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Due Process Disaggregation

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DUE PROCESS DISAGGREGATION

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ABSTRACT

One-size-fits-all procedural safeguards are becoming increasingly suspect under the Due Process Clause. Although the precise requirements of due process vary from context to context, the Supreme Court has held that, within any particular context, the Due Process Clause merely requires one-size-fits-all procedures that are designed according to the needs of the average or typical person using the procedures. As the Court explained when announcing the modern approach to procedural due process in Mathews v. Eldridge*, the due process calculus must be focused on "the generality of cases, not the rare exceptions." A more granular approach to due process rules, the Court emphasized in a series of rulings between 1976 and 1985, would place an undue administrative and financial burden on the government.*

This aspect of procedural due process law no longer matches the on-the-ground realities of many procedural regimes. In recent years, the space between "the generality of cases" and "the rare exceptions" has become populated with subgroups of individuals whose procedural needs are different from those of the typical individual. Whether due to subgroup members' capacities and circumstances, their stronger stake in the proceedings, or their unusually complex cases, subgroup members forced to rely on one-size-fits-all procedures may be deprived of truly meaningful procedural safeguards. At the same time, in ways that were unimaginable just a couple of decades ago, technological developments have enabled government agencies to identify and accommodate subgroup members at a comparatively small additional cost. Based on these developments and the inherently flexible nature of due process, it is time to move beyond the Court's narrow focus on "the generality of cases" and its preference for one-size-fits-all procedural rules. To be sure, not every subgroup warrants additional procedural safeguards. However, rather than dismissing subgroup members as "rare exceptions" unworthy of procedural accommodation, courts should evaluate the due process rights of subgroups under the traditional Mathews *balancing test. This refinement of due process doctrine is necessary to ensure that members of due process subgroups—and not just average or typical individuals—are afforded the fundamentally fair procedural protections guaranteed by the Due Process Clause.*

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INTRODUCTION

Determining the procedures required by the Due Process Clause is a deceptively simple task. The Supreme Court provided the instructions in 1976, when it adopted a three-factor balancing test in *Mathews v. Eldridge*.[1] Since then, courts have weighed the *Mathews* factors to specify which procedural safeguards satisfy due process in contexts ranging from deprivations of government benefits[2] and terminations of parental rights,[3] to deportations of noncitizens[4] and involuntary civil commitments to mental hospitals.[5] Yet the Supreme Court and lower courts have never fully answered one of the most basic questions related to due process: In each context, for whom should due process procedures be designed? In other words, does the Due Process Clause merely require that a procedural regime meet the needs of the average or typical person using the procedures, or is some additional tailoring required for people whose procedural needs are quite different from those of the majority?

On the few occasions when the Supreme Court has commented on this aspect of due process, it has suggested a choice between extremes: either due process requires one-size-fits-all procedures designed for the average or typical person in a particular context, or due process requires procedures that are determined on a case-by-case basis.[6] The Court made its preference clear in *Mathews*, when it explained that due process rules must be targeted to "the generality of cases, not the rare exceptions."[7] Indeed, in almost every case since *Mathews*, the Court has interpreted the Due Process Clause to require uniform procedural rules even for plaintiffs whose situations were extreme or unusual in tangible ways.[8] Those types of outlier cases do not warrant special

1 Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976). In *Mathews*, the Court held that three factors must be considered when determining the "specific dictates" of due process: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

2 *See, e.g.*, *id.*

3 *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 758–68 (1982).

4 *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32–37 (1982).

5 *See, e.g.*, Addington v. Texas, 441 U.S. 418, 425–27 (1979).

6 *See infra* Section I.A.

7 *Mathews*, 424 U.S. at 344. *But cf. id.* at 349 ("All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard.'" (quoting Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970) (footnote omitted))).

8 *See* Ingraham v. Wright, 430 U.S. 651 (1977) (rejecting a due process claim brought by two students who were subject to exceptionally harsh corporal punishment at school); Parham v. J.R., 442 U.S. 584 (1979) (rejecting a due process claim brought by a class of minor children who were involuntarily placed in mental health institutions by their parents or guardians); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (rejecting a due process claim brought by applicants for veterans' disability benefits challenging a statutory attorneys' fee limitation that contained no exceptions for "complex" cases). *But*

procedural rules, the Court has explained, because requiring such tailoring would place an undue administrative and financial burden on the government.[9] Moreover, just identifying, let alone accommodating, the unusual cases would be impracticable.[10]

It is no surprise that the Court has favored an approach to due process that focuses almost exclusively on the needs of the average or typical person using a given set of procedures. With some procedural regimes used by hundreds of thousands of people per year,[11] it is difficult to imagine how government agencies or courts could implement anything approaching individualized procedures. And even if it were possible, the fiscal and administrative burden created by such procedures would, under the *Mathews* balancing test, surely preclude a court from interpreting the Due Process Clause to require such tailoring.

And yet, viewing due process in purely systemic terms overlooks more than just extreme or idiosyncratic situations that may pop up from time to time. In particular, it fails to account for what this Article refers to as "subgroups"—that is, identifiable clusters of individuals in a particular context whose procedural needs are different from those of the majority.

Subgroups can arise in any context in which due process rules are applied across the board to a diverse population.[12] For example, in the immigration context, subgroups of pro se noncitizen minors and adults with mental disabilities are less able to defend themselves against deportation using the adversarial, trial-like procedures that are available to all noncitizens. In the veterans' disability benefits context, the subgroup of individuals seeking benefits based on military sexual trauma must contend with eligibility standards and an adjudication process that were designed for claims that are more straightforward and easier to document. And in the school discipline context, the subgroup of students attending schools that have criminalized their discipline policies is stuck with limited due process rights based on an inaccurate perception of school discipline as educational rather than criminal in nature. The members of each of these subgroups are situated quite differently from the rest of the individuals using the available procedural safeguards, and those differences cast doubt on whether the pro-

see Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (adopting a case-by-case approach to determine whether due process requires the appointment of counsel for indigent parents in termination of parental rights proceedings); Turner v. Rogers, 131 S. Ct. 2507 (2011) (declining to hold that due process never requires appointment of counsel in civil contempt proceedings that could result in imprisonment).

9 *See, e.g.*, *Ingraham*, 430 U.S. at 680 (noting the "impracticability of formulating a rule of procedural due process that varies with the severity of the particular imposition"); *see also Walters*, 473 U.S. at 326 (emphasizing the "greater administrative costs" that would be incurred if the plaintiffs' due process challenge was successful).

10 *See, e.g.*, *Ingraham*, 430 U.S. at 680.

11 For example, the Social Security Administration alone resolves more than 500,000 hearings and appeals each year. *See Information About Social Security's Hearings and Appeals Process*, SOC. SEC. ADMIN. (June 30, 2014), http://ssa.gov/appeals/#a0=2.

12 *See infra* Section II.A.

cedures constitute due process for the subgroup members. Yet current due process doctrine does not acknowledge the existence of subgroups, nor does it address whether or how the procedural needs of subgroups should be accommodated.

Although the Supreme Court has not been presented with a due process claim on behalf of a subgroup articulated as such, subgroups are not total strangers to the law.[13] In recent years, subgroup members have brought class actions claiming that their due process rights are being violated even though the available procedures are constitutionally sound for non-subgroup members. Government actors have taken affirmative steps, either on their own initiative or in response to litigation, to pass legislation, promulgate regulations, and alter policies in an effort to accommodate the needs of particular subgroups. And a growing branch of due process scholarship is concerned with identifying the plight of particular subgroups and arguing that the Due Process Clause mandates that those subgroups be provided with additional or alternative procedural safeguards.

The increasing visibility of subgroups has not led to a corresponding evolution of due process doctrine or theory, however. Lower courts presented with due process challenges on behalf of subgroups typically respond in one of two ways: either they reject the claims based on the *Mathews* Court's statement that due process rules must be targeted to "the generality of cases, not the rare exceptions," or they apply the *Mathews* test to only the subgroup, as if the subgroup members make up the entire population of individuals using the procedures. Absent from these decisions is any discussion of how the subgroup concept fits into the Supreme Court's systemic approach to procedural due process.

Nor has the academic literature fully engaged with the doctrinal and theoretical implications of subgroup due process claims. The arguments advanced in favor of subgroup accommodation largely ignore the Court's reluctance to define due process procedures according to anything other than the needs of the typical or average person using the procedures. Instead, like some lower courts, scholars have mostly analyzed the due process rights of subgroup members using a *Mathews* analysis that focuses exclusively on the facts and circumstances of the subgroup members themselves.

The lack of clarity concerning the due process rights of subgroups has consequences. Most obviously, across many different contexts in which the Due Process Clause applies, subgroups of individuals are in danger of being deprived of their constitutional right to fair procedures. For their part, judges considering due process claims brought by subgroups lack a clear and consistent way to evaluate those claims. Similarly, government agencies seeking to establish procedural regimes that comport with due process requirements are unable to do so when the status of subgroup due process rights is so unsettled. And to the extent that subgroup claims are perceived to be unsound under Supreme Court caselaw, subgroup members may believe that

13 *See infra* Section II.A.

the only way to vindicate their rights is to go it alone, bringing claims on behalf of just themselves rather than the rest of the members of their subgroup. Such individual challenges are costly, both for the subgroup members who bring them as well as the government agencies that defend against them and the courts that adjudicate them.

It does not need to be this way. Although largely invisible to the Supreme Court during the due process revolution, subgroups can no longer be brushed aside as unworthy of attention under the Due Process Clause. Whatever skepticism about subgroups that can be inferred from the Court's due process rulings of the 1970s and 1980s no longer matches up with the on-the-ground realities of many procedural regimes that serve large and diverse populations. Indeed, the Court's concern about the impracticability of identifying subgroup members and the steep cost of accommodating their needs can seem almost quaint: where once government workers would need to gather and flip through thousands of paper files just to figure out who might be in a subgroup, today's massive computer databases can collect, track, store, sort, and share information in ways that enable agencies to identify and accommodate subgroups at little extra cost.[14]

This Article argues that the Due Process Clause requires the government to accommodate the procedural needs of subgroups in certain situations. To be clear, I am not suggesting that all subgroups must be accommodated in all situations. Rather, the argument here is that courts should not dismiss due process claims brought by subgroup members simply because they do not represent "the generality of cases"—subgroup members should have the opportunity to prove, pursuant to the traditional three-factor *Mathews* test as applied to members of the subgroup, that they are entitled to additional or alternative procedural safeguards.[15]

Part I of this Article examines the evolution of due process doctrine as it relates to the question of how procedures should be tailored. It begins by providing an overview of the Supreme Court's modern procedural due process jurisprudence, with a focus on the cluster of decisions issued in the wake of the due process revolution of the 1970s. It then summarizes the relatively small amount of legal scholarship examining the Court's preference for a one-size-fits-all, systemic approach to due process rules. Part I thus reveals that current due process doctrine and theory overlook the procedural needs of individuals whose cases cannot be characterized as "the generality of cases" or "the rare exceptions."

Part II traces the recent rise of due process subgroups. It begins by identifying the numerous subgroup arguments that have emerged within just the past decade. Based on this survey of due process arguments on behalf of subgroups, this Part defines subgroups as identifiable cohorts of individuals who, because of some common characteristic, may be entitled to additional or alternative procedural safeguards under a traditional *Mathews* analysis.

14 *See infra* Section II.C.

15 *See infra* Part III.

Then, in an attempt to distill the distinguishing characteristics of due process subgroups, this Part develops a typology that sorts subgroups into three categories: (1) subgroups composed of individuals who, due to their shared capacities and circumstances, are less able to use the available procedures; (2) subgroups composed of individuals who possess a stronger stake or interest in the proceedings; and (3) subgroups composed of individuals who are challenging a determination that is unusually complex or complicated. Because these distinguishing characteristics directly affect one or more of the *Mathews* factors, they raise questions about whether one-size-fits-all procedural safeguards satisfy the due process rights of subgroup members. This Part then documents recent technological developments that may enable government officials to identify and accommodate subgroup members with relative ease, suggesting that these shifts also affect the *Mathews* balance.

Part III explores how courts and government actors should respond to claims that the due process rights of subgroup members may be different from the rights of the average or typical individual in a particular context. Through a close examination of the Supreme Court's procedural due process caselaw, this Part argues that an approach to procedural due process that accommodates the divergent needs of subgroups fits comfortably within established doctrine. This Part then considers some of the likely objections to subgroup accommodation, and the need for experimentation and empirical research in this area of law. The Article concludes by arguing that the requirements of due process must evolve in order to ensure that subgroup members—and not just average or typical individuals—are provided with procedural protections that are fundamentally fair.

I. DUE PROCESS FOR WHOM? THE SUPREME COURT'S SYSTEMIC APPROACH TO PROCEDURAL DUE PROCESS

Due process may be the oldest and most commonly invoked of our civil rights,[16] but the precise requirements of the Due Process Clause received little attention until the due process revolution of the 1970s. Only then, after the establishment of the modern administrative state, did the Supreme Court begin to confront difficult questions about what specific procedural safeguards are required by due process in the various contexts in which it applies. Among these questions, perhaps the most fundamental was: For whom must due process procedures be designed? In other words, in any context in which due process applies, must the requisite procedures be indi-

16 *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 7–8 (1985) (observing that due process cases are found "in virtually every arena of constitutional conflict" and that "[t]he great political issues of the times, certainly those of post-Civil War America—immigration, state economic regulation, communist subversion, abortion, welfare rights, the treatment of social deviance and criminality, to name but a few—converge on the federal courts with due process claims leading the charge"); Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1044 (1984) (referring to procedural due process as "[b]y far the oldest of our civil rights").

vidually tailored to the needs of every person who may use them, or are one-size-fits-all procedures sufficient?

This Part traces the evolution of the Supreme Court's approach to procedural due process and the Court's attempts to answer key questions about the design of due process procedures. It begins by examining a series of decisions from the 1970s and 1980s in which the Court developed a largely systemic approach to procedural due process rules, according to which all individuals within a particular context are entitled to the same procedural safeguards. It then reviews the scholarly response to the Court's chosen approach to procedural due process. Finally, this Part identifies what is overlooked by the Court's approach to determining the requirements of due process.

A. The Evolution of the Supreme Court's Systemic Approach to Procedural Due Process

Between 1970 and 1985, the Supreme Court developed what became the modern approach to determining which procedures are required by the Due Process Clause when the government seeks to deprive an individual of a constitutionally protected interest. The following subsections discuss the development of this approach, with a focus on how the Court handled due process claims in procedural settings that served individuals who were not necessarily similarly situated.

1. A New Focus on the Requirements of Procedural Due Process

The content of due process "seemed so clear to prior generations that they included the term 'due process' in the [F]ifth and [F]ourteenth [A]mendments virtually without discussion."[17] Similarly, for most of its history, the Supreme Court did not concern itself with the specific requirements of procedural due process.[18] Prior to 1970, the Court's due process decisions largely focused on what types of government action triggered any due process rights at all.[19] When due process did apply, the Court held that some

17 Rubin, *supra* note 16, at 1044.

18 *See* 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.3, at 746 (5th ed. 2010) (referring to the Court's "tradition of simply requiring a hearing and assuming that 'hearing' had a commonly understood meaning"). For example, perhaps the most well known discussion of the concept of due process includes no detail concerning the procedural safeguards that would assure due process. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 160–65 (1951) (Frankfurter, J., concurring).

19 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (holding unconstitutional a series of statutes that denied welfare assistance to certain individuals); Sherbert v. Verner, 374 U.S. 398 (1963) (holding unconstitutional South Carolina's denial of unemployment benefits to a practicing Seventh-Day Adventist); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232 (1957) (holding unconstitutional New Mexico's denial of a former Communist's admission to its state bar); Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956) (holding unconstitutional the dismissal of a teacher who refused to testify about his membership in the Communist Party before a federal legislative committee); United States *ex rel.* Knauff v.

kind of hearing was required, but offered little elaboration as to what that hearing should entail.[20]

The Court began to chart a new direction in *Goldberg v. Kelly*.[21] *Goldberg* was a landmark decision,[22] establishing that welfare recipients had a due process right to a hearing before their benefits were terminated.[23] But the Court did not stop there. After declaring that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard,"[24] the Court considered the challenges facing welfare recipients who seek to contest the termination of their benefits.[25] In an attempt to fashion procedures that would match the needs of welfare recipients, the Court specified the following core elements of the welfare "fair hearing": the hearing must provide welfare recipients an opportunity to state their position orally[26] and confront and cross-examine witnesses;[27] recipients must be allowed to retain an attorney if they so desire;[28] and the hearing must be adjudicated by an impartial decisionmaker whose final decision states the evidence relied upon and the legal basis for the ruling.[29]

Shaughnessy, 338 U.S. 537 (1950) (upholding the Attorney General's refusal of an immigration hearing to the alien wife of a World War II veteran).

