The Transaction Explosion and the Cost of Judgment

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ABSTRACT

Our civil justice institutions are about 100 years old, dating back to the progressive era and the adoption of the Federal Rules of Civil Procedure. But the world has changed a lot since then. In particular, the number of transactions in society has exploded, as population growth, economic growth, and technological change have exponentially increased the activity in society that leads to disputes. Separately, alongside the rise in civil disputes, the cost of the time and attention of legally trained experts has skyrocketed, rising faster than inflation for generations.

Our civil justice institutions are caught between these two forces. There are more disputes to resolve, but the cost to resolve each of them has gone up significantly. Meanwhile, courts' tools for managing cost and scale, such as the class action, are powerful in only limited domains, leaving a growing number of disputes without redress. The result is that we are collectively paying much more for civil justice, but still getting widespread bad outcomes.

This article identifies and documents these two sweeping trends in cost and volume. It then discusses several implications for civil justice reform. Notably, long-term increases in cost suggest changes to the constitutional mandates of due process, which is doctrinally structured as a balancing of benefits and costs. The article argues that the increased flexibility facilitated by this understanding of due process should be used to experiment with new approaches to volume. It concludes with suggestions for a new "liberal ethos" aimed for resolving civil disputes at scale.

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INTRODUCTION

The modern regime of civil justice in the United States is now roughly 100 years old.[1] Courts, of course, are continuously changing institutions, and civil litigation has evolved over centuries.[2] But around one hundred years ago, progressive era reforms in state and federal courts ushered in many of the distinctive features of contemporary civil courts, culminating with the adoption of the Federal Rules of Civil Procedure in the 1930s and their subsequent embrace by most state judiciaries.[3] Although there have been changes since then, we are in many ways still working with institutions that date back to that era.[4]

But the world has changed dramatically in the meantime. Over the last hundred years, the social, economic, technological, and political landscape of society has grown and shifted in ways familiar from everyday history classes, and likely in ways that are less familiar to many, too.[5]

Two forces in particular have exerted slow, steady, and growing pressure on society in ways that are directly relevant to our institutions of civil justice. The first of these is what this article dubs "the transaction explosion": the significant growth in the number of transactions occurring daily in the United States over

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[1] *See, e.g.*, John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522, 542 (2012) ("In the 1930s, the Americans began devising what became a new civil procedure system.")

[2] *See, e.g.*, *id.* at 526–27 (noting the evolution of the jury system from medieval times to the present day); KELLEN FUNK, LAW'S MACHINERY, at 241–65 (describing the merger of law and equity over the Nineteenth and into the Twentieth Century).

[3] *See, e.g.*, Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 Yale L.J. 2940, 2951 (2015) ("Progressive-era lawyers fundamentally remade the American legal system, creating the underpinnings of the modern administrative state and refashioning urban justice on the foundations of civil-service bureaucracy and social-scientific expertise."); Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 Law & Hist. Rev. 63, 67 (1998) ("For at the local level . . . the socialization of law entailed a sweeping reorganization of judicial institutions in the early twentieth century, as municipal reformers scrapped particularistic justice-of-the-peace systems and constructed centralized municipal court systems in their place."); Langbein, *The Disappearance of Civil Trial*, *supra* note 1, at 542 ("The Federal Rules were devised for use in the federal courts, but most of the American states have chosen to emulate the Federal Rules, with the result that the Federal Rules and state codes patterned on them now govern most civil litigation in the United States.").

[4] *See, e.g.*, David Marcus, *The Collapse of the Federal Rules System*, 169 U. Pa. L. Rev. 2485, 2486 (2021) ("[T]he Federal Rules System . . . embraces the procedural regimes of many American jurisdictions. They share many of the system's constituent components . . . .").

[5] *See, e.g.*, JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES (2018); VACLAV SMIL, TRANSFORMING THE TWENTIETH CENTURY (2006), at 27–85 (describing the history of "dominant prime movers," and in particular the significance of the gas turbine, in shaping the Twentieth Century).

the last century, and the rise in disputes that appears to accompany it.[6] The second force is the well documented rise in the cost of legal services above the rate of inflation, which has been ongoing for at least four decades and quite possibly the entire past century.[7] The result is that, compared to the era in which our dispute resolution systems were designed, there are many more disputes to resolve, and the cost of applying trained human judgment to each dispute is much higher.

These forces are big. When it comes to transactions, the number of exchanges, purchases, and other interactions in our mass consumer society far outstrips the world of the 1920s and 1930s that created our courts.[8] Our economy has grown exponentially; our population has tripled; technology has enabled us to generate vastly more outputs from the same number of inputs.[9] Perhaps most significantly, our entire form of social production has shifted from an era in which many households were more self-sufficient along many dimensions (such as childcare and food production) to one in which people are deeply dependent on exchanges and purchases to live everyday life.[10] All of these developments entail growth in the number and rate of transactions. Today, many common transactions—credit card purchases, transit rides, communications—are numbered in the hundreds of millions or billions per day.[11]

These transactions are the soil in which disputes grow. While many (probably the overwhelming majority) of transactions entail no problems or disagreements, even a minute fraction of such vast activity results in problems or disputes on a huge scale. There were more than 100 million credit card disputes in the U.S. in 2024.[12] Government agencies routinely receive millions of complaints.[13] There were more emergency room visits in the U.S. in 2024 than there were people in the U.S. in 1924.[14] There is no universal log of civil

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[6] The empirical evidence establishing the rise in transactions is strong; the rise in disputes is less possible to document, but is supported by some evidence and reasonable inferences. *See infra* Part I.A. and I.B.

[7] *Infra* Part II.

[8] *Infra* Part I.A.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Toms-Chris Emewulu, *The Ultimate Chargeback Statistics 2025: Trends, Costs, and Solutions,* Changeflow (June 24, 2025), https://www.chargeflow.io/blog/chargeback-statistics-trends-costs-solutions.

[13] *Infra* Part I.B.

[14] *Compare* Emergency Department Visits, National Center for Health Statistics (visited Oct. 20, 2025), https://www.cdc.gov/nchs/fastats/emergency-department.htm (estimating emergency room visits numbering over 150 million per year), *with* Historical Population Change Data, U.S. Census Bureau, https://www.census.gov/data/tables/time-series/dec/popchange-

disputes to rely on, but the most reasonable inference is that the explosion in transactions over the last century has similarly led to a major increase in the quantity of civil disputes.[15]

The cost of legal judgment for hire, meanwhile, has similarly seen massive transformation. Hiring a lawyer in Southern California to prepare a will or testament in 1925 might have cost you around $5—about $93 in today's currency, adjusting for inflation.[16] Today, that $93 will get you less than 15 minutes of time at the average lawyer's hourly rate of $420 in California.[17] Since 1987, when systematic data is first available, the price of legal services has grown by 4.03% per year on average, while inflation has grown only at 2.77% on average. That's the difference between a $100 billable hour growing over the last few decades to $260/hour (if it matched inflation) versus $400/hour (the actual growth of legal service costs).[18]

These cost explosions fit a well-known economic model, Baumol's cost disease, which suggests that the rise in legal costs is in part due to the fact that it is hard to squeeze more productivity out of the fundamental act of a human being sitting down and thinking about legal issues.[19] As a result, because many other sectors of the economy have seen significant productivity increases over the last century, the cost of legal services has risen relative to the cost of the goods and services produced by those sectors.[20]

This matters greatly for civil justice, because the goods and services produced by those other sectors are often going to be the subject of the disputes that need to be resolved. So, for many disputes, the cost of getting trained legal attention applied to that dispute has risen relative to whatever is at stake. The implication is that the number of disputes where it does not make sense to use legal services to resolve has been steadily increasing, and may well continue to increase for the indefinite future.

Our civil justice systems are thus in a bind: the transaction explosion increases the volume of disputes in society, while the rising cost of judgment increases the resources necessary to resolve each of those disputes.

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data-text.html (accessed Oct. 17, 2025) (displaying a 1920 population of around 106 million). An emergency room visit is not itself a dispute, of course; but it often will be the type of transaction reflecting "something going wrong" from which a dispute might arise.

[15] *Infra* Part I.B.

[16] *See infra* Part I.B.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

The challenges of this bind matter to more than just the litigants who happen to have disputes; they matter for us all. The accurate and fair resolution of disputes, as well as the processes used to resolve those disputes, have many spillover benefits: the deterrence of unlawful action; the articulation of legal rules and establishment of precedent; the production of socially useful information; and more.[21] How we collectively allocate the scarce resource of human judgment in the context of dispute resolution is broadly socially important, affecting more than just private goals.

Faced with the bind of rising volumes and costs, dispute resolution systems have three options: they can spend more money; they can decide to apply judgment to fewer disputes; or they can work to reduce the amount of judgment that gets applied in each case.[22] Each of these approaches has different tradeoffs; none of them is clearly the dominant choice overall.[23] The forces at play here are difficult to manage, and they help explain how, even with significant increases in funding over time, courts can nonetheless be perceived as deteriorating, resolving fewer cases and feeling perennially strapped for cash.[24] The transaction explosion and the rising cost of judgment help explain a disconcerting phenomena in modern civil justice: we are paying more for civil justice than ever before, but perceptions of decay and intractable problems are widespread.[25]

In response to these tradeoffs, an ecosystem has emerged of public and private actors taking different routes to triage their spending and reduce costs. In state courts, default judgments abound, and many legal problems never get brought in in the first place.[26] For cost reduction, the most important development in civil litigation is aggregation, which allows something like a deluxe suite of procedures to be applied, but amortizes the cost over many claims that rise and fall together.[27] In the private sector, meanwhile, corporate dispute resolution systems often favor automation, often applying simple heuristics to resolve disputes with little or no human judgment applied, not based on accuracy but on predictions of what will be best for a company's bottom line.[28] Other techniques, such as mediation, negotiation, and settlement, are used in the public and private sector alike, attempting to reduce the cost to

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[21] *See infra* Part III.

[22] *See infra* Part III.

[23] *Id.*

[24] *Id.*

[25] *See infra* nn. 141–149 and accompanying text.

[26] Pamela K. Bookman, *Default Procedures*, 173 U. Pa. L. Rev. 1419, 1421 (2025); Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. Rev. 443, 447–48 (2016).

[27] *See infra* Part III

[28] *Id.*

the dispute resolution system by allowing informal dealmaking that satisfies the disputants.[29]

This ecosystem is made up of many disparate actors facing distinct incentives and constraints, and is rarely examined as a whole. But looking at private and public dispute resolution systems together, and comparing their responses to secular increases in cost and volume, can help illuminate the strengths and weaknesses of existing institutions as well as potential gaps in the overall landscape of civil dispute resolution. Private actors have developed cost-effective ways of handling volume, but lack mechanisms of transparency and accountability to give the public confidence that their resolution of disputes is fair or accurate.[30] Courts, meanwhile, are particularly bad at handling lower-value disputes that are not amenable to aggregation—a very large category, often encompassing the kind of eviction or debt collection cases with unrepresented defendants that make up significant portions of state civil dockets.[31]

After building this descriptive account, this article argues that improving our response to the transaction explosion and the rising cost of judgment will require changes in both the public and private processing of disputes. Considering civil dispute resolution as a whole in the years to come, we should aim broadly for two goals. First, we should bring increased transparency and accountability to private sector dispute resolution, while seeking to preserve the cost-effectiveness, freedom, and experimentation that private sector resolution can promote. Second, we should focus in particular on public sector civil justice reforms that are designed to manage both cost and volume, especially those that promote the cost-effective resolution of disputes that are less amenable to aggregation.

When it comes to the public sector, the article notes a significant and largely unappreciated implication of long-term cost growth for a core doctrine of civil procedure: due process.[32] The due process inquiry is structured largely as a cost-benefit test, where the costs of a given procedure are weighed against the benefits it provides in terms of accuracy, considering the various interests at stake in the dispute. A straightforward implication of this doctrine is that as costs rise, the procedural "floor" that is constitutionally mandated for a given type of dispute should be lowered.[33] Where all else is equal in terms of the interests at stake and the accuracy of a given set of procedures, higher costs will suggest a lower threshold of required procedures. Due process doctrine is self-

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[29] *Id.*
[30] *See infra* Part III.
[31] *Id.*
[32] *Infra* Part IV.
[33] *Infra* Part IV.

consciously contextual and flexible. But commentators who invoke due process's ability to change over time tend to be advocating for *more* constitutionally mandated procedures, rather than for more flexibility for courts and legislatures.

Recognizing the due process implications of the transaction explosion and the rising cost of human judgment is important, because improving courts may require some big changes, at least for some case types or contexts. This article provides a brief overview of a few possibilities—reforming courts to make them more inquisitorial, such as by reducing or abandoning the party presentation requirement; becoming more accepting of probabilistic reasoning to resolve cases or issues based on extrapolations from other similar cases; pursuing error correction via audits rather than relying solely on appeals; and experimenting with automation.[34] These possibilities come nowhere near exhausting what should be on the table, but offer a general proof of concept of how reforms can be designed with cost and scale in mind in ways that go beyond aggregation.

Of course, making justice cheaper doesn't necessarily mean making justice better. A rule that automatically dismissed all complaints with prejudice would be a extremely cheap way of resolving cases. Reform goals like cost-effectiveness and productivity must be guided and tempered by core civil justice values such as fairness and accuracy. But it may also be the case that the ideal mix of civil justice values looks different today than it did a hundred years ago, when the world was so different. The article therefore concludes by considering what mix of values a "new liberal ethos" might adopt, at least for the set of cases where volume and cost appear to be particularly high barriers. It suggests that an emphasis on outcomes, accountability, and efficacy should get more weight going forward relative to the more proceduralist emphases of the "liberal ethos" of the federal rules.

Developing a full account of the transaction explosion and the cost of judgment is particularly important now, as our civil justice systems on the whole are not doing very well. In state courts, overwhelming numbers of cases end in default.[35] The proceedings that do happen tend not to be navigable by most litigants, who are largely lawyerless.[36] And there is a broad institutional mismatch between the kinds of problems brought into state courts and their capacities to

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[34] *See infra* Part Iv.

[35] *See* Pamela K. Bookman, *Default Procedures*, 173 U. Pa. L. Rev. 1419, 1421–22 (2025).

