THE NEW DUE PROCESS

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ABSTRACT

Due process is due for a reboot. Its current doctrinal framework was forged in a very different era, when adversarialism supplied the dominant constitutional account of procedural fairness. So long as the legal system affords litigants formal opportunities to assert their rights—notice, a hearing, the chance to present evidence, the possibility of appeal—due process is satisfied. But that adversarial conception fits poorly with the realities of twenty-first-century civil justice. In courthouses throughout the nation, the majority of cases now pit institutional plaintiffs—typically a bank, debt buyer, corporate landlord, or government agency, nearly always with lawyers—against individual defendants without them. Sharp asymmetries in resources and access to legal help, high rates of default judgment, and the routinized processing of claims at scale have become the norm, leaving little room for individualized court attention or genuine adversarial testing. The result is a widening gap between constitutional aspiration and litigation reality, especially for millions of litigants whose housing, financial solvency, and even physical liberty are at stake. Due process remains formally intact but practically sidelined, and a deteriorating civil justice system sits largely beyond the Constitution's reach.

This Article seeks to adapt twentieth-century due process to twenty-first-century litigation realities by offering a new vision of due process we call "mediated adversarialism." We do so by recovering and synthesizing multiple strands of thinking that have been present for decades but never fully absorbed into doctrine. Most notably, soon after Goldberg v. Kelly *inaugurated the current due process framework with its canonical description of the elements of fair process, Judge Henry Friendly and Professor Jerry Mashaw—building out earlier critiques by Roscoe Pound and other leading expositors of the due process tradition—began to question whether adversarial opportunity alone could vindicate due process values, especially in areas of mass adjudication. For Friendly, the answer lay in a more active, investigatory judicial role that departs from the classical model of a passive, neutral judge. For Mashaw, it lay in the managerial design, oversight, and continuous improvement of adjudicatory systems. This Article argues that due process can renew itself only by bringing those investigatory and managerial conceptions into its frame. In a civil justice system defined by pervasive self-representation, sharp asymmetries across the two sides of the "v," and high—and, indeed, constitutionally intolerable—rates of decisional error, due process must concern itself not only with the procedural opportunities available to litigants with the capacity to seize them. It must also attend to the institutional processes courts design to ensure fair and accurate adjudication at scale.*

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INTRODUCTION

On any given morning in state courthouses across the United States, due process seems to be alive and well. Summonses issue. Hearings are scheduled. Courtrooms are open. Litigants have, at least in theory, the opportunity to appear, assert claims and defenses, present evidence, and seek review. But this surface formality obscures a harsher reality. The modal case in the American civil justice system is not the stylized clash between equals before a neutral, passive judge contemplated by the classical model of adversarial process or civil procedure rules.[1] Instead, the large majority of civil cases play out as highly routinized encounters between an institutional plaintiff, often a

[1] Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L.Q. 261, 265-66 (2021).

bank or debt buyer seeking to collect on consumer debt, a corporate landlord seeking an eviction, or a government agency seeking to enforce child-support obligations, nearly always represented by counsel, and an individual defendant who appears, if at all, without meaningful legal help. The result is a civil justice system in which the formal architecture of due process—notice, a hearing, the chance to present evidence, the possibility of appeal—remains in place. But adversarial contestation and individualized consideration—the procedural ideal celebrated in *Goldberg v. Kelly*, the 1970 landmark that sparked a due process revolution—have fallen away in all but a small fraction of cases.[2]

This Article argues that due process must save itself by moving past an adversarialism-tethered conception of procedural fairness that has sidelined the doctrine and placed a deteriorating civil justice system beyond its reach. We do so by describing and defending a new architecture of due process, centered on a concept we call "mediated adversarialism." Mediated adversarialism begins from the premise that due process protects the opportunity to be heard, but it rejects the assumption that procedural fairness can be achieved simply by providing formal opportunities for adversarial participation. The problem, to be clear, is not that American civil procedure affords too few such opportunities. Through rules and codes of procedure, states already provide tenants, consumer debtors, child-support obligors, and other vulnerable litigants with many of the opportunities for adversarial engagement that *Goldberg* canonized.[3] The problem, instead, is that millions of litigants lack the capacity to use those opportunities in any meaningful way. Litigant incapacity—not the absence of formal procedural opportunity—defines today's civil justice crisis. The results are wide-scale and catastrophic deprivations of property and liberty—tenants wrongly evicted, wages unjustly garnished, and people incarcerated for their poverty.[4]

Mediated adversarialism supplements adversarial procedure with two additional dimensions that can compensate for its deficits. First is an investigatory judicial role, in which judges take affirmative steps to provide information and explanation to litigants and elicit legally relevant facts and issues. Second is a managerial role, in which courts use their growing bureaucratic capacity to design, monitor, and improve adjudicatory systems to reduce error at scale. In short, due process requires not only procedures that well-armed litigants may invoke, but also institutional mediation of the adversarial process that makes litigant participation meaningful and fair adjudication possible—particularly for the millions of self-represented litigants that now dominate American court dockets. Going beyond *Goldberg*, a new due process would reconceive fundamental procedural fairness in more than adversarial terms.

An ambitious reframing of due process along these lines might seem like a tall order, but mediated adversarialism already enjoys a doctrinal foothold. The Supreme Court's 2011 decision in *Turner v. Rogers* offers a guide—even a Rosetta stone of sorts—for a revitalized due process.[5] The *Turner* Court rejected a father's claim that due process required court-appointed counsel before he could be jailed for civil contempt after failing to pay child support. But the Court insisted that such a proceeding may nonetheless violate due process if the state fails to provide "substitute procedural safeguards," even where the parent received every one of *Goldberg*'s protections.[6] At

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[2] 397 U.S. 254 (1970); *see also* Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1320 (2012) (describing the revolution).
[3] The most notable exception involves summary process in eviction cases. *E.g.*, Mary Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135 (2000).
[4] On errors, see *infra* notes 59-63 & accompany text. On incarceration, see, e.g., ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT (2018).
[5] 564 U.S. 431 (2011).
[6] *Id.* at 447-48.

least under the litigation conditions present in *Turner*, judges must actively elicit information about the parent's ability to pay, and court systems must take proactive steps to provide materials that help self-represented litigants understand and protect their interests. *Turner*'s seeming rupture in the conventional account can also be glimpsed in an evolving but largely unsung body of state law endorsing, within certain limits, a more "active" judging role in providing information and explanation, eliciting facts and arguments, and adjusting procedures, particularly when one side is self-represented.[7] In short, due process is not exhausted by notice, hearing, and the formal chance to speak. It may also require courts to mediate the adversarial process so that legally salient facts are surfaced and vulnerable litigants can participate in a meaningful way.

Mediated adversarialism also enjoys a rich intellectual history, even if it has not yet been fully absorbed into governing doctrine. Our new due process takes inspiration from a lost moment from last century when courts and commentators began to grapple with the problems of adversarial breakdown now so evident, and when an ideology of adversarialism had not yet narrowed constitutional imagination. Two giants of due process jurisprudence, Judge Henry Friendly and Professor Jerry Mashaw, proposed the building blocks of mediated adversarialism—for Friendly, the "investigatory" judge,[8] for Mashaw, the "management side" of due process[9]—amidst the jurisprudential tumult in *Goldberg*'s wake. The new due process, and the concept of mediated adversarialism at its core, thus has its roots in the ideas of two of the doctrine's greatest expositors.

Finally, mediated adversarialism may be emerging at a moment of particular doctrinal opportunity. *Mathews* will soon mark its fiftieth year, a milestone that, if past is prologue, portends the current framework's senescence. Indeed, since ratification of the Fourteenth Amendment, due process has, with almost cicada-like regularity, undergone seismic shifts at roughly fifty-year intervals. Grand shifts in American public life have catalyzed strains of due process characteristic of their times. *Goldberg*, for instance, reflected the high-water mark of the rights-conscious, postwar activist state. *Mathews*, decided just six years later, recast procedural fairness in the cost-conscious and utilitarian idiom of an emerging neoliberal age. To be sure, one can readily point to transformations that might spur a new due process—an unbound executive,[10] for instance, or an increasingly AI-powered, "automated state."[11] But the profound transformation of the American litigation landscape since the 1970s has a special claim. A due process that cannot speak to the central realities of the modern civil justice system—and, given the scale of the current crisis in access to civil justice, perhaps its most significant development in roughly a century—is not worthy of the name.

Our effort at revitalizing due process unfolds in three steps. Part I begins with the descriptive backdrop. We catalog the twenty-first-century litigation conditions that make renovation urgently necessary, setting an essential baseline for the jurisprudential work to come. Three features define the current civil justice system: first, dramatic growth in high-volume dockets, such as eviction, debt collection, home foreclosure, and certain family law matters, particularly child support enforcement cases, that pit institutional plaintiffs against individual defendants and now account for a majority of civil filings; second, pervasive asymmetries in

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[7] *See infra* notes 323-347 and accompanying text.
[8] Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1290 (1975).
[9] Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 775 (1974).
[10] *E.g.*, Emily S. Bremer & William N. Eskridge Jr., *The Unitary Executive and the Due Process State*, 101 NOTRE DAME L. REV. REFLECTIONS 1 (2026).
[11] *E.g.*, Danielle Keats Citron, *Technological Due Process*, 85 WASH. U.L. REV. 1249 (2008); David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State*, 37 YALE J. REG. 800 (2020).

resources, expertise, and access to meaningful legal help across the two sides of the "v"; and third, fundamental changes to the outputs of adjudication itself, including sharp growth in default judgments, routinized settlements, and decisional error. Together, these tectonic shifts in the litigation landscape have spurred a wide range of reformist thinking that a revitalized due process can and should engage with.

Part II continues with a mix of doctrine and intellectual history. The analysis reveals how and why due process painted itself into a corner during the last century—and thereby lost the conceptual resources needed to confront the transformation of litigation in the current one. The reason has little to do with doctrinal structure or the particular logic and grammar of *Mathews v. Eldridge*, the 1976 decision that announced an all-purpose due process test that continues to govern today.[12] Rather, two broad and related developments—both modern, neither inevitable—placed an adversarial limit on what due process can offer. One is the triumph of adversarial *opportunity* over adversarial *reality*. During the twentieth century, an adversarial ideology that celebrated the formal availability of procedures for vindicating rights steadily came to define constitutional conceptions of procedural fairness, even as litigant incapacity emerged as a pressing problem. The second development is what we call the reference-model problem: the civil justice system became a virtuous foil for evaluating other schemes, including state welfare agencies and other mass adjudicatory systems in the administrative state, rather than an object of due process concern in its own right. Save for a few pocketed interventions—think here of personal jurisdiction doctrine, preclusion rules, and class action procedure—civil litigation became the reference model from which due process borrowed rather than a domain to which due process meaningfully applied.[13]

Part III turns to rehabilitation—and to an elaboration of mediated adversarialism as a new organizing principle for due process. Mediated adversarialism is neither a repudiation of adversarialism nor a call for judges to become advocates for one side. Rather, it is a theory of institutional responsibility calibrated to the conditions of modern civil litigation. Where litigants can actually make use of adversarial tools, due process should continue to rely on and mandate them. But where litigant incapacity and system-level error make formal adversarial opportunity an illusory guarantee of procedural fairness, due process should demand more. Courts must help surface legally relevant information and adjust procedures to make participation meaningful, and they must use their growing bureaucratic capacities to monitor and improve the systems through which valuable rights are adjudicated at scale. In this way, mediated adversarialism offers both a doctrinal path forward and a normative account of why due process must once again become central to the civil justice system it has long neglected.

I. DUE PROCESS AT THE BREAKING POINT

The history of procedural due process since the Fourteenth Amendment's ratification in 1868 divides into three broad eras. The first, covering roughly the next half-century, saw *Lochner*-era efforts to reckon with an expanding regulatory state and rapid changes to civil procedure.[14] The

[12] 424 U.S. 319 (1976); *see also Turner*, 564 U.S. at 444-45 (applying *Mathews*).

[13] We acknowledge that due process doctrine governs these important aspects of civil litigation, albeit in cabined ways. Specialized strains of doctrine limited to these particular issues, not the all-purpose *Mathews* balancing test, govern them. *E.g.*, Dusenbery v. United States, 534 U.S. 161, 167 (2002) (insisting that due process doctrine developed under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and not *Mathews*, governs notice issues). Nothing about the due process governance of these discrete issues indicates a broader interest in the due process supervision of civil litigation more generally.

[14] *See infra* notes 149-170 & accompanying text.

second era, beginning with the New Deal, sought to balance deference to economic regulation with concern for diminished civil liberties, particularly as a McCarthyist chill descended on a Cold War nation.[15] The Due Process Revolution of the 1970s, the start of the current era, emphasized procedural fairness within a post-New Deal regulatory state. *Goldberg* articulated the modern constitutional template for procedural fairness, one rooted in the premise that adversarial engagement is the *sine qua non* for accuracy and fairness in adjudication.[16] Six years later, *Mathews* superimposed a utilitarian balancing framework that has governed ever since.[17]

Various pressures have triggered these doctrinal reconstructions. Sometimes the catalyst has been a shift in legal thought. Legal realism's rise, for example, transformed numerous areas of procedural doctrine, including personal jurisdiction.[18] More often, however, doctrinal change has been driven by transformations in the conditions of adjudication. Transformations in the volume and character of litigation—themselves flowing from changes in society, the economy, or government—have repeatedly forced courts to reconsider what fundamental fairness requires in practice.

The latter type of pressures is what warrants a new due process. This Part describes a civil justice system that, in its current form, looks nothing like the "model" of civil litigation that *Goldberg* drew upon to set into place the cornerstone of existing doctrine.[19] Three interrelated developments are most significant: first, a rising tide of high-volume, high-stakes, but low-dollar litigation; second, widening asymmetries in expertise, resources, and access to legal help across the two sides of the "v"; third, the growing prevalence of default judgments and routinized settlements plus high rates of decisional error. Each of these developments has its own history. None is entirely new. Taken together, however, they have fundamentally altered the conditions and the outputs of adjudication. The result is a twenty-first-century civil justice system that has drifted far from the premise of functioning adversarialism on which current due process doctrine rests.

A. Changing Cases: The Transformation of Court Docket Flows

No change has altered the American litigation landscape more than the remaking of state court civil dockets, which today account for roughly 98 percent of civil filings nationwide.[20] Over the past several decades, those dockets have undergone a fundamental change in their composition.

The ascendance of contract matters alongside the near disappearance of torts lie at this shift's center. During much of the twentieth century, tort and contract actions occupied roughly equal shares of state court civil filings, with tort litigation serving as the principal mechanism through which individuals sought compensation from institutional defendants, particularly

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[15] *See infra* notes 185-259 & accompanying text.
[16] *E.g.*, Parkin, *supra* note 2, at 1320.
[17] *See infra* note 12.
[18] *E.g.*, George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347.
[19] *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 513, 517 (1986) (discussing the "model" of litigation implicit in *Goldberg*).
[20] *Compare* Miriam Hamilton, *Civil Case Trends*, NAT'L CTR. FOR ST. CTS. (Oct. 2024) (reporting an estimated 13.7 million civil cases in state courts in 2022), https://nationalcenterforstatecourts.app.box.com/s/kb6vc0qnglti9o3o3uu0ps6lrsd0ovds [https://perma.cc/5K82-S2NR] with Federal Judicial Caseload Statistics 2025, U.S. CTS (reporting roughly 284,000 filed civil cases in federal district courts), https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2025 [https://perma.cc/WAR3-FZXG] (last visited July 18, 2026).

corporations.[21] Beginning in the 1990s, however, tort filings have steadily declined, displaced by mandatory arbitration, private dispute resolution, tort reform, and the consolidation of mass-harm cases in federal multidistrict litigation.[22] Filling the void has been a surge of contract-based claims, most of them high-stakes but low-dollar matters, particularly consumer debt collections, evictions, and home foreclosures.[23] State courts have thus shifted from serving as forums in which individuals regularly sought redress against powerful institutions to forums in which powerful institutions mostly enforce legal rights against individuals.

The magnitude of the resulting shift in docket flows is difficult to overstate. Debt collections and evictions have always been a substantial part of the civil docket, but they now occupy a historically unprecedented share of it. Between 2000 and 2018, eviction filings nationwide increased by more than twenty percent.[24] In California alone, debt collection filings grew from roughly 30,000 to approximately 250,000 during the first decade of the century.[25] Just four case types—debt collections, evictions, home foreclosures, and child support enforcement actions—now account for a *majority* of all filed civil cases in most state court jurisdictions, particularly large urban ones.[26]

At the core of these seismic changes is a related development with significant implications for due process protections. Shifting docket compositions now mean that much of the American civil justice system's throughput involves "social needs" cases, in which ordinary people encounter courts while facing housing instability, family disruption, financial precarity, or the loss of essential benefits.[27] Parties to these lawsuits, especially the millions of individual defendants staring down lawsuits brought by large, repeat-player plaintiffs, routinely suffer from a range of intersecting vulnerabilities.[28] These lawsuits implicate basic human welfare and, in some instances, personal liberty. In *Mathews* balancing terms, the private interest in many such cases plainly merits a high level of constitutional concern.[29]

The causes of these seismic docket shifts are the subject of debate, but a few possibilities stand out. Foremost is technological change. The institutional plaintiffs that have come to dominate

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[21] See NAT'L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, at 7 (2015) [hereinafter LANDSCAPE STUDY]. For more on the decline of tort litigation, see Joe Palazzolo, *We Won't See You in Court: The Era of Tort Lawsuits Is Waning*, WALL ST. J. (July 24, 2017, 5:09 PM ET), https://perma.cc/Q7HA-8SWA.

[22] *See* David Freeman Engstrom et al., *Compliance Courts* at 10 (working paper 2026).

[23] Hannah E. M. Lieberman & Paula Hannaford-Agor, *Meeting the Challenges of High-Volume Civil Dockets*, *in* TRENDS IN STATE COURTS: SPECIAL FOCUS ON FAMILY LAW AND COURT COMMUNICATIONS 89-90 (Carol R. Flango et al. eds., 2016); LANDSCAPE STUDY, *supra* note 21, at 7 (1992 figures); *id.* at 17 (more recent figures).

[24] Ashley Gromis, et al., *Estimating Eviction Prevalence Across the United States*, 119 THE PROCEEDINGS OF NAT'L ACADEMY OF SCIS. 1, 3 (2022).

[25] *See* Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, 75 STAN. L. REV. ONLINE 146, 149–52 (2024); HANNAH LOCKLEAR & GEORGE SIMONS, SOLOSUIT, DEBT COLLECTION LITIGATION INDUSTRY REPORT 2023 at 5 (2023).

[26] *See* LANDSCAPE STUDY, *supra* note 21, at 10; FAMILY JUSTICE INITIATIVE: THE LANDSCAPE OF DOMESTIC RELATIONS CASES IN STATE COURT, at 20-21 (2018) [hereinafter FAMILY LANDSCAPE STUDY]. *See generally* Engstrom & Engstrom, *supra* note 25, at 149–52 (reviewing statistics).

[27] Colleen F. Shanahan et al., *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1497 (2022).

[28] *See generally* Kathryne M. Young & Katie R. Billings, *An Intersectional Examination of U.S. Civil Justice Problems*, 2023 UTAH L. REV. 487.

[29] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 758 ("In parental rights termination proceedings, the private interest affected is commanding[] …."); Grayden v. Rhodes, 345 F.3d 1225, 1233 (11th Cir. 2003) (describing tenants' interest in uninterrupted occupancy of their homes as one of "undeniably great magnitude"); Finberg v. Sullivan, 634 F.2d 50, 58 (3d Cir. 1980) (en banc) (recognizing under *Mathews* that debt-collection procedures can implicate a "very compelling" private interest).

state court civil dockets have increasingly relied on automation—from basic robotic process automation to sophisticated AI—to generate the materials and filings necessary to assembly-line large numbers of cases through the system.[30] Broader economic forces have reinforced the trend. Two of the most salient are a growing American dependency on debt and rising precarity,[31] with the average American much more likely to suffer substantial income shocks today than in yesteryear.[32] The grim consequences include more bankruptcies, home foreclosures, and inability to make rent when a surprise bill, often health-related, lands.

B. Changing Litigants: Widening Adversarial Asymmetries

The transformation of state court dockets has laid the foundation for what may be the defining characteristic of twenty-first-century civil justice: increasingly sharp asymmetries in legal know-how, financial resources, and, perhaps most important of all, access to meaningful legal help across the two sides of the "v." Indeed, the high-volume cases that have come to dominate state court dockets tend to pit institutional plaintiffs—a bank, credit card company, debt buyer, corporate landlord, or, in the case of child support enforcement actions, the government—nearly always with a lawyer, against individual defendants without one.[33] The iconic image of civil litigation as a contest between opposing counsel presenting argument and evidence to a passive, neutral judge has become, for much of the civil justice system, an anachronism.