20 *See* PIERCE, *supra* note 18, § 9.3, at 744 ("Before 1970, the Court paid little attention to the nature of the decisionmaking procedure required by due process. Typically, the Court held only that due process required a 'hearing,' without describing the nature of the hearing required."); Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1277 (1975) ("The Court's early opinions on this score were rather vague."). *But cf.* Rubin, *supra* note 16, at 1060 n.80 ("By the 1960's, the Court was more specific about the requirements of due process.").

The Court's ruling in *Londoner v. City of Denver* provides an early example of the limited detail with which the Court described the due process hearing requirement. *See* 210 U.S. 373, 386 (1908) ("[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."); *see also* Friendly, *supra* (characterizing *Londoner*'s discussion of hearings as "unilluminating"). Other early examples include *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 300–06 (1937), and *Interstate Commerce Commission v. Louisville & Nashville Railroad*, 227 U.S. 88, 91–92 (1913).

21 397 U.S. 254 (1970); *see* PIERCE, *supra* note 18, § 9.3, at 745 (stating that the Court in *Goldberg* "announced its intention to address explicitly and in detail the issue of how much process is due in each decisionmaking context to which due process applies").

22 *Goldberg* is recognized as the first battle in the due process revolution that reshaped the contours of procedural due process doctrine. *See* MASHAW, *supra* note 16, at 33 ("[B]y most accounts the due process revolution began with the Supreme Court's opinion in *Goldberg v. Kelly* . . . ."); Friendly, *supra* note 20, at 1268 (observing that, since *Goldberg*, "we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another").

23 *Goldberg*, 397 U.S. at 260–66.

24 *Id.* at 268–69.

25 *Id.* at 269–70.

26 *Id.* at 269.

27 *Id.* at 269–70.

28 *Id.* at 270.

29 *Id.* at 271.

The Court continued to scrutinize the requirements of due process after *Goldberg*,[30] ultimately adopting a new test to identify precisely which procedures are required by due process in any given context.[31] In *Mathews v. Eldridge*, the Court announced that courts must determine the "specific dictates of due process" by balancing the following three factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[32]

Although the *Mathews* Court quoted *Goldberg*'s view that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard,"[33] it made clear that courts should weigh the *Mathews* factors based on system-wide facts rather than the facts of individual claimants. According to the Court, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."[34] So, in *Mathews*, it did not matter that Mr. Eldridge brought his lawsuit on behalf of only himself and not a class of disability benefits claimants. Under the "generality of cases" principle, the Court examined the facts and weighed the *Mathews* factors as they applied to disability claimants in the aggregate, not just to Mr. Eldridge.[35] And, once the Court determined the procedures required by the Due Process Clause, those procedures were deemed sufficient for all disability benefits claimants, not just Mr. Eldridge.[36]

In the decades since deciding *Mathews*, the Court has continued to use *Mathews*'s three-factor balancing test, characterizing it as "a general approach" for determining the specific procedures required by due pro-

30 *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Arnett v. Kennedy, 416 U.S. 134 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971).

31 *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

32 *Id.*

33 *Goldberg*, 397 U.S. at 268–69; *see Mathews*, 424 U.S. at 349 ("All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." (quoting *Goldberg*, 397 U.S. at 268–69)).

34 *Mathews*, 424 U.S. at 344.

35 *See, e.g.*, *id.* at 341–43 (analyzing the first *Mathews* factor based on the hardship imposed upon a generic "erroneously terminated disability recipient," rather than the hardship actually imposed on Mr. Eldridge); *id.* at 344 (when discussing the nature of disability benefit determinations, focusing on the complexity of "most cases" not the complexity of Mr. Eldridge's case); *id.* at 345 (explaining that critical information related to eligibility for disability benefits "usually is derived from medical sources," without any discussion of Mr. Eldridge's eligibility determination); *id.* at 347 (focusing on the administrative burden and societal costs associated with providing a pre-deprivation hearing in "all cases," not just in Mr. Eldridge's case).

36 *See id.* at 349 (stating the Court's holding in systemic, not individual, terms).

cess.[37] Indeed, the Court has used the *Mathews* test to evaluate due process claims in an ever-growing number of contexts, including immigration law,[38] family law,[39] public employment law,[40] and national security law.[41]

Although the three *Mathews* factors have remained unchanged through the years, the Court has refined its stance on the systemic nature of procedural due process rights. The Court considered this aspect of the procedural due process analysis in a series of decisions issued during the ten-year period after *Mathews* was decided. These decisions, and the reasoning that underlies them, shed light on how due process procedures should be tailored to the needs of the individuals who use them.

2. Applying *Mathews* and the "Generality of Cases" Principle

Little time passed before the Court was called upon to revisit *Mathews*'s systemic approach to procedural due process. Between 1976 and 1985, the Court considered this aspect of procedural due process in five different cases;[42] in all but one of those cases, the Court reaffirmed its view that procedural due process rules must be based on "the generality of cases, not the rare exceptions."[43] Although the Court handed down those decisions almost thirty years ago, they remain the Court's most extensive inquiry into the nature of due process rules.[44]

The Court initially held firm to its systemic approach in the face of fairly extreme facts. In *Ingraham v. Wright*,[45] the first post-*Mathews* decision to apply the *Mathews* balancing test, the Court rejected a claim that public school students were entitled to a hearing before being subjected to corporal

37 Parham v. J.R., 442 U.S. 584, 599 (1979); *see also* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.8(i), at 165 (5th ed. 2012) ("All courts must now employ the *Mathews v. Eldridge* balancing test to determine the type of procedures that are required by due process when a government action would deprive an individual of a constitutionally protected liberty or property interest."). *But cf.* Dusenbery v. United States, 534 U.S. 161, 167–68 (2002) (declining to use the *Mathews* approach to evaluate a due process challenge to the adequacy of a method of giving notice, and observing that the Court has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims").

38 *See* Landon v. Plasencia, 459 U.S. 21, 32–37 (1982).

39 *See* Santosky v. Kramer, 455 U.S. 745, 758–68 (1982).

40 *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542–45 (1985).

41 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 528–35 (2004).

42 Ingraham v. Wright, 430 U.S. 651 (1977); *Parham*, 442 U.S. at 584; Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981); *Santosky*, 455 U.S. at 745; Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

43 *Compare Ingraham*, 430 U.S. at 680 n.49, *Parham*, 442 U.S. at 612–13, *Santosky*, 455 U.S. at 757, *and Walters*, 473 U.S. at 321, *with Lassiter*, 452 U.S. at 31–32 (conspicuously omitting the *Mathews* "generality of cases" language from its due process analysis).

44 Since deciding these cases, the Supreme Court has touched on this aspect of procedural due process just once, in *Turner v. Rogers*, 131 S. Ct. 2507 (2011). The Court's decision in *Turner* is discussed in Section III.A.

45 *Ingraham*, 430 U.S. at 651.

punishment by school officials.[46] The Court acknowledged that the two *Ingraham* plaintiffs were the victims of an "exceptionally harsh" disciplinary regime.[47] As the Court recounted, one plaintiff was paddled so severely that "he suffered a hematoma requiring medical attention and keeping him out of school for several days,"[48] while the second plaintiff lost the full use of his arm for a week due to one of his several paddlings.[49]

Yet the Court declined to allow the severity of the plaintiffs' injuries to affect the due process analysis.[50] Characterizing the mistreatment suffered by the two plaintiffs as "an aberration,"[51] the Court weighed the *Mathews* factors based on how school officials "usually" administer corporal punishment.[52] The Court further observed that only one-size-fits-all procedures were available under the Due Process Clause, citing the "generality of cases" principle announced in *Mathews*.[53] Based on this systemic view of school discipline procedures,[54] the Court ruled that due process required no more procedural protections than those that were already available to students.[55]

The Court maintained its focus on systemic facts and uniform procedures in *Parham v. J.R.*, a class action challenging Georgia's procedures for admitting children for treatment to state-run mental hospitals.[56] The plaintiff class alleged that the state routinely admitted children to mental hospitals in error, but the Court, applying the *Mathews* test, found no due process violation.[57] The Court acknowledged that the state's procedures were "not totally free from risk of error,"[58] but such risk did not drive the Court's analysis. Rather, the Court emphasized—repeating it twice within two pages of its opinion—*Mathews*'s view that "procedural due process rules are shaped by

46 *Id.* at 682.

47 *Id.* at 657.

48 *Id.* (footnote omitted) (noting that the student was "subjected to more than 20 licks with a paddle while being held over a table in the principal's office").

49 *Id.*

50 *Id.* at 682.

51 *Id.* at 677.

52 *Id.* at 675–82 (applying the *Mathews* test). For example, the Court stated that "because paddlings are *usually* inflicted in response to conduct directly observed by teachers in their presence, the risk that a child will be paddled without cause is typically insignificant." *Id.* at 677–78 (emphasis added).

53 *Id.* at 680 n.49.

54 Although the Court recognized that its due process analysis was affected by what it described as "the common-law privilege permitting teachers to inflict reasonable corporal punishment on children in their care," *id.* at 674, the Court nonetheless applied the *Mathews* test to determine which procedural safeguards were required by the Constitution. *Id.* at 675–82.

55 *Id.* at 682.

56 Parham v. J.R., 442 U.S. 584 (1979).

57 *See id.* at 599–617.

58 *Id.* at 615; *see also id.* at 612 ("By expressing some confidence in the medical decisionmaking process [used by Georgia], we are by no means suggesting it is error free.").

the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."[59]

Just two years later, however, the Court took a quite different approach to a procedural due process claim. In *Lassiter v. Department of Social Services*, an indigent plaintiff argued that her due process rights were violated when the trial court refused to require North Carolina to provide government-appointed counsel in a case involving the termination of the plaintiff's parental rights.[60] Applying *Mathews*, the Court rejected the claim, holding that the Due Process Clause did not require that the plaintiff be appointed counsel.[61]

The *Lassiter* Court reached its conclusion after first making a striking pronouncement: the requirements of due process, at least in cases involving the termination of parental rights, must be determined case by case, based on a review of the individual facts of each case.[62] Unlike its decisions in *Ingraham* and *Parham*, the Court did not rely on (or even refer to) the "generality of cases" principle announced in *Mathews*.[63] Instead, the *Lassiter* Court warned against "rigid" across-the-board rules,[64] explaining that it is "neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed" when deciding whether parents have a due process right to appointed counsel.[65]

The five-member majority opinion in *Lassiter* provoked a strongly worded dissent authored by Justice Blackmun. According to Justice Blackmun, the majority's reasoning reflected "a sharp departure"[66] from the Court's previous view that due process "requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context."[67] Justice Blackmun predicted that the majority's approach would be "both cumbersome and costly" to implement,[68] and that it would diminish "the predictability and uniformity that underlie our society's commitment to the rule of law."[69]

Lassiter's case-by-case approach to procedural due process rules was short-lived. In the following term, the Court returned to its systemic view of

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59 *Id.* at 612–13 (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)); *id.* at 615 (observing that this statement from *Mathews* "bears repeating").

60 Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

61 *Id.* at 32–33.

62 *Id.* at 27–33.

63 In fact, *Lassiter* seemed to turn the *Mathews* reasoning on its head, arguing that a one-size-fits-all set of procedural safeguards was inappropriate because "the [*Mathews*] factors will not always be so distributed." *Id.* at 31.

64 *Id.* (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)) (internal quotation marks omitted).

65 *Id.* at 32 (quoting *Gagnon*, 411 U.S. at 790).

66 *Id.* at 49 (Blackmun, J., dissenting).

67 *Id.*; *see also id.* ("In analyzing the nature of the private and governmental interests at stake, along with the risk of error, the Court in the past has not limited itself to the particular case at hand.").

68 *Id.* at 51.

69 *Id.* at 50.

procedural due process in *Santosky v. Kramer*.[70] *Santosky* involved a due process challenge to the standard of proof in cases involving the termination of parental rights. Justice Blackmun, now writing for the majority, acknowledged *Lassiter* but, quoting *Mathews*, emphasized that procedural rules must be "shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions."[71] The Court then proceeded to apply the *Mathews* test and hold that due process required an elevated standard of proof to be applied in all cases involving the termination of parental rights.[72]

Any lingering doubts as to the Court's take on procedural due process rules seemed to be resolved by the Court's 1985 decision in *Walters v. National Association of Radiation Survivors*.[73] The plaintiffs in *Walters* brought a due process challenge to a federal statute that prohibited attorneys from charging more than ten dollars to represent a veteran seeking disability benefits.[74] The plaintiffs challenged the fee limit as it applied to all cases, but emphasized the existence of unusually complex cases that claimants could not handle without the assistance of a lawyer.[75] In the course of applying the *Mathews* test, the Court reaffirmed the systemic nature of procedural due process: "[T]he fundamental fairness of a particular procedure does not turn on the result obtained in any individual case,"[76] and the focus must be on "the generality of cases, not the rare exceptions."[77] Guided by this principle, the Court rejected the plaintiffs' claim, holding that the fee limit, on its face, did not violate due process.[78]

The "generality of cases" principle received additional attention in a concurring opinion in *Walters*. Although Justice O'Connor, joined by Justice Blackmun, agreed that the plaintiffs had not yet established a "sound basis for carving out a subclass of complex claims" that required additional due process protection,[79] she wrote separately to note that the claims of any

70 Santosky v. Kramer, 455 U.S. 745 (1982). Despite *Santosky*'s refusal to adopt *Lassiter*'s case-by-case approach, lower courts did not ignore *Lassiter*. *See, e.g.*, Buttrey v. United States, 690 F.2d 1170, 1178 (5th Cir. 1982) (when applying *Mathews*, "[e]ach case . . . will depend upon the nature of the facts challenged and upon the effectiveness of the procedures afforded the plaintiff for challenging them").

71 *Santosky*, 455 U.S. at 757 (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)).

72 *Id.* at 767–68.

73 473 U.S. 305 (1985).

74 *Id.* at 307–08.

75 *Id.* at 314 ("Though never expressly defined by the District Court, these cases apparently include those in which a disability is slow developing and therefore difficult to find service connected, such as the claims associated with exposure to radiation or harmful chemicals, as well as other cases identified . . . as involving difficult matters of medical judgment.").

76 *Id.* at 321.

77 *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)).

78 *Id.* at 334.

79 *Id.* at 337 (O'Connor, J., concurring).

"identifiable groups" remained open on remand.[80] According to Justice O'Connor, such an argument is available under the Due Process Clause because "[t]he 'determination of what process is due [may] var[y]' with regard to a group whose 'situation differs' in important respects from the typical veterans' benefit claimant."[81]

* * *

The line of procedural due process cases beginning with *Mathews* and ending with *Walters* established a strong preference for procedural rules that apply uniformly to all individuals in a particular context.[82] That said, the Court did not offer much insight into the rationale underlying this choice. For the most part, the Court merely invoked *Mathews*'s language about the "generality of cases," without further elaboration.[83] *Ingraham* is something of an exception in this regard, as the Court supplemented its reference to the "generality of cases" principle with a warning about the consequences of departing from one-size-fits-all procedural rules. "[F]ormulating a rule of procedural due process that varies with the severity of the particular imposition" is impracticable,[84] the Court observed, raising concerns about the development of "manageable standards for determining what process is due in any particular case."[85] The most detailed rationale for uniform procedural rules appeared in Justice Blackmun's dissent in *Lassiter*, which argued that generally applicable procedural rules help to "guarantee[ ] the predictability

80 *Id.* at 336. Indeed, on remand, Justice O'Connor's concurring opinion guided the district court's analysis of the plaintiffs' due process claim. *See* Nat'l Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595, 597 (N.D. Cal. 1986).

81 *Walters*, 473 U.S. at 337 (O'Connor, J., concurring) (alterations in original) (quoting Parham v. J.R., 442 U.S. 584, 617 (1979)).