[36] *See, e.g.*, Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 B.Y.U. L. Rev. 899, 904 (2016) ("The adversary norm of party control requires that parties draft court papers, parse through substantive law, master procedural and evidentiary rules, and articulate a coherent, legally relevant narrative to a judge. However, lay parties, who now dominate the civil dockets, are frequently unable to perform any of these functions.").

resolve those problems.[37] Federal courts, meanwhile, are increasingly rarified, with litigants tending more toward companies with significant resources and large amounts in controversy, after two decades of the Roberts Court's "restrictive ethos" have limited class actions, civil rights litigation, and other mainstays of "people law."[38] These phenomena are complex, and can't be reduced to symptoms of the transaction explosion and the rising cost of judgment. But the forces described in this article are a core part of the story, and one that often gets overlooked.

This article proceeds as follows. Part I introduces and describes the transaction explosion, detailing the massive increase over the last century in the volume of transactions happening daily in society. Part II discusses the long-term increases in the cost of applying legal judgment to resolve the disputes that arise out of those transactions. Part III gives a broad overview of responses to these two forces, discussing both the public and private dispute resolution sectors. Part IV discusses some potential directions for reform. The Conclusion ends by briefly considering what a normative "liberal ethos" might look like for civil justice reforms aimed at scale.

I. THE TRANSACTION EXPLOSION

A. The dramatic growth in transactions

There is no official record of "the number of transactions" in society that one can point to and compare across time. Even the definition of "transaction" itself is flexible and capacious in a way that defies easy enumeration: a transaction can be "[t]he act or an instance of conducting business or other dealings," or "a business agreement or exchange," or simply "any activity involving two or more persons."[39] There is no way of aggregating and quantifying instances of such a broad concept with much precision.

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[37] *See generally* Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark, and Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 Colum. L. Rev. 1471 (2022) (discussing "the mismatch between state civil courts' institutional design and social needs").

[38] *See, e.g.*, Brooke D. Coleman, *One Percent Procedure*, 91 Wash. L. Rev. 1005, 1009 (2016) (arguing that "the entire civil litigation system is captured by lawyers, judges, and parties that, while participating in the rarest litigation, inevitably bend the rules of the civil litigation system toward their best interests."); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 364 (2013) ("The federal procedural system has shifted dramatically in recent years in ways that impede and disadvantage substantial categories of plaintiffs."); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 Geo. Wash. L. Rev. 353, 366 (2010) (pointing to "a collection of procedural rules and reforms [that] reflect a restrictive ethos, characterized by a desire to discourage certain claims and to keep systemic litigation costs under control.").

[39] *Transaction*, Black's Law Dictionary (12th ed. 2024).

But it also is broadly clear that the number of transactions occurring in the United States has increased dramatically over the last century. Many factors point in the same direction: population growth, economic growth, economic specialization, automation, and digitalization all point in the direction of sustained massive growth in the number of transactions occurring in society today compared to one hundred years ago. The U.S. population has more than tripled since 1920.[40] Even if everything else in society had stayed the same, we could reasonably expect that as population grows, the transaction number would grow with it—more people purchasing basic necessities, finding gainful employment, engaging in non-monetary exchanges and activities, and so on.

And everything else did not stay the same. To the contrary, along with population growth, there have been dramatic changes in the social, economic, and technological landscape of the United States that have compounded and facilitated the explosion of transactions over the last century.

1. Economic growth and dependence on exchange

Perhaps most basically, economic growth over the last century has dramatically altered lifestyles and economic behaviors in the direction of increasing transactions. In 1929, just before the Great Depression, the median family earned between $1,500 and $2,000 a year,[41] which is between roughly $27,000 and $36,000 in 2024 dollars.[42] In contrast, in 2024 the median household income was $83,730.[43] So not only are there three times as many people as there were a hundred years ago; they are also earning something like three times as much, in real terms.

Rising incomes do not necessitate an increase in transactions. One can imagine a world, for instance, in which growing wealth does not cause people to buy more goods and services, but instead results in them buying roughly the same number of goods and services and just getting higher-quality and more

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[40] Historical Population Change Data, U.S. Census Bureau, https://www.census.gov/data/tables/time-series/dec/popchange-data-text.html (accessed Oct. 17, 2025) (displaying a 1920 population of around 106 million and a 2020 population of around 331 million).

[41] Steven Mintz, *Statistics: The American Economy during the 1920s*, The Gilder Lehrman Institute of American History, https://www.gilderlehrman.org/history-resources/teaching-resource/statistics-american-economy-during-1920s (indicating that the 50th percentile family fell within the $1,500–$2,000 range).

[42] *See* CPI Inflation Calculator, U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm (showing that $1,500 in January 1929 has the same buying power as $27,054 in January 2024, and $2,000 in January 1929 has the same buying power as $36,072 in 2024).

[43] U.S. Census Bureau, *Income in the United States: 2024* (Sept. 9, 2025), https://www.census.gov/library/publications/2025/demo/p60-286.html.

expensive versions. It might even be the case that higher quality goods break down less often, so higher incomes could result in *fewer* purchases, rather than more.

But that doesn't seem to be the story of the last hundred years. To the contrary, the 1920s and 1930s saw the rise of mass consumption: the widespread purchasing of mass-produced, brand name goods that are designed for and marketed to mass audiences.[44] Rising wealth and standards of living, along with new goods such as refrigerators, washing machines, and televisions, meant that midcentury America was awash in purchases that "represented a net increment, not a shift in spending" from one kind of good to another.[45] Relatively new types of purchases could rapidly become normalized: television sets, for instance, went from only three million being produced in 1949 to present in three-quarters of U.S. households by 1956.[46] Between the 1930s and the 1970s, a broad range of goods and appliances went from being uncommon or rare to being present in nearly every household, such as vacuum cleaners, washing machines, refrigerators, irons, toasters, coffeemakers, radios, and televisions.[47]

These purchases occurred as individual transactions themselves, but their greater significance is in how they reflect a restructuring of daily life and economic organization. As the Twentieth Century progressed, Americans became more dependent on commercial exchange. Everyday routines in American households "involved making fewer things and purchasing more."[48] Everyday goods, and their supply chains, became more complex, and people began to understand less about how to make or fix goods and more about how to purchase them.[49] The "marketization of production" happened not just in the United States, but in many countries around the world as they grew richer over the course of the Twentieth Century, and as women increasingly entered the workforce: households shifted hours away from producing goods and services internally and toward more market exchanges.[50] The story of the United States shifting from an agricultural economy to an industrial and mass consumer economy is thus one of constantly increasing transactions, both as higher

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[44] Lizabeth Cohen, A Consumer's Republic: The Politics of Mass Consumption in Postwar America, at 23 (2003)

[45] *Id.* at 123.

[46] *Id.* at 123 n.19 (citing U.S. Bureau of Labor Statistics, How American Buying Habits Change, p. 208).

[47] Stanley Lebergott, The American Economy: Income, Wealth, and Want, Table 20 (1976).

[48] Susan Strasser, Charles McGovern, and Matthias Judt, *Satisfaction Guaranteed: The Making of the American Mass Market*, 15 (1989).

[49] *Id.*

[50] Benjamin Bridgman, Georg Duernecker, and Berthold Herrendorf, *Structural transformation, marketization, and household production around the world*, 133 Journal of Development Economics 102 (July 2018).

incomes allowed people to spend more and as market exchanges substituted more and more for self-sufficiency.

This social and economic reorganization both fueled and was driven by extraordinary changes in technology. The arc of the Twentieth Century was one in which the increased availability of fossil fuels and electricity led to the adoption of engines and motors "whose power was used to mechanize just about every conceivable productive task," leaving "no kind of economic activity" unaffected[51]. The resulting productivity gains transformed the number and type of goods that the economy could produce: "In 1900 U.S. wheat averaged about 40 hours of labor per hectare, but during the late 1990s it was no more than 100 minutes."[52]

As mass production matured over the Twentieth Century, new tools made it easier to customize and modify assembly lines and tools of production, allowing for ever-increasing variety and types of consumption.[53] By the end of the century, consumers could not only afford cars and refrigerators, but were presented with spectacular variety. Consumers could afford more than 1,000 distinct cars on the automobile market, pick one of more than 300 types of breakfast cereals in the supermarket, and wear any of 70 styles of Levi jeans.[54] Changes in productive organization and technology created a consumer economy with kinds and amounts of purchases that dwarfed what had existed in the early 1900s.

2. Information technology, automation, and digitalization

Examples of commodities and durable goods from the middle of the Twentieth Century may seem quaint in light of what happened next. In the closing decades of the Twentieth Century, and into the present day, the rise of information technology ushered in dramatic new changes in economic production and organization. In 1951, the first commercial mainframe computer UNIVAC, cost around $1 million and could execute around 60,000 instructions per second.[55] In 2000, mass produced personal computers from Intel cost around $1,000 and could execute one billion instructions per second.[56] Communications tools circled the world and went into space, making fast and cheap communication viable through much of the country and the world.[57] These changes resulted in massive shifts in society, including a greatly expanded

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[51] Vaclav Smil, *Transforming the Twentieth Century*, at 140–41.
[52] *Id.* At 144.
[53] *Id.* At 190–95.
[54] *Id.* At 194–95.
[55] Vaclav Smil, *Transforming the Twentieth Century*, at 228.
[56] Vaclav Smil, *Transforming the Twentieth Century*, at 228.
[57] *Id.* At 271.

landscape of transactions.

The rise of telecommunications and the Internet is too multifaceted to canvas quickly, but one example that can illustrate the scale of change is the world of consumer credit reports. Consumer credit reporting is a practice that is socially important, is intricately connected with the broader economy of credit and consumption, and is the basis for many routine disputes. It also is a practice with a long pedigree: the first credit bureaus in the United States began in the late Nineteenth Century.[58]

Credit bureaus were primarily local in the first half of the Twentieth Century.[59] By 1960, the roughly 2,000 members of the national trade group Associated Credit Bureaus collectively had achieved universal coverage of consumer borrowers in the United States, but even then the largest credit bureaus only managed credit reports for consumers in a few cities.[60] In that era, on the verge of revolutions in computers and telecommunications, "the technology was limited to filing cabinets, the postage meter, and the telephone," and "American credit bureaus issued 60 million credit reports in a single year."[61]

Over the next few decades, capacities and practices changed significantly. Economic information began to be managed electronically and automatically, creating opportunities and demand for credit reporting at scales that dwarfed what had come before.[62] From 1969 to 1975, the number of members of Associated Credit Bureaus that were partially or fully automated went from four to eighty.[63] It became possible for individual credit bureaus to aspire to have universal, national coverage of U.S. consumers on their own; and by the 1980s, the big three credit bureaus that have continued to this day achieved that goal.[64] By 1989, the industry was issuing 450 million credit reports annually.[65]

Automation and digitalization continued, both within the credit reporting industry and the broader economy with which it interacted. In roughly the last thirty years of the Twentieth Century, the number of credit reports rose tenfold, while employment in the industry remained constant—reflecting significant automation and productivity increases.[66] By 2003, an estimated two *billion* credit

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[58] Robert M. Hunt, *The Development and Regulation of Consumer Credit Reporting in America*, at 8, Working Paper No. 02-21, Federal Reserve Bank of Philadelphia (Nov. 2002).

[59] *Id.*

[60] *Id.* at 9–11.

[61] *Id.*

[62] *Id.* at 11.

[63] *Id.* n.14.

[64] *Id.* at 11.

[65] *Id.* at 14.

[66] *Id.* at 12.

reports were being sold annually.[67] Those reports, in turn, reflected information obtained via billions of records received by credit reporting agencies every month.[68] By 2012, those numbers had grown to around three billion credit reports issued annually based on 36 billion updates to consumer files.[69]

Credit reporting is just one industry. But it shows the way that information technology transformed institutions in the late Twentieth Century. As records and decisions moved onto computers, and computers became networked, routine interactions that once required paper, phone calls, or face-to-face time became automated and scalable. Transaction costs became lower, and coordination became easier. Alongside economic growth, that set the stage for the interconnected, digitized, mass commercial society that is the contemporary United States.

3. The status quo in a mass consumer society

Today, you don't have to look far to get a sense of the huge swath of transactions enabled by the population, institutions, technology, and wealth of the United States. Across many categories and many types of institution, transactions often number in the millions or billions—per year, or, sometimes, per day. The Federal Reserve, for instance, tracks annual noncash payments in the U.S. economy.[70] The most recent data, for 2021, shows 202.9 billion noncash payments, or about 560 million payment transactions per day.[71]

Payments are a particularly important type of transaction, but not the only relevant data point. Consider transportation: the American Public Transportation Association estimates that 7.7 billion transit trips occurred in 2024, about 21 million per day.[72] The TSA screens about 2.5 million passengers per day, for about 900 million screenings per year.[73] Or consider recreation: the

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[67] Statement of Richard J. Hillman, GAO Statement for the Record Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, at 6 (July 31, 2003).

[68] *Id.* at 12–13.

[69] CFPB Fact Sheet: Credit Reporting Market, at 2, https://files.consumerfinance.gov/f/201207_cfpb_factsheet_credit-reporting-market.pdf

[70] Federal Reserve Payments Study, Fig. 2 Trends in noncash payments, by number, 2000–22 (Billions), https://www.federalreserve.gov/paymentsystems/2024-The-Federal-Reserve-Payments-Study-Initial-Data-accessible.htm

[71] *Id.* (202.9 billion number reached by adding the categories in Figure 2 for the year 2021; 560 million number reached by dividing 202.9 billion by 365 and rounding to nearest 10 million).

[72] APTA Public Transportation Ridership Update, May 2025, https://www.apta.com/wp-content/uploads/APTA-Policy-Brief-Transit-Ridership-May-2025.pdf

[73] Homeland Security Today, *TSA 2024 Year in Review: Record Passenger Volumes, Tech Upgrades, and Customer Service Wins* (Jan. 23, 2025), https://www.hstoday.us/subject-matter-areas/transportation/tsa-2024-year-in-review-record-passenger-volumes-tech-upgrades-and-customer-service-wins/ (reporting 904 million passenger screenings in 2024).

