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CONSTITUTIONAL/LAND USE—SMALL-TOWN POLITICS, BIG-TIME PROBLEM: ADDRESSING THE DUE PROCESS IMPLICATIONS OF EX PARTE COMMUNICATIONS IN QUASI-JUDICIAL MUNICIPAL PROCEEDINGS

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*Ryan K. O'Hara**

Town residents and politicians stand at odds over the conversion of a driving range and ice cream shop—a local favorite—into a big-box supermarket. The town zoning board's decision on an appeal of the store's permit will determine the practical fate of a neighborhood, and the metaphorical fate of the town. The supermarket, during an appeal of its granted permit, brings in new "local counsel," an attorney-politician who ultimately meets with four of five zoning board members individually, in-person. He claims these meetings were merely to discuss "procedural questions." Circumstantial evidence suggests otherwise. Upon judicial review of the board's affirming the permit on appeal, the trial judge finds that bias played no role in the board's decision, yet articulates no standard for when a finding of bias should be made in such circumstances.

These facts are drawn from a real situation, and similar situations occur in different factual settings before municipal boards. Despite this, Massachusetts (along with roughly forty-five other states) has no established law governing the effect of such ex parte *communications on those quasi-judicial proceedings, a constitutional issue of due process.*

Four other jurisdictions—Florida, Idaho, Oregon, and Washington—have addressed this problem, each reaching a different resolution. Idaho has a rule implying that undisclosed ex parte *communications made to municipal boards in quasi-judicial settings are fatal to the outcome of the proceedings. A Washington statute requires disclosure to avoid nullification. Florida imputed a presumption of bias onto* ex

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parte *communications, whereas Oregon takes the approach that no such presumption results from such communications.*

This Note describes the issue presented by ex parte communications in the municipal context; identifies the current rules and approaches adopted by jurisdictions that have addressed this issue, weighing their various strengths and weaknesses; and considers what guidance federal administrative law can provide. Ultimately, it synthesizes, proposes, and justifies a model rule for jurisdictions that have not yet addressed this issue: a rebuttable presumption of bias, curable by disclosure on the record.

"Sunlight is said to be the best of disinfectants . . . ."
– Supreme Court Justice Louis D. Brandeis[1]

INTRODUCTION

Often, some of the most pressing legal matters faced by American citizens take place outside of the courtroom, in both formal and informal interactions with municipal government. Prospective tavern keepers must go before municipal licensing boards to obtain hotly contested liquor licenses;[2] landowners must consult local zoning and planning boards regarding the use of their property;[3] and new construction must be approved under both state-based administrative safety regulations and permitting processes within individual municipalities that enforce those regulations.[4] The Fourteenth Amendment of the United States Constitution guarantees the state cannot deprive a citizen of property or liberty without due process of the law[5]—how do these protections manifest in the less formal circumstances presented by municipal administration?

1. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY, Dec. 20, 1913, at 10, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45 r81.cf1 rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf [https://perma.cc/LC2L-44PG].

2. *See, e.g.*, Mary Serreze, *Easthampton City Council Delays Vote on Seeking 8 Over-Quota Liquor Licenses*, MASSLIVE.COM (Oct. 22, 2015), http://www.masslive.com/news/index.ssf/2015/10/easthampton_over_quota_liquor_licenses ht ml [https://perma.cc/3HEL-M7VK].

3. *See, e.g.*, Mary Serreze, *Crowd Turns Out to Support Fort Hill Brewery at Easthampton Zoning Board Hearing*, MASSLIVE.COM (Oct. 9, 2015, 6:00 AM), http://www.masslive.com/news/index.ssf/2015/10/tcrowd_turns_out_to_support_for html [https://perma.cc/44TN-NGEQ].

4. *See generally, e.g.*, Mass. State Sanitary Code, 105 MASS. CODE REGS. 410 (2016).

5. U.S. CONST. amend. XIV, § 1.

Consider the following scenario:[6] a big-box supermarket is intent on developing a new location in a small city.[7] This new store will be placed on land that is currently the site of a soft-serve ice cream shop and driving range, a local favorite with a beautiful view of a mountain and church steeples.[8]

The supermarket applies to the town zoning board of appeals ("ZBA") for a special permit.[9] However, the community fears that the new store would push out smaller businesses, create further traffic snarls in an already congested area, and replace a favorite local institution; these fears threaten to derail the permitting process.[10] In response, the supermarket brings in a local attorney-politician, who contacts ZBA members, shows them plans and gets to know them personally.[11] Ultimately, the permit is denied in a split decision; however, the attorney participates in the drafting of the decision to give it a greater chance of success on appeal, via communication with the head of the ZBA.[12]

When the denial of the special permit is appealed, the local counsel continues to meet personally with most members of the ZBA, despite being rebuffed by some.[13] In some instances, he travels over forty-five minutes each way to meet with the members;[14] in others, he calls them

6. The scenario is derived from the facts plead in the plaintiff's opposition to summary judgment in *Cernak v. Planning Board for the City of Easthampton*, a Massachusetts trial court case. *See* Pls. Mem. of Law in Opp. to Defs. Motion for Summary Judgment, Cernak v. Planning Bd. for the City of Easthampton, No. 10-035 (Mass. Super. Ct. Hampshire Cty., Mar. 26, 2013) (on file with author) (hereinafter "Cernak Memorandum"). While the facts, then, are necessarily those most favorable to the plaintiff, they are presented at face value here to illustrate the issue in its most vivid form.

7. *Id.* at *1.

8. *See* Mary Serreze, *Stop & Shop, Tasty Top Owner, Mum on Supermarket Project in Easthampton*, MASSLIVE.COM (Oct. 16, 2014), http://www.masslive.com/news/index.ssf/2014/10/tasty_top_owner_and_stop_shop html [https://perma.cc/QF7V-FLC5].

9. *See* Cernak Memorandum, *supra* note 6, at *1.

10. *See* John Paradis, *Get Tasty Top Treat While You Can*, DAILY HAMPSHIRE GAZETTE (June 12, 2014), http://www.gazettenet.com/Archives/2014/06/paradis-hg-061314 [https://perma.cc/3VWB-6BU2]. Paradis's editorial, albeit penned several years after the initial permit was granted, eloquently articulates the common anti-Stop & Shop sentiment, writing about sprawl and classic New England charm:

> What I lament is that when the Tasty Top and its cool cone sign comes down, a piece of New England will come down with it . . . . Easthampton has a beautiful mountain backdrop, old mills as well as a revitalized and repurposed mill, a downtown with character and attractive specialty stores, a bike trail, and a prep school. What it won't have now is an ice cream stand.

Id.

11. *See* Cernak Memorandum, *supra* note 6, at *2.

12. *Id.* at *7–11.

13. *See id.* at *17–26.

14. *Id.* at *18.

both at their offices and on their personal phones.[15] When members do meet with the attorney, they comment on alternative plans offered by him.[16] The attorney hopes that these conversations will help "make sure that the message . . . is clear" and "assist[] the Planning Board in making a decision."[17]

Throughout the process, the existence of these communications remains unknown to those opposing the permit.[18] After the ZBA reverses its original decision and grants a special permit, abutters of the property—suspicious of impropriety in the process—sue for judicial review of the ZBA's decision.[19] Through discovery, the plaintiffs learn of the communications described above.[20]

Naturally, all members of the ZBA deny any prejudice resulting from the communications.[21] Some indicate they refused to meet with the attorney at all, uncomfortable with the unprecedented (for this ZBA, at least) situation.[22] The supermarket and its attorneys maintain that the local counsel's conversations were merely limited to procedural questions, despite a professional town planner designated as the sole point of contact between the ZBA and interested parties.[23]

What recourse do the parcel's aggrieved neighbors have? When does lobbying—a fact of municipal life—become improper, or unduly influential? What effect does the supermarket's persistent and pervasive pattern of *ex parte* influence have on the judicial validity of the ZBA's decision? If the ZBA flatly denies it was influenced by these *ex parte* communications, how can a litigant successfully demonstrate bias? These are not questions with easy answers. Given the Constitution's promise of due process,[24] however, they must be answered.

Ex parte communications in such settings—by definition, those outside of official procedure[25]—present serious issues under the constitutional mandate for due process,[26] and dangerous potential for

15. *Id.* at *17–26.

16. *Id.*

17. *Id.* at *18 (internal citation omitted).

18. *See id.* at *2.

19. *See generally* Pls. Complaint, Cernak v. Planning Bd. for the City of Easthampton, No. 10-035 (Mass. Super. Ct. Hampshire Cty., Mar. 26, 2013) (on file with author).

20. *See* Cernak Memorandum, *supra* note 6, at *2.

21. *See id.* at *20–23. The board members do not, however, contest that the communications occurred. *See id.* at *24.

22. *Id.* at *20–21.

23. *Id.* at *22.

24. *See* U.S. CONST. amend. XIV, § 1.

25. *Ex parte*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest.").

26. *See* U.S. CONST. amend. XIV, § 1; *see also infra* Part II.

improper influence and moral hazards for practitioners and parties alike.[27] These questions must be addressed in order to ensure stakeholders' rights and clearly delineate obligations for those conducting the day-to-day work of municipal law. As a fundamentally local issue, this can only be done on the state level.[28]

Very few jurisdictions have provided solutions to this problem: only Massachusetts, Oregon, Idaho, Washington, and Florida have had opportunities to squarely address it, reaching divergent answers.[29] The federal administrative context, an environment in which many of the same issues arise, may provide some indication of a solution.[30]

Ideally, to resolve this issue, board members facing circumstances such as those described above should cure the hazards presented by improper contacts by disclosing the existence and content of any *ex parte* communications, and providing parties the chance to contest and rebut on the official record any arguments advanced in those communications. However, where board members engage in *ex parte* communications, yet fail to publicly disclose them, their decision should automatically be rendered suspect and infected by bias—a presumption they can then rebut.

This Note will first provide a brief overview of municipal government, including the powers it is given and the structure by which it administers those powers. It will then turn in Part II to the constitutional issues raised in the context of those structures, depending on the type of power being exercised. In Part III, this Note discusses the specific procedural and substantive issues posed by *ex parte* communications in municipal administrative context. Part IV addresses what jurisdictions have done to resolve the issue, and the successes and failures of those solutions. The Note then turns to federal administrative law for insight in Part V, discussing that body of law in conjunction and comparison with the state law examined in Part IV. Finally, in Part VI, this Note proposes a model solution of this issue for any jurisdiction that may encounter it, synthesizing all prior proposed solutions to create a rule that balances fundamental fairness with the realities of the municipal context.

I. MUNICIPAL AUTHORITY: SOURCE AND STRUCTURE

Before addressing the constitutional problems that may arise when *ex parte* communications are made to municipal decision-making bodies,

27. *See infra* Part III.

28. *See* discussion *infra* Part I. While the federal context is not totally irrelevant; *see* Part V *infra*; a national framework is an impossibility, as it would impermissibly intrude on the police powers reserved for states and their municipal bodies.

29. *See infra* Part IV.

30. *See infra* Part V.

it is critical to briefly sketch out the municipal context. Municipal governments are a special type of corporation, and, accordingly, are exclusively creatures of state law.[31] They "have no sovereign power. Instead, they enjoy only the powers conferred on them by state constitutions and statutes."[32] Municipalities may take many different forms—from autocratic mayors, to strong councils, to town meetings—and the choice of form is left solely with the municipal government.[33] The prevalent forms of municipal governance vary greatly between jurisdictions.[34]

The powers of the municipal corporation are bound most narrowly by the municipality's charter.[35] The charter—when duly authorized by state law—is the source of all of a municipality's power, defining and limiting its form and bounds.[36] Charters can be understood as the municipal analogues to a constitution, although their creation must first be permitted by the relevant state law.[37]

Typically, the charter will vest two types of powers in the municipal legislature: legislative and administrative.[38] Legislative power is the authority to create law, whereas administrative power is the authority to enforce law.[39] The classic test for distinguishing between the two involves examining whether the municipal action in question (often an ordinance) makes new law, or merely executes existing law.[40]

Municipalities have authority to legislate on matters traditionally within the state's reserved police powers—namely health, safety, welfare, and morals.[41] The police powers have been held to provide sufficient grounds for zoning legislation.[42] However, most jurisdictions' state legislatures explicitly provide municipalities with the authority to zone in

31. *See* 2A MCQUILLIN MUN. CORP. § 10:3 (3d ed. 2016) (discussing sources of municipal power, including state constitutions, statutes, and municipal charters, *inter alia*).

