that the ordinance created a "legitimate claim of entitlement" in the benefits for those persons who meet the eligibility requirements.⁵⁴ The nature of the benefit, a retirement fund, also influenced the court's decision that the application constituted a property interest.⁵⁵ In addition, the court refused to entertain a distinction between applicants for benefits and recipients of benefits in determining a property interest.⁵⁶ Specifically, the court stated:

We join our sister courts in rejecting the mechanical and simplistic applicant/recipient distinction where a statute mandates the payment of benefits to eligible applicants based on objective, particularized criteria. As explained in *Roth*, the Supreme Court's procedural due process jurisprudence focuses on whether statutory provisions create a right, not whether benefits have been received in the past. The Arlington Retirement System creates in its members a legitimate expectation of receiving benefits and a consequent right to be heard. Eligible applicants are no less entitled to that expectation than are eligible recipients, and the potential consequences of denying disability benefits are no less potentially dire than those of revoking them.⁵⁷

Thus, the court concluded that due process would apply to the plaintiff's application for benefits.⁵⁸

Id. at 382 (O'Connor, J., dissenting).

53. *Mallette v. Arlington County Employees Supplemental Ret. Sys. II*, 91 F.3d 630, 635 (4th Cir. 1996).

54. *Id.* at 635 (emphasis added).

55. *Id.* at 636. As the court stated:

The statutory claim of entitlement in this case is bolstered by the nature of the benefit at stake. The right to payment of disability retirement benefits arises by virtue of past labor services and past contributions to a disability fund. Member employees, who contribute their earnings to the system, reasonably expect that accrued benefits will be waiting if they need them and qualify for them. As a member of the class of persons the Retirement System was intended to protect and benefit, Mallette has more than an abstract desire for the benefits. If she can make a *prima facie* case of eligibility, she has a property interest in those benefits and an accompanying right to be heard.

Id.

56. *See id.* at 638 (following the lead of other courts of appeals in declining to make a distinction between applicants and recipients of benefits).

57. *Id.* at 639–40 (citations omitted).

58. *Id.*

The court noted that due process was a flexible notion and that a balancing of three factors would determine what process was due: (1) the private interest at stake; (2) the risk of erroneous deprivation; and (3) the government's interest, including the financial and administrative burdens that additional procedures would require.⁵⁹ Balancing these factors, the court found that the procedures in place in evaluating the plaintiff's application deprived her of due process.⁶⁰ In particular, the court found that, based on the plaintiff's account of events, she "could not have understood the adverse nature of the hearing, could not have adequately evaluated her need for counsel, and could not have prepared appropriate rebuttal evidence."⁶¹ The court determined that there was a substantial risk of erroneous deprivation and that the plaintiff ultimately deserved more process than she received.⁶² Thus, on remand, the court required the district court to balance the three factors to determine how much more process the plaintiff was due.⁶³

Mallette represents the typical analysis for due process challenges to denials of applications. The requirement that there be specific criteria that guide a decisionmaker in granting and denying mandatory benefits—that is, benefits that the decisionmaker must grant if the applicant meets the statutorily defined criteria—essentially bars due process claims for applications for benefits when the decisionmaker's discretion is less restricted.⁶⁴ Despite the

59. *Id.* at 640 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

60. *See id.* ("These factors lead us to conclude that Mallette has alleged facts sufficient to persuade a reasonable factfinder that she was deprived of the minimum procedural safeguards guaranteed her under the circumstances.").

61. *Id.* at 641.

62. *See id.* ("Because we find sufficient evidence in the record to suggest that Mallette did not receive notice 'reasonably calculated' to afford her a meaningful opportunity to present her side at a hearing before the System's Board of Trustees, we remand the case for further proceedings.").

63. *Id.* The court also noted that an applicant sometimes may be due less process than a current recipient of benefits. *Id.* at 640 n.5. As the court explained:

That is because applications for benefits often turn on objective factors not productively developed in a hearing, such as age or length of employment. But where eligibility turns on subjective factors, an applicant no less than a recipient is entitled to an opportunity to be heard.

Id.

64. Compare Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 963 (2000) ("[A] purely discretionary benefit—one that a government agent is free to dispense or withhold at will—does not qualify [as an entitlement]."), with *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118, 1127–28 (W.D. Pa. 1980) (finding a limited property interest in submitting bids for a cable television contract where the city retained the right to reject all bids). In *Three Rivers*, the plaintiffs and three other companies submitted a bid to provide a cable television service to the city of Pittsburgh. *Id.* at 1120. The council

fact that a majority of federal courts adopt this approach to applications for benefits,⁶⁵ some debate remains as to whether an application for benefits should

rejected all four bids for failure to comply with the Cable Communications Ordinance (CCO) and the Request for Proposals (RFP). *Id.* All four companies received an opportunity to submit new bids, but the council rejected these bids again for noncompliance and refused to permit amendments to the bids. *Id.* at 1120–21. The plaintiffs asserted that one bidder, Warner, met secretly with the Bureau of Cable Communications, learned the specific deficiencies with its second bid, and that later the Bureau allowed this bidder to correct at least one of the deficiencies. *Id.* at 1121. One of the plaintiffs also asserted that its second bid complied with the CCO and RFP. *Id.* The council ultimately awarded the contract to Warner. *Id.* The plaintiffs filed an action claiming that: (1) the council award disregarded recommendations from the Bureau of Cable Communications and the Cable Communications Advisory Committee that the contract be awarded to Three Rivers; (2) the award ignored the fact that Warner's bid contained deficiencies; (3) the award was the result of a sham proceeding designed to favor Warner; and (4) the reason that the council provided for the award was "infirm since the specifications regarding that program were unconstitutionally vague." *Id.* As to the due process claim, the district court acknowledged that it was difficult to ascertain the nature and source of the property interest. *Id.* at 1128. However, the court said that the property interest would not arise from adherence to the statutory procedures delineated for the CCO and RFP. *Id.* The court then stated that if there was a property interest, it would be located in the "benefit whose enjoyment is sought to be regulated by the procedure; namely, the award of the contract." *Id.* at 1129. Reviewing the statutory language of the CCO, the City's Home Rule Charter and the City Code, the court determined that although the city had no obligation to award a contract, once it chose to award such a contract, it had to award the contract to the lowest bidder. *Id.* at 1130. In determining the lowest bidder, city statutes demanded that the "awarding party must exercise its discretion in a non-arbitrary fashion." *Id.* at 1131. Specifically, the court found, "The due process to which one possessing the protected interest was entitled was the non-arbitrary exercise by the city of its discretion in making the award." *Id.* Though the court recognized that it could be argued that only one of the bidders would be entitled to due process—"a non-arbitrary evaluation of its bid"—it stated that the spirit of cases such as *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979) (holding that "the expectancy of release provided in [the] statute is entitled to some measure of constitutional protection") and *Winsett v. McGinnes*, 617 F.2d 996, 1007 (3d Cir. 1980) ("We hold that a state-created liberty interest in work release arises when a prisoner meets all eligibility requirements under the state regulations and the exercise of the prison authorities' discretion is consistent with work release policy.") supported the notion that Three Rivers only needed to establish its status as a bidder to invoke due process protection. *Id.* at 1131–32 n.14. This view is an extremely liberal reading of the property interest rule created by the circuit courts, in that discretion limited by rationality does not appear to fit within the definition of specific eligibility requirements that usually confer a property interest in an application for benefits.

65. See *Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1021 (1985) (mem.) (order denying cert.) (O'Connor, J., dissenting) (asserting that the Court has never determined whether applicants for general assistance have an interest protected by due process, but finding that most lower courts have found such an interest). As Justice O'Connor explained:

One would think that where state law creates an entitlement to general assistance based on certain substantive conditions, there . . . results a property interest that warrants at least some procedural safeguards Although this Court has never addressed the issue whether applicants for general assistance have a protected property interest . . . , the weight of authority among lower courts is [that they have].

constitute a property interest.⁶⁶ Even though the Supreme Court has expressly held that a liberty interest can arise from statutory language that creates a mere expectation of a benefit,⁶⁷ the Court has thus far declined to transfer this idea into the property realm in discussing applications for benefits.⁶⁸

Id. (O'Connor, J., dissenting) (citations omitted).

66. See *Peer v. Griffeth*, 445 U.S. 970, 970 (1980) (mem.) (order denying cert.) (Rehnquist, J., dissenting) (questioning whether state-mandated welfare benefits should cue procedural safeguards for applicants for those benefits and citing differing opinions of what actually constitutes a property interest for due process concerns); see also Merrill, *supra* note 64, at 967 n.299 (arguing that no property right should vest in an application for benefits). Professor Merrill is critical of the idea that applications for benefits can trigger the protection of due process, stating that "[t]he positivist trap in the form of too much property is a [great] concern, given the vast range of government 'entitlements' established by existing nonconstitutional law." *Id.* at 968. Regarding applications for benefits specifically, he states:

Lower courts have reached varying results in considering whether procedural due process guarantees apply to government decisions denying initial claims to benefits, and the Supreme Court has reserved judgment on the question The modified *Memphis Light/Logan* definition would resolve this dispute by finding no property unless the state seeks to terminate a presently existing entitlement. This result is consistent not only with the perceptions that individuals experience a loss of existing benefits more sharply than they do the failure to gain new benefits, but, more importantly, with the objective of avoiding the too-much-property trap, with the inevitable watering-down of protections that follows for claimants with more serious claims.

Id. at 967 n.299 (citations omitted).

67. See *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979) (finding that the structure and language of the Nebraska parole statute created a "legitimate expectation of release absent the requisite finding that one of the justifications for deferral exists"). But see Merrill, *supra* note 64, at 964 (suggesting that the positive liberty interests recognized by the Court—"new" liberty interests—should be distinguished from "new" property rights). As Professor Merrill explains:

Positive liberty interests typically involve freedoms from restraint or punishment that the state is otherwise free to inflict "[N]ew" liberty interests typically do not have a readily ascertainable monetary value, so the fact that the entitlement has a monetary value would appear to provide a reasonable basis for differentiating *Roth*-type property from new liberty interests.

Id. at 964–65.

68. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 61 n.13 (1999) (refusing to address the issue of whether there was a property interest in claims for payment under a state-regulated workers compensation act, as distinct from payment itself, because the respondents did not claim such an interest); *Lyng v. Payne*, 476 U.S. 926, 942 (1986) (stating that the Court has never held that procedural due process protects applicants for benefits); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985) (failing to reach the question regarding whether there is a property right in an application for federal veterans' benefits that implicates the Due Process Clause of Fifth Amendment); *Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1021 (1985) (mem.) (order denying certiorari) (O'Connor, J. dissenting) (asserting that the Court has never determined whether applicants for general assistance have a protected property interest).

III. Substantive Due Process and Liberty

In 1964, Professor Charles Reich introduced to the legal world the concept of *The New Property*.⁶⁹ In this groundbreaking article, Reich articulated the unique nature of the modern administrative state and the various benefits that it doles out from its "largess."⁷⁰ Reich identified various concerns that led him to suggest that courts should attach a property-like right to certain governmental benefits.⁷¹ Two of these concerns are particularly relevant to our discussion: First, governmental power expands when the government decides to extend or offer a benefit.⁷² Second, this power is magnified by an administrative agency's discretion in how to interpret its own authority and make policy.⁷³ Reich's solution to these two concerns was to give the individual a property right in at least part of the largess she receives from the government, so that the individual may have some protection from an unjust revocation of her benefits, thus protecting her self-sufficiency.⁷⁴ However, this solution is short-sighted. While Reich asserts a property interest in things such as welfare benefits and social security⁷⁵ because a person's status depends on these benefits,⁷⁶ he neglects to consider the problem of benefits that may not be entirely essential to

69. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

70. See *id.* at 733–36 (describing the numerous and various types of benefits that the modern administrative state offers, from jobs to occupational licenses, and from governmental contracts to subsidies).

71. See *id.* at 785 (suggesting that a property interest should attach when largess is linked to personal status). As Reich proposes, "[F]orms of largess which are closely linked to status must be deemed to be held as of right. Like property, such largess could be governed by a system of regulation plus civil or criminal sanctions, rather than a system based upon denial, suspension and revocation." *Id.*

72. See *id.* at 746 (stating that distribution of government largess expands the government's power). Specifically, Reich noted that "[w]hen government—national, state or local—hands out something of value, whether a relief check or a television license, government's power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess. It obtains new rights to investigate, to regulate, and to punish." *Id.*

73. See *id.* at 749–51 (finding that the nature of administrative governance—in allowing an agency to interpret its own power, to hold multiple functions, and to administer sanctions, coupled with individual actors unable or unwilling to resist agency manipulation—increases governmental power over the individual).

74. See *id.* at 785–86 (suggesting that government benefits linked to status should be treated as property to reinforce a person's dignity and self-sufficiency).

75. See *id.* at 785 ("The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance.").

76. See *id.* ("[S]tatus deriv[es] primarily from source of livelihood.").

status, but are nonetheless important in the sense that the grant of these benefits expands the government's powers over the individual.⁷⁷

In thinking about the enlargement of government power via the offering of various benefits, when granting or denying a benefit not recognized as a property right,⁷⁸ the decisionmaker needs to observe only those procedures mandated by the corresponding state statute.⁷⁹ Applications for benefits granted or denied at the sole discretion of an agency's decisionmaking official, with little or no statutory guidance as to how to make the determination, do not implicate due process protections.⁸⁰ The high level of discretion that an official has in extending a benefit necessarily precludes any claim that the applicant had a legitimate claim of entitlement to the benefit under the current property regime.⁸¹ So, where does this leave the minority applicant for a state scholarship, applying for a scholarship awarded by a state's department of education on the basis of undefined "merit" and minority status? Where does this leave the applicant for the state small business loan program, where the basis for the determination is ill-defined "need"? These current victims of the property paradigm for government benefits may suffer potentially arbitrary governmental actions because procedural due process challenges do not exist.

One way to solve the under-inclusiveness of the current property paradigm is to view an applicant's interest not as a property interest (regardless of any

77. *See id.* at 746–51 (concluding that by extending benefits, the government automatically expands its power and stating that this power is magnified by an agency's wide degree of discretion in determining its own policies and interpreting its own power).

78. By property right, I mean one found either under Reich's status-benefit theory or the current federal circuit court evaluation of legitimate claims of entitlement.

79. *See Van Alstyne, supra* note 8, at 449 (discussing the problem of denying an applicant a license without adequate procedural protections). As Van Alstyne states:

To be sure, in some of these situations the government may itself be sufficiently concerned about the risk of error to provide for appellate procedures less prone to error. In such cases the adversely affected party may take advantage of those additional procedures or, failing that, sue to secure specific compliance with whatever procedures the agency has itself seen fit to provide. But that, by definition, is to say only that government may be held to do what it undertakes to do, leaving government free to reconsider the matter and free to arrange to do less thereafter.

Id.

80. *See supra* note 17 (discussing how the level of discretion that a decisionmaker has often determines whether or not a property interest exists).

81. This idea logically follows from the notion that when the decisionmaking official has limited discretion, applications for benefits create a legitimate claim of entitlement, a property interest protected by the Due Process Clause. *See supra* note 17 and accompanying text (discussing how the level of discretion that a decisionmaker has often determines whether or not a property interest exists).

potentially legitimate claim of entitlement), but as a liberty interest.⁸² Under this theory, substantive due process protects a liberty interest defined as "freedom from arbitrary adjudicative procedures."⁸³ This theory is not without merit, as the Supreme Court has already held that substantive due process protects persons from conscience-shocking actions.⁸⁴ In this sense, a government official could not exercise his discretionary authority by throwing darts at a wall to determine who will receive a coveted government benefit.⁸⁵ In addition, in locating such a liberty interest, a court would not be confined to searching state law for that interest.⁸⁶ Rather, in order to respect the substantive

82. See Van Alstyne, *supra* note 8, at 487 (suggesting that "freedom from arbitrary adjudicative procedures" is a substantive element of liberty); see also Ronald J. Krotoszynski Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 624 (1997) (citing Van Alstyne's liberty interest theory with approval and stating that "[a]rbitrary or irrational conduct by government officers constitutes a substantive constitutional wrong, regardless of the adequacy or inadequacy of the procedures surrounding the action").

83. Van Alstyne, *supra* note 8, at 487. In other words: "[T]he ideas of liberty and of substantive due process may easily accommodate a view that government may not adjudicate the claims of individuals by unreliable means." *Id.*

84. See *County of Sacramento v. Lewis*, 523 U.S. 833, 848 n.8 (1998) ("[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."). The Court went on to explain that at the core of the meaning of due process was protection from arbitrary action:

The principal and true meaning of [due process] has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat. 235–244 [(1819)] . . . : "As to the words from Magna Carta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

We have emphasized time and again that "the touchstone of due process is protection of the individual against arbitrary action of the government" . . . , whether the fault lies in a denial of fundamental procedural fairness . . . , or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective

Id. at 845–46 (some citations omitted).

85. Under Van Alstyne's analysis, throwing darts to determine who receives the benefit would be arbitrary. The adjudicative procedure is clearly unreliable, even if the sole qualification to apply for a limited benefit, such as a scholarship, is "merit." The official has a duty to at least review all applications, in order that an applicant's merit might be evaluated in comparison to the other applicants.

86. See *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) ("Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States."), *overruled in part* by *Sandin v. Connor*, 515 U.S. 472 (1995). Though the Court stepped away from the extent of liberty interests created by prison regulations in *Sandin v. Connor*, 515 U.S. at 477–88, it remains true today that liberty interests can be created out of

due process liberty interest, the state would be responsible for defining the method of accepting or denying applicants and giving the official more guidance on how to make such determinations by more clearly defining factors that clarify the meaning of the selection criteria.⁸⁷ In this manner, the process owed to the minority scholarship applicant might be a letter of receipt of the application and short explanation of the reasons for denial of the application, coupled with a procedure to petition for reconsideration.⁸⁸

With this minimum process, the applicant would be able to determine if the review board correctly determined the sole nondiscretionary factor—the fact of her minority status—and at a minimum, the applicant would know that someone had reviewed her application.⁸⁹ If the letter indicated that the determination of her minority status was incorrect, then the procedure would serve its purpose by exposing agency error and allowing the applicant to challenge that error.⁹⁰ No further process would be due or practical because of

state law or the Due Process Clause. *But cf.* *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (finding that state law, not the Constitution, creates property interests).

87. As an alternative to developing better selection criteria, the state could require that all decisions be rational.

88. See Van Alstyne, *supra* note 8, at 489 ("It is perfectly familiar learning that when due process applies, its particular dimensions are nevertheless the function of many contextual considerations.").

89. See *id.* at 487 ("[T]he ideas of liberty and of substantive due process may easily accommodate a view that government may not adjudicate the claims of individuals by unreliable means."); see also Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. REV. 297, 330 (1982) (advocating a constitutional right to know why administrative decisions are made). As Professor Morgan states:

[T]he absence of prescribed criteria to guide administrative decisionmaking does not eliminate the need for reasons requirements in order to protect against erroneous decisions. Indeed, . . . the need for a statement of reasons may be greatest where [a person] is "not even afforded the protection of written standards to govern the exercise of the powers of the Board of Pardons."

Id. (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 472 (1981) (Stevens, J., dissenting)). Professor Morgan argues that people subject to administrative decisions, such as decisions made by a parole board, should at a minimum receive a statement of reasons for the denial of parole and a list of the facts relied upon for the decision. *Id.* at 332. However, in the context of a scholarship applicant, a shorter statement should suffice. After all, as Justice Harlan stated in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), "[Liberty] is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." Therefore, any remedial procedures due for a substantive due process violation of that liberty should enjoy similar flexibility. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). As the interest of a scholarship applicant is minimal as compared with that of a prisoner, though a statement may be due, it would be much more limited than Professor Morgan's suggestions.

90. See Van Alstyne, *supra* note 8, at 487 (finding that the ideas of liberty and substantive due process should not allow the government to make determinations by unreliable means).

the significant discretion involved.⁹¹ For instance, providing a list of specific reasons for each candidate's failure to obtain the scholarship would be administratively burdensome on the agency, which may be operating under decisional and time constraints.⁹² In addition, due to the discretionary nature of the determination, subjective reasons might be hard to articulate.⁹³ In the sense that the ultimate issuance of the benefit rests on these subjective factors, such decisions may seem arbitrary. However, by issuing letters of receipt and general statements of reasons for denials, the agency's minimum procedures provide some evidence that it has considered all applications.