Self-represented litigants and the challenges they pose have long been a feature of the American litigation landscape. Indeed, as discussed in Part II, their circumstances garnered considerable attention at the time of the Due Process Revolution.[34] But the 1990s marked a critical inflection point. Percolating up from local bar committees but soon airing at a set of agenda-setting national conferences, a growing corps of concerned judges, court administrators, and legal aid lawyers sounded an alarm from the trenches about a growing "pro se crisis."[35] The best available evidence, compiled by the National Center for State Courts (NCSC), captures the remarkable speed and scale of the change that followed. In 1992, both parties were represented in 98 percent of tort cases, 94 percent of contract cases, and 93 percent of real property cases. By 2013, those figures had fallen to 64 percent, 20 percent, and 39 percent, respectively, with nearly all of the decline on

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[30] *See* Engstrom & Engstrom, *supra* note 25, at 159-63.

[31] TAMARA DRAUT & JAVIER SILVA, DĒMOS, A NETWORK FOR IDEAS AND ACTION, BORROWING TO MAKE ENDS MEET: THE GROWTH OF CREDIT CARD DEBT IN THE '90S, at 17, 33-37 (2003).

[32] JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM 2, 14 (rev. & expanded ed. 2008) (indicating that short-term income volatility is three times higher than it was thirty years ago, and that Americans have a 17% chance of seeing their family income drop by more than half from one year to the next).

[33] PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 1 (2020); PAULA HANNAFORD-AGOR, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS: EXAMINING DEBT COLLECTION, LANDLORD/TENANT AND SMALL CLAIMS CASES 3-4 (2019); CHRIS ALBIN-LACKEY, HUM. RTS. WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 1 (2016).

[34] *See infra* notes 66-76 & accompanying text; *see also* Dalié Jiménez, *Decreasing Supply to the Assembly Line of Debt Collection Litigation*, 135 HARV. L. REV. F. 374, 39-80 (2022).

[35] See, e.g., DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 213-15, 222-24 (1974); Hillard M. Sterling & Philip G. Schrag, *Default Judgments against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357, 358, 386-87 (1990); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 535, 538 (1992). For influential conference proceedings, see JONA GOLDSCHMIDT ET AL., AM. JUDICATURE SOC'Y, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 9, 142 (1998).

the defense side.[36] More granular studies, such as a recent study of eviction dockets in the L.A. Superior Court, the nation's largest trial court, show a continued widening of the "representation gap," with nearly 92 percent of landlords represented in 2023, up from 87 percent just four years before, and only 13 percent of tenants represented, down from 16 percent.[37] Self-represented adversaries often square off against each other, especially in family court.[38] But asymmetric representation now characterizes the overwhelming majority of cases in the twenty-first-century civil justice system.

Several developments have combined to produce such stark adversarial imbalance. One, already noted, is the rising prevalence of repeat-player, institutional plaintiffs. Corporate landlords increasingly dominate the ranks of eviction plaintiffs,[39] an uptick from past decades that housing experts attribute to the Great Recession of the late 2000s and the COVID-19 pandemic a decade later.[40] Both generated economic shocks—and, with the pandemic, eviction moratoria—that smaller landlords proved unable to weather, precipitating a wave of consolidation as corporate landlords, buoyed by low interest rates and cheap private-equity capital, bought properties in fire sales.[41] So, too, a wave of consolidation within the debt collection industry—fueled by explosive growth of charged-off consumer debt following credit-card expansion in the 1990s and then growing compliance costs as regulatory requirements tightened in the 2010s—has scaled litigation and boosted repeat-player advantages.[42]

A second, particularly powerful engine is systemic failure in the market for legal services. Government obligations to provide counsel are modest,[43] and free legal services, still funded mostly by the Congress-created Legal Services Corporation, are woefully insufficient.[44] The

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[36] *See* LANDSCAPE STUDY, *supra* note 21, at 31-33.
[37] DAVID FREEMAN ENGSTROM ET AL., A BLUEPRINT FOR EXPANDING ACCESS TO JUSTICE IN LOS ANGELES SUPERIOR COURT 21 [hereinafter BLUEPRINT] (April 2025).
[38] *See* FAMILY LANDSCAPE STUDY, *supra* note 26, at 20.
[39] Lillian Leung et al., *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOCIAL FORCES 316 (2021) (reviewing literature on changes in ownership of rental housing and how those changes have impacted eviction filings)**;** *see also* BLUEPRINT, *supra* note 37, at 21.
[40] *E.g.*, Meghan McCarty Carino, *Private equity money changed the housing market, then the pandemic hit*, MARKETPLACE, Sept. 30, 2021.
[41] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, RENTAL HOUSING: INFORMATION ON INSTITUTIONAL INVESTMENT IN SINGLE-FAMILY HOMES (2024) (noting effect of the 2007-2009 financial crisis on institutional ownership of rental homes), at https://www.gao.gov/products/gao-24-106643; Elora Raymond et al., *Large corporate buyers of residential rental housing during the COVID19 pandemic in three southeastern metropolitan* areas (Jan. 13, 2022), at https://bpb-us-e1.wpmucdn.com/sites.gatech.edu/dist/d/2497/files/2022/01/ERaymond-2022-CorporateLandlords_PandemicPurchases.pdf (noting growth in "large corporate buyers" of residential properties in 2021 in southeastern states).
[42] *See* Cong. Res. Serv., *The Debt Collection Market and Selected Policy Issues* (June 22, 2021), at https://www.congress.gov/crs-product/R46477; *see also* Mary Spector, *Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L & BUS. REV. 257, 265-67 (2011) (noting the rise of the "debt buyer" industry).
[43] The Supreme Court has found a "Civil *Gideon*" right to counsel in only a select few contexts, and statutorily created programs are, at best, a patchwork of pilots and programs. *See* National Coalition for a Civil Right to Counsel, Resource Library, at https://civilrighttocounsel.org/resources/ (providing a Right to Counsel Activity and Status Map); Tonya L. Brito et. al., *What We Know and Need to Know About Civil* Gideon, 67 S.C. L. REV. 223 (2016).
[44] Engstrom & Engstrom, *supra* note 25, at 152-53 (noting that, while legal aid funding has expanded somewhat in recent decades as legal aid organizations have diversified their funding sources beyond LSC, "even a vast increase over current commitments would barely dent the current crisis"). For underlying data, see David Reich, *Additional Funding Needed for Legal Services Corporation*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (Feb. 1,

private market fares little better. The lawyers' monopoly, bolstered by rules that reserve the practice of law to lawyers and that bar non-lawyer ownership of law firms,[45] creates an all-or-nothing choice between a full-service lawyer and an anemic set of "self-help" tools or, increasingly, generative AI. The disproportionate presence of people of color in the nation's high-volume dockets exacerbates matters, given growing evidence that they find it more difficult to retain counsel.[46]

Finally, the economics of high-volume litigation makes formal legal representation unattainable for many litigants. The cases that have steadily come to dominate state court civil dockets, while high-stakes for many of the people involved, also tend to be low-dollar matters, with amounts in controversy that range from several hundred to several thousand dollars.[47] As already noted, use of technology by institutional plaintiffs has reduced the marginal cost of initiating lawsuits, fueling a "miniaturization" of disputes by empowering those plaintiffs to dip deeper into the pool of potential cases and sue on smaller and smaller arrears. With the average American lawyer charging on the order of $300 an hour, most tenants threatened with eviction, consumer debtors sued for nonpayment of modest amounts of debt, and homeowners allegedly delinquent on their mortgages are simply priced out of the market for legal services. Many rationally choose to go it alone, if they defend at all.

The modal lawsuit thus no longer resembles the adversarial contest between equals contemplated by both the rules of civil procedure and modern due process doctrine.[48] A repeat-player institutional plaintiff with a lawyer squares off against an overmatched individual defendant with few resources, no meaningful access to legal help, and much on the line. Though the American due process tradition celebrates an opportunity to be heard as the constitutional baseline, the reality is that many and perhaps even most litigants have no practical ability to participate in their cases.

C. Changing Outcomes: Default Judgments, Routinized Settlement, and Decisional Error

The transformation of civil litigation has fundamentally altered the outputs of adjudication itself. In many of today's highest-volume dockets, adjudication on the merits has become the exception rather than the rule. Studies from multiple jurisdictions indicate that roughly nine out of ten debt collection defendants—and sometimes more—never answer the complaint.[49] Eviction proceedings exhibit lower but still striking rates of nonparticipation, with roughly 40 to 50 percent of tenants failing to appear or respond.[50] As a result, some 70 percent of debt collection actions and 20 to 30 percent of eviction cases culminate in default judgment—a strikingly higher rate than

2021), https://perma.cc/5NUR-DVRL; ABA Res. Ctr. for Access to Just. Initiatives, *ABArray Legal Aid Funding Report: U.S. Funding for Legal Aid*, TABLEAU (updated Nov. 30, 2022), https://perma.cc/QDT6-GVYP.

[45] On the combined impact of UPL and Rule 5.4's prohibition on fee-sharing with nonlawyers on access to legal services, see DAVID FREEMAN ENGSTROM ET AL., LEGAL INNOVATION AFTER REFORM: FIVE YEARS OF DATA ON REGULATORY CHANGE 12–15 (2025).

[46] *See* Young & Billings, supra note 28; Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANNU. REV. SOCIOL. 339 (2008); Jens Frankenreiter & Michael A. Livermore, *Are Lawyers' Case Selection Decisions Biased? A Field Experiment on Access to Justice*, 52 J. LEG. STUDS. 273 (2023); Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53 (2020).

[47] *See* LANDSCAPE STUDY, *supra* note 21, at 23-25.

[48] Spaulding, *supra* note 1, at 265-66.

[49] Pamela Bookman, *Default Procedures*, 173 U. PA. L. REV. 1419, 1432–49 (2025).

[50] Nicole Summers & Justin Steil, *Evicted by Default*, 57 CONN. L. REV. 1233, 1235 (2025).

just a few decades before.[51] Indeed, evidence from the NCSC studies suggests that the prevalence of default judgments in state courts at least doubled between 1992 and 2013.[52]

The decision to default may be a rational one. Often a defendant is dead to rights; the cost of mounting a defense of any kind, let alone retaining counsel, outstrips any possible benefit. But defaults that result from an inability to navigate a complex system without meaningful legal help should cause concern. Other engines of default's rise are equally worrying. Many defendants do not receive legally adequate notice that a case has been filed against them, for instance. Evidence suggests that improper or even fraudulent service—"sewer service," in access-to-justice parlance[53]—remains commonplace in high-volume litigation.[54]

Where cases do not end in default, they increasingly terminate through highly routinized settlements that reflect sharp asymmetries in legal know-how and access to legal help. Settlement is hardly new, and negotiated resolution is part of civil procedure's design.[55] But distinctive to modern high-volume litigation is the emergence of standardized, pre-drafted agreements that leave overmatched defendants little meaningful opportunity to negotiate—a phenomenon one commentator has dubbed "settlements of adhesion."[56] Adversarial asymmetries have engendered widespread concern about coercive settlement practices in chaotic court hallways and with little to no court oversight.[57]

These developments matter for due process because they undermine the very objective *Goldberg* and *Mathews* assumed adversarial procedure would achieve: accurate adjudication. Recent seismic shifts in the American litigation landscape make error rates hard to pin down, and courts rarely possess an objective benchmark against which to compare their judgments.[58] Nevertheless, a growing empirical literature has begun to document high rates of error in the nation's largest civil dockets by focusing on the prevalence of forgone claims and defenses that, had they been fully litigated, would likely have changed the outcome or even precluded entry of

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[51] Bookman *supra* note 49, at 1422 & n.5 (surveying reported rates in debt collection); Summers & Steil, *supra* note 50, at 1233 (surveying reported rates in evictions).

[52] *See* Engstrom & Engstrom *supra* note 25, at 149 & n. 19. More recent and localized studies, including further empirical work from the L.A. Superior Court, found a default rate of 33 percent in eviction matters, up from 28 percent in 2019. *See* BLUEPRINT, *supra* note 37, at 23.

[53] California Cap. Ins. Co. v. Hoehn, 558 P.3d 590, 596 (Cal. 2024) (referring to "[t]he filing of false affidavits to conceal a lack of lawful service" as "a common practice among debt collectors" and describing this practice as "'sewer service'").

[54] *E.g.*, Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813 (2018); Jake Harper, *A California Debt Collector has Sued Thousands of People – Some of Them Never Knew*, KPBS (Apr. 6, 2023), https://www.kpbs.org/news/local/2023/04/06/a-california-debt-collector-has-sued-thousands-of-people-some-of-them-never-knew; Josh Kaplan, *Thousands of D.C. Renters are Evicted Every Year. Do They All Know to Show Up to Court?*, DCIST (Oct. 5, 2020), https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court/.

[55] J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012).

[56] Nicole Summers, *Settlements of Adhesion*, 93 U. CHI. L. REV. 149 (2026).

[57] Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847 (2023).

[58] *See infra* notes 389-395 & accompanying text.

judgment.[59] A related set of studies shows chronic non-compliance by institutional plaintiffs with procedural requirements, such as heightened pleading requirements.[60]

Debt collection litigation in the L.A. Superior Court again offers some of the most rigorous evidence of both types. Beginning in 2015, the court has subjected proposed default judgments in categories of these cases to review by staff attorneys before their entry.[61] Even with that additional safeguard, a careful, case-by-case review found that more than 10 percent of default judgments contained legal defects that should have prevented entry of judgment or materially reduced the amount awarded.[62] An additional 30 percent contained procedural or substantive deficiencies serious enough to require refiling or amendment.[63] Put differently, even a court that has imposed quality-control measures systematically enters legally erroneous judgments. Error rates elsewhere, in courts that rely entirely on the parties to surface legal issues, are surely higher.

High error rates are hardly mysterious. They are a predictable consequence of a general decline in genuine adversarial contestation and the practical inability of many litigants, lacking access to any meaningful legal help, to assert defenses or counterclaims. Procedural safeguards and substantive protections depend on meaningful participation. When parties do not appear or effectively invoke the law's protections, factual and legal assertions go untested, and courts decide cases on incomplete or inaccurate records—or on nothing at all. When meaningful adversarial engagement is absent, the procedural safeguards celebrated by modern due process doctrine become more formal than real.

* * *

In short, due process has reached a breaking point. Across large swaths of the American civil justice system—and, in particular, within the cluster of case types that account for a majority of its total throughput—contemporary litigation practice falls below virtually any defensible conception of procedural regularity or fundamental fairness. The grim result is decisional error rates, particularly in many of the nation's highest-volume dockets and, relatedly, in the swelling share of cases implicating fundamental social needs, that are not just troubling but constitutionally intolerable.

Yet, as we demonstrate in Part II, due process has had virtually nothing to say about any of these developments.[64] It is confined to a collection of specialized domains—personal jurisdiction, preclusion, class actions, and a handful of other doctrinal enclaves—and does not address the everyday realities of the civil justice system. And it has hewed to the availability of procedural opportunities to be heard as a constitutional touchstone amidst a rising tide of evidence that these opportunities, while formally available, matter little in reality.

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[59] *See*, *e.g.*, Mary Spector, *Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L & BUS. REV. 257, 272 (2011); Summers, *supra* note 56, at 205; Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 42 (2015).

[60] *See* JULIA BARNARD ET AL., COURT SYSTEM OVERLOAD, THE STATE OF DEBT COLLECTION IN CALIFORNIA AFTER THE FAIR DEBT BUYING PROTECTION ACT 3 (2020); ABHAY ANEJA ET AL., MORE PAPER IN CONNECTICUT: AN EVALUATION OF DOCUMENTATION REFORMS IN STATE COURT 2 (July 2024).

[61] *See* Engstrom et al., *supra* note 22, at 46-49.

[62] *Id.* at 66-69.

[63] *Id*. For a further perspective, see Theodora Worledge at al., *AI Assistance for Human Review of Default Judgments*, AI, ETHICS, AND SOCIETY (forthcoming 2026).

[64] *See infra* notes 127-131 & accompanying text.

The next Part explains how it is that due process painted itself into a corner and was rendered unable to engage with what many rightly see as one of the most pressing challenges facing the American civil justice system. The story is not one of irreducible constitutional or doctrinal constraints but of ideology. Due process is shackled to constraints unsuited to the twenty-first-century moment because the twentieth gave legal elites occasion to celebrate adversarialism. With the party now over, nothing but ideology stands in the way of a new due process's emergence.

II. DUE PROCESS AND THE ADVERSARIAL CONSTRAINT: PATHS NOT TAKEN

Constitutional indifference to what ails the American civil justice system is puzzling, at least at first blush. The Due Process Revolution of the 1970s unfolded just as the first signs of pathology in court-based social needs dockets were becoming apparent. At precisely this moment, Friendly and Mashaw developed influential accounts of procedural fairness in response to problems in agency-based social needs dockets—state welfare determinations, federal disability benefits, and other forms of mass adjudication—that foreshadowed many of the civil justice system's current challenges: routinization, litigant incapacity, and persistent barriers to meaningful participation. Their work sketched important components of the model we develop here, emphasizing active judging (Friendly) and managerial oversight (Mashaw) rather than adversarial opportunity alone. In short, both the practical problem and the jurisprudential raw materials for addressing it were already in view. Yet no body of responsive constitutional doctrine emerged for the civil justice system itself. Part II.A traces that intellectual and doctrinal history.

Part II.B turns to explanation—and why the brief window of constitutional possibility quickly closed. In a nutshell, by the time the Due Process Revolution arrived, decades of legal thought by American legal elites—conservative and liberal alike—had idealized adversarialism as a totem of the American legal order's distinctive goodness and made it the constitutional touchstone of procedural fairness. Due process came to privilege adversarial opportunity over adversarial reality. As part of that intellectual development, civil litigation became due process's reference model—the gold standard against which to evaluate other adjudicatory systems—but not an object of due process concern itself. Adversarial opportunity has defined due process ever since, setting an implicit boundary on the protections that a court, wielding the *Mathews* balancing test, can order. Court-based social needs cases already proceed under the rules of civil procedure that set the constitutional gold standard. Due process has nothing to offer them, adversarial reality notwithstanding.

A. Social Needs Dockets and Early Gestures Toward a New Due Process

Today, the Due Process Revolution is understood as the reformation of administrative adjudication in terms of adversarial court procedure.[65] But in the moment, neither the revolution's target (administrative adjudication) nor its supposed lodestar (adversarialism) was fixed. For a time, court-based social needs dockets drew constitutional scrutiny alongside their agency-based equivalents. And problems common to both types of dockets prompted Friendly and Mashaw to turn away from adversarialism for solutions.

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[65] *E.g.*, Judith Resnik, *The Story of* Goldberg*: Why This Case Is Our Standard*, *IN* CIVIL PROCEDURE STORIES 473, 476 (Kevin Clermont ed., 2d ed. 2008)

1. Adversarial Breakdown, Social Needs Adjudication, and the Due Process Revolution

The Due Process Revolution proceeded amidst growing attention to problems of adversarial breakdown in both court- and agency-based social needs dockets, adjudication domains that observers at the time understood to present similar problems.[66] Consumer debt, often undertaken pursuant to installment contracts with exploitative terms, exploded in magnitude after World War II.[67] This phenomenon produced a "heavy docket of small collection claims" in state courts,[68] with cases often filed by repeat-player creditors seeking quick judgments.[69] By the end of the 1960s, concern for the dearth of meaningful adversarial engagement in consumer debt cases was commonplace.[70] Default judgment rates were high; service problems, including "sewer service," plagued many; summons forms included "incomprehensible language"; and creditors' attorneys routinely engaged in abusive forum-shopping.[71] Courts "do not provide forums in which issues are debated and the merits of cases decided," sociologist David Caplovitz insisted. "The notion of 'judgment' which implies deliberation by a judge" is inapposite to this litigation.[72]

The country's housing dockets, in turmoil during the 1960s, also garnered attention for adversarial breakdown,[73] with sewer service, rushed processes favorable to landlords, and financial barriers to tenants mounting a defense common.[74] More fundamentally, tenants often lacked lawyers.[75] Without counsel, a housing lawyer observed in 1964, the adversarial process proves illusory. Tenants "cannot [be] expecte[ed] to be able to know, let alone exercise, the legal rights which they have."[76]

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[66] U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, THE EXTENSION OF LEGAL SERVICES TO THE POOR (1964) (hereinafter "HEW REPORT").

[67] David Caplovitz, *Breakdowns in the Consumer Credit Marketplace*, 26 BUS. LAW. 795, 795 (1971); Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 UCLA L. Rev. 381, 402-03 (1965); David Caplovitz, *Consumer Credit in the Affluent Society*, 33 LAW & CONTEMP. PROBS. 641, 641 (1968); Robert P. Shay, *Major Developments in the Market for Consumer Credit Since the End of World War II*, 21 J. FINANCE 369 (1966).

