SMU | Dedman School of Law

SMU Law Review

Volume 76 | Issue 3 Article 12

2023

Constraining and Licensing Arbitrariness: The Stakes in Debates about Substantive-Procedural Due Process

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Recommended Citation

Helen Hershkoff & Judith Resnik, *Constraining and Licensing Arbitrariness: The Stakes in Debates about Substantive-Procedural Due Process*, 76 SMU L. Rev. 613 (2023)

Constraining and Licensing Arbitrariness: The Stakes in Debates about Substantive-Procedural Due Process

*Helen Hershkoff and Judith Resnik**

ABSTRACT

"Due process," unmodified by the words "substantive" or "procedural," has long marked the obligation of federal and state governments to protect individuals against arbitrary and unfettered uses of state power. Constitutional guarantees of rights to remedies and access to court date back centuries and, during the twentieth century, were reread to include all persons regardless of race, gender, and class. Moreover, the need for governments to legitimate their own decisions propelled interpretations of the Due Process Clauses of the Fifth and Fourteenth Amendments in conjunction with evolving interpretations of equal protection to ensure that courts provided even-handed treatment.

Thus, on occasion, the Supreme Court has concluded that court fees had to be waived, subsets of litigants needed to be provided with lawyers, and failures to pay fines or child support could not result in detention unless judges inquired into the "ability to pay." Judges also assessed the "fairness" of procedures in courts and agencies and at times required revamping modes of decision making. Moreover, due process was the touchstone of the "fairness" of state courts' exercise of jurisdiction over absent litigants and application of their law to out-of-state parties.

Thus, in various contexts, and at times in conjunction with other constitutional and common law provisions, due process had come to denote the relationship between government and individuals that entails respect for people expressed through procedures and decision making that are fundamentally "fair." Due process has thus been adaptive, pluralistic, and Janus-faced—looking to protect individuals in their encounters with government while shoring up the authority of governments to enforce their laws.

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https://doi.org/10.25172/smulr.76.3.12

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The Supreme Court's 2022 decision in Dobbs v. Jackson Women's Health Organization*, rejecting the federal constitutional right to an abortion, raises concerns about this account of due process. Our contribution to this Symposium is to sketch the elaboration of due-process principles that, built in earlier eras, came to apply to people who had been denied these protections. We analyze how the Supreme Court has, through the interaction of due process and equal protection, begun to address inadequate litigation resources and asymmetries between individuals and their adversaries in courts and agencies. We sketch the intersection of due-process norms with other constitutional provisions and the embeddedness of aspirations for non-arbitrary and fair treatment across diverse doctrinal categories including family, criminal, banking, and administrative law, as well as in other common and civil law systems. Yet, as* Dobbs *makes plain, commitments to due process and equality can be undermined. Through clarifying the stakes in debates about due process in a variety of its forms, we hope to encourage mobilization across the political spectrum to reject the potential for a frightening arbitrariness that members of the current Supreme Court seem poised to countenance. Renewed commitments are needed to insist on practices of bounded lawfulness, equality, and fairness that due process has encoded and should continue to promote.*

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I. DUE PROCESS, MODIFIED AND NOT

WHAT are the stakes if a majority of Justices on the U.S. Supreme Court revisit and alter more of the law on the due-process guarantees of the Fifth and Fourteenth Amendments? While commentators have focused on the Court's impact on individual rights (for which the 2022 decision in *Dobbs v. Jackson Women's Health Organization* is one shorthand[1]), we bring to the fore the various roles that due process plays to validate government power by protecting individuals from its arbitrary use. The hyphen between "substantive" and "procedural" in our title is a reminder that due process has facets that can be characterized as both substantive and procedural. As a concept and a practice, due process is simultaneously protective of governments and individuals and hence

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

functions as an individual right and as part of the "structural" Constitution.[2] Were the Court to extend the interpretive approach (often dubbed "originalism") used by a majority of Justices in *Dobbs* to decisions at times called "procedural due process," at others "substantive due process," and sometimes "due process" unmodified, the results could undermine aspirations for fairness, equality, and liberty that undergird the legal order of the United States.

Due process is not the exclusive predicate for such commitments. Hence, we analyze legal principles entwined with due process that include aspects of Article III, the Privileges and Immunities and Habeas Corpus Clauses, and the Fifth, Sixth, and Eighth Amendments. Decisions about these provisions regularly reference the importance of fair and even-handed treatment, impartial decision making, and state obligations to organize and hence to discipline the power government officials have. For example, in *Gideon v. Wainwright*, the Court ruled that the Sixth Amendment required state-funded counsel for indigent, felony defendants,[3] and in *Boddie v. Connecticut*, that states had to provide court-fee waivers for indigent litigants seeking to divorce.[4] The Court has relied on the Eighth Amendment to protect conditions of confinement and health care in prisons, of which *Estelle v. Gamble* is one example,[5] and parallel obligations flow to pre-trial detainees by virtue of the Due Process Clause, as explained in several opinions such as *Bell v. Wolfish*.[6] All of those approaches are under attack, at times under the name of "originalism."

Before explicating this analysis, more prefatory comments are in order. Under the rubric of "substantive due process" is an eclectic set of rights and claims—including freedom of contract and market liberty, known by the shorthand *Lochner*[7]—that can be and have been used to defeat a host of regulations, some of which aim to enable more economically just and egalitarian social orders. We do not here explore the range of practices sanctioned or challenged under substantive due process but focus instead on the substantive purpose of due process. As Charles Miller has excavated, due process's *relational* focus aims to curb government *arbitrariness*. Due process imposes a discipline on government's relationship with individuals and frames obligations to sustain a system of participatory, even-handed, transparent, and accountable decision making. That point can be found in our discussion below of the challenges governments face when,

2. *See* William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. Rev. 1183, 1187–88 (2000); Anthony R. Enriquez, *Structural Due Process in Immigration Detention*, 21 CUNY L. Rev. 35, 40–41 (2017). Some commentators use the term "structural due process" to attend to methods by which legislative "policies are both formed and applied." Laurence H. Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269, 269 (1975).

3. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

4. Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971).

5. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

6. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979).

7. Lochner v. New York, 198 U.S. 45 (1905).

in courts and agencies, individuals lack adequate resources or adversaries have asymmetrical capacities.

Moreover, when we draw on history, we do so not as originalists, nor do we offer the kind of sustained critiques of originalism that many others have provided. (For example, Reva Siegel has argued originalism to be both a method and "a politics whose longstanding goal has been reversing *Roe*,"[8] and Richard Fallon has labeled the Court's use of it downright "dishonest."[9]) Our interest in history is to understand the relevance of traditions built over time and now applied to people who in centuries past had no access to those protections.[10] Although the majority in *Dobbs* discredited and ignored women's reliance interests with respect to due-process rights to autonomy, practices of governance aspiring to fair, open, and equal treatment generate legitimate expectations about how governments are to conduct themselves. One need not quest for some magic moment of meaning from the Founding Era to generate a political order to which the words "constitutional democracy" can be applied.

Furthermore, while we focus mostly on courts in the discussion that follows, the articulation of due-process values has always come from many venues and been reshaped in light of social movements. The kinds of "process due" can be seen from procedural codes that have structured decision-making in courts. As Kellen Funk, Amalia Kessler, and other historians have mapped, debates about procedure laced the state-building of the nineteenth and twentieth centuries, and expositions can be found in the Field Code and other compendia of procedures for courts.[11] The development of the Federal Rules of Civil Procedure in the 1930s and the Administrative Procedure Act in the 1940s is likewise replete with commitments to fair procedure as a requisite to legitimate judgments.[12] Federal statutes on

8. Reva B. Siegel, *Memory Games:* Dobbs's *Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 Tex. L. Rev. 1127, 1129 (2023). The misuse of history and the effort to equate the Court's approach to *Dobbs* with *Brown v. Board of Education* is documented in Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs's *Method (and Originalism) in the Defense of Segregation*, 133 Yale L.J.F. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4501815 [https://perma.cc/WP9K-HPEN]. There, she analyzes how *Dobbs* comports with the approach of *Plessey v. Ferguson*, rather than *Brown*.

9. Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality 58 (Feb. 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4347334 [https://perma.cc/9MZA-8XJB].

10. *See* Judith Resnik, *Representing What? Gender, Race, Class, and the Struggle for the Identity and the Legitimacy of Courts*, 15 L. & Ethics Hum. Rts. 1, 1–2 (2021); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 Notre Dame L. Rev. 1753, 1754 (2015); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1736 (1991).

11. *See* Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 Am. Hist. Rev. 132, 145–46 (2018); Kellen Funk, Law's Machinery: Reforming the Craft of Lawyering in America's Industrial Age (forthcoming 2024) (on file with authors); Amalia D. Kessler, Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877, at 12 (2017); Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. Legal Hist. 152, 152 (2015).

12. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 922 (1987); Stephen B.

habeas corpus include a mini procedural code, and the Court interpreted the guarantee not to suspend habeas to require independent fact finding on claims of unlawful pre-trial detention.[13] In addition, a variety of federal statutes generating rights of action invite people to use administrative agencies and courts to seek redress. One example is the 1946 Federal Tort Claims Act, which waived the sovereign immunity of the United States and enabled individuals alleging tortious injury by federal officials to obtain relief.[14] Congress has also granted courts the authority to adjudicate claims in a variety of fields including civil rights, consumer and credit provisions, and antitrust laws. As a result, parties alleging injury could bring lawsuits to require accountings from government and, at times, corporate actors.[15] In short, "due process" can be found in many enactments, and hence we remind readers of the broader context.

Thus, Part II explores the conceptualization of due process and the development of an understanding of how it shapes the relationship between the individual and the government by imposing constraints on state actors when seeking to affect an individual's life, liberty, or property. Part III examines the challenges arising from aspirations to provide decision making that can be understood to be legitimate when many disputants have limited and asymmetrical resources. In response and generally in the context of courts, the Supreme Court and legislatures innovated in imposing new requirements in service of equal treatment in courts and agencies. Part IV discusses due-process values that find expression in legal systems outside the United States. We conclude by returning to our concerns about the normative stakes if members of the Court hollow out what due process, interacting with other facets of the Constitution, has come to protect.

II. RELATIONSHIPS AND RESPONSIBILITIES AS BUFFERS AGAINST ARBITRARY USES OF GOVERNMENT POWER

Our analyses center on the discipline that due process injects into the *relationship* between individuals and government. "Due process" marks obligations that governments owe to the body politic to structure decision making in ways that constrain arbitrariness and prevent idiosyncratic,

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Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1943–54 (1989); Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940 (2014).

13. *See* 28 U.S.C. § 2241; Boumediene v. Bush, 553 U.S. 723, 745–46 (2008); Paul D. Halliday, Habeas Corpus: From England to Empire 58–60 (2010); Amanda L. Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantánamo Bay (2017); William F. Duker, A Constitutional History of Habeas Corpus 141–42 (1980). The Court has recently limited habeas review in a number of cases. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 (2020); Shoop v. Twyford, 142 S. Ct. 2037, 2046 (2022); Jones v. Hendrix, 143 S. Ct. 1857, 1871–72 (2023).

14. The focus is on a "principle of public accountability that informs the FTCA." *See* Helen Hershkoff, *Early Warnings, Thirteenth Chimes: Dismissed Federal-Tort Suits, Public Accountability, and Congressional Oversight*, 2015 Mich. St. L. Rev. 183, 193 (2015).