32. STEWART E. STERK & EDUARDO M. PENALVER, LAND USE REGULATION 18 (2011).

33. *See* MCQUILLIN, *supra* note 31, § 9:14.

34. *Id.*

35. *See, e.g.*, Alvord Inv., LLC v. Zoning Bd. of Appeals of Stamford, 920 A.2d 1000, 1011 (Conn. 2007) ("The charter serves as an enabling act, both creating power and prescribing the form in which it must be exercised.").

36. *See* MCQUILLIN, *supra* note 31, § 9:3.

37. *Id.*

38. *See id.* § 10.6.

39. *Id.* For more nuanced, in-depth treatment of these separate categories of municipal power, *see* discussion *infra* Section II.B.

40. *See, e.g.*, Whitbeck v. Funk, 12 P.2d 1019, 1019 (Or. 1932); *see also* MCQUILLIN, *supra* note 31, § 10:6.

41. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–87 (1926).

42. *Id.* at 395 (holding that particular zoning measures were sufficiently justified by reason of health, safety, and welfare).

zoning enabling acts ("ZEA").[43] Once a municipal government legislatively enacts zoning standards, it must also administrate the laws—often this is done by delegation to a zoning-specific authority.[44]

As a broad rule, delegation of administrative powers—including permitting, licensing, and enforcement—to boards or individuals is permitted, so long as they are merely to apply the rules.[45] In the zoning context, this typically leaves the granting of variances, special permits, approval of subdivision plans, and many other property-specific determinations in the hands of administrative bodies with delegated power.[46] It is before exactly these sorts of boards that the issue discussed in this Note arises.[47]

II. CONSTITUTIONAL IMPLICATIONS

The Fourteenth Amendment demands that no state "shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[48] Where the municipal government wishes to take action that would impact "life, liberty, or property," citizens are entitled to due process.[49] Due process takes two distinct forms: substantive (examining whether the government had legal authority for its action), and procedural (determining whether the government took action in a proper manner).[50] This Note is concerned exclusively with procedural due process protections.

Communications with public officials are not constitutionally

43. *See, e.g.*, MASS. GEN. LAWS ch. 40A (2015); *see also* ADVISORY COMM. ON ZONING, DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1926), https://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf.

44. *See* MCQUILLIN, *supra* note 31, § 26:81. Often, this authority is called the Zoning Board of Appeals ("ZBA") or some other similar name; this Note will often use ZBA, or "board" more generally.

45. *See id.*

46. *Id.*

47. Note, however, that delegated executive power exists in many areas of the municipal government, not just zoning. For example, boards may properly be given authority over administrating laws regarding licensing of amusement devices; licensing businesses for health, safety, and sanitary compliance; permitting weapons; and issuing liquor licenses. *See id.* § 26:87. As will be discussed *infra* Part II, these determinations all raise the same constitutional issues. This Note will retain its focus on zoning and land use authorities, but its arguments apply with equal force in all municipal administrative contexts.

48. U.S. CONST. amend. XIV, § 1; *see also* U.S. CONST. amend. V (providing for due process protections against the federal government). This Note primarily handles due process issues on the state level, so it will speak about the Fourteenth Amendment. However, the requirements of procedural due process are identical under either amendment.

49. U.S. CONST. amend. XIV, § 1.

50. For a nuanced and detailed examination of these two closely related concepts, *see generally* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 847–48 (2003).

troublesome in a vacuum—indeed, in order to be an active and well-informed member of the community, people *should* become familiar with those in their local government.[51] However, in certain contexts, those conversations have the potential to be problematic. *Ex parte* communications, those outside of official procedure, present a significant question in the context of determining what level of subsequent process satisfies the Fourteenth Amendment.[52] To obtain any relief on that question, however, plaintiffs must first demonstrate that due process protections apply.[53] As this section will discuss, doing so depends on the nature of the municipal action that is being challenged.

A. *When Does Due Process Apply?*

The Fourteenth Amendment contains three requirements which trigger due process protection.[54] First, there must be some state action that will affect the citizen.[55] In the context of municipal boards, this requirement is easily satisfied: they are part of the city apparatus, and—at minimum—any grant or denial of permits is state action.[56]

Second, the government action must threaten one of the protected constitutional interests: "life, liberty, or property."[57] A municipal proceeding is unlikely to deprive a citizen of his or her life. Practically, property or liberty are the only interests a municipal board can touch. In the case of zoning boards, their actions clearly impact the ways in which people can utilize their real property. Licensing boards' actions may damage a person's finances[58]—both money and real property are

51. *See generally* Margaret Stimmann Branson, *The Role of Civic Education*, CTR. FOR CIVIC EDUC. (Sept. 1998), http://www.civiced.org/papers/articles role html [https://perma.cc/62UC-QECW]. "There is no more important task than the development of an informed, effective, and responsible citizenry." *Id.*

52. *See* discussion *infra* Section III.C.

53. *See* WILLIAM F. FUNK, ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 246 (5th ed. 2014) (stating that the threshold question, before asking how much procedure is necessary, is whether any procedure is necessary).

54. U.S. CONST. amend. XIV, § 1. Note that some may consider citizenship a prerequisite for due process protections as well, given the text of the amendment. However, there is great debate over when due process might apply, regardless of citizenship. *See, e.g.*, Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879 (2015). This Note will assume that any requisite citizenship is satisfied when parties are before municipal boards.

55. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . ."); *see* Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1380 (2005) ("[State action is] a key component of the Fourteenth Amendment—a threshold requirement that must be satisfied before triggering protection of our fundamental rights . . . .").

56. *See supra* Section I.

57. U.S. CONST. amend. XIV, § 1.

58. Ivan B.K. Levingston & Celeste M. Mendoza, *Liquor Licenses Prove Critical for Local Restaurants*, HARV. CRIMSON (Apr. 25, 2014),

traditional property interests, protected by the Fourteenth Amendment.[59]

Municipal boards' actions can also impact a person's liberty.[60] Zoning regulations may determine whether a business owner can realize their vision at a particular location;[61] the failure to obtain a liquor license could derail the dreams of an aspiring restaurateur.[62] The vast majority of municipal boards' actions will touch some citizen's liberty or property interest.[63] However, the mere showing that a government actor is impinging upon one's liberty or property is not enough to trigger due process.

Finally, the state action must affect a particular citizen (or group of citizens) on an individualized, fact-specific basis.[64] Many actions the state takes are legislative in nature (or quasi-legislative), affecting each citizen equally; in such cases, due process protections do not apply.[65] However, some actions impact only one person, or a discrete set of individuals based on facts specific to them.[66] These actions are judicial in nature (or quasi-judicial), and trigger due process protections,[67] depending on the interest at stake.

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http://www.thecrimson.com/article/2014/4/25/liquor-licenses-square-biz/ [https://perma.cc/4PMS-YNG2].

59. *See* Bd. of Regents v. Roth, 408 U.S. 564, 571–72 (1972). In addition to those clear examples of property, the concept can also extend to welfare entitlements and employment contracts—actual or implied. *Id.* at 576–77.

60. *See* Wisconsin v. Constantineau, 400 U.S. 433, 435–36 (1971) (holding that a police department's branding of a woman as a habitual drunkard and resultant prohibition of sale of alcohol to her triggered due process); Shands v. City of Kennett, 993 F.2d 1337, 1347 (8th Cir. 1993) (stating that, in some circumstances, government's infringement on good reputation can be sufficient infringement of liberty interests).

61. *See* Serreze, *supra* note 3.

62. *See* Levingston & Mendoza, *supra* note 58.

63. *Cf.* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty] denotes . . . the right of the individual to contract, to engage in any of the common occupations of life . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

64. *See* U.S. CONST. amend. XIV, § 1 ("[D]eprive any person . . . ."); *see also* Londoner v. City of Denver, 210 U.S. 373, 386 (1908) (ruling that where Denver sought to institute a road-improvement tax on petitioners on the basis of their property abutting newly-paved road, petitioners were entitled to a hearing on the specific facts to determine their tax).

65. *See generally* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (holding that action raising the valuation of every property in Denver equally did not entitle each subject individual to due process claims); *see also* Pronghorn, Inc. v. Licensing Bd. of Peabody, 430 N.E.2d 842, 843 (Mass. App. Ct. 1982) (holding that city-wide change in closing time of bars was not an individualized determination, so did not require individual procedure).

66. *See Londoner*, 210 U.S. at 373–86 (discussing how each petitioner should have been able to present evidence regarding their property's relationship to new road before tax was imposed).

67. *Id.* at 386; *cf. Bi-Metallic*, 239 U.S. at 446 (contrasting *Londoner*: "a local board had to determine 'whether, in what amount, and upon whom' . . . . A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds . . . .").

Whether the municipal board's action is an individualized determination is often the critical consideration. In short, if a board's action is quasi-judicial,[68] it satisfies the individualized determination requirement, invoking due process.[69] However, the inclusion of "quasi-judicial" in that definition adds another level of complexity: which actions are quasi-judicial, and which are quasi-legislative?

B. *Distinguishing Between Quasi-Legislative and Quasi-Judicial Actions*

Municipal boards have dual functions. First, they are responsible for promulgating rules and regulations within their jurisdiction.[70] Second, they are responsible for enforcing those rules and regulations, along with other laws of the community with which they are charged.[71] The first is quasi-legislative (acting like a legislature) and the second is administrative (enforcing that quasi-legislature's laws).[72] While administrative board activity is not always adjudicatory, it will often involve making a determination regarding a particular citizen on particular facts: in other words, boards often act quasi-judicially when acting administratively, such as in granting permits.[73]

Different jurisdictions have proposed and utilized many tests in order to determine whether a particular board action is quasi-judicial or quasi-legislative.[74] The consensus that seems to emerge is that quasi-judicial actions are those taken on the basis of facts specific to an individual, operating from a basis of established law.[75] Quasi-legislative actions,

68. *Quasi-judicial*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Of, relating to, or involving an executive or administrative official's adjudicative acts."); *cf. Quasi-legislative*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Not purely legislative in nature . . . .").

69. *See, e.g.*, Cast Iron Soil Pipe Inst. v. Bd. of State Exam'rs of Plumbers & Gas Fitters, 396 N.E.2d 457, 464 (Mass. App. Ct. 1979).

70. *See, e.g.*, *Pronghorn, Inc.*, 430 N.E.2d at 843 (handling a challenge to Licensing Board's decision to set closing-time for bars at 1:00 a m., a change from an earlier 2:00 a.m. close).

71. *See, e.g.*, Neuberger v. City of Portland, 603 P.2d 771, 772 (Or. 1979) (reviewing grant of a special permit to one landowner); *cf. Pronghorn, Inc.*, 430 N.E.2d at 845 (noting board was not wielding its powers against a single permit-holder).

72. *Pronghorn, Inc.*, 430 N.E.2d at 843–45; *see also* discussion *supra* Part I.

73. *See Pronghorn, Inc.*, 430 N.E.2d at 843–45.

74. *See* Fasano v. Bd. of Cty. Comm'r of Washington Cty., 507 P.2d 23, 25–26, 30 (Or. 1973) (citing Illinois, Washington, and Ohio authorities in determining that test was whether action created rule of general applicability to an open class, or application of a general rule to a specific individual or interest); *Pronghorn, Inc.*, 430 N.E.2d at 845 (identifying general applicability, invocation of public need, lack of charges, and no need for hearings followed by official findings on those charges as crucial factors weighing against quasi-judicial nature).