82 The Court's decision in *Lassiter* is the obvious exception, but, after its subsequent decisions in *Santosky* and *Walters*, the Court re-established its preference for a systemic approach to procedural due process rules. *See, e.g.*, Randy Lee, *Twenty-Five Years After* Goldberg v. Kelly*: Traveling from the Right Spot on the Wrong Road to the Wrong Place*, 23 CAP. U. L. REV. 863, 979 (1994) ("Among the descendants of *Mathews v. Eldridge*, *Lassiter v. Department of Social Services of Durham County* is not the case with the greatest impact on the determination of procedural due process. In fact, within a year of that decision, the Court handed down another that limited the effect of *Lassiter* both structurally and substantively." (footnotes omitted)); *see also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 34 (1981) (Burger, C.J., concurring) (agreeing to join "the narrow holding of the Court").

83 *See Walters*, 473 U.S. at 321, 330, 337; Santosky v. Kramer, 455 U.S. 745, 757 (1982); *Parham*, 442 U.S. at 613, 615; Ingraham v. Wright, 430 U.S. 651, 680 (1977). The most detailed and nuanced rationale for the "generality of cases" principle comes from Justice Blackmun's dissent in *Lassiter*. *See Lassiter*, 452 U.S. at 50 (Blackmun, J., dissenting) (arguing, inter alia, that one-size-fits-all procedures "guarantee[ ] the predictability and uniformity that underlie our society's commitment to the rule of law").

84 *Ingraham*, 430 U.S. at 680.

85 *Id.* at 682 n.55 (suggesting that adopting adjustable procedures in the school discipline context would mean that school officials would be "left to guess" at the constitutionally required procedures).

and uniformity that underlie our society's commitment to the rule of law,"[86] and to avoid practical difficulties related to determining the appropriate procedures at the outset of a case and on appellate review.[87]

In addition to providing minimal justification for a systemic approach to due process, the Court did not clearly define what constitutes "the generality of cases" as opposed to "the rare exceptions." In *Mathews* and *Ingraham*, the Court used words such as "typical" and "usual" to describe the factual scenarios to which the Court applied the *Mathews* analysis,[88] but the Court offered no hint as to precisely what those terms might mean. The Court's most straightforward pronouncement came in *Walters*, when it explained that "a process which is sufficient for the *large majority* of a group of claims is by constitutional definition sufficient for all of them,"[89] which the Court contrasted with claims based on only "a *tiny fraction* of the total cases pending."[90] But even that explanation does not provide much additional clarity to courts seeking to honor the "generality of cases" principle.

Despite the Court's hostility towards due process claims seeking something more tailored than one-size-fits-all procedures, the Court did seem to leave some room for claims that could overcome the "generality of cases" principle in *Mathews*. Although not expressed in the clearest of terms, the Court in *Parham* suggested, after rejecting the plaintiff class's due process challenge, that "the determination of what process is due [may] var[y]" with regard to a group whose "situation differs" in important respects from the typical claimant.[91] And in *Walters*, even though the Court was reviewing a lower court order that applied to all claimants, the Court offered its views on a hypothetical due process claim limited to "complex" cases.[92] Rather than

86 *Lassiter*, 452 U.S. at 50 (Blackmun, J., dissenting).

87 *Id.* at 51 & n.19. According to Justice Blackmun, it would be difficult for judges to discern the proper level of procedure at the outset and to review the constitutionality of chosen procedures after the fact. *Id.*

88 *See Ingraham*, 430 U.S. at 677–78 (focusing the due process analysis on what "usually" prompts corporal punishment in schools and the "typically insignificant" risk of error); Mathews v. Eldridge, 424 U.S. 319, 342 (1976) (focusing the due process analysis on the "typical[ ]" disability benefits claimant).

89 Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985) (emphasis added). Even this formulation could be viewed as ambiguous, however, as "a group of claims" could be understood as referring to all claims in a particular context or a subgroup of claims in that context. The Court has quoted this reference to "the large majority of a group of claims" just once, in a dissent authored by Justice Souter. *See* Burns v. United States, 501 U.S. 129, 152 n.7 (1991) (Souter, J., dissenting) (applying the *Mathews* factors to a due process challenge to criminal sentencing procedures). There, Justice Souter found no due process violation because, inter alia, "[t]here is no contention that this class of defendants is sufficiently large to affect the due process calculus in this case." *Id.* No further explanation of what would or would not be a "sufficiently large" group of individuals was provided.

90 *Walters*, 473 U.S. at 330 (emphasis added).

91 Parham v. J.R., 442 U.S. 584, 617; *see also Walters*, 473 U.S. at 337 (O'Connor, J., concurring) (quoting *Parham*, 442 U.S. at 617).

92 *Walters*, 473 U.S. at 330.

simply stating that no subgroup of cases could ever trigger additional or alternative procedural safeguards, the Court explained that individuals with complex cases would need to make a "very difficult factual showing" to overcome the "generality of cases" principle.[93] The *Walters* plaintiffs had failed to make such a showing because, among other things, they had not clearly defined the potential subgroup of cases or identified how prevalent those cases were.[94] Yet, this dicta from *Walters*, as well as Justice O'Connor's concurring opinion,[95] suggests the possibility that the "generality of cases" principle can be overcome.

B. Critiques of the Supreme Court's Systemic Approach to Procedural Due Process

For more than a decade after *Mathews* was decided, scholars engaged in something of a critical dismantling of the Court's three-factor balancing approach to determining the requirements of procedural due process. Those favoring a more expansive interpretation of the Due Process Clause expressed concerns about the Court's adoption of an instrumentalist, cost-benefit approach to due process. They accused the *Mathews* test of prioritizing accurate and efficient decisionmaking over harder-to-define "process values."[96] Scholars also argued that assigning the proper weight to each

93 *Id.*

94 *Id.* ("[O]n this record we simply do not know how those cases should be defined or what percentage of all of the cases before the VA they make up."); *see also id.* at 337 (O'Connor, J., concurring) ("In its present posture, this case affords no sound basis for carving out a subclass of complex claims that by their nature require expert assistance beyond the capabilities of service representatives to assure the veterans '[a] hearing appropriate to the nature of the case.'" (alteration in original) (quoting Boddie v. Connecticut, 401 U.S. 371, 378 (1971)) (internal quotation marks and citation omitted)).

95 *See id.* at 336 (O'Connor, J., concurring) (noting that the claims of any "identifiable groups" remain open on remand).

96 *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, 48 (1976) ("The *Eldridge* Court conceives of the values of procedure too narrowly: it views the sole purpose of procedural protections as enhancing accuracy, and thus limits its calculus to the benefits or costs that flow from correct or incorrect decisions. No attention is paid to 'process values' . . . ." (footnote omitted)) [hereinafter Mashaw, *The Supreme Court's Due Process Calculus*]; Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 473 (1986) ("An efficiency-oriented balancing test, therefore, weighs an inevitable and immediately recognizable administrative cost against a largely prophylactic interest in the use of specific procedural protections."); *cf.* Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 13 (1974) (suggesting, prior to *Mathews*, that legal processes should be evaluated with respect to such factors as "process value efficacy" in addition to "[g]ood result efficacy").

For discussions of the meaning and importance of "process values," see, for example, Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 888–93 (1981) (discussing the importance of an individual's right to participate in decisions that affect her in important ways); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process* (explaining the importance of "process values" such as an

Mathews factor is exceedingly difficult,[97] creating opportunities for courts to manipulate the *Mathews* test to justify limited procedures.[98] At the same time, others assailed the notion that judges should be the ones determining the procedures required by due process.[99] Related to this view was the argument that due process rules should be determined not by application of the *Mathews* test, but by whatever procedures are specified by state and federal legislation.[100]

In contrast with the numerous and wide-ranging critiques of the *Mathews* balancing test, scholars have had comparatively little to say about the "generality of cases" principle announced in *Mathews*. This aspect of the Court's approach to due process is not entirely missing from the post-*Mathews* literature; rather, it is just referred to routinely and without the degree of critical analysis applied to other aspects of the due process calculus.[101]

To the extent that scholars have considered the Court's systemic approach at all, they have done so in relation to *Lassiter*'s departure from it.

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individual's participation in administrative decisionmaking), *in* DUE PROCESS: NOMOS XVIII, at 126, 127–28 (J. Roland Pennock & John W. Chapman eds., 1977).

97 *See, e.g.*, Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 776 (1978) (observing that "the Court has not attempted to define how one tells how much [the cost of additional procedures] weigh or how that weight can be compared with that of competing interests"); Mashaw, *The Supreme Court's Due Process Calculus*, *supra* note 96, at 48 (criticizing the *Mathews* approach for "ask[ing] unanswerable questions"); Rubin, *supra* note 16, at 1138 ("This reliance upon 'weight,' which is a useful approach for dealing with bananas, leaves something to be desired where factors such as those in *Mathews* are concerned.").

98 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 674 (2d ed. 1988) (arguing that the *Mathews* balancing approach "not only overlooks the unquantifiable human interest in receiving decent treatment, but also provides the Court a facile means to justify the most cursory procedures by altering the relative weights to be accorded each of the three factors" (footnote omitted)); *cf.* Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 196 (1991) ("Although framed in terms that invite quantitative analysis, the *Mathews* balance is rarely conducted with empirical evidence.").

99 *See, e.g.*, Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 771 (1990) (arguing that "[t]here are no authoritative, even plausible, constitutional answers" to questions related to the specific contours of due process in the public benefits context).

100 *See, e.g.*, Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125 ("Giving judges this power of revision may be wise or not. The Court may design its procedures well or poorly. But there is no sound argument that this is a legitimate power or function of the Court."). *But see* Redish & Marshall, *supra* note 96, at 457–68. Although this argument, often referred to as the "bitter with the sweet" approach to procedural due process, appeared to gain support in *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974), the Court ultimately rejected it in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985).

101 *See, e.g.*, *infra* notes 105–14 and accompanying text. *But cf.* Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 801–03 (1990) (arguing, with respect to the Supreme Court's decision in *Goldberg v. Kelly*, that "the Court's perspective must be systematic, not anecdotal: It should focus not on the plight of four or five or even twenty families, but consider the welfare system as a whole, which can only be understood as a complex interaction between millions of people and a host of bureaucratic and political institutions").

Some scholars have argued that adjusting procedures based on individual facts is dangerous, as it could give rise to the appearance of arbitrariness or even favoritism.[102] Others have contended that fashioning procedures on a case-by-case basis is unwieldy and inaccurate, creating headaches both for trial courts required to make threshold determinations about the appropriate procedures and for appellate courts asked to review such determinations.[103] Scholars have also suggested that, as a practical matter, busy judges may simply decline to inquire into the details of individual cases and, instead, use the minimal procedural protections available in that context.[104]

With so little critical analysis of the rationale underlying the Court's systemic view of procedural due process and *Mathews*'s "generality of cases" principle, it is not surprising that the academic literature offers scant insight into what the principle actually means and how courts should apply it. To be sure, there is widespread agreement that the approach adopted in *Mathews* and reaffirmed in *Walters* is "systemic" in nature;[105] one commentator has

102 *See, e.g.*, Lee, *supra* note 82, at 984–85 ("[T]he case-by-case approach invites the appearance of favoritism and unfairness that the Due Process Clause itself seeks to avoid.").

103 Much of this criticism of the case-by-case approach has come in the context of arguments concerning the right to appointed counsel under the Due Process Clause. *See, e.g.*, Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 533 (2006); John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 DRAKE L. REV. 763, 767–68 (2013); Kevin W. Shaughnessy, Note, Lassiter v. Department of Social Services*: A New Interest Balancing Test for Indigent Civil Litigants*, 32 CATH. U. L. REV. 261, 282–83 (1982); *see also* John Pollock & Michael S. Greco, *It's Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. PENNUMBRA 40, 41–44 (2012), https://www.law.upenn.edu/journals/lawreview/articles/volume161/issue1/PollockGreco161U.Pa.L.Rev.40(2012).pdf. *But see* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 991 (2012) (arguing in favor of a case-by-case approach to determining whether the Due Process Clause requires government-appointed counsel in certain civil cases).

104 *See, e.g.*, William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L.J. 195, 201–02 (1996); Louis S. Rulli, *On the Road to Civil* Gideon*: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 694–95 (2011); *cf.* Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 186 (2006) ("Determining how, and how often, the trial courts actually perform [the *Lassiter*] due process analysis is a remarkably difficult task . . . .").

105 *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 336–37 & n.160 (1993) (discussing the systemic approach to procedural due process and observing that the *Mathews* test is used "to ensure administrative procedures adequate to achieve a tolerable average level of accuracy in the application of law to fact"); Daniel S. Feder, Note, *From* Parratt *to* Zinermon*: Authorization, Adequacy, and Immunity in a Systemic Analysis of State Procedure*, 11 CARDOZO L. REV. 831, 846 (1990) ("The inquiry is solely whether the *system*, as a whole, provides sufficient guarantess [sic] of accurate determinations for most cases . . . ."); *cf.* Jacob R. Fiddelman, *Protecting the Liberty of Indigent Civil Contemnors in the Absence of a Right to Appointed Counsel*, 46 COLUM. J.L. & SOC. PROBS. 431, 451 (2013) ("If a certain procedural protection is to be

even characterized it as "a facial approach to due process questions."[106] But efforts to define which cases are included within the "generality of cases" have been unsatisfying, with scholars resorting to ambiguous qualifiers such as "run-of-the-mill cases,"[107] "the whole of cases,"[108] or "most cases."[109] Focusing on the other end of the spectrum is no more helpful, as scholars have agreed that the Court's approach to procedural due process does not turn on the facts of "exceptional" cases[110] or demand "extreme individualization."[111] As one leading administrative law casebook puts it, "the determination of what process is due is performed on a 'wholesale' basis for general categories of disputes, rather than on a 'retail' basis taking into account the particular characteristics of each case."[112] Unfortunately, none of these formulations offer much more guidance than the Court's references to the "generality of cases" in *Mathews*[113] and the "large majority" in *Walters*.[114]

C. The Gap in the Systemic Approach to Procedural Due Process

The overarching message of the Supreme Court decisions and legal scholarship discussed above appears clear: the requirements of procedural due process must be based on the needs of the typical or average user of those procedures. In other words, when courts are called upon to determine the precise contours of the Due Process Clause, they must apply the *Mathews*

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required, then, it must provide a sufficient enhancement to judicial accuracy in the aggregate.").

106 Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 256 n.38 (2003)).

107 Barton & Bibas, *supra* note 103, at 984 ("[D]ue process rules should be crafted for run-of-the-mill cases, not exceptional ones." (citing Mathews v. Eldridge, 424 U.S. 319, 344 (1976))).

108 Emily Woodward Deutsch & Robert James Burriesci, *Due Process in the Wake of* Cushman v. Shinseki*: The Inconsistency of Extending a Constitutionally-Protected Property Interest to Applicants for Veterans' Benefits*, 3 VETERANS L. REV. 220, 239 (2011) ("The Supreme Court [in *Walters*] further remarked that the rules and the inherent risks associated with the truth-finding process should be considered as applied to the whole of cases and not the exceptions.").

109 Feder, *supra* note 105, at 846 ("The inquiry is solely whether the *system*, as a whole, provides sufficient guarantess [sic] of accurate determinations for most cases.").

110 *See, e.g.*, Barton & Bibas, *supra* note 103, at 984 ("[D]ue process rules should be crafted for run-of-the-mill cases, not exceptional ones." (citing *Mathews*, 424 U.S. at 344)); Deutsch & Burriesci, *supra* note 108, at 239 ("The Supreme Court [in *Walters*] further remarked that the rules and the inherent risks associated with the truth-finding process should be considered as applied to the whole of cases and not the exceptions.").

111 Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2003 n.161 (2007) ("[T]he Supreme Court's jurisprudence does not demand extreme individualization even when due process requires some kind of individual hearing.").

112 STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 698 (7th ed. 2011).

113 *Mathews*, 424 U.S. at 344.

114 Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985).

test to the facts associated with "the generality of cases, not the rare exceptions."[115]

Missing from the Court's systemic approach to procedural due process is any recognition that a subgroup of cases may present procedural needs that are quite different from "the generality of cases," but are too numerous to be dismissed as "the rare exceptions." To be sure, the Court has not addressed a due process claim on behalf of a subgroup of individuals seeking additional or substitute procedural safeguards. But on the rare occasion when the Court has acknowledged, albeit in dicta, that some groups of cases might be atypical in ways that could affect the *Mathews* balance (and sizeable enough not to be dismissed as "rare exceptions"), the Court has held firm to its systemic view of due process.[116] Requiring government agencies to provide anything other than uniform one-size-fits-all procedures, the Court has explained, would be too administratively burdensome.[117] Thus, for lower courts, government agencies, legislators, and individuals attempting to discern the due process rights of subgroups of individuals with different procedural needs than the majority, the Court's approach has suggested a narrow focus on "the generality of cases" to the exclusion of all others.