15. *See* Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 Va. L. Rev. 1483, 1497–98 (2022).

unfair treatment of individuals.[16] These ideas were first embodied in common-law principles and then stated at the federal level in 1791 in the Fifth Amendment when the Bill of Rights was added to the Constitution and restated in 1868 in the Fourteenth Amendment. Those two Due Process Clauses help sustain the "basic structure" of political life by obliging federal and state actors to act in accordance with legal rules.[17]

The constitutional formulation, built on centuries of English law, reflects one of many examples of "law's migration" from outside the United States that has become constitutive of the country's legal identity.[18] Charles Miller provided a historical account of English commitments which became part of U.S. due process and which produced a "tradition of social thought and practice as well as a meandering stream of judicial precedent" that he called "a tribute to a law-minded people."[19] As Miller explained, a variegated development of "language and ideas" in the twentieth century came to encompass all persons under its aegis and aimed to recognize and construct relationships that achieved both "individual fulfillment and social welfare."[20] That point is made in constitutional doctrine that has used the Fourteenth Amendment's Due Process Clause to incorporate and apply Bill of Rights guarantees to the states and that has recognized equal protection obligations of the federal government through the words of the Fifth Amendment's Due Process Clause.[21]

Because due-process protections come into play when governments take action that affects an individual's "life, liberty, and property,"[22] questions have emerged about how to define life, liberty, and property and whether to characterize them as "inalienable" rights that predate the Constitution, as rights that the Constitution creates or defines, or as rights that are sourced elsewhere, such as in the common law and statutes.[23] In some cases (such as

16. *See* Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* Due Process: Nomos XVIII 3, 38 (J. Ronald Pennock & John W. Chapman eds., 1977); *see also* T.M. Scanlon, *Due Process*, *in* Due Process: Nomos XVIII 93, 96 (J. Ronald Pennock & John W. Chapman eds., 1977).

17. *See generally* Iris Marion Young, *Taking the Basic Structure Seriously*, 4 Persps. on Pol. 91 (2006). For an analysis of whether originalism supports taking different approaches to the Fifth and Fourteenth Amendment Due Process Clauses, see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408 (2010).

18. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 Yale L.J. 1564, 1564 (2006).

19. Miller, *supra* note 16, at 36–38.

20. *Id.* at 38.

21. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 687 (2019). The Court has relied on the Fourteenth Amendment's Due Process Clause (and concurrences in *Timbs* on the Privileges or Immunities Clause) to incorporate protections of the Fourth, Fifth, Sixth, and Eighth Amendments to the states via the Fourteenth Amendment. *See, e.g.*, *id.* at 687–92; Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963). For equal protection and hence obligations to desegregate schools in the District of Columbia, the Court relied on the Fifth Amendment's Due Process Clause to apply Equal Protection mandates to the federal system. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

22. *Timbs*, 139 S. Ct. at 692.

23. One arena in which that debate has occurred involves the "liberty" that remains for individuals after conviction. Justice Stevens explained that incarcerated people had liberty interests, and therefore that the state's decision to transfer a detainee to a more onerous prison required providing rights to be heard and to contest the decision. *See* Meachum v.

about family life), Justices have assumed the liberty interests exist without inquiries into their sources, while in others, Justices have probed whether state or federal statutes generated entitlements protected as property or liberty by due process. Given the range of interests that may be characterized as "life, liberty, and property," courts and commentators have invoked due process in diverse contexts to advance a host of different ends and, depending on the application, have garnered support from various parts of the political spectrum.

Due process is thus adaptive, contextual, and pluralistic—which can make it seem "cryptic and abstract," as Justice Jackson put it.[24] The breadth of due-process doctrine comes in part from its non-exclusivity; the ideas associated with due process can also be found in interpretations of other constitutional provisions. For example, practices of non-arbitrary treatment, access to legal remedies, and methods to ensure fair decision making inform readings of the "privileges and immunities" of citizens, of "Article III values," of the Fourth, Fifth, Sixth, and Eighth Amendments, and the content of guarantees against suspension of the writ of habeas corpus.[25] Moreover, because state and federal codes, statutes, and rules governing courts and administrative agencies also structure decision making, they have influenced constitutional interpretations of due process and some statutes and rules have also been found wanting because of it.

The potential arbitrariness of government power is vivid when used to detain and prosecute individuals. The Fifth and Sixth Amendments specify protections on behalf of criminal defendants; those rights could be read as exemplifying due process or adding specific provisions for only those litigants. A majority of Justices have, thus far, drawn on the concerns of the rights of criminal defendants and applied, with modifications, some of these procedural protections to disputes involving civil litigants in court and administrative proceedings.[26] Many opinions outline a package of interrelated obligations that entail "opportunities to be heard" and impose a structure on government decision making that includes notice, in-person hearings or reviews on paper to present and contest information, and impartial officers limited by a record.[27] The Court has likewise required

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Fano, 427 U.S. 215, 235 (1976) (Stevens, J., dissenting). However, a long line of decisions have formulated a limited view of incarcerated people's liberty; they must show the state is subjecting them to "atypical and substantial" prison conditions to obtain procedural protections. Thus, the Court has concluded that it is "normal" for those detained in prisons to have limited protection from potentially arbitrary state conduct. *See* Judith Resnik, Hirsa Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola & Meredith Wheeler, *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 Nw. U. L. Rev. 45, 92–93 (2020).

24. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

25. For example, Justice Alito in *Mallory v. Norfolk Southern Railway Co.* turned to the Commerce Clause as a constraint on state power over absent defendants. *See* 143 S. Ct. 2028, 2052–53 (2023) (Alito, J., concurring).

26. For example, in *Goldberg v. Kelly*, Justice Brennan's majority opinion quotes from cases involving the rights of criminal defendants. 397 U.S. 254, 270 (1970) (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

27. *See, e.g.*, *Goldberg*, 397 U.S. at 267; Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337, 341–42 (1969); Goss v. Lopez, 419 U.S. 565, 580–81 (1975); *see also* Judith Resnik,

non-arbitrariness in sentencing as a matter of the Eighth Amendment.[28] In addition, given the Court's view that the prohibition on "cruel and unusual punishment" in that Amendment applies *only* when the state is "punishing" people, the Due Process Clause has been the source of protections for people detained for other reasons or subject to other forms of state sanctions.[29] Thus, government obligations to prevent "excessive force" against persons imprisoned after conviction, to provide health care and sanitation, and not arbitrarily to "discipline" individuals stem from the Eighth Amendment.[30] When detaining individuals before trial or as migrants, parallel obligations are based on the Due Process Clause.[31]

In addition, due process structures the power of states to render binding judgments on people within and outside their borders. During the second half of the twentieth century, the law of personal jurisdiction analyzed the issues by assessing whether requiring a non-resident to appear in a court proceeding or enforcing a judgment against such a non-resident was "reasonable and just" or comports with "fair play."[32] Like so much of constitutional law, that approach exemplifies that interpretations extrapolate from text to explain outcomes that insist upon the non-arbitrary use of government power. The Constitution does not use the word "fairness" (nor many other familiar and contested precepts like "federalism," "sovereignty," "separation of powers," "checks and balances," and "immunity"). Nonetheless, as efforts to achieve a measure of racial justice were underway, words such as "fairness," "essential fairness," and "fundamental fairness" became benchmarks of due process.[33] Moreover, even as the U.S. Constitution is not regularly identified with "positive" rights such as education,

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The Story of Goldberg*: Why This Case is Our Shorthand*, *in* Civil Procedure Stories 473, 473–508 (Kevin M. Clermont ed., 2d ed. 2008).

28. *See generally* Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Carol S. Steiker & Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment (2016).

29. *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977).

30. Conditions of confinement, including issues of responding to known medical needs, providing safety, and protecting against violence are based on the Eighth Amendment. *See* Estelle v. Gamble, 429 U.S. 97, 102–03 (1976); *see generally* Turner v. Safley, 482 U.S. 78 (1987). Imprisoned people also have rights under the Due Process Clauses. *Wolff v. McDonnell* held that due process required procedural protections before a state could deprive a prisoner of statutory good-time credits. 418 U.S. 539, 558 (1974). However, the Court has since concluded that, for in-prison punishments or changes, prisoners have to show the imposition of an "atypical and significant hardship" in order to establish an interest for which due process requires some procedural protections. *See* Sandin v. Conner, 515 U.S. 472, 484 (1995); Wilkinson v. Austin, 545 U.S. 209, 222–23 (2005).

31. *See* Kingsley v. Hendrickson, 576 U.S. 389, 391–92 (2015). The Fourth Amendment as well as the Due Process Clause may be a basis for protection. *See* Lombardo v. City of St. Louis, 141 S. Ct. 2239, 2241 n.2 (2021). In terms of pretrial conditions, the Supreme Court has relied on the Due Process Clause when addressing the rights of people in jail. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979). Liberty interests generating rights to bail and historical traditions are analyzed in Kellen Funk & Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. (forthcoming 2024) (on file with authors).

32. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2039–44 (2023) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319–20 (1945)).

33. *See, e.g.*, Halbert v. Michigan, 545 U.S. 605, 611 (2005) (quoting M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996)); Turner v. Rogers, 564 U.S. 431, 448 (2011).

housing, and monetary subsidies, due-process obligations have required that the government affirmatively deploy its resources to create courts and other adjudicatory mechanisms and, on occasion, to subsidize individuals to enable their participation.[34] These requirements are always Janus-faced, looking both to protect individuals from government arbitrariness and to shore up the legitimacy of the decisions rendered, whether or not the outcomes are substantively just. Due process is thus "conservative" in the sense of preserving government power.

Atop adjectives like "fundamental" and "essential," the modifiers "substantive" and "procedural" have taken hold.[35] A focus on "procedural due process" became familiar in the 1970s when the Court responded to claims that the government had arbitrarily terminated a person's public benefits, a job, or educational opportunities, and done so without sufficient notice or an opportunity to present facts and arguments.[36] As the case law developed, the Court initially concluded that legislatures had the power both to create new forms of property and liberty interests and to specify procedures for their termination. In *Arnett v. Kennedy*, Justice Rehnquist, in a plurality opinion, famously called that linkage "tak[ing] the bitter with the sweet."[37]

Thereafter, the Court insisted on *its* prerogative to decide whether procedures were adequate under the Due Process Clause.[38] As Justices explained in several rulings, the point was not only to respect and protect individuals, but also to sustain the legitimacy of governments by requiring fair and open process. A cheerful account of due process equates the processes due with eliciting quality information that generate good substantive outcomes. Principles of fairness and non-arbitrariness are not limited to generating "accurate" outcomes; they also recognize the dignity of individuals by enabling them to participate meaningfully in the processes by which decisions are made. Furthermore, disciplined decision making aims to enhance equal treatment through even-handed and consistent treatment by government, while also seeking to assuage anxiety about government overreach.[39]

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34. For arguments recognizing positive obligations under the U.S. Constitution, see, for example, Robin West, Progressive Constitutionalism: Reconstructing the Fourteenth Amendment 2–3 (1994). *See also* Vicki C. Jackson, Constitutional Engagement in a Transnational Era 199–200 (2010).

35. *See* Eskridge, *supra* note 2, at 1187–88, 1200.

36. *See* Tribe, *supra* note 2, at 277–78.

37. Arnett v. Kennedy, 416 U.S. 134, 154 (1974).

38. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). The Takings Clause has its own jurisprudence. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); San Remo Hotel, L.P. v. City and Cnty. of San Francisco, 545 U.S. 323 (2005); Tyler v. Hennepin Cnty., 598 U.S. 631 (2023).

39. Many analyses explain these aspirations. *See, e.g.*, 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 (1976); *see also* Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 Duke L.J. 1153 (1973); Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 Duke L.J. 527 (1974); Robert G. Bone, *Statistical Adjudication: Rights, Justice and Utility in a World of Process Scarcity*, 46 Vand. L. Rev. 561 (1993); Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. Rev. 1011 (2010).