75. *Cf.* Cast Iron Soil Pipe Inst. v. Bd. of State Exam'rs of Plumbers & Gas Fitters, 396 N.E.2d 457, 464 (Mass. App. Ct. 1979) (holding that because plumbing code amendments were reflective of political policy choices, although they affected a closed class, they were not enacted in response to any particular person or set of facts and therefore quasi-legislative).

conversely, establish law with which all individuals must conform.[76] As discussed *supra* in Part I, the zoning context is fertile with examples of boards acting quasi-judicially, including considering variances, special permits, pre-existing non-conforming uses, and subdivision plans.

It is fair (although recursive) to say that those municipal board proceedings that satisfy the individualized determination requirement of the Fourteenth Amendment are quasi-judicial, and quasi-judicial proceedings are those that are individualized determinations.[77] In the final analysis, the requirement of individualized determinations and the notion of quasi-judicial proceedings are two ways of describing the same fundamental notion: due process is only triggered where a particular person's constitutional rights are under threat of infringement, on the basis of circumstances unique to that person.[78]

C. *How Much Process is Due?*

Procedural due process requires, at minimum, notice of all facts in consideration by the quasi-judicial tribunal, opportunity to present and rebut evidence, and a neutral decision-maker.[79] As far as what measures are actually constitutionally mandated, however, a more fact-specific analysis controls. When a litigant claims he or she was deprived of a procedural measure required under due process, that claim is tested against *Mathews v. Eldridge*.[80] In *Mathews*, the Supreme Court established a three-factor balancing test for whether a measure is required by the due process clause.[81] If, in light of the competing interests of the state (both the public's interest and efficiency/fiscal concerns) and the individual, the additional procedure would substantially reduce the risk of erroneous deprivation, the proposed measure is required.[82]

Ex parte communications bear on all three essential fairness

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76. *Cast Iron*, 396 N.E.2d at 464.

77. *See* Londoner v. City and Cty. of Denver, 210 U.S. 373, 386 (1908); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 446 (1915).

78. *Cf. Londoner*, 210 U.S. at 386 (discussing individualized determination requirement) *with Fasano*, 507 P.2d at 25, 30 (discussing the character of quasi-judicial action by municipal bodies).

79. *See* Goldberg v. Kelly, 397 U.S. 254, 255 (1970) (discussing due process in context of welfare termination proceedings); *see also, e.g.*, Chrismon v. Guilford Cty., 370 S.E.2d 579, 593 (N.C. 1988) (emphasizing a zoning board's more general "duty to exercise independent judgment in making zoning decisions . . . .").

80. 424 U.S. 319 (1976).

81. *Id.* at 335. The three factors are the individual's interest at stake, the government's interest at stake, and the risk of erroneous deprivation in the proposed measure's absence. *Id.*

82. *Id.* In *Mathews*, the Court found a very strong state interest (effective administration of the disability benefits program), a non-critical personal interest (disability is not a need-based benefit), and a relatively low risk of erroneous deprivation, because the plaintiff only sought a pre-deprivation hearing, rather than a post-deprivation hearing. *Id.*

elements.[83] When a party contacts a board member, any relevant information discussed in that conversation is essentially an unnoticed, unrebuttable fact-finding session, with the board member—willingly or not—taking evidence off the record.[84] Additionally, those contacts could introduce bias into the proceedings, whether nefarious misconduct or subtler forms of prejudice.[85]

The mere fact that *ex parte* communications have occurred, however, does not violate procedural due process. Municipalities would resolve the potential constitutional issues by developing a method for handling those contacts that satisfies the *Mathews* test. There are no blanket rules of what procedure applies in a given situation.[86] Rather, the *Mathews* test is intended to provide a flexible method to determine what procedure is necessary on a factual, case-by-case basis.[87] After demonstrating that due process applies, it is the task of the party claiming its protections to demonstrate what specific provisions it requires.[88]

III. THE DANGER OF *EX PARTE* COMMUNICATIONS WITHOUT APPLICABLE LAW

In most United States jurisdictions, *ex parte* communications occupy a gray area in the context of quasi-judicial municipal proceedings and their accompanying due process rights.[89] Even if *ex parte* communications are recognized as potential violations of procedural due process in those settings, there is rarely a workable legal standard set forth.[90] Because *ex parte* communications carry not only traditional due process dangers such as corruption and explicit bias,[91] but also threaten adjudicators' neutrality in more subtle ways,[92] courts or legislatures must adopt a clear, uniform standard.

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83. *See id.*

84. *See* Eacret v. Bonner Cty., 86 P.3d 494, 501 (Idaho 2004).

85. *See infra* Part III.

86. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

87. *See Mathews*, 424 U.S. at 334 (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

88. Part VI of this Note applies the *Mathews* test to a proposed solution, which would remedy due process concerns.

89. Only Oregon, Idaho, Florida, and Washington have developed clear, controlling law on the issue. *See infra* Part IV.

90. *See, e.g.*, Cernak v. Planning Bd. for the City of Easthampton, No. 10-035 (Mass. Super. Ct. Mar. 26, 2013) (on file with author) (deciding on whether allegations of bias from *ex parte* communications sufficient to void a ZBA decision).

91. *See* Goldberg v. Kelly, 397 U.S. 254, 255 (1970) (guaranteeing a neutral decision maker).

92. *See infra* Section III.A.

A. Ex Parte *Communications Present Substantial Danger of Bias*

Certain types of bias, assuming they can be proven, are unquestionable—pecuniary interest, personal interest, prejudgment, and prejudice all violate due process.[93] While *ex parte* communications likely arise in the context of those biases, proof beyond improper communications is needed to establish that level of apparent bias. More difficult (and frustrating) cases arise where the *ex parte* communications are alleged to have subtly influenced the board's decision, without any outright corruption.[94]

Social sciences have demonstrated that bias can take many forms. Of particular note are cognitive biases, which are generally unnoticed assumptions that play large roles in the decision-making process.[95] These biases often take the form of heuristics—essentially, shortcuts the human brain takes in the decision-making process, without its user ever knowing.[96]

Some of these cognitive biases seem particularly relevant in the context of otherwise innocent *ex parte* communications. First, there is the availability heuristic, also referred to as the "ease of retrieval" bias.[97] Under this cognitive bias, decision-makers give the most credence to the set of facts they are most easily able to recall.[98] Studies demonstrate the ease of recall is itself credited as information supporting the truth of the matter.[99]

Ex parte communications thereby provide the communicator with an invaluable persuasive edge: mere repetition of his or her points, making them easier for the board member to recall, gives them credence and may influence the ultimate decision.[100] The availability heuristic problem is further compounded by the concept of availability cascades: the more common and repeated a view is, the more available it is, and, therefore,

93. *See, e.g.*, *Goldberg*, 397 U.S. at 255; Neuberger v. City of Portland, 607 P.2d 722, 725 (Or. 1980) (discussing explicit biases which would justify invalidation of municipal board's decision).

94. *See, e.g.*, Cernak v. Planning Bd. for the City of Easthampton, No. 10-035 (Mass. Super. Ct. Hampshire Cty., Mar. 26, 2013) (on file with author).

95. *See* Jim Taylor, *Cognitive Biases are Bad for Business*, PSYCHOL. TODAY (May 20, 2013), https://www.psychologytoday.com/blog/the-power-prime/201305/cognitive-biases-are-bad-business [https://perma.cc/CT35-5TBV].

96. *Id.*

97. *See generally* Norbert Schwarz et. al., *Ease of Retrieval as Information: Another Look at the Availability Heuristic*, 61 J. PERSONALITY & SOC. PSYCHOL. 195 (1991) (discussing availability bias).

98. *Id.* at 195.

99. *Id.* at 200–01. In other words, people will generally afford more credibility to things which are easier to recall.

100. The effect is even greater if the communication is made in an unexpected context, e.g., by accosting the member in public—the communication is then more memorable. *See id.*

the more credence it is given.[101] On matters of great public concern, where one viewpoint may be communicated much more than another, the decision-makers may be further biased.

Perhaps even stronger is the mere exposure effect, alternatively referred to as the familiarity principle.[102] The familiarity principle describes a phenomenon often unnoticed in daily life, but well-established: the more exposure one has to something, the more one likes that thing.[103] This principle applies with inanimate objects[104] and human beings[105] alike. *Ex parte* communications provide parties with the opportunity to show municipal decision-makers their individual personality. The more familiar the decision-makers grow with the person, the more they unconsciously begin to like them and want to decide a case in their favor.[106]

Two other related biases are worth mentioning: the framing[107] and focusing[108] effects. An *ex parte* contact, in addition to the benefits of repetition, availability, and personal familiarity, provides its sender with an opportunity to frame the issue at hand without rebuttal. Additionally, the familiarity and repetition of the issue may attract undue focus to this frame. A combination of focus and framing biases may be impossible to cure once the decision-maker has encountered it. Unless the communications are disclosed, there is no chance for the party opponent to challenge those biases by telling his or her own version of the same facts, or emphasizing different facts that may be just as significant.[109]

B. *Because of Obvious Biases, Subtle Biases, and the Extraneous Fact-Finding Presented by* Ex Parte *Communications, Jurisdictions Must*

101. Timur Kuran & Kass R. Junstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 683–84 (1999).

102. *See generally* R.B. Zajonc, *Mere Exposure: A Gateway to Subliminal*, 10 CURRENT DIRECTIONS IN PSYCHOL. SCIENCE 224 (2001) (discussing familiarity bias).

103. *Id.* at 224.

104. *Id.* at 224–25. For example, mere exposure to Chinese characters—without any meaning attached—lead to subjects developing fondness for said characters. *Id.*

105. *See generally* W.C. Swap, *Interpersonal Attraction and Repeated Exposure to Rewarders and Punishers*, 3 PERSONALITY & SOC. PSYCHOL. BULL. 248 (1977) (arguing mere familiarity with positive humans increased fondness for them; mere exposure to negative persons, distaste).

106. *See* Zajonc, *supra* note 102, at 224.

107. *See generally* James N. Druckman, *Evaluating Framing Effects*, 22 J. ECON. PSYCHOL. 91, 91 (indicating that the frame in which a question is presented—e.g., mortality rate versus survival rate—radically effects subsequent opinions and decisions on the matter).

108. *See* Daniel Kahneman et al., *Would You Be Happier if You Were Richer? A Focusing Illusion*, SCIENCE 1908–10 (June 30, 2006) (discussing tendency to focus on one issue as critical when it may not be).

109. *See id.*; Druckman, *supra* note 107, at 91. If multiple parties frame the issue and promote different points of emphasis, these cognitive biases may be neutralized.

Adopt Rules to Address Them

Ex parte communications in proceedings before municipal boards acting quasi-judicially will continue to present an unknown risk in jurisdictions that have not addressed the issue. One of the groups most impacted by the current, cloudy situation are attorneys who represent clients in land use or permitting proceedings.[110] Attorneys are governed by ethical rules, which have stringent guidelines on improper communications with both adjudicators and other attorneys' clients.[111] When dealing with municipal board members—who may be both a decision-maker and represented party—what are the boundaries of the encounter? Do *ex parte* communications violate ethical rules?[112] Under the current state of the law, only the classic magic eight-ball answer suffices: answer unclear, try again later.

All those who must have a matter decided before a municipal quasi-judicial board also require a clear standard delineating their rights and the applicable law.[113] "The American commitment to the rule of law means that every citizen is governed by the same laws, applied through a fair and equal judicial process."[114] Each person must be quasi-judged under equally fair due process conditions and must be entitled to equal review of those municipal decisions.

Just as litigants would benefit from well-defined standards, judges would too: laws should be "clearly communicated and fairly enforced. Everyone is held accountable to the same laws."[115] Some uniform understanding of the due process implications of *ex parte* communications in quasi-judicial settings would significantly aid judges as they decide future cases.