II. Between the "Generality of Cases" and the "Rare Exceptions": The Rise of Due Process Subgroups

The Supreme Court's procedural due process decisions of the 1970s and 1980s failed to anticipate two developments with respect to the design of due process procedures: first, that the space between the "generality of cases" and the "rare exceptions" would become populated with subgroups of individuals with procedural needs that differ from those of the typical individual; and, second, that identifying and accommodating many of these subgroups would become significantly less burdensome than ever before. Taken together, these two developments challenge the systemic view of procedural due process that has dominated the doctrine for almost four decades.

This Part traces the rise of due process subgroups and the government's increasing ability to identify and accommodate the individuals who make up these subgroups. Section A provides an overview of the recent surge in due process arguments on behalf of subgroups. These arguments are being raised by scholars, advocates, and policymakers, and they show no sign of receding. Looking across the range of new subgroup arguments, Section B develops a typology of due process subgroups that classifies subgroups according to their key distinguishing characteristics. Finally, Section C examines the administrative environment in which subgroups exist and how that environment has changed since the Supreme Court developed its systemic approach to procedural due process. In particular, Section C explores the growing capacity of government agencies to gather, store, and use data that

115 *Mathews*, 424 U.S. at 344.

116 *See Walters*, 473 U.S. at 330.

117 *See id.* at 326; Ingraham v. Wright, 430 U.S. 651, 680 (1977).

may enable them to identify and accommodate subgroups more easily than when the Supreme Court last considered this aspect of the due process calculus.

A. Due Process Subgroups Take Center Stage

The past decade has seen a sharp increase in the number of due process arguments on behalf of subgroups. Although these arguments follow the *Mathews* framework, they typically elide the Supreme Court's "generality of cases" principle and its preference for one-size-fits-all procedures. In fact, most of the arguments do not contend with the "generality of cases" principle at all, moving directly to a weighing of the *Mathews* factors based only on the facts of the subgroup. Thus, notwithstanding the Court's adoption of a systemic approach to procedural due process, there has been a noticeable turn towards disaggregation and differentiation based on factual variations among individuals in a particular procedural context.

Immigration law has been a particularly fertile area for this new wave of procedural due process arguments.[118] In a wave of recent law review articles and law student notes, commentators have identified various subgroups of noncitizens appearing in immigration removal proceedings that, for reasons specific to each subgroup, they argue are entitled to additional procedural safeguards under the Due Process Clause.[119] These subgroups of noncitizens include asylum seekers,[120] individuals who lack mental competency,[121]

118 The Due Process Clause of the Fifth Amendment applies to immigration proceedings. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (explaining that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to [the] constitutional protection" of the Fifth Amendment's Due Process Clause); *see also* Yamataya v. Fisher, 189 U.S. 86, 100 (1903) (holding that due process applies to deportation procedures for lawfully admitted noncitizens); Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments], and that even aliens shall not . . . be deprived of life, liberty, or property without due process of law.").

119 In addition to making due process arguments on behalf of specific subgroups, immigration scholars have also made categorical due process arguments with respect to all noncitizens in removal proceedings. *See, e.g.*, Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1629–30 (2010) (arguing for a categorical due process right to appointed counsel in immigration proceedings); Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 395 (2000) (same); William Haney, Comment, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 177, 185 (1970) (same).

120 *See* John R. Mills et al., *"Death Is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 363 (2009); Nimrod Pitsker, Comment, *Due Process for All: Applying* Eldridge *to Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169, 171 (2007).

121 *See* Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 377 (2011); *Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1675–78 (2013); Aliza B. Kaplan, *Disabled*

juveniles and unaccompanied minors,[122] lesbian, gay, bisexual, and transgender (LGBT) children and young adults seeking asylum,[123] individuals who are statutorily eligible to seek relief from removal,[124] lawful permanent residents who are detained during their immigration proceedings,[125] and all lawful permanent residents.[126] Each of these subgroups represents a fraction of the total number of noncitizens appearing in immigration removal proceedings.[127] Nonetheless, for each of these subgroups, the *Mathews* balancing test is invoked and applied[128] using facts related only to that population

and Disserved: The Right to Counsel for Mentally Disabled Aliens in Removal Proceedings, 26 GEO. IMMIGR. L.J. 523, 558 (2012); Helen Eisner, Comment, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. PA. J. CONST. L. 511 (2011); Christopher Klepps, Note, *What Kind of "Process" Is This?: Solutions to the Case-by-Case Approach in Deportation Proceedings for Mentally Incompetent Non-Citizens*, 30 QUINNIPIAC L. REV. 545, 547 (2012); *cf.* Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 955 (2014) (suggesting that noncitizens with mental disabilities appearing in removal proceedings have a procedural due process right to a competency determination).

122 *See* Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. FOR L. & SOC. CHANGE 63, 103–05 (2011); Linda Kelly Hill, *The Right to be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011); Benjamin Good, Note, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 128–47 (2014); *cf. Immigrant Rights & Immigration Enforcement*, *supra* note 121, at 1678–79 (arguing, without reference to *Mathews*, for a due process right to appointed counsel for juvenile noncitizens in removal proceedings); Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331 (2013) (arguing for a right to appointed counsel for unaccompanied minors in removal proceedings based on international law, not the U.S. Constitution's due process guarantee).

123 *See* Susan Hazeldean, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. DAVIS L. REV. 373, 417–32 (2011).

124 *See* Christen Chapman, *Relief From Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1554–69 (2011); David A. Robertson, *An Opportunity To Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019 (1988).

125 *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 68 (2012); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113 (2008).

126 *See Immigrant Rights & Immigration Enforcement*, *supra* note 121, at 1674–75; Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013).

127 *See, e.g.*, Hazeldean, *supra* note 123, at 378 n.14 (LGBT youth); Hill, *supra* note 122, at 45 n.8 (unaccompanied minors); *Immigrant Rights & Immigration Enforcement*, *supra* note 121, at 1675–76 (noncitizens with mental disabilities); Johnson, *supra* note 126, at 2413 (lawful permanent residents); Kaufman, *supra* note 125, at 115–16 (detained lawful permanent residents); Mills et al., *supra* note 120, at 379 (asylum seekers). *See generally* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK (2013), *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf.

128 As in other procedural due process contexts, courts use the *Mathews* balancing test to determine what procedures are due in immigration removal proceedings. *See* Landon v. Plasencia, 459 U.S. 21, 34–37 (1982).

of noncitizens.[129] With the facts limited in this manner, the *Mathews* test results in procedural safeguards that are different from those that are currently available to all noncitizens.[130] The "generality of cases" principle and the Court's systemic approach to procedural due process typically go unmentioned or underanalyzed despite the obvious challenge they pose to such a disaggregated due process analysis.[131]

Similar procedural due process arguments are increasingly common in other areas of law as well. In the family law context, for example, commentators have singled out subgroups of children in divorce custody disputes that involve allegations of child abuse and subgroups of children in termination of parental rights proceedings, arguing that these subgroups are entitled to more procedural protections than other children appearing in those proceedings.[132] In the school discipline context, a commentator has argued for

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129 *See, e.g.*, Chapman, *supra* note 124, at 1560–69; Clapman, *supra* note 121, at 389–93; Hazeldean, *supra* note 123, at 417–32; Hill, *supra* note 122, at 59–69; *Immigrant Rights and Immigration Enforcement*, *supra* note 121, at 1675; Johnson, *supra* note 126, at 2403–14; Kaplan, *supra* note 121, at 549–54; Mills et al., *supra* note 120, at 368–81; Robertson, *supra* note 124, at 1034–37; Eisner, *supra* note 121, at 526–29; Good, *supra* note 122, at 128–47; Kaufman, *supra* note 125, at 139–47; Klepps, *supra* note 121, at 568–69; Pitsker, *supra* note 120, at 185–97.

130 In most of the examples discussed above, commenters have argued that the additional procedural safeguard required under *Mathews* is court-appointed counsel. *See, e.g.*, Frankel, *supra* note 122, at 105; Hill, *supra* note 122, at 69; *Immigrant Rights and Immigration Enforcement*, *supra* note 121, at 1675–78; Johnson, *supra* note 126, at 2414; Kaplan, *supra* note 121, at 549–54; Mills et al., *supra* note 120, at 371, 379; Noferi, *supra* note 125, at 120; Robertson, *supra* note 124, at 1040; Eisner, *supra* note 121, at 529; Kaufman, *supra* note 125, at 145–47; Klepps, *supra* note 121, at 584; Pitsker, *supra* note 120, at 183.

However, some commentators have argued that other procedural safeguards are required in addition to appointed counsel. *See, e.g.*, Chapman, *supra* note 124, at 1569–78; Clapman, *supra* note 121, at 397–404; Hazeldean, *supra* note 123, at 432–41.

131 *See, e.g.*, Chapman, *supra* note 124, at 1534; Frankel, *supra* note 122, at 103–05; *Immigrant Rights and Immigration Enforcement*, *supra* note 121, at 1671; Johnson, *supra* note 126, at 2396; Kaplan, *supra* note 121, at 549; Mills et al., *supra* note 120, at 376; Robertson, *supra* note 124, at 1020; Eisner, *supra* note 121, at 513; Kaufman, *supra* note 125, at 139; Klepps, *supra* note 121, at 584. *But see* Hill, *supra* note 122, at 68–69 (discussing the benefits of a "[g]roup [r]ight" to expanded procedural safeguards); Clapman, *supra* note 121, at 392–93; Pitsker, *supra* note 120, at 188.

To be fair, longstanding caselaw suggests that due process claims seeking government-appointed counsel in immigration removal proceedings must be resolved on a case-by-case basis. *See, e.g.*, Aguilera-Enriquez v. INS, 516 F.2d 565, 568 n.3 (6th Cir. 1975) (holding that noncitizens do not have a categorical right to government-appointed counsel in immigration deportation proceedings, but noting that due process may require appointment of counsel "[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge"). *Aguilera-Enriquez* was decided before *Mathews*, however, and it did not address the Court's preference for uniform procedural rules.

132 *See* Sarah Dina Moore Alba, Comment, *Searching for the "Civil* Gideon*": Procedural Due Process and the Juvenile Right to Counsel in Termination Proceedings*, 13 U. PA. J. CONST. L. 1079 (2011) (discussing due process rights of children in termination of parental rights proceedings); David Peterson, Comment, *Judicial Discretion Is Insufficient: Minors' Due Process*

expanded due process rights for students in jurisdictions that rely on the criminal justice system, rather than traditional school disciplinary measures, to maintain order in schools.[133] In the housing law context, a commentator has argued that individuals with mental disabilities who are facing eviction from subsidized housing are entitled to additional procedural safeguards.[134] And in the veterans' benefits context, commentators have argued for expanded due process rights for veterans whose eligibility is based on claims of post-traumatic stress disorder, especially claims related to military sexual trauma.[135] As with the arguments on behalf of subgroups of noncitizens appearing in immigration removal proceedings, the arguments in these wide-ranging contexts dutifully apply the *Mathews* test but typically do not engage with the "generality of cases" principle or the Court's systemic view of procedural due process.[136]

Although the Supreme Court has not yet ruled on the type of disaggregated due process arguments referenced above, such claims are working their way through the lower courts. Claims brought in the immigration context are, not surprisingly, leading the way. Noncitizens with mental disabilities and unaccompanied noncitizen minors have brought class actions seeking procedural safeguards in addition to those that are available to all noncitizens appearing in removal proceedings.[137] So too have classes of vet-

Right to Participate with Counsel When Divorce Custody Disputes Involve Allegations of Child Abuse, 25 GOLDEN GATE U. L. REV. 513 (1995) (discussing due process rights of children in child custody disputes involving child abuse allegations).

133 *See* Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 864–65 (2012). *See generally* Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 960–65 (2009) (discussing the increasingly punitive nature of school discipline policies).

134 *See* Meghan P. Carter, *How Evictions from Subsidized Housing Routinely Violate the Rights of Persons with Mental Illness*, 5 NW. J.L. & SOC. POL'Y 118, 136–40 (2010).

135 *See* Brianne Ogilvie & Emily Tamlyn, *Coming Full Circle: How VBA Can Complement Recent Changes in DoD and VHA Policy Regarding Military Sexual Trauma*, 4 VETERANS L. REV. 1 (2012); Ben Kappelman, Note, *When Rape Isn't Like Combat: The Disparity Between Benefits for Post-Traumatic Stress Disorder for Combat Veterans and Benefits for Victims of Military Sexual Assault*, 44 SUFFOLK U. L. REV. 545, 549–50 (2011); Contessa M. Wilson, Note, *Saving Money, Not Lives: Why the VA's Claims Adjudication System Denies Due Process to Veterans with Post-Traumatic Stress Disorder and How the VA Can Avoid Judicial Intervention*, 7 IND. HEALTH L. REV. 157, 178–83 (2010). *See generally* Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501 (2011) (discussing due process and the veterans' benefits system).

136 *See* Peterson, *supra* note 132, at 532–37; Carter, *supra* note 134, at 136–41; Alba, *supra* note 132, at 1105–12; Wilson, *supra* note 135, at 180–81 (briefly mentioning the "generality of cases" principle). *But see* Kim, *supra* note 134, at 896–97 (arguing that a "reliance on generalities," although "explicitly permissible" under *Mathews*, is nonetheless inappropriate in the school discipline context).

137 *See* Franco-Gonzalez v. Holder, No. CV 10-02211 DMG, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013) (involving a due process claim brought by class of unrepresented noncitizens with severe mental disabilities appearing in removal proceedings); Gonzalez Machado v. Ashcroft, No. CS-02-0066-FVS (E.D. Wash. June 18, 2002) (involving a due process claim brought by class of unaccompanied minors appearing in immigration

erans presenting post-traumatic stress disorder symptoms,[138] public housing tenants with mental disabilities challenging evictions,[139] and individuals with limited English proficiency challenging public benefits determinations.[140] In all of these cases, the plaintiffs do not ask the court to order new procedural safeguards for everyone; rather, they demand that the existing procedures be altered only for subgroup members in order to accommodate their atypical needs.

These types of due process claims have seen mixed outcomes thus far. Although one court has found a due process violation,[141] others have dismissed the due process claim on the merits,[142] refused to consider the due process claim due to a lack of jurisdiction,[143] or granted relief on alternative grounds without considering the due process claim.[144] In the few decisions that have reached the due process issue and applied the *Mathews* test to a subgroup claim, the "generality of cases" principle has not received any critical analysis.[145]

At the same time that subgroup arguments have begun appearing in the due process literature and in litigation, some government actors have inde-

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removal proceedings); Complaint, J.E.F.M. v. Holder, No. 2:14-cv-01026 (W.D. Wash. July 9, 2014) (involving a due process claim brought by class of unrepresented noncitizen minors appearing in removal proceedings).

138 *See, e.g.*, Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc) (involving a due process claim brought by veterans presenting post-traumatic stress disorder symptoms); *cf.* Edwards v. Shinseki, 582 F.3d 1351 (Fed. Cir. 2009) (involving a due process claim seeking additional procedural protections for individual suffering from a psychiatric disorder).

139 *See, e.g.*, Blatch v. Hernandez, 360 F. Supp. 2d 595, 640 (S.D.N.Y. 2005) (involving a due process claim brought by a class of public housing tenants with mental disabilities).

140 *See, e.g.*, Complaint, Ramirez v. Giuliani, No. 99 Civ. 9287 (S.D.N.Y. Aug. 27, 1999) (involving a due process claim brought by class of food stamp applicants and recipients with limited English proficiency).

141 *See, e.g.*, *Blatch*, 360 F. Supp. 2d at 640 (holding that local public housing authority's "practices and procedures for conducting administrative tenancy termination hearings fail to protect mentally disabled tenants against deprivations of their tenancy rights without due process of law"); *cf. Edwards*, 582 F.3d at 1355 (declining to reach the due process claim of a veteran with a psychiatric disorder but observing that "[i]n some circumstances, a mentally disabled applicant, known to be so disabled by VA, may receive additional protections while pursuing an application for benefits").