[68] Caploviz, *Affluent Society*, *supra* note 67, at 641; Special Project, *Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts*, 28 VAND. L. REV. 711, 723 (1975); Carlin & Howard, *supra* note 67, at 402-07.

[69] Thomas L. Eovaldi & Joan E. Gestrin, *Justice for Consumers: The Mechanism of Redress*, 66 NW. U. L. REV. 281, 282 (1971); Note, *Small Claims Courts as Collections Agencies*, 4 STAN. L. REV. 237, 328 (1952); *see also* Robert J. Hollingsworth et al., *The Ohio Small Claims Court: An Empirical Study*, 42 U. CIN. L. REV. 469, 469-70 (1973) (referring to criticism from 1951).

[70] Caplovitz, *Breakdowns*, *supra* note 67, at 798; *see also* David Caplovitz, *Consumer Problems*, *in* HEW REPORT, *supra* note 66, at 61, 65-66; Thomas E. Willging, *Installment Credit: A Social Perspective*, 15 CATH. U. L. REV. 45, 59-60 (1966); Stephen L. Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 COLUM. J. L. & SOC. PROBS. 370, 382-390 (1974).

[71] Caplovitz, *Breakdowns*, *supra* note 67, at 798.

[72] Caplovitz, *Breakdowns*, *supra* note *supra* note 67, at 798; see also Note, *Small Claims Courts*, *supra* note 69, at 242; Mary Gardiner Jones & Barry B. Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357, 401 (1972); Marco Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 250 (1978); Leonard S. Rubenstein, *Procedural Due Process and the Limits of the Adversarial System*, 11 HARV. C.R.-C.L. L. REV. 48, 84-87 (1976).

[73] Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 68 CORNELL L. REV. 517, 541-54 (1984); Randall W. Scott, *Housing Courts and Housing Justice: An Overview*, 17 URB. L. ANN. 3 (1979).

[74] Nancy E. LeBlanc, *Landlord-Tenant Problems*, *in* HEW REPORT, *supra* note 66, at 51, 53; PATRICIA M. WALD, LAW AND POVERTY: 1965, at 19 (1965); LeBlanc, *supra* note 74, at 53; Joel M. Klevens, Note, *Poverty and Equal Access to the Courts: The Constitutionality of Summary Dispossess in Georgia*, 20 STAN. L. REV. 766, 766 (1968).

[75] LeBlanc, *supra* note 74, at 60.

[76] *Id.* at 51.

Agency-based social needs dockets, which expanded considerably in the 1960s, suffered from analogous challenges.[77] Welfare beneficiaries had invoked their "fair hearing" right in the Aid to Families with Dependent Children program for some time.[78] But regulatory changes that strengthened notice to beneficiaries[79] and an organizing effort assisted by federal legal aid support fueled significant increased demand for hearings by the end of the 1960s.[80] Likewise, an acceleration in disability benefits filings over the course of the 1960s produced heavy dockets of social security claims.[81]

As early as the 1950s, the limitations of adversarial protections as protections for these sorts of claimants attracted attention. "Fair hearing procedures . . . meet reasonable formal criteria," the law professor and disability rights advocate Jacobus tenBroek observed in 1956, including by requiring notice, a hearing right, and an opportunity to present and confront evidence.[82] But without lawyers, "[m]ost welfare recipients are simply not able to utilize this machinery on their own."[83] As a 1965 study of welfare beneficiaries demonstrated, "only two claimants denied aid out of several hundred studied knew enough about the hearing process to" take advantage of the adversarial hearing right.[84]

The Supreme Court's due process docket of the late 1960s and early 1970s reflected awareness of problems with adjudicative integrity. Cases like *Fuentes v. Shevin*[85] and *Sniadach v. Family Finance Corporation*,[86] both involving installment contracts for consumer goods, were characteristic of its attention to court-based social needs dockets. Between 1964 and 1974, the Court decided five cases on due process grounds involving lawsuits over installment contracts or their equivalent,[87] an engagement that one commentator praised for its "sophisticat[ion] and attent[ion] to the realities of the seller-consumer relationship."[88] The Court's due process docket also included two eviction cases during this time.[89] When the Court denied certiorari in a third in

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77 A 1964 U.S. Department of Health, Education, and Welfare lumped three court-based dockets (consumer debt, housing, and family) with welfare administration in a lengthy report on "the extension of legal services to the poor." *See generally* HEW REPORT, *supra* note 66.

78 *See* KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972, at 117-25 (2016). *See also id.* at 20; Joel F. Handler, *Justice for the Future Welfare Recipient: Fair Hearings in AFDC – The Wisconsin Experience*, 43 SOC. SERV. REV. 12, 15 (1969); Walter Gellhorn, *Poverty and Legality: The Law's Slow Awakening*, 9 WM. & MARY L. REV. 285, 300 (1967).

79 Tani, *supra* note 78, at 28.

80 Gellhorn, *supra* note 78, at 300; LARRY R. JACKSON & WILLIAM A. JOHNSON, RAND, PROTEST BY THE POOR: THE WELFARE RIGHTS MOVEMENT IN NEW YORK CITY 183-90 (1973).

81 Robert G. Dixon, Jr., *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 682-83.

82 Jacobus tenBroek, *Operations Partially Subject to the APA: Public Welfare Administration*, 44 CAL. L. REV. 242, 259 (1956).

83 *Id.* at 259.

84 Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. REV. 361, 373 (1965).

85 407 U.S. 67 (1972).

86 395 U.S. 337 (1969).

87 Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964); Swarb v. Lennox, 405 U.S. 191 (1972). *Szukhent* did not involve an installment sales contract but a lease for farm equipment that obliged the lessee to make periodic payments. For another consumer sales case with due process arguments from this time, see *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) (deciding whether consumers had a right of action to sue).

88 James R. McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance - Repossession and Adhesion Contract Issues*, 26 HASTINGS L.J. 383, 385 (1974).

89 Lindsey v. Normet, 405 U.S. 56 (1972); Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969).

1967, William Douglas, dissenting, took the occasion to remark more generally on the problem of adversarial breakdown in civil litigation.[90] The case was "part of the larger problem regarding the inability of indigent and deprived persons to voice their complaints through the existing institutional framework," he insisted.[91]

The lower courts also addressed a wide array of due process challenges to practices common in court-based social needs dockets.[92] Consumer debt cases illustrate the pattern well, although eviction litigation also produced important due process rulings.[93] In a 1968 case involving a consumer's default on an installment payment, for instance, the California Supreme Court invalidated a state law permitting the defendant's prejudgment arrest.[94] In 1970, a federal district court, anticipating *Fuentes v. Shevin*, declared a prejudgment attachment procedure unconstitutional in another case involving the installment purchase of consumer goods.[95] A third court invalidated postjudgment wage garnishment procedures.[96] The frequency of such cases prompted a prominent creditors' attorney in 1973 to lament "[a] rash of judicial decrees emanating from all parts of the country" that have "disrupted business practices" in the service of "consumerism."[97]

2. Pathways Toward a New Due Process

These developments did not merely expose deficiencies in existing procedures. They also inspired a small but important group of thinkers to rethink procedural fairness itself. One of the earliest was Jacobus tenBroek, who advocated for active judging in a little-noticed 1956 critique of welfare adjudication. "It is the job of the hearing officer," he argued, "to listen to the claimant's story, to find and formulate the issue, to aid [the claimant] in sorting out the evidence he has, and to indicate to him the ways . . . in which he can establish his case."[98] "Without such help," tenBroek continued, "fair hearings would be a sham and a farce . . . . [P]rocedural rights . . . would stand as cynical mockery of claimants who assayed to employ them but whose inability foredoomed them to failure."[99] Friendly and Mashaw picked up this dropped thread amidst the doctrinal tumult of

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[90] Williams v. Shaffer, 385 U.S. 1037, 1037-38 (1967).
[91] *Id.*
[92] *E.g.*, Anthony M. Feeherry & Philip Zuckerman, Note, P*rocedural Due Process - The Prior Hearing Rule and the Demise of* Ex Parte *Remedies*, 53 B.U. L. REV. 41, 47-48 n. 43-53 (1973).
[93] *E.g.*, Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Shaffer v. Holbrook, 346 F. Supp. 762 (1972); Mihans v. Municipal Court, 7 Cal. App. 3d 479, 484 (1970); Amanuensis, Ltd. v. Brown, 65 Misc.2d 15 (N.Y. Civil Ct. 1971); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970); Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970); David B. Rand, Note, *Eviction Procedures in Public Housing*, 73 DICK. L. REV. 307 (1969); Note, *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 YALE L.J. 988 (1968).
[94] In re Harris, 69 Cal. 2d 486 (1968); *see also Imprisonment for Debt and the Constitution*, 1970 LAW & SOC. ORDER 659, 673-74.
[95] Laprease v. Raymours Furniture Co., 315 F. Supp. 316 (N.D.N.Y. 1970); *see also* Blair v. Pitchess, 5 Cal. 3d 258 (1971); Frank X. Froncek, *Replevin: A Due Process Prescription for an Ancient Writ*, 45 TEMPLE L. Q. 259, 269-74 (1972).
[96] Brown v. Liberty Loan Corp. of Duval, 392 F. Supp. 1023 (M.D. Fla. 1974), *rev'd* 539 F.2d 1355 (5th Cir. 1976).
[97] David F. Maxwell & John P. McKelligott, *Due Process and Prejudgment Remedies: The Attempt to Protect Legitimate Creditor Interests in the Days of Consumerism*, 44 PA. BAR ASSOC. Q. 665, 665 (1973); Robert S. Catz & Edmund H. Robinson, *Due Process & Creditors' Remedies: From* Sniadach *to* Fuentes *to* Mitchell*,* North Georgia*, and Beyond*, 28 RUTGERS L. REV. 541, 541 (1975).
[98] tenBroek, *supra* note 82, at 259.
[99] *Id.* According to Hein Online, tenBroek's article has been cited only eight time.

the 1970s. They criticized adversarial procedures as inadequate for agency-based social needs dockets, and they proposed non-adversarial pathways toward procedural fairness as alternatives.

Friendly's 1975 lecture *Some Kind of Hearing* is often remembered as a distillation of mid-century doctrinal struggles over due process in the administrative state—a critique and synthesis that would help shape *Mathews*' flexible standard.[100] But the lecture also questioned adversarialism's universality. Friendly asked, point blank, whether "we would not do better to abandon the adversary system for certain areas of mass justice."[101] He worried that the misalignment between "adversary process" and "a situation in which many thousands of hearings must be provided each month" would generate delay and confusion.[102] And he doubted the value of importing the full suite of adversarial protections in case types governed by well-settled legal standards, where decisions turned on factfinding and routine rule application.[103]

As an alternative, Friendly proposed an "investigatory model." A neutral decision-maker, not the parties, would assume primary responsibility for developing the factual record and guiding the proceeding.[104] Friendly conceded that this type of informal proceeding departed from settled assumptions in "American legal thought" and would mark a sharp break with "our tradition of adversary process," but argued it would ultimately result in more "protection to the individual."[105] Ultimately, he urged experimentation with non-adversarial procedure, and he argued that "mass administrative justice"—where the adversarial ideal was most weakly established—was the ideal place to do it.[106]

Like Friendly, Mashaw advanced a conception of due process motivated by the futility of formally available adversarial protections for overmatched, under-resourced social needs claimants. He developed his critique of adversarialism in his landmark studies of mass adjudicatory agencies, first in a 1973 report for the Administrative Conference of the United States, and further in a 1974 article.[107] Mashaw began from a straightforward premise: procedural safeguards should promote fairness to individual claimants and the accurate resolution of claims.[108] But, he argued, adversarial devices—the opportunity to make one's case at a hearing and on appeal—were "inadequate to produce fairness in social welfare claims adjudication."[109] They presupposed a claimant who is "aggressive, knowledgeable about the program, and skillful in developing and presenting facts (or has access to those who are)," assumptions that bore little resemblance to the realities of the claimant population. The social welfare claimant, Mashaw observed, was not "an adversary in any realistic sense." This adversarial reality made "the theoretical model of the passive adjudicator" ruling on party-presented facts "wholly inappropriate."[110] Case volumes exacerbated the problem. Mashaw documented how agencies managing adversarial requirements buckled under considerable docket pressures, burdens that produced delay and error.[111]

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[100] Friendly, *supra* note 8; *see also* Mathews v. Eldridge, 424 U.S. 319, 343 (1976); *id.* at 348.
[101] Friendly, *supra* note 8, at 1289; *id.* at 1316.
[102] *Id.* at 1290.
[103] *Id.* at 1289-90.
[104] *Id.*
[105] *Id.* at 1290.
[106] *Id.* at 1290-91.
[107] Jerry L. Mashaw, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, Report in Support of Recommendation 73-3, Admin. Conf. of the U.S. (June 1973).
[108] *Id.* at 162.
[109] Mashaw, *supra* note 9, at 775.
[110] *Id.*; *id.* at 811-12.
[111] *Id.* 790; *id.* at 814-15, 790; *see also* Mashaw, *supra* note 107, at 164.

While Friendly's proposal remained fundamentally judge-centered, Mashaw questioned whether adversarialism should remain the organizing principle of due process at all. Reconceiving due process in institutional and managerial terms, he insisted due process should center not on formal adversarial opportunity but on "systemic management" by an adjudicatory institution. Fairness at scale, he insisted, turns on agency-supervised mechanisms designed to assure the accuracy of claims adjudication.[112] A "positive caseload management system" would set concrete standards for timeliness, accuracy, and fairness;[113] continually audit performance through quality-assurance review;[114] and respond with targeted interventions, including training, resource allocation, and the deployment of staff to address recurring failures.[115] This managerial approach would make accuracy and error-detection the agency's responsibility, rather than the claimant's burden.[116]

Neither Friendly nor Mashaw focused principally on ordinary civil litigation. Yet the implications of their arguments for the emerging social needs dockets in state courts were immediately apparent. Friendly acknowledged that "[s]trongly embedded traditions, specific constitutional limitations, and resistance of the bar" would complicate an investigatory model's use in ordinary civil litigation.[117] But the model's potential for court-based social needs dockets was clear to those paying attention to these dockets' conditions. As one commentator argued shortly after Friendly published his lecture, "continued reverence for the adversary system" was misplaced for "the vast majority of consumers [and] tenants."[118] For them, "[t]he adversary system is, as a practical matter, unavailable . . . ."[119] An investigatory model made sense, not just for agency adjudication, but also for civil litigation.[120] Mashaw likewise proposed the "management side" of due process to respond to problems in agency-based, not court-based, mass adjudication.[121] But he commented on an "increasing willingness to view the [civil] adjudication process as one in which the positive management of cases . . . to achieve accurate and fair results is . . . appropriate . . . ."[122]

3. Paths Not Taken

Friendly and Mashaw saw what due process doctrine to that point had failed to see. Writing at the height of the Due Process Revolution, they sketched the outlines of a doctrine that rejected the equation of procedural fairness with adversarial opportunity and instead emphasized the adjudicatory and institutional conditions necessary for fair and accurate adjudication. These proposals represented genuine doctrinal possibilities. Yet American courts ultimately took a different path.

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[112] Mashaw, *supra* note 9, at 815-16.
[113] Mashaw, *supra* note 107, at 166-167; Mashaw, *supra* note 9, at 792.
[114] Mashaw, *supra* note 107, at 169-170; *id.* at 174; *see also* Mashaw, *supra* note 9, at 798-803.
[115] Mashaw, *supra* note 107, at 177.
[116] Mashaw, *supra* note 107, at 166-167; *id.* at 169-170; *id.* at 177; Mashaw, *supra* note 9, at 792; *id.* at 798-803.
[117] Friendly, *supra* note 8, at 1290.
[118] Rubenstein, *supra* note 72, at 51.
[119] *Id.* at 66.
[120] *Id.* at 82.
[121] Mashaw, *supra* note 9, at 780.
[122] Mashaw, *supra* note 107, at 163.

By 1984, Edward Rubin would describe *Mathews* as virtually irrelevant to civil litigation.[123] *Mathews*'s "three factors" had merely "serve[d] as methods for adjusting the requirements of civil trials in particular types of administrative adjudication"—to determine, in other words, which protections afforded by civil procedure's reference model had to be offered in agency adjudication.[124] His observation has proven evergreen. The Court has only used *Mathews* to evaluate procedures in civil cases ten times. Of these, nine have involved specialized litigation domains—civil forfeiture,[125] parental rights and child support,[126] and civil commitment[127]—where the government appears directly as an adversary, and thus where civil litigation most resembles agency proceedings. Only once, in 1991, has the Court scrutinized the constitutional adequacy of a procedure devised in trans-substantive terms for use in private civil litigation.[128] The Supreme Court has not decided a consumer debt or eviction case on any grounds, due process or otherwise, since 1974.[129] Not until *Turner* in 2011 did the Court suggest the possibility of non-adversarial protections.

Lower courts have largely followed the Supreme Court's lead. On occasion, aspects of judgment enforcement in consumer debt and eviction litigation have drawn due process scrutiny. Several courts have held that a judgment debtor has a right to notice of potentially applicable wage or asset garnishment exemptions, as well as a right to a timely hearing to challenge the garnishment of allegedly exempt wages or assets.[130] Several others have required that tenants receive notice of possible consequences for personal property after an eviction, plus an opportunity to reclaim personal property if taken.[131] These interventions have largely orbited the edges of adjudication—policing notice, timing, and the aftermath of judgment—rather than confronting adversarial breakdown in the civil justice system itself.

Family law is the only civil justice domain to have received sustained due process attention since the Revolution. State supreme courts have diagnosed constitutional deficits with processes for the termination of parental rights;[132] for other custody matters;[133] for the enforcement of child

[123] Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1137 (1984).
[124] *Id.* at 1146.
[125] Culley v. Marshall, 601 U.S. 377 (2024); United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).
[126] Turner v. Rogers, 564 U.S. 431 (2011); Santosky v. Kramer, 455 U.S. 745 (1982); M.L.B. v. S.L.J., 519 U.S. 102 (1996); Little v. Streater, 452 U.S. 1 (1981); Lassiter v. Dep't of Social Services of Durham County, 452 U.S. 18 (1981).
[127] Heller v. Doe by Doe, 509 U.S. 312 (1993); Addington v. Texas, 441 U.S. 418 (1979).
[128] Connecticut v. Doehr, 501 U.S. 1 (1991).
[129] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).
[130] *E.g.*, Finberg v. Sullivan, 634 F.2d 50, 62 (3d Cir. 1980); Hutchinson v. Cox, 784 F. Supp. 1339, 1342-1343 (S.D. Ohio 1992); Strickland v. Alexander, 153 F. Supp. 3d 1397, 1412-1413 (N.D. Ga. 2015); Distressed Holdings v. Ehrler, 113 A.D.3d 111, 119 (N.Y. 2013); Duhon v. Gravett, 302 Ark. 358 (1990) (exemptions); Dorwat v. Caraway, 290 Mont. 196 (1998) (exemptions).
[131] *E.g.*, Todman v. Mayor and City Council of Baltimore, 631 F. Supp. 3d 314 (D. Md. 2022); Davis v. Bissen, 545 P.3d 557, 573-74 (Hawaii 2024).
[132] *E.g.*, Tara R. v. Dep't of Family & Community Servs., 541 P.3d 530 (Alaska 2024); Orville v. Division of Family Servs., 759 A.2d 595 (Del. 2000); J.B. v. Fla. Dep't of Children & Family Servs., 768 So.2d 1060 (Fla. 2000); In re T.M., 131 Hawaii 419 (2024); In re D.T., 212 Ill.2d 347 (2004); In the Interest of M.D., 921 N.W.2d 229 (Iowa 2019); Interest of A.S., 319 Kan. 396 (2024); In re Roberts, 966 A.2d 894 (Me. 2009).
[133] *E.g.*, M.G.D. v. L.B., 164 So.3d 606 (2014); D.M. v. F.L.C., 388 So.3d 701 (Ala. Civ. App. 2023); Flores v. Flores, 598 P.2d 893 (Alaska 1979); In re Zakai F., 336 Conn. 272 (2020); Watkins v. Watkins, 266 Ga. 269 (1996).

support obligations;[134] for determinations of child dependency, neglect, and abuse;[135] for paternity determinations;[136] and for divorce.[137] This pattern is revealing for the same reason the Supreme Court's record of due process decision-making is. In many of these cases the government participated directly as an adversary, as the party seeking the termination of parental rights, for instance,[138] or as the party seeking to establish paternity.[139] They suggest that what prompts due process concern is not adversarial breakdown *per se*, but the directness of the government effort—a sufficient "imprimatur of state involvement"—to deprive someone of liberty or property.[140]

B. Due Process's Ideology of Adversarialism and the Reference-Model Problem

Why has due process remained largely indifferent to ordinary civil litigation? The answer cannot be found in doctrine alone. Indeed, nothing in *Mathews v. Eldridge* confines due process scrutiny to administrative adjudication or forecloses nonadversarial protections of the sort Friendly and Mashaw envisioned. As Mashaw himself observed, *Mathews* merely supplies a standard of instrumental rationality—one concerned with accurate and cost-effective decisionmaking[141]—and *Turner* demonstrates that this framework can accommodate nonadversarial protections when litigation conditions warrant them. Nor is there any principled reason to subject family-law proceedings, but not the rest of civil litigation, to constitutional scrutiny.[142] Finally, interpretive methodology does not compel an adversarial ceiling on due process. While an originalist might invoke the centrality of adversary process in American legal thought to justify limits on due process's reach, only very recently have Supreme Court justices even hinted at history as a

134 *E.g.*, Vincent v. Green, 872 So.2d 676 (Miss. 2004); Connell v. State of Montana, 280 Mont. 491 (1997); Pasqua v. Council, 186 N.J. 127 (2006); State v. Manco, 425 A.2d 519 (R.I. 1981); McBride v. McBride, 334 N.C. 124 (1993).