Last, but certainly not least, local municipalities and board members would be greatly aided by clearer standards, defining their obligations and providing greater predictability of outcomes.[116] Currently, quasi-judicial decision-makers in many jurisdictions have no idea of their duties or

110. *See* R. Lisle Baker, *Ethical Limits on Attorney Contact with Represented and Unrepresented Officials: The Example of Municipal Zoning Boards Making Site-Specific Land Use Decisions*, 31 SUFFOLK U. L. REV. 349, 349 (1997).

111. *Id.* at 381.

112. *Id.* at 382–83.

113. *See* Ronald D. Keefe, *Guarding the Rule of Law*, 87 MICH. B.J. 12, 12 (2008); *see also* JUD. LEARNING CENTER, *Law and the Rule of Law*, http://judiciallearningcenter.org/law-and-the-rule-of-law/ [https://perma.cc/8QKB-SSHS].

114. *Id.*

115. *Id.*

116. *See generally* Letter from Robert A. Butterworth, Florida Atty. Gen., to Hon. Truman G. Scarborough, Jr., Chairman, Brevard Cty. Comm'n. (Aug. 19, 1994), http://www.myfloridalegal.com/ago nsf/Opinions/8D781F3363CBEE6D852562210050A78D. This advisory opinion, sent in the wake of *Jennings*, was sent in response to a municipal board seeking definitive legal guidance on an unclear area. *Id.*

obligations relative to procedural due process and *ex parte* communications. Even where cities are aware of the potential problem, there is no easy or apparent solution available.[117]

Were there a model rule available and adopted, these problems would be alleviated. Land use practitioners would know more precisely how they were allowed to communicate with board members, and exactly what effects those communications might have. Judges would work within a standard when ruling on issues of *ex parte* communications, instead of creating unguided precedent. Board members and those before the board would know the law and their rights.

IV. SOLUTIONS FROM THE STATES

What rule might suffice to resolve the serious issues of bias and extra fact-finding, while remaining simple and flexible enough that any jurisdiction could adopt it? Other states—the laboratories of democracy[118]—have already encountered the issue, and can be looked to for guidance. While Massachusetts has only addressed the issue of *ex parte* communications in quasi-judicial proceedings before municipal boards in an obscure fashion at the lowest judicial level,[119] several other jurisdictions have settled the issue more decisively and conclusively. Oregon, Idaho, Florida, and Washington have each attempted to resolve the due process problems presented by *ex parte* communications in municipal proceedings, each reaching divergent solutions.[120]

As the discussion below will indicate, each approach adopted by the relevant state courts has its respective flaws. However, some consistent patterns emerge after viewing the treatments in conjunction. These state rules—both by their distinctions, and their shared features—provide strong models (and cautionary tales) on how any state court encountering *ex parte* communications in municipal proceedings should rule.

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117. *See, e.g.*, Memorandum from Berkeley City Manager to the Mayor and Members of the City Council re: Regulation of *Ex Parte* Contacts, Apr. 20, 2004 (on file with author) (attempting to proactively set plan on how to handle the issue; finding no guidance).

118. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

119. *See infra* Section IV.A.

120. *See* discussion *infra*. In addition to Oregon, Idaho, Florida, and Washington, several other jurisdictions have handled the issue in a manner similar to Massachusetts—non-conclusive discussion of the issue, with murky (if any) standards emerging. *See, e.g.*, Armstrong v. Turner Cty. Bd. of Adjustment, 772 N.W.2d 643, 653–54 (S.D. 2009) (commenting on the problem presented by *ex parte* communications); City of Hobart Common Council v. Behavioral Inst. of Ind., LLC, 785 N.E.2d 238, 254 (Ind. Ct. App. 2003) (discussing potential problems related to off-the-record phone calls and conversations). However, because such decisions are of very limited use in determining standards that jurisdictions could use going forward, they are beyond the scope of this Note.

A. *Massachusetts's Ambiguous Standard*

Massachusetts provides an illustrative example of a jurisdiction that has failed to develop a consistent standard for treating the issue, despite consistently encountering it. As early as 1932, the Supreme Judicial Court of Massachusetts ("SJC") encountered allegations of *ex parte* communications tainting a zoning board adjudication.[121] There, the SJC held that because the plaintiffs introduced no evidence regarding the nature of the communications or the weight afforded to them by the board in making its decision, there was no valid claim for relief.[122]

In *Alford v. Boston Zoning Commission*, a Massachusetts appellate court ruled that because plaintiffs' alleged harm came as a result of quasi-legislative rather than quasi-judicial actions by the zoning commission, arguments regarding *ex parte* communications had no merit.[123] Despite finding that the plaintiffs had no cognizable cause of action regarding those communications, the court's decision seemed to imply they could be problematic in an adjudicatory setting.[124]

Massachusetts's most definitive treatment of this issue to date is limited to a single unpublished lower court decision, although that decision represents the only (quasi-) resolution provided to date.[125] *Cernak v. Planning Board for the City of Easthampton*—a case surrounding the facts discussed in the Introduction of this Note—forced a Massachusetts district court to address the issue directly, as it was the basis for the entire suit.[126]

In *Cernak*, the district judge found that although there were many uncontroverted *ex parte* communications from the permit-seeking grocery chain, Stop & Shop, the plaintiffs had failed to show any bias resulting from those communications.[127] First, the judge opined that the plaintiffs had been given a full opportunity to be heard at a public hearing, and that the board members had based their decisions solely on information presented at public hearings.[128] Next, he wrote that evidence of *ex parte* communications from the first permitting process did have some probative

121. *See* Fandel v. Bd. of Zoning Adjustment of Bost., 182 N.E. 343, 344 (Mass. 1932) ("The precise point is whether the reading of these communications received subsequently to the public hearing requires the quashing of the proceedings.").

122. *See id.*

123. Alford v. Boston Zoning Commission, 996 N.E.2d 883, 890–891 (Mass. App. Ct. 2013).

124. *Id.* at 891.

125. *See generally* Cernak v. Planning Bd. for the City of Easthampton, No. 10-035 (Mass. Super. Ct. Hampshire Cty., Mar. 26, 2013) (on file with author).

126. *See generally id.* (deciding on allegations of bias from *ex parte* communications sufficient to void a ZBA decision).

127. *See id.* at *6–7.

128. *See id.*

value as to Stop & Shop's behavior and intent, but solely provided context.[129]

Ultimately, the judge drew a bright line between *ex parte* communications implicating substance—which he did not observe here—and those implicating procedure, which he viewed as harmless.[130] In light of the lack of any proven bias, lack of proof of substantive discussions, and failure to show any consideration of *ex parte* communications in the ZBA's decision-making, the judge refused to touch the ZBA's decision—even where it appeared clear that Stop & Shop had intended to influence the board.

> In short, the question is not whether Stop & Shop intended to influence the Board, but whether or not, through *ex parte* contacts with Board members, Stop & Shop caused the board to do what it would not otherwise have done. In my judgment it did not. While I do not condone Stop & Shop's *ex parte* contacts, they were not so egregious as to affect the administrative process in a way that substantial justice was not done.[131]

That quotation (frustratingly vague as it may be) represented the entire articulation of any standard by the court. As will become clear in discussion *infra*, that standard does not cleanly fit within any of the rules utilized by other jurisdictions,[132] nor with the approach used in the administrative context.[133] Additionally, it is not sufficiently definite to provide any guidance to parties hoping to bring similar claims, and, as a district court decision, carries no binding precedential weight.

Despite all of these deficiencies, Massachusetts law is relatively well-developed on this issue; although its standard may not be satisfactory, it at least implies that a showing of actual bias is required.[134] However, the notion of actual bias is already contemplated by procedural due process, under the prong of an impartial tribunal.[135] *Ex parte* communications present a unique danger of subtler bias that, operating in conjunction with their nature as off-the-record fact-finding sessions,[136] renders *ex parte* communications severely problematic.

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129. *Id.* at *7.

130. *See id.* at *6–7 ("[C]ontacts . . . did not include substantive discussions of the denial of the First Application or the merits of the Second . . . .").

131. *Id.* at *8.

132. *See infra* Part IV.

133. *See infra* Part V.

134. *See* Cernak v. Planning Bd. for the City of Easthampton, No. 10-035, at *8 (Mass. Super. Ct. Hampshire Cty., Mar. 26, 2013) (on file with author).

135. Goldberg v. Kelly, 397 U.S. 254, 255 (1970) (discussing impartial tribunal requirement in terms of pecuniary interest and prejudgment bias).

136. *See* Eacret v. Bonner Cty., 86 P.3d 494, 501 (Idaho 2004).

B. *Oregon's Presumption of No Bias*

Oregon was an early trailblazer in establishing the due process rights of parties subject to individualized determinations by municipal boards. In 1973, the Oregon Supreme Court (sitting *en banc*) heard the case of *Fasano v. Board of County Commissioners of Washington County*.[137] A property owner had applied for and been granted a rezoning permit, which would allow him to convert his parcel—previously only approved for a single-home residence—into a trailer park.[138] Abutters to the rezoned parcel, hoping to avoid a trailer park in their neighborhood, brought an action in the district court to challenge the board's permit.[139]

Previously, Oregon had operated by the long-standing blanket rule that all zoning actions were legislative acts, and therefore assigned presumptions of validity. The Oregon Supreme Court, however, held zoning actions that affected the concrete rights of individuals on an individualized basis were quasi-judicial, despite the old rule.[140] Although the *Fasano* decision was about the scope of review that could be applied to certain board actions,[141] its authorization of the characterization of those actions as quasi-judicial brought with it all the accompanying nuances of quasi-judicial categorization, including due process rights.[142]

1. Movement from Broad Promises to a Narrow Rule

Seven years later, in 1980, the Oregon Supreme Court was called to determine which due process rights ought to be afforded to interested parties in quasi-judicial municipal decisions.[143] The court in *Fasano* had announced that "parties at the hearing before the . . . governing body are entitled to . . . a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte [sic] contacts concerning the question at

137. *See generally* Fasano v. Bd. of Cty. Comm'r of Washington Cty., 507 P.2d 23 (Or. 1973) (holding that rezoning of property based on facts unique to said property was quasi-judicial activity by the board).

138. *Id.* at 25.

139. *Id.*

140. *See id.* at 26 ("At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers.").

141. *See id.* at 25, 30. Because deeming the board's actions quasi-judicial removed the legislative presumption of validity, the test became whether there was a "justifiable basis" in the record for the board's decision. Because there was no ascertainable record to speak of, the decision in *Fasano* could not be so justified, and the lower courts' decisions to invalidate the change of use were affirmed. *Id.*

142. *See supra* Part II.

143. *See generally* Neuberger v. City of Portland, 607 P.2d 722 (Or. 1980) (deciding whether, in context of quasi-judicial proceedings, off-the-record dealings and conversations between parties and board violated due process).

issue."[144] Based on that language, Oregonians who wished to challenge municipal boards' quasi-judicial actions believed a showing of *ex parte* communications would serve as a *de facto* violation of parties' due process rights, thereby invalidating the board's action.[145]

Neuberger v. City of Portland brought the language from *Fasano* and the resulting arguments into sharp focus. In *Neuberger*, Portland's city council had granted a special zone change to a developer, which would entitle him to a greatly increased building density on his land.[146] Throughout the permitting process, the developer had been negotiating the sale of another, abutting property to the city—Portland hoped to add the land to its city park.[147] Additionally, the permit-seeking developer's attorney contributed language to the drafting of the ordinance enacting the city council's decision; the city did not provide the opponents with the same opportunity.[148]

The opponents of the rezone were disturbed by these ongoing communications, arguing they must have influenced the board's decision.[149] Relying on the language from *Fasano* indicating *ex parte* communications were incongruous with the notion of an impartial tribunal,[150] the opponents urged the Oregon Supreme Court to invalidate the city council's actions.

The *Neuberger* court declined the challenger's invitation: "*Fasano* should not be read as adopting a mechanical rule that any ex parte [sic] contact touching on a matter before a tribunal acting quasi-judicially renders the tribunal, or its affected members, unable to act in that matter."[151] Rather, the court indicated, reviewing courts should focus on whether there was any real, apparent bias in the decision.[152] "The issue is not whether there were any ex parte [sic] contacts, but whether the evidence shows that the tribunal or its members were biased. In this case it does not."[153]

2. A Rule That Offers No Relief?

By overturning (or, at the least, severely restricting) the portion of

144. *Fasano*, 507 P.2d at 30.