National Park Service reports 331.9 million visits in 2024, or about 909,000 per day.[74]

The numbers proliferate. Communications? People in the U.S. exchange about 6 billion text messages per day,[75] talk on the phone for about 6.6 billion minutes per day,[76] and send about 9.8 billion emails per day.[77] Healthcare? There are an estimated 155.4 million emergency room visits per year, or about 426,000 per day; about a quarter of those are related to injuries.[78] There were 6.9 billion retail medical prescriptions dispensed in 2023, around 18.9 million dispensations per day.[79] Governance? The federal government receives 1.5 million FOIA requests per year, or about 4,100 per day.[80]

To return to where this discussion began: there is no official registry of transactions. But if there were, it is safe to say that the last century would have seen the numbers skyrocketing, as wealth, population, productivity, interconnectedness, and automation collectively grew to shape the country into what it is today. And today, the status quo is an economy of extraordinary size, complexity, and speed, with tens of billions of transactions occurring daily across a wide swath of human activity.

B. From transactions to disputes

Just as there is no ledger to compare the number of transactions over time, there is no ledger for disputes, and no "conversion rate" from transactions to disputes. The number of transactions in society could, in principle, skyrocket without the number of disputes growing at all. And it seems likely that plenty of the growth in transactions that occurred over the last hundred years did not result in a rigidly correlated growth in the number of disputes as well. As the

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[74] National Park Service, Visitor Use Data (visited Oct. 20, 2025), https://www.nps.gov/subjects/socialscience/visitor-use-statistics-dashboard.htm

[75] 2025 Annual Survey Highlights, ctia, at 8, https://mma.prnewswire.com/media/2767258/2025_Annual_Survey_Highlights.pdf. 2.2 trillion text messages per year / 365 days per year = 6.03 billion text messages per day.

[76] *Id.* 2.4 trillion minutes per year / 365 days per year = 6.58 billion minutes per day.

[77] Daily number of emails sent worldwide as of August 2025 by country, Statista, https://www.statista.com/statistics/1270459/daily-emails-sent-by-country/ (showing the U.S. rate as 9.8 billion emails per day).

[78] Emergency Department Visits, National Center for Health Statistics (visited Oct. 20, 2025), https://www.cdc.gov/nchs/fastats/emergency-department.htm.

[79] Press Release, U.S. Medicines Spending Grew in 2023 as Greater Access Offset COVID-19-related Decline, Says IQVIA Institute, https://www.iqvia.com/newsroom/2024/05/us-medicines-spending-grew-in-2023-as-greater-access-offset (May 14, 2024).

[80] Summary of Fiscal Year 2024 Annual FOIA Reports Published, DOJ Office of Information Policy (April 29, 2025), https://www.justice.gov/oip/blog/summary-fiscal-year-2024-annual-foia-reports-published

number of conversations happening over text message grew from one million per day to one hundred million per day, there is no obvious reason to think that the number of disputes arising out of those conversations grew by a factor of one hundred as well. Maybe it did; maybe it grew by less; maybe it grew by more.

Nonetheless, it seems hard to doubt that the number of disputes has gone up significantly in the last hundred years. There is, in a meaningful way, more "stuff" happening in society now than there was one hundred years ago: more people, more purchases, and more non-economic exchanges as well. It seems like our best understanding should be that the number of disputes has risen accordingly, even if such a stance is essentially impossible to prove empirically.

And regardless of just how tightly and proportionately the rise in disputes has tracked the rise in transactions, what is clear is that, in an absolute sense, the volume of civil disputes in the United States is high. The high number of transactions in our mass commercial society carries with it large numbers of disputes.

Assessing the number of disputes in society is more complicated than looking at the number of lawsuits that are filed. People get into disagreements all the time without involving a lawyer, let alone filing a lawsuit.[81] These disagreements can be significant and protracted, and involve legal issues, whether about a product a person has purchased, an agreement with a landlord or employer, or a dispute over a healthcare charge.[82] The disputes that make it into formal legal institutions are only those that have traversed what is sometimes called the "naming, blaming, and claiming" process of distillation and formalization, which often involves time, money, and information that is not evenly distributed in society.[83]

But looking upstream from litigation shows a world in which there are routine signs of high volumes of disagreements or disputes. Take, for instance, the relatively narrow slice of the world of disputes that is federal agencies who monitor consumer complaints: in 2024, the CFPB received 3.19 million consumer financial complaints;[84] the FTC Consumer Sentinel Network received 6.5 million consumer reports;[85] and the FBI's Internet Crime Complaint Center

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[81] Rebecca L. Sandefur, What We Know and Need to Know About the Legal Needs of the Public, 67 S.C. L. Rev. 443, 447 (2016).

[82] *See id.* at 445.

[83] See generally William L.F. Felstiner, Richard L. Abel, and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* ..., 15 L. & Soc'y Rev. 631 (1980).

[84] CFPB, Consumer Response Annual Report, at 9 https://files.consumerfinance.gov/f/documents/cfpb_cr-annual-report_2025-05.pdf

[85] FTC, Consumer Sentinel Network Data Book 2024, https://www.ftc.gov/reports/consumer-sentinel-network-data-book-2024

received 859,532 complaints, with reported losses over $16 billion.[86] In 2024, U.S. consumers disputed 105 million charges on their credit cards.[87] By one estimate, disputes arise in 3–5% of online purchases.[88], a number that would suggest hundreds of millions of disputes per year.[89]

And there's more. Federal law establishes an "independent dispute resolution" system for private arbitrators to receive disputes about medical bills; in 2024, more than 1.46 million disputes were initiated.[90] The EEOC's public contact center handled more than 553,000 calls from members of the public in 2024.[91] The National Fair Housing Alliance reports over 32,000 complaints of housing discrimination received by private, nonprofit fair housing organizations in 2024.[92] Across industries, in both public and private sectors, the data suggest a world of millions and millions of disputes arising every year throughout the country.

* * *

No statistic or group of statistics can firmly pin down concepts as broad and contextual as "transaction" or "dispute." But what the numbers here can show is immense change and growth across a wide swath of human activity. Compared to the 1920s and 1930s, there are more people, spending more money, and engaging in more financial and non-financial exchanges. All indications are that this tremendous upwelling in activity has brought with it a rise in disputes as well. The present day is one in which the volume of activity

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[86] FBI, Internet Crime Report 2024, at 4, https://www.ic3.gov/AnnualReport/Reports/2024_IC3Report.pdf

[87] Toms-Chris Emewulu, *The Ultimate Chargeback Statistics 2025: Trends, Costs, and Solutions,* Changeflow (June 24, 2025), https://www.chargeflow.io/blog/chargeback-statistics-trends-costs-solutions

[88] Ethan Katsh & Orna Rabinovich-Einy, *Digital Justice*, at 67 & n.57.

[89] There does not appear to be a reported total number of online purchases per year. But it is possible to get at least a rough estimate of the number by dividing the total dollar value of online sales by the average dollar value of each transaction, which are numbers that have been reported. The Census Bureau reports $1.2 trillion in e-commerce sales in 2024. *See Quarterly Retail E-Commerce Sales*, U.S. Census Bureau News (Jan. 19, 2025), https://www2.census.gov/retail/releases/historical/ecomm/24q4.pdf (reporting an estimated 2024 total of 1,192.6 billion). Market analysts report an average order value in 2024 of around $140.

The average

[90] Ryan J. Rosso & Wen W. Shen, *No Surprises Act (NSA) Independent Dispute Resolution (IDR) Process Data Analysis for 2024*, Congressional Research Service (Nov. 26, 2025).

[91] EEOC, *2024 Annual Performance Report* (Jan. 17, 2025) https://www.eeoc.gov/2024-annual-performance-report

[92] National Fair Housing Alliance, *2025 Fair Housing Trends Report*, at 4 https://nationalfairhousing.org/wp-content/uploads/2025/11/2025-NFHA-Fair-Housing-Trends-Report.pdf (reporting 32,321 complaints).

and disputes is significantly higher than it was when much of modern civil procedure was born.

II. THE RISING COST OF HUMAN JUDGMENT

At the same time that the transaction explosion was progressing, a different force was at work that also has come to shape the landscape of dispute resolution: the rising cost of what this article describes as the application of trained human judgment to disputes. When a dispute arises, the parties to the dispute have a variety of options to seek help: they can hire lawyers, go to court or a mediator, and so on. Many of these options involve the application of trained human judgment: a lawyer or judge giving their attention to a set of facts and using their expertise to assess the application of legal rules and standards to those facts. And as it turns out, the application of this judgment has become more and more expensive over time, growing significantly more than inflation.[93]

A. The secular rise on the cost of legal services

Lawyers are expensive. The state with the lowest cost for a lawyer's time is West Virginia, where the average billable hour rate is $196.[94] At the other end of the chart is Washington, D.C., where the average billable hour rate is $490 (with Delaware and New York coming in second and third place at $472 and $420, respectively).[95] In other words, if you would like a single eight-hour workday of a lawyer's time at average rates, there is nowhere in the United States where you'll pay less than $1,500, and many places where you'll pay more than $3,000.

Comparing these prices across a century-long time horizon is difficult. Data sources from the 1920s are scarce, and the nature of legal practice has changed quite a bit as well. Before the 1970s, for instance, the billable hour was not a common part of legal fee arrangements.[96] But there is nonetheless strong evidence to indicate that the world of legal costs that exists in 2026 is a far cry from the world of legal costs that surrounded the defining reform era of our modern civil justice institutions around one hundred years ago.

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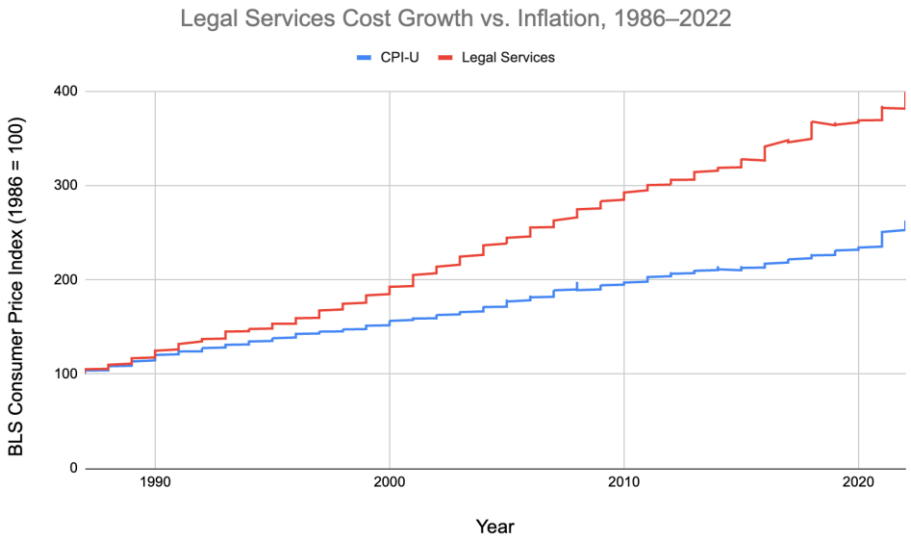
[93] *See infra* Part II.A.

[94] Clio, *How Much Should I Charge as a Lawyer?*, https://www.clio.com/resources/legal-trends/compare-lawyer-rates/ (last accessed Dec. 5, 2025) (providing average billable hour rates by state based on aggregated billing data).

[95] *Id.*

[96] Jonathan H. Choi, In Defense of the Billable Hour: A Monitoring Theory of Law Firm Fees, 70 S.C. L. Rev. 297, 314–15 (2018) ("Prior to the 1970s, lawyers billed their clients primarily through a combination of fixed fees, contingent fees, and an amorphous method known as "value billing," wherein they would simply hand the client a bill at the end of the matter for "Professional Services Rendered." Few lawyers itemized their services by the hour or established a written compensation agreement with the client in advance.").

First, it is well established that the price of legal services has grown steadily and significantly in real terms for decades.[97] Comparing the Bureau of Labor Statistics' cost data for legal services with its overall consumer price index shows the following divergence since 1987, the first full year when the legal services data series begins:



Per this data, since 1987 the price of legal services has grown by 4.03% per year on average while overall consumer inflation has grown by 2.77%.[98] Although a difference of about 1.3% may not seem like much, it has significant effects over time. A billable rate of $100 an hour in 1987 would grow only to about $260 per hour by 2022 if it matched inflation; but growing 1.3% more per year would cause it to rise to about $400 per hour.[99] This long-term above-inflation growth thus has major implications for the affordability of legal services.

There is not good enough data before the 1980s to show conclusively that the cost of legal services grew more than inflation during that time as well. But there are some data points that are at least consistent with that degree of growth, and potentially suggestive of it. A 1949 report from the Office of Business

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[97] *See, e.g.*, Baumol, The Cost Disease, supra note [XX], at 29; Abramowicz, Law's Cost Disease, supra note [XX], at 217; Brooks, Curing the Cost Disease, supra note [XX], at 526;

[98] The BLS data normalize to 101 in 1987 for legal services and 100 for the CPI-U, and reach 399 in 2022 for legal services and 263 for CPI-U. Given the 35 year time difference, the compound annual growth rate calculation for legal services is (399-400)^(1/35) - 1 = 4.03%. For the general CPI-U it is (263-101)^(1/35) - 1 = 2.77%.

[99] These numbers track the 399 and 263 figures mentioned in the previous footnote from the CPI-U data.

Economics (a predecessor of the Bureau of Economic Analysis) describes the median lawyer's net income from 1936 to 1948 as rising by 6.57% per year, during a period when inflation would have averaged 4.9% per year—consistent with a real growth in the cost of legal services similar to the 1987–2022 period.[100] This data is not decisive, as income growth can be caused by a number of factors other than price growth. For instance, lawyers could have begun working more during that time period, or worked more productively, rather than charging more. But the data is at least consistent with rising prices.

Individual data points from bar association fee schedules and court approved attorneys fee awards over the years are also consistent with a story of costs rising higher than inflation, even if they do not prove that story conclusively. The fee schedules from a variety of bar associations in Massachusetts in the 1950s, for instance, suggest fees of five dollars per hour.[101] Adjusted for inflation, that would amount to about $60 in 2025 dollars.[102] Today, the average hourly rate in Massachusetts is $331. Around 1960, the Supreme Court of Michigan upheld an award based on a $20 per hour fee schedule,[103] while the Supreme Court of Wisconsin rejected a lower court's decision based on a $10 per hour fee and instead imposed fees amounting to a similar $20 per hour amount.[104] With inflation, $20 in 1960 amounts to $222 today. The average billable hour rate in Wisconsin in 2025 was $278, while in Michigan it was $296.[105]

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[100] *See* William Weinfeld, Income of Lawyers, 1929–48, Office of Business Economics (Aug. 1949). The data in this report show the median lawyer's net income being $2,665 in 1936 and $5,719 in 1948, amounting to an average of 6.57% growth per year in the interim. The Bureau of Labor Statistics reports that, with inflation, $2,665 in 1936 would have grown to $4,731 in 1948, a 4.9% average annual inflation rate. *See* BLS Inflation Calculator, *supra* note [XX].