135 *E.g.*, Clark v. Arkansas Dep't of Human Servs., 206 S.W.3d 899 (Ark. App. 2005); Thompson v. Arkansas Dep't of Human Servs., 452 S.W.3d 123 (Ark. App. 2014); Grimm v. Calica, 88 N.E.3d 741 (Ill. 2017); In re K.D., 962 N.E.2d 1249 (Ind. 2012).

136 *E.g.*, Allen v. Division of Child Support Enforcement, 575 A.2d 1176 (Del. 1990); In the Interest of J.M., 590 So.2d 565 (La. 1991); Carroll v. Moore, 423 N.W.2d 757 (Neb. 1988).

137 *E.g.*, Wild v. Wild, 940 So.2d 1037 (Ala. Civ. App. 2006); Mesi v. Mesi, 478 P.3d 366 (Nev. 2020); Highsmith v. Highsmith, 587 S.W.3d 771 (Tex. 2019).

138 *E.g.*, Tara R. v. Dep't of Family & Community Servs., 541 P.3d 530 (Alaska 2024); Matter of K.L.J., 813 P.2d 276 (Alaska 1991); People in Interest of A.M.D., 648 P.2d 625 (1982); In re Baby Girl T., 298 P.3d 1251 (Utah 2012); Matter of Welfare of D.E., 469 P.3d 1163 (Wash. 2020); In re S.M.H., 385 Wis.2d 418 (2019).

139 *E.g.*, Allen v. Division of Child Support Enforcement, 575 A.2d 1176 (Del. 1990).

140 Matter of K.L.J., 813 P.2d 276, 283 (Alaska 1991). An "imprimatur of state involvement" may also explain (but not justify) those few instances when courts have paid due process attention to other parts of the American social need docket. E.g., Williams v. Illinois State Scholarship Comm'n, 139 Ill.2d 24 (1990) (holding that forum selection clauses in student loan agreements with a state agency violated due process).

141 JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 102 (1985)

142 While many family law matters have a government party, state supreme courts have also decided plenty of cases without government parties on due process grounds. *E.g.*, Vincent v. Green, 872 So.2d 676 (Miss. 2004); Morgan v. Getter, 441 S.W.3d 94 (Ky. 2014); Steab v. Luna, 356 Mont. 372 (2010); Wild v. Wild, 940 So.2d 1037 (Ala. Civ. App. 2006); Mesi v. Mesi, 478 P.3d 366 (Nev. 2020). "Private lawsuits," as John Leubsdorf argued in 1984, "can lead to error, subvert the rule of law, and impede access to justice as easily as government proceedings can," and those cases can just as surely "bring[]the government's power and policies to bear on individual citizens." John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 602-03 (1984). Family law exceptionalism when it comes to due process seems to be more a matter of doctrinal culture – courts' willingness to consider problems in these matters in constitutional terms – than doctrinal fundamentals.

constraint on due process possibilities,[143] and state courts remain free to construe their own states' constitutional guarantees.[144]

The better explanation for due process's indifference to ordinary civil litigation lies less in doctrine than in the emergence of a powerful ideology of adversarialism that came to define twentieth-century conceptions of procedural fairness. At the century's outset, due process doctrine did not treat adversary processes or civil procedure as constitutionally sacrosanct. To the contrary, both were often the subject of withering criticism. But events over the next six decades gave first conservative legal elites, then their liberal counterparts, reason to celebrate adversarial procedures. That intellectual transformation produced two enduring and related features of modern due process that the interventions of Friendly, Mashaw, and others could not overcome. First, due process came to privilege adversarial opportunity over adversarial reality. Second, civil litigation became due process's reference model rather than one of its objects. Together, these developments explain why due process has proven remarkably unresponsive even as the deterioration of the civil justice system has reached crisis proportions.

1. Due Process and Civil Litigation at the Turn of the Twentieth Century

American conceptions of due process originated in adversarial procedures characteristic of civil litigation. Due process at the Founding and through the Civil War meant a process according to the practices of the common law.[145] The U.S. Supreme Court's only direct antebellum encounter with what twentieth-century lawyers would call procedural due process came in 1856, in *Murray's Lessee v. Hoboken Land & Improvement Co.*[146] If the procedure under review does not violate a more specific constitutional constraint, the *Murray's Lessee* Court held, the question is whether the process was among "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors . . . ."[147] This metric for a procedure's constitutional adequacy linked due process to common law litigation, the font of American adversarialism, albeit at a time when adversarialism's centrality to American litigation remained contested.[148]

But the "common law" test from *Murray's Lessee* quickly yielded when the Court had to grapple with a flood of cases generated by the new Fourteenth Amendment.[149] The onslaught had

143 Culley, 601 U.S. at 390-92.

144 *E.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). For examples of states to have adopted *Mathews* for their due process clauses, see, e.g., *Jamison v. State of Missouri, Dep't of Social Servs*., 218 S.W.3d 399, 405 (Mo. 2007); *Rhode Island Dep't of Att'y Gen. v. Smith*, 330 A.3d 38, 45-46 (R.I. 2025); *State in Interest of A.C.*, 643 So.2d 719, 724 (La. 1994); *Jamgochian v. New Jersey State Parole Bd.*, 952 A.2d 222, 239-40 (N.J. 2008); *University of Texas Medical Sys. v. Than*, 901 S.W.2d 926, 929-30 (Tex. 1995).

145 Zylstra v. Corporation of Charleston, 1 Bay (S.C.) 382, 382 (1794); *id.* at 390-92; *see also* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMM. 339, 347-48 (1987); RODNEY L. MOTT, DUE PROCESS OF LAW 214 (1926).

146 *See* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 100 (discussing this history).

147 59 U.S. 272, 276-77 (1856).

148 MOTT, *supra* note 145, at 242. Charles M. Hough, *Due Process of Law-To-Day*, 32 HARV. L. REV. 218 (1918). On adversarialism's contested footing in the mid-19th century, see AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE 6 (2017).

149 Davidson v. New Orleans, 96 U.S. 97, 103-04 (1877) (commenting on a docket "crowded with cases" alleging Fourteenth Amendment violations).

at least two causes. One was the burgeoning regulatory state.[150] If every governmental interference with private property rights had to work through the processes of common law litigation, due process would have created a procedural "straightjacket" unsuited to this period of "tremendous economic revolution."[151] The second was the recreation of American civil procedure during the second half of the nineteenth century, with the proliferation of reforms modeled on New York's Field Code.[152] If due process meant common law processes, the Fourteenth Amendment would have stood squarely in the path of these seismic changes.[153]

The Supreme Court sensed as much when it decided *Hurtado v. California* in 1882. The common law test *Murray's Lessee* espoused simply means that a procedure not otherwise prohibited by the Constitution is "due process of law, if it can show the sanction of settled usage both in England and this country . . . ." "But it by no means follows," the *Hurtado* Court continued, "that nothing else can be due process of law . . . ."[154] A "legal proceeding" is also acceptable if it comports with "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[155]

Hurtado offered what Sanford Kadish described as a "method of flexibility" to determine whether a new agency or court procedure passed due process muster.[156] This method quickly became an open-textured standard.[157] "[C]ertain immutable principles of justice, which inhere in the very idea of free government," would determine a procedure's constitutionality.[158] In some instances, the Court simply pronounced procedures fair or unfair with little more than a conclusory assertion to this effect.[159] Due process threatened to become a vague muddle.[160] But deference characterized procedural due process decision-making after *Hurtado*, saving the doctrine's administration from unmitigated judicial discretion.[161] The Court required *some* modicum of process when the government acted in a "judicial or *quasi*-judicial capacity."[162] Otherwise, the Court mostly refused to disrupt states' procedural innovations.[163]

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150 *Cf.* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1465 (2010) (discussing evolving administrative action and due process in the late 19th century).
151 MOTT, *supra* note 145, at 245-46.
152 Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 932 (1987); *id.* at 939; *see also* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 511 (2000).
153 *Cf.* T.W. Brown, *Due Process of Law*, 32 AM. L. REV. 14, 19-20 (1898) (describing a "firmly established" common law procedure that many states jettisoned during this time). It was during this time that the term "procedure" first emerged. LUCIUS POLK MCGEHEE, DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION 159 (1906).
154 Hurtado v. People of the State of California, 110 U.S. 516, 528-29 (1884).
155 *Id.* at 535; *id.* at 537.
156 Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey and Critique*, 66 YALE L.J. 319, 321-27 (1957).
157 MOTT, *supra* note 145, at 254.
158 Holden v. Hardy, 169 U.S. 366, 389 (1898); *see also* In re Kemmler, 136 U.S. 436, 448 (1890); MOTT, *supra* note 145, at 252.
159 *E.g.*, Leeper v. Texas, 139 U.S. 462, 468 (1891); Iowa Cent. Ry. Co. v. Iowa, 160 U.S. 389, 394 (1896); Maxwell v. Dow, 176 U.S. 581, 604-05 (1900); West v. Louisiana, 194 U.S. 258, 263-64 (1904).
160 MCGEHEE, *supra* note 153, at 57.
161 MOTT, *supra* note 145, at 254 ("[T]he courts would approve almost any procedure unless it was so grossly and arbitrarily unjust as to be beyond the approval of any reasonable man."). *Cf.* Twining v. New Jersey, 211 U.S. 78, 106-07 (1908) ("[W]e must take care that we do not import into the discussion our own personal views of what would be wise, just, and fitting rules . . . and confound them with constitutional limitations.").
162 MCGEHEE, *supra* note 153, at 236; *see also* Londoner v. City and County of Denver, 210 U.S. 373, 386 (1908).
163 Brown v. New Jersey, 175 U.S. 172, 172, 175 (1899); Holden v. Hardy, 169 U.S. 366, 385-86 (1898).

That deferential approach loosened the connection between procedural due process and the court-based, adversarial model that had anchored the doctrine before the Civil War. So too did the expanding regulatory state.[164] Commissions and other executive branch institutions adjudicated interests in private property using procedures very different from court-based processes.[165] By the turn of the century, the Court, allowing much of this innovation, would acknowledge that "due process is not necessarily judicial process."[166]

At times around the turn of the century, the Supreme Court cast due process's "essential elements" as requiring some sort of notice and hearing.[167] But even this red line yielded in certain regulatory contexts,[168] permitting agency enforcement practices that afforded no adversarial engagement before a deprivation.[169] As a treatise writer commented in 1925, "the doctrine of notice and hearing . . . is subject to too many exceptions and modifications to be used as a suitable general norm of what is to constitute due process of law."[170]

Indeed, any suggestion that adversarial processes exemplified fundamental fairness would have struck a false note at the start of the twentieth century, at least among legal elites. Lawyers of all political stripes acknowledged serious problems with excessive adversarialism in the American justice system.[171] Roscoe Pound's famous jeremiad on "popular dissatisfaction" with the administration of justice, delivered as a speech to the American Bar Association in 1906, exemplified a critique other influential voices also expressed.[172]

Pound faulted "American exaggerations of the common law contentious procedure" as a "potent source of irritation."[173] A "wholly contentious" system, he argued, "disfigures our judicial administration," with litigation made a "game" and not a search for "truth and justice."[174] As such, Pound declared, "neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it." Hence courts become "agents or abettors of lawlessness."[175]

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[164] MOTT, *supra* note 145, at 214-215.
[165] MCGEHEE, *supra* note 153, at 80.
[166] Reetz v. People of the State of Michigan, 188 U.S. 505, 507 (1903); Ballard v. Hunter, 204 U.S. 241, 266 (1907).
[167] MCGEHEE, *supra* note 153, at 76; *see also* Iowa Central Ry. Co. v. Iowa, 160 U.S. 389, 393 (1896); Isaac Franklin Russell, *Due Process of Law*, 14 YALE L.J. 322, 329 (1905).
[168] MOTT, *supra* note 145, at 220; MCGEHEE, *supra* note 153, at 80; *id.* at 201; John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 509 (1997).
[169] *E.g.*, North American Cold Storage Co. v. Chicago, 211 U.S. 306, 308 (1908); Lawton v. Steele, 152 U.S. 133, 140-41 (1894); Weimer v. Bunbury, 30 Mich. 201, 211 (1874); MCGEHEE, *supra* note 153, at 373.
[170] MOTT, *supra* note 145, at 239.
[171] *E.g.*, Barry Friedman, *Popular Dissatisfaction with the Administration of Justice: A Retrospective (and a Look Ahead)*, 82 IND. L.J. 1193, 1193 (2007) (describing "a time of extraordinary discontent about judges and the judicial system").
[172] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. ABA 395, 405 (1906); JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 228 (2007); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045-1097 (1982). For other influential critiques, see William H. Taft, *Delays and Defects in the Enforcement of Law in This Country*, 187 N. AM. REV. 851, 851 (1908); William H. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 11 (1905); WILLIAM F. WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 3 (1929). Frustration with the administration of justice also drove campaigns to take worker injury cases out of common law courts. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 221 (1992); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 176 (2004).
[173] Pound, *Causes*, *supra* note 172, at 404.
[174] *Id.* at 405.
[175] *Id.* at 406.

Common-law substance and procedure alike had become pathologically individualistic, Pound insisted, elevating "individual rights" over "the welfare of all," and relying on litigants' "individual initiative" with deleterious consequences for weaker litigants.[176] With "the common law arrayed against the people" and "courts . . . distrusted," support grew for "[c]ommissions and boards, with summary administrative and inquisitorial powers . . . ."[177] Many clearly shared these views. Pound's ABA speech catalyzed the campaign for procedural reform that culminated with the Federal Rules of Civil Procedure three decades later.[178]

Pound soon extended his critique in ways that anticipated Friendly and Mashaw and, read today, have startling prescience. In a 1913 article, he described a mismatch between an antiquated "judicial organization," on the one hand, and "our great cities and the social and legal problems to which they give rise," on the other.[179] Among other problems, the former fails "to make adequate provision for . . . the litigation of the poor," including "the collection of debts" and other matters that compose a "great volume of small controversies . . . ."[180] "[W]ith respect to the everyday rights and wrongs of the great majority of an urban community," Pound elaborated, "the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them," a problem he linked to litigants' lack of resources.[181]

The crux of the problem, Pound explained, was unmediated adversarialism. "For ordinary causes," he explained, "our contentious system has great merit . . . ."[182] But it is a "denial of justice" in "small cases" to leave parties to find "charity" representation or be left to fend for themselves.[183] The judge "cannot be a mere umpire." Instead, with the assistance of staff, the judge should shoulder "the duty of ascertaining and formulating the claims of the parties":

> [T]he judge . . . must actively seek the truth and the law . . . .The lay vision of every man his own lawyer has been shown by all experience to be an illusion. . . . The alternative is a judge who represents both parties and the law, and a procedure which will permit him to do so effectively. No doubt he should have assistance in the way of clerks, who may save valuable judicial time by showing parties how to present their respective claims. . . . [O]ur first concern in a people's court is a procedure that will help parties assert and secure their rights . . . .[184]

Pound proposed, in short, what Friendly and Mashaw would offer sixty years later.

2. The New Deal and a Conservative Ideology of Adversarialism

Elite views of adversarial procedure characteristic of civil litigation would shift profoundly over the next several decades. The successful campaign for civil procedure reform likely played a

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[176] Roscoe Pound, *The Spirit of the Common Law*, 18 GREEN BAG 17, 20 (1906); Pound, *Causes*, *supra* note 172, at 403.
[177] Pound, *Spirit*, *supra* note 176, at 19-20; *see also* Pound, *Causes*, *supra* note 172, at 396.
[178] *Report of the Committee on Judicial Administration and Remedial Procedure*, 30 ANN. REP. ABA 505, 512 (1907); *see also* Burbank, *supra* note 172, at 1045.
[179] Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 303 (1913).
[180] *Id.* at 315.
[181] *Id.* at 316.
[182] *Id.* at 318.
[183] *Id.* at 318.
[184] *Id.* at 319.

role.[185] But so did politics. Ironically, Pound represented this shift's vanguard as he drifted to the right by the 1930s.[186] As John Fabian Witt observes, Pound came to believe that both the common law's substance and procedure—to Pound, writing in 1933, "a precious inheritance of English speaking peoples"[187]—"represented the Anglo American legacy of legal liberty, of which the United States was the highest realization."[188] By contrast, the "commissions and boards" Pound had once acknowledged sympathetically became "administrative absolutism" during the New Deal.[189] As Pound and his fellow travelers fought the rise of the federal regulatory state, they invoked court-based procedure, now perfected as the new Federal Rules of Civil Procedure, as due process's reference model, one that exemplified American law's essential virtue.[190]

Early New Deal agencies that operated largely unconstrained by procedural requirements prompted due process challenges to how they adjudicated matters.[191] One case in 1936 gave the Supreme Court, still dominated by conservative justices, occasion to invoke a "general rule" from civil litigation as a virtuous foil for the agency's "wholly unreasonable and arbitrary" process.[192] "'[I]llegitimate and unconstitutional practices get their first footing," the Court insisted, "by slight deviations from legal modes of procedure.'"[193]

The then-conservative ABA led lobbying efforts for legislation to curb agency power, with the New Deal's "judicialization" as a core goal.[194] These efforts centered due process as a source of constraint.[195] Pound chaired the ABA committee that developed its proposals. He viewed the Committee's charge as continuous with the earlier procedural-reform project his speech had catalyzed three decades earlier.[196]

If previously "we had carried to the extreme a system of judicial interference with administration," Pound wrote for the Committee, the New Deal tilted the balance too far in the opposite direction.[197] American democracy hung in the balance. "[A] regime of autocratic bureaus" threatened to "lead us in the same direction" as the "dictatorships and totalitarian governments" of Europe.[198] Pound warned that New Dealers' penchant for "administrative absolutism"[199]

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185 *E.g.*, Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 515-16 (1986).
186 For discussions of Pound's ideological drift, see WITT, PATRIOTS, *supra* note 172, at 228-234 (2009); DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE 107-138 (2014).
187 Roscoe Pound, *The Future of the Common Law*, 7 U. CIN. L. REV. 343, 355 (1933).
188 WITT, PATRIOTS, *supra* note 172, at 258.
189 *Report on the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 343 (1938); ERNST, *supra* note 186, at 125.
190 For such arguments before the New Deal, see John Dickinson, *Administrative Law and the Fear of Bureaucracy – II*, 14 A.B.A.J. 597, 602 (1928). For a comment on this phenomenon during the New Deal, see James M. Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077, 1078 (1940).
191 *E.g.*, McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. LAW, ECON., & ORG. 180, 189 (1999).
192 Jones v. Securities and Exchange Comm'n, 298 U.S. 1, 23 (1936).
193 *Id.* at 19; *id.* at 23-24 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).
194 Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U.L. REV. 377, 380 (2021); Marver H. Bernstein, *The Politics of Adjudication*, 16 J. POLITICS 299, 317 (1954).
195 Bernstein, *supra* note 194, at 301; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1569-80 (1996).
196 ABA Report, *supra* note 189, at 339; *id.* at 354.
197 Shepherd, *supra* note 195, at 1590.
198 Roscoe Pound, *The Challenge of the Administrative Process*, 30 ABA J. 121, 125-26 (1944).
199 ABA Report, *supra* note 189, at 340; *id.* at 343.

threatened "the canons of fair notice, full hearing, and full opportunity of meeting charges and accusations which in our polity are associated with the guarantee of due process of law."[200]

Among their absolutist desires, in other words, New Dealers wanted to abandon adversary procedure—what Pound called the "first principle of judicial justice," and one for which he elsewhere invoked civil litigation as a reference model.[201] The ABA report listed ten "tendencies" of administrative action. The first several—"a tendency to decide without a hearing, or without hearing one of the parties," for instance, and "a tendency to decide on the basis of . . . evidence not produced"—were framed as due process violations.[202] To thwart administrative absolutism, Pound called on the bar to emulate "the lawyers and judges under the Stuarts who were steadfast for the immemorial rights of Englishmen," a reference to the champions of common law processes once sanctified in antebellum due process.[203]

The recommendations that Pound's committee made informed the Walter-Logan Bill, proposed in 1939.[204] As Paul Verkuil observes, the supporters of the bill, "the high water mark of" efforts at the New Deal's "judicialization," aimed to deploy "the adversary model" to slow the expansion of bureaucratic power.[205] The bill's proposals included uniform rules of procedure, inspired by the Federal Rules of Civil Procedure, that would ensure that bureaucrats with "messiah complexes" did not "reform the United States regardless of the terms of . . . the Constitution . . . ."[206]

This struggle over administrative procedure ended with due process cast in adversarial terms as part of the settlement that emerged. In 1936, the Supreme Court in *Morgan v. United States* interpreted the term "full hearing" to require "fundamental procedural requirements" characteristic of "the tradition of judicial proceedings," which the Court then enumerated in detail.[207] Two years later when *Morgan* returned, the Court described these requirements as "the essence of due process."[208] Although a veto felled the Walter-Logan Bill, the *Morgan* cases had a considerable influence on the evolving rules and practices that emerged for administrative adjudication.[209] By the start of the 1940s, the Supreme Court's skepticism for agencies' procedural

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[200] Pound, *supra* note 198, at 121-22.