145. *See Neuberger*, 607 P.2d at 725 (noting opponents' arguments that *ex parte* communications are condemned by *Fasano* and a default violation of due process).

146. *See* Neuberger v. City of Portland, 603 P.2d 771, 771 (Or. 1979) (granting petition for review and developing the facts of the case).

147. *Id.* at 725.

148. *Id.*

149. *See id.*

150. *See* Fasano v. Bd. of Cty. Comm'r of Wash. Cty., 507 P.2d 23, 30 (Or. 1973).

151. *Neuberger*, 607 P.2d at 725.

152. *Id.*

153. *Id.*

the *Fasano* decision pertaining to *ex parte* communications, Oregon essentially instituted a rule presuming that off-the-record communications were non-prejudicial.[154] In practice, this rule has proved fatal to any challenges of zoning actions founded on concerns over *ex parte* communications or resulting bias.[155]

Even in cases where circumstantial evidence of improper influence resulting from *ex parte* communications is substantial and compelling, Oregon's Supreme Court has refrained from invalidating municipal board decisions without hard evidence.[156] In *1000 Friends of Oregon v. Wasco County Court*, the court reversed the appeals court's finding of bias where a board member ordering a municipal incorporation election had been in persistent, off-the-record contact with the aspirant town.[157]

The group hoping to incorporate in *1000 Friends* resided at a former ranch in Oregon's cattle-country desert.[158] One member of the county commission that ordered the election was a cattle rancher.[159] Before ordering the vote, the rancher-commissioner had sold cattle to the ranch residents at a price well above fair market value.[160] The record was replete with evidence that the ranchers had been eager buyers; that conversations regarding the sale were ongoing off the record throughout the incorporation process; that the sale had never been made public; and that the buyers had endeavored to keep the transaction "low key," so as not to "embarrass" the purchasing county commissioner.[161]

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154. *See id.* at 725–26 (Or. 1980). The plaintiffs' showing of *ex parte* communications—indeed, strong contextual evidence that there may have been a trade-off of the permit for a favorable sale price on the concurrent transaction, not completed until after the rezone—got them nowhere. *Id.* Because they could not demonstrate any prejudice, in light of the fact that discussions of the sale were on the record, inferences of bias were not sufficient. *Id.*

155. *See* Columbia Riverkeeper v. Clatsop Cty., 341 P.3d 790, 804 (Or. Ct. App. 2014) (noting no reported Oregon case had ever required the non-participation of a municipal board member in land use proceedings).

156. *See generally* 1000 Friends of Or. v. Wasco Cty. Ct., 742 P.2d 39 (Or. 1987) (representing the Oregon Supreme Court's most recent statement on *ex parte* communications and bias in the relevant context).

157. *Id.* at 40–41.

158. *See id.* at 40; *see also Oregon Experience: Rajneeshpuram* (Or. Public Broadcasting television broadcast Nov. 19, 2012), http://www.opb.org/television/programs/oregonexperience/segment/rajneeshpuram/ [https://perma.cc/9Q4F-NX9B]. The former ranch was occupied by followers of Bhagwan Shree Rajneesh, an Indian spiritual leader. Rajneesh and thousands of his followers, called "sannyasins," moved to Wasco County in 1981 and sought to build a utopian community, called Rajneeshpuram. *Id.* However, the commune's gathering of many societal misfits—including transients, traumatized veterans, and children of the psychedelic era—chafed on the commune's rural neighbors. *Id.* Tensions rose consistently, especially when the commune developed an armed defense force. *Id.* After attempts to become a recognized Oregon city were met with extensive legal battles, Rajneeshpuram existence ended in 1986. *Id.*

159. *See 1000 Friends*, 742 P.2d at 40.

160. *Id.*

161. *Id.* at 40–41.

Despite this circumstantial evidence—seemingly enough to allow an inference of a favorable deal on property exchanged for a favorable vote—the court held that the challengers had not made a sufficient showing of bias to invalidate the commission's decision.[162] In so deciding, the court wrote that invalidating local boards' decisions merely because they appear unfair would lead to invalidating otherwise "correct and fair" decisions.[163]

The court left the question open as to what would suffice to show that a decision was *not* correct and fair. To be sure, there are situations where the mere existence of off-the-record communications does not implicate unfairness in the decision.[164] Oregon's legislature provided a specific avenue to ensure *ex parte* communications have no harmful effect: so long as any communications are disclosed on the record, including both the senders' identities and the messages' content, and parties are informed of their right to rebut that content, there is no due process violation.[165]

If, however, those communications are left undisclosed at the municipal level, aggrieved parties are left with the doctrine expressed in both *Neuberger* and *1000 Friends*. Oregon's statute, while a good first step in resolving the issue, provides no meaningful protection against *ex parte* communications that remain undisclosed—a gap that has not been filled by the judiciary.

The courts have provided some suggestion as to what may be sufficient to prove bias in Oregon.[166] If a party can demonstrate *ex parte* communications were made in conjunction with covert dealings, express or implied agreements, or as part of bribery, extortion, or the like, they clearly violate due process; however, the party needs absolute proof of those events, not the mere suggestion they exist.[167] Because business deals may be made for many reasons, and board members are generally laypeople who have occupations beyond their municipal duties, plaintiffs must be able to demonstrate that improper influence was the motivating factor, above all other potential motivations for a deal.[168]

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162. *Id.* at 46.

163. *Id.* at 44.

164. *See* Tierney v. Duris, 536 P.2d 435, 443 (Or. Ct. App. 1975) (holding pre-*Neuberger* that there was no due process concern where *ex parte* communications were innocent and were disclosed on the record).

165. OR. REV. STAT. § 215.422(3) (2015).

166. *See 1000 Friends*, 742 P.2d at 41 (noting that challengers had no proof of express contingency of vote for incorporation election on above-market purchase of cattle; could not show a deal so one-sided as to obviously be a payoff or sham transaction; and were unable to prove any conversations occurred in the context of the business deal about the vote).

167. Neuberger v. Portland, 607 P.2d 722, 725 (Or. 1980) (listing how bias could be proved).

168. *See 1000 Friends*, 742 P.2d at 42–43; *cf.* Eastgate Theater v. Bd. of Cty. Comm'r, 588 P.2d 640, 644 (Or. Ct. App. 1978) (stating while a judge is expected to be detached, municipal board members were expected to be intensely involved in community).

In cases where undisclosed *ex parte* communications, viewed in context, seem to evince probable bias, there is a significant issue of proof for prospective challengers: how can they find the elusive, proverbial "smoking gun?"[169] By the inherent nature of secret deals, they typically remain secret—any hard evidence of their existence rests solely with those who made them. Requiring challengers to provide definitive proof of a scheme presents a near-insurmountable obstacle.[170]

Additionally, the explicit mention of only clear *quid pro quo* bargains accompanying *ex parte* communications as proof of bias[171] is problematic for potential challengers, beyond issues of proof. Subtler forms of bias can result from *ex parte* communications, which are not as obvious or malicious as the crass corruption imagined by the Oregon Supreme Court in *Neuberger*.[172]

Oregonians who feel that *ex parte* communications irreparably influenced a municipal board's quasi-judicial decision, yet do not allege an explicit scheme or exchange, may be left in the cold, given the indications that only apparent bias of a gross nature will ever vitiate such decisions.[173] Unless *ex parte* bias left a board member with actual bias on the narrow issue in determination, such that he or she would be incapable of determining the case on the merits, it has not violated due process under Oregon law.[174]

C. *Idaho's Automatic—Albeit Limited—Invalidation*

Fasano's impact was not limited to the Pacific Northwest. Among others, Idaho viewed the Oregon Supreme Court's holding as the correct view of the law, with its own Supreme Court holding in *Cooper v. Board of County Commissioners of Ada County* that, depending on the nature of a municipal board's action, it could be either quasi-legislative or quasi-

169. *See* Robert C. Cadle, *Burdens of Proof: Presumption and Pretext in Disparate Treatment Employment Discrimination Cases*, 78 MASS. L. REV. 122, 122–23 (1993) (discussing how presumptions are used in employment discrimination law, given sophisticated corruption and the resulting lack of "smoking guns").

170. *See* Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1115 (1st Cir. 1989) (stating that circumstantial evidence is typically the only kind available in discrimination cases); Wheelock Coll. v. Mass. Comm'n Against Discrimination, 355 N.E.2d 309, 314 (Mass. 1976) ("We recognize, however, that proof of unlawful discrimination rarely can be established by direct evidence").

171. *See Neuberger*, 607 P.2d at 725.

172. *See supra* Part III, Section IV.B.

173. *See, e.g.*, Columbia Riverkeeper v. Clatsop Cty., 341 P.3d 790, 800–01 (Or. App. 2014) (holding one of three county commissioners may have prejudged issue, but did not infect tribunal's decision).

174. *Id.* at 804.

judicial.[175] As in Oregon, a case questioning the effect of *ex parte* communications under the due process protections in quasi-judicial municipal proceedings ultimately followed.[176]

1. An Equal and Opposite Reaction to *Neuberger*

Idaho Historic Preservation Council, Inc. v. City Council of Boise presented a case centered on the demolition of a historic warehouse.[177] The Boise City Council had given the building's owners a certificate of appropriateness for demolition in a proceeding found to be quasi-judicial under *Cooper*.[178] Accordingly, due process required that all interested parties be provided with an opportunity to comment on the record and rebut contrary evidence, and that the city council's decision be confined to that record.[179]

However, in the process of making its final determination regarding the demolition of the warehouse, the Boise City Council had received multiple phone calls regarding the merits of the application for a demolition certificate.[180] Not only had the councilmembers received these calls, they had failed to disclose the callers' identities or affiliations, or indicate the content of those calls—they merely stated in public meetings that they had taken calls.[181]

The Idaho Supreme Court held the Council's failure to provide sufficient information about the calls was a violation of the process due to interested parties.[182] Because the City Council essentially held a "second fact-gathering session without . . . notice" or opportunity to rebut evidence, its subsequent action could not stand.[183]

In making its decision, Idaho's Supreme Court acknowledged Oregon's harsher rule; still, "[e]ven if this Court were persuaded that *Tierney* and *Neuberger* express the better rule," the communications at issue here were never disclosed on the record.[184] In fact, although the

175. Cooper v. Bd. of Cty. Comm'r of Ada Cty., 614 P.2d 947 (Idaho 1980) (citing Fasano v. Bd. of Cty. Comm'r of Wash. Cty., 507 P.2d 23 (Or. 1973)).

176. *See generally* Idaho Hist. Pres. Council, Inc. v. City Council of Boise, 8 P.3d 646 (Idaho 2000) (addressing issue of *ex parte* communications in quasi-judicial processes before municipal boards).

177. *Id.* at 647–48.

178. *See id.* at 649 (citing *Cooper*, 614 P.2d at 947).

179. *See* Chambers v. Kootenai Cty., 867 P.2d 989, 992 (Idaho 1994) (citing U.S. CONST. amend. XIV).

180. *Idaho Hist.*, 8 P.3d at 648.

181. *Id.* at 650–51.

182. *Id.*

183. *Id.* at 649.