[101] *See* The Massachusetts Lawyer's Diary for 1955, at 53–54 https://archive.org/details/alicewinifredoco1955ocon_0/page/n55/mode/1up (Bristol County Bar Association); *id.* at 63 (Lowell County Bar Association).

These fee schedules and others are framed as "minimum" fees. In practice, though, it appears that at least in some circumstances lawyers would "adhere[] to the fee schedule" without "set[ting] an individualized fee." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781 (1975). At least some courts and bar members viewed them as "a scale of fees generally fair for the types of services listed." *Conway v. Sauk Cnty.*, 19 Wis. 2d 599, 604 (1963).

[102] *See* CPI Inflation Calculator ($5 in January 1955 equates to $60.82 in September 2025).

[103] *Harden v. Widovich*, 361 Mich. 422, 427 (1960).

[104] *Touchett v. E Z Paintr Corp.*, 14 Wis. 2d 479, 489 (1961). The Court broke down its award by day rather than by hour for each category, but based on the six-hour day the Court applied the equivalent amounts are as follows:

- Court and out-of-town business: $150 per day / 6 hours per day = $25 per hour.
- Days in circuit courts and before commissioners: $125 per day / 6 hours per day = $20.84 / hour
- Office work: $100 per day / 6 hours per day = $16.67 / hour.

[105] Clio, *supra* note [XX].

In the world of flat fees, one example suggests that legal services' fees have risen higher than inflation over the last century even in areas where technology has driven increases in productivity and significant competition. In 1925, the Orange County Bar Association adopted a minimum fee schedule that put "preparation of [a] last will and testament" at five dollars.[106] Five dollars will get you just under 43 seconds of a lawyer's time at the average hourly rate of $420 in California in 2025.[107] Adjusting for inflation brings the five dollars up to $93; still less than 15 minutes of an average lawyer's time today.[108] Drafting wills is an area that has seen significant competition and productivity increases for several decades, as companies have developed automated will-drafting tools and begun selling wills directly to consumers online.[109] And yet even in this area of the law, fees for a simple will drafted by an attorney still are reportedly between $500 and $2,000.[110] That amounts to a range of five to twenty times higher than the inflation-adjusted 1925 rate. The automated alternatives can cost several hundred dollars, too, especially if any attorney time is involved.[111]

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[106] *The Roaring '20s*, Orange County Bar Association, https://www.ocbar.org/About/History/Centennial-Roaring-20s (last accessed Dec. 4, 2025).

[107] See Average lawyer hourly rates by state, *Clio*, https://www.clio.com/resources/legal-trends/compare-lawyer-rates/ (last accessed Dec. 4, 2025).

[108] The Bureau of Labor Statistics CPI Inflation Calculator puts $5 in 1925 as worth just under $94 in 2025. *See* CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm.

Another California data point from between 1925 and 2025 reinforces this trend. Based on one recollection, in 1963 the San Luis Obispo County Bar Association's fee schedule recommended $35 for a simple will. Judge Barry Hammer, *A Look Back at San Luis Obispo's Legal Community of Yesterday*, SLO County Bar Bulletin, July-August 2024, 12, 13 (2024), https://slobar.org/wp-content/uploads/2024/08/July-August-2024-SLOCBA-Bar-Bulletin.pdf. While that is a different county than Orange County, comparing $35 in 1963 to $5 in 1925 would represent an average annual growth of 5.25%, compared to the national average inflation of 1.5% over that time period. Meanwhile, $35 in 1963 to $500 today would be an annual growth rate of 4.38%, compared to national average inflation over that time period of 3.86%.

[109] *See* John Spiers, Note, *Code as Counselor: How Robo-Will Platforms Are Productizing Estate Planning Services*, 27 N.C. J.L. & Tech. 237, 240–41 (2025). One of the major companies in the automated-will-drafting space, Quicken, has been marketing will-drafting assistance to consumers since at least the 1990s. *See Unauthorized Prac. of L. Comm. v. Parsons Tech., Inc.*, No. CIV.A. 3:97CV-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999), vacated and remanded, 179 F.3d 956 (5th Cir. 1999).

[110] Spiers, *supra* note [XX], at 244. *See also* MetLife, *How Much Does a Will Cost?* (Oct. 7, 2025), https://www.metlife.com/stories/legal/how-much-does-a-will-cost/ ("A lawyer may charge a flat fee for writing a simple will. That can cost anywhere from around $300 to $1,000 or more.").

[111] *See* Samantha Colaianni, *Reviewing the Best Online Will Makers: Our Recommendations for 2025* (Dec. 2, 2025), https://www.ncoa.org/product-resources/estate-planning/best-online-will-makers/ (noting that online will "starting costs . . . range from $50–$150," and that "[m]ost online will makers offer attorney access for an extra fee").

None of these sources is dispositive—comparing individual data points across court cases and fee schedules in different places at different times is not a rigorous methodology. But they should be viewed against the backdrop established by the nearly forty years of price data gathered by the Bureau of Labor Statistics, which shows the cost of legal services growing consistently across a long period at a rate faster than inflation. Combined with the theoretical cost disease model discussed in the next subsection, the evidence is suggestive that, for the last century, the cost of legal services has consistently grown at a rate higher than inflation.

B. A long-term, generalizable trend in the cost of human judgment?

The high growth of costs in the legal sector over the last century may not be idiosyncratic to either legal services or to the last four decades. Instead, it may be emblematic of a more general trend in relative prices known as the "cost disease." Most associated with economist William Baumol, the cost disease theory posits that certain sectors of the economy that are less able to grow in terms of productivity will see their costs rise faster than average.[112]

The argument behind the cost disease is relatively straightforward. First, almost definitionally, some sectors in the economy will see their costs grow faster than average, and some will see their costs grow slower than average.[113] Second, as a matter of historical observation, some identifiable sectors have persistently had their costs grow faster than average—including healthcare, legal services, the performing arts, policing, and education.[114]

Next, Baumol's key move was to posit that the important feature these "stagnant" sectors have in common is their lackluster productivity growth: the amount of output that they generate per worker grows much more slowly than other sectors in the economy.[115] This may be because they resist the kind of standardization and mechanization that other areas of the economy have relied on to boost productivity, like manufacturing assembly lines.[116] For instance, it's not possible to "speed up" the live performance of a violin concerto in the same way that it is possible to speed up the output of a manufacturing process for, say, light bulbs.[117]

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[112] *See* Baumol, The Cost Disease, *supra* note [XX], at 20–28.

[113] Baumol, The Cost Disease, at 19–20. It is theoretically possible that every sector could grow at the same pace, but that doesn't seem to be how the world works. *Id.* at 19–20.

[114] *Id.* at 20–25.

[115] *Id.* at 22–25.

[116] *Id.*

[117] *Id.* This assertion depends in part on what you take to be the essential features of "producing" a violin concerto. For instance, if recording the concerto and selling digital copies

The cost disease analysis posits that, as an economy grows, prices in the sectors where productivity grows slowly will rise relative to the prices in sectors that have become more productive.[118] The more-productive sectors will be able to pay their employees more because of higher productivity.[119] As a result, over time the less-productive sectors will have to pay their own employees more or be unable to compete for labor with the more-productive sectors.[120] A concert violinist in 2025 may not be able to play more concertos per hour than a concert violinist in 1925. But she is paid more, in real terms. And because she is in a less-productive sector—one that has not managed to increase its output per employee much—her increased wages will manifest as increased prices per unit of output.[121] And that, in a nutshell, is the cost disease: less-productive sectors must increase wages to keep up with more-productive sectors, raising their prices to do so.[122]

The cost disease is a phenomenon that is well established in economics and supported by significant empirical work.[123] And numerous commentators, including Baumol himself, have attributed the rise in the cost of legal services to the cost disease.[124]

Rising costs have serious implications for the delivery and distribution of civil justice, which are discussed more in the next subsection. But beyond the importance of the raw empirical fact of increased costs, there are at least two significant implications of attributing this rise in costs to the cost disease analysis in particular.

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of that recording count as "producing" it, then it is possible to have significant increases in the productivity of musical performers. *Id.* at 23. But if the production of a concerto refers to the in-person performance of that concerto for an in-person audience, there are more significant limitations to how the productivity of that production process can be increased. *Id.*

[118] *Id.* at 22–28.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *See, e.g.*, William D. Nordhaus, *Baumol's Diseases: A Macroeconomic Perspective,* 8 B.E. Journal of Macroeconomics at 21 (2008)("Baumol's hypothesis of a cost-price disease due to slow productivity growth is definitely confirmed by the data."); Alwyn Young, *Structural transformation, the mismeasurement of productivity growth, and the cost disease of services.* 104 Amer. Econ. Rev. 11, 3635, 3665 (2014) ("William Baumol's cost disease of services has become part of the intellectual landscape of the profession, a truism taught, at least by this author, to generations of students.").

[124] *See* Baumol, The Cost Disease, *supra* note [XX], at 28–29; Michael Abramowicz, Law's Cost Disease, 52 Fla. St. U. L. Rev. 205, 208–09 nn. 11–16 (2025) (collecting sources discussing the cost disease and legal services); John R. Brooks, Curing the Cost Disease: Legal Education, Legal Services, and the Role of Income-Contingent Loans, 68 J. Legal Educ. 521 (2019); Emery G. Lee III, Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services, 69 U. Miami L. Rev. 499, 511 (2015).

First, and most clearly, the cost disease analysis indicates that the higher-than-average cost increases discussed above may be long-term features of legal services that will continue into the future. If the economy continues to grow, and legal services continues to experience less productivity growth than other sectors, the cost disease hypothesis would be that legal services will continue to become more expensive relative to the rest of the economy. In other words, the problem with legal services is not just that they are expensive right now. Absent new developments, they will keep getting more expensive, putting ever-greater cost pressures on individuals and institutions.

This can be true even if legal services does have *some* gains in productivity. For instance, a BLS analysis suggests that technological change and increases in competition drove productivity gains in legal services from 2008–2019.[125] Those productivity gains drove the growth rate in costs down somewhat—but prices still rose faster than inflation during that period nonetheless.[126] Those hoping for technological progress to be a solution to rising legal costs, for instance, must have a story as to why technological change will increase productivity in the legal sector *relative* to other sectors, not just in some absolute sense.

Second, and more speculatively, the cost disease analysis would suggest that similar cost growth might also befall non-lawyer methods of resolving civil disputes to the extent that those methods also resist productivity increases. The cost disease model is generalizable outside of the legal services sector.[127] It applies wherever productivity growth is low.[128] And that, in turn, tends to be in areas where the application of human labor is tied up with the delivery of services in some way that seems to resist automation, mechanization, or other forms of speed or productivity increase: areas such as surgery, musical performance, and so on.[129] It may be that the application of human judgment to a dispute is just one of those areas no matter who is reviewing a case. Having a person familiarize themselves with the facts of a dispute and apply some standard to resolve that dispute may simply take time in a foundational way that is difficult to automate, at least without automating the "person" part of it away

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[125] Joseph Valentine, *Producer prices in the legal services industry after the Great Recession*, Monthly Labor Review, Bureau of Labor Statistics (Nov. 2019), https://www.bls.gov/opub/mlr/2019/article/pdf/producer-prices-in-the-legal-services-industry-after-the-great-recession.pdf.

[126] *Compare id.* at 1 (noting that the average growth in producer prices in the legal services industry from 2009 through 2018 was 3.01 percent) *with* Current U.S. Inflation Rates: 2000–2025, US Inflation Calculator https://www.usinflationcalculator.com/inflation/current-inflation-rates/ (last accessed Dec. 9, 2025) (showing inflation rates from 2009–2018 below 3 percent on average).

[127] *Id.* at 22–24.

[128] *Id.*

[129] *Id.*

in favor of some mechanized dispute resolution process. If that is true, one implication of the cost disease analysis is that rising costs are not just a "legal services" problem, but instead an "application of human judgment" problem, which will see rising costs so long as a person's time and judgment is a critical facet of dispute resolution.

To be clear, shifting the provision of some legal services from lawyers to nonlawyers such as "justice workers" may still result in the cheaper delivery of those services in the present day.[130] But the implication of the cost disease analysis may be that those costs should still be expected to rise over time faster than inflation. This may have implications for the costs and benefits of various proposals for managing costs, ranging from automation via AI to deregulation of the bar.[131]

These two implications could, of course, be wrong. The cost disease phenomenon is relatively well established,[132] but its applicability to any particular industry, as well as its ability to predict future developments, can be contested.[133] It may be that legal services costs have risen for reasons other than the cost disease, and the cost disease is an inapt lens to use to understand the current state of affairs of legal services or make predictions.[134] Or, even if the cost disease framing is accurate, it may be that "dispute resolution services" as a category sees more relative productivity growth in future years than it has in the past. This is particularly plausible given recent developments in large language models, the form of artificial intelligence that has seen massive innovations in recent years and which has made major inroads into legal services.[135] The next

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[130] See, e.g., Rebecca Sandefur & Matthew Barnett, *Building Successful Justice Worker Programs: Emerging Insights from Research and Practice*, 41 Alaska Law Review 23, 23–28 (2024) (discussing justice worker programs)

[131] For more discussion of AI, *see* infra [XX]; for more discussion of deregulation of legal services, *see infra* [XX].

[Something about how deregulation can be a productivity-enhancing move?].

[132] *See supra* note [XX] (citing Nordhaus and Young).

[133] *See, e.g.*, Stephen J. Bailey, Ari-Veikko Anttiroiko, Pekka Valkama, *Application of Baumol's Cost Disease to Public Sector Services: Conceptual, theoretical, and empirical falsities*, Public Management Review (2014) (challenging the application of the cost disease in the public services sector); Kaan Celebi, Jochen Hartwig, and Anna Pauliina Sandqvist, *Baumol's cost disease in acute versus long-term care: Do the differences loom large?*, 25 In'l. J. Health Econ. and Management 159, 161 (2025) (discussing debate over the application of the cost disease in the context of healthcare spending).