[201] Pound, *supra* note 198, at 123-24 (equating "the first principle of judicial justice" with "audi alteram partem, hear the other side"); *id.* at 122-23 (describing as defects with administrative procedure in adversarial terms); Roscoe Pound, *Administrative Law: Its Growth, Procedure, and Significance*, 7 U. PITT. L. REV. 269, 271 (1941) (discussing "judicial justice" and due process).

[202] ABA Report, *supra* note 189, at 346-347.

[203] Pound, *supra* note 198, at 124; *see also* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1202-03 (2005).

[204] *See* ERNST, *supra* note 186, at 7; JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 60 (2012).

[205] Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 271 (1978); *id.* at 273; *see also* Robert B. Hankins, *The Necessity for Administrative Notice and Hearing*, 25 IOWA L. REV. 457, 482 (1940).

[206] *Providing for the More Expeditious Settlement of Disputes with the United States, and for Other Purposes*, H.R. REP. NO. 76-1149, at 2-3 (1939).

[207] Morgan v. United States, 298 U.S. 468, 480 (1936).

[208] Morgan v. United States, 304 U.S. 1, 19 (1938). *See generally* Daniel Ernst, Morgan *and the New Dealers*, 20 J. POLICY HISTORY 447, 456 (2009) (discussing Charles Alan Hughes' preference that agencies "follow procedures like those of common-law courts" for fact-finding).

[209] Bremer, *supra* note 194, at 446 & n.442; James A. Doyle, *Federal Administrative Hearings: Significance of the* Morgan *Case*, 19 NEB. L. BULL. 125, 125 (1940); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 225 (1986).

rectitude had all but disappeared.[210] Ultimately, the drafters of the Administrative Procedure Act modeled several of its provisions for agency adjudication on the due process standard the *Morgan* cases set.[211] As one commentator observed in 1954, the APA's model was "the ordinary judicial procedure in an adversary action . . . ."[212]

3. The Cold War and a Liberal Ideology of Adversarialism

New Dealers understood that the fight over the expanding regulatory state required responses to the conservative idealization of adversarial court procedure.[213] Critiquing the Walter-Logan Bill and its ABA champions, James Landis insisted that agency activity cannot always proceed pursuant to "customary procedures of judicial determination." The "Procrustean formula" that Pound and others demanded would "leav[e] broken and bleeding the processes of administrative law."[214] To Louis Jaffe, the ABA committee viewed "the judiciary . . . with such unseeing awe." "[E]quivalent abuses by the judiciary" in civil litigation matched each supposed pathological tendency of administrative action in Pound's bill of particulars.[215] Kenneth Culp Davis, one of the APA's drafters, insisted that "opportunity for hearing or lack of it" should not be "the pivot on which fairness to the parties" in administrative adjudication "turns."[216] "[A]lternative devices," such as an informal investigatory process accessible to the public, may be "even better than a trial" in certain instances.[217] Stressing "differences in origin and function" between agencies and courts, Felix Frankfurter in 1940 advocated against "wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."[218]

But by the early 1950s, the theater for fights over due process had "shifted from [agencies like the] SEC and NLRB," as Davis later observed, "to programs relating to the Cold War, communist subversion, and the specter of atomic devastation."[219] If the New Deal had prompted conservative elite idealization of civil litigation as a due process reference model, efforts to root out communists and other "subversives" gave post-war liberal elites their occasion to celebrate

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[210] *E.g.*, Market Street Ry. Co. v. Railroad Comm'n of California, 324 U.S. 548, 560-62 (1945); Opp Cotton Mills v. Administrator of Wage and Hour Div. of the Dep't of Labor, 312 U.S. 126, 151-53 (1941); Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 584 (1942); Sunshine Anthracite Co. v. Adkins, 310 U.S. 381, 401 (1940). *See also* VIRGINIA WOOD, DUE PROCESS OF LAW 1932-1949, at 322-23 (1951).

[211] Daniel J. Gifford, *The* Morgan *Cases: A Retrospective View*, 30 ADMIN. L. REV. 237, 242 (1978).

[212] Bernstein, *supra* note 194, at 304.

[213] *E.g.*, Walter Gellhorn, *Symposium on Procedural Administrative law: Introduction*, 25 IOWA L. REV. 421, 423 (1940); A.H. Feller, *Administrative Procedure and the Public Interest – The Results of Due Process*, 25 WASH. U. L.Q. 308, 318 (1940); Ernst, *supra* note 208, at 449; Norman W. Spaulding, *Due Process Without Judicial Process? Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249, 2252-55 (2017). For a New Dealer's skepticism about adversary civil justice, offered before the ABA's report, see THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 184-185 (1935).

[214] Landis, *supra* note 208, at 1101-02.

[215] Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1236 (1939).

[216] Kenneth Culp Davis, *The Requirement of Opportunity to be Heard in the Administrative Process*, 51 YALE L.J. 1093, 1097 (1942).

[217] *Id.* at 1097.

[218] Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940),

[219] Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 193 (1956).

adversarial procedures as a bulwark of American liberty.[220] Frankfurter did just this in a 1951 opinion on due process for suspected communists in government jobs. "No better instrument has been devised for arriving at truth," he insisted, "than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[221] Indeed, Frankfurter continued, this adversarialism best "generat[es] the feeling, so important to a popular government, that justice has been done."[222] As Máximo Langer has persuasively shown in his magisterial treatment of American adversarialism, it was in this moment that the Supreme Court began invoking "our adversary system"—in explicit contrast to foreign, "inquisitorial" models—recasting adversarial procedure as a defining feature of American legal identity rather than a contingent mode of adjudication.[223]

Post-war efforts to protect the United States from communism and other such perceived threats to national security often occasioned substantial departures from settled due process practices.[224] To Robert Jackson, back from his stint as the Nuremberg chief prosecutor, this procedural retreat posed a civilizational threat. In a 1954 speech to the New York State Bar Association, Jackson recounted for the assembled lawyers how Joseph Stalin, demanding "immediate and undiscriminating vengeance," pushed to summarily execute 50,000 German officers after World War II. But the Americans insisted upon trials—judicial procedure.[225] American liberty can only survive "the expanding authority of government, [with] its encroachment on the fields once left to individual choice," if "procedures which comport with our concept of due process" persist.[226]

Jackson identified these civilizational stakes in several instances where the government targeted alleged security threats without providing the sorts of protections associated with adversarial process. In 1950, for instance, he complained that a person's exclusion from the country, made without a hearing and on evidence the government refused to disclose, was a "menace to free institutions" and in service of "the police state."[227] His 1953 *Shaughnessy v. United States ex rel. Mezei* dissent particularly illustrates the essential link Jackson perceived between

[220] For examples beyond those discussed in the text, see, e.g., *Bridges v. Wixon*, 326 U.S. 135, 159 (1945) (Murphy, J., concurring) (faulting a proceeding that involved "a singular lack of due process of law" to order an American labor leader suspected of communist sympathies deported); *id.* at 166 (insisting that "[o]nly by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us" "can freedom flourish and endure in our land"); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 217 (1953) (Black, J., dissenting) (insisting that an immigrant and alleged national security risk needs a hearing in open court at which evidence is presented to a neutral decision-maker, and distinguishing this procedure from what "Russian laws of 1934" and "Hitler's secret police" offered); Konigsberg v. State Bar of California, 366 U.S. 36, 79 (1961) (Black, J., dissenting) ("We do not have to imitate the communists in order to survive. Our Bill of Rights placed our survival upon a firmer ground – that of freedom, not repression."); BERNARD SCHWARZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 323-341 (1957); Warren A. Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406, 1407 (1957); Morris D. Forkosch, *American Democracy and Procedural Due Process*, 24 BROOK. L. REV. 173, 251 (1958).
[221] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). On Frankfurter's liberalism, see generally BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT (2022).
[222] *Id.*
[223] *See generally* Máximo Langer, *Is 'Our Adversary System' Younger Than my Grandparents or Even my Parents? Historical Anachronism and American Legal Identity* (working paper on file with authors).
[224] Eleanor Bontecou, *Due Process in Security Dismissals*, 300 ANN. ACAD. POL. & SOC. SCI. 102, 102 (1955). For an important example, see *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950).
[225] Robert Jackson, *Liberty Under Law*, 77 N.Y.S.B.A. REP. 207, 213 (1954).
[226] *Id.*
[227] United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950).

adversarial procedure and liberty.[228] Citing Herman Goring's Nuremberg testimony, Jackson compared the indefinite detention of a U.S. resident, suspected of communist leanings, to "a system of protective custody" in "Nazi Germany" that denied victims "judicial or other hearing procedures" and "populated" the "concentration camps."[229] The lack of process also "is what renders communist justice such a travesty."[230] The differences between these "reign[s] of terror and one of law," Jackson insisted, are "[p]rocedural fairness and regularity"—"the indispensable essence of liberty."[231] This fairness, in turn, entailed "our common law procedures." Americans would rather live under "Soviet substantive law," administered by these procedures, than subject themselves to "our substantive law enforced by Soviet procedural practices."[232]

William Douglas, once a New Dealer impatient with due process constraints on agencies, also canonized adversarialism after the war.[233] Speaking to the Missouri State Bar in 1953, he lamented Cold War era paranoia—the "fear [that] eats away at the hearts of men until even old neighbors suspect each other"—and the pressure it put on government procedures.[234] The American battle against "the communist forces that masquerade behind slogans of brotherhood and equality" required "a procedure that respects the dignity and worth of the individual . . . ." The "concept of due process as we have come to know it," Douglas insisted, exemplifies "the freedoms that are involved in the present world conflict."[235]

These lofty abstractions had their concrete expressions in several Cold War era opinions Douglas wrote on procedural due process.[236] He dissented in 1952 from a decision affirming a New York law that created a rebuttable presumption of unfitness for public employment from membership in a "subversive group." "What happens under this law is typical of what happens in a police state," Douglas lamented.[237] He concurred in 1955 when the Court invalidated the federal government's termination of a physician's part-time employment on suspicions of communist party membership. The government had relied on statements by unidentified informers not introduced on the record at the physician's hearing or presented for cross-examination—"an unamerican practice which we should condemn," Douglas declaimed. "Confrontation and cross-examination under oath are essential," he insisted, "if the American ideal of due process is to remain a vital force in our public life."[238]

Lon Fuller shared the view that adversarial procedure helped to justify the essential goodness of the American legal order during a time of civilizational anxiety.[239] He lauded the

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[228] 345 U.S. 206, 208-09 (1953).
[229] *Id.* at 225 & n.8.
[230] *Id.*
[231] *Id.* at 224; *id*. at 226.
[232] *Id.* at 224.
[233] Ernst, *supra* note 208, at 471-72.
[234] William O. Douglas, *A Crusade for the Bar: Due Process in a Time of World Conflict*, 39 A.B.A.J. 871, 874 (1953).
[235] *Id.* at 875.
[236] For other opinions echoing similar themes, see *Beard v. Stahr*, 370 U.S. 41, 43 (1962) (Douglas, J., concurring); United States v. Nugent, 346 U.S. 1, 13-14 (1953). (Douglas, J., dissenting); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 178-79 (1951) (Douglas, J., concurring).
[237] Adler v. Board of Educ. of the City of New York, 342 U.S. 485, 510 (1952) (Douglas, J., dissenting).
[238] Peters v. Hobby, 349 U.S. 331, 350-51 (1955) (Douglas, J., concurring).
[239] On Fuller's jurisprudential contributions to the post-war project of legitimation for American law, see William M. Wiecek, *American Jurisprudence After the War: "Reason Called Law"*, 37 TULSA L. REV. 857, 860-61 (2002); *id.* at 862-66. On Fuller's views of the centrality of adversarial advocacy to the moral reasoning of adjudication, see Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and the Public Law Models of Litigation*, 75 B.U. L. REV. 2173, 1309 (1995).

Nuremberg Trials as representative of Americans' unique capacity to entrench a moral order through the force of ideas.[240] Jackson in particular won Fuller's praise. The prospect of trying German war criminals "seemed a moral monstrosity" to some people, Fuller observed, who wanted the Allies simply to "shoot the German leaders without a hearing . . . ."[241] But Jackson, Fuller argued, "had the insight that the process of adjudication can itself be a moral force in men's lives[;]" leaving "a lasting moral effect on both victors and vanquished."[242]

Fuller connected the moral potential of adjudication to adversarial procedure in a 1960 lecture, delivered as one of several radio addresses on American law the U.S. government broadcast to foreign nations.[243] The lecture's occasion came shortly after Fuller had completed his famous response to H.L.A. Hart's defense of legal positivism, a debate that addressed in important part the problem of law in totalitarian regimes.[244] The broadcasts' organizer disclaimed any suggestion that Fuller's and others' lectures were propaganda.[245] But the broadcasts were intended to introduce foreign audiences to the "basic characteristics of the American legal system."[246] The moment, both for the government and for Fuller, suggests that the broadcasts were motivated not merely by a desire to describe American law, but also by a desire to celebrate, however implicitly, its virtue.

At its core, Fuller explained, an adversarial system "insists on keeping distinct the function of the advocate, on the one hand, from that of the judge or of the judge from that of jury, on the other."[247] As Robert Bone observed, commenting on Fuller's jurisprudence more generally, this separation and the distinctive roles it envisions for advocates and judges enable impartial decision-making according to law, or the distinctive "moral reasoning" "inherent in adjudication."[248] Much of Fuller's essay conveyed this basic idea.

But Fuller concluded with comments that surely resonated in a Cold War context, against the backdrop of that era's struggles over national security and due process. "I believe," Fuller declared, that "an adversary presentation of a controversy [is] perhaps the most effective means we have of combatting the evils of bureaucracy."[249] Fuller did not disdain bureaucracy *per se*, as Pound had in the 1930s. Rather, Fuller addressed the tendency of government officials to prejudge matters, to assume that "my case . . . is just like that of the man who was ahead of me in the line . . . ."[250] Adversarial procedure "is . . . the only sure cure." It requires the official to suspend judgment while the parties make their presentations (enabling adjudication's distinctive moral reasoning).[251] This is "the justification for the adversary system," Fuller concluded. The system

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[240] LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE 718-19 (Temporary Ed. 1949); *see also* Jonathan A. Bush, *Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 ST. LOUIS U.L.J. 515 (2001).
[241] Fuller, *supra* note 240, at 719.
[242] *Id.*
[243] Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW, at 30 (Harold J. Berman ed., 1961). Fuller delivered the essay as a radio address in 1960. *Id.* at vi.
[244] Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648-57 (1958); *see also* Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1063-67 (2008).
[245] *Id.* at vi.
[246] Harold J. Berman, *Foreword*, *in* TALKS ON AMERICAN LAW, at v (Harold J. Berman ed., 1961).
[247] Fuller, *supra* note 243, at 30.
[248] Bone, *supra* note 239, at 1309.
[249] Fuller, *supra* note 243, at 40.
[250] *Id.* at 40.
[251] *Id.* at 40; *see also* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160 (1958). For a similar idea, see Grey, *supra* note __, at 187.

enables "the capacities of the individual [to] be lifted to the point where he gains the power to view reality through eyes other than his own, where he is able to become as impartial, and as free from prejudice, as the lot of humanity will admit."[252] Adversarial procedure, in other words, makes possible the fair treatment of individuals and their liberty, according to rules of law, in the face of bureaucratic power.

One consequence of adversarialism's mid-century idealization was that civil litigation, which enjoyed broad approval as a model of healthy adversarialism well into the 1960s, mostly eluded the Supreme Court's due process scrutiny until the flurry of social needs cases came at the decade's end.[253] Due process doctrine weathered a period of remarkable tumult from the 1930s into the 1970s, an instability reflected in the Supreme Court's constant engagement with administrative and criminal adjudication.[254] But the Court rarely assessed civil justice by a due process metric during this time. It decided a landmark class action case in 1940, then did not render another decision on class action doctrine until 1969.[255] In 1945, the Court remade personal jurisdiction doctrine. It revisited this law only four times before the late 1970s.[256] The due process standard the Court defined in 1950 for notice in civil litigation prompted just two sequels.[257] Otherwise, the Court's infrequent due process engagements with civil justice in mid-century mostly involved some knotty issues arising from divorce cases[258] and some highly idiosyncratic, nonconsequential matters lost to procedural history.[259]

C. A Revolution Subdued: The Adversarial Ideal's Limiting Power

In the moment, *Goldberg* did not necessarily read as a case only about due process in the administrative state. It was preceded by *Sniadach v. Family Finance Corp.*, which required notice and a hearing for prejudgment wage garnishment, and came just before *Fuentes v. Shevin*, which extended similar reasoning to the summary repossession of consumer goods. Together, the three

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[252] *Id.* at 43 (internal quotation omitted).
[253] Resnik, *supra* note 185, at 515-516.
[254] On due process and administrative action, see Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1428-35 (2000). On due process and criminal law, see, e.g., FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW (1970). For an observation about doctrinal tumult from the time, see Kadish, *supra* note 156, at 319.
[255] *See* Hansberry v. Lee, 311 U.S. 32 (1940); *see also* Snyder v. Harris, 394 U.S. 332 (1969).
[256] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945); *see also* Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consolidated Min. Co., 342 U.S. 437 (1952); Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950).
[257] Mullane v. Central Hanover Bank, 339 U.S. 306 (1950); *see also* Walker v. City of Hutchinson, 352 U.S. 112 (1956); Covey v. Somers, 351 U.S. 141 (1956).
[258] *E.g.*, Simons v. Miami Beach First Nat'l Bank, 381 U.S. 81 (1965); Armstrong v. Manzo, 380 U.S. 545 (1965); Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); May v. Anderson, 345 U.S. 528 (1953); Rice v. Rice, 336 U.S. 674 (1949).
[259] *E.g.*, Link v. Wabash Ry. Co., 370 U.S. 626 (1962) (affirming a court's power to dismiss a case for nonprosecution if an attorney fails to make a required appearance without an excuse); Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958) (excusing on due process grounds a failure to comply with a discovery request on grounds that responding to the request would expose the party to criminal prosecution in Switzerland); National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37 (1954) (holding that a court could dismiss a defendant's appeal as a sanction for failing to deliver assets subject to the judgment to the court); Milliken v. Meyer, 311 U.S. 457 (1940) (pre-*International Shoe* personal jurisdiction case allowing for service out of state); Adam v. Saenger, 303 U.S. 59 (1938) (permitting a plaintiff to serve a pleading asserting a cross-claim on a co-plaintiff by serving it on the co-plaintiff's lawyer).

decisions appeared to signal a due process doctrine newly attentive to the pathologies of social-needs dockets, whether court- *or* agency-based. But *Sniadach* and *Fuentes* would prove aberrations. After *Goldberg*, due process did not abandon civil litigation as its reference model. In this regard, due process's pre- and post-revolutionary trajectories are identical.

