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## ARTICLE

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### DIALOGIC DUE PROCESS

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*What does the future hold for procedural due process? From the due process revolution of the 1960s and 1970s until recently, constitutional litigation was the primary driver of procedural innovation. Plaintiffs brought lawsuits challenging existing procedures under the Due Process Clause, and courts used the Supreme Court's cost-benefit, interest-balancing approach to determine the specific dictates of due process. That approach reflected the Court's longstanding view of procedural due process as flexible and adaptable to changing circumstances, but it also imposed significant evidentiary hurdles on due process plaintiffs. As a result, in recent years, due process doctrine has stagnated, with courts less and less interested in ordering additional or alternative procedural safeguards.*

*At the same time, bottom-up procedural experimentation is on the rise. Across jurisdictions and legal contexts, government agencies and court systems are reforming procedures in ways that have been unachievable through litigation. These reforms—for example, creating a right to counsel in deportation and eviction cases, adopting electronic forms of notice, and requiring judges to play an active role in cases with pro se litigants—strike at the heart of the due process guarantee, yet the courts are not driving these changes. This has created a growing gap between due process doctrine and procedural innovations that are not the result of litigation.*

*This Article analyzes the current divergence between due process doctrine and practice. It begins by tracing the shift from the due process revolution's court-driven procedures to today's bottom-up experimentation. Next, it examines three recent examples of procedural experimentation and situates those innovations within the Supreme Court's due process doctrine. The Article then proposes a dialogic approach*

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to procedural due process, through which data generated by procedural innovations can help courts evaluate due process claims in litigation. By putting courts in conversation with the wave of procedural innovations unfolding across the nation, this dialogic approach can help revive an otherwise stagnant branch of constitutional doctrine and ensure that the Due Process Clause continues to guarantee fair procedures in the face of changing circumstances.

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## INTRODUCTION

What does the future hold for procedural due process? Not too long ago, in the 1960s and 1970s, procedural due process claims occupied a prominent place on the Supreme Court's docket and attracted the attention of the nation's leading legal scholars. A series of Court decisions culminating in *Goldberg v. Kelly*<sup>1</sup> greatly expanded the scope of the Due Process Clause's coverage,

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<sup>1</sup> 397 U.S. 254 (1970).

triggering an “explosion”<sup>2</sup> in due process litigation that came to be known as the “due process revolution.”<sup>3</sup> Constitutional litigation was the primary driver of procedural innovation, with judges ruling that the Due Process Clause demanded more or different procedures in cases involving issues as diverse as welfare benefits,<sup>4</sup> school discipline,<sup>5</sup> family law,<sup>6</sup> immigration deportation,<sup>7</sup> and public employment.<sup>8</sup> In 1976, the Court in *Mathews v. Eldridge*<sup>9</sup> adopted a cost-benefit approach for determining the requirements of procedural due process in civil contexts,<sup>10</sup> and government agencies eventually conformed their procedures to the constitutional requirements. Since the 1990s, procedural due process doctrine has been relatively stable, with few notable Supreme Court decisions and limited scholarly analysis.<sup>11</sup>

Even as due process doctrine stabilized, the facts and circumstances of many procedural contexts have continued to evolve. The more things change, the more likely it is that decades-old procedures must be updated to ensure fundamental fairness. Although the Supreme Court has explained that “‘due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,”<sup>12</sup> its modern approach to procedural due process imposes significant evidentiary hurdles on plaintiffs bringing due process

<sup>2</sup> Henry J. Friendly, “*Some Kind of Hearing*”, 123 U. PA. L. REV. 1267, 1268 (1975); see also JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 9 (1985) (noting that “federal court complaints of procedural due process deprivation in the 1970s showed a 350 percent increase over the 1960s,” compared to a seventy percent increase in federal civil litigation of all kinds).

<sup>3</sup> MASHAW, *supra* note 2, at 33 (“[B]y most accounts the due process revolution began with the Supreme Court’s opinion in *Goldberg v. Kelly* . . .”).

<sup>4</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 274-75 (1970) (holding that the due process clause of the Fourteenth Amendment requires an evidentiary hearing before certain government benefits can be discontinued).

<sup>5</sup> See, e.g., *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (establishing due process protections for students facing suspensions of ten days or less).

<sup>6</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 748 (1982) (defining the required standard of proof as “clear and convincing” in cases terminating parental custody rights).

<sup>7</sup> See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (holding that lawful permanent residents are entitled to certain due process protections).

<sup>8</sup> See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-43 (1985) (holding that public employees are entitled to due process before losing their employment).

<sup>9</sup> 424 U.S. 319 (1976).

<sup>10</sup> See *Parham v. J.R.*, 442 U.S. 584, 599-600 (1979) (characterizing the *Mathews* analysis as “a general approach” for determining the specific procedures required by due process).

<sup>11</sup> See, e.g., Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1334-36 (2012) (discussing the ossification of due process procedures and the stagnation of procedural due process scholarship). The Supreme Court’s most notable recent procedural due process decision did not result in a meaningful change to the *Mathews* analysis. See *Turner v. Rogers*, 564 U.S. 431, 435 (2011) (rejecting a claim that the Due Process Clause automatically requires the provision of counsel at civil contempt proceedings when the defendant is an indigent individual facing incarceration for failure to pay child support to a child’s unrepresented custodian).

<sup>12</sup> *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) (quoting *Mathews*, 424 U.S. at 334).

claims. As a result, courts have not been actively reassessing or reevaluating the constitutionality of longstanding procedural regimes.

Yet procedural innovation has not stopped. In recent years, federal, state, and local agencies and court systems have been experimenting with new and additional procedures in a wide range of legal contexts. Cities have passed legislation guaranteeing government-funded lawyers for indigent people facing eviction and deportation.<sup>13</sup> Agencies have adopted electronic notification systems to ensure that families receiving essential public benefits are given fast and reliable notice of benefit terminations or changes.<sup>14</sup> And judges have developed practices and procedures for taking a more active role in cases involving pro se litigants.<sup>15</sup> These experimental procedures hold the potential to benefit countless individuals and families, improving the fairness of legal proceedings where the stakes could not be higher.

These new procedural innovations share three notable features. First, they are not the result of litigation involving due process claims. Instead, they have emerged through policy and legislative reforms or other initiatives that took effect without constitutional litigation. Second, even though these innovations are not court-driven, their proponents use the language of “due process” when explaining why the new procedures are necessary and valuable. And third, the innovations are either similar to, or extensions of, procedural innovations that have been the product of due process litigation in the past. In other words, despite being delinked from constitutional litigation and the development of due process doctrine, the new wave of innovation remains fundamentally connected to the Constitution’s due process guarantee.

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<sup>13</sup> See, e.g., Liz Robbins, *Mayor and City Council Make Deal on Lawyers for Immigrants*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/nyregion/mayor-and-city-council-make-deal-on-lawyers-for-immigrants.html> [<https://perma.cc/KFM8-G49K>] (reporting on continued funding for a project that guarantees representation for indigent immigrants held in detention during their deportation proceedings); Press Release, Office of the Mayor of N.Y.C., Mayor de Blasio and Speaker Mark-Viverito Rally Around Universal Access to Free Legal Services for Tenants Facing Eviction in Housing Court (Feb. 12, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/079-17/state-the-city-mayor-de-blasio-speaker-mark-viverito-rally-universal-access-free> [<https://perma.cc/EQ62-E45Y>] (announcing funding that guarantees “all NYC tenants facing eviction access to free legal advice and low-income tenants with full legal representation”).

<sup>14</sup> See, e.g., Letter from Lizbeth Silbermann, Dir., Program Dev. Div., U.S. Dep’t of Agric., to All Reg’l Dirs., Supplemental Nutrition Assistance Program (Nov. 3, 2017), <https://fns-prod.azureedge.net/sites/default/files/snap/Memo-Electronic-Notice-and-Other-Options-11317.pdf> [<https://perma.cc/3HAG-4EVS>] (announcing changes to the electronic notification system for the Supplemental Nutrition Assistance Program).

<sup>15</sup> See, e.g., Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 649-50 (2017) (examining how judges change their practices when proceedings involve pro se litigants); Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1059-60 (2017) (examining alternative judicial decisionmaking and procedural approaches in housing court cases involving pro se litigants).

As procedural innovations proliferate, how will they affect due process doctrine? Perhaps not at all—the innovations may take root or not, while the doctrine remains essentially static. After all, states and cities are free to provide procedural safeguards above and beyond the floor established by the Constitution. Under this view, bottom-up procedural innovations could serve as merely an interesting footnote to our understanding of the Due Process Clause—highly meaningful to the individuals and proceedings they affect but inconsequential as a doctrinal matter and irrelevant to people living in places where the innovations are not available.

This Article considers a different outcome, one that is shaped by a dialogue between bottom-up procedural innovations and the courts' development of due process doctrine. For over forty years, since its decision in *Mathews v. Eldridge*, the Supreme Court has evaluated the constitutionality of procedural rules based on a fact-intensive cost-benefit analysis.<sup>16</sup> Under *Mathews*, courts must consider three factors when determining the “specific dictates” of procedural due process:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>17</sup>

The Court uses a similar balancing approach when considering whether the notice provided by the government satisfies due process.<sup>18</sup> Thus, the procedural due process analysis is sensitive to the facts and circumstances of a particular procedural regime. This distinguishes due process from other individual rights conferred by the Constitution, making due process amenable to reevaluation and revision.

The recent wave of procedural experimentation is generating precisely the kind of evidence that can influence future due process balancing. For each innovation, it may be possible to answer the following questions, among others: How much does a particular innovation cost? To what extent does it help avoid erroneous deprivations of constitutionally protected interests? Is it administratively feasible? As each innovation is implemented, it will be possible to gather data and answer these questions in ways that would be

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<sup>16</sup> *Mathews*, 424 U.S. at 335.

<sup>17</sup> *Id.* at 319.

<sup>18</sup> See *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (“[A]ssessing the adequacy of a particular form of notice requires balancing the ‘interest of the State’ against ‘the individual interest sought to be protected by the Fourteenth Amendment.’” (quoting *Mullane v. Cent. Hanover Bank & Tr.*, 339 U.S. 306, 314 (1950))).

otherwise impossible. This evidence could then be used to fuel litigation efforts to push due process doctrine in new and important directions.

To be sure, there may be reasons to resist constitutionalizing the latest procedural innovations. Ever since the due process revolution, judges, government officials, advocates, and scholars have expressed concerns about extending the scope of constitutional protection.<sup>19</sup> Just because an innovation is feasible or appropriate in one context or in one location does not necessarily mean that it should be extended more broadly. Similarly, some worry that raising the constitutional floor will stifle future innovation.<sup>20</sup> Put simply, the recent flourishing of innovation could be perceived as proof that the courts and the Constitution should keep out. And fears of increased uncertainty and disruption are not to be taken lightly.<sup>21</sup>

But the requirements of due process are particularly well-suited to evolve based on a dialogue between on-the-ground experimentation and legal doctrine. As the Supreme Court has emphasized in case after case, “due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>22</sup> While the extent to which other constitutional rights may change over time is subject to intense dispute,<sup>23</sup> the procedural rights conferred by the Due Process Clause are under no such constraints.<sup>24</sup>

The idea that changing facts and circumstances can affect the meaning of a constitutional right is not a novel one. Courts interpreting the Fourth Amendment’s prohibition on “unreasonable searches and seizures”<sup>25</sup> look to an individual’s “reasonable expectation of privacy,”<sup>26</sup> which evolves over time. Similarly, courts interpreting the Eighth Amendment’s prohibition on “cruel and unusual punishments”<sup>27</sup> consider “evolving standards of decency that mark

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<sup>19</sup> See *infra* subsection III.C.1.

<sup>20</sup> See *infra* subsection III.C.2.

<sup>21</sup> See *infra* subsection III.C.3.

<sup>22</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); see also *Connecticut v. Doebr*, 501 U.S. 1, 10 (1991) (contrasting due process with bright-line legal rules and noting the importance of contextual factors). See generally *infra* subsection III.B.1.

<sup>23</sup> Compare Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 736 (1963) (“A constitutional provision can maintain its integrity only by moving in the same direction and at the same rate as the rest of society.”), with William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976) (arguing that the Constitution was “designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times”).

<sup>24</sup> See Parkin, *supra* note 11, at 1360-65 (citing precedent from the late nineteenth century forward characterizing due process as a “flexible” concept, susceptible to tailoring based on historical and societal circumstances).

<sup>25</sup> U.S. CONST. amend. IV.

<sup>26</sup> *United States v. Jones*, 565 U.S. 400, 406 (2012) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967)).

<sup>27</sup> U.S. CONST. amend. VIII.

the progress of a maturing society.”<sup>28</sup> Nor is the concept of dialogue foreign to constitutional law, though it is typically used to describe an exchange between courts and legislatures<sup>29</sup> or government officials and affected individuals.<sup>30</sup>

This Article argues that a dialogic approach to procedural due process can reunify and revive due process doctrine. I do not suggest that every procedural innovation must be incorporated into due process doctrine—just that courts reviewing due process claims can and should look to non-court-driven reforms for insight into what the Due Process Clause requires. Specifically, courts should consider the data and information generated by procedural reforms when applying the interest-balancing tests mandated by the Supreme Court’s modern approach to due process. The result of that balancing may or may not provide a basis for courts to order additional or alternative procedural safeguards, but this kind of dialogue offers an opportunity to connect due process litigation with non-court-driven innovation and to revive an increasingly stagnant aspect of due process doctrine.

This Article proceeds as follows. Part I traces the development of the Supreme Court’s modern approach to procedural due process. It highlights the role of courts as the drivers of procedural reform, particularly in the wake of the due process revolution of the 1960s and 1970s. After summarizing the leading critiques of the Court’s modern approach to due process, Part I concludes by noting the relative stability of contemporary procedural due process theory and doctrine.

Part II turns away from court-driven procedure and toward the recent trend of procedural reform arising outside the context of constitutional litigation. It profiles three recent procedural innovations: a local legislature’s creation of a right to counsel in deportation and eviction proceedings, a federal agency’s approval of notice by electronic means, and trial court judges’ adoption of an “active judging” approach to cases involving pro se parties. This Part situates each innovation in its doctrinal context, noting that the innovations would not be attainable through due process litigation. It also

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<sup>28</sup> *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>29</sup> See, e.g., Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 211 (2008) (describing the advantages of an approach by which “courts apply constitutional provisions such as the Equal Protection Clause or the Due Process Clause through a dialogic process with the legislature to ensure that the scope of welfare provision democratically reflects our social understandings”).

<sup>30</sup> See, e.g., Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1002 (1988) (discussing “the possibilities of a coherent theory of dialogism in the relationship between dependent people and the state”); David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 842 (1976) (describing the potential for due process hearings in the school discipline context to be “candid and informal exchange[s]” between administrators and students); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 310 (1975) (discussing role of courts in the ongoing dialogue between the state and individuals subject to the laws of the state).

describes how the innovations are generating substantial data and information about their costs and benefits.

Part III explores how due process doctrine and theory can account for non-court-driven innovations like the ones profiled in Part II. It begins by identifying the growing and harmful divergence between due process doctrine and the kinds of procedures that are actually available to affected individuals. Then, in light of the Due Process Clause's deeply rooted flexibility and openness to evolution based on changing facts and circumstances, this Part proposes a dialogic approach to due process that encourages courts to consider non-court-driven innovations when engaging in the requisite cost-benefit balancing to determine the requirements of due process. This Part then considers the limits and potential objections to a dialogic approach to procedural due process. The Article concludes by arguing that a dialogic approach is both consistent with due process theory and doctrine, and also a useful strategy to bridge the growing gap between non-court-driven innovations and the courts' understanding of what the Due Process Clause requires.