142 *See, e.g.*, *Gonzalez Machado*, No. CS-02-0066-FVS, slip op. at 12–22 (granting defendants' motion to dismiss a due process claim brought by unaccompanied minors appearing in immigration removal proceedings).

143 *See, e.g.*, *Veterans for Common Sense*, 678 F.3d at 1026–28 (dismissing, on jurisdictional grounds unrelated to the merits, a due process claim seeking an expedited procedure for veterans presenting post-traumatic stress disorder symptoms to receive access to mental health care).

144 *See Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 3674492, at *3–10 (C.D. Cal. Apr. 23, 2013) (granting relief on a separate claim but declining to reach the due process claim).

145 *See, e.g.*, *Gonzalez Machado*, No. CS-02-0066-FVS, slip op. at 12–22; *Blatch*, 360 F. Supp. 2d at 640.

pendently modified existing procedures to accommodate the needs of particular subgroups. Congress,[146] as well as some state and local legislatures,[147] has proposed or passed legislation mandating procedural accommodations for some of the subgroups mentioned above. A handful of government agencies have also promulgated regulations[148] and altered internal policies[149]

146 *See, e.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232(c)(5) (2012) (requiring the Secretary of Health and Human Services to "ensure, to the greatest extent practicable" that "all unaccompanied alien children . . . have counsel to represent them in legal proceedings or matters"). In addition, the immigration reform bill recently passed by the Senate and currently under consideration in the House of Representatives would amend the Immigration and Nationality Act to include special procedural safeguards (i.e., the right to appointed counsel) for subgroups consisting of "unaccompanied alien children" and "aliens with a serious mental disability" appearing in removal proceedings. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3502(c) (as passed by Senate, June 27, 2013). Similarly, a bill mandating appointed counsel in removal proceedings for "unaccompanied alien child[ren]" and aliens who are rendered incompetent due to a "serious mental disability" was recently introduced in the House of Representatives. *See* Vulnerable Immigrant Voice Act, H.R. 4936, 113th Cong. § 2(a) (introduced June 23, 2014).

147 *See, e.g.*, Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE § 68651(a), (b)(7) (West 2011) (providing funds for appointed counsel in civil cases "involving critical issues affecting basic human needs," and prioritizing cases based on inter alia, "[c]ase complexity," "[l]anguage issues," "[d]isability access issues," and "[t]he nature and severity of potential consequences for the potential client if representation is not provided"); Press Release, The Council of the City of New York, City Council Adopts Fiscal Year 2015 Budget (June 25, 2014), http://council.nyc.gov/html/pr/062514budget.shtml (announcing the significant expansion of a city-funded program that provides legal representation to detained noncitizens in removal proceedings).

148 For example, in 2010, the Department of Veterans Affairs amended its regulations in order to relax the veterans' benefits evidentiary requirements for the subgroup consisting of veterans with post-traumatic stress disorder based on fear of hostile military or terrorist activity. *See* 38 C.F.R. § 3.304(f) (2013). *But cf.* Petition for Review, Serv. Women's Action Network v. Gibson, No. 14-7115 (Fed. Cir. Aug. 7, 2014) (seeking to compel the Department of Veterans Affairs to promulgate regulations establishing evidentiary accommodations for individuals seeking benefits based on post-traumatic stress disorder claims related to military sexual trauma). Other federal agencies have also modified their regulations to ensure that the needs of subgroups are accommodated. *See, e.g.*, 7 C.F.R. § 273.15(i) (2012) (mandating interpreters for food stamp hearings).

149 *See, e.g.*, Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 257 (2010) (discussing efforts by the U.S. Department of Health and Human Services' Office of Refugee Resettlement to increase legal representation for unaccompanied minors in immigration removal proceedings); Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to all ICE Employees (Apr. 22, 2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf (establishing special procedural safeguards for the subgroup consisting of mentally incompetent noncitizens in immigration removal proceedings); *cf.* Miguel A. Gradilla, *Making Rights Real: Effectuating the Due Process Rights of Particularly Vulnerable Immigrants in Removal Proceedings Through Administrative Mechanisms*, 4 COLUM. J. RACE & L. 225 (2014) (arguing for promulgation of new regulations that would safeguard the due process rights of "vulnerable immigrants" appearing in removal pro-

that make similar adjustments to existing procedural regimes, and court systems have taken similar actions as well.[150]

B. Defining and Classifying Due Process Subgroups

In an effort to better understand what makes a subgroup a subgroup, this Section offers a working definition and a typology of what this Article has been referring to as due process subgroups. Given the growing number of subgroup arguments and the wide range of legal contexts in which they are appearing, this effort is intended to distill the attributes that unite subgroups across legal contexts, distinguish subgroups from "the generality of cases" in a particular legal context, and explain what aspects of subgroups make them potentially entitled to additional or substitute procedures under the Due Process Clause.

Due process subgroups can be defined rather simply: they are identifiable cohorts of individuals who, because of some distinguishing characteristic, may be entitled to additional or alternative procedural safeguards under the traditional *Mathews* due process analysis. The actual number of individuals who make up a subgroup will vary, but the size of the subgroup must be smaller than the "large majority"[151] or the "generality of cases"[152] yet larger than the "rare exceptions"[153] in the relevant context. Subgroup members must be linked together by a shared characteristic that creates procedural needs that differ from the needs of the "generality of cases." It is that distinguishing characteristic that creates the possibility that, under a *Mathews* analysis, the Due Process Clause will require procedural safeguards that differ from those available to all individuals in the context.

At first glance, it may seem that subgroups merely represent ad hoc pleas for special treatment for particularly favored or vulnerable subsets of the population. Yet through a careful review of the recent wave of subgroup arguments, it is possible to sort subgroups according to the nature of the distinguishing characteristic that links the members of each subgroup. This sorting gives rise to three distinct categories: (1) subgroups composed of individuals who, due to their personal capacities and circumstances, are less

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ceedings, defined as mentally incompetent noncitizens, unaccompanied noncitizen minors, and detainees who raise asylum as a defense against removal).

150 For example, in 2007, the Supreme Court of Washington promulgated a new rule that provides for accommodations, including court-appointed counsel, for unrepresented parties with disabilities. *See* WASH. REV. CODE ANN. G.R. 33(a)(i)(c) (West 2014). Similarly, the immigration court system has attempted to accommodate minors in removal proceedings. *See, e.g.*, Fact Sheet, U.S. Dep't of Justice, Unaccompanied Alien Children in Immigration Proceedings (Apr. 22, 2008), http://www.justice.gov/eoir/press/08/UnaccompaniedAlienChildrenApr08.pdf (noting that "EOIR has established 'juvenile dockets' throughout the country to facilitate consistency, encourage child-friendly courtroom practices, and promote pro bono representation for unaccompanied alien children").

151 Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985).

152 Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

153 *Id.*

able to use the available procedures; (2) subgroups composed of individuals who possess a stronger stake or interest in the proceedings; and (3) subgroups composed of individuals who are challenging a determination that is unusually complex or complicated. For each of these categories, the distinguishing characteristic creates procedural needs that are, by definition, not shared by the typical or average individual. Furthermore, because these distinguishing characteristics affect one or more of the *Mathews* factors, subgroups defined according to such characteristics raise questions about whether one-size-fits-all procedural safeguards satisfy the due process rights of subgroup members.

1. The Capacities and Circumstances of Subgroup Members

The first type of subgroup is composed of individuals who, due to their shared capacities and circumstances, are less able to use the available procedures than the rest of the individuals in a particular context. It is therefore reminiscent of the Supreme Court's pronouncement in *Goldberg v. Kelly*, later repeated in *Mathews v. Eldridge*, that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[154] Describing a category of subgroups in this manner is not to say that all members of such subgroups are by definition helpless or powerless;[155] rather, the key is that their capacities and circumstances place them at a disadvantage in comparison to the typical individual for whom the existing procedural safeguards were designed.

The recent wave of subgroup arguments has identified numerous subgroups that are defined according to the shared capacities and circumstances of their members. Due process arguments made on behalf of individuals who suffer from mental disabilities or who lack mental competency are a prime example. These arguments, whether made in the context of immigration removal proceedings,[156] eviction proceedings,[157] or public benefit terminations,[158] all turn on the fact that these subgroup members, due to their shared capacities and circumstances, are unable or less able to use the availa-

154 Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970); *see Mathews*, 424 U.S. at 349 ("All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard.'" (quoting *Goldberg*, 397 U.S. at 268–69)).

155 *See* Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 884 (1990) (critiquing *Goldberg*'s concept of tailoring and suggesting that "it was the plaintiffs [in *Goldberg*] who made known their own capacities and announced the terms on which they would be heard," as "[i]t was the plaintiffs, and not the Court, who tailored the real 'hearing' that *Goldberg v. Kelly* secured").

156 *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492, at *1 (C.D. Cal. Apr. 23, 2013); Clapman, *supra* note 121, at 373; *Immigrant Rights & Immigration Enforcement*, *supra* note 121, at 1674–79; Kaplan, *supra* note 121, at 523; Eisner, *supra* note 121, at 512; Klepps, *supra* note 121, at 547.

157 *See, e.g.*, Blatch v. Hernandez, 360 F. Supp. 2d 595, 640 (S.D.N.Y. 2005); Carter, *supra* note 134, at 136–40.

158 *See, e.g.*, Lovely H. v. Eggleston, 235 F.R.D. 248, 250–54 (S.D.N.Y. 2006).

ble procedural safeguards. Arguments with respect to subgroups composed of minor children appearing in procedural settings designed for adults follow a similar pattern,[159] as do arguments on behalf of individuals with limited English proficiency.[160]

Not all capacities and circumstances cut across different procedural regimes in the way that mental disabilities and lack of maturity do. Indeed, a subgroup may be defined by capacities and circumstances that are particular to a specific context. For example, in the context of welfare terminations, a subgroup could be composed of individuals who are subject to work requirements and, due to their employment, are unable to appear at a daytime hearing without jeopardizing their jobs.[161] Or, returning to the immigration context, a subgroup could consist of noncitizens who are held in immigration detention during the pendency of their removal proceedings, separated from the lawyers and evidence they need to defend against deportation.[162] Like the subgroups based on the trans-substantive capacities and circumstances identified above, members of context-specific subgroups share a characteristic that puts them on unequal footing when they attempt to use the available procedural safeguards.

Whether subgroups of this type are entitled to anything other than the existing one-size-fits-all procedures will turn on the second and third *Mathews* factors. Subgroup members will need to be able to prove that their shared capacities and circumstances place them at greater "risk of an erroneous deprivation" and that "additional or substitute procedural safeguards" would

159 *See* Mot. for Prelim. Inj. at 10–14, J.E.F.M. v. Holder, No. 2:14-cv-01026 (W.D. Wash. July 31, 2014); Frankel, *supra* note 122, at 103–05; Hazeldean, *supra* note 123, at 425–29; Hill, *supra* note 122, at 59–69; *Immigrant Rights & Immigration Enforcement*, *supra* note 121, at 1678–79; Good, *supra* note 122, at 128–47. *See generally* Roper v. Simmons, 543 U.S. 551 (2005) (recognizing the relevance of developmental psychology and neurobiology to the constitutional rights of youth).

160 *See* Laura K. Abel, *Language Access in the Federal Courts*, 61 DRAKE L. REV. 593, 603 (2013) ("A trial conducted in only English that concerns a person who cannot understand or communicate in English is the epitome of a case lacking due process."); Mary K. Gillespie & Cynthia G. Schneider, *Are Non-English-Speaking Claimants Served by Unemployment Compensation Programs? The Need for Bilingual Services*, 29 U. MICH. J.L. REFORM 333, 375–78 (1996) (discussing the rights of persons with limited English proficiency at unemployment insurance hearings); *see also* AM. BAR ASS'N, STANDARDS FOR LANGUAGE ACCESS IN COURTS 29 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf (urging courts to "ensure that persons with limited English proficiency have meaningful access to all the services . . . provided by the court").

161 *See* Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1349–52 (2012) (discussing the predicament facing employed welfare recipients who seek to challenge a termination or reduction of benefits at a fair hearing). *See generally* David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051, 1088 (2005) ("Working claimants may lose more in wages (and their employer's good will) by attending [a fair hearing] than they would win from a successful result.").

162 *See* Noferi, *supra* note 125, at 76–80; Kaufman, *supra* note 125, at 127–29.

reduce that risk.[163] They must also then demonstrate that the cost of providing such safeguards does not outweigh the other *Mathews* factors.[164] Only then will this type of due process subgroup overcome the Supreme Court's preference for uniform procedural rules.

2. The Private Interest at Stake

A second type of subgroup is composed of individuals who possess a stronger stake or interest in the proceedings than the typical individual. The private interest affected by a government action surely varies from person to person; after all, it would be difficult to imagine a constitutionally protected interest being of identical value to any two people. However, beyond such anticipated minor variations, there may be subgroups of individuals who share an interest in the proceedings that is demonstrably stronger than the interest at issue in the "generality of cases."

Subgroups based on a heightened private interest can be found in a variety of contexts. In contested divorce proceedings, children may possess a greater private interest when there are allegations of child abuse than when there are no such allegations.[165] In school discipline proceedings, the private interest may be greater for students who will be subject to unusually severe corporal punishment[166] or criminal prosecution[167] for their alleged misbehavior. In immigration proceedings, lawful permanent residents and refugees may possess a stronger interest in remaining in the United States than noncitizens who lack similar ties,[168] or who do not fear death or persecution if forced to return to their home countries.[169]

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

164 *See id.* (identifying the third *Mathews* factor as "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

165 *See* Peterson, *supra* note 132, at 515.

166 *See* Ingraham v. Wright, 430 U.S. 651, 680 (1977) (considering the due process rights of students who were subjected to severe paddlings by school officials).

167 *See* Kim, *supra* note 133, at 862–63 (discussing the situation of students enrolled in schools that have adopted school discipline policies that are more criminal than educational in nature).

168 *See Immigrant Rights & Immigration Enforcement*, *supra* note 121, at 1675 ("[T]here is arguably a greater private interest at stake for [lawful permanent residents] given their already strong ties to the United States."); Johnson, *supra* note 126, at 2404–06 ("The interests at stake are especially high for the average lawful permanent resident in removal proceedings, as compared to the ordinary noncitizen who entered without inspection or overstayed a visa."). The Supreme Court has recognized the heightened stakes when lawful permanent residents face removal from the United States. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").

169 *See* Mills et al., *supra* note 120, at 363; Pitsker, *supra* note 120, at 185. The Supreme Court has recognized the heightened stakes when noncitizens claim refugee status. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.").

To obtain different procedural protections under the Due Process Clause, members of this type of subgroup must focus on the first factor of the *Mathews* test: "the private interest that will be affected by the official action."[170] Thus, these subgroup members will need to be able to establish that their private interest in the proceedings is, in fact, stronger than the private interest at stake in the "generality of cases." In addition, as with all subgroup types, to tip the *Mathews* balance in their favor, members of these subgroups will need to demonstrate that the cost of the additional procedural safeguards they seek does not outweigh the other two *Mathews* factors.[171]

3. The Complexity of the Determination

A third type of subgroup is composed of individuals who are challenging a determination that is unusually complex or complicated. This subgroup type is likely to appear in decisionmaking contexts in which the issues and determinations are straightforward in most, but not all, cases. A common distinction along these lines involves differences between determinations that hinge on issues of fact or law. Many factual issues—the who, what, when, and where of a past event—can seem relatively simple when compared to legal issues that involve complicated statutory or regulatory regimes. It is also possible that among the factual issues that arise in a particular context, some will be more complex than others, for example, issues that involve medical reports or expert testimony.

Like the other two subgroup categories, subgroups based on the complexity of the determination arise in many different contexts. For example, efforts have been made to carve out subgroups of veterans' benefits cases involving post-traumatic stress disorder claims generally,[172] as well as a subset of claims related to military sexual trauma,[173] as those types of claims are significantly harder to prove, as a factual matter, than run-of-the-mill claims for veterans' benefits. Subgroups of complex cases have also been identified in the context of immigration removal proceedings. There, noncitizens facing removal based on prior criminal charges often must contend with "extraordinarily complicated legal issues,"[174] in contrast with the "large majority" of noncriminal immigration proceedings that "involve much simpler deportability determinations: whether someone entered the country ille-

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

171 *See id.*

172 *See, e.g.*, Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc) (due process claim brought by class of veterans with post-traumatic stress disorder who were eligible for or receiving medical services).