Indeed, viewed from the present, *Goldberg* resonates as an example of American "adversarial legalism" at its peak.[260] Decades of conservative and liberal voices celebrating adversarial procedure as a bulwark of liberty appear in the work of Charles Reich, *Goldberg*'s prophet.[261] They do so in *Goldberg* itself. The Court simply had to decide whether welfare beneficiaries had a right to a hearing before benefits' termination. It went much further, to enumerate litigation's full procedural trappings as essential mortar in the procedural due process edifice.[262] In a sense, *Goldberg* brought the twentieth century idealization of adversarial procedure, exemplified by civil litigation, full circle.[263] Its list of protections resembles the catalogue of fair procedures the Court espoused in the *Morgan* cases of the 1930s, where the Court explicitly invoked civil litigation as due process's reference model.[264]

Goldberg, of course, did not explicitly disclaim nonadversarial protections of the sort Friendly and Mashaw would soon recommend. But two contemporaneous developments indicate the tension between their proposals and a due process jurisprudence that remained bound by an unstated adversarial ideal. In the late 1970s and early 1980s, numerous judges and commentators bemoaned a bureaucratization trend in American courts—precisely the sort of capacity-building that Mashaw's managerialism would have required.[265] These prominent voices did not couch their criticism in terms of due process *per se*. But they did warn that creeping managerialism threatened to undermine a model of adjudication premised on adversarial party engagement and judicial passivity, one they saw as indispensable to its legitimacy.[266]

Similarly, in 1982, Judith Resnik published *Managerial Judges*, a justly famous and influential article in which she warned against an uptick in active judging in civil litigation—precisely the sort of inquisitorial involvement that Friendly suggested for mass agency dockets.[267] She couched the threat explicitly in constitutional terms, warning against "the erosion of traditional due process safeguards." "Our society has not yet openly and deliberately decided to discard the traditional adversarial model in favor of some version of the . . . inquisitorial model," Resnik wrote.[268] Managerial judging raised the "fear that, as it moves closer to administration, adjudication may be in danger of ceasing to be."[269]

These views represent an unstated adversarial ideal as a constraint on perceptions of fundamental fairness in civil litigation. Both the brief flurry of Supreme Court engagements with

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[260] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 44 (2d ed. 2019); Mark V. Tushnet, *Metaprocedure?*, 63 S. CAL. L. REV. 161, 167 (1989).
[261] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 783 (1964); Karen M. Tani, *Flemming* v. *Nestor: Anticommunism, the Welfare State, and the Making of "New Property"*, 26 LAW & HIST. REV. 379, 410 (2008) (describing Reich's concept of the "new property" and its value in triggering adversarial due process protections").
[262] Robert L. Rabin, *Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases*, 16 SAN DIEGO L. REV. 301, 306 (1979)
[263] Resnik, *supra* note 185, at 517.
[264] *Compare* Goldberg v. Kelly, 397 U.S. 254, 267-271 (1970), *with* Morgan v. United States, 298 U.S. 468, 480 (1936).
[265] *E.g.*, David Engstrom et al., *Managerial Courts*, 135 YALE L.J. 1296, 1299 (2026); *id.* at 1389-91.
[266] *Id.* at 1289-90.
[267] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).
[268] *Id.* at 445; *see also id.* at 424.
[269] *Id.* at 445.

court-based social needs dockets and subsequent judicial neglect of civil litigation as a matter of due process concern make sense as further manifestations of this ideal in action. Cases like *Fuentes* and *Sniadach*, it turns out, did not portend a deeper reckoning with then-evident civil justice pathologies, ones loudly echoed in today's dysfunction. Rather, they amounted to limited interventions, to correct idiosyncratic departures from adversarial procedural norms.[270]

With the benefit of five decades' perspective, three other Revolution-era cases better capture the moment, one of due process's crabbed potential for the American civil justice system. In *Lindsey v. Normet*, decided in 1972, the Supreme Court rejected a challenge to summary procedures in eviction litigation that place tenants on an abbreviated litigation schedule and particularly disfavor under-resourced defendants.[271] In *Ortwein v. Schwab*, decided in 1973, the Court, changing from an earlier course, held that certain impecunious litigants had no due process right to a fee waiver.[272] In *Lassiter v. Department of Social Services*, decided in 1981, the Court refused to recognize a categorical right to counsel for indigent parties in parental rights termination cases.[273]

Lindsey, *Ortwein*, and *Lassiter* are good examples of the "litigation of the poor" that Pound in 1913 deemed unsuited for adversarialism. They share defining characteristics with the social welfare matters—most importantly, litigant incapacities that render meaningful adversarial engagement unrealistic—that inspired Friendly's investigatory model and Mashaw's "managerial side of due process." But rules of civil procedure guaranteed to the parties in *Lindsey*, *Ortwein*, and *Lassiter* formal opportunities to engage as adversaries, even if their circumstances rendered these opportunities illusory. This trio, then, demonstrates the work of an implicit constraint on due process in action, one that elevates opportunity over reality, and one that has rendered due process indifferent to endemic adversarial breakdown in the American civil justice system.

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A long historical perspective reveals that ideology, not principle, best explains the implicit adversarial limit that has cabined due process's reach and deprived it of the conceptual resources needed to address—or even so much as engage with—the most urgent problems facing the American civil justice system. The next Part leaves this ideology behind and turns to an effort to adapt a twentieth-century due process to twenty-first-century litigation realities.

III. MEDIATED ADVERSARIALISM AS THE NEW DUE PROCESS

Finding inspiration in Friendly's and Mashaw's paths not taken, this Part turns from diagnosis to reconstruction. We begin by setting out mediated adversarialism as a theory of due process, explaining how its various elements operate in synthesis. We then locate the theory's foothold in existing doctrine and judicial and court practice, and we illustrate how due process doctrine supports non-adversarial protections once the adversarial constraint yields. There are surely complications to be worked out, but they pale in comparison to the potential that a new due

[270] In *Fuentes v. Shevin*, the Court invalidated a state law that authorized the prejudgment seizure of the defendant's property without an opportunity for a hearing. 407 U.S. 67, 83-84 (1972). In *Sniadach v. Family Finance Corp.*, the Court invalidated a prejudgment procedure that allowed the garnishment of the defendant's wages without an opportunity for a hearing. 395 U.S. 337, 342 (1969).
[271] 405 U.S. 56 (1972).
[272] 410 U.S. 656 (1973).
[273] 452 U.S. 18 (1981).

process organized around adversarialism offers to a civil justice system badly in need of fundamental reform.

A. Mediated Adversarialism in Concept

Adversarial procedure earned its mid-century canonization as the guarantor of deeper commitments—to participation by the individual whose rights are at stake, to the dignity that fair treatment confers, and to accurate and impartial adjudication. Where litigation conditions allow parties to perform the roles the adversarial model assigns them, contestation remains a powerful engine of those commitments. No one should doubt the fundamental importance of an opportunity to be heard.[274] But in a civil justice system where conditions predictably prevent that performance—and where, as Part I documents, the modal case pits a represented institutional plaintiff against an unrepresented defendant[275]—adversarial procedural mechanisms lose their connection to the values that justify them.

A due process grounded in mediated adversarialism recognizes that the Constitution guarantees minimally adequate adversarial procedures of the sort *Goldberg* canonized, but it rejects the assumption that formal adversarial opportunities satisfy constitutional minima when litigants lack the capacity to use them. In these situations, adversarial procedural rights must be supplemented by non-adversarial approaches, namely active judging of the sort Friendly advocated for and managerial systems along the lines of what Mashaw proposed. Mediated adversarialism draws on both approaches, in other words, without abandoning adversarial procedure. The theory thus comprises three elements: an adversarial core, retained because it alone can secure due process's participatory and dignitary commitments; active judging, which reassigns responsibility for record development where party presentation predictably fails; and court managerialism, which tasks court systems, and not judges alone, with designing, monitoring, and improving the processes through which rights are adjudicated at scale. Non-adversarial protections supplement, but do not replace, an adversarial core.

Active judging draws on Friendly's "investigatory model," in which the decisionmaker, rather than the parties, takes primary responsibility for developing the factual record and guiding the proceedings. A growing body of commentators concerned with pathologies in court-based social needs dockets has renewed Friendly's proposal, urging an "active judging"[276] or "affirmative judging"[277] model that would shift a substantial share of the burden of factual development and case processing onto judges.[278] Anna Carpenter describes "active judging" in state civil courts operating along three dimensions: informally adjusting procedures to accommodate self-represented litigants; explaining law, procedure, and the hearing process to them; and eliciting

[274] The right is particularly important and contested in immigration adjudication. *See, e.g.*, CHIRLA v. Mullin (Expedited Removal), *at* https://justiceactioncenter.org/case/chirla-v-noem-expedited-removal/.
[275] *See infra* notes 33-38 & accompanying text.
[276] *See, e.g.*, Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 649-50 (2017).
[277] *See, e.g.*, Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 B.Y.U. L. REV. 899, 919-26.
[278] *See, e.g.*, Rusell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969 (2004); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002).

information from them to develop the record.[279] A tenant, for instance, may have a habitability claim but fail to assert in court that she notified the landlord of the defect, an element she had in fact satisfied but did not know to raise.[280] Where a passive judge would enter judgment for the landlord, an active judge would ask whether she notified her landlord of the conditions and explain how to enter her documentation of them into the record.[281] Active judging in this vein removes the judge from the traditional posture of disinterested umpire, but in a manner compatible with the ethical commitment to judicial neutrality.[282]

The second non-adversarial supplement draws on Mashaw's "management side" of due process, reconceiving due process as a function of institutional systems rather than individual procedural rights. Fairness at scale, on this view, requires administrative mechanisms that set standards for accuracy and timeliness, audit performance against them, and correct recurring error. Output accuracy becomes the adjudicating institution's responsibility, not the claimant's burden. Mashaw's managerial conception has most fully come to fruition in efforts by administrative agencies adjudicating large numbers of claims to improve their decisionmaking systematically. In various mass-benefit systems, agencies have experimented with "quality assurance" regimes that operationalize his idea of due process as "quality control": setting standards, evaluating performance against them, and taking affirmative managerial action to upgrade substandard performance.[283] The Social Security Administration, for example, randomly samples benefits determinations to determine whether hearing-office staff and administrative law judges are preparing and deciding cases consistently with agency policy. The results guide training and management interventions.[284]

Courts, too, have begun to adopt some of these agency-style managerial tools—an institutional shift we have elsewhere described as "court managerialism."[285] Rather than relying exclusively on individualized adjudication by a single judge, state courts have responded to docket pressure and pervasive asymmetries in representation by adopting a set of bureaucratic techniques familiar to administrative governance.[286] Courts, for instance, manage cases in bulk through standardized caseflow systems, clustered calendars, and "pathway" regimes that route filings into predetermined procedural tracks tied to case features.[287] They increasingly use quality-control tools—decision aids, checklists or bench cards, performance measures, and internal review processes—to shape outputs and reduce error without relying on party initiative.[288] Taken together, these developments constitute a managerial infrastructure that mirrors Mashaw's agency-side reforms within the civil justice system.

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279 *See* Carpenter, *supra* note 276, at 667–72.
280 *See* Steinberg, *supra* note 277, at 923–24.
281 *Id.* at 936–37.
282 *See, e.g.*, Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367 (2008). *Cf.* MODEL CODE OF JUD. CONDUCT r. 2.2. cmt. 4 (Am. Bar Ass'n 2007).
283 *See* David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 30-47 (2020) (describing examples of these strategies).
284 *Id.* at 31-40.
285 *See generally* Engstrom et al., *supra* note 265.
286 *Id.* at 1333-81.
287 *Id.* at 1343.
288 *Id.* at 1348.

With those two models in view, an obvious question arises: Why preserve adversarial protections at all, especially given the conditions that now define high-volume dockets? That question is not idle. Indeed, Friendly himself posed it.[289] Further, a purely managerial conception of due process seems to fit well with strands of due process doctrine that evaluate procedural adequacy in terms of cost-effective accuracy. After all, *Goldberg* itself insists that a pre-termination hearing serves "one function only": protecting the recipient "against an erroneous deprivation."[290] And *Mathews* likewise casts the constitutional question in terms of "the risk of an erroneous deprivation" of protected interests "through the procedures used."[291]

Our answer has multiple components. For starters, procedural due process doctrine is trans-substantive and must apply throughout the civil justice system, not just its beleaguered high-volume dockets. As a result, the prospect of losing due process's adversarial core in other adjudication contexts is daunting, no less so than it was in the 1950s amidst the Red Scare.[292] Indeed, due process's adversarial core remains important to civil litigation, and it can meaningfully further due process's accuracy aims even if it cannot always do so alone.

More fundamentally, due process, like procedure more generally, serves multiple aims in addition to accuracy, including individual dignity and self-determination.[293] An account of what process is due must therefore be pluralistic, rather than collapsing due process into any single value such as accuracy. Justice Brennan, who authored *Goldberg*, later insisted that the decision also attended to "[w]hether the government treats its citizens with dignity,"[294] echoing Justice Frankfurter's earlier defense of procedural regularity as "generating the feeling, so important to a popular government, that justice has been done."[295] As Jerry Mashaw later argued, *Mathews*' focus on accuracy "conceives of the values of procedure too narrowly" and is "unresponsive to the full range of concerns embodied in the due process clause."[296] Due process must therefore protect more than systemic accuracy; it also safeguards the dignitary and self-determination interests that in many instances require an opportunity for meaningful participation.[297]

Adversarialism can also promote individual autonomy by empowering parties to frame their interests, tell their own story, decide what to contest and what to concede, and choose whether and on what terms to resolve their case.[298] Adversarialism can also promote self-determination, or the litigant's ability to form and vindicate a legal identity of their own and to direct their own

[289] *See infra* note 101 & accompanying text.
[290] 397 U.S. at 261.
[291] 424 U.S. at 335.
[292] *E.g.*, Trump v. J.G.G., 604 U.S. __ (2025) (holding that immigrants alleged to be members of a foreign gang have a right to notice and an opportunity to be heard before removal).
[293] On procedure's various ends, see, e.g.,Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 281 (1992) (accuracy-centered end); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (dignitary and rights-realization ends); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981) (dignitary end); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (litigant satisfaction end); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 261 (2004) (multiple, blended ends).
[294] William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 21-22 (1988).
[295] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951).
[296] Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48, 30 (1976).
[297] *See, e.g.*, Oberholzer v. Comm'n on Judicial Performance, 20 Cal. 4th 371, 390-91 (1999).
[298] *See* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1714 (1992).

course through the justice process.[299] Neither active judging nor court managerialism is primarily motivated by these interests in dignity, autonomy, and self-determination.

Finally, these non-adversarial components carry practical and constitutional risks that counsel against making due process without the full complement of adversarial, investigatory, and managerial protections. Indeed, none of these models, standing alone, can fully cash out the full range of due process values. For its part, active judging can enable meaningful participation, particularly where the judge provides explanations that allow litigants to make informed choices or adjusts procedures to facilitate greater participation. But the questions remain the judge's own, asked based only on the judge's inference about a litigant's interests and desired outcomes.[300] At a more practical level, an investigatory model asks too much of individual judges charged with processing large numbers of cases in the context of mass adjudication. High-volume courts operate under extreme time pressure,[301] and these resource constraints shape adjudication in predictable ways.[302] Judges often lack the time to fully understand the factual record of each case, much less develop the record by probing for defenses that an unrepresented litigant may not know how to identify or articulate.[303] Under these conditions, decisionmakers understandably rely on heuristics and other cognitive shortcuts—mechanisms that would likely seep into discretionary choices about what to ask, how deeply to inquire, and when (or whether) to accommodate self-represented litigants.[304] As Judith Resnik has warned, substitute safeguards that depend on individualized judicial vigilance risk returning litigants to "the very judges who dealt with them too hastily."[305] Even well-intentioned judges may struggle to implement the core elements of an investigatory model on their own in high-volume settings.[306]

A purely managerial conception of due process fares no better. It usefully shifts responsibility for accuracy from overmatched litigants to the court, but it also risks maximizing accurate decision-making at the expense of other due process values, including individual dignity. Within the classic adversarial frame, a conflict between accuracy and dignity rarely comes into

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[299] *See* Lauren Sudeall, *Self-Determination and Self-Represented Liigants*, 106 BOSTON U.L. REV. 1, 4–7 (2026).
[300] *See id.* at 43.
[301] *See, e.g.*, PAULA HANNAFORD-AGOR & BRITTANY KAUFFMAN, PREVENTING WHACK-A-MOLE MANAGEMENT OF CONSUMER DEBT CASES: A PROPOSAL FOR A COHERENT AND COMPREHENSIVE APPROACH FOR STATE COURTS 7 (2020); Nina Lea Oishi, *Judging Debt: How Judges' Practices in Consumer-Credit Court Undermine Procedural Justice*, YALE L.J. FORUM 271, 275 (2023).
[302] *See, e.g.*, Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011) (showing that docket loads shaped decisional variation in immigration appeals).
[303] *See, e.g.*, Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 COLUM. L. REV. 1423, 1457 (2022); Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1516 (2004).
[304] *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 29 (2007) (describing judicial reliance on intuition, whose speed is an advantage when judges handle large volumes of cases); Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 43 (2016) (describing the relationship between high caseloads and the development of decisional heuristics).
[305] *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 160 (2011).
[306] Scholars have also noted that ingrained judicial instincts toward adversarialism and impartiality have in practice diminished judges' capacities to take steps to aid pro se litigants. *See, e.g.*, Anna E. Carpenter et al., *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 563 (2022). This concern bears on feasibility but is not dispositive for the normative question of what due process should require. Judicial role norms are in part downstream of (and endogenous to) due process doctrine and broader procedural culture and thus may shift as constitutional baselines and shared expectations of "fair process" evolve.

view. *Goldberg* and *Mathews* largely assume a positive correlation between correct outcomes and participatory rights that give litigants opportunities to manage their own disputes, with the doctrinal questions turning on the marginal gains and marginal costs of these additional procedural protections.[307] If courts embrace managerialism as the primary engine of fairness, however, that alignment can break down. Managerial tools—standardized pathways, for instance, or quality assurance programs—may well improve aggregate accuracy and reduce administrative burden, but they do so largely by replacing rather than deepening the encounter between a litigant and a responsible decisionmaker. For example, many courts have replaced open-ended pleadings with structured forms that better surface the most legally relevant information from self-represented litigants. But these forms also reduce the litigants' freedom to choose how to structure their story.[308] Even a high-functioning quality-assurance regime cannot supply the dignitary interests that attach to being heard in a proceeding affecting one's rights. Managerial interventions, in other words, do not offer the opportunities for individual participation that due process treats as foundational.

In short, due process's multiple aims—and procedure's multiple aims more generally—create a dilemma: neither a strictly adversarial "judicial" model, nor an "investigatory" or "managerial" alternative, taken in their pure forms, can provide a defensible conception of procedural due process. An unmodified adversarial approach fails when one or both parties lack the capacity to identify issues, develop facts, or present claims coherently—the adversarial reality that has made *Goldberg*'s promise ring hollow for millions of civil litigants. A purely managerial response, however promising for improving systemic accuracy, risks transforming the participatory core of due process into a back-end quality-control project. And the investigatory alternative demands more than individual judges can reliably supply under the conditions of high-volume judging. Each model corrects for a different failure of the others, but each, in turn, carries its own costs.

The way through this trilemma is not to choose among the models but to synthesize procedures and practices that draw from each of the judicial, investigatory, and managerial models of due process. Hence due process-as-mediated adversarialism. A proceeding that threatens the deprivation of liberty or property should still preserve an adversarial core. That core consists, first, of a merits hearing at which the affected person may appear and be heard before a neutral decisionmaker, retained as the presumptive site of voice and dignity. Second, non-adversarial interventions must be structured to preserve the litigant's authority over their own case, including the ability to tell their own story, present evidence, and contest the adversary's account. Preserving a commitment to adversarial ideals both secures the values that accuracy-focused techniques cannot and supplies limiting principles that keep active judging and court managerialism from becoming unbound inquisitorialism and technocracy.

Around that adversarial core, mediated adversarialism introduces elements of the investigatory and managerial models as supplements. The hearing cannot be fair in high-volume settings if courts treat adversarial presentation as self-executing. When litigants are unrepresented, meaningful participation requires the court and the judge to take affirmative steps to ensure a full consideration of the case's core issues. The court system must supply basic scaffolding for record development and issue-framing, including forms, prompts, routinized inquiries, and other institutional supports, supplemented by mechanisms to ensure the sufficiency of evidence and identify and correct recurring error outside the standard appellate process. Judges, for their part, must shoulder limited but real investigatory responsibilities: asking the questions that party

[307] Engstrom et al., *supra* note 265, at 1367–68; Sudeall, *supra* note 299, at 51–52.
[308] Engstrom et al., *supra* note 265, at 1367–68.

presentation predictably fails to generate, testing the factual predicates of legally dispositive issues, and ensuring that the record is sufficient to support a reasoned decision.

In this sense, investigatory and managerial techniques do not displace adversarial adjudication, but instead make it workable. They mediate what would otherwise be an adversarial process limited to the judicial model, so that the proceeding both protects participation interests and reduces the risk of erroneous deprivation. Mediated adversarialism is thus neither an embrace of inquisitorialism nor a technocratic replacement of adjudication with administration. It aims to preserve contestation where it can do real work, while building the institutional and judicial supports necessary to realize due process's multiple values at scale.