Critics of the theory that liberty includes within its meaning freedom from arbitrary adjudicatory procedures state that "there would be no need to mention any protected substantive interests if the clauses intended to establish a right to due process without regard to the substantive interest at stake."⁹⁴ This argument has a certain measure of logical force, but when one considers the alternative—that there is no general right to be free from arbitrary adjudicatory procedures—it seems a counterintuitive assumption.⁹⁵ After all, if the "touchstone of due process is protection of the individual against arbitrary

91. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (finding three factors relevant when determining the "specific dictates" of due process). The *Mathews* Court identified the factors a court must consider:

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

Id. at 335; see also *Zinerman v. Burch*, 494 U.S. 113, 126 (1990) (concluding that in determining whether due process requirements are sufficient, the court must "examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law"); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (stating that due process is "flexible and calls for such procedural protections as the particular situation demands").

92. See *Mathews*, 424 U.S. at 335 (finding fiscal and administrative burdens relevant considerations when determining whether additional procedures are necessary).

93. See *Morgan*, *supra* note 89, at 322 ("In the context of reasons requirements, the Court's focus on positive law definitions of protected interest has led it to reject arguments for imposing reasons requirements on 'discretionary' decisionmaking because of the absence of prescribed criteria establishing an 'entitlement' to a particular result.").

94. Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 18 (1983).

95. See *Van Alstyne*, *supra* note 8, at 487–88 (finding that the freedom to be free from "arbitrary adjudicatory procedures" is in accord with "highly conventional social contract theories that yield the background of the Constitution").

action of the government,⁹⁶ then a person should at least be able to expect a minimum level of rationality from her government when she interacts with it, regardless of the benefit at issue or the discretion of the decisionmaker.⁹⁷

The plausibility of attacking adverse benefit applications decisions under such a liberty approach is not clear. Research reveals only one case where an applicant has challenged a denial of an application for benefits under the theory that the agency abridged the applicant's right to be free from arbitrary adjudicatory procedures.⁹⁸ However, in other contexts, arguments asserting this substantive liberty right have had varying degrees of success.⁹⁹ For the most part, courts

96. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see also Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (finding that substantive due process includes "freedom from all substantial arbitrary impositions and purposeless restraints and . . . also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment" (citations omitted)).

97. *See Morton v. Ruiz*, 415 U.S. 199, 232 (1974) ("No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds."); *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968) (explaining that arbitrary agency action "cannot be reconciled with the fundamental principle that ours is a government of laws, not men"); *McDonough v. Goodcell*, 91 P.2d 1035, 1039 (Cal. 1939) ("[D]iscretion must be exercised within legal bounds. Those bounds are generally that the discretion of the administrative officer or board may not be exercised arbitrarily, capriciously, fraudulently, or without factual basis sufficient to justify the refusal."); *State v. Wheelock*, 45 A.2d 430, 432-33 (Vt. 1946) ("[D]iscretion as to the granting of licenses may lawfully be delegated to public officials without prescribing definite rules of action, but not, however, to be exercised arbitrarily, for that would not be discretion."); *see also Van Alstyne*, *supra* note 8, at 487 (noting that case law suggests that one's personal freedom includes the protection to be free from a government's arbitrary decisionmaking). Van Alstyne states that "[s]uch a liberty may be at least as old as the idea of the social contract, which informs so much of our Constitution." *Id.*

98. *See Saleeby v. State Bar*, 702 P.2d 525, 535-36 (Cal. 1985) (finding a statutorily created right to *apply* for a compensation benefit from the state bar association and finding that this right triggers procedural due process protections). Specifically, the court stated:

As we have described, petitioner does not have a right to an award from the [Client Security Fund (CSF)]. The bar is free to exercise its discretion and to set any guidelines it sees fit which advance the legislative policy behind the CSF. Nonetheless, an applicant may be entitled to relief "if the announced grounds for [the bar's decision have] been patently arbitrary or discriminatory."

Id. at 536 (quoting *People v. Ramirez*, 599 P.2d 622, 629 (Cal. 1979)). Because the California court fixed the focus of due process claims on the freedom to be free from procedural grossness, the procedure of decisionmaking itself, it suggests that statutory benefit schemes, even if highly discretionary, must still provide procedural protections. *Id.* at 534.

99. *Compare Ramirez*, 599 P.2d at 626-27 (recognizing that the freedom to be free from procedural grossness protects "dignitary values") *with Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (finding unpersuasive a claim of liberty interest in procedure).

generally have rejected the notion of the existence of a liberty interest as unpersuasive.¹⁰⁰

A. *People v. Ramirez*

One court that has not rejected such an interest is the California Supreme Court.¹⁰¹ Thus, it would be prudent to examine this court's reasoning to determine why it identified such a liberty interest and the procedural protections that the liberty interest yielded. In *People v. Ramirez*,¹⁰² the California Supreme Court confronted the meaning of the state's due process clause.¹⁰³ To guide its opinion of the scope of California's due process clause, the court reviewed United States Supreme Court precedent regarding the federal Due Process Clause.¹⁰⁴

In *Ramirez*, a state court had convicted the appellant of second degree burglary in 1970, and he pleaded guilty to possession of heroin in 1971.¹⁰⁵ After adjourning

100. See, e.g., *Olim*, 461 U.S. at 250 (finding unpersuasive a claim of liberty interest in procedure); *United States v. Jiles*, 658 F.2d 194, 200 (3d Cir. 1981) (finding unpersuasive a claim of property interest in procedure); *Bills v. Henderson*, 631 F.2d 1287, 1298-99 (6th Cir. 1980) (finding that procedural rules created by administrative bodies do not create a liberty interest recognized by the federal constitution); *Pugliese v. Nelson*, 617 F.2d 916, 924-25 (2d Cir. 1980) (finding that a policy statement did not affect the U.S. Attorney General's discretion to grant or deny a benefit); *Cofone v. Manson*, 594 F.2d 934, 938 (2d Cir. 1979) ("Although a Due Process Clause liberty interest may be grounded in state law that places substantive limits on the authority of state officials, no comparable entitlement can derive from a statute that merely establishes procedural requirements."); *Lombardo v. Meachum*, 548 F.2d 13, 16 (1st Cir. 1977) ("We do not regard it as inconceivable that substantive protections could be inferred from the existence of procedural safeguards but where, as here, the practice is that there are no limitations on the administrator's discretion in these matters, we see no basis for doing so.")

101. See *Ramirez*, 599 P.2d at 626-27 (finding that substantive liberty includes the right to be free from arbitrary adjudicatory procedures). A subsequent case, *Schultz v. Regents of Univ. of Cal.*, 160 Cal. App. 3d 768 (Cal. Ct. App. 1984), attempted to limit the scope of *Ramirez*. Specifically, *Schultz* stated that *Ramirez* should be limited to the "arena of deprivation of statutory interests." *Id.* at 786. However, the context of *Schultz*, a case where an employee sought a hearing on a mere reclassification of his position and not a demotion or an application for a different position, *id.* at 773-74, distinguishes it from application for benefit cases. In addition, given the holding in *Saleeby*, 702 P.2d at 535-36, which found a statutorily created right to apply for compensation benefits from state bar association triggered procedural due process protections, it is unclear how such a limitation, imposed by a single state appellate court, would affect the holding of *Ramirez*. For a discussion of *Saleeby*, see *infra* part III.B.

102. *People v. Ramirez*, 599 P.2d 622 (Cal. 1979).

103. See *id.* at 624 ("In this case we review the scope of the due process clauses of the California Constitution.")

104. See *id.* at 625 ("We begin our analysis by examining United States Supreme Court decisions discussing the federal due process clause.")

105. *Id.* at 624.

criminal proceedings in each case, the state court determined that the appellant was, or was in danger of becoming, a narcotic addict.¹⁰⁶ The court committed him to the California Rehabilitation Center (CRC) for treatment.¹⁰⁷ After four years, he obtained outpatient status.¹⁰⁸ Two years later, the police arrested appellant for resisting arrest and disturbing the peace.¹⁰⁹ The director of corrections subsequently found that appellant "was 'not a fit subject for confinement or treatment' in the CRC."¹¹⁰ The superior court held a hearing on the "propriety of the order excluding appellant from the CRC" and found that the Director did not abuse his discretion in making his determination.¹¹¹ The superior court then terminated the appellant's CRC commitment and criminal proceedings against him resumed.¹¹² On appeal, appellant claimed that the procedures used by the CRC to exclude him from their program denied him his right to procedural due process under the California constitution.¹¹³

The California Supreme Court began its evaluation of the appellant's claim by evaluating Supreme Court case law regarding the federal Due Process Clause.¹¹⁴ The court found that under federal law, liberty interests, like property interests, derive from the federal Constitution or state law.¹¹⁵ The court examined Supreme Court precedent and found that "[w]hen the asserted interest is derived exclusively from state law, it will be recognized as within the scope of due process liberty if the state statute protects the interest by permitting its forfeiture only on the happening of specified conditions."¹¹⁶ Conversely, it noted that a statute not containing specific conditions for revocation of a benefit will yield no due process protection under Supreme Court precedent.¹¹⁷ Finding that the vague statutory language limited the CRC director's discretion,¹¹⁸ the court found that the appellant's interest in

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 625.

114. *See id.* ("We begin our analysis by examining United States Supreme Court decisions discussing the federal due process clause.")

115. *See id.* ("In interpreting the federal clause, the Supreme Court has held that a prisoner may derive a due process liberty interest from either the Constitution or state law.")

116. *Id.*

117. *See id.* ("By contrast, in cases in which a statute does *not* protect an interest by specifying that its loss is subject to the happening of some condition, a protected liberty interest is not created under federal law.")

118. *See id.* (stating that the CRC director must decide whether the person is not a fit

remaining in the CRC was a liberty interest protected by federal due process that warranted some degree of procedural protection.¹¹⁹

However, the court boldly expanded its finding, accepting the conclusion that the situation warranted procedural protection under Supreme Court case law, but finding the Supreme Court's analysis unsatisfactory.¹²⁰ Specifically, the California court pointed to the effect of the Supreme Court's reasoning:

[A]s long as the interest is not one that would otherwise fall within the scope of constitutional concepts of liberty, the state may "define it out" of the due process clause by specifying that it is subject to the unconditional discretion of the person in charge of its administration; further the state may apparently limit the scope of the clause in this manner irrespective of the extent to which "grievous loss" or "substantial adverse impact" results.¹²¹

Citing Van Alstyne, among other scholars, the court noted that the Supreme Court's reasoning leaves a state free to determine what procedures to follow when it deals with its citizens.¹²² The court then found that the current federal Due Process Clause analysis ignores fundamental values found at the root of the Due Process Clause.¹²³

Initially, the approach fails to give sufficient weight to the important due process value of promoting accuracy and reasonable predictability in governmental decision making when individuals are subject to deprivatory action. The Supreme Court itself has stated that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." And, as one federal circuit court observed with respect to

subject for confinement or treatment before he excludes a person from the program, considering excessive criminality or other relevant reasons to make his determination).