Due process is also relevant to how states interact generally with individuals and not only in courts and agencies. In some decisions, described in the last several decades as predicated on "substantive due process," the Court has recognized individual rights such as personal autonomy and privacy; *Griswold v. Connecticut*—on the right to contraception—is illustrative.[40] Criticisms of substantive due process came into fashion in the 1980s and are associated with articles by John Hart Ely, Robert Bork, Antonin Scalia, and Richard Posner.[41] As Jamal Greene has explained, the accusation that substantive due process was an "oxymoron" developed in that era, as well as arguments that all the "process due" was what statutes or rules already provided.[42] (Greene's counter was that substantive due process was "redundant" in that what is "due" cannot be "indifferent to the substance of the associated loss."[43]) Greene, as well as Douglas NeJaime, Reva Siegel, and others, have excavated these earlier critiques of substantive due process and shown that they aimed selectively to withdraw judicial review when the critics objected to the substantive outcomes.[44]

The need to clarify the role played by due process in legal ordering has renewed saliency in the wake of the Supreme Court's decision in *Dobbs*,[45] in which an emboldened conservative majority overruled *Roe v. Wade*[46] and rejected the federal constitutional right to an abortion.[47] In overcoming the force of stare decisis, the Court discredited women, their reliance interests, their autonomy to chart their lives' courses, and their equality.[48] Justice Thomas, in his concurring opinion, again hurled the "oxymoron" epithet, and called "'substantive due process' . . . an oxymoron that 'lack[s] basis in the Constitution.'"[49] Abortion rights can also be predicated on the Equal Protection Clause as well as the Constitution's protection of liberty and privacy. The *Dobbs* decision underscores the vulnerability of many rights if constitutional protection is, as the conservative majority insists, limited only to rights that Justices find in the text of the Constitution or which they believe are deeply rooted in "this Nation's history and tradition."[50]

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40. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

41. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 375–76 (2013).

42. Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 257–63 (2016).

43. *Id.* at 253.

44. *See* Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1964 (2021); Greene, *supra* note 42, at 255–57.

45. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

46. Roe v. Wade, 410 U.S. 113 (1973).

47. *Dobbs*, 142 S. Ct. at 2242.

48. *Id.* at 2257, 2276–77; *see* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023).

49. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (quoting Johnson v. United States, 576 U.S. 591, 608 (2015) (Thomas, J., concurring)). As explained by NeJaime and Siegel, Justice Thomas's repudiation of substantive due process can be understood as exemplifying a rejection of "living constitutionalism" rather than an application of originalism. *See* NeJaime & Siegel, *Answering the* Lochner *Objection*, *supra* note 44, at 1964.

50. *Dobbs*, 142 S. Ct. at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). Some commentators have called the Court's approach a "hybrid" that combines originalism

As some of the concurring and dissenting opinions in *Dobbs* discuss, and as others have commented, the decision's sequelae could undermine the privacy of all persons, the role of constitutional privacy rights within marriages, of choosing partners in marriage of all races and sexual identities, and gaining recognition as parents, freedom to form other associational relations, access to and the use of contraception, the ability to make one's own choices about health care (including when to end one's life), and equality.[51] To be clear, *Dobbs* is not the only engine for such changes. As gun violence and the new Second Amendment case law make painfully clear, the originalist approach is not limited to women's reproductive choices.[52] Indeed, well before *Dobbs*, some members of the Court embraced an approach that James Pfander and Jacob Wentzel called "equitable originalism," an ironic term given that, in the name of originalism, the Court undercut the power of Article III judges to fashion a range of remedies in structural litigation and in smaller-scale lawsuits.[53] Further, recent interpretations of the Constitution's Articles I, II, and III intersect with rights associated with due process rulings undermining the independence of administrative judges, as one example.[54]

As a consequence, just as *Roe* was in the crosshairs, so too may be rights of access to courts and subsidies to use them, including state funding of lawyers for criminal defendants lacking the capacity to pay; state equipage of subsets of civil litigants; and an insistence on the integrity of administrative adjudicators protected from oversight by their executive-branch superiors.[55] Likewise in peril are the Bill of Rights' protections for criminal

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with nonoriginalist analysis. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 Nw. U. L. Rev. (forthcoming 2023) (manuscript at 25) (on file with authors). Others term the approach "selective" and without any "plausible defense." *See* Fallon, *Selective Originalism and Judicial Role Morality*, *supra* note 9, at 1. Reva Siegel also understands it as "politics." *See* Reva B. Siegel, Professor, Yale L. Sch., 18th Annual Robert H. Jackson Lecture on the Supreme Court of the United States at the Chautauqua Institution (July 11, 2022).

51. *See Dobbs*, 142 S. Ct. at 2319 (Breyer, J., dissenting); *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Turner v. Safley, 482 U.S. 78, 99–100 (1987); Obergefell v. Hodges, 576 U.S. 644, 666 (2015); Loving v. Virginia, 388 U.S. 1, 11 (1967); 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2331 (2023); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1741 (2018); Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954); *see also* Melanie Kalmanson, *Death After* Dobbs*: Addressing the Viability of Capital Punishment for Abortion*, 29 Wm. & Mary J. Race, Gender & Soc. Just. 545, 557 (2023).

52. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022); District of Columbia v. Heller, 554 U.S. 570, 584 (2008); United States v. Rahimi, 61 F.4th 443, 450 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (mem.).

53. James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 Stan. L. Rev. 1269, 1282 (2020); *see, e.g.*, Horne v. Flores, 557 U.S. 433, 472 (2009); Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 333 (1999); *see also* Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 Duke L.J. 941, 960 (2023); Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 544 (2016); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 Ind. L.J. 223, 226 (2003).

54. *See, e.g.*, Lucia v. S.E.C., 138 S. Ct. 2044, 2055–56 (2018); United States v. Arthrex, Inc., 141 S. Ct. 1970, 1988 (2021).

55. We thus disagree with the view that a turn to originalism in domains denominated as "procedure" is not infused with political agendas about social ordering. *Cf.* Sohoni, *The Puzzle of Procedural Originalism*, *supra* note 53, at 1009.

defendants and for people who are in civil detention and prisons. For example, Justice Thomas has proposed reconsidering *Gideon v. Wainwright*[56] and argued that the protections of "cruel and unusual punishment"—which have interacted with due-process analyses to limit arbitrary imposition of in-prison punishments—have no application after sentences are imposed.[57] As we noted, civil detainees' rights are likewise grounded in due process.

In contrast to the political and social movements seeking to end abortion and to open access to guns, not all the rights we discuss here have a visibility garnering mobilization. However, given that the due-process canopy protects a range of interests that cut across some political divides, coalitions could be formed to underscore the stakes of undermining the law we discuss below.

III. THE CHALLENGES OF INADEQUATE AND ASYMMETRICAL RESOURCES IN COURTS AND AGENCIES

The idea that law ought to provide fair treatment was inscribed on the building that opened in 1935 and currently houses the Supreme Court.[58] Atop the front steps are the words "Equal Justice Under Law," which became the Court's motto.[59] Although that phrase is not found in the text of the Constitution, these words have been reprinted on the Court's brochures and appear hundreds of times in lower court opinions.[60]

Less read is the inscription on the back of the Court's building: "Justice the Guardian of Liberty."[61] In that era, "liberty," as in property interests, was

56. Garza v. Idaho, 139 S. Ct. 738, 757–58 (2019) (Thomas, J., dissenting).

57. The Eighth Amendment has been central to litigation on the conditions of confinement. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978); Rhodes v. Chapman, 452 U.S. 337 (1981). While the Supreme Court has, since the 1960s, assumed that the Eighth Amendment applies to prison officials, Justice Thomas has argued that it does not. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting); Helling v. McKinney, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting); *see also* Christopher E. Smith, *Rights Behind Bars: The Distinctive Viewpoint of Justice Clarence Thomas*, 88 U. DET. MERCY L. REV. 829, 846 (2011); Linda Greenhouse, Opinion, *Clarence Thomas, Silent but Sure*, N.Y. TIMES (Mar. 11, 2010, 9:37 PM), https://opinionator.blogs.nytimes.com/2010/03/11/clarence-thomas-silent-but-sure [https://perma.cc/E4AN-MYB5].

Yet Justice Thomas has on occasion joined decisions that assume the application of the Eighth Amendment. *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 487 n.11 (1995). Some self-identified originalists believe Justice Thomas is wrong on the limited role of the Eighth Amendment. *See, e.g.*, John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1749–52 (2008); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 444–45 (2017). The view that prisoners lack the protection of the Eighth Amendment can be found in the lower courts. *See, e.g.*, Helphenstine v. Lewis Cnty., 65 F.4th 794, 795 (6th Cir. 2023) (Readler, J., statement respecting denial of rehearing en banc).

58. Matthew Hofstedt, *The Words Not Chiseled: Unused Inscriptions for the Supreme Court Building*, 43 J. SUP. CT. HIST. 125, 125, 137 (2018).

59. *Id.* at 125.

60. A brochure provided to Supreme Court visitors has that phrase on its cover. *See* SUPREME COURT OF THE UNITED STATES SELF-GUIDE TO THE BUILDING'S EXTERIOR ARCHITECTURE (2022), https://www.supremecourt.gov/visiting/ExteriorBrochure_Web_FINAL_May2022.pdf [https://perma.cc/V6ZB-4Z2A]; *see also* Judith Resnik & Dennis Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court*, 38 J. SUP. CT. HIST. 207 (2013).

61. Neither "Justice the Guardian of Liberty" nor "Equal Justice Under Law" are "a direct quotation from any identified source." Harold H. Burton, *"Justice the Guardian of*

high on the Court's agenda. As should also be familiar, despite the words inscribed, in the 1930s, not all persons were understood in the Court's case law as among those protected by mandates of either equality or liberty. In the second half of the twentieth century, the Court came to recognize people's juridical authority, regardless of gender, race, or economic status. But that proposition is now under siege—as exemplified by the Court's decision in *Dobbs*, by the 2022–23 Term's decision in *303 Creative v. Elenis*, which permits a company in the business of designing wedding websites to advertise that it will not contract with customers unless they identify as heterosexual,[62] and by legislative efforts to prevent individuals from making decisions about their sexual identities and lives.[63]

Both before and after egalitarian commitments gained some traction in constitutional doctrine, the Court acknowledged the requirement of fair decision making in a myriad of contexts. One example is the constitutional law of personal jurisdiction. States may not command absent defendants to appear unless some connection or relationship to the jurisdiction predates that demand. The many rulings on a state's authority to hale defendants that are physically outside the state into its court and apply its law are founded on due-process constraints on government power. For scholars of procedure, that point was made some decades ago by Wendy Perdue. She underscored that the 1878 landmark decision of *Pennoyer v. Neff*, determining Oregon's authority to enforce a judgment rendered against an out-of-state defendant and to hale that defendant into its courts, was an early Fourteenth Amendment substantive-due-process decision.[64]

Since *Pennoyer*, when the Court considers whether states can exercise jurisdiction over persons or entities that are physically beyond their borders, the question is whether doing so comports with due process. That inquiry turns on whether the relationship between a proposed defendant and a state is sufficient for the state to demand responses to lawsuits.[65] The Court has looked at physical presence, volition, implicit consent, notice, the specific legal violations alleged, and sovereign interests.[66] The Court has made plain that the power of courts to require participation is a concern not only for absent defendants but also for absent plaintiffs who may be part of aggregate litigation.[67] The power of a state to apply its law likewise hinges on due-process analyses of relationships among the forum, the

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Liberty": John Marshall at the Trial of Aaron Burr, 37 Am. Bar Ass'n J. 735, 788 n.17 (1951).

62. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312 (2023).

63. *See, e.g.*, S.B. 254, 2023 Leg., Reg. Sess. (Fla. 2023); Act No. 2023-SB0001, 2023 Tenn. Pub. Acts § 68-33-101, *et seq.* (2023).

64. Pennoyer v. Neff, 95 U.S. 714, 733–34 (1878). *See* Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 Wash. L. Rev. 479, 479–80, 508–09 (1987); *see also* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 Tul. L. Rev. 567 (2007).

65. *See, e.g.*, *Pennoyer*, 95 U.S. at 733.

66. *See generally* 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, Federal Practice & Procedure (4th ed.).

67. *See, e.g.*, Adam N. Steinman, *Beyond* Bristol-Myers*: Personal Jurisdiction Over Class Actions*, 97 N.Y.U. L. Rev. 1215 (2022).

cause of action, and a pending lawsuit.[68] And, as a result, the "dichotomous concepts of procedure and substance"[69] are overstated; "in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible,"[70] even as distinctions between forms of due process can at times be helpful.[71]

As discussed at the outset, due-process values are not exclusively associated with the Fifth and Fourteenth Amendments. Concerns about government power, access to remedies, opportunities to be heard, even-handed treatment, and fairness are regularly expressed in discussions about the "privileges and immunities" of citizens,[72] in the meaning of the Constitution's protection of habeas corpus,[73] and in decisions about whether civil detention is lawful and criminal punishments are "cruel and unusual."[74] Below we sketch some of the ways in which due-process obligations are entwined with rights of citizenship and the various contexts in which judges pay homage to due-process values.

Consider, first, the centuries-long emphasis on access to courts, even when not all doors were open. In 1907, Justice William H. Moody, writing for the Court, upheld an Ohio statute barring state citizens as well as noncitizens from filing suit in Ohio courts for the wrongful death of a person who was not a citizen of the state at the time of death.[75] The Court held that Ohio could constitutionally bar a widow from seeking redress in its state's courts to redress the alleged wrongful death of her husband, who at the time was a citizen of Pennsylvania.[76] Although the Court decided that Ohio's refusal did not amount to unconstitutional discrimination under the Privileges and Immunities Clause,[77] it nevertheless explained:

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68. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

69. D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. Rev. 189, 189 n.1 (1982); *see* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 Stan. L. Rev. 379, 379 n.2 (1988). Self-identified originalists likewise acknowledge the interrelation of procedure and substance. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 Wm. & Mary L. Rev. 1599, 1605 (2019).

70. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting); *see also* David Dyzenhaus, *Process and Substance as Aspects of the Public Law Form*, 74 Cambridge L.J. 284, 306 (2015).

71. *See* Greene, *supra* note 42, at 268.

72. *See* Chambers v. Balt. & Ohio R.R. Co., 207 U.S. 142, 160 (1907).

73. *See* Caritativo v. California, 357 U.S. 549, 550–51 (1958).

74. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 761 (1987); Furman v. Georgia, 408 U.S. 238, 241 (1972).

75. *Chambers*, 207 U.S. at 151.

76. *Id.* at 148. Elizabeth Chambers, the petitioner, alleged that under Pennsylvania law she had a right to bring a suit against Baltimore & Ohio Railroad Company for negligently causing the death of her husband, Harry E. Chambers, a locomotive engineer. *Id.* at 146.

77. A dissenting opinion questioned that result. *Chambers*, 207 U.S. at 157, 160 (Harlan, J., dissenting). Moreover, as a commentator put it, "[I]t would seem equally unjustifiable to discriminate against the widow of the deceased on the basis of her husband's citizenship as upon her own." *See* Notes, *The Equal Privileges and Immunities Clause of the Federal Constitution*, 28 Colum. L. Rev. 347, 351 n.31 (1928).

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . . Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.[78]

This leitmotif of open access to courts has appeared in judicial decisions many times since. Another example from more than a half-century later comes from a 1958 decision in which a majority of the Court concluded that California could rely on its own psychiatrist to assess the mental capacity of an individual the state had sentenced to death.[79] Justice Felix Frankfurter dissented.

> *Audi alteram partem*—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them—executive, legislative, and judicial—whenever any individual, however lowly and unfortunate, asserts a legal claim . . . . The right to be heard somehow by someone before a claim is denied, particularly if life hangs in the balance, is far greater in importance to society, in the light of the said history of its denial, than inconvenience in the execution of the law. If this is true when mere property interests are at stake, how much more so when the difference is between life and death.[80]

Not long thereafter, in 1971, Justice Harlan explained for the Court in *Boddie v. Connecticut* that the state had to provide a mechanism for waiving court fees if a person seeking to file for divorce could not afford to pay and would otherwise be blocked from using courts to obtain that relief.[81] The rule that emerged has had—as we discuss below—less of a reach than the explanation for it. Justice Harlan emphasized that the interests at stake when Connecticut erected a barrier to judicial access were not limited to those of individuals aiming to reorganize their family lives.

> Without this guarantee that one may not be deprived of his rights . . . without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.[82]

Building on that approach, in 1996 Justice Ginsburg, for the Court, wrote that "the essential fairness of the state-ordered proceedings anterior to

78. *Chambers*, 207 U.S. at 148.
79. Caritativo v. California, 357 U.S. 549, 550–52 (1958).
80. *Id.* at 558–59 (Frankfurter, J., dissenting) (internal citation omitted).
81. Boddie v. Connecticut, 401 U.S. 371, 386 (1971).
82. *Id.* at 375.

adverse state action" likewise required fee waivers when people are unable to pay the costs of a transcript to enable an appeal of a decision terminating parental status.[83]

Governments depend on courts to validate their power, including the state-sanctioned violence that is a result of civil as well as criminal litigation. As Robert Cover explained, "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[84] Opinions such as *Boddie* have both shaped and been shaped by ideas about political and social equality that have become central to the legitimacy of governments. The French sociologist Pierre Bourdieu would call what we have described "reflexivity," in that judges and lawyers are part of a "habitus" that makes both the exercise of state power (with its violence) and the elements of due process seem *natural* to the social order.[85] More broadly, expectations of fairness —that people get their "day in court"— have shaped a good deal of popular discourse.[86]

In the next Part, we turn to the issues that emerged when new causes of action enabled people who had not before been eligible to turn to courts—women seeking divorce, civil-rights claimants, environmentalists, employees, consumers, and others—to seek entry and redress. Before exploring problems of limited and asymmetrical resources, a reminder is in order: new entrants were not the only court-users pressing jurists to reconsider the parameters of due process. An important example comes from efforts by *banks* in the 1940s to have the Court reframe the import of due process so as to protect their economic interests in developing a broader base for asset management. During the post-World War II period, small investors became a potential source of business for financial institutions. Banks proposed pooling assets to have larger sums to invest in tandem.[87] Yet banks also understood that a larger number of investors to whom they owed fiduciary duties could result in more arguments about the prudence of investment decisions. To protect themselves from a potentially large number of claims, banks promoted legislation that would both license pooled trusts

83. M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996). Justice Thomas dissented, in part arguing that the majority had "brush[ed] aside the distinction between criminal and civil cases" by extending the right to free transcripts in an action involving parental termination, and that in the process the Court had "eliminated the last meaningful limit on the free-floating right to appellate assistance." *Id.* at 144 (Thomas, J., dissenting). For a view that courts are a service that governments have to provide, see Judith Resnik, *Courts and Economic and Social Rights/Courts as Economic and Social Rights*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 259 (Katharine G. Young ed., 2019).

84. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

85. *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 830 (1987).

86. *See generally* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMONPLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998); Sally Engle Merry, *Everyday Understandings of the Law in Working-Class America*, 13 AM. ETHNOLOGIST 253, 256 (1986).

87. *See* Gary Richardson, *The Federal Reserve's Role During WWII*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/feds-role-during-wwii [https://perma.cc/WXD7-TBFP].

and provide periodic judicial confirmation that the banks had properly discharged their fiduciary obligations.[88]

The legality of doing so reached the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, which, in 1950, addressed a New York statute requiring banks periodically to file a kind of declaratory action ("settling accounts").[89] Once a judgment was entered on the bank's behalf, the law of *res judicata* would block any unhappy beneficiary who subsequently might seek to challenge investment failures.[90] Unlike the 1966 version of Rule 23 of the Federal Rules of Civil Procedure, in which claimants step forward as representatives of a class, the New York statute called for judges to appoint lawyers to serve as guardians *ad litem*.[91] Kenneth Mullane was designated to represent what was functionally one subclass, the *inter vivos* beneficiaries; the other appointee, James Vaughan, assigned to represent the testamentary beneficiaries, did not contest the procedures.[92]

Mullane argued that the New York statute violated the rights of absentee beneficiaries by mandating the adjudication of their assets in the state and violated the rights of all beneficiaries by providing insufficient notice that their property interests were to be decided.[93] The Court's holding in *Mullane* that New York had power to adjudicate claims affecting absent beneficiaries may, in hindsight, seem obvious. But at the time, the Court had to leap over entrenched distinctions between "*in rem*" and "*in personam*" jurisdiction, as well as ideas that the finality of a judgment required an affected party's personal presence and individual participation in the judicial proceeding that was to be enforced.[94]

The *Mullane* Court determined that states could bind individuals outside their physical boundaries by upholding what is, in today's terms, nationwide jurisdiction. The Court used the location of the trust (analogized to physical property) and the state's personal jurisdiction over the trustee as the hooks that empowered the state to bring all the beneficiaries, wherever they lived, before New York courts.[95] Yet the Court tempered its ruling by holding that the New York legislature's method of providing notice to some of the beneficiaries about the settling of accounts violated the Constitution.[96] The statute had provided notice at the time of the trust's creation

88. *See, e.g.*, N.Y. Banking Law § 188-a (1937) (codified as revised at N.Y. Banking Law § 100c (McKinney)).

89. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 309–12 (1950) (citing N.Y. Banking Law § 100c (McKinney)).

90. *Id.* For an account of the New York State Legislature's practices that led to *Mullane*, see Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 Harv. L. Rev. 78, 134–42 (2011). Several other states authorized pooled trusts without creating this form of accounting. *See* John Leubsdorf, *Unmasking* Mullane*: Due Process, Common Trust Funds, and the Class Action Wars*, 66 Hastings L.J. 1693, 1708 (2015).

91. *See* N.Y. Banking Law § 188-a (1937) (codified as revised at N.Y. Banking Law § 100c (McKinney)).

92. *Mullane*, 339 U.S. at 307, 310–11.

93. *Id.* at 311.

94. *See id.* at 312–13.

95. *See id.* at 316–20.

96. *Id.* at 312–13, 320.

and by newspaper publication thereafter. Writing for the Court, Justice Jackson said more was needed as to certain groups of beneficiaries.[97] Yet he pragmatically read due process as not imposing "impossible or impractical obstacles" to legitimizing a decision about the banks' prudence while requiring an "opportunity" for those affected to know about the action so as to be able to present objections—in *Mullane*, through representatives appointed by the New York courts.[98]

The Court both focused on the mechanics of letting people know that their property rights were being determined and on the purpose for doing so.[99] *Mullane* held that, when names of beneficiaries were "at hand" and "easily" found on the bank's books, notice by publication was constitutionally deficient.[100] Yet the Court did not want to impose too great an economic burden on the underlying activity.[101] The Court did not offer an in-depth, theoretical account of what today is termed "interest representation," yet it assumed that an "individual interest does not stand alone" but rather was "identical with that of a class."[102] Notice to those whose addresses were readily available sufficed, as everyone shared the same interests in "the integrity of the fund and the fidelity of the trustee."[103] The Court explained that the purpose of the notice was to elicit objections: "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all."[104] Another facet of the ruling merits attention. The Court did not address that New York provided *no method of exit*—these property holders were placed in what came to be called a "mandatory" class under the federal class action rule, as those beneficiaries had no opportunity to "opt out" and seek individual relief in a separate proceeding.