184. *Id.* at 650; *cf.* Neuberger v. City of Portland, 607 P.2d 722, 725 (Or. 1980) (highlighting fact that ongoing, separate sale negotiations had been discussed on the record);

language of the *Historic Preservation Council* decision seems to imply that *ex parte* communications are *de facto* violations of due process protections, the true holding is limited to cases where those communications' existence and content are not disclosed.[185]

2. Potent in Theory, Limited by Facts

At the time of the *Historic Preservation Council* decision, observers assumed that the holding would give Idaho residents challenging municipal quasi-judicial decisions more leverage upon showing that undisclosed *ex parte* communications had occurred than their Oregonian counterparts.[186] Critics feared that holding city councilors to a standard requiring them to disclose all contact with constituents regarding a matter of public concern or face reversal would have a chilling effect on the roles of public servants, which was echoed in the dissent.[187]

However, Idaho's treatment of *ex parte* communications in quasi-judicial, municipal proceedings since the *Historic Preservation Council* decision has demonstrated those fears to be unfounded. Certainly, in cases where *ex parte* communications have functioned as the undisclosed second fact-gathering sessions that were of concern in *Historic Preservation Council*, Idaho's Supreme Court has not hesitated to invalidate decisions on those grounds.[188] However, there are very few instances where all the requisite conditions for overturning decisions on this basis have been met.[189]

For example, where a county board member had made statements indicating prejudgment regarding a proposed boathouse variance; had communicated with the permit-seeking parties off the record; and had conducted a site-visit without notifying the parties, the Idaho Supreme Court found due process violations.[190] Again, the concept of un-rebuttable fact-finding was at the heart of the court's decision: "Mueller effectively

Tierney v. Duris, 536 P.2d 435, 443 (Or. Ct. App. 1975) (ruling that because *ex parte* communications were disclosed, no due process violation).

185. *Idaho Hist.*, 8 P.3d at 651 ("We also hold that the City Council violated due process by accepting ex parte [sic] telephone calls without disclosing the names of the callers and the substance of the callers' comments concerning the proposed destruction of the Foster Building.").

186. *See* Michael Asimow, *News from the States: Idaho Supreme Court Rules on Ex Parte Communications to City Council*, 26 ADMIN. & REG. L. NEWS 16, 16–17 (2001).

187. *Id.* (citing *Idaho Hist.*, 8 P.3d at 651–52 (Kidwell, J., dissenting)).

188. *See* Eacret v. Bonner Cty., 86 P.3d 494, 501 (Idaho 2004) (holding that challengers' due process rights were violated by undisclosed *ex parte* communications), *overruled on different grounds by* City of Osburn v. Randel, 277 P.3d 353 (Idaho 2012) (pertaining only to holding on attorneys' fees, irrelevant here).

189. *See Eacret*, 86 P.3d at 501. After review of Idaho appellate law, the author could identify this as the only time the absolute ban has been effectuated.

190. *See id.* at 496–97, 499–501.

had evidence derived from the *ex parte* contacts and the unauthorized view that was not available to the entire Board or equally to the parties."[191]

The rule Idaho practitioners have derived from *Historic Preservation Council* and the limited cases following its principles is that *ex parte* contacts that provide decision-makers with facts external to the public record must be disclosed.[192] This rule seems to exclude *ex parte* communications that do *not* introduce new evidence into the record.

Communications unrelated to the substance of a quasi-judicial proceeding, which may appear to be harmless, can nonetheless imbue a decision maker with bias.[193] This apparent exclusion of non-factual communications leaves a significant gap in Idaho's protection of aggrieved parties. Idaho's challengers can only succeed upon a showing that undisclosed *ex parte* communications touched the merits of the adjudication at issue—if they fail to make that showing, they are left to prove apparent bias.[194] For reasons discussed in IV.B *supra*, actual bias is incredibly difficult to prove. While Idahoans may have a slightly more forgiving standard than their Oregonian counterparts, it is little comfort to those who find themselves injured by the more subtle, pernicious forms of bias.[195]

D. *A Presumption of Bias: Florida's Approach*

As demonstrated by the laws in Oregon and Idaho, nominal protection against undisclosed *ex parte* communications does not necessarily solve the more subtle issues presented by those contacts.[196] In the early 1990s, between Oregon and Idaho establishing their individual rules, Floridian courts took a tack nearly opposite Oregon's.[197]

1. The Birth of a Presumption

In *Jennings v. Dade County*, a Florida appellate court considered whether undisclosed *ex parte* communications in a zoning variance proceeding, where a man sought to turn his residential property into a

191. *Id.* at 501.

192. *See* Renee Magee & Joseph H. Groberg, *Representing Clients in Land Use Decisions—A View from the Inside*, 49 ADVOCATE (IDAHO) 15, 15–16 (2006).

193. *See supra* Section III.A.

194. *See* Spencer v. Kootenai Cty., 180 P.3d 487, 493 (Idaho 2008) (holding that elements of procedural due process in land use decisions are limited to an opportunity to be heard, notice, and the chance to present and rebut all evidence; stating that impartiality is a separate issue, and requires substantial proof).

195. *See supra* Part III.

196. *Id.*

197. *See* John W. Howell & David J. Russ, *Planning v. Zoning: Snyder Decision Changes Rezoning Standards*, 68 FLA. B.J. 16, 21 (1994).

quick-change oil business, were sufficient to revoke the permit.[198] The *Jennings* court held that those communications presented a due process issue in the strongest terms: "[e]x parte [sic] communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts where they are identifiable."[199] Further, the court's language was not limited to *undisclosed* contacts only—the occurrence of *any ex parte* contact was sufficient to trigger the *Jennings* rule.[200]

Florida did not stop at removing the distinction between disclosed and undisclosed *ex parte* communications. Once a challenger demonstrated the existence of those contacts, under the *Jennings* rule, "[their] effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence."[201] This standard (and its legal foundation) was reiterated and endorsed by the Florida Supreme Court in *Board of County Commissioners of Brevard County v. Snyder*.[202]

Florida's rule prompted fervent reactions amongst the land-use community, ranging from academic concern[203] to pragmatic suggestions on how to proceed under the recent decisions.[204] Participants on all sides of quasi-judicial municipal decisions—boards, permit-seekers, challengers, and all of their attorneys—were advised to avoid lobbying, record and disclose any material, off-the-record communications on the merits, but still not fear harmless, pleasantry-type contacts.[205] Although the courts had instituted a presumption of bias resulting from *ex parte* communications, that presumption was clearly rebuttable, and the nature of communications would still play a significant role.[206]

2. Powerful, Yet Flexible: The *Jennings* Presumption and its Boundaries

After the *Jennings* and *Snyder* decisions, important questions remained as to how strong the presumption resulting from *ex parte* communications was. *Jennings* provided some indication, listing factors—taken from a seminal administrative law case, *Professional Air*

198. Jennings v. Dade Cty., 589 So. 2d 1337, 1339–40 (Fla. 3d Dist. Ct. App. 1991) (noting that communications included benign contact and the hiring of a lobbyist), *rev. denied*, 598 So. 2d 75 (Fla. 1992).

199. *Id.* at 1341.

200. *See id.*

201. *Id.*

202. 627 So. 2d 469, 472 (Fla. 1993).

203. *See generally* Paul R. Gougelman III, *The Death of Zoning As We Know It*, 67 FLA. B.J. 25 (1993) (heralding *Snyder* as the dawn of a new, uncertain era of Florida zoning law).

204. *See* Howell & Russ, *supra* note 197, at 22–24.

205. *Id.*

206. *Jennings*, 589 So. 2d at 1341.

Traffic Controllers Organization v. Federal Labor Relations Authority[207]—that should be considered in evaluating whether communications were in fact prejudicial, after the presumption arose.[208] Those factors (hereinafter "*Jennings*" or "*PATCO* factors") included (1) the gravity of the communications; (2) the likelihood that the contacts influenced the board's ultimate decision; (3) whether the party who made the contacts benefitted from the decision; (4) whether the opposing party knew of the content of the contacts therefore having the opportunity to rebut their facts; and (5) whether vacating the decision and remanding it would serve a useful purpose.[209]

Under Florida law, the presumption that arose after showing *ex parte* communications was a "presumption affecting the burden of proof."[210] Where a presumption is utilized to put into force public policy objectives, it is a presumption bearing on proof;[211] the presumption of bias upon a showing of *ex parte* communications was instituted in order to promote the strong social policy of fundamental fairness in quasi-judicial determinations.[212] Essentially, the *Jennings* presumption satisfies the burden of production and persuasion.[213] Absent any other proof, it both establishes bias and is sufficient to base a ruling upon.[214] Municipal boards presumed biased should testify and introduce other evidence regarding the adapted *PATCO* factors, in order to counter-persuade against the presumption.[215]

3. Democracy in Action: Eradicating a Promising Judicial Solution

Florida law immediately following *Jennings* and *Snyder* seemed to resolve the gaps in Oregon and Idaho's laws, without losing their strengths—it gave prospective challengers assurance their claims were taken seriously and recognized the more subtle forms of bias that could result from *ex parte* communications.[216] However, this solution was short-lived. Florida citizens, frustrated because they interpreted *Jennings* as

207. 685 F.2d 547, 564–65 (D.C. Cir. 1982) (hereinafter "*PATCO*").

208. *See Jennings*, 589 So. 2d at 1341 (citing *PATCO*, 685 F.2d at 564–65 (D.C. Cir. 1982)). The *PATCO* decision will be discussed further in Part V *infra*.

209. *See id.*

210. *See* FLA. STAT. §§ 90.303–304 (2015) (dividing presumptions into two categories: those bearing on the burden of producing evidence, and those bearing on the burden of proof).

211. FLA. STAT. § 90.303 (2015).

212. *See Jennings*, 589 So. 2d at 1344–45 (Barkdull, J., concurring).

213. *Id.*

214. *Id.*

215. *See id.* at 1341 (citing Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth., 685 F.2d 547, 564–65 (D.C. Cir. 1982)).

216. *See supra* Section III.A.

denying them access to their elected officials, petitioned the legislature for help.[217]

In 1995, the Florida legislature enacted a statute that required disclosure of *ex parte* communications (including their sender and content) on the record in quasi-judicial proceedings before municipal boards, thereby removing the judicial presumption instituted in *Jennings*.[218] However, this disclosure requirement and presumption exception was limited. It only applied to boards filled by *elected* officials, had no application in local land use decisions, and was only operative if adopted by the local body.[219] The statute also took special care to ensure that *Jennings* did not retain any force whatsoever over zoning: in local land use decisions, no one would be prohibited from communicating with a board member by *ex parte* prohibitions.[220] Such communications do not need to be disclosed, nor do they create a presumption of bias.[221]

Through that statute, Florida's unique rule governing quasi-judicial proceedings before municipal boards was neutered as applicable to the very context for which it was instituted—due process protections in local land-use decisions.[222] It is unclear how the *Jennings* rule and presumption would have prevented citizens from communicating with their elected officials. Because disclosure on the record and whether the *ex parte* communications originated from a party are prominent factors in weighing the prejudicial effect of a communication,[223] it seems unlikely that disclosed communications from non-invested parties would ever be cause for vacation of a board decision. Regardless, Floridians raised their voices in protest, and Florida's brief-lived presumption of bias (along with its potential relief for aggrieved citizens) was discarded.

E. *Washington's Proactive Legislation*

Unlike the other states addressed to this point, Washington did not wait for a case to present itself before addressing *ex parte* communications. In the early 1980s, the legislature enacted a statute, claiming the first and (to date) final word on the issue.[224] Under section 42.36.060 of the Washington Revised Code, *ex parte* communications

217. Bernard R. Appleman, *Can Florida's Legislative Standard of Review for Small-Scale Land Use Amendments be Justified?*, 24 UCLA J. ENVTL. L. & POL'Y 305, 337 (2006).

218. FLA. STAT. § 286.0115(1) (2015).

219. FLA. STAT. § 286.0115 (2015).

220. FLA. STAT. § 286.0115(2)(c) (2015).

221. *Id.*

222. *See* Jennings v. Dade Cty., 589 So. 2d 1337, 1344–45 (Fla. Dist. Ct. App. 1991) (Barkdull, J., concurring).

223. *See id.* at 1341 (citing Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth., 685 F.2d 547, 564–65 (D.C. Cir. 1982)).