173 *See, e.g.*, Petition for Review at 2–3, Serv. Women's Action Network v. Gibson, No. 14-7115 (Fed. Cir. Aug. 7, 2014) (discussing reasons why military sexual trauma survivors face "higher hurdles to obtaining VA benefits" than other veterans); Ogilvie & Tamlyn, *supra* note 135, at 35–39; Kappelman, *supra* note 135, at 546–47.

174 Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1359 (2011) (discussing the need to determine the complicated ways in which "federal immigration law maps onto the criminal code of a given state").

gally or whether they have stayed beyond the period authorized upon admission."[175] And among noncitizens whose proceedings do not involve criminal charges, subgroups of individuals who are statutorily eligible to seek relief from removal also face atypically difficult challenges that distinguish their cases from the "generality of cases."[176]

As with due process claims brought by subgroups defined according to their members' shared capacities and circumstances, claims brought by subgroups facing unusually complex cases will turn on the second and third *Mathews* factors. Subgroup members will need to be able to prove that the complexity of their cases increases "the risk of an erroneous deprivation" and that "additional or substitute procedural safeguards" would reduce that risk.[177] They must also then establish that the cost of such safeguards does not outweigh the other *Mathews* factors.[178]

C. Identifying and Accommodating Due Process Subgroups

Any argument that subgroups should be accommodated under the Due Process Clause must contend with the systemic view of due process developed by the Supreme Court in *Mathews* and subsequent decisions.[179] In rejecting a more tailored approach to procedural due process, the Court expressed concerns about the government's ability to identify and accommodate individuals in need of additional or alternative procedural safeguards. Ruling almost thirty years ago, the Court assumed that imposing such obligations would be impracticable, unduly burdensome, and exceedingly costly.[180] These concerns were consistent with the Court's cost-benefit approach to procedural due process, which identifies the burden on the government as one of the three factors that courts must consider when determining the requirements of procedural due process.[181]

At the risk of stating the obvious, things have changed since the 1970s and 1980s in ways that directly affect the government's ability to identify and

175 *Id.*

176 For example, individuals who are statutorily eligible to seek relief from removal may contend with demands for extensive documentation, expert testimony in support of their claims, and legal arguments based on a notoriously complex statutory and regulatory regime. *See* Robertson, *supra* note 124. *See generally* Padilla v. Kentucky, 559 U.S. 356, 369 (2010) ("Immigration law can be complex, and it is a legal specialty of its own."); Baltazar-Alcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004) ("[I]mmigration laws have been termed second only to the Internal Revenue Code in complexity.").

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

178 *See id.* (identifying the third *Mathews* factor as "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

179 *See supra* Section I.A.

180 *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 326, 349 (1985); Ingraham v. Wright, 430 U.S. 651, 680, 682 n.55 (1977).

181 *See Mathews*, 424 U.S. at 334–35 (identifying "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" as one of the three factors courts must consider).

accommodate subgroup members. Government agencies have increasingly moved beyond labor-intensive, paper-based processes for obtaining and storing information about their constituents,[182] and the emergence of new technologies has revolutionized the ways in which agencies manage and process information.[183] Despite growing and legitimate concerns about privacy, accuracy, confidentiality, and security,[184] this transformation is showing no signs of slowing down.

Government agencies have always collected personal information about their constituents. In the course of administering many of the property interests that trigger due process protection, agencies gather a wide range of information about the individuals who possess those interests. Indeed, means-tested public benefit programs such as welfare, food stamps, and Medicaid are notorious for demanding that claimants turn over large amounts of personal information.[185] But, more generally, just about any

182 *See, e.g.*, STAN DORN & ELIZABETH LOWER-BASCH, MOVING TO 21ST-CENTURY PUBLIC BENEFITS: EMERGING OPTIONS, GREAT PROMISE, AND KEY CHALLENGES 2 (2012), http://www.clasp.org/admin/site/publications/files/Moving-to-21st-Century-Public-Benefits.pdf (observing that "eligibility determination for assistance in the past was largely paper-driven"); *id.* at 3 (referring to "the traditional model of extended one-on-one interaction between caseworker and client").

183 *See id.* at 4 ("The world has changed, and a new model of public benefit administration is emerging."); *see also* CARI DESANTIS & SARAH FASS HIATT, DATA SHARING IN PUBLIC BENEFIT PROGRAMS: AN ACTION AGENDA FOR REMOVING BARRIERS 4 (2012), http://www.clasp.org/admin/site/publications/files/Data-Sharing-in-Public-Benefit-Programs.pdf (explaining that "[i]n recent years, there have been dramatic changes across the landscape of public benefit programs with the emergence of significant technological capability in information systems").

184 *See* DESANTIS & HIATT, *supra* note 183, at 10 (discussing "[q]uestions regarding data privacy, confidentiality, and security"); DORN & LOWER-BASCH, *supra* note 182, at 15–16 (discussing "serious problems" created by use of inaccurate or incomplete data to determine eligibility, and the need for "careful attention to privacy and data security"); *cf.* Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249 (2008) (discussing the dangers created by government agencies' increasing use of automated decisionmaking systems).

185 To establish eligibility for welfare benefits, for example, applicants must provide extensive information and documentation:

> A typical applicant for welfare, called Temporary Assistance for Needy Families (TANF), must undergo a multistage, multiday application process consisting of screening interviews, application interviews, group orientations, and employability assessments. She must answer questions ranging from her resources and sustenance needs to her psychological well-being. Her own word is not enough; she must also provide independent verification of her answers to many of these questions, either through her own documentation or through information gathered from third parties, and in some cases, caseworkers conduct investigations themselves. As part of TANF, an applicant must also comply with child support enforcement efforts by providing detailed paternity information about her children.

Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1397–98 (2012) (footnotes omitted). Thus, "the poor are often subject to humiliating and stigmatizing data collection practices." *Id.* at 1427.

interaction with a government agency requires individuals to disclose personal information to the government.

Although the government's collection of personal data is not a new development, its ability to store and access that data is unprecedented. In the past, personal information was recorded and kept in paper records and files, which could then be available for inspection at only one place at a time. But today, with the shift from paper files to electronic files, and from file cabinets and storage sites to virtual data warehouses, the government is able to retain and retrieve a seemingly unlimited amount of information.[186] Thus, in ways that were never possible before, government agencies can now easily view, sort, group, and analyze personal information across entire populations of individuals.

The government's growing capacity to collect and store personal information is only half the story, however. What makes these developments even more powerful are the new ways in which agencies can share this information with one another. Within just the past decade, governmental entities across the country have adopted computer systems that enable them to share the vast amounts of information and records accumulating in their databases.[187] Agencies cross-referencing information with one another is not an entirely new phenomenon,[188] but recent years have seen a sharp increase in the amount of information that is available to be shared and the capacity of agencies to share that information.[189] As a result, the information gathered through applications and eligibility determinations for government benefits and services remains available to the agencies that collected the information as well as other agencies that are connected to that data.[190] While this type

186 *See, e.g.*, Patricia L. Bellia, *The Memory Gap in Surveillance Law*, 75 U. CHI. L. REV. 137, 142 (2008) ("Developments in data storage technology now make indefinite data retention feasible for businesses and individuals alike."); Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFF. L. REV. 461, 481 (2013) ("The amount of information that a modern database can hold and the ease with which that information can be transferred, manipulated, and combined is unprecedented . . . .").

187 *See* Bernstein, *supra* note 186, at 481 ("Networked information storage has made it easier for information in one database to be shared with new users, put to new uses, and combined with information from other sources."); *see also* AM. PUB. HUM. SERVS. ASS'N, BRIDGING THE DIVIDE: LEVERAGING NEW OPPORTUNITIES TO INTEGRATE HEALTH AND HUMAN SERVICES 5 (2011) ("Unlike even a decade ago, today's technology can enable seamless interoperability of data exchange, program coordination, case management and business work flow process, even while maintaining security and privacy requirements.").

188 *See* Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 672 (2005) (discussing, in the context of Medicaid eligibility determinations, "workers using computer-matching [to] check information reported in public and private databases").

189 *See* DORN & LOWER-BASCH, *supra* note 182, at 5 ("Public agencies and their contractors are gaining access . . . to ever-increasing amounts of information about household income and other characteristics potentially relevant to eligibility.").

190 *See id.* at 13 ("When electronic case records or data warehouses store eligibility-related information, multiple programs can access that information.").

of information sharing is most common between agencies at the local[191] and state level,[192] state and federal agencies have also developed information-sharing arrangements,[193] as have some state agencies and court systems.[194]

Putting it all together, the task of identifying and accommodating members of particular subgroups looks much different today than it did when the Supreme Court developed its systemic approach to procedural due process. Government agencies now possess unprecedented capacity to collect, store, analyze, retrieve, and share an ever-expanding universe of data concerning the individuals they serve. While these developments have resulted in harm-

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191 For example, New York City is developing a database that "links together vast amounts of information gathered by city agencies that previously maintained their files separately," such as the city's child welfare agency, its homeless services agency, its public housing authority, its agency that administers safety-net benefits, and its agency that administers rent subsidies for senior citizens. *See* Anemona Hartocollis, *Promise and Concern for a Vast Social Services Database on the City's Neediest*, N.Y. TIMES, June 17, 2011, at A31. "[T]housands of workers in nine city agencies will have access to the information, including employees from Family Court, legal services, child protection, the Department for the Aging, corrections, public hospitals and domestic violence prevention." *Id.* As of 2011, similar projects were being developed in Montgomery County, Maryland, and Alameda County, California. *Id.*

192 For example, Utah has implemented a system, called Electronic Resource and Eligibility Product (e-REP), that is designed to enable state agencies "to share data and applications throughout programs and services that include unemployment insurance, worker's compensation, employment services, Temporary Assistance for Needy Families (TANF), food stamps, child care, child welfare and child support enforcement, Medicaid and mental health." *See* Dibya Sarkar, *Utah Takes an Integrated Approach to Human Services*, FCW: THE BUS. OF FED. TECH. (Apr. 17, 2006), http://fcw.com/articles/2006/04/17/utah-takes-an-integrated-approach-to-human-services.aspx; *see also* DESANTIS & HIATT, *supra* note 183, at 7 (describing Louisiana's use of data sharing).

193 *See, e.g.*, Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 361 (2005) (describing, in the context of child support enforcement, a nationwide "system of tracking and collecting information on fathers who owe child support that 'creates a detailed profile of who you are, what you do and what you are likely to do.'" (footnote omitted) (quoting Samuel V. Schoonmaker, IV, *Consequences and Validity of Family Law Provisions in the "Welfare Reform Act,"* 14 J. AM. ACAD. MATRIM. L. 1, 51 (1997))); Robert Pear, *Vast Worker Database to Track Deadbeat Parents*, N.Y. TIMES, Sept. 22, 1997, at A1 (describing the national directory of new hires). Some of the information-sharing between the federal government and state governments is mandated by federal statute. *See, e.g.*, 42 U.S.C. § 653a (2012) (mandating a new hire directory); 42 U.S.C. § 654a (mandating a central registry for child support cases); 42 U.S.C. § 666(a)(5)(M) (mandating a national paternity database); *see also* Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 262 (2000) (discussing the "interconnected, computerized databases on the state and national level" required by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

194 *See, e.g.*, Jonathan Walters, *Social Services' Challenge of Sharing Data,* GOVERNING: THE STATES AND LOCALITIES (Dec. 11, 2012), http://www.governing.com/topics/health-human-services/col-challenge-sharing-data-human-services.html (describing an arrangement between the Michigan Department of Human Services and the state court system through which the state shares data "in a host of areas like adoption status, reunification and length of stay in state custody").

ful outcomes for many individuals, particularly low-income people of color,[195] they do offer new possibilities for tailoring procedural regimes to meet the needs of subgroups.

In light of these changes, the idea that identifying and accommodating subgroup members is necessarily impracticable or unduly burdensome, as the Supreme Court has suggested, appears to be increasingly outdated. In the 1970s and 1980s, the task of identifying subgroup members would have likely required government employees to gather paper case files from wherever they were stored, read each file page by page looking for relevant information, document the results of that search, and bring the results to other government officials involved in the proceeding that was about to take place.[196] Today, using the vast, networked computer databases discussed above, it is possible that each of those steps could be accomplished with the push of a few buttons.[197] And even if an agency does not already possess information with respect to a subgroup's distinguishing characteristics, the burden of collecting that information is much smaller than it would have been in the past. To be sure, advances in technology cannot help to identify all subgroups, and not all government agencies are taking full advantage of the technological advances that are available to them. But the larger point remains: the administrative burden associated with identifying and accommodating subgroups is shrinking and will continue to shrink in many different contexts. Accordingly, for some subgroups, the third *Mathews* factor—the fiscal and administrative burden of additional or substitute procedural safeguards[198]—is now significantly smaller than it would have been when the Court last considered this aspect of procedural due process.

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195 *See* Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE J.L. & FEMINISM (forthcoming 2014) (manuscript at 23), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383908 (discussing "regulatory intersectionality" and how information gathered by social welfare systems can be accessed and used by more punitive systems); *see also* KAARYN GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 57 (2011) (arguing that "the collection of biometric data scrutinizes and stigmatizes low-income adults in a way that equates poverty with criminality"); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 131 (2011) (observing that social safety net programs require that "poor women's private lives [be] made available for state surveillance and . . . punitive state responses"). *See generally* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1374 (2000) (describing the "intense concern about the personal and social implications of such databases—now, in digital form, capable of being rapidly searched, instantly distributed, and seamlessly combined with other data sources to generate ever more comprehensive records of individual attributes and activities").

196 *Cf.* Hartocollis, *supra* note 191, at A31 (explaining, in the context of searching for information about missing children, that "[n]ot long ago, the agency would have had to find the children the old-fashioned way, by combing through paper records, sending letters to other agencies and issuing an Amber alert").

197 *See supra* notes 186–94 and accompanying text.

198 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

III. Due Process Disaggregation

Despite the recent rise of due process subgroups, they remain largely absent from due process doctrine. The Supreme Court has not yet ruled on a claim that the Due Process Clause requires additional or alternative procedural safeguards for members of a subgroup. Nor have lower courts or legal scholars thoroughly analyzed this aspect of procedural due process. Put simply, there is no consensus on the due process rights of subgroups of individuals that can be characterized as neither "the generality of cases" nor "the rare exceptions."

The resulting uncertainty about the due process rights of subgroups is having real consequences. Lower courts ruling on due process claims brought by subgroups lack a clear and consistent way to evaluate those claims. Government agencies seeking to establish and maintain procedural regimes that comport with due process requirements are unable to do so when the status of subgroup due process rights is so unsettled. And, to the extent that subgroup claims are perceived to be unsound under Supreme Court caselaw, subgroup members may believe that the only way to vindicate their rights is to go it alone, bringing claims on behalf of just themselves rather than the rest of the members of their subgroup. Such individual challenges are costly, both for the subgroup members who bring them as well as the government agencies that defend against them and the courts that adjudicate them.

This Part examines the due process rights of subgroup members. Based on a review of the Supreme Court's precedents concerning the meaning and scope of the Due Process Clause, this Part argues that interpreting due process to require the accommodation of subgroups in certain situations fits within well-established due process doctrine. It then considers three potential objections to such a disaggregated approach to procedural due process: that accommodating the needs of subgroups will create a sense of unfairness and arbitrariness, that it will cause practical difficulties, and that the reliance on constitutional rights brings significant risks and limitations. This Part concludes by considering the vital role of experimentation and empirical research with respect to the future of due process subgroups.

A. Fitting Subgroups into Due Process Doctrine

As discussed in Section I.A, the Supreme Court's initial wave of post-*Mathews* decisions largely overlooked the possibility that subgroups of individuals may have different procedural needs than the average or typical individual in a particular context. Since turning its attention to the precise contours of due process in the early 1970s, the Court has emphasized that due process rules must be shaped by the facts associated with "the generality of cases, not the rare exceptions."[199] Aside from one foray into a case-by-case approach to

199 *Id.* at 344.

due process rules,[200] the Court has applied the *Mathews* test to the facts of the "typical," "usual," or "large majority" of cases in whichever context it is reviewing.[201] This view of procedural due process—with its focus on "the generality of cases" as opposed to "the rare exceptions"—does not account for subgroups of individuals whose cases differ from the "generality of cases" in ways that affect one or more of the *Mathews* factors.