[134] See, e.g., Ariell Reshef & Cailin Slattery, *Legislation, Regulation and Litigation: Demand for U.S. Legal Services in Historical Perspective* (July 2025) (arguing that a significant increase in demand for legal services in the second half of the Twentieth Century is attributable to changes in legislation and regulation that "increased the scope of law and uncertainty over legal outcomes").

[135] *See, e.g.*, Yonathan A. Arbel, *Judicial Economy in the Age of AI*, 96 U. Colo. L. Rev. 549, 563–64 (2025).

subsection goes into more detail discussing the problem of rising relative costs; the subsection after that briefly considers artificial intelligence.

C. The problems of cost

It might be possible to look at the rising cost of legal services in the context of the economic growth of the last century and not see a problem. Legal services costs have risen, but the economy has grown as well, and there is more wealth and higher incomes to help people afford legal services. William Baumol took that stance with respect to some of the services affected by the cost disease: that because of the productivity increases in non-stagnant sectors, economic growth meant that more costly sectors would continue to be affordable overall.[136] "With [the] explosion of purchasing power" enabled by economic growth, he argued, "we can expect to afford even the sharply rising costs of services such as health care and education without cutbacks in quality or quantity."[137] Why not make the same argument for law?

Setting aside questions about healthcare and education, there are two problems with such an argument in the legal context. The first is about distributive justice. As the economy grows, the growth in wealth and income is not evenly distributed. It may be that, in principle, the greater aggregate wealth of society could be used to take care of the higher costs of legal services overall. But unlike with healthcare, there is no massive redistributive engine on the order of Medicare or Medicaid to steer huge quantities of social resources to the legal sector. There are legal aid organizations, with some public funding from the Legal Services Corporation, but it is of a tiny scale compared to redistribution in healthcare. So even if, in principle, economic growth brings the resources to deal with higher costs, what we have seen so far is that those resources are not in fact marshaled to meet the needs of many.

The second problem of rising costs has to do with the distinctive role of *relative cost* when it comes to the affordability of legal services. Legal services are often employed to secure some end goal that itself is likely to have a dollar value attached to it: securing damages for a breach of contract; defending against a claim of money owed; seeking remuneration for a wrongful termination; and so on. And the relative price of legal services to the value of that end goal matters for affordability, independent of the wealth or income of the client. It's of course possible for lawyers to be unaffordable to a client even when the value of the dispute would justify it. But no matter a person's wealth or income, it won't make sense for them to spend $2,000 on a lawyer in a dispute over a refrigerator

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[136] *See* Baumol, *The Cost Disease*, *supra* note [XX], at 50–55

[137] *Id.* at 50.

where the most at stake is the refrigerator's $700 price. Even if they were guaranteed to win, it would make more sense to go buy a new refrigerator.

In any individual dispute, this could be fine. It could represent a net improvement over earlier times where refrigerators were relatively more expensive. Asked whether they preferred a future ten years from now where (a) lawyers' relative costs had decreased, so it's easier to hire them to manage disputes over goods and services, or (b) the costs of those goods and services have decreased, to the point that it's not worth it to hire a lawyer, many people would presumably pick (b).

But in the aggregate, legal services costs that rise faster than other costs in society create a problem: a growing category of disputes in which it is no longer cost-effective to apply the judgment of trained lawyers to reach a resolution. As the cost of legal judgment rises relative to other goods and services, you need more goods and services at stake in any given dispute to justify the application of legal judgment to them.

This is a problem for two broad reasons. First, the resolution of disputes according to the law that governs them has a variety of benefits, both public and private. First, the law's deterrent effect depends in part on enforcement, and when the costs of that enforcement go up it is reasonable to think the deterrent effect of the law may go down. Next, enforcement helps flesh out the substantive content of the law itself, through the formation of precedent. And the process of litigation can also bring to light beneficial public information, as well as serving as a site for the formation and expression of important democratic values.[138] These important benefits to enforcing the law are often not going to be captured in individual cost-benefit calculations about whether to pursue a dispute formally, such as by going to court.[139] As a result, the growth in the cost to private litigants to pursue formal resolution can be expected to decrease the supply of these public benefits.

Second, when costs are the reason not to apply legal judgment to the resolution of a dispute, there are significant concerns of distributive justice. People with less money can afford fewer legal services than people with more money. The decision to forego legal services in the face of high costs can be because of low ability to pay, not just an abstract calculus of the cost of the suit compared to the cost of legal services. We should therefore expect the rising

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[138] *See* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 Emory L.J. 1657, 1659 (2016) (arguing that the procedures used in litigation itself "are democracy promoting, in addition to being a source for the resolution of disputes and resulting in law declaration and development").

[139] See, e.g., William B. Rubenstein, Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action (2006)

cost of legal services to increase the number of cases where a person would find it worthwhile to pay for legal services if they had the money, but foregoes those services simply because they are unaffordable.

D. The potential role of artificial intelligence

As mentioned above, a cost disease analysis of the legal services sector in 2026 would be incomplete if it did not talk about the potential role in the legal sector of artificial intelligence, and of generative artificial intelligence in particular. Generative AI tools are being rapidly adopted by lawyers across the country, many of whom tout its ability to increase productivity. Since the cost disease phenomenon is closely linked to productivity, AI may have a significant role to play in the years ahead.

But for purposes of the cost disease analysis, the relevant question is not just whether AI will increase productivity in the legal sector. It is also whether AI will increase productivity in the legal sector *more* than productivity in other sectors increase over the same time period. Because prices are relative, what matters most for the prices of one area of the economy is how the productivity in that area changes relative to the rest of the economy.

That complicates the forecast of AI's net effect on legal prices. AI is a "general-purpose technology"—it can be used for many different purposes in many different economic sectors, like an electric motor or a personal computer. And there are reasons to think that AI will lead to productivity gains in a wide range of economic sectors. So even if AI significantly increases productivity in the legal sector, if productivity in other sectors grows by similar or greater amounts, it remains possible that cost disease will continue to be a problem. In other words, AI tools may help mitigate the relative cost problem of the transaction explosion, or they may exacerbate them.

From a 30,000-foot view, there might be a reason to think that AI will disproportionately affect productivity in the legal sector. The legal sector, after all, is heavily intermediated by words: legal services often involve sifting through documents, analyzing them, and producing customized text in response to them.[140] That may make it particularly ripe for productivity growth driven by AI tools like large language models. But the ultimate effects on economic growth across different sectors will depend on a huge number and variety of factors that

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[140] Wilf-Townsend & Tobia, *Generated Legal Texts,* draft at __.

aren't all known yet. The medium- and long-term effects of AI remain speculative.

And in any event, the development and deployment of AI tools in the law will be driven in part by the decisions legal institutions make about how to permit and regulate the use of those tools. Those decisions, in turn, will be based both on the tools' technical capabilities and on institutional and social understandings of the problems that those tools are called on to manage. It is therefore still worth carefully considering the forces of the transaction explosion, and institutional responses to them, even as we are on the precipice of significant potential change. Our understanding of the options that we are faced with will help guide us through the many decision points ahead that AI will present. The next sections of this paper therefore examine responses to the transaction explosion by courts and other institutions, and begin outlining some considerations about where civil dispute resolution may go from here.

III. Responding to the Transaction Explosion

The previous two sections outlined two secular trends that have operated in the background of our civil dispute resolution systems for the last century: a massive increase in the volume of transactions in society, and the steadily rising real cost of applying trained legal judgment to disputes.

How can our systems of dispute resolution respond to rising costs and volumes over time? Conceptually, there are three options. First, they can spend more money. Second, they can resolve fewer disputes. Or third, they can reduce the per-dispute cost of resolution. Each of these approaches has tradeoffs. Collectively, as a society we have not chosen one of these options over the other two; instead, all have been happening to some degree, and we have a range of dispute resolution systems that have prioritized different approaches.

This section discusses each of these options and their tradeoffs. It provides a brief, high-level overview of how the current set of institutional arrangements balances these tradeoffs, considering both the public sector and the private sector along the way. It then focuses specifically on the contrast between aggregation and automation as methods of cost reduction.

A. Three approaches to rising costs

1. Spending more money

Perhaps most basically, one way that institutions can respond to rising costs is by spending more money. This has been a primary approach of public judicial

institutions. There is not comprehensive data about state court budgets available for most of the Twentieth Century. But in terms of the last few decades, a long-term review by the Urban Institute found that between 1992 and 2021, "state and local government spending on courts increased from $32 billion to $52 billion" in inflation-adjusted dollars, a real increase of 65 percent.[141] This is at least roughly comparable to the magnitude of the overall rate at which legal services costs outpaced inflation in the broader economy, around 85% over the same time period.[142]

While a cost increase of 65% above inflation on its own would be significant spending growth, the increase looks even larger when viewed in per-case terms. State court caseloads have been on the decline for decades. Between 2006 and 2015, state court caseloads dropped by about 16% overall, including an 11% drop in civil filings.[143] Since 2015, state court caseloads have continued to drop significantly, falling by roughly another 25%.[144] So courts have seen costs rise for decades, faster than inflation, while also seeing their caseloads shrink by sizeable margins. Comparing across data sources and long time horizons is fraught, given the different universes of data being considered and significant changes in institutional structure and context.[145] But estimating the change in

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[141] Criminal Justice Expenditures: Police, Corrections, and Courts, State and Local Backgrounders, Urban Institute https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures (last accessed Dec. 10, 2025). This data includes spending on both civil and criminal matters, and also includes spending on court-adjacent publicly funded services such as public defenders.

[142] Using the BLS data normalized to 1987 from Part II above, legal services costs rose from 134.7 in January 1992 to 369.4 in January 2021, an increase of 174%. The CPI-U, meanwhile, rose from 138.1 in 1992 to 261.6 in 2021, an increase of 89%. 174 - 89 = 85%.

[143] The Rise and Fall of State Court Caseloads, National Center for State Courts, https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2184.

[144] According to the National Center for State Courts' Court Statistics Project, there were 73.4 million incoming cases in 2015 across 37 states providing data, and 56.9 million incoming cases in 2024 across 38 states providing data. That represents a shift from about 1,983,784 cases per state to 1,497,368 cases per state, a drop of about 24.5%. *See* Trial Court Caseload Overview, Court Statistics Project (last accessed Dec. 11, 2025), https://www.ncsctableauserver.org/t/Research/views/TrialDashboards/Overview?%3Aembed=y&%3AisGuestRedirectFromVizportal=y.

Some of this more recent drop may be due to the lasting effects of the coronavirus pandemic. There was a significant drop in case filings from 2019 to 2020, and the numbers have grown slightly each year since then. *See id.* But there has been no significant uptick in the years since the pandemic, suggesting that the current numbers may be roughly the new equilibrium level of case filings.

[145] For instance, the Urban Institute's data on state and local government spending on courts does not include a detailed list of which courts were considered, and appears to include all 50 states. The National Center for State Courts' reports vary on the number of states they include data from, and the specific missing states may vary from year to year. *See, e.g.*, State Court Caseload Statistics: Annual Report 1992, at 10 (1994) (noting that civil filings data do not include

per-case spending using the Urban Institute's cost data and the National Center for State Courts' filing data suggests that per-case costs rose from around $340 per filed case in the early 1990s to around $740 per filed case in the early 2020s, in inflation-adjusted dollars.[146] Adjusting for a per-case basis thus suggests that real spending more than doubled, rising by 118% rather than only 65%.[147]

This significant long-term increase in state court funding has accompanied "[s]cholarly and attorney perceptions of state-court decay . . . [and] American Bar Association (ABA) and judicial reports that have continuously decried the dramatic underfunding of state courts."[148] There are a variety of potential explanations for that contrast: perhaps state courts have always been underfunded, and the increase in funding has not been enough to provide a quality level of services, leading to perceptions of decay. Or maybe, as Diego Zambrano has argued, the improved and more rapidly growing resources in the federal court system create a contrast with state courts, contributing to perceptions of relative decay.[149]

But the transaction explosion and rising cost of human judgment are likely a significant part of the story. As volumes and costs go up, a given amount of money will, on balance, pay for the resolution of fewer cases. And those cases will represent an even smaller proportion of the increasing universe of civil disputes. Unless funding rises enough to account for both of these effects, it is easy to imagine a world where funding can increase but results can decline. And that appears to be the world we are in: spending more money and getting less justice.

The tradeoffs to this approach are clear. By spending more money on disputes as costs rise, courts or other dispute-resolution institutions are able to

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Georgia or Montana); Trial Court Caseload Overview, Court Statistics Project, *supra* note [XX], for 2024 (noting that 2024 data include 38 states).

The National Center for State Courts does estimate the total number of national case filings across all state courts. In 1992, that number was 93,786,499. *See* State Court Caseload Statistics: Annual Report 1992, at 43. In 2024, that number was 70.09 million. *See* 2024 Snapshot, https://www.ncsctableauserver.org/t/Research/views/TrialDashboards/Overview?%3Aembed=y&%3AisGuestRedirectFromVizportal=y.

[146] Using the figures from the previous footnote: $32 billion / 93.79 million cases = $341.19 per case in 1992. $52 billion / 70.09 million = $741.90 in 2024. I use 2024 case data here to avoid artificially deflating the number of cases filed due to the coronavirus pandemic. If 2021 case numbers were used, the per-case cost would be higher than $741.

[147] (740-340)/340 * 100 = 117.6%

[148] Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. Chi. L. Rev. 2101, 2147 (2019).

[149] *Id.*

preserve their existing procedures. So there is a strong pull to spend money for institutions like courts where robust procedures are core to their purpose.

But spending more money on dispute resolution means less money that can go to other purposes. If a city is deciding where to spend its next $100,000, will it be better off if it spends that money on the salaries of judges overseeing debt collection cases, or on antipoverty programs, or on economic development? As the cost of dispute resolution grows relative to other goods and services, choosing to spend more money on courts means losing an increasing amount of other opportunities for the same, or less, dispute resolution.

2. Applying legal judgment to fewer disputes

Spending money is not the only way to respond to the rising costs of dispute resolution. As the costs of legal services go up, another effect is that some disputes that used to be resolved with the help of lawyers and courts no longer will be.