Mediated adversarialism fits comfortably with due process doctrine's longstanding insistence on contextualism. The Court has noted that due process, "unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances."[309] Rather, "due process is flexible and calls for such procedural protections as the particular situation demands."[310] High-volume adjudication should be understood as a distinctive "situation," where the feasibility and efficacy of particular safeguards matter a great deal. Courts and policymakers who pioneer a particular safeguard, then measure its efficacy and cost, help shape due process doctrine. If it proves cost-effective, a procedural innovation that exceeds due process minima today may become a due process obligation tomorrow.

B. Mediated Adversarialism's Basis in Existing Doctrine and Practice

1. Mediated Adversarialism's Doctrinal Foothold

Although ours is a new theory of due process, it requires no doctrinal invention. *Mathews* is open to all manner of procedural safeguards, as exemplified by the Supreme Court's embrace of investigatory and managerial alternatives in *Turner*. Moreover, state courts, working in both constitutional and subconstitutional registers, have already begun to assemble the active judicial role and managerial tools that mediated adversarialism contemplates.

Due process's ideologically determined commitments to adversarialism notwithstanding, nothing in the terms or logic of *Mathews* limits due process to a *Goldberg*-style menu of adversarial protections. The decision's balancing test directs courts to weigh the private interest affected by official action; the risk of an erroneous deprivation of that interest under existing procedures, together with "the probable value, if any, of additional or substitute procedural safeguards"; and the government's interest, including the fiscal and administrative burdens that added procedures would entail.[311] None of these factors nor the test's overall concern for cost-effective error reduction excludes investigatory or managerial tools from the set of "procedural safeguards" the balance might require.

The Supreme Court seems to agree. Mediated adversarialism lurks in *Turner*, one of only two instances this century when the Supreme Court has wrestled with due process in civil litigation.[312] Decided in 2011, *Turner* involved South Carolina's processes for the enforcement of

[309] Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961).
[310] Morrisey v. Brewer, 408 U.S. 471, 481 (1972).
[311] 424 U.S. 319, 335 (1976).
[312] 564 U.S. 431 (2011). The other instance was *Culley v. Marshall*, 601 U.S. 377 (2024).

child support orders, a matter that surfaces frequently on state court dockets.[313] A parent behind on their payments is issued an order to show cause why they should not be held in contempt. The family court holds a hearing, and if the parent lacks a defense to contempt, they may be imprisoned until they make payments.[314] The parent in *Turner* was jailed for twelve months after such a hearing. He had been given a formal opportunity to be heard; the judge asked whether there was "anything you want to say." The parent had no notice that his ability to pay was the question on which his liberty turned, and the hearing did not include a form or inquiry designed to elicit relevant information or make findings on this critical issue.

The parent challenged the contempt finding that resulted in his incarceration on grounds that South Carolina should have provided him with counsel. The *Turner* Court rejected that argument.[315] But it nonetheless found the proceeding constitutionally deficient, because the family court had failed to employ "a set of 'substitute procedural safeguards,' … which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty."[316] The Court named four such safeguards:

> (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (*e.g.,* those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.[317]

Together, these "substitute procedural safeguards" are—or at least sketch the outlines of—mediated adversarialism. The proceeding continues to center on an adversarial hearing, but *Turner* makes clear that the hearing is constitutionally inadequate unless the court affirmatively structures it to compensate for the litigant's inability to identify and develop the legally dispositive issue.[318] The judge must investigate rather than merely arbitrate, ensuring that the ability-to-pay issue is identified, explored, and resolved. But *Turner* also contemplates more than active judging. It also demands institutional design. The court system must also provide a form to elicit core factual information, an obligation that necessarily implies managerialism beyond a single judge's actions. The system has to determine what factual information the ability-to-pay defense requires, develop and test the form, and (presumably) take steps to ensure its ongoing adequacy.

Concededly, the doctrine that has grown up around *Turner* itself remains modest.[319] To date, courts applying the decision have—perhaps reflecting due process's unjustified confinement to family law—mostly done so to evaluate arguments for court-appointed counsel in child support

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[313] In California, child support enforcement filings range between 100,000 to 150,000 per year. JUDICIAL COUNCIL OF CALIFORNIA, 2024 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 2013-14 THROUGH 2022-23, at 57 (2024).
[314] 564 U.S. at 434-35.
[315] *Id.* at 448.
[316] *Id.* at 447 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).
[317] *Id.* at 447-48.
[318] Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 811-12 (2012) (describing *Turner*'s holding).
[319] For an isolated example of due process-as-mediated adversarialism before *Turner*, see *In re M.H.*, 196 Ill.2d 356 (2001).

contempt proceedings.[320] Several have assessed alternative procedural safeguards against the standard *Turner* sets.[321] But no court has invoked *Turner* to require a particular affirmative obligation for courts or judges beyond what the Supreme Court prescribed for the child support context.[322]

Focusing on *Turner* alone, however, understates mediated adversarialism's foothold within the system. Its logic resonates with a broader shift regarding the judicial role, one surely prompted by concern for adversarial realities in the American civil justice system. In the state courts that administer eviction, debt collection, family, and other high-volume civil dockets, an emerging body of doctrine has begun to recognize that passive adjudication may fail when litigants appear without counsel. Courts have even, on occasion, hinted at a due process basis for those moves, even if a subconstitutional mix of procedural doctrines, judicial ethics, bench guides, and internal court protocols and administrative rules do most of the work. Across these different registers, courts have begun to identify a set of active judging modes that mediate pure adversarialism by providing information and explanation to overmatched, self-represented litigants, by eliciting legally relevant information from them, and by adjusting procedural obligations, including overlooking good-faith procedural failures.

On the first of these modes, state courts have increasingly treated the provision of information and explanation as part of the judicial office rather than as a departure from it. The Alaska Supreme Court, for instance, has instructed trial judges to "inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish."[323] Appellate courts elsewhere have reached similar conclusions, directing judges to "explain matters that would normally not require explanation" and to alert unrepresented litigants of critical procedural junctures.[324] Most jurisdictions to address the question have held, for instance, that a judge must ensure that a self-represented litigant has been informed how to respond to a summary judgment motion.[325]

One California appellate court deemed a hearing "short on due process" where the trial court failed to make this sort of effort.[326] "In a purely adversarial setting," the court reasoned, a judge may fairly "sit back and expect the party's lawyer to know about and either assert or by silence forfeit even the most fundamental of the party's constitutional and statutory procedural

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[320] *E.g.*, Liming v. Damos, 979 N.E.2d 297, 304-05 (Ohio 2012); State Dep't of Family Servs. v. Currier, 295 P.3d 837, 842 (Wyo. 2013). *See generally* Ashley Robertson, Note, *Revisiting* Turner v. Rogers, 69 STAN. L. REV. 1541 (2017) (discussing state court responses to *Turner*).

[321] *See, e.g.*, Dep't of Revenue Child Support Enf't v. Grullon, 147 N.E.3d 1066, 1070–74 (Mass. 2020); Spitz v. Iowa Dist. Ct. for Mitchell Cnty., 881 N.W.2d 456, 466 (Iowa 2016); Stewart v. Rice, 296 P.3d 1174, 1180 (Mont. 2013); Francis v. Francis, 2014 ND 111, ¶ 20, 847 N.W.2d 131, 135 (J. Sandstrom, concurring) (criticizing the participation of a nonlawyer advocate in a domestic violence proceeding, and, citing *Turner*, advocating instead for "neutral engagement by the judge" whereby the judge "explains, inquires, and clarifies").

[322] Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1146 (2019).

[323] Breck v. Ulmer, 745 P.2d 66, 75 (Alaska 1987); *see also* Keating v. Traynor, 833 P.2d 695, 696 (Alaska 1992); Bernard v. Lafayette City-Par. Consol. Gov't, 80 So. 3d 665, 669 (La. Ct. App. 2011) (quoting *Breck* approvingly).

[324] Oko v. Rogers, 466 N.E.2d 658, 661 (Ill. App. Ct. 1984); Padou v. District of Columbia, 998 A.2d 286, 294 (D.C. 2010); Williamson v. St. Martin's Apartments, L.P., 234 A.3d 187, 193 (D.C. 2020); McCain v. A.F. Evans Co., Inc., No. C074902, 2019 WL 3060339, at *6 (Cal. Ct. App. July 12, 2019).

[325] *See* Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97, 134 (2007).

[326] Ross v. Figueroa, 43 Cal. Rptr. 3d 289, 295–96 (Cal. Ct. App. 2006).

rights." But that posture fails in a forum "which can expect most of those appearing before the court to be unrepresented."[327]

Other decisions rest instead on courts' inherent authority to regulate court practice and procedure. The New Jersey Supreme Court, for instance, invoked this authority to prescribe informational procedures for the state's eviction courts, reasoning that a tenant who appears "but has not been informed by the court about his or her rights and obligations, provides the court with little or no meaningful assurance that the jurisdictional conditions have been satisfied."[328] Judicial ethics codes in a growing number of states now expressly authorize this informational role, providing that a judge who explains rules, procedures, and the basis for rulings does not thereby compromise impartiality.[329]

A second body of authority concerns the elicitation of information and the development of the record. For many matters, judges have well-established authority to test the legal sufficiency of a party's claims *sua sponte*. When a plaintiff seeks a default judgment, for instance, the court must satisfy itself that the pleadings establish a legally sufficient basis for the relief sought.[330] This obligation is not confined to defaults. As a New York housing court explained when conducting *sua sponte* review of an eviction petition, a respondent "is not entitled to less scrutiny by the Court by virtue of his appearance."[331] Courts have also long recognized judges' discretion to question parties and witnesses in order to elicit information bearing on issues the record has already surfaced[332]—an authority codified in state evidence rules,[333] endorsed in judicial ethics opinions,[334] and treated by many courts as especially appropriate where a party appears without counsel.[335] Finally, numerous jurisdictions permit judges to raise *sua sponte* affirmative defenses, such as an expired statute of limitations, that unrepresented defendants predictably fail to assert.[336] To the Vermont Supreme Court, a court's inability to do so would "obligate [it] to issue judgment … no matter how old or unjust the claim."[337]

A third, more modest foothold appears in procedural facilitation. Courts have long construed self-represented litigants' filings liberally, reading them for substance rather than legal form so that a litigant's failure to use the right label does not extinguish the opportunity to be heard.

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327 *Id.* at 295.

328 In Cmty. Realty Mgmt., Inc. for Wrightstown Arms Apartments v. Harris, 714 A.2d 282, 295–96 (N.J. 1998).

329 *See, e.g.*, ME CODE OF JUD. CONDUCT r. 2.6(c) (2015); VA. CANONS OF JUD. CONDUCT Canon 1(I) (2023); LA. CODE OF JUD. CONDUCT Canon 3A(4)((2013).

330 *See, e.g.*, Youree v. Recovery House of E. Tenn., LLC, 705 S.W.3d 193, 206 (2025); Becerra v. Equity Imports, Inc., 551 So. 2d 486, 488 (Fla. Dist. Ct. App. 1989).

331 P.S. 85th St. F.L.P. v. Demos, 17 Misc. 3d 1139(A), 856 N.Y.S.2d 25 (Civ. Ct. 2007). *See also* Four Quarters Inc. v. Davis, 73 Misc. 3d 1208(A), 154 N.Y.S.3d 217 (City Ct. 2021) (dismissing an eviction petition *sua sponte*, where the tenant had appeared intermittently, because the petition contained "fundamental misstatements and omissions").

332 *See, e.g.*, Williams v. S.C. Farm Bureau Mut. Ins. Co., 251 S.C. 464, 471 (1968); Crownover v. Nat'l Farmers Union Prop. & Cas. Co., 673 P.2d 1301, 1303 (N.M. 1983); Dawson v. Grudinskas, 2016 Mass. App. Div. 6 (Dist. Ct. 2016).

333 *See, e.g.*, N.H. R. Evid. 614; F.R.E. 614.

334 *See* Cal. Judges Ass'n Jud. Ethics Comm., Formal Op. 76 (2018); N.C. Jud. Standards Comm'n, Op. 2016-01 (2016).

335 *See, e.g.*, Everett v. Scott, 137 A.3d 971, at *3 (Del. 2016); B.L.F. v. T.G.C., No. A-4544-17T2, 2019 WL 2189108, at *3* (N.J. Super. Ct. App. Div. May 21, 2019); I.L. v. R.F.D., No. A-2637-11T4, 2012 WL 5949747, at 2 n.1 (N.J. Super. Ct. App. Div. Nov. 29, 2012).

336 *See, e.g.*, Exeter Hosp. v. Hall, 137 N.H. 397, 399–400 (1993); Leonhard v. United States, 633 F.2d 599, 609 n.11 (2d Cir. 1980). *But see, e.g.*, 352 Legion Funding Assocs. v. 348 Riverdale, LLC, 164 A.D.3d 551, 552–53 (N.Y. App. Div. 2018).

337 DaimlerChrysler Services North America v. Ouimette 175 Vt. 316 (2003).

The Supreme Court has repeatedly endorsed the practice,[338] nearly every jurisdiction follows it,[339] and several states have written the practice into their judicial ethics rules.[340] State high courts have justified it in terms that have echoes in due process. This judicial obligation, the Colorado Supreme Court reasoned, "ensure[s] that [litigants] are not denied review of important issues because of their inability to articulate their argument like a lawyer."[341]

Alongside the case law and judicial canons that, in a range of doctrinal registers, provide authority for an active judicial role, many courts have also begun to implement the kinds of managerial interventions that mediated adversarialism counsels. As described elsewhere, these reforms move beyond judge-centered, case-by-case adversarial adjudication by redistributing adjudicatory functions across judges and staff, triaging cases through differentiated pathways, and using standardized processes and data-driven oversight to monitor performance and outcomes at scale.[342] At the front end of litigation, courts rely on court-created forms and front-end information exchange obligations that prompt litigants—especially those proceeding *pro se*—to identify issues, supply key facts, and produce supporting documentation.[343] They then manage how cases move through the system by routing matters into differentiated pathways and by using "teaming" arrangements that enlist trained staff to support judges and develop the record.[344] At the merits stage, courts increasingly supplement active judging with bench cards, checklists, and other decisional aids that regularize judicial discretion.[345] Before entering judgment, judges may be required to confirm that the record provides an adequate basis for the relief requested, rather than treating default or weak opposition as a substitute for proof.[346] Finally, courts are beginning to supplement these interventions with back-end quality assurance, including data-based monitoring to identify patterns of decisional error that can trigger corrective feedback.[347]

The doctrinal materials for a due process grounded in mediated adversarialism are thus already at hand. *Mathews* leaves the universe of "substitute procedural safeguards" open, while *Turner* fills it with investigatory and managerial content. State courts have assembled much of the active judicial role that mediated adversarialism contemplates. What mediated adversarialism supplies is a synthesis, demonstrating that these scattered authorities express a common principle of institutional responsibility for fair and accurate adjudication.

2. Mediated Adversarialism's Foothold in Practice

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338 *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (pro se complaints, "however inartfully pleaded," are held to "less stringent standards than formal pleadings drafted by lawyers" (quoting Haines v. Kerner, 404 U.S. 519, 520–21 (1972) (per curiam))); Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam).

339 *See* SELF-REPRESENTED LITIGATION NETWORK, HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A BENCH GUIDE FOR JUDGES 3-9 (2008).

340 *See* ARK. CODE OF JUD. CONDUCT r. 2.2 cmt. 4 (2016); IND. CODE OF JUD. CONDUCT r. 2.2 cmt. 5 (2023); MASS. CODE OF JUD. CONDUCT r. 2.6 cmt. 1A (2016).

341 People v. Cali, 459 P.3d 516, 522 (Colo. 2020).

342 *See* Engstrom et al., *supra* note 265*,* at 1335.

343 *See* Daniel W. Bernal, *Pleadings in a Pandemic: The Role, Regulation, and Redesign of Eviction Court Documents*, 73 OKLA. L. REV. 573, 635-640 (2021) (highlighting form-based judicial and legislative reforms).

344 *See* Engstrom et al., *supra* note 265*,* at 1336.

345 *Id.* at 1349.

346 *See* Engstrom et al., *supra* note 22.

347 *See* Engstrom et al., *supra* note 265*,* at 1402.

Two examples, drawn from debt collection and eviction litigation, respectively, not only confirm the compatibility of existing doctrine with due-process-as-mediated adversarialism, but also point to a foothold in emerging practice. Both are good candidates for next steps for due process, following *Turner*'s lead.

The first involves the emerging practice of staff-led review of default judgment requests in debt collection litigation. In most of these cases the defendant defaults, so frequently a case endures no adversarial testing before the court enters judgment.[348] Numerous states have responded with documentation requirements, laws that effectively require plaintiffs to file evidence demonstrating an entitlement to recover before a default judgment's entry.[349] Some of these laws explicitly instruct courts that they must review compliance with documentation requirements before they can enter judgment.[350] These laws thus mandate active judging, requiring courts to confirm that the plaintiff has evidence for its prima facie case notwithstanding the defendant's nonappearance.

Judges handling this review process on their own often fall short. They routinely fail to check the plaintiff's filings adequately, resulting in thousands of erroneously entered judgments.[351] The Los Angeles County Superior Court (LASC), managing 30,000 default judgment requests each year, has turned to court managerialism as a response to improve its capacity for error avoidance.[352] LASC employs trained staff attorneys who use checklists and standardized review protocols to determine whether the plaintiff has actually satisfied California's documentation requirement.

This review comes at a cost, requiring thousands of hours of staff time each year.[353] Staff review surely improves LASC's overall accuracy. But the volume of filings gives staff only a few minutes per case to confirm compliance,[354] and errors still result.[355] Court-hosted technology, another managerial intervention, has particular potential, both to address this residual accuracy problem and to lower costs. A design prototype for a "Default Assistant," developed as part of a court-academic collaboration, has already proven capable of assessing compliance with the documentation requirements to a high degree of accuracy and is being implemented in live cases as of summer 2026.[356] This AI tool may obviate the need for staff involvement altogether. If it lives up to its early promise, the marginal cost of a default prove-up will effectively go to zero.

Default judgment review—active judging, aided now by staff-review and soon by court-hosted technology—is not a retreat from adjudication. Rather, this iteration of mediated adversarialism makes merits assessment possible even as adversarial testing almost invariably fails. Especially if the AI tool succeeds, the *Mathews* balancing test should make default prove-ups a matter of constitutional obligation, not merely a best practice, at least in states that require

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348 *Id.*

349 COLO. REV. STAT. § 5-16-111(3); CONN. PRAC. BOOK § 17-25; Administrative Directive of the Chief Judge of the Court of Common Pleas for the State of Delaware, No. 2012-2, *Consumer Debt Actions*, at 3; D.C. CODE § 28-314(t); ILL. SUP. CT. R. 280.4; ME. REV. STAT. § 11019; MD. R. CIV. PROC. 3-306(d); MA. R. CIV. PROC. 55.1; MINN. STAT. 548.101; N.Y. UNIF. CT. SYS. R. 202.27; N.C. GEN. STAT. § 58-70-155; TEX. R. CIV. PROC. 508.3; WASH. REV. CODE § 19-16-260; WIS. STAT. § 425.109; CAL. CIV. CODE § 1788.60(c).

350 *E.g.*, CAL. CIV. CODE § 1788.60(c); MA. R. CIV. PROC. 55.1; N.C. GEN. STAT. § 58-70-155; TEX. R. CIV. PROC. 508.3.

351 *E.g.*, Barnard et al., *supra* note 60, at 3; *id.* at 35.

352 *See* Worledge et al., *supra* note 63.

353 *See* Engstrom et al., *supra* note 22, at 46-49.

354 Worledge et al., *supra* note 352, at 1.

355 *Id.* at 1-2.

356 *Id.*; *id.* at 6.

judges to scrutinize plaintiffs' filings for evidentiary sufficiency.[357] The existing procedural safeguard—defendants' opportunities to flag problems with plaintiffs' documentation—fails nearly across the board due to the ubiquity of default. Judicial scrutiny lowers the risk of erroneous deprivation, and staff involvement reduces the error risk even further. The AI tool takes the error rate nearly to zero while imposing negligible "fiscal and administrative burdens." A defendant's "private interest" in a consumer-debt case can be considerable. An erroneously entered default judgment can trigger wage garnishment, bank levies, or other such consequences for people unable to make their credit card payments. Conversely, a consumer debt plaintiff has no interest in a default judgment unsupported by the proof state law requires as a condition of a judgment's entry.[358] The *Mathews* variables thus align to require investigatory and managerial machinery—the judicial check for compliance, aided by staff and the AI tool—to respond to a reality in debt collection dockets for which *Goldberg*-style adversarial testing offers no answer.