Despite the absence of subgroups from due process doctrine, the Court's prior decisions offer clues as to how such a claim should be analyzed. The Court has stated, albeit in dicta, that overcoming the "generality of cases" principle is possible, but it requires a "very difficult factual showing."[202] Such a showing would presumably hinge on whether the administrative burden associated with identifying and accommodating subgroup members is outweighed by the other two *Mathews* factors. Thus, while the Court reaffirmed the "generality of cases" principle in a series of cases decided during the decade following *Mathews*,[203] it did not completely dismiss the notion that the Due Process Clause could require different procedural rules for members of a subgroup.[204]

After twenty-five years of silence on this aspect of procedural due process, the Court's recent decision in *Turner v. Rogers* sheds new light on the due process rights of subgroups.[205] *Turner* involved a due process challenge to a state's refusal to provide appointed counsel in a civil contempt proceeding that could result in the plaintiff's imprisonment.[206] Applying the *Mathews* test, the Court found that the plaintiff's due process rights had been violated but declined to create a new right to appointed counsel.[207] Instead,

200 *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

201 *See, e.g.*, Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985) (explaining that "a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them"); Ingraham v. Wright, 430 U.S. 651, 677–78 (1977) (focusing the due process analysis on what "usually" prompts corporal punishment in schools and the "typically insignificant" risk of error); *Mathews*, 424 U.S. at 342 (focusing the due process analysis on the "typical[ ]" disability benefits claimant).

202 *Walters*, 473 U.S. at 330. The *Walters* Court reviewed a lower court order modifying due process procedures for all claimants in the veterans' benefits context, not just a subgroup of claimants. *See id.* at 316 (discussing the scope of the injunction issued by the district court). Nonetheless, the Court briefly discussed a hypothetical due process claim on behalf of only those claimants whose cases were "complex." *See id.* at 330.

203 *See Walters*, 473 U.S. at 330; Santosky v. Kramer, 455 U.S. 745, 757 (1982); Parham v. J.R., 442 U.S. 584, 615 (1979); *Ingraham*, 430 U.S. at 680; *see also supra* Section I.A.

204 *See Walters*, 473 U.S. at 337 (O'Connor, J., concurring) (stating that "[t]he 'determination of what process is due [may] var[y]' with regard to a group whose 'situation differs' in important respects from the typical veterans' benefit claimant" (quoting *Parham*, 442 U.S. at 617)).

205 131 S. Ct. 2507 (2011).

206 *See id.* at 2512.

207 *See id.* at 2520 ("In our view, a categorical right to counsel in proceedings of the kind before us would carry with it disadvantages (in the form of unfairness and delay) that, in terms of ultimate fairness, would deprive it of significant superiority over the alternatives that we have mentioned.").

the Court identified various "substitute procedural safeguards" that, if made available to the plaintiff, would satisfy due process.[208]

The *Turner* Court did not invoke the "generality of cases" principle, nor did it suggest that it was creating a new one-size-fits-all standard. Instead, the Court clarified that its holding does not address the due process rights of individuals subject to civil contempt proceedings whose cases are "unusually complex" or whose adversary is the government.[209] Thus, the Supreme Court's most recent pronouncement on procedural due process rights appears to contemplate that subgroups of individuals may be entitled to different procedural safeguards.

This apparent shift away from a one-size-fits-all approach to procedural due process should dissuade courts from simply brushing aside the current wave of due process subgroup claims. As defined in Section II.B, subgroups that are based on the capacities and circumstances of subgroup members, the complexity of their cases, and the heightened interests at stake, all present facts that affect one or more of the *Mathews* factors in ways that are different from "the generality of cases."[210] Furthermore, the government's shift towards digitizing unprecedented amounts of information and its increasing use of massive networked computer databases challenge old assumptions about the administrative burden associated with identifying and accommodating subgroup members.[211]

To be clear, merely fitting into one of the categories proposed by this Article does not guarantee that a subgroup will be entitled to different procedures under the Due Process Clause. The universe of potential subgroups is too vast, and the facts of each subgroup too specific, to make any predictions. Rather, the argument here is that subgroup members should have the opportunity to argue and prove that the facts related to their cases alter the *Mathews* balance to such an extent that they are entitled to additional or alternative procedural safeguards. In other words, courts should not dismiss

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208 *Id.* at 2519. As the Court noted:

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

Id.

209 *Id.* at 2520.

210 *See supra* Section II.B.

211 *See supra* Section II.C. In addition, in the years since *Mathews*, agencies at all levels of government have become increasingly familiar with identifying and accommodating the needs of certain subsets of the population. *See, e.g.*, Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012); Title VI of Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (2012); Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000); 28 C.F.R. § 35.130(b)(7) (2012); 28 C.F.R. § 42.405(d)(1) (2013).

such claims simply because they are based on something other than the "generality of cases."

This disaggregated approach to due process is not foreclosed even in contexts in which a one-size-fits-all procedural regime has already been held to satisfy the Due Process Clause. The Supreme Court has long acknowledged that due process rules may evolve over time.[212] As the Court has explained, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[213] Thus, when subgroups present facts and circumstances that differ from those presented by the typical case in ways that alter the *Mathews* balance, the requirements of due process must adapt to those changes.[214] Indeed, requiring the accommodation of such subgroups is the only way to ensure that the fundamental requirement of due process—the opportunity to be heard "at a meaningful time and in a meaningful manner"[215]—is satisfied for more than just the average or typical individuals in each context in which due process applies.

Finally, arguing that one-size-fits-all procedural rules are insufficient for a subgroup of individuals is merely the first step toward securing procedures that are adequately tailored for subgroup members. Next, a court must identify precisely how subgroup members should be accommodated. Although the "additional or substitute procedural safeguards"[216] will depend on the specific context and the result of the *Mathews* analysis, courts, policymakers,

212 *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 630 (1990) (Brennan, J., concurring) (stating that procedural rules, "even ancient ones, must satisfy contemporary notions of due process"); Griffin v. Illinois, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring) (explaining that the concept of due process is "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society"); Hurtado v. California, 110 U.S. 516, 528–29 (1884) (expressing fear that establishing a fixed definition of due process would "stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians").

213 Connecticut v. Doehr, 501 U.S. 1, 10 (1991) (quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976)) (internal quotation marks omitted). Similarly, as the Court has explained, "[i]t has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *accord* Wilkinson v. Austin, 545 U.S. 209, 224 (2005); Gilbert v. Homar, 520 U.S. 924, 930 (1997); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14–15, n.15 (1978); *Mathews*, 424 U.S. at 334; *see also* Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.").

214 *See* Parkin, *supra* note 161, at 1360–76 (arguing that the requirements of due process must adapt to new facts and circumstances); *cf.* Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 341 (1957) ("Freezing the meaning of due process, which in the final analysis is more a moral command than a strictly jural precept, destroys the chief virtue of its generality: its elasticity.").

215 *Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))).

216 *Id.* at 335.

and scholars have already begun to propose and experiment with potential procedural accommodations.[217]

The range of possible accommodations for due process subgroups is both broad and evolving. At one end of the spectrum is the right to court-appointed counsel, which has been the reform most commonly sought by proponents of due process subgroups.[218] But meaningful procedural accommodations do not necessarily require full representation by a lawyer. There may be contexts in which the assistance of a non-lawyer representative or a "lawyer for the day" is sufficient.[219] Or, as the Supreme Court suggested in *Turner v. Rogers*, due process might be assured through enhanced notices and forms, targeted hearings, and express findings by the courts.[220] In line with *Turner*, scholars have identified meaningful reforms that could be accomplished without an influx of new lawyers.[221] Such proposals have included expanding the role of judges and court clerks,[222] modifying the burdens of production and proof,[223] simplifying procedural rules,[224] and adopting

217 *See supra* Section II.A.

218 *See, e.g.*, *supra* note 130 (identifying scholars who have argued in favor of a due process right to court-appointed counsel for subgroups in the immigration removal context).

219 *See* Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241 (1999); Wallace B. Jefferson, *Liberty and Justice for Some: How the Legal System Falls Short in Protecting Basic Rights*, 88 N.Y.U. L. REV. 1953, 1965–81 (2013); Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259, 1293–98 (2014).

220 131 S. Ct. 2507, 2519 (2011).

221 *See, e.g.*, Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. (forthcoming 2014) (manuscript at 49) (on file with author) (arguing in favor of "'demand side' reform of the courts as an alternative, or complementary, theory of access to justice, one that improves fairness and due process for the unrepresented without an increase in the presence of attorneys").

222 *See, e.g.*, Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the* Pro Se *Litigant*, 27 J. NAT'L ASS'N ADMIN. L. JUDCIARY 447 (2007); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 977 (2004); Steinberg, *supra* note 221, at 63–65. Although not aimed exclusively at the needs of subgroup members, improvements to court systems—for example, creating self-help centers and special courts for pro se litigants and permitting clerks' offices to give limited advice—could ameliorate some of the problems facing subgroups. *See* RICHARD ZORZA, THE NAT'L CTR. FOR STATE COURTS, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 49 (2002); Benjamin H. Barton, *Against Civil* Gideon *(and for* Pro Se *Court Reform)*, 62 FLA. L. REV. 1227, 1273 (2010); Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573, 1581 (2002).

223 *See* 38 C.F.R. § 3.304(f) (2013) (establishing relaxed veterans' benefits evidentiary requirements for the subgroup consisting of veterans with post-traumatic stress disorder based on a fear of hostile military or terrorist activity); Fiddelman, *supra* note 105, at 458.

224 *See, e.g.*, Fiddelman, *supra* note 105, at 458; Steinberg, *supra* note 221, at 58–60.

plain-language form pleadings.[225] The menu of potential accommodations is constantly expanding, as technological developments offer new and better ways to ensure that subgroup members receive due process of law.[226] Thus, interpreting the Due Process Clause to require accommodation of subgroups will create new opportunities for procedural innovation and experimentation.

B. Potential Objections to a Disaggregated Approach to Procedural Due Process

Interpreting the Due Process Clause to account for the needs of subgroups may trigger a number of reasonable objections. For example, granting subgroup members additional or alternative procedural safeguards may engender a sense of unfairness or even arbitrariness among non-subgroup members. Implementing different procedures for subgroups and requiring judges to determine which individuals receive those procedures may create significant practical challenges for courts and government agencies. And constitutionalizing the procedural due process rights of subgroups may result in little actual benefit—and possibly some harm—to subgroup members. This Section addresses each of these potential objections in turn.

1. Unfairness and Arbitrariness

Any shift away from one-size-fits-all procedures in a particular context runs the risk of creating an impression of unfairness.[227] It is not difficult to imagine that individuals who are not offered the same additional or alternative procedural safeguards that are made available to subgroup members may feel like victims of arbitrary decisions or even favoritism.[228] This would be a

225 *See* Charles R. Dyer et al., *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. FOR SOC. JUST. 1065 (2013).

226 *Cf.* Barton, *supra* note 222, at 1273 ("If any thought or effort is put into combining technology with the needs of pro se courts and litigants, something truly revolutionary might emerge.").

227 *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 50 (1981) (Blackmun, J., dissenting) (arguing that varying procedural safeguards within a particular context can diminish "the predictability and uniformity that underlie our society's commitment to the rule of law").

228 *See* Lee, *supra* note 82, at 984 ("Nothing . . . invites the impression of arbitrariness more than treating similarly situated people differently . . . ."). According to Lee, when procedural safeguards vary within the context of public benefit programs, "the recipient of benefits will often believe first, that favoritism, rather than rule, fuels the distribution of procedural protection, and second, that had the recipient received the same process afforded others, the result in his case would have been different." *Id.* at 985. Of course, individuals may define fairness differently. *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 175 (2011) ("[T]he very basis of the psychology of procedural justice—measuring subjective perceptions of fairness—suggests the limitations of a one-size-fits-all template for procedural fairness."). *See generally* Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 121 (2000) (identifying "four elements of procedures [that] are the primary factors that contribute to judgements about their fairness"). The grouping of certain individuals but not others within a subgroup could also be viewed as arbitrary. *Cf.* Ronald J. Allen & Michael S.

troubling consequence of subgroup accommodation, especially because the concept of due process of law is commonly understood as a bulwark against unfairness and arbitrariness.[229]

Yet disaggregating due process and accommodating the needs of subgroups is not, and need not necessarily be perceived as, unfair or arbitrary. Procedural rules that apply uniformly to everyone in a particular context are appropriate when the individuals in that context are similarly situated.[230] Subgroup members, in contrast, may have different procedural rights because they are unlike the typical individual. Indeed, subgroup members will be entitled to different procedures only when such differences are substantial enough to tip the *Mathews* balance in favor of subgroup accommodation. Because these differences reveal that subgroup members and non-subgroup members are not similarly situated, moving away from one-size-fits-all procedures in those contexts would be justified.[231]

Moreover, current due process doctrine already contemplates these types of distinctions. The Supreme Court acknowledged this issue in *Turner v. Rogers*, when it observed that the Due Process Clause may require different procedural safeguards for individuals whose civil contempt cases are "unusually complex."[232] Similarly, courts and administrative agencies are accus-

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Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107 (2007) (discussing the "reference class problem"—the challenge of making principled classifications of people according to certain characteristics); Edward K. Cheng, *A Practical Solution to the Reference Class Problem*, 109 COLUM. L. REV. 2081 (2009) (proposing a solution to the reference class problem in legal contexts).

229 *See* Mashaw, *The Supreme Court's Due Process Calculus*, *supra* note 96, at 52–54 (discussing the role of "equality of treatment" in the realm of adjudicatory procedure); Redish & Marshall, *supra* note 96, at 483–85 (discussing the role of fairness and equality in procedural due process); *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (noting that due process "[r]epresent[s] a profound attitude of fairness between man and man, and more particularly between the individual and government").

230 *See* Kim, *supra* note 133, at 897 ("[T]he primary purpose of uniform, categorical rules is to ensure that 'similarly situated litigants are treated equally.'" (quoting Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 39 (1994))).

231 *See* Kim, *supra* note 133, at 897 ("Where the facts show that litigants are not, in fact, similarly situated in a legally significant way, the application of the same rule to them is no longer appropriate."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1681–82 (1992) ("It does not necessarily violate procedural due process to discriminate in the procedures that are afforded, since the differences may be justified."); White, *supra* note 155, at 877 ("Fairness may require more than the even-handed extension of the *same* procedural protections, in a given setting, to all claimant groups."); *cf.* MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2011) ("It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.").

232 131 S. Ct. 2507, 2520 (2011); *see also* Barton & Bibas, *supra* note 103, at 982 (observing that *Turner* "recognized that different cases have differing levels of complexity and differing need for lawyers"); *supra* notes 91–95 and accompanying text; *cf.* Kim, *supra* note

tomed to accommodating certain subsets of individuals according to longstanding antidiscrimination statutes, regulations, and executive orders.[233] Thus, while it is possible that subgroup accommodation may result in perceptions of unfairness and arbitrariness among individuals who are not members of subgroups, the danger of such perceptions does not outweigh the argument in favor of disaggregating due process procedures.

2. Implementation Challenges

Providing meaningful procedural safeguards can be an enormous logistical challenge, especially considering that many proceedings involve hundreds, thousands, or tens of thousands of individuals per year.[234] Indeed, the task may be even more difficult than the Supreme Court recognized when it first endeavored to specify the requirements of procedural due process.[235] And there can be no doubt that shifting from one-size-fits-all procedural rules to rules that vary for certain subgroups would create new burdens and challenges for the courts and government agencies responsible for providing the required procedures. In particular, the task of identifying subgroup members at the outset of the proceedings—which might even require some kind of prehearing evidentiary hearing to determine subgroup mem-

133, at 899 (discussing Supreme Court precedent approving of constitutional protections that vary based on the location of the individual asserting them).

233 For example, federal, state, and local entities are required to provide reasonable accommodations to individuals with disabilities. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012); 28 C.F.R. § 35.130(b)(7) (2012). In addition, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (2012), prohibits recipients of federal funding from engaging in discrimination on the basis of, inter alia, national origin. This provision has been interpreted to require recipients of federal funding to provide meaningful access to their services to individuals with limited English proficiency. Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000) (requiring federal agencies to provide meaningful access to individuals with limited English proficiency); 28 C.F.R. § 42.405(d)(1) (2013).