It might be tempting to attribute the decline in case filings discussed above to this effect, but the truth is more complicated. There are many causal forces that have a role in how case filing rates have changed over the last several decades: the effects of substantive and procedural reforms to the law, especially given the tort reform movement of the 1980s and 1990s; the increased emphasis in the legal profession, beginning in the late Twentieth Century, on the importance of mediation and settlement over litigation; the significant rise in the spread and enforceability of mandatory arbitration provisions in consumer and employment contracts; and, presumably, changes in commerce and culture that influence the volume of disputes that arise in the first place. So, although it is reasonable to conclude that rising legal services costs will result in fewer disputes receiving legal services, the declining volume of state court cases cannot be attributed directly to those cost increases.

Nonetheless, there is a tremendous volume of civil disputes with a legal dimension that do not receive much if anything in the way of applied legal judgment.[150] This is true both of cases that are filed in courts and also of the huge volume of disputes with a legal dimension that never become formal legal disputes at all.[151]

Consider first the universe of filed cases. State courts are overrun every year with cases that end in default judgments: cases filed by a plaintiff in which the

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[150] Sandefur, *supra* note 26, at 447–48 ("While civil justice problems are common in the United States, turning to the legal system to try to handle them is not.").

[151] *Id.*

defendant does not appear, and a default is entered, typically with little or no scrutiny by the presiding judge.[152] As Pamela Bookman has detailed, these default procedures have become "standard operating procedure for resolving cases in state and local courts."[153] In two of the most common types of civil cases, debt collection and eviction, default judgment rates are high throughout the country, surpassing 50% in some jurisdictions.[154] Collectively, these defaulted cases number in the millions, making up a large portion of all civil filings.

These cases are filed by plaintiffs, so there is at least some effort and attention that has been paid to the disputes in them. But it often is quite small. In debt collection cases, for instance, the processing of cases by plaintiffs is highly automated. High-volume filers have heavily digitized operations and contractual arrangements with specialized law firms, allowing debt-buyer clients and the law firms that service them to onboard a case, generate documents for filing, and file and track the case with a minimum of human oversight. The amount of trained human attention that goes into these cases is so little that it can raise ethical concerns about whether the lawyers who file the cases are doing the minimally adequate due diligence to ensure that the claims are valid. Meanwhile, the other potential actors who might apply scrutiny and judgment to the dispute—the defendant and the court—appear to do little or nothing. There are a variety of potential explanations for this; the defendants in many of these cases may not be served properly, for instance. But an important part of the story is likely that the cost of addressing these disputes is higher in many circumstances than the value at stake in the dispute itself.[155]

And that's the set of cases that make it into court. There is a much broader universe of civil disputes that never make it into a court filing. Disputes between employees and their bosses; tenants and their landlords; consumers and merchants; these kinds of disputes arise regularly in everyday life, often without either side obtaining legal services to help even if there is a legal dimension to the dispute. These disputes might be resolved informally, through conversations between the people involved. Or one side may simply "lump it," deciding to swallow the loss even if they believe they are legally entitled to more than they

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[152] Pamela K. Bookman, *Default Procedures*, 173 U. Pa. L. Rev. 1419, 1442 (2025) ("Even today, many states continue to have rubber-stamp default procedures with minimal substantiation requirements.").

[153] *Id.* at 1421.

[154] *See id.* at __ (discussing debt collection cases); Kathryn A. Sabbeth, *Eviction Courts*, 18 U. St. Thomas L.J. 359, 380 (2022) (discussing eviction studies and noting rates above 50% in some jurisdictions); David A. Hoffman & Anton Strezhnev, *Longer Trips to Court Cause Evictions* (2022) (finding that nearly 40% of tenants in a large sample from Philadelphia were evicted via default judgment).

[155] This is more likely to be true in debt collection cases than in eviction cases.

are getting. Although it's essentially impossible to know, it seems likely that lumping it and informal negotiation are the mechanisms for concluding the vast majority of disputes with a legal dimension. And as the costs of legal services increases, the proportion of disputes that end up being lumped or informally resolved should be expected to go up as well.

The tradeoffs of applying legal judgment to fewer disputes are more complex than they might appear. Costs are relative; to the extent that the rising real cost of legal services reflects increased wages and/or decreased costs of other goods and services, increased rates of "lumping it" can reflect a kind of progress in some circumstances. For instance, if the cost of any particular consumer good falls in real terms, that may make consumers better off on net even if it no longer is reasonable to consult a lawyer for disputes about that item.

But there are still significant downsides. As discussed above, when fewer cases get adjudicated, there is a loss of the public benefits associated with law enforcement and dispute resolution.[156] And the downsides of claims going unenforced is likely to fall disproportionately on those with fewer resources, raising serious concerns of distributive justice.[157]

A similar phenomenon can play out in the realm of public institutions triaging cases. When it comes to deciding where to spend less money, courts and other institutions may look to low-dollar-value cases as a place to allocate fewer dollars in terms of judge time or other resources.[158] The rationale for that decision can relate to the judgment-cost gap: where there is less at stake in a given case, it may make sense to spend fewer public resources on the resolution of that case. But low-dollar-value cases are likely to matter disproportionately to lower income people; the cost of "lumping" a $500 claim is much higher for someone whose annual income is $15,000 than $150,000. And because lower income individuals are more likely to find themselves as defendants in small-dollar-value cases such as debt collection or eviction cases, the decreased procedural opportunities in those cases will disproportionately impact them as defendants as well.[159]

3. Reducing the per-case cost of applying legal judgment

As the cost of legal judgment goes up, if you don't want to pay more or consider fewer cases, there's only one option: find ways to reduce the amount

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[156] *See supra* nn.**Error! Bookmark not defined.**–139 and accompanying text.

[157] *Id.*

[158] For instance, many court systems allocate jurisdiction by looking to the amount in controversy in a given case, and apply cost-saving procedures to the cases with the lowest amounts in controversy.

[159] [Summers on fee shifting].

of judgment applied to each case, or at least to some subset of cases. Many significant developments in civil justice over the last century can be understood as embodying this path: the rise of settlement and the decline of the jury trial; the rise of class actions; and the rise of multidistrict litigation. [Additionally, the diversion of dispute resolution from courts to agencies can be viewed through this lens as well.[160]]

First, a defining feature of the last century has been "the virtual abandonment of the centuries-old institution of trial."[161] About a hundred years ago, civil trials happened in about one out of five cases; they now happen in less than one percent of cases in both state and federal court.[162] This did not happen as a result of any specific change in policy or law; instead, it occurred through a steady decline in trial rates over decades, with a gradual shift to pretrial processes for resolution such as summary judgment or motions to dismiss.[163] And more recently, it appears that even pretrial procedures are on the decline, with many cases that are brought not even making it to the phase of dispositive motions.[164]

Although these are complex phenomena with multiple causes, the cost and complexity of litigation is an important part of the story.[165] Jury trials are expensive, both for courts and for litigants; settling before trial is one way of reducing the costs of litigation. Survey data indicates that attorneys and judges rank jury trials last in cost effectiveness behind other methods of resolving cases, and put mediation ahead of forms of adjudication such as arbitration and bench trials.[166] And both economic models and empirical studies paint a picture of litigants whose inclination to settle goes up as the costs of litigation rise.[167]

Alongside the decline of the jury trial, the rise of aggregate litigation is another defining feature of Twentieth Century civil litigation, and it too can be understood in part as an effort to reduce the per-case cost of adjudication. With

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[160] [Adam Zimmerman?]

[161] John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522, 524 (2012)

[162] *Id.; see also*

[163] *Id.*

[164] *See* No Adjudication, at 6 ("For a majority of cases, pretrial has gone the way of the trial.").

[165] See Galanter, *Vanishing Trial*, at 517 ("Rising costs of increasingly specialized lawyers, the need to deploy expensive experts, jury consultants, and all the associated expenses have priced some parties out of the market. For those who can afford to play, the increased transaction costs enlarge the overlap in settlement ranges.").

[166] *See* Shari Seidman Diamond & Jessica M. Salerno, Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges, 81 La. L. Rev. 119, 132 (2020).

[167] *See* Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. Rev. 1713, 1729–32 (2012) (discussing the relationship between costs and settlement under the Federal Rules of Civil Procedure).

the empowerment of damages class actions with Rule 23(b)(3) in 1966, class actions rose to prominence in the legal culture and even the broader political culture, becoming embedded in political debates over the role of the judiciary and litigation more broadly.[168] In recent decades, class actions have been retrenched by a variety of doctrinal and statutory developments.[169] But those decades have also seen the rise of multidistrict litigation, a form of aggregation that surged from around 16 percent to roughly 40 percent of the federal courts' civil caseload in the first fifteen years of the Twenty-First Century.[170]

The tradeoffs around cost reduction are extremely complex; the considerations around settlement vs. trial, class actions, and MDLs could fill not just an entire law review article, but entire canons of law review articles around each topic. But to paint with a broad brush: reducing costs allows dispute resolution systems to resolve more cases for a given amount of resources, but that will often come with some reduction in terms of either process quality, outcome quality, or both. Many of the safeguards present in class actions, for instance, can be understood as efforts to preserve process or outcome quality for unnamed class members whose individual claims may get little or no scrutiny applied to them. Many of the critiques of aggregation, meanwhile, can be understood as arguments that these safeguards are not enough.

B. Responses in the private sector

The previous subsection focused on public sector institutions: how our courts handle civil disputes, and how they have adjusted to rising costs and volumes. But the cost of applying human judgment affects the private sector as well. In the private sector, all of the responses discussed above are on display. Private individuals and companies have also increased their spending on legal services at rates above inflation.[171] National accounts data, for instance, shows that personal expenditures on legal services grew from about $41 billion in 1990 to around $141 billion in 2024, more than 40% higher than one would expect from inflation alone.[172] Private individuals clearly can choose to "lump" their losses, and so can companies. And cost-cutting is a major theme of private

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[168] *See* David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 Fordham L. Rev. 1785, 1810–31 (2018).

[169] *See* generally Robert H. Klonoff, The Decline of Class Actions, 90 Wash. U.L. Rev. 729 (2013); Myriam Gilles, The Day Doctrine Died: Private Arbitration and the End of Law, 2016 U. Ill. L. Rev. 371 (2016).

[170] Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67, 72 (2017)

[171] *See* Table Data - Personal Consumption Expenditures: Legal Services, FRED

[172] *Id.*; *see also* BLS Inflation Calculator, *supra* note [XX] (showing that $41 billion in 1990 would rise to about $99 billion in 2024 given normal CPI inflation). ((141 - 99)/99) * 100 = 42%.

dispute resolution work, as well.[173]

Private sector entities may be parties to a dispute; may be providers of dispute resolution services; or may be both. It is hard to generalize too much about this diverse landscape (which is also more opaque than the public sector). But there are a few salient points that provide a broad overview of the private sector's approach to our world of mass transactions and costly dispute resolution.

First, there is volume: the private sector provides a huge volume of dispute resolution services. This comes both in the form of formal dispute resolution services such as private arbitration, and also in the form of more informal in-house dispute resolution services such as companies' complaint management systems. On the arbitration side, the American Arbitration Association reports that it had 537,000 cases filed in 2024,[174] over 100,000 more than the number of civil cases filed in the federal judiciary that year.[175]

But the real volume comes from the vast and multitudinous internal dispute resolution systems managed by private companies throughout the country. As Rory Van Loo put it in his definitive article "The Corporation as Courthouse," "[t]he main institutional actor in the private consumer legal system is not the arbitration tribunal, but the consumer-facing corporation."[176] eBay's dispute resolution program, for instance, resolves over 60 million disputes between buyers and sellers each year.[177] In recent years, U.S. banks, credit card providers, and merchants have processed over 100 million credit card disputes annually.[178] As Van Loo describes, businesses manage disputes both when it comes to their own products, as with customer service departments; disputes between customers and third parties, as with eBay's dispute resolution program; and as reputation intermediaries (such as Yelp or other review platforms) who play a role in informal norm enforcement.[179] Collectively, through these mechanisms, businesses' internal processes have ended up serving as "the backbone for a

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[173] *See infra* notes [xx–xx] and accompanying text (discussing automation).

[174] https://www.adr.org/ (home page noting "537,000 cases filed in 2024").

[175] *See* Federal Judicial Caseload Statistics 2024, https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024 (reporting 414,026 civil cases filed in U.S. district courts in 2024).

[176] Van Loo, *Corporation as Courthouse*, supra note [XX], at 547.

[177] Erika Rickard, *Online Dispute Resolution Moves from E-Commerce to the Courts*, PEW (June 4, 2019), https://www.pew.org/en/research-and-analysis/articles/2019/06/04/online-dispute-resolution-moves-from-e-commerce-to-the-courts.

[178] Emewulu, *supra* note [XX], https://www.chargeflow.io/blog/chargeback-statistics-trends-costs-solutions (noting 105 million credit card charge disputes in the U.S. in 2024).

[179] Van Loo, *Corporation as Courthouse*, supra at [XX], at 551–52.

private consumer dispute system."[180]

Next, how does this dispute system grapple with cost? It is difficult to know, and to generalize, given the opacity and diversity of the private sector. From what we do know, it appears that corporate dispute resolution systems have leaned heavily on automation.[181] Automation serves the dual functions of minimizing the amount of judgment that employees of a given company need to apply to a dispute, and of triaging disputes to ensure that employee time is spent only on disputes that rise to a certain level of importance.[182] eBay, for instance, automates a discussion about a given dispute between a buyer and a seller in the hopes of the dispute getting resolved without intervention by eBay employees, and is successful at that goal 90% of the time.[183] Other companies may use automation to determine the significance of losing a particular customer's business, and alter their redress or procedures depending on the expected profitability of that particular consumer.[184] Bank of America, for instance, patented an automated complaint handling system that considers factors such as the amount of money in a particular consumer's family members' accounts at the bank, as potentially relevant to the profitability of that consumer's business with the bank.[185] Other companies may simply grant consumers refunds automatically if they are below a certain amount, as it isn't worth the cost of processing disputes above that amount.[186]

Despite being such a significant part of the ecosystem of civil dispute resolution, these private sector resolution systems are largely opaque and subject only to a relatively minimal patchwork of regulations.[187] As a result, in many contexts there is no public knowledge or accountability about the basics of these programs—not their procedures or their outcomes. It is difficult to assess their quality or fairness, or even the basic question of whether they tend to resolve disputes in a way consistent with the law governing the entitlements of the two disputants.[188]

C. Aggregation vs. Automation

The previous two subsections provided an extremely brief overview of how

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[180] *Id.* at 553.
[181] *Id.* at 564–66.
[182] *Id.*
[183] *Id.* at 559–60.
[184] *Id.*
[185] *Id.* at 565.
[186] *Id.* at 566.
[187] *Id.* at 584–86 (describing a variety of industry-specific regulations affecting corporate consumer dispute resolution systems).
[188] *See id.* at 578.

private and public dispute resolution systems have responded to rising costs and volumes. It's worth emphasizing that private and public systems are differently situated. They have different goals and incentives, different funding, different constraints, and so on. One major difference is that public dispute resolution systems are often general purpose: with limited exceptions, courts of general jurisdiction are open to the whole range of legal disputes that might arise in society, from all types of litigants and with a vast range of factual circumstances and potential stakes. In contrast, private sector dispute resolution systems are more likely to be specialized: businesses often engage in many iterations of the same or similar types of transactions: selling a particular product, facilitating a particular exchange as a platform, etc.