## I. COURT-DRIVEN DUE PROCESS

The relationship between courts and procedural due process is not as straightforward as it may seem. Over time, the Supreme Court has taken different approaches to due process claims, particularly with respect to evaluating the specific procedural safeguards required by the Due Process Clause. Since the 1970s, the Court has used a cost-benefit, interest-balancing approach, which requires courts to weigh the interests of affected individuals against the interests of the government. Despite substantial scholarly criticism, that approach has endured, and it has guided the design of the procedural regimes that are in effect today.

This Part traces the evolution of due process doctrine and the Supreme Court's modern approach to procedural due process. It highlights the Court's interventionist rulings during the due process revolution of the 1960s and 1970s, and the Court's ultimate retreat to a more deferential approach. It surveys the procedural reforms that were prompted by due process litigation, and it surfaces the leading scholarly critiques of the Court's modern approach to procedural due process. Finally, this Part notes the relatively stagnant state of current due process doctrine and theory, and the lack of recent court-driven reforms.

### A. *The Due Process Revolution and the Modern Approach to Procedural Due Process*

Throughout American history, the nation's courts have been the arbiters of whether the government has provided due process of law before depriving



someone of “life, liberty, or property.”<sup>31</sup> For nearly two hundred years, this inquiry was fairly ad hoc. Judges ruling on due process challenges looked to a mix of common law, history, tradition, and custom to assess whether the available procedures survived constitutional scrutiny.<sup>32</sup> The Supreme Court had little to say about the specific procedural protections required by the Due Process Clause<sup>33</sup>—in most cases, “the Court merely referred to the requirement of a ‘hearing,’ on the assumption that everyone understood what it meant by the term ‘hearing.’”<sup>34</sup> Instead, most of its due process rulings focused on whether or not the government’s action triggered due process protections at all.<sup>35</sup>

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<sup>31</sup> U.S. CONST. amends. V, XIV (guaranteeing that no person shall be deprived of “life, liberty, or property, without due process of law”); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1890 (2016) (“In the textbooks, procedural due process is a strictly judicial enterprise.”); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>32</sup> See, e.g., *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855) (“[W]e must look to those settled usages and modes of proceeding existing in the common and statute [sic] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.”); see also Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 468 (1986) (explaining that after a brief, early attempt to confine procedural due process to the “procedures that were integral to the English common law system,” the Court “quickly abandoned this approach, . . . choosing instead to ask whether a given procedure was essential to *modern*—as opposed to 17th century—notions of fairness”).

<sup>33</sup> See 2 RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* 797 (5th ed. 2010) (“Until the 1970s, the Court devoted little attention to the question of what process was due once it concluded that due process applied to an agency’s decisionmaking process.”); Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1044 (1984) (observing that the content of due process “seemed so clear to prior generations that they included the term ‘due process’ in the fifth and fourteenth amendments virtually without discussion”).

Legal scholars similarly focused on other aspects of due process. See Redish & Marshall, *supra* note 32, at 455-56 (“[N]otwithstanding the voluminous scholarship dedicated to defining the interests triggering due process, little attention has been given a question of far greater importance to the typical litigant who invokes the clause: What process is due once it is recognized that the guarantee applies in a given case?”).

<sup>34</sup> PIERCE, *supra* note 33, at 797-98. “In the relatively few opinions in which the Court described the nature of the ‘hearing’ required by due process, its brief description suggested that the Court used ‘hearing’ to refer to a decisionmaking procedure modeled after a judicial trial, including oral presentation of evidence and cross-examination.” *Id.* at 798 (citing *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)); see also *Greene*, 360 U.S. at 496-97 (equating due process procedures with the type of procedures available at a judicial trial).

<sup>35</sup> See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (holding unconstitutional a series of statutes that denied welfare assistance to certain individuals based solely on length of residency); *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 246-47 (1957) (holding that New Mexico unconstitutionally deprived an applicant to the state bar of his right to due process by denying his application on the basis of his former membership in the Communist Party); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 558-59 (1956) (holding that a professor at a public university who refused to testify about his membership in the Communist Party before a federal legislative committee was entitled to more process than a “summary dismissal”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544, 546-47 (1950) (upholding the Attorney General’s refusal of an immigration hearing to the noncitizen wife of a World War II veteran).

The Court's due process jurisprudence underwent two radical changes in the 1960s and 1970s. In a series of decisions culminating in *Goldberg v. Kelly*,<sup>36</sup> the Court held that the term "property" in the Fifth and Fourteenth Amendments includes a wider range of interests than the Court had previously recognized.<sup>37</sup> While the property interests protected by due process had historically been limited to "traditional common-law concepts of property,"<sup>38</sup> *Goldberg* held that entitlements and interests created by the government—such as public benefits, licenses, and public employment, among many others—could amount to constitutionally protected property interests as well.<sup>39</sup>

*Goldberg* also demonstrated the Court's new willingness to specify the procedures required by the Due Process Clause.<sup>40</sup> Rather than merely holding that a "hearing" was required before terminating someone's welfare benefits, the Court proceeded to identify the precise procedural safeguards that due process requires in the welfare context. The Court clarified what it means for welfare recipients to receive timely and adequate notice,<sup>41</sup> stating that recipients have a right to a hearing before their benefits are terminated.<sup>42</sup> The Court explained that welfare recipients must have an opportunity to present evidence and argument orally,<sup>43</sup> to confront and cross-examine adverse witnesses,<sup>44</sup> and to appear with an attorney.<sup>45</sup> It also stated that hearing officers must be impartial and their decisions must be based on the record created at the hearing.<sup>46</sup>

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<sup>36</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963) (citing a series of previous due process decisions to support holding that an individual's interest in unemployment compensation benefits is a right rather than "merely a 'privilege'"); *Speiser v. Randall*, 357 U.S. 513, 555-57 (1958) (holding a citizen's interest in a tax exemption to be protected by due process); *Slochower*, 350 U.S. at 555-57 (holding that interest in public employment is protected by due process).

<sup>37</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>38</sup> *Id.* at 262 n.8.

<sup>39</sup> *Id.* at 262. In just one year after deciding *Goldberg*, the Court held that "property" interests were at issue when the government suspended a driver's license, denied social security benefits, and categorized a person as an "excessive" drinker. See *Bell v. Burson*, 402 U.S. 535, 542-43 (1971); *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971); see also *Friendly*, *supra* note 2, at 1268 ("[T]he Court has carried the hearing requirement from one new area of government action to another.").

<sup>40</sup> See *PIERCE*, *supra* note 33, at 799 ("*Goldberg v. Kelly* marked the beginning of the Court's systematic effort to determine in detail the procedures required for the kind of 'hearing' sufficient to satisfy due process." (internal citation omitted)).

<sup>41</sup> *Goldberg*, 397 U.S. at 268.

<sup>42</sup> *Id.* at 263-66.

<sup>43</sup> *Id.* at 269.

<sup>44</sup> *Id.* at 269-70.

<sup>45</sup> *Id.* at 270-71.

<sup>46</sup> *Id.* at 271.

But *Goldberg* did not announce a method or test for analyzing whether existing procedures comply with the Due Process Clause.<sup>47</sup> Nor did it clarify whether and when courts should specify the procedures required by due process.<sup>48</sup> In fact, in a handful of cases decided shortly after *Goldberg*, the Court took inconsistent approaches to this aspect of the due process analysis, specifying the procedures in some<sup>49</sup> and declining to do so in others.<sup>50</sup>

It was not until six years later, in *Mathews v. Eldridge*, that the Court adopted what has become the modern approach to procedural due process.<sup>51</sup> The plaintiff in *Mathews* claimed that the federal government's procedures for terminating Social Security disability benefits did not comply with due process.<sup>52</sup> In the course of rejecting the plaintiff's claim, the Court announced a new cost-benefit approach to evaluating whether existing procedures comply with the Due Process Clause.<sup>53</sup> According to *Mathews*, courts must determine the "specific dictates of due process" by balancing the following three factors:

[f]irst, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>54</sup>

The *Mathews* approach marked a departure from the Court's previous rulings on procedural due process. The Court paired *Goldberg*'s willingness to specify the requirements of procedural due process with an interest-balancing test for determining whether "additional or substitute procedural safeguards"

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<sup>47</sup> That said, by 1975 there "ha[d] been a measure of consistency as to the factors which the Court . . . consider[ed] in determining what due process requires." Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1517 (1975) [hereinafter *Specifying the Procedures*].

<sup>48</sup> See *id.* ("[T]here has been confusion as to whether the Court should itself specify a general set of procedures for similar future cases or whether it should leave this to be accomplished on a case-by-case basis."); cf. PIERCE, *supra* note 33, at 799 ("Once it decided *Goldberg*, the Court was forced to consider carefully and critically what 'hearing' mean[t] in the context of resolving administrative disputes.").

<sup>49</sup> See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 563-72 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 485-89 (1972).

<sup>50</sup> See, e.g., *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972); *Bell v. Burson*, 402 U.S. 535, 542-43 (1971).

<sup>51</sup> 424 U.S. 319, 334-35 (1976); see also Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 422 (2010) ("The Court's modern approach to implementing the procedural aspects of the Due Process Clauses focuses on the three-factor balancing test set forth in *Mathews v. Eldridge* . . .").

<sup>52</sup> *Mathews*, 424 U.S. at 323-25.

<sup>53</sup> *Id.* at 334-35.

<sup>54</sup> *Id.*

are required by the Constitution.<sup>55</sup> *Mathews* made no reference to common law, history, or custom. Rather, its analysis focused on current conditions and the relative costs and benefits of expanding or modifying existing procedures. This is not altogether surprising, as *Mathews* involved a species of “new property” that until recently had fallen outside the protection of due process,<sup>56</sup> and for which there were no examples of analogous past practices to guide the due process analysis.<sup>57</sup> Yet the Court has since applied *Mathews*’s fact-driven, interest-balancing approach across a wide range of civil proceedings, far beyond the types of “new property” considered by the Court in *Goldberg* and *Mathews*.<sup>58</sup>

Although *Mathews* supplied the “general approach” for determining the procedures required by the Due Process Clause,<sup>59</sup> it did not address the notice that must be provided when the government deprives an individual of “life,

<sup>55</sup> *Id.* at 335.

<sup>56</sup> The Court’s decision in *Goldberg* was the first time it held that an individual’s interest in continued receipt of a public benefit could be a “property” interest protected by the Due Process Clause. See *Goldberg v. Kelly*, 397 U.S. 254, 261-62 & n.8 (1970) (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”). Following *Goldberg*, the Court had implied—without deciding—that Social Security disability benefits were a “property” interest as well. See *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (“We have held that ‘the interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause.’” (quoting *Flemming v. Nestor*, 363 U.S. 603, 611 (1960))); *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (“We may accept the proposition[] advanced by the claimant . . . that the right to Social Security benefits is in one sense earned.” (quoting *Flemming*, 363 U.S. at 610) (internal quotations omitted))).

<sup>57</sup> Cf. *PIERCE*, *supra* note 33, at 798 (“Most of the disputes agencies are required to resolve today did not exist until recent decades and have no clear historical analogue.”).

<sup>58</sup> See, e.g., *Turner v. Rogers*, 564 U.S. 431, 444-45 (2011) (right to counsel in civil contempt proceedings to enforce child support orders); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993) (seizure of real property through civil forfeiture); *Connecticut v. Doeher*, 501 U.S. 1, 11, 24 (1991) (prejudgment attachment); *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320, 333-34 (1985) (attorney-payment rules in proceedings involving veterans’ benefits), *superseded by statute*, Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105, *as recognized in* *Cintron v. West*, 13 Vet. App. 251 (Vet. App. 1999); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (firing of public school employees); *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (state parental rights termination proceedings); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27-28 (1981) (right to counsel for indigent parents in termination of parental rights proceedings); *Little v. Streater*, 452 U.S. 1, 13 (1981) (payment for blood tests in paternity suits); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (involuntary civil commitment to mental hospitals); *Mackey v. Montrym*, 443 U.S. 1, 10 (1979) (civil suspension of a driver’s license); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 n.3 (1978) (dismissal from a public university’s medical school).

<sup>59</sup> *Parham v. J.R.*, 442 U.S. 584, 599-600 (1979) (referring to the *Mathews* test as “a general approach for testing challenged state procedures under a due process claim”); see also Gerald L. Neuman, *The Constitutional Requirement of “Some Evidence”*, 25 SAN DIEGO L. REV. 631, 698 (1988) (“Eldridge balancing has increasingly colonized the domain of due process . . .”). But cf. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 331 (1993) (“Although the Supreme Court has treated *Mathews* as furnishing a test for all seasons, it was designed for resolving claims of entitlement to particular types of administrative, rather than judicial, procedures.”).

liberty, or property.” It is axiomatic that individuals can exercise their right to be heard only if they are first notified of the proceedings.<sup>60</sup> To assess whether notice is sufficient, the Court has relied on *Mullane v. Central Hanover Bank & Trust Co.*, which asks whether notice is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>61</sup> Despite their differences, the Court has clarified that the *Mathews* and *Mullane* tests are to be applied in a similar fashion, with courts weighing the individual’s interests against the interests of the government.<sup>62</sup>

### B. Court-Driven Procedures

The due process revolution gave rise to the modern, court-centric notion of procedural due process.<sup>63</sup> Whether prompted by court order or merely the threat of litigation, government agencies were forced to conform old procedures and create new ones to satisfy the Court’s evolving interpretation

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<sup>60</sup> See *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (“Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.” (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 223)); see also *Friendly*, *supra* note 2, at 1280-81 (“It is . . . fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it. Otherwise the individual likely would be unable to marshal evidence and prepare his case so as to benefit from any hearing that was provided.” (footnote omitted)).

<sup>61</sup> 339 U.S. 306, 314 (1950); see also *Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002) (explaining that courts must use the *Mullane* reasonableness test—not the *Mathews* balancing test—when evaluating due process claims involving notice); W. Alexander Burnett, Casenote, *Dusenbery v. United States: Setting the Standard for Adequate Notice*, 37 U. RICH. L. REV. 613, 626 (2003) (“In *Dusenbery*, the Court affirmed—in no unclear terms—that the *Mullane* standard is the appropriate analytical framework for determining whether a method of delivery of notice satisfies the due process requirements in the Fifth and Fourteenth Amendments.”).

<sup>62</sup> See, e.g., *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (applying *Mullane* and assessing the adequacy of the challenged notice by “balancing the interest of the State against the individual interest sought to be protected” (quoting *Mullane*, 339 U.S. at 314) (internal quotation marks omitted)); Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1114 (2012) (“Although *Mullane* did not engage in the balancing test outlined in *Mathews v. Eldridge*, the decision is consistent with an approach that takes all of the relevant interests at stake into account to compare different procedures.”); Philip P. Ehrlich, *A Balancing Equation for Social Media Publication Notice*, 83 U. CHI. L. REV. 2163, 2178 (2016) (“Although *Mathews* and *Mullane* use different language, both cases create the same cost-benefit test for courts to evaluate whether parties provided the best notice practicable.”).