224. *See* WASH. REV. CODE § 42.36.060 (2015).

between any member of a decision-making body and opponents or proponents of a pending quasi-judicial measure are forbidden, unless two conditions are met.[225] First, the substance of any such contact must be placed on the record.[226] Second, the content of the messages and a party's right to rebut that content must be announced at any proceeding where the measure is in determination.[227]

Washington's statutory text answers the fears that the Florida statute sought to assuage, without denying relief to parties aggrieved by undisclosed *ex parte* contacts: the prohibition does not "preclude correspondence between a citizen and his or her elected official if any such correspondence is made a part of the record when it pertains to the subject matter of a quasi-judicial proceeding."[228] The fundamental requirement remains disclosure on the record.[229] Washington found no need to dispense with it, despite the elected nature of a board member.[230]

Other provisions of Washington's Revised Code preclude some *ex parte* contacts from the disclosure requirement.[231] For example, if contacts are made by virtue of a board member carrying on the business of his or her office, unrelated to the matter in determination, they need not be disclosed and do not violate quasi-judicial due process.[232] This provision makes clear that *ex parte* contacts will only matter if they reference the merits or material facts of a current adjudication.

Also, no person who, in the process of running for elected office, comments on the merits of a situation that they must later rule on as a result of being elected to office violates due process on the basis of those earlier comments.[233] That section allays any concerns that public-minded prospective officials will refrain from civic engagement, or that candidates will be unavailable to citizens, as communications made in such contexts are totally harmless under the statute.[234]

However, the Washington statutes requiring and exempting disclosure leave a significant question unspoken and unanswered: what happens when municipal quasi-judicial decision-makers *do not* disclose *ex parte* communications when required? Unlike the brief *Jennings-Snyder* regime in Florida, the Washington statute provides no convenient

225. *Id.*
226. WASH. REV. CODE § 42.36.060(1) (2015).
227. WASH. REV. CODE § 42.36.060(2) (2015).
228. *Id.*
229. *See id.*
230. *Cf.* FLA. STAT. § 286.0115(2)(c) (2015).
231. WASH. REV. CODE §§ 42.36.020, 42.36.040 (2015); *see* discussion *infra*.
232. WASH. REV. CODE § 42.36.020 (2015). This Section is applicable to any board member and any constituent—even those with matters currently before the board. *Id.*
233. WASH. REV. CODE § 42.36.040 (2015).
234. *Id.*

list of factors to determine the prejudicial effect of a communication, nor a presumption to aid those challenging decisions.[235]

Rather, proceedings where *ex parte* communications are not disclosed when otherwise required are reviewed under a common-law doctrine called "the appearance of fairness."[236] Under that doctrine, decisions reached by a municipal body in a quasi-judicial proceeding must be fair in both fact and appearance.[237] If a "reasonably prudent and disinterested observer" would perceive a quasi-judicial proceeding to be unfair, it is treated as such, and therefore invalid.[238] Unfairness can manifest in several ways, but generally takes the form of three classic biases: prejudgment, hostility and favoritism, and personal interest.[239]

The appearance of fairness doctrine theoretically provides some relief to parties left disappointed with the results of a quasi-judicial municipal determination, assuming they can show *ex parte* communications were made that should have been disclosed.[240] *Ex parte* contacts bear on issues of prejudgment, favoritism, and interest—all critical concerns under the doctrine.[241] One can imagine the litigants from *Neuberger* or *1000 Friends* succeeding under the doctrine: the off-the-record business dealings in those cases certainly lead to a reasonable inference of some apparent unfairness.[242]

Still, the appearance of fairness doctrine is no silver bullet resolving the issue. Because of its potentially broad application, Washington courts have been reluctant to apply it, to the point that it may essentially be dead-letter law.[243] Indeed, where the courts discuss the appearance of fairness doctrine, they consistently find it has not been violated.[244]

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235. *See supra* Section IV.D.

236. *See* WASH. REV. CODE § 42.36.020 (2015); *see also* WASH. REV. CODE § 42.36.040 (2015). These sections, in their most technical operation, announce situations where *ex parte* communications are not reported, triggering the doctrine of appearance of fairness, but are exempted from said doctrine. *Id.*

237. *See* Carolyn M. Van Noy, Comment, *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533, 534 (1986).

238. W.T. Watterson, Comment, *What Ever Happened to the Appearance of Fairness Doctrine? Local Land Use Decisions in an Age of Statutory Progress*, 21 SEATTLE U. L. REV. 653, 654 (1998).

239. *Id.* at 658–59 (citing Buell v. Bremerton, 495 P.2d 1358, 1362 (Wash. 1972)).

240. *See id.*

241. *Id.* at 659.

242. *See* Neuberger v. City of Portland, 607 P.2d 722, 725–26 (Or. 1980); *see also* 1000 Friends of Oregon v. Wasco Cty. Ct., 742 P.2d 39, 40 (Or. 1987).

243. Watterson, *supra* note 238, at 666. Between 1982 and the date of this Note's publication, Washington's higher courts had not held a single violation of the doctrine in land-use contexts. *Id.*

244. *See* Org. to Pres. Agr. Lands v. Adams Cty., 913 P.2d 793, 804–05 (Wash. 1996) (holding undisclosed *ex parte* communications were at worst duplicative of facts already on the record and did not violate appearance of fairness doctrine); *see also* Bjarnson v. Kitsap Cty., 899 P.2d 1290, 1294 (Wash. Ct. App. 1995) (finding that rehearing excluding official tainted

Just as an apparently unfair proceeding would be invalid, an apparently fair one would be valid.[245] This presents a significant problem to potential challengers of quasi-judicial actions: more subtle forms of bias (which could be referred to under the umbrella of favoritism) are not apparent in the same way that interest or prejudgment may be.[246] A proceeding could appear to be fair, but in fact be tainted by impropriety.[247] Even the appearance of fairness doctrine requires "sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of commissioner; mere speculation is not enough."[248] Ultimately, the appearance of fairness doctrine seems to present the same obstacle of proof of bias as a standard requiring actual, proven bias.[249]

Beyond its inherent weaknesses, there is a practical problem in the appearance of fairness doctrine. Were it to be a part of a standard for other jurisdictions, those jurisdictions would need an already-developed body of common law relating to quasi-judicial decision-makers' partiality.[250] Washington is the only state with such a background, and the only state that has ever fully endorsed the doctrine.[251]

While Washington's combination of statutory regime with common-law relief could feasibly help those who seek to challenge quasi-judicial municipal action, its practical restraints and judicial reluctance limit its potential, both within and beyond Washington. Although Washington's system provides some positive attributes, a model rule for the handling of *ex parte* communications needs to be clearer in order to provide a meaningful opportunity for relief to aggrieved parties.

V. LEGISLATURE AND JUDICIARY IN HARMONY: THE FEDERAL

by *ex parte* communications satisfied appearance doctrine); Snohomish Cty. Improvement All. v. Snohomish Cty., 808 P.2d 781, 786–87 (Wash. Ct. App. 1991) (ruling that campaign contributions by interested parties to council members were not *ex parte* communications, so failure to disclose was not unfair).

245. *See* Van Noy, *supra* note 237, at 534.

246. *See, e.g.*, Bunko v. City of Puyallup Civil Service Comm'n, 975 P.2d 1055, 1057, 1060–61 (Wash. Ct. App. 1999). In *Bunko*, the lower court had found that several informal conversations indicating friendship between employment commission and police chief—including condolences on deaths in the family, thanks for personal advice on firearm purchases, and complaints about office staff at the police department—during the course of plaintiff's grievance hearing violated appearance of fairness doctrine. *Id.* The appeals court reversed, saying that the conversations had nothing to do with "the matter in determination," contrary to statutory requirements. *Id.*; *see also* WASH. REV. CODE § 42.36.060 (2015).

247. *See supra* Part III.

248. *Bunko*, 975 P.2d at 1060.

249. *Cf. supra* Section IV.C.

250. *See generally* Van Noy, *supra* note 237 (tracing the history of the doctrine from Washington's early judicial history to the present).

251. *See* Watterson, *supra* note 238, at 654–55.

GOVERNMENT'S SOLUTION

The handling of *ex parte* communications in the municipal quasi-judicial context is, by its very terms, a state-level legal issue. However, that does not render federal law irrelevant in determining the best way to handle the issue. Aside from municipal boards, quasi-judicial proceedings arise in another significant context: federal administrative law.[252]

Administrative law controls the relationships between government agencies, the entities they regulate, the beneficiaries of their actions, and the federal judiciary's review of those actions.[253] The Administrative Procedure Act ("APA")[254] governs almost all aspects of administrative law.

Pursuant to the APA, agencies exercise two primary functions in carrying out their broader business of administrating federal laws and policy: rulemaking and adjudication.[255] When an agency issues a statement of general (or particular) applicability that has future effect, and future effect only, that agency participates in rulemaking.[256] By contrast, when an agency formulates an order[257] specific to one party, it participates in adjudication.[258] For example, the Environmental Protection Agency (EPA) may make a rule regarding emissions from automobiles; that rule applies to all auto manufacturers equally, and its creation is rulemaking.[259] If, however, the EPA sought to force one particular manufacturer to stop violating that rule, then it would be adjudicating the matter.

An agency, therefore, has dual natures: it is both legislative and judicial, exercising both functions in its broader role as an administrator of the law.[260] Accordingly, agency actions can be characterized as quasi-legislative, or quasi-judicial.[261] The direct nexus between administrative agencies and municipal bodies is evident—both are bodies of dual nature and purpose, and accordingly incur different obligations depending on the

252. *See* FUNK ET. AL., *supra* note 53, at 22 (noting that adjudication—a critical agency function—corresponds with the judicial process).

253. *See Administrative law*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* FUNK ET. AL., *supra* note 53, at 5–6.

254. 5 U.S.C. §§ 500–596 (2015).

255. 5 U.S.C. § 551 (2015).

256. 5 U.S.C. § 551(4)–(5) (2015).

257. 5 U.S.C. § 551(6) (2015) ("'[O]rder' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing . . . .").

258. 5 U.S.C. § 551(7) (2015).

259. *See generally* Massachusetts v. E.P.A., 549 U.S. 497 (2007) (regarding attempts to institute EPA emissions rulemaking).

260. *See* FUNK ET. AL., *supra* note 53, at 21–22.

261. *Id.* (noting that some actions are like those of congresses, while some are like those of courts).

actions they engage in.[262] It is therefore instructive to examine how administrative law treats *ex parte* communications when they arise in the quasi-judicial context.

The APA provision governing adjudication is only triggered under certain circumstances, where the legislature has intended hearings to be conducted under formal, trial-like procedures.[263] Once triggered, APA adjudication requires an agency to follow specific processes.[264] Among these mandatory procedural protections is a provision prohibiting *ex parte* communications on the merits in a proceeding between any interested party and the agency (including intra-agency discussion).[265]

If any prohibited communications occur, then the APA requires the communications—including written documents, summary of oral contacts, and all responses made to *ex parte* communications—be placed on the record.[266] Additionally, the agency may require the party who made a prohibited contact to demonstrate why his or her interest in the proceeding should not be "dismissed, denied, disregarded, or otherwise adversely affected."[267]

When, however, prohibited communications *are not* disclosed, a decision is not *de facto* invalid.[268] Rather, undisclosed *ex parte* contacts render the agency decision voidable.[269] This is true even where an adjudication was never required to follow APA procedures on grounds of procedural due process.[270] A reviewing court must decide whether the "process was irrevocably tainted so as to make the ultimate judgment of the agency unfair . . . ."[271]

To determine this, courts turn to the *PATCO* factors adopted by

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262. *See supra* Parts I, II.

263. 5 U.S.C. § 554(a) (2015) ("[I]n every case of adjudication *required by statute to be determined on the record after opportunity for an agency hearing* . . . ." (emphasis added)).

264. 5 U.S.C. §§ 556–557 (2015). These provisions also apply to hearings conducted pursuant to APA § 553, informally called formal rulemaking. Formal rulemaking is incredibly rare, and beyond the scope of this Note. *See id.*; *see also* FUNK ET. AL., *supra* note 53, at 51.

265. 5 U.S.C. § 557(d)(1)(A)–(B) (2015).