234 *See* Farina, *supra* note 98, at 234 (noting the "inescapable reality" that "[p]roviding mass justice is a staggering task"); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 813 (1974) (arguing, in the context of social welfare determinations, that "developing a hearing system which would give assurance that disappointed claimants had experienced fair and accurate determinations of their claims is quite a subtle and expensive business"); *cf.* Rubin, *supra* note 16, at 1044–45 (commenting that the task of determining the procedures required by due process "has proved to be a dark conundrum for newer forms of government activity, such as benefits programs, licensing, mass employment, education, and corrections").

235 *See* Mashaw, *supra* note 234, at 815 (arguing that "the difficulties of providing meaningful hearings may be much more significant than the Court was called upon to recognize in *Goldberg*"). *See generally supra* Section I.A (discussing the Court's shift toward specifying the requirements of procedural due process).

bership[236]—could introduce additional cost, delay, and uncertainty into the process.[237]

Requiring subgroup accommodation in certain circumstances will bring with it new implementation challenges, as would the adoption of any new procedures. But those challenges would not necessarily be insurmountable or unduly burdensome. More so than at any time since the due process revolution, subgroup members are easier to identify based on information to which courts and agencies already have access or to which they can easily obtain access.[238] Yet even when technological innovation is of no help and an individualized assessment is necessary to determine the identity of subgroup members, that added burden will be accounted for in the *Mathews* analysis.[239] In addition, in comparison with the implementation challenges associated with a case-by-case approach to determining procedural rules, the clustering of subgroup members would result in a comparatively smaller burden on the government.[240]

3. Limits and Risks of Constitutionalizing Due Process Subgroups

A third potential objection to seeking additional or alternative procedural safeguards for subgroups is that obtaining such safeguards through the Constitution is either not as beneficial as it may seem or is ultimately counterproductive. Ever since the due process revolution of the 1970s, scholars have questioned whether enhanced procedural protections can ensure accuracy and fairness[241] or promote dignity.[242] Expanding due process rights for sub-

236 *Cf.* Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 561 (1967) (proposing, for identifying individuals entitled to court-appointed counsel, a procedure that "might make use of a frontline screening agency, whether a judge, a private lawyer operating under a scheme of state reimbursements, an official or private legal aid agency, or a public or private referral service").

237 This argument has been developed with respect to the Supreme Court's adoption of a case-by-case approach to determining whether due process requires the provision of appointed counsel in termination of parental rights proceedings. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 50–52 (1981) (Blackmun, J., dissenting) (discussing administrative challenges caused by noncategorical procedural rules); *see also supra* notes 102–03 and accompanying text (summarizing criticisms of *Lassiter* advanced by scholars).

238 *See supra* Section II.C; *cf.* Kim, *supra* note 133, at 897 (arguing, in the context of subgroups of students subject to criminalized school disciplinary regimes, that "[t]he increasing availability of relevant data mitigates this concern about administrability").

239 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (instructing courts to consider the administrative burden along with the private interests at stake, the risk of erroneous deprivation, and the value of additional or substitute procedural safeguards).

240 *See, e.g.*, Clapman, *supra* note 121, at 391 (arguing that in contrast to a case-by-case analysis, holding that a class of individuals with mental disabilities was entitled to additional procedural safeguards "makes good sense from a judicial administration perspective").

241 *See* JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 22 (1986) (identifying the many conditions that must be satisfied before a public benefits recipient can successfully overturn an erroneous decision at a fair hearing); Mashaw, *supra* note 234, at 787 (arguing that procedural protections in the public benefits

groups could also be seen as diverting resources and attention from efforts to broaden the procedural and substantive rights of all individuals.[243] Furthermore, as with any attempt to secure procedural rights through the courts, there is a danger that "judicial declaration of process rights marks the end of innovation and adaptability."[244]

These concerns should not stand in the way of interpreting the Due Process Clause to require subgroup accommodation. The value of due process procedures certainly has its limits,[245] but in the case of due process subgroups those limits will be examined and quantified as courts apply the *Mathews* test to determine whether due process requires different procedural safeguards for subgroup members.[246] Courts will order such accommoda-

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context are unable to ensure the accuracy of eligibility determinations). *See generally* Super, *supra* note 161, at 1086–89 (discussing the limits of procedural due process rights in the public benefits context).

242 *See* White, *supra* note 155, at 887 ("Constitutionalizing welfare procedures has not done very much to imbue the welfare system with the norms of human dignity that the [*Goldberg v.*] *Kelly* decision rhetorically endorsed.").

243 *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1487 (1997) (arguing, in the context of immigration procedures, that "[j]udicial creation of new procedural due process protections can lead to reluctance to create new substantive statutory rights"); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1856 (2001) (arguing that expanding procedural rights in the welfare context has become "a quintessential lawyer's process-based reform, easily routinized within the welfare bureaucracy, its pursuit sapping movement energy and gaining nothing of substance").

A related concern is that expanding procedural rights may result in the diminishment of existing substantive rights. *See, e.g.*, Wheeler v. Montgomery, 397 U.S. 280, 284 (1970) (Burger, C.J., dissenting) (raising "the possibility that new layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing, and other living essentials"). *See generally* Frug, *supra* note 97, at 773–77 (discussing the role of administrative costs in the evaluation of procedural due process claims).

244 Farina, *supra* note 98, at 254. As Professor Farina explains, "[w]hen law is understood as demarcating the extent to which one is compelled to yield to the hostile demands of the other, it is not surprising that a decision which specifies the minimum a losing official must give, comes to establish the maximum he will offer." *Id.* The experience in the veterans' benefits context after *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), offers an interesting counter-example, as Congress revised the attorneys' fee limitation at issue in *Walters* and effectively provided the plaintiffs with the relief denied to them by the courts. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 104(a), 102 Stat. 4105 (1988).

245 *See generally* Parkin, *supra* note 161, at 1329–33 (summarizing scholarly assessments of the value of the quintessential due process procedure, the welfare fair hearing required by *Goldberg v. Kelly*).

246 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (requiring courts to consider, inter alia, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"). *But cf.* 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, 158 (2011) ("Neither judges nor litigants can identify with any rigor the actual costs of various procedures, let alone model (or

tion only if the subgroup is able to demonstrate that the additional or alternative procedures will in fact reduce the risk of erroneous deprivation. Accordingly, subgroups that are granted different procedural rights will be those that have proven in court that the new procedures will make a measurable difference in comparison to the existing one-size-fits-all procedures.

Whether the pursuit of new procedural rights for subgroups will divert attention and resources from broader efforts to expand the rights of all individuals raises what is essentially a question about strategy. It is possible that piecemeal efforts to carve out the subgroups most in need of additional procedural protections may give the impression that existing procedures are constitutionally sufficient for everyone else, thereby reducing the likelihood of across-the-board improvements to existing procedures. Yet with no broader expansions of constitutional due process rights on the horizon,[247] it is difficult to ignore an opportunity to ensure that existing procedures are better tailored to the needs of subgroups.[248]

It is also possible that subgroup accommodation could ultimately lead to an overall improvement in existing procedural safeguards.[249] The history of the right to government-appointed counsel in state criminal proceedings, though distinguishable in obvious ways,[250] may be instructive in this regard.[251] Indigent criminal defendants appearing in state court went from

know) the impact in terms of false positives and negatives produced by the same, more, or different processes . . . . While one can state the equation, one cannot do the math because the data are missing.").

247 *See, e.g.*, Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2217 (2013) (observing that *Turner* "all but clos[ed] the door on prospects for a strong constitutional civil *Gideon*").

248 *See, e.g.*, Russell Engler, *Shaping a Context-Based Civil* Gideon *from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697 (2006) (arguing for a broad right to civil representation but concluding that for strategic reasons, advocates should start with the right to representation in child custody cases).

249 Russell Engler has discussed this possibility as it relates to efforts to expand the right to court-appointed counsel in civil cases. *See* Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REV. 196, 202 (2006) ("A strategic decision to focus on the narrower group initially might give a foothold to obtain broader relief in implementing the right to appointed counsel."); *see also* Engler, *supra* note 248, at 716 ("A success in one context can provide an impetus for expansion elsewhere. A narrower victory might yield broader relief where the broader relief is more financially and administratively feasible.").

250 A significant difference between the criminal and the civil contexts is that the source of the procedural safeguard at issue in the criminal context is the Sixth Amendment and not the Fifth or the Fourteenth Amendments. *Compare* U.S. CONST. amend. VI (guaranteeing that, "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence"), *with* U.S. CONST. amends. V, XIV (guaranteeing that no person shall be deprived of "life, liberty, or property without due process of law").

251 *See, e.g.*, Ingrid V. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282, 2306 (2013) ("During the years prior to *Gideon*, some criminal justice experts advocated a universal and high-quality public defender system, whereas others promoted a more limited approach to funding defense counsel in only the most crucial cases and when necessary to preserve the legitimacy of the justice system.").

having no constitutional right to appointed counsel, to having a right to appointed counsel but only if they could prove that they were facing "special circumstances"[252] (essentially a type of subgroup), to having a right to appointed counsel regardless of their particular situation.[253] In this way, the move to subgroup accommodation under the Due Process Clause could be seen as the first step toward improved procedures for all.

Concerns that new constitutional rulings on the due process rights of subgroups may stifle innovation in this area also should not deter arguments in favor of subgroup accommodation. As discussed in Section II.A, some federal, state, and local government agencies are beginning to accommodate subgroups without being compelled by court rulings on due process claims.[254] Given that these procedural innovations have taken place during a time when the due process doctrine is perceived to be hostile to the procedural rights of subgroups,[255] moving towards an interpretation of the Due Process Clause that requires subgroup accommodation does not seem likely to halt further government-initiated innovation along these lines.

Finally, it is worth noting that even just a few court decisions recognizing the rights of due process subgroups could have a large impact on the procedures used by government agencies in other contexts. As Professor Richard Pierce has explained, the small number of Supreme Court decisions applying the Due Process Clause to agency procedures "eventually become major determinants of administrative procedure through their effects on (1) legislatures engaged in drafting the procedural provisions of statutes, (2) courts engaged in interpreting the often ambiguous procedural provisions of statutes, and (3) agencies engaged in drafting the procedural rules that govern various types of proceedings."[256] As a result, developing this area of due process doctrine through constitutional litigation may have effects far beyond the lawsuits that result in court decisions.

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252 Among the special circumstances recognized by the Supreme Court were cases involving capital punishment, *see, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932), and cases involving "complex" legal issues, *see, e.g.*, Chewning v. Cunningham, 368 U.S. 443 (1962); Hudson v. North Carolina, 363 U.S. 697 (1960); Williams v. Kaiser, 323 U.S. 471 (1945). The Court affirmed this approach to right-to-counsel claims in *Betts v. Brady*, 316 U.S. 455, 462 (1942) (observing that the denial of a court-appointed lawyer in state criminal prosecutions could "constitute a denial of fundamental fairness," depending on "the totality of facts"), *overruled by* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

253 *See Gideon*, 372 U.S. at 344–45 (overruling *Betts v. Brady* and holding that indigent defendants in state criminal proceedings have a right to appointed counsel under the Sixth Amendment).

254 *See supra* notes 146–50 and accompanying text.

255 *See supra* Section I.A.

256 PIERCE, *supra* note 18, § 9.1, at 735–36. "Legislatures and agencies can, of course, choose procedures more demanding than those dictated by due process, but their choice of procedures is influenced heavily by their beliefs concerning the procedures required by due process." *Id.* §9.1, at 736.

C. *The Essential Link Between Procedural Innovation and Empirical Research*

Any discussion of the future of due process subgroups must acknowledge the innovation that has been occurring outside the context of constitutional litigation. Across the country, a small but growing number of government agencies and officials, legislatures, advocacy groups, and court administrators have already recognized the shortcomings of one-size-fits-all procedures in various contexts.[257] Their efforts have brought about new statutes, regulations, policies, and pilot programs that provide additional or alternative procedural safeguards to subgroups of individuals who are differently situated from the average or typical person. Taken together, these changes have done more to affect the experiences of subgroup members than has any litigation thus far.[258]

This Article's focus on the rights of subgroups under the Due Process Clause is not meant to minimize the role or importance of the innovation that is already underway. To the contrary, litigation and nonlitigation approaches to subgroup accommodation should reinforce each other: as government agencies demonstrate their ability to accommodate subgroups effectively and without incurring undue expense, it will be harder for courts to dismiss due process claims seeking similar accommodation. And, as more courts order agencies to accommodate subgroups under the Due Process Clause, it will be harder for agencies to ignore their obligation to ensure that procedural safeguards accommodate the needs of subgroup members.

These two approaches to subgroup accommodation are also linked by their reliance on empirical research into the functioning of procedural systems. For reforms arising outside the litigation context, data is essential to convincing policymakers of the need for new procedures and the effectiveness of potential alternatives. Data is also essential for reforms pursued through litigation, as courts must weigh the three *Mathews* factors based on evidence provided by the parties. Although scholars have long expressed concern over procedural due process rulings that lack a sufficient evidentiary basis,[259] the Supreme Court's recent decision in *Turner v. Rogers*[260] appears

257 *See supra* Section II.A.

258 *Cf.* Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 31–32 (2013) ("The Supreme Court infrequently addresses [access to justice] issues, while state courts, state legislatures, and state access to justice commissions regularly grapple with the flood of unrepresented litigants in the courts.").

259 *See, e.g.*, Farina, *supra* note 98, at 196 ("Although framed in terms that invite quantitative analysis, the *Mathews* balance is rarely conducted with empirical evidence."); Friendly, *supra* note 20, at 1303 ("It is unfortunate that, five years after *Goldberg*, we have so little empirical knowledge how it has worked in its own field, let alone in others where its principles have been applied."); Resnik, *supra* note 246, at 158 (arguing that *Mathews*'s "veneer of scientific constraints on judicial judgment can serve to mask the lack of genuine empiricism," and that "[n]either judges nor litigants can identify with any rigor the actual costs of various procedures"); *cf.* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 21 (1988) (observing that the Court in *Goldberg v. Kelly* "sought to leaven reason with experience").

to signal a renewed commitment to grounding due process rules in empirical knowledge.[261] That type of research has already begun, especially with respect to the impact of legal representation,[262] but much more remains to be done.[263]

CONCLUSION

The concept of procedural due process has reached an important moment in its history. More than three decades have passed since an "explosion" of due process claims prompted the Supreme Court to develop the modern approach to procedural due process.[264] Despite the passage of time and predictions of its demise,[265] this approach to procedural due process—including its focus on "the generality of cases, not the rare exceptions"—remains largely unchanged. Yet there is still a sense that things are in flux. The relationship between individuals and government agencies and court systems is changing, due in large part to evolving technologies. Digital files are replacing paper files, video hearings are replacing in-person hearings, websites and apps are replacing offices and caseworkers—not all at once, but one step at a time.

With this much change in the air, now is the time to reexamine the way our due process rules are designed. The reasons to exclude subgroup members from the due process calculus are becoming increasingly outdated.

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260 131 S. Ct. 2507 (2011).

261 *See* Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 62 (2012) ("[D]uring oral argument, three of the five Justices in the *Turner* majority specifically requested data as they sought to weigh due process considerations."); *see also* Jeanne Charn, Turner v. Rogers, CONCURRING OPINIONS (June 27, 2011, 7:07 PM), http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-2.html (arguing that *Turner* challenges advocates "to undertake a serious and rigorous examination of what works best in what types of cases"). *But cf.* Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1236 (2014) ("[T]he [*Turner*] court provided no empirical evidence to support assertions about the complexity of procedures and fairness of alternatives.").

262 *See, e.g.*, D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51 (2010); Colleen F. Shanahan et al., Representation in Context: Party Power and Lawyer Expertise (Aug. 29, 2014) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489252.

263 *See, e.g.*, Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 821 (2012) ("Unfortunately, there is a shortage of reliable data concerning what kind of legal assistance various types of litigants need to obtain meaningful access [to the courts].").

264 Friendly, *supra* note 20, at 1268.

265 *See, e.g.*, Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1973 (1996) (arguing that "a [due process] counterrevolution will be fought and won before the turn of the century").

That is not to say that due process should require that all subgroups be accommodated in all situations, only that subgroups should have an opportunity to prove that the *Mathews* balance may tip in their favor. Marshaling the requisite evidence will be essential to any subgroup argument, but so will an understanding that the Due Process Clause requires procedural safeguards that meet the needs of subgroup members.