But, bearing in mind these differences, it can still be useful to consider the comparison. This subsection highlights one important contrast between private and public methods of cost reduction: automation in the private sector and aggregation in the public sector.

In courts, a primary form (and arguably *the* primary form) of per-case cost reduction over the last century has been the development of aggregate litigation. This kind of cost reduction enables the thorough vetting of factual and legal issues that arise in a given set of claims, but amortizes the cost of that vetting over cases that are so similar that any given individual case may not need much if any individualized attention.

In contrast, in the private sector, automated systems can manage each dispute individually, but either apply algorithms that avoid the need for human attention (such as granting refunds to all complaints below $50), or that outsource the cost of judgment by facilitating the individual disputants' negotiation and mediation in the expectations that that will resolve the case.[189]

This contrast between public aggregation and private automation makes some sense, given the distinct features and incentives of the different systems. In the world of public courts, the perceived legitimacy of the system is at a premium, and that goal has often been invoked as the justification for thorough procedures.[190] Aggregation often allows for courts to employ many of the typical intensive processes of civil litigation, while still getting a reduction in per-case costs because of economies of scale. Much of aggregate litigation is not "cheap" in any absolute sense: there may be protracted battles with intensive legal

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[189] *See* supra nn. [XX]–[XX] (discussing automation in the private sector).

[190] *See, e.g.*, Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 Alb. L. Rev. 1095, 1127 (2014) ("It is the perceived fairness of legal procedures that drives popular legitimacy, with people reacting both to whether they believe decisions are fairly made and whether they think that litigants are fairly treated.").

argument and factual discovery over the course of many years. But they are cheap in the *relative* sense, in that doing the equivalent argument and discovery for every case that is being aggregated would be prohibitive.

In contrast, in the private sector, automation is more plausible. First, as noted above, private sector dispute resolution systems may be able to be more specialized than generalist courts. This may simply make it easier to automate disputes because those disputes may vary along fewer dimensions, reducing their complexity and facilitating their resolution by automatic processes.

But more broadly, automation may be easier for entities that are more motivated by profitability than perceptions of substantive justice and legitimacy. While concerns about reputation and fairness may matter, they often will matter in ways that are instrumental to the goal of profit.[191] Private systems can therefore tolerate (and may be incentivized to create) outcomes that courts cannot: inconsistency across similar cases; resolutions that prioritize speed and customer satisfaction; and resolutions that do not particularly attend to questions of legal accuracy.[192] If two buyers with similar complaints receive different outcomes because one complains more persistently, or because one is expected to make more future purchases than the other, that may be acceptable from a business's perspective where it would not be acceptable to a court.

This maps onto a greater acceptance of automation by businesses in a couple of ways. First, where legal accuracy is not the primary objective, the decisional task will often be simpler. Some goals, like minimizing decision time, maximizing customer satisfaction, or retaining high-value customers, may be more tractable and easier to resolve with simple and automatic heuristics than whatever legal questions are relevant to a given dispute. And second, higher error rates that stem from the use of an automated system may be more acceptable where there is less of a premium on treating like cases alike. Companies may view failures of substantive justice in dispute resolution as not directly relevant to their main mission, in a way that dedicated public dispute resolvers like courts cannot.

Questions about the desirable uses of automation in public institutions are likely to be particularly active and important in the years ahead given developments in generative artificial intelligence technology. One way that this technology can be understood is as widening the scope of automation to allow

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[191] *See, e.g.*, Van Loo, *Corporation as Courthouse,* at 560 (discussing the link between procedural fairness and profit).

[192] It's worth noting that this can often inure to the benefit of the complainant, not the detriment. For instance, companies often "ignore their strong legal position and make concessions to which the consumer is not legally entitled," because doing so might be better for business on net. Van Loo, *Corporation as Courthouse*, supra note [XX], at 559.

automatic processes to address more multidimensional inputs. It may therefore be the case that automated technologies are at least facially more plausible for courts in the future than they have been in the past. But these conversations will also need to account for the differences in the missions and motivations of private and public actors, to avoid extrapolating unreasonably from the fruitful use of automation in the private sector to its potential application in the public sector.

IV. ALLOCATING JUDGMENT IN A HIGH-VOLUME WORLD

The last three parts of this paper have described a world that has changed significantly since our modern civil justice institutions were designed. Transactions have exploded; costs have risen; decision-makers have tried to respond well given the options available. But problems abound.[193]

How can an understanding of these long-term trends help improve our civil justice institutions? This section considers a few possibilities. First, it discusses how recognizing long-term trends in cost growth should make due process doctrine less restrictive in a way that encourages flexibility and experimentation. It then proceeds to discuss a few broad ideas for reforms in the private and public sector. Finally, it closes with a consideration of the types of values that should ground institutional experimentation in the years to come.

A. Dynamic Due Process

To start with, the changes in cost over the last century, along with the possibility of continued secular increases in cost and volume, have implications for how we should see due process. As the Supreme Court has described it, the determination of how much procedure a given person is due on their claim is fundamentally a balancing of costs and benefits.[194] And, as Part II detailed above, the costs associated with a given set of legal procedures may change over time. These changes are not just the nominal price shifts that we expect from inflation, but instead reflect real changes in cost: legal services have risen in price relative to other goods and services for decades, possibly going all the way back to the pre-Federal Rules era.

As the costs of a set of procedures rise, the cost/benefit calculus of that set of procedures changes as well. If the benefits associated with the procedures

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[193] *See supra* nn. 35–38 and accompanying text.

[194] Jason Parkin, *Dialogic Due Process*, 167 U. Pa. L. Rev. 1115, 1119 (2019) ("[S]ince its decision in Mathews v. Eldridge, the Supreme Court has evaluated the constitutionality of procedural rules based on a fact-intensive cost--benefit analysis.").

stay the same, fall, or rise less than the increase in costs,[195] then rising costs over time result in a less favorable due process calculus for those procedures. At some point of increasing costs, the due process calculus may change to the point that those procedures are no longer constitutionally required.

On some level, this is nothing new: due process doctrine has always emphasized that due process is adaptable, flexible, and contextual.[196] But scholars and advocates appear to typically advocate that that flexibility should be deployed to *increase* the procedural safeguards that the Constitution's due process clauses are interpreted to require.[197] And there may be strong cases for increasing procedural safeguards in plenty of circumstances. But it would be strange if the only response to extremely long-running trends of rising costs and volumes were to increase the constitutional requirements for increasingly costly procedures.

Notably, this argument that some due process requirements may need to be reduced over time can be true even with a more capacious vision of the benefits of procedure than the Supreme Court has adopted. After *Mathews*, a common line of criticism emerged that noted that the cost-benefit test employed by *Mathews* discounted certain types of process values—e.g., the broader benefits to governmental legitimacy, or the specific benefits accruing to individuals themselves, when people are able to participate in decisions that affect them.[198] That line of critique is important and persuasive; the due process cost/benefit balancing will be more meaningful if it fully incorporates all the relevant costs and benefits implicated in a given procedural context.

But those critiques simply point out that the cost/benefit calculus should contain more benefits than courts often include; they do not indicate that those benefits can never be outweighed by rising costs. There is no objective math here, and it is important to consider intangibles like participation values. But it is important for our systems to realistically acknowledge costs, too, and to be

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[195] The benefits associated with a given set of procedures could go up over time, for instance if changes in technology or record-keeping improved the ability of a set of procedures like discovery to seek the truth. Or they could go down over time, for instance if the value of what is in dispute declines.

What is important for the discussion here is that there is no particular reason to assume that benefits increase in exact proportion to cost increases. As a result, cost increases should, on balance, result in a shifting equilibrium in favor of fewer procedures required by due process doctrine, unless there is evidence that the benefits associated with those procedures have increased at least as much.

[196] *See* Parkin, *Dialogic Due Process*, supra note [XX], at 1151–53.

[197] *See, e.g.*, *id.* at 1153–55; Danielle Keats Citron, *Technological Due Process*, 85 Wash. U.L. Rev. 1249, 1306 (2008)/

[198] *See* Parkin, *Due Process Disaggregation*, supra n. [XX], at 298–301 (surveying this line of critique).

able to adjust to long-term changes in social production and relative expense.

Recognizing that due process doctrine's flexibility can result in decreasing safeguards, not just increasing them, is important for enabling another type of flexibility: the flexibility of courts, agencies, and legislatures to experiment with different procedures for managing the transaction explosion and the rising cost of judgment. There are many critiques of our current dispute resolution systems, both public and private.[199] Increasing procedural safeguards may be the best solution to address some problems. But other problems may be better addressed through streamlining adjudicators' processes, or wholesale restructuring of dispute resolution institutions. These all may require the ability to rethink how civil justice can and should be delivered. These improved institutional arrangements may require flexibility to implement systems like those explored in the rest of this section—which may, in turn, require adjustments to existing conceptions of due process.

Will these changes be regressive? An important concern with any suggestions about walking back due process protections is that those protections have historically safeguarded the vulnerable. Many of the significant due process cases of the Twentieth Century involved advances in procedural safeguards that affected the interests of marginalized groups.[200]

But the relationship between due process and distributive justice is more complicated than simply saying "more procedural protections means better outcomes for vulnerable groups." It is true that when individuals face deprivation of significant interests—such as the termination of important benefits, loss of liberty, or deportation—strong procedural protections are extremely important.

It also seems unlikely that marginal changes in the cost of legal services could justify the erosion of important safeguards for these paramount interests. In other words, there is not a compelling argument that the adjustment of procedural safeguards to allow for institutional flexibility in handling the judgment-cost gap described in Part II would touch the safeguards that exist in these kinds of contexts.

In contrast, due process doctrine is often invoked by repeat defendants to resist procedural tools that would make relief more widely available. Corporate defendants invoke due process to challenge class certification; to contest streamlined administrative procedures; and to resist other aggregation

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[199] *See supra* nn.35–38 and accompanying text.

[200] *See, e.g.*, *Sniadach v. Fam. Fin. Corp. of Bay View*, 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

mechanisms that would allow claimants to pursue low-value claims collectively. Due process can operate to entrench existing inequalities by preserving a procedural system that insists on individualized, full-dress adjudication for all claims and defenses, to the detriment of those who cannot afford those procedures or those more likely to have claims and defenses that do not merit the expense.

B. Transparency and accountability in private dispute resolution

Within the landscape of dispute resolution discussed in Part III, there are important roles in both the public and private sector. But the private sector of dispute resolution largely lacks institutions with meaningful transparency and accountability. Alternative dispute resolution systems like arbitration are, as a rule, opaque. They typically do not even disclose much in the way of aggregate data. And the world of business's internal dispute resolution systems are similarly opaque. Throughout the academic literature, the standard example of corporate dispute resolution platforms is eBay, because very little is known about nearly any other major company's systems.

This is a systematic problem for at least two reasons. First, it is hard to determine the best balance between public and private dispute resolution systems in society if we have little insight into the world of private dispute resolution. It may be that private dispute resolution systems are doing a good job of managing the tradeoffs between cost effectiveness, the value of private ordering, and the various goals of law enforcement. Or they may be failing entirely at balancing those tradeoffs. But we do not know without more information.

Second, given the important interests that the general public has in the resolution of civil disputes, there is a strong argument for greater public accountability in how these disputes are managed by private entities. As discussed above, there are positive public externalities created by private dispute resolution, such as deterrence and law development.

The ideal amount of transparency from private dispute resolution systems may not look like the amount of transparency we have into public institutions. Private systems may be cheaper and more informal in ways that result in no record being made analogous to a court docket; private interests in privacy or trade secrets may legitimately foreclose granular disclosures of specific types of information. There are lots of reasons to allow private dispute resolution systems to look different than public ones: part of the value they provide in a broader dispute resolution ecosystem is that they embrace a different set of tradeoffs than public systems. Transparency and accountability measure should not endeavor too much to make private systems look like public ones.

But greater transparency is still needed to see what these private systems even do look like in the first place. It may be that the best balance between public and private dispute resolution systems will entail more private resolution, less private resolution, or just somehow different private resolution. But we will not know unless we know more about what is going on already.

C. Scale without aggregation in public institutions

Courts tend to have two main methods to lower the costs of dispute resolution: aggregation, in which formal procedures are kept but amortized over large numbers of cases; and informality, in which procedures are at least nominally relaxed for the sake of cost savings, as often happens in small claims courts or other specialized courts.

Both of these approaches have their limitations. Aggregation, for one, is much less available for cases that do not have major factual and legal similarities with each other. That ends up being a wide swath of everyday disputes, which can turn on all sorts of nuances—who said what to whom, what a particular person's course of conduct was at a particular time, and so on. And even where cases tend to have similarities, as a practical matter aggregation is only available when there are many similar claims being brought by plaintiffs, as opposed to many similar defenses that might be raised by defendants.[201] Between these limitations, traditional forms of aggregation are essentially off the table in three of the biggest categories of civil legal disputes: family disputes, eviction disputes, and debt collection disputes.

Meanwhile, courts that have been tasked with adopting less formal procedures to facilitate resolution of low-dollar-value claims have serious shortcomings. As Anna Carpenter, Colleen Shanahan, Jessica Steinberg, and Alyx Mark have found, across different types of jurisdictions, judges nominally tasked with reducing formal procedural hurdles for litigants have "maintained legal and procedural complexity" in ways that have maintained barriers for lawyerless litigants.[202] Hallmarks of the adversarial tradition appear hard to erode, resulting in gatekeeping in the form of procedural and evidentiary roadblocks even in courts where huge numbers of people have no lawyers or legal training.[203]

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[201] *See, e.g.*, Wilf-Townsend, *Assembly-Line Plaintiffs*, at 1762.