<sup>63</sup> See 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, 28-29 (1976) (“During the 1970s the Supreme Court has undertaken an intensive review of administrative hearing procedures for conformity with constitutional requirements of due process of law . . . . What followed was a ‘due process revolution’—a flood of cases seeking to extend, or simply to apply, *Goldberg’s* precepts.” (footnote omitted)). *But cf.* Vermeule, *supra* note 31, at 1903 (“[T]here is no necessary connection between *Mathews’s* due process calculus and the notion that procedural due process must entail the allocation of primary decisional responsibility to courts.”).

of the Due Process Clause.<sup>64</sup> This dynamic was most evident in the “new property” context,<sup>65</sup> but it extended to more traditional forms of property and liberty interests as well.

Judicial scrutiny of due process procedures did not always result in agencies providing additional procedural safeguards, however. In fact, *Goldberg* itself arguably prompted a policy reversal that led to less, rather than more, procedural protections for welfare recipients. In November 1968, two years before *Goldberg* was decided, the agency responsible for administering the federal welfare program proposed regulations requiring state and local welfare agencies to make available free legal representatives to welfare recipients in the hearing process.<sup>66</sup> The regulations were initially scheduled to become effective in 1969, but they were delayed and still pending when *Goldberg* came before the Court.<sup>67</sup> Ultimately, *Goldberg* held that welfare recipients have a due process right to be represented by counsel at their hearings, but not that the government is obliged to provide free counsel to recipients.<sup>68</sup> Following the Court’s decision, the agency revised its regulations, deleting the mandatory representation provision and limiting the hearing procedures to those specifically identified in *Goldberg*.<sup>69</sup>

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<sup>64</sup> See, e.g., Robert E. Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725, 726 n.6 (1972) (“Following *Goldberg* a number of courts have found state procedures for termination or suspension of public assistance benefits constitutionally defective.”); see also Parkin, *Adaptable Due Process*, *supra* note 11, at 1323 (“In response to the Supreme Court’s rulings in *Goldberg* and *Mathews*, federal, state, and local administrative agencies adjusted existing procedures and created new ones in order to satisfy the requirements of due process.”). These developments in due process doctrine were not always well received. See Kirp, *supra* note 30, at 842 (observing that “new applications” of due process doctrine “encountered resistance within the affected bureaucratic and professional organizations, which found the implementation of procedural norms threatening”).

<sup>65</sup> See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (discussing concept of “new property”); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965) (“The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right.”).

<sup>66</sup> See Fair Hearings—Public Assistance Programs, 33 Fed. Reg. 17,853 (Oct. 30, 1968) (to be codified at 45 C.F.R. Ch. II) (proposing regulations requiring state and local welfare agencies to provide representation at welfare hearings beginning July 1, 1969); 34 Fed. Reg. 1354, 1356 (Jan. 28, 1969) (to be codified at 45 C.F.R. pt. 220) (“Legal services must be made available to families who desire the assistance of lawyers at fair hearings and appropriate fee schedules . . . must be established to assure legal representation when desired.”). Notably, the regulations were issued after the three-judge district court in *Goldberg* issued its decision “signalling [sic] the new judicial attitude toward pre-termination notice and hearing . . .” Scott, *supra* note 64, at 729. See generally Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968), *aff’d sub nom.* Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970).

<sup>67</sup> See Fair Hearings: Legal Services; Continuing Assistance, 34 Fed. Reg. 13,595 (Aug. 22, 1969) (postponing the effective date of regulations requiring representation at welfare hearings to July 1, 1970).

<sup>68</sup> *Goldberg*, 397 U.S. at 270-71.

<sup>69</sup> See Fair Hearings; Revocation of Regulations, 35 Fed. Reg. 10,591 (June 26, 1970) (codified at 45 C.F.R. § 205.10(a)(3)(iii) (1973)) (removing the mandatory representation provision from the

Developments in Supreme Court doctrine also influenced legislation drafted by Congress. Although most major federal programs had been enacted by the time the Court's modern procedural due process doctrine took shape, not all had. For example, in 1975, in the middle of the due process revolution, Congress passed landmark legislation that later became known as the Individuals with Disabilities Education Act.<sup>70</sup> The legislation imposed new requirements on schools serving students with special needs.<sup>71</sup> Congress reasonably anticipated that school administrators' decisions would be subject to due process scrutiny<sup>72</sup> and mandated a set of procedural safeguards that were consistent with the Supreme Court's modern approach to due process.<sup>73</sup>

Individuals also looked to the courts for clarification and enforcement of their procedural due process rights. The late 1960s and 1970s saw an "explosion" of due process litigation.<sup>74</sup> Although the volume of litigation eventually tapered off, plaintiffs have continued to turn to the courts for clarification on whether available procedures comply with the Due Process Clause and what additional or substitute procedural safeguards might be required by the Constitution.

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final regulations). *See generally* Scott, *supra* note 64 (discussing pre- and post-*Goldberg* hearing regulations). "Whether the implications of the *Goldberg* requirements or more concrete economic considerations were responsible for the decision to revoke the free legal representation requirement is not entirely clear." *Id.* at 730.

<sup>70</sup> Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended in scattered sections of 20 U.S.C. § 1400 *et seq.*). In 1990, Congress amended and renamed this legislation the Individuals with Disabilities Education Act (IDEA). Pub. L. No. 101-476, 104 Stat. 1103, 1142-43 (1990) (codified as amended in scattered sections of 20 U.S.C. § 1400 *et seq.*); *see also* Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 444 (2011) ("The IDEA was enacted . . . in the midst of what has come to be known as the due process revolution.").

<sup>71</sup> Education for All Handicapped Children Act § 612.

<sup>72</sup> *See* Romberg, *supra* note 70, at 445 ("[N]otions of proceduralism were prominent in the minds of the Congress that enacted the IDEA . . ."). Indeed, lower courts had already begun finding due process rights in the special education context. *See, e.g.,* Mills v. Bd. of Educ., 348 F. Supp. 866, 875-76 (D.D.C. 1972) (citing *Goldberg*, 397 U.S. 254) (holding that plaintiffs' due process rights were violated); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295 (E.D. Pa. 1972) (holding that plaintiff class of special education students had "established a colorable claim under the Due Process Clause").

<sup>73</sup> *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982) (explaining that "[b]oth the House and the Senate Reports attribute the impetus for the [Education for All Handicapped Children] Act and its predecessors to two federal-court judgments" rendering post-*Goldberg* due process decisions); *see also* Romberg, *supra* note 70, at 446 ("The due process revolution, as reflected in [two lower court rulings analyzing the due process rights of students with special needs], was . . . imported into the IDEA itself.").

<sup>74</sup> Friendly, *supra* note 2, at 1268; *see also* MASHAW, *supra* note 2, at 9-10 (noting that "federal court complaints of procedural due process deprivation in the 1970s showed a 350 percent increase over the 1960s," compared to a 70% increase in federal civil litigation of all kinds); Rubin, *supra* note 33, at 1146 ("The welfare rights movement and related social trends brought a wider variety of administrative actions to the courts than they had previously seen.").

Just as hearing procedures were revised in the wake of *Goldberg* and the due process revolution, so too were the notices provided by the government. Agencies promulgated new regulations establishing detailed standards for notices that were in line with the policymakers' understanding of the constitutional requirements. Those regulations typically focused on the content and timeliness of the notice, with little detail as to how the notice was to be transmitted. At most, there were passing references to the "mailing" of the notices.<sup>75</sup>

Not surprisingly, litigation involving the notice aspect of the Due Process Clause increased in the wake of *Goldberg* and the due process revolution. Once the Supreme Court endorsed an expanded definition of "property" under the Fifth and Fourteenth Amendments,<sup>76</sup> the notice that the government provided before depriving individuals of those "new property" interests came under constitutional scrutiny for the first time. In cases involving public benefits, public employment, and other interests, courts fleshed out what the *Mullane* "reasonably calculated" standard meant in these various contexts.<sup>77</sup> The primary focus was on the content and timeliness of the notice,<sup>78</sup> not on how the notice was transmitted to the affected individual. To the extent that courts considered notice transmission at all, they assumed that sending paper notices by mail to affected individuals was sufficient to satisfy the Due Process Clause.<sup>79</sup>

### C. Critiques of the Modern Approach to Procedural Due Process

The Supreme Court's modern approach to procedural due process prompted intense criticism.<sup>80</sup> Although utilitarian balancing was not entirely new to the due process analysis,<sup>81</sup> scholars assailed the Court's adoption of such an approach in *Mathews*. Some argued that using a cost-benefit approach to determine which procedures are required by due process dilutes the Constitution's protections against procedural unfairness.<sup>82</sup> Cynthia Farina

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<sup>75</sup> See *infra* notes 136–138 and accompanying text (describing notice requirements contained in food stamps statute and regulations).

<sup>76</sup> *Goldberg*, 397 U.S. at 262 n.8.

<sup>77</sup> *Mullane v. Cent. Hanover Bank & Tr.*, 339 U.S. 306, 314 (1950).

<sup>78</sup> See RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 17.8(h) (5th ed. 2012) (discussing *Mullane* and its progeny).

<sup>79</sup> *Id.*

<sup>80</sup> See Rubin, *supra* note 33, at 1044 (observing, less than a decade after *Mathews*, that "[t]he procedural due process doctrine is now the subject of intense debate, with its central meaning regularly questioned by both courts and commentators").

<sup>81</sup> See Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 4 (1943) (defining "due process of law" as "a weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment"). *But cf.* Rubin, *supra* note 33, at 1137 ("Although Justice Powell stated [in *Mathews*] that the three factors had been dictated by the Court's 'prior decisions,' they were largely new to due process adjudication." (footnote omitted)).

<sup>82</sup> *Specifying the Procedures*, *supra* note 47, at 1527 ("When courts accept essentially utilitarian justifications for withholding procedural protections, the due process clause ceases to be respected



characterized *Mathews's* use of utilitarian balancing as “deeply troubling,” asking, “If due process is to mark out and defend a sphere in which the individual is reliably preserved from the demands of the collective, how can the extent of the protection the individual receives turn on some calculus explicitly designed to maximize aggregate welfare?”<sup>83</sup> Others, most notably Jerry Mashaw, criticized the *Mathews* approach for conceiving of the values of due process too narrowly,<sup>84</sup> underemphasizing “process values,” and ignoring the complexities and ambiguities present in many procedural systems.<sup>85</sup>

The interest-balancing approach has also been criticized for being difficult—if not impossible—to apply.<sup>86</sup> As an initial matter, some scholars have argued that courts—as compared to legislatures and administrative agencies—lack the institutional competence to engage in this type of cost–benefit analysis.<sup>87</sup> Scholars

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as a basic right which the individual can assert against the power of government and becomes instead simply one of the several checks and balances in the separation of powers scheme.”).

<sup>83</sup> Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 234 (1991); see also Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2279 (2013) (“In practice, th[e *Mathews*] approach tends to reinforce hierarchies of economic privilege and the status quo of access to justice, as what process is due rests on the value of that process to society.”); cf. John J. Capowski, *Reflecting and Foreshadowing: Mathews v. Eldridge* (1976), in THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES 219, 219 (Marie A. Failing & Ezra Rosser eds., 2016) (“*Mathews* is a case that foreshadowed the rightward political movement in this country.”).

<sup>84</sup> See Mashaw, *supra* note 63, at 46 (“The Supreme Court’s analysis in *Eldridge* is not informed by systematic attention to any theory of the values underlying due process review. The approach is implicitly utilitarian but incomplete, and the Court overlooks alternative theories that might have yielded fruitful inquiry.”); see also Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 154–56 (1978) (arguing that *Mathews* undervalues dignitary interests).

<sup>85</sup> Mashaw, *supra* note 63, at 48; see also Farina, *supra* note 83, at 235 (arguing that the *Mathews* analysis “shares with all cost/benefit assessments the tendency to overlook, or at least underrate, ‘soft’ variables”); Redish & Marshall, *supra* note 32, at 474 (arguing that the *Mathews* balancing approach fails because it is unable to account for “the traditional concerns of procedural justice that the framers most certainly intended when they shaped the two amendments”); Rubin, *supra* note 33, at 1138 (“[T]he [*Mathews*] criteria themselves focus on subsidiary issues rather than the essence of the due process guarantee”); Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 158 (2011) (“[T]he *Mathews v. Eldridge* formulation, focused on accuracy, does not take other goals that can be assigned to due process into account.”).

<sup>86</sup> See, e.g., PIERCE, *supra* note 33, at 812 (“Like Hand’s formula, the *Mathews* formula is conceptually simple but extremely difficult to apply.”); Mashaw, *supra* note 63, at 48 (“[T]he [*Mathews*] calculus asks unanswerable questions.”); Rubin, *supra* note 33, at 1138 (“[T]he *Mathews* framework presents considerable difficulties.”).

<sup>87</sup> See, e.g., PIERCE, *supra* note 33, at 820 (“The complicated nature of the cost–benefit analysis required by the *Mathews* test raises serious questions concerning the competence of judges to apply that test.”); see also Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1999 (1996) (“Politically accountable legislatures are far better than courts at determining the relative social value of the myriad benefits they choose to make available by statute, and agencies are far better than courts at performing the difficult empirical work required to estimate the costs

have noted that judges reviewing due process claims rarely have before them the types of data and empirical information that the three-factor balancing test requires.<sup>88</sup> Indeed, *Mathews* requires courts to predict the impact of “additional or substitute procedural safeguards,”<sup>89</sup> which typically have not been utilized in the context at issue.<sup>90</sup> Moreover, it is far from clear how courts are to determine the “weight” of each *Mathews* factor<sup>91</sup> or how to weigh the three factors against each other.<sup>92</sup> As a result, critics claim that the *Mathews* approach creates uncertainty about the requirements of due process,<sup>93</sup> both for legislators and policymakers

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and benefits of alternative decisionmaking procedures.”). Pierce writes, “Courts systematically overestimate the benefits and underestimate the costs of formal decisionmaking.” *Id.*

<sup>88</sup> See Farina, *supra* note 83, at 196 (“Although framed in terms that invite quantitative analysis, the *Mathews* balance is rarely conducted with empirical evidence.”). Judith Resnik succinctly explained the problem:

[E]ven as *Mathews v. Eldridge* prompts a judicial accounting of the bases for a due process ruling, its veneer of scientific constraints on judicial judgment can serve to mask the lack of genuine empiricism. Neither judges nor litigants can identify with any rigor the actual costs of various procedures, let alone model (or know) the impact in terms of false positives and negatives produced by the same, more, or different processes . . . . While one can state the equation, one cannot do the math because the data are missing. Interpretive choices abound.

Resnik, *supra* note 85, at 158; cf. Friendly, *supra* note 2, at 1303 (“[F]ive years after *Goldberg*, we have so little empirical knowledge how it has worked in its own field, let alone in others where its principles have been applied.”).

<sup>89</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>90</sup> See, e.g., Farina, *supra* note 83, at 235 (“How can the Court predict the number of errors that would be avoided by, for example, permitting the individual to present oral testimony? Or the cost to the government that would be entailed? Although in theory quantifiable, these factors cannot, realistically, be quantified.”).

<sup>91</sup> See, e.g., *Specifying the Procedures*, *supra* note 47, at 1519 (“No scale has been calibrated which courts, legislators, and administrators can use to sensitively and predictably measure either the relative severity of deprivations inflicted upon individuals or the relative importance of governmental interests in summary action.”).

<sup>92</sup> See, e.g., Rubin, *supra* note 33, at 1138 (“This reliance upon ‘weight,’ which is a useful approach for dealing with bananas, leaves something to be desired where factors such as those in *Mathews* are concerned.”); *Specifying the Procedures*, *supra* note 47, at 1520 (“[T]here is no method by which the weight of the individual’s interest in obtaining protective procedures and the weight of the government’s interest in acting informally—optimistically assuming that each of these can somehow be accurately measured in isolation from the other—can be compared.”).

<sup>93</sup> See, e.g., PIERCE, *supra* note 33, at 805 (“Application of the *Mathews* approach to a given class of disputes has the potential to yield any of a wide range of minimum procedural safeguards depending on the Justices’ assessment of the three factors encompassed in the *Mathews* balancing test.”); Farina, *supra* note 83, at 196 (“[T]he precise outcome of the balancing in any given case is virtually impossible to predict . . . .”); *Specifying the Procedures*, *supra* note 47, at 1519 (“[T]he concept of ‘weight’ employed in the interest-balancing doctrine is of such a subjective and ambiguous nature that use of interest balancing necessarily occasions great uncertainty.”); see also PIERCE, *supra* note 33, at 809 (“Not surprisingly, circuit courts often differ with respect to the results of their applications of the *Mathews* test to similar cases.”).

seeking to comply with the Due Process Clause<sup>94</sup> and for individuals unsure whether they have suffered a violation of their due process rights.<sup>95</sup>

Despite these critiques and challenges, the interest-balancing approach to procedural due process endures. The Court has had numerous opportunities to modify or overturn its due process precedents but has declined to do so. It has also had occasion to limit the application of *Mathews* to public benefits adjudications or “new property” claims, but it has not. To the contrary, it continues to apply *Mathews* in new situations that bear little resemblance to the type of “new property” at issue in that case.<sup>96</sup>

Just as the Court’s approach to procedural due process claims has remained stable for decades, so too has the resulting case law. Procedural regimes that were established or modified in the wake of the due process revolution remain largely identical today.<sup>97</sup> Whether due to evidentiary hurdles created by the cost-benefit approach or to a growing reluctance among judges to hold existing procedures unconstitutional and to specify new procedures,<sup>98</sup> due process procedures can appear stuck in the past, despite ever-increasing changes that arguably bear upon one or more of the *Mathews* factors.<sup>99</sup>

There may be reasons to revisit old procedures and redo the due process analysis with new facts.<sup>100</sup> Courts, policymakers, legislatures, and litigants now have access to new technology, new insights into how procedural systems function, and new evidence of how individuals use (or fail to use) the procedures that are available to them. But courts have not been sites for this

<sup>94</sup> See, e.g., *Specifying the Procedures*, *supra* note 47, at 1520 (“[E]xcessive uncertainty as to what the requirements of due process are may seriously hamper the efforts of legislators and administrators to fashion governmental programs which comport with due process and yet are efficiently administered.”).

<sup>95</sup> See, e.g., *id.* at 1521 (arguing that the uncertainty and unpredictability created by an interest-balancing approach to procedural due process “may require citizens affected by similar governmental actions to relitigate repeatedly the issue of whether the minimum requirements of due process have been satisfied”).

<sup>96</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-35 (2004) (applying *Mathews* in case where a U.S. citizen was detained as an enemy combatant). *But see id.* at 575 (Scalia, J., dissenting) (criticizing the majority for applying the *Mathews* test, which was derived from “a case involving . . . the withdrawal of disability benefits!”); Fallon, *supra* note 59, at 331 (“Although the Supreme Court has treated *Mathews* as furnishing a test for all seasons, it was designed for resolving claims of entitlement to particular types of *administrative*, rather than *judicial*, procedures. Claims of a right to judicial review raise issues lying beyond the *Mathews* framework.” (footnote omitted)).

<sup>97</sup> See Farina, *supra* note 83, at 254 (“At the agency level, we have watched programs rigidify around the contours of entitlement, as constitutional floors become process ceilings.”); Parkin, *supra* note 11, at 1334-36 (discussing the ossification of due process procedures in the decades after the due process revolution).

<sup>98</sup> This is consistent with the broader trend of judges becoming more deferential to government policy choices and less inclined to micromanage government agencies. See, e.g., Ronald M. Levin, *Administrative Procedure and Judicial Restraint*, 129 HARV. L. REV. F. 338, 347 (2016) (“[T]oday’s courts do not seem particularly eager to expand procedural rights in administrative adjudication . . . .”); see also *infra* subsection III.C.1.

<sup>99</sup> See, e.g., Parkin, *supra* note 11, at 1336-60 (discussing changes in the facts and circumstances of welfare programs and welfare recipients following the *Goldberg* decision).

<sup>100</sup> See *id.* at 1366-74.

kind of rigorous reevaluation of due process procedures, despite the Supreme Court's frequent reminder that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."<sup>101</sup> Procedural innovation is happening, but unlike the innovations of the 1960s and 1970s, it is not being driven by courts.

## II. BOTTOM-UP PROCEDURAL INNOVATION

Not content to wait for courts to reassess longstanding due process precedents, legislatures, policymakers, and advocates have been seeking procedural innovations outside of litigation. Some of these innovations are ones that courts had previously rejected as not required by the Due Process Clause. Others are procedures that have never been the subject of constitutional litigation. Either way, the result is that procedural safeguards are evolving without judicial intervention—or even the threat of judicial intervention.

Despite the detachment from constitutional litigation, much of the rhetoric associated with these reforms sounds in due process. Proponents frequently describe the reforms as necessary to ensure that proceedings are fair and participants are afforded due process. For them, the concept of "due process" appears to have meaning and power that is not bound by the limits of due process doctrine. Indeed, in some instances, proponents of procedural reforms describe the reforms as compelled by due process even when courts have uniformly held that the Due Process Clause does not in fact require the procedures at issue.

This Part identifies three examples of non-court-driven procedural reforms: the right to appointed counsel, electronic transmission of notice, and active judging. The examples represent a new and growing trend in which procedural reforms and innovations are being driven not by creative and precedent-setting constitutional litigation, as during the due process revolution, but rather by reform efforts and experimentation that are unfolding outside formal due process doctrine.

### A. *Right to Counsel*

Since the due process revolution, the Supreme Court has considered on a number of occasions whether the Due Process Clause requires the government to provide a lawyer before depriving an individual of her constitutionally protected interest. The Court declined to reach the question in *Goldberg v. Kelly* as it related to welfare hearings,<sup>102</sup> but it could not dodge the issue for long.

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<sup>101</sup> *Connecticut v. Doebr*, 501 U.S. 1, 10 (1991) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

<sup>102</sup> *See* 397 U.S. 254, 270 (1970) ("We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires."). Justice Black, writing in dissent, asserted that even though the majority decision "requires only the opportunity to have

Ultimately, the Court held that due process does not require appointment of counsel in civil proceedings unless a person's liberty is at stake,<sup>103</sup> and, even then, procedural safeguards short of a right to counsel can be sufficient.<sup>104</sup>

Despite the Supreme Court's hostility towards civil right-to-counsel claims,<sup>105</sup> the idea that the Due Process Clause may require appointment of a lawyer is a persistent one. With respect to deportation and eviction proceedings, for example, scholars have put forward various arguments for a right to appointed counsel rooted in due process. Employing the Court's *Mathews* analysis, they have identified the various interests at stake, weighed those interests against each other, and argued that the Due Process Clause mandates the appointment of counsel. Some argue for a categorical right to counsel in deportation<sup>106</sup> and eviction proceedings,<sup>107</sup> while others focus on

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the benefit of counsel at the administrative hearing. . . it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these people are too poor to hire their own advocates." *Id.* at 278-79 (Black, J., dissenting). His prediction has not come true.

<sup>103</sup> See *Turner v. Rogers*, 564 U.S. 431, 442 (2011) ("[The] pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981))). Compare *Turner*, 564 U.S. at 448 (holding that there is no right to counsel in civil contempt proceedings for nonsupport of child), and *Lassiter*, 452 U.S. at 23 (holding that there is no right to counsel in termination of parental rights cases), and *Wolff v. McDonnell*, 418 U.S. 539, 569-70 (1974) (holding that there is no right to counsel in prison discipline cases), with *In re Gault*, 387 U.S. 1, 36 (1967) (holding that juveniles in delinquency cases have a right to counsel), and *Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) (holding that where the state seeks to transfer an indigent prisoner to a mental health facility against his will, a "qualified representative" must be provided).

<sup>104</sup> See *Turner*, 564 U.S. at 447-48 (rejecting plaintiff's right-to-counsel argument and holding that a set of "substitute procedural safeguards" can satisfy due process even when the plaintiff's liberty is at stake); *Vitek*, 445 U.S. at 500 (Powell, J., concurring) (describing the majority as holding that a prisoner involuntarily transferred to a mental health facility has a right to "qualified and independent assistance" but not necessarily an attorney).

<sup>105</sup> This hostility contrasts, of course, with the Court's right-to-counsel jurisprudence in the criminal context. See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (holding that indigent defendants in state criminal proceedings have a right to appointed counsel under the Sixth Amendment).

<sup>106</sup> See, e.g., Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1629-30 (2010); Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 395 (2000); William Haney, Comment, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 177, 185 (1970).

<sup>107</sup> See, e.g., Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1509-18 (2004); Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 558 (1988); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 700 (2006); Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 421 (1995); Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 538-53 (1991). See generally Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187 (2009)

the due process rights of particular subgroups.<sup>108</sup> Such subgroups in the immigration context include noncitizens who are asylum seekers,<sup>109</sup> who lack mental competency,<sup>110</sup> who are juveniles or unaccompanied minors,<sup>111</sup> and who are lawful permanent residents,<sup>112</sup> among others.<sup>113</sup> Similar subgroups have been identified in the eviction context as well.<sup>114</sup> The academic literature thus reflects a persistent effort to argue for a right to counsel under the *Mathews* approach to procedural due process.

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(summarizing arguments presented by advocates who seek to establish a right to counsel for indigent tenants in eviction proceedings).

<sup>108</sup> See Jason Parkin, *Due Process Disaggregation*, 90 NOTRE DAME L. REV. 283, 287-88 (2014) (considering the due process rights of subgroups of individuals with different procedural needs than the typical individual in a particular procedural context).

<sup>109</sup> See John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, “*Death Is Different*” and a *Refugee’s Right to Counsel*, 42 CORNELL INT’L L.J. 361, 363 (2009); Nimrod Pitsker, Comment, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169, 171 (2007).

<sup>110</sup> See Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 377 (2011); Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN’S L. REV. 915, 940-53 (2016); Aliza B. Kaplan, *Disabled and Diserved: The Right to Counsel for Mentally Disabled Aliens in Removal Proceedings*, 26 GEO. IMMIGR. L.J. 523, 558 (2012); *Developments in the Law—Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1675-78 (2013); Helen Eisner, Comment, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. PA. J. CONST. L. 511, 514-36 (2011); Christopher Klepps, Note, *What Kind of “Process” Is This?: Solutions to the Case-by-Case Approach in Deportation Proceedings for Mentally Incompetent Non-Citizens*, 30 QUINNIPIAC L. REV. 545, 547 (2012).

<sup>111</sup> See Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. L. & SOC. CHANGE 63, 103-05 (2011); Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41,44 (2011); Benjamin Good, Note, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 128-47 (2014); see also Susan Hazeldean, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. DAVIS L. REV. 373, 417-32 (2011) (arguing for a due process right to counsel for lesbian, gay, bisexual, and transgender (LGBT) children and young adults seeking asylum).

<sup>112</sup> See Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2414 (2013); *Developments in the Law—Immigrant Rights & Immigration Enforcement*, *supra* note 110, at 1674-75; see also Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 68 (2012) (arguing for a due process right to counsel for lawful permanent residents who are detained during their deportation proceedings); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 116 (2008) (listing the ways in which detention impacts a noncitizen’s ability to effectively defend against removal).

<sup>113</sup> See, e.g., Christen Chapman, *Relief from Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1554-69 (2011) (arguing for due process right to counsel for individuals who are statutorily eligible to seek relief from removal); David A. Robertson, *An Opportunity to Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019, 1037-40 (1988) (same).

<sup>114</sup> See, e.g., Meghan P. Carter, Comment, *How Evictions from Subsidized Housing Routinely Violate the Rights of Persons with Mental Illness*, 5 NW. J.L. & SOC. POL’Y 118, 136-40 (2010) (arguing that individuals with mental disabilities who are facing eviction from subsidized housing have a due process right to appointed counsel).

Arguments for a due process right to counsel have made no headway in the courts,<sup>115</sup> but that is not the end of the story. Recent nonlitigation efforts in New York City have succeeded in guaranteeing counsel for indigent individuals appearing in deportation and eviction proceedings. First, beginning in 2014, the New York City Council began to fund the provision of counsel to all detained noncitizens with cases pending in the local immigration court.<sup>116</sup> Then, in 2017, the City Council established a right-to-counsel program for all indigent tenants defending against eviction in the city's housing courts.<sup>117</sup>

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<sup>115</sup> See, e.g., *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1150-51 (9th Cir. 2018) (holding that there is no due process right to appointed counsel for noncitizen minors in immigration deportation proceedings), *rehearing en banc granted by* 904 F.3d 642 (2018); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975) (holding that noncitizens do not have a categorical right to government-appointed counsel in immigration deportation proceedings); *N.Y.C. Hous. Auth. v. Johnson*, 565 N.Y.S.2d 362, 364 (App. Term 1990) (rejecting a due process right to counsel in residential tenant eviction proceedings); cf. *Blatch ex rel. Clay v. Hernandez*, 360 F. Supp. 2d 595, 640 (S.D.N.Y. 2005) (finding a due process violation in a case brought by a class of public housing tenants with mental disabilities); *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG, 2013 WL 3674492, at \*3-9 (C.D. Cal. Apr. 23, 2013) (holding that a class of detained noncitizens with mental disabilities has a right under section 504 of the Rehabilitation Act to appointed counsel in immigration deportation proceedings, without reaching the due process claim).

<sup>116</sup> See *Universal Representation for Immigrants Facing Deportation*, VERA INST. JUST., <https://www.vera.org/projects/universal-representation-for-immigrants-facing-deportation/learn-more> [<https://perma.cc/UML5-NVSK>] (describing the New York Immigrant Family Unity Project); Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503, 510-13 (2018) (same).

Since the universal representation program began in New York City, other jurisdictions have created similar systems. See NINA SIULC & KAREN BERBERICH, VERA INST. JUST., *A YEAR OF BEING SAFE: INSIGHTS FROM THE SAFE NETWORK'S FIRST YEAR* 1 n.2 (Nov. 2018), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/a-year-of-being-safe/legacy\\_downloads/a-year-of-being-safe.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/a-year-of-being-safe/legacy_downloads/a-year-of-being-safe.pdf) (describing the expansion of universal representation programs to Oakland and Alameda County, CA; Sacramento, CA; Santa Ana, CA; Denver, CO; Austin, TX; San Antonio, TX; Dane County, WI; Chicago, IL; Columbus, OH; Atlanta, GA; Baltimore, MD; and Prince George's County, MD).

<sup>117</sup> See N.Y. City Local Law No. 136, § 1 (2017) (amending local law to provide legal services for tenants who are subject to eviction proceedings); Press Release, Office of the Mayor of N.Y.C., Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions (Aug. 11, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/547-17/mayor-de-blasio-signs-legislation-provide-low-income-new-yorkers-access-counsel-for/#/0> [<https://perma.cc/4ZSW-ARJG>] (describing the city's efforts to ensure legal representation in housing court). One year after its passage, there are efforts to amend the law to expand eligibility for legal representation. See Andrew Denney, *NYC Council Considering Bill to Further Expand Tenants' Right to Counsel*, N.Y. L.J. (Sept. 14, 2018), <https://www.law.com/newyorklawjournal/2018/09/14/nyc-council-considering-bill-to-further-expand-tenants-right-to-counsel/?slreturn=20190231114350> (describing introduction of bill that would expand eligibility to tenants who are at 400 percent of the poverty level or below).

Since New York City began its program, San Francisco, CA, and Newark, NJ, have adopted similar programs for tenants in eviction proceedings. See J.K. Dineen, *SF's Measure F Wins, Will Give Tax-Funded Legal Help to Tenants Facing Eviction*, S.F. CHRON. (Jun. 5, 2018), <https://www.sfchronicle.com/politics/article/SF-Measure-F-to-give-tax-funded-legal-help-to-12970924.php> [<https://perma.cc/7K6V-HJ7B>] (reporting on approval of a San Francisco ballot initiative that guarantees counsel for tenants in eviction proceedings regardless of the tenant's income); Newark,

One might view these right-to-counsel programs as an example of pure policy development. After all, local governments routinely identify problems of concern, develop solutions, and appropriate funding for implementation of those solutions. From one perspective, that is what happened when New York City went ahead and guaranteed counsel in these deportation and eviction cases. Proponents of the right to counsel presented testimony and proposals as part of coordinated advocacy campaigns, legislators and policymakers considered the alternatives, and ultimately the city's legislature took action.

Yet there is another way to look at these reforms. Even though they did not involve litigation or even the threat of litigation, proponents of the reforms framed the debate in terms of fairness and the right to "due process."<sup>118</sup> They did this even though many of them were lawyers and were well aware that no courts—let alone the Supreme Court—have held that the Due Process Clause requires the provision of counsel in deportation or eviction proceedings.<sup>119</sup> Nonetheless, the proponents understood that the concept of "due process" has meaning and power that extends beyond Supreme Court jurisprudence, and they marshaled that power in support of their reform efforts.

In addition to establishing a right to counsel in deportation and eviction proceedings, the New York City reforms have been accompanied by a commitment to research and evaluation. Careful analysis of the value of legal representation has

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N.J., Ordinance 18-0673 (Dec. 19, 2018) (guaranteeing counsel to tenants with incomes below 200% of the federal poverty level who are in eviction proceedings). Bills that would create similar guarantees are pending in additional jurisdictions. See S. 652, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019) (proposing to guarantee counsel in Connecticut for tenants making less than \$50,000 per year who are in an eviction proceeding); H. 1537, 191st Gen. Court, Reg. Sess. (Mass. 2019); H. 3456, 191st Gen. Court, Reg. Sess. (Mass. 2019); S. 913, 191st Gen. Court, Reg. Sess. (Mass. 2019) (providing a right to counsel in eviction proceedings in Massachusetts for persons who are "indigent").

<sup>118</sup> For an example related to eviction proceedings, see Samar Khurshid, *Push to Expand Your Right to an Attorney Gains Momentum*, GOTHAM GAZETTE (Feb. 12, 2015), <http://www.gothamgazette.com/government/5571-push-to-expand-your-right-to-an-attorney-gains-momentum-levine-mark-viverito-de-blasio> [<https://perma.cc/4ZSW-ARJG>] (quoting Andrew Scherer's statement that "[i]t's impossible for an unrepresented tenant to navigate the court system without having an attorney and it's a matter of fundamental due process").

For examples related to deportation proceedings, see Press Release, Vera Institute of Justice, New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation, (Apr. 7, 2017), <https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation> [<https://perma.cc/VS7J-A37A>] (quoting proponents of right-to-counsel program stating that it will "help thousands of immigrant families receive due process," "ensure due process," and "provid[e] a basic level of due process"); Roque Planas & Elise Foley, *De Blasio Under Fire for Plan to Keep Some Immigrants out of Legal Aid Program*, HUFFPOST (June 2, 2017), [https://www.huffpost.com/entry/de-blasio-under-fire-for-restricting-immigrants-access-to-lawyers\\_us\\_59318c3ce4bo2478cb9af54b](https://www.huffpost.com/entry/de-blasio-under-fire-for-restricting-immigrants-access-to-lawyers_us_59318c3ce4bo2478cb9af54b) [<https://perma.cc/JQ8X-ATUP>] (quoting a letter from twenty-seven City Council members referring to Mayor De Blasio's changes to the right-to-counsel program as undermining part of "our city's commitment to due process for all").

<sup>119</sup> See *supra* note 115 and accompanying text.



been a part of the immigration program since its inception.<sup>120</sup> Using quantitative analyses of administrative and program data, evaluators have studied the program's impact on the noncitizens who receive representation, their families, and local budgets.<sup>121</sup> The eviction right-to-counsel initiative was similarly grounded in extensive research and evaluation,<sup>122</sup> and the recently enacted legislation imposes robust reporting requirements upon the city agency responsible for administering the program.<sup>123</sup> Among other things, the city must track both case outcomes and the costs of the program.<sup>124</sup> Thus, both right-to-counsel programs are generating detailed and extensive data about the costs and benefits of guaranteed counsel.<sup>125</sup>

### B. *Electronic Notice*

A second example of non-court-driven procedural reform targets the notice that the Due Process Clause requires before an individual is deprived of a constitutionally protected interest. There is a long line of Supreme Court cases ruling on the constitutionality of different forms of notice.<sup>126</sup> Notice can be provided orally or in writing or both; it can be transmitted in person or by telephone, mail, or electronic means. Some due process cases involve

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<sup>120</sup> See Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 360 (2011) (describing the goals of the Study Group on Immigrant Representation's research); see also PETER L. MARKOWITZ ET AL., STUDY GROUP ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 1 (2012), <https://cardozo.yu.edu/sites/default/files/New%20York%20Immigrant%20Representation%20Study%20II%20-%20NYIRS%20Steering%20Committee%20%28%29.pdf> [<https://perma.cc/VKX4-WAND>] (proposing data-driven solutions for the immigration representation crisis).

<sup>121</sup> See JENNIFER STAVE ET AL., VERA INSTITUTE OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 5 (2017), <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation> [<https://perma.cc/DU4U-D8VH>] (analyzing the impact of NYIFUP).

<sup>122</sup> See, e.g., STOUT RISIUS ROSS, INC., THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A 2-6 (2016), [https://www2.nycbar.org/pdf/report/uploads/SRR\\_Report\\_Financial\\_Cost\\_and\\_Benefits\\_of\\_Establishing\\_a\\_Right\\_to\\_Counsel\\_in\\_Eviction\\_Proceedings.pdf](https://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf) [<https://perma.cc/VM87-FEDJ>] (providing a cost-benefit analysis of the proposed law).

<sup>123</sup> See N.Y. City Local Law No. 136 (2017) (establishing annual reporting requirements).

<sup>124</sup> *Id.*

<sup>125</sup> See OFFICE OF CIVIL JUSTICE, N.Y.C. HUM. RESOURCES ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR ONE OF IMPLEMENTATION IN NEW YORK CITY (2018), <https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ-UA-2018-Report.pdf> [<https://perma.cc/6D6P-Q7GH>] (summarizing research on first full year of implementation of New York City eviction representation program); STAVE ET AL., *supra* note 121, at 5 (analyzing the impact of NYIFUP).

<sup>126</sup> See *supra* Section I.B.

challenges to the timeliness<sup>127</sup> and adequacy of the notice,<sup>128</sup> while others involve the way in which the notice was sent to the individual.<sup>129</sup> As discussed in Part I, the Supreme Court analyzes notice claims under *Mullane v. Central Hanover Bank & Trust*, a 1950 decision holding that the government must provide notice that is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>130</sup>

In contrast to the Supreme Court’s relatively stable notice jurisprudence, innovations are nonetheless underway. Changes in technology are raising new questions about how notice can be provided. For decades, transmitting notice by mail has been the standard, constitutionally sound practice,<sup>131</sup> but new

<sup>127</sup> See, e.g., *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 346 (S.D.N.Y. 1999) (discussing plaintiffs’ claims that a social services agency failed to provide timely and adequate notice of public assistance, food stamps, and Medicaid determinations); *Doston v. Duffy*, 732 F. Supp. 857, 872 (N.D. Ill. 1988) (finding to be timely a notice that is mailed at least ten days before the effective date of the proposed termination or suspension of benefits).

<sup>128</sup> See, e.g., *Henry v. Gross*, 803 F.2d 757, 766 (2d Cir. 1986) (defining “adequate” notice and describing its purpose as providing an individual with sufficient information to defend his or her interests); *Doston*, 732 F. Supp. at 872-73 (holding that a notice is inadequate if it is “unintelligible, confusing, or misleading” or does not “meaningfully inform” the recipient of his or her rights); *Ortiz v. Eichler*, 616 F. Supp. 1046, 1061 (D. Del. 1985) (explaining that in the welfare context “[a]t a minimum, due process requires the agency to explain, in terms comprehensible to the claimant, exactly what the agency proposes to do and why the agency is taking this action”), *aff’d*, 794 F.2d 889 (3d Cir. 1986).

<sup>129</sup> See, e.g., *Jones v. Flowers*, 547 U.S. 220, 230 (2006) (deeming notice by mail to be insufficient in a case involving seizure of house due to delinquent payment of taxes where “the government’s knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government’s part to take additional steps to effect notice”); *Dusenbery v. United States*, 534 U.S. 161, 168-69 (2002) (finding no due process violation where notice of forfeiture was sent by certified mail and placed in a newspaper); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (“Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.”); *Greene v. Lindsey*, 456 U.S. 444, 453 (1982) (ruling that solely posting notice of eviction action on the door of an apartment in a public housing unit violated due process); *Schroeder v. City of New York*, 371 U.S. 208, 210-11 (1962) (holding that publication in a newspaper and posted notices were inadequate to apprise a property owner of condemnation proceedings when his name and address were readily ascertainable).

<sup>130</sup> *Mullane v. Cent. Hanover Bank & Tr.*, 339 U.S. 306, 314 (1950). As the Court later explained, “assessing the adequacy of a particular form of notice requires balancing the ‘interest of the State’ against ‘the individual interest sought to be protected by the Fourteenth Amendment.’” *Jones*, 547 U.S. at 229 (quoting *Mullane*, 339 U.S. at 314).

<sup>131</sup> The Supreme Court has long recognized that transmitting notice via mail satisfies due process. See, e.g., *Mennonite Bd. of Missions*, 462 U.S. at 800 (“Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.”); *Greene*, 456 U.S. at 453 (holding that posting notice of eviction action on the door of an apartment in a public housing unit violates due process); *Mullane*, 339 U.S. at 319 (“[T]he mails today are recognized as an efficient and inexpensive means of communication.”).

methods of communication are creating new opportunities for conveying notice in ways that are potentially faster, cheaper, more effective, and less administratively burdensome.<sup>132</sup>

Administrative agencies are now experimenting with various forms of electronic notice, such as transmitting notice by email, text message, online portal, or some combination of these options. The federal Supplemental Nutrition Assistance Program (SNAP, formerly known as food stamps) provides an illuminating example of this trend. SNAP is one of the nation's largest public benefit programs, with over forty million Americans currently receiving some amount of nutrition assistance.<sup>133</sup> Because food stamps, like many other public benefits, are considered "property" under the Due Process Clause,<sup>134</sup> the government must provide notice of any denial or termination of a household's benefits.<sup>135</sup> The federal food stamp statute, which established the program and imposes obligations on state administrators, makes only limited reference to "notice,"<sup>136</sup> and the federal implementing regulations focus on the timeliness and adequacy of the notice that is provided.<sup>137</sup> Aside

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Of course, sending notice by mail is not always constitutionally sound. *See, e.g.*, *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (per curiam) (holding that notice by mail regarding forfeiture of an automobile connected to crime was inadequate when notice was mailed to the individual's home at a time that the government knew that the individual was incarcerated); *Covey v. Town of Somers*, 351 U.S. 141, 146 (1956) (holding that notice of foreclosure by mail and publication was inadequate when government was aware that the property owner was mentally incompetent and did not have a guardian).

<sup>132</sup> *See, e.g.*, Ehrlich, *supra* note 62, at 2165 ("Many notice plans now include a social media component, and most courts allow parties to provide publication notice using targeted social media banner ads." (footnote omitted)); Claire M. Specht, Note, *Text Message Service of Process—No LOL Matter: Does Text Message Service of Process Comport with Due Process?*, 53 B.C. L. REV. 1929, 1931 (2012) (noting that "[s]ervice of process by text message offers many advantages," including efficiency, cost-effectiveness, ease, and accessibility). *See generally* Christine P. Bartholomew, *E-Notice*, 68 DUKE L.J. 217 (2018) (discussing new forms of notice in class-action litigation).

<sup>133</sup> *See Supplemental Nutrition Assistance Program Participation and Costs*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV. (Feb. 2, 2019), <https://fns-prod.azureedge.net/sites/default/files/pd/SNAPsummary.pdf> [<https://perma.cc/4KP8-CL3Q>].

<sup>134</sup> *See Atkins v. Parker*, 472 U.S. 115, 128 (1985) ("Food-stamp benefits, like the welfare benefits at issue in *Goldberg v. Kelly*, 'are a matter of statutory entitlement for persons qualified to receive them.' Such entitlements are appropriately treated as a form of 'property' protected by the Due Process Clause . . . ." (citations omitted)).

<sup>135</sup> *See id.* ("[T]he procedures that are employed in determining whether an individual may continue to participate in the [food stamp] program must comply with the commands of the Constitution."). Courts have considered numerous due process challenges to food stamp notices. *E.g.*, *Banks v. Trainor*, 525 F.2d 837, 838 (7th Cir. 1975); *Barry v. Corrigan*, 79 F. Supp. 3d 712, 720 (E.D. Mich. 2015), *aff'd* 834 F.3d 706 (6th Cir. 2016); *Febus v. Gallant*, 866 F. Supp. 45, 46 (D. Mass. 1994); *Ortiz v. Eichler*, 616 F. Supp. 1046, 1049 (D. Del. 1985), *aff'd* 794 F.2d 889 (3d Cir. 1986); *Dingle v. Lam*, 434 F. Supp. 1173, 1175 (D. Haw. 1977).

<sup>136</sup> *See* 7 U.S.C. § 2020(e)(10) (2012) (outlining requirements of a state plan of operation, which does not itself mandate any notice of adverse agency action but merely assumes that a hearing request by a household aggrieved by a state agency's action will be preceded by "individual notice of agency action").

<sup>137</sup> *See* 7 C.F.R. § 273.13 (2019) (establishing requirements for notice of adverse agency action).

from a few references in the regulations to termination or denial notices being “mailed” to the household,<sup>138</sup> there are no instructions concerning how notice is to be transmitted to participants in the program.

Not surprisingly, since the beginning of the program, state agencies have provided food stamp notices by mail. In recent years, however, agencies have sought waivers to allow them to shift from mailing paper notices to issuing notices electronically.<sup>139</sup> The federal government began approving these waiver requests in 2011, allowing states to issue notices to households using an online account on a secure network or portal and to cease mailing paper notices to a household’s physical address.<sup>140</sup> Then, in late 2017, the federal government went one step further, eliminating the need for states to obtain a waiver, instead making the e-notice option available to all states, provided that certain conditions are met.<sup>141</sup>

The shift to electronic transmission of notices is being driven not by courts engaging in the type of interest-balancing required by due process doctrine, but rather by government agencies employing a similar balancing approach.<sup>142</sup> According to the federal government, it changed its policy concerning notice transmission for two reasons. First, it cited “the positive data reported from currently approved e-notice waivers,” noting that since the first e-notice waivers were approved, “stakeholders including State agencies, SNAP households, and advocacy groups, have reported that e-notices may provide several administrative and customer service related benefits,”<sup>143</sup> including “reduced printing and mailing costs, faster receipt of notices, fewer lost notices and easier access to them within the portal, and decreases in returned mail for

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<sup>138</sup> See, e.g., *id.* § 273.13(a)(1) (referring to notice as timely if it “includes at least 10 days from the date the notice is mailed to the date upon which the action becomes effective”); *id.* § 273.10(g)(1)(ii) (referring to an action “taken within 30 days of the date the notice of denial was mailed”).

<sup>139</sup> See Memorandum from the U.S. Dep’t of Agriculture, Food & Nutrition Servs., Electronic Notice Waivers and Options 1 (Nov. 3, 2017), <https://fnsp-prod.azureedge.net/sites/default/files/snap/Memo-Electronic-Notice-and-Other-Options-11317.pdf> [<https://perma.cc/855D-MXCK>] [hereinafter Memo on Electronic Notice] (noting the availability of e-notice waivers, “which allow States to provide designated noticed to households through an online account on a secure website or portal instead of mailing paper notices to physical addresses”).

<sup>140</sup> *Id.* at 1.

<sup>141</sup> *Id.* at 1-2. The notice policy did not include the use of text messages as a substitute for mailed notices. See *id.* at 2 (“Text messages differ from email and mail correspondence in important ways, the most important of which is that the sender does not get feedback (returned mail or undeliverable email) indicating if the recipient did not receive the information that was sent.”).

<sup>142</sup> This cost–benefit analysis is similar to the analysis employed by courts when considering whether notice complies with the Due Process Clause. See *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (“[A]ssessing the adequacy of a particular form of notice requires balancing the ‘interest of the State’ against ‘the individual interest sought to be protected by the Fourteenth Amendment.’” (quoting *Mullane v. Cent. Hanover Bank & Tr.*, 339 U.S. 306, 314 (1950))).

<sup>143</sup> Memo on Electronic Notice, *supra* note 139, at 1.

households who lack a fixed permanent address.”<sup>144</sup> Second, the federal government highlighted its “re-evaluation of the regulations regarding notice issuance in light of current technology.”<sup>145</sup>

The federal government has made clear that this kind of procedural innovation depends on data concerning its costs and benefits. For example, it has declined to give blanket approval to notice via text message, stating that state agencies wishing to use solely text messages “must continue to request waiver approval and include appropriate plans to evaluate the impact of the proposed alternative procedure.”<sup>146</sup> Thus, the federal government has demonstrated its willingness not to lock in certain forms of notice and to continue to be open to new ideas based on evidence of how they operate.

### C. Active Judging

A third example of non-court-driven procedural reform focuses on the role of the judge when court proceedings involve one or more unrepresented litigants. Civil courts in the United States have been suffering from a “pro se crisis” for decades.<sup>147</sup> Even when basic human needs are at issue—for example, shelter, sustenance, health, and child custody—a high percentage of people are unable to afford to hire an attorney to represent them.<sup>148</sup> The

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<sup>144</sup> *Id.* But see *SNAP Policy Update: DTA Pilot on e-Notification for SNAP and Cash Clients; Update List of DTA Local Office Contact Information*, MASS. LEGAL SERVS. (Jan. 14, 2014), <https://www.masslegalservices.org/content/snap-policy-update-dta-pilot-e-notification-snap-and-cash-clients-update-list-dta-local> [<https://perma.cc/78TJ-67CB>] (describing problems with Massachusetts’s e-notification system, such as lack of reliable Internet access, language barriers, and Internet safety concerns).

<sup>145</sup> Memo on Electronic Notice, *supra* note 139, at 1.

<sup>146</sup> *Id.* at 2.

<sup>147</sup> See, e.g., JOY MOSES, CTR. FOR AM. PROGRESS, *FOUNDATIONS FOR OBJECTION: CAUSES AND CONSEQUENCES OF AMERICA’S PRO SE CRISIS AND HOW TO SOLVE THE PROBLEM OF UNREPRESENTED LITIGANTS* 3 (2011), <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/objection.pdf> [<https://perma.cc/E6ZT-Q437>] (noting that “[t]he number of low and moderate-income litigants representing themselves in civil matters has increased in recent decades” and naming this trend a “Pro Se Crisis”); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 *LOY. L.A. L. REV.* 869, 883 (2009) (“In many courts that handle housing, bankruptcy, immigration, small claims, and family matters, pro se litigants are not the exception but the rule, and the recent economic downturn has increased their presence.”); Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 *CONN. L. REV.* 741, 749-51 (2015) (reporting that up to ninety percent of litigants in certain state systems appear unrepresented and concluding that “the pro se crisis is immense”).

<sup>148</sup> See, e.g., AM. BAR ASS’N, *REPORT TO THE HOUSE OF DELEGATES (104-REVISED)* 1 (2010), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lsc\\_laid\\_104\\_revised\\_final\\_aug\\_2010.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lsc_laid_104_revised_final_aug_2010.pdf) [<https://perma.cc/DMD4-RUPM>] (discussing need for government-funded legal representation for low-income individuals appearing in proceedings involving “basic human needs”); LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 30 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/WS4X->

absence of lawyers can undermine the American adversarial model of adjudication, which relies on the parties, through their legal representatives, to present evidence and make legal arguments.<sup>149</sup> Without lawyers representing parties, there are real questions about whether court proceedings can be fundamentally fair.

Due process doctrine and theory have not historically been focused on how judges run proceedings in the courtroom.<sup>150</sup> To be sure, the Supreme Court has considered numerous cases in which pro se parties in civil matters sought a due process right to appointed counsel.<sup>151</sup> However, the Court in those cases did not consider the role of judges in ensuring the fairness of the proceedings, with one recent and significant exception: the Court's 2011 decision in *Turner v. Rogers*.<sup>152</sup>

The Court's decision in *Turner* is a small but important step toward connecting the requirements of due process with the role of the judge in cases involving pro se litigants. In *Turner*, the Court, applying *Mathews*, rejected the petitioner's argument that he was entitled to a government-appointed lawyer under the Due Process Clause because he was in danger of being incarcerated due to unpaid child support payments.<sup>153</sup> However, the Court also held that the state must provide "substitute procedural safeguards," which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty.<sup>154</sup> The Court identified a handful of alternative procedures, each of which implicates the role of the judge: giving pro se defendants more information about the "critical issue" to be decided at the hearing, using a form to collect information about that issue, giving defendants an opportunity to respond to questions about the issue at the hearing, and making an express finding on that issue.<sup>155</sup> Thus, in the specific

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GJNA] ("[L]ow-income Americans receive inadequate or no professional legal help for 86% of their civil legal problems in a given year.").

<sup>149</sup> See generally Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (acknowledging the existing imperfections of the American adversarial system); Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377 (2008) (opining that the adversarial system itself does not create a problem but that the failure of lawyers within that system does).

<sup>150</sup> The Court has, of course, explored the related but distinct question of judicial bias. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (holding that due process requires a judge's recusal when the likelihood of bias "is too high to be constitutionally tolerable" (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975))); *In re Murchison*, 349 U.S. 133, 136 (1955) (explaining that due process guarantees "an absence of actual bias" on the part of the judge).

<sup>151</sup> See *supra* note 103 and accompanying text.

<sup>152</sup> 564 U.S. 431, 435 (2011).

<sup>153</sup> See *id.* at 444-48.

<sup>154</sup> *Id.* at 447 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (citation omitted).

<sup>155</sup> *Id.* at 447-48.

proceedings considered in *Turner*, pro se individuals have a due process right to a judge who does not sit passively at the hearing.<sup>156</sup>

The academic literature has seen a similar increase in attention to the role of the judge. At the height of the due process revolution, scholars paid little attention to the role of the judge as a component of procedural due process. For example, in his seminal article on what type of hearing the Due Process Clause requires, Judge Henry Friendly identified eleven “elements” of a fair hearing, ranking them in order of importance.<sup>157</sup> Aside from a requirement that the judge be unbiased,<sup>158</sup> Friendly omitted any reference to how the judge actually presides over the proceedings.<sup>159</sup> Although he did argue for an “investigatory model” rather than an adversarial model for certain hearings, Friendly did not even suggest that such an approach to judging might be required by the Due Process Clause.<sup>160</sup>

Even without clear direction from due process doctrine, ideas about the role of the judge are changing. With the support of a growing body of academic and policy literature,<sup>161</sup> courts are experimenting with an “active

<sup>156</sup> *Id.* The impact of this aspect of *Turner*’s holding is unclear. *See, e.g.*, Ashley Robertson, Note, *Revisiting Turner v. Rogers*, 69 STAN. L. REV. 1541, 1541 (2017) (arguing that *Turner*’s “substitute procedural safeguards do not adequately offset the risk of wrongful incarceration”).

<sup>157</sup> *See* Friendly, *supra* note 2, at 1279-95.

<sup>158</sup> *Id.* at 1279-80.

<sup>159</sup> *Id.* at 1278-95.

<sup>160</sup> *Id.* at 1289-91.

<sup>161</sup> *See, e.g.*, RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 109-12 (2002) (suggesting ways for judges to facilitate pro se litigation); Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES’ J., Winter 2003, at 16, 45-46 (recommending that judges prepare more intensely, provide more guidelines, and accept more informal evidence and testimony in cases involving pro se litigants); *see also* Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659, 670-74 (2006) (recommending a survey of the strategies of judges who successfully mitigate difficulties faced by pro se litigants in New York City’s Housing Court); Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1233-34 (2010) (arguing that court reform would be more effective than increasing funding for appointed counsel); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 987-88 (2012) (surveying the range of bottom-up pro se court reform); Carpenter, *supra* note 15, at 649, 651 (noting that “[a] critical mass of scholars and experts now argue that court reform, including reform of the judge’s role, could help solve the pro se crisis in civil justice”); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 368-69 (2008) (focusing on the changing judicial role in cases with unrepresented litigants); Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 330 (2010) (arguing that failing to address the lack of access to justice for the poor is judicial abdication of the central mission of justice); 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, 970 (2004) (applying a market perspective to argue that a changing judicial role would be more effective than increasing funding for counsel and demanding more pro bono hours of lawyers); Rhode, *supra* note 147, at 885 (explaining how the concerns of judges regarding the

judging”<sup>162</sup> approach to legal proceedings where one or both of the parties are unrepresented by counsel.<sup>163</sup> There is no universally recognized definition for “active judging,”<sup>164</sup> nor is there much guidance for judges seeking to take on an active role in pro se litigation.<sup>165</sup> In the leading scholarly treatment of active judging, Anna Carpenter explains that it typically operates in one or more of three “dimensions”: accommodating pro se litigants by adjusting procedures, explaining the law and hearing process, and eliciting information to develop the record.<sup>166</sup> These judicial interventions are aimed at promoting fairness for pro se litigants, improving the quality of judicial rulings, and increasing the efficiency of court proceedings, while at the same time maintaining the judge’s neutrality and impartiality.<sup>167</sup>

The recent uptick in active judging is not being driven by changes in due process doctrine. As a general matter, due process case law continues to say little about the judge’s role in cases involving pro se litigants.<sup>168</sup> In fact, many cases hold that judges have no obligation to treat pro se litigants any differently than represented parties.<sup>169</sup> And while experimentation with active judging resembles the kinds of procedural safeguards that the Supreme Court held in *Turner* to be required by the Due Process Clause, neither the Supreme Court nor lower courts have extended this aspect of *Turner*’s holding beyond the proceedings at issue in that case.

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appearance of impartiality have inhibited potential reforms); Jeffrey Selbin, Jeanne Charn, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 60-61 (2012) (describing how court simplification efforts have become a major feature of reforms).

<sup>162</sup> Anna Carpenter explains, “Reform proposals go by different names, such as ‘active judging,’ ‘affirmative judging,’ ‘engaged judging,’ and ‘engaged neutrality,’ but all refer to a model of judging that sets aside traditional judicial passivity in favor of some form of judicial intervention or activity to assist people without counsel.” Carpenter, *supra* note 15, at 649-50. Like Carpenter, this Article uses the term “active judging” to refer to these reforms.

<sup>163</sup> See Carpenter, *supra* note 15, at 665 (“On the ground, while many judges likely hew to the passive norm, limited evidence suggests some judges are beginning to alter their practices in response to the rise of pro se litigation.”); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899, 937-43 (arguing that judicial departures from adversarial procedures are widespread).

<sup>164</sup> See Carpenter, *supra* note 15, at 656 (finding, based on an empirical study, that “there is no single model of, or approach to, active judging”).

<sup>165</sup> See *id.* at 663-64 (“[W]hile some authorities have taken a permissive stance on active judging, there is little in the way of specific guidance on the scope, nature, and objectives of a judge’s role in pro se litigation.”).

<sup>166</sup> *Id.* at 667-72.

<sup>167</sup> *Id.* at 662-63 (discussing arguments in support of active judging); see also Barton, *supra* note 161, at 1273 (discussing how even relatively modest reforms can impact the pro se litigant’s experience positively).

<sup>168</sup> See, e.g., Steinberg, *supra* note 163, at 927 (“[O]nly a few dozen opinions address the intersection of pro se litigation and adversary norms.”).

<sup>169</sup> See, e.g., *id.* at 927 (listing cases where courts emphasized “the norm of party control”).



Still, it is impossible to ignore the links between active judging and procedural due process. When proponents describe the goals of active judging, they typically refer to ensuring fair procedures, fair hearings, and fair opportunities for pro se litigants to participate in the proceedings.<sup>170</sup> Similar language appears in a recent revision to the Model Code of Judicial Conduct that arguably authorizes active judging.<sup>171</sup> These invocations of “fairness” sound in the Constitution’s due process guarantee.<sup>172</sup> Indeed, that is what enabled the Supreme Court in *Turner* to find a constitutional violation where a judge sat back passively and did not make the kind of interventions in the proceedings that would have afforded the pro se litigant a process that comported with due process.<sup>173</sup>

Along with the recent increase in active judging have come efforts to measure its impact. A growing number of scholars are beginning to engage in this empirical research.<sup>174</sup> Although there is currently limited evidence of the costs and benefits of specific active judging practices, studies are aiming to reveal the impact on pro se litigants, judges, and the civil justice system as a whole.<sup>175</sup>

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<sup>170</sup> See, e.g., Carpenter, *supra* note 15, at 658 (“Central to th[e] vision [of justice reform given the pro se crisis] is an active judge, one who maintains impartiality while promoting access and fairness for pro se parties by making procedural adjustments, explaining law and the hearing process, and eliciting information to develop the record.”).

<sup>171</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 2 r. 2.2 cmt.4 (AM. BAR ASS’N 2014) (“It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters *fairly heard*.” (emphasis added)). The ABA report on the rule change uses similar language. See AM. BAR ASS’N, ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT 47 (2007), [https://www.americanbar.org/content/dam/aba/migrated/judicialethics/house\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/judicialethics/house_report.authcheckdam.pdf) [<https://perma.cc/6PZ4-8VZR>]. (“[B]y leveling the playing field, . . . judges ensure that pro se litigants receive the *fair hearing* to which they are entitled.” (emphasis added)).

<sup>172</sup> See, e.g., *Vitek v. Jones*, 445 U.S. 480, 500 (1980) (Powell, J., concurring) (“The essence of procedural due process is a fair hearing.”); *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting) (“Whatever disagreement there may be as to the scope of the phrase ‘due process of law,’ there can be no doubt that it embraces the fundamental conception of a fair trial . . .”).

<sup>173</sup> *Turner v. Rogers*, 564 U.S. 431, 448 (2011).

<sup>174</sup> See Carpenter, *supra* note 15, at 684-707 (summarizing the results of a study of a majority pro se court where controlling law supports active judging); see also *id.* at 672 (“We do not have sufficient empirical data to make categorical statements about how judges behave in pro se cases, let alone studies that tell us about the effectiveness of particular active judging practices.”). See generally Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 WIS. L. REV. 249 (calling for more research focused on state civil courts and judges).

<sup>175</sup> See Carpenter, *supra* note 15, at 672 (“Existing research suggests that jurisdictions, courts, and individual judges differ in meaningful ways in how they apply the law and enforce procedure . . . [when] they engage with pro se litigants.”); Carpenter et al., *supra* note 174, at 252 (“The data [scholars] *do* have about state courts point to a radical and ongoing transformation in the civil justice system, a transformation both easy to observe and largely overlooked.”).

## III. REUNIFYING AND REVIVING DUE PROCESS THROUGH DIALOGUE

The innovations described in Part II are just a few examples of the procedural experimentation that is currently underway. These innovations are taking root in different jurisdictions and across unrelated legal contexts, and experimentation in one place is inspiring similar reforms elsewhere.<sup>176</sup> Despite their diversity, the innovations share three important characteristics: they involve foundational elements of procedural due process (notice, the right to counsel, and the role of the judge), they are not the product of due process litigation, and they are portrayed as mandated by due process. Thus, they are simultaneously all about due process while also disconnected from due process theory and doctrine.

What do these innovations mean for the future of procedural due process? Should due process doctrine evolve to include innovations like these? If so, how? Drawing on two fundamental aspects of procedural due process—the flexibility and adaptability that is deeply rooted in American due process jurisprudence and the Supreme Court’s modern approach to procedural due process claims—this Part argues for revival and reunification of due process through what I call a “dialogic” approach to procedural due process. Section A identifies the growing divergence between procedural innovations that are not prompted by litigation, on the one hand, and the relatively stagnant due process theory and doctrine, on the other hand. Then, drawing on the flexible nature of due process and the Supreme Court’s modern approach to evaluating due process claims, Section B argues that this divergence can be reconciled through dialogue between due process doctrine and the innovations that are underway. This Part then concludes with Section C, which anticipates and responds to objections and counterarguments that may be triggered by a dialogic approach to procedural due process. In sum, this Part offers both a justification and a roadmap for reinvigorating procedural due process doctrine at a time when non-court-driven experimentation is on the rise.

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<sup>176</sup> See, e.g., Matt Krupnick, “People Will Sign Anything”: How Legal Odds Are Stacked Against the Evicted, THE GUARDIAN (Jan. 24, 2018), <https://www.theguardian.com/us-news/2018/jan/24/evicted-tenants-landlords-lawyers-disparity-housing-crisis> [<https://perma.cc/5FAV-BQNF>] (reporting that since New York City adopted right-to-counsel legislation for eviction cases in 2017, “San Francisco, Philadelphia and Baltimore all are testing or considering right-to-counsel programs, as are smaller cities such as Santa Rosa, California”). There are numerous organizations, coalitions, and working groups focused on bringing the strategies and lessons of right-to-counsel advocacy to jurisdictions with no such programs. See, e.g., NAT’L COALITION FOR CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org> [<https://perma.cc/7JXG-JWEJ>] (last visited Feb. 22, 2019) (advocating for “a right to counsel in key areas like child custody, guardianship of adults, termination of parental rights, and incarceration for failure to pay criminal fees and fines”).

### A. Divergence

As discussed in Part II, there is a growing divergence between what courts say that the Due Process Clause requires and the procedural safeguards that are actually available to affected individuals. Indeed, in some instances, the procedures that are now available are ones that courts have held, either explicitly or implicitly, *not* to be required by due process.<sup>177</sup> In other instances, the new procedures have never before been ordered by courts in constitutional litigation.<sup>178</sup>

Although government officials are free to—and often do—provide more procedural protections than are required by the Constitution,<sup>179</sup> the growing divergence is nonetheless noteworthy. First, some of the new procedural innovations are variations on bedrock elements of procedural due process: the right to counsel, the right to timely and adequate notice, and the role of the judge at a hearing. But even though they directly implicate fundamental aspects of procedural due process, courts are not participating in these developments. And second, these additional procedural safeguards are presented and discussed by proponents as if the procedures spring directly from the right to due process.<sup>180</sup> Some even claim that the procedures are mandated by due process, despite clear precedent to the contrary.<sup>181</sup> Thus, even though the courts' interpretation of the Due Process Clause is not driving these innovations, they are nonetheless portrayed as synonymous with the Constitution's due process guarantee.

This kind of divergence is also noteworthy because of the potential for perceived unfairness. For every individual who benefits from these procedural innovations, there are others who are on the outside looking in. Due process is all about fairness,<sup>182</sup> and having procedural safeguards vary depending on

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<sup>177</sup> See, e.g., *supra* Section II.A (discussing the emergence of right-to-counsel programs in immigration deportation proceedings and eviction proceedings).

<sup>178</sup> See, e.g., *supra* Sections II.B–C (discussing the use of active judging and electronic transmission of constitutionally required notices).

<sup>179</sup> See, e.g., ROTUNDA & NOWAK, *supra* note 78, at § 17.8(i) n.70 (“[T]he state may exceed due process minimum requirements when creating procedures to protect liberty or property interests.”); see also PIERCE, *supra* note 33, at 736 (“Agencies almost invariably provide procedures greater than those required by the APA when they engage in informal adjudication.”); Vermeule, *supra* note 31, at 1924–25 (noting that agencies often voluntarily provide more than “the bare-bones procedure for informal adjudication” required by the Administrative Procedure Act).

<sup>180</sup> See, e.g., *supra* note 118 and accompanying text (discussing the use of “due process” language with respect to right-to-counsel efforts).

<sup>181</sup> See, e.g., *supra* note 118 and accompanying text.

<sup>182</sup> See, e.g., ROTUNDA & NOWAK, *supra* note 78, § 17.8(g) (“The essential guarantee of the due process clause is that of fairness.”); Mashaw, *supra* note 63, at 52–54 (discussing the importance of “equality of treatment” in the realm of adjudicatory procedure); Redish & Marshall, *supra* note 32, at 483–85 (discussing the importance of fairness and equality in procedural due process); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)

where a case is being adjudicated can seem arbitrary, if not explicitly unfair.<sup>183</sup> For example, indigent, detained noncitizens appearing in immigration court in New York City are automatically appointed free counsel if they cannot afford it, while similarly situated respondents in other parts of the country are on their own.<sup>184</sup> Similarly, pro se litigants appearing in court systems that have adopted active judging practices can rely on the judge's assistance in court, while pro se litigants involved in the same types of legal actions in other jurisdictions receive no such help from the presiding judges.<sup>185</sup> The same dynamic can exist in the notice context, too, where the method and speed of notice delivery can vary depending on where one lives.<sup>186</sup>

That said, the Constitution does not mandate a uniform set of procedural safeguards across all jurisdictions<sup>187</sup>—it merely sets a baseline below which the available procedures cannot fall.<sup>188</sup> Yet the growing divergence between due process doctrine and the procedures available on the ground raises important questions about the future of procedural due process and the role of courts and doctrine. Can courts expand the demands of procedural due process to include these types of innovations? If so, how? The following Section takes up those questions, arguing for a dialogic relationship between court-driven and non-court-driven procedures that is consistent with longstanding due process theory and doctrine.

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(noting that due process “[r]epresent[s] a profound attitude of fairness between man and man, and more particularly between the individual and government”).

<sup>183</sup> See, e.g., Randy Lee, *Twenty-Five Years After Goldberg v. Kelly: Traveling from the Right Spot on the Wrong Road to the Wrong Place*, 23 CAP. U. L. REV. 863, 984 (1994) (“Nothing . . . invites the impression of arbitrariness more than treating similarly situated people differently . . . .”); see also *id.* at 985 (explaining that when procedural safeguards vary within the context of public benefit programs, “the recipient of benefits will often believe first, that favoritism, rather than rule, fuels the distribution of procedural protection, and second, that had the recipient received the same process afforded others, the result in his case would have been different”); cf. Resnik, *supra* note 85, at 85 (discussing intraligant inequities and the role of due process in the context of criminal adjudications).

<sup>184</sup> See *supra* Section II.A.

<sup>185</sup> See *supra* Section II.C.

<sup>186</sup> See *supra* Section II.B.

<sup>187</sup> Compare U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power “[t]o establish a uniform Rule of Naturalization” (emphasis added)), with U.S. CONST. amend. XIV, § 1 (prohibiting States from depriving “any person of life, liberty, or property, without due process of law”).

<sup>188</sup> See, e.g., *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 33 (1982) (“In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.”); ROTUNDA & NOWAK, *supra* note 78, § 17.8(i) n.70 (“[T]he state may exceed due process minimum requirements when creating procedures to protect liberty or property interests.”).

## B. Dialogue

Due process doctrine is well situated for a dialogic engagement with non-court-driven procedural innovations. This Section explores the conditions that make due process open to dialogue and sketches what a dialogic approach to procedural due process could look like with respect to the procedural innovations discussed in Part II.

### 1. Conditions for Dialogue

The Due Process Clause is different from other rights guaranteed by the Constitution. As the Supreme Court has repeatedly emphasized, “due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>189</sup> Indeed, “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”<sup>190</sup> Thus, due process rules must be tailored to the procedural context in which they operate, and they must be open to revision based on changing fact and circumstances.<sup>191</sup>

The Supreme Court has long recognized that the requirements of due process may evolve over time. Over a century ago, the Court rejected the argument that the Framers’ view of the Due Process Clause limits the scope of procedures required by the Constitution.<sup>192</sup> As Justice Felix Frankfurter later explained, the concept of due process is, “perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.”<sup>193</sup> Indeed, procedural

<sup>189</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). According to *Morrissey*, this proposition “has been said so often by this Court and others as not to require citation of authority.” *Id.* The Court has quoted this language numerous times since *Morrissey*. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 n.15 (1978); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

<sup>190</sup> *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); see also *Farina*, *supra* note 83, at 268 (“Due process jurisprudence has long claimed a special fluidity and sensitivity to context.”).

<sup>191</sup> See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 571-72 (1974) (explaining, in the context of prison disciplinary procedures, that due process requirements are “not graven in stone” and may be revisited based on changing circumstances); see also *Parkin*, *supra* note 11, at 1360-65 (arguing that the Due Process Clause requires procedural rules to be reevaluated in light of changing facts and circumstances).

<sup>192</sup> See *Hurtado v. California*, 110 U.S. 516, 528-29 (1884) (expressing fear that establishing a fixed definition of due process “stamp[s] upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians”).

<sup>193</sup> *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring). Justice Frankfurter wrote previously,

“[D]ue process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of

rules, “even ancient ones, must satisfy contemporary notions of due process.”<sup>194</sup> For these reasons, the Court has repeatedly emphasized that “‘due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”<sup>195</sup>

The Supreme Court’s modern approach to procedural due process arguably reflects this commitment to flexibility in the face of changing facts and circumstances. Since 1976, the *Mathews v. Eldridge* balancing test has provided the analytical framework for determining what procedures are due when due process rights are triggered.<sup>196</sup> *Mathews* requires courts to scrutinize and weigh three factors—the private interest at stake, the risk of erroneous deprivation and the probable value of additional or substitute procedural safeguards, and the government’s interest—to determine whether existing procedures satisfy the Due Process Clause.<sup>197</sup> And since 1950, the related but analytically distinct question of whether the government provides sufficient notice of a constitutional deprivation has been guided by the Court’s decision in *Mullane v. Central Hanover Bank & Trust*, which asks whether the notice provided was “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>198</sup>

Both the *Mathews* and the *Mullane* tests are highly fact dependent. They reject one-size-fits-all approaches to procedural due process, instead directing courts to consider the facts and circumstances of the specific procedural setting in which the due process challenge arises.<sup>199</sup> *Mathews* and *Mullane* also root the analysis in the present, giving little explicit weight to historical or customary

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the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

<sup>194</sup> *Burnham v. Superior Court*, 495 U.S. 604, 630 (1990) (Brennan, J., concurring). Although history creates a strong presumption of continued validity, “the Court has the authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid.” *Id.* at 628 (White, J., concurring); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (“[The] constitution [was] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” (emphasis omitted)).

<sup>195</sup> *Connecticut v. Doebr*, 501 U.S. 1, 10 (1991) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

<sup>196</sup> *Mathews*, 424 U.S. at 319.

<sup>197</sup> *Id.* at 335.

<sup>198</sup> 339 U.S. 306, 314 (1950).

<sup>199</sup> See *Mathews*, 424 U.S. at 334-35 (embracing the notion that due process “calls for such procedural protections as the particular situations demands” (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))); *Mullane*, 339 U.S. at 314 (instructing courts to give “due regard for the practicalities and peculiarities of the case” when evaluating whether the constitutional requirements have been met).

procedural practices.<sup>200</sup> In theory—if not always in practice<sup>201</sup>—*Mathews* and *Mullane* open the door to reevaluation of procedural due process precedents when changes in the underlying facts and circumstances bear upon the factors that courts must consider when evaluating challenges to existing procedures.<sup>202</sup>

Yet this focus on the facts has frustrated attempts to push due process doctrine in new directions. By asking courts to weigh the costs and benefits of procedural safeguards that are by definition not currently in place, the modern approach to procedural due process requires plaintiffs in due process litigation to produce information that is typically unavailable.<sup>203</sup> Even when courts allow cases to proceed to discovery, there is often no way for plaintiffs to marshal the evidence necessary to prove that current procedures violate the Due Process Clause. Indeed, because plaintiffs usually seek procedural safeguards that the government has not previously implemented or even considered,<sup>204</sup> it can be impossible for plaintiffs to produce the evidence demanded by the modern approach to procedural due process.

## 2. Dialogic Due Process

The kinds of procedural innovations described in Part II can offer a way out of this doctrinal dead end. These innovations create an opportunity for dialogue between the courts that review due process claims, on the one hand, and the procedural systems in which these innovations are taking place, on the other. The innovations are often accompanied by rigorous and robust data collection and analysis. They are therefore generating new ideas for procedural safeguards as well as the type of evidence that *Mathews* and *Mullane* demand.

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<sup>200</sup> See, e.g., Mashaw, *supra* note 63, at 55 (noting that the *Mathews* Court “could [not] discover guiding authority in prior administrative practice, which [was] based on the now discredited notion that social welfare benefits are subject to discretionary divestiture”); see also Bartholomew, *supra* note 132, at 224-28 (explaining that the *Mullane* Court adopted a case-specific analysis that emphasizes flexibility).