266. 5 U.S.C. § 557(d)(1)(C) (2015).

267. 5 U.S.C. § 557(d)(1)(D) (2015).

268. *See* Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Authority, 685 F.2d 547, 564 (D.C. Cir. 1982) ("In sum, Congress sought to establish common-sense guidelines to govern ex parte [sic] contacts in administrative hearings, rather than rigidly defined and woodenly applied rules.").

269. *Id.* at 564.

270. *See supra* Section III. Cases arising from non-APA adjudications have revolved around whether *ex parte* communications were "so substantial and so likely to cause prejudice" that the resulting decision cannot stand. Stone v. FDIC, 179 F.3d 1368, 1373, 1377 (Fed. Cir. 1999) (dismissing government's argument for a test requiring proof of contacted official's subjective intent).

271. *PATCO*, 685 F.2d at 564.

Florida in *Jennings*,[272] weighing (1) the seriousness of the contacts; (2) the effect of the contacts on the ultimate decision; (3) the beneficiary of the action and whether he or she made the contacts; (4) if the communications were not merely undisclosed, but unknown to the other party; and (5) whether remand would have any meaningful effect.[273] Taken together, these factors implicate a fact-heavy analysis of situations on a case-by-case basis. They consider both objective factors—what is the decision, and how does it appear in light of *ex parte* communications—and subjective ones: what does it seem the administrative tribunal took from these communications?[274]

This standard is identical to the one briefly adopted by Florida (without a stated presumption of bias),[275] and bears significant similarities to the appearance of fairness doctrine as well.[276] Additionally, it fills gaps left by Idaho's limited rule while avoiding the draconian proof requirements seen in Oregon.[277] The law surrounding the doctrine is much further developed than that seen in the states. As discussion *infra* will address, the administrative solution to *ex parte* communications in quasi-judicial determinations presents a compelling starting point for any potential model rule.

VI. A MODEL PROPOSAL: STANDARDIZING, YET AVOIDING, JUDICIAL REVIEW

Taking into consideration the solutions proposed by both the states[278] and the Federal Government,[279] the first step of a solution is eminently clear: any state addressing the issue of *ex parte* communications in a quasi-judicial context should adopt a disclosure requirement. Every authority that has tackled the issue has, in some way, utilized the mechanism.[280]

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272. Jennings v. Dade Cty., 589 So. 2d 1337, 1341 (Fla. Dist. Ct. App. 1991) (citing *PATCO*, 685 F.2d at 564–65); *see supra* Section IV.D.

273. *PATCO*, 685 F.2d at 564–65.

274. The *PATCO* court's balancing test is compatible with the fact-specific inquiry into whether *ex parte* communications were so susceptible to creating bias that the decision cannot stand set out in *Stone*. *Stone*, 179 F.3d at 1377.

275. *See supra* Section IV.D.

276. *See supra* Section IV.E.

277. *Compare supra* Section IV.C, *with supra* Section IV.B.

278. *See supra* Part IV.

279. *See supra* Part V.

280. *See* 5 U.S.C. § 557(d)(1)(C) (2015) (mandating disclosure subject to sanctions); WASH. REV. CODE § 42.36.060 (2015) (requiring disclosure, otherwise triggering appearance of fairness doctrine); OR. REV. STAT. § 215.422(3) (2015) (allowing for disclosure to quell potential issues); *see also* Idaho Historic Pres. Council, Inc. v. City Council of Boise, 8 P.3d 646, 649 (Idaho 2000) (noting disclosure may have led to different holding); Jennings v. Dade

There is no doubt that quasi-judicial proceedings implicate due process, and *ex parte* communications present possible due process violations.[281] Applying the *Mathews* test for particular due process procedures,[282] it is evident that disclosure is required. First, there are some of the most essential private interests at issue in municipal board hearings: property, liberty, and the resulting procedural right to a fair hearing before a fair tribunal.[283] The measure would cost the government nothing, and both increase public faith in municipal boards while simultaneously preventing the expense of potential litigation, as any cause of action would be moot.[284] Finally, disclosing *ex parte* communications on the record cures any possible erroneous deprivation that would result from their existence by giving parties an opportunity to rebut their content.[285]

Required disclosure alone is not enough, as it does not provide for what should happen when contacts are not disclosed. Another great strength of the APA is its explicit balancing test for weighing the prejudicial effect of undisclosed *ex parte* contacts.[286] Allowing for a fact-based determination of the actual prejudicial effect of such contacts[287] without requiring absolute proof that the contacts resulted in prejudice provides plaintiffs more latitude in proving their claims.[288] At the same time, such a test prevents potentially over-reactive *de facto* invalidation,[289] and prevents situations that may *appear* unfair, but in fact are completely above-board from being exploited.[290]

Still, the *PATCO* factors[291] leave one major gap in coverage: what happens to plaintiffs who can only demonstrate persistent, subtle influence?[292] In a situation such as *Cernak*, where a plaintiff can show a

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Cty., 589 So. 2d 1337, 1341 (Fla. Dist. Ct. App. 1991) (requiring disclosure, although even disclosed *ex parte* communications opened action to invalidation).

281. *See supra* Part II.

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

283. U.S. CONST. amend. XIV, § 1; *see also* Goldberg v. Kelly, 397 U.S. 254, 255 (1970).

284. *See, e.g.*, Tierney v. Duris, 536 P.2d 435, 443 (Or. Ct. App. 1975) (holding that disclosed *ex parte* communications did not implicate due process).

285. *Cf. Mathews*, 424 U.S. at 335 (holding that pre-deprivation hearing would be no more effective at preventing erroneous deprivation than a post-deprivation hearing).

286. *See* Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth., 685 F.2d 547, 564–65 (D.C. Cir. 1982).

287. *Id.* at 564–65.

288. *Cf.* Neuberger v. Portland, 607 P.2d 722, 725 (Or. 1980).

289. Of the kind feared after *Idaho Historic Pres. Council, Inc. v. City Council of Boise*, 8 P.3d 646 (Idaho 2000).

290. *See* Van Noy, *supra* note 237, at 564.

291. *See PATCO*, 685 F.2d at 564–65. The *PATCO* factors are mostly concerned with communications that are apparently prejudicial—weighty communications with a demonstrable effect on the deciding body's decision. *Id.*

292. *See, e.g.*, Cernak Memorandum, *supra* note 6.

pattern of the relatively mundane contacts being continuously made to make relations friendlier, that person must still *prove* a prejudicial effect from them—none of the *PATCO* factors would provide recourse.[293] However, psychological studies indicate that those communications—already recognized as problematic and prohibited—can have substantial effect on a board member's decision.[294]

This issue can be resolved with the *Jennings* presumption, which shone brightly and briefly in Florida in the early 1990s.[295] By presuming bias upon the showing of undisclosed *ex parte* communications,[296] courts can recognize those subtler forms of bias that result from repetition, familiarity, and availability.[297] Presumptions have four general functions: (1) to place a burden where it is most likely to be carried—that is, with the party who can best access proof; (2) to put into effect substantive policy choices; (3) to recognize what is probably true; and (4) to allow for proof where it may be impossible.[298]

Presumptions are common throughout America's civil courtrooms.[299] In a situation such as this, bias from undisclosed *ex parte* communications may be incredibly hard to prove for a plaintiff, and the defendant board will have the best access to proof of the communications' effects.[300] Additionally, given the strong potential of *ex parte* communications to bear on well-established cognitive biases, a presumption would recognize a probable truth of some quantum of bias.[301]

Like the presumption instituted in *Jennings*, this presumption would be far from conclusive. While not so weak that the slightest quantum of evidence presented against the presumption would defeat it,[302] the

293. *See PATCO*, 685 F.2d at 564–65. The gravity of the contacts is low; they did not bear on material matters; it is hard to say the decision of the ZBA relied on them. *See* Cernak v. Planning Bd. for the City of Easthampton, No. 10-035, *4–6 (Mass. Super. Ct. Hampshire Cty., Mar. 26, 2013) (on file with author).

294. *See supra* Section III.A.

295. Jennings v. Dade Cty., 589 So. 2d 1337, 1344–45 (Fla. Dist. Ct. App. 1991) (Barkdull, J., concurring).

296. *Cf. id.* at 1341. *Jennings* would have invoked its presumption upon the showing of *any ex parte* communications. *Id.* This Note proposes removing that automatic trigger, as it does not seem to serve a useful purpose—if contacts are disclosed, there is fair opportunity for rebuttal and counter-persuasion.

297. *See* Zajonc, *supra* note 102, at 224; Schwarz et. al., *supra* note 97, at 200–01; Swap, *supra* note 105, at 248.

298. CHRISTOPHER R. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 116 (5th ed. 2012).

299. *Id.* at 117. In fact, there are so many that creating an exhaustive list is impractical and unhelpful. *Id.*

300. *See, e.g.*, Cernak Memorandum, *supra* note 6, at *20–23 (discussing ZBA testimony on the effects of communications).

301. *See supra* Section III.A.

302. *See generally* Cappuccio v. Prime Capital Funding, LLC, 649 F.3d 180 (3d Cir. 2011) (discussing the "bursting bubble" presumptions). Bursting bubble presumptions take

presumption of bias would only serve to give the plaintiff some proof to build upon in persuading the jurors or bench of a *PATCO/Jennings*-factor impact.[303] This balance would still favor the board—assuming there was in fact no bias, and the communications were indeed harmless, a plaintiff could not win on the presumption alone.

A disclosure requirement is a common-sense step in clearly delineating the obligations of all parties to a quasi-judicial municipal proceeding, as well as a stepping-off point for allowing judicial review of those proceedings on the issue of *ex parte* communications. If *ex parte* communications are disclosed—absent other procedural or substantive defaults—there is no reason to institute judicial review. If, however, they are left hidden, courts should assume they had a prejudicial effect, until persuaded otherwise. This regime strikes the proper balance between respecting the due process rights of citizens and leaving their municipal boards with a manageable standard.

CONCLUSION

By the very nature of procedural due process doctrine, any issue that potentially violates its guarantees is fraught with inconsistency and confusion. However, this is not prohibitive in establishing safeguards for those who seek its protections in quasi-judicial municipal proceedings.

There is no doubt *ex parte* communications present serious risks of bias and determinations made on facts that are not included in the record.[304] Sufficient case law has developed around attempts to combat these risks to demonstrate what works, and what does not. Under a rule requiring absolute proof of bias, plaintiffs who demonstrate circumstantial evidence of a cash-for-votes scheme (such as those in *1000 Friends*) are left in the cold.[305] Under a rule rendering *ex parte* communications *de facto* due process violations, harmless—even accidental—contacts could leave a municipal board unable to function.[306]

As with any measure of procedural due process, the proposal must balance the governmental and individual interests, along with the effect

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only the slightest rebuttal to disappear. In this context, mere testimony by board members that *ex parte* communications had no effect would erase the presumption, and leave plaintiffs without any proof, defeating the purpose of a presumption altogether. *See* MUELLER & KIRKPATRICK, *supra* note 298, at 122–23.

303. *See id.* at 123–24. Where no evidence either mandating a finding for the presumption or against it is available, the parties are left to persuasion on whatever evidence there is. *Id.*

304. *See supra* Parts II, III, V.

305. *See supra* Section IV.B.

306. *See supra* Section IV.C.

on the risk of erroneous deprivation.[307] Allowing for initial disclosure of *ex parte* communications to cure subsequent issues—an act that is easy for the government, protects the strong individual rights in play, and removes risk of faulty outcome—places the ball firmly in the municipal body's court. If they fail to follow that clear, simple requirement, it is fair to assume they did so for a reason, and presume them biased.[308]

At that point, the reasonable fact finder's opinion will rule the day—the county commissioner extorting constituents for above-market cattle sales will be overturned; the ZBA member who speaks with a constituent in passing about a grocery store will not be. Every interested party will receive a procedure (on the municipal level and beyond) that is fact-based and fundamentally fair.

307. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (discussing the due process balancing test).

308. *See supra* Section IV.D, Part V, Part VI.