In now-familiar terms of "voice" and "loyalty,"[105] we can theorize that the beneficiaries who *did* get notice were similarly situated to those who did not, and therefore the people noticed were able to provide information to and monitor the actions of their court-selected representatives to ensure that they presented objections when appropriate. Yet each individual's small stakes made responses unlikely—both inside and especially outside of New York. Indeed, in later decades when pooled funds came to control billions of dollars, recorded challenges by beneficiaries or successful

97. *Id.* at 320.
98. *Id.* at 313–14.
99. The Court identified two forms of property interests: the "rights to have the trustee answer for negligent or illegal impairments," and the risk of a "diminution" in their funds through an "allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest." *Id.* at 313.
100. *Id.* at 318–19.
101. *Id.*
102. *Id.* at 319.
103. *Id.*
104. *Id.*
105. *See* Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms (1970); *see also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000).

challenges by guardians *ad litem* had not materialized.[106] Nevertheless, to focus on filed objections in cases as the only metric misses the incentive effects of due-process notice: broadcasting information raised the potential of oversight in diverse means and that publicity could affect decision making, even if the impact on investments and distribution of funds are hard to assess.[107] More generally, *Mullane* provided a constitutional path to large-scale resolutions by courts through upholding the legitimacy of binding absentees by telling a subset of those affected that their interests were being determined through a representative structure. *Mullane*'s insistence on notice thus enabled the public as well as individuals directly affected by diverse forms of aggregation to gain information about proposals to bundle their claims.[108]

Mullane's foundational *reconception* of the demands of the Due Process Clause in 1950 enabled New York's banking laws that permitted fiduciaries to obtain judicial clearance, in the aggregate, of potential claims from beneficiaries of pooled trusts.[109] *Mullane* thus paved the way for federal class actions in which some aspire to "global peace."[110] Further, in addition to licensing the binding of individuals whose "whereabouts could not with due diligence be ascertained" to judgments with preclusive effect, the Court revised its jurisdictional rules to permit a state to close off the rights of individuals within the group to bring later challenges.[111] Yet, as we noted, the Court structured notice requirements to avoid making them too costly. As Justice Jackson explained,

> [T]he vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way that could not be justified.[112]

Mullane is an example of the Janus-faced Due Process Clause, as it was used to validate state power for economic development, which could redound to the benefit of individual investors, and to structure a mechanism to have such individuals represented in an adjudication of their property rights. That approach has since been deployed (albeit with limitations read into it by the Supreme Court in *Eisen v. Carlisle & Jacquelin* to impose more costly notice methods) to support consumer claimants in federal class

106. *See* Leubsdorf, *supra* note 90, at 1709.

107. *See generally* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929 (2005).

108. *See* Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. Rev. 1017, 1067 (2017).

109. *See generally Mullane*, 339 U.S. at 311–19.

110. Judith Resnik, *Mature Aggregation and Angst: Reframing Complex Litigation by Echoing Francis McGovern's Early Insights into Remedial Innovation*, 84 L. & Contemp. Probs. 231 (2021).

111. *Mullane*, 339 U.S. at 317–18.

112. *Id.* at 313–14. Justice Burton dissented, arguing that states had discretion to decide whether they had to "supplement the notice" to beneficiaries. *Id.* at 320 (Burton, J., dissenting).

actions.[113] Even as this regime may provide benefits to corporate litigants, it has not been stable, and many institutional litigants have aimed to limit the use of class actions. While *Mullane's* jurisdictional and notice rules remain, critics have succeeded in limiting aggregation by narrowing the criteria for class certification through arguments about a lack of commonality among members of proposed classes.[114] In addition, would-be defendants have cut off the possibility of using class actions (and accessing courts in general) through clauses in employment and consumer documents demanding that, if individuals want to gain redress, they may pursue remedies only through going single-file, to private arbitrations.[115]

In the decades since *Pennoyer* and *Mullane*, due process has remained central to the Court's doctrine of whether states have the power to exercise jurisdiction over individuals and entities who were not within their territorial borders and to apply their substantive law. In the last few years, as Mila Sohoni has explored,[116] Justice Gorsuch has raised questions about the legality of tests such as "traditional notions of fair play and substantial justice," which are the terms of many of the Court's decisions and which cannot be found in the U.S. Constitution.[117] In 2023, Justice Gorsuch, writing for a plurality in *Mallory v. Norfolk Southern Railway Co*., upheld a Pennsylvania statute requiring non-resident corporations that register to do business in the state to consent to jurisdiction on "any cause of action" against them brought in the state's courts. The plurality tried to skirt the issue of whether originalism required moving away from "traditional notions of fair play and substantial justice" by relying on history, as well as through concluding that if "fairness" was at issue, Pennsylvania could insist that a corporation that has done business there face lawsuits in that state.[118]

As we forecast in Part II, people who had, in earlier centuries, been excluded from the protections of due process—women, people of color and those without property—gradually gained recognition as members of the polity who could challenge arbitrary exercises of government power. The commitment to fairness as an aspect of due process poses distinct problems if litigants have no means to participate in judicial proceedings. The Court faced this situation when Gladys Boddie sought a divorce but lacked the funds to pay the state court's sixty-dollar fees for filing and service of process.[119] Boddie filed suit in federal court as a representative of a class of similarly situated "welfare recipients residing in . . . Connecticut,"

113. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

114. *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 851–52 (2018); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011).

115. *See, e.g.*, AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 351–52 (2011); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013).

116. Sohoni, *The Puzzle of Procedural Originalism*, *supra* note 53, at 970.

117. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1037–38 (2021) (Gorsuch, J., concurring). The Court used the phrase "traditional notions of fair play and substantial justice" in *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), relying on *McDonald v. Mabee*, 243 U.S. 90 (1917).

118. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2040–42 (2023).

119. Boddie v. Connecticut, 401 U.S. 371, 372 (1971).

and argued that the state-imposed fees violated due process.[120] The Court responded by recognizing the need for due process protections that, to borrow *Mullane's* terms, entailed another kind of "vital interest" of the state—access to courts for people who needed to obtain a divorce and lacked resources to bring actions.[121]

Boddie was one of several cases in which the Court invoked due process when litigants sought judicial assistance in pursuing rights related to family structure.[122] These constitutional family-law cases provide additional examples of the convergence of "substantive" and "procedural" due process and the risks to individuals and society if the Court rejects rights that are not keyed to specific words in the Constitution or extant at the Founding. The words "right to marry" are not in the Constitution. Nor does a "right to parent" appear in the text. Nonetheless, a "federal law of families," based on both the Constitution and federal and state statutes, has emerged.[123] With little discussion of origins, the Court has recognized that parenting is protected by the Due Process Clause and that states cannot deprive individuals of parental status without record evidence and fair procedures that they do not meet state statutory requirements to parent.[124] As we noted, debate surrounds the sources of the Constitution's terms of "liberty" and "property"—whether they predate or are artifacts of positive law and the viability and wisdom of generating procedural protections for an array of "statutory entitlements."[125] Yet, in some instances—and *Boddie* is but one example—the Justices have assumed the existence of constitutionally protected liberty and property without detailing the sources.[126]

Our account requires caveats of many kinds. First, as Douglas NeJaime has explained, the federal constitutional parenting rights that exist do not yet apply to all forms of parenting—even as the potential to do so can be found in some of the Court's decisions.[127] Second, the due-process protections for litigants with limited resources are far from complete. In the context of family life and its dissolution, the Court has required a few specific subsidies to enable individuals to participate. If one is unable to pay, the

120. *Id.*
121. *Id.* at 372, 382–83.
122. *See id.* at 382–83; *see generally* Tom R. Tyler, Why People Obey the Law 3–7 (2006).
123. *See generally* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. Rev. 1682, 1721 (1991); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 Yale L.J. 619 (2001); *see also* Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825 (2004).
124. *See* Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18, 27 (1981).
125. *See, e.g.*, Meacham v. Fano, 427 U.S. 215, 229–35 (1976) (Stevens, J., dissenting); Montayne v. Haymes, 427 U.S. 236, 242 (1976); Thomas C. Grey, *Procedural Fairness and Substantive Rights*, *in* Due Process: Nomos XVIII 182, 202 (J. Ronald Pennock & John W. Chapman eds., 1977); *see also* William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 Brook. L. Rev. 777, 784 (1990); Tracey L. Meares, *What's Wrong with* Gideon, 70 U. Chi. L. Rev. 215, 216 (2003). On the role of equal protection doctrine as protection for parenting status, see Skinner v. Oklahoma, 316 U.S. 535 (1942). *See also* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).
126. *See generally Boddie*, 401 U.S. at 374–83.
127. *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 Stan. L. Rev. 261, 261–62 (2020).

government must fund tests to establish paternity.[128] In addition to requiring funding related to establishing parental obligations, the Court has read due process to require providing resources for some individuals when the state seeks to terminate parental status. As the Court explained, in some cases the individual interests at stake and the risks of error are too great to proceed without assistance of counsel.[129] The Court has also relied on the interaction between due process and equal protection to require states to fund appellate transcript fees in parental-status termination proceedings for individuals unable to pay themselves.[130] In instances when states seek civil contempt for individuals who have not paid child support, states have to provide either state-funded lawyers or other forms of protection to ensure fair decision making.[131] In terms of the merits, the Court has concluded that due process requires imposing the burden of proof on the state if seeking to end parental rights.[132] Interacting with these decisions and with state constitutional interpretations, many states have enacted statutes mandating that lawyers be provided for parents at risk of losing that status and for their children.[133]

Some of these cases involve the rights of fathers or potential fathers, while others involve women who historically did not have authority over their children or, if married, over themselves. Had the Court limited its inquiry to whether the rights were rooted in this "Nation's history and tradition,"[134] the answer from history would have entailed assessing the lack of juridical authority of married women. Further, while men had to support their children, women were not seen as wage earners and hence statutes did not impose support obligations upon them in centuries past. In the 1970s and thereafter, with attention to histories of racial and gendered exclusions, a majority of the Court did not focus on textual silence or historical absences as grounds for denying due-process protections. Rather, due process was an engine for overcoming the effects of women's historic exclusion and put some mothers in the same constitutional position as some fathers. As the Court explained in its 1981 ruling responding to Abby Gail Lassiter's objection to North Carolina's termination of her status as a parent,

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the

128. Little v. Streater, 452 U.S. 1, 16–17 (1981); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. Pa. L. Rev. 2119, 2135 (2000).

129. *Lassiter*, 452 U.S. at 26–27, 31–32.

130. M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996); *see* Judith Resnik, *Equality's Frontiers: Courts Opening and Closing*, 122 Yale L.J.F. 243, 250 (2013).

131. Turner v. Rogers, 564 U.S. 431, 435 (2011); Resnik, *Fairness in Numbers*, *supra* note 90, at 154–61.

132. Stanley v. Illinois, 405 U.S. 645, 658 (1972).

133. *See* Helen Hershkoff & Stephen Loffredo, Getting By: Economic Rights and Legal Protections for People with Low Income 791 (2020); Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 Fam. L.Q. 245, 263 (1985). An alternative would be federal legislation. *See* Vivek S. Sankaran, *Moving Beyond* Lassiter*: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. Legis. 1, 2 (2017).

134. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

> companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." Here the State has sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one.[135]

The Court's approach has not, however, been realized beyond a narrow set of cases. Although the *Boddie* rule had the potential to protect more litigants, Justice Harlan wrote a narrow opinion. Justice Harlan identified that the combination of "the basic position of the marriage relationship in this society's hierarchy of values and the . . . state monopolization" of lawful dissolution resulted in a due-process obligation by the state to provide access.[136] The concurring opinions illuminated the potential reach of the proposition that state-subsidized access was needed for people lacking resources. Justice Douglas, worried that due process was too "subjective,"[137] read the Equal Protection Clause's prohibition of "invidious discrimination . . . based on . . . poverty" to require subsidizing access.[138] Justice Brennan agreed that Boddie's claim presented a "classic problem of equal protection"[139] on top of due process; the state's legal monopoly on marital dissolution required access for all attempting to "vindicate any . . right arising under federal or state law."[140]

The implications of that proposition were lost as political shifts changed the composition of the Court and resulted in a constitutional retreat from the logic that Justice Brennan had advanced. Two years after *Boddie*, the Court rejected poverty as a suspect classification for purposes of equal protection.[141] That ruling dampened, but did not end, the Court's acknowledgment that poverty undercuts the ability of a person to function as a litigant in court, and hence the legitimacy of courts themselves. As we recounted, the Court has identified a narrow band of disputes for state-required support that involve a subset of family conflicts[142] as well as those in which criminal defendants face imprisonment.[143] Yet the Court has not evoked the Constitution to respond to other asymmetries of power and knowledge

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135. *Lassiter*, 452 U.S. at 27 (internal citations omitted); *see* Elizabeth G. Thornburg, *The Story of* Lassiter*: The Importance of Counsel in an Adversary System*, *in* Civil Procedure Stories 509, 513 (Kevin Clermont ed., 2d ed. 2004).

136. Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

137. *Id.* at 385 (Douglas, J., concurring).

138. *Id.* at 384–86 (raising the specter of *Lochner v. New York*, 198 U.S. 45 (1905)).

139. *Id.* at 388 (Brennan, J., concurring in part).

140. *Id.* at 387. The sole dissenter, Justice Black, thought the Court had invaded state prerogatives. *Id.* at 393–94 (Black, J., dissenting). Justice Thomas also objected on those grounds in his *Turner* dissent. Turner v. Rogers, 564 U.S. 431, 456–57 (2011) (Thomas, J., dissenting).

141. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973).

142. *See, e.g.*, *Boddie*, 401 U.S. 371. *See generally* Michelman, *Part I*, *supra* note 39; Michelman, *Part II*, *supra* note 39. Michelman argued that all exclusionary filing fees were unconstitutional burdens on what he termed "effective" access rights to courts. Michelman, *Part I*, *supra* note 39, at 1162–68. He pointed to the parallels between effective access to courts and to voting. *See* Michelman, *Part II*, *supra* note 39, at 540–41, 540 n.36.

143. *See generally* Hershkoff & Loffredo, *supra* note 133, at 803–09.

in civil litigation where expenses often outstrip the resources of many and for whom subsidies to file and appeal cases or for experts and lawyers would enable access.[144]

A facet of what we have discussed—asymmetrical resources—merits additional analyses. Critical to institutional integrity and the legitimacy of government decision making is that adversaries be on a par in their ability to develop a factual and legal record on which the court can base its rulings. Adversaries with *asymmetrical resources* thus present a serious problem for due-process commitments. Moreover, as a "war on crime" beginning in the 1960s exacerbated the racial disparities, some Justices relied on elaborations of defendants' rights in an effort to constrain government overreach, and that approach in turn prompted critiques that a judicially constructed set of procedural requirements was unduly burdensome without producing substantively wise or just decisions.[145]

The due-process asymmetry cases were exemplified by conflicts between governments and individuals of which the 1963 decision of *Gideon v. Wainwright* is iconic. The Court there read the Sixth Amendment "right to counsel" to require states to provide lawyers for indigent criminal defendants facing prosecutors seeking felony convictions.[146] The Court therefore relied on due process as the basis of constitutional obligations for states to provide indigent criminal defendants with other resources such as experts and translators when necessary to mount a defense.[147] In addition, the Court read the Due Process Clause to require that government provide exculpatory, material information to criminal defendants, whether rich or poor: "Society wins not only when the guilty are convicted but when criminal trials are fair . . . ."[148] Parallel analyses can be found in the constitutional family law cases we have discussed. For example, when ruling that states have to pay for paternity tests, Chief Justice Burger explained for a unanimous Court in 1981, "the requirement of 'fundamental fairness'" expressed by the Due Process Clause would not otherwise be "satisfied."[149]

The situation of *intra-litigant disparities* raised yet another problem for due process; resource and capacity differences from one criminal defendant to another could result in "like" cases not being treated "alike." For

144. *See, e.g.*, United States v. Kras, 409 U.S. 434, 447–50 (1973).

145. *See* Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America (2016); William J. Stuntz, The Collapse of American Criminal Justice (2013). Further, in addition to the Court's consciousness of race discrimination in the criminal justice system, its resolve to distinguish detention practices in the democratic United States from those of "totalitarian" regimes shaped the development of this due-process doctrinal line. *See* Hope Metcalf & Judith Resnik, Gideon *at Guantánamo: Democratic and Despotic Detention*, 122 Yale L.J. 2504 (2013); Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 Colum. L. Rev. 579, 634–35 (2010).

146. Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963).

147. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 83 (1985). *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 67–69 (2009), concluded that due process did not oblige Alaska to provide a DNA test to a convicted defendant alleging innocence.

148. Brady v. Maryland, 373 U.S. 83, 87 (1963). Enforcement is, however, limited. *See* Connick v. Thompson, 563 U.S. 51, 59 (2011).

149. Little v. Streater, 452 U.S. 1, 16 (1981) (quoting Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18, 24 (1981)).

example, in 1956, the Court addressed the fact that some defendants could afford to pay for transcripts for appeals and for lawyers while others could not: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[150] Not all "like" litigants are, however, in court involuntarily. As is familiar and exemplified by class actions, individuals sometimes seek judgments that could affect others who have not filed lawsuits. Aggregation, enabled by *Mullane*, offers a method to avoid disparate outcomes. Due-process challenges have emerged, as we recounted, requiring courts to determine whether the proposed group shares sufficient commonalities to permit representatives to go forth on behalf of absent others, and whether the kinds of affiliations and forms of consent—affirmative, implicit, or inferred—legitimate binding all through final judgments.[151]

Another line of due-process cases, again reliant on the alchemy between due process and equal protection and involving inadequate resources, addressed whether governments can put people in jail when they are not able to pay a fine or post bail. In 1970, in *Williams v. Illinois*, Chief Justice Burger, writing for the Court, ruled out the extension of a sentence because a person without resources could not pay a fine.[152] In 1971, in *Tate v. Short*, the Court concluded that the automatic conversion of an unpaid fine to a term in prison—to "work it off"—was unconstitutional.[153] In 1981, Justice O'Connor, for the Court, applied those ideas in *Bearden v. Georgia*; the question was whether judges could impose a fine without assessing the person's ability to pay.[154] The answer was that the Constitution required an inquiry into the "ability to pay."[155]

As explained in 2023 by the U.S. Department of Justice, the due-process doctrine on fines and fees, central to fair treatment and limiting racial discrimination, intersects with courts' obligations of impartiality and disinterest.[156] The Department of Justice recounted the canonical ruling by Chief Justice Taft in the 1927 decision of *Tumey v. Ohio*, concluding that decision makers reaping monetary benefits from fines that they imposed violates

150. Griffin v. Illinois, 351 U.S. 12, 19 (1956). In 1963, the Court held that, although the Constitution did not require states to provide appeals, states had to subsidize appellate lawyers for indigent criminal defendants if appeals were generally available. Douglas v. California, 372 U.S. 353, 357–58 (1963). *Douglas* was announced the same day as *Gideon*.

151. For analyses of the distinct ideas entailed in representation, see Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987), and Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 Geo. Wash. L. Rev. 577, 588 (2011).

152. Williams v. Illinois, 399 U.S. 235, 240–41 (1970); *see* Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 120 Yale L.J.F. 365, 387 (2020).

153. Tate v. Short, 401 U.S. 395, 399 (1971).

154. Bearden v. Georgia, 461 U.S. 660, 661–62 (1983).

155. *Id.* at 672.

156. *See generally* Letter from U.S. Dep't of Just. to Courts Regarding Guidance on the Use of Fines and Fees (Apr. 20, 2023) [hereinafter DOJ Letter], https://www.justice.gov/opa/press-release/file/1580546/download [https://perma.cc/3E3S-U2VV].

due process.[157] Thus, courts in recent years have held that states may not constitutionally rely on income generated by court fees to fund services for judges or provide other forms of remuneration.[158] In addition, several lower federal courts and state courts have interpreted the inability-to-pay lines of cases to protect people without resources from automatic suspensions of driver's licenses based on nonpayment of traffic tickets and from denial of bail for lack of funds. In contrast, some appellate courts—embracing versions of the approach championed by Justices Scalia and Thomas—have rejected those analyses and limited the *Bearden* approach to cases in which a person is at risk of being jailed.[159]

Funding and resource asymmetries are facets of fairness, and another is the structure of process. The iconic example that prompted attention to "procedural due process" is the 1970 Supreme Court decision in *Goldberg v. Kelly*.[160] With help from the analysis by Charles Reich in *The New Property*,[161] the Court developed the proposition that when governments create statutory entitlements—to driver's licenses, tenured employment, attending schools, social benefits, and more—such provisions create property and/or liberty interests in constitutional terms.[162] The Due Process Clause therefore requires the state to create procedures to protect against arbitrary deprivations—whether in courts or agencies.[163] Thus, a genre of due-process analysis probes the authority, nature, and kinds of procedures that make specific forms of decision making "fair." *Goldberg v. Kelly* concluded that the way New York City decided to terminate welfare benefits violated due process.[164]

As is familiar, *Goldberg* is part of a line of "fair hearing" cases in which the Court has concluded that due process requires hearings when statutory entitlements to government benefits, jobs, or licenses are at issue.[165]

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157. Tumey v. Ohio, 273 U.S. 510, 531 (1927); *see also* Ward v. Vill. of Monroeville, 409 U.S. 57, 59 (1972); DOJ Letter, *supra* note 156, at 10–12.

158. *See* Cain v. City of New Orleans, 281 F. Supp. 3d 624, 655 (E.D. La. 2017). Judge Sarah Vance found that, while the sums gathered from fines were not to be used to supplement judicial salaries directly, the hundreds of thousands of dollars went into a fund for judicial expenses and court operations and could be used for salaries and benefits of judges' employees. Thus, in addition for failures to conduct "ability to pay" inquiries, a substantial "conflict of interest" arose when Orleans Parish Criminal District Court Judges both had power over fines and fees revenue and were responsible for determining whether criminal defendants could pay the fines and fees imposed at sentencing, and that this conflict interest "offend[ed] due process." *Id.* at 658.

159. *See In re* Humphrey, 228 Cal. Rptr. 3d 513 (2018); O'Donnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1167 (S.D. Tex. 2017), *modified*, 892 F.3d 147 (5th Cir. 2018). *But see* Daves v. Dallas Cnty., 64 F.4th 616, 635 (5th Cir. 2023); Schultz v. Alabama, 42 F.4th 1298, 1335 (11th Cir. 2022), *cert. denied*, Hester v. Gentry, 143 S. Ct. 2610 (2023).

160. Goldberg v. Kelly, 397 U.S. 254 (1970).

161. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); *see also* Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143 (1958).

162. *See Goldberg*, 397 U.S. at 262–63.

163. *Id.*

164. *Id.* at 267–71; *see* Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273 (2013).