Settlement governance in eviction cases offers a second example. Outside a few specialized domains,[359] civil procedure largely treats settlement as an entirely private matter. Settling parties in federal court, for instance, can have a case dismissed without a court order, enabling them to resolve disputes on whatever terms they wish.[360] But this model, of settlement-as-private-ordering, poorly describes what happens in eviction dockets for several reasons. Most importantly, most eviction settlement agreements are not private contracts. Rather, parties' agreements get entered as "stipulated" or "consent judgments,"[361] orders that bear a judicial imprimatur.[362] Second, "courthouse settlements" are common.[363] Given the extraordinarily short timelines on which eviction cases proceed, parties often have their first and only encounters when they appear at courthouses for merits hearings. Sometimes mistaking landlord attorneys for court personnel, tenants agree to terms in the back of courtrooms or in court hallways, often minutes before trials start.[364] The public setting, confusion over personnel and their roles, and the impending trial thus exacerbate severe asymmetries of power and expertise that produce mass settlement entirely on landlords' terms.[365] As Nicole Summers demonstrates, what results is a shadow legal regime, a third reason to see past the patina of private ordering. Tenants anxious to remain housed routinely agree to terms, some of which are illegal, that replace otherwise-applicable housing law.[366]

An evolving trend, whereby judges review agreements before entering them as consent judgments, reflects a shift of eviction settlement out of a model of private ordering and into one of

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[357] For a complication if a state does not have this requirement, see *infra* notes 396-397 & accompanying text.
[358] *See* Connecticut v. Doehr, 501 U.S. 1, 10-11 (1991) (modifying the *Mathews* balancing test for "disputes between private parties," to require consideration of an adversary's interest).
[359] *See, e.g.*, Will v. Nw. Univ., 378 Ill. App. 3d 280, 293 (2007) (requiring judicial review of settlements involving minors as parties); Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1022 (2013) (discussing the rationale for court review of settlements in class actions).
[360] *See* FED. R. CIV. P. 41(a)(1)(A).
[361] *E.g.*, Alexa Eisenberg & Katlin Brantley, Pov. Solutions, *Crisis Before the Emergency: Evictions in Detroit Before and After the Onset of COVID-19*, Report, June 2022, at 11 (documenting consent-judgment rates in eviction cases in Detroit).
[362] *E.g.*, Smyth ex rel. Smyth v. Rivero, 282 F.3d 268, 282 (4th Cir. 2002).
[363] *E.g.*, Hannah Lieberman, *Uncivil Procedure: How State Court Proceedings Perpetuate Inequality*, 35 YALE L. & POL'Y REV. 257, 266-67 (2016).
[364] *E.g.*, Summers, *supra* note 57, at 850; Lieberman, *supra* note 363, at 266-67 (2016); Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2020 (1999).
[365] Summers, *supra* note 56, at 155.
[366] Summers, *supra* note 57, at 888.

public governance.[367] New York City was at the forefront. In 2007, Fern Fisher, who then headed the city's housing court, issued an order "strongly advis[ing]" judges to conduct an on-the-record "allocution" before accepting a settlement involving a self-represented tenant, a task that should include "ascertain[ing] whether a *pro se* litigant's claims are adequately addressed."[368] Judge Fisher's order specified topics for judicial investigation, including the tenant's understanding of the parties' claims and defenses, of the terms of the deal, and of the consequences of noncompliance.[369]

What evolved was active judging aided by court managerialism. To prepare for their allocutions, many judges relied on court attorneys to review the proposed settlements.[370] Acknowledging this practice, Judge Fisher issued a second order, in 2012, to manage these attorneys' work.[371] They had to "[r]eview each allegation" in the complaint to determine its accuracy, surface any facts bearing on potential tenant defenses and counterclaims, and ensure that the parties understood the settlement's material terms.[372]

Viewed through the lens of mediated adversarialism, this approach to settlement governance does for bargaining what *Turner* envisioned for contempt proceedings. It retains an adversarial core of party choice and agreement. But it injects active judging and court managerialism into a context where asymmetry, speed, and mass processing undermine confidence in private bargains as informed, voluntary, and law-compliant. When landlords and tenants ask that courts adopt their settlements as judgments, the *Mathews* balance tilts decidedly in favor of something like Judge Fisher's mix of active judging and court managerialism. Because "one's right to a home involves a vital private interest," the first factor favors protection for tenants.[373] When applicable law permits the court to enter a consent judgment only if the tenant entered into the deal knowingly,[374] or only if the deal adequately addresses the tenant's claims and defenses,[375] a scripted allocution surely reduces the risk of error. Since parties often settle at the courthouse shortly before a merits hearing, the administrative costs of active judging, tempered by court managerialism—an allocution, pursuant to a script, in lieu of the scheduled merits adjudication—are modest. A landlord has no cognizable interest in a settlement with unconscionable terms, or one procured due to the tenant's ignorance or lack of volition.

C. Future Complications

Once loosened from its adversarial binds, due process doctrine under *Mathews* can be readily applied to AI-assisted review of default judgments and settlement governance protocols. In both contexts, law already defines the error the safeguard prevents: in California, a default

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[367] MICH. CT. R. 4:201(j); N.J. R. OF CT. 6:6-4(a); N.Y. REAL PROP. ACT. & PROC. § 746.
[368] *See Allocutions of Stipulations in Landlord and Tenant Cases*, Civil Court of the City of New York, Advisory Notice AN-1, Apr. 6, 2007.
[369] *Id.*
[370] *See Housing Court Attorney Conferences of Stipulations in Non-payment and Holdover Cases*, Civil Court of the City of New York, Directive, DRP-195, Jan. 23, 2012.
[371] *Id.*
[372] *Id.*
[373] 444 W. 54th Street Tenants' Assoc. v. Costello, 138 Misc.2d 5, 12 (N.Y. Civil Ct. 1987); *see also* Nozzi v. Housing Authority of the City of Los Angeles, 806 F.3d 1178, 1193 (9th Cir. 2015); Ressler v. Landrieu, 502 F. Supp. 324, 327 (D. Alaska 1980).
[374] MICH. CT. R. 4:201(j)(3).
[375] N.Y. REAL PROP. ACT. & PROC. § 746(c)(v).

judgment entered without adequate documentation; in New York, a consent judgment that does not adequately address the tenant's claims and defenses. Administrative costs are negligible, the plaintiff's interest is not cognizable, the tenant's or consumer debtor's private interest is substantial, and the risk of an erroneous deprivation without mediated adversarialism is considerable. *Mathews*' three factors align almost frictionlessly for these examples. As due-process-as-mediated-adversarialism evolves, however, courts will encounter claims to constitutional entitlement that raise more challenging questions. Some of these problems are old wine in new bottles, but others are distinctive to mediated adversarialism.

First are line-drawing challenges: just how much mediated adversarialism does due process require? At least part of the challenge is *Mathews*' indeterminacy, an issue courts have struggled with since 1976. *Mathews* is notorious for its command that courts balance interests and costs that are both incommensurate and resistant to any sort of rigorous estimation.[376] Faced with *Mathews*' "pervasive indeterminacies"—how to define the "private interest" in an eviction forestalled, how to compare its value with the "fiscal and administrative burdens" imposed by court staff reviewing proposed consent judgments, and so on—due process doctrine may yield highly context-dependent outcomes that resist generalization.[377] Sometimes, a *Mathews* inquiry along these lines is easy. Judicial oversight of eviction settlements might deliver a sharp decrease in agreements with illegal terms at little additional cost—a slam-dunk case. But New Jersey, for instance, has an eviction litigation program whereby specialized staff attorneys manage a mediation process and supervise court-administered information-gathering that effectively replaces party-initiated discovery—a wholesale revision to the adversarial process.[378] Its approach may reduce the risk of unknowing tenants agreeing to one-sided settlements even better than New York's, but it likely entails a considerably higher administrative cost. *Mathews* cannot say whether the added protection is worth the added expense.[379] In a similar vein, AI could make LASC's default-judgment review regime nearly costless and thus another easy call under *Mathews*. But if it does not realize its full potential or proves more expensive to implement and maintain, the due process inquiry would have to balance the error reduction benefits of staff review against its nontrivial costs.

These problems of boundary identification and unprincipled contextualism, however, have long been the stuff of due process history. Complaining about due process doctrine after *Hurtado*, a commentator in 1906 insisted that the Supreme Court had "throw[n] us hopelessly into the fields

[376] 32 CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. § 8139 (2026 update); Mashaw, *supra* note 296, at 38-46; Rubin, *supra* note 123, at 1138.
[377] Mashaw, *supra* note 296, at 48.
[378] *See* Supreme Court of New Jersey, *Notice to the Bar – Conclusion of Mandatory Case Management Conferences & Continuation of Other Landlord Tenant Reforms*, July 18, 2023, at 1; Supreme Court of New Jersey, *Notice to the Bar – Conclusion of Mandatory Case Management Conferences; Continuation of Other Reforms – Court Forms and Procedures as of September 1, 2023*, Aug. 23, 2023, at 2.
[379] Questions also remain about how to define costs in the first place. In Goldberg, for instance, the decision to require a pre-termination hearing for welfare beneficiaries resulted not just in increased operating costs for welfare adjudication but also fiscal impacts on systems of social service provision. Ames et. al., *supra* note **283**, at 24; William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777, 786 (1990). Whether due process requires an eviction settlement governance regime may raise similarly daunting issues, including an estimation of its administrative cost and, more broadly, its impact on rental markets. But a due process decision about eviction settlement governance and one about, say, the appointment of counsel for categories of indigent litigants are distinct but not different, at least from the cost perspective. For a discussion of courts finding due process rights to counsel in various civil contexts, see John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorial Rights to Counsel in Basic Human Needs Civil Cases*, 61 DRAKE L. REV. 763 (2013).

of speculation cultivated by writers on the law of nature and the nebulous natural rights of man."[380] The twentieth century did little to resolve due process's "ipse dixit" problem.[381] A court's choice between a pre-termination and a post-termination hearing for a particular type of adjudication—the issue in Goldberg and so many other cases since—is no more or less principled than the choice between New York's and New Jersey's settlement governance regimes.

That said, the line-drawing challenges that would afflict a new due process organized around mediated adversarialism may raise particularly acute concerns about overconstitutionalization. When should experiments become constitutional requirements? An adversarial constraint limits the menu of what due process may require to the short list of protections enumerated in *Morgan* and *Goldberg*, ones almost invariably provided for already in codes and rules of civil procedure. However, as state courts' many and varied experiments with active judging and court managerialism indicate, the menu expands considerably when due process might require a non-adversarial protection. Many such interventions—benchcards to cabin judicial discretion, or online tools to generate pleadings for self-represented litigants—could reduce error at a modest, sometimes negligible, cost. *Mathews*' appetite for mediated adversarialism may prove ravenous, hardening court system experiments into an ever-expanding suite of constitutional obligations. This prospect could chill innovation, lest a success with active judging or court managerialism ensnare a court system in a constitutional bind. Or, as courts grapple with *Mathews*' looming ineluctability, they might degrade due process doctrine. To avoid constitutionalizing "wise public policy," courts may calibrate what is "minimally tolerable under the Constitution" to an unjustly low standard.[382]

A second broad challenge concerns adversarialism's residual values. Among many other questions, how can courts preserve due process's adversarial core while engaged in active judging? As already noted, due process-as-mediated-adversarialism supplements but does not replace adversarial contestation. By one articulation of its goal, mediated adversarialism aims to match outcomes to what a healthy, well-functioning adversary system would generate. New York's settlement governance regime reflects as much, only requiring court review when tenants lack counsel.[383] But even if configured as a response to adversarial imperfections, active judging or court managerialism may threaten core aspects of the adversary process, creating the prospect of a due process at war with itself.

Perhaps the most vulnerable part of the adversarial core is judicial neutrality, itself a due process right.[384] An example from New York illustrates how active judging can pose a threat. Under a 2019 statute that took Judge Fisher's settlement governance regime statewide, a New York judge may not approve a consent judgment in an eviction case involving a self-represented tenant unless the judge, after an allocution, determines that the tenant's "claims or defenses are adequately addressed . . . ."[385] This determination involves more than a judge providing information to a self-

[380] MCGEHEE, *supra* note 153, at 57; *see also* Freeland v. Williams, 131 U.S. 405, 418 (1889) ("This phrase, due process of law, has always been one requiring construction; and, as this court observed long ago, never has been defined, and probably never can be defined, so as to draw a clear and distinct line, applicable to all cases . . . .") (internal quotation omitted).
[381] JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 71 (1983); *id.* at 99-100 (critiquing the analysis in *Goldberg* on these lines); *id.* at 112 (critiquing *Mathews* along these lines).
[382] Lassiter v. Dep't of Social Services of Durham County, 452 U.S. 18, 33 (1981).
[383] N.Y. REAL PROP. ACT. & PROC. § 746(1).
[384] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).
[385] N.Y. REAL PROP. ACT. & PROC. § 746(2)(c)(v).

represented litigant about the litigation process,[386] or even a judge eliciting factual information needed to resolve a claim or defense.[387] Rather, New York's law seems to oblige the judge to assess the strength of the defenses to eviction the tenant might have, then to evaluate the consideration the settlement gives the tenant for these defenses' waiver. If the judge withholds approval because the tenant has a strong defense that the settlement does not adequately credit, and if the judge explains this reason to the parties, the judge has effectively told the tenant how to get the case dismissed. Under different but arguably analogous circumstances, New York courts have deemed judicial engagement of this sort as an illegitimate departure from neutrality.[388]

A third challenge may be even more fundamental. It concerns the civil justice system's aims and, in particular, the relationship between decisional accuracy and party autonomy. When Mashaw proposed his managerial conception of due process for agency adjudication in the 1970s, he drew a sharp line between administration and civil litigation. Administrative adjudication differs fundamentally from civil litigation, Mashaw argued, because agencies exist to implement public policy whereas courts exist to resolve disputes. As a result, agency adjudication carries an obligation to achieve "the systematic and affirmative implementation of certain prescribed legislative policies."[389] The law at issue "is not a loose framework within which private ordering is dominant," but a policy regime that the agency must implement faithfully.[390] If a disability benefits claimant poorly presents evidence of her impairments to the Social Security Administration, the agency nonetheless errs if she is in fact disabled but has her application denied.[391] By contrast, "[a] court generally has no responsibility for 'administering' the substance of a legislative program."[392] The civil justice system values party autonomy and dispute resolution.[393] If a consumer debtor fails to raise a statute-of-limitations defense and judgment is entered for the debt buyer, the system has functioned as intended.[394] The litigant had an opportunity to be heard and failed to use it.[395]

If Mashaw's understanding of civil litigation is correct, mediated adversarialism rests on an unstable foundation. *Mathews* asks whether additional procedures would reduce the risk of erroneous deprivations. But if party failures are not judicial errors in the first place, then many of the safeguards discussed in this Article—from AI-assisted default review to judicial oversight of eviction settlements—do not improve adjudicative accuracy at all. They simply compensate for litigants' failures to take advantage of adversarial opportunities. Under Mashaw's conception of civil litigation, due process would have no reason to require them.

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[386] *See infra* notes 323-329 & accompanying text.
[387] *See infra* notes 330-337 & accompanying text.
[388] *E.g.*, 3 Wells Fargo Bank, N.A. v. St. Louis, 229 A.D.3d 116, 122, 213 N.Y.S.3d 86, 93 (2024); 52 Legion Funding Assocs. v. 348 Riverdale, LLC, 164 A.D.3d 551, 552-553 (N.Y. App. Div. 2018).
[389] Mashaw, *supra* note 9, at 780.
[390] *Id.*
[391] *Cf.* Steinberg, *supra* note **277**, at 967 (discussing SSA's affirmative obligation to "develop the record").
[392] *Id.* at 779.
[393] MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 88-89 (1986).
[394] Mashaw, *supra* note **9**, at 780 (noting that, if a lawsuit's settlement wholly departs from what the applicable substantive law means for the underlying facts, the civil justice system has not faile; rather it has achieved its goal, because peaceful dispute resolution, "one of the purposes of judicial decisionmaking[,] . . . is served regardless of the substance of the outcome . . . .").
[395] *Cf.* Md. Jud. Ethics Comm., Opinion Request No. 2006-11 (Apr. 10, 2006) (concluding that judges should not raise statute of limitations defenses on behalf of *pro se* defendants *sua sponte*).

Yet Mashaw surely drew too bright a line between litigation and administration back in 1974.[396] In the decades since, as mediated adversarialism has gained a foothold in doctrine and practice, that distinction no longer describes much of the modern civil justice system. Legislatures increasingly impose obligations on courts that make certain outcomes erroneous regardless of litigant incapacity or acquiescence. As already noted, some states' documentation laws instruct judges that they cannot enter default judgments in certain categories of consumer debt cases if plaintiffs have not submitted evidence indicating their entitlement to recover.[397] Similarly, New York prohibits approval of an eviction settlement involving an unrepresented tenant unless the court determines that the tenant's claims and defenses have been adequately addressed.[398] In these settings, positive law itself defines the judicial error. The question is no longer whether courts should compensate for adversarial breakdown, but how far that obligation extends.

Harder cases arise where positive law is not explicit—where statutes do not clearly prescribe judicial obligations[399] or where judges retain broad discretion over matters such as default judgments.[400] There, mediated adversarialism tees up a more fundamental grappling with the purposes a civil justice system does and should serve. But that inquiry should not simply presume an adversarial conception of party responsibility forged for a twentieth-century civil justice system. Nor should party autonomy and responsibility serve as all-purpose trump cards. The civil justice system's "ought" should correspond meaningfully to its "is," and the "is" is shifting. If, as this Article has argued, adversarial breakdown increasingly defines ordinary civil litigation, then our understanding of adjudicative accuracy—and, by extension, the procedural protections due process may require—must evolve accordingly.

These challenges—indeterminacy and overconstitutionalization, threats to the adversarial core, and questions about the proper understanding of accuracy in civil litigation—are difficult but not insoluble. A due process organized around mediated adversarialism will require courts to resolve them in satisfying ways for the doctrine to mature fully. While *Mathews* offers enough constitutional material for this work to start, a new due process may require more than its unguided utilitarianism. But sources already exist to tap for answers.[401] And a due process doctrine that emerged through iterative engagement with an evolving adjudication landscape, making modest progress toward a coherent jurisprudence with each step, would hardly prove novel.[402]

CONCLUSION

Describing *Goldberg*'s core lesson in 1987, William Brennan, the opinion's author, insisted that due process requires us to "draw on . . . our own sense of the uneven fabric of social life." We

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[396] Courts should not enter a default judgment if the plaintiff has failed to state a cause of action, a responsibility at odds with Mashaw's boundary. *See infra* note 330; *see also* Bayne v. Sun Finance Co. No. 1, 150 S.E.2d 311, 313-14 (Ga. Ct. App. 1966); American Bankers Ins. Co. v. Leist, 189 N.E.2d 456, 458 (Ohio Ct. App. 1962).
[397] *See infra* note 350.
[398] Likewise, New York's law on eviction settlement governance provides that "no stipulation . . . may be approved by the court" unless the court finds "that the unrepresented litigant's claims or defenses are adequately addressed . . . ."N.Y. REAL PROP. ACT. & PROC. § 746(2)(c)(v).
[399] *E.g.*, WASH. REV. CODE § 19-16-260.
[400] *E.g.*, LF Centennial Ltd. v. Inovex Furnishings Corp., Civ. No. 17-5824, at *2 (C.D. Cal. June 12, 2019).
[401] For instance, issues involving appropriate bounds on the judicial role, particularly in cases involving self-represented litigants, arise frequently and have generated extensive subconstitutional doctrine. *See* AM. LAW INSTIT., PRINCIPLES OF THE LAW OF HIGH-VOLUME CIVIL ADJUDICATION, Chapter 9 (The Judicial Role) (draft, on file with authors).
[402] *E.g.*, Mashaw, *supra* note 296, at 47 n.61 (describing patterns in due process history).

cannot "silence . . . questions" about what due process requires "solely by pointing to rational action taken according to standard rules."[403] *Goldberg* resulted when the Court refused to look away from the reality of desperation and indignity that an otherwise formally acceptable set of procedures inflicted on welfare beneficiaries.[404]

Due process-as-mediated adversarialism honors this lesson. Today, the "uneven fabric of our social life" mass-produces lawsuits involving serious social needs. For millions of people ensnared in these cases each year, "rational action taken according to the standard rules"—a judgment entered after notice and an opportunity to be heard—is nothing more than an illusion of procedural fairness. Fairness in reality requires more of judges and courts, lest asymmetries of power, wealth, and expertise among litigants continue to make default judgments and one-sided settlements our civil justice system's chief products. Ironically, the Constitution will best honor the legacy of *Goldberg* and its demand that doctrine reflect reality if due process for civil justice moves past the adversarialism Brennan and his colleagues canonized.

[403] Brennan, *supra* note 294, at 16.
[404] *Id.* at 20-22.