<sup>201</sup> See, e.g., Parkin, *supra* note 11, at 1312-15 (describing a series of federal court cases involving debt collection procedures in which lower courts split over the question of whether the procedures required by the Due Process Clause could be reevaluated based on changed facts and circumstances); see also Bartholomew, *supra* note 132, at 234-59 (summarizing empirical research on class-action notices finding that most judges have not embraced new forms of notice).

<sup>202</sup> See Parkin, *supra* note 11, at 1360-65 (arguing that due process procedures can be reevaluated under *Mathews* in light of changing facts and circumstances); see also Bartholomew, *supra* note 132, at 260-65 (arguing that notice requirements can be reevaluated under *Mullane* in light of new technologies).

<sup>203</sup> See Resnik, *supra* note 85, at 158 (“Neither judges nor litigants can identify with any rigor the actual costs of various procedures, let alone model (or know) the impact in terms of false positives and negatives produced by the same, more, or different processes . . . . While one can state the equation, one cannot do the math because the data are missing.”).

<sup>204</sup> Notably, this was not the case in *Mullane*, where the defendant had actually provided the sought-after notice (mailed notice to known beneficiaries of the trust) in the past. See *Mullane*, 339 U.S. at 319 (“[T]he fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.”).

The right-to-counsel innovations discussed in Section II.A demonstrate the potential for dialogue between non-court-driven innovation and due process doctrine. The jurisdictions that have implemented a right to counsel in deportation and eviction proceedings are generating exactly the kind of data that has been missing or insufficient in prior right-to-counsel litigation. Plaintiffs in those lawsuits had little difficulty producing evidence of the first *Mathews* factor (the private interest at stake), but it was much harder to show the risk of error when individuals proceed pro se, the probable value of an appointed lawyer, and the cost to the government of a right-to-counsel program. Now, however, the right-to-counsel experiments make it possible to assess the actual value of the *Mathews* factors based on what is happening day in and day out in jurisdictions where this kind of experimentation is taking place.

The use of electronic notice is also creating an opportunity for dialogue.<sup>205</sup> When government agencies experiment with forms of notice that are different from the paper mailings that were used for decades, it becomes possible to evaluate the impact of those changes. The government can measure whether electronic notices result in fewer mailing problems, whether notices are received in a more timely manner, whether electronic notice is administratively feasible, and whether it is less costly than printing and mailing paper notices. While it may not be possible to answer all of these questions, the implementation of new forms of notice can generate data and information that is relevant to the cost–benefit analysis. Thus, it lays the groundwork for a dialogue between the agencies that have adopted electronic notice and the courts that may have occasion to rule on a due process challenge to another agency’s method of providing notice.

Finally, a similar opportunity also exists with respect to the rise of active judging in litigation involving pro se parties.<sup>206</sup> Courts that implement active judging can measure its impact on litigants, judges, and the court system. Evidence of active judging’s effect on error rates and administrative costs is particularly important, as there is no other way to gather that kind of evidence without actually implementing such a program.

The idea that a constitutional right can be informed and shaped by changing facts and circumstances is not a novel one. For example, the Supreme Court has recognized the evolving nature of the Fourth Amendment’s prohibition on “unreasonable searches and seizures”<sup>207</sup> and the

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<sup>205</sup> See *supra* Section II.B.

<sup>206</sup> See *supra* Section II.C.

<sup>207</sup> U.S. CONST. amend. IV; see *United States v. Jones*, 565 U.S. 400, 406 (2012) (explaining that courts must look to an individual’s “reasonable expectation of privacy,” which evolves over time (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967))).



Eighth Amendment's prohibition on "cruel and unusual punishments."<sup>208</sup> Nor is the concept of dialogue foreign to constitutional law; however, it is typically used to describe a dialogue between courts and legislatures<sup>209</sup> or between government officials and affected individuals.<sup>210</sup>

In any event, the fact-intensive nature of the Court's modern approach to procedural due process makes a dialogue between bottom-up experimentation and due process litigation both appropriate and potentially powerful. When reviewing procedural due process claims, courts demand evidence of the costs and benefits of the procedural safeguards sought by plaintiffs. Government defendants typically are the main—if not only—source of evidence regarding the risk of error and the value and cost of additional procedures. But the kinds of innovations described in this Article are generating new evidence in the form of raw data and even expert reports, which plaintiffs can use to rebut defendants' factual assertions. This new evidence may come from innovations occurring in other jurisdictions and perhaps even different procedural regimes; however, as is the case in civil litigation generally, both parties can advance arguments concerning the relevance and weight of the evidence.

This dialogic approach does not guarantee that plaintiffs' due process claims will succeed. But it can help plaintiffs convince judges that the costs and benefits may not be as clear cut as the government suggests—in other words, that there is a "genuine dispute as to a[] material fact" that must be resolved at trial.<sup>211</sup> Ultimately, it will be up to the factfinder to decide whether the evidence presented by the parties tips the cost–benefit balance in favor of the procedural safeguards sought by plaintiffs.

In sum, armed with evidence generated by procedural innovations, plaintiffs in due process litigation have an opportunity to link on-the-ground experimentation with due process doctrine. This kind of dialogic approach to due process can therefore ensure that the changes wrought by the due process revolution of the 1960s and 1970s are not the end of the road for the evolution of procedural due process.

### C. *Limits and Objections*

The kind of dialogue proposed in this Article is not without its limits and potential objections. Ever since the due process revolution, judges,

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<sup>208</sup> U.S. CONST. amend. VIII; *see* *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (explaining that courts must consider "evolving standards of decency that mark the progress of a maturing society" (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

<sup>209</sup> *See generally* Liu, *supra* note 29.

<sup>210</sup> *Cf.* Tribe, *supra* note 30, at 301 (discussing the need for dialogue between the state and individuals whose liberty the state seeks to constrain). *See generally* Handler, *supra* note 30; Kirp, *supra* note 30.

<sup>211</sup> FED. R. CIV. P. 56(a).

government officials, advocates, and scholars have raised concerns about courts holding that the Due Process Clause requires specific procedural safeguards. A dialogic approach to procedural due process would encounter similar objections. It could be challenged for being out of step with current judicial reluctance to interfere with the operation of large-scale procedural systems. It could be attacked for entrenching a new set of procedures and stifling future innovation. And it could trigger fears about disrupting procedural systems that have been in place for decades. This Section addresses each of these limits and objections in turn.

### 1. Inconsistent with Prevailing Judicial Mood

One potential objection to a dialogic approach to procedural due process is that it is out of step with prevailing notions of the proper role of judges and courts. Since the due process revolution, scholars, government officials, and many judges themselves have questioned the legitimacy of courts interfering with procedural regimes designed by administrative agencies and court systems.<sup>212</sup> Some criticize judicial intervention on separation-of-powers grounds, arguing that it is illegitimate for judges to dictate procedures to other governmental actors.<sup>213</sup> Others claim that judges lack the capacity to identify the proper procedures in light of administrative and budgetary constraints.<sup>214</sup> While the Supreme Court has made clear that the courts—not legislatures or administrative agencies—have the last word on whether

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<sup>212</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 279 (1970) (Black, J., dissenting) (“[N]ew experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left . . . to the Congress and the legislatures that the people elect to make our laws.”).

<sup>213</sup> See, e.g., William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982) (“[S]ince trial court remedial discretion in institutional suits is inevitably political in nature, it must be regarded as presumptively illegitimate.”); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978) (arguing that separation of powers principles limit the authority of federal courts to order relief against state institutions); John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1123–24 (1996) (arguing that “separation of powers principles require that the answer come from the political branches” rather than the courts).

<sup>214</sup> See, e.g., Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 807 (1990) (“Courts lack the administrative capacity to alter basic institutional practices directly and are constrained by both a limited constitutional mandate and a narrow vision of their role.”); Vermeule, *supra* note 31, at 1922 (arguing that judges lack “the overall perspective” required to fashion procedural systems); cf. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1017–18 (2004) (summarizing concerns about the capacity of courts and judges to reform institutions).

procedures comply with the Due Process Clause,<sup>215</sup> judges reviewing due process claims tend to be reluctant to displace existing procedures.<sup>216</sup>

These longstanding critiques apply with equal force to a dialogic approach to due process. As an initial matter, just because an innovation is feasible or effective in one context or jurisdiction does not mean that the Due Process Clause requires the procedure to be extended to others. This is related to a broader point about due process procedures that is also relevant here—as the Supreme Court has explained, “our cases have never held that improvements in the reliability of new procedures necessarily demonstrate the infirmity of those that were replaced.”<sup>217</sup>

It is also true that government officials are typically in the best position to understand the relative advantages and disadvantages of procedural innovations. However, the Supreme Court’s modern approach to procedural due process is intended to account for this dynamic. If a plaintiff is able to produce the kinds of evidence demanded by *Mathews* and *Mullane*, then the court must evaluate that evidence and reach a conclusion about the constitutionality of the existing procedures. And while critics have assailed the *Mathews* analysis in particular for asking courts to weigh factors for which little evidence is typically available,<sup>218</sup> the dialogic approach is rooted in an understanding that procedural experimentation will generate exactly the type of evidence that courts usually lack when evaluating due process claims.<sup>219</sup> Thus, a dialogic approach to due process enables courts to assert their role in the development of due process doctrine while also grounding their rulings in hard facts that are generated by non-court-driven procedural innovations.

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<sup>215</sup> See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (“The right to due process ‘is conferred, not by legislative grace, but by constitutional guarantee.’” (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring))).

That said, as Adrian Vermeule has noted, administrative agencies “are now the primary frontline expositors and appliers of the *Mathews* test.” Vermeule, *supra* note 31, at 1891. See generally Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013). For example, federal agencies that have used the *Mathews* approach to determine which procedures to make available include the Environmental Protection Agency; the Nuclear Regulatory Commission; the Bureau of Alcohol, Tobacco, and Firearms; the Treasury Department; the Centers for Disease Control and Prevention; the Department of Labor; the Department of Homeland Security; the National Labor Relations Board; the Federal Election Commission; and the Department of Housing and Urban Development. Vermeule, *supra* note 31, at 1891-92.

<sup>216</sup> See, e.g., Vermeule, *supra* note 31, at 1893 (arguing that courts “review[] agency determinations about due process with a light hand”).

<sup>217</sup> *Dusenbery v. United States*, 534 U.S. 161, 172 (2002); see also *Medina v. California*, 505 U.S. 437, 451 (1992) (explaining that “[t]he Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to” the party challenging the existing procedures).

<sup>218</sup> See *supra* notes 86–95 and accompanying text.

<sup>219</sup> See *supra* Part II (discussing evidence generated by procedural innovations).

## 2. Tension Between Constitutional Entrenchment and Innovation

Whenever courts are asked to hold that the Due Process Clause requires specific procedures, there is fear that constitutionalizing those procedures will entrench the procedures and stifle future innovation.<sup>220</sup> This concern is particularly resonant here, as the dialogic approach to due process relies on procedural innovation occurring outside the realm of constitutional litigation. If the types of innovations described in Part II lead courts to hold that the Due Process Clause requires similar procedural safeguards in other jurisdictions, courts may reduce the incentives and flexibility that enable procedural innovation.<sup>221</sup> Or viewed another way, the recent flourishing of innovation could be perceived as proof that the courts and the Constitution should keep out.

But it is far from clear that entrenchment is a real concern with respect to procedural due process. The wave of procedural due process rulings in the 1970s and 1980s did not prevent experimentation with procedures that had been rejected by courts or never tried in the past.<sup>222</sup> Moreover, a dialogic approach to procedural due process could encourage future experimentation: it would demonstrate the courts' openness to innovation and their willingness to consider data generated by jurisdictions and adjudicatory systems that opt to try new procedures. In that sense, the dialogic approach could become a force for anti-entrenchment, leading to procedural regimes that are more inclined to experiment with additional or alternative procedural safeguards.

## 3. Disruption and Uncertainty

There is no way to avoid disruption and uncertainty when engaging in a dialogic approach to procedural due process. The more experimentation and innovation that occurs, the higher the likelihood that due process doctrine will evolve in new and unexpected ways. This is the price of a constitutional right that is defined by its flexibility and responsiveness to changing

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<sup>220</sup> See, e.g., Farina, *supra* note 83, at 254 (observing that “judicial declaration of process rights marks the end of innovation and adaptability”); Friendly, *supra* note 2, at 1301–02 (agreeing with Chief Justice Burger that it would be better “to hold the heavy hand of constitutional adjudication and allow evolutionary procedures at various administrative levels to develop, given their flexibility” (quoting *Wheeler v. Montgomery*, 397 U.S. 280, 283 (1970) (Burger, C.J., dissenting))); Levin, *supra* note 98, at 346 (“Constitutional holdings, by their nature, are especially hard to modify or overturn when experience casts doubt on their wisdom.”); cf. *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976) (“[E]xperience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.”).

<sup>221</sup> See, e.g., Friendly, *supra* note 2, at 1301–02 (cautioning courts to leave procedural developments to administrative agencies).

<sup>222</sup> See Parkin, *supra* note 11, at 1365–74 (discussing post-*Goldberg* procedural experimentation in the welfare context).

circumstances.<sup>223</sup> In the end, if the evidence generated by procedural innovations shows that the benefits of an additional or substitute procedural safeguard outweigh the costs (per *Mathews*), or that the evidence reveals existing notice procedures not to be reasonably calculated to provide timely and adequate notice (per *Mullane*), then courts have no choice but to hold that the existing procedures do not satisfy the Constitution's due process guarantee.<sup>224</sup>

### CONCLUSION

It is an exciting time for procedural due process. Procedural systems that have been in place for decades are coming under new scrutiny. Experimentation with new and different procedural safeguards is occurring at the local, state, and federal levels. Whether prompted by the pro se crisis in civil courts, changes in technology, or a better understanding of the shortcomings of existing procedural regimes, procedural reform is emerging across a diverse set of jurisdictions and legal proceedings.

Due process doctrine and theory are not experiencing a similar evolution, however. Even though the innovations described in this Article strike at the heart of procedural due process, they are not the result of constitutional litigation. The Supreme Court's due process case law has changed little since the due process revolution, and the Court's modern approach to procedural due process has been largely unreceptive to novel arguments based on new facts and circumstances. Indeed, if the proponents of today's procedural reforms had first gone to court seeking new and different procedures, their claims almost certainly would have been denied. The result is a growing gap between procedural rights on the ground and due process doctrine.

A dialogic approach to due process offers a way to reconcile bottom-up procedural innovations and due process doctrine. The Court's modern approach to procedural due process is highly fact-dependent, and many current procedural innovations are generating precisely the types of data and information that the Court requires in due process litigation. For the first time, it may be possible for plaintiffs to produce evidence of the costs and benefits of novel procedures, enabling courts to more accurately balance the interests of the government and affected individuals. There is no guarantee that this kind of dialogue will result in courtroom victories or doctrinal change, but it is consistent with due process's deeply rooted flexibility and adaptability, and it offers an opportunity for reviving and reunifying procedural due process doctrine.

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<sup>223</sup> See *supra* subsection III.B.1.

<sup>224</sup> Changes in due process procedures need not always result in additional procedures. See David E. Benz, *Is Less Ever More? Does the Due Process Clause Ever Require Fewer Procedures?*, 65 *DRAKE L. REV.* 1 (2017) (arguing that the Due Process Clause can require *less* process in certain circumstances).

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