[202] Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark, *Judges in Lawyerless Courts*, 110 Geo. L.J. 509, 539–56 (2022).

[203] *Id.* at 556–57 ("American civil trial courts were designed for adversarial, procedural contests driven by lawyers on both sides of a case. . . . The judicial behavior we observed is rooted, more than anything else, int he core design and purpose of civil courts and the roles judges and lawyers are expected to play in this system.").

This subsection considers approaches that might take a different tack: reforms that are aimed at dealing with scale in ways that are distinct from aggregation. These ideas start from the premise of high volumes and high costs. They show how economies of scale can exist in a variety of ways distinct from applying the full set of procedures while averaging out costs. Economies of scale can exist wherever there are large volumes of cases from which patterns can be extracted and used to help resolve other cases—which can include the development of expertise in decision-makers; the use of probabilistic reasoning; the examination of cases in bulk to root out persistent errors; or the development of automated tools based on general dispute patterns and trends. This subsection considers suggestions based on each of these paths in turn.

1. Less party presentation

A useful component of many different regimes going forward would be to rely less on party presentation. The "party presentation principle," which provides that judges should rely on parties to define the factual and legal arguments being considered, is strongly rooted in the adversarial tradition in the United States.[204] But in a world with a rising judgment-cost gap, there are many contexts where it will both be inefficient and run counter to achieving justice. Non-lawyers encounter legal challenges in disputes where hiring an attorney is infeasible or irrational.[205] If there is a court or agency that is able to handle the dispute, the judge or administrator will be more knowledgeable about many facets of the case than an unrepresented party. The experience of a judge who sees a high volume of particular cases can itself be understood as a kind of economy of scale: the knowledge of where the ins and outs of a case may be, and the kinds of facts that a claim is likely to rise or fall on, can help resolve the claim more quickly.

But judges have been trained in a traditional, passive model that allows much of that expertise to lie dormant, relying on litigants to make arguments and provide evidence rather than the judge soliciting it from them.[206] This often results in more cabined and formalistic presentation of argument and evidence than might otherwise be permitted.[207] Perhaps unsurprisingly, many have called for reforms to this kind of passive judicial role.[208] Moving civil justice forward, especially in cases involving unrepresented litigants, will likely require the

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[204] *See* Jeffrey M. Anderson, *The Principle of Party Presentation*, 70 Buff. L. Rev. 1029, 1037–49 (2022).

[205] *See above* Part II.

[206] *See* Carpenter et al, *Judges in Lawyerless Courts*, *supra* note [XX] at 519 (describing the traditional role of judges as "passive").

[207] *See id.* at 545–51 (describing judges declining to answer litigants questions and constricting opportunities to present evidence in narrow and formalistic ways).

[208] *Id.* at 518–21 (describing calls for reform).

implementation of a more inquisitorial and assistive role from those hearing cases.

2. Accepting more probabilistic reasoning

Another way for courts to move the needle on cost management is to become more accepting of substantive and procedural rules that lean more heavily on probabilistic reasoning. There is a line of skepticism in civil procedure doctrine when it comes to using methods of adjudication that rely on extrapolation from one case to other cases.[209] A primary concern with such extrapolation is that it does not give each individual case the attention and individualized assessment due from the civil justice system.[210] Where probabilistic reasoning would be used to resolve a claim without opportunities for a claimant or a defendant to present individualized evidence, that raises due process concerns.[211] This skepticism about statistical reasoning has had the effect of limiting cost-reducing efforts like aggregate litigation or class arbitration.[212]

In a world more willing to experiment with due process constraints, it may be possible to work around some of those constraints in some contexts. And even within existing due process rules, there may be opportunities for experimentation. Jay Tidmarsh, for instance, has suggested "presumptive judgments"—judgments established based on statistical data in similar cases, but which defendants or plaintiffs are allowed to contest with evidence specific to an individual claim.[213] That approach could potentially be disaggregated and applied to different determinations that courts must make short of judgment.

For instance, in debt collection cases, there are frequently disputes about notice. Evidence of one high-volume plaintiff or process server's bad notice practices in a set of cases could create rebuttable presumptions against the adequacy of their notice in a batch of other cases filed at similar times and locations.[214] These kinds of extrapolations may already be happening in informal ways via the reputations of various litigants or other actors in front of judges; formalizing them may help make them be applied more transparently, consistently, and accountably across the board. And, importantly, these kinds of

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[209] *See, e.g.*, Alexandra D. Lahav, The Case for "Trial by Formula", 90 Tex. L. Rev. 571, 574 (2012) ("The Supreme Court has consistently favored the liberty of individual adjudication" over probabilistic sampling);

[210] Jay Tidmarsh, Resurrecting Trial by Statistics, 99 Minn. L. Rev. 1459, 1471–72 (2015).

[211] *Id.*

[212] *See* Lahav, *Trial by Formula*, supra note [XX], at 574–75 (discussing *Wal-Mart v. Dukes* and *AT&T Mobility v. Concepcion*).

[213] Tidmarsh, *Resurrecting Trial by Statistics*, at 1478–82.

[214] *Cf.* Wilf-Townsend, Assembly-Line Plaintiffs, at 1769–70 (describing "batch processing" of debt collection cases).

partial extrapolations may be justifiable for litigants who share some sets of features (such as parties to debt collection suits involving the same process server) even if their overall cases are not similar enough to justify formal aggregation in a class action.

Academic commentary in favor of probabilistic reasoning in adjudication is not new.[215] Most commentary about the use of probabilistic reasoning has focused on mass tort cases, where valuations of personal injuries may be relatively high.[216] But the efficiencies of extrapolation may be just as applicable in lower-value cases; and those cases might even have a stronger justification for using such extrapolation, given that the amounts at stake might not even equal several hours' of a lawyer's time. And in addition to efficiencies, there are strong egalitarian arguments in favor of well-done probabilistic sampling.[217] Civil justice should care not just about applying formally equal procedures; it should also care about achieving similar outcomes in similar cases.[218] To the extent that probabilistic reasoning can facilitate the bulk resolution of similar cases in similar ways, rather than letting some or all those cases go unheard, it can advance this substantive egalitarian goal.[219] Such an approach can be done in better ways and worse ways; but in the face of long-term cost and volume increases, it is worth considering.

3. Audits for error correction

Courts are not just in the business of adjudicating disputes in the first instance; they are also in the business of error correction: reviewing whether a decision by a court in the first instance in a case was actually correct as a matter of fact or of law. Currently, the method of error correction is largely done via appeals: individual cases "raised" from a trial court to an appellate court for another round of adversarial briefing and dispute.

Whatever the merits of appeals as a form of error correction in general, they are poorly suited for high-volume, lower-value disputes. First, appeals are party-initiated: they only happen when at least one party decides it is worthwhile to appeal despite the costs and uncertainty of the appellate outcome. Appeals therefore suffer from many of the same cost problems as seeking legal resolution in the first place: many legal issues simply won't get appealed, even if there is

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[215] See Tidmarsh, Resurrecting Trial by Statistics, *supra* note [XX], at 1459 (describing "trial by statistics" as "[a]lways more popular among academics than among courts").

[216] See, e.g., Lahav, *Trial by Formula*, supra note [XX]; David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 849, 851 (1984)

[217] *See* Lahav, *Trial by Formula*, at 593–600.

[218] *Id.*

[219] *Id.* at 612–

error.

Second, appeals have only limited avenues for cost reduction. Aggregated cases can, of course, be appealed in the aggregate. But cases rarely, if ever, get aggregated *on appeal*. As a result, if a trial case is making repeated, similar errors across similar cases, unless those cases already happen to be aggregated, they won't get resolved in bulk by an appellate court. Appellate courts instead rely on the mechanics of precedent: the idea that, if the appellate court points out an error to the trial court in the appeal of one case, the trial court will stop making that error in other cases. But parties are aware of that phenomenon, and may selectively settle or moot cases that might otherwise be appealed to stop the formation of precedent that is contrary to their interests.

To combat these issues, trial courts should conduct more audits: court-initiated self-assessments of cases, in bulk, to discover errors in fact or law or problems in procedural processes.[220] This would allow courts to evaluate recurring problems in the cases that never get appealed, which is the vast majority of cases.

Courts could target their audits in a variety of ways: for instance, through random sampling, or by identifying areas where error rates are likely to be high, or where the identification of errors is likely to make an especially large difference to litigants. Audits could, but need not, involve a deep review of every facet of the cases scrutinized; they could, instead, be targeted toward issues that have been raised by litigants who do appeal, or that have been identified by judges as recurring issues, or that have been identified by litigants or outside commenters in more informal ways. Audits for error correction could be a kind of inquisitorial analogue to appeals, and one that is designed with scale in mind.

4. Experimenting with automation

Finally, courts can take cues from private sector dispute resolution and experiment with automation. A few state courts systems have already begun this experimentation, particularly in the world of online dispute resolution (ODR).[221] And, as discussed above, generative artificial intelligence technologies raise the potential for an increased frontier in the automation of specific tasks by courts,

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[220] Courts do already conduct audits, but they tend to be ones aimed at questions of institutional management, such as financial issues, rather than error correction in litigated cases. *See, e.g.*, Rule 10.63, California Rules of Court (describing the duties of California's Advisory Committee on Audits and Financial Accountability for the Judicial Branch); Cal. Gov't Code § 77206(h)–(i) (providing for court audits focused on "revenues, expenditures, and fund balances").

[221] *See, e.g.*, J.J. Prescott, *Using ODR Platforms to Level the Playing Field*, in LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE, David Freeman Engstrom, ed. (2023)

by plausibly being able to process more multidimensional inputs, such as natural language briefing, argumentation, and evidence.

The world of automation within courts is fraught, and needs to be managed carefully. It is possible for utopian or hyperbolic visions of technological capacity to prompt reforms that have serious unaccounted for downsides.[222] What Norm Spaulding calls "the Panglossian enthusiasm surrounding artificial intelligence"[223] can already be observed prompting jurists to embrace AI tools for purposes that they are not clearly fit for.[224]

Nonetheless, courts and reformers alike should be strongly considering whether there are plausible ways that automation could help facilitate cost reduction and case management, and should begin experimenting with automation to generate data and experience. The lesson of the last century is that the challenges of cost and volume are not static; they are dynamic, and can climb consistently for generations. In a world where we are regularly paying more into our dispute resolution systems and getting less out of them, there is a clear need to rigorously explore avenues of cost reduction. And although the strongest proponents of AI tools may be too Panglossian, generative AI technology does represent a genuine step forward in our collective technological capacity that is worth exploring.

Another factor that weighs in favor of experimentation with automation in the public sector is that litigants are already experimenting with automation in ways that are likely to increase pressures on courts. As discussed above, technology has already facilitated the growth of cheap, high-volume filings by repeat litigants in the debt collection space.[225] Generative AI may extend that phenomenon to a much broader universe of cases, allowing law firms and repeat parties to file many more cases by greatly reducing their costs.[226] If private actors' use of AI precipitates a significant increase in cases, that could increase the demands on already-strained civil justice systems.[227] Given that generative AI

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[222] *See, e.g.*, Norman Spaulding, *Online Dispute Resolution and the End of Adversarial Justice?*, in LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE, *supra* note 221, at 251–285 (discussing "[t]he tech evangelism that reigns in Silicon Valley" and "the Panglossian enthusiasm surrounding artificial intelligence" in the context of online dispute resolution).

[223] *Id.*

[224] *Compare Snell v. United Specialty Ins. Co.*, 102 F.4th 1208 (11th Cir. 2024) (concurring opinion of Newsom, J.) (applying a large language model to help resolve a dispute of contract interpretation) *with* Jonathan H. Choi, *Off-the-Shelf Large Language Models Are Unreliable Judges* (Dec. 25, 2025) (casting doubt on the ability of large language models to accurately and consistently interpret texts in legal contexts).

[225] Assembly-Line Plaintiffs, *supra* note [XX], at 1719–21.

[226] *See* Yonathan A. Arbel, Judicial Economy in the Age of AI, 96 U. Colo. L. Rev. 549, 553–54 (2025).

[227] *Id.* at 569.

technology could very well increase the demand for dispute resolution services, civil justice reformers should consider the possibility of its use in supply-side reforms as well.

CONCLUSION: TOWARD A "LIBERAL ETHOS" FOR SCALE?

Much of this article has emphasized the importance of productivity: how many disputes a given system can resolve with some given amount of resources. But it is clear that "dispute resolutions per dollar" is not the overarching goal of our civil justice systems. A system that simply denied all claims automatically would be extremely cost-effective by that metric, but would be viewed as a complete failure to deliver justice. Reforms based around productivity must therefore be guided by other values and lodestars.

The current procedural regime, governed by the Federal Rules of Civil Procedure and many state court analogues, is characterized to at least some extent by what is called the "liberal ethos" of the Federal Rules. This ethos emphasized court access and openness, a resolution of disputes on their legal merits rather than on technicalities, rigorous factual discovery, the availability of jury trials, and more. Although the extent to which this ethos has been actualized in our judicial systems has waxed and waned over time, it is reflected in a variety of features of the federal rules regime.

What would a "liberal ethos" look like for a system designed for scale? Such an ethos need not supplant the existing value scheme of the Federal Rules; there are many cases for which the fulsome procedural vision of the Federal Rules is highly appropriate, and will continue to be appropriate in the years ahead.

But it is important to articulate a normative vision for justice at scale, to help show that discussions of cost reduction are not just about saving money. They can be part of a vision of advancing substantive fairness and justice in ways that our current system may discount by not adequately taking cost into account.

Such a vision might emphasize outcomes over procedures, weighing reforms and institutions by their success or failure at delivering results. It could be more agnostic about exactly which institutions are delivering dispute resolution: courts or agencies, or even the private sector, so long as the institution in question is transparent, accountable, and delivers good outcomes. Similarly, a liberal ethos for scale might care less about who exactly delivers assistance to the parties to a dispute—maybe lawyers, or maybe justice workers, or maybe a more inquisitorial adjudicator from a court, agency, or other institution. In keeping with the original ethos of the Federal Rules, an ethos for scale would promote experimentation and revision, the interrogation of unchanging institutions, and a vision of dispute resolution as a place to serve the

goals of everyone, not just the most well-heeled or technically sophisticated. Many of those goals and values should remain unchanged, even as we update our civil justice systems to account for the significant changes of the last century.