165. *See* Reich, *supra* note 161, at 734–37, 751–55. Other analyses criticize the Court's development of procedural due process as misguided policymaking. *See generally* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (1982).

Depending on the context, constitutionally fair decision making must include in-person hearings,[166] specific allocations of burdens of proof,[167] reasons for the decisions rendered by impartial decision-makers,[168] oversight of whether evidence supports a criminal verdict and of the quality of eyewitness identification,[169] and review of the award of punitive damages.[170] The Court has relied on these due-process norms in lawsuits between private parties. In 2011, the Court invoked due process in *Wal-Mart v. Dukes* when it insisted that unnamed class members seeking monetary remedies for alleged unlawful employment discrimination had to be given an opportunity to opt-out of a class action that would bind them.[171] The Court also held that, to be consistent with due process, Wal-Mart could not be required to make payments to individual class members for back wages without an opportunity to rebut each individual's claim of discriminatory treatment.[172]

In some but not all of these rulings, the Court assumed that the public had access to the decision making or its outcomes. Thus, while less clearly articulated in the doctrine to date, the dialogic facets of due process imply that the public has to have some access itself, either as an audience empowered to watch and critique the proceedings that occur in open court or to know the outcomes. Atop efforts addressing inter- and intra-litigant asymmetries and easing access to courts and requiring procedurally adequate hearings, the public needs to know what transpires. Doing so requires participation from those outside a litigation triangle. That publicity enables assessments of whether procedures and decision-makers are fair and permits an understanding of the impact of resources (symmetrical and not) on the treatment of litigants, and of why one would want to get into (or avoid) court. A public presence divests both the government and private litigants of unfettered control over the meanings of the claims made and the judgments rendered and enables popular debate about, and produces the means to seek, revision of law's content and application.

Because publicity enables accountability, it can be understood as an aspect of due process addressing the quality of procedures required for making binding judgments. Moreover, publicity could also stand in its own

166. *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) required an in-person hearing before termination of cash assistance. *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) determined that in-person hearings were not necessary, given the procedures in place to decide whether to terminate disability benefits and the Court's perception that the "brutal need" of an indigent person for cash assistance, *Goldberg*, 397 U.S. at 261, was not present in the disability context because the right to benefits was not based on financial need. *Mathews*, 424 U.S. at 340.

167. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

168. *See, e.g.*, *Goldberg*, 397 U.S. at 271; Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876–81 (2009).

169. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 324 (1979); Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Perry v. New Hampshire, 565 U.S. 228, 248 (2012).

170. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 349 (2007); TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 446 (1993).

171. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011).

172. *Id.* at 366.

right. Jeremy Bentham termed such observers "auditors" in his famous commitment to publicity as a disciplinary mechanism for government and for prisoners.[173] Without public processes, one cannot assess the practices or understand law's application. Indeed, it is the performance of fairness before the public that legitimates adjudication. (The phrase chosen for the European Convention on Human Rights is a "fair and public hearing."[174]) Moreover, third-party participation facilitates democratic lawmaking in which court judgments serve as both an object of attention and a basis on which to argue for changing legal norms. Courts in democratic social orders are thus one of several venues in which the content of law is debated, and other branches of government may, in turn, respond.[175] Again, this account is not in service of particular ends. Dissemination of information through litigation has generated laws aiming to protect people from violence in their households as well as laws ratcheting up punishments for individuals convicted of violent crimes.

We have thus far been court-centric, but due process is not. Rather, it informs many legal arenas, including legislatures shaping statutes, committees drafting rules, and agencies shaping administrative regulation. As noted, *Mullane* became a pillar of the revision of the 1966 class-action rule, an innovation that aimed to lessen power asymmetries in civil litigation. Those rule makers fashioned group proceedings to give members of racial minorities the ability to seek enforcement of injunctions mandating school desegregation and to give consumers claiming violations of their statutory rights the capacity to attract lawyers through the potential for large monetary recoveries. These benefits were not one-sided; as we discussed, the utilities for would-be defendants included the potential to close out liability claims through one proceeding.[176] Further, Congress has addressed some of the challenges posed by litigants with limited resources. The Civil Rights Attorney Fee Act of 1976[177] and the Equal Access to Justice Act of 1980,[178] along with the creation of the Legal Services Corporation in 1974,[179] aim (again incompletely) to equip would-be litigants with resources to pursue claims.

Before turning to the next Part, a pause is in order to sort out different concerns animating the facets of due process that we have discussed. Some of the inquiry into the quality of procedure is justified by utilitarian concerns for accuracy, as well as by interests in guarding against non-arbitrary

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173. Jeremy Bentham, *An Introductory View of the Rationale of Evidence*, *in* 6 The Works of Jeremy Bentham 356 (John Bowring ed., 1843).

174. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6.1, Nov. 4, 1950.

175. For further discussion of the shift from rituals of performance to rights of access, see Judith Resnik & Dennis Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms 288–305 (2011).

176. *See* Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. Pa. L. Rev. 1765, 1801 (2017); Resnik, *Reorienting the Process Due*, *supra* note 108, at 1044–46.

177. 42 U.S.C. § 1988(b).

178. Equal Access to Justice Act of 1980, Pub. L. No. 96-481, 94 Stat. 2321.

179. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378.

treatment by the government. Given that the linguistic lineage of due process traces back to traditions associated with the Magna Carta,[180] non-arbitrary treatment has a historical pedigree independent of democracy, while democratic values have come to provide new understandings of the purposes of non-arbitrary treatment, sounding today in terms of dignity, equality, and in the sovereignty of the people. Legal acknowledgement during the twentieth century of discrimination predicated on the intersections of race, class, and gender made the need to buffer against arbitrariness all the more acute.

Similarly, the demand for subsidizing and equalizing opportunities to participate, like the insistence on publicity, comes in service of democratic values that recognize the contribution of and need for diverse voices and participants being heard in social orders. To be clear, as Jerry Mashaw explained decades ago, due-process commitments to protect efficacy and equal treatment need not be equated with court-based procedures; other means exist to effectuate their import.[181] But constitutional oversight of decision-making processes remains critical to that effectuation.[182] Indeed, as Harry Jones put it in 1958,

> In an era where rights are mass produced, can the quality of their protection against arbitrary official action be as high as the quality of the protection afforded in the past to traditional legal rights less numerous and less widely dispersed among the members of society? Dicey accurately perceived it as a great strength of the rule of law in England that most questions of individual right came for decision to a small and homogeneous group of dedicated men, the judges of the "ordinary law." A thousand times as many deciding officers are needed to settle the issues presented by claimants of the new and more widely held rights of the welfare state. Is it beyond hope that this vast new company of officials can, in time, develop a tradition of decision worthy of being called, in Pound's fine phrase, an "ethos of adjudication"?
>
> In the welfare state, the private citizen is forever encountering public officials of many kinds: regulators, dispensers of social services, managers of state-operated enterprises. It is the task of the rule of law to see to it that these multiplied and diverse encounters are as fair, as just, and as free from arbitrariness as are the familiar encounters of the right-asserting private citizen with the judicial officers of the traditional law.[183]

Those aspirations are a way to understand the variegated constitutional case law that we have described, as it documents both the development of aspirations to produce fair and equal treatment of disputants and the

180. *See* Miller, *supra* note 16, at 4–5.
181. Mashaw, *supra* note 39, at 58.
182. *See* Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right* in Vacuo*? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 Buff. L. Rev. 523 (2022).
183. Jones, *supra* note 161, at 156.

difficulty of doing so.[184] Finding methods to materialize these forms of fairness has also occupied Congress, the states, and procedural rule makers in the public and private sectors. The results are eclectic and uneven. We recount these developments because the "originalist" turn puts even these incomplete interventions at risk, and it signals an attack on the integrity of decision making at the statutory as well as the constitutional level. If continued, the loss of institutional integrity in the federal system and the states could be enormous.

A key example involves Court decisions empowering executive oversight over adjudicators sitting in agencies; these decisions undermine the independence of agency adjudicators and undercut a critical facet of their identity as judges.[185] Indeed, the Court's explanations of when non-Article III adjudication is permissible are laden with invocations of the "Article III values" of independent, fair, and public judging.[186] Just a few decades ago, when insisting that state sovereign immunity applied to administrative adjudication before the Federal Maritime Commission, Justice Thomas explained that the Commission functioned as an equivalent of courts.[187] In contrast, and in the name of constitutional fidelity, a majority of the Court has developed a new doctrine which, as we noted, undercuts the insulation of administrative agencies by subjecting them to executive oversight.[188]

Furthermore, the Court has retreated from ensuring the requirements of due process in instances when individuals have argued that agencies have not fairly responded to their claims. One example comes from Justice Gorsuch's dissenting opinion in *Biestek v. Berryhill*, which involved a challenge to the denial of Social Security disability benefits based on evidence that the agency declined to share with the claimant.[189] Justice Gorsuch objected to that withholding of evidence.

> The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking. Without it, people like Mr. Biestek are left to the mercy of a bureaucrat's caprice. Over 100 years ago, in *ICC v. Louisville & Nashville R. Co.*, . . . the government sought to justify an agency order binding private parties without producing

184. Judith Resnik, *Constituting a Civil Legal System Called "Just": Law, Money, Power, and Publicity*, *in* New Pathways to Civil Justice in Europe: Challenges of Access to Justice (Xandra Kramer, Alexandre Biard, Jos Hovenaars & Erlis Themeli eds., Springer 2021); The Costs and Funding of Civil Litigation: A Comparative Perspective (Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka eds., 2010); Hazel Genn, The Hamlyn Lecture: Judging Civil Justice (2009); Geoffrey Davies, *Can Dispute Resolution Be Made Generally Available?*, 12 Otago L. Rev. 305, 305 (2010); Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 Fordham Urb. L.J. 129 (2010).

185. *See, e.g.*, Lucia v. S.E.C., 138 S. Ct. 2044, 2051–53 (2018); United States v. Arthrex, Inc., 141 S. Ct. 1970, 1986 (2021).

186. *See* N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 58–59 (1982); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850–51 (1986); Stern v. Marshall, 564 U.S. 462, 484 (2011).

187. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 769 (2002).

188. *See Arthrex*, 141 S. Ct. at 1991; *Lucia*, 138 S. Ct. at 2054–55.

189. Biestek v. Berryhill, 139 S. Ct. 1148, 1151–52 (2019).

> the information on which the agency had relied. The government argued that its findings should be "presumed to have been supported." In essence, the government sought the right to "act upon any sort of secret evidence." This Court did not approve of that practice then, and I would not have hesitated to make clear that we do not approve of it today.[190]

Justice Gorsuch made a similar point, again in dissent, in an immigration case involving Pankajkumar Patel, a noncitizen who challenged the government's denial of work authorization and its order of removal from the United States.

> The majority concludes that courts are powerless to correct an agency decision holding an individual ineligible for relief from removal based on a factual error, no matter how egregious the error might be. The majority's interpretation has the further consequence of denying *any* chance to correct agency errors in processing green-card applications outside the removal context. Even the government cannot bring itself to endorse the majority's arresting conclusions. For good reason. Those conclusions are at war with all the evidence before us. They read language out of the statute and collapse the law's clear two-step framework. They disregard the lessons of neighboring provisions and even ignore the statute's very title. They make no sense of the statute's history. Altogether, the majority's novel expansion of a narrow statutory exception winds up swallowing the law's general rule guaranteeing individuals the chance to seek judicial review to correct obvious bureaucratic missteps. It is a conclusion that turns an agency once accountable to the rule of law into an authority unto itself. Perhaps some would welcome a world like that. But it is hardly the world Congress ordained.[191]

Our reason for bringing agency adjudication to the fore is because it has a broad impact. Many more people bring claims to administrative agencies than to federal courts. That disparity becomes clear by contrasting the number of administrative judges and agency evidentiary hearings with the number of judges (including bankruptcy and magistrate) in Article III courthouses and their hearing docket. As of 2022, more than 2,000 individuals sat in federal agencies as administrative law judges or hearing officers.[192] About 1,800 judgeships were authorized in Article III courts, and roughly half of those were magistrate and bankruptcy judges.[193] As of 2019,

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190. *Id.* at 1162–63 (Gorsuch, J., dissenting) (internal citations omitted). Parallel concerns were raised in 1958 by Harry Jones, writing for an international audience to explain an Anglo-American approach to the rule of law. *See* Jones, *supra* note 161, at 156.