119. *See id.* ("[S]ince exclusion is conditioned by the terms of the statute, the patient-inmate's interest in remaining in the CRC is apparently within the scope of due process liberty and therefore warrants some degree of procedural protection.").

120. *See id.* at 626 ("Although we agree with [the Supreme Court's] conclusion, the reasoning appears anomalous.").

121. *Id.* *But see* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty."). As the *Loudermill* Court explained:

The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Id. (citations omitted).

122. *See* *People v. Ramirez*, 599 P.2d 622, 626 (Cal. 1979). *But cf.* *Loudermill*, 470 U.S. at 541 (finding that a state cannot create a right and then limit it by the quantity and quality of the procedural protections it provides for that right).

123. *Ramirez*, 599 P.2d at 626.

occupations controlled by government, "The public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse."¹²⁴

The California court noted that in order to counteract such abuse, a reviewing court must focus on procedural protections that create reliable results, rather than initially focusing on whether the state grants or denies the benefit on the basis of certain specified criteria.¹²⁵ Explaining further difficulties with the federal approach, such as failing to recognize the dignity and worth of the individual, the court decided to break with Supreme Court interpretations of the Due Process Clause and held that an individual's statutory interests must always be evaluated within the context of the principle that substantive liberty includes the right to be free from arbitrary adjudicatory procedures.¹²⁶

Finding a substantive liberty interest that triggers procedural due process protections, the court then proceeded to address how it would determine the procedures necessary to honor the Due Process Clause.¹²⁷ As Van Alstyne predicted, finding a liberty interest in substantive due process triggered procedural protections as a remedy for a violation of the interest.¹²⁸ Observing that due process is a flexible notion, the court determined that the process due will always turn on the balancing of the interests at stake in any given situation.¹²⁹

The court offered four factors to guide a court in determining the amount of due process required: (1) the private interest affected by governmental action; (2) the risk of erroneous deprivation by the procedures used and the value of additional or alternative procedural safeguards; (3) the "dignitary interest in informing individuals of the nature, grounds and consequences of the action"; and (4) the governmental interest, including financial considerations and additional burdens imposed by alternative or additional procedural requirements.¹³⁰ In the

124. *Id.* (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), and *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964)) (internal citations omitted).

125. *Id.*

126. *Id.* at 626-27.

127. *See id.* (discussing the federal approach in determining the necessary procedures to honor the Due Process Clause and discussing further factors necessary to evaluate in determining the proper procedures under the California due process clause).

128. *See Van Alstyne, supra* note 8, at 488-89 (discussing substantive liberty interests and concluding that finding such an interest, the freedom to be free from arbitrary adjudicatory procedures, will trigger some procedural protections).

129. *People v. Ramirez*, 599 P.2d 622, 626-27 (Cal. 1979).

130. *Id.* at 627-28. These considerations closely resemble those set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (finding three factors relevant when determining the

appellant's case, the procedure required for appellant's exclusion from the CRC included an opportunity to respond to the various grounds for his exclusion prior to any final decision, a statement of the grounds for exclusion, and access to any information the director used in making his decision.¹³¹ In addition, the court required the CRC to notify a patient of his right to respond, a right that contained an actual opportunity to respond orally to the appropriate official.¹³² Finally, the court found that the patient should receive a statement of the final decision that includes the reasons for that decision.¹³³

Following the logic thoughtfully set forth in *Ramirez*, one can extract two general principles that apply to applicants and recipients alike. First, inquiry into the denial or deprivation of a benefit should not start with an evaluation of the liberty or property interest involved.¹³⁴ Rather, substantive due process requires an agency to operate in a rational manner that honors an individual's liberty interest in freedom from arbitrary adjudicatory procedures.¹³⁵ Starting with this assumption allows a court to avoid the property inquiry currently used in benefit application due process claims because the focus shifts toward the government's rationality in its decisionmaking process.¹³⁶ Second, the court recognized that due process helps to minimize abuses of government discretion and, thus, requires some procedural protection in order to secure accurate and reliable administrative decisions.¹³⁷ Specifically, the California Supreme Court makes no mention of

"specific dictates" of due process); see *supra* note 91 (discussing the *Mathews* factors). However, the California court adds a concern for an individual's dignity that is missing from the *Mathews* approach. *Ramirez*, 599 P.2d at 626–27.

131. *Ramirez*, 599 P.2d at 631.

132. *Id.*

133. *Id.* at 632.

134. As the court states:

[W]hen a person is deprived of a statutorily conferred benefit, due process must start not with a judicial attempt to decide whether the statute has created an 'entitlement' that can be defined as 'liberty' or 'property,' but with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake.

Id. at 632.

135. See *id.* at 626–27 (discussing the liberty interest and the ability of procedure, even if it does not alter the outcome of the action, to create the appearance of fairness).

136. See Van Alstyne, *supra* note 8, at 485–90 (discussing the difficulties in identifying government benefits as property and proposing to solve these difficulties by finding a substantive liberty interest that would focus on the fairness of adjudicative procedures, regardless of whether one considered a benefit to be property).

137. See *People v. Ramirez*, 599 P.2d 622, 626 (Cal. 1979) ("[C]ourts must evaluate the extent to which procedural protections can be tailored to promote more accurate and reliable administrative decisions in light of the governmental and private interests at stake.").

establishing any liberty or property interest before requiring minimal procedures to ensure accuracy. Rather, it is the presence of a benefit or deprivation, perhaps too small or insignificant to be deemed property or liberty, plus a substantive due process right to nonarbitrary treatment, that triggers this protection.¹³⁸

B. Saleeby v. State Bar

Six years after the California Supreme Court located a right to be free from procedural grossness in the California constitution's due process clause, the California Supreme Court extended *Ramirez* to applications for benefits. In *Saleeby v. State Bar*,¹³⁹ the California Supreme Court held that procedural due process must attach to applications for state bar compensation benefits to ensure the nonarbitrary exercise of discretion by state bar decisionmakers.¹⁴⁰ The plaintiff applied for benefits under a state program designed to compensate litigants that were victims of attorney misconduct.¹⁴¹ The bar denied the plaintiff's initial application, explaining that the reviewing panel was divided and invited the plaintiff to request reconsideration.¹⁴² The plaintiff requested reconsideration, and the bar subsequently awarded plaintiff \$10,246, which was substantially less than the sum that plaintiff requested in his initial application.¹⁴³ The plaintiff then appealed the decision in the courts.¹⁴⁴

The petitioner challenged the bar's unreviewable discretion in determining awards.¹⁴⁵ After looking at the statutory language and purpose, the California Supreme Court "conclude[d] that the Legislature did not intend the bar's powers to be limitless and that the bar's exercise of discretion [was] reviewable to assure conformance to the purposes of the fund and to avoid the potential for arbitrary or discriminatory decisions."¹⁴⁶ Focusing on its earlier holding in *Ramirez*, the court

138. See *id.* (finding that the court should look to the nature of the private and governmental interests at stake when determining what procedures will produce reliable decisions).

139. *Saleeby v. State Bar*, 702 P.2d 525 (Cal. 1985).

140. See *Saleeby*, 702 P.2d at 535-36 (finding a statutory right to *apply* for compensation benefits from state bar association that triggers procedural due process).

141. *Id.* at 527.

142. *Id.* at 528.

143. *Id.*

144. *Id.*

145. *Id.* at 533.

146. *Id.*

determined that the plaintiff had a right to have his application for benefits reviewed and decided in a nonarbitrary fashion.¹⁴⁷ Specifically, the court stated:

As we have described, petitioner does not have a right to an award from the CSF. The bar is free to exercise its discretion and to set any guidelines it sees fit which advance the legislative policy behind the CSF. Nonetheless, an applicant may be entitled to relief "if the announced grounds for [the bar's decision have] been patently arbitrary or discriminatory."¹⁴⁸

The court went on to require the state bar to set forth guidelines for itself that honor procedural protections and create a reviewable record.¹⁴⁹

C. Summary

Ramirez and *Saleeby* emphasize the importance of locating a liberty interest within substantive due process. Although other courts have failed to follow the reasoning in *Ramirez* and *Saleeby*,¹⁵⁰ and the United States Supreme Court seems to have rejected a claim that specific process protections outlined in a statute do not themselves create an independent liberty interest to be free from procedural grossness,¹⁵¹ this fact should not necessarily dissuade an applicant who is arbitrarily denied benefits from claiming that an agency abridged his *substantive*

147. See *id.* at 535 ("Following the approach of *Ramirez*, we inquire whether the present procedures adequately assure that the bar, having elected to exercise the discretion conferred upon it by the Legislature, will exercise that discretion in a nonarbitrary, nondiscriminatory fashion.").

148. *Id.* at 536 (quoting *People v. Ramirez*, 599 P.2d 622, 627 (Cal. 1979)) (alteration in original).

149. See *id.* at 536–37 (discussing the difficulties with the procedures in place at the time of the suit and stating, "We therefore find it appropriate to order the bar to reformulate its regulations pursuant to its authority under Business and Professions Code section 6140.5 . . .").

150. A Westlaw search of the case citing references for *Ramirez* and *Saleeby* has not revealed that other courts have depended on these cases for their reasoning in determining what due process an application for benefits deserves.

151. See *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (finding claim of liberty interest in procedure unpersuasive). Justice Blackmun explained:

[A] liberty interest is of course a substantive interest of an individual; it cannot be the right to demand needless formality . . . Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. If officials may transfer a prisoner for whatever reason or for no reason at all, there is no such interest for process to protect. The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Id. (internal citations and quotations omitted).

freedom to be free from procedural grossness.¹⁵² The California Supreme Court makes a persuasive argument that freedom from procedural grossness should be a recognized liberty interest protected by due process, regardless of whether an agency has little or broad discretion.¹⁵³ In addition, United States Supreme Court precedent suggests that the Court may recognize important dignitary interests, thus making the claim for a substantive liberty interest to be free from procedural grossness more plausible.¹⁵⁴ If the United States Supreme Court chooses not to follow the lead of the California court, it will, in essence, legitimize an agency's right to make discretionary decisions in an unfair and prejudiced manner, free from constitutional constraints.¹⁵⁵

152. See *id.* at 257–58 (Marshall, J., dissenting) (finding that the guiding factors that assist a committee in making its discretionary recommendations for transfers and classifications of prisoners created a liberty interest protected by the Due Process Clause). Justice Marshall's logic closely resembles that found in *Saleeby*, in that the court in *Saleeby* evaluated statutory language and purpose to determine that the discretion of the decisionmaker was not unfettered. See *Saleeby v. State Bar*, 702 P.2d 525, 533–35 (Cal. 1985) (discussing the requirements of the statute and concluding that the procedures of the bar must promote the nonarbitrary, nondiscriminatory exercise of its discretion).

153. See *People v. Ramirez*, 599 P.2d 622, 626–27 (Cal. 1979) (discussing flaws in the Supreme Court's reasoning and the benefits of recognizing a right to be free from arbitrary adjudicative procedures).

154. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (finding that the Due Process Clause recognizes dignitary interests). Specifically, the *Jerrico* Court stated:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and *the promotion of participation and dialogue by affected individuals in the decisionmaking process*. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the *appearance* and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Id. (citations omitted) (emphases added); see also *Meacham v. Fano*, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting) ("I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore."). Though the *Jerrico* Court spoke in the context of administrative prosecutors and judges, and Justice Stevens spoke in the context of prisoners, the root of their assertions—that persons should be treated with dignity—rings true.

155. See *Ramirez*, 599 P.2d at 627 (stating that the finding that freedom from arbitrary adjudicative procedures is a substantive element of one's liberty presumes that a person will have a liberty interest in fair and unprejudiced decisionmaking). Thus, no interest in fair and unprejudiced decisionmaking follows if a court fails to acknowledge such a substantive liberty interest.

IV. Equal Protection

Given the paucity of case law supporting a person's freedom to be free from procedural grossness, it is worth shifting the focus away from due process concerns—procedural and substantive—to another challenge that may protect an applicant from arbitrary decisions.¹⁵⁶ Challenging an arbitrary decision on equal protection grounds eliminates the threshold need to locate a liberty or property interest in order to bring a claim.¹⁵⁷ Van Alstyne states that it is impractical to rely on equal protection because, in the case of an applicant, "we are . . . dealing with situations in which all similarly situated persons are uniformly subject to the same degree of procedural grossness."¹⁵⁸ It would seem obvious that, to the extent that a decisionmaker treats all applicants in an arbitrary fashion, it is unlikely that courts would find an equal protection violation.¹⁵⁹ It is also possible that the political process will function as an adequate remedy for widespread arbitrary action by government decisionmakers.¹⁶⁰ To the extent that the federal courts have attempted to solve this issue under the property interest paradigm,

156. This Part only addresses the merits of an equal protection claim for arbitrarily denied applications for benefits. It does not seek further investigation into subjects such as standing. However, it is important to note that at least in the affirmative action context, applicants for benefits do have standing. See *N.E. Fla. Chapter of Assoc'd Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (finding that when the government erects a barrier that makes it more difficult for one group to obtain a benefit, those members challenging the barrier need not prove that but for the barrier, the challenger would have received the benefit to achieve standing). As the Court stated, "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*; see also *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 708 (9th Cir. 1997) (challenging a statute that allowed a contracting company owned by women or minorities "to subcontract out a fifth of the work to whomever it [chose][], or keep the work itself, but denie[d] this flexibility to contractors not in those groups"). The Ninth Circuit found that bidders "need only show that they are forced to compete on an unequal basis" and that being forced to compete on an unequal basis because of race (or sex) is an injury under the Equal Protection Clause. *Id.* at 708. Though it is clear that race-based policies receive strict scrutiny, an applicant for a benefit would presumably have standing if the discretion of the official created a class of people treated differently from other applicants and if the creation of that class had no rational basis.

157. U.S. CONST. amend. XIV (stating that due process applies when life, liberty, or property is at stake, but making no such qualification for equal protection claims).

158. See Van Alstyne, *supra* note 8, at 451.

159. See *id.* (stating that in such a case, all individuals would be treated equally unfairly).

160. See *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998) ("Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."). The flaw in this argument is that this solution may only assist groups or persons that are politically active or politically connected.

applicants for benefits defined by strict eligibility criteria already possess legitimate claims of entitlement protected by procedural due process.¹⁶¹ Thus, the more likely scenario in which one may find a violation of equal protection, but not necessarily a denial of due process, arises when a decisionmaker with a high level of discretion fails to consider certain applications at all.

A. *Bush v. Gore*

Though contextually distinct, *Bush v. Gore*¹⁶² provides valuable insight into how a benefit applicant may assert a claim that the state denied her equal protection.¹⁶³ One might initially try to distinguish *Bush v. Gore* from a case involving an alleged violation of equal protection in determining the allocation of a discretionary benefit. After all, the right to vote is often considered a fundamental right deserving strict scrutiny in the equal protection context.¹⁶⁴ However, Professor Pamela S. Karlan suggests that the Court did not apply a strict scrutiny review in *Bush v. Gore*.¹⁶⁵ Removing *Bush v. Gore* from

161. See *supra* Part II (discussing the current property interest paradigm in determining whether applicants for benefits receive procedural due process protections).

162. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). As most people remember, *Bush v. Gore* stopped the manual recounts of votes for President of the United States in various counties of the State of Florida. *Id.* at 110. First, the Court found that the Florida legislature had conferred the right to vote for presidential electors on Florida's citizens. *Id.* at 104–05. Having found this right, the Court noted that equal protection applies both to the initial allocation of the vote and to the "manner of its exercise." *Id.* at 104. In evaluating the Florida Supreme Court's order that the intent of the voter should be determined in recounts, the Court determined that the measures taken by the county canvassing boards to observe the Florida Supreme Court's decision did "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right." *Id.* at 105. As the Court stated, "The problem inheres in the absence of specific standards to ensure its equal application." *Id.* at 106. Thus, the Court found that the lack of uniform standards designed to determine the intent of individual voters in manual recounts violated the Equal Protection Clause. *Id.* at 109.

163. See *id.* at 103–08 (finding an equal protection violation in the "standardless manual recounts" of votes required by the Florida Supreme Court).

164. See *id.* at 104 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental."); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153–54 n.4 (1938) (suggesting that restrictions on the right to vote may need to receive more "exacting judicial scrutiny," whereas other legislative actions receive mere rationality review); see also Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT* 77, 95 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (stating that a fundamental right normally triggers strict scrutiny).

165. See Karlan, *supra* note 164, at 95 ("[M]ost of [the Court's] analysis seems to rest not on traditional strict scrutiny forms of analysis, but rather on a perception that Florida's scheme was simply arbitrary and therefore ran afoul of garden-variety rationality review.").

fundamental rights jurisprudence by viewing it as an unremarkable application of rational basis review sheds some light on how an applicant might challenge an arbitrary denial of her benefit application.¹⁶⁶ That is, whenever a decisionmaker makes any determination, whether of voter intent or the merit of a scholarship applicant, one would assume that given the Court's analysis in *Bush v. Gore*, the demands of minimum rationality would limit the discretion of the decisionmaker.¹⁶⁷

Though the Court asserted that it limited its decision to the facts of the case,¹⁶⁸ it is unclear if *Bush v. Gore* is viable as precedent for the simple principle that people, applications, or votes in similar circumstances should be treated similarly.¹⁶⁹ In essence, the Court found that the discretion given to local canvassing boards to determine voter intent created unequal evaluation of ballots.¹⁷⁰ Thus, one could argue that the discretion of an agency decisionmaker, or decisionmakers, denies equal protection to the applicants because in the

166. See 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, 2122 (2002) (discussing the equal protection claim in *Bush v. Gore* and comparing it to administrative law principles). Specifically, Professor Krotoszynski states:

To be sure, *Bush v. Gore* did present a credible claim of an equal protection violation. This is precisely why Justices Souter and Breyer voted to sustain the equal protection claim. Black letter administrative law principles prohibit agencies from arbitrarily administering their duties. Accordingly, were a local canvassing board to deploy a Ouija board to discern the intent of the voter, such action would violate basic notions of . . . equal protection. To the extent that persons at different counting tables in the same county employed inconsistent standards for analyzing undervotes, a nontrivial equal protection . . . objection existed.

Id. at 2121–22.

167. See *Bush v. Gore*, 531 U.S. at 106 (finding that evaluation of voter intent required specific standards to ensure equal evaluation of each ballot). *But see* Krotoszynski, *supra* note 166, at 2129 (noting that the Justices provided notions of equal protection that contradicted their previous decisions regarding the scope of equal protection). Specifically, in examining Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia's equal protection notions, Krotoszynski states that "in the absence of any discriminatory intent and given the generally cabined discretion inherent in the intent-of-the-voter standard, Florida's election procedures, as explicated by the state supreme court, should have been 'good enough for government work.'" *Id.*

168. See *Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

169. To date, the author has been unable to find any cases that would support this point of view. However, it is worth mentioning that unless the Court intends to wink as it stands by its decision that "elected" the President (along ideological lines), the Court should not, in good conscience, back away from the underlying principles of equal protection stated in the case.

170. See *Bush v. Gore*, 531 U.S. at 106–09 (discussing the various methods that counties used in determining the intent of the voter).

absence of standards, certain applicants receive treatment different from what similarly situated applicants receive. To be sure, one might not find this argument entirely persuasive.¹⁷¹ Nevertheless, it is an argument worth making, in order to protect an applicant from arbitrary governmental action.

Even if *Bush v. Gore* does not establish a generic guarantee of protection from arbitrary governmental actions, even when the government actor has wide discretion, other equal protection arguments exist. For example, one can fall back on an approach similar to Van Alstyne's substantive due process approach.¹⁷² Though it is unclear whether a court would accept the argument that an applicant has a liberty interest in the right to be free from arbitrary adjudicatory procedures in the substantive due process context,¹⁷³ a court concerned with the democratic process, such as the Supreme Court in *Bush v. Gore*, might accept a substantive equal protection claim based on the freedom to be free from arbitrary state action.¹⁷⁴ By recognizing this fundamental liberty interest, the evaluation of an application for benefits would not be functionally different from the evaluation of

171. The Court specifically stated that *Bush v. Gore* should be limited to its facts. *Bush v. Gore*, 531 U.S. at 109. In addition, the fundamental nature of the right at stake may prevent the case from being extrapolated into nonelectoral cases.

172. See Van Alstyne, *supra* note 8, at 487 (locating the substantive freedom to be free from procedural grossness).

173. See *supra* Part III (discussing the possibility of locating a liberty interest, the freedom to be free from procedural grossness, under substantive due process).

174. See *Bush v. Gore*, 531 U.S. 98, 111 (2000) ("None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere."). But, the Court continued, "When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Id.* Thus, the Court will involve itself in a state's legislative and political affairs to resolve important constitutional issues. See *id.* at 104 ("[O]ne source of [the right to vote's] fundamental nature lies in the equal weight accorded to each vote and the equal *dignity* owed to each voter." (emphasis added)). The Court's mention of the dignity owed each voter recalls the voice of Professor Richard B. Saphire, who argued that dignity interests should help guide the notion of fairness in due process. See Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 119–25 (1978). Saphire went on to argue that the primary purpose of structuring procedural protections that respect dignitary interests was:

ensur[ing] that the method of interaction itself is fair in terms of what are perceived as minimum standards of political accountability—of modes of interaction which express a collective judgment that human beings are important in their own right, and that they must be treated with understanding, respect, and even compassion.

Id. at 159.

One can argue that the *Bush v. Gore* Court, arguably concerned with the democratic process, cannot be blind to the need to protect dignitary interests if, as Saphire argues, they protect "minimum standards of political accountability." *Id.*

a voter's intent on a ballot.¹⁷⁵ Equal protection would demand that specific standards govern the discretion of the decisionmaker in order to ensure equal individual evaluation of each application.¹⁷⁶ Thus, a decisionmaker would not be allowed to throw away half of the applications for a benefit scheme merely to reduce his workload.¹⁷⁷

B. Village of Willowbrook v. Olech

In *Village of Willowbrook v. Olech*,¹⁷⁸ the Court bolstered the viability of an equal protection claim regarding the application for benefits.¹⁷⁹ The Court

175. See *Bush v. Gore*, 531 U.S. at 105–06 (finding that the discretion of county canvassing boards to determine the intent of the voter must be guided by specific standards to ensure equal evaluation of each ballot).

176. This sounds a lot like Van Alstyne's approach in the substantive due process realm, attempting to cue procedural protections by locating a substantive liberty interest. However, in the equal protection context, a court would not be concerned with evaluating or adding procedures to ensure fair and accurate results. In a more limited sense, equal protection would only ensure that a decisionmaker evaluates each application in a similar manner. Thus, it ensures that each application is considered. Furthermore, any finding of an equal protection violation would cue uniform standards and begin to curb unlimited discretion. See Krotoszynski, *supra* note 166, at 2122 (discussing the equal protection claim in *Bush v. Gore* and comparing it to administrative law principles). Professor Krotoszynski explains that using inconsistent standards in evaluating ballots created a colorable equal protection claim, because "[b]lack letter administrative law principles prohibit agencies from arbitrarily administering their duties." *Id.*

177. See Morin, *supra* note 1 (discussing the plight of two clerical workers who shredded thousands of INS documents, including applications for visas, in an attempt to eliminate a backlog of paperwork sent to the agency). Though the two clerical workers face federal charges due to the duties they owed to the INS, *id.*, the article serves as a broader reminder of the corner-cutting measures some administrative employees may take to reduce an unanticipated amount of paperwork.

178. *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam). In *Village of Willowbrook*, a homeowner sued the Village of Willowbrook, Illinois because the Village required a thirty-three-foot easement for connection of the water service to the plaintiff's property, where other homeowners in the Village only had to provide a fifteen-foot easement for water connection. *Id.* at 563. The plaintiff claimed that the demand for the longer easement was arbitrary and motivated by bitterness from a previous lawsuit filed by the plaintiffs against the Village. *Id.* The Supreme Court found that the plaintiff presented a cognizable equal protection claim, in that she alleged that she had been treated differently from similarly situated property owners, that the Village's demand was "irrational and wholly arbitrary," and that the Village eventually connected her property to the water supply via a fifteen-foot easement. *Id.* at 565. The court found that these allegations alone, without considering the Village's subjective motivation, formed a cognizable equal protection claim. *Id.*; cf. *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 387–89 (7th Cir. 1998) (finding a valid equal protection claim for the plaintiff under a theory of "subjective ill will"), *aff'd*, 528 U.S. 562 (2000) (per curiam).

179. See *Village of Willowbrook*, 528 U.S. at 565 (upholding equal protection claim

reaffirmed the broad nature of an equal protection claim, stating that "[t]he purpose of the equal protection clause of the Fourteenth Amendment is 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."¹⁸⁰ Though the applicant failed to allege membership in a class, the Court affirmed that "class-of-one" equal protection claims will lie "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."¹⁸¹ It is important to note that the Court did not limit its application of equal protection to the particular facts of this class-of-one case.¹⁸² In fact, Justice Breyer noted that the Court's language could "transform many ordinary violations of city or state law into violations of the Constitution."¹⁸³ Thus, Justice Breyer attempted to limit *Village of Willowbrook* to cases in which there is not only a violation of the principles of equal protection, but also an additional factor such as "ill will."¹⁸⁴ However, it is unclear whether Justice Breyer's concurrence would carry significant weight with the entire Supreme Court or the lower federal courts if

brought by class of one to address plaintiff's claim that she has been treated arbitrarily and differently from other similarly situated persons).

180. *Id.* at 564 (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)).

181. *Id.*

182. *See id.* at 565 (stating that plaintiff's allegations, apart from an additional allegation of "subjective ill will," are sufficient to assert an equal protection violation).

183. *Id.* at 565 (Breyer, J., concurring).

184. *Id.* at 565–66 (Breyer, J., concurring) (discussing the broad nature of the per curiam opinion and finding that an extra factor, such as "ill will," should be required in order to raise an equal protection claim for ordinary city and state violations). Justice Breyer stated:

It might be thought that a rule that looks only to an intentional difference in treatment and a lack of a rational basis for that different treatment would work such a transformation. Zoning decisions, for example, will often, perhaps almost always, treat one landowner differently from another, and one might claim that, when a city's zoning authority takes an action that fails to conform to a city zoning regulation, it lacks a "rational basis" for its action (at least if the regulation in question is reasonably clear).

This case, however, does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause. That is because the Court of Appeals found that in this case respondent had alleged an extra factor as well—a factor that the Court of Appeals called "vindictive action," "illegitimate animus," or "ill will."

Id. (Breyer, J., concurring) (quoting *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), *aff'd*, 528 U.S. 562 (2000) (per curiam)).

an applicant for benefits challenged a state's action as a violation of equal protection.

C. Vindictive-Action Equal Protection

Language in several Seventh Circuit cases suggests that Justice Breyer's suggested limit on *Village of Willowbrook* may be persuasive.¹⁸⁵ However, as in *Bush v. Gore*, the Court could have easily limited *Village of Willowbrook* to the facts of that case.¹⁸⁶ It is telling that the majority in *Village of Willowbrook* did not reach the issue of subjective ill will.¹⁸⁷ Given the nature of the plaintiff's claim, the fact that the plaintiff brought an equal protection claim under the Seventh Circuit's "subjective ill will" equal protection analysis should have forced the Court to consider and address the issue.¹⁸⁸ Instead, by making no reference to how much discretion the Village had in determining the size of an easement needed to hook up the plaintiff to the village's water supply, the Court found an equal protection violation because the Village requested a fifteen-foot easement from all other residents of the village, while they requested a thirty-three-foot easement from Ms. Olech.¹⁸⁹ Therefore, *Village of Willowbrook* may stand for the proposition that a state official may not treat similarly situated people differently for irrational or wholly arbitrary reasons.¹⁹⁰

185. See *Olech*, 160 F.3d at 388 (requiring the additional factor of subjective ill will in order to create a viable claim for an equal protection violation); *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (finding that the plaintiff stated a valid equal protection claim by asserting that spite motivated a mayor to force the plaintiff to incur substantial legal bills for trumped-up charges). But see *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 61 (2d Cir. 1985) (finding no equal protection violation despite an allegation that the zoning board of appeals had "killed" plaintiff's application as a favor to the mayor). In *Yale Auto Parts*, the Second Circuit explained that the plaintiff's claim lacked the assertion that the board treated other applicants differently. *Id.*

186. See *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam) (limiting the decision to the facts of the case at hand).

187. See *Village of Willowbrook*, 528 U.S. 562, 565 (2000) (per curiam) (declining to reach the theory that subjective ill will created an equal protection violation).

188. See *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 387 (7th Cir. 1998) (discussing the fact that the plaintiff brought the equal protection claim under the theory set forth in *Esmail v. Macrane*, 53 F.2d 176 (7th Cir. 1995), a theory that focuses on arbitrary and vindictive actions of state actors), *aff'd*, 528 U.S. 562 (2000) (per curiam).

189. See *Village of Willowbrook*, 528 U.S. at 565 (finding the allegations, apart from the claim of subjective motivation, stated a valid equal protection claim).

190. See *id.* (noting the plaintiff's alleged different treatment from similarly situated homeowners, that the demand for a longer easement was arbitrary, and that the Village eventually requested that Ms. Olech provide a fifteen-foot easement). These brief facts alleged a

Support for Justice Breyer's theory of the need to add a claim of "subjective ill will" to a discretionary decision was derived from the Seventh Circuit's opinion in *Olech v. Village of Willowbrook*.¹⁹¹ In *Olech*, Judge Posner found that the plaintiff's claim arose under a theory the judge described as "vindictive-action equal protection."¹⁹² A vindictive-action equal protection claim, as developed by Judge Posner in *Esmail v. Macrane*¹⁹³ and *Olech*,

sufficient claim according to the Court. *Id.*

191. See *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998) (finding an equal protection violation when the plaintiff alleged disparate treatment was the result of "illegitimate animus" towards plaintiff), *aff'd on other grounds*, 528 U.S. 562 (2000). In *Olech*, plaintiffs desired to have their home connected to the municipal water supply. *Id.* at 387. The Village insisted that plaintiffs provide a thirty-three foot easement, though the Village had only required a fifteen-foot easement for other similarly situated homeowners. *Id.* Plaintiffs alleged that the Village demanded a thirty-three foot easement due to "substantial ill will" towards plaintiffs as a result of previous litigation between the two parties. *Id.* Judge Posner noted that there was no general requirement of "orchestration" in vindictive equal protection cases. *Id.* at 388. Thus, the court reversed the district court's dismissal of the case. *Id.* at 389. Specifically, Judge Posner stated:

Of course we are troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case. But bear in mind that the "vindictive action" class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant.

Id. at 388.

192. *Id.*

193. See *Esmail*, 53 F.3d at 179 (finding plaintiff alleged a valid equal protection claim by stating that an equal protection claim may be brought if plaintiff alleges different treatment was the result of a "vindictive campaign"). In *Esmail*, the plaintiff, a liquor store owner, claimed the mayor of Naperville, Illinois engaged in a campaign of persecution against him that resulted in the city moving to deny his license renewal application for his current liquor store and his license application for a new liquor store. *Id.* at 177. The plaintiff claimed that the mayor, motivated by animosity, trumped up charges against him to deny the license applications, and he incurred \$75,000 in legal expenses to get his licenses granted. *Id.* at 177-78. The court found that while the equal protection claim was unusual and did not fit under the usual rubric of traditional equal protection claims, a valid equal protection claim will lie where the unequal treatment is a result of a "vindictive campaign." *Id.* at 178-79. As Judge Posner explained:

[E]qual protection does not just mean treating identically situated persons identically That has been understood since Aristotle invented the antecedent of our concept of equal protection more than two millennia ago. If the liquor dealers enumerated in *Esmail*'s complaint committed worse infractions than he was charged with but were let off with lighter or no sanctions, this was unequal treatment. It would not in itself establish a claim under the equal protection clause, because nonactionable selective prosecution produces exactly such inequalities. The distinctive feature here . . . is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor.

Our decision in *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), holds that such conduct, so motivated, violates the equal protection clause The

supports the notion that there are limits to official discretion, no matter how wide that discretion may be.¹⁹⁴ The standard announced by Judge Posner applies to discretionary actions motivated by vindictiveness.¹⁹⁵ Posner's theory of equal protection may protect some applicants whose applications may be discarded by decisionmakers who act on personal feelings about the applicant.

But, vindictiveness itself might be too narrow a limit to draw for arbitrary decisionmaking.¹⁹⁶ In order to protect the individual as an applicant, one only needs to expand upon Judge Posner's meaning of vindictiveness. For example, instead of requiring those plaintiffs litigating equal protection claims to allege unequal treatment and an element of vindictiveness on the part of the state actor, a court could require a claim of "bad faith discretion" or "irrational arbitrariness" which would encompass the vindictiveness standard. In this manner, an applicant could challenge a denial of a completely discretionary benefit via an equal protection claim in several ways: (1) that subjective ill will motivated the decisionmaker to refuse the benefit to the applicant;¹⁹⁷ (2) that subjective ill will motivated the decisionmaker to refuse to review the

principle it states is no doubt subject to abuse by persons whose real complaint is selective prosecution in the sense that is not cognizable in suits to enforce the equal protection clause. But it strikes us as sound. 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.

Id. at 179.

194. See *Esmail*, 53 F.3d at 178–79 (stating that selective prosecution, though it may be arbitrary in result, producing random disparities or enforcement targeted at "newsworthy lawbreakers," can be limited by prohibiting discretion motivated by vindictiveness).

195. See *Olech*, 160 F.3d at 388 ("[T]he 'vindictive action' class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant."); *Esmail*, 53 F.3d at 179 ("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.").

196. If a plaintiff who is not subjected to "subjective ill will" claims an equal protection violation, she cannot allege vindictiveness and her equal protection claim may be trumped up to something equivalent to selective prosecution—something that recognizes a lack of sufficient resources or other reasonable motivation for reaching disparate results. See *Esmail v. Macrane*, 53 F.3d 176, 178–79 (7th Cir. 1995) (discussing the law's tolerance of unequal legal treatment in the case of selective prosecution).

197. That is, if the benefit was a benefit usually granted to all applicants, an applicant could challenge the denial of that benefit to her if the sole reason for plaintiff's denial was vindictiveness. See *id.* at 177–78 (discussing plaintiff's denial of licenses for his liquor stores and how the city's vindictively motivated denials led plaintiff to incur substantial legal fees that spurred him to bring his claim that he had been denied equal protection).

applicant's application;¹⁹⁸ and (3) that the decisionmaker irrationally refused to consider the applicant's application.¹⁹⁹ By stating the additional requirement as "irrational arbitrariness," it is important to note that the applicant would not be challenging the final decision of whether or not to grant the plaintiff the benefit.²⁰⁰ Rather, the plaintiff would merely be arguing that all applications must be evaluated in the same manner—that any arbitrary decisions must occur randomly, or if not randomly, for a rational reason. It may seem a fine distinction to draw, but "irrational arbitrariness," rather than vindictiveness, captures the spirit of the Equal Protection Clause. As Judge Posner has observed, "[Equal protection] has long been understood to provide a kind of last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives."²⁰¹

D. The "Newer" Equal Protection

In 1972, Professor Gerald Gunther provided a concise review of the cases decided by the Supreme Court on equal protection grounds.²⁰² According to

198. See *id.* (discussing denial of licenses for the plaintiff's liquor stores and how the city's vindictively motivated denials led him to incur substantial legal fees that caused him to bring his claim of denial of equal protection).

199. See *id.* at 179–80 ("[S]ome objectives of state action simply are illegitimate and will not support actions challenged as denials of equal protection."). This claim would be especially useful when the claim is not subjective ill will towards a particular applicant, but rather unfair favoritism of another applicant. An example of this mistreatment might be political favoritism which corrupts an ordinary benefit program, investing complete discretion with the decisionmaker, by favoring political supporters.

200. To a certain extent, discretionary acts will always result in arbitrary results. See *id.* at 178–79 (discussing the disparate effects of prosecution). However, one can reduce the amount of arbitrary results by placing limits on the scope of discretion. See *id.* at 179 (asserting that vindictiveness, when added to a claim of unequal treatment, will constitute a valid equal protection claim, when the state action being charged is a discretionary action). I submit that if "rational arbitrariness" (rationality) is a baseline limit on the initial screening procedures used to process applications, the results of discretionary decisions become more fair. For example, assume the state board of education receives three thousand applications for three scholarships and the guiding factors for the decisionmaker are that (1) the applicant must be a minority and (2) merit. The initial screening procedure could not include throwing out applications without reviewing them, whether because of vindictiveness or laziness. Rather, each application would demand a fair initial screening. This process would serve to narrow the pool of applicants to a manageable number. However, assuming the pool narrows to thirty applicants that are virtually identical and equally well qualified, the discretion of the decisionmaker would bar any claim that a denial of the scholarship violated equal protection.

201. *Esmail*, 53 F.3d at 180.

202. See Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19 (1972) (discussing the 1971 Supreme

Professor Gunther, this "newer" equal protection jurisprudence "would have the courts do more than they have done for the last generation to assure rationality of means, without unduly impinging on legislative prerogatives regarding ends."²⁰³ Indeed, to the extent that *Bush v. Gore* applied a means-oriented scrutiny to strike down the manual recount of Florida's ballots, Professor Gunther may have foreshadowed where the Court finds itself today.²⁰⁴

But, Professor Gunther also pointed out that the 1971 Court seemed to be trending towards using means scrutiny as a narrower ground to decide divisive issues.²⁰⁵ In addition, Gunther recognized that the Court seemed ready to apply equal protection more broadly, stating that "the standards the Court applied in [the 1971 Supreme Court] cases seem on their face applicable to a wide range of statutory schemes."²⁰⁶ Finally, he suggested that deciding a case under equal protection might help a divided court find more common ground.²⁰⁷

Though written in 1971, Professor Gunther's statements hold true today. With one noteworthy exception,²⁰⁸ there remains a strong aversion to deciding

Court as utilizing equal protection "to intervene on the basis of the deferential standard [of rational basis review]").

203. *Id.* at 23.

204. *See Bush v. Gore*, 531 U.S. 98, 104–05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over another."); *see also* Karlan, *supra* note 164, at 95 ("[M]ost of [the Court's] analysis seems to rest not on traditional strict scrutiny forms of analysis, but rather on a perception that Florida's scheme was simply arbitrary and therefore ran afoul of garden-variety rationality review.").

205. *See* Gunther, *supra* note 202, at 29 (citing cases such as *Reed v. Reed*, 404 U.S. 71 (1971), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), to illustrate the fact that the Court favored "narrower, less divisive routes," rather than answering questions such as whether sex was a suspect class or whether the right to privacy extended to unmarried persons seeking contraceptives).

206. *Id.* at 33.

207. *See id.* at 40 ("[S]ome liberal Justices may find a more neutral and general concern for property a small price to pay for continued protection of such favored interests as welfare benefits."). Professor Gunther continued, "More broadly, Justices unable to persuade a majority to extend new equal protection into novel spheres of strict scrutiny may well look favorably on the half a loaf of more genuine rationality review of a wider range of legislation." *Id.*

208. *See Lawrence v. Texas*, 123 S. Ct. 2472, 2481–83 (2003) (reviving substantive due process in determining that a Texas sodomy law violated petitioner's right to personal autonomy to make decisions in a private, consensual relationship free from governmental interference). It is unclear whether the Court will expand the understanding of liberty beyond the *Lawrence* autonomy interests. Furthermore, it is unclear whether this "revival" of substantive due process is an exception to their general policy to avoid deciding cases on this basis, or whether this decision represents a turning point in the modern Court's jurisprudence. However, the *Lawrence* Court did note that liberty interests may continuously be "discovered," as each generation attempts to solidify its own understanding of the term. *Id.* at 2484. As Justice Kennedy states:

cases on the grounds of substantive due process.²⁰⁹ According to Gunther, the "means-focused" inquiry is found both in equal protection cases and substantive due process cases.²¹⁰ Gunther suggests, however, that the Court, though desiring to be more interventionist, shies away from recognizing substantive due process violations because the term "substantive due process" carried a negative connotation in the minds of a substantial portion of the 1971 Court's Justices.²¹¹ Thus, he finds that "evolution of constitutional doctrine in the direction of the modestly interventionist model is likely to fare better along the equal protection route than on the haunted paths of due process."²¹²

One can see the truth of Professor Gunther's statement when one evaluates Judge Posner's vindictive-action equal protection cases.²¹³ At the heart of Judge Posner's concern are completely arbitrary and irrational government actions.²¹⁴ But, the Due Process Clause originally protected citizens from such actions.²¹⁵ Perhaps the Seventh Circuit's trend towards vindictive-action equal

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. Thus, it remains possible, though in this author's view unlikely, that the Court will entertain an argument expanding liberty interests to include a freedom to be free from arbitrary procedures.

209. See *Albright v. Oliver*, 510 U.S. 266, 271–72 (1994) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992))).

210. See Gunther, *supra* note 202, at 42 ("[T]he means-focused inquiry is as legitimate an ingredient of due process as of equal protection.").

211. See *id.* at 42 ("But due process carries a repulsive connotation of value-laden intervention for most of the Justices, of the Burger Court as well as the Warren Court.").

212. *Id.* at 43.

213. See *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998) ("[T]he 'vindictive action' class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant."); *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995) ("If the power of the 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.").

214. *Id.*; see also *supra* notes 195–200 and accompanying text (discussing the idea of "irrational arbitrariness" as more appropriately limiting discretion).

215. See *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998) (stating that the standard for reviewing executive actions under substantive due process is whether the action "shocks the conscience"). See *supra* note 84 for a more comprehensive discussion of the case.

protection and the Supreme Court's rational review in *Bush v. Gore* illustrate Professor Gunther's observations regarding equal protection and due process some thirty years after his analysis of the 1971 Supreme Court.²¹⁶

E. Summary

Using the theories underlying *Bush v. Gore* and *Village of Willowbrook*, one can make a colorable claim that a state actor violates equal protection when he denies an application for benefits under a standardless review process.²¹⁷ What actions may an applicant challenge? According to the Seventh Circuit, an applicant may challenge a denial of benefits, even if their disbursement is discretionary, if the actor acts in a vindictive and arbitrary manner.²¹⁸ In addition, an applicant may challenge a decision on the basis of equal protection if a state actor treated a certain subset of applications differently from others,²¹⁹ such as throwing away a large number of unanticipated applications to reduce the administrative workload. And, it is clear that treating even one application in a different manner from similarly situated applicants will give rise to a valid equal protection claim.²²⁰ However, equal protection most likely will not assist the applicant whose application is accidentally lost in the administrative process.²²¹ In addition, the discretion of state actors may be enough to deny an equal protection claim to the ordinary denial of an application.²²² Finally, equal

216. See Gunther, *supra* note 202, at 42–43 (concluding that the "modestly interventionist model is likely to fare better along the equal protection route than on the haunted paths of due process").

217. See *supra* Parts IV.A–IV.B (discussing the equal protection analysis in *Bush v. Gore* and *Village of Willowbrook*).

218. See *Esmail*, 53 F.3d at 180 (finding plaintiff's allegation of an equal protection violation asserted that his differential treatment was not a result of selective prosecution, but "was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective").

219. See *Bush v. Gore*, 531 U.S. 98, 105–06 (2000) (per curiam) (finding that the discretion of county canvassing boards to determine the intent of the voter must be guided by specific standards to ensure equal evaluation of each ballot).

220. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) ("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.").

221. *Id.* (stating that applicant must allege that the differential treatment was intentional).

222. See *id.* at 565–66 (Breyer, J., concurring) (attempting to limit the case to contexts where actual malice is alleged, as well as unequal treatment of similarly situated persons, in order to limit the transformation of ordinary violations of city or state law into violations of the Constitution).

protection violations may be difficult to prove if the decisionmaking process takes place behind closed doors and the applicant has no way to know whether a decisionmaker actually reviewed her application. Thus, though equal protection serves to protect applicants from several types of arbitrary actions, it can only regulate the relationship between a person and his government in limited ways, a situation in which the government may have the upper hand.²²³

V. Conclusion

It is clear that under the property interest paradigm, only those applicants who can claim to meet the enumerated eligibility criteria for a mandated benefit can claim a legitimate claim of entitlement. But, this paradigm suffers from underinclusiveness. Consider the example from the beginning of this Note: Assume that the shredded applications were applications for a state scholarship program, a benefit program which gave the decisionmaker wide discretion in awarding three scholarships. Assume further that the decisionmaker shredded half of the applications because the program received an unanticipated number of applications and the decisionmaker did not want to put in the extra time to review them all individually.

Under the property interest paradigm, an applicant whose application was shredded could not challenge this action because she could assert no property interest in the application. However, this paradigm is a useful tool for some applicants who can point to less vague statutes or program requirements. Thus, an applicant should always assert a claim for procedural due process under the current property regime, as it is the most well-established method of gaining procedural protections for such applications for benefits.

After twenty-five years, Van Alstyne's solution to the application for benefits problem is still persuasive. The freedom to be free from procedural grossness, located under substantive due process, lends procedural protections to any applicant, no matter how small the interest in the benefit may be, or how much discretion the legislature vests with the decisionmaker.²²⁴ Van Alstyne

223. See Reich, *supra* note 69, at 746 (discussing how distribution of government largess expands the government's power). Specifically, Reich noted that "[w]hen government—national, state or local—hands out something of value, whether a relief check or a television license, government's power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess. It obtains new rights to investigate, to regulate, and to punish." *Id.*; see also Esmail v. Macrane, 53 F.3d 176, 179 (7th Cir. 1995) (acknowledging that even if a plaintiff may bring a vindictive-action equal protection claim, the plaintiff is not likely to find "ultimate victory").

224. See *supra* Part III (discussing the merits and broad application of Van Alstyne's theory).

captures the essence of the Court's statements regarding due process: "[T]he touchstone of due process is protection of the individual against arbitrary action of the government."²²⁵ In addition, the Court appears more willing to locate liberty interests outside of state law, whereas the general rule seems to be that property interests must be created by positive law.²²⁶ Van Alstyne's approach also recognizes dignitary interests,²²⁷ and reinforces an individual's logical expectation that, at a minimum, the government will treat each applicant rationally and review his application.²²⁸ However, whether the Court will honor such a claim under a freedom to be free from procedural arbitrariness remains to be seen.

Continuing the scholarship hypothetical from the preceding paragraph, the victim of a shredding campaign could challenge the shredding action under substantive due process, stating that the decisionmaker acted in an arbitrary and capricious manner by failing to review or consider her application for the scholarship. If the Court accepts a substantive due process freedom to be free from procedural arbitrariness argument, this victim would most likely win her claim. The remedy the Court would use would not be the benefit itself, but a vindication of the plaintiff's rights triggering enough procedural safeguards to ensure that the state and decisionmaker honor the plaintiff's liberty interest.

Finally, *Bush v. Gore* and *Village of Willowbrook* breathe new life into a potential claim for an applicant who feels a decisionmaker has arbitrarily denied her application. Under *Bush v. Gore*, it appears that evaluation techniques must be standardized, so that each ballot (or application, for the purposes of this Note) receives similar review.²²⁹ Under *Village of Willowbrook*, an individual, class-of-one plaintiff may posit a realistic equal

225. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see also Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (finding that substantive due process includes "freedom from all substantial arbitrary impositions and purposeless restraints and . . . also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment" (citations omitted)).

226. *See supra* note 86 (discussing the differences in locating a property right under state law and locating a liberty interest under state law and the Due Process Clause).

227. *See* Van Alstyne, *supra* note 8, at 484–88 (discussing the fact that following procedural safeguards has traditionally been seen as synonymous with the meaning of liberty and finding that the notion of fairness can be observed in locating such a freedom); *see also* Saphire, *supra* note 174, at 119–25 (arguing that dignity interests should help guide the notion of fairness in due process).

228. Saphire, *supra* note 174, at 159; *see also supra* note 154 (discussing case law that endorses the idea that the Due Process Clause serves, in part, to respect an individual's dignitary interests).

229. *See supra* Part IV.A (discussing the potentially broad application of *Bush v. Gore* and the minimum rationality standard set forth by the Court).

protection claim that she was treated differently from similarly situated individuals.²³⁰ In addition, broadening the Seventh Circuit scope of vindictive-action equal protection to irrational arbitrariness equal protection may also support a plaintiff's desire for equal treatment when it comes to the evaluation of her application.²³¹

Under an equal protection argument, the victim of the shredding spree hypothetical above will most likely prove her assertion that the decisionmaker treated the applicant and her application differently from other similarly situated applicants and applications, whether the action was motivated by vindictiveness or pure laziness—assuming, in the first place, that she learns that her application suffered such a fate. The only situation where such a claim would fail would be a case where the decisionmaker shredded all applications or treated all applicants in a similar arbitrary manner.

As modern Supreme Court jurisprudence suggests an unwillingness to further extend substantive due process,²³² a disappointed applicant should attempt to assert her claim, stating that the decisionmaker denied her right to equal protection. As evidenced in *Bush v. Gore* and *Village of Willowbrook*, although complaints of arbitrariness constituted the heart of the plaintiffs' claims, it proved easier to claim a denial of equal protection than a denial of a right under substantive due process that complained of arbitrariness.²³³ Professor Gunther realized this back in 1971 when he stated, "[E]volution of constitutional doctrine in the direction of the modestly interventionist model is likely to fare better along the equal protection route than on the haunted paths of due process."²³⁴

230. See *supra* Part IV.B (discussing *Village of Willowbrook* and its contributions to an equal protection attack on the arbitrary denial of a benefit application).

231. See *supra* Part IV.C (discussing the nature of vindictive-action equal protection cases and elaborating on the root concern of judges who honor such claims).

232. See *Albright v. Oliver*, 510 U.S. 266, 271–72 (1994) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). But see *Lawrence v. Texas*, 123 S. Ct. 2472, 2481–83 (2003) (apparently reviving substantive due process). For further discussion of *Lawrence*, see *supra* note 208.

233. See *Bush v. Gore*, 531 U.S. 98, 105–06 (2000) (evaluating the Florida Supreme Court's order that the intent of the voter should be determined in recounts and determining that the measures taken by the county canvassing boards to observe the Florida Supreme Court's decision did "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right"); see also *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (*per curiam*) ("[T]he purpose of the equal protection clause of the Fourteenth Amendment is 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." (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923))).

234. Gunther, *supra* note 202, at 43.

ARTICLES