191. Patel v. Garland, 142 S. Ct. 1614, 1637 (2022) (Gorsuch, J., dissenting).

192. Data on Article III courthouses (comprising Article III judges, bankruptcy judges, and magistrate judges) compiled from Admin. Off. of U.S. Cts., Authorized Judgeships From 1789 to Present (2023); and Admin. Off. of U.S. Cts., Judicial Business of the U.S. Cts. (2021). Data on administrative law judges from U.S. Off. of Pers. Mgmt., Administrative Law Judges (2017).

193. As of 2022, Congress had authorized 865 authorized judgeships in the U.S. District Courts, Courts of Appeals, and Supreme Court. *Status of Article III Judgeships—Judicial Business 2022*, U.S. Cts. (Sept. 30, 2022), https://www.uscourts.gov/statistics-reports/

about 1,097,734 "evidentiary hearings" were held across four major administrative agencies, while approximately 41,005 evidentiary hearings were held in Article III courthouses.[194]

One might conclude that undercutting administrative adjudication would be coupled with expanding access to Article III courts. Instead, a series of rulings under the Chief Justiceships of Warren Burger, William Rehnquist, and John Roberts have restricted opportunities to be heard in the federal courts. One vehicle for cutting off access has been Section 5 of the Fourteenth Amendment, which the Court has read to limit Congress's power to provide remedies for civil-rights violations.[195] Another set of rulings undermined the use of implied constitutional and statutory causes of action.[196] Yet others added more requirements than Congress had imposed for eligibility to pursue statutory claims[197] and narrowed the bases for establishing Article III injury. In 2021, before *Dobbs*, the Court permitted a state legislature to insulate a new anti-abortion law from federal court review through endowing private actors—rather than state officials—with the power to bring actions against people allegedly violating that state law.[198]

Yet, as we noted when discussing *Mullane* and class actions, the Court has also imposed constraints through interpretations of statutes. Its last decades of applications of the 1925 Federal Arbitration Act have empowered prospective defendants to ban class actions and to insist that claimants are relegated to single-file arbitration proceedings. Hence, the Court has outsourced final adjudicatory power over federal and state statutory and contract violations alleged by employees and consumers to private

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status-article-iii-judgeships-judicial-business-2022 [https://perma.cc/T9PJ-JJJX]. As of 2022, Congress had also authorized 345 authorized bankruptcy judgeships. *Status of Bankruptcy Judgeships—Judicial Business 2022*, U.S. Cts. (Sept. 30, 2022), https://www.uscourts.gov/statistics-reports/status-bankruptcy-judgeships-judicial-business-2022 [https://perma.cc/M5JQ-CUJJ]. As of 2022, the federal judiciary has approved 589 federal magistrate judge positions. *Status of Magistrate Judge Positions and Appointments—Judicial Business 2022*, U.S. Cts. (Sept. 30, 2022), https://www.uscourts.gov/statistics-reports/status-magistrate-judge-positions-and-appointments-judicial-business-2022 [https://perma.cc/ZV7G-69UR].

194. Data on the number of evidentiary hearings in Article III courthouses were compiled from Admin. Off. of the U.S. Cts., Judicial Business of the United States Courts (2019). The largest administrative adjudication agencies were the Social Security Administration, Executive Office for Immigration Review, Board of Veterans' Appeals, and Equal Employment Opportunity Commission. The data on administrative agency hearings were compiled from U.S. Soc. Sec. Admin., Annual Statistical Supplement tbl.2.F9 (2022); Exec. Off. for Immigr. Rev., Adjudication Statistics (2023); U.S. Dep't of Veterans Affs., Board of Veterans' Appeals Annual Report 12 (2019); and U.S. Equal Emp. Opportunity Comm'n, Annual Report on the Federal Workforce 49 (2019).

195. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

196. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662 (2009); Ziglar v. Abbasi, 582 U.S. 120 (2017); Vega v. Tekoh, 142 S. Ct. 2095 (2022); Egbert v. Boule, 142 S. Ct. 1793, 1803–04 (2022). In *Egbert*, the Court stated that the decision whether to imply a damages action to redress a constitutional violation "does not invite federal courts to independently assess the costs and benefits of implying a cause of action" because a "court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert*, 142 S. Ct. at 1805 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017)).

197. *See, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2206–07 (2021); Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020); Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

198. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 529–30 (2021).

dispute-resolution centers, chosen by potential defendants.[199] (Congress imposed one limit when, in 2021, in the Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act, it made unenforceable both arbitration mandates and obligations not to disclose outcomes for that subset of claims.[200]) In a parallel fashion, the Court's interpretation of habeas corpus has imposed a host of doctrines that have walled off access to court. In the rare cases in which judges look at the merits, a state court ruling not only has to be in error, but also "unreasonabl[y]" wrong.[201] In 2023, the Court added to its interpretation of habeas by blocking access for a person alleging actual innocence.[202]

IV. DISCIPLINED AND ACCOUNTABLE DECISION MAKING ASPIRING TO FAIRNESS

Our account of commitments to fair process and the challenges of enabling access is not a narrative *sui generis* to the United States nor, as we have discussed, are the problems addressed in courts alone. Here, as part of our conclusion, we sketch parallel concerns in European case law and in other parts of the English Commonwealth and then turn to the underlying precepts that emerge from this transatlantic account of due process.

As we noted, the European Convention on Human Rights calls for a "fair and public hearing." The jurisprudence that emerged is voluminous and includes obligations to assist individuals in specific circumstances when seeking law's help.[203] *Airey v. Ireland* is an early exemplar, as the European Court of Human Rights required Ireland to provide assistance, including a lawyer, to help a woman navigate its complex family-separation law.[204] Below, we provide a few other illustrations of this fabric of due-process principles that have come to the fore in constitutional democracies that, like the United States, aim to have an inclusive, functioning adjudication system.

A decision from the Supreme Court of Canada in 2014 provides one illustration, as that court found the schedule that raised fees imposed by British Columbia on litigants whose trial extended longer than a set period

199. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011); *see also* Helen Hershkoff & Judith Resnik, *Contractualisation of Civil Litigation in the United States: Procedure, Contract, Public Authority, Autonomy, Aggregate Litigation, and Power*, *in* Contractualisation of Civil Litigation (Anna Nylund & Antonio Cabral eds., forthcoming 2023); Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 Lewis & Clark L. Rev. 611, 618 (2020).

200. Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act, Pub. L. No. 117-90, 136 Stat. 26 (2022).

201. *See* 28 U.S.C. § 2254(d)(1); *see also* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1236–37 (2015).

202. *See* Jones v. Hendrix, 143 S. Ct. 1857, 1877–78 (2023) (Sotomayor & Kagan, JJ., dissenting).

203. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 174, art. 6.1, Nov. 4, 1950.

204. *See* Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) at 12 (1979).

was unlawful because its exemptions were too narrow.[205] Fees needed to be waived not only for those who were "impoverished" but also for those who would have to "forgo reasonable expenses."[206] The court continued,

> It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts—a tradition that goes back to the *Statute of Henry VII*, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees.[207]

Another ruling in 2017 came from the U.K. Supreme Court, which likewise found fee provisions unlawful; in this instance, the fees were imposed by the English government when people sought to use the country's employment tribunal.[208] The court explained,

> At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.[209]

Moreover,

> Access to the courts is not, therefore, of value only to the particular individuals involved . . . .

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205. Trial Laws. Ass'n of British Columbia v. British Columbia, [2014] 3 S.C.R. 31, 34 (Can.).
206. *Id.*
207. *Id.* at 54.
208. *See* R (UNISON) v. Lord Chancellor, [2017] UKSC 51, ¶¶ 65–85.
209. *Id.* at ¶ 68.

> Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established . . . .
>
> But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.[210]

The aims were for access and some measures to ensure "equality of arms," to borrow English terminology, that are (as in the United States) in support of structural as well as individual interests. The goals are to stabilize political and social relations, instantiate respect for individual rights, and enable governments to function so as to generate and conserve government authority.

The various analyses we have discussed underscore the interactions between "substantive" and "procedural" due process as principles committed to the government's decent treatment of individuals in myriad forms and venues and, in turn, legitimate government's exercise of its power. Thus, both individuals and the country *need* due process to secure judicial integrity and government accountability, to ensure fairness, and to avoid arbitrariness. Such commitments become all the more important given the attack on efforts to bring about equality and to mitigate the impact of concentration of political and economic power.[211] We have highlighted diverse areas of law in the hopes of inspiring a backlash against the unbridled power being wielded.

To be clear, we are not suggesting some halcyon past. Rather, we are keenly aware that neither courts nor agencies functioning under due-process mandates have, to date, succeeded in generating fully accessible, even-handed procedures, wise judges, and fair outcomes. Indeed, an expansive literature now mines "lawyerless courts" and barriers to legal remedies.[212] Those problems, central to state courts, are also present in the federal

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210. *Id.* at ¶¶ 69–71.

211. *See, e.g.*, Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. (forthcoming 2023).

212. *See, e.g.*, Suzette M. Malveaux, *Is It Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2405 (2022). As this article contends, "[o]ver the last half-century, the Supreme Court has chipped away at the process that everyday people use to access and employ the civil court system to resolve their grievances and seek remedies." *Id.*; Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509 (2022). *See also* Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183 (2022); Judith Resnik, *Class in Courts: Incomplete Equality's Challenges for the Legitimacy of Procedural Systems*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL

system, where a quarter of the complaints filed come from people without lawyers and half of appeals are pursued without counsel of record.[213]

Moreover, courts are not the exclusive domain of legal remedies nor necessarily the model of fairness.[214] Yet responses to the limits of and challenges facing courts do not lie in the turn to originalism; in Article III exclusivity or in unfettered agency decision making; in the privatization of process; or in the rejection of judicial engagement with the quality and fairness of procedures. Eliminating or narrowing due-process protections undercuts the potential for the redistribution of power and resources, immunizes exercises of authority, and undermines institutional integrity and individual liberty. The development and application of due-process principles that we have sketched are grounded in a long trail of commitments to trying to hold power to account in the hopes of stopping its frightening arbitrariness. The question is how to build on that history, rather than to abandon aspirations for lawfulness.

Legal Perspectives 132 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., N.Y.U. Press 2022).

213. *See Table B-19—U.S. Courts of Appeals Judicial Business*, U.S. Cts. (Sept. 30, 2022), https://www.uscourts.gov/statistics/table/b-19/judicial-business/2022/09/30 [https://perma.cc/C7A9-A8G7]; *Table C-13—U.S. District Courts–Civil Judicial Business*, U.S. Cts. (Sept. 30, 2022), https://www.uscourts.gov/statistics/table/c-13/judicial-business/2022/09/30 [https://perma.cc/THN5-5CPJ]; *see also* Merritt E. McAlister, *Missing Decisions*, 169 U. Pa. L. Rev. 1101, 1143–45 (2021); Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 Cornell L. Rev. 1, 98–99 (2021).

214. *See* Mashaw, *supra* note 39, at